Robert P. Blasco, Esq.
Megan J. Costello, Esq.
Hoffman & Blasco, LLC
9360 Glacier Hwy., Ste. 202
Juneau, AK 99801
(907) 586-3340
(907) 586-6818 (fax)
Attorneys for the Defendants
rpblasco@hoffmanblasco.com
mjcostello@hoffmanblasco.com

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 CROSS MOTION FOR SUMMARY JUDGMENT

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THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' Opposition (hereafter CLIA) to the Cross Motion for Summary Judgment of CBJ is founded on multiple faulty premises or mischaracterizations of CBJ's Cross Motion. Before analyzing each defense and why summary judgment is proper, CBJ sets out these general reasons for rejecting the legal and factual arguments of CLIA:

1. CLIA does not offer any exhibit, declaration or affidavit to dispute any of the facts upon which the Cross Motion is based, facts that are supported by exhibits and affidavits. Because of CLIA's failure to dispute the truthfulness of the facts provided by CBJ with any exhibit, affidavit or declaration, this Court should accept the facts presented by CBJ as undisputed for purposes of CBJ's Cross Motion.[1]

2. CLIA fails to distinguish the Port Development Fee (PDF) and the Marine Passenger Fee (MPF), both as to implementation and expenditures, simply describing them as "Entry Fees," ultimately ignoring CBJ's Cross Motion which identifies how and why the PDF is different from the MPF for purposes of all of CBJ's defenses. CLIA has blurred the distinction by providing the Court with expenditures of the MPF in order to allege that the PDF is therefore unconstitutional. The PDF and MPF must be analyzed independently for purposes of the Tonnage Clause and CBJ's defenses. The absence of a single alleged unconstitutional expenditure of the PDF by CLIA with factual support as to why it is allegedly unconstitutional entitles CBJ to summary judgment on all of CLIA's claims as related to the PDF, and should result in the denial of CLIA's request for an injunction to stop the collection and expenditure of PDF funds.

3. CLIA's Opposition to many of the defenses is based on the presumption the Court has already declared the PDF Resolution and the MPF code ordinance unconstitutional.[2] There is no basis for such a presumption in analyzing the applicability of CBJ's defenses to preclude some or all of CLIA's claims.

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[1] *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Goped Ltd. LLC v. Amazon.com, Inc.*, No. 3:16-cv-00165-MMD-VPC, 2018 WL 834591, 2018 U.S. Dist. LEXIS 22975, at *6 (D. Nev. Feb. 12, 2018) citing *Bhan v NME Hosps., Inc.* 929 F. 2d 1404, 1409 (9th Cir. 1991). CLIA filed an Exhibit B with their Reply and Opposition. (Dkt. 148-4). Although 40 pages in length, it does nothing more than make statements that CLIA does not agree with the CBJ fact. CLIA did not dispute any of the facts with any exhibit, declaration or affidavit.

[2] For examples, see Dkt. 148, CLIA Opp., pgs, 47-51.

4. CLIA's Opposition claims the legal and procedural benefits of associational standing, but believes it can disavow the statements and conduct of their members that are applicable to the CBJ defenses. CLIA does not have any constitutional rights independent or superior of whatever constitutional rights their members may assert.[3] Associational standing provides a procedural mechanism to allow parties who do have constitutional rights to assert them in one lawsuit. Nothing about associational standing insulates the members from making statements or acting in a way that may abrogate, waive, or otherwise adversely impact the alleged constitutional claims made on their behalf by the association. The members cannot act contrary to their alleged constitutional positions and then claim those statements and conduct cannot be used because the statements or conduct were by associational members rather than by the associational entity. CLIA did not cite to any case which would support their position that the statements and conduct of the CLIA cruise ship member companies cannot be considered by the Court.[4] To the extent CLIA's cruise ship members have made statements or acted in ways that adversely impact their alleged constitutional claims, CBJ may use those factual statements and conduct by way of defense, and the Court should as well.

The above are addressed more fully as to each section of the Cross Motion.

[3] CLIA admits it is their cruise ship members, not CLIA, who are allegedly impacted by the fees, and similarly, the relief sought does not benefit CLIA, it would benefit the members. (See Dkt. 148, CLIA Opp., p. 47 for one example of this admission.) In reality it is the cruise ship members' passengers who pay the fees. There is no impact at all of the PDF or the MPF on CLIA or its members. Passengers will not pay less for the fees in Alaska even if CLIA prevails.

[4] CLIA did not dispute any of the statements or conduct of NWCA President John Hanson, Don Habeger of Royal Caribbean and Celebrity Cruises, Kirby Day of Princess Cruise Lines and Drew Green of Alaska Cruise Line Agency with any exhibit, declaration or affidavit. CLIA did not dispute that the cruise ship members of CLIA are the same cruise ship companies who were members of NWCA.

II. CBJ IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS FOR RELIEF AND FOR AN INJUNCTION DIRECTED AT THE PORT DEVELOPMENT FEE

CLIA does not dispute any of the facts set out in Section III of CBJ's Cross Motion by exhibit, declaration or affidavit. To show a dispute exists, CLIA must "produce specific evidence" supporting the claimed factual disputes.[5] Therefore, the facts as set forth in Section III and Section V of CBJ's Cross Motion and the facts in the exhibits and affidavits relied on by CBJ in Section III and Section V of the Cross Motion as to the PDF are undisputed for purposes of the Court ruling on the Cross Motion.[6]

A. Waiver

CLIA claims that the defenses do not apply; and based this on their claim that the NWCA (Northwest Cruise Association) was a different cruise line association and that any approvals or requests from the NWCA or their members has no relevance.[7] CLIA's opposition fails to provide the Court with any admissible evidence that the NWCA was not CLIA's predecessor or that the members of NWCA are not the same as the members of CLIA, for whom CLIA is claiming associational standing.[8] CBJ has shown conclusively that the NWCA acted on behalf of the same cruise ship companies who are currently members of CLIA, and who would

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[5] *Goped Ltd. LLC v. Amazon.com, Inc.*, No. 3:16-cv-00165-MMD-VPC, 2018 WL 834591, 2018 U.S. Dist. LEXIS 22975, at *6 (D. Nev. Feb. 12, 2018). See also *Mixsooke v. Prudential Life Ins. Co.*, 3:12-cv-00170-JWS, 2013 WL 600237, 2013 U.S. Dist. LEXIS 22421, at *3 (D. Alaska February 15, 2013) , citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (The non-moving party may not rest upon mere allegations or denials, but most show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.)

[6] *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *See also Hughes v. United States*, 953 F.2d 531, 542 (9th Cir. 1992).

[7] Dkt. 148, CLIA's Opposition, at page 40.

[8] CLIA does not address the statements made by the Alaska Cruise Association (ACA), but this was another trade association that represented the cruise line members and is also a predecessor to CLIA, with John Binkley as the President of both ACA and CLIA.

allegedly benefit from this lawsuit, in their statements, representations and conduct with the CBJ both as to the establishment of the PDF and as to its expenditures.[9]

Despite CLIA's claims in their Opposition that CBJ has not established the NWCA was a predecessor of CLIA or CLIA Alaska, CBJ has provided sufficient admissible evidence to show the historical connection between NWCA (and their members) and CLIA (and their members). CBJ further supplements its evidence pursuant to Federal Rule of Civil Procedure 56(e)(1). In 2012, CLIA combined with nine cruise industry associations, including the Alaska Cruise Association (ACA),[10] and the Northwest and Canada Cruise Association, the re-named NWCA,[11] into a new unified "CLIA."[12] The organization created geographic designations.[13] CLIA-Northwest & Canada is the regional group of CLIA that appears to currently represent Alaska's interests, as CLIA-Alaska has been dissolved.[14] The NWCA was folded into the CLIA-

[9] Exhibit AS; Exhibit BI; and Exhibits CV, DR, EJ (Exhibit EJ marked confidential but CLIA in their opposition to the motion to file under seal states this is no longer confidential), all letters from NWCA listing the CLIA members it represented (Carnival Cruise Lines, Celebrity Cruises, Crystal Cruises, Holland America Cruises, Norwegian Cruise Lines, Princess Cruises, Radisson Seven Seas Cruises, Royal Caribbean International)—which are all members currently in CLIA (See Exhibit FQ).

[10] CLIA does not address the statements made by the Alaska Cruise Association (ACA), but this was another trade association who represented the cruise line members in discussions with the CBJ. (See Exhibit FR (marked confidential but CLIA in their opposition to the motion to file under seal states this is no longer confidential)).

[11] See RFA response No. 2, with Exhibit AS. Note that CLIA states that to their knowledge there is no entity in Alaska with the name NWCA, however as shown in Exhibit MG, there was an entity registered in Alaska as the NWCA, which has now been dissolved.

[12] See Cruise Industry Press release, "Cruise Industry Forms Global Trade Association," December 17, 2012, attached as Exhibit MB to this reply. Available on the world wide web at: https://www.prnewswire.com/news-releases/cruise-industry-forms-global-trade-association-183771941.html, last accessed on April 20, 2018.

[13] *Id.*

[14] See Exhibit MC, the "About CLIA North West & Canada" webpage, available on the world wide web at: http://clia-nwc.com/index.php/about/, last accessed April 20, 2018, listing CLIA-NWC as the association now for Alaska. See also Exhibit MD, the Alaska Division of Corporations, Business and Professional Licensing page showing the history of directors, how CLIA-Alaska was formed from the ACA, and the dissolving of the CLIA-Alaska in 2016, available on the world wide web at: https://www.commerce.alaska.gov/CBP/Main/Search/EntityDetail/106387, last accessed on April 18, 2018.

Northwest & Canada regional group.[15] The former CLIA-Alaska, former Alaska Cruise Association, and former NWCA shared most of the same cruise line company executives as officers, many of whom are now officers for CLIA-NWC.[16]

If the NWCA was not the "industry representative" for the same cruise companies as in CLIA, CLIA could have submitted an exhibit or affidavit to dispute that fact. CLIA chose not to. If NWCA was not the predecessor of CLIA, CLIA could have easily denied the Request for Admission.[17] But CLIA did not deny it. In CLIA's Docket 148-3, which CLIA characterizes as

[15] See Information on the Northwest Cruise Ship Association, which now is listed as CLIA-Northwest and Canada, attached as Exhibit ME, available on the world wide web at: https://www.tourismvancouver.com/listings/cruise-line-international-association-north-west-and-canada/19179/, last accessed on April 20, 2018. See also the CLIA-Northwest and Canada page linked from the information on the NWCA, attached as Exhibit MF, available on the world wide web at: http://clia-nwc.com/, last accessed on April 20, 2018.

