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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 15, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIL' MAN IN THE BOAT, INC.,
a California Corporation,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO PORT OPINION COMMISSION, operating under the title Port of San Francisco; ELAINE FORBES, Interim Executive Director; PETER DALEY, DEPUTY DIRECTOR, Maritime the San Francisco Port; JEFF BAUER, Deputy Director of Real Estate, the San Francisco Port; JOE MONROE, Harbormaster, South Beach Harbor, Pier 40,

Defendants-Appellees.

No. 19-17596

D.C. No. 4:17-cv-00904-JST

Appeal from the United States District Court for the Northern District of California Jon S. Tigar, District Judge, Presiding

Before: Mary H. MURGUIA and Morgan CHRISTEN, Circuit Judges, and William K. SESSIONS III, District Judge.

CHRISTEN, Circuit Judge:

Plaintiff Lil' Man in the Boat (Lil' Man) seeks reversal of a district court order granting summary judgment on its claim that several municipal entities and officials (collectively, defendants) violated the Rivers and Harbors Act, 33 U.S.C. § 5(b)(2) (RHA), by imposing landing fees on commercial charters operating out of South Beach Harbor Marina in San Francisco Bay. The district court concluded that Congress did not intend the RHA to restrict the type of fees defendants imposed. We affirm the district court's order dismissing Lil' Man's RHA claim on alternate grounds: we see no indication that Congress intended to create a private right of action in § 5(b)(2).

I

Lil' Man is a commercial charter business that provides transportation and hospitality services in San Francisco Bay. Lil' Man uses South Beach Harbor as a base for its commercial enterprises. Defendants are the City and County of San Francisco; the San Francisco Port Commission; Port officials Elaine Forbes, Peter Daley, and Jeff Bauer; and Harbormaster Joe Monroe. Together, the defendants own, operate, and regulate the Port of San Francisco and the South Beach Harbor.

Until 2016, Lil' Man paid a landing fee of $80 per docking to load and unload passengers at the South Beach Harbor. In 2016, defendants increased

the landing fee to $110 and asked Lil' Man and all other commercial vessels to sign a Landing Agreement that altered the terms of the contract for using the marina. In addition to increasing the landing fee, the Landing Agreement required a "gross revenue fee" that applied only in months the vessel docked at the port. The gross revenue fee was to be 7% of the user's monthly gross revenues, in any month that 7% of the user's gross revenues exceeded the user's monthly landing fees.[1] Lil' Man refused to sign the Landing Agreement but twice paid the gross revenue fee for charters booked prior to implementation of the Agreement.

Lil' Man brought suit in the Northern District of California pursuant to 42 U.S.C. § 1983, alleging the Landing Agreement violated the Tonnage Clause, the dormant Commerce Clause, the First Amendment, and § 5(b) of the RHA, 33 U.S.C. § 5(b). Though Lil' Man's complaint did not specify a particular sub-section of § 5(b), it expressly incorporated the language of § 5(b)(2). Specifically, the complaint alleged the new fees violated the RHA because they were "not reasonable and [were] not charged on a fair and equitable basis;" were "used for purposes other than to pay for the cost of services" to vessels; did not "enhance the safety and efficiency of interstate commerce;" and "impose[d] burdens on interstate commerce." 33 U.S.C. § 5(b)(2)(A)-(C). These allegations make plain that Lil' Man's RHA claim is premised on § 5(b)(2), which allows for the

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[1] The gross revenue fee excluded "[s]ums collected for any sales or excise tax imposed directly upon Licensee by any duly constituted governmental authority."

imposition of "reasonable fees charged on a fair and equitable basis."

The First Amendment claim asserted that the Landing Agreement violated Lil' Man's right to petition the government because the Agreement included a provision waiving the right to challenge the fees. The district court granted defendants' motion for judgment on the pleadings with respect to this claim because Lil' Man had not signed the Landing Agreement. After the parties engaged in discovery, they filed cross-motions for summary judgment on Lil' Man's remaining claims.

The district court granted defendants' motion for summary judgment. The court relied on *Asante v. California Department of Health Care Services*, 886 F.3d 795 (9th Cir. 2018), and *American Trucking Ass'ns v. City of Los Angeles*, 569 U.S. 641 (2013), to conclude the Landing Agreement did not violate the dormant Commerce Clause because defendants, through the Port, operated as market participants subject to market pressures, and were therefore "exempt from the dormant Commerce Clause." The court ruled that the landing fees did not violate the Tonnage Clause because the fees were charged in exchange for services provided to vessels and not for general revenue-raising purposes. *See Clyde Mallory Lines v. Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935); *see also Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 10 (2009).

Turning to the RHA claim, the district court concluded that Congress intended § 5(b) "to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel, and to prohibit fees and taxes on a vessel simply because that vessel sails through a

given jurisdiction." The court granted summary judgment to defendants on the § 5(b)(2) claim because it concluded Congress did not intend § 5(b)(2) to apply to the fees imposed by the Landing Agreement. Lil' Man appeals only the dismissal of this claim and an evidentiary ruling excluding former harbor attendant Paul Dima's declaration from consideration at the summary judgment stage.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291.

II

We review de novo a district court's order granting summary judgment. *L.F. ex rel. v. Lake Washington Sch. Dist. #414*, 947 F.3d 621, 625 (9th Cir. 2020). We must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (quoting *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002)). "There is no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion." *West v. State Farm Fire & Cas. Co.*, 868 F.2d 348, 350 (9th Cir. 1989). Questions of statutory interpretation are addressed de novo. *United States v. Northrop Corp.*, 59 F.3d 953, 959 (9th Cir. 1995). We may affirm the district court's order on any basis supported by the record. *McSherry v. City of Long Beach*, 584 F.3d 1129, 1135 (9th Cir. 2009).

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[2] Because we conclude Lil' Man has no private right of action, we do not reach whether the district court properly excluded Dima's declaration from consideration.

III

A

33 U.S.C. § 5, commonly known as the Rivers and Harbors Act of 1884, prohibits tolls and operating charges for vessels passing through any lock, canal, canalized river, "or other work for the use and benefit of navigation" belonging to the United States. *See* 33 U.S.C. § 5, 23 Stat. 147 (July 5, 1884). Section 5 has been modestly amended on several occasions, but it was significantly revised in 2002 in conjunction with amendments to the Maritime Transportation Security Act (MTSA) as part of a comprehensive overhaul of the Merchant Marine Act of 1936. *See* MTSA, Pub. L. No. 107-295, § 101(13), 116 Stat. 2064 (2002); H.R. Rep. No. 108-334, at 180 (2003) (Conf. Rep.). Congress took this step following the September 11, 2001 terrorist attacks on the World Trade Center out of concern that United States ports were vulnerable to security breaches. *See* MTSA, Pub. L. No. 107-295, § 101(6)-(13), 116 Stat. 2064 (2002). Through the MTSA, Congress established a program that balanced the nation's concern for increased port security with the need to ensure the free flow of interstate and foreign commerce. *See id.*

The 2002 amendment modified § 5's prohibition of tolls and operating charges and allowed the imposition of some charges, consistent with Tonnage Clause and Commerce Clause case law. *See* 33 U.S.C. § 5(b). The current version of § 5(b) provides:

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or

> crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for
>
> (1) fees charged under section 2236 of this title;
>
> (2) reasonable fees charged on a fair and equitable basis that–
>
> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and
>
> (C) do not impose more than a small burden on interstate or foreign commerce; or
>
> (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.

33 U.S.C. § 5(b).

As several courts have observed, the 2002 amendment codified Commerce Clause and Tonnage Clause common law.[3] A few courts have considered § 5(b) challenges to fees imposed upon vessels,[4] but we are

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[3] *See, e.g., Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F. Supp. 2d 81, 102 (D. Conn. 2008), *aff'd*, 567 F.3d 79 (2d Cir. 2009); *State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1222 (Alaska 2010).

[4] *See, e.g., Bridgeport*, 566 F. Supp. 2d at 102; *Alaska Riverways, Inc.*, 232 P.3d at 1222; *City of Chicago Through Dep't of Fin. v. Wendella Sightseeing, Inc.*, 143 N.E.3d 771, 777-78 (Ill. App. Ct.

aware of just one that has squarely considered whether § 5(b)(2) includes a private right of action. *See Cruise Lines Int'l Ass'n Alaska v. City & Borough of Juneau*, 356 F. Supp. 3d 831, 845-47 (D. Alaska 2018).

In the district court, Lil' Man argued that the fee imposed by the Landing Agreement violates § 5(b)(2) because it was calculated as a percentage of vessels' gross revenues, and not solely to pay for services provided to vessels. Lil' Man further argued that the fees imposed by the Landing Agreement were not imposed on a fair and equitable basis. Defendants urged the district court to dismiss Lil' Man's complaint because § 5(b)(2) does not provide a private right of action, and also argued the new fees were correctly assessed. The district court did not rule on defendants' first argument. Because Lil' Man cannot bring its RHA claim if § 5(b)(2) does not provide a private right of action, we first consider that threshold question. *See Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1169 (9th Cir. 2013). It is an issue of first impression.

B

i

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "Congress may so empower litigants expressly or implicitly." *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir. 2018). If Congress does not provide a private right of action explicitly

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2019), *appeal denied sub nom. City of Chicago v. Wendella Sightseeing, Inc.*, 135 N.E.3d 544 (Ill. 2019).

within a statute's text, we must determine whether Congress implied one. *See Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 929-30 (9th Cir. 2010).

The parties agree that § 5(b)(2) does not expressly provide a private right of action, so we consider the statute's language, structure, context, and legislative history to determine whether a private right of action is implied. *Logan*, 722 F.3d at 1170. "[C]lear and unambiguous terms" are "required for Congress to create new rights enforceable under an implied private right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

The Supreme Court initially identified four factors relevant to determining whether a statute contains an implied private right of action: "(1) whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted'; (2) whether there is 'any indication of legislative intent, explicit or implicit, either to create [a private right of action] or to deny one'; (3) whether an implied private cause of action for the plaintiff is 'consistent with the underlying purposes of the legislative scheme'; and (4) whether the cause of action is 'one traditionally relegated to state law.'" *Logan*, 722 F.3d at 1170 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Since announcing this test, "the Supreme Court has elevated intent into a supreme factor," and *Cort*'s other three factors are used to decipher congressional intent. *Id.* at 1171.

ii

To determine whether Lil' Man is one of a class "for whose especial benefit the statute was enacted," we examine § 5(b)(2)'s text and look for "rights-creating language." *See Sandoval*, 532 U.S. at 288-89. "Statutes

that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Id.* at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)). The Supreme Court has explained that "[t]he question is not simply who would benefit from [an] Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Sierra Club*, 451 U.S. at 294.

In *Sandoval*, the Supreme Court considered whether § 602 of the Civil Rights Act, 42 U.S.C. § 2000d-1, created a private cause of action. 532 U.S. at 288-89. The Court compared § 602 to § 601 and cited its decision in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), where the Court had previously recognized that § 601 does create a private right of action. *See Sandoval*, 532 U.S. at 288–89 (quoting *Cannon*, 441 U.S. at 690-1). *Sandoval* explained that the clear focus of § 601 is protecting a class of beneficiaries from discrimination because its text expressly mandates that "[n]o person . . . shall . . . be subjected to discrimination." *Id.* at 288-89 (quoting 42 U.S.C. § 2000d). In contrast, § 602 authorizes federal agencies "to effectuate" § 601 "by issuing rules, regulations, or orders. . . . " *See id.* at 278 (quoting 42 U.S.C. § 2000d-1). The Court observed that the "rights-creating language so critical to the Court's analysis in *Cannon*" is completely absent from § 602, and held that § 602 does not include an implied right of action. *Id.* at 289-90, 293 (internal quotation marks omitted).

We addressed another statute that lacks rights-creating language, the Investment Company Act of 1940, in *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d at 698-99. One section of that statute dictated

"[n]o investment company" shall "engage in any business in interstate commerce" unless it registers with the Securities and Exchange Commission. 15 U.S.C. § 80a-7(a)(4). Because the statute's aim was to regulate the conduct of investment companies, we held it did not create a private right of action. *UFCW*, 895 F.3d at 699 (citing *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 615 F.3d 1106, 1115-16 (9th Cir. 2010)). We explained that a separate section of the statute, which directed the SEC to take certain actions, was "yet a step further removed from having rights-creating language" because it "focuse[d] neither on the individuals protected nor even on the [parties] being regulated, but on the agenc[ies] that will do the regulating." *Id.* (citing *Sandoval*, 532 U.S. at 289, and 15 U.S.C. § 80a-3(b)(2)) (internal quotation marks omitted). Thus, the statutory language in *UFCW* "doom[ed] any suggestion that Congress intended to create a private right." *Id.*

A statute must also display an intent to create a private remedy in order to create an implied right of action. We have previously recognized the Supreme Court's direction that "[w]ithout evidence of a congressional intent to create both a private right and a private remedy, a private right of action 'does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *UFCW*, 895 F.3d at 699 (quoting *Sandoval*, 532 U.S. at 286-87)). General language or reference to a statute's remedial purpose is not enough to suggest congressional intent to create a remedy; something more is required. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (observing that even a statute intended to protect a class of beneficiaries does not require the conclusion

that Congress intended to imply a private cause of action for damages). The absence of remedial language is a key clue that Congress did not intend to imply a private right of action. *Id.*

We examined these concepts thoroughly in *Logan v. U.S. Bank National Ass'n*, 722 F.3d at 1169-73. In that case, we concluded that the Protecting Tenants at Foreclosure Act (PTFA) does not include a private right of action. *Logan* first observed that, by its terms, the PTFA is aimed at "the regulated party" and is "framed in terms of the obligations imposed on the regulated party . . . while the [tenant] is referenced only as an object of that obligation." *Id.* at 1171. This language indicates that Congress's aim was regulating foreclosure procedures, rather than providing a benefit to tenants. *Id.* We explained that "[s]tatutes containing general proscriptions of activities or focusing on the regulated party rather than the class of beneficiaries whose welfare Congress intended to further do not indicate an intent to provide for private rights of action." *Id.* (citation and internal quotation marks and alteration omitted).

As in *Logan*, nothing in the text or structure of § 5(b)(2) reflects a clear and unambiguous intent to create a private right of action. *Id.* at 1171. To begin, § 5(b)(2) lacks rights-creating language. The statute prohibits non-federal entities from imposing fees or other charges (the obligation) and refers to vessels "only as an object of that obligation." *Id.*; *see also* 33 U.S.C. § 5(b) ("No . . . fees . . . shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest.. . . "). This distinguishes § 5(b)(2) from statutes that target a class of beneficiaries as their subject. *See*

Cannon, 441 U.S. at 689-90. Section 5(b)(2)'s imposition of an express prohibition on the conduct of non-federal entities—a command we have already held lacks rights-creating language—strongly suggests that § 5(b)(2) is "the kind of general ban" that carries no implied intent "to confer rights on a particular class of persons." *Sierra Club*, 451 U.S. at 294; *UFCW*, 895 F.3d at 699 (citing *Northstar*, 615 F.3d at 1109-10); *see Logan*, 722 F.3d at 1171.

The absence of an expressly identified remedy in § 5(b)(2) also presents a significant textual clue that Congress did not intend to confer private rights. *See Sierra Club*, 451 U.S. at 294-98. "[E]ven where a statute is phrased in [] explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" *Gonzaga*, 536 U.S. at 284 (quoting *Sandoval*, 532 U.S. at 286) (emphasis omitted). Section 5(b)(2) does not include any remedial language; rather, it limits the ability of non-federal interests to impose fees on vessels, their passengers, and crews in federally controlled navigable waters. We see no indication that Congress intended § 5(b)(2) to confer an individual benefit upon vessels. Rather, the benefit they receive appears to be ancillary to the statute's goals. *See Sierra Club*, 451 U.S. at 297-98.

iii

Cort also instructs that we may consider legislative history if a statute's text or structure is unclear regarding the intent to create a right of action, or the legislative history squarely contradicts the statute's text. *See Logan*, 722 F.3d at 1171. We find no

ambiguity, but note that § 5(b)'s legislative history reinforces the conclusion that the statute does not afford a private right of action.

Legislative history from both the original enactment and intervening amendments helps to divine congressional intent. *See id.* at 1172-73. As originally enacted, the RHA generally prohibited non-federal actors from imposing tolls on vessels and their passengers and crews, thereby facilitating free travel from one port to another. *See* 15 Cong. Rec. 5831-32 (July 1, 1884) (observing the need for appropriations "to keep commerce moving upon these waters" by avoiding obstructions in navigable channels); H.R. Rep. No. 1544, at 6 (1884). The 1884 Act provided:

> That no tolls or operating charges whatsoever shall be levied or collected upon any vessel or vessels, dredges, or other passing watercraft through any canal or other work for the improvement of navigation belonging to the United States; and for the purpose of preserving and continuing the use and navigation of said canals, rivers, and other public works. . . the Secretary of War . . . is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said works in repair . . .

23 Stat. 133, 147 (July 5, 1884).

In 1909, Congress amended the statute to add more federally controlled waterways, to expand the meaning of "belonging to the United States," and to allow spending for the purpose of "preserving and continuing the use and navigation of . . . canals and

other public works." *See* 35 Stat. 815 (Mar. 3, 1909). The RHA was not materially amended again until 2002.[5]

The 2002 amendment added exceptions to the RHA's general ban on tolls and taxes, harmonizing the RHA with Tonnage Clause and Commerce Clause common law that allows local entities to charge fees in exchange for services provided to the vessels. *See* 33 U.S.C. § 5. The amendment was intended to "clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel," and "prohibit fees and taxes imposed on a vessel simply because that vessel sails through a given jurisdiction." H.R. Rep. No. 108-334, at 180 (2003) (Conf. Rep.). On the House floor, the Chair of the Transportation and Infrastructure Committee explained that the bill would prevent "local jurisdictions [from] impos[ing] taxes and fees on vessels merely transiting or making innocent passage through navigable waters. . . . " 148 Cong. Rec. E2143-04 (2002).

The district court appears to have relied heavily on the Committee Chair's floor statement when it concluded that Congress did not intend § 5(b) to apply to the type of fees imposed by the Landing Agreement. But the Conference Committee's report, the Chair's floor statement, and the text of the 2002 amendment make clear that in addition to retaining the prohibition against taxing vessels for merely transiting federally controlled waters, Congress also intended to

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[5] A 1947 supplement to the U.S. Code altered "Secretary of War" to "Secretary of the Army," 33 U.S.C. § 5 (Supp. I 1947), and a 1954 supplement repealed a proviso requiring an itemized statement of expenses, 33 U.S.C. § 5 (Supp. II 1954).

permit several exceptions to § 5(b)'s general prohibition, including the imposition of fees for services rendered to vessels that enhance the safety and efficiency of interstate and foreign commerce. *See* § 5(b)(2).

