

1 Stephen M. Rummage
2 David W. Oesting
3 M. Scott Broadwell
4 DAVIS WRIGHT TREMAINE LLP
5 701 West 8th Avenue, Suite 800
6 Anchorage, AK 99501
7 (907) 257-5300

8 Attorneys for Alaska Cruise Association

9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF ALASKA

11 ALASKA CRUISE ASSOCIATION,)

12 Plaintiff,)

13 v.)

14 PATRICK GALVIN, in his official)
15 capacity as Commissioner of the State)
16 of Alaska Department of Revenue,)

17 Defendant.)
18 _____)

Case No. 3:09-cv-

19 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

20 Plaintiff Alaska Cruise Association (“ACA”) alleges as follows:

- 21 1. ***Introductory Statement.*** The ACA seeks relief from a \$46.00 fee imposed
22 on the passengers of its member cruise lines as a condition of their entry into Alaska (the
23 “Entry Fee”), which Alaska voters passed in August 2006.
24
25

1 The proponents of this Entry Fee promoted it as a way to make out-of-state
2 visitors to Alaska pay for government projects that have nothing to do with the burdens
3 the State and its municipalities bear as a direct result of cruise ships calling in Alaska
4 ports. Because the Entry Fee does precisely what its proponents hoped it would do, it
5 violates basic federal constitutional and statutory protections that prevent states from
6 exacting fees from maritime visitors to defray local government expenses and from
7 discriminating against interstate commerce. Further, the new Entry Fee ignores the
8 substantial additional charges imposed on cruise ships in Ketchikan and Juneau, the most
9 frequently visited ports; it produces revenues that far exceed the expenses the State incurs
10 to provide services or facilities to cruise ships; it was imposed without consideration of
11 any specific services being provided to cruise ships; it has been earmarked in part for
12 localities that are not even ports of call; it has been used to fund future projects that
13 provide no benefits to the passengers who actually pay the fee; and its proceeds have
14 been appropriated to projects that do not have the legally-required relationship to services
15 or facilities provided to cruise ships.

16 Alaska’s new Entry Fee thus blatantly violates federal constitutional and statutory
17 protections that circumscribe a state’s permissible charges to a vessel or its passengers,
18 limiting those charges to fair and equitable fees that (a) are used solely to compensate the
19 state for specific services provided to the vessels charged, (b) impose a minimal burden
20 on interstate or foreign commerce, and (c) enhance the safety and efficiency of
21
22
23
24
25

1 commerce. The ACA therefore brings this action to prevent the continued collection of
2 this unlawful Entry Fee, which violates fundamental precepts of federalism.

3
4 PARTIES

5 2. **Identity of Plaintiff.** Plaintiff ACA is a not-for-profit association organized
6 under the laws of Alaska, with its principal place of business in Anchorage, Alaska.
7 ACA’s members include nine cruise lines serving Southeast and Southcentral Alaska,
8 including Carnival Cruise Lines, Celebrity Cruises, Crystal Cruises, Holland America
9 Line, Norwegian Cruise Line, Princess Cruises, Regent Seven Seas Cruises, Royal
10 Caribbean International, and Silversea Cruises (the “Cruise Lines”). ACA works on
11 behalf of its member Cruise Lines to build positive relationships with communities and
12 government agencies, to develop strong partnerships with communities and businesses in
13 Alaska, and to help protect its members’ legal interests. The member Cruise Lines and
14 their affiliated businesses make substantial economic and intangible contributions to the
15 State of Alaska.

16
17
18 3. **Identity of Defendant.** Patrick Galvin (“Galvin”) has been named as the
19 Defendant solely in his official capacity as Commissioner of the State of Alaska
20 Department of Revenue. Mr. Galvin is responsible for collection of the unlawful Entry
21 Fee and enforcement of Alaska’s revenue laws. Acting in his official capacity for the
22 State of Alaska, Mr. Galvin collects the Entry Fee under color of state law, pursuant to
23
24
25

1 AS 43.52.200-210. The ACA in this Complaint seeks to enjoin Mr. Galvin from
2 continued collection of the unlawful Entry Fee.

