

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 11-12**

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**KAWASAKI KISEN KAISHA, LTD.,**

**COMPLAINANT**

**v.**

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

**RESPONDENT**

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**PORT AUTHORITY'S REPLY TO APPEAL  
FROM DISMISSAL OF COMPLAINT OF  
COMPLAINANT KAWASAKI KISEN KAISHA, LTD.**

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Pursuant to FMC Rule 227(b)(2) and the Commission's February 20, 2014 Notice of Extension of Time to File Exceptions and Replies, Respondent The Port Authority of New York and New Jersey ("Port Authority") hereby replies to Complainant Kawasaki Kisen Kaisha, Ltd. ("K' Line")'s March 31, 2014 Appeal from Dismissal of Complaint ("Appeal").

### **INTRODUCTION**

The cargo facility charge ("CFC"), which went into effect in March 2011, is a user fee assessed by the Port Authority on all cargo containers, non-containerized cargo, and vehicles upon discharge or loading onto vessels at the Port Authority's leased and public berths. The CFC was designed to recoup the Port Authority's unrecovered costs for on-dock ExpressRail facilities, certain road improvements, and heightened post-9/11 security—all of which enhance the safety, reliability, and efficiency with which cargo can travel through the Port of New York and New Jersey. On a per container basis, the amount of the CFC is *de minimis*.<sup>1</sup> The charge is paid by the ocean common carrier responsible for the assessed cargo, irrespective of whether that particular carrier's own vessel or another vessel provides the ocean transport. The Port Authority implemented the CFC only after lengthy analysis, including the engagement of outside expert economists, to ensure that (1) the benefits to all users paying the CFC would be reasonably commensurate with the amount of the charge, as required by the Shipping Act; and (2) the CFC would be charged in an efficient and cost-effective way.

In August 2011, nine ocean common carriers initiated this proceeding against the Port Authority, alleging that the CFC was unreasonable and discriminatory under the Shipping Act,

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<sup>1</sup> By way of example, the total cost of shipping a 40-foot container from Asia to the U.S. East Coast is approximately \$6,656, while the CFC on that cargo is \$9.90, just 0.1 percent of the shipping cost. See Ole Mikkelsen, "Container lines plan Pacific freight rate rise," Reuters, April 30, 2014, <http://uk.reuters.com/article/2014/04/30/shipping-rates-idUKL6N0NM6Z120140430> (citing Shanghai Shipping Exchange) (last visited May 7, 2014).

46 U.S.C. §§ 41102(c) and 41106(2). By the time the proceeding ended in February 2014,<sup>2</sup> eight of those carriers had already withdrawn their claims voluntarily, and the lone remaining carrier, “K” Line, had oddly moved to dismiss its own Complaint. During the two-and-a-half intervening years of litigation, “K” Line and the other Complainants repeatedly disregarded Commission procedures, ignored deadlines, flouted Judge Wirth’s orders, and abused the privileges of this forum, all in order to obtain a ruling on the merits of the CFC’s lawfulness while concealing evidence that would help prove that the CFC is a perfectly reasonable and permissible charge. Most egregiously, despite demanding and receiving voluminous discovery into the Port Authority’s confidential business operations, Complainants openly refused to comply with Judge Wirth’s orders compelling them to provide certain highly specific, limited, and targeted discovery that was directly relevant to their claims. As Complainants made clear by filing one baseless and duplicative motion after another, they would litigate by their own rules or not at all: they repeatedly demanded that they be granted summary judgment invalidating the CFC based on a demonstrably incomplete record consisting of only those “facts” that they chose to reveal, while withholding crucial information that would help disprove their allegations and that they had been repeatedly ordered to produce.

The heart of “K” Line’s attack on the CFC, as presented in its motion for summary judgment, was its disputed allegation that, whereas the CFC funds landside infrastructure and security at the port, the Complainants required to pay the charge are merely “vessel operators” that do not receive any landside services in return. *See* Motion for Judgment that Respondent’s Cargo Facility Charge Violates 46 U.S.C. § 41102(c), dated Dec. 6, 2012 (“Mot. for J.” or “Motion for Judgment”), at 1, 15-16, 21. To maintain the illusion that they were mere vessel

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<sup>2</sup> *See* Order Dismissing Proceeding, dated Feb. 5, 2014 (“Dismissal Order”).

operators that do not receive services funded by the CFC, “K” Line and the other Complainants desperately resisted—and then repeatedly defied orders to produce—discovery requested by the Port Authority that would illuminate the actual nature and extent of their landside operations, revealing the many ways in which they and their full-service, point-to-point subsidiary logistics companies benefit directly from the rail, roadway, and security services funded by the CFC. As just one example, to rebut Complainants’ unsupported assertion that “the movement of containers beyond the terminals by truck usually is not within the Complainants’ terms of carriage,”<sup>3</sup> the Port Authority sought discovery of those very “terms of carriage” by requesting copies of Complainants’ and their subsidiaries’ agreements with beneficial cargo owners for ocean and intermodal services via the Port of New York and New Jersey. “K” Line and the other Complainants ignored multiple orders by Judge Wirth to produce these highly relevant documents, just as they did with respect to several other critical topics of discovery. In further violation of Judge Wirth’s orders, they refused to produce even a single witness for depositions.

At every turn, instead of producing the documents and witnesses ordered by Judge Wirth, “K” Line chose to file motion after motion seeking a final ruling on the merits based on a demonstrably incomplete, and accordingly skewed, factual record. And to a remarkable degree, “K” Line’s theory of the case continually shifted in response to whatever discovery it hoped to avoid. The gravamen of the initial Complaint was that Complainants did not receive benefits commensurate with the CFC, which assertedly resulted in a discriminatory subsidy from Complainants (which claimed to make minimal use of the ExpressRail) to other ocean carriers (which used ExpressRail extensively). *See* Compl. at 10-11. Unwilling or unable to substantiate those allegations, Complainants later abandoned that contention, arguing instead that they were

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<sup>3</sup> Complaint for Cease and Desist Order and Reparations, dated Aug. 5, 2011 (“Compl.”), at 9.

mere “vessel operators” with no interest in *any* of the landside improvements funded by the CFC.<sup>4</sup> But when the Port Authority then sought discovery to refute that contention, and moved to compel discovery of Complainants’ subsidiary logistics companies to demonstrate the true extent of Complainants’ landside operations, Complainants shifted position again, eventually conceding, though only in a vague and general way, that they did in fact “enjoy some benefit” from CFC-funded projects because they did play a central role in the movement of cargo containers overland and through the Port Authority’s rail and roadway infrastructure.<sup>5</sup>

Despite such fleeting half-hearted (and sometimes vanishing) concessions, however, Complainants refused to comply with orders compelling the production of highly relevant documentary evidence and deposition testimony. To this day, notwithstanding prior concessions, “K” Line continues to mischaracterize itself as a mere “vessel operator” and, trying to take advantage of the incomplete record, continues to object to paying the CFC on that basis. *See, e.g.*, Appeal at 2. The result of Complainants’ conduct is that the parties and the Presiding Officer repeatedly went around in circles over a period of two and a half years, leaving the Port Authority no closer to the discovery necessary to make an accurate record of Complainants’ and their subsidiaries’ actual use of CFC-funded projects and services.

In its later attempts to evade its discovery obligations, “K” Line finally took the position that regardless of its role in the movement of cargo through the Port Authority’s CFC-funded facilities, the CFC unlawfully “singl[es] out the vessel operators,” Appeal at 46, to pay for projects that also benefit “many other users of the same facilities and services,” Appeal at 32; *see also* Motion for Implementation of ALJ’s Rulings by Order of Dismissal, dated Oct. 8, 2013

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<sup>4</sup> *See* Opposition to Complainants’ Motion for Judgment, dated Feb. 1, 2013 (“Opp. to Mot. for J.”), at 14-15 & n.26.

<sup>5</sup> *See id.* at 15-16.

(“Mot. for Implementation”), at 3. But, as the Port Authority argued, such “other users” include Complainants’ *own subsidiaries* or parties with whom they directly contract. Accordingly, as Judge Wirth correctly recognized, Complainants’ refusal to participate in discovery continues to stymie any fair evaluation of the Port Authority’s defense that the CFC is “apportioned as closely as is practicable” to use of the port services and infrastructure that are funded by the charge. *See Dismissal Order* at 8 (citing *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Maritime Comm’n*, 838 F.2d 536, 548 n.11 (D.C. Cir. 1988)).<sup>6</sup>

Judge Wirth refused to accede to Complainants’ strategy, and ordered them *multiple times* to participate in discovery or risk dismissal. Judge Wirth’s final warning in September 2013 could not have been clearer:

At this point, Complainants have three options. They may immediately provide the required discovery and proceed to a determination on the merits; they may file a motion to withdraw the Complaint . . . or, if they refuse to provide discovery, may have the case dismissed for discovery violations.

Order on Motion for Final Judgment, dated Sept. 5, 2013 (“Final Judgment Order”), at 5. But “K” Line, still determined to obtain a ruling on the merits *without* divulging the evidence that would undermine its case, persisted in its refusal to provide discovery, and instead took the audacious step of asking the Presiding Officer to dismiss its own Complaint on the merits so that it could then appeal a loss on the merits to the full Commission.<sup>7</sup> Unwilling to participate in Complainants’ manipulative gambit, and recognizing that “K” Line had no intention *ever* to produce the required discovery, Judge Wirth finally dismissed the proceeding pursuant to FMC

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<sup>6</sup> As detailed below, by charging the CFC to the ocean carriers, which are in the best position either to absorb the CFC themselves or to allocate it to others in the cargo transportation chain, the Port Authority assesses the CFC in the most efficient and fair way, resulting in cost-savings to all of the beneficiaries of the CFC-funded projects. *See infra* at 48-49.

<sup>7</sup> *See* Mot. for Implementation at 1.

Rule 210(b), due to “K” Line’s “willful failure to provide discovery.” Dismissal Order at 9. “K” Line then filed the instant appeal.

It would be hard to imagine a record of litigation misconduct more deserving of a dismissal sanction than this one. “K” Line contumaciously violated successive orders compelling production of duly requested and obviously relevant documents; refused to appear for noticed depositions; filed seven specious motions designed to evade discovery while eliciting a ruling based on an incomplete record;<sup>8</sup> forced the tribunal to revise the scheduling order *four* times; ignored warnings that its dilatory tactics could result in dismissal; and indicated to Judge Wirth that it would continue to refuse to provide the required discovery, all in the face of explicit warnings that such actions would result in dismissal.

Complainant willfully frustrated the very purpose of the pre-trial discovery procedures mandated by the Commission Rules and prevented the Presiding Officer from making merits determinations on a fair record and regulating the course of the hearing. Now, on appeal, “K” Line invites the Commission to join it in undermining the Commission’s own authority by ignoring the orders underlying the dismissal and deciding this case on the unfairly truncated record resulting from Complainants’ misconduct. Instead, the Commission should uphold the sanction of dismissal by Judge Wirth and reaffirm the Presiding Officer’s broad discretion to manage discovery in adversary proceedings. *See* FMC Rule 210(b) (“If a party . . . fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer . . . may make such orders in regard to the failure or refusal as are just. An

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<sup>8</sup> *See* Omnibus Motion to Quash or Modify Respondent’s Five Subpoenas, dated Dec 24, 2012 (“Mot. to Quash”); Motion for Protective Order, dated Jan 4, 2013 (“Mot. for Protective Order”); Petition for Leave to Appeal, dated July 8, 2013 (“Pet. for Leave to Appeal”); Motion to Stay Discovery, dated July 11, 2013 (“Mot. to Stay Discovery”); Motion to Amend Complaint, dated Aug 8, 2013 (“Mot. to Amend”); Motion for Final Judgment, dated Aug 8, 2013 (“Mot. for Final J.”); Mot. for Implementation.

order of the presiding officer may . . . dismiss[] the action or proceeding . . . .”); *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 SRR 1020, 1021 (F.M.C. Nov. 15, 2002); 46 C.F.R. § 502.201(i) (“The presiding officer may at any time. . . make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience.”).

