[PROPOSED]

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, and CRUISE LINES INTERNATIONAL ASSOCIATION, Plaintiffs, v. **THE CITY AND BOROUGH OF JUNEAU, ALASKA, a municipal corporation, RORIE WATT, in his official capacity as City Manager,** Defendants.	Case No.: 1:16-cv-00008-HRH

THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S REPLY IN SUPPORT OF MOTION TO DETERMINE THE LAW OF THE CASE ON THE TONNAGE CLAUSE AND RIVERS AND HARBORS ACT

[PROPOSED]

I. INTRODUCTION

The Plaintiffs' Opposition misstates and mischaracterizes the issue presented to the Court by the City and Borough of Juneau and Rorie Watt (hereafter CBJ) and the ruling of law requested by CBJ. CBJ seeks an affirmative ruling of law that the Tonnage Clause and the Rivers and Harbors Appropriations Act as Amended (hereafter RHAA), and the cases decided under the Tonnage Clause, do not impose a constitutional or statutory restriction such that CBJ may only use the Port Development Fees (hereafter PDF) and the Marine Passenger Fees (hereafter MPF) for services provided solely to the physical vessel.[1] The CBJ has further delineated this into four separate questions that CBJ seeks ruling on.[2] CBJ did not request a ruling on specific expenditures in the Motion;[3] whether any expenditures of fees are constitutional is a factual inquiry requiring the Plaintiffs to meet their burden of proof under the test set out in *Clyde Mallory Lines*.[4]

The Plaintiffs mischaracterize CBJ's motion stating that CBJ seeks a ruling that: "a non-federal entity may lawfully assess taxes or fees against interstate and foreign commerce passenger vessels if their passengers use (or have the opportunity to use) participate in, or enjoy civic infrastructure and services funded by the fees."[5] The Plaintiffs base their misstatement of

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[1] The Plaintiffs' mischaracterize the actual fees in their Opposition, incorrectly using the term "vessel fees." (Opp., 3, 15, 24). The fees are passenger fees, remitted to the CBJ by the vessel or the vessel agent. If the Plaintiffs' members brings their vessels to Juneau with no passengers, they are not assessed any fee. The factual issue of who pays the fees is before the Court in CBJ's Cross Motion for Summary Judgment and Opposition to the Plaintiffs' Motion for Summary Judgment, Docket 118. Although the Court need not address that issue here, CBJ has demonstrated, including by the multiple admissions by the Plaintiffs' representatives, that the passengers in fact pay the fees as part of the ticket prices.

[2] Motion at 3-4.

[3] Motion at 1.

[4] The test is outlined on page 7 of the Motion. A fee is constitutional if: 1) the service funded by the fee enhances the safety and efficiency of interstate and foreign commerce; 2) the fee is used to pay for the service provided or available; 3) the fee places no more than a small burden on interstate and foreign commerce. *Clyde Mallory Lines v. Alabama*, 296 US at 263, 266-267 (1935), as described in *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1021-1022, (5th Cir. 1989), cert denied, 495 U.S. 932 (1990).

[5] Plaintiffs' Opposition at page 4. The Plaintiffs make similar mischaracterizations of the requested ruling.

the issue and CBJ's requested ruling on pages 8-9 and 27-28 of the CBJ motion. The Plaintiffs' characterization is not found at any of those pages. CBJ does not seek an affirmative ruling that expenditures for passengers are per se constitutional or statutorily unchallengeable under the RHAA as suggested by the Plaintiffs. The Plaintiffs may challenge any and all expenditures on an expenditure-by-expenditure basis, but the challenge cannot not be based on the Plaintiffs' new proposed interpretation of the Tonnage Clause and the RHAA that passengers fees may only be used for services provided to the physical vessel. CBJ's motion seeks a ruling that there is no per se constitutional or statutory preclusion of the use of passenger fees such that the fees must be used solely for services to the physical vessel. CBJ's motion does not seek any further ruling or relief as what fees are or may be constitutional or statutorily permissible where the fees are used for services to passengers and/or vessels and does not seek a broad ruling, as claimed by the Plaintiffs, that all use of fees for services used by or available to passengers are constitutional as a matter of law.[6] The Court need not delve into any facts,[7] or have before it any of the actual expenditures, to reach this solely legal issue.[8]

II. THE TONNAGE CLAUSE CASES DO NOT HOLD AS A MATTER OF CONSTITIONAL LAW THAT ALL USES OF PASSENGERS FEES MUST BE SOLELY FOR SERVICES PROVIDED TO THE PHYSICAL VESSEL

If the Tonnage Clause precluded, as a matter of law, any use of passenger fees except for services to the physical vessel, there would be a prior court decision that would lay out that test.

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[6] This is why CBJ did not provide a detailed factual statement with the Motion to Determine Law of the Case; the Motion was written to seek a legal ruling, not a ruling on specific expenditures of the CBJ--which CBJ understood would be ruled on later by motion or trial.

[7] Though the Plaintiffs attempted to make factual assertions in its Opposition (for example incorrectly stating that the services CLIA challenges are not used or requested by the vessels, which is disputed by CBJ in the Summary Judgment pleadings) it does not change the nature of the Motion filed by CBJ, which was to get a ruling on the legal standard to be applied to the expenditures.

[8] The Court's ruling on this legal issue would require the Plaintiffs to evaluate the actual expenditures, on an expenditure-by-expenditure basis, and establish which expenditures the Plaintiffs claim do not meet constitutional or statutory muster, rather than allowing the Plaintiffs to assert a broad challenge to all categories of expenditures of the fees asserted by the Plaintiffs as not benefitting solely the physical vessel, the categories with which CBJ does not agree do not benefit the vessel.