[16] It is startling to see how the individual officers belong to all the organizations that CLIA claims are not related. See Exhibit MG, the Alaska Division of Corporations, Business, and Professional Licensing webpage, available on the world wide web at: https://www.commerce.alaska.gov/CBP/Main/Search/EntityDetail/50518D, last accessed on April 18, 2018, which lists the officials of the NWCA of Alaska as:

- Bob Stone - Also listed as previous VP, secretary, and Director of ACA/CLIA-Alaska (Exhibit MD). CBJ understands he is/was an executive of Royal Caribbean Cruises, Ltd. (See Exhibit MH, CBJ080831 provided in discovery to CLIA).
- Charlie Ball - Holland America Group, currently on CLIA-NWC board of directors (Exhibit MC). Also listed as previous Vice President, Director, Treasurer for ACA/CLIA-Alaska (Exhibit MD).
- Christian Sauleau - Also listed as Director of ACA/CLIA-Alaska (Exhibit MD). CBJ understands he is a VP of Silversea Cruises and former Executive of Crystal Cruises. (See Exhibit MI, CLIA executive partner 2016 summit, available on the world wide web at: https://www.cruising.org/docs/default-source/ep/clia_epsummit_2016_agenda_email.pdf?sfvrsn=10, last accessed on April 28, 2018 and Exhibit MJ "Christian Sauleau Rejoins Silversea"-Cruise Industry News, available on the world wide web at: https://www.cruiseindustrynews.com/cruise-news/17701-christian-sauleau-rejoins-silversea.html, last accessed on April 23, 2018).
- Donna Spaulding - CLIA-NWC Director of Administration (Exhibit MC).
- Minas Myrtidis - Also listed as Previous Director, Secretary, Treasurer of ACA/CLIA-Alaska (Exhibit MD). CBJ understands he is a former executive of Norwegian Cruise Lines. (See Exhibit MK, LinkedIn of Minas Myrtidis, available on the world wide web at: https://www.linkedin.com/in/minasmyrtidis, last accessed on April 20, 2018).
- Paul Goodwin - Holland America Group, currently on CLIA-NWC board of directors (Exhibit MC). Also listed as Vice President, Previous Vice President, and Director of ACA/CLIA-Alaska (Exhibit MD).
- Rick Erickson -current Director and VP of Cruise Line Agencies of Alaska. (See Exhibit ML, Alaska Division of Corporations, Business, and Professional Licensing Officer Information for Cruise Line Agencies of Alaska, available on the world wide web at: https://www.commerce.alaska.gov/CBP/Main/Search/EntityDetail/93476, last accessed on April 18, 2018. Cruise Line Agencies of Alaska is the employer of Drew Green.)

[17] See Exhibit AS, pages 3-4.

a table of facts not in dispute and argues that these facts support summary judgment for CLIA,[18] CLIA cites to exhibits and facts that relate to pre-CLIA, facts relating to NWCA, which further supports that CLIA is using statements by NWCA and CBJ's responses to NWCA as material facts.[19] CLIA's assertions in the opposition referencing NWCA as "third parties" is not encumbered by any citation.[20] Under Rule 56, and the case law on the standard for summary judgment, the Court can and should accept CBJ's facts with respect to the statements, representations and conduct of the NWCA and its representative, Don Habeger of Royal Caribbean Cruises (a CLIA member company), as undisputed in determining the application of Waiver to CLIA's claims related to the PDF.

CBJ does not assert that the CLIA members have waived their claims as to the PDF based on the members "acquiescence" in payment of the fees.[21] The CLIA members, through the NWCA, and through its member Royal Caribbean Cruises, affirmatively "supported" the fee.[22] Specifically Don Habeger said: "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."[23] CLIA does not claim that their members were ignorant of the Tonnage Clause and were not aware of any alleged rights under the Tonnage Clause. As such, the affirmative statement of "support" for the fee can and does constitute a

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[18] *See Plaintiffs' Response to City and Borough of Juneau's and Rorie Watt's Statement of Facts in Support of CBJ's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment and in Support of CBJ's Motion to Strike Certain Exhibits,* Docket 148-2, at 7.

[19] For example, in the last row of Dkt. 148-3, CLIA quotes a statement in a letter (CBJ's Exhibit LN) from former City Manager Rob Swope, written in response to NWCA. CLIA also purports to list "facts" relating to CLIA's members (148-3, pages 7-8), and "others" in support of their argument.

[20] Dkt. 148, CLIA Opp., p. 55.

[21] Dkt. 148,CLIA Opp., p. 55.

[22] Exh. BI.

[23] Exh. BI, January 7, 2008 minutes. At the time that Mr. Habeger made this statement, he had previously been the industry representative for the MPF for many years. Mr. Habeger also represented himself to CBJ in other communications as the contact for the cruise ship representatives. (See Exhibit FG).

knowing waiver. CLIA went further than just support. Mr. Habeger made clear that the cruise line companies supported the use of the PDF for the planned dock projects (which became 16B) and for the projects in the Waterfront Plan, such as the Seawalk.[24] Allowing CLIA to escape responsibility for the statements of their predecessors in interest would signal that any entity could avoid culpability by simply dissolving and re-incorporating. The Court should have no problem considering the statements and representations made by CLIA's predecessors, their officers, and their members.

Apparent authority applies here as to CBJ's defenses of waiver and estoppel as to the PDF.[25] Alaska has adopted the Restatement's general rule for apparent authority and considers the following factors:

1) The manifestations of the principal to the third party (here CBJ);

2) The third party's reliance on the principal's manifestations;

3) The reasonableness of the third party's interpretation of the manifestation and the reasonableness of the reliance.[26]

Generally, the third factor as to reasonableness is a question of fact for the jury, although summary judgment is not precluded when no reasonable juror could conclude other than as to the reasonableness of the reliance.[27]

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[24] Exh. BI. If Mr. Habeger of Royal Caribbean, in referencing the support of NWCA and the "cruise industry" who was he speaking on behalf of if not the "cruise industry," which was and is the current CLIA members? No rational and reasonable juror could find that Mr. Habeger was not speaking as a representative of the cruise ship companies who seek to benefit from this lawsuit.

[25] Apparent authority also applies to the CBJ defenses of estoppel as to all of the expenditures of the MPF requested by CLIA representatives or members and expenditures agreed to by CLIA representatives and members in Section IV and Section VI(B)(4) and 5 of CBJ's Cross Motion.

[26] *Airline Support Inc. v. ASM Capital,* 279 P. 3d 599, 604 (Alaska 2012). The federal courts appear to apply state law to the issue of apparent authority. *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.,* 213 F. 3d 474, 480-481 (9th Cir. 2000).

[27] 279 P. 3d at 606.

Don Habeger represented Royal Caribbean, a CLIA member; he represented the NWCA (which included the current CLIA members), with the permission of its President, John Hanson, and he represented the "cruise industry, which included the NWCA and the CLIA members.[28] Mr. Habeger's manifestations were unequivocal. NWCA, its members and the cruise industry affirmatively supported the enactment of the PDF and its use for infrastructure such as new docks for the large cruise ships and the Waterfront Development projects such as the Seawalk. That conduct and statements satisfies the first factor.

CBJ relied on the conduct and statements of the CLIA members to incur the indebtedness to build the 16B docks that solely serve the large cruise ships of the CLIA members.[29] CBJ had no "civic" need for the large docks. The 30,000 people living in Juneau do not need docks to serve large cruise ships in order to carry on their day to day lives or to otherwise enhance the community. As Mr. Binkley, CLIA's President, clearly stated, the use of the PDF for the 16B docks is exactly what the PDF is supposed to be used for.[30] As with the payment of the check in *Airline Support* (cited at Fn. 26), the incurrence of the bond indebtedness by CBJ establishes that it did rely on the representations of the CLIA predecessor and member and industry representatives' statements and conduct. The Ordinance approving the bond indebtedness for the 16B dock project specifically states the bonds will be repaid by the PDF, just as expected and supported by CLIA's predecessor and its members.[31]

This is a case where the third factor, the reasonableness of CBJ's reliance, is "straightforward" and thus warrants summary judgment.[32] CLIA's Opposition does not put

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[28] *See* Exhs. BI, DS.
[29] Dkt. 133, Affidavit of Bartholomew, paragraphs 26-39; Dkt. 132, Affidavit of Watt, paragraphs 24-34.
[30] Exh. FE; Exh. FF.
[31] Exh. MM, CBJClerks00035-57, p. 1.
[32] 279 F. 3d at 606.

forward any admissible evidence that the NWCA, John Hanson, Don Habeger, or Kirby Day[33] did not represent the CLIA members' interests and the cruise industry, including the CLIA members, in their statements or dealings with the CBJ. As the large number of Exhibits filed by CBJ and CLIA show, Mr. Habeger represented himself to the CBJ as an agent of NWCA and the cruise ship industry[34] and was nominated by the cruise ship companies to be their representative.[35] John Hanson wrote letters on behalf of the cruise ship industry and CLIA members to the CBJ.[36] Drew Green was later nominated as the industry representative.[37] Kirby Day and Drew Green have acted as agents of CLIA in requesting certain projects and not objecting to others.[38] [redacted].[39] In this voluminous record, there is no exhibit or affidavit to even hint that the NWCA was not comprised of the same members as CLIA, did not act on behalf of the CLIA members, or that there was some other unknown association of cruise ship companies (other than the ACA) that was really the predecessor of CLIA. In fact, as shown in this reply, the NWCA officers involved mostly the same individuals who made the decision on behalf of CLIA-Alaska/ACA/CLIA. It would have been simple for John Hanson or Don Habeger or Kirby Day

[33] Kirby Day works for Princess Cruises (Exh. BV), whose parent company is Carnival Corporation, the same corporation that owns Holland America and Carnival Cruise Line. (See Exh. JP); Affidavit of Watt, paragraph 40.
[34] *See* Exh. BI; Exh. DL (Habeger submitted the "industry list" as a Passenger Fee Board member); Exh. DN; Exh. FG.
[35] *See* Exh. DS.
[36] Exhs. CV, DR, EJ (Exhibit EJ marked confidential but CLIA in opposition to the motion to file under seal states this is no longer confidential), all letters from NWCA listing the CLIA members it represented (Carnival Cruise Lines, Celebrity Cruises, Crystal Cruises, Holland America Cruises, Norwegian Cruise Lines, Princess Cruises, Radisson Seven Seas Cruises, Royal Caribbean International)—which are all members currently in CLIA (See Exh. FQ). CLIA cites to exhibits where CBJ responded to Mr. Hanson of NWCA, arguing that this supports that there are no material facts in dispute, which further supports that CLIA admits NWCA is a predecessor and John Hanson is a agent in interest. (See Dkt. 148-3, last row: CLIA quotes a statement in CBJ's Exhibit LN from former City Manager Rob Swope, written in response to NWCA.)
[37] *See* Exh. DW, page 5, Drew Green as the industry member of the Passenger Fee Committee.
[38] *See* Exhs. AQ; AR; BV; CR; DF; DI; DJ; DX; EB; EI; GA; GJ; GK; HJ; IU; IV; KV; LW; ED (Confidential); FX (Confidential); Affidavit of Watt, paragraph 40.
[39] *See* Exhs. BH; EQ; ET; FI; FP; FT; IZ; JA, all Confidential.

in approving projects to say: "[w]e do not represent the cruise ship companies, we are only speaking for ourselves personally". But, of course, they did not.[40] They said who they were, who they represented, what they wanted for the CLIA member companies, and they continued to act and speak consistently as to the PDF and PDF expenditures for the next eight years until this lawsuit was filed.[41]

For the next 8 years, until this lawsuit was filed, CLIA took no action contrary to the support for the PDF fee and expenditures stated to CBJ in 2008. The Amended Complaint fails to identify a single expenditure of the PDF alleged to be unconstitutional, which is because the PDF is indebted to pay for the cruise ship docks that are used by CLIA's members, docks required due to the large cruise ships.[42]

CBJ respectfully asserts that all three of the factors for apparent authority are satisfied. CBJ is entitled to summary judgment on its defenses of waiver, equitable estoppel and quasi-estoppel as to the validity of the PDF resolution and the expenditures. CBJ respectfully requests CLIA's request for an injunction to stop the collection of the PDF and to prohibit the continued use of the PDF to pay the bond indebtedness on the 16b dock projects should be denied.

The cases cited by CLIA based on "actual or attempted compliance" are not applicable. In *Zenith/Kremer Waste Sys., Inc. v. W. Lake Superior Sanitary District,*[43] the district court did not find a waiver based on the predecessor hauler's lobbying efforts to prevent the district's

[40] With the exception of specific requests by Princess Cruises for the Franklin Dock Company, in some years signed by Kirby Day. (For an example, see Exh. EX).
[41] Affidavit of Watt, paragraph 40.
[42] See Dkt. 133, Bartholomew Affidavit, paragraphs 23, 27, 28, 3, 35, 36, 37, 38, 39; Dkt. 132, Watt Affidavit, paragraphs 29, 30, 31, 33, 34.
[43] No. CIV-5-95-228, 1996 WL 612465, 1996 US Dist. Lexis 15921 at *25-26 (D.C. Minn. July 2, 1996).

confiscation of their waste collection business. Here, we have CLIA members and the predecessor organization affirmatively supporting the PDF. That is not simply "compliance."[44]

Nor does CBJ's motion ask the Court to preclude CLIA from challenging future expenditures of the PDF that CLIA may claim to be unconstitutional. That is not the basis of CBJ's defense of waiver as to the PDF.