Moreover, even if the Commission were inclined to consider the merits of this case prematurely on this inadequate record—which it should not—“K” Line could not prevail even on this current incomplete record, given its concessions below that: (1) “K” Line and its affiliates are not only “vessel operators” but also provide overland through-transportation of cargo; (2) “K” Line and its affiliates use and benefit from CFC-funded projects and services; and (3) “K” Line does not dispute that the amount of the CFC is reasonable in comparison to the benefits admittedly received. *See infra* Part III.

For all of these reasons, the Commission should affirm the dismissal of this proceeding with prejudice.

## **BACKGROUND**

### **A. Development of the Port Authority’s Cargo Facility Charge**

The CFC, which went into effect on March 14, 2011, is a user fee assessed on all cargo containers, non-containerized cargo, and vehicles upon discharge or loading onto vessels at the Port Authority’s leased and public berths. *See* FMC Schedule No. PA-10 (“Tariff”) at Subrule 34-1200, *available at* [http://www.panynj.gov/port/pdf/tariff\\_pa\\_08\\_19\\_2013.pdf](http://www.panynj.gov/port/pdf/tariff_pa_08_19_2013.pdf). It is designed to recoup the unrecovered costs of major infrastructure improvements undertaken by the Port

Authority, including on-dock rail facilities, road improvements,<sup>9</sup> and enhanced security measures and facilities implemented pursuant to federal mandate in the wake of the September 11, 2011 terrorist attacks.<sup>10</sup> *See* SOF ¶¶ 76, 121. Cargo containers are assessed \$4.95 per TEU,<sup>11</sup> non-containerized cargo is assessed \$0.13 per metric ton, and vehicles are assessed \$1.11 each. *See* Tariff at Subrule 34-1210. The CFC went into effect only after lengthy consideration and careful analysis by the Port Authority Port Commerce Department, which recognized the need to ensure that the contemplated fee would recoup the investment in port improvements in an even-handed manner. *See* SOF ¶ 123. In discussions with the New York Shipping Association, of which each of the nine Complainants that brought this action is a member, it was observed that the Port Authority's then-existing Intermodal Container Lift Fee ("Rail Fee") of \$57.50 for each container that used the on-dock rail facilities—a fee significantly higher than the CFC's average assessment of \$8.42 on all containers<sup>12</sup>—had the detrimental effect of incentivizing carriers to use trucking rather than rail. *See id.* ¶ 116.<sup>13</sup> This led to greater roadway congestion than would

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<sup>9</sup> The important roadway projects funded by the CFC increase road capacity, reduce the high number of traffic accidents, and "reduce truck idling times and mitigate the attendant negative environmental impact caused by idling." *See* SOF ¶ 105. (Citations to "SOF" refer to the Port Authority's Response to Complainants' "Statement of Facts Not in Dispute" and Port Authority's Statement of Additional Facts, dated Feb. 1, 2013, which was filed together with the Port Authority's Opposition to Complainants' Motion for Judgment.)

<sup>10</sup> The Port Authority's "incremental post-9-11 security costs," funded in part by the CFC, include more than \$125 million invested in seaport security, "to put in place leading-edge technologies," as well as security upgrades necessary to obtain certification in the U.S. Department of Homeland Security's Customs-Trade Partnership Against Terrorism program. *See* SOF ¶¶ 107- 108.

<sup>11</sup> "TEU" stands for "twenty-foot equivalent unit." Containers come in different sizes that are often expressed in TEUs. Most cargo containers are two TEUs and most others are one TEU. The Port Authority assumes that the average ratio of TEUs to containers is 1.7. *See* SOF ¶ 22.

<sup>12</sup> Because containers are 1.7 TEUs on average (*see supra* n.11), and the CFC is \$4.95 per TEU, the average cost of the CFC per container is \$8.42. SOF ¶ 75.

<sup>13</sup> At the time the CFC was implemented, in addition to the Rail Fee, the Port Authority had also been charging a volume-based annual Container Terminal Subscription Fee (the "Truck Fee") in

otherwise exist (together with increased costs associated with congestion), and also failed to allocate the costs of the port infrastructure and security improvements fairly among all that actually benefited from them. *See id.* Accordingly, it was agreed that the Port Authority should consider assessing a fee on all cargo containers moving through the port on an equal basis, because all of them benefit directly from the Port Authority’s infrastructure and security investments. *See id.* ¶ 117.

By the same token, the Port Authority wanted to be sure that by replacing the Rail Fee and Truck Fee with the CFC on all containers, those carriers that primarily utilized trucks for the inland transportation of the containers would be receiving corresponding benefits. Accordingly, the Port Authority engaged economic experts from Compass Lexecon to study the benefits from the ExpressRail infrastructure projects to carriers primarily utilizing trucks, including the shift of a portion of the inland movement of cargo from truck to rail, and the attendant decrease in roadway congestion and truck waiting time. *See* SOF ¶ 126. The report by Compass Lexecon—which Complainants never even attempted to dispute<sup>14</sup>—concluded that the reduced roadway congestion resulting from the ExpressRail infrastructure projects reduced the transportation costs per cargo container transported by truck by far more than the amount of the CFC, and that those benefits were likely to increase further as a result of additional traffic moving to ExpressRail because of the restructuring of the cost recovery fees. *See id.* ¶ 127 (citing Compass Lexecon Report at 29, which estimated that “the savings [for containers transported by truck] appear to be

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connection with the SeaLink trucker identification system used for interchange of containers between truckers or trucking companies and container terminals subsequent to unloading from the vessel or before loading onto the vessel. *See* SOF ¶ 115. The Truck Fee, like the Rail Fee, was eliminated as part of the CFC’s implementation. *See id.* ¶ 118.

<sup>14</sup> *See e.g.*, Mot. for Protective Order at 3 (stating that “Complainants have no intention of engaging in a pillow-fight between ‘experts’” over benefits received).

conservatively in the range of \$21.42 to \$25.33 per container—substantially larger than the \$8.42 per container fee proposed by the [Port Authority]).

The CFC was not developed in a vacuum. After publishing a draft of the Tariff for notice and comment, the Port Authority held numerous meetings with ocean carriers (including Complainants), terminal operators, and others to discuss the proposed Tariff, and provided multiple opportunities for comment that led to certain revisions to the CFC before final implementation.<sup>15</sup> No carriers, other than Complainants, have sued to challenge the CFC.

### **B. Implementation of the CFC**

As described in the Tariff, the CFC is a charge assessed on all cargo containers and non-containerized cargo moving through the Port Authority's marine terminals.<sup>16</sup> It is assessed at the time that the cargo container or non-containerized cargo is loaded onto or unloaded from a vessel at the port. For cargo containers, the charge is paid by the ocean common carrier responsible for the container, irrespective of whether that carrier's vessel or another's provides the ocean transport. *See* SOF ¶ 28.

It is important to distinguish between a “common carrier” and a “vessel,” a distinction that Complainants have purposefully tried to blur throughout this litigation. A common carrier is defined by the Shipping Act, in relevant part, as an entity that (i) holds itself out to the general public as providing transportation of cargo by water; (ii) assumes responsibility for the transportation from the port or inland point of receipt to the port or inland point of destination;

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<sup>15</sup> One revision was to require the Port Authority to generate monthly invoices for each individual ocean carrier as opposed to having the terminal operators bill the ocean carriers directly. *See* SOF ¶ 130.

<sup>16</sup> *See* SOF ¶ 19 (citing Tariff, Subrule 34-1200, which defines “Cargo Subject to Fee” and explains that the CFC applies to “all cargo containers, vehicles and bulk cargo, break-bulk cargo, general cargo, heavy lift cargo, and other special cargo discharged from or loaded onto vessels at Port leased and public berths”).

and (iii) uses a vessel for all or part of that transportation. *See* 46 U.S.C. § 40102(6). In other words, a carrier is the party responsible for arranging and providing the transportation of cargo from, for example, Shanghai to Chicago. *See* SOF ¶¶ 133, 134 (citing Declaration of Brian Kobza, dated Feb. 1, 2013 (“Kobza Decl.”) ¶ 7). A vessel, on the other hand, is simply a watercraft used to transport cargo on water. Carriers may move containers on their own vessels or arrange to transport their containers on other carriers’ vessels pursuant to a vessel sharing agreement, slot charter or other arrangement. *See id.* ¶ 132. A carrier might transport several other carriers’ containers on its vessels. *See id.* It is the carrier that has contracted and issued a bill of lading for the carriage of the goods, *i.e.*, that is responsible for the particular shipment, not the carrier that owns or operates the vessel transporting the goods, that is responsible for paying the CFC. *See id.* ¶ 26. Thus, “K” Line’s assertion that the CFC is a “charge on vessels,” Appeal at 15, is fundamentally inaccurate.

By placing the obligation to pay the CFC on the carrier that has contractual responsibility for the carriage of the goods, the CFC is assessed on the party most directly responsible for the movement of the cargo container from its point of origin, through the port, and onward to its final destination. *See* SOF ¶ 26 (citing Declaration of Peter Zantal, dated Feb. 1, 2013 (“Zantal Decl.”) ¶ 37). Carriers contract directly (or through their own subsidiaries) with all the other major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. The carriers’—including “K” Line’s—position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC themselves or to allocate it to others in the chain as they see fit. *See id.* ¶ 147 (citing Kobza

Decl. ¶ 17).<sup>17</sup> In addition, by triggering the obligation to pay the CFC at the point when the cargo containers are unloaded from or loaded onto vessels at the port, the Port Authority ensures that all cargo containers bear their fair share, *see id.* ¶ 141, and also can make efficient use of the existing administrative structure already in place at the marine terminals to account for each cargo container and collect the fee.<sup>18</sup> *See id.* ¶ 144. By collecting the CFC in this manner, the Port Authority can avoid the need to charge a higher CFC rate to cover the additional administrative costs of a less efficient system. *See id.* ¶ 145.

### **C. Enforcement of the CFC**

If a carrier does not pay the invoiced CFC charges for two consecutive reporting periods (a “non-compliant carrier”), the practice of the Port Authority is to contact both the non-compliant carrier and each private terminal operator to remind them of the outstanding balance. *See* SOF ¶ 37 (citing Zantal Decl. ¶ 38). If the balance remains unpaid, the Tariff authorizes the Port Authority to issue a directive requiring each terminal operator either to cease service to the non-compliant carrier or to take financial responsibility itself for payment of that carrier’s CFC charges. Tariff, Section H, Subrule 34-1220, 3(b)(iii). Thus, a non-compliant carrier’s cargo containers may still be moved through the port where a terminal operator accepts financial responsibility for paying the CFC on the non-compliant carrier’s behalf. *See id.* ¶ 37.

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<sup>17</sup> Carriers already do pass the costs of tariffs and other expenses, including the CFC, on to their customers in the form of surcharges. *See* SOF ¶ 154.