3
4 JURISDICTION

5 4. ***Subject Matter Jurisdiction.*** Pursuant to 28 U.S.C. §§ 1331 and 1343, this
6 Court has jurisdiction to redress the State’s constitutional violations alleged in this
7 Complaint, committed by Mr. Galvin in his official capacity on behalf of the State of
8 Alaska, because this action arises under Article 1, Sections 8 and 10 of the United States
9 Constitution, the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §
10 1983, and 33 U.S.C. § 5. The ACA seeks redress for the deprivation under color of state
11 law of rights secured by the United States Constitution and Acts of Congress.

12
13 5. ***Declaratory and Injunctive Relief.*** The ACA seeks declaratory and
14 injunctive relief to protect its member Cruise Lines and their passengers from continued
15 exaction of the unlawful Entry Fee, as defined below. The foregoing constitutional
16 provisions and 33 U.S.C. § 5, 28 U.S.C. §§ 2201-02, and Fed. R. Civ. P. 57, provide
17 authority for the requested declaratory and injunctive relief. Alaska does not afford the
18 ACA and its member Cruise Lines adequate means of redress for Mr. Galvin’s violations
19 of the rights of ACA’s members.

20
21 6. ***Redress for Civil Rights Violations.*** 42 U.S.C. § 1983 provides for
22 injunctive relief against a state official sued in his official capacity, such as Mr. Galvin, to
23 protect against deprivation, under color of state law, of rights, privileges, or immunities
24
25

1 secured by the United States Constitution and federal laws. As a result of Mr. Galvin's
2 violation of the Cruise Lines' federal constitutional and statutory rights, as more fully
3 detailed below, the Cruise Lines have been and will continue to be damaged.

4
5 VENUE

6 7. **Venue.** A substantial portion of the events giving rise to this claim
7 occurred in this district, and the Defendant resides in this district. Accordingly, venue is
8 proper in the District of Alaska under 28 U.S.C. § 1391(b).

9
10 GENERAL ALLEGATIONS

11 8. **Ballot Initiative 2.** In August 2006, Alaska voters narrowly passed Ballot
12 Initiative 2. Among other things, Ballot Initiative 2 enacted AS 43.52.010-020 (now
13 renumbered as AS 43.52.200-210), which levies a so-called excise tax (the "Entry Fee,"
14 as defined above) of \$46.00 on each passenger traveling on a voyage of 72 hours or more
15 aboard a vessel with 250 or more berths ("Large Cruise Ships") that anchors or moors in
16 Alaska waters with the intent to allow passengers to disembark. The Initiative also
17 contained income tax and environmental provisions that expressly singled out owners of
18 Large Cruise Ships for adverse treatment.

19 9. **Responsibility for Collecting the Entry Fee.** AS 43.52.220 requires ACA
20 members, the Cruise Lines, to collect the Entry Fee and remit it to the Department of
21 Revenue at their own expense, and makes the Cruise Lines liable for payment of the
22 Entry Fee if their passengers do not pay. In addition, the statute imposes accounting and
23
24
25

1 recordkeeping obligations on the Cruise Lines, and the Cruise Lines are subject to
2 penalties for late payment of the Entry Fee.

3
4 10. ***Motivation behind Initiative.*** Public statements by the Initiative’s drafters
5 show that discriminatory motives against out-of-state businesses and tourists drove the
6 Initiative. One of the founders of the group that sponsored the ballot measure told the
7 press: “Even for a cynical political hack like me, it’s a good day when the citizens get to
8 win one against a multibillion-dollar industry in British Columbia and Outside.” Paula
9 Dobbyn, *Judge OKs Cruise-Ship Initiative*, ANCHORAGE DAILY NEWS, Feb. 9, 2006, at
10 D1. The same person explained: “Alaskans are not stupid. ... For the average person
11 sitting in a bar, it takes five minutes to figure out this is a tax on the guy from Ohio.”
12 Paula Dobbyn, *Cruise Industry Blitzing Voters*, ANCHORAGE DAILY NEWS, May 19,
13 2006, at A1. In short, the Initiative’s backers overtly sought to extract fees from visitors
14 to Alaska without providing corresponding benefits to those visitors.