But no court has done so and that is not the test applied by any federal court. That is why CBJ filed its Motion. The Plaintiffs' new interpretation of the Tonnage Clause is that all uses of passenger fees are constitutionally improper unless the service is to the physical vessel.

This motion does not presume the PDF and MPF are "lawful" as contended by the Plaintiffs.[9] The Plaintiffs claim that uses of the fees violate the Tonnage Clause and RHAA. The Court cannot declare the fees unconstitutional absent delving into the factual issues related to the uses of the fees.[10] The Court can determine that the legal starting point for evaluating the constitutionality of any use of the fees is not that only services to the physical vessel are constitutional.

The CBJ has not asked the Court to "legitimize" the fees by adopting an "unsolicited and unmeasurable services to passengers" standard.[11] To the contrary, CBJ is not asking the Court to legitimize any fees; CBJ requests the Court not per-se illegitimize any expenditures. The Plaintiffs may challenge the use of the fees by meeting their burden of proof under *Clyde Mallory Lines* and the subsequent decisions.[12]

The Plaintiffs suggest that: "The ultimate question of the constitutionality of CBJ's ordinances…in applying fee revenues to a wide range of activities, functions and projects, is best decided…against an extensive, but undisputed record concerning the…uses of the fees."[13]

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[9] Plaintiffs' Opp., p. 2.
[10] The determination of the legal issue as put forward in CBJ's Motion does not require the Court to evaluate any specific services provided by CBJ. That is the analysis undertaken by the Federal Court in *Bridgeport* at trial. *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority*, 566 F.2d 81 (D. Conn. 2008), *aff'd, Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority*, 567 F.3d 79 (2nd. Cir. 2009).
[11] Plaintiffs' Opp., p. 2.
[12] CBJ is asking the Court to establish one aspect of the legal standard, which is, the Tonnage Clause and RHAA do not limit the use of passenger fees solely for services to the physical vessel. From there, the Plaintiffs may launch their attack on all fees, but cannot simply claim the fees are not used for the physical vessel to meet their burden of proof.
[13] Plaintiffs' Opp., p. 3. The Plaintiffs cite to their Summary Judgment motion, Docket 67.

However, extensive facts are disputed.[14] The Court in determining in this motion the constitutional standard will help narrow the focus of the disputed facts by both parties.[15]

The Plaintiffs mischaracterize the CBJ motion in another way by saying the CBJ asks the Court to treat the passengers as the "vessel itself."[16] Services to passengers or crew may be services to vessels and do facilitate maritime commerce, and are not necessarily separate and apart from a service to the vessel.[17] CLIA does not agree that some of the uses of the fees compensate the CBJ or are used to provide a service to the vessel or facilitate maritime commerce.[18] Whether that is true for certain expenditures may be a factual issue, similar to the expenditures in the Tonnage Clause decisions finding fees used for police, medical, hospital, and emergency services, restrooms, parking, and security lights as constitutional.[19]

The Plaintiffs attempt to convert *Clyde Mallory Lines* to a Commerce Clause case,[20] which it is not—it is a Tonnage Clause case which set out a three part test as outlined in CBJ's Motion.[21] The Plaintiffs further dilute *Clyde Mallory* by stating this Court should ignore *Plaquemines II*[22] because it applied the Commerce Clause test "in reliance on *Clyde Mallory.*"[23] It is unlikely the Fifth Circuit did not know what constitutional clause was ruled upon in *Clyde*

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[14] The disputed facts are shown in CBJ's Cross Motion, Opposition, Appendix A, Statement of Facts, and Objections to Plaintiffs' Statement of Facts, Dockets 118-134, 136-137.

[15] CBJ's motion requests a ruling that the Plaintiffs' proposed limitation of services only to the physical vessel is not the constitutional standard. If the Court decides that there is no such constitutional limitation, then the issue turns to the uses of the fees the Plaintiffs' challenge, and whether the use of the fees are reasonable in relation to the services provided to the vessel, passengers, or both, and the costs of those services.

[16] Plaintiffs' Opp., p. 4.

[17] Plaintiffs' Opp., p. 9-10 acknowledges that services to facilitate maritime commerce are constitutional.

[18] Plaintiffs' Opp., p. 10.

[19] See CBJ's Motion, pages 6, 9-13. The Plaintiffs, in their Summary Judgment Motion, make statements such as "vessels don't use restrooms." But nowhere in their Opposition to this Motion do the Plaintiffs dispute that these courts have held uses of fees for these services to be constitutional.

[20] Plaintiffs' Opp., p. 8-9.

[21] 296 US at 263, 266-267. The Plaintiffs offer no explanation how fees used for "police services" are constitutional under the Tonnage Clause in *Clyde Mallory Lines* when "police services" are not services solely for the benefit of the physical vessel.

[22] *New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District,* 874 F.2d 1018, 1023 (5th Cir. 1989) (*Plaquemines II*) *cert denied*, 495 U.S. 923 (1990).

[23] Plaintiffs' Opp., p. 8.