<sup>18</sup> The terminal operators—which already had a process in place for invoicing and collecting fees from the carriers when the CFC became effective—send a monthly Vessel Activity Report (“Report”) to the Port Authority detailing each carrier’s activity at their terminals that is subject to the CFC. *See* SOF ¶ 32. Monthly invoices are then issued by the Port Authority to private marine terminal operators for each of the carriers calling at that terminal based on the prior month’s Report. *See id.* ¶ 34; Tariff, Section H, Subrule 34-1220, 3(b)(i). The terminal operator then collects the CFC from each carrier incurring the charge and forwards the payments to the Port Authority. *See* SOF ¶ 30. Some carriers have chosen to pay the CFC directly to the Port Authority. *See id.* ¶ 31.

Only a non-compliant carrier, *but not a vessel*, risks being unable to move its cargo containers through the port by failing to pay the CFC. *See* SOF ¶ 37. For example, a vessel owned by a non-compliant carrier is permitted to load and unload in the port the containers of any compliant carrier that are transported on the vessel. *See id.* Likewise, a vessel owned by a compliant carrier that is transporting containers of both compliant and non-complaint carriers is permitted to discharge and load in the port the containers of any compliant carrier. *See id.* But in all circumstances, the vessel itself is allowed to berth in the port. *See id.*<sup>19</sup>

#### D. “K” Line

“K” Line is an ocean common carrier within the meaning of the Shipping Act, 46 U.S.C. § 40102(6). *See* SOF ¶ 1; Compl. ¶ III.B. While one aspect of “K” Line’s business enterprise is the operation of vessels, *see* SOF ¶ 1, its business is not so limited, as “K” Line eventually, if grudgingly, admitted. *See, e.g.,* Opposition to Motion to Compel Production of Contracts in Response to Port Authority’s Request No. 27, dated Jan. 10, 2013 (“Opp. to Mot. to Compel Contracts”), at 4 (“Complainants, while fundamentally vessel operators who load, carry and discharge containers, do subcontract the movement of cargo under through bills of lading to and from inland points. Some have affiliates that perform logistics services.”); *see also* Mot. for Implementation at 6. Indeed, “K” Line is a highly integrated global shipping and logistics company that coordinates intermodal transportation of cargo not only from its point of origin across the ocean, but also through the port’s infrastructure and inland to its destination. *See, e.g.,* Opp. to Mot. to Compel Contracts at 4-6.

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<sup>19</sup> Complainant’s assertion that the CFC is enforced by threat of a “blockade” on vessels is thus simply false. *See* Appeal at 15; Mot. for J. at 4-5.

## **PROCEDURAL HISTORY**

The serpentine procedural history of this matter is attributable largely to Complainants' contumacious refusal to comply with Judge Wirth's scheduling and discovery orders while repeatedly seeking a premature decision on the merits. The case can be broken down into three distinct stages.

The first commenced with the filing of the Complaint in August 2011, and was characterized by a one-sided discovery process in which the Port Authority timely responded to Complainants' discovery requests while receiving almost nothing in return.

The second stage began with Complainants' premature Motion for Judgment in December 2012, while staunchly refusing to provide any further discovery, resulting in discovery motions aimed at unmasking the false nature of the Complaints' conclusory allegations, which were reiterated without evidentiary support in Complainants' Motion for Judgment. On June 20, 2013, Judge Wirth denied Complainants' Motion for Judgment and ordered them to provide the requested discovery, finding that the discovery and record development were essential to a fair determination of the issues raised in the Complaint and by the Motion for Judgment.

That ruling led to the third and final stage of this litigation, during which Complainants attempted, through a series of repetitive and somewhat creative filings, to reargue their Motion for Judgment and otherwise try to bring their case before the full Commission on a skewed and incomplete record—despite the absence of any final determination of the merits—while openly defying Judge Wirth's orders compelling discovery.

### **Stage I: Complainants Seek Broad Discovery, But Produce Almost Nothing in Return**

Through Complainants' first counsel of record, Manelli Selter PLLC, Complainants initiated this proceeding on August 5, 2011, alleging violations of the Shipping Act, 46 U.S.C.

§§ 41102(c) and 41106(2). *See* Compl. ¶ III.C. The Complaint alleged, *inter alia*, that the CFC violated § 41102(c) because “Complainants do not receive services commensurate with the [CFC],” and § 41106(2) because it “severely and unreasonably prejudices Complainants while unduly preferring other users of the Port’s facilities.” *Id.* at 5. In support, Complainants alleged that they “generally do not use” the ExpressRail or other infrastructure and intermodal transportation funded by the CFC. *Id.* at 10; *see also id.* at 9 (“[M]ovement of containers beyond the terminals by truck usually is not within the Complainants’ terms of carriage.”). Therefore, Complainants alleged, the CFC was a discriminatory subsidy from carriers that made minimal use of the ExpressRail to other carriers that used it extensively. *See* Compl. at 10-11. Along with their Complaint, Complainants served broad discovery on the Port Authority, propounding eighty document requests seeking wide-ranging discovery into a plethora of operations over an eight-year period dating back to 2004. *See* Declaration of Jared R. Friedmann, dated July 18, 2013 (“July 18, 2013 Friedmann Decl.”), ¶ 4.

In order to test Complainants’ allegations that they do not receive services commensurate with the CFC, to discover evidence regarding the extent to which Complainants *do* benefit from the infrastructure, intermodal transportation, and security services funded by the CFC, and to shed daylight on Complainants’ central role in the movement of cargo to and through the port, the Port Authority served discovery seeking:

- The economic terms on which Complainants provide transportation of cargo containers through port infrastructure and further inland, as reflected in Complainants’ contracts with beneficial cargo owners;
- The economic terms on which Complainants arrange or provide transportation of cargo containers via the rail and roadway projects funded by the CFC, as reflected in their contracts with rail and motor carriers;
- Whether Complainants provide the above services (and hence use CFC-funded infrastructure) on their own or through their subsidiaries, as reflected in their corporate arrangements with subsidiary logistics companies; and

- Complainants' actual costs to transport cargo containers to or from the Port of New York and New Jersey by rail and by truck.

*See generally* Rule 56(d) Declaration of Jared R. Friedmann, dated Feb. 1, 2013 (“56(d) Decl.”).<sup>20</sup>

Pursuant to a joint request to modify the discovery schedule, the Port Authority and the remaining Complainants were ordered to complete their discovery productions by January 20, 2012. *See* Order Granting Joint Motion to Modify Discovery Schedule, dated December 16, 2011. The Port Authority timely produced over 80,000 pages of documents in response to Complainants' requests. *See* July 18, 2013 Friedmann Decl. ¶ 4; *see also* Port Authority Motion to Compel Discovery from Complainants, dated Feb. 16, 2012, at 8.<sup>21</sup> Although Complainants had agreed during the meet-and-confer process to produce much of the discovery requested by the Port Authority (rather than stand on their boilerplate objections), Complainants produced only a fraction of what they promised by the deadline. *See id.* at 4-8. Nor would Complainants specify a date by which they expected to complete their admittedly deficient production. *See* Declaration of Reed Collins, dated Feb 16, 2012, Ex. 10 (Letter from E. Halperin to J.

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<sup>20</sup> After receiving the Port Authority's discovery requests, Complainant China Shipping Container Lines Co., Ltd., moved to withdraw from the proceeding. *See* Motion for Withdrawal, dated Oct. 25, 2011, at 2.

<sup>21</sup> Although the Port Authority produced documents as they are kept in the ordinary course of business, Complainants moved to compel the Port Authority to identify to which, of the 80 propounded document requests, each of the 80,000 documents was responsive. *See* Complainants' Motion to Compel, dated December 1, 2011. Before Judge Wirth could rule on that motion, Complainants filed a second motion to compel on the exact same grounds. *See* Complainants' Second Motion to Compel, dated Mar. 15, 2012. These motions were denied as without merit. *See* Order on Motions to Compel and to Reply, dated Oct. 11, 2012 (“Oct. 11, 2012 Discovery Order”).

Friedmann, dated Jan. 23, 2012). The Port Authority then filed a motion to compel limited to the most important outstanding discovery. *See generally id.*<sup>22</sup>

On April 20, 2012, the Port Authority moved to disqualify George Quadrino, Esq. and Manelli Selter from representing Complainants, after the firm hired Mr. Quadrino, a former FMC employee who had been involved with this litigation while working at the FMC, who then entered his appearance on Complainants' behalf. *See Renewed Motion to Disqualify George Quadrino and Manelli Selter PLLC*, dated Apr. 20, 2012, at 4-9. Although Mr. Quadrino and the Manelli firm first opposed the Port Authority's disqualification motion, they moved to withdraw without waiting for a ruling. *See Motion to Withdraw from Representation*, dated May 15, 2012.

The next day, the law firm of Cichanowicz, Callan, Keane, Vengrow & Textor LLP ("Cichanowicz") appeared as new counsel for Complainants. *See Notice of Appearance*, dated May 16, 2012. Judge Wirth ordered the parties to meet and confer regarding both the transfer of Manelli Selter's case file to Cichanowicz and the outstanding discovery disputes (*i.e.*, the subject of the pending motions to compel), and to file a joint status report within 30 days of the file transfer to identify any "areas of continued conflict regard discovery . . . [and] which [discovery] motions, if any, remain pending." *See Order Regarding Pending Motions*, dated May 31, 2012 ("May 31, 2012 Order").<sup>23</sup> That process took some time, with Complainants twice moving to

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<sup>22</sup> Even while refusing to meet their discovery obligations, on January, 11 2012, Complainants filed a meritless motion for partial summary judgment based upon the unpleaded assertion that the Cargo Facility Charge by its terms does not apply to empty cargo containers, and thus its collection on those "empties" violates the Shipping Act. *See Complainants' Motion for Partial Summary Judgment*, dated Jan. 11, 2012. This entirely baseless motion was denied. *See Order Denying Complainants' Motion for Partial Summary Judgment*, dated Feb. 5, 2014.

<sup>23</sup> K-Line asserts that the "Port filed a motion to interfere with the turnover of files to new counsel," Appeal at 14, but that is false. In response to the Cichanowicz firm's request for "advices from the Port's counsel whether they have objections to any part of the file being turned over to us," the Port Authority filed a letter motion objecting to the complete and unconditional turnover of the file without safeguards, but indicating that it was willing to meet and confer

extend the joint status report deadline due to various obligations unrelated to this case. *See* Motions to Extend Deadline in “Order Regarding Pending Motions” Served May 31, 2012, dated July 12, 2012, and Aug. 17, 2012.<sup>24</sup>

Eventually, after numerous meet-and-confers, Complainants agreed to produce some of the discovery sought in the Port Authority’s pending motion to compel as set forth in the agreements recited in a September 14, 2012 Joint Status Report. *See* Joint Status Report, dated Sept. 14, 2012 (Sept. 14, 2012 Joint Status Report”), at 4-6. The Presiding Officer then resolved the remaining discovery disputes, requiring Complainants to supplement their deficient interrogatory responses by October 18, 2012 and produce certain responsive documents they were withholding by November 9, 2012, but also ruling that the Port Authority had not yet established the relevance of Complainants’ agreements with cargo owners, rail carriers, and motor carriers (a ruling she would later revisit). *See* Oct. 11, 2012 Discovery Order; Revised Scheduling Order, dated Oct. 11, 2012 (Oct. 11, 2012 Scheduling Order”), at 1.<sup>25</sup>

During the meet and confer process that preceded the September 14, 2012 Joint Status Report, the Port Authority learned that Complainants had not produced any documents from their subsidiary logistics companies, even where such documents were in Complainants’ possession, custody or control. *See* Sept. 14, 2012 Joint Status Report at 8-9. Discovery from

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regarding the transfer. *See* May 31, 2012 Order (discussing filings). The parties thereafter promptly reached agreement that Manelli Selter would remove any communications between Mr. Quadrino and others at the Manelli firm from the files before providing them to Cichanowicz. *See* Joint Status Report, dated June 18, 2012.

