

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 08-03**

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**MAHER TERMINALS, LLC**

**COMPLAINANT**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

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**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S OPPOSITION TO  
MAHER TERMINALS, LLC'S APPLICATION FOR ENLARGEMENT OF THE PAGE  
LIMIT FOR ITS EXCEPTIONS TO THE PRESIDING OFFICER'S INITIAL DECISION**

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The Port Authority of New York and New Jersey (the "Port Authority") hereby opposes Maher Terminals, LLC's ("Maher") Application for an Enlargement of the Page Limit for Its Exceptions to the Presiding Officer's Initial Decision filed June 4, 2014.

**INTRODUCTION**

Maher's request for a 125-page extension beyond the presumptive fifty-page limitation for exceptions, for a total of 175 pages, is entirely unwarranted. Maher's application simply continues its unbroken practice of launching baseless attacks on the Commission and its Presiding Officers since this action first began six years ago. Here, as before, Maher premises its application on grave mischaracterizations of the decision below, including by incorrectly claiming that the Presiding Officer ignored entire claims, ignored the applicable legal standards,

and ignored a mountain of purportedly supporting evidence. None of this is true. Rather, Maher's complaints reflect nothing more than a disappointed litigant's ordinary, if vociferous, disagreement with a result, and are not the occasion for extraordinary departure from the applicable rules. Accordingly, Maher's application to file a 175-page brief should be denied. At most, the parties' briefs should be subject to a seventy-five page limit.<sup>1</sup>

### **DISCUSSION**

Maher's application, premised in significant part on meritless attacks on the Presiding Officer's carefully reasoned sixty-two-page decision, *see pp. 4-5 infra*, continues the pattern of overly litigious conduct that it has pursued at every stage of these proceedings dating back to 2008. First, over the course of this action, Maher has repeatedly leveled unseemly personal attacks upon the former and current Presiding Officers responsible for this proceeding, followed by similar attacks on the Commission itself. The forums that heard these claims, including the Commission and the federal Court of Appeals, have properly rejected them. Second, throughout this action, Maher has repeatedly filed briefs and proposed findings of grossly excessive length, as it now seeks to do once more. *See p. 3-4 infra*.

Maher's consistent pattern of unwarranted challenges in Commission proceedings began with Maher's opposition to the settlement in the 07-01 action between APM/Maersk and the Port Authority. Maher there submitted three separate petitions before the Presiding Officer and the Commission even though it had no legitimate reason or basis to oppose the settlement.<sup>2</sup> Its

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<sup>1</sup> After the Commission denied Maher's application of June 3, 2014 without prejudice, the parties met and conferred by email, in which the Port Authority indicated that it would consent to an extension of up to 75 pages but not 175 pages. Maher thereafter refiled its motion.

<sup>2</sup> Maher's Exceptions to Initial Decision Approving Settlement and Related Dismissals with Prejudice, Nov. 17, 2008, Case No. 07-01, Doc. No. 124; Maher's Petition to Stay the Commission's Consideration of the Initial Decision Approving Settlement in this Proceeding Pending the Commission's Consideration of Maher's Petition to Determine Port Authority's

challenges were rejected. Maher adopted the same approach throughout the 08-03 proceedings, during which Maher leveled personal attacks upon Presiding Officer Guthridge—including in its exceptions to his dismissal of Maher’s reparations claims on summary judgment on statute of limitations grounds.<sup>3</sup> When the Commission upheld summary judgment on those claims, Maher went on to raise meritless challenges against the Commission itself, as it pursued specious motions for reconsideration and improper interlocutory appeals.<sup>4</sup>

Moreover, as it seeks to do now, Maher has repeatedly subjected the Port Authority, the Presiding Officers, and the Commission to briefing of inordinately excessive length, accompanied by voluminous exhibits.<sup>5</sup> Even Maher’s discovery motions regarding routine

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Subject Matter Waiver of Privilege Concerning Evidence Material to the Settlement and/or Port Authority’s Spoliation of Such Evidence, Jan. 13, 2009, Case No. 07-01, Doc. No. 129; Maher’s Petition for Leave to Reply to Port Authority’s Memo in Opposition to Maher’s Petition to Stay, Petition to Determine Subject Matter Waiver of Privilege and/or Spoliation, Etc., Feb. 18, 2009, Case No. 07-01, Doc No. 136.

<sup>3</sup> For example, Maher accused the Presiding Officer of “erroneously ignor[ing] FMC Rule 63(b) and Commission continuing violation authority,” “misconstru[ing] Commission authority recognizing continuing violations and invok[ing] inapposite employment discrimination and antitrust case law.” Maher’s Exceptions to Initial Decision of May 16, 2011 Granting in Part Motions for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims at 15, 17, June 7, 2011, Case No. 08-03, Doc. No. 133. Maher also stated, “[t]he I.D.’s complete failure to address . . . express Commission authorities precisely on point, and instead resort to non-Shipping Act authorities, is stunning,” and argued that the “position taken in the I.D. reflects its fundamental failure to appreciate PANYNJ’s absolute continuing duty to make available to Maher the same preferential lease terms provided to Maersk-APM.” *Id.* at 17, 21.

<sup>4</sup> Maher’s Verified Petition for Reconsideration of the FMC’s January 31, 2013 Order, Mar. 4, 2013, Case No. 08-03, Doc. No. 206; Petition for Review, Feb. 11, 2013, USCA Case # 13-1028; Maher’s Opposition to Respondent’s Motion to Dismiss, Apr. 8, 2013, USCA Case # 13-1028; Maher’s Opposition to Intervenor’s Motion to Dismiss, Apr. 8, 2013, USCA Case # 13-1028.