Facilitating commerce was clearly a focus of the 2002 amendment, as reflected by the condition in § 5(b)(2)(C) that any fees may not impose "more than a small burden on interstate or foreign commerce." *See also* MTSA, Pub. L. No. 107-295, § 101(12), 116 Stat. 2064 (2002). And as we have explained, the 2002 amendment brought the RHA in line with Commerce Clause and Tonnage Clause jurisprudence. *See supra.* In all, nothing in the legislative history suggests that Congress contemplated the creation of a separate private right or private remedy in § 5(b)(2).

iv

Cort's third factor looks to whether an implied private right of action is consistent with the underlying purposes of the RHA. *See Cort*, 422 U.S. at 78. Consideration of this factor also suggests that Congress did not intend to imply a private right of action in § 5(b)(2). Congress adopted a number of provisions governing the use, administration, and navigation of the waters of the United States in Title 33, and § 5(b) is part of this complex regulatory scheme. *See Sierra Club*, 451 U.S. at 289, 297-98 (addressing the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 408 (1982) (Powell, J., dissenting) (observing "modern federal regulatory statutes tend to be exceedingly complex" and suggesting the Court should be wary of inferring private rights of action). Because the free movement

of commerce and national security are interests historically safeguarded by the federal government, the absence of an implied right of action in § 5(b)(2) is consistent with the overall statutory scheme.[6]

The last *Cort* factor asks us to consider whether the cause of action is traditionally relegated to state law. *Cort*, 422 U.S. at 78. The types of fees at issue here are sometimes challenged pursuant to state law and sometimes challenged pursuant to federal law. *See, e.g.*, *Bridgeport*, 566 F. Supp. 2d at 96-105 (analyzing plaintiffs' claims that passenger fees violated both federal and state law). This factor does not materially

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[6] The existence of another provision in the statutory scheme that expressly creates a private right of action supports this conclusion. Section 5(b)(1) permits non-federal interests to impose fees on vessels pursuant to 33 U.S.C. § 2236, part of the Water Resources Development Act of 1986. *See* Pub. L. No. 99-662, § 208, 100 Stat. 4082. That statute allows the imposition of port or harbor dues to finance harbor navigation projects such as removing obstructions to navigation or widening channels for vessel transit. *See* 33 U.S.C. § 2236(a)(1)-(3). Section 2236 includes an express private right of action for any party aggrieved by the imposition of such fees. *Id.* § 2236(b)(2). Lil' Man does not allege that defendants violated § 5(b)(1) or § 2236. Nor do the parties allege that defendants followed § 2236's procedural steps, including notice and a hearing, before imposing the fees, and Lil' Man does not allege that it filed its complaint within the 180-day window that § 2236 provides. *Id.* § 2236(a)(5), (b)(2). Instead, Lil' Man's complaint explicitly uses the language of § 5(b)(2), which makes no comparable allowance for private claims. We conclude it is "highly improbable that Congress absentmindedly forgot to mention an intended private action" in § 5(b)(2) when it simultaneously incorporated § 2236's private right of action into § 5(b)(1). *Logan*, 722 F.3d at 1170-71 (quoting *Transamerica Mortg. Advisors*, 444 U.S. at 20); *see, e.g.*, *Sandoval*, 532 U.S. at 288-89 (finding no private right of action to enforce § 602 of Title VI of Civil Rights Act).

affect our analysis given the weight of the other factors. *See Sierra Club*, 451 U.S. at 297 ("Here consideration of the first two *Cort* factors is dispositive.").

v

Lil' Man contends that a private right of action to enforce § 5(b)(2) must be implied because private charters benefit from the RHA's prohibition on local authorities imposing unreasonable fees on vessels that call at their ports. Lil' Man argues that if it cannot bring suit to enforce § 5(b)(2)'s provisions, no one can, and it urges that § 5(b)(2) must not be left without any enforcement mechanism. We are not persuaded.

First, to the extent Lil' Man argues it cannot vindicate its rights if § 5(b)(2) does not include a private right of action, Lil' Man overlooks that the reasonableness of the Landing Agreement is subject to challenge pursuant to the Tonnage Clause. *See Cruise Lines Int'l*, 356 F. Supp. 3d at 852-53 (considering challenge brought pursuant to the Tonnage Clause to passenger fees imposed upon vessels by non-federal authority); *see also San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1095-96 (9th Cir. 2005) (explaining that alternate avenue for litigation, via Administrative Procedure Act, weighed against finding private right of action).

Second, even if there were no alternative mechanism for private enforcement, this alone would not require us to infer a private right of action. In *California v. Sierra Club*, the Supreme Court construed § 10 of the Rivers and Harbors Appropriation Act of 1899 and determined that it does not include an implied private right of action. 451 U.S. at 292-98.

Plaintiffs in *Sierra Club* sought to prevent the State of California from constructing water storage and diversion facilities. *Id.* at 290-91. The statute at issue in *Sierra Club* prohibited "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. . . . " *Id.* (quoting 33 U.S.C. § 403). The Supreme Court reasoned "Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways," and observed that the statute benefits the public at large because it empowers "the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures." *Id.* at 295-96.

The lack of any private enforcement mechanism did not require an alternate conclusion in *Sierra Club*, nor does it here. *See id.* at 297-98; *Three Rivers Ctr. for Indep. Living, Inc. v. Hous. Auth. of City of Pittsburgh*, 382 F.3d 412, 420 (3d Cir. 2004) (explaining "[s]ome statutes create rights in individuals that are only enforceable by agencies . . . or not enforceable at all").[7]

---

[7] Lil' Man argues that the subject landing fee is per se invalid because it is calculated as 7% of a vessel's gross revenue and the plain text of § 5(b)(2) only permits docking fees that are *solely* related to services rendered to vessels. We do not reach the reasonableness of the fees under § 5(b)(2) because we conclude § 5(b)(2) does not include an implied right of action. Whether the landing fees violate the Tonnage Clause is a question beyond the scope of this appeal because Lil' Man did not appeal the dismissal of its Tonnage Clause claim.

C

We are aware of just one case, *Cruise Lines International*, 356 F. Supp. 3d at 845-47, in which a federal court has directly addressed whether Congress implied a private right of action in § 5(b)(2).[8] In *Cruise Lines*, a trade organization challenged passenger fees imposed by the City of Juneau to fund municipal departments performing services for passengers, projects and services for Juneau's tourist-laden downtown area, and waterfront capital projects. *Id.* at 837-39. The district court ruled that Congress could not have intended to preclude a private right of action in § 5(b)(2) because Congress crafted the 2002 amendment to mirror federal case law that developed pursuant to the Commerce Clause and Tonnage Clause. *Id.* at 845-47. Reasoning that private plaintiffs had been allowed to enforce the limitations imposed by the Tonnage Clause, the court decided that Congress must have intended to allow private plaintiffs to enforce the same restrictions pursuant to § 5(b)(2). *Id.* at 847 ("Because private plaintiffs have been able to enforce the prohibitions of the Tonnage Clause in courts, Congress must have intended that private plaintiffs would be able to enforce these same prohibitions under Section 5(b) of the RHAA."). We agree with the court's conclusion that Congress intended the 2002 amendment to codify common law that had developed pursuant to the Tonnage Clause and Commerce Clause since the RHA was enacted, but we are obliged

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[8] *Bridgeport* questioned whether a private right of action is implied in § 5(b) but it did not resolve the question because the court concluded the challenged passenger fee violated the Tonnage Clause. 566 F. Supp. 2d at 102-03 ("It is not clear to the Court . . . whether there is a private right of action under the statute.").

to apply *Cort* to determine whether Congress intended to create a private right of action in § 5(b)(2). Having done so, we conclude the amendment was not enacted for the purpose of conferring a benefit on vessels. Rather than including rights-creating language, § 5(b) limits the conduct of non-federal entities for the benefit of the public at large. *See Sierra Club*, 451 U.S. at 298.

We find no indication that Congress intended to create an implied private right of action in § 5(b)(2). Accordingly, we conclude the district court did not err by granting summary judgment on Lil' Man's § 5(b)(2) claim.

AFFIRMED.

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (DECEMBER 17, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIL' MAN IN THE BOAT, INC.,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants.

Case No. 17-cv-00904-JST

Re: ECF No. 127

Before: Jon S. TIGAR,
United States District Judge.

On November 26, 2019, this Court entered an Order Denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment. ECF No. 127. Defendants moved for summary judgment on the Tonnage Clause, the Commerce Clause, and the Rivers and Harbors Act. The alleged violations of those laws formed the basis of each of Plaintiff's remaining claims for: (1) the Civil Rights Act, 42 U.S.C. § 1983; (2) Declaratory and Injunctive

Relief; and (3) Unjust Enrichment. This Court found in Defendants' favor on its cross-motion for summary judgment. As a result, this action, including each of Plaintiff's claims, is dismissed on the merits.

NOW, THEREFORE, THE COURT HEREBY ORDERS that judgment shall be entered in favor of Defendants the City and County of San Francisco and San Francisco Port Commission, operating under the title Port of San Francisco, and against Plaintiff Lil' Man in the Boat. Costs are awarded to Defendants as the prevailing party.

IT IS SO ORDERED.

/s/ Jon S. Tigar
United States District Judge

Dated: December 17, 2019

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (NOVEMBER 26, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIL' MAN IN THE BOAT, INC.,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants.

Case No. 17-cv-00904-JST

Re: ECF No. 90; 94; 115

Before: Jon S. TIGAR,
United States District Judge.

Before the Court are cross-motions for summary judgment filed by Plaintiff Lil' Man In The Boat, Inc. and Defendants City and County of San Francisco and San Francisco Port Commission. ECF Nos. 90, 94. The Court will deny Plaintiff's motion and grant Defendants' cross-motion.

I. Background

A. Undisputed Facts

Plaintiff Lil' Man In The Boat, Inc. "owns and operates a licensed commercial charter Motor Vessel 'Just Dreaming' . . . that provides transportation and hospitality services on the San Francisco Bay." ECF No. 33 ¶ 1; ECF No. 90-1 ¶ 2. Between 2006 and 2017, Plaintiff "operate[d] within the jurisdiction of the Port of San Francisco" and "load[ed] and unload[ed] its passengers at the North Side Dock of Pier 40's South Beach Harbor." ECF No. 33 ¶¶ 1, 32.

South Beach Harbor Marina ("SBH") "was built in 1986 by the San Francisco Redevelopment Agency ("SFRA")." ECF No. 99 ¶ 4. In February 2012, the State of California "dissolved the state redevelopment agencies, including SFRA." *Id.* ¶ 5. "Thereafter, SFRA's successor agency–the Office of Community Investment and Infrastructure ("OCII")–assumed ownership of the developments at SBH." *Id*. The Port of San Francisco ("Port") assumed management responsibilities for SBH in 2012. *Id.* ¶ 6. In 2019, OCII transferred ownership of SBH to the Port. *Id.* ¶ 7. "The Port is a self-sustaining enterprise agency of the City and County of San Francisco." *Id.* ¶ 3.

Prior to 2016, SBH charged an $80 landing fee ($80 for picking up passengers and $80 for returning to drop them off) for commercial vessels to dock at the North Side Dock of SBH. ECF No. 90-1 ¶ 5; ECF No. 97 ¶ 15. In 2016, SBH introduced a new "Landing Agreement" for all commercial charter operators who wished to land at the harbor. ECF No. 90-1 1 5; ECF No. 97 1 15. The agreement increased landing fees to $110 per landing ($110 for picking up passengers and

$110 for returning to drop them off). ECF No. 90-1 ¶ 5; ECF No. 97 ¶ 15. The Landing Agreement also gave the Port the right to increase the required fees "at any time," and "impose[d] a supplemental 7% Gross Revenue Fee." ECF No. 33 ¶¶ 32, 39, 40; ECF No. 90-1 ¶ 5; ECF No. 97 ¶ 15. The gross revenue fee "requires the commercial vessel operator to pay 7% percent [sic] of its monthly gross revenues in any month when (i) the 7% percent [sic] fee for such calendar month exceeds the (ii) base landing fee for such calendar month." ECF No. 33 ¶ 40; ECF No. 97 ¶ 15.

Plaintiff raised "a number of concerns" about the Landing Agreement and then refused to sign it on or around January 2017. ECF No. 90-1 ¶ 6. Shortly thereafter, Plaintiff "was told by [SBH] Staff that Just Dreaming could not use the North Dock at Pier 40 for commercial landings because it had not signed the '2016 Landing Rights Agreement.'" *Id.* Plaintiff paid the 7% gross revenue fee on two occasions in 2017 to conduct charters that had been reserved "before Defendants prohibited Plaintiffs from using the Port." ECF No. 33 ¶ 17; *see also id.* ¶ 49 ("Plaintiff and others refused to sign the 2016 Landing Agreement, but have been forced to pay Defendants' illegal 7% Gross Revenue Fee as of January 2017 for charters that had been reserved before Defendants' final November 2016 orders.").

B. Procedural Background

On February 22, 2017 Plaintiff filed this action against the City and County of San Francisco ("City"), the San Francisco Port Commission, Elaine Forbes, Peter Daley, Jeff Bauer, and Joe Monroe. ECF No. 1.

Plaintiff's operative First Amended Complaint ("FAC") alleges three claims relating to the Landing Agreement. ECF No. 33 ¶¶ 58-96. First, Plaintiff brings a claim for violation of 42 U.S.C. § 1983 based on violations of the Tonnage Clause, the Commerce Clause, the First Amendment, and the Rivers & Harbors Act. *Id.* ¶¶ 58-84. Second, Plaintiff brings a claim entitled "Declaratory and Injunctive Relief," although the body of the complaint seeks declaratory relief only. *Id.* ¶¶ 85-89. Third, Plaintiff brings a claim for unjust enrichment. *Id.* ¶¶ 90-96. The FAC requests compensatory damages, punitive damages, costs of suit, and attorney's fees. *Id.* at 26-27.

On February 22, 2018, Defendants filed a motion for judgment on the pleadings with respect to Plaintiff's claims based on the First Amendment and California Business and Professions Code section 23300. ECF No. 40. The Court granted the motion and dismissed these claims with prejudice. ECF No. 49 at 12. On October 4, 2018, Plaintiff filed a motion to certify two classes of commercial vessel operators: (1) vessels who were asked to sign the 2016 Landing Agreement and (2) vessels that paid fees pursuant to that agreement. ECF No. 50 at 5. The Court denied the motion. ECF No. 66. On October 9, 2019, Defendants filed a motion for judgment on the pleadings, seeking to dismiss four Defendants from this action. ECF No. 106. The Court granted the motion and dismissed Defendants "Ms. Forbes, Mr. Dailey, Mr. Bauer, and Mr. Monroe" from this action. ECF No. 125 at 8.

On August 22, 2019, Plaintiff filed a motion for summary judgment with respect to its Tonnage Clause and Rivers and Harbors Act claims. ECF No. 90. Defendants then filed a cross-motion, which seeks

summary judgment on Plaintiff's claims under the Tonnage Clause, the Rivers and Harbors Act, and the Commerce Clause. ECF No. 94. The Court now considers Plaintiff's and Defendants' motions for summary judgment.

II. Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

III. Evidentiary Issues

Defendants have filed a motion to exclude evidence pursuant to Federal Rule of Civil Procedure 37(C)(1). ECF No. 115. Defendants object to the declaration of Paul Dima because Plaintiff "failed to disclose that it would be using and relying on evidence from Mr. Dima" until "after the closure of fact discovery." ECF No. 115 at 3; ECF No. 116 ¶¶ 2-4; *see* Fed. R. Civ. P. 26(a). Plaintiff responds that it was unaware that Dima had discoverable information on the date of its Rule 26 disclosures and Dima's written testimony was offered solely for "impeachment." ECF No. 118 at 3-5.

Federal Rule of Civil Procedure 26(a)(1)(i) requires a party to include with its initial disclosures "(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Rule 26(e) in turn requires that "[a] party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response" in a timely manner or as ordered by the court. Federal Rule of Civil Procedure 37(c)(1) provides:

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." In addition to, or instead of that sanction, the court may also impose any of the other appropriate sanctions provided for in Rule 37. Fed. R. Civ. P. 37(c)(1)(C). The Advisory Committee Notes to the 1993 amendments to Rule 37 describe subsection (c)(1) as a "self-executing," "automatic" sanction to "provide[] a strong inducement for disclosure of material" that must be disclosed pursuant to Rule 26. Rule 37(c)(1) sanctions based on failure to disclose evidence in a timely manner may be appropriate "even when a litigant's entire cause of action or defense" will be precluded. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001).

"The party facing sanctions bears the burden of proving that its failure to disclose the required information was substantially justified or is harmless." *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012). However, "[d]isruption to the schedule of the court and other parties . . . is not harmless." *Wong v. Regents of Univ. of California,* 410 F.3d 1052, 1062 (9th Cir. 2005). The Court is not required to find willfulness or bad faith before imposing the sanction of exclusion. *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008).[1]

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[1] In *Wendt v. Host International, Inc.,* 125 F.3d 806, 814 (9th Cir. 1997), the Ninth Circuit identified several factors that the court may consider in deciding whether to impose Rule 37(c)(1)'s exclusion sanction. Those factors include (1) the public's interest in expeditious resolution of litigation; (2) the court's need to

Here, the Court finds that Plaintiff's late disclosure was not substantially justified. Plaintiff's owner was aware of Dima during the pendency of the case and attempted to contact him to obtain case-related information. *See* ECF No. 118-1 ¶ 5. That alone may have been sufficient to trigger Plaintiff's obligation of disclosure under Rule 26, which requires disclosure of the name of each individual "likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). Even if it was reasonable for Plaintiff to have waited until it developed further information from Dima to disclose Dima's identity, however, the law requires a party to pursue discovery diligently *before* the discovery cut-off. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 (9th Cir. 2006). Accordingly, a court may properly reject the late disclosure of evidence that would have been timely discovered if the disclosing party had been more diligent. *See Ratcliff v. City of Red Lodge*, No. CV 12-79-BLG-DWM-JCL, 2013 WL 5817210, at *3 (D. Mont. Oct. 29, 2013) ("Ratcliff's prior counsel was simply not diligent in meeting the expert disclosure deadline."); *Wolde-*

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manage its docket; (3) the risk of prejudice to the other parties; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See also Holen v. Jozic*, No. C17-1147JLR, 2018 WL 5761775, at *2 (W.D. Wash. Nov. 2, 2018) ("To determine whether a late disclosure was substantially justified or harmless, courts consider (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." (citing *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010)). The parties do not discuss these factors in their papers and so the Court does not address them.

Giorgis v. Christiansen, 438 F. Supp. 2d 1076, 1078 (D. Ariz. 2006), *aff'd*, 307 F. App'x 67 (9th Cir. 2009) ("Even assuming for the sake of this argument that Plaintiff never received the attachment to Defendants' response to Plaintiff's interrogatories, this omission if it occurred was obvious and Plaintiff should have exercised reasonable diligence to obtain the omitted material."); *see also Leland v. Cty. of Yavapai*, No. CV178159PC TSPLDMF, 2019 WL 1547016, at *4 (D. Ariz. Mar. 18, 2019), *report and recommendation adopted*, No. CV-17-08159-PCT-SPL, 2019 WL 1531875 (D. Ariz. Apr. 9, 2019).

Nor is the Court persuaded by Plaintiff's argument that Dima's testimony was offered solely for "impeachment." Plaintiff is correct that

> [e]vidence which would be used solely as impeachment is excluded from the rule, but that requires the Court to determine when evidence is being used for that sole purpose. Case law holds that evidence material to the substance of the case—evidence that would tend to prove the truth of a matter to be determined by the jury— must be disclosed even if it could also be considered impeaching with respect to some aspect of a witness's testimony."

Norwood v. Children & Youth Servs. Inc., No. CV107944GAFMANX, 2013 WL 12133879, at *4 (C.D. Cal. Dec. 3, 2013) (emphasis in original) (citations omitted). As the *Norwood* court explains, "[s]ubstantive evidence is that which is offered to establish the truth of a matter to be determined by the trier of fact." *Id.* (citing *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993)). By contrast, "impeachment

evidence is offered to discredit a witness and reduce the effectiveness of her testimony." *Id.* (citing *Chiasson*, 988 F.2d at 517). Here, Dima's declaration offered extensive testimony concerning the operation and management of South Beach Harbor and the landing facility at issue in this litigation. It was, without question, substantive. Accordingly, Plaintiff was bound to disclose it earlier.

The Court also finds that Plaintiff's late disclosure of Dima was not harmless. "A late disclosure is not considered harmless if the late disclosure would deprive a party of the opportunity to conduct its own discovery or to take the deposition of a witness." *Schwartz v. Clark Cty., Nevada*, No. 213CV709JC MVCF, 2018 WL 1627806, at *3 (D. Nev. Apr. 4, 2018); *Medina v. Multaler, Inc.*, 547 F. Supp. 2d 1099, 1106 (C.D. Cal. 2007) ("Medina's failure to disclose Hannaway as a likely witness before defendants' summary judgment motion was filed prejudiced defendants by depriving them of an opportunity to depose him."). Defendants were deprived of the opportunity to take Dima's deposition before the close of discovery and were forced to confront his testimony for the first time on summary judgment.

Accordingly, the Court will grant the motion and exclude Dima's declaration.[2]

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[2] The Court notes that although this evidence will be excluded, that fact does not affect the outcome of these motions. As set forth below, because the City's landing fee qualifies as a service fee, the facts contained in the Dima declaration are not relevant to the Court's analysis. *See* note 2, *infra.*

IV. Legal Standard

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if there is sufficient evidence for a reasonable trier of fact to resolve the issue in the nonmovant's favor, and a fact is material only if it might affect the outcome of the case. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)). The court must draw all reasonable inferences in the light most favorable to the nonmoving party. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1018 (9th Cir. 2010).