<sup>24</sup> During that period, another one of the nine original Complainants, Horizon Lines, LLC, moved to withdraw from the case. *See* Motion to Withdraw, dated Aug. 1, 2012.

<sup>25</sup> Almost immediately thereafter, two more Complainants—Cosco Container Lines Co., Ltd., and Evergreen Line, a Joint Service Agreement—moved to withdraw from this proceeding, reducing the original nine Complainants down to five. *See* Motion to Withdraw, dated Nov. 16, 2012. A few days after that, yet another law firm, Reed Smith, LLP, entered its appearance as counsel alongside the Cichanowicz firm. *See* Entry of Appearance, dated November 21, 2012.

Complainants' subsidiaries was crucial to uncovering the extent to which Complainants coordinate the transportation of containers through and beyond the port—whether by themselves or via their subsidiaries—and in turn receive services and/or benefits from the infrastructure, intermodal transportation, and security improvements funded by the CFC. Rather than engage in further motion practice by moving to compel this discovery from Complainants, the Port Authority served the logistics companies directly with subpoenas signed by the Presiding Officer on November 30, 2012, for documents and depositions relating to this issue.

Meanwhile, after receiving yet another extension to submit their discovery responses—this time until December 7, 2012<sup>26</sup>—each of the remaining Complainants submitted document productions that failed to provide either (i) the information Complainants had agreed to produce in the September 14, 2012 Joint Status Report (upon which the Port Authority relied in agreeing to table certain discovery disputes); or (ii) the information they were required to produce pursuant to the October 11, 2012 Discovery Order. *See* July 18, 2013 Friedmann Declaration, Ex. A (Letter from J. Friedmann to M. Thomas, dated Feb. 25, 2013) (detailing Complainants' discovery failures). Critically missing from all five remaining Complainants' productions was information crucial to uncovering the extent to which Complainants utilize the services and benefits funded by the CFC, including Complainants' Vessel Sharing Agreements with one another, the volume and associated costs of rail and truck cargo they move through the port, and the extent to which they can and do pass the CFC through to their customers. *See id.* at 3-4. Complainant "K" Line distinguished itself as the only remaining Complainant that also failed to provide the ordered supplemental interrogatory responses, which sought such basic information as the names of employees with knowledge relevant to this proceeding. *See id.* at 4-5.

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<sup>26</sup> *See* Third Revised Scheduling Order, dated Nov. 29, 2012.

## **Stage II: Complainants File for Judgment While Flouting the Discovery Orders**

On December 6, 2012, just one day before submitting their wholly deficient discovery responses, Complainants filed their Motion for Judgment in which, for the first time, they detailed a new and peculiar change of course: Specifically, they expressly abandoned the allegation in the Complaint that the CFC discriminates against ocean carriers that make little use of the ExpressRail. *See* Mot. for J. at 1 (“Complainants will not pursue violation of any provision of the Shipping Act of 1984, as amended, other than 46 U.S.C. § 41102(c).”).<sup>27</sup> And, with respect to their unreasonable practices claims under § 41102(c), Complainants argued that the CFC is unreasonable because they do not benefit in *any* meaningful way from the port projects and activities funded by the CFC. *See* Mot. for J. at 1, 15-16, 21. But this argument was premised on the demonstrably false factual contention that Complainants are mere “vessel operators” whose responsibility for containers and cargo ends at the water’s edge and that they therefore receive no meaningful benefits from improvements to port infrastructure and security. *See id.* Complainants argued that no discovery was needed, and that the case was ripe for determination. *See generally id.*

But because the controlling precedent for an unreasonable practices claim expressly held that an assessed charge is proper under the Shipping Act if services or benefits received are commensurate with the charge assessed, it was obvious that discovery and the development of a fair evidentiary record regarding the services and benefits received by Complainants was essential to the Port Authority’s presentation of its defense. *See Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 282 (1968). The Port

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<sup>27</sup> *See also* Declaration of Jared R. Friedmann, dated Jan. 11, 2013, Ex. C, at 2 (Letter dated Oct. 2, 2012 from Complainants’ counsel to Port Authority’s counsel, copying FMC Secretary, announcing intention to withdraw discrimination claims under § 41106).

Authority also hotly disputed the factual premise of the Motion for Judgment: that Complainants were simple “vessel operators” whose responsibility for transporting cargo ended at the water’s edge and who thus received none of the services and benefits funded by the CFC. And because Complainants were continuing to refuse to provide discovery specifically seeking information regarding the extent to which Complainants received such CFC-funded services and benefits, the Port Authority argued that the Motion for Judgment was premature, and promptly noticed Rule 30(b)(6) depositions for each Complainant, to take place between January 3 and January 11, 2013, to test Complainants’ self-portrayal in their Motion for Judgment as mere “vessel operators” whose duties end at the water’s edge. *See* 56(d) Decl. ¶ 15.

The Rule 30(b)(6) notices, which were aimed specifically at revealing the extent to which Complainants received benefits from CFC-funded projects and services, sought testimony regarding: (i) Complainants’ relationships with their subsidiary logistics companies regarding transportation of containers at the port; (ii) Complainants’ ability to pass port and terminal charges, such as the CFC, through to their customers; and (iii) Complainants’ use of ExpressRail and trucking to and from the port. *See* 56(d) Decl. ¶ 15. The Port Authority’s efforts to obtain this discovery were met once again with contumacious refusal, despite the Presiding Officer’s order that permitted Complainants to file a motion for summary judgment with the proviso that “discovery will continue” while Complainants’ motion was pending. *See* Oct. 11, 2012 Scheduling Order at 1. Indeed, Complainants refused to make witnesses available for any of the noticed depositions, and instead moved for a protective order on the baseless ground that every single one of the topics noticed for those depositions was irrelevant. *See generally* Mot. for Protective Order. The Port Authority cross-moved to compel each Complainant to produce witnesses for the Rule 30(b)(6) depositions on the ground that the noticed topics were narrowly

tailored to elicit relevant information on the extent to which Complainants receive CFC-funded services and benefits. *See generally* Opposition to Complainants’ Joint Motion for Protective Order and Cross-Motion to Compel Production of 30(b)(6) Witnesses, dated Jan. 11, 2013. In addition, Complainants’ subsidiaries—which were represented by the same counsel as Complainants—moved to quash the Port Authority’s November 30, 2012 subpoenas, claiming that each and every noticed deposition topic and document request was irrelevant, despite their clear relevance not only to the allegations in the Complaint, but now also to the facts on which Complainants’ recently-filed Motion for Judgment was premised. *See* Mot. to Quash.

The Port Authority also renewed its request, which had initially been denied in the October 11, 2012 Discovery Order, that Complainants (or their logistics affiliates) produce certain contracts and agreements with cargo owners, rail carriers, and motor carriers for service to or from the Port of New York and New Jersey that were initially sought in its 2011 Document Requests. Complainants refused, leading the Port Authority to move to compel stating:

Although Complainants claim that they do not meaningfully benefit from [CFC-funded] improvements because they are mere “vessel operators” who have no responsibility for moving cargo containers beyond the water, through the port’s infrastructure, or inland to the ultimate destination, the Port Authority has every right to contest this unilateral and unsupported pronouncement as untrue, through document discovery and otherwise.

Motion to Compel Production of Contracts in Response to Port Authority’s Request No. 27, dated January 3, 2013, at 6.

In their opposition to the motion to compel contracts, as part of their effort to evade the creation of an adequate evidentiary record as to their actual operations, Complainants grudgingly acknowledged, for the first time, though in exceedingly vague and general terms:

- That Complainants do in fact provide “intermodal through transportation of containerized cargo”;

- That Complainants “subcontract the movement of cargo under through bills of lading to and from inland points” via rail and truck; and,
- That Complainants “have affiliates that perform logistics services”.

*See* Opp. to Mot. to Compel Contracts, at 4-6. In other words—contrary to the falsehood upon which their Motion for Judgment was premised—that Complainants are mere “vessel operators” and “not ‘users’ of the Port’s cargo services in their containerized cargo operations” (*see* Mot. for J. at 17, 20, 23)—Complainants now admitted that they are highly integrated global shipping and logistics companies that coordinate the transportation of cargo from its point of origin and across the ocean, through the port’s infrastructure and then inland to its ultimate destination. *See* Opp. to Mot. to Compel Contracts at 4-6.<sup>28</sup> At the same time, however, Complainants also sought to characterize themselves as “fundamentally vessel operators” and asserted that the CFC is charged “to vessel operators for calling on the Port,” while continuing to try to block the Port Authority from establishing an evidentiary record as to the facts. Opp. to Mot. to Compel Contracts at 4, 7. In aid of their self-contradictory posture, Complainants now introduced a new, wordplay-based argument, *i.e.*, that irrespective of the whether Complainants and their logistics subsidiaries receive “benefits” as a result of the CFC-funded improvements, the CFC cannot stand because it does not fund a specific “service to the class paying the charge.” *See id.* at 2; *see also* Mot. for J. at 1, 13-16, 20, 21.

On February 1, 2013, the Port Authority filed its response to Complainants’ Motion for Judgment relying upon the well-settled proposition that “[a] charge levied by a marine terminal operator is “just and reasonable” for purposes of § 41102(c) if it is ‘reasonably related to an

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<sup>28</sup> The day after Complainants filed their Opposition to the Port Authority’s motion to compel contracts, the Cichanowicz firm sought leave to withdraw as counsel to Complainants, for the reasons described at pages 5-6 of its Motion for Leave to Withdraw as Counsel, dated January 11, 2013, which was filed under seal.

actual service performed *or* a benefit conferred on the person charged.” See Opp. to Mot. for J., dated Feb. 1, 2013, at 18 (quoting *West Gulf Maritime Assoc. v. Port of Houston*, 18 SRR 783, 790 n. 14 (FMC Aug. 16, 1978) (“WGMA I”) (emphasis added). The Port Authority also argued that Complainants’ continued refusal to provide the targeted discovery that is highly relevant to the central issue in this litigation—whether the extent of the benefits they receive is roughly commensurate with the amount charged—required denial of their Motion for Judgment as premature. See *id.* at 3, 17-18, 24-25.<sup>29</sup>

The Presiding Officer rejected Complainants’ wordplay-based argument that the “benefits” they received were irrelevant because they received no “services.” Order Denying Mot. for J. at 5 (“Complainants seem to argue that fees can only be assessed when a specific service is provided (as opposed to a general benefit) . . . . Case law does not draw such clear lines.”). She also denied the Motion for Judgment as premature given the state of the record:

Determination of whether the [CFC] violates that Shipping Act requires a comparative analysis of the benefits received by Complainants, including the services provided to the Complainants, and a determination of the reasonableness of the fee imposed . . . . While Complainants contend that they receive no service in return for the [CFC], they do acknowledge receiving a benefit, and the extent of that service/benefit will be a material fact that impacts the ultimate decision. Resolution of these issues will depend on facts, and implication of the facts, in this case.