The waiver relates to collection of the fee and past uses of the fee, not future as yet unspecified uses of the fee. Yet CLIA asks for both an injunction as to collection of the PDF and further use of the PDF. CLIA is not entitled to an "advisory opinion," such that the Court enjoins collection and use of the PDF on some vague basis that the fees must be used for constitutionally permitted purposes. If CLIA identifies an alleged unconstitutional use of the PDF, in the future, which they have failed to do to date, the Court can have a trial on that expenditure or expenditures, as the court did in *Bridgeport.*[45]

CBJ is entitled to summary judgment as to the collection of and use of the PDF and respectfully requests the Court deny an injunction as to the collection of and use of the PDF.

B. Laches

CLIA advances three reasons to oppose summary judgment based on laches:

1) CBJ failed to show prejudice;
2) "special circumstances"; and
3) the claim is for injunctive relief.[46]

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[44] *Salla v County of Monroe,* 409 N.Y.S. 2d 903,906-907 (App. Div. 1978) is similarly inapplicable. There the construction contractor complied with a statute in order to not breach a contract. Here, the CLIA members affirmatively supported the PDF, and supported specific uses of the PDF, with full awareness of the Tonnage Clause. CLIA also cites to *Wendlandt v. Indus. Comm'n,* 39 N. W. 2d 854, 856 (Wis. 1949). There is no waiver of a constitutional right issue in that case. These two state court cases are not binding on this Court and would seem to have little precedential value. CLIA does not rely on any federal cases other than *Zenith/Kremer* for their "compliance" argument.

[45] 567 F. 3d 79, 82-83 (2d Cir. 2009); 566 F. Supp. 2d 81, 83 (D. Conn. 2008).

[46] CLIA does not differentiate between the PDF and MPF although CBJ's motion is different as to each and the ordinances and expenditures are different for the PDF and MPF. CBJ will address their entitlement to summary judgment consistent with the Cross Motion, addressing the two fees independently.

None of these reasons are sustainable.

1. *CBJ Has Established Prejudice*

The community of Juneau, with 30,000 people, has no need or use for massive docks whose sole purpose is accommodating massive cruise ships. The docks were built solely because of the demand by CLIA and their members for larger docks to accommodate their mammoth vessels. The vessels are the means for the CLIA members to make their profits; the vessels are not a means of "tourism enhancement" for the people of Juneau. Similarly, the community of Juneau has no independent need for covered walkways to keep cruise ship passengers dry, or for crossing guards, or for a Seawalk starting from the docks where the cruise ships berth[47]. As stated in the reports of CLIA's expert, McDowell Group[48], cruise ship passengers' highest priority for Southeast communities is to have a seawalk.[49]

What the Affidavits of Mr. Bartholomew and Mr. Watt establish is that the City would not have incurred the bond indebtedness of $29,000,000 to build docks whose only use is to dock massive cruise ships without the belief and knowledge that the Port Development Fees would be used—without challenge—to pay that indebtedness. The Ordinance passed by the Assembly to incur the bonded indebtedness specifically states the PDF will be the source of the funds to repay.[50] Mr. Bartholomew, the Finance Director since 2012, and the person directly involved in the finances of the City and the incurrence of bond indebtedness unequivocally stated:

> 27. In 2015, $22.7 million in bonds were sold (including $1.7 million for funding the required debt reserve and $130,000 in closing costs). The

[47] Affidavit of Watt, paragraphs 42-56, 63-69.
[48] Mr. Calvin, CLIA's expert, is a member of McDowell Group.
[49] See Exh. KP, page 12; 78% of cruise ship passengers found a continuous walkway important.
[50] Exh. MM, CBJClerks00035-57, p. 1.

remaining went into the 16B capital project. Debt service on these bonds will be paid from 2016 until 2034, with annual payments of around $1.6 million for a total of $31.7 million.

28. CBJ would not have taken on the indebtedness necessary to build 16B if CLIA's predecessors and members had not concurred in the Port Development Fee and its use.

29. The Port Development Fee has been used consistent with the resolutions since it was first enacted in 2002, when Resolution 2150 created a port development fee of $1.73 per passenger and continuing in 2008, when the fee was increased to $3.00 per passenger. (The fee originally had a sunset date, but the sunset date was repealed in 2010). (See Resolution Nos. 2163, 2294b-am, 2423b-am, 2552).

30. CBJ has used the Port Development Fee consistent with the resolution and in doing so has consulted with CLIA's predecessor and cruise line representatives or gave them the opportunity to consult.

31. The CLIA members have all paid the Port Development Fee since its inception, by paying CBJ directly or through their agents, such as Cruise Line Agencies of Alaska.

32. The CLIA members have never objected to or challenged the payment of the PDF.

33. The most significant recent project is the 16B project to construct a new public dock known as the Cruise Ship Terminal (CT) dock and to reconstruct the Alaska Steamship Wharf (AS) to accommodate larger cruise ships. This project cost in excess of $54,000,000. At the ribbon cutting ceremony in May 2017, Mr. Binkley, CLIA's Executive Director, in his speech expressed that Juneau was leading the way for all of Alaska in the development of docks to support the new larger cruise ships.

34. The Cruise Ship Berth Improvements project listed in CLIA's fact No. 127 and CLIA's Exhibit 1 is funding for the 16B project for the cruise ship docks.

37. The CBJ incurred substantial revenue bond indebtedness to plan, design and build the dock, with the express intent to repay the indebtedness from the Port Development Fee.

38. Juneau would not have undertaken such a massive project if CLIA's members did not need a new dock for larger ships.

39. CBJ took on substantial debt based on the demands of CLIA and/or its predecessors that it would be bringing bigger ships that could not dock at the existing docks and by CBJ incurring the debt to satisfy the demands had the assurance that the PDF would be available to pay the debt service.[51]

The City Manager, Mr. Watt, was similarly unequivocal as to the prejudice suffered by CBJ if the PDF cannot be used to pay the bond indebtedness:

[51] Dkt. 133.

24. The Port Development Fee has been collected since 2002, and in its present form of $3.00 since 2008. CLIA has never objected to or challenged the collection of the PDF or the reasonableness of the fee since I have been City Manager.

25. CBJ used the PDF consistent with the resolutions and has consulted with CLIA's predecessors, CLIA, and cruise line representatives or gave them the opportunity to consult on proposed PDF projects.

26. The CBJ relied on the requests by industry and their lack of objections to certain projects when deciding what to finance with PDF.

27. The CBJ has been unreasonably prejudiced by CLIA's delay in bringing a lawsuit more than 14 years from the implementation of the fees. Many of the prior city managers and assembly members who made the decisions on the CBJ projects are no longer part of CBJ and CBJ cannot reach these individuals for testimony in the case. CBJ has also relied on CLIA and the industry's requests for projects and agreements with other projects and relied on the representations of cruise industry representatives supporting the services and projects to believe those services and projects would not be challenged later as they were approved or requested by the cruise ship industry representatives and/or agents. CBJ relied on the statement by Don Habeger in 2008 who made public comments as the representative of the industry and the NWCA in response to the resolution creating the $3.00 MPF, when he said that the industry supported the PDF and that the industry specifically said the fee would be in harmony with any project in the waterfront plan. (See CBJ069749). The creation of new docks and the Seawalk were in the waterfront plan since 2004.

28. The Port Development Fee has only been used for capital projects on infrastructure directly used by the cruise vessels along the downtown waterfront.

29. The most significant recent project paid for by the PDF is the 16B Project to construct a new public dock known as the Cruise Ship Terminal (CT) dock and to reconstruct the Alaska Steamship Wharf (AS) to accommodate larger cruise ships. This project costs in excess of $54,000,000. The docks are used solely by cruise ships that pay the MPF and PDF.

30. Other than objections to specific design components of project 16B, no industry representative has objected to or challenged any use of the PDF. There was an Advisory Group for the 16B project which included CLIA's Executive Director John Binkley. Comments from the Advisory Group were taken into account in the design of the project. At the 16B ribbon cutting ceremony, CLIA's Executive Director Binkley complimented the CBJ for leading the way in creating large docks.

31. Since 2011, the PDF has only been spent on the 16B dock project and the Seawalk.

32. The PDF has not been spent on services only for passengers.

> 33. The CBJ incurred substantial bond indebtedness to plan, design and build the 16B project, with the express intent to repay the indebtedness in large part from the Port Development Fee.
>
> 34. Juneau would not have undertaken such a massive project if CLIA's members did not need a new dock for larger ships. CBJ took on substantial debt based on the assurance of CLIA's predecessor and its members that CLIA and its members did not and would not challenge the Port Development Fee. CLIA's members solely determine the size, deployment and scheduling of the ships on a year-to-year basis with the help of Drew Green of Cruise Line Agencies of Alaska. CLIA has never asked CBJ to participate in the planning or scheduling of ship visitation.[52]

CLIA did not submit any exhibit, declaration or affidavit to dispute any of the testimony of Mr. Bartholomew or Mr. Watt.

CLIA flippantly states that Juneau can fund its "tourism related" projects from "other sources of revenue."[53] That unsupported statement is plainly insufficient to dispute or call into question or in any way lessen the import of the testimony of Mr. Bartholomew and Mr. Watt. Their testimony establishes the 16B docks are not simply a "tourism" project, but rather solely for the benefit of the cruise vessels. Their testimony establishes that the City would not have undertaken this massive debt but for reliance on the statements and conduct of CLIA, their predecessors and their members. Importantly, nowhere does CLIA dispute that all of this bonded indebtedness and the projects funded as outlined in the Affidavits were incurred and the projects built solely because of the demand of CLIA and their members for the accommodations and their agreement with the projects identified in the Long Range Waterfront Plan.[54] As clearly evidenced by the Affidavits, Juneau has no other "revenue source" for these projects and would not commit to the use of some other source for these massive projects.[55]

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[52] Dkt. 132.
[53] Dkt. 148,Opp., p. 59.
[54] As noted in various other pleadings, CLIA's President, Mr. Binkley, wanted the City to build even larger docks.
[55] Exh. MM, CBJClerks00035-57.

CBJ has established substantial prejudice in reliance on the actions, statements and conduct of CLIA, NWCA, and the CLIA members and representatives to satisfy that criteria of the doctrine of laches.

CBJ has additionally been prejudiced by the loss of evidence and witnesses. If CLIA (or NWCA) had not delayed, for 8 years now, challenging the PDF, after affirmatively supporting it and the uses of the funds, CBJ would have had access to witnesses and the records of NWCA. For example, it is not known if John Hanson and Don Habeger are available to be deposed and testify.[56] As CLIA absorbed the members of the NWCA, CBJ does not have access to its records, particularly its communications, internal and external, regarding the PDF and uses of the funds.

In *Boone v Mech. Specialties Co.*,[57] relied on by CLIA, the court dismissed the plaintiff's constitutional claims on the basis of laches. The court noted there that the plaintiff offered no excuse for his delay and that the defendant had established the potential loss of witnesses during the delay.[58]

CLIA has offered no excuse for the delay in bringing their lawsuit to challenge the validity of the PDF Resolution and the uses of the funds. Like the plaintiff in *Boone*, CLIA let their potential action lay "dormant," much to the prejudice of CBJ. Like the defendant in *Boone*, CBJ is required to defend without important witnesses and records, solely due to the delay.

