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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CRUISE LINES INTERNATIONAL ASSOCIATION ALASKA, *et al.*, Plaintiffs, v. CITY AND BOROUGH OF JUNEAU, ALASKA, *et al.*, Defendants.	Case No. 1:16-cv-00008-HRH **PLAINTIFFS' NOTICE TO COURT OF ISSUES THAT REMAIN TO BE RESOLVED**

Introduction

On December 6, 2018, the Court ruled on Defendants' motion to determine the law of the case and the parties' cross-motions for summary judgment. (Dkt No. 207). That same day, the Court stated in a separate order: "It is the court's perception that all that remains to be done in this case is to enter a declaratory judgment. If, however, any of the parties think otherwise, they shall provide notice to the court of what issues they believe remain to be resolved." (Dkt. No. 208).

In its summary judgment ruling, the Court granted Plaintiffs' motion for summary judgment as to their Tonnage Clause claim (Count I) and Rivers and Harbors Appropriation Act (RHAA) claim (Count II) "to the extent that the MPF ordinance and the PDF resolution impose fees that are used to fund services that are not rendered to a vessel." (Dkt. No. 207 at 34-35). The Court observed that "fees imposed by defendants upon vessels and used for services to passengers are unconstitutional and unlawful unless the services in question constitute a service to a vessel." (*Id.* at 35). The Court further clarified that services to cruise vessels are those "that facilitate the marine operations of … vessels." (*Id.* at 30). The Court framed the proper question as: "Passenger benefits are not relevant. The proper question as to each category of expenditure by defendants is: Does the expenditure provide a service to a vessel? If the answer is yes, the expenditure is constitutional. If the answer is no, the expenditure is unconstitutional under the Tonnage Clause." (*Id.*). The Court provided examples of unlawful expenditures, including crossing guards, sidewalk repairs, and access to the public library's internet. (*Id.* at 30-31). Thus, the Court has already indicated that past, current, and proposed uses of the CBJ Entry Fees violate federal law.

Promptly after the Court issued its ruling, Plaintiffs' counsel sent a letter to Defendants' counsel (copy attached as Exhibit 1) asking "how CBJ proposes to achieve compliance with the Court's ruling" and "whether CBJ intends to repeal either the MPF or PDF ordinances in whole or part, or whether CBJ contemplates that reductions in per-passenger amounts of either or both fees will be enacted before the commencement of cruise operations in 2019." Defendants' counsel responded two days ago. (*See* Exhibit 2, attached hereto).

Defendants' counsel states that "[t]he Court held that both the PDF and MPF were constitutional" and insists that "[n]othing in the Order or the Decision requires the City to reduce

either of the fees" because "[t]he Decision is a declaratory judgment" and "does not order the City to do anything." (Ex. 2). Of course, the Court made no such holding. It rejected Defendants' argument that "their use of MPF and PDF revenue for services to passengers is constitutional and lawful" and denied their cross-motion for summary judgment because "fees imposed by defendants upon vessels and used for services to passengers are unconstitutional and unlawful unless the services in question constitute a service to a vessel." (Dkt. No. 207 at 32).

The Court's ruling on the parties' summary judgment motions came at a propitious time. The 2019 Alaska cruise season will commence in the late spring of this year, and CBJ's planning process for use of revenues from the MPF and the PDF (collectively, the "Entry Fees") is now in progress. A review of Defendants' present and proposed budget entries showing their uses of Entry Fee revenues in the coming 2019 cruise season reveals a large number of uses that are inconsistent with the Court's December 6 ruling and that far exceed the uncontested uses of fees that Plaintiffs have accepted for purposes of this litigation.

Any declaratory judgment in this action should apply the legal principles established in the Court's December 6 ruling to the facts (as determined by the Court), provide clarity of guidance for current and future lawful uses of Entry Fee revenues, and eliminate confusion or controversy between the parties at a time when Defendants are making funding decisions for the coming year. By reviewing Defendants' past, current, and proposed uses of Entry Fee revenues, the Court's application of the legal principles in its December 6 ruling will compel constitutional and statutory compliance, fiscal discipline, and a recalibration of any remaining fees to a lawful, compensatory level for any services actually rendered to cruise vessel operations.

