C. Jonathan Benner (*pro hac vice*)
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
Phone: 202-585-6900
Fax: 202-585-6969
Email: jbenner@thompsoncoburn.com

Herbert H. Ray, Jr. (Alaska Bar No. 8811201)
Schwabe, Williamson & Wyatt
310 "K" Street, Suite 200
Anchorage, AK 99501
Phone: 907-264-6715
E-mail: hray@schwabe.com

Attorneys for Plaintiffs

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' SUR-REPLY TO DEFENDANTS' REPLY IN SUPPORT OF REQUEST FOR ENTRY OF FINAL JUDGMENT**

1. Defendants concede that the case is not yet fully resolved.

On January 17, 2019, Defendant Rorie Watt, the City Manager of Defendant The City and Borough of Juneau (CBJ), told "a packed room of attendees at the Moose Lodge" the following about the Court's December 6, 2018 ruling: **"What exactly is a service to a vessel? We have not resolved that."** (*See* Alex McCarthy, *City breaks silence on cruise lawsuit*, JUNEAU EMPIRE, Jan. 18, 2019, p. 2 (copy attached as Exhibit 5 and available at

https://www.juneauempire.com/news/city-breaks-silence-on-cruise-lawsuit/).[1] Moreover, Defendants state in their Reply that "the Court must examine separately each activity of CBJ" that is funded by Entry Fee revenues. (Dkt. No. 213, p. 5, n.14). Given Defendants' statements, it is clear that the Court's work in this case is not yet complete and that the Court must determine the extent to which Defendants have been violating the Tonnage Clause and the RHAA by misusing Entry Fee revenues to fund services that do not facilitate the marine operations of cruise vessels. Absent such guidance from the Court, Defendants will continue their unlawful actions unabated.

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[1] The same newspaper article further states: "In a manager's report at Monday's Assembly meeting, Watt suggested that the city use head tax money [i.e., Entry Fee revenues] to purchase property to help build a waterfront improvement on a property known as the Archipelago Lot near the downtown library." (Ex. 5, p. 2). According to another newspaper article linked in this article, the plan for the Archipelago Lot "includes space for food carts, an expansion to the USS Juneau Memorial, additional restrooms and space for a new small vessel dock and a future covered gathering shelter. It would involve multiple retail spaces, a decked open space and a paved plaza. It would widen the sidewalk along South Franklin Street and add a staging area for passenger vans." *See City considering downtown waterfront development*, JUNEAU EMPIRE, Nov. 19, 2017 (available at https://www.juneauempire.com/local/news/2017-11-19/city-considering-downtown-waterfront-development/). This proposed use of Entry Fee revenues by Defendants does not reflect recovery of cost for services to cruise vessels and further confirms that Defendants have no intention of complying with the letter or reasoning of the Court's December 6 ruling.

2. The Court can readily determine the legality of Defendants' uses of Entry Fee revenues as a matter of law.

In their summary judgment papers, Plaintiffs identified misuses of Entry Fee revenues by Defendants. (Dkt. No. 68). As explained in Plaintiffs' notice (Dkt. No. 211), these same misuses of Entry Fee revenues are occurring *now* during CBJ's current fiscal year (FY 2019)[2] and are budgeted to occur during CBJ's next fiscal year (FY 2020). Defendants do not dispute that they are using Entry Fee revenues in the ways identified by Plaintiffs. Whether each such use complies with or violates the Tonnage Clause and the RHAA is a question of law for the Court to determine. *See, e.g., United States v. Lizarraga-Carrizales*, 757 F.3d 995, 997 (9th Cir. 2014) ("The constitutionality of a statute is a legal question we review de novo."); *Hagen v. City of Eugene*, 736 F.3d 1251, 1257 (9th Cir. 2013) ("[T]he ultimate constitutional significance of the undisputed facts is a question of law." (quotation omitted)).

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[2] On June 4, 2018, CBJ enacted CBJ's Ordinance 2018-11, which appropriates funds in accordance with the FY 2019 budget, including the budgeted uses of Entry Fee revenues. (Pls.' Ex. 3 (Dkt. No. 211-3), pp. 222-25). That same day, CBJ adopted Resolution 2819(c), which adopted the Capital Improvement Program for Fiscal Years 2019 through 2024 (Pls.' Ex. 4 (Dkt No. 211-4)), including the following capital projects funded by MPF revenues in FY 2019: (a) $150,000 for "Public/Private Port Infrastructure Plan"; (b) $150,000 for replacement of the visitor information kiosk; (c) $500,000 for construction of new restrooms in downtown Juneau; (d) $900,000 for "Downtown Sidestreets Phase III"; (e) $450,000 for "Downtown Wayfinding and Interpretive Signs"; (f) $85,000 for "Seawalk Major Maintenance"; and (g) $250,000 for "Seawalk Next Phases." (Pls.' Ex. 3 (Dkt. No. 211-3), pp. 228-32 (the use of MPF revenues for capital projects is listed on page 230)).