Where the party moving for summary judgment would bear the burden of proof at trial, that party "has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that party "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party satisfies its initial burden of production, the nonmoving party must produce admissible evidence to show that a genuine issue of material fact exists. *Id.* at 1102-03. The nonmoving party must "identify with reasonable particularity the evidence

that precludes summary judgment." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996). It is not the duty of the district court to "to scour the record in search of a genuine issue of triable fact." *Id.* "A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (citation and internal quotation marks omitted). If the nonmoving party fails to make this showing, the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

V. Discussion

A. Commerce Clause

1. Legal Standard

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations and among the several states." U.S. Const. Art. I, § 8. "Although the Commerce Clause is by its text an affirmative grant of power," it "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development*, 467 U.S. 82, 87 (1984). Modern dormant Commerce Clause jurisprudence is primarily driven by concern about regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). The principal objects of dormant Commerce Clause scrutiny are state or local

statutes and regulations that discriminate against interstate commerce. *See CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87-88 (1987); *Harris*, 682 F.3d at 1148; *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor and Terminal Dist.*, 874 F.2d 1018, 1021 (5th Cir. 1989) ("The commerce clause prevents state and local regulations that promote parochial interests by discriminating against interstate commerce.").

When a state or municipality "act[s] as a market participant, rather than a market regulator, its decisions are exempted from the dormant Commerce Clause." *Asante v. California Dept. of Health and Servs.*, 886 F.3d 795, 800 (9th Cir. 2018) (citing *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008)). This distinction recognizes that '[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.' *Id.* (quoting *Reeves Inc. v. Stake*, 447 U.S. 429, 437 (1980)). "An activity is exempt under the market participant exception if it is a 'proprietary rather than regulatory activity' that may be 'analogized to the activity of' a private entity." *Id.* 800-01 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277-78 (1988)). The exemption does not apply, however, when "a state has absolute monopoly over a resource and uses that monopoly to interfere with interstate commerce." *Id.* at 802.

2. Discussion

Plaintiff alleges that SBH's landing fees violate the dormant Commerce Clause by "impos[ing] burdens on commercial vessels operating in interstate commerce that far exceed those imposed on non-commercial vessels." ECF No. 33 at 22. Defendants argue that they

are entitled to summary judgment because the Commerce Clause does not apply to SBH's landing fees and, if it does apply, the fees neither discriminate against nor impose substantial burdens on interstate commerce. ECF No. 94 at 11-18. The Court will grant Defendants' motion because the Port is a market participant exempt from the dormant Commerce Clause.

The Port acts as a market participant by selling landing services at SBH in exchange for the price and terms established in its Landing Agreement. "[P]rivately and publicly managed harbors across the San Francisco Bay Area charge landing fees for use of their facilities." ECF No. 97 ¶ 19; *see* ECF No. 33-4 at 30; ECF No. 95-2 at 12-13. SBH "competes for business with numerous harbors and docks in the Bay Area." ECF No. 94 at 13; *see* ECF No. 97 ¶¶ 19-25; ECF No. 95-2 at 8-10. Therefore, SBH's landing fees are "subject to market pressures and conditions," influenced by the fees charged by competing harbors in the region and the expenses associated with maintaining SBH. *See Asante*, 886 F.3d at 801 (Department of Health Care Services subject to market pressure to set payment rates sufficient to attract qualified providers); ECF No. 97 ¶ 12, 13, 20. By setting landing fees based on these market conditions, the Port "act[s] as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic." *Am. Trucking Ass'ns, Inc. v. City of Los. Angeles, Cal.*, 569 U.S. 641, 651 (2013); *see Airline Serv. Ass'n v. Los Angeles World Airports*, 873 F.3d 1074, 1079 (9th Cir. 2017) ("When a state or local government buys services or manages property as a private party would, it acts as a 'market participant,' not as a regulator.").

Plaintiff argues that the market-participant exception does not apply because Defendants control both "SBH and the coastline of San Francisco and thus have a monopoly over the market." ECF No. 109 at 24. *See Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340, 1343 (9th Cir. 1984) (finding that the market-participant exception did not apply where Defendants had "a complete monopoly over the sites used" by plaintiff, there was "no other competitor" to which plaintiffs could go, and plaintiffs had "no choice" but to renew their leases with defendants). In support, Plaintiff cites several of Defendants' declarations which: (1) describe the history of SBH; (2) state that "the Port pays for its expenses through its own revenue sources;" (3) identify "a privately-managed marina ["Marina"] in San Francisco which operates pursuant to a long-term lease" with the City; and (4) state that "the City has not taken any actions to influence whether Pier 39 LP allows Plaintiff (or any other vessel) to use the Marina or under what conditions." *See* ECF No. 109 at 24 n. 98; ECF No. 96 ¶ 2; ECF No. 97 ¶¶ 2-6; ECF No. 99 ¶¶ 1-7. These declarations provide no support for Plaintiff's argument. Instead, they bolster Defendants' assertion that the Port operates as a market participant.

Plaintiff also cites a declaration from Lawrence Murray, President of Lil' Man In The Boat, Inc. ECF No. 109 at 24 n. 99; ECF No. 90-1 ¶¶ 6-7. Murray states that "[a]ccording to the City's web site, it controls all the landings in San Francisco, other than the Presidio and Hunter's point." ECF No. 90-1 ¶ 7. Murray also claims that, "[a]ccording to the Rules promulgated by the San Francisco Port Commission, they exert control over all of the docks and piers of San

Francisco from the Presidio to Hunter's Point, including Pier 39." *Id.* Plaintiff, however, fails to identify any particular language from the website and/or Rules which support these assertions. Even assuming generously that Murray has a sufficient foundation of personal knowledge from which to make these statements–*i.e.*, that he has reviewed the materials on which the statements are purportedly based–they are insufficient to defeat Defendant's "properly supported motion for summary judgment." *See Summers*, 127 F.3d at 1152 ("[A] mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some "significant probative evidence tending to support the complaint."). Because there is no genuine dispute of fact regarding whether the Port acts as a market participant exempt from the dormant Commerce Clause, Defendants are entitled to summary judgment.

B. Tonnage Clause

1. Legal Standard

The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art. 1, § 10, cl. 3. The clause prohibits "all taxes and duties regardless of their name or form, . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. State of Alabama ex rel State Docks Comm'n*, 296 U.S. 261, 265-66 (1935). "But it does not extend to charges made by state authority, . . . for services rendered to and enjoyed by the vessel." *Id.* at 266. Charges for "services rendered or for conveniences provided [are] in no sense a tax or a duty."

Keokuk N. Line Packet Co. v. City of Keokuk, 95 U.S. 80, 84-85, (1877).

A state or municipality "may not escape the Tonnage Clause's reach merely by labeling a tax as a charge for services." *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, 805 F.3d 98, 107 (3d Cir. 2015) (citing *Keokuk*, 95 U.S. at 86). Regardless of its label, a fee qualifies as a tax subject to the Tonnage Clause if it is exacted for general, revenue-raising purposes that do "not contemplate any beneficial service for . . . vessels subjected" to the fee. *In re State Tonnage Tax Cases*, 79 U.S. 204, 220 (1870); *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. 1, 10 (2009) (finding that defendant could not "escape application of the Clause by claiming that the ordinance imposes, not a duty or tax, but a fee or a charge for 'services rendered' to a 'vessel'").

2. Discussion

Plaintiff argues that it is entitled to summary judgment on its Tonnage Clause claim because Defendants impose landing fees "for general revenue-raising purposes used for projects that do not benefit those paying the fees." ECF No. 90 at 7. Defendants respond that the Tonnage Clause does not apply because the Port "charg[es] vessels in a proprietary capacity . . . for services provided." ECF No. 94 at 19.

There is no dispute of fact that SBH provides services to charter vessels in exchange for its landing fees. In addition to providing a dock at which vessels may conveniently "load and unload" their passengers, charter vessels "have access to and/or benefit from the full amenities of SBH," such as its walkways and restroom facilities. ECF No. 33 ¶¶ 1, 32; ECF No. 101

¶ 6. Vessels also benefit from "the work of staff members available to assist charter customers," "security and lighting provided at SBH, and the cleanliness of SBH." *Id.* The nominal basis for the fees charged by SBH (use of docks, walkways, restrooms, security, lighting, etc.) is sufficient to render SBH's landing fees a charge for services.[3] Keokuk, 95 U.S. at 84-85 ("Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service."); *Barber v. State of Hawai'i*, 42 F.3d 1185, 1196 (9th Cir. 1994) ("[T]he nominal basis for the fees charged by Hawaii (use of rest room facilities, parking, trash disposal, and security) would be sufficient to satisfy *Clyde Mallory Lines*.").

Plaintiff provides no evidence that Defendants do "not provide the services [they] claim to provide." *See Barber* 42 F.3d at 1196. The services, moreover, do not constitute "projects which do not and could not benefit" the vessels paying the fee. *See Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79, 88 (2d Cir. 2009) (finding a fee impermissible under the Tonnage Clause where it was used "for projects which do not and could not benefit" the fee-payers); *In re State Tonnage Tax Cases*, 79

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[3] Plaintiff argues that some SBH's amenities do not benefit the "vessel itself." ECF No. 109 at 13; *see Cruise Lines Int'l Assn. Alaska v. City of Borough of Juneau, Alaska*, 356 F. Supp. 3d 831, 842 ("In order for fees to be permissible under the Tonnage Clause, . . . the fees must be used for services rendered to the vessel itself."). However, Plaintiff neither argues nor provides any evidence that the vessel does not benefit from the docks, walkways, restrooms, staff assistance, security, and lighting provided by SBH.

U.S. at 220 (finding a revenue-raising act impermissible under the Tonnage Clause where it did "not contemplate any beneficial service for the . . . vessels subjected to taxation"). Therefore, there are no questions of fact. Defendants "provide[] services in exchange for the [landing] fees." *Barber*, 42 F.3d at 1196. The fees are not a tax or duty subject to the Tonnage Clause. *See id.* Accordingly, the Court grants Defendants' motion for summary judgement as to Plaintiff's Tonnage Clause claim.[4]

C. Rivers and Harbors Act

1. Legal Standard

The Rivers and Harbors Act ("RHA") provides, in pertinent part, that:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or

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[4] In its order granting in part and denying in part Defendants motion to dismiss, ECF No. 29, the Court stated that "[f]ees for service can still violate the Tonnage Clause if they have 'a general, revenue-raising purpose.'" (quoting *Polar Tankers*, 557 U.S. at 10). In determining whether a fee constitutes a true "service fee" verses a "duty of tonnage," courts have considered whether the fee is exacted for a "general, revenue raising purpose" and whether it "contemplate[s] any beneficial service for" vessels subjected to the fee. *See Polar Tankers*, 557 U.S. at 10; *In re State Tonnage Tax Cases*, 79 U.S. at 220 (1870). While a general, revenue-raising purpose weighs in favor of finding that the fee is a duty of tonnage, *Polar Tankers*, 557 U.S. at 10, a true "service fee" is not subject to the Tonnage Clause. Therefore, after determining that a charge constitutes a fee for service, courts need not examine any additional purposes to which the fee may be applied.

> other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for . . . reasonable fees charged on a fair and equitable basis that— (A) are used solely to pay the cost of a service to the vessel or water craft; (B) enhance the safety and efficiency of interstate and foreign commerce; and (C) do not impose more than a small burden on interstate or foreign commerce.

33 U.S.C. § 5(b). The purpose of 33 U.S.C. § 5(b) was "to clarify existing law with respect to Constitutionally permitted fees and taxes on a vessel," and "to prohibit fees and taxes on a vessel simply because that vessel sails through a given jurisdiction." H.R. Rep. No. 108-334, at 180 (2002) (Conf. Rep.); *Reel Hooker Sportfishing, Inc. v. State, Dept. of Taxation*, 123 Hawai'i 494, 499 (2010). While few courts have interpreted this provision of the RHA, a sponsor of the bill codified at 33 U.S.C. § 5(b) explained that the legislation addresses the problem "of local jurisdictions seeking to impose taxes and fees on vessels merely transitioning or making innocent passage through navigable waters subject to the authority of the United States that are adjacent to the taxing community." 148 Cong. Rec. E22143-04 (2002); *see Reel Hooker Sportfishing*, 123 Hawai'i at 499-500. In particular, the legislation aims to prevent "instances in which local communities [] seek[] to impose taxes or fees on vessels even where the vessel is not calling on, or landing, in the local community. These are cases where no passengers are

disembarking . . . and where the vessels are not stopping for the purpose of receiving any other service offered by the port."[5] 148 Cong. Rec. E22143-04 (2002); *see Reel Hooker Sportfishing*, 123 Hawai'i at 500.

2. Discussion

In its motion for summary judgment, Plaintiff argues that the landing fees violate the RHA because they are not "charged on a fair and equitable basis." ECF No. 90 at 23. Defendants respond that the RHA "has no application" to the 2016 Landing Agreement. ECF No. 94 at 28. The Court agrees and will grant Defendants' motion for summary judgment.

As discussed above, SBH provides services to charter vessels in exchange for its landing fees. By paying the landing fees, vessels are provided with a dock at which to land, load, and unload passengers. ECF No. 33 ¶¶ 1, 32; ECF No. 101 ¶ 6. In addition, charter vessels and their passengers receive the benefit of SBH's walkways, restrooms, security, and lighting. *Id.* Thus, the Landing Agreement does not impose any fees "on a vessel simply because that vessel sails through" the San Francisco bay. *See* H.R. Rep. No. 108-334, at 180 (2002) (Conf. Rep.). Nor does the Landing Agreement impose taxes or fees where vessels are not "landing[] in the local community," "where no passengers are disembarking," or "where the vessels are not stopping for the purpose of receiving

[5] In 2002, the RHA was amended to "clarify" the restriction in 33 U.S.C. § 5(b). H.R. Rep. No. 108-334, at 180 (2002) (Conf. Rep.). The congressional record leading up to the passage of these amendments includes various statements regarding the purpose of 33 U.S.C. § 5(b) as well as the problems that the Section aims to address.

any other service offered by the port." *See* 148 Cong. Rec. E22143-04 (2002); *see Reel Hooker Sporyfishing*, 123 Hawai'i at 500; ECF No. 97 ¶ 24. Rather, the landing fees are "charged only to commercial vessels that voluntarily land and avail themselves of the landing services provided by SBH." *See* ECF No. 94 at 28; ECF No. 97 ¶ 24. Congress never intended the RHA to restrict fees of this type. *See* H.R. Rep. No. 108-334, at 180 (2002) (Conf. Rep.); 148 Cong. Rec. E22143-04 (2002). Therefore, 33 U.S.C. § 5(b) does not apply to the fees charged in the 2016 Landing Agreement. The Court grants summary judgement for Defendants on the RHA claim.

D. Other Terms of 2016 Landing Agreement

Plaintiff also seeks declaratory and injunctive relief for other "unlawful" provisions in the 2016 Landing Agreement, such as those regarding: "the type of materials that can be used to repair the vessel," "signage on the vessel," "medical benefits for all employees," and purchase of insurance. ECF No. 90 at 24-25. Plaintiff, however, offers no argument or authority to show that these terms are unlawful. *See id.*; ECF 109 at 24-25. Plaintiff states solely that "[e]ach of the terms and conditions contained within the Landing Agreement . . . are inconsistent with the Tonnage Clause and the RHA." ECF No. 109 at 25. The Court therefore grants summary judgment for Defendants on this claim in light of its other rulings. *See Vazquez v. TWC Admin. LLC*, 254 F. Supp. 3d. 1220, 1232 (C.D. Cal. 2015) (finding no triable issue of fact and granting defendants' motion for summary judgment where "[p]laintiffs cite no authority in support of [their] argument.").

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment as to all claims.

IT IS SO ORDERED.

/s/ Jon S. Tigar
United States District Judge

Dated: November 26, 2019

ORDER GRANTING JUDGMENT ON THE PLEADINGS (NOVEMBER 6, 2019)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIL' MAN IN THE BOAT, INC.,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants.

Case No. 17-cv-00904-JST

Re: ECF No. 106

Before: Jon S. TIGAR,
United States District Judge.

Before the Court is Plaintiff Lil' Man In The Boat, Inc.'s motion for judgment on the pleadings. ECF No. 106. The Court will grant the motion.

I. Background

Plaintiff Lil' Man In The Boat, Inc. "owns and operates a licensed commercial charter Motor Vessel 'Just Dreaming' . . . that provides transportation and hospitality services on the San Francisco Bay both for locals and visitors from all over the globe." ECF

No. 33 ¶ 1.[1] Since 2006, Plaintiff has "operate[d] within the jurisdiction of the Port of San Francisco, and by Port regulation, must load and unload its passengers at the North Side Dock of Pier 40's South Beach Harbor." *Id.* ¶¶ 1, 32.

From 2013 through 2015, the landing fee charged for commercial vessels, such as Just Dreaming, to dock at North Side Dock was $160 per hour. *Id.* ¶ 32, 34. In 2016, a new "Landing Agreement" was introduced for all commercial charter operators who wished to land at the Port of San Francisco ("Port"). *Id.* ¶ 12. The agreement increased landing fees "to $220 for commercial vessel operators," gave the Port the right to increase the required fees "at any time," and "impose[d] a supplemental 7% Gross Revenue Fee." *Id.* ¶¶ 32, 39, 40. The gross revenue fee "requires the commercial vessel operator to pay 7% percent of its monthly gross revenues in any month when (i) the 7% percent fee for such calendar month exceeds the (ii) base landing fee for such calendar month." *Id.* ¶ 40.

On February 22, 2017 Plaintiff filed this action against the City and County of San Francisco, the San Francisco Port Commission, Elaine Forbes, Peter Daley, Jeff Bauer, and Joe Monroe ("Defendants"). ECF No. 1. Plaintiff's operative First Amended Complaint ("FAC") alleges three claims relating to the Landing Agreement. ECF No. 33 ¶¶ 58-96. First,

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[1] For the purposes of deciding this motion, the Court accepts as true all allegations set forth in Plaintiff's operative First Amended Complaint. *See Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (In deciding a Rule 12(c) motion for judgment on the pleadings, "a court must determine whether the facts alleged in the complaint, taken as true, entitle plaintiff to a legal remedy.") (citation and quotation marks omitted).

Plaintiff brings a claim for violation of 42 U.S.C. § 1983 ("Section 1983") based on violations of the Tonnage Clause, the Commerce Clause, the First Amendment, and the Rivers & Harbors Act. *Id.* ¶ 58-84. Second, Plaintiff brings a claim entitled "Declaratory and Injunctive Relief," although the body of the FAC seeks declaratory relief only. *Id.* ¶¶ 85-89. Third, Plaintiff brings a claim for unjust enrichment. *Id.* ¶¶ 90-96. The FAC requests compensatory damages, punitive damages, costs of suit, and attorney's fees. *Id.* at 26-27.

The FAC alleges that "Elaine Forbes, Peter Daley, and Jeff Bauer were, at all times relevant to this Complaint, the Interim Director and assistant directors of the Port of San Francisco. Defendant Joe Monroe was, at all times relevant to this Complaint, the harbormaster for South Beach Harbor." *Id.* 1 26. Each of the aforementioned "Individual Defendants" was an "executive officer" and a "manager" "with respect to the violations of federal and state law described" in the FAC. "In their official capacity, they proposed and enforced the Port's rules and policies. . . that are at issue in [the FAC]." *Id.* (emphasis added).

Defendants state that, on September 19, 2019, Plaintiff notified Defendants that it wished to sue Forbes, Dailey, Bauer, and Monroe in their individual capacities. ECF No. 106. In response, Defendants have now filed a motion for judgment on the pleadings which requests that "the Court dismiss Ms. Forbes, Mr. Dailey, Mr. Bauer, and Mr. Monroe from this case." ECF No. 106 at 7. Defendants assert that (1) when "individuals are being sued in their official capacity as municipal officials and the municipal entity itself is also being sued, then the claims against

the individuals are duplicative and should be dismissed," ECF No. 106 at 7 (quoting *Roy v. Contra Costa County*, 15-CV-02672-TEH, 2015 WL 5698743, at *4 (N.D. Cal. Sept. 29, 2015), and (2) that even if these defendants could be sued in their individual capacities, they are entitled to qualified immunity, *id.*

Plaintiff opposes the motion. ECF No. 112. Defendants have filed a reply. ECF No. 120.

II. Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

III. Request for Judcial Notice

Defendants ask the Court to take notice of "Monroe's Responses to Plaintiff's First Set of Interrogatories, served on September 20, 2018." ECF No. 107 at 2. The Court will deny Defendants' request.

