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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

**CRUISE LINES INTERNATIONAL
ASSOCIATION ALASKA, and CRUISE
LINES INTERNATIONAL
ASSOCIATION,**

Plaintiffs,

v.

**THE CITY AND BOROUGH OF
JUNEAU, ALASKA, a municipal
corporation, RORIE WATT, in his
official capacity as City Manager,**

Defendants.

Case No.: 1:16-cv-00008-HRH

SCHEDULING AND PLANNING CONFERENCE REPORT

I. Meeting. In accordance with Rule 26(f), Federal Rules of Civil Procedure, a meeting was held on the dates and attended by counsel as set forth below:

Jonathan Benner and Kathleen E. Kraft, counsel for Plaintiffs Cruise Lines International Association and Cruise Lines International Association Alaska (“Plaintiffs”), and Robert P. Blasco and Megan Costello, counsel for Defendants the City and Borough of Juneau, Alaska, a municipal corporation, and Rorie Watt, in his official capacity as City Manager (collectively, “Defendants” or “CBJ”) initially conferred by telephone on June 3, 2016 and by email and telephone throughout the week of June 13, 2016 [ECF No. 21 at 2], conferred by exchange of email on October 25, 2016, again conferred by telephone on November 3, 2016, and continued to confer via exchange of email on November 7, 2016 through December 8, 2016.

As a result of these conferences, the parties provide their respective positions regarding the nature of this case and recommend the following:

II. Brief Statement of Nature of the Case.

In setting forth the statements below, neither party concurs with the other party’s statement of the nature of the case.

A. Plaintiffs’ position. Plaintiffs challenge, under the Constitution and laws of the United States, the legality of certain cruise ship passenger fees imposed by CBJ as a condition of entry into its port by cruise vessels engaged in the interstate and international commerce of the United States. The challenged fees are a \$5.00 entry fee per cruise ship passenger (the “Marine Passenger Fee”) and a \$3.00 fee per cruise ship passenger (“Port Development Fee” and together with the Marine Passenger Fee, the “Entry Fees”).

Plaintiffs seek a declaration that CBJ’s Entry Fees are excessive and unlawful under federal statutory and constitutional protections for the following reasons, among others: (i) the Entry Fees are not reasonable fees charged on a fair and equitable basis used solely to pay the cost of a service to a vessel or water craft, do not enhance the safety and efficiency of interstate commerce, and impose more than a small burden on interstate or foreign commerce; (ii) the Entry Fees are not imposed under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. § 2236); and (iii) the Entry Fees are not solely compensatory for services rendered to and enjoyed by the vessel, do not enhance the safety and efficiency of interstate commerce, and place more than a

minimal burden on interstate commerce. Further, CBJ's Entry Fees constitute discrimination against cruise vessels and visitors over other modes of transportation. Plaintiffs seek declaratory and injunctive relief against the assessment, collection, and improper use of the Entry Fees in whole or part.

B. Defendants' position. CBJ contends that the challenged fees do not violate any constitutional provisions or any provisions of federal law. CBJ contends the fees are properly levied, collected and used in compliance with any applicable constitutional provisions or federal law provisions. The Plaintiffs have not been discriminated against and do not have standing to allege discrimination of the individual members under Section 1983. The Plaintiffs' claims are barred for many other reasons, including but not limited to such as immunity, laches, the statute of limitations, waiver, failure to exhaust administrative remedies, and estoppel. The Borough contends that the Plaintiffs have not been harmed such that they are entitled to any relief, or that the any alleged harm is *de minimis*, similarly precluding the relief sought, and that there are or may be standing issues related to the prosecution of the action and relief sought.

III. Pre-Discovery Disclosures. The information required by Fed. R. Civ. P. 26(a)(1):

- A. Has been exchanged by the parties.
- B. Will be exchanged by the parties on or before **December 12, 2016**.
- C. Preliminary witness lists:
 - 1. Have been exchanged by the parties.
 - 2. Will be exchanged by the parties on or before **January 13, 2017**.

IV. Contested Issues of Fact and Law.

A. Contested Issues of Fact and Law. Preliminarily, one or more of the parties expects the following issues of fact and law to be presented to the Court:

- 1. Do the Entry Fees levied by CBJ Ordinance No. 2000-01am (City and Borough of Juneau, AK., Code Ch. 69.20, *et seq.*) and Resolution Nos. 2163, 2294b-am, 2423b-am, and 2552 violate the Tonnage Clause of the United States Constitution?