15
16
17 11. ***Entry Fee Applies Only to Large Cruise Ships.*** The statute does not
18 impose the Entry Fee on passengers of vessels other than Large Cruise Ships. Further, on
19 the ACA’s best information and belief, none of the Large Cruise Ships subject to the
20 Entry Fee are owned by Alaska corporations or residents of the State of Alaska. On the
21 other hand, Alaska residents and corporations do own and operate small cruise vessels
22 that compete with Large Cruise Ships but will not be subject to the Entry Fee. As a
23 result, by exempting passengers of vessels that have less than 250 berths, the Entry Fee
24
25

1 exempts passenger vessels owned by Alaska corporations or residents, providing further
2 evidence of the sponsors' intent to discriminate against out of state interests.

3
4 12. ***Revenue Not Used to Service Large Cruise Ships.*** Revenues generated by
5 the Initiative's Entry Fee bear no reasonable relationship to the actual costs incurred by
6 municipalities and other Alaska governmental entities to service Large Cruise Ships. Nor
7 was that the intention. Indeed, the Voter's Pamphlet for the Initiative explained that even
8 inland municipalities would receive revenue from the Entry Fee. Further, the statute
9 exacts the Entry Fee *in addition to* similar fees already charged by the ports of Juneau
10 and Ketchikan, the most visited ports in Alaska.

11
12 13. ***Appropriation of Revenue to Local Projects.*** Consistent with the
13 Initiative, the Alaska Legislature in 2007 allocated a portion of the 2007 revenue from the
14 new Entry Fee to municipalities and governmental entities that are not even ports of call
15 for Large Cruise Ships. In 2008 and 2009, the Alaska Legislature appropriated revenues
16 from the Entry Fee to a variety of government projects that do not have any relation to
17 services provided to Large Cruise Ships carrying the passengers who paid the Entry Fee
18 and that do not promote the safety and efficiency of interstate commerce. For example,
19 in 2008 the Legislature appropriated \$1.5 million in Entry Fee collections for
20 reconstruction of the Saxman Community Hall; \$1.675 million to construct a dock in
21 Valdez that cannot accommodate Large Cruise Ships; \$1.25 million for dock upgrades in
22 Petersburg, Alaska, a significant portion of which will be used to provide power to a dock
23
24
25

1 used by small cruise ships that compete with Large Cruise Ships; and \$650,000 to
2 construct a fuel dock in Yakutat that will be used primarily (if not exclusively) by vessels
3 other than Large Cruise Ships. In 2009, the Legislature appropriated \$6.0 million in
4 Entry Fee collections for maintenance and repairs at Alaska State Parks; \$21,180,000 for
5 road and sidewalk improvements in or near Haines, Homer, Juneau, Ketchikan, Moose
6 Pass, Skagway, and Valdez; \$500,000 for heating and electrical systems at the Alaska
7 Aviation Heritage Museum in Anchorage; \$1.0 million for a bear education awareness
8 research sanctuary near Portage; \$800,000 for improvements to the Alaska Zoo in
9 Anchorage; \$1.0 million for an exhibit gallery at the Morris Thompson Cultural and
10 Visitors Center in Fairbanks; \$1.0 million to replace the roof on the Egan Center
11 convention center in Anchorage; \$1.0 million to construct a multi-use facility in Cordova
12 for community use; \$1.0 million to renovate the Carlson Center in Fairbanks; and
13 \$430,000 to construct a railroad station in Wasilla that will serve as a commuter stop for
14 future commuter rail service.