Mallory[24] when it entered its decision under the Tonnage Clause in *Plaquemines II* and held the fees "easily meet the *Clyde Mallory* test."[25] The Plaintiffs offer no explanation as to how the Fifth Circuit upheld expenditures of fees under the Tonnage Clause for emergency services because they "save lives,"[26] nor how the U.S. Supreme Court upheld the use of fees to provide emergency services in *Cooley v. Bd. of Wardens* partially for the purpose to "secure lives."[27] Lives are not "vessels;" services that save lives are not services solely for the benefit of the "physical vessel."[28]

The Plaintiffs' examples that found fees in violation of the Tonnage Clause did not evaluate the fees in terms of services to passengers. In *Portwardens*, fees were unconstitutional because they were used to pay for costs of having port masters, not to provide services; the Court found an attenuated connection between having port masters and a service to the vessel, and found the fees were not constitutional where there was no showing any services were actually rendered.[29] The other two cases cited by CLIA involved fees that did not provide any services.[30]

The Plaintiffs attempt to distinguish the Tonnage Clause cases that did allow fees for services to passengers but do not address the actual facts and holdings of the Courts. Instead, the Plaintiffs inserted their wishes about the holdings without citation as CBJ explains below.

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[24] *Clyde Mallory Lines* has been cited 73 times, according to Lexis Nexis, including 13 U.S. Supreme Court Cases.
[25] 874 F. 2d at 1022.
[26] 874 F.2d at 1023.
[27] 53 U.S. 299, 312 (1851). Plaintiffs' Opp., p. 13.
[28] Some of the fees challenged by CLIA include amounts used to provide emergency fire, ambulance, medivac, and medical services to the cruise ships, crew, and their passengers.
[29] *S. S. Co v. Portwardens*, 73 U.S. 31, 34 (1867). There is no claim made by CLIA, to the understanding of CBJ, that the fees are used to pay the entire costs of the Juneau Port Authority or the Juneau Port Director or Harbor Master. As shown in the exhibits and facts filed with CBJ's Cross Motion and Opposition to Plaintiffs' Summary Judgment (Dockets 118-137), the fees are not used for that purpose.
[30] See Plaintiffs' Opp., p. 14 and the cases they cite. The Plaintiffs' also cite *Polar Tankers* on Opp., p. 7, but that case did not involve a fee assessed against passenger vessels, and did not analyze or find that a service to passengers on a passenger vessel could not be constitutional. 557 U.S. at 10.

Although the Supreme Court in *Morgan's S.S. Co. v. Louisiana Bd. of Health,*[31] upheld fees used for hospitals, medical personnel and other services to the passengers, not services just for the physical vessel, the Plaintiffs state, without citation: "Any benefit of treatment for diseased passengers was incidental."[32] The Court does not say any such thing as evident by the Plaintiffs lack of citation. This is an admission by the Plaintiffs that passenger fees may be used for services to passengers that are "incidental" to the physical vessel; a service "incidental" to the physical vessel is not a service solely for the benefit of the physical vessel. That is exactly what all the Federal Courts have held; that is exactly what the CBJ requests the Court to hold: The Tonnage Clause does not limit the use of passenger fees to services that solely benefit the physical vessel.

Without any discussion of the case, the Plaintiffs make the same statement about the use of fees in *Captain Andy's Sailing, Inc. v. Johns*,[33] saying "[s]imilarly."[34] Again, the Plaintiffs acknowledge that passenger fees are constitutional when used for "limited parking and lights."[35] The Plaintiffs admit that fees for parking and lights—which are not services to the physical vessel—have been held constitutional under the Tonnage Clause. The Court did not characterize any of these services, as being "incidental" to the physical vessel, as the basis for upholding the fees.[36] *Captain Andy's* found that fees used to provide parking, security, lights, and "other

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[31] 118 U.S. 455 (1886).
[32] Plaintiffs' Opp., p. 17.
[33] 2001 U.S. Dist. LEXIS 26105, *43-45, 195 F. Supp. 2d 1157, (Dist. Hawaii 2001).
[34] Plaintiffs' Opp., p. 17.
[35] Plaintiffs' Opp., p. 17. The decision says "parking" not "limited parking." The Plaintiffs added the "limited."
[36] The Plaintiffs criticize CBJ for including a reference to "restrooms" in the discussion of the *Captain Andy's Sailing, Inc. v. Johns* decision. (Opp., p. 17, fn. 18: "The Kukui'ula facilities did not include public restrooms.") There is no cite to the decision. It may be that the "facilities" or "improvements" referenced by the court did include public restrooms. However, the court did cite with approval to *Barber v. Hawaii,* 42 F.3d 1185, 1196 (9th Cir. 1994), specifically noting that the Ninth Circuit upheld the constitutionality of fees charged for the use of restroom facilities: "…a harbor fee charged for the use of restroom facilities, parking, trash disposal, and security is not a 'duty of tonnage…'" 195 F. Supp. 2d at 1172.

improvements" at the Kukuiula Small Boat Harbor were constitutional.[37] The Plaintiffs do not explain how parking, security, and lights are services solely to the physical vessel. They are not. If the Tonnage Clause does not prohibit the use of passenger fees for "parking," then the Tonnage Clause, as a matter of law, does not limit the use of passenger fees to solely for the benefit of the physical vessel.

The Ninth Circuit in *Barber v. Hawaii* held fees constitutional under the Tonnage Clause and specifically the *Clyde Mallory* test where used for "restroom facilities, parking, trash disposal and security."[38] The Plaintiffs avoid that holding by saying the plaintiff in *Barber* conceded the constitutionality of the use of fees for those services and claim that the case provides no framework for "analyzing Tonnage Clause compliance."[39] CBJ is not aware of a limitation on this Court's analysis of decisions in other cases based upon whether a plaintiff "conceded" the constitutionality of the uses of the fees. The Plaintiffs' comment minimizes the legal abilities of both counsel involved and the Courts—in this case the Federal District Court and the Ninth Circuit.[40] What is plain and clear is that the Ninth Circuit upheld the use of passenger fees for services such as restroom facilities, which the Plaintiffs concede are not solely for the benefit of the physical vessel.