2. Does the Rivers and Harbors Appropriation Act of 1884, 33 U.S.C. § 5, prohibit the imposition of the Entry Fees?
3. Do the Entry Fees violate the Supremacy Clause of the United States Constitution?
4. Do the Entry Fees violate the Commerce Clause of the United States Constitution?
5. Has CBJ, through imposition of the Entry Fees, deprived Plaintiffs' member cruise lines of federal rights under color of state law, in violation of 42 U.S.C. § 1983?
6. Do Plaintiffs have a claim for attorneys' fees under 28 U.S.C. § 1983?
7. Are the Plaintiffs' claims barred by the statute of limitations?
8. Are there necessary and/or indispensable parties that the Plaintiffs have failed to join?
9. Do the Plaintiffs lack standing to pursue some or all of the claims for its member companies?
10. Are CBJ and Mr. Watt entitled to the protections of absolute and/or qualified immunity as to some or all of the Plaintiffs' claims?
11. Are the Plaintiffs' claims barred by failure to exhaust administrative remedies, laches, waiver, estoppel, or the doctrine of unclean hands?
12. If the Plaintiffs are able to establish any damages as alleged, have the Plaintiffs mitigated those alleged damages?
13. Is 42 U.S.C. § 1983 applicable to the Plaintiffs' claims, and if so, how have the Plaintiffs been subject to discrimination prohibited by 42 U.S.C. § 1983?

V. Discovery Plan. The parties jointly propose to the court the following discovery plan:

- A. Issues requiring discovery:

1. Plaintiffs expect that discovery will be needed on, but not limited to: the development (including, but not limited to, process and content of deliberations leading to imposition), imposition, implementation, application, administration, distribution, uses, and effects of the Entry Fees and related fees (including, but not limited to, fees charged for modes of transportation other than cruise vessels); and the existence, cost, and availability of, and funding or payment for, services, facilities, amenities, and other benefits provided by CBJ or at Port of Juneau or other nearby areas or available to or used by cruise vessels or cruise visitors.

2. CBJ expects that discovery will be needed on, but not limited to: the relationship of the member companies to the Plaintiffs, the timing, scope and content of the alleged objections to CBJ's use of the fees, the factual basis for the allegations of "misuse" of the fees, the factual basis for the allegations of discrimination and the kind and type of discrimination and which members were discriminated against, the factual basis for the allegations that the fees bear no reasonable relationship to the cost of the services provided by CBJ, the factual basis for the allegations that the use of the fees has not benefited cruise ship passengers, including but not limited to all communications from passengers indicating such absence of benefit or other complaint about the fees, the projects contended by Plaintiffs that do not benefit cruise ship passengers and how and why each project does not benefit any cruise ship passengers, how the Plaintiffs' members collect the fees from passengers, the alleged damage claimed by Plaintiffs.

B. The parties have agreed to preserve all discoverable information relating to the issues in dispute between the parties.

C. Disclosure or discovery of electronically stored information ("ESI") should be handled as follows: The parties agree to preserve all ESI relating to the issues in dispute between the parties. To reduce the expense and burden associated with producing ESI, the parties propose that discovery be disclosed in two ways:

1. All word documents, emails, and PowerPoint files be converted and produced in multi-page pdf file format, with document-level extracted/OCR text, and labeled with bates-numbers. Files already in pdf format will remain in pdf format, labeled with bates-numbers. Excel files will be produced in native format, with a PDF image placeholder. All other files that cannot be imaged (e.g., audio/video) will be produced in native format, with a PDF image placeholder. All files (PDF, native, and OCR text) should be named for the start bates number.

2. A second set of the same documents will also be provided in native format, preserving system metadata (e.g., custodian, author, email to/from/cc/sent date, etc.) saved in a folder with a "hash code" to ensure preservation. These native documents will be provided in folders corresponding with the identical folders of the bates stamped documents. The folders of each group of native documents will be labeled with the bates numbers of the documents in the corresponding PDF version. The native documents will retain the native labels.

D. The parties expect to negotiate and present for the Court's approval a protective order for the production and protection of confidential information and agree to do so as soon as is practicable, but no later than **December 12, 2016**. The parties agree that, absent Court order, they shall not withhold discovery pending the Court's entry of a protective order and that pending the Court's entry of a protective order, counsel receiving information shall keep any information confidential that the producing party designates as confidential per the terms of the proposed order.

E. Disclosure of experts and expert reports:

1. Plaintiffs' Expert Witness List on or before **February 20, 2017**.
2. Defendants' Expert Witness List on or before **March 31, 2017**.
3. Plaintiffs' Expert Reports on or before **March 31, 2017**.
4. Defendants' Expert Reports on or before **May 5, 2017**.
5. Rebuttal reports by Plaintiffs' experts on or before **May 26, 2017**.

F. The parties will supplement disclosures and discovery responses under Fed. R. Civ. P. 26(e) as new information is acquired, but not later than 60 days before the close of fact discovery, or as soon as reasonable if information is discovered within 60 days of the close of fact discovery.

G. A final witness list disclosing all lay and expert witnesses whom a party may wish to call at trial will be served and filed: **March 31, 2017**.¹

H. Time for completing discovery:

1. Fact discovery will be completed on or before: **May 20, 2017**.
2. Expert discovery will be completed on or before: **August 1, 2017**.
3. All discovery will be completed on or before: **August 1, 2017**.