15
16
17
18
19 14. ***Vetoed Projects.*** The State’s Governor vetoed the Legislature’s effort to
20 appropriate Entry Fee collections to other projects likewise bearing no relationship to
21 services provided to Large Cruise Ships, including \$3.5 million in 2008 to a “salmon
22 learning center” in Anchorage, \$3.6 million in 2008 to a salmon hatchery visitors’ center
23 near Fairbanks, and \$1.65 million in 2009 to remove noxious plants and provide lighting,
24 a dock, and a boat launch at a lake in Sitka. The pattern of legislative appropriations –
25

1 including those vetoed by the Governor – shows that the State has not levied or collected
2 the Entry Fee for the purpose of defraying the costs of services actually rendered to Large
3 Cruise Ships and their passengers.
4

5 15. ***Entry Fee Increases the Total Cost of Cruises.*** Beginning with the 2007
6 cruise season and continuing to the present, the Cruise Lines have collected the Entry Fee
7 from passengers in addition to the price of their cruises, which increases the total cost of
8 a cruise charged to passengers by the ACA’s Cruise Line members and makes cruises
9 less attractive in comparison to other vacation options to Alaska. In other words,
10 although the Initiative purports to impose the Entry Fee only on the passengers of the
11 Cruise Lines, it puts the ACA’s Cruise Line members at a comparative competitive
12 disadvantage.
13
14

15 16. ***Passengers.*** The persons against whom the statute assesses the Entry Fee,
16 and from whom the Cruise Lines have collected and will in the future collect the Entry
17 Fee, include citizens and resident aliens of the United States, the vast majority of whom
18 reside outside Alaska. Some of these passengers will not visit the State of Alaska again,
19 and they therefore have no interest in and derive no benefit from projects that the State
20 may build in the future.
21

22 17. ***Operations in Interstate Commerce on Navigable Waters.*** The Cruise
23 Lines operate Large Cruise Ships that enter Alaska waters while engaged in interstate
24
25

1 commerce. The Cruise Lines' Large Cruise Ships operate on the navigable waters of the
2 United States while carrying passengers subject to the Entry Fee.

3
4 CLAIMS FOR RELIEF

5 First Cause of Action
6 (Violation of the Tonnage Clause)

7 18. **Tonnage Clause.** The United States Constitution from its inception has
8 prohibited efforts to extract money from maritime commerce for the peculiar benefit of a
9 single state. In particular, Article I, Section 10 of the United States Constitution (the
10 "Tonnage Clause") limits a state's authority to impose fees or taxes measured by the
11 capacity of a vessel for the privilege of entering, lying in, or leaving ports or waters of a
12 state unless those fees or taxes defray the cost of services provided to the vessel.
13

14 19. **Vessel Capacity.** The Entry Fee imposes a duty on Large Cruise Ships that,
15 as a practical matter, is measured by a vessel's capacity.
16

17 20. **Absence of Reasonable Relationship.** The amounts collected and to be
18 collected as a result of the Entry Fee do not bear a reasonable relation to the actual cost of
19 services provided by the State of Alaska or its governmental subdivisions (including the
20 municipal entities that receive proceeds of the Entry Fee) to Large Cruise Ships carrying
21 passengers subject to the Entry Fee.
22

23 21. **Revenues Exceed Legitimate State Expenditures.** The revenues generated
24 by the Entry Fee exceed by a large margin the amount reasonably necessary to
25 compensate the State of Alaska and its governmental subdivisions (including cities or

1 other Alaska entities that receive proceeds of the Entry Fee) for expenditures for services
2 to and infrastructure used by Large Cruise Ships. The State of Alaska has used only a
3 small portion of Entry Fee revenues to pay for services to Large Cruise Ships. That
4 impermissible imbalance between collections and legitimate expenditures will increase
5 into the future.