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[37] 195 F. Supp. 2d at 1175.
[38] 42 F. 3d 1185, 1196 (9th Cir. 1994).
[39] Plaintiffs' Opp., p. 18. They claim this case does not provide a framework for analyzing the Tonnage Clause compliance in the context of CBJ's undefined "services to passengers." As discussed in detail above, CBJ does not seek a ruling in this Motion for specific services to passengers, but seeks a legal ruling that there is no prohibition against any and all services to passengers and/or crew.
[40] The plaintiff's attorneys in *Barber* conceded constitutionality likely because there was no basis to claim that the use of the fees for those services was unconstitutional. If the Tonnage Clause clearly, unmistakably and historically, limited the use of passenger fees to only services to the physical vessel, is it rational to assume the plaintiff's attorneys in *Barber* would concede the constitutionality of the use of the fees for restroom facilities? Is it logical and rational to assume both the district court and the Ninth Circuit would ignore what the Plaintiffs' argue to be black letter law as to the application of the Tonnage Clause, without at least a comment that the concession exceeds the limitations historically put on the use of fees under the Tonnage Clause?

The Plaintiffs offer another distinction of *Barber* without a cite: "Passengers on small vessels in the *Hawaii* cases are not akin to cruise ship passengers disembarking in Juneau. The differences in services necessary to facilitate secure navigation and operation of these very dissimilar vessel types is substantial."[41] The only way to read this statement is the Plaintiffs concede that the use of passenger fees for services such as restroom facilities are constitutional under the Tonnage Clause if the restroom is at a "small boat harbor" but not if the restroom is on a dock used by cruise ships. Under this interpretation, a government could charge a passenger fee on something the Plaintiffs call "small vessels" and then use that fee to build or maintain a public restroom where the "small vessels" dock that the "small vessels" passengers could use without violating the Tonnage Clause; but a government that charges a passenger fee on cruise ship passengers and uses the fees to build or maintain a public restroom where the cruise ships dock would be in violation of the Tonnage Clause. Where does such a distinction exist in the Tonnage Clause or any case decided under the Tonnage Clause? Such an interpretation provides a special level of constitutional "protection" to cruise ships, which CBJ does not find anywhere in the Constitution.[42] This statement by the Plaintiffs is another admission that the Tonnage Clause does not limit the use of passenger fees to services provided solely to the physical vessel.

The Plaintiffs' analysis of the *Bridgeport* decisions avoids the constitutional issue in the same manner as their interpretations of the decisions discussed above. In *Bridgeport,* the fees were collected by the Ferry Company and remitted to the Authority.[43] Nowhere does either the District Court or the Second Circuit even intimate that if the Ferry Company paid the fees,

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[41] Opp., p. 18, fn. 21. The Plaintiffs' do not encumber this statement with any cite to either *Barber* or any case.
[42] It also seems especially inappropriate to make that distinction as cruise ships bring record numbers of passengers who actually use the restrooms, as further explained in CBJ's Opposition and Cross Motion, Docket 118.
[43] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F.2d 81, 83 (D. Conn. 2008). The Ferry Company was a plaintiff along with two passengers.

charging the passengers the fees as part of the ticket price,[44] the Tonnage Clause would preclude the use of the fees for any service except services provided only to the actual physical Ferry Company vessel.[45] The Tonnage Clause cases make no distinction as to whether the vessel pays the fees directly, or whether the vessel pays the fees after charging the passengers the fees as part of the ticket price, or whether the vessels collect the fees for the municipality with the fees assessed against the passengers, or whether the passengers pay the fees directly. All the Courts focus on the use of the fees and no Court has held the use of the fees must be solely for the physical vessel based upon who is assessed or pays or collects or remits the fees. The import of the *Bridgeport* decisions is that under the Tonnage Clause the Courts do not restrict the use of the fees to only the physical vessel; the Court found unconstitutional services that were unavailable to passengers. What uses of the fees were found constitutional, which included services to passengers and services to the vessel, was a factual inquiry decided after trial.[46]

The Plaintiffs argue that a government cannot escape the Tonnage Clause by calculating a levy "on a basis other than tonnage."[47] But that is not what CBJ is asking for; CBJ did not ask for a ruling that their fees are exempt from analysis under the Tonnage Clause because they are assessed per passenger. CBJ understands that the Tonnage Clause has not created an exemption to analysis because the fees are paid by the passengers and remitted by CLIA's members. CBJ is asking for a ruling that the Tonnage Clause does not per se prohibit fees used for services that may be available and used by passengers, not only services used or available to physical vessels.

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[44] The Plaintiffs have admitted in public documents and passenger contracts that the fees are paid by passengers as part of the ticket price. This is further detailed in the Cross Motion and Opposition to Summary Judgment and the exhibits filed by CBJ (Dockets 118-137). The statement by Plaintiffs in its Opposition, p. 19, that the "fee payers are the cruise vessels" is not true under their members' passenger contracts.

[45] Plaintiffs' Opp., p. 19.

[46] The Courts did not make a blanket finding that all services to passengers would be constitutional—and CBJ does not request such a ruling here.

[47] Opp. p. 20.