*Id.*

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<sup>29</sup> In their reply, Complainants made the peculiar assertion that the FMC—before which they filed their Complaint—lacked jurisdiction over this matter. See Reply to Respondent’s Opposition to Complainants’ Motion for Judgment, dated Feb. 15, 2013; see also Complainants’ Sur-Response to Respondent’s Sur-Reply to Complainants’ Motion for Judgment, dated Mar. 11, 2013 at 7 (“[T]he CFC setup is a Byzantine scheme to pressure terminals into doing the Port’s collections to try to avoid the Tonnage Clause and 33 USC 5, which are matters for court, not Commission scrutiny.”). While noting that “Complainants’ position on jurisdiction is not clear,” Judge Wirth held that Commission jurisdiction in this matter was readily apparent. Order Denying Motion Complainants’ Motion for Summary Judgment, dated June 20, 2013 (“Order Denying Mot. for J.”), at 3-4. The Presiding Officer questioned “why a Complainant would initiate a proceeding in a venue that it believed did not have jurisdiction.” *Id.* at 4.

At the same time, the Presiding Officer issued an order ruling on the various outstanding discovery motions. She denied Complainants' motion to quash the five subpoenas the Port Authority had served on their logistic subsidiaries:

[R]elevant evidence is being sought from an affiliate or subsidiary of the Complainants, not from an independent nonparty . . . [and] discovery regarding the Complainants' relationships with their affiliates and any benefits they receive from the infrastructure, intermodal, or security improvements [is] relevant and discoverable.

Order on Discovery Motions, dated June 20, 2013 ("June 20, 2013 Discovery Order"), at 5. She denied Complainants' request for a protective order staying the Rule 30(b)(6) depositions of Complainants and granted the Port Authority's cross motion to compel:

To determine whether the [CFC] is reasonable, it is necessary to determine what services/benefits are received by Complainants . . . directly or indirectly. For purposes of discovery, Respondent may inquire about Complainants' relationships with their subsidiary logistics companies regarding transportation of containers at the port; the ability to pass port and terminal charges through to customers; the impact of the [CFC] on Complainants' business; the impact of use of rail and trucking; and document retention and collection.

*Id.* at 4. Finally, she granted the Port Authority's motion to compel production of the relevant contracts:

The Port Authority has specifically identified improvements to rail, transit, and security to justify imposing the [CFC] and Complainants have admitted that they benefit, at least to some extent, from these improvements. Therefore, contracts or agreements with shippers, rail carriers, and motor carriers are relevant and discoverable.

*Id.* at 3. The Presiding Officer directed Complainants to complete their document production by July 8, 2013 and set a new August 15, 2013 deadline for the close of fact discovery. *See* Fourth Revised Scheduling Order, dated June 20, 2013, at 2.

**Stage III: Complainants Ignore Judge Wirth's Orders, and Repetitiously Seek to Reargue Their Motion for Judgment on an Incomplete Record**

The ordered document production deadline of July 8, 2013 came and went without Complainants: (i) producing any of the ordered documents, (ii) responding to the Port Authority's attempts to reschedule the ordered depositions, or (iii) replying to the Port Authority's inquiries into the status of their other outstanding ordered discovery obligations. *See* July 18, 2013 Friedmann Decl. ¶¶ 8-11. Instead, Complainants sought to circumvent the Presiding Officer's authority by seeking an interlocutory appeal of her denial of their Motion for Judgment. *See* Pet. for Leave to Appeal.<sup>30</sup> In their petition, Complainants repeated their mantra that they were mere "vessel operators," despite their prior general, half-hearted acknowledgement to the contrary. *Compare* Pet. for Leave to Appeal at 3 ("[T]he CFC cannot be extracted by an MTO from a vessel operator unless the MTO furnishes a service to the vessel operator, or the MTO is engaging in a practice that violates 46 U.S.C. 41102(c).") *with supra* at 22-23 (conceding that Complainants provided intermodal through-transportation of cargo).<sup>31</sup>

The Presiding Officer denied Complainants' petition to pursue an interlocutory appeal, correctly stating that the "[order] which denied summary decision prior to conducting discovery was not a final determination of any issue in the proceeding," and adding that the Port Authority was "entitled to discovery and an opportunity to defend [itself] in this proceeding." Appeal/Stay Order at 2-3. The Presiding Officer also warned that:

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<sup>30</sup> Three days after filing their interlocutory appeal papers, Complainants separately moved to stay discovery. *See* Mot. to Stay Discovery. That motion was promptly denied. *See* Order Denying Petition for Leave to Appeal and Motion to Stay, dated July 24, 2013 ("Appeal/Stay Order").

<sup>31</sup> In the accompanying Petition for Review of Administrative Law Judge's Order, dated July 8, 2013 ("Pet. for Review"), Complainants left no doubt that they intended not to participate in any further discovery. *Id.* at 5 ("Complainants, in their Motion for Judgment, made abundantly clear that they were presenting their case in its final form.").

This proceeding has been pending for almost two years and the parties are expected to proceed expeditiously. Complainants may not refuse to participate in the proceeding that they brought. ***Failure to produce discovery or to meet deadlines may result in sanctions, including dismissal.***

*Id.* at 4 (emphasis added).<sup>32</sup>

None of the remaining Complainants produced any discovery, despite the Presiding Officer's explicit warnings that such defiance of her orders risked dismissal. Instead, on August 8, 2013, they filed yet another motion attempting to obtain a merits ruling on what the Presiding Officer had already repeatedly ruled was an incomplete record. *See generally* Mot. for Final J. Complainants asserted that their "motion for final judgment" was necessary to "clear up the ongoing misunderstanding of the case they are presenting" and to "further clarify their position," even though they had nothing to say that either was new or had been misunderstood. *Id.* at 1. They attempted to use another vague, half-hearted concession as the basis for seeking to prevent further development of the record, stating in general terms that they "do not contest the reasonableness of the current level of the CFC in comparison to the myriad benefits which may come to them and their affiliates as participants in commerce at the Port." *Id.* at 3-4.<sup>33</sup> But this was simply a continuation of their strategy to try to prevent the development of a full and fair record. Similarly, together with their motion, Complainants submitted a revised statement of facts in which they claimed "not [to] dispute the Port's versions of the undisputed fact statements." *Id.* at 2; *see also* Statement of Facts Not in Dispute for Final Judgment on the Record as it Stands, dated August 8, 2013. But this general proclamation was belied when it

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<sup>32</sup> Following the Presiding Officer's directive, Hanjin Shipping Co., Ltd. became the fifth of the nine complainants to move to withdraw from the case. *See* Motion to Withdraw, dated July 26, 2013.

<sup>33</sup> *See also* Mot. for Final J. at 5 ("We stipulate for purposes of this case that there are "benefits" to vessels which call the Port (including their containers, if applicable) for which the current level of the charge is reasonable."); *id.* at 4 ("We do not contest the 'reasonableness' of today's charge of \$4.95 per TEU or \$1.11 per cargo unit.").

came to the specifics, perhaps most graphically by Complainants' repackaged assertion that "there is no identifiable quid pro quo service rendered BY THE PORT TO THE VESSELS ALONE in return for the CFC PAID BY VESSELS ALONE." Mot. for Final J. at 5 (emphasis in original). That statement is comprised of three underlying, hotly-disputed, and indeed ultimately false, factual premises: (1) the CFC is paid by the vessel; (2) Complainants themselves are nothing more than "Vessel Operators"; and (3) Complainants receive no "service" in return for the CFC. *See* Opposition to Complainants' Motion for Final Judgment on the Record as it Stands, dated Aug. 23, 2013 ("Opp. to Mot. for Final J."), at 9.

The Port Authority responded to this latest iteration of Complainants' quest for summary judgment on a skewed and incomplete record by pointing out that the Motion for Final Judgment was nothing more than an improper attempt to reargue their prior Motion for Judgment, and noting that the Presiding Officer had "already rejected this very same argument on the basis of the exact same state of the record." Opp. to Mot. for Final J. at 6-7. The Port Authority restated its position that "the discovery . . . already ordered would demonstrate the extent of Complainants' activities at the port and the services and benefits they receive in exchange for the CFC." *Id.* at 11. The Port Authority also pointed out that, despite Complainants' representations to the contrary, numerous hotly-disputed material facts remain that would be crucial to any fair determination of the CFC's validity, even if the Presiding Officer were to accept Complainants' already-rejected assertion that, for the CFC to be lawful, the Port Authority must provide some specific "service" in return for the charge. *Id.* at 8. And because "acceptance of a movant's version of disputed facts on a summary judgment is impermissible," the Port Authority asked that Complainants' latest motion for judgment "be denied out of hand as frivolous." *Id.* at 12.

The Presiding Officer properly denied Complainants' Motion for Final Judgment, ruling:

The fundamental factual disputes which prevented the motion for summary judgment continue. This duplicative request, previously denied in two orders, will not be permitted. The proceeding is not ripe for decision until discovery is completed and a decision can be rendered on a full and complete record, as indicated previously.

Final Judgment Order at 3. The Presiding Officer admonished Complainants for failing to comply with her prior discovery and scheduling orders, stating that “[a] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Id.* at 5 (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992)). Judge Wirth noted that although “Complainants appear to prefer a ruling regarding the legality of the cargo facility charge without providing additional discovery . . . this issue cannot be resolved without an opportunity for Respondent to obtain discovery and defend itself.” *Id.*

She then gave Complainants a second warning:

At this point, the Complainants have three options. They may immediately provide the required discovery and proceed to a determination on the merits; they may file a motion to withdraw the Complaint (indicating whether the withdrawal is because of a settlement or for other reasons); ***or, if they refuse to provide discovery, may have the case dismissed for discovery violations.***

*Id.* (emphasis added).

In the wake of this ruling, three of the four remaining Complainants filed motions to withdraw from the proceeding. *See* Motion of Nippon Yusen Kaisha, United Arab Shipping Company (S.A.G.), and Yang Ming Marine Transport Corporation to Withdraw, dated Sept. 20, 2013. Four days later, the only remaining Complainant, “K” Line, indicated its intention *not* to withdraw. *See* Status Report of Kawasaki Kisen Kaisha, Ltd., dated Sept. 24, 2013. On that same date, the law firm of Reed Smith LLP moved to withdraw as counsel, leaving “K” Line America, Inc. to proceed solely through its in-house counsel, John Meade. *See* Motion to Withdraw as Counsel, dated Sept. 24, 2013.

Despite having witnessed the withdrawals of all eight of its co-Complainants as well as three sets of outside counsel, “K” Line was evidently determined neither to change course nor to “immediately provide the required discovery” as ordered by Judge Wirth. Instead, on October 8, 2013, “K” Line filed yet another motion, *this time asking for its own Complaint to be dismissed on the merits*. See generally Motion for Implementation of ALJ’s Rulings by Order of Dismissal, dated Oct. 8, 2013 (“Mot. for Implementation”). But the Presiding Officer had already ruled no less than three separate times that a ruling on the merits was premature—whether for or against “K” Line—until the development of an evidentiary record upon which such a ruling could be made. See Order Denying Mot. for J. at 5 (“The question of whether the cargo facility charge violates the Shipping Act requires an analysis of disputed material facts.”); Appeal/Stay Order at 3 (“Once discovery has been completed, the parties will be in a better position to fully brief the issues and the decision will be based on a thorough understanding of the material facts.”); Final Judgment Order at 3 (“Resolution of actual disputes requires a factual basis on which to make the decision.”).