6
7 22. ***Entry Fee Violates Tonnage Clause.*** The assessment of the Entry Fee on
8 passengers of Large Cruise Ships for the privilege of the Large Cruise Ships entering,
9 lying in, or leaving Alaska waters violates the Tonnage Clause of the United States
10 Constitution. The imposition of the Entry Fee, including the requirement that the Cruise
11 Lines collect the Entry Fee from their passengers, is unlawful. Mr. Galvin’s collection
12 of the fee therefore violates 42 U.S.C. § 1983.

13
14 23. ***Entry Fee Injures ACA Members.*** The unlawful Entry Fee imposed by AS
15 43.52.200-220 has damaged, and will continue to damage, the ACA’s member Cruise
16 Lines and their passengers. The Cruise Lines face irreparable harm if the Court does not
17 enjoin Mr. Galvin from collecting the Entry Fee on behalf of the State of Alaska, and
18 they have no adequate remedy at law because, among other things, prices they quote to
19 potential passengers for their cruise seasons must include the Entry Fee. It would be
20 impractical, expensive, and in many cases impossible for the Cruise Lines to refund Entry
21 Fee assessments to passengers after they complete a cruise if the Court were to later
22 declare the Entry Fee to be unlawful.
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Second Cause of Action
(Violation of 33 U.S.C. § 5 and Supremacy Clause)

24. ***Entry Fee Violates Federal Statute.*** 33 U.S.C. § 5 prohibits a non-federal interest from collecting any taxes, tolls, operating charges, fees, or any other impositions whatever from any vessel operating upon navigable waters of the United States, or its passengers, except (a) fees charged under 33 U.S.C. § 2236; (b) property taxes on vessel or watercraft; or (c) reasonable fees charged on a fair and equitable basis that (i) are used *solely* to pay the cost of a service to the vessel; (ii) enhance the safety and efficiency of interstate and foreign commerce; *and* (iii) do not impose more than a small burden on interstate or foreign commerce.

25. ***Failure of Entry Fee to Satisfy Statute.*** The Entry Fee does not fit within the definition of a port or harbor fee authorized by 33 U.S.C. § 2236, nor does the Entry Fee function as a property tax. The State has not used, and will not use, the Entry Fee solely to pay for services to the vessels carrying passengers against whom the Entry Fee is assessed, as 33 U.S.C. § 5 requires. Instead, the State has imposed the Entry Fee as a fee for entry into Alaska by Large Cruise Ship passengers, without regard to any specific services provided to Large Cruise Ships. As a result, the State has not used, and will not use, the proceeds of the Entry Fee for purposes consistent with 33 U.S.C. § 5.

26. ***Recipients of Revenue Not Ports of Call.*** AS 43.52.230 makes clear that, on its face, the Entry Fee *cannot* comply with 33 U.S.C. § 5. Under AS 43.52.230, the State places 25 percent of the Entry Fee proceeds in a “Regional Cruise Ship Impact

1 Fund,” which must be distributed to government entities that are *not* ports of call for
2 Large Cruise Ships. Consistent with this provision, in 2007, the Alaska Legislature
3 passed 2007 SLA Chapter 28, Section 29, which appropriates funds from the Regional
4 Cruise Ship Impact Fund for payment in fiscal year 2008 to municipalities and other
5 government entities that are *not* ports of call for Large Cruise Ships. The municipalities
6 and other government entities eligible for distributions from the Regional Cruise Ship
7 Impact Fund render no services to Large Cruise Ships and thus cannot expend the
8 proceeds of the Entry Fee in compliance with 33 U.S.C. § 5.
9
10

11 27. ***Expenditures in Violation of Statute.*** Aside from the impermissible
12 appropriation to the Regional Cruise Ship Impact Fund, the State of Alaska has
13 appropriated Entry Fee revenues to a variety of projects that fall outside the scope of
14 expenditures permitted under 33 U.S.C. § 5, including (but not limited to) the projects
15 described in Paragraph 13 above. As administered by the State of Alaska, the Entry Fee
16 predictably has functioned as a means of taxing interstate and foreign maritime
17 commerce to support local government projects.
18