The Plaintiffs argue that CBJ asks the Court to hold that passengers are cargo and so all services for passengers are constitutional.[48] There is no distinction between cruise ship passengers and cargo for purposes of Tonnage Clause analysis, and fees used to pay for services to facilitate the unloading and loading of cargo have been found constitutional,[49] which supports that services for the loading and unloading of passengers are not per se unconstitutional. CBJ's point is simple and consistent: in those cases where the Courts upheld fees for services related to cargo under the Tonnage Clause, those services were not being provided to the physical vessel.

The Plaintiffs argue that a government cannot "fashion constitutionality" by spending vessel fee revenue on services "ostensibly provided to non-vessels."[50] The Plaintiffs have no citation to support this argument and this does not reflect the ruling requested by CBJ. CBJ has not, and does not, propose a standard of "fee for services" exception to the Tonnage Clause.[51] The ruling CBJ request is not an exception at all. The Plaintiffs propose a new standard and new interpretation of the Tonnage Clause. The Plaintiffs did not cite to a single case where a court held that passenger fees imposed by a government were unconstitutional unless the fees paid for services provided solely to the physical vessel. CBJ's requested ruling is narrowly tailored to the actual decisions under the Tonnage Clause. The cases are consistent and CBJ's limited request here is consistent with the cases: no Federal Court has held that the Tonnage Clause limits the use of passenger fees to the provision of services solely to the physical vessel. The Plaintiffs may challenge each and every expenditure as unconstitutional. But the challenge to any particular use of the fees cannot be based on the Plaintiffs' attempt to limit the Tonnage Clause

[48] Plaintiffs' Opp., p. 19-20.
[49] See CBJ's Motion at 5, 6.
[50] Plaintiffs' Opp., p. 20.
[51] As alluded to by Plaintiffs' at Opp., p. 20.

to allowing only services to the physical vessel. The Tonnage Clause does not restrict the use of passenger fees to the provision of services solely to the actual physical vessel.

III. THE RIVERS AND HARBORS ACT AS AMENDED DOES NOT CREATE NEW FEDERAL SUBSTANTIVE LAW AND DOES NOT LIMIT THE USE OF PASSENGERS FEES TO "PHYSICAL VESSELS"

The Plaintiffs' Opposition states that the Section 5(b) of the Rivers and Harbors Appropriations Act as Amended in 2002 (RHAA)[52] "confirms that a compliant fee is one that preserves the nexus between the fee payer and the service being used by that fee payer."[53] The fees are paid by the passengers as part of their ticket; therefore using the Plaintiffs' conclusion, the use of the fees for services to passengers is compliant under the RHAA.[54] CBJ asks the Court to rule that the use of fees for services to passengers is not per se violation of the RHAA.

The Plaintiffs' Opposition fails to address the basic premise stated by the few Courts that have reviewed RHAA in the context of a challenge to fees under the Tonnage Clause: that is, the RHAA did not create new substantive law and at most codified the Tonnage Clause.[55] The Plaintiffs do not cite to any case where a court separately analyzed the challenged fees under the RHAA after having reached its decision as to the constitutionality of the fees under the Tonnage Clause. With no clear Congressional intent to the contrary, there is no basis for the Court to hold differently from the Courts in *Bridgeport*[56], *Maher Terminals, LLC*[57], *Alaska Riverways,*[58] and *Moscheo*[59] that the RHAA only at most "codified" the Tonnage Clause. There is no additional

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[52] 33 U.S. 5(b).
[53] Opp., p. 21.
[54] This is addressed in the Summary Judgment pleadings.
[55] See CBJ's Motion at 20-21, and cases cited therein.
[56] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F.2d 81 (D. Conn. 2008), *aff'd, Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority*, 567 F.3d 79 (2nd. Cir. 2009).
[57] *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 805 F.3d 98,111 (3rd Cir. 2015) (Finding that the landside entity did not have protection under the Tonnage Clause or the Rivers and Harbors Act).
[58] *State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1222 (Alaska 2010).
[59] *Moscheo v. Polk County*, 2009 WL 2969754 (Tenn. Ct. App. Sept. 2, 2009).

and separate analysis for the Court under the RHAA after analysis of the Tonnage Clause.[60] If the CBJ passenger fees are constitutional under the Tonnage Clause, the fees cannot be held invalid under the RHAA.

The statutory language does not change this analysis. The RHAA does not include the words "physical" before vessel and does not state that services to the vessel must exclude services to the passengers or crew.[61] The word "vessel" does not necessarily mean that services to passengers and/or crew would be in violation of the RHAA, and that is not reflected in the RHAA or the legislative history and commentary.[62] The Plaintiffs' interpretation would require the Court to import the word "physical" into the RHAA, and to interpret the RHAA in a vacuum, rather than by analysis of the legislative intent, the cases since the RHAA was passed, and the Tonnage Clause cases. CBJ requests this Court look to the purpose and intent of the RHAA, and the cases analyzing the Tonnage Clause and the RHAA to find that the RHAA does not limit services to the undefined "physical vessel."