Additionally, Plaintiffs respectfully urge the Court to issue injunctive relief enjoining Defendants from applying Entry Fee revenues to uses that would violate the Tonnage Clause or

the RHAA because they lack a nexus to the marine operations of cruise vessels or generate revenues in excess of Defendants' costs of providing services that facilitate the marine operations of cruise vessels.

Plaintiffs' concern about possible uncertainty or confusion leading to continuing controversy between the parties has gravitated to near certainty with the recent exchange of correspondence between the parties' counsel. The January 8 letter from Defendants' counsel appears to convey a view on Defendants' part that the Court's ruling has no effect on either the level or the continued assessment of the challenged Entry Fees. Defendants' attitude and interpretation of the implications of the Court's December 6 ruling, if unconstrained by additional guidance from the Court, will leave the parties precisely where they were at the outset of this litigation. Plaintiffs therefore respectfully urge the Court to provide express identification of uses or categories of uses of the Entry Fees that are impermissible and to issue injunctive relief against continued unlawful activity by Defendants.

Plaintiffs request the entry of injunctive relief with full awareness that federal courts often decline, prudentially, to accompany declarations of unlawfulness with injunctive relief when invalidating state statutes or municipal ordinances. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect that interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."). The rationale for this reluctance is that state and local government official can be expected to respect and follow federal declarations of constitutional invalidity, thus rendering injunctive relief unnecessary. *See, e.g., Poe v. Gerstein*, 417 U.S. 281 (1974). However, departure from this comity-based practice is merited when, as here, it appears that the prevailing

plaintiffs will be denied effective relief due to recalcitrant defendants. *See*, *e.g., Wooley v. Maynard*, 430 U.S. 705, 712 (1977).

The January 8 letter from Defendants' counsel signals obdurate refusal to acknowledge the import of the Court's December 6 ruling and Defendants' intent to press on regardless in the exaction of unlawful fees in the future. Given the sentiments expressed in the January 8 letter of Defendants' counsel, without the Court's clear guidance as to impermissible categories of expenditures and/or clear injunctive relief, the controversy that gave rise to this litigation will continue unabated.

Discussion

1. The Court should apply its declaration of the law to the facts concerning Defendants' assessment and use of the Entry Fees and should specify categories of uses to which Defendants have allocated Entry Fee revenues in violation of the Tonnage Clause and the RHAA.

Having declared the law, the Court should now apply the law to the facts by specifying categories of uses to which Defendants have been impermissibly allocating Entry Fee revenues in violation of the Tonnage Clause and the RHAA. The Supreme Court has held that federal courts are "without power to give advisory opinions" and cannot "decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Fed'n of Labor, Local Union No. 103, United Bhd. of Carpenters & Joiners of Am. v. McAdory*, 325 U.S. 450, 461–62 (1945); *see also Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997). As this Court has previously noted, in ruling on a motion for summary judgment, "the Court may apply the law to undisputed facts, but may not render what amounts to an advisory opinion on an abstract question of law." *Garisto v. Geico Ins. Co.*, No. 3:10-CV-00261-TMB, 2011 WL 13152057, at *2 (D. Alaska Aug. 2, 2011); *see also Signal Prod., Inc. v. Am. Zurich Ins. Co.*, No. 2:13-CV-04581-CAS, 2013 WL 6814847, at *9 (C.D. Cal. Dec. 19, 2013) ("[T]o

the extent that Signal is requesting that this Court issue a pure statement of law, unconnected to the facts of this case, such a statement would constitute an improper advisory opinion.").