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[56] Pursuant to F.R.C.P. 56(e)(1), CBJ requests the Court allow CBJ to conduct discovery, if the Court does not grant summary judgment for CBJ, including the depositions of Mr. Hanson, Mr. Habeger, and the depositions of John Binkley, Kirby Day, and others. CBJ would also take the F.R.C.P. 30(b)(6) depositions of CLIA and those members who bring cruise ships to Juneau.

[57] 609 F. 2d 956 (9th Cir. 1979).

[58] 609 F. 2d at 958-960.

In *Brown v Kayler,*[59] an Alaska Federal District Court case, the court dismissed the plaintiff's claim based on laches. The court noted that the burden to establish the excuse for the delay is on the plaintiff.[60] CLIA has offered no excuse for their delay, let alone admissible evidence to counter anything in the Affidavits of Mr. Bartholomew and Mr. Watt.

The court also noted that each case should be decided on its own facts.[61] CBJ has established substantial prejudice—in essence over $60,000,000 in prejudice. On the other hand, CLIA has failed to identify any excuse for delay; failed to submit any exhibit or affidavit to dispute the testimony of Mr. Bartholomew and Mr. Watt; and are asserting solely an economic, business right under the Tonnage Clause, not a fundamental right of free speech, freedom of religion, freedom from discrimination[62]. Based on the facts in this case, CBJ is entitled to a dismissal of CLIA's claim against the collection and use of the PDF.

2. *"Special Circumstances"*

CLIA alleges "special circumstances" but fails to identify what those alleged "special circumstances" are and fails to cite the Court to anything in the record to support why CLIA and their members should get a pass on the doctrine of laches.[63] Since CLIA has devoted only one sentence in their Opposition to their argument, without citation and without anything in the record, CBJ respectfully requests the Court find that CLIA has not established "special circumstances."

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[59] 273 F. 2d 588 (9th Cir. 1959).
[60] 273 F. 2d at 591.
[61] 273 F. 2d at 592.
[62] CLIA does not assert any economic harm at all. In reality, the fees are paid by the passengers (Exh. AS, Response to RFA 54; Exh D; Exh. E).
[63] Dkt. 148, Opp., p. 59.

3. *Laches Does Not Bar Prospective Relief*

For this argument, CLIA relies on three cases, one which was reversed, and two that have been criticized.[64] In *Danjaq v. Sony Corp.*,[65] the court applied the doctrine of laches to bar the plaintiff's claims even though the relief sought was prospective injunctive relief. The court stated that seeking prospective injunctive relief is not an absolute bar to the application of the doctrine of laches.[66] The court held that the defendant had established substantial prejudice and that the plaintiff failed to provide any reasonable excuse for delay, just as is the case here.

CLIA's claim that it only seeks to prevent future harm continues to ignore the distinction between the PDF and the MPF. CLIA has neither alleged nor provided the Court with any evidence of any alleged unconstitutionality as to the implementation of and the uses of the PDF. The Affidavits of Mr. Bartholomew and Mr. Watt establish that the PDF has been used solely for dock related infrastructure and capital improvements directly related to the cruise vessels. CLIA failed to provide the Court with any exhibit or affidavit to dispute those facts.

CBJ reiterates: the Court must review the PDF independently from the MPF, as to both validity of implementation and constitutionality of uses, as the courts did in *Bridgeport.* On this record, the Court does not have any allegation of any separate alleged unconstitutional use of the PDF, as distinct from challenges to alleged uses of the MPF.

In *Lyons P'ship, L.P. v. Morris Costumes, Inc.*[67], a criticized decision, the Court's comments related to laches and injunctive relief are in direct conflict with the Ninth Circuit's view in *Danjaq*. To the extent *Lyons* could be read as an "absolute" bar to the application of

[64] Dkt. 148, Opp., p. 59.
[65] 263 F. 3d 942 (9th Cir. 1991).
[66] 263 F. 3d at 969.
[67] 243 F. 3d 789 (4th Cir. 2001).

laches when an injunction is sought, CBJ urges this Court apply the Ninth Circuit's view, not that of the Fourth Circuit.

However, even under *Lyons*, CBJ has established a factual distinction. CLIA has not established any ongoing threat of future harm as related to the PDF. CLIA has not offered any factual or legal basis to claim the PDF is unconstitutional on its face; no case law would support such a position and none was cited by CLIA. CLIA has not identified for the Court any alleged ongoing unconstitutional use of the PDF, but rather has alleged unconstitutional uses of the MPF, and lumps the PDF in under their term "Entry Fees."

CBJ respectfully submits that a claim for injunctive relief is not an absolute bar to the application of the doctrine of laches, and here, CBJ has established significant prejudice, and CLIA has failed to offer any reasonable excuse for delay.

C. Quasi-Estoppel

CLIA either misunderstands or mischaracterizes CBJ's defense of quasi-estoppel, or both. CBJ does not assert the defense of quasi-estoppel "on the notion that the CBJ has collected the Entry Fees and spent the Entry Fee revenues because of CLIA's alleged support of the Fees over the years" as stated by CLIA.[68] As to the PDF, the support for the implementation of the fee—the Resolution—is not alleged, it is a fact, not disputed by CLIA by any admissible evidence.[69] CLIA then asserts that their members "have profited at best indirectly." As with the entirety of their Opposition, CLIA makes these kinds of factual assertions without any citation to the record and without any exhibit or affidavit to support the factual allegation. CLIA's members have benefited directly by the construction of the 16B docks, which only serve the large cruise ships.

[68] Dkt. 148, Opp., p. 61.
[69] Exh. BI; Dkt. 133, Affidavit of Bartholomew, paragraphs 26-39; Dkt. 132, Affidavit of Watt, paragraphs 24-34.

CLIA both affirmatively supported the PDF and affirmatively sought construction of the 16B docks, knowing the PDF would be used to pay the bonded indebtedness.[70]

CLIA states they "objected to those expenditures" but declines to identify for the Court what expenditures it allegedly objected to.[71] Although CLIA cites to the Affidavit of Mr. Botelho, the Affidavit does not support CLIA's claim that they objected to any expenditures of the PDF.

CLIA references the statements of John Hanson and Don Habeger. Of importance, CLIA does not deny the statements were made, nor do they deny the truthfulness of the statements. As to the hearsay objection, those statements will be admissible at trial as admissions made by CLIA and/or their members, as well as admissible under hearsay exceptions.[72] CLIA then goes on to state it is "implausible" the CBJ would rely on a "single statement" to design and plan a multi-million dollar structure.[73] CBJ did not rely on a "single statement." At no point did the industry seek to enjoin the award of the contracts or expenditures of the money before or during the construction. CLIA's lack of conduct was understood by CBJ to be an approval of the new docks needed for their cruise ships[74]. CBJ relied on the unequivocal affirmative support of the "cruise ship industry," and the representations of the cruise ship companies who wanted the PDF

[70] As discussed in CBJ's motion, CLIA's President served on the planning committee for the 16B docks, voiced initial disagreement with design and placement, but not with the need for docks to berth the larger ships, and when built publicly stated the building of 16B is exactly the proper use of the PDF funds. *See* Exh. FF and Exh. FE; Affidavit of Watt, paragraph 30.
[71] Dkt. 148, Opp., p. 61.
[72] As the Court has noted, a comprehensive pretrial order will be issued after the Court's rulings on the pending motions. Depending on the Court's decisions, CBJ will depose Mr. Hanson and Mr. Habeger for purposes of trial, if they are alive and available, and depose CLIA representatives and CLIA member officials, all of which will support the obvious, that both Mr. Hanson and Mr. Habeger were speaking on behalf of the cruise ship companies who are the CLIA members. Fed. Rule of Evid. 801(d)(2);803(6); 804(b)(3).
[73] Dkt. 148, Opp., p. 61, fn. 55.
[74] Affidavit of Watt, paragraphs 27; 34.

and wanted the expenditures, which were ongoing, and even continue today, as evidenced by the statements of Mr. Binkley.[75]

The second ground asserted by CLIA as to why quasi-estoppel should not apply appears to be something they term an "advantage" that CLIA has "paid for." It is not clear what this means or where it comes from because CLIA does not cite to any case that discusses this legal theory.

However, there are factual misstatements by CLIA in their "advantage" discussion. CLIA continues to assert that the members pay the passenger fees.[76] CBJ has demonstrated, with no contrary admissible evidence from CLIA, that the members charge the cruise ship passengers the full amount of the CBJ fees.[77] CLIA's President Mr. Binkley has stated in explaining the purpose for this lawsuit: "Industry is not arguing that our guests should not pay taxes...The litigation is about the use of a specific tax, the $8 local entry fee tax, ***each passenger pays*** to visit Juneau."[78] Other than remitting the fees to CBJ, CLIA has not offered the Court any admissible evidence that shows that any CLIA member even pays one cent of the PDF. The reasons CLIA cannot claim a refund is that they have no standing to assert the rights of the passengers who have paid the fees in their ticket price, and if CLIA did claim a refund, they would be obligated to repay every passenger who has paid those fees for the entire time the fees have been remitted to CBJ. It is simply untrue for CLIA to assert that their members have "provided the revenue

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[75] Exhs. FF and FE; Dkt. 133, Affidavit of Bartholomew, paragraphs. 26-39; Dkt. 132, Affidavit of Watt, paragraphs 24-34.
[76] Dkt. 148,Opp., p. 62.
[77] Exhs. D; E; AV; Exh.AS, page 12: Response to RFA 54.
[78] Exh. AU, emphasis added. CBJ points out that there are actually two separate fees at issue, the PDF and MPF, and not one fee as described by CLIA. Mr. Binkley uses the same phrase "industry" as used by Mr. Hanson and Mr. Habeger. It is clear that by "industry" Mr. Binkley, Mr. Hanson and Mr. Habeger are all referring to the cruise line companies who are the members of NWCA and CLIA, all being the same companies. And it is clear that CBJ understood and understands that when the NWCA/CLIA spokesperson references "industry," it is meant the cruise line companies. See also Exh. FR, a letter from Mr. Binkley as president of ACA, representing the same cruise companies who bring ships to Alaska. See also Exh. KT, p. 2 [confidential] "Industry feels a responsibility to our passengers to ensure ***the taxes they pay*** are being used in a legal manner."(emphasis added).

stream CBJ used to provide these advantages."[79] There is nothing in this record that the CLIA members have done anything other than remit fees that they have collected from their passengers to CBJ.

CLIA states they only seek "prospective relief mandating constitutional uses."[80] That is not true. CLIA has asked the Court to not only to prevent alleged unconstitutional uses but also stop the collection of the PDF. As thoroughly briefed, CLIA has not offered the Court a single case that makes the PDF Resolution per se unconstitutional under the Tonnage Clause. And as CBJ has repeatedly pointed out, CLIA has not identified a single alleged unconstitutional expenditure of the PDF and it failed to do so again in their Opposition to the application of quasi-estoppel.

CBJ respectively requests the Court apply the doctrine of quasi-estoppel to dismiss CLIA's claims against the PDF, and deny an injunction as related to the PDF.