In its odd motion for dismissal of its own case on the merits, “K” Line again sought to argue that the case was ripe for final determination without further discovery, asserting that “the undisputed fact that many other users of the same [CFC-funded port] facilities and services who benefit significantly entirely escape responsibility for paying the CFC, means that the CFC is *per se* unreasonable under Section 41102(c).”<sup>34</sup> Mot. for Implementation at 3. But this assertion was

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<sup>34</sup> While this motion was pending, “K” Line filed a 23-page “Status Report”—that was called for by no rule or scheduling order—purporting to satisfy “the discovery demands ‘K’ Line’s files show to be outstanding as of this date.” See “K” Line Status Report, dated October 21, 2013. But this filing amounted to nothing other than an untimely attempt by “K” Line to supplement its motion by having the Presiding Officer revisit discovery disputes long since resolved through motions to compel. Furthermore, the unsworn submissions by counsel in the report were not discovery responses, but rather unilateral assertions and argument that essentially all of the

inconsistent with “K” Line’s having expressly abandoned any unreasonable discrimination claim. *See supra* at 20. Furthermore, “K” Line continued to rely on the disputed factual premise that “only vessel operators like ‘K’ Line bear the burden of the fee.” *Id.* at 3.<sup>35</sup>

In response to “K” Line’s motion to dismiss its own proceeding on the merits, the Port Authority agreed with “K” Line that dismissal was proper, but asserted that the dismissal should be based solely on “K” Line’s discovery failures, because any ruling on the merits was premature given the incomplete record. *See generally* Opp. to Mot. for Implementation. Since it was obvious that this peculiar motion was just the latest iteration of “K” Line’s attempt to have its case addressed by the Commission on a demonstrably skewed and incomplete record, and because “K” Line had evidenced its intention of *never* complying with its outstanding discovery obligations and the Presiding Officer’s multiple compulsion orders, the Port Authority asked that the Presiding Officer dismiss the case, not on the merits, but under FMC Rule 210(b)(3) as a sanction for “K” Line’s extensive, ongoing discovery violations. *See id.* at 7-8.

On February 5, 2014, the Presiding Officer dismissed “K” Line’s claims in light of its “failure to provide required discovery.” Dismissal Order at 8. With regard to “K” Line’s motion to dismiss its own Complaint, the Presiding Officer reiterated her holding that the already-ordered discovery was necessary before a decision on the merits could be rendered:

The discovery that has been ordered and not produced goes to the heart of this issue of whether the [CFC] is being levied against vessel operators or against

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outstanding discovery was irrelevant. *See* Response to “K” Line’s Motion for Implementation, dated Oct. 23, 2013 (“Opp. to Mot. for Implementation”), at 7 n. 10. In later dismissing “K” Line’s case for its continuing refusal to comply with its discovery obligations, the Presiding Officer implicitly agreed that this “status report” did not fulfill “K” Line’s outstanding obligations. *See* Dismissal Order at 6-9.

<sup>35</sup> “K” Line also purported to raise constitutional arguments that it had not pleaded or previously made, positing that the CFC is an unconstitutional “tax,” *see* Mot. for Implementation at 3-6, while acknowledging that the FMC is not the proper forum for such claims, *see id.* at 10 (“recognizing that the Commission will not pass on [the CFC’s] constitutionality”).

integrated global shipping and logistics enterprises and whether the charges have been apportioned as closely as practicable. The *Plaquemines* case . . . does not create a well-defined class of per se violations and does not remove the need for discovery into the facts involved in imposition of the fees.

*Id.* Addressing the Port Authority’s discovery requests, the Presiding Office reiterated:

The Port Authority has a right to defend itself in this proceeding. To do so, it has requested discovery regarding Complainant’s relationships with its affiliates and any benefits received from the Port’s infrastructure, intermodal, or security improvements. These discovery requests are relevant and narrowly tailored to the issues in this proceeding.

*Id.* at 7-8. The Dismissal Order ruled that the “evidence demonstrates that ‘K’ Line has failed to comply with the October 11, 2012, Order on Motions to Compel and to Reply and the June 20, 2013, Order on Discovery Motions”:

Complainant has refused to provide the required discovery despite specific orders to do so and despite specific warnings that the case may be dismissed if Complainant continues to refuse to provide the required discovery. Complainant has indicated that it will continue to refuse to provide the required discovery because it does not think the required discovery is relevant to the issues in this proceeding . . . Complainant’s failure to produce discovery is therefore willful.

*Id.* at 7. The Presiding Officer dismissed the proceeding with prejudice, citing as authority both FMC Rule 72(c), which provides for dismissal if a Complainant “fails to prosecute or to comply with . . . an order in the proceeding,” and FMC Rule 210(b)(3), which provides for dismissal as a sanction for failure to comply with discovery orders.

“K” Line has now filed what purports to be an appeal not only of Judge Wirth’s order dismissing “K” Line’s claim for its egregious discovery failures, but also—in keeping with their tactic of trying to obtain a merits ruling while refusing to allow the development of an adequate factual record—on the merits of their claims. *See generally* Appeal.<sup>36</sup> “K” Line does this

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<sup>36</sup> Shortly prior to the filing of this Appeal, Richard D. Gluck and Benjamin J. Lambiotte, both of the law firm of Garvey Schubert Barer, entered their appearances as co-counsel for “K” Line. *See* Notices of Appearances, dated February 18, 2014. Yet, neither Mr. Gluck nor Mr.

despite Presiding Officer Wirth's unequivocal statement that the "*merits of the proceeding have not been reached, and indeed cannot be reached, without a full and fair record.*" Dismissal Order at 8 (emphasis added).

## ARGUMENT

### I. Standard of Review

The final order in this matter "dismisses the proceeding with prejudice on the ground that Complainant has refused to provide required discovery." See Dismissal Order at 1. "The merits of the proceeding have not been reached, and indeed cannot be reached, without a full and fair record." *Id.* at 8.

The Commission's rules charge the presiding judge with "secur[ing] the just, speedy and inexpensive determination of every proceeding," 46 C.F.R. § 502.1, and, to that end, grant the presiding judge broad powers to "regulate the course of a hearing," 46 C.F.R. § 502.25(b)(3). "Rule 201(i), on its face, grants a presiding officer complete discretion in deciding motions pertaining to discovery." *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 SRR 1020, 1021 (F.M.C. Nov. 15, 2002); 46 C.F.R. § 502.201(i)(1) ("The presiding officer may at any time . . . make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience."). If a party "fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests," the Commission's Rules authorize such sanctions "as are just," including "dismissing the action or proceeding." 46 C.F.R. § 502.210(b).

Commission Rule 227 governs the review of exceptions to initial decisions (Subrule 227(a)) and orders of dismissal (Subrule 227(b)). See 46 C.F.R. § 502.227. The standard of

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Lambiotte appears on the appellate papers, which are signed only by John Meade of "K" Line.

review for initial decisions is plenary. *See* § 502.227(a)(6) (“Where exceptions are filed to, or the Commission reviews, an initial decision, the Commission . . . will have all the powers which it would have in making the initial decision.”). But no standard of review is specified for exceptions to orders of dismissal. *See* § 502.227(b). In order to give effect to the Presiding Officer’s “complete discretion” in discovery matters, see *Exclusive Tug Arrangements*, 29 SRR at 1021, the Commission’s review of an order dismissing a proceeding for failure to comply with discovery orders should be governed by an abuse of discretion standard.

Where the Commission’s Rules do not explicitly address a subject relating to procedure, the Rules direct the Commission to follow the Federal Rules of Civil Procedures to the extent they are consistent with sound administrative practice. 46 C.F.R. § 502.12.<sup>37</sup> Both in courts governed by the federal rules and in administrative proceedings before other federal agencies, discretionary dismissals for discovery violations are reviewed under the abuse of discretion standard. Following the guidance of the Supreme Court in *National Hockey League v. Metropolitan Hockey Club*, courts consider the question to be “not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.” *Weisberg v. Webster*, 749 F.2d 864, 870 (D.C. Cir. 1984) (*quoting* 427 U.S. 639, 642 (1976)); *see also* *3 Penny Theater Corp. v. Plitt Theatres, Inc.*, 812 F.2d 337, 339-40 (7th Cir. 1987) (holding that district court did not abuse discretion in dismissing action for failure to prosecute); *In the Matter of: Laura Butler, Complainant v. Anadarko Petroleum Corp., Respondent*, 2012 WL 2673238, at \* 3 (U.S. Dept.

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<sup>37</sup> Here, following of Federal Rules of Civil Procedure is especially appropriate, given that the Commission Rules on which Judge Wirth based her dismissal—Rules 72 and 210—were specifically intended to align FMC practice closely with the Federal Rules. *See* Commission’s Rules of Practice and Procedure, 77 Fed. Reg. 61519, 61523 (Oct. 10, 2012) (explaining that Rule 72 “is similar to FRCP 41” and Rule 210 “is revised to more closely conform to FRCP 37(b)(2)(A)”).

of Labor SAROX June 15, 2012) (“We find that neither [Complainant’s] amended motion for summary judgment, nor her response to the show cause order, nor her pleadings before the Board justify her contumacious refusal to obey the ALJ’s discovery orders . . . . We conclude that the ALJ did not abuse his discretion in sanctioning [Complainant] and dismissing her complaint.”); *Secretary of Labor v. Sealtite Corp.*, OSHRC Docket No. 88-1431, 15 O.S.H. Cas. (BNA) ¶ 1130 at \*1 (O.S.H.R.C. June 28, 1991) (“[W]e hold that the judge did not err in finding that [Complainant’s] conduct was contumacious and that the judge did not abuse his discretion in imposing the sanction of dismissal.”).<sup>38</sup>

Accordingly, the abuse of discretion standard that governs in reviewing dismissals under Federal Rule of Civil Procedure 37(b), upon which Commission Rule is modeled, *see Kin Bridge Express Inc.*, 28 SRR 980, 981 (A.L.J. Apr. 14, 1999), is consistent with sound administrative process and should be utilized here.<sup>39</sup>

## **II. Judge Wirth Properly Dismissed This Proceeding With Prejudice**

“K” Line took advantage of this forum to wage a two-and-a-half-year litigation but refused to follow the FMC’s rules, refused to participate in discovery, and refused to obey the Presiding Officer’s orders. Its abuse of this forum wasted the resources of not just one but *two* public agencies (the FMC and the Port Authority), all while persistently attempting to prevent the Port Authority from defending itself against the allegations in the Complaint on a fair record. Under those circumstances, dismissal of the proceeding was both appropriate and necessary.

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<sup>38</sup> The Port Authority is not aware of any FMC cases setting forth any different standard of review for review of a dismissal order based upon a complainant’s repeated failure to comply with discovery orders, nor did “K” Line cite any.

<sup>39</sup> Of course, in explaining why the abuse of discretion standard should be applied, we do not for a moment mean to suggest that Judge Wirth was anything other than absolutely correct in dismissing the proceeding, given Complainant’s incontestably continuous flouting of her perfectly appropriate discovery and compulsion orders, and only after repeated warnings.