Federal Rule of Evidence 201 permits a court to take judicial notice of facts that are "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Discovery documents are not generally appropriate candidates for judicial notice." *See Hawkins v. California*, No. 1:09-cv-01705-LJO-MS (PC), 2015 WL 2454275, at *2 (E.D. Cal. May 22, 2015), *adopted by Hawkins v. California*, 2015 WL 4130945 (July 9, 2015). The document containing Monroe's responses to Plaintiff's interrogatories "is not a matter of public record and its contents are not facts beyond the scope of reasonable controversy." *See*

id.; *see also Boisvert v. Li*, No. 13-cv-01590 NC, 2014 WL 279915, at *4 (N.D. Cal. Jan. 24, 2014) (denying request for judicial notice of Defendant's responses to interrogatories). However, the interrogatory responses are relevant, unobjected to, and constitute admissible evidence. *See Hawkins*, 2015 WL 2454275, at *2. Therefore, the Court denies Defendants' request for judicial notice but will, nevertheless, consider the interrogatory responses in deciding this motion. *See id.* at *1-2 (denying request for judicial notice of responses to interrogatories but, nevertheless, considering the documents in deciding motions for summary judgment).

IV Legal Standard

After the pleadings are closed–but early enough not to delay trial–a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The analysis for Rule 12(c) motions for judgment on the pleadings is "substantially identical to [the] analysis under Rule 12(b)(6)." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citation and quotation marks omitted). Under both rules, "a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Brooks v. Dunlop Mfg. Inc.*, No. C 10–04341 CRB, 2011 WL 6140912, at *3 (N.D. Cal. Dec. 9, 2011). A plaintiff must allege facts that are enough to raise his right to relief "above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 55 (2007) (citation omitted). "A judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999) (citation

omitted). "Finally, although Rule 12(c) does not mention leave to amend, courts have discretion both to grant a Rule 12(c) motion with leave to amend, and to simply grant dismissal of the action instead of entry of judgment." *Lonberg v. City of Riverside*, 300 F. Supp. 2d 942, 945 (C.D. Cal. 2004) (citations omitted).

V Discussion

Defendants argue that the allegations of the FAC and the parties' course of conduct demonstrate the "common understanding" that Plaintiff sued Forbes, Dailey, Bauer, and Monroe solely in their official capacities. ECF No. 106 at 7, 9-11. Plaintiff responds that the FAC brings suit against "Defendants in their personal, official, and government capacities." ECF No. 112 at 7. The Court will find that Plaintiff has clearly sued the Individual Defendants only in their official capacities and will, therefore, grant Defendants' motion for judgment on the pleadings.

A. Suit Against Government Officials in their Official Capacities

In an official-capacity suit, "the government entity is a real party in interest and the plaintiff must show that the entity's policy or custom played a part in the federal law violation." *Castro v. City of Union City*, 14-cv-00272-MEJ, 2014 WL 4063006, at *6 (N.D. Cal. Aug. 14, 2014) (citing *Vance v. Cty of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996)) (internal quotation mark omitted). "In contrast, in a personal-capacity suit, the plaintiff is trying to place liability directly on the state officer for actions taken under the color of state law." *Vance*, 928 F. Supp. at 996 (citing *Hager v. Melo*, 502 U.S. 21, 25-27 (1991)).

In determining whether a plaintiff has sued officials in their personal capacity, courts first look to the allegations asserted in the complaint. *See Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985) (noting that courts should consider additional factors in cases where the complaint does not clearly specify whether officials are sued personally). If the complaint is unclear as to "whether officials are being sued personally, in their official capacities, or both," courts make this determination by examining the course of proceedings, the basis of the claims asserted, and/or the nature of relief sought. *See Kentucky*, 473 U.S. at 167 n. 14 ("In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both. 'The course of proceedings' in such cases typically will indicate the nature of the liability sought to be imposed."); *Cervantes v. Zimmerman*, No. 17-cv-1230-BAS-NLS et al., 2019 WL 1129154, at *9 (S.D. Cal. March. 12, 2019) (same); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1990) ("Although the Complaint does not expressly state that [Plaintiff] is suing the trustees themselves, as opposed to the state, the 'basis asserted and nature of relief sought' imply that this must be so.").

Here, the FAC clearly demonstrates that Plaintiff has sued the Individual Defendants in their official capacities only. The FAC states that "[e]ach Individual Defendant . . . acted in his or her capacity as a public official with respect to the violations of federal and state law described herein." ECF No. 33 at 8 (emphasis added). It also alleges that, "[i]n their official capacity, they proposed and enforced the Port's rules and policies . . . that are at issue in this Complaint." *Id.* (emphasis added). Nowhere in the FAC does Plaintiff

allege that Forbes, Dailey, Bauer, or Monroe are sued in their individual or personal capacities.

Moreover, the course of proceedings reiterates the parties' understanding that this is an official capacity suit. First, every document Defendants have filed in this case–including documents jointly filed with Plaintiff–noted on the cover page that Forbes, Dailey, Bauer, and Monroe are participating in this action in their "capacities" as "Interim Executive Director," "Deputy Director Maritime," "Deputy Director of Real Estate," and "Harbormaster." *See, e.g.*, ECF No. 25 at 1; ECF No. 40 at 1. Second, when Plaintiff served interrogatories on Monroe, the City objected throughout its responses that "Mr. Monroe is sued in this action in his official capacity, and therefore is not a separate defendant from the City." ECF No. 107-1 at 5-10. Finally, Plaintiff's statements in its August 22, 2019 motion for summary judgment demonstrate its shared understanding that this is an official capacity suit. In its motion, Plaintiff confirmed that "[t]he basis for liability for the individual Defendants is that they were each an executive officer, and a manager for, Defendant [City and County of San Francisco], and acted in his or her capacity as a public official causing and enforcing the alleged federal law violations." ECF No. 90 at 16 (emphasis added).

Plaintiff argues that its "assertion of punitive damages indicates that the lawsuit is against an official in his or her personal capacity." ECF No. 112 at 12. Plaintiff's argument correctly notes that courts have examined the "nature of relief sought" to determine the capacity in which defendants are sued. *See Price*, 928 F.2d at 828; *Cervantes*, 2019 WL 1129154, at *9 ("'[T]he basis of the claims asserted and the

nature of relief sought' can also show that a plaintiff intended to bring a Section 1983 action against defendant officials in their individual capacity.") (quoting *Price*, 928 F.2d at 828). However, requests for punitive damages only indicate a personal capacity suit "[w]hen the pleadings are not clear" and "the Complaint [does] not clearly specify whether officials are being sued personally, in their individual capacities, or both." *See Cervantes*, 2019 WL 1129154, at *9 (applying the "'course-of-proceedings' test to determine whether a defendant has received notice of the plaintiff's intent to hold the defendant personally liable"). Where, as here, Plaintiff's FAC and motion for summary judgement clearly establish that this is an official capacity suit, the assertion of punitive damages is not sufficient to provide the Individual Defendants notice of Plaintiff's intent to hold them personally liable. *See id.*

B. Duplicative Claims

"A suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself." *Johnson v. City of Berkeley*, No. 15-cv-05343-JSC, 2016 WL 925058, at *3 (N.D. Cal. March 11, 2016) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)). "Consequently, 'if individuals are being sued in their official capacity as municipal officials *and* the municipal entity itself is also being sued, then the claims against the individuals are duplicative and should be dismissed.'" *Chavez v. City of Petaluma*, No. 14-cv-05038-MEJ, 2015 WL 6152479, at *4 (N.D. Cal. Oct. 20, 2015) (quoting *Vance*, 928 F. Supp. at 996 (N.D. Cal. 1996) (emphasis in original).

Because Plaintiff names the City and County of San Francisco as a defendant, "it is unnecessary to also name [Forbes, Dailey, Bauer, and Monroe] in their official capacities." *Chavez*, 2015 WL 6152479, at *4. Accordingly, the Court dismisses Plaintiff's claims against Forbes, Dailey, Bauer, and Monroe. *See id*; *see Mauck v. McKee*, No. 18-cv-04482-NC, 2018 WL 5906085, at *6 (N.D. Cal. Nov. 9, 2018) ("[C]ourts have routinely dismissed suits against municipal officials sued in their official capacity as duplicative when the municipal entity itself is also being sued.").

Plaintiff requests that the Court "permit it leave to file an Amended Complaint to clarify that Plaintiff is suing the individual Defendants both in their official and personal capacities." ECF No. 112 at 23. In *Cervantes*, a court granted leave to amend where the complaint contained many allegations that "point[ed] toward claims asserted against the individual Defendants in their individual capacity," and the defendants had not "treated the litigation as solely an official capacity suit." *Cervantes*, 2019 WL 1129154, at *9, 10. By contrast, both Defendants and Plaintiff have treated this case as an official capacity suit from its inception in February 2017 through the filing of Plaintiff's motion for summary judgment in August 2019. *See* ECF No. 1; ECF No. 33 ¶ 26; ECF No. 90 at 16. Therefore, Plaintiff's claims against Forbes, Dailey, Bauer, and Monroe are dismissed without leave to amend. *See Mauck*, 2018 WL 5906085, at *6 (finding claims against individuals in their official capacities duplicative and dismissing claims without leave to amend); *Quan v. San Francisco Police Dept.*, No. C 10-01835 MEJ, 2011 WL 2470477, at *5 (N.D. Cal. June 21, 2011) (Courts "have repeatedly held that,

the fact that a motion to amend is filed after substantial discovery and the filing of a motion for summary judgment weighs heavily against allowing leave.") (internal quotations and alteration omitted); *Lee v. AFT–Yakima*, No. CV-09-3112-EFS, 2011 WL 2181808, at * 12 (E.D. Wash. June 3, 2011) (denying motion to amend filed after summary judgment motion because forcing defendants to file new summary judgment motions to address new allegations "would cause undue hardship and waste judicial resources").

CONCLUSION

For the aforementioned reasons, Defendants' motion for judgment on the pleadings is GRANTED with prejudice. Defendants Forbes, Dailey, Bauer, and Monroe are hereby dismissed from this action.

IT IS SO ORDERED.

/s/ Jon S. Tigar
United States District Judge

Dated: November 6, 2019

ORDER GRANTING IN PART DEFENDANT'S MOTION TO DISMISS (JULY 24, 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIL' MAN IN THE BOAT, INC.,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants.

Case No. 17-cv-00904-JST

Re: ECF No. 12

Before: Jon S. TIGAR,
United States District Judge.

Before the Court is Defendants' motion to dismiss. ECF No. 12. The Court will grant the motion in part and deny it in part.

I. Background[1]

Plaintiff Lil' Man In The Boat, Inc. "owns and operates a licensed commercial charter Motor Vessel

[1] Plaintiff asks the Court to take judicial notice of the "State of California, San Francisco Bay Conservation and Development Commission, Permit Number 2-84, originally issued on March

'Just Dreaming' that provides transportation and hospitality services on the San Francisco Bay both for locals and visitors from all over the globe." ECF No. 1 ("Compl.") ¶ 1.[2] Plaintiff "hosts parties and receptions, and transports guests to visit local landmarks (like Angel Island or the Golden Gate Bridge) and cities (like Oakland and Sausalito), among other things." *Id.* ¶ 25. Plaintiff's customers come "from all over the United States, and from other states and countries such as China, France, Mexico, Russia, Germany, Australia, and Spain." *Id.*

Since 2006, Just Dreaming has operated out of the Port of San Francisco, and, "by local regulation, must load and unload its passengers at the North Side Dock of Pier 40's South Beach Harbor." *Id.* ¶¶ 1, 27. Defendants the City and County of San Francisco and the San Francisco Port Commission (together operating under the title "Port of San Francisco" and referred to here as "Defendant City"), Elaine Forbes, Peter Daley, Jeff Bauer, and Joe Monroe (collectively, "Defendants") "operate and regulate the North Side Dock, including by setting all fees and charges associated with charter vessels' excursion landings." Compl. ¶ 27.

16, 1984, as amended, Amendment No. Seventeen of September 25, 2008, issued to the San Francisco Redevelopment Agency and the Port of San Francisco." ECF No. 116. Because this document is a public record, the Court grants the request. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-689 (9th Cir. 2001).

[2] For the purpose of deciding this motion, the Court accepts as true the allegations from Plaintiff's Complaint, ECF No. 1. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In 2016, Defendants "insist[ed] on a written landing rights agreement (the "2016 Landing Agreement") between Defendant City and all commercial charter operators like Plaintiff who wished to land at the Port." *Id.* ¶ 7. Most importantly, the 2016 Landing Agreement increased "landing fees" for use of the North Side Dock. "In 2013, 2014, and 2015 Defendants' landing fee for commercial vessels such as MV Just Dreaming was $160.00. In 2016, the fee increased to $220 for commercial vessel operators who signed the 2016 Landing Agreement, but remained at the 2015 rate for those who refused to sign the new agreement by virtue of a 'grace period' extended by Defendants." Compl. ¶ 27. The 2016 Landing Agreement also requires each "commercial vessel operator to pay 7% percent of its monthly gross revenues[3] in any month when (i) the 7% percent fee for such calendar month exceeds the (ii) the base landing fee for such calendar month." *Id.* ¶ 35. Non-commercial or recreational vessels "pay little or nothing to Defendants" for use of the same dock. *Id.* ¶ 35. Defendants reserve the right to raise fees at any time. *Id.* ¶ 34.

Despite paying these fees, vessels like Just Dreaming may only use a "small portion" of the North Side Dock. *Id.* ¶ 30. Moreover, Defendants allow recreational vessels to "moor for hours and even days," further decreasing the available docking space. *Id.* Nor is the North Side Dock in good condition. The dock is "not

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[3] Gross revenues include the sale of alcoholic beverages. *Id.* ¶ 8. Plaintiff alleges that this requirement forces it to violate California Business and Professions Code section 23300, which "prohibits [unlicensed entities like] Defendants from participating in, receiving, or sharing any revenue or profit from alcohol sales within the state." *Id.*

secured or protected, exposing the vessels to damage from Bay surges and making passenger loading difficult and potentially dangerous." *Id.* ¶ 31. "Additionally, for the last three years, Defendants rarely inspect[ed] or maintain the North Side Dock despite its poor condition and repeated requests by tenants to do so." *Id.*

Plaintiff alleges that the "excessive fees imposed on commercial vessels have resulted in a profit to Defendants, far in excess of the costs to maintain the North Side Dock." *Id.* ¶ 33. Specifically, Plaintiff explains that "Defendants' budget for operation of South Beach Harbor for fiscal years 2015 through 2021 shows that approximately $500,000 per year will be taken as 'rent' from the Port to the Defendant City, and approximately $1,000,000 will go to Defendant City's general funds." *Id.* ¶ 32. As support, Plaintiff attaches to the Complaint a "budget for operation of South Beach Harbor from 2015 through 2021." ECF No. 1-6.

In addition to the fee provisions, the 2016 Landing Agreement contains other terms to which Plaintiff objects. *Id.* ¶ 37. "For example, it requires commercial vessel operators to waive every claim for damages against the Defendants." *Id.* ¶ 37; ECF No. 1-3 ¶ 20.3 ("Licensee agrees that Licensee will have no recourse with respect to, and Port shall not be liable for, any obligation of Port under this License, or for any Claim based upon this License . . . "); ¶ 15.4 ("Licensee, as a material part of the consideration to be rendered to Port, hereby waives any and all Claims, including without limitation all Claims arising from the joint or concurrent, active or passive, negligence of the Indemnified Parties, but excluding any Claims caused solely

by the Indemnified Parties' willful misconduct or gross negligence.")

Defendants stated that Plaintiff and other commercial vessel operators had to sign the 2016 Landing Agreement or they "would not be able to use the Port for commercial activities at all as of January 1, 2017." Compl. ¶ 41. Plaintiff refused to sign the 2016 Landing Agreement. *Id.* ¶ 44.[4] As a result, Plaintiff is "locked out of South Beach Harbor (and, in reality, the City and County of San Francisco) for purposes of conducting their businesses." *Id.*

Plaintiff's complaint alleges four causes of action arising out of the 2016 Landing Agreement. First, Plaintiff brings a Section 1983 claim based on violations of the Tonnage Clause, the Commerce Clause, the Rivers & Harbors Act, and the First Amendment. Second, Plaintiff alleges that Defendants violated the Bane Act. Third, Plaintiff seeks declaratory and injunctive relief. And fourth, Plaintiff brings a claim for unjust enrichment. Plaintiff's complaint is a putative class action and Plaintiff seeks to represent the following four classes:

> (a) All persons and entities licensed by the USCG for commercial passenger service who, at any time during the three years preceding the filing of this action to the date of Class Certification have landed at, moored, or caused passengers to traverse South Beach

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[4] "Fearing for their businesses, some commercial vessel operators ceded to Defendants' demands and signed the 2016 Landing Agreement." *Id.* ¶ 11.

> Harbor and incurred or paid fees to Defendants for that opportunity;
>
> (b) All persons and entities who, at any time during the three years preceding the filing of this action to the date of Class Certification, were licensed commercial passenger vessel operators subject to Defendants' demand that they execute and/or comply with the terms, payments and conditions of the 2016 Landing Agreement in order to use South Beach Harbor;
>
> (c) All persons and entities who, at any time during the three years preceding the filing of this action to the date of Class Certification, were licensed commercial passenger vessel operators and signed the 2016 Landing Agreement and complied with its terms;
>
> All persons or entities who, for the past three years to the present, have been licensed for sale and consumption of alcoholic beverages and who were or are subject to Defendants' demand for payment of a percentage of revenues or profits.

Id. ¶ 45.

Defendants moved to dismiss on March 30, 2017. ECF No. 12. They argue that each of Plaintiff's claims fail as a matter of law.

II. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is

entitled to relief." Fed. R. Civ. P. 8(a)(2). While a complaint need not contain detailed factual allegations, facts pleaded by a plaintiff must be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While the legal standard is not a probability requirement, "where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

III. Analysis

A. Tonnage Clause

First, Defendants argue that Plaintiff's claim under the Constitution's Tonnage Clause fails as a matter of law. Under the Tonnage Clause,

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or

> engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. Const. art. I, § 10, cl. 3. Defendants claim that the fees imposed by the 2016 Landing Agreement are fees for a service, not tonnage duties. ECF No. 17 at 7. This distinction matters because the Tonnage Clause "does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel." *Clyde Mallory Lines v. State of Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935). For example, "[p]roviding a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service," and charging for that service does not violate the Tonnage Clause. *Keokuk N. Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 84-85, 24 L. Ed. 377 (1877). Here, the challenged fees appear to be fees to compensate Defendants for use of the North Side Dock; in other words, fees for service.[5]

That is not the end of the inquiry, however. Fees for service can still violate the Tonnage Clause if they have "a general, revenue-raising purpose." *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 10 (2009). In other words, where a fee is used "for projects which

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[5] The fact that the fees are called "fees" and not "duties" or "taxes" is not dispositive, as Defendants suggest. Charges described as fees have been held to violate the Tonnage Clause, despite their labels. *See, e.g., Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1162 (D. Haw. 2001) ("[T]he Court concludes that DOBOR's assessment of a two percent (2%) ORMA Fee against the "Hula Kai" is an impermissible tax in violation of the prohibition against tonnage duties.") (emphasis added).

do not and could not benefit" those paying the fee, the fee is unconstitutional. *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 82-83 (2d Cir. 2009).

Plaintiff makes two primary arguments why the landing fees are not lawful fees for service. First, Plaintiff argues that the calculation of the fees as a percentage of gross revenue when that amount exceeds the per use fees demonstrates that the fees are not actually compensation for commercial boats' use of the North Side Dock. As support, Plaintiff relies on the Second Circuit's opinion in *Bridgeport*. There, the Bridgeport Port Authority ("BPA") "imposed a passenger fee on all persons and vehicles embarking on, or disembarking from, the Ferry Company ferries at the Dock." 567 F.3d at 82-83. Plaintiff asserts that *Bridgeport*'s per passenger fees are analogous to the revenue-based fees imposed by Defendants here. While it is true that the Second Circuit held that the BPA's fees violated the Tonnage Clause, Plaintiff misstates the rationale behind that holding. The fact that the fees were collected on a per passenger basis did not factor into the court's analysis. Rather, the court concluded that, although the fees were ostensibly fees for service, they were actually "used for the impermissible purpose of raising general revenues and for projects which do not and could not benefit the ferry passengers." *Id.* at 85. For example, a BPA official "testified that the purpose of passenger fee has always been 'to create a source of revenue to support the operations of the Port Authority.'" *Id.* at 88. Moreover, the fees were used to pay for "non-ferry services [that] are not available to ferry passengers; they were 'completely unrelated and unavailable to the fee payers.'"