D. Equitable Estoppel

The grounds on which CLIA opposes CBJ's motion on equitable estoppel are 1) that the CLIA members benefit only "indirectly" from CBJ's expenditures of the PDF;[81] and 2) what CLIA terms "legislation by estoppel." CLIA does not cite to any exhibit or affidavit to support their statement that the CLIA members benefit only "indirectly" from the use of the PDF. CLIA does not dispute that the 16B dock project, in excess of $60,000,000, was built for, exists for, and is only used by the CLIA members for their large cruise ships that need special docks to berth. No one benefits from that use of the PDF except the CLIA members. CLIA does not

[79] Dkt. 148, Opp., p. 62.
[80] Dkt. 148, Opp., p. 62.
[81] CBJ stresses again that CLIA fails to distinguish between the PDF and MPF, which is critical to the analysis of equitable estoppel and CLIA's unsupported statement that the members only benefit "indirectly." Dkt. 148, See Opp., p. 62-64.

dispute that CBJ would not have built the 16B project but for the demand by CLIA members and the assurance of their representatives that the PDF was a proper and reasonable fee and the use of the fee for infrastructure such as 16B was both requested and agreed to by the CLIA members.[82]

The cases relied upon by CLIA for their "indirect benefits" argument are not applicable. Unlike those cases, CBJ is not claiming that CLIA is estopped from challenging the validity of the PDF and the uses of the PDF because they accepted the benefits of the expenditures. Rather, CBJ's position adheres to the factors for the application of estoppel: an assertion by conduct or word, reasonable reliance, and resulting prejudice.[83] CBJ has established all of those factors: 1) words and conduct—"we support"—the PDF and the expenditures for the docks and infrastructure and not making any effort to stop construction of the projects; 2) reliance by CBJ in incurring the indebtedness to build the structures; and 3) resulting prejudice by incurring the indebtedness on the understanding with CLIA that the PDF would be used to pay the indebtedness.[84]

In *Surmeli,* the court held that the physicians acquired a property right when they obtained their licenses and therefore could challenge the constitutionality of certain restrictions on those licenses.[85] Obtaining the license did not estop a challenge to aspects of the restrictions on the license. Here, CLIA did not obtain a "property" right through passage of the Resolution implementing the PDF. Unlike the physicians, who obtained a license, the CLIA members affirmatively supported the PDF as a reasonable fee and affirmatively supported the expenditures.

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[82] See Affidavit of Bartholomew, paragraphs 26-39; Affidavit of Watt, paragraphs 24-34.
[83] See Cross Motion, Section V(C).
[84] Exh. BI; Dkt. 133, Affidavit of Bartholomew, paragraphs 26-39; Dkt. 132, Affidavit of Watt, paragraphs 24-34; Exh. MM, CBJClerks00035-57.
[85] 412 F. Supp. 394, 395-396 (S.D. N.Y. 1979).

The *Louisville* case involved a decision on stipulated facts and related to monetary benefits received by the Plaintiffs pursuant to a statute.[86] As discussed above, that is not the case here.

In *Begin,* the court started with the "principle" that one who receives the benefits of a statute should be estopped from later claiming the invalidity of the statute.[87] The court there applied an "exception" to the general principle that estoppel should apply. The court also noted that each case should be viewed on the "balance of equities," the court having the discretion to apply the general principle of estoppel or determine whether an exception applies. Here, CLIA has not offered any basis for the Court to make an exception to the application of estoppel to bar CLIA's challenge to the validity of and expenditures of the PDF.

CLIA's "legislation by estoppel" argument presumes the PDF Resolution is invalid, but the cases relied on by CLIA for that proposition do not apply to the facts here. In *New York v. US,*[88] the Court did not apply estoppel to the State of New York as to challenges to certain aspects of a federal waste disposal law because it noted that although New York supported some aspects of the federal process, it specifically did not join the regional compact implemented by the law. It is unclear whether the Court would have applied estoppel had New York joined the regional compact.

The decision in *O'Brien v. Wheelock,*[89] is lengthy and complex with multiple parties. In offering this case CLIA extracted one sentence that related to a fact not present here: the statute in question had been declared unlawful many years before the litigation. The litigation sought to enforce collection aspects of that already declared invalid law against certain persons and

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[86] *Louisville & Nashville R.R.Co. v. Bass,* 328 F. Supp. 732 (W.D. Ky. 1971).
[87] *Begin v. Inhabitants of Sabattus,* 409 A. 2d 1269, 1271 (Me. 1979). CBJ notes that the cases relied upon by CLIA are lower court decisions or state court decisions, at least 40 years old, none of which are binding on this Court or offer meaningful precedential value to this Court.
[88] 505 US 144 (1992).
[89] 184 US 450 (1902).

entities. The court said that a law already declared unlawful could not then be enforced under the principle of estoppel. Here, the PDF Resolution has not been declared unconstitutional and CBJ is not attempting to collect fees under a previously declared unconstitutional law. CBJ stresses again that estoppel applies to CLIA's constitutional challenge to the validity of the Resolution and the expenditures to date. The balance of equities requires that CLIA be estopped from some unspecific general attack on "Entry Fees," as the manner to obtain a decision on the PDF and its expenditures, where CLIA affirmatively supported the PDF and supported the uses of the PDF.

The last case relied on by CLIA actually supports the estoppel defense of the CBJ. In *Lloyd e. Clarke v City of Bettendorf,*[90] developers worked with the city to develop certain construction requirements. The city then passed an ordinance that was beyond what had been discussed. That ordinance exceeded the city's statutory authority and was declared unlawful. All the court said was the city could not resurrect that ordinance by estoppel. CBJ has no issue with that general proposition. The difference here is the PDF Resolution does not exceed the CBJ's constitutional authority on its face. As stressed by CBJ, CLIA does not allege the use of the PDF for construction of infrastructure such as the 16B docks, is violative of the Tonnage Clause, nor could it under existing case law. That is why CLIA created the "Entry Fees" term to be able to lump the PDF with the MPF and thus evade the proper defenses of estoppel, waiver, and laches, and avoid having to identify an actual expenditure of the PDF alleged to violate the Tonnage Clause. Nothing in the Iowa court decision precludes the application of estoppel on these facts.

[90] 158 N.W. 2d 125 (Iowa 1968).

CBJ respectfully requests the Court grant summary judgment to CBJ and deny CLIA's request for an injunction as to the collection and expenditure of the PDF.

E. Statute of Limitations

1. *RHAA Claim*

CLIA failed to address the statute of limitations issue regarding their claim involving the PDF under the RHAA. The RHAA is not a constitutional claim; it is a statutory claim. CLIA does not dispute that the 4 year statute of limitations applies to their statutory claims under the RHAA.

CLIA does not dispute that the PDF was first implemented in 2002, and the current Resolution adopted in 2008. CLIA did not offer any case law that would allow CLIA to challenge the validity of the Resolution under the RHAA long past the statute of limitations. CLIA did not offer any case law that would allow CLIA to challenge specific expenditures of the PDF as statutory violations, where the expenditures occurred before the statute of limitations had run. CLIA did not offer any case law that applied the constitutional "continuing violation doctrine" to a statute, and in particular, to the RHAA. CLIA has not pointed the Court to any alleged PDF expenditure that CLIA claims violates the RHAA. CLIA's first grounds in their opposition as to the RHAA, the continuing violation doctrine, is not applicable to the alleged statutory claims regarding the Resolution and expenditures of the PDF.

CLIA's second ground is that the statute of limitations does not bar equitable relief. CLIA did not cite any cases that support that position. In *Holmburg v. Armbrecht,*[91] the Supreme Court declined to apply a New York statute of limitations to a claim under a federal statute. That

[91] 327 US 392 (1946).

is not the case here. CBJ seeks to apply the four year federal statute of limitations to the claims alleging violations of the RHAA.

Castner v. First Nat'l Bank[92] is the same as *Holmberg*—the defendant sought to impose a state statute of limitations. The only other case cited by CLIA is an Alaska case, *Metcalfe v State of Alaska.*[93] In addition to not being binding on this Court, *Metcalfe* was based on a significant factual difference. Metcalfe alleged specific future harm as related to his retirement benefits. Here, CLIA alleges future harm as to "Entry Fees," but not any specific future harm as to any alleged expenditure of the PDF under the RHAA. CLIA did not cite to any case that allows them to escape the application of a federal statute of limitations when alleging a federal statutory violation by requesting equitable relief without identifying the alleged future harm under the statute.

Even if these three cases established an immutable legal rule that the statute of limitations does not apply when equitable relief is sought, the courts are clear that laches does apply. CLIA has not advanced any legal or factual basis for avoiding the doctrine of laches as to their statutory claims under the RHAA related to the PDF. CBJ incorporates their argument in Section II B above. Whether the Court applies the statute of limitations, or laches, CLIA's allegations of statutory violations of the RHAA are time-barred.

CLIA's Fourth Cause of Action attempts to assert a Supremacy Clause cause of action. The Supremacy Clause does not create any independent cause of action and is not a source of federal rights.[94] The Supremacy Clause claim necessarily must be based on the allegations of violations of the RHAA. Whether barred by laches, waiver, quasi-estoppel,

[92] *Castner v First Nat'l Bank of Anchorage,* 278 F. 2d 376 (9th. Cir. 1960).
[93] 382 P. 3d 1168 (Alaska 2016).
[94] *Armstrong v Exceptional Child Center,* 135 S. Ct 1378, 1382 (2015).

equitable estoppel or the statute of limitations, CLIA has no claim of alleged violations of the RHAA as related to the PDF Resolution and PDF expenditures. As such, the Supremacy Clause claim similarly must be dismissed as to the Resolution and expenditures of the PDF.[95]

2. *Constitutional Claims*

CLIA's Opposition based on the statement of "continuing violations" or "continuing harm" creates at best a factual dispute for CLIA. As noted consistently, CLIA cannot avoid their factual burden of establishing alleged unconstitutional expenditures of the PDF by lumping the PDF with the MPF as "Entry Fees," and then offering the Court only expenditures of the MPF as alleged constitutional violations. CLIA did not cite any case to the Court where the Court can presume future constitutional violations, particularly where the Plaintiff fails to even show a past or existing alleged constitutional violation.

The proper statute on the CLIA constitutional claims is two years. The current PDF Resolution has been in place since 2008. The PDF has been spent only on infrastructure and infrastructure improvements for the benefit of the cruise vessels and/or passengers.[96] CLIA did not offer the Court any exhibit or affidavit to dispute these facts or otherwise show allegedly unconstitutional PDF expenditures. The two-year statute of limitations for the constitutional claims bars CLIA's challenge to the PDF and the PDF expenditures.

III. CBJ IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIMS FOR RELIEF AND FOR AN INJUNCTION DIRECTED AT THE MARINE PASSENGER FEE

CBJ adopts all of the discussion above related to the PDF as supportive of the CBJ's defenses related to the MPF. As discussed above, CLIA failed to separately address the

[95] CLIA does not challenge CBJ's position that the most applicable statute of limitations for the Section 1983 claim is 2 years.
[96] Dkt. 133, Affidavit of Bartholomew, paragraphs 26-39; Dkt. 132, Affidavit of Watt, paragraphs 24-34.

expenditures of PDF and expenditures of MPF, which CBJ demonstrated in its Cross Motion are distinctly different and cannot be lumped together as "Entry Fees" for purposes of constitutional analysis. Where there have been challenges to separate fees, the courts have analyzed the claims as to those fees separately.[97] CLIA did not cite to any case that lumped fees together as "Entry Fees," where those fees were enacted by different governmental actions (here a Resolution and an ordinance implementing a voter initiative) and have different stated purposes and allowable uses, for purposes of constitutional analysis. CBJ, hindered by CLIA's lack of response to the separate fees in the Cross Motion, will attempt to address the differences as to the MPF.

1. Statute of Limitations

CLIA did not provide the Court with any exhibit or affidavit to dispute the list of MPF expenditures barred by the two year statute of limitations contained in Section VII(B)(1) of the CBJ Cross Motion.[98] As such, the Court can find that all of the listed expenditures occurred more than two years before the filing of the Complaint. Similarly, CLIA did not offer any exhibit or affidavit to show the Court that any of the expenditures listed in Section VII(B)(1) are ongoing expenditures or expenditures CLIA claims to be a "continuing harm." Therefore, the Court can find those expenditures are not continuing expenditures and the concept of a "continuing constitutional violation" cannot be applied to any of those expenditures.[99]

CBJ is entitled to summary judgment on the statute of limitation as to those expenditures of the MPF listed in section VII(B)(1) of the Cross Motion and those expenditures cannot be

[97] *Captain Andy's Sailing, Inc. v. Johns,* 195 F. Supp. 2d 1157, (D. Haw. 2001).
[98] CLIA did not dispute that the applicable statute of limitations is the two year statute under the Alaska tort statute.
[99] The specific expenditures barred by the statute of limitations as listed in CBJ's Cross Motion are contained in Paragraphs 104, 111, 114, 121-125, 134, 142, 144-145, 151, 158-163, 168-176, 178, 188-198, 213-219, 222 of the Plaintiffs' Statement of Facts, except where noted in CBJ's Section VII(B)(1).

considered on the Plaintiffs' request for an injunction to enjoin the collection and use of the MPF.