In its ruling, the Court stated that it was "not making factual determinations at this time" and that it "does not presently have before it any claim or sufficient evidence upon which to make a determination as to the reasonableness of any costs or services which defendants supply to vessels." (Dkt. No. 207, p. 33). Nevertheless, the Court discussed as examples a few of Defendants' uses of Entry Fees, concluding that:

- The expenditure of MPF and PDF funds for "the supply and maintenance of equipment by defendants which is used by passengers for purposes of embarking or disembarking a vessel … does not offend the Tonnage Clause because boarding and disembarking from a vessel plainly constitutes a service to the vessel."
- "But expenditures of MPF and PDF funds for … crossing guards [and] repair and maintenance of sidewalks … violate the Tonnage Clause because they do not constitute a service to a vessel [in that] [t]here is no nexus to the marine operations of a vessel."
- "[S]ervices provided by defendants to passengers which are of like kind to those services generally provided by municipalities and generally funded by municipal tax revenues are unlikely to qualify as a services to a vessel. Whereas a gangplank used by passengers and the general public is a service to a vessel, sidewalk repairs and access to the public library's internet, which passengers share with the general public, are unlikely to be a service to a vessel."

(Dkt. No. 207 at 30-31). Having concluded that Defendants have been using at least some portion of Entry Fee revenues in violation of the Tonnage Clause and the RHAA, Plaintiffs ask

the Court to provide the parties with clear guidance as to categories of uses that are permissible and impermissible and to clearly forbid the exaction of fees in excess of amounts necessary to provide compensation for lawfully-funded vessel-related services. Identification of categories of impermissible uses, an exercise already addressed illustratively in the December 6 Order, will provide the clarity necessary to avoid the renewed controversy ominously foreshadowed by Defendants' counsel in his January 8 letter (Exhibit 2).

2. As set forth in Plaintiffs' summary judgment papers and as reflected in CBJ's budget and capital improvement program, Defendants have been charging excessive Entry Fees and using the funds generated by the Entry Fees in violation of the Tonnage Clause and the RHAA.

In their summary judgment papers, Plaintiffs identified ways that Defendants have applied Entry Fee revenues and explained that the vast majority of such uses are not services rendered to cruise vessels paying the Entry Fees. (Dkt. No. 68). One of the recurring objections Plaintiffs have had to the Entry Fees is that, instead of being targeted cost recovery charges for specific operational services provided to cruise vessels, the Entry Fees have become revenue generators of a pool of funds for which CBJ then devises applications. This characteristic distinguishes the challenged Entry Fees from the examples of permissible Tonnage Clause exceptions cited in the parties' summary judgment filings. The Court so recognized in its December 6 ruling when it observed that municipal services "which are of like kind to those services generally provided by municipalities and generally funded by municipal tax revenues are unlikely to qualify as services to a vessel." (Dkt. No. 207 at 31). Many of the past, current, and projected uses of Entry Fee revenues fit this description.

Categories of impermissible uses include, but are not necessarily limited to:

- CBJ's general government operations and services, including those of its departments of the Mayor and the Assembly, the City Manager, Finance, Capital City Fire/Rescue, Libraries, Parks and Recreation, Police, Public Works & Streets, and Capital Transit.
- CBJ's Law Department and legal fees in this litigation.
- Compensation to municipal employees or officials.
- Administrative services.
- Road, trail, and walkway projects (including the Seawalk project).
- Transit bus or other land transport services.
- Airport costs or expenses.
- Fire and ambulance services.
- Airlift and air medivac services.
- Public safety services, equipment, buildings, or expenses.
- Police patrols, security programs, and crossing guards.
- Restroom and sidewalk cleaning.
- Pay phones.
- Operations, maintenance, and capital improvements of Bartlett Regional Hospital.
- Parks, museums, and libraries.
- Convention centers and visitor bureaus.
- City beautification projects, artwork, and cultural enhancements.
- Municipal utilities (such as water treatment and electrical facilities).

- The provision or enhancement of ancillary services, excursions, or attractions for cruise passengers unrelated to passengers' physical access to the cruise vessels.
- Tourism-related infrastructure.
- Repairs and maintenance of roads and sidewalks.
- Cruise passenger information services.
- Projects at private dock facilities.

There may be other impermissible uses.