Id. In other words, the Second Circuit invalidated the fees because of how they were *used*, not how they were collected. In analyzing Plaintiff's Tonnage Clause claim, therefore, the mere fact that the landing fees can be based on gross revenue does not support the inference that they are not actually fees for service.

Second, Plaintiff argues that funds collected through the landing fees generate a budget surplus that Defendants divert to the City's general funds. Compl. ¶¶ 30-31. The Complaint alleges that "Defendants' budget for operation of South Beach Harbor for fiscal years 2015 through 2021 shows that approximately $500,000 per year will be taken as 'rent' from the Port to the Defendant City, and approximately $1,000,000 will go to Defendant City's general funds." Compl. ¶ 32. As support, Plaintiff attaches to the Complaint a "budget for operation of South Beach Harbor from 2015 through 2021." ECF No. 1-6.A.

Fees that are diverted to general revenue funds and that are not actually used to defray the costs for which they are collected violate the Tonnage Clause. *Captain Andy's Sailing, Inc. v. Johns* provides one example. 195 F. Supp. 2d 1157 (D. Haw. 2001). To operate commercially within the Na Pali coast, Hawaii's Division of Boating and Ocean Recreation ("DOBOR") requires the "payment of two percent (2%) of the permitted vessel's gross receipts" ("ORMA Fee"). *Id.* at 1162. The defendants "argued the assessment of the ORMA Fee is justified in order to recover the costs of regulating the Na Pali Coast ocean water. *Id.* at 1173. The district court disagreed, concluding that the fee violated the Tonnage Clause "because it [did] not relate to a specific service that confers a "readily perceptible" benefit to vessels operating in the Na Pali Coast ocean

waters." *Id.* The court noted that the record was "bereft of any evidence corroborating the existence of any regulatory scheme specific to the Na Pali Coast ocean waters," and that the fee was really "a revenue measure that is used to recoup the costs of a statewide boating program whose many components are not limited to commercial navigation within the Na Pali Coast ocean waters." *Id.* at 1174. Under *Captain Andy's Sailing* and *Bridgeport*, therefore, if the landing fees go to the City's general fund instead of being used to provide services at the North Side Dock, they likely violate the Tonnage Clause.

Here, Plaintiff has plausibly alleged that some portion of the landing fees go to the City's general funds, rather than for the services for which they are collected. Compl. ¶ 33 ("[E]xcessive fees imposed on commercial vessels have resulted in a profit to Defendants, far in excess of the costs to maintain the North Side Dock."). The budget Plaintiff attached to its Complaint projects a roughly $1,000,000 surplus for the South Beach Harbor for all but the 2015-16 fiscal year. ECF No. 1-6. The budget also lists as an "expense" over $500,000 in "Port Rent/Reserve for Capitol." *Id.* Together, these line items suggest that the South Beach Harbor's revenue exceeds its expenses by over $1.5 million. Of course, the surplus is for the South Beach Harbor as a whole, not for the North Side Dock specifically, and the budget does not make clear which revenue line represents the landing fees. This means it is difficult to say what role, if any, the landing fees have in contributing to the $1 million surplus.[6] Nevertheless, at the motion to dismiss

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[6] For example, it may be that the landing fees are included in "Commercial Rental," a revenue line which accounts for only

phase, the Court agrees with Plaintiff that the fact of the overall Harbor surplus, together with Plaintiff's allegations that the North Side Dock is small, unsecured, and poorly maintained, Compl. ¶¶ 30-31, raise a plausible inference that the landing fees are going to general revenues and not to provide services at the dock. Given these allegations, Plaintiff's Tonnage Clause claim survives the motion to dismiss.

B. Dormant Commerce Clause

1. Three Prong Test

Second, Plaintiff argues the landing fees violate the Dormant Commerce Clause ("DCC"). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). A fee like the one at issue here survives a DCC challenge where it "(1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Nw. Airlines, Inc. v. Cty. of Kent, Mich.*, 510 U.S. 355, 369 (1994). The Supreme Court "has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

Plaintiff argues that the landing fees fail the first two prongs of the *Northwest Airlines* test for largely

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$250,000 of the total $5 million operating revenue. If so, they obviously

the same reasons that the fees violate the Tonnage Clause. First, Plaintiff again claims that the use of gross revenue to calculate the landing fees demonstrates that they are not a fair approximation of use. But the Ninth Circuit rejected that argument in *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1991). There, Alamo challenged an "access fee" it was required to pay for "for using the airport access roads to pick up and drop off airline passengers who rent its cars. The access fee charged [wa]s seven percent of the gross receipts Alamo generate[d] from customers picked up at the airport." 955 F.2d at 30. The Ninth Circuit held that "calculating use by a percentage of gross receipts is a fair approximation" of use, and cannot be responsible for a $1 million dollar surplus. concluded the first prong had been "easily" satisfied. 955 F.2d 30, 31 (9th Cir. 1991), as amended on denial of reh'g (Jan. 24, 1992). The same is true here.

Plaintiff has plausibly alleged, however, that the landing fees are "excessive" when compared with the benefits the North Side Dock confers. Plaintiff claims that Defendants allow commercial boats like Just Dreamin to use only a "small portion" of the dock, neglect maintenance of the dock, and divert landing fee revenues to the City's general fund. Compl. ¶¶ 30-33. As the Court found in its Tonnage Clause analysis, these allegations make it plausible that Defendants are realizing a profit from the landing fees while providing only minimal services. They also serve to distinguish this case from *Alamo*, where the Ninth Circuit concluded that the airport access fee was not excessive on stipulated facts after trial. *Alamo*, 955 F.2d at 31. The court explained that Alamo had

"offered no proof" that an access fee of seven percent of gross receipts excessively compensated the City of Palm Springs for providing "improved airport facilities," including security, maintenance, overhead, and debt service costs. *Id.* That this issue has come before the Court on a motion to dismiss is another basis for reaching a different conclusion than the *Alamo* court, which did not have to accept Alamo's allegations as true. Here, all Plaintiff must do is plausibly allege that the landing fees are excessive when compared with the benefit commercial operators receive in exchange. At the motion to dismiss phase, it has met that burden.

The Court acknowledges the tension between Alamo's reasoning and the fact that "*Evansville* makes clear that it is immaterial where the funds are deposited and whether those specific funds are the funds eventually used to effectuate the Statute's purpose." *Ctr. for Auto Safety Inc. v. Athey*, 37 F.3d 139, 144 (4th Cir. 1994) (citing *Evansville–Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972)). But, ultimately, a line can be drawn between deciding whether a fee is higher than necessary to cover the designated service's costs, and whether the fee is actually used to cover the costs.[7] In this case, the alleged budget surplus and limited permissible use of the dock at least makes it plausible that Defendants' fees are excessive and therefore fail this prong of the Northwest Airlines test.

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[7] In *Athey*, the Court separately noted that there was no "dispute that the total amount raised through registration fees did not exceed the funds necessary to cover Maryland's administration and enforcement of the Statute." 37 F.3d at 143.

That leaves the last factor: whether the fees "discriminate against interstate commerce." *Id.* To show discrimination, Plaintiff states that "the Port imposes the Landing Fee, however, only on these commercial charter vessels; recreational vessels are not being subjected to this imposition." ECF No. 15 at 15. Because commercial vessels are more likely to be engaged in interstate commerce, Plaintiff's argument goes, charging them and not recreational vessels discriminates against interstate commerce. Plaintiff cites to no case that has endorsed this theory for showing a fee's discriminatory effect, and the Court declines to adopt it here. In fact, in *Alamo*, the Ninth Circuit concluded that an analogous access fee "not discriminate against interstate commerce, but applies to inter- and intrastate passengers equally." *Alamo*, 955 F.2d at 31. Likewise here, the landing fees apply to all commercial boats, regardless of who is traveling on those boats or whether they are operated by in-state or out-of-state companies.[8] "[A] party cannot satisfy its burden simply by showing that a government action affects an out-of-state company or manufacturer." *Industria y Distribuction de Alimentos v. Trailer Bridge*, 797 F.3d 141, 146 (1st Cir. 2015) (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978). "Instead, the evidence must illustrate that the government action interferes with interstate commerce by, for example, dissuading competition from out-of-state corporations." *Id.* Plaintiff has failed to make such a challenged showing here.

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[8] Presumably, in *Alamo*, residents of the area used the access road but were not charged the access fee (since it was calculated as a percentage of each company's revenue), but that did not factor into the Court's analysis at all.

Plaintiff has plausibly alleged that one of the three of the factors identified by the Supreme Court in *Northwest Airlines* is not satisfied here,[9] and has therefore stated a claim under the DCC.

2. Market Participant Exception

Defendants next argue that even if Plaintiff has plausibly alleged that the landing fees do not pass muster under the three-prong *Northwest Airlines* test, the DCC should still be dismissed because Defendants charge the fees as a "market participant." ECF No. 12 at 7. Supreme Court precedent "make[s] clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984). For example, the Court rejected DCC challenges against states who favored their own citizens when purchasing scrap metal, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976), or selling cement, *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37, (1980), because a state may "impose burdens on commerce within the market in which it is a participant." *S.-Cent. Timber Dev., Inc.*, 467 U.S. at 93.

Although initially persuasive, Defendants market participant argument ultimately fails because there is

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9 The *Northwest Airlines* test is written in the conjunctive, meaning that a defendant must demonstrate all three prongs are met to defeat a DCC claim. This leads to the odd possibility that, even if a fee does not discriminate against interstate commerce, it can still violate the DCC if, for example, it not a fair approximation of use. *See, e.g., Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86 (2d Cir. 2009). Such is the case here.

an exception to the exception: where the state has a monopoly over the services at issue, the market participant exception does not apply. *See W. Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1341 (9th Cir. 1984) ("Cory"); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1057-58 (9th Cir. 1987). In *Cory*, for example, the Ninth Circuit explained that there was "no other competitor to which [the plaintiff gas companies could] go for the rental of the required strip of California coastline." 726 F.2d at 1341. That meant the plaintiffs had "no choice but to renew their leases despite" their objections to the rates charged. *Id.* Similarly, here, Plaintiff has plausibly alleged that Defendants enjoy a monopoly over docks in San Francisco. Specifically, Plaintiff alleges that "[m]ost charter vessels like Plaintiff that accommodate 500 passengers or less that wish to load and unload passengers within the City and County of San Francisco must do so at the North Side Dock under Defendants' regulations." Compl. ¶ 27. Without access to the North Dock, Plaintiff claims it is "locked out of South Beach Harbor (and, in reality, the City and County of San Francisco) for purposes of conducting their business." Compl. ¶ 44. Defendants respond Plaintiff "can use Pier 39 or the San Francisco Marina," ECF No. 17 at 11, but at the motion to dismiss phase, the Court must take the allegations in the Complaint as true. The Court concludes that Plaintiff has plausibly alleged Defendants occupy a monopoly position such that the market participant exception does not apply. The motion to dismiss is denied as to the DCC claim.

C. River and Harbors Act

Third, Plaintiff argues that the landing fees violate the Rivers and Harbors Act ("RHA"). The RHA provides that:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for (1) fees charged under section 2236 of this title; (2) reasonable fees charged on a fair and equitable basis that— (A) are used solely to pay the cost of a service to the vessel or water craft; (B) enhance the safety and efficiency of interstate and foreign commerce; and (C) do not impose more than a small burden on interstate or foreign commerce[.]

33 U.S.C. § 5(b). Few courts have interpreted this provision of the RHA, and the parties each rely largely on a state supreme court case to argue either for or against a violation of the RHA. Defendants focus on *Brusco Towboat Co. v. State, By & Through Straub*, in which the Oregon Supreme Court analyzed an RHA challenge[10] to the State Land Board's requirement that "anyone who maintains a permanent structure on

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[10] The plaintiff actually brought the claim under Oregon's version of the RHA, but the two laws are interpreted the same way. *See, e.g., State, Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1205 (Alaska 2010)

or over state-owned submerged and submersible lands under navigable waters enter into a lease and pay rent." 589 P.2d 712, 715 (Or. 1978). The Court held that the leasing program did not violate the RHA because "[i]t does not impose a charge for the use of the navigable waters as a highway, or tend to limit the privilege of navigation to any particular class of persons or vessels. It merely imposes a charge upon those who wish to occupy, to the exclusion of others, portions of the state's lands in pursuit of their own business activities." *Id.* at 724. Defendants argue that the landing fees are analogous to these leasing fees and therefore do not offend the RHA.[11]

Plaintiff points the Court to the Alaska Supreme Court's decision in *State Dep't of Nat. Res. v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1205 (Alaska 2010). That case involved a similar leasing scheme, under which the "State of Alaska has the authority to require private parties who construct wharves into adjacent navigable waters to enter into leases." Specifically, the State proposed "a twenty-five year lease of approximately one acre of shoreland to Alaska Riverways for $1000 per year or $.25 per paying passenger, whichever is greater." *Id.* The Alaska Court distinguished *Brusco Towboat* and held that the proposed Alaska Riverways lease violated the RHA. *Id.* at 1221. The critical difference between the two cases, the court explained, was that "[i]n *Brusco*

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[11] Defendants also make the argument that the landing fees fall outside the scope of the RHA because they are charges for landing rather than using the navigable waters around San Francisco. ECF No. 17 at 14. This is an overly simplistic analysis. Fees can operate as a tax on the use of navigable waters even if not labeled as such.

Towboat, the administrative agency did not attempt to calculate the lease fee based on passenger count but instead based the lease fee on the amount of water surface area occupied." *Id.* Plaintiff argues that, just as an "assessment of a lease fee based on passenger count for exclusive use of state land implicates 33 U.S.C. § 5(b)," *id.*, so do the landing fees because they are calculated as a percentage of gross revenue.

Neither case is directly on point because neither involves a fee calculated using gross revenue, but the Court finds *Alaska Riverways* most analogous to the facts here. Defendants cannot claim that the landing fees are calculated based on the amount of docking space Plaintiff occupies, as was the case in *Brusco Towboat*. And although a per passenger fee is not the same as a gross revenue fee, both are most plausibly categorized as "use" charges, rather than permissible lease or rental fees. Therefore, this Court concludes that Plaintiff has sufficiently alleged that Defendants "proposed assessment [], however labeled, is a charge exacted specifically for the use of navigable waters." *Alaska Riverways, Inc.*, 232 P.3d at 1221. Plaintiff has stated a claim under the RHA.

D. First Amendment

Fourth, Plaintiff challenges the 2016 Landing Agreement under the First Amendment. Specifically, Plaintiff claims the Agreement's requirement that "commercial vessel operators [] waive every claim for damages against the Defendants" places an unconstitutional condition on Plaintiff's First Amendment Right to Petition. Compl. ¶ 37; ECF No. 1-3 ("Licensee agrees that Licensee will have no recourse with

respect to, and Port shall not be liable for, any obligation of Port under this License, or for any Claim based upon this License. . . . ").

Defendants offer two reasons why this claim should be dismissed: 1) Plaintiff cannot demonstrate the required causation element for this section 1983 claim, and 2) the challenged provisions in the Agreement are not unconstitutional conditions.[12] Both arguments fail.

"In a § 1983 action, the plaintiff must also demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). To do so, "the plaintiff must establish both causation-in-fact and proximate causation. *Id.* Defendants argue that Plaintiff would have refused to sign the 2016 Landing Agreement even without the waiver provision because of, for example, the fees imposed by the Agreement. Therefore, Plaintiff cannot show that the waiver provision the cause-in-fact of his injury. ECF No. 12 at 21. Defendants rely exclusively for this argument on *Emmert Indus. Corp. v. City of Milwaukie*, a Ninth Circuit memorandum disposition that rejected a section 1983 on similar grounds. 307 F. App'x 65 (9th Cir. 2009). In *Emmert*, "[t]he record show[ed] that the litigation waiver was not a but-for dealbreaker" because "Emmert objected to several provisions of the

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[12] Defendants also argue in reply only that Plaintiff misinterprets the Landing Agreement, which does not actually require a waiver of the right to sue. ECF No. 17 at 16-17. The Court does not consider new facts or argument made for the first time in a reply brief. "It is inappropriate to consider arguments raised for the first time in a reply brief." *Ass'n of Irritated Residents v. C & R Vanderham Dairy*, 435 F.Supp.2d 1078, 1089 (E.D. Cal.2006).

proposed agreement, and each was independently fatal to the settlement." *Id.* at 67. On that basis, the court held that "the waiver was not the actual or proximate cause of Emmert's injury." *Id.*

Memorandum dispositions are not binding, and the Court declines to apply [*Emmert*'s] reasoning in this case. The Court takes Plaintiff's objections to the various parts of the 2016 Landing Agreement at face value and assumes that Plaintiff would have independently rejected the Agreement based on any one of the challenged provisions. Indeed, Defendants could have made this same argument with respect to the fees imposed by the Agreement; claiming that they were not a but-for dealbreaker because Plaintiff would not have signed anyway due to the waiver provision. Taken to its logical conclusion, *Emmert*'s reasoning would bar a plaintiff from challenging <u>any</u> term of an agreement where more than one term is objectionable. Agreements with only one objectionable term could be challenged in court, but those with a greater number would be immune from attack. That cannot be correct. In reality, Defendants are suggesting that Plaintiff views the landing fees as more important than the waiver and that Plaintiff would have accepted the waiver had the fees been acceptable. That concession does not appear in the Complaint, however, and the Court will not assume it for purposes of this motion. The Court will not dismiss the First Amendment claim on causation grounds.

Next, Defendants argue that the First Amendment claim fails because the Landing Agreement's waiver is not an unconstitutional condition. ECF No. 12 at 21-22. "Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person

to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). The Ninth Circuit has further explained that the government must "have a legitimate reason for including the waiver in the particular agreement," which "almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1399 (9th Cir. 1991).

Defendants begin by claiming that the waiver is not unconstitutional in the first place because the government routinely seeks and obtains litigation waivers. ECF No. 12 at 22 (citing *Emmert Indus. Corp.*, 307 F. App'x at 67) (holding that "it is not at all unusual or impermissible for the government to seek a litigation waiver as part of a settlement agreement of a pending dispute or a potential lawsuit."). Citing to cases that have upheld waivers, however, does not mean waivers are per se constitutional. In *Emmert*, for example, the court held that the waiver was not an unconstitutional condition because it met the close nexus test, *id.*, not settlement agreements often include waivers.

The waiver in this case is unlike the others that Defendants cite because it is not contained in a settlement agreement that resolves a lawsuit to which the government is a party. Defendants emphasize *Emmert*, for example, but the court's reasoning there does not support the same result here:

> In this case, the City had a legitimate interest in settling a dispute over a rundown house

> that had dragged on for years. The condition the government imposed–a litigation waiver—directly advanced this interest by ensuring the dispute would come to a quick end. The benefit Emmert was to receive—a comprehensive settlement—was also closely connected to the litigation waiver and the City's need for resolution.

Id. Here, the 2016 Landing Agreement does not concern, much less resolve, a pending dispute; it is focused on future disputes. Plaintiff alleges that the Agreement requires a broad, prospective waiver of "every claim for damages against the Defendants" in exchange for the right to land at the North Side Dock. *Id*. ¶ 37; ECF No. 1-3 ¶ 20.3 ("Licensee agrees that Licensee will have no recourse with respect to, and Port shall not be liable for, any obligation of Port under this License, or for any Claim based upon this License . . . ").

The Court sees the waiver here as more analogous to the one in *Davies* than *Emmert*. In *Davies*, "Dr. Davies and his wife sued the [local school d]istrict in state court, alleging violations of 42 U.S.C. § 1983 and various state law causes of action in connection with the District's transfer of Mrs. Davies, who had been employed as a teacher in the District." 930 F.2d at 1399. As a condition of the parties' eventual settlement, "the District extracted a waiver of Dr. Davies' right ever to seek or accept a position on the [School] Board." *Id*. The Court concluded that the "nexus between the individual right waived and the dispute that was resolved by the settlement agreement [wa]s not a close one" because "[t]he underlying dispute had little connection with Dr. Davies' potential future service

on the Board." *Id.* In so holding, the court contrasted Davies' wavier with "release-dismissal agreements," "in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges." *Id.*; *Town of Newton v. Rumery*, 480 U.S. 386, 389 (1987).