2. Waiver

CLIA did not provide the Court with any exhibit or affidavit to dispute that CLIA or their representatives or its members directly requested CBJ to use MPF for certain projects as shown by CBJ in Section VII(B)(2) of its Cross Motion. For purposes of waiver, the Court should find a waiver as to those MPF expenditures.

Waiver cannot be more clear than where there is, as here, a direct request for the expenditure of the MPF. No case cited by CLIA would allow CLIA's members to affirmatively solicit CBJ to use MPF funds for a specific use requested by the CLIA members and then, after receiving the benefits of the expenditures, claim the expenditures they requested was an unconstitutional use of the funds. Will CLIA's members reimburse CBJ for the funds CLIA's members requested to build the covered walkway at the CLIA members' owned docks so that CBJ can use those funds for another purpose? Under CLIA's theory, the CLIA members can request the use of MPF funds for their specific projects, have the projects built, and then use those projects to claim to the Court it should stop the collection of the MPF. No federal court decision supports such a view of the Tonnage Clause. No federal court decision precludes waiver on these facts.

CBJ respectfully requests the Court grant summary judgment as to all MPF expenditures requested by or approved by CLIA, their representatives or their members as demonstrated in CBJ's Cross Motion Section VII(B)(2), and to deny CLIA an injunction as to the collection of and use of the MPF for those purposes.

3. Laches, Equitable Estoppel and Quasi-Estoppel

CBJ addresses these defenses together because CLIA's Opposition does not offer any contrary law as to the legal factors related to these defenses set out in Section VII of the CBJ Cross Motion and CLIA does not offer any exhibit or affidavit to dispute any of the facts set out in that section of the Cross Motion.

Particularly telling is CLIA does not provide the Court with any exhibit or affidavit that contradicts the fact that CLIA's members have affirmatively requested that CBJ spend $3,035,075 in MPF funds for specific projects for the benefit of their members for fiscal years 2018 and 2019.[100] CBJ cannot find a federal decision that has held a beneficiary of the expenditure of passenger fees, who specifically requests the use of the fees for particular projects, can simultaneously challenge the constitutionality or the validity of the fees and uses of the fees and escape the defenses of laches, equitable estoppel and quasi-estoppel applying to such statements, actions and conduct.

CBJ respectfully requests the Court grant CBJ summary judgment as to the collection and use of the MPF on the CBJ defenses of laches, equitable estoppel and quasi-estoppel, and deny the Plaintiffs request for an injunction as to the collection and use of the MPF.

CLIA argues that the services that CBJ provides to the cruise ship passengers would be provided regardless of the cruise ship industry.[101] That is not true. As the CBJ has explained in the various pleadings to date, and shown through the exhibits and affidavits, there is no need to fund the services used by the cruise ship passengers or crew, other than because CLIA members bring cruise ships to Juneau. These include, but are not limited to, the crossing guards,

[100] Exh. FA; Exh. EZ.
[101] CLIA's Opposition, at page 61.

downtown restrooms at the cruise ship docks, pay phones, extra police officers and additional EMS funding for overtime medical transport.[102] Juneau's local population does not need these services and they are in place for the passengers (1,100,000 booked for summer 2018, an additional 100,000 more people than 2017)[103] that arrive by cruise ship. Mr. Binkley, the President of CLIA has publicly announced that there will an additional increase of 200,000 cruise passengers (plus crew) to Juneau in 2019, for a total of 1,310,000.[104] That 300,000 increase between 2017 and 2019 is ten times the population of Juneau. Without these services, what will happen to the cruise ship passengers? If the MPF cannot be used to clean and maintain the restrooms on or near the docks where the cruise ship passengers disembark (the cleaning of which is required every two hours for passenger use)[105] where will the 1.3 million people go to the restrooms? Where does the Tonnage Clause or decisions under the Tonnage Clause prohibit the use of passenger fees to maintain restrooms for passengers on the cruise ship docks where the passengers disembark? That is why CLIA's members have supported the use of MPF to maintain the restrooms and have also requested money from CBJ to maintain and clean the restrooms at their CLIA member owned private docks.[106] If the cruise ship industry does not think crossing guards are needed, why has the cruise ship industry supported the crossing guards for the passengers?[107] The simple answer is because the crossing guards are needed due to the

[102] Dkt. 132, Affidavit of Watt, paragraphs 43-51, 53-54, 69.
[103] See Exh. MN, April 6, 2018 KTOO article "What's Juneau's Capacity for Cruise Ship Visitors?" available on the world wide web at: https://www.ktoo.org/2018/04/06/whats-juneaus-capacity-for-cruise-ship-visitors/, last accessed on April 23, 2018. This involves an additional 22 ship calls this year and increases the passengers from the 1 million that arrived in 2017.
[104] See Exh. MN.
[105] Dkt. 132, Affidavit of Watt, paragraphs 43, 69.
[106] See Exhs. CV; FA; EZ; Dkt. 132, Affidavit of Watt, paragraph 40.
[107] See Exhs. HJ; HK; BV.

high volume of cruise ship passengers, which CLIA's members have admitted.[108] The crossing guards are intended to enhance the safety of CLIA's passengers, and to aid the flow of traffic, including businesses and cruise ship buses through downtown.[109]

The continued requests by CLIA members for the use of MPF for the specific projects they now are challenging in the lawsuit establishes a firm factual basis to grant CBJ summary judgment as to those uses of the MPF.

IV. 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

CLIA's Opposition proceeds from multiple faulty premises, legally and factually. It:

1) mischaracterizes CBJ's Cross Motion;

2) continues to reference "Entry Fees" although no court has referenced passenger fees as "entry fees" and nowhere in the PDF Resolution or the MPF Ordinance are the fees defined as "entry fees;"

3) ignores that the PDF and MPF are passenger fees, not vessel fees;

4) asks the Court to find that the District Court and Second Circuit in *Bridgeport* confused the Tonnage Clause with the Commerce Clause, and

5) offers no standard or test under the Tonnage Clause different from *Clyde Mallory*[110] or *Captain Andy's Sailing*[111]

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[108] See Exh. BV: Kirby Day with Princess Cruises asking the Assembly to address the congestion issue downtown and look at instituting a crossing guard program. This was in 2000 when the number of passengers was lower; the need for the service can only be assumed to have increased.
[109] See Exh. EM.
[110] 296 U.S. 261 (1935).
[111] 195 F. Supp. 1157, 1174 (D. Haw. 2001).

The CBJ allocation for the cost of services provided to the vessels and/or passengers does not constitute the entire operating expenses for the CBJ, contrary to the 100% of the Port Authority operating expense, as in *Bridgeport.* The allocation is reasonable in relation to the services provided, being less than 2% of the operating expenses for the CBJ. Neither the Tonnage Clause nor the Commerce Clause creates a constitutional prohibition against using an allocation method to reimburse certain departments for the cost of the services provided by those departments to the cruise ships and/or passengers.[112]

CLIA posits that there is a different standard under the Tonnage Clause than the Commerce Clause, but CLIA does not provide the Court with a Tonnage Clause "standard." CBJ analyzed the existing cases, both Tonnage Clause cases (*Bridgeport; Capt. Andy's Sailing*) and Commerce Clause cases *(Evansville; Northwest Airlines; Alamo*) to demonstrate that under neither Clause has any court determined that a municipal government may not allocate passenger fee revenues to reimburse specific government departments for the cost of services provided to the vessels and/or passengers. CBJ did not argue, or propose, that the Commerce Clause and Tonnage Clause are one and the same; CBJ established that under the applicable cases, neither precludes the allocation of passenger fees in the manner done by CBJ.

CLIA states that the "Framers" gave "special consideration" to "vessels."[113] CBJ respectfully observes that the Constitution is a living document.[114] The Framers did not have in

[112] Dkt. 133, Affidavit of Bartholomew, paragraphs 5-16; Dkt. 136, Affidavit of Schachter, paragraphs 5-10. CLIA continues to make the unsupported statement that the PDF and MPF were enacted for general revenue raising purposes. There is nothing in the Resolution or ordinance to support that allegation. CLIA has failed to offer any admissible evidence contrary to the fact that only 2% of the CBJ operating expenses is from the MPF (and not the PDF at all), such amount hardly can be found as a fact to be "general revenue raising." CLIA has failed to offer any admissible evidence contrary to the fact that the amount of the allocation is determined in direct relationship to the cost of services provided to the vessels and/or passengers, as opposed to general government operations, established by the testimony of Mr. Bartholomew and Mr. Schachter.

[113] Dkt. 148, Opp., p. 73.

mind six 3,000+ passenger cruise ships coming into a port of 30,000 people every day for 5 months[115], nor did the Framers have in mind airplanes and the role of airplanes in passenger transport and commerce. Courts have to interpret the Tonnage Clause and Commerce Clause in the context of today. CLIA did not cite to any case that the constitutional standards applicable to consideration of passenger fees are or should be different for passenger fees assessed against airlines and passenger fees assessed against cruise ship companies. If no service is provided to the vessels or passengers with the funds collected from the passenger fees, then such a fee violates the Tonnage Clause under *Polar Tankers.* When the municipality does provide services to the vessels and/or passengers, the question under the Tonnage Clause is whether there is a reasonable relationship between the cost of services provided and the passenger fees charged—the analysis under the Tonnage Clause used in *Clyde Mallory,*[116] *New Orleans Steamship Association v. Plaquemines Port Harbor & Terminal District,*[117] the *Bridgeport*[118] decisions, and *Capt. Andy's Sailing.*[119]

CLIA did not provide any exhibit or affidavit disputing that CBJ in fact provides services to the vessels and/or passengers through the departments as explained in the Affidavit of Bartholomew and the Affidavit of Schachter; CLIA did not submit any exhibit or affidavit disputing that the amount of the MPF allocated to reimburse those departments for those services is reasonable or otherwise greatly exceeds the costs of the services. CLIA did not provide the Court with any exhibit or affidavit contrary to the testimony of Mr. Schachter that the allocation

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[114] As Justice Catron said in *Smith v Turner,* 48 US 283, 449 (1849): "The Constitution is a practical instrument, made by practical men, and suited to the territory and circumstances on which it was intended to operate."
[115] Affidavit of Watt, paragraph 42.
[116] 296 U.S. 261 (1935).
[117] 874 F.2d 1018, 1023 (5th Cir. 1989) (Plaquemines II) *cert denied*, 495 U.S. 923 (1990).
[118] 566 F. Supp. 2d 81, 83 (D. Conn. 2008) affirmed 567 F. 3d 79, 82-83 (2d Cir. 2009).
[119] 195 F. Supp. 1157, 1174 (D. Haw. 2001).

does not reimburse the CBJ departments for the full amount of the cost of services and the testimony of Mr. Watt that CBJ incurs extensive costs in relation to the administration of other services funded by the MPF.[120]

As there is no factual dispute as to the provision of the services or the reasonableness of the allocation in relation to the cost of the services, the only issue becomes whether the Tonnage Clause precludes such an allocation even if services are in fact provided (as distinguished from *Polar Tankers*[121]) and the allocated amount of the passenger fees for those services is reasonable (as distinguished from *Bridgeport* where 100% of the operating expenses of the entity was funded from the passenger fees). CLIA does not dispute that CBJ properly analyzed the Commerce Clause cases[122] but rather that those cases should not be interpreted to apply the same test as to the Tonnage Clause (which CBJ did not do).