CBJ's current biennial budget for its current fiscal year 2018-19 (FY 2019) and its upcoming fiscal year 2019-20 (FY 2020) confirms that Defendants are continuing to charge and use Entry Fees in a manner that violates the Tonnage Clause and the RHAA. A copy of this budget is attached hereto as Exhibit 3 and is available at https://3tb2gc2mxpvu3uwt0l20tbhq-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/FY19_20-Adopted-Budget-Book-for-web.pdf.

A. The Port Development Fee (PDF).

In its summary judgment ruling, the Court observed that since 2011, funds generated by the PDF have only been used for the 16B project (which involved the construction of a new public dock and the reconstruction of the Alaska Steamship Wharf to accommodate larger cruise ships) and the Seawalk project (a public walkway that runs along the waterfront). (Dkt. No. 207 at 6-7 & nn. 27, 33). In its budget documents, CBJ intends to continue to use funds generated by the PDF to cover the continuing costs of the 16B project *and* the Seawalk project. (*See* Ex. 3 at 31, 40, 64, 205-06). This category appears to aggregate debt service for 16B dock construction (a category of expense that Plaintiffs chose not to contest in this litigation) with Seawalk costs (a category not related to vessel operations). (*Id.*). Moreover, while CBJ intends to spend

$2,097,300 and $2,094,700 in FY 2019 and FY 2020, respectively, for debt service for the 16B project and the Seawalk project, it expects to: (a) collect $3,325,000 and $3,500,000 in funds generated by the PDF in FY 2019 and FY 2020, respectively; and (b) return the projected surpluses ($1,227,600 for FY 2019 and $1,405,200 for FY 2020) to its Port Development Fund. (*Id.* at 64). CBJ's own budget shows that PDF revenues are 58.5 percent (in FY 2019) and 67.1 percent (in FY 2020) more than the amount needed to cover the stated intended purposes of the PDF.

The Seawalk project is not a proper use of PDF revenues. The Seawalk is a public pedestrian thoroughfare that plays no role in embarking or disembarking passengers from the vessels. Consistent with the Court's ruling, Defendants can only lawfully use PDF revenues to pay for continuing costs of the 16B project, and PDF revenues cannot exceed the amount necessary to cover the debt service or other direct costs for the 16B project, which CBJ budgeted at $1,692,500 in FY 2019 and $1,688,200 in FY 2020. (*See* Ex. 3 at 205). The current PDF is projected to generate revenues of nearly twice that amount. Thus, the current PDF exceeds the costs of lawful uses. CBJ should be enjoined from charging any PDF until it reduces the PDF to a level that complies with the Tonnage Clause and the RHAA. The computation of an appropriate, compensatory amount should reflect current estimates of passenger volume expected in the 2019 cruise season.[1]

[1] Industry estimates for passenger volumes at Juneau in 2019 are somewhat in excess of 1.3 million passengers. To the extent any lawful categories of uses of Entry Fees are recognized, the per passenger rate must be connected to a rational estimate of the number of passengers that will be the multiplier of that rate.

B. The Marine Passenger Fee (MPF).

CBJ's budget for MPF revenues reflects that it expects collections of $5.5 million and $5.75 million in funds in FY 2019 and FY 2020, respectively. (Ex. 3 at 35-38, 65). In each fiscal year, CBJ has applied or will apply: (a) over $2.6 million of these funds to fund its general government operations and services, including those of its departments of the Mayor and the Assembly, the City Manager, Capital City Fire/Rescue, Libraries, Parks and Recreation, Police, Public Works & Streets, and Capital Transit; (b) $12,800 for downtown parking; (c) $46,200 for building maintenance of its Parks and Recreation Department; and (d) $457,600 for its "Docks" department. (Ex. 3 at 31, 65, 72, 77-78, 82, 87, 121, 133, 137, 140-41, 147, 151, 155, 165). These are the same types of impermissible purposes for which CBJ has previously used the MPF.