The Court can look to legislative purpose and intent to understand a law. The Plaintiffs cite to this Court's decision in *Alaska Native Tribal Health Consortium v. Cross,* but failed to address the parts of that decision that cite to the Ninth Circuit that found that a court is supposed to also look at the structure of the statute, "including its object and policy," that the language is not determinative, and that a court can examine legislative history as an aid to interpretation

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[60] The Plaintiffs cited *Alaska Riverways* and *Moscheo* in their Opposition, p. 23, but these courts found the RHAA follows the language of the Tonnage Clause. *Moscheo* also found no private cause of action under the RHAA.
[61] 33 U.SC. §5(b).
[62] *See Dolan v. United States Postal Service,* 546 U.S. 481, 486 (2006) ("The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform that analysis.")

when it "clearly indicates that Congress meant something other than what it said."[63] The Plaintiffs also cite to *Barnhart v. Sigmon Coal Co.*,[64] but the Court in that case found that the Congressional intent matched the statutory language in interpreting the meaning of the law and found a specific statement was not clear enough to be used.[65] As explained in *Conn. Nat'l Bank v. Germain*, canons of construction in looking at an act are only rules of thumb that help courts determine the meaning of the legislation.[66] The U.S. Supreme Court, just three weeks ago, affirmed that understanding of a law can be corroborated by the law's purpose and design: the objective of the law.[67] In the present case, the meaning of the RHAA is found in the descriptions and explanations of Congress, specifically by Congressman Young, who was the chairman of the committee that added the language; the meaning of this amendment as described by the legislative history is clearly different than the interpretation by the Plaintiffs.[68]

The RHAA does not fit in with the rest of the Rivers and Harbors Act statutory scheme, which prohibits all tolls or operating charges for passing through any work for the use and benefit of navigation which was acquired or constructed or otherwise belongs to the United States.[69] This amendment also is not a natural fit with the rest of the Maritime Transportation

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[63] No. 3:12-CV-0065-HRH, page 6, 2014 WL 1251534 at *4 (D. Alaska October 15, 2014) quoting *Wash. V. Chimei Innolux Corp.*, 659 F.3d 842, 8479848 (9th Cir. 2011), internal quotation marks deleted. The parties in *Alaska Native Tribal Health Consortium v. Cross* also both agreed the statute was unambiguous (No. 3:12-CV-0065-HRH, page 7, 2014 WL 1251534 at *4 (D. Alaska October 15, 2014). CBJ does not agree that the RHAA language is unambiguous in accordance with the interpretation outlined by CLIAA.

[64] 534 U.S. 438 (2002).

[65] 534 U.S. 438, n.13 (2002) Stating in analyzing a senator's statement: "Placed in its proper context, this statement is entirely consistent with the statutory text." The Court then goes on to examine the congressional statements in comparison to the text. The Court later went on to find that one senator's explanation could not be used because it was not "clear evidence" and because there was no evidence that the Senator's version garnered support in Congress. *Id.* at n.15. There is not that issue in interpreting the RHAA--Congressman Young was the sponsor of the addition. His explanation is not the same as a statement from a senator who did not garner support for his changes.

[66] 503 U.S. 249, 253 (1992).

[67] *Dig. Realty Trust, Inc. v. Somers,* 2018 U.S. LEXIS 1377, *4, *10-12, *19-21 (February 21, 2018).

[68] This Court in *Alaska Native Tribal Health Consortium* also looked at case law interpretation to determine the meaning of the statute. 2014 WL 1251534 at *7-8. The case law on the RHAA shows that it was meant to codify the existing case law, not create new substantive law.

[69] 33 U.S.C. 5, Rivers and Harbors Appropriations Act of 1884.

Security Act of 2002 (MTSA) that the RHAA was added to.[70] The starting basis to understand why this RHAA was enacted is the Joint Explanatory Statement of the Committee on the Conference, which is an "explanation of the effect on the action agreed upon by the managers and recommended in the accompanying conference report" and listed "the differences between the Senate bill, the House amendment, and the substitute agreed to in conference."[71] This is where the RHAA was added, as Section 445 of the MTSA;[72] the RHAA was not in the original Senate Bill or the House Amendment on the MTSA.[73] The conference members explained in the conference report that the RHAA "does not prohibit those instances in which Federal Law has permitted the imposition of fees and recognizes those circumstances under which non-Federal interests may charge reasonable port and harbor fees for services rendered."[74] This statement was not made after the passage of the Act and is the explanation agreed to by all members of the joint committee in amending the law and presented by Congressman Young as the Conference Chair.[75] CLIA agrees in their Opposition on page 22 that this language "buttresses the statute's plain language."[76]

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[70] MARITIME TRANSPORTATION SECURITY ACT OF 2002, Enacted November 25, 2002, 116 Stat. 2064, 107 P.L. 295, 2002 Enacted S. 1214, 107 Enacted S. 1214. The RHAA is in Section 445 of Title IV, the "Omnibus Maritime Improvements." See the explanation of the purpose of the bill on pages 16 and 17 of CBJ's Motion, specifically footnote 57 and 58 and the explanation in CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8580 (November 13, 2002).

[71] CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8580 (November 13, 2002) discussed on page 17 of CBJ's Motion. Also cited as MARITIME TRANSPORTATION SECURITY ACT OF 2002, H.R. Rep. No. 107-777, pg.75 (2002 Conf. Rep.)

[72] See Section 445 in CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8580 (November 13, 2002). Also cited as MARITIME TRANSPORTATION SECURITY ACT OF 2002, H.R. Rep. No. 107-777, pg. 71 (2002 Conf. Rep.)

[73] CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8589 (November 13, 2002). Also cited as MARITIME TRANSPORTATION SECURITY ACT OF 2002, H.R. Rep. No. 107-777, pg. 107 (2002 Conf. Rep.)

[74] *Id.* See CBJ's Motion, page 18, for the entire statement.

[75] See the list of Committee members who agreed with the joint statement, CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8580-8581 (November 13, 2002). Also cited as MARITIME TRANSPORTATION SECURITY ACT OF 2002, H.R. Rep. No. 107-777, pg. 74 (2002 Conf. Rep.)