The waiver here is overly broad and fails to meet the close nexus test. In order to gain use of the North Side Dock, Plaintiff had to waive the right to bring "any Claim based upon this License." ECF No. 1-3. Defendants argue that avoiding exposure to "extensive litigation costs and potential damages" is a "legitimate reason" for including the waiver. ECF No. 17 at 17. But a general reduction in "financial and legal risk," *id.*, is not the kind of "specific interest" that has been found to satisfy the close nexus test. Notably, Defendants cite no case that has upheld a general litigation waiver as a part of a contract to use government property. Defendants' only cases involve waivers as a prerequisite to dismissing pending litigation, which, as the *Davies* court explained, is factually dissimilar. Particularly at the motion to dismiss phase, the Court will not assume without support Defendants' claim that the government commonly and lawfully inserts broad waiver provisions in commercial contracts. *Id.* at 18 n.8.

The Court denies the motion to dismiss as to Plaintiff's First Amendment claim.

E. Bane Act

Defendants next seek dismissal of Plaintiff's Bane Act claim. The Bane Act prohibits a person from "interfere[ing] by threat, intimidation, or coercion, or attempt[ing] to interfere by threat, intimidation, or

coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." Cal. Civ. Code §§ 52.1(a), (b).[13] Liability under section 52.1 "requires an attempted or completed act of interference with a legal right, accompanied by a form of coercion." *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 334 (1998). The Act makes clear that "[s]peech alone is not sufficient to support [a Bane Act claim], except upon a showing that the speech itself threatens violence against a specific person or group of persons." Cal. Civ. Code § 52.1(j). Defendant claims Plaintiff cannot state a Bane Act claim for two reasons: 1) because Plaintiff cannot allege that it faced violence or a threat of violence, and 2) because Plaintiff has not alleged that Defendants deprived Plaintiff of any constitutional or statutory rights. ECF No. 12 at 24.

Defendants' second argument can be dispensed with quickly. Plaintiff has sufficiently alleged a violation of its First Amendment rights. Therefore, Plaintiff can state a Bane Act claim if the Complaint plausibly alleges that Defendants used some form of coercion to interfere with that First Amendment right.

Defendants argue that Plaintiff alleges it faced only a "verbal threat of economic harm if it did not sign the 2016 Landing Agreement." *Id.* If Plaintiff

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[13] In the vast majority of Bane Act claims, even those that involve interference with a First Amendment right, the coercive act is an arrest or some other detention by law enforcement. *E.g., Eberhard v. California Highway Patrol*, No. 3:14-CV-01910-JD, 2015 WL 6871750, at *7 (N.D. Cal. Nov. 9, 2015). This appears to be an unusual proposed application of Civil Code § 52.1.

challenges speech only, it must also allege violence or a threat of violence to support a Bane Act claim. Cal. Civ. Code § 52.1(j). Plaintiff objects to Defendants' characterization of its conduct as speech and describes the following "coercive and intimidating acts": "prohibiting Plaintiff from landing at the Port of San Francisco, taking illegal fees, requiring Plaintiff and others to expose themselves to criminal liability." ECF No. 15 at 25. The Court agrees with Defendants that the first "act" is actually just speech. Defendants told Plaintiff that it could not use the North Side Dock if it did not sign the agreement; Plaintiff does not allege that it was actually prevented from landing. Nor can the other two "acts" have interfered with Plaintiff's First Amendment rights. Logically, it cannot be that collecting the landing fees (and thereby supposedly exposing Plaintiff to liability under section 23300) was an act designed to coerce Plaintiff into signing the allegedly unlawful waiver. Both the fees and the waiver were part of the same objectionable 2016 Landing Agreement. Having to pay the fees was another reason not to sign the Agreement and the waiver within it, rather than the other way around.

Because Plaintiff challenges speech only, it must also allege violence or a threat of violence. Cal. Civ. Code § 52.1(j). Plaintiff makes no attempt to satisfy this requirement, focusing instead on the unsuccessful argument that Defendants engaged in coercive acts, not just speech. In any event, the Court sees no support for the proposition that economic coercion of the kind at issue here can constitute violence or threats of violence. *See Gottschalk v. City & Cty. of San Francisco*, 964 F. Supp. 2d 1147, 1164 (N.D. Cal. 2013) (noting that the plaintiff cite[d] no authority indicating that

'economic coercion' . . . may constitute violence or threats of violence within the meaning of either of these statutes").

The Court dismisses Plaintiff's Bane Act claim without prejudice.

F. Declaratory, Injunctive Relief, and Restitution

Given the Court's finding that Plaintiff plausibly alleged claims under the Tonnage Clause, DCC, RHA, and First Amendment, Plaintiff's derivative claims for declaratory relief, injunctive relief, and restitution survive the motion to dismiss. The Court denies the motion to dismiss as to these claims.

CONCLUSION

The Court denies the motion to dismiss with respect to the Tonnage Clause, DCC, RHA and First Amendment claims, and grants it with respect to the Bane Act claim.

IT IS SO ORDERED.

/s/ Jon S. Tigar
United States District Judge

Dated: July 24, 2017

CIVIL MINUTE ORDER
(JUNE 15, 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Minutes

LIL' MAN IN THE BOAT, INC

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.

Case No. 3:17-cv-00904-JST

PROCEEDINGS

- Initial Case Management Conference
- Defendants' City and County of San Francisco, et al.'s Motion to Dismiss Complaint for Violation of the Civil Rights Act, the Bane Act, Declaratory and Injunctive Relief and Unjust Enrichment (ECF No. 12)

RESULT OF HEARING

1. Motion hearing held. The motion is under submission.
2. The Court will reschedule the case management conference.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (AUGUST 20, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIL' MAN IN THE BOAT, INC.,
A CALIFORNIA CORPORATION,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO; ET Al.,

Defendants-Appellees.

No. 19-17596

D.C. No. 4:17-cv-00904-JST
Northern District of California, Oakland

Before: MURGUIA and CHRISTEN, Circuit Judges, and SESSIONS,* District Judge.

Judge Murguia and Judge Christen voted to deny Appellant's petition for rehearing *en banc*, and Judge Sessions so recommended. The full court has been advised of the petition for rehearing *en banc*, and no

* The Honorable William K. Sessions III, United States District Judge for the District of Vermont, sitting by designation.

judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35. The petition for rehearing *en banc* is DENIED.

FIRST AMENDED COMPLAINT
(AUGUST 14, 2017)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LIL' MAN IN THE BOAT, INC.,
A CALIFORNIA CORPORATION,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO AND SAN FRANCISCO PORT COMMISSION, OPERATING UNDER THE TITLE PORT OF SAN FRANCISCO, ELAINE FORBES, INTERIM EXECUTIVE DIRECTOR OF THE SAN FRANCISCO PORT; PETER DALEY, DEPUTY DIRECTOR, MARITIME, THE SAN FRANCISCO PORT; JEFF BAUER, DEPUTY DIRECTOR OF REAL ESTATE, THE SAN FRANCISCO PORT; JOE MONROE, HARBORMASTER, SOUTH BEACH HARBOR, PIER 40,

Defendants.

No. 17-cv-00904-JST

FIRST AMENDED COMPLAINT FOR:

1) The Civil Rights Act, 42 U.S.C. § 1983
2) Declaratory and Injunctive Relief
3) Unjust Enrichment

CLASS ACTION

JURY TRIAL DEMANDED

INTRODUCTION

1. Plaintiff Lil' Man In The Boat, Inc. ("Lil' Man" or "Plaintiff") owns and operates a licensed commercial charter Motor Vessel "Just Dreaming" (the "MV Just Dreaming") that provides transportation and hospitality services on the San Francisco Bay both for locals and visitors from all over the globe. MV Just Dreaming operates within the jurisdiction of the Port of San Francisco, and by Port regulation, must load and unload its passengers at the North Side Dock of Pier 40's South Beach Harbor. The license or Certificate of Inspection issued to Plaintiff by the United States Coast Guard since 2003 for MV Just Dreaming is for both commercial and recreational uses.

2. In addition to its commercial operations, MV Just Dreaming likewise resides and has been moored as a recreational tenant at South Beach Harbor since March 1, 1994, under the various agencies of the City and County of San Francisco which have asserted control over that port on behalf of the City and County of San Francisco. Plaintiff's vessel is therefore in the harbor as a commercial vessel and a recreational tenant vessel.

3. The Port of San Francisco operates under three sets of rules, one for "commercial vessels," such as Plaintiff, one for vessels which are "recreational tenant vessels" of the South Beach Harbor, and one which applies to visiting or "recreational transient vessels.

4. Plaintiff brings this action on behalf of itself and all others similarly situated to redress Defendants the City and County of San Francisco and the San Francisco Port Commission (together operating under the title "Port of San Francisco" and hereinafter referred to as "Defendant City"), Elaine Forbes, Peter Daley, Jeff Bauer, and Joe Monroe (collectively referred to as "Defendants") knowing and repeated violations of the United States Constitution as well as federal and California statutory law.

5. Defendants regulate the Port of San Francisco (the "Port") and thus have exclusively determined all landing fees, regulations and requirements for South Beach Harbor.

6. Defendant's regulatory authority covers all the docks and locations to land a vessel within the City and County of San Francisco. Defendant's own map of the jurisdiction of the Port of San Francisco covers all docks from Gas House Cove on the North side of the City of San Francisco, to the county line with the county of San Mateo at the southern-most edge of San Francisco. (See Attachment 10.) With respect to the remaining three docks in the city of San Francisco, the Marina Green Harbor is operated by the City and County of San Francisco by and through the Parks and Recreation Department. The remaining two docks in the city of San Francisco-the Golden Gate Yacht Club and the St Francis Yacht Club-are operated under agreement with and under the authority and

jurisdiction of Defendant City and County of San Francisco, through the Parks and Recreation Department. Since the 2016 Landing Agreement, which is at issue in this proceeding, was first mandated by the City and County of San Francisco, Plaintiff has attempted to land at these various docks under the control of the City and County of San Francisco as a commercial enterprise and has been refused unless and until Plaintiff signs the "2016 Landing Agreement." (See Attachment 11). Beyond the area claimed as the exclusive jurisdiction of the City and County of San Francisco as set out in this paragraph, there are no other docks upon which to land in San Francisco from the San Francisco Bay.

7. By the design of Defendants, South Beach Harbor is the hub of the San Francisco Bay charter activity for the entire Northern Bay Area, and the ability to load and unload passengers from South Beach Harbor's North Side Dock is critical to the viability of businesses like Plaintiff's. Defendants have a monopoly on all vessel landings within the City and County of San Francisco. Well aware of their power, Defendants impose excessive fees and charges and place regulations and restrictions on vessels, with the greatest unjustified imposition on commercial charter vessels engaged in interstate commerce as a condition of landing at the Port. The fees charged by Defendants bear no relationship to the costs generated or to the services provided by Defendants to commercial vessels. Defendants' excessive charges on commercial vessels create a substantial revenue for Defendants and vastly exceed the amount Defendants charge recreational vessels that are not engaged in interstate commerce and use Port services more extensively. Defendants

impose disproportionate charges on commercial vessels, which are more than the actual costs for commercial vessels' usage. By contrast, Defendants fail to charge or impose lower charges on the tenant recreational and transient vessels who use the North Dock. Defendants' fees are intended to, and in fact generate a substantial profit for Defendants from the entire dock.

8. The framers of the United States Constitution intended the Tonnage and Commerce Clauses to prevent exactly this scenario, which if left unchecked, would cripple interstate commerce. (U.S. Constitution, Article 1, § 10, cl. 3 (the "Tonnage Clause"); U.S. Constitution, Article 1, § 8, cl. 3 (the "Commerce Clause").)

9. The Tonnage Clause prohibits localities from imposing an assessment, regardless of name or form, that by operation levies a charge for the privilege of entering, trading in, or lying in a port. A "duty of Tonnage," or a fee for the use of a port in the United States, is permissible under the Tonnage Clause only to the extent that: (a) the proceeds of such a duty are used for services rendered to and enjoyed by the vessel, (b) such services enhance the safety and efficiency of interstate commerce, and (c) the duty places only minimal burdens on interstate commerce.

10. Similarly, a port entry fee or charge violates the Commerce Clause if it (i) discriminates against interstate commerce, (ii) is not based upon a fair approximation of use, or (iii) is excessive in relation to the cost to the government of the benefits conferred.

11. The federal Rivers and Harbors Act (as amended, the "Rivers and Harbors Act") codifies these principles, and likewise prohibits taxation, fees, or other charges, restrictions or obligations, imposed on

vessels on the navigable waters of the United States, except in an amount reasonably necessary to maintain the portion of the port facility used for passage. *See* 33 U.S.C. § 5(b).

12. Defendants have forced the payment of excessive fees from Plaintiff and others similarly situated for years, in violation of these federal laws. In 2016, Defendants sought to impose even higher fees by insisting on a written landing rights agreement (the "2016 Landing Agreement," Attachment 3) between Defendant City and all commercial charter operators like Plaintiff who wished to land at the Port.

13. In addition to raising the standard base excursion landing fee and reserving the right to increase that fee "at any time" without limitation and without the right to complain, the "2016 Landing Agreement" insists upon payment of seven percent (7%) of a charter vessel's gross revenues, including the sale of alcoholic beverages (the "7% Gross Revenue Fee") when the income for the vessel reaches a certain level. Plaintiff is informed and believes that Defendants impose the 7% Gross Revenue Fee on its land-based tenants, such as restaurants and bars. Not only does the 7% Gross Revenue Fee make Defendants' landing fees even more excessive, it is illegal under California law governing the licensing and sale of alcohol within the state. Business and Professions Code section 23300 prohibits Defendants from participating in, receiving, or sharing any revenue or profit from alcohol sales within the state. (*See* Attachment 7.) Any person who violates section 23300, whether a licensee or a non-licensee improperly sharing in revenues or profits, is guilty of a criminal misdemeanor. *See* Cal. Bus. & Prof. Code § 23301.

14. The 2016 Landing Agreement is illegal and coercive in several other respects. Among other things, it requires a waiver of the vessel operator's right to bring claims against Defendants under the Agreement, in violation of the First Amendment right to petition the government for a redress of grievances, and, on information and belief, the Agreement itself was required to be and was never authorized or approved by the Bay Conservation and Development Commission ("BCDC"), as required by Defendants' permit to operate South Beach Harbor as issued by BCDC. The 2016 Landing Agreement is replete with excessive, illegal and impossible charges, regulations, restrictions and conditions, as further described below and as set forth in Attachment 10, "Objections to Specific Provisions In The "2016 Landing Agreement."

15. At various times in 2016, Defendants threatened that any commercial charter operator refusing to sign the 2016 Landing Rights Agreement would lose all rights to land at the Port for commercial purposes. (*See* Attachment 3.) Plaintiff and others faced the "choice" to either sign the Landing Rights Agreement and pay Defendants' illegal and potentially limitless fees, or stop doing business legally in the City and County of San Francisco.

16. Plaintiff repeatedly met with Defendants throughout 2016 to protest their fees and the 2016 Landing Agreement, providing them with unambiguous legal authority demonstrating the illegality of their conduct. Fearing for their businesses, some commercial vessel operators ceded to Defendants' demands and signed the 2016 Landing Agreement. Others, like Plaintiff, refused. Defendants did not correct their actions or withdraw their demands. In October 2016,

Defendants threatened Plaintiff and others to either sign the 2016 Landing Agreement or cease commercial use of the Port by January 1, 2017.

17. Plaintiff and others who refused to sign the 2016 Landing Agreement are currently refused landing rights in and out of using South Beach Harbor for commercial purposes and cannot lawfully operate their businesses. Other members of the proposed class who did execute the "2016 Landing Agreement" can and do use the Port, but only on the condition of paying Defendants' extortionate fees. All members of the proposed class, including Plaintiff, have been forced to pay the 7% Gross Revenue Fee as of January 2017. Plaintiff has made two such payments, one in January 2017 and one in February 2017, in connection with charters that had been reserved before Defendants prohibited Plaintiff from using the Port.

18. Plaintiff brings this action on behalf of itself and all others similarly situated to enjoin Defendants' extortionate activities, declare Defendants' fees and other impositions, conditions, regulations and restrictions in the "2016 Landing Agreement" illegal and unenforceable, and secure the return of all illegal fees paid to Defendants from four years prior to the filing of this complaint to the date of the trial of this matter.

JURISDICTION AND VENUE

19. This action arises under 42 U.S.C. § 1983 (Civil Rights). This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1343(a)(3) (jurisdiction to redress constitutional violations); and 28 U.S.C. § 1367 (supplemental jurisdiction).

20. Venue is proper in this Court under 28 U.S.C. § 1391(b). Venue is appropriate in this district pursuant to 28 U.S.C. § 1391, because Defendants reside in, are found within, and transact their affairs within this judicial district.

21. Venue is also proper in this district because all of the events giving rise to the claims occurred in this district. Specifically, Plaintiff has conducted business and/or is being denied the opportunity to lawfully conduct business within this district while engaged in interstate commerce.

22. Pursuant to Local Civil Rules 3-2 and 3-5, assignment to this division is proper because a substantial number, if not all of the events or omissions that give rise to the claims asserted by Plaintiff occurred in the City and County of San Francisco.

PARTIES

23. Plaintiff Lil' Man is a California corporation created in 1994 and is currently operating in good standing. Plaintiff is organized and exists under the laws of the state of California and is and was at all times mentioned herein qualified to do business in California. Plaintiff owns and operates MV Just Dreaming, and sues each of the Defendants listed below for violations of law and claims as set forth herein.

24. Defendant the City and County of San Francisco and its Port Commission, an agency of the City and County of San Francisco (collectively, "Defendant City"), was and is, at all times relevant, a public government entity existing by virtue of the laws of the state of California and City of San Francisco.

25. At all times relevant, Defendant City has operated South Beach Harbor, the Port of San Francisco, the predecessor to the Port, the San Francisco Redevelopment Agency, the remnants of the Hunter's Point Naval Shipyard, docks on the North end of San Francisco, and all of the docks that permit commerce vessels to pick up or drop off commercial passengers. A true and correct copy of the Port's jurisdiction for the imposition of its regulations, fees and tariffs, which are claimed by the Port of San Francisco is attached as Attachment 11. There is one other public dock in the north end of San Francisco, Marina Green, which is operated by the City of San Francisco Parks and Recreation Department. There are two private yacht clubs, which are operated under an agreement with the City and County of San Francisco. All of these docks, which have agreements with the City and County of San Francisco, have refused landings to MV Just Dreaming as a result of Plaintiff's failure and refusal to sign Defendants "2016 Landing Agreement."

26. Individual Defendants Elaine Forbes, Peter Daley, and Jeff Bauer were, at all times relevant to this Complaint, the Interim Executive Director and assistant directors of the Port of San Francisco. Defendant Joe Monroe was, at all times relevant to this Complaint, the harbormaster for South Beach Harbor. Each Individual Defendant was an executive officer of, and a manager for, Defendant City, and acted in his or her capacity as a public official with respect to the violations of federal and state law described herein. In their official capacity, they proposed and enforced the Port's rules and policies, including but not limited to the 2016 Landing Agreement, that are at issue in this Complaint.

Forbes, Daley, and Bauer were each an executive officer of and a manager for Defendant City acting in the capacity of a public official with policy-making authority over South Beach Harbor. Each Individual Defendant seeks to and does deprive and violate Plaintiff's rights, and those of all similarly situated, under the Constitution and laws of the United States by taking funds not properly due to Defendant City by threat, coercion and intimidation. Each Individual Defendant has had sufficient time to realize his or her actions violated the Constitution and the Rivers and Harbors Act. Each Individual Defendant is on notice that his or her conduct is illegal conduct as set forth in the U.S. Court of Appeal decision in *Bridgeport Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79 (2009), a copy of which was delivered to them along with a letter on July 20, 2016. (*See* Attachment 4.) Despite being on notice and having sufficient time to realize their actions violated the law, Individual Defendants have failed to correct their conduct and continue to act illegally. (*See* Attachment 5 (Oct. 6, 2016 Letter).)

27. Each Defendant was likewise advised in meetings on July 20, 2016, and November 8, 2016, and in writing on numerous occasions, that their conduct also violated California law. However, they refused to comply with the law, and insisted that Plaintiff and all others similarly situated either accede to their demands or cease operations from South Beach Harbor as of January 1, 2017.

FACTUAL ALLEGATIONS

28. Since 1994, MV Just Dreaming has been moored with the City and County of San Francisco at

South Beach Harbor as a recreational tenant vessel pursuant to a lease agreement between Plaintiff and South Beach Harbor management. Plaintiff's status as a recreational tenant of the City and County of San Francisco is not in issue in this suit.