In its summary judgment ruling, the Court found that "CBJ allocates a portion of the revenue generated by the MPF to municipal government departments which perform functions 'that are available for use by cruise ship passengers." (Dkt. No. 207 at 4 (quoting Summary Judgment Exhibit 25, Dkt. No. 69-10)). Defendants' own explanation of the MPF allocation states that the various MPF-funded departments provide services to passengers, not to cruise vessels: "Not all general governmental expenditures are used in the calculation but only those functions that are available for use by cruise ship *passengers*." (Summary Judgment Exhibit 25 (emphasis added)).

Defendants have not identified the services that each of its various MPF-funded departments allegedly render for the marine operations of cruise vessels. Instead, Defendants have insisted that the Entry Fees are constitutional because they provide benefits to *passengers*. As this Court has already ruled, that does not suffice because "[p]assenger benefits are not relevant." (Dkt. No. 207 at 30).

Throughout their summary judgment papers, Defendants asserted that MPF revenues funded general government services to passengers *or* cruise vessels, thereby conceding that at least some of the general government services funded by MPF revenues benefit only passengers. Indeed, Defendants touted their use of MPF revenues for crossing guards, which the Court indicated is an example of impermissible use benefitting passengers, as opposed to cruise vessels. Defendants also mentioned that MPF funds are used to reimburse for "time the City spends reading and responding to cruise ship passenger emails." (Dkt. No. 180-2 at 30). Defendants failed to explain how such activity is a service with a nexus to the marine operations of cruise vessels.

The FY 2019 budget also allocates $2,675,000 of MPF funds to capital projects (whereas the FY 2020 budget does not yet allocate the remaining MPF funds to capital projects, but presumably will do so in the coming weeks). (Ex. 3 at 65). These capital projects are identified in CBJ's "Capital Improvement Program for Fiscal Years 2019 Through 2024," a copy of which is attached hereto as Exhibit 4 and is available online at http://www.juneau.org/engineering/documents/CIPFINALCOMBINED.pdf.

The capital projects funded by MPF revenues in FY 2019 include: (a) $150,000 for "Public/Private Port Infrastructure Plan"[2]; (b) $150,000 for replacement of the visitor information kiosk; (c) $500,000 for construction of new restrooms in downtown Juneau; (d)

[2] CBJ's Capital Improvement Program (CIP) document states: "Public/Private Port Infrastructure Plan - These funds will fund a master plan study that would assess the existing docks and needs for the future, including infrastructure and governance." (Ex. 4 at 29).

$900,000 for "Downtown Sidestreets Phase III"[3]; (e) $450,000 for "Downtown Wayfinding and Interpretive Signs"[4]; (f) $85,000 for "Seawalk Major Maintenance"[5]; and (g) $250,000 for "Seawalk Next Phases."[6] (Ex. 4 at 7). None of these capital projects involves services rendered to cruise vessels paying the MPF. They are all unlawful uses of funds generated by the MPF.

It appears that CBJ is using little, if any, of the funds generated by the MPF to render services to cruise vessels paying the MPF. Instead, CBJ is simply using the MPF for general revenue-raising purposes, which is prohibited by the Tonnage Clause and the RHAA. The current MPF is unlawfully excessive, and CBJ should be enjoined from charging any MPF until it reduces the MPF to a verifiable level (if one exists) that complies with the Tonnage Clause and the RHAA.

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[3] The CIP document states: "Downtown Sidestreets Phase III - This funding will provide for routine maintenance street construction of Phase III of the Downtown Street Improvement project. This phase includes Front Street, Seward Street and Ferry Way." (Ex. 4 at 35).

[4] The CIP document states: "Downtown Wayfinding and Interpretive Signs - This funding will pay for the fabrication and installation of wayfinding and interpretive signage in the downtown area and the Willoughby district. Throughout the public process for the Downtown Streets Improvement, the public commented on the lack of signage in the downtown area to direct visitors to attractions, services, and businesses. The public requested an improved wayfinding and interpretive program with consistent and accurate information." (Ex. 4 at 35).