[76] Citing the same quotation as CBJ references in footnote 77 above.

Congressman Young then made further explanation of why Section 445 was added to the bill before it was signed into law by the President.[77] This was consistent with the joint conference statement made above during the active changes to the bill. This statement by Congressman Young, as quoted on page 18-19 of CBJ's Motion, starting with "I would like to point out a particular concern...We are seeking 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..." was not made after the bill was signed into law, as CLIA writes in their footnote 27; the statement is in the Congressional record as being made on November 14, 2002 as an extension of Congressman Young's statement made on the same day before the passage by the House.[78] The intention of the RHAA is found in Congressman Young's description.[79]

The cases the Plaintiffs cite regarding statements by other politicians made while drafting completely separate statutes and provisions of law years after passage of a bill do not have any relevancy to Congressman Young's statements as the Conference Chair of the Conference that added the RHAA language, and as the statements were made during the passage of the bill and before it was signed into law and directly relate and explain the language at issue.

The court in *Consumer Safety* looked at the entire legislative history[80] in determining the meaning of a bill, addressing that the language was must be regarded "absent legislative

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[77] See quote on page 18-19 of CBJ's motion, from the CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec E 2143, 2143-2144. (November 22, 2002).

[78] See Exhibit B, page 1, the Congressional Record Extension of Remarks, CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, E2143, 2143-2144 (November 22, 2002), with Congressman Young's remarks on the Maritime Transportation Act listed as November 14, 2002. Available online at https://www.congress.gov/crec/2002/11/22/CREC-2002-11-22-pt1-PgE2143-4.pdf, last accessed March 2, 2018. Mr. Young made earlier statements that same day, November 14, 2002, located at CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8809, *8810 (November 14, 2002), provided as Exhibit C, page 2, available online at: https://www.congress.gov/crec/2002/11/14/CREC-2002-11-14-pt2-PgH8809-3.pdf, last accessed March 2, 2018. Congress approved additional remarks made on the record. (See Exhibit C, page 4). Note that CLIA's Exhibit 2 does not list any statements as being on November 22, 2002.

[79] Congressman Young made a public statement after the bill was signed in response to concerns by then Alaska Governor Murkowski that further supports this intention of the RHAA; the statement was provided as Exhibit A to CBJ's Motion.

intention to the contrary."[81] *Consumer Safety* involved post-legislative statements made 4 years after the law was passed, by a member of the subsequent congress in a committee that was discussing an entirely different amendment to the law, a member who was not the sponsor of the language that was adopted and the Court found was not a reliable indicator of the congressional intent.[82] *Consumer Safety* also cited *Chrysler Corp. v. Brown* for the statement that the contemporaneous remarks of a single legislator may not be controlling;[83] the Court in *Chrysler Corp.* reviewed the sponsor's statement, the entire legislative history, the reports of both houses and the statements of other Congressmen, and found that this combined refuted the respondent's interpretation.[84] In the present case there are no remarks made during the passing of the RHAA other than Congressman Young's. There is no similarity to the statements made by Congressman Young before the RHAA was signed into law and shortly after as the Conference Chair of the committee who added the RHAA and as the only member to explain the RHAA.

The court in *Dao* also looked at the legislative history in determining the meaning of the law, finding that the interpretation requested by the plaintiff was underscored by the drafting history that cut out the language that would support the plaintiff's interpretation.[85] *Dao* found that the drafters of the language must have understood the common law for similar torts in drafting the language at issue;[86] Congress here in drafting the RHAA must have understood the Tonnage Clause case law and there is no evidence in the legislative history that they intended to

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[80] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 111-117 (1980).
[81] 477 U.S. at 108.
[82] 447 U.S. at 116-121. The Court discussed how the Congressman's statements were made in a committee on another provision of the Act, and that the committee was not involved with the provision at issue in the case and did not make any statements on the provision at issue in the case. This is different than the issue in our case because Congressman Young was the sponsor of the bill and made statements on the meaning of the RHAA.
[83] 477 U.S. at 120.
[84] 441 U.S. 281, 311 (1979).
[85] *Dao v. Chao*, 540 U.S. 614, 622-624 (2004).
[86] 540 U.S. at 625.

create new law.[87] Importantly, *Dao* relates to completely dissimilar facts than the RHAA; the language the plaintiff sought to use in *Dao* was for an entirely different law passed well beyond the law at issue in the case.[88] The quote was taken out of context; the Court actually said "[T]hose of us who look to legislative history have been wary about expecting to find reliable interpretive help outside the record of the statute being construed, and we have said repeatedly that 'subsequent legislative history can rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to enactment.' "[89]

The Committee explanation in the Conference Report and the statements by Congressman Young are consistent with the text of the bill, and are "clear evidence" as to why the RHAA was drafted; there is not the same problem as there was with one senator's statement in *Barnhart v. Sigmon Coal Co.*[90] Congressman Young was the only person who made any statements or explanation as to the RHAA which was added to the MTSA at the end of the legislative process during the Conference committee in which Congressman Young was the chair.[91] The intent of this addition is reflected in the description of the addition and

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[87] The cases *Native Village of Venetie IRA Council v. Alaska*, 944 F.2d 548, 554 (9th Cir. 1991) and *Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir 2016) *as amended r'hearing* (April 15, 2016) cited by the Plaintiff on Congress understanding the existing law support CBJ's argument that the RHAA was not intended to prevent communities from charging fees for services to cruise ship passengers. *Venetie* discussed how Congress is presumed to know existing law before it enacts new legislation, and if the Congress did not seek to have the existing law applied it would have said so. 944 F.2d at 554. In our case, Congress did not make any statements that the existing Tonnage Clause cases would no longer apply, and in fact made a statement that the new law was not intended to block fees used to provide services, instead the intent was to block fees that were charged but not used to provide any services. CBJ's interpretation of the RHAA is that it was not meant to substantively change the existing law, as the explanations by Congressman Young show.