19 28. ***Entry Fee Invalid.*** The Entry Fee violates 33 U.S.C. § 5. Accordingly,
20 under the Supremacy Clause of the United States Constitution, the imposition of the
21 Entry Fee, its enforcement by Mr. Galvin, and the requirement that the Cruise Lines
22 collect the Entry Fee from their passengers are unlawful and violate 42 U.S.C. § 1983.
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Third Cause of Action
(Commerce Clause)

29. ***Commerce Clause.*** Article I, Section 8 of the United States Constitution (the “Commerce Clause”) prohibits state governments from taking action that has the purpose or effect of discriminating against interstate commerce or that unduly burdens interstate commerce. The Commerce Clause requires that a state tax or fee have a substantial nexus with the jurisdiction imposing it, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to services provided by the jurisdiction.

30. ***Large Cruise Ships and Passengers Engaged in Interstate Commerce.*** In practice, the State of Alaska has required the collection of the Entry Fee only from passengers of vessels engaged in interstate commerce.

31. ***Large Cruise Ships Are Out-of-State Vessels.*** No Large Cruise Ships that are subject to the Entry Fee are owned by Alaska corporations or residents of the State of Alaska. By exempting passengers of vessels that have less than 250 berths, the Entry Fee exempts all passenger vessels owned by Alaska corporations or residents, even if their operations compete with Large Cruise Ships and have similar impacts on the State.

32. ***Recipients of Entry Fee Revenue.*** The State has paid Entry Fee proceeds to local government entities that are not even ports of call for Large Cruise Ships. Proceeds from the Entry Fee have been and will be used to provide benefits and services to Alaska residents who are not subject to the Entry Fee or a similar tax or fee.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

33. *Discrimination against Interstate Commerce.* In imposing the Entry Fee, Alaska has discriminated in purpose and effect against interstate commerce, has not justly apportioned its financial burdens, has not imposed fees fairly related to services provided by the State of Alaska, and has unduly burdened interstate commerce, all in violation of the Commerce Clause. If all states imposed a fee or tax comparable to the Entry Fee, the resulting tax burden would be inflicted on interstate commerce alone, with no comparable burden on intrastate commerce. Because the Entry Fee therefore violates the Commerce Clause, Mr. Galvin’s enforcement of AS 43.52.200-220 violates the laws of the United States of America, deprives the Cruise Lines of rights, privileges, or immunities secured by the Constitution and laws of the United States, and violates 42 U.S.C. § 1983.

PRAYER FOR RELIEF

Based on the foregoing, ACA prays for the following relief:

- A. That the Court declare that the Entry Fee imposed by AS 43.52.200-220 violates the Tonnage Clause, the Supremacy Clause (by virtue of its violation of 33 U.S.C. § 5), and the Commerce Clause of the United States Constitution;
- B. That the Court declare that Mr. Galvin has deprived the Cruise Lines of federal rights under color of state law in violation of 42 U.S.C. § 1983;
- C. That the Court enjoin Mr. Galvin from collecting the unlawful Entry Fee or requiring the Cruise Lines to collect the Entry Fee from their passengers;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

D. For an award of costs and attorney's fees under 42 U.S.C. § 1983; and

E. For such other and further relief as this Court deems just and equitable.

Respectfully submitted this 17th day of September, 2009.

s/ David W. Oesting
Stephen M. Rummage (*pro hac vice* pending)
David W. Oesting
M. Scott Broadwell
DAVIS WRIGHT TREMAINE LLP
701 West 8th Avenue, Suite 800
Anchorage, AK 99501
Telephone: (907) 257-5300
Facsimile: (907) 257-5399
ABA No. 0011078
E-mail: daveoesting@dwt.com

Certificate of Service

The undersigned certifies that on September 17, 2009, a true and correct copy of the foregoing Complaint for Declaratory and Injunctive Relief was served on the following attorneys or parties of record by the court's ECF system:

By: s/ _____
/s/ David W. Oesting