[5] The CIP document states: "Seawalk Major Maintenance – The anticipated upcoming work for 2018-2019 includes transition repair at the Icehouse Dock, Franklin Dock by the bathrooms, and the Fisherman's Memorial." (Ex. 4 at 35).

[6] The CIP document states: "Seawalk Next Phase – Funds will be used for continued efforts on next phase(s) of the seawalk. Activities will include surveying, geotechnical investigations, property appraisals and negotiations, cost estimating, permitting and preparation of conceptual and detailed design plans." (Ex. 4 at 35).

3. CBJ's "State Marine Passenger Fee" must be accounted for.

In evaluating the Entry Fees, the Court also needs to account for Defendants' use of two other sources of cruise-related revenue: (1) CBJ's portion of the State's CPV Tax of $34.50 per cruise passenger that the State remits to CBJ; and (2) other dock fees that CBJ charges cruise vessels above and beyond the Entry Fees. CBJ's portion of the State's CPV Tax is $5 per cruise passenger. CBJ describes this revenue in its budget as the "State Marine Passenger Fee" and deposits this revenue in its "Port Development Fund" along with the funds generated by its PDF. (Ex. 3 at 40).

Under the Tonnage Clause and the RHAA, CBJ's portion of the State CPV Tax and its other dock fees can only be used to fund vessel services rendered to cruise vessels paying the CPV Tax and the other dock fees. In the past, Defendants have used these funds to pay for improvements to Statter Harbor in Auke Bay, Alaska, which is approximately 12 miles away from the downtown cruise vessel docks, even though these improvements have no relationship to services rendered to cruise vessels. Other uses of CPV funds have included funding for elements of a downtown park some distance from vessel operations. In its current budget, CBJ anticipates receiving $5,025,000 and $5,250,000 in "State Marine Passenger Fees" in FY 2019 and FY 2010, respectively. (Ex. 3 at 64). Its budget reflects no expenditure of these funds for any purpose, let alone for services rendered to cruise vessels paying the fees. (*Id.*). Instead, CBJ apparently intends to retain all of these funds to bolster its "Port Development Fund." (*Id.*). By expending the Entry Fees instead of the "State Marine Passenger Fees," CBJ is imposing higher Entry Fees than it would otherwise impose if CBJ used the "State Marine Passenger Fees" exclusively to cover costs of providing services to cruise vessels.

4. Defendants cannot charge the same Entry Fees whether cruise vessels use the public docks or the private docks.

In determining Defendants' permissible and impermissible uses of the Entry Fees, the Court should distinguish between services rendered by Defendants to cruise vessels while using the two public docks (the Cruise Ship Terminal Dock and the Alaska Steam Ship Dock) and services rendered by Defendants to cruise vessels while using the two private docks (the AJ Dock and the Franklin Dock). Defendants have charged cruise vessels the same Entry Fees, regardless of whether they are using the public docks or the private docks. The public and private docks compete for cruise vessel trade. To assess vessels at both facilities the same per passenger amounts does not reflect a disparity in the value of services provided by CBJ to vessels at these facilities. Defendants cannot lawfully charge any fees to cruise vessels using the private docks except to the extent the fees fund services rendered by Defendants to the cruise vessels while using the private docks.

5. The Court should issue injunctive relief.

In its December 6 order, the Court stated in a footnote: "It is the court's perception that injunctive relief would be duplicative of the declaratory relief to which plaintiffs are entitled and thus injunctive relief would be unnecessary." (Dkt. No. 208). However, given the position stated in the January 8 letter of Defendants' counsel (Exhibit 2), to protect Plaintiffs and their members, the Court should enter injunctive relief to prevent Defendants from assessing excessive Entry Fees and unlawfully using funds generated from Entry Fees. The Declaratory Judgment Act provides that "[f]urther necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. Such "further necessary or proper relief" includes injunctive relief. *See Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981).