I. Limitations on discovery.

1. X The limitations contained in Fed. R. Civ. P. 26(b), 30, and 33 will apply except as indicated below.

2. The parties have been unable to agree on certain exceptions to discovery limitations and procedures.

CBJ's position is that CLIAA can and should facilitate necessary discovery from its member companies without forcing CBJ to the expense and time of Rule 45 Subpoenas. CBJ specifically requests that it be allowed to take a Federal Rule 30(b)(6) deposition of those member companies who have cruise ships that bring passengers to the Port of Juneau. CBJ does not contend the members are parties, but that discovery from the member companies is essential to a fair and adequate defense by CBJ and CLIAA can facilitate that discovery in the interests of cost effective discovery. CBJ requests the Court order in its scheduling order that CLIAA facilitate the scheduling of Federal Rule of Evidence 30(b)(6) depositions of their member companies who have cruise ships that bring passengers to the Port of Juneau without the necessity of serving the member companies with Rule 45 subpoenas.

¹ This date may be more than but not less than 45 days prior to the close of discovery. Only those witnesses disclosed at this time will be permitted to testify at trial.

Plaintiffs oppose CBJ's request. Plaintiffs' counsel does not represent Plaintiffs' member companies. Plaintiffs' counsel do not have the authority to waive the protections of the Federal Rules of Civil Procedure regarding discovery from nonparties for Plaintiffs' member companies. Plaintiffs' member companies are not parties to this action. The Federal Rules provide clear-cut procedures for obtaining discovery from nonparties, and CBJ has not provided any reason justifying modification, disregard or elimination of those procedures and the protections they afford to nonparties in this case.

VI. Pretrial Motions.

A. Are there preliminary motions as to jurisdiction, venue, arbitration, and/or statutes of limitation (*see* D. Ak. L.R. 16.1(c)(5)) that should be filed within 60 days.

Yes No (If yes, explain)

On June 7, 2016, Juneau filed a motion to dismiss the First Amended Complaint under Federal Rule of Civil Procedure 12(b)(1) asserting the Tax Injunction Act, 28 U.S.C. § 1341, divests this Court of subject matter jurisdiction over this case, which motion has been denied by the Court.

CBJ will file any preliminary motion on or before **February 24, 2017**.

B. Motions subject to D. Ak. L.R. 16.1(c)(6)–(8) and Fed. R. Civ. P. 56(b):

1. Will be served and filed within the times specified in the applicable rules, except as noted below.

2. Motions to amend the pleadings or add parties on or before **February 20, 2017**.

3. Motions under the discovery rules will be filed not later than **August 22, 2017**.

4. Motions *in limine* will be filed not later than **October 17, 2017**.

4. Dispositive motions (including motions for summary judgment) will be filed not later than **September 21, 2017**.

VII. Other Provisions:

A. The parties X do do not request a conference with the Court before the entry of a scheduling order to address any issues on which the parties were not able to agree.

B. The parties do X do not consent to trial before a magistrate judge.

C. The disclosure requirements of Fed. R. Civ. P. 7.1, if applicable:

1. X Have been complied with.

D. Early settlement/alternative dispute resolution.

1. Do the parties request immediate assistance by way of a settlement conference or alternative dispute resolution? Yes X No If Yes, explain.

2. The parties may wish to consider private mediation or settlement conference with a judicial officer of this court at a later date.

E. The scheduling order will make provision for pretrial conferences, certification of the case as ready for trial, and a final pretrial order.

VIII. Trial.

A. At this time, Plaintiffs' position is that the issues raised in the complaint can be resolved in whole or in part as matter(s) of law in pretrial or other dispositive motions. If a trial is necessary, however, Plaintiffs anticipate that trial of this case will take 5 days.

B. CBJ requests the Court allow ten days for trial with the time divided equally between the parties. If the Court allows any less time, CBJ similarly requests that the Court order the time will be divided equally between the parties.

C. 1. A jury trial has been demanded. X Yes No

2. The right to a jury trial X is is not disputed. Plaintiffs reserve their right to dispute Defendants' asserted right to a jury trial as to each cause of action of the complaint.

VIII. Report Form.

A. Have counsel experienced any problem(s) in using this form? Yes X No. If yes, explain.

B. ___ Are there subjects that counsel would like to see added to this form?
___ Yes X No. If yes, explain.

DATED: December 8, 2016

By: /s/ C. Jonathan Benner
C. Jonathan Benner (*pro hac vice*)
Kathleen E. Kraft (*pro hac vice*)
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Keesal, Young & Logan, LLC
Attorneys for Plaintiffs Cruise Line
International Association Alaska and
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DATED: December 8, 2016

HOFFMAN & BLASCO, LLC

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

CERTIFICATE OF SERVICE

I certify that on December 8, 2016, I caused a true and correct copy of the foregoing Report to be filed using the Court's Electronic Case Files System ("ECF"). The document is available for review and downloading via the ECF system, and will be served by operation of the ECF system upon all counsel of record.

/s/ C. Jonathan Benner

C. Jonathan Benner