The only issue for the Court on CBJ's Cross Motion regarding the allocation is whether the Tonnage Clause prohibits any and all use of the MPF to reimburse the specific departments for costs of services to the vessels and/or passengers. If the Tonnage Clause prohibited the use of passenger fees to reimburse government departments for the costs of services to the vessels and/or passengers, there would have been no need for a trial in *Bridgeport* and the Second Circuit opinion would have simply stated that the Tonnage Clause precludes the use of passenger fees to reimburse for the costs of services to the vessels and/or passengers. But the District Court held a trial and required the Ferry Company and passenger plaintiffs to prove—under the

[120] Affidavit of Bartholomew, paragraphs 5-16; Affidavit of Schachter, paragraph 5-10; Affidavit of Watt, paragraphs 7-11.
[121] *Polar Tankers v. City of Valdez,* 555 U.S. 1 (2009).
[122] *Evansville Vanderburgh Airport Authority District. v. Delta Airlines, Inc,* 405 U.S. 707 (1972); *Northwest Airlines, Inc. et al. v. County of Kent, Michigan et al.*, 510 U.S. 355 (1994); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority,* 906 F.2d 516 (11th Cir. 1990).

Tonnage Clause—each expenditure of the passenger fees that did not reimburse for services to the vessels and/or passengers.[123] That process was affirmed by the Second Circuit.[124]

CLIA makes the unsupported statement that CBJ uses the MPF to fund general government operations "that it would fund regardless of the presence of the cruise vessels, cruise passengers or cruise industry in Juneau."[125] CBJ would not fund the services to the vessels and/or passengers currently provided by these departments without the MPF.

The City Manager, Mr. Watt, stated:

> 9. The list of potential uses for the MPF in CBJ code 69.20.120(a) do not reflect typical municipal governances: Design, construction, enhancement, operation, or maintenance of capital improvements; Operating funds for personnel, training, commodities, rentals, services and equipment for services provided, made available to, or required as a result of marine passenger ships and marine passengers; Projects and programs that promote safety, environmental improvements efficiency of interstate and international commerce, or enforcement of laws caused or required by marine passenger ships and marine passengers; Acquisition of land required to execute the activities listed in this section; Surveys, analyses, polls, plans, monitoring, and similar efforts to measure, describe or predict, or manage marine passenger ships and marine passengers, for above list. These are costs directly related to the vessels and passengers necessitated by visitation of more than one million cruise ship passengers per year. Without these fees the CBJ would not offer any of these services.
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> 10. It is not feasible or economically cost efficient to track every minute spent by every CBJ employee providing some service to the cruise ships, passengers and crew. In order to address these costs to the CBJ for providing the service, the CBJ developed an allocation formula for allocating a portion of the Marine Passenger Fees collected for the department operating expenses for those departments who provide such services. The explanation of this formula is accurately stated in the Statement of Facts. There are currently nine departments who received an allocation in this manner. This allocation formula was provided to CLIA's predecessor for comment before it was implemented, and neither CLIA nor its members objected to or provided any alternative formula. The CLIA

[123] 566 F. Supp. 2d 81, 83 (D. Conn. 2008).

[124] CLIA suggests that the district court and the Second Circuit were confused between the Tonnage Clause and Commerce Clause and although the courts entered their decisions under the Tonnage Clause—and did not reach the Commerce Clause issues—the decisions were "essentially" Commerce Clause decisions. Opp., p. 76, fn. 73, Dkt.148. CBJ cannot find anything in either decision upon which the Court should find those courts were confused by the two constitutional provisions and failed to apply the proper analysis under the Tonnage Clause.

[125] Dkt. 148, Opp., p. 77. CLIA cites to CBJ Exh. FM, which is just a list of the departments who receive reimbursement and the amounts for the costs of services provided to the vessels and/or passengers. The exhibit does not say that the services provided to the vessels and/or passengers would continue to be funded without the MPF.

predecessor representative's only response was that CBJ not state in the manager's report that the allocation formula had been approved by the NWCA.

11. The amount allocated to the CBJ departments for identified government operations that support the cruise industry is about 2% of the overall CBJ general government operating budget per year. This amount has never exceeded 2% of the total overall CBJ general government operating budget per year.

43. The restrooms located near Marine Park in the ground floor of the parking garage were constructed solely due to the large number of cruise ship passengers utilizing the area; these restrooms are closed in the winter months when there are no cruise ships in town. Due to high volume use by cruise ship passengers, the bathrooms must be cleaned and restocked every two hours.

44. The crossing guards located downtown are for the safety and efficiency benefits of the cruise ship passengers in the downtown area and for vehicle transportation including the substantial number of tour vehicles which solely serve the cruise ships and which are a fundamental piece of the cruise ship's business; the crossing guards never work when there are no cruise ships in town, there is no need. There would be no need for these crossing guards if it were not for the cruise ship passengers in downtown Juneau.

45. The information kiosk provides services to cruise passengers and is manned by the Juneau Visitors Bureau. It is closed after the cruise ships leave each season. There would be no need for the information kiosk if it were not for the cruise ship passengers in downtown Juneau.

48. The extra police officers are stationed downtown in the summer to enhance the safety for cruise passengers and crew in Juneau. The cruise passengers and crew do benefit from the extra security. The CBJ would not station these extra police officers downtown if it were not for the cruise ship passengers and crew who increase Juneau's downtown population dramatically.

49. The downtown security program referenced in CLIA's fact No. 219 ensures that the cruise ship passengers and crew have a safe and inviting shopping experience in downtown Juneau. This program would not be needed if it were not for the high numbers of cruise ship passengers using and enjoying this area each day a ship is in port.

53. The dedicated case manager and cruise ship passenger liaison that has been funded by the MPF for Bartlett Regional Hospital would not be needed if it was not for the cruise ships coming to Juneau.[126]

The above portions from Mr. Watt's affidavit are highlights of the services that would not be provided except for use of the MPF. The MPF does not fund services that would be funded "regardless of the presence of cruise vessels, cruise passengers…"

The consequences will become even more dire next year. Mr. Binkley, the President of CLIA has publicly announced that there will an increase of 300,000 cruise passengers to Juneau

[126] Dkt. 132, Affidavit of Watt.

next year, for a total of 1,300,000.[127] The cost for the services currently provided through the allocation of the MPF to the nine departments providing those services will dramatically increase with another 300,000 cruise ship passengers. Nothing in the Tonnage Clause or cases decided under the Tonnage Clause precludes CBJ from providing these services to the vessels and/or passengers with the MPF through an allocation reimbursement method that amounts to less than 2% of the City's total operating expenses.[128]

CLIA cites to *Smith v Turner,*[129] for the proposition that Juneau "cannot constitutionally charge vessels for the burdens imposed upon it as a result of cruise ship passengers..."[130] CBJ does not make that assertion; the use of the MPF to reimburse the departments is for the cost of the services provided to the vessels and/or passengers, not for the "burdens" the vessels and passengers impose on Juneau.[131] *Smith v, Turner* is an interesting historical decision. The cases were tried to juries in the lower courts, not decided as a matter of law under the Tonnage Clause.

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[127] See Exh. MN, April 6, 2018 KTOO article "What's Juneau's Capacity for Cruise Ship Visitors?", available on the world wide web at: https://www.ktoo.org/2018/04/06/whats-juneaus-capacity-for-cruise-ship-visitors/, last accessed on April 23, 2018.

[128] CLIA's statement that cruise ship passengers when they get off the ship are "indistinct from members of the general public" is a nonsensical statement with no legal meaning. Ten thousand people descending on a town of 30,000, in the area of the docks, per day can hardly be called "indistinct" from local Juneauites going about their business if there were not 10,000 cruise ship people in town, not to mention the hordes of buses and tour vehicles crowding the streets and roads, which would otherwise not be part of the Juneau "general public." Not a single Tonnage Clause case limits the use of passenger fees to services that are not available to the general public. "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." *Captain Andy's Sailing, Inc. v. Johns,* 195 F. Supp. 2d at 1172.

[129] 48 US 283 (1849).

[130] Dkt. 148, Opp., p. 77-78.

[131] CLIA suggests the Court should "not forget" that cruise ship passengers contribute to the revenue stream in Juneau through the purchase of goods, services and sales tax. Opp., p. 78, fn. 74, Dkt. 148. That statement has no legal or factual significance. As discussed at length in CBJ's Opposition to CLIA's Motion for Summary Judgment, and in CBJ's Cross Motion, no federal court has evaluated the constitutionality of a passenger fee under the Tonnage Clause by undertaking a microscopic look at all the revenue sources of a municipality to determine whether, in the Court's view, the municipality may be able to provide the services to the vessels and passengers through some other revenue source. That is neither a function of the federal court nor any constitutional standard. Equally as important, CLIA does not have standing to raise "passenger rights." CBJ is not aware of any case, nor has any been cited by CLIA that would allow CLIA to make factual assertions related to their passengers for their benefit. Finally, monies paid by passengers for goods, services and sales tax is not monies paid by CLIA. CLIA has not cited to any case that would allow the Court to "impute" the expenditures by passengers to CLIA as part of the constitutional analysis under the Tonnage Clause.

As CBJ has maintained, CLIA has the factual burden to show what alleged expenditures are not related to the cost of the services provided to the vessels and/or passengers. The lower courts in the *Smith* cases applied that principle.

The *Smith* decision was also a split decision, with three dissenting justices, including Chief Justice Taney. The constitutional issues were not "clear" to the Chief Justice and two other Justices. The decision stresses the issue as related to a "regulation of commerce."[132] The discussion in the decision centered on whether states could prohibit immigrants from coming into their territories unless the vessel master paid a fee per passenger who remained—which implicated foreign treaties.[133] The decision noted that the alleged use of the fees collected—the support for a State hospital and an "institution for young culprits"—had no "necessary" connection to commerce.[134] The use of the MPF for the cost of services directly provided to the actual passengers or vessels cannot be compared to monies set aside in a fund for an "institution for young culprits" collected from vessel masters on the basis of immigrant passenger remaining in the State.

CBJ respectfully requests the Court grant summary judgment for the CBJ that the use of the MPF to reimburse certain departments for the costs of services provided by those departments to passengers or vessels is not constitutionally prohibited by the Tonnage Clause or the Commerce Clause.

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[132] 48 US at 437.
[133] It is disconcerting that a case in which the Supreme Court distinguished between vessels carrying immigrants and vessels carrying "slaves" can be used today to support the interpretation of the Tonnage Clause, Supremacy Clause and Section 1983 advocated by CLIA.
[134] 48 US at 439.

V. 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

CLIA's Opposition consists of two paragraphs without citation to any case. CLIA's fundamental premise is that the Court cannot analyze whether the allocation at issue is "reasonable" under the RHAA. What CLIA blatantly ignores is that "reasonable" is the actual language of the statute. CBJ may implement "reasonable fees charged on a fair and equitable basis..."[135]

The RHAA does not define "reasonable." As such, the Court must use the concepts of reasonableness adopted by the Supreme Court and other federal courts applying the Tonnage Clause or Commerce Clause. In neither their Summary Judgment Motion nor in their Opposition to the CBJ's Cross Motion does CLIA provide any factual or legal basis for the Court to declare the MPF to be an "unreasonable" fee under the RHAA. As such, the Court may accept CLIA's concession that the $5.00 MPF is reasonable under the RHAA and the only issue then becomes whether the allocation at issue in this section constitutes a use that violates the statute. CBJ's position as argued above is that CLIA is barred from challenging the uses of the MPF under the statute of limitations, and with the application of laches, equitable estoppel, and quasi-estoppel.