The Ninth Circuit has noted that "it appears to be the general rule that a private party may seek declaratory *and injunctive relief* against the enforcement of a state statutory scheme on the ground of federal preemption." *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994) (emphasis added). Here, the MPF ordinance and the PDF resolution as applied violate the Tonnage Clause and the RHAA to the extent they impose fees that are used to fund services that are not rendered to cruise vessels paying the fees. Thus, both declaratory and injunctive relief are appropriate.

Violations of the Tonnage Clause or similar constitutional prohibitions are frequently remedied by injunctive relief. *See Henderson v. Mayor of City of New York*, 92 U.S. 259, 275 (1875) (ordering lower court to issue injunction enjoining enforcement of New York statute requiring vessel owner to pay sum of money for each passenger brought to port of New York from foreign shore). In *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81, 107 (D. Conn. 2008), *aff'd*, 567 F.3d 79 (2d Cir. 2009), the court concluded that irreparable harm would occur "if the Port Authority were permitted to continue its practice of instituting a Passenger Fee in violation of the Constitution" and that "[t]here is no adequate remedy at law which would prevent the occurrence of this future constitutional harm." Accordingly, the court enjoined "the Port Authority from the further use of the revenues from the Passenger Fee to fund its activities that are unrelated to and do not benefit the ferry passengers or approximate their use of the Port" and ruled that "[t]he Port Authority shall not be allowed to collect a Passenger Fee in an amount that exceeds what is necessary for their [sic] expenses that benefit ferry passengers and fairly approximate their use of the Port." *Id.*

Similarly, Plaintiffs and their members will suffer irreparable harm if Defendants are permitted to continue their practice of charging excessive Entry Fees to cruise vessels and

misusing the funds generated by the Entry Fees in violation of the Tonnage Clause and the RHAA. Plaintiffs have no adequate remedy at law to prevent the recurrence of this constitutional and statutory harm by Defendants in the future. As in *Bridgeport*, the Court should enjoin Defendants from: (a) further using funds generated by the Entry Fees to fund services that are not rendered to cruise vessels paying the Entry Fees; and (b) assessing Entry Fees (or any similar fees) in amounts that exceed Defendants' cost of rendering services to cruise vessels paying the fees.

6. Plaintiffs are entitled to attorney's fees and expenses.

Under 42 U.S.C. § 1988, Plaintiffs, as prevailing parties, are entitled to recover their attorney's fees and expenses in vindicating their federal rights. Section 1988 provides in pertinet part: "In any action or proceeding to enforce a provision of section[ ] 1983 …, the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee as part of the costs…." As this Court recognized in its summary judgment ruling, Plaintiffs' Tonnage Clause claim is a Section 1983 claim. (Dkt. No. 207 at 20).[7]

Plaintiffs are "prevailing parties" under Section 1988 because they have succeeded on significant issues in this litigation and are entitled to declaratory or injunctive relief as to their claims that the Entry Fees violate the Tonnage Clause. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if

[7] The Court further rejected Defendants' argument "that plaintiffs' § 1983 claims against CBJ fail because plaintiffs cannot show that CBJ is acting pursuant to an official policy" because "[i]f CBJ has been using revenue from the MPF and PDF in impermissible ways, there can be no doubt that it has done so pursuant to an official policy which is expressed in the MPF ordinance and the PDF resolution." (*Id.* at 20, n.40).

they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." (quotation omitted)); *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (A plaintiff "prevails," we have held, when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. And we have repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy that test." (quotation omitted)). "Because [Plaintiffs are] 'prevailing part[ies],' [they] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Lefemine*, 568 U.S. at 5 (quotation omitted).

Under Federal Rule of Civil Procedure 54(d)(2), the award of Plaintiffs' attorney's fees and expenses should be determined after the Court enters judgment and Plaintiffs subsequently file their motion for attorney's fees and expenses.

DATED: January 10, 2019

By: /s/ C. Jonathan Benner
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Certficiate of Service

I certify that on January 10, 2019, I caused a true and correct copy of the foregoing document to be served via the Court's electronic filing system, on counsel for Defendants, and upon the Honorable H. Russel Holland, Judge District Court of Alaska.

/s/ C. Jonathan Benner