**A. Judge Wirth Properly Ordered Complainants to Provide Basic, Targeted Discovery Relevant to Their Claims**

None of the discovery ordered by Judge Wirth is even remotely controversial. While the scope of permissible discovery obviously is not limitless, parties to FMC proceedings “may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense.” June 20, 2013 Discovery Order at 2 (quoting 46 C.F.R. § 502.201(e)). Here, Complainants’ claim that the CFC is an unreasonable charge rests on several unproven assertions in their Complaint and motion papers, including:

- The CFC is paid by “vessels” alone;<sup>40</sup>
- Complainants are nothing more than “vessel operators”;<sup>41</sup>
- Complainants receive no “services” in return for paying the CFC;<sup>42</sup>
- Complainants “generally do not use the ExpressRail system”;<sup>43</sup>
- Complainants “generally do not use the system for the interchange of containers between trucks and container terminals”;<sup>44</sup>
- Movement of containers beyond the terminals by truck “usually is not within the Complainants’ terms of carriage”;<sup>45</sup> and
- Other types of port users, such as “inland roadway truck or railway carriers,” benefit extensively from CFC-funded projects without having to pay the charge.<sup>46</sup>

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<sup>40</sup> Mot. for J. at 21; Opp. to Mot. to Compel Contracts at 7; Pet. for Review at 7; Mot. for Final J. at 5; Mot. for Implementation at 2; *see also* Appeal at 4.

<sup>41</sup> Mot. for J. at 1, 13, 15-16, 21; Pet. for Leave to Appeal at 1-4; Mot for Final J. at 1; Mot. for Implementation at 3; *see also* Appeal at 3-4.

<sup>42</sup> Mot. for J. at 16; Opp. to Mot. to Compel Contracts at 7; Pet. for Leave to Appeal at 4-5; Mot for Final J. at 6; Mot. for Implementation at 6.

<sup>43</sup> Compl. at 10.

<sup>44</sup> Compl. at 9.

<sup>45</sup> *Id.*

<sup>46</sup> Motion for Implementation at 2-3, 6-8.

The Port Authority contested each of these assertions and, accordingly, sought targeted discovery that would disprove Complainants' claims. Granting the Port Authority's motion to compel, Judge Wirth ordered Complainants to produce three specific, narrowly-tailored categories of documents:

1. Contracts or agreements with shippers, including beneficial cargo owners or non-vessel-operating common carriers, for ocean and intermodal services to or from the Port of New York and New Jersey;
2. Contracts or agreements with rail carriers for transportation services to or from the Port of New York and New Jersey;
3. Contracts or agreements with motor carriers for transportation services to or from the Port of New York and New Jersey.

June 20, 2013 Discovery Order at 3. These documents define the scope and extent of Complainants' operations and responsibilities for providing intermodal transportation via the Port of New York and New Jersey, and thus, the extent to which Complainants:

- Are more than mere "vessel operators," and in fact coordinate intermodal transportation of cargo through the port and inland;
- Engage in landside operations that use and benefit from CFC-funded services, such as ExpressRail;
- Provide for movement of containers beyond the terminals via truck using CFC-funded roadways;
- Already pass the cost of the CFC on to their customers, rail carriers, or motor carriers; and
- Are, as the Port Authority believes, best situated to pay or pass along the amount of the CFC in a way that is most efficient, cost-effective, and fair to those that receive, utilize, and benefit from the CFC-funded projects.

Developing the evidence on these points therefore was essential to provide the Port Authority with a fair opportunity to contest—and for the Presiding Officer to resolve—Complainants' claims, which otherwise rest on Complainants' disputed, self-serving assertions.

Judge Wirth properly rejected Complainants' outlandish position that the Port Authority was not entitled to depose even a single witness before defending this case on the merits. *See* June 20, 2013 Discovery Order at 3-4. Instead, she identified several discrete, limited, relevant topics on which witnesses may be deposed: Complainants' relationships with their subsidiary logistics companies regarding transportation of containers at the port; the ability to pass port and terminal charges through to contracting parties; the impact of the CFC on Complainants' business; the impact of use of rail and trucking; and document retention and collection. *Id.* at 4. Judge Wirth further held that the Port Authority could obtain related discovery from Complainants' subsidiary logistics companies, rejecting Complainants' suspect efforts to keep the fully integrated landside activities of their own subsidiaries out of the record. *Id.* at 4-5. These topics bear directly on Complainants' claims that they are mere "vessel operators" that do not receive CFC-funded services, and that other parties benefit economically from CFC-funded services without paying for them.<sup>47</sup>

All of the categories of discovery ordered by Judge Wirth are thus essential to presenting an accurate picture of Complainants' role in the intermodal transportation of cargo and their central position in the economic and logistical chain, which makes them the most logical and efficient collection point for the CFC. The Port Authority believes the evidence withheld by Complainants would have shown that they coordinate point-to-point transportation by negotiating directly (or through their own subsidiaries) with all the major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the

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<sup>47</sup> Given the *de minimis* amount of the CFC in comparison to overall international shipping costs, *see supra* at 1 & n.1, discovery of the actual impact of the CFC on Complainants' businesses also was directly relevant to the CFC's reasonableness under the Shipping Act. *See Volkswagenwerk*, 390 U.S. at 281 (holding that "a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under § 17 [of the Shipping Act], even though not all members of the group receive equal benefits").

vessels; and the rail and motor carriers that move cargo through the port and inland. Indeed, in many instances, as the Port Authority has asserted, Complainants and their own subsidiaries *are* those major players. *See supra* at 11-12, 22-23. Thus, Complainants' position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC themselves or to allocate it to others in the chain as they see fit, by adjusting the rates they charge their own customers and by negotiating the amounts they pay to rail and motor carriers for inland transport.<sup>48</sup>

The Commission has previously upheld the practice of collecting fees through “the party who can most efficiently effectuate and enforce the same.” *WGMA I*, 18 SRR at 790 (noting that, by allocating fees based on efficiency concerns, problems determining responsible parties were eliminated, and the volume and costs of invoicing wharfage charges were drastically reduced). This practice has been found to be reasonable and to “promote overall port efficiency” as it ensures that all revenues due to the port are collected by extending liability for the tariff to “parties over whom the port has the highest degree of collection leverage.” *Id.*; *see also Palmetto Shipping & Stevedoring Co., Inc. v. Georgia Ports Authority*, 24 SRR 761, 765 (FMC Jan. 29, 1988) (the “relevant inquiry would appear to be who has the better ability to require advance security from ... principals”). The ordered discovery therefore is highly relevant under Shipping Act precedents.

Most fundamentally, all of the discovery ordered by Judge Wirth would have provided evidence of the many ways in which Complainants *directly benefit* from the rail, roadway, and

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<sup>48</sup> Carriers can and routinely do pass through their costs to the BCOs and other stakeholders. For example, two of the original Complainants, Hanjin and Yang Ming, levied “congestion” surcharges on their customers as compensation for slowdowns at American ports. *See* SOF ¶ 155. Carriers likewise can and do pass the costs of the CFC on to the BCOs in the form of surcharges. *See id.* ¶ 154.

security projects funded by the CFC. This is the heart of the reasonableness test under the Shipping Act. To prevail on a § 41102(c) claim, a Complainant must show that a marine terminal operator (such as the Port Authority) has “fail[ed] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c).<sup>49</sup> A charge levied by a marine terminal operator is “just and reasonable” for purposes of § 41102(c) if it is “reasonably related to an actual service performed *or a benefit conferred* on the person charged.” *WGMA I*, 18 SRR at 790 n. 14 (emphasis added). Accordingly, as recognized by Judge Wirth, when deciding claims under § 41102(c), courts consider whether the charge is reasonably proportionate to the services or benefits provided to the person paying the charge. *See* Order Denying Mot. for J. at 5; *Volkswagenwerk*, 390 U.S. at 282 (“The question under § 17 is . . . whether the correlation of [the] benefit to the charges imposed is reasonable.”). Thus, as Judge Wirth explained, evaluating the legality of the CFC under § 41102(c) requires a comparison between the amount charged and the extent of the benefits that the Complainant receives from the infrastructure, intermodal transportation, and security projects funded by the CFC. *See* Order Denying Mot. for J. at 5; *Volkswagenwerk*, 390 U.S. at 281-82.<sup>50</sup>

Despite the foregoing case law, “K” Line argued that the “benefits” conferred by the Port Authority were irrelevant and therefore the CFC could be declared “unreasonable” without

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<sup>49</sup> Section 41102(c) is the recodification of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. App. 1709(d)(1). The same requirement was carried forward from section 17 of the Shipping Act of 1916, 46 U.S.C. App. 816.

<sup>50</sup> Indeed, the D.C. Circuit remanded a case to the Commission where there had not been a thorough evidentiary analysis of the benefits inuring to multiple users of a facility. *Baton Rouge Marine Contractors, Inc. v. Fed. Maritime Comm’n*, 655 F.2d 1210, 1217 (D.C. Cir. 1981) (vacating and remanding because the Commission’s evaluation of a charge for use of an automated shipping gallery “ignore[d] evidence concerning the impact of automation on stevedore prices and profits”).

developing an evidentiary record as to any such “benefits.” Unsurprisingly, the precedents which “K” Line purports to rely upon squarely contradict this view, reaching their decisions based on a developed evidentiary record. *See Plaquemines*, 838 F.2d at 541, 548 (decided “[a]fter an evidentiary hearing” in which the “substantial benefits” to non-paying users were “clearly supported by the evidence”); *Baton Rouge*, 655 F.2d at 1217 (holding that *Volkswagenwerk* requires the FMC to undertake a “comparative evaluation of relative benefits”); *Dreyfus v. Plaquemines Port Harbor & Terminal Dist.*, 21 SRR 219 (FMC Nov. 17, 1981) (49-page opinion detailing third-party contracts, the extent of complainant’s port use, and voluminous other evidence in determining whether harbor fees reasonably related to benefits conferred by the port).

As previously noted, “K” Line repeatedly tried to convince Judge Wirth to reverse her well-considered discovery rulings by purporting to offer vague, piecemeal concessions in their motion papers that they argued would obviate the need for certain discovery. *See supra* at 26-28. But these concessions shifted with each successive motion and do not provide the basis for a fair and adequate record upon which the Port Authority must defend the CFC’s reasonableness under the Shipping Act. *See id.* The Port Authority should not be forced to defend the merits of this case having been denied the opportunity to develop its best case in a reasonable fashion. Indeed, the discovery ordered by Judge Wirth remains unquestionably relevant to “K” Line’s case even as currently presented to the Commission. Specifically, “K” Line now contends—without legal support and without even attempting to define the term—that the Port Authority’s purported failure to provide a “quid pro quo” service in return for the CFC makes the charge unreasonable. *See Appeal* at 46. But the discovery ordered by Judge Wirth would have allowed the Port Authority to show the nature of the return that “K” Line actually receives from CFC-funded

projects. “K” Line also contends that the CFC unlawfully “singl[es] out the vessel operators,” Appeal at 46, to pay for projects that also benefit “many other users of the same facilities and services,” Appeal at 32. As explained above, however, the discovery ordered by Judge Wirth would have allowed the Port Authority to show that: (1) “K” Line is much more than a “vessel operator” and in fact engages in extensive landside activities at the Port; and (2) given “K’ Line’s direct relationships with other port users and its ability to pass the CFC on to them if appropriate, the CFC is in fact is “apportioned as closely as is practicable” to use of the port services and infrastructure that are funded by the charge.<sup>51</sup>

Thus, the discovery that “K” Line has refused to provide was obviously relevant. In order to demonstrate the reasonableness of the CFC under the Shipping Act, the Port Authority should have been permitted first to develop a full evidentiary record showing: (1) the true nature and extent of Complainants’ and their subsidiaries’ landside activities at the Port; (2) the amount and type of CFC-funded services that Complainants and their subsidiaries actually receive; and (3) the extent to which Complainants’ direct transactions with other alleged beneficiaries of the CFC enable them to either absorb the charge or pass it along efficiently. “K” Line, well aware that any discovery into these particular questions would decimate its case, deliberately stonewalled the Port Authority’s attempt to develop that record.