CBJ has demonstrated to the Court that every court that has analyzed the RHAA consistently says the RHAA did not create new substantive law, merely "codifies" the Tonnage Clause, and does not require separate analysis from the analysis under the Tonnage Clause. CLIA has not provided the Court with a single federal decision that separately analyzed the RHAA after having entered a decision under the Tonnage Clause or otherwise stated the RHAA

[135] 33 USC Section 5(b)(2).

created independent substantive law as related to passenger fees. If CBJ's allocation of MPF to reimburse certain departments for the cost of services provided to the vessels and/or passengers passes constitutional muster under the Tonnage Clause, which it does, then it cannot to the contrary be a violation of the RHAA.

If the Court undertakes a separate analysis of reasonableness under the RHAA based on the "reasonable" language in the statute, the Court would have to find some way to evaluate a "reasonable" fee. To adopt how the Supreme Court evaluated a "reasonable" fee in *Evansville* and *Northwest Airlines* would be a proper approach for the Court here.[136] CLIA states that what is "reasonable" is stated "clearly" in the RHAA. However, CLIA does not point to any language in the RHAA defining "reasonable," and CBJ cannot find any such definition. As in any other similar case for interpreting a statute, the Court may use Supreme Court analysis on the same issue.

CBJ notes one other effort at misdirection by CLIA. CLIA states that CBJ is relying on the legislative history and that CBJ is "wrong." CLIA does not enlighten the Court with how CBJ is supposedly wrong. CBJ relied on federal case law citing to *Real Hooker Sportfishing v. Dept. of Taxation.*[137] The Hawaii Court pointed out what CBJ has been arguing all along—the RHAA is directed at ports imposing taxes and fees "on vessels merely transiting or making innocent passage through navigable waters" where "no passengers are disembarking in the case of passenger vessels."[138] The MPF does not apply to vessels "transiting" through Juneau or to

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[136] *Evansville Vanderburgh Airport Authority District. v. Delta Airlines, Inc*, 405 U.S. 707 (1972); *Northwest Airlines, Inc. et al. v. County of Kent, Michigan et al.*, 510 U.S. 355 (1994).
[137] 236 P. 3d 1230 (Hawaii App. 2010) (cert to both the state Supreme Court and US Supreme Court was denied).
[138] 236 P. 3d at 1235-36.

vessels where passengers do not disembark in Juneau. CLIA has not cited to any case where a different interpretation of the RHAA has been adopted by a federal court.

The Court need not undertake a separate analysis of the RHAA after making its determination under the Tonnage Clause. If the Court does so, CBJ respectfully requests the Court find the allocation of less than 2% of the CBJ operating expenses of MPF to reimburse departments for the cost of services provided to the vessels and/or passengers to be harmony with the RHAA.

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

CLIA's Opposition to the use of the MPF for defense costs in this litigation continues CLIA's pattern of mischaracterizing CBJ's position, states facts without an exhibit or affidavit support, and misrepresents the holding in *Bridgeport.*

It is a fact that enjoining the collection of the PDF and MPF will have a devastating effect CBJ's financial stability. CLIA does not dispute the docks only serve the large cruise ships of their members. CLIA admits this is exactly the kind of project that is a constitutionally proper use of the PDF. CBJ would not have incurred the bond indebtedness to build 16b without the PDF.[139] CBJ would not have incurred the bond indebtedness without the support and assurance of CLIA, their President, their representatives and their members that the PDF can and should be used for the 16B project.[140] CLIA has not provided the Court any exhibit or affidavit to the contrary.

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[139] Affidavit of Bartholomew, paragraphs 26-39; Affidavit of Watt, paragraphs 24-34.

[140] Using CLIA's arguments on the law, the PDF as used for the cruise ship docks is clearly constitutional, as the docks only use and need is to provide a service to the cruise ship vessels; the docks funded by the PDF allow the ever-increasing in size and number cruise ships to dock in Juneau.

CBJ's Cross Motion pointed out that the total of $8.00 (the PDF and MPF) is a small fraction of the total ticket price paid by the passengers. On the other hand, the loss of $25 million to pay off the bonded indebtedness would be a major blow to the Juneau economy. CLIA twisted these two points to say that CBJ "admits" that the "magnitude" of the fees is "nominal" as it "argues that the loss of such would devastate the Juneau economy."[141] CBJ requests the Court see through this intentional effort to mislead the Court and misrepresent CBJ's position by CLIA. It is a fact that $8.00 is nominal compared to ticket prices ranging from $600 to several thousand dollars[142]. It is a fact that the loss of the use of $25,683,500 of PDF revenue to pay the bond indebtedness on the 16B docks will be devastating to Juneau's financial condition. The CLIA members and representatives supported the PDF, affirmatively approved the projects for its use, advocated for the construction of the docks for the large cruise ships, knew CBJ would have to go into indebtedness to build that project, knew CBJ only committed to the bonds with the understanding the PDF would be used to pay the bonded indebtedness, extolled the project as a model project for the use of the PDF, never claimed the PDF could not be constitutionally used for the 16B project, do not pay a penny of the PDF and now ask for an injunction against the collection and use of the PDF eight years later. The immense unfairness of the circumstances should not be lost on the Court. How could the Assembly do anything other than vigorously defend, and what better use can there be for the MPF than to defend this lawsuit from such a potential disaster for the City, as well as for the passengers, who will lose the services currently provided by CBJ through the use of the MPF?

[141] Dkt. 148, Opp., p. 82.
[142] See Exhibit AS, page 5.

CLIA makes a vague reference that their members will not receive a windfall by enjoining the collection of the fees because allegedly the decrease of the PDF and MPF revenue to Juneau will "increase" the cruise lines "indirect tax liability to the State of Alaska."[143] CLIA does not offer the Court any exhibit or affidavit that if the Court were to enjoin the collection of the PDF and MPF, the CLIA members would have to pay $8.00 per passenger for 2018 to the State. Absent such an exhibit or affidavit, or some directive from the State in support of such a statement, the Court properly should reject CLIA's effort to avoid the truth—that their members have collected $8.00 from every passenger who has purchased a ticket for 2018 and if the Court enjoins the fees, the CLIA members will not be returning those funds to each passenger, and there is nothing in the record upon which the Court could make a factual finding that CLIA would have to disgorge those funds to the State.

CLIA fails to tell the Court that CLIA's members have no liability to the State of Alaska at all to pay what CLIA calls an "indirect tax." The State "tax" is a passenger fee assessed directly against the passengers, not the CLIA members at all.[144] The CLIA members are not going to disgorge the $8.00 they have already collected from their passengers for the Juneau PDF and MPF in 2018 and give that money to the State.[145] CLIA does not represent the passengers. There is nothing before the Court as to what action the State may take as to the passengers if the Court were to enjoin the PDF and MPF. Whatever the State does as to the passengers, CLIA's members still would get a more than $8,000,000 windfall for 2018 and likely 2019, as those fees have been collected by the members from the passengers in the ticket prices.

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[143] Dkt. 148, Opp., p82-83. Although CLIA cites to another section of their brief to support this statement, CBJ is unable to find the referenced section in CLIA's Reply and Opposition.
[144] CLIA Exh. 18.
[145] If that is what the CLIA members were going to do, it would have been easy for CLIA to say that in their Opposition and provide an affidavit to support it.

All of CLIA's pleadings go to great lengths to mischaracterize the *Bridgeport* decisions in their efforts to lead the Court away from those decisions. In this section of their Opposition, CLIA asserts the *Bridgeport* decisions held the use of the passenger fees to pay for the Authority's legal fees to defend the lawsuit to be unconstitutional. Nowhere in either decision did either so hold.[146]

The legal fees the court held to be improper under the Tonnage Clause were the legal fees used in connection with a specific project, the "foreign trade zone project."[147] The use of any passenger fees, whether for legal fees directed at that project or anything else directed at that specific project were determined by the court to not benefit the passengers, and so to be an unconstitutional use.

Neither the district court nor the Second Circuit held that the Authority's use of passenger fee revenues for legal fees related to the defense of the lawsuit to be in violation of the Tonnage Clause, Commerce Clause or RHAA.[148] The only decision by either court on that issue was the district court's denial of the Ferry Company's request for a preliminary injunction to stop the use of the passenger fees to pay the Authority's legal defense.[149] CLIA cites nothing from either decision upon which the Court could speculate on how the court would have decided the legal defense issue based on the limited reference to the use of fees to pay legal fees for a specific project unrelated to the ferry terminal or the passengers. The CBJ cost of the defense is directly

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[146] CLIA's citations to the district court *Bridgeport* decision at pages 80-81 of the CLIA's Opposition do not appear to be accurate. CBJ will address what appears to be the substance of the CLIA mischaracterization of the decision with the proper page cites.

[147] *Bridgeport,* 566 F. Supp. 2d at 91.

[148] *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 567 F. 3d 79 (2nd Cir. 2009); *Bridgeport and Port Jefferson Steamboat Company v. Bridgeport Port Authority,* 566 F. Supp. 2d 81, 103 (D. Conn. 2008).

[149] *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority,* 2004 U.S. Dist. Lexis 6643, 2004 WL 840140 (D. Conn. April 15, 2004).

related to the benefit of the cruise vessels and/or passengers. The cost of the defense here is directly related to the "safety and efficiency and foreign commerce" of the Port of Juneau.[150] The cost of the defense here is directly related to the continued "capital improvements" "for the provision of service to the cruise industry."[151] The cost of the defense is directly related to "services and infrastructure rendered to cruise ships and cruise ship passengers."[152]

CLIA continues to misrepresent CBJ's purpose in referencing that CLIA's counsel represented the Port Authority in *Bridgeport* and advocated that the use of the passenger fees for their legal fees was a constitutional use of the fees. It is not a personal attack or criticism of counsel. To the contrary, CBJ acknowledges that CLIA's counsel in *Bridgeport* would not have argued so zealously and forcefully (and successfully) that the passenger fees could be used to pay their legal fees in defense of the lawsuit unless CLIA's counsel in *Bridgeport* had a good faith belief their position was supported by the case decisions under the Tonnage Clause, Commerce Clause and RHAA.

What is important is the position of CLIA's counsel in *Bridgeport* demonstrates that CBJ's position here is similarly one of good faith, and that the law is not as clear as CLIA's counsel now argues contrary to their position in *Bridgeport.* As the issue is solely an economic one, CBJ should be permitted to use the MPF to pay the defense of this lawsuit, pending final decision by the Court on all issues, including any issues that may require trial.

CBJ respectfully requests the Court allow CBJ to use MPF to pay the legal fees in defense of this lawsuit pending final decision of the Court on all issues. CBJ asserts that there is no case law that precludes such an order and the balance of equities in this litigation and what is at stake

[150] CLIA Exh. 15, p. 1.
[151] CLIA Exh. 15, p. 2.
[152] CLIA Exh. 11, p. 1.

for the City of Juneau weigh in favor of allowing CBJ to use the MPF to protect the continued provisions of services to the vessels and/or passengers.

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

By: /s/ Robert P. Blasco
Robert P. Blasco, AK Bar #7710098
Attorneys for the City and Borough of Juneau, Alaska, a municipal corporation, and Rorie Watt in his official capacity as City Manager

HOFFMAN & BLASCO, LLC

Dated: May 1, 2018

By: /s/ Megan J. Costello
Megan J. Costello, AK Bar #1212141
Attorneys for the City and Borough of Juneau, Alaska, a municipal corporation, and Rorie Watt, in his official capacity as City Manager

CERTIFICATE OF SERVICE

The undersigned certifies that on May 1, 2018 a true and correct copy of the foregoing **THE CITY AND BOROUGH OF JUNEAU AND RORIE WATT'S REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** was served on the following parties of record via ECF:

C. Jonathan Benner (*pro hac vice*)
Kathleen E. Kraft (*pro hac vice*)
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
JBenner@thompsoncoburn.com
KKraft@thompsoncoburn.com

Herbert H. Ray, Jr.
Schwabe, Williamson & Wyatt
310 "K" Street, Suite 200
Anchorage, AK 99501
HRay@schwabe.com

/s/ Robert P. Blasco
Robert P. Blasco