3. Plaintiffs do not seek reconsideration or to re-litigate any issues.

Defendants erroneously assert that Plaintiffs seek "to re-litigate issues already decided by the Court" and that Plaintiffs' notice to the Court of the remaining issues in the case "is a motion for reconsideration." (Dkt. No. 213, pp. 1-2). To the contrary, Plaintiffs ask the Court to decide issues that it has not yet decided, and Plaintiffs cannot seek reconsideration of what the Court has yet to decide—namely, which of Defendants' uses of Entry Fee revenues violate the Tonnage Clause and the RHAA because the uses fund services that do not facilitate the marine operations of cruise vessels. Apart from determining that Defendants have unlawfully used Entry Fee revenues for crossing guards, sidewalk repairs, and access to the public library's internet, the Court has yet to expressly determine whether Defendants' other uses of Entry Fee revenues are permissible or impermissible. Indeed, Defendants concede that the Court has not decided these issues as they request that the Court "hold a trial on any actual expenditure CLIA claims to be unconstitutional" after "the Court enter[s] final judgment and allow[s] the appellate courts … to determine whether the Court declared the proper standard under the Tonnage Clause for determining the constitutionality of the use of CBJ's fees." (Dkt. No. 213, p. 6).

4. The Court has not denied injunctive relief.

Defendants also inaccurately assert that the Court has already "correctly denied an injunction." (Dkt. No. 213, p. 4). The Court has done no such thing. In its December 6 order, the Court stated that it was its "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). In other words, the Court stated its belief that declaratory relief would sufficiently serve as the equivalent of injunctive relief because the Court expected

Defendants to honor its ruling. However, given Defendants' stated intent to ignore the import of the Court's ruling, injunctive relief is necessary to ensure that Defendants comply with the law.

5. The Court cannot enter any final judgment until it applies its legal ruling and fully adjudicates Plaintiffs' Tonnage Clause and RHAA claims by determining Defendants' impermissible uses of Entry Fee revenues.

In a transparent attempt to delay the day of reckoning and allow continued collections of excessive Entry Fees for as long as possible, Defendants request that the Court: (1) enter a "final judgment" now; (2) "allow" the parties (presumably, Defendants) to appeal and have the Ninth Circuit "determine whether this Court correctly declared the proper standard under the Tonnage Clause for determining the constitutionality of the use of CBJ's fees"; and (3) then, after the appeal is resolved, "hold a trial on any actual expenditure CLIA claims to be unconstitutional." (Dkt. No. 213, pp. 5-6). Plaintiffs respectfully submit that the Court should not proceed in this manner. Any such "judgment" would not be "final" and appealable because it would not be a full adjudication of all issues in the case and would not end and fully dispose of the litigation on the merits. *See FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co.*, 498 U.S. 269, 273–74 (1991) ("For a ruling to be final, it must end the litigation on the merits." (quotation omitted)); *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1106 (9th Cir. 2018) ("The touchstone for finality is that the particular action filed is fully disposed of."); *Reed v. Lieurance*, 863 F.3d 1196, 1212–13 (9th Cir. 2017) ("A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." (quotation omitted)). "So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.'" *Bagdasarian Prods., LLC v. Twentieth Century Fox Film Corp.*, 673 F.3d 1267, 1270 (9th Cir. 2012) (quoting *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949)). Defendants' proposed course of action is more in the nature of a request to take an

interlocutory appeal and to segment the dispute into a series of trials and appeals that could, given current timeframes for appeals in the Ninth Circuit, extend for many years without final resolution. This approach would result in numerous appeals and thereby violate the "final-judgment rule," which provides that "the whole case and every matter in controversy in it must be decided in a single appeal." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017).

In *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81 (D. Conn. 2008, *aff'd*, 567 F.3d 79 (2d Cir. 2009), the district court determined the legal standard, analyzed the uses of the defendant port authority's passenger fee, and then issued a final judgment that included a permanent injunction prohibiting the defendant port authority from charging excessive passenger fees. Thereafter, the defendant port authority appealed, and the Second Circuit affirmed the district court's final judgment and injunction.[3]

Likewise, in the present case, the Court must fully adjudicate Plaintiffs' Tonnage Clause and RHAA claims by determining Defendants' impermissible uses of Entry Fee revenues and then issuing all appropriate relief (including injunctive relief). Thereafter, the Court can enter final judgment.

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[3] In their reply, Defendants erroneously assert that the district court in *Bridgeport* "reached a determination regarding an injunction" "in accordance … with the legal standard that emerge[d] after appeal." (Dkt. No. 213, p. 11 and n.40), In *Bridgeport*, there was only one appeal and that appeal was taken and decided after the district court entered its final judgment and issued its permanent injunction.

DATED: January 23, 2019

By: /s/ C. Jonathan Benner
C. Jonathan Benner (*pro hac vice*)
Thompson Coburn LLP

Herbert H. Ray, Jr. (Alaska Bar No. 8811201)
Schwabe, Williamson & Wyatt

Attorneys for Plaintiffs Cruise Lines International Association and Cruise Lines International Association

Certficiate of Service

I certify that on January 23, 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