29. In 2003, Plaintiff obtained a commercial license issued by the United States Coast Guard ("USCG") for operation as a vessel for hire to carry passengers on the navigable waters of the United States, and has at all times since 2003 acted within that license. Like other passenger charter vessels at the South Beach Harbor, Plaintiff provides transportation and hospitality services on the San Francisco Bay for visitors from other states and nations during their stays in San Francisco.

30. MV Just Dreaming hosts parties and receptions, and transports guests to visit local landmarks (like Angel Island or the Golden Gate Bridge) and cities (like Oakland and Sausalito), among other things. In the past four years, Plaintiff has routinely provided services to groups from all over the United States, and from other states and countries such as China, France, Mexico, Russia, Germany, Australia, and Spain. In 2013, 2014, 2015, 2016, and 2017, MV Just Dreaming transported passengers in interstate commerce from and to foreign nations and other states of this nation over the navigable waters of San Francisco in numerous separate charters monthly and often weekly, and occasionally on a daily basis. Hiring this vessel, and most vessels on San Francisco Bay, is seasonal, with few charters in January, February and March, with usage increasing to almost daily use, in August and September. A few examples of MV Just Dreaming

carrying passengers in interstate commerce from other states and other nations include:

(a) Numerous citizens of and from main land China who had flown to San Francisco and then boarded MV Just Dreaming transporting them from San Francisco over the navigable waters of San Francisco Bay to Angel Island where they disembarked to view and examine the location of Chinese internments at the Immigration Station on the Island. Later MV Just Dreaming picked them up again and transported them again over the navigable waters of San Francisco Bay back to Pier 40, South Beach Harbor;

(b) Numerous citizens of and from main land China who had flown to San Francisco and then boarded MV Just Dreaming transporting them from San Francisco over the navigable waters of San Francisco Bay to Sausalito where they disembarked to view and examine streets, shops and restaurants of the City of Sausalito.

(c) Numerous citizens of and from main land China who had flown to San Francisco and then MV Just Dreaming transported them from Sausalito after shopping and visiting in that city over the navigable waters of San Francisco Bay to San Francisco, Pier 40, South Beach Harbor;

(d) Numerous citizens of and from the nation of Mexico, on multiple separate occasions who had flown to San Francisco and then boarded MV Just Dreaming which transported them

from San Francisco over the navigable waters of San Francisco Bay to Sausalito to view and examine the City of Sausalito, then on to the Golden Gate Bridge, and ultimately returning to Pier 40, South Beach Harbor, San Francisco.

(e) Numerous citizens of and from the nation of Russia, who had flown to San Francisco and then boarded MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay for a wedding and reception on San Francisco Bay and ultimately returning to Pier 40, South Beach Harbor, San Francisco.

(f) Numerous citizens of and from the nation of France, who had flown to San Francisco to participate in Oracle World, an internet company's annual convention, and then boarded MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay for a reception on San Francisco Bay and ultimately returning to Pier 40, South Beach Harbor.

(g) Numerous citizens of and from the nation of Germany, who flew to San Francisco to participate in an internet company's annual convention, and then boarded MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay where they disembarked for a reception at Sausalito. Later they would return to MV Just Dreaming which transported these passengers returning to Pier 40, South Beach Harbor.

(h) Approximately twenty excursions in two years involving numerous citizens of other states in the nation who flew to San Francisco and attended management training for their company in the Redwood City area, and then took a train to San Francisco where they boarded MV Just Dreaming, which transported them from San Francisco over the navigable waters of San Francisco Bay, usually to the Golden Gate Bridge, for a reception on San Francisco Bay and ultimately returning to Pier 40, South Beach Harbor, San Francisco.

(i) Numerous excursions throughout each year involving numerous citizens of other states involved in the accounting industry who flew to and attended training for their employees in the Bay Area at the conclusion of which they boarded MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay, usually to the Golden Gate Bridge, for a reception on San Francisco Bay and returning to Pier 40, South Beach Harbor.

(j) Multiple excursions involving numerous citizens of other nations, predominantly Australia, who flew to San Francisco and then took other transportation to San Francisco where they boarded MV Just Dreaming, which transported them from San Francisco over the navigable waters of San Francisco Bay, to witness and celebrate

their own teams participation in the "Americas' Cup," and ultimately returning to Pier 40, South Beach Harbor, San Francisco.

(k) Multiple separate excursions involving numerous citizens involved in the banking and finance industry from and of the nation of Spain who flew to San Francisco and investigated the banking and finance industry in order to set up financial offices, who then boarded MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay, on each occasion disembarking in Sausalito.

(l) Repeated and multiple excursions, on a dozens or more occasions, for numerous citizens of other states, and occasionally other nations who came as family members and friends to San Francisco, boarded MV Just Dreaming, which transported them from San Francisco over the navigable waters of San Francisco Bay, on each occasion to or beyond the Golden Gate Bridge to deposit the remains of loved ones into San Francisco bay waters, spreading the ashes of loved ones at sea, then returning to South Beach Harbor, Pier 40, San Francisco.

(m) Repeated and multiple separate excursions involving numerous citizens of other states, and occasionally other nations who came to San Francisco to participate in and who did participate in sale discussions of goods and services in and outside of the United States, who then boarded MV Just Dreaming, which transported them from San Francisco over

the navigable waters of San Francisco Bay, then returning to South Beach Harbor, Pier 40.

(n) Repeated and multiple separate excursions, often weekly, involving numerous citizens of other states, and occasionally other nations who came as family members and friends to San Francisco who then boarded MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay, for the purpose of celebrating a birthday, then returning to South Beach Harbor, Pier 40, San Francisco.

(o) On New Year's Eve, December 31, 2016, numerous citizens of and from the nation of Australia, who had flown to San Francisco to observe and film New Year's Eve fireworks, for use in advertising and documentaries boarded MV Just Dreaming, which transported them from San Francisco over the navigable waters of San Francisco Bay for a viewing of fireworks at midnight, and ultimately returning to Pier 40, South Beach Harbor, San Francisco.

(p) Numerous citizens of and from other nations and states are regularly a party of any passenger group in family and company celebrations where they board MV Just Dreaming which transported them from San Francisco over the navigable waters of San Francisco Bay, and ultimately returning to Pier 40, South Beach Harbor, San Francisco.

31. The presence of tourists from other states and other nations, and the revenue they produce, are all part of and in furtherance of Plaintiff's participation, and the participation of all other similarly situated charter passenger vessels, in interstate commerce, as that phrase is used in the Constitution of the United States.

32. Since 2006, Plaintiff has loaded and unloaded its passengers at the North Side Dock of Pier 40's South Beach Harbor pursuant to an agreement with Defendant City. Most charter vessels like Plaintiff that accommodate 500 passengers or less that wish to load and unload passengers within the City and County of San Francisco must do so at the North Side Dock under Defendants' regulations. Defendants operate and regulate the North Side Dock, including by setting all fees and charges associated with charter vessels' excursion landings. In 2013, 2014, and 2015 Defendants' landing fee for commercial vessels such as MV Just Dreaming was $160.00. In 2016, the fee increased to $220 for commercial vessel operators who signed the 2016 Landing Agreement, but remained at the 2015 rate for those who refused to sign the new agreement by virtue of a "grace period" extended by Defendants.

33. For at least the last four years, Defendants have discriminated against vessels engaged in interstate commerce on the navigable waters of San Francisco Bay by favoring non-interstate commerce recreational vessels that use the same docks. While commercial vessels pay far more than the cost of dock maintenance associated with picking up and dropping off passengers, recreational tenant vessels and transient recreational

vessels pay nothing to Defendants for loading or discharging passengers on the North or South Dock of South Beach Harbor.

34. For example, Defendants charged MV Just Dreaming as a recreational tenant $1167 per month for 24-hour per day month long dockage at South Beach Harbor as a recreational vessel, which included water, electrical and security services. As a commercial passenger vessel, Defendants charged MV Just Dreaming $160 for one hour of docking to embark and debark passengers (30 minutes allotted for each) at the North Side Dock, with no water, electrical or security services included. The residential tenant and the transient recreational vessel pays nothing for landing on the North or South Dock to drop off and pick up passengers.

35. The exorbitant fees Defendants charge charter vessels like MV Just Dreaming for use of the North Side Dock is compounded by the fact that these vessels can only use a small portion of that dock's 640 feet. Concession stands and the permanent mooring of a water taxi and kayak hut reduce the space to 330 feet, which is further diminished by the presence of recreational and transient vessels that Defendants allow to moor for hours and even days. Defendants charge these recreational vessels far less than MV Just Dreaming, if at all. Sometimes there is no space available for charter vessels like MV Just Dreaming to pick up guests, resulting in failed or late reservations and increased fuel and wage costs.

36. Defendants do not use the fees collected from Plaintiff and all others similarly situated to maintain the North Side Dock, nor are the fees even reasonably approximated to do so. Defendants provide a stable,

secured, and protected dock on the South Guest Dock of South Beach Harbor for the exclusive use of non-interstate recreational vessels. The North Side Dock, which Defendants force commercial vessels like MV Just Dreaming to use, is not secured or protected, exposing the vessels to damage from Bay surges and making passenger loading difficult and potentially dangerous. Additionally, for the last four years, Defendants rarely inspect or maintain the North Side Dock despite its poor condition and repeated requests by tenants to do so. Indeed, despite repeated public records requests, Plaintiff has been unable to find any study or assessment by Defendants of the costs necessary to maintain the North Side Dock or any allocation of relative use between recreational and commercial vessels.

37. Yet, Defendants' budget for operation of South Beach Harbor for fiscal years 2015 through 2021 shows that approximately $500,000 per year will be taken as "rent" from the Port to the Defendant City, and approximately $1,000,000 will go to Defendant City's general funds. (*See* Attachment 6: (budget for operation of South Beach Harbor from 2015 through 2021).)

38. Beginning in at least four years prior to the filing of this complaint to the present, Defendants' excessive fees imposed on commercial vessels have resulted in a profit to Defendants, far in excess of the costs to maintain the North Side Dock. Despite that Plaintiff and others similarly situated have Constitutional rights to land at the Port and pay only those fees permitted under the Tonnage and Commerce Clauses, Defendants have forced commercial vessel operators to pay their illegal charges under the threat of revoking commercial access to the North Side Dock entirely,

which would almost certainly spell the end of the operators' businesses.

39. In 2016, Defendants demanded that commercial vessel operators pay even higher fees pursuant to the 2016 Landing Agreement. The 2016 Landing Agreement purports to reserve Defendants' right to increase its fees "at any time" in any amount with a waiver of the right to seek judicial review under the Constitution of the United States. (*See e.g.*, Attachment 3: at p. 2, ¶ 5.1(a) ("All Fees shall be paid to Port, without any deduction, setoff or counterclaim whatsoever. . . . Port may increase any Fee at any time . . . ").)

40. The 2016 Landing Agreement also imposes a supplemental 7% Gross Revenue Fee, which requires the commercial vessel operator to pay 7% percent of its monthly gross revenues in any month when (i) the 7% percent fee for such calendar month exceeds the (ii) the base landing fee for such calendar month. (*See* Attachment 3: at p. BLI-4.) The 7% Gross Revenue Fee includes the vessel's sale of alcoholic beverages. (*See* Attachment 3: at Ex. F.) Plaintiff is informed and believes that Defendants impose a similar percentage fee on their land-based lessees that is also calculated in part based on the revenue from the sale of alcoholic beverages.

41. The 7% Gross Revenue Fee is illegal. Cal. Bus. & Prof. Code § 23300. Such illegality has been brought to the attention of the Defendants repeatedly, and they refuse to comply with California law. Under California law, any entity licensed to sell and serve alcoholic beverages onsite does so under the laws of the state of California including the Business and Professions Code, and under the supervision and regulation of California's Department of Alcohol Beverage

Control ("ABC"). Each such licensee is prohibited from sharing revenue from alcoholic beverage sales with non-licensees such as Defendants. *See* Cal. Bus. & Prof. Code § 23300. Violation of section 23300, by either the licensee or a non-licensee, is a criminal misdemeanor. *See* Cal. Bus. & Prof. Code § 23301. Since 2015, Defendants have insisted on payments from gross revenue of the sale of alcohol in violation of sections 23300 and 23301.

42. The 2016 Landing Agreement contains multiple other illegal and unenforceable terms. For example, it requires commercial vessel operators to waive every claim for damages against Defendants in violation of the First Amendment right to petition the government for a redress of grievances. (*See* Attachment 3: at p. 18, ¶ 20.3 ("Licensee agrees that Licensee will have no recourse with respect to, and Port shall not be liable for, any obligation of Port under this License, or for any Claim based upon this License . . . "). It also contains provisions which waive any right of recovery against Defendants for any loss or damage sustained by Plaintiff and others similarly situated while on Port property. (*See* Attachment 3: at pp. 12-14.)

43. In addition, the 2016 Landing Agreement provides that Defendant City can incur costs and expenses for Plaintiff and others, without limitations, such as the hiring of CPAs for an audit, and permits Defendant City to set insurance policy limits in any amount, thereby drastically increasing the expenses for the operation of the vessel and making it virtually impossible for the vessel to operate.

44. By the terms of the 2016 Landing Agreement, Defendants can revoke the agreement at any time, without reason, and prohibit the vessel from landing

at the Port with no right to seek judicial review or other redress of grievances by the vessel owner, in violation of the vessel and vessel owner's right to due process of law. (*See* Attachment 3: p. 2 at ¶ 4.)

45. In addition to its illegal terms, on information and belief, the 2016 Landing Agreement is also unenforceable because Defendants have never applied for, secured approval of or authorization for the contract from BCDC, as required by Defendants' operating permit issued by BCDC by which, as a trustee, the City and County of San Francisco operates South Beach Harbor.

46. Beginning in June 2016, Defendants ordered Plaintiff and others similarly situated to either sign the illegal 2016 Landing Agreement or cease all commercial interstate operations as of October 1, 2016. Some of Defendants' commercial tenants signed the 2016 Landing Agreement, while others like Plaintiff refused. Defendants repeated their order to holdouts like Plaintiff on November 8 and November 10, 2016, again threatening that any commercial vessel operator who refused to pay Defendants' illegal fees and waive various other Constitutional rights under the 2016 Landing Agreement would not be able to use the Port for commercial activities at all as of January 1, 2017. Defendants as the entity in possession of the premises ordered that any commercial landing at the North Side Dock by a vessel operator who had not signed the 2016 Landing Agreement was not authorized, hence would thereby constitute criminal trespass under California Penal Code section 602, which would subject the operators to arrest and seizure of the vessel.

47. Defendants were well aware of the illegality of their demands, their conduct, and the content of the

2016 Landing Agreement. Plaintiff and others met with Defendants, including Individual Defendants, in July, September, October and November 2016 to explain why Defendants' conduct and the 2016 Landing Agreement violated both federal and state law. Plaintiff provided Defendants with unambiguous authority demonstrating that Defendants' demanded fees violated the Tonnage and Commerce Clauses, Rivers and Harbors Act, and California law regarding the licensed sales of alcoholic beverages. (*See* Attachments 4, 5, 8 & 9) Defendants refused to correct their actions, with Individual Defendants Bauer and Dailey insisting that Defendants were entitled to "a piece of the action," or a percentage of gross profit for each vessel, in exchange for Plaintiff and others' access to the North Side Dock for commercial purposes. In other words, if Plaintiff and others did not pay Defendants' illegal fees and expose themselves to criminal liability for sharing alcohol revenues with a non-licensee, Defendants would lock them out of South Beach Harbor and effectively shut down the commercial vessel operators' businesses.

48. The 2016 Landing Agreement is the culmination of Defendants' repeated, intentional efforts to strip Plaintiff and others similarly situated of their federal and state rights in order to make a profit for Defendant City. Defendants succeeded in stripping those rights by their coercive actions, including demanding the payment of illegal (indeed, criminal) fees as a condition of doing business from the City's Port, which is under Defendants' exclusive control.

49. Plaintiff and others refused to sign the 2016 Landing Agreement, but have been forced to pay

Defendants' illegal 7% Gross Revenue Fee as of January 2017 for charters that had been reserved before Defendants' final November 2016 orders. Standing on their rights, Plaintiff and others similarly situated are currently locked out of South Beach Harbor (and, in reality, the City and County of San Francisco) for purposes of conducting their businesses. The City of San Francisco is the hub of San Francisco Bay charter businesses. Without the ability to land at South Beach Harbor, businesses like Plaintiff's are essentially valueless.

CLASS ACTION ALLEGATIONS

50. Class Definition: Plaintiff brings this action on behalf of itself and all others similarly situated as a representative of a class action pursuant to Federal Rule of Civil Procedure 23, and seeks to represent classes defined as follows:

(a) All persons and entities licensed by the USCG for commercial passenger service who, at any time during the four years preceding the filing of this action to the date of Class Certification have landed at, moored, or caused passengers to traverse South Beach Harbor and incurred or paid fees to Defendants for that opportunity;

(b) All persons and entities who, at any time during the four years preceding the filing of this action to the date of Class Certification, were licensed commercial passenger vessel operators who were subject to Defendants' demand that they execute and/or comply with the terms, payments and conditions of

the 2016 Landing Agreement in order to use South Beach Harbor;

(c) All persons and entities who, at any time during the four years preceding the filing of this action to the date of Class Certification, were licensed commercial passenger vessel operators and signed the 2016 Landing Agreement and complied with its terms;

(d) All persons or entities who, for the past four years to the present, have been licensed for sale and consumption of alcoholic beverages and who were or are subject to Defendants' demand for payment of a percentage of revenues or profits.

51. Ascertainability: Defendants maintain records of the commercial vessel owners landing at South Beach Harbor who were subject to landing fees for the past four years. Defendants also maintain records of each vessel subject to Defendants' demands to execute the 2016 Landing Agreement and similar agreements imposed on Port tenants that demand payment of gross revenue percentage fees. Defendants also maintain records of all vessels commercially licensed for passenger service in San Francisco Bay, its tributaries and sounds, and those on the West Coast which would be subject to the demands of Defendants to execute or comply with the terms of the 2016 Landing Agreement. Defendants also maintain records of each agreement entered into with each holder of an on-sale commercial license issued by ABC by which they seek any percentage from the sale of alcohol, as well as the records of receipts of the payment of those amounts.

52. Numerosity: This action is appropriately suited for a class action because Plaintiff is informed and believes and thereon alleges that the class is so numerous that joinder of all members would be impractical and over the last four years there are in excess of 75 commercial vessel owners who land and or who could have landed at South Beach Harbor, Pier 40, and there are at least 75 commercial vessel operators subject to Defendants' demands to execute or comply with the terms of the 2016 Landing Agreement. There are more than a dozen land-based restaurants at the Port, and upon information and belief, many others who are subject to Defendants' demands for payment of a percentage of gross revenues.

53. Commonality: This action is appropriately suited for class action treatment because it involves common questions of law and fact related to the putative class that predominate over individual issues. These common questions include but are not limited to:

(a) Whether Plaintiff, and all class members have been charged, over the last four years and to date of trial, more than the cost to maintain the North Side Dock.

(b) Whether Plaintiff and all class members are required to pay into the future more than the cost to maintain the North Side Dock.

(c) Whether Plaintiff and all class members were subject to Defendants' discriminatory terms for usage of the Port including Defendants' demands for fees and conditions which violate the Constitution of the United States and the Rivers and Harbors Act.

(d) Whether Plaintiff and class members were subject to discriminatory fees and conditions for use of South Beach Harbor imposed by Defendants as commercial vessels and as vessels involved in interstate commerce, as compared to fees imposed by Defendants on recreational vessels not engaged in interstate commerce.

(e) Whether Defendants' charge of a percentage fee of gross or net revenues of any establishment which serves alcoholic beverages violates California Business and Professions Code section 23300.

54. Typicality: This action is appropriately suited for a class action as Plaintiff's claims are typical of the class as defined, as Defendants set uniform charges for all commercial and non-commercial vessels using South Beach Harbor, including Plaintiff. In addition, the charges imposed on and paid by on-sale alcohol license holders, were uniformly imposed on class members, including Plaintiff.

55. Adequacy: Plaintiff will fairly and adequately protect the interests of all members of the class because it has standing as a tenant of the Port, its interests are aligned with the class, it has no conflicts of interest, and it has personal knowledge of Defendants' conduct as described herein. Plaintiff has selected counsel which will adequately represent the class.