<sup>5</sup> *See, e.g.*, Maher’s Verified Petition for Reconsideration of the FMC’s January 31, 2013 Order, Mar. 4, 2013, Case No. 08-03, Doc. No. 206 (brief, together with exhibits, totaling **358** pages).

disputes have often exceeded forty pages in length, with hundreds of pages of exhibits.<sup>6</sup> Indeed, a primary example is presented by Maher’s submission on the merits of this action before the Presiding Officer. Having already filed a 100-page brief and 120-page proposed findings of fact on the merits, Maher disregarded the Presiding Officer’s page limitations for its reply briefing and filed approximately 370 pages of reply papers—170 pages over the permissible limits—as well as a voluminous appendix without pagination.<sup>7</sup> This conduct led the Presiding Officer to admonish Maher in her Initial Decision and prompted the Commission to enter a special procedural order for this appeal.<sup>8</sup> Further, Maher has repeatedly used the excessive length of its filings to set forth numerous mischaracterizations of the record, repeat groundless factual and legal arguments at great length, and, as noted, make attacks on the Presiding Officers, and more recently the Commission. Every time, its claims were carefully analyzed and properly rejected.

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<sup>6</sup> See, e.g., Maher’s Motion to Compel Discovery from Respondent the Port Authority, Sept. 10, 2012, Case No. 12-02, Doc. No. 17 (submitting 82-page brief with 240 pages of exhibits); Maher’s Reply in Opp’n to Port Authority’s Motion to Compel Discovery from Complainant, July 31, 2012, Case No. 12-02, Doc. No. 15 (submitting 63-page brief with 158 pages of exhibits); Maher’s Motion to Compel Production, Sept. 25, 2008, Case No. 08-03, Doc. No. 15 (submitting 40-page brief with 292 pages of exhibits); Maher’s Motion to Compel with Appendix, July 26, 2011, Case No. 08-03, Doc. No. 143 (submitting with discovery motion an Appendix of exhibits spanning 225 pages)

<sup>7</sup> See 08-03 Initial Decision at 7-8 (explaining that while briefs are generally limited to 80 pages and proposed findings were limited to 100 pages, Maher submitted a 100-page reply brief and 270 pages of responses to the Port Authority’s proposed findings on reply).

<sup>8</sup> See 08-03 Initial Decision at 7 (observing that “the filings clearly exceed the page limitations” and warning that “[i]n the future, however, failure to abide by page limitations may result in sanctions”); *id.* at 8 (noting that Maher’s “fifteen volume supplemental appendix includes three volumes of documents which lack pagination, so that it is impossible to identify the specific page cited,” and ordering that “[i]n the future, only one readable, paginated copy of relevant exhibits should be submitted”); see also Procedural Order at 2, Case No. 08-03 (F.M.C. May 1, 2014) (quoting the Presiding Officer’s remarks and instructing the parties to file a joint Exceptions Appendix).

Maher's current application for an excessive enlargement of the page limitation for its exceptions rests on yet another series of serious mischaracterizations of the Presiding Officer's Initial Decision on the merits of the 08-03 action. For example, Maher asserts that the Presiding Officer "fail[ed] entirely to consider certain of Maher's claims." Mot. at 2. Maher does not specify which claims it has in mind, nor could it because the Presiding Officer systematically addressed every one of Maher's claims in the 08-03 and 07-01 actions. 08-03 Initial Decision at 35-60. Maher also misrepresents that the Presiding Officer "failed to address both the proper legal standards for the multiple violations," namely, the Commission's decisions in *Ceres*, *Volkswagenwerk*, *Ivarans*, and *Secretary of the Army*. Mot. at 4. In fact, the Presiding Officer relied on these very decisions, discussing and analyzing *Ceres* for several pages as well as invoking and applying the *Volkswagenwerk*, *Ivarans*, and *Secretary of the Army* legal standards as appropriate. 08-03 Initial Decision at 36-39, 41-42, 52-54, 57.

Maher further mischaracterizes the Initial Decision by claiming that the Presiding Officer "ignored" a "mountain of evidence" as "not dispositive or material." Mot. at 8. As the Presiding Officer carefully explained, the Initial Decision properly "addresses only material issues of fact and law." 08-03 Initial Decision at 8. Thus, "[p]roposed findings of fact not included in this initial decision were *rejected*"—not ignored—"because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto." *Id.* (emphasis added). There is nothing improper about the Presiding Officer's approach. Nor does Maher identify even one material proposed finding or piece of evidence that the Presiding Officer purportedly failed to consider.

In short, Maher has no genuine justification for its extravagant request to exceed the applicable fifty-page limit for its brief by 125 additional pages. The Port Authority respectfully

submits that if the parties' briefs are enlarged at all, at most, they should be extended to no more than seventy-five pages each.

**CONCLUSION**

Accordingly, the Port Authority respectfully submits that the Commission should deny Maher's application to enlarge the page limit for its exceptions to 175 pages. At most, the page limit should be extended to seventy-five pages for both parties.

Dated: June 5, 2014

Respectfully submitted,



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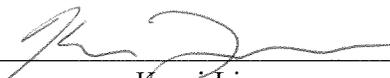
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon the persons listed below in the matter indicated, a copy to each such person.

<p><b><u>Via Federal Express and E-mail:</u></b> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Rand Brothers Winston &amp; Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at Washington, DC this 5th day of June, 2014</p>
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