[88] *Dao*, 540 U.S at 626-627. The Plaintiff compared the language in the Tax Reform Act of 1976 and the Electronic Communications Privacy Act of 1986 to the Privacy Act of 1974, the law at issue in the case.

[89] *Id.* at 627. *Citing Solid Waste Agency v. United States Army Corps of Engineers,* 531 U.S. 159, 170 n.5 (2001), citing *Consumer Safety* discussed above.

[90] That court found that one senator's statement in a long colloquy to affect the change was not "clear evidence of congressional intent" when it was taken out of context, was absent of support, and where there was no indication that that senator's version garnered support by the House, Senate, or President. 534 U.S. 438, n. 15 (2002).

[91] CONFERENCE REPORT ON S. 1214, MARITIME TRANSPORTATION SECURITY ACT OF 2002, 148 Cong Rec H 8561, 8589 (November 13, 2002). Also cited as MARITIME TRANSPORTATION SECURITY ACT OF 2002, H.R. Rep. No. 107-777, pg. 107 (2002 Conf. Rep.).

Congressman Young's remarks. The interpretation argued by the Plaintiffs does not comport with the intent of the RHAA as explained by Congress, and as it is at odds, the intention is controlling.

The RHAA does not include the term "physical vessel." The Congressional history shows no intent to create new law as suggested by the Plaintiffs. As the RHAA does not create new substantive law, the RHAA does not restrict the use of passenger fees to services provided only to the actual physical vessel. CBJ respectfully requests the Court to hold that the RHAA does not limit the use of passenger fees to services provided only to the actual physical vessel.

IV. CBJ DOES NOT ADVOCATE IN THIS MOTION FOR A JUDICIAL SANCTION TO SPEND PASSENGER FEES ON ANY LOCAL CIVIC OR INFRASTRUCTURE IMPROVEMENT

CBJ has not requested the Court to rule as a matter of law any "unilateral" designation of a use of the fees as "services to passengers" would be constitutional under the Tonnage Clause.[92] CBJ has not requested that the Court hold as a matter of law that "if even one single passenger visits, uses, walks over, gazes upon any" "civic improvements," the use of fees are constitutional as a matter of law.[93] These kinds of efforts to re-characterize and misstate the CBJ's motion should be rejected by the Court. CBJ's motion asks the Court to affirm what is and has always been the law as to the interpretation and application of the Tonnage Clause: there is no per se constitutional limitation that only uses of passenger fees for services to the actual physical vessel will pass constitutional muster.[94]

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[92] Opp., p. 24.
[93] Opp., p. 24.
[94] The final portions of this section of the Plaintiffs' Opposition are conclusory factual assertions which have no bearing on the Motion which requests a ruling on the law. The Plaintiffs' can make those factual assertions with admissible evidence in the challenge to any identified actual expenditures, those factual issues do not need to be decided for the Court to rule on this motion. In footnote 28 of the Plaintiffs' Opposition, the Plaintiffs assert that "Vessel interests have not negotiated to purchase sidewalks, road surfaces, hospital or emergency medivac services, ambulances, bus transport, parks, or sculptures from CBJ." This statement is both misleading and not accurate. The

[PROPOSED]

V. CONCLUSION

The Tonnage Clause does not prohibit the use of fees for services to passengers and/or crew. The RHAA does not limit the services paid for by the fees to the physical vessel, and congressional intent does not reflect such an interpretation of the RHAA. CBJ respectfully requests a ruling that the Tonnage Clause does not restrict the use of the passenger fees for services solely to the physical vessel. CBJ respectfully requests a ruling that services to passengers and/or crew are not per se unconstitutional under the Tonnage Clause or prohibited under the RHAA.

HOFFMAN & BLASCO, LLC

Dated: March 13, 2018

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Dated: March 13, 2018

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Plaintiffs have specifically requested funding for, advocated for funding for, or approved funding from the passenger fees for improvements to sidewalks, bus turn outs and improvements for their tour buses, emergency and medivac services, and the sea walk project. (See CBJ's Cross Motion for Summary Judgment, Statement of Facts, and Objections to Plaintiffs' Statement of Facts, and exhibits and affidavits, Dockets 118-137.) No passenger fees monies have been used for "sculptures." The Court need not decide any of these factual assertions by the Plaintiffs to decide this motion. CBJ inserts this footnote only to advise the Court it does not acquiescence in the Plaintiffs' misrepresentations. Additionally, CBJ does not agree that a municipal government is required to negotiate with the "vessel interests" on each and every proposed expenditure, although CBJ has provided the planned list of projects each year to CLIA members and reviewed any comments provided thereby in accordance with the CBJ code.

[PROPOSED]

CERTIFICATE OF SERVICE

The undersigned certifies that on March 13, 2018 a true and correct copy of the foregoing **CITY AND BOROUGH OF JUNEAU'S REPLY IN SUPPORT OF MOTION TO DETERMINE THE LAW OF THE CASE ON THE TONNAGE CLAUSE AND RIVERS AND HARBORS ACT** was served on the following parties of record via ECF:

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