United States District Court
Northern District of California

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

ORDER GRANTING IN PART AND PART DEFENDANTS' MOTION TO DISMISS

Re: ECF No. 12

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 '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

[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 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).

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.

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 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.

[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.

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:

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

> (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 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;
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> (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;
>
> (d) 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 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).

[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).

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 phase, the Court

[6] For example, it may be that the landing fees are included in "Commercial Rental," a revenue line which accounts for only $250,000 of the total $5 million operating revenue. If so, they obviously

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 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

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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

[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.

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.

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.

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.

[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.

[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.

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 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 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]

[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)

[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.

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 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 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 *any* 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

[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).

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 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).

[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.

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.

D. 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.

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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.

Dated: July 24, 2017

JON S. TIGAR