56. Additionally, prosecuting separate actions by individual class members creates a risk of:

(a) inconsistent or varying adjudications with respect to individual class members that

would establish incompatible standards of conduct for the party opposing the class; and

(b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

FILING OF GOVERNMENT CLAIMS AND REJECTIONS

57. Plaintiff complied with the Claims filing requirements of California Government Code section 910 *et seq*. for claims of violations of California Law. On or about November 15, 2016, Plaintiff filed a Government Claim setting out the facts as stated herein with Defendant City, a government entity, which identified all Individual Defendants and their conduct. On December 16, 2016, Defendants denied said claim in its entirety and Plaintiff timely brought this action.

FIRST CLAIM FOR RELIEF
(Violation of The Civil Rights Act, 42 USC § 1983: Tonnage Clause, Commerce Clause and Rivers & Harbors Act) (Plaintiff for Itself and All Others Similarly Situated against all Defendants)

58. Plaintiff incorporates each of the foregoing allegations here.

59. Each Defendant herein was and is a state actor, by reason of (a) being a municipality authorized

by law and acting within the powers of said authorization, (b) for the individual Defendants due to their position as a municipal organization, and acting as managing agents for the municipal organization with their power over Plaintiff and all of those similarly situated, and that each was acting in the capacity of a government agency government manager "acting under color of law."

60. Defendants, and each of them, sought to, did attempt to interfere, and did interfere with the federal rights of Plaintiff, and all others similarly situated, under the Tonnage Clause, the Commerce Clause, the First Amendment, and the Rivers and Harbors Act under color of state law.

Violation of the Tonnage Act.

61. The United States Constitution, U.S. Const., art. I, § 10, cl. 3, provides, in pertinent part, that "[n]o State shall, without the Consent of Congress, lay any duty of Tonnage."

62. The Tonnage Clause prohibits states and localities from imposing any assessment regardless of name or form, even though not measured by tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port.

63. A duty of Tonnage is permissible under the Tonnage Clause only to the extent that: (a) the proceeds of such a duty are used for services rendered to and enjoyed by the vessel, (b) such services enhance the safety and efficiency of interstate commerce, and (c) the duty places only minimal burdens on interstate commerce.

64. Since 2013 to date Plaintiff, and others similarly situated, paid Defendants fees in an amount that greatly exceeded the value of services rendered by Defendants to Plaintiff. The amounts collected do not bear a reasonable relation to the actual costs of services Defendants provide to Plaintiff and others similarly situated.

65. Defendants use a significant portion of the proceeds of the fees for purposes that do not enhance the safety and efficiency of interstate commerce and navigation. The revenues generated by the fees exceed by a large margin the amount reasonably necessary to compensate Defendants for expenditures for direct services used by Plaintiff and others similarly situated.

66. The fees are a charge for the privilege of entering, trading in, or lying in a port and thus are subject to the Constitutional prohibition against laying "any Duty of Tonnage."

67. The fees, in whole or in part, burden interstate commerce.

68. By reason thereof, the fees imposed and sought to be imposed by Defendants are excessive or otherwise violate the Tonnage Clause.

Violation of the Commerce Clause.

69. The Commerce Clause of the U.S. Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . " (the "Commerce Clause").

70. An entry fee or similar charge violates the Commerce Clause and fundamental right to travel if

it (i) discriminates against interstate commerce, (ii) is not based upon a fair approximation of use, or (iii) is excessive in relation to the cost to the government of the benefits conferred.

71. As described above, Defendants' fees discriminate against interstate commerce because they impose burdens on commercial vessels operating in interstate commerce that far exceed those imposed on non-commercial vessels.

72. As described above, Defendants' fees are not based upon a fair approximation of Plaintiff's use of the Port and are excessive in relation to the cost to Defendants of the benefits conferred upon Plaintiff.

Violation of First Amendment Right to Petition Government for Grievances.

73. In order to land a vessel at South Beach Harbor, Defendants insist that Plaintiff, and those similarly situated, agree that Defendants can set the fees at any level they wish, take any percentage of passenger sale and alcohol sales they wish, can expel Plaintiff and others similarly situated from landing in San Francisco and impose any other conditions they wish and that Plaintiff and others similarly situated may not complain or seek a redress of their grievances, including by way of lawsuit.

74. In order to operate a vessel in interstate commerce and/or on the navigable waters of the United States under the terms and conditions guaranteed by the Constitution and federal statutes, Defendants have taken and have forced Plaintiff, and those similarly situated, to surrender of any right to seek a

redress of grievances, as guaranteed under the First Amendment to the Constitution of the United States.

75. Plaintiff, and those similarly situated, are thus deprived of their constitutional and statutory rights to operate and to seek a redress under the First Amendment if they wish to continue to operate a motor vessel in accordance with their license to do so.

Violation of the Rivers & Harbors Act.

76. The Rivers and Harbors Act prohibits taxation, fees, conditions, restrictions, and charges on vessels to, from, in and across the ports in the United States, greater than the cost to maintain the portion of the facility and prohibits any burden other than a "small" burden for the benefit of maintaining the facility. In relevant part, the statute provides that:

> No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for (2) reasonable fees charged on a fair and equitable basis that (A) Are used solely to pay the cost of a service to the vessel or water craft; (B) Enhance the safety and efficiency of interstate and foreign commerce; and (C) Do not impose more than a small burden on interstate or foreign commerce.

77. Plaintiff's vessel operates at all times on navigable waters subject to the authority of the United States and under the right of freedom of navigation on those waters.

78. As described above, Defendants' fees are not reasonable and are not charged on a fair and equitable basis regarding the costs to operate the North Side Dock; are used for purposes other than to pay for the cost of services to Plaintiff and its passengers; do not enhance the safety and efficiency of interstate commerce; and impose burdens on interstate commerce.

79. As described above, Defendants have appropriated revenue obtained from the fees for a variety of purposes falling outside the permissible scope of the Rivers and Harbors Act.

80. As a result of Defendants' violations of 42 U.S.C. § 1983, Plaintiff, and those similarly situated, have incurred injuries and have been harmed because (a) they have in large part been prevented from operating in the navigable waters of the San Francisco Bay by not having a location to land and pick up from at South Beach Harbor, (b) have been harmed because they have paid and continue to pay landing fees and charges in excess of the fair and equitable assessment of the expense to maintain the North Side Dock; (c) have been required to incur costs, expenses and terms and conditions unrelated to the costs to maintain the dock; (d) have paid and continue to pay percentage assessments relating to income generated during a cruise, including seven percent (7%) of all sales of alcohol, and (e) impose conditions, requirements and restrictions which violate the terms and limitations contained in 33 USC § 5(b).

81. Defendants threaten Plaintiff and others similarly situated with irreparable injury for which there is no adequate remedy at law, and as to which injunctive relief is a necessary and appropriate remedy to permanently enjoin Defendants, jointly and severally, from committing such violations.

82. An actual controversy exists because Defendants' fees create an actual and present controversy regarding the rights and legal rights and relations of Plaintiff and others similarly situated and Defendants.

83. Defendants' violations threaten Plaintiff and others similarly situated and have already caused injury, making declaratory relief a necessary and appropriate remedy in permanently declaring the constitutional rights and legal relations of Plaintiff and others similarly situated.

84. Plaintiff and others similarly situated are entitled to compensatory damages, and punitive damages for Defendants' malicious, intentional, or recklessly and/or callously indifferent conduct, and costs, including attorneys' fees as well as injunctive relief.

SECOND CLAIM FOR RELIEF
Declaratory and Injunctive Relief
(Plaintiff for Itself and All Others Similarly Situated against Defendants)

85. Plaintiff incorporates each of the foregoing allegations.

86. There exists a case and controversy between the parties regarding Defendants' violations of Plaintiff's Constitutional and statutory rights, and the rights of others similarly situated, as set out herein.

87. No resolution is likely absent a declaration of rights as to the actions described herein.

88. Plaintiff seeks a declaratory judgment acknowledging Defendants' past and ongoing violations of the rights of Plaintiff and those similarly situated, and ordering the correction of and protections of those rights, including right to land at the North Side Dock and pay no more than the amount permitted under the Tonnage Clause, Commerce Clause, Rivers and Harbors Act, and California Business and Professions Code section 23300.

89. Plaintiff seeks a declaratory judgment that the 2016 Landing Agreement, and all similar agreements between Defendants and class members, are illegal and unenforceable because they violate Plaintiff and class members' rights under the United States and California Constitutions, and federal and state statutory law.

THIRD CLAIM FOR RELIEF
(Unjust Enrichment) (Plaintiff for Itself and All Similarly Situated against Defendants)

90. Plaintiff incorporates each of the foregoing allegations.

91. As of at least 2013, Plaintiff and others similarly situated paid landing fees to Defendants in exchange for the right to land at the North Side Dock of South Beach Harbor to load and unload passengers on commercial vessels.

92. At all times relevant, Plaintiff, and each similarly situated vessel operator in interstate commerce, and all others similarly situated, including all other entities, licensees, bars, hotels and businesses hold or have held a license issued by the State of California, Department of Alcohol Beverage Control, for the sale of alcohol, with the attendant protections of the California Business and Professions Code section 23300.

93. California Business and Professions Code section 23300 limits the right to collect any portion of the fee or income from the sale of alcohol. Under that statute, "no person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division." Violation of section 23300 by either a licensee or non-licensee is a criminal misdemeanor. *See* Cal. Bus. & Prof. Code § 23301.

94. Under the 2016 Landing Agreement and similar agreements, Defendants demanded and have received 7% of the income from Plaintiff and other business tenants' sales of alcohol, even though Defendants are not licensed to share such revenue.

95. Defendants' fees have exceeded the amount Defendants are permitted to charge for use of the North Side Dock of South Beach Harbor under federal and California law. As such, Defendants have knowingly taken and retained a benefit (an excess of lawful fees) and have unjustly retained that benefit at the expense of Plaintiff and others similarly situated.

96. Plaintiff and others similarly situated are entitled to recover from Defendants all fees paid thereunder that were illegal and exceeded the amounts Defendants could charge consistent with the Tonnage and Commerce Clauses, the Rivers and Harbors Act, and California Business & Professions Code section 23300.

PRAYER

Wherefore, Plaintiff prays for judgment, for itself and those similarly situated, as follows:

1. For an order of restitution commanding the return of excessive landing fees taken by Defendants from Plaintiff and those similarly situated for the last four years for landing at South Beach Harbor, in an amount to be proven at trial.

2. For an order of restitution commanding the return of all fees and money taken by Defendants from Plaintiff and those similarly situated in violation of California Business and Professions Code section 23300, in amount to be proven at trial.

3. For an order enjoining Defendants from imposing fees, terms, conditions, or other charges in violation of the United States Constitution and Rivers and Harbors Act for landing at South Beach Harbor.

4. For an order enjoining Defendants from imposing fees or other charges in violation of California Business and Professions Code section 23300.

5. For an order declaring the 2016 Landing Agreement illegal, void, and unenforceable, voiding any such "agreement" having been signed.

6. For an order declaring any other agreement between Defendants and their tenants that imposes charges in violation of California Business and Professions Code section 23300 as illegal, void, and unenforceable.

7. For compensatory damages in an amount to be proven at trial.

8. For punitive damages under 42 USC § 1983.

9. For costs of suit and attorneys' fees under 42 USC § 1983, 1988 *et seq*. and/or California Civil Code § 1021.5.

10. For any further relief that the court deems just and proper.

Respectfully submitted,

ONGARO PC

/s/ David R. Ongaro
Attorneys for Plaintiff
LIL' MAN IN THE BOAT, INC.

Date: August 14, 2017

LANDING RIGHTS AGREEMENT
(AUGUST 14, 2017)

ATTACHMENT THREE
2016 Amended Landing Rights Agreement
(49 pages)

Pier 1
San Francisco, CA 94111

LANDING RIGHTS AGREEMENT LICENSE TO
LAND AT PORT OF SAN FRANCISCO PIERS

License No. ___

By and Between

The City and County of San Francisco Operating by and Through the San Francisco Port Commission

and

[Insert Name of Licensee]

South Beach Harbor Guest Dock

Elaine Forbes
Interim Executive Director

San Francisco Port Commission
Leslie Katz, President
Willie Adams, Vice President
Kimberly Brandon, Commissioner

Eleni Kounalakis, Commissioner
Doreen Woo Ho, Commissioner

Landing Fees

Fees

Licensee shall pay a fee of $110 per Landing ("Base Fee for Excursion Landings"). Effective January 1, 2017, this fee shall increase to $112.

In addition to the Base Fee for Excursion Landings, Licensee shall pay a percentage fee in an amount equal to seven percent (7%) of its Gross Revenues ("Percentage Fee for Excursion Landings") in any month when (i) the Percentage Fee for Excursion Landings for such calendar month exceeds the (ii) the Base Fee for Excursion Landings for such calendar month.

5. Fees.

5.1. Payment of Fees.

(a) Licensee shall pay the Fees in the amount and manner as set forth in the Basic License Information. All Fees shall be paid to Port, without prior demand and without any deduction, setoff or counterclaim whatsoever. All sums payable by Licensee to Port hereunder shall be paid in cash or by good check to the Port and delivered to Port's address specified in the Basic License Information, or such other place as Port may designate in writing. Without limiting its right to revoke or terminate this License or any of its other rights hereunder, Port may increase any Fee at any time. . . .

5.2. Books and Records; Audit.

If Licensee understates its data for any audit period with knowledge of such understatement or by reason of gross negligence, in addition to the foregoing, on the first such occasion Licensee shall pay Port ten (10) times the amount of the difference between the amount paid to Port by Licensee and the amount Port should have received. At the discretion of Port a second such understatement made with knowledge of or by reason of gross negligence shall result in cancellation of this License.

7. Permitted activity; Suitability of License Area; Operational Requirements.

7.3. Port shall have the full right and authority to make, revoke, impose, and amend any rules and regulations pertaining to and reasonably necessary for the proper use, operation and maintenance of the Landing Sites. If no rules and regulations currently exist for the Landing Sites, Licensee agrees to be bound by any rules and regulations Port later imposes on the Landing Sites. Licen*see also* acknowledges that Port's exercise of any of its rights regarding the License Area and other Port property in the vicinity of the License Area will not entitle Licensee to any abatement or diminution of Fees.

15.4. Exculpation and Waiver.

Licensee, as a material part of the consideration to be rendered to Port, hereby waives any and all Claims, including without limitation all Claims arising from the joint or concurrent, active or passive, negligence of the Indemnified Parties, but excluding any Claims caused solely by the Indemnified Parties'

willful misconduct or gross negligence. The Indemnified Parties shall not be responsible for or liable to Licensee, and Licensee hereby assumes the risk of, and waives and releases the Indemnified Parties from all Claims for, any injury, loss or damage to any person or property in or about the License Area by or from any cause whatsoever including, ...

20. Attorneys' Fees; Limitations On Damages.

20.1. Litigation Expenses.

The prevailing party in any action or proceeding (including any cross complaint, counterclaim or bankruptcy proceeding) against the other party by reason of a claimed default, or otherwise arising out of a party's performance or alleged non-performance under this License, shall be entitled to recover from the other party its costs and expenses of suit, including but not limited to, reasonable attorneys' fees, which fees shall be payable whether or not such action is prosecuted to judgment.

20.3. Limitation on Damages.

Licensee agrees that Licensee will have no recourse with respect to, and Port shall not be liable for, any obligation of Port under this License, or for any Claim based upon this License, except to the extent of the fair market value of Port's fee interest in the License Area (as encumbered by this License). Licensee's execution and delivery hereof and as part of the consideration for Port's obligations hereunder Licensee expressly waives all such liability.

22.3. First Source Hiring

Licensee acknowledges receiving and reviewing the First Source Hiring Program materials and requirements and agrees to comply with all requirements of the ordinance as implemented by Port and/or City, including without limitation, notification of vacancies throughout the Term and entering into a First Source Hiring Agreement, if applicable. Licensee acknowledges and agrees that it *may* be subject to monetary penalties for failure to comply with the ordinance or a First Source Hiring Agreement and that such non-compliance shall be default of this License.

22.11. Tropical Hardwood and Virgin Redwood Ban.

Licensee shall not provide any items to the construction of Alterations, or otherwise in the performance of this License which are tropical hardwoods, tropical hardwood wood products, virgin redwood, or virgin redwood wood products. In the event Licensee fails to comply in good faith with any of the provisions of Chapter 8 of the Environment Code, Licensee shall be liable for liquidated damages for each violation in any amount equal to the contractor's net profit on the contract, or five percent (5%) of the total amount of the contract dollars, whichever is greater.

"*Gross Revenues*" means, subject only to the exceptions stated below, all sales, payments, revenues, income, fees, rentals, receipts, proceeds and amounts of any kind whatsoever, whether for cash, credit or barter, received or receivable from business conducting at a Landing Site or on vessels calling at the Landing Site by Licensee, its Agents, concessionaires or by any

other person, firm or corporation including without limitation, all returns and refunds, employee meals, discounted and complimentary meals, beverages and services or similar benefits and/or goodwill, the total value, based on price, for the tickets, cover charges, merchandise and any other items and the operation of any event, including any special or fundraising event, and catering or food delivery business conducted by, from or at the Landing Site or approaches thereto (irrespective of where the orders therefor originated or are accepted and irrespective of where the food or beverages are consumed). Except as specified below, Gross Revenues shall be determined without reserve or deduction for failure or inability to collect (including, without limitation, spillage and waste) and without deduction or allowance for cost of goods sold or other costs, charges or expenses of purchasing or selling incurred by Licensee. No value added tax, no franchise or capital stock tax and no income, gross receipts or similar tax based upon income, profits or gross receipts as such shall be deducted from Gross Revenues.

DEPOSITION OF KATHARINE PETRUICIONE
(JULY 25, 2018)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LIL' MAN IN THE BOAT, INC.,
A CALIFORNIA CORPORATION,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO and SAN FRANCISCO PORT COMMISSION,
OPERATING UNDER THE TITLE PORT OF SAN FRANCISCO, ET AL.,

Defendants.

No. 3:17-cv-00904 JST

[July 25, 2018 Transcript p. 161]

. . . put into this where if the greater the use of the dock at the North Dock at Pier 40 would result in greater fees being charged to the user?

A. I don't know.

Q. Okay. And then it indicates what they tried to do was increase the fees—well, strike that. Let me ask you this:

South Beach Harbor also tried to force inhabitants of the South Beach—well, strike that.

South Beach Harbor and the City also attempted to collect 7 percent of the gross revenues of any vessel that used the North Dock to take on passengers or have passengers exit. Do you know how the City came up with the 7 percent figure?

A. I do not.

Q. Do you know whether it was based on anything other than the City wanting to generate revenue?

A. I don't know how the City arrived at that figure.

Q. And you'd agree with me that that 7 percent gross revenue figure, that's not based on any fair approximation of use of the vessel of the North Dock; true?

MS. STEELEY: Objection, outside the scope of this deposition.

A. I have no knowledge of that. I can't agree or disagree.

BY MR. ONGARO:

Q. Well, you would agree with me that if you had–

A percentage of your gross profit of a vessel owner could never be an approximation of the use of the North Dock at Pier 40; right?

MS. STEELEY: Same objection.

A. Yes, I would agree that a percentage of gross revenue fee is certainly a different kind of fee than a usage fee.

BY MR. ONGARO:

Q. Are you aware of any study that attempted to correlate the 7 percent fee that South Beach—

that the City wanted to impose on everybody who used the North Dock at Pier 40 to the cost of maintenance, operations, or capital expense?

A. I am not aware of such a study.

Q. How about a study regarding the $110 landing fee? Was there any study that you are aware of where the City undertook to determine, hey, if we charge you $110 per landing, that is an estimate of what our operation, maintenance, and capital expenses are going to be for the North Dock at Pier 40?

MS. STEELEY: Objection, outside the scope of this deposition.

A. I am not aware of such a study.

BY MR. ONGARO:

Q. Do you know why the North Dock is no longer being used by the City?

A. I know that the North Dock has some deferred maintenance issues, but I will defer to operations staff about why specifically the Port is not using the North Dock.

Q. What are the deferred maintenance issues?

A. I know generally that there are issues, because I am aware that we need to allocate funding to address some of those issues, but I don't know specifically what they are.

Q. And you would agree with me as the Deputy Finance person for the City that if the City undertook affirmative action to damage the dock so it couldn't be used, that would be wrongful conduct; right?

MS. STEELEY: Objection, outside the scope of this deposition.

A. If the City were to do that, that would be wrongful conduct.

[. . .]

MAP OF PORT JURISDICTION

http://www.sfport.com/port-jurisdiction (accessed August 8, 2017)