Finally, as Judge Wirth recognized, “K” Line’s burden and confidentiality objections to producing the required discovery were equally unsupportable.<sup>52</sup> “K” Line failed to come

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<sup>51</sup> *Plaquemines*, 838 F.2d at 548 n.11 (D.C. Cir. 1988); *see also supra* at 5; *infra* at 48-49.

<sup>52</sup> *See* June 20, 2013 Discovery Order at 2 (“The Protective Order will protect confidential information and it does not appear that the request is overly burdensome.”); Appeal/Stay Order at 2 (“[A] protective order is in place to protect confidential material which may need to be disclosed.”); Dismissal Order at 7 (“The prior rulings on motions to compel limited the amount of discovery required from “K” Line and provided for attorney’s [eyes] only protection for commercially sensitive material produced.”).

forward with any evidence of the required specific showing as to what the purported “burden” of producing documents would be, or why it would outweigh the Port Authority’s need to receive those documents to defend the case. *See, e.g., Possible Unfiled Agreements Among A.P. Moller-Maersk Line, P&O Nedlloyd Limited and Sea-Land Service, Inc.*, 28 SRR 322, 323 (FMC May 13, 1998) (“[P]arties resisting discovery have the burden of persuasion that the requested information is not relevant, is unduly burdensome to produce, is privileged, and the like.”); 46 C.F.R. 502.201(e)(2)(ii)(C) (the presiding officer may limit discovery upon determining that “[t]he burden or expense of the proposed discovery outweighs its likely benefit”). And the parties’ mutual concerns about the confidentiality of information produced in discovery had already been addressed through a binding stipulation. *See* Declaration of Jared R. Friedmann, dated Jan. 3, 2013, Ex. 20 (Stipulation and Protective Order Governing Disclosure of Confidential Information, dated Oct. 14, 2011); *id.*, Ex. 21 (confirmation from Office of Administrative Law Judges recognizing confidentiality stipulation). Under that stipulation, the parties’ most sensitive documents could be stamped “Highly Confidential – Attorney Eyes Only” and accordingly could be reviewed *only* by the parties’ attorneys, *not* by their business personnel. *See id.*, Ex. 20 at 3-4.

For these reasons, Judge Wirth properly ordered the requested discovery.

**B. “K” Line’s Willful, Repeated, and Continuing Failure to Follow Judge Wirth’s Discovery Orders Warranted Dismissal of the Proceeding.**

Despite Judge Wirth’s efforts to ensure that discovery remained within a narrow and proper scope, and despite her extending discovery deadlines *four* times to accommodate Complainants, “K” Line and the other Complainants willfully ignored their discovery obligations, even in the face of clear warnings that doing so would lead to dismissal of the case. FMC Rule 210(b)(3) authorizes the Presiding Officer to impose sanctions on a party that violates

a discovery compulsion order, including authorizing an order “dismissing the action or proceeding.” 46 C.F.R. § 502.210(b)(3); *see also Universal Logistic Forwarding Co., Ltd.*, 29 SRR 36, 37 (A.L.J. Feb. 6, 2001) (“A presiding judge may issue sanctions against parties that refuse to answer discovery requests and violate orders to answer. The Commission’s rules specifically provide for sanctions in such cases.”).<sup>53</sup>

Although dismissal is a sanction that should not be imposed lightly, it is particularly appropriate where, as here, a party has been given ample opportunity to remedy its discovery deficiencies and has been warned that it faced such consequences if it did not comply. *See Neal v. Director, District of Columbia Department of Corrections* No. Civ. A. 93-2420, 1995 WL517248, at \*7 (D.D.C. 1995) (noting that sanctions were appropriate where defendants were granted numerous extensions, and were “forewarned of the consequences of their failure to comply with the discovery request, but nonetheless failed to reply responsively”); *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1320-21 (10th Cir. 2011) (affirming district court’s sanction of dismissal where plaintiffs were warned of possible dismissal under Rule 37 for failure to comply with discovery orders, but continued to “repeatedly flout[]” the court’s orders). Indeed, “[i]f harsh measures were not taken in such cases, [litigants] would feel freer than . . . Rule 37 contemplates they should feel to flout . . . discovery orders.” *U.S. v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (citations omitted); *see also Kalijarvi, Chuzi, Newman & Fitch, P.C. v. Baker*, CIV.A. 12-01127 ESH, 2013 WL 2107174, at \*2 (D.D.C.

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<sup>53</sup> Likewise, the Federal Rules provide that “[i]f a party . . . fails to obey an order to provide or permit discovery,” a court may “dismiss[] the action or proceeding in whole or in part.” Fed. R. Civ. P. 37(b)(2)(a)(v); *see also Albert v. Starbucks Coffee Co. Inc.*, 213 F. App’x 1, 1-2 (D.D.C. 2007) (“Under Rule 37, the district court has broad discretion to impose sanctions for discovery violations.”) (citation omitted); *Chira v. Lockheed Aircraft Corp.*, 85 F.R.D. 93, 98-100 (S.D.N.Y. 1980) (dismissing case for failure to prosecute based on repeated discovery failures); *Curtis-Joseph v. Richardson*, 417 F. App’x 570, 572-573 (7th Cir. 2011) (same).

May 15, 2013) (explaining that dismissal is appropriate where there is a “need to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future”) (citation omitted).

In the instant proceeding, “K” Line was given multiple chances to provide the required discovery but willfully and repeatedly refused to do so, choosing instead to “litigat[e] the same issues over and over” in a series of wasteful and duplicative motions on terms of its own choosing. Dismissal Order at 8; *see also supra* at 26-31. When faced with Judge Wirth’s repeated and specific warnings that failure to produce the ordered discovery would result in dismissal, “K” Line did not even attempt to make a show of rectifying its behavior. *See supra* at 27-32. To the contrary, “K” Line made clear that it had no intention of *ever* complying with the Presiding Officer’s discovery orders. *See id.* Having correctly determined that it was “not possible to reach the merits” without a fair factual record, and having patiently waited to see whether “K” Line would cooperate in that endeavor, Judge Wirth dismissed the proceeding for discovery violations, recognizing that nothing else would stop the unending series of repetitive motions. Dismissal Order at 8.

Judge Wirth’s actions and decisions, including dismissal, were entirely correct and appropriate throughout, and certainly were in no way an abuse of her discretion. Indeed, she was a model of patience.

### **III. “K” Line Cannot Prevail as a Matter of Law on the Merits Given Its Admissions**

Even if the Port Authority were forced to litigate the merits of this case without the benefit of a complete record—which would be palpably unfair and improper—“K” Line *still* could not prevail on the record as it stands, given several key admissions that directly undermine its position. Seeking to avoid the consequences of its concessions, “K” Line tries to invent a new standard for evaluating its unreasonable practices claims under § 41102(c). But when examining

“K” Line’s admissions in the face of the actual standard, it is obvious that “K” Line cannot obtain judgment as a matter of law.

As detailed above, in its repeated efforts to avoid fact discovery, and as repeated again in its Appeal, “K” Line has conceded that: (1) Complainants and their subsidiaries are not only “vessel operators” but also coordinate overland transportation of cargo by subcontracting with rail carriers, motor carriers, and other port users, *see* Opp. to Mot. to Compel Contracts at 4 (“Complainants, while fundamentally vessel operators who load, carry and discharge containers, do subcontract the movement of cargo under through bills of lading to and from inland points. Some have affiliates that perform logistics services.”); (2) Complainants and their subsidiaries do indeed use and benefit from CFC-funded projects and services, *see* Appeal at 4 (“Obviously, everyone who uses the Port directly or indirectly benefits from the roads, reduced truck traffic and police protection.”); Appeal at 6 (“‘K’ Line would happily stipulate that the ‘benefits’ are enjoyed, just not that they are relevant.”); and (3) “K” Line does not dispute here that the amount of the CFC is reasonable in relation to the benefits it receives, *see* Appeal at 26 (“We repeat, we do not contest ‘reasonableness’ of the amount of the CFC.”); Appeal at 47 (“We have said over and over that the level of the CFC is immaterial and uncontested . . . the amount of the fee is immaterial”).

True to its third concession, “K” Line has never attempted to demonstrate that the benefits it receives are disproportionately less than the amount of the CFC. Nor has it challenged the expert analysis of economists at Compass Lexecon, who confirmed that the benefits payors of the CFC receive far outweigh the amount of the CFC. *See supra* at 9-10. Given these concessions, “K” Line cannot possibly succeed on its § 41102(c) claims, which, as discussed

above, would require it to show that the benefits it receives from the CFC are not reasonably commensurate with the charge. *See supra* at 39-41.

Having conceded away its case, “K” Line now argues that “regardless of ‘benefits,’ there is no service rendered as a quid pro quo for the CFC [and] [t]his renders the CFC unlawful under Section 41102(c).” Appeal at 46. But neither the Shipping Act itself nor any Commission precedent requires a terminal operator to provide a discrete or “quid pro quo” service to the payor each and every time a charge is incurred. *See, e.g., Evans Cooperage Co., Inc. v. Board of Commissioners*, 6 FMB 415, 418-419 (FMB Aug. 4, 1961) (rejecting claim that “charges are unreasonable because no specific service is rendered to the complainant” and upholding charge to defray facility costs, which included access to fire, tug, police, and mooring facilities); *WGMA I*, 18 S.R.R. at 790 (finding that charges against users were reasonable, and stating that “[t]here is no question that vessel owners, agents, and cargo interests are ‘users’ of the terminal facilities”—even if they do not directly use the facility—because they “derive a benefit therefrom”). All that the standard requires is that the charge reflect “the reasonable cost and value of services and facilities which it can and does make available” for the payor’s benefit. *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 FMC 155, 161 (Dec. 2, 1965); *see also id.* at 419 (recognizing that at times there “can be no precise equivalence between services rendered and the charges”). And, as noted above, “K” Line does not contest the “reasonableness” of the amount of the CFC. *See supra* at 46.

Likewise “K” Line’s artificial focus on “services” (to the exclusion of “benefits”) is directly contravened by the case law. Indeed, the Shipping Act does not require any “service” *per se*; rather, “K” Line may properly be charged a user fee for *either* a “service performed” or a “benefit conferred.” *See WGMA I*, 18 SRR at 790 n.14; *see also Indiana Port Commission v.*

*Bethlehem Steel Corp.*, 521 F.2d 281, 287 (D.C. Cir. 1975) (reversing and remanding to the Commission upon finding that a proper analysis of the benefits conferred by the IPC, even in the absence of “services” performed, could justify the IPC’s user fee). Were the law otherwise, the Commission would find itself in the business of attempting to draw metaphysical or semantic distinctions between benefits that are based on “services” and those that are not.

“K” Line now also argues that “the Port cannot lawfully single out vessel operators for a charge which purportedly goes to support [the] operations [of port facilities].” Appeal at 46. We note in the first instance that “K” Line expressly waived any claim that the CFC discriminates against ocean carriers under 46 U.S.C. § 41106. *See supra* at 20 & n.27; *see also* Mot. for J. at 1 (expressly requesting a limited ruling only on claims under § 41102(c), and relinquishing any other Shipping Act claims); Mot. for Protective Order at 2 (stating Complainants will “conduct their case in accordance with their significantly narrowed theory of the case and the facts presented in their Motion [for Judgment]”).<sup>54</sup>

Moreover, the CFC “singles out” no one: the Port Authority fairly allocates the CFC across *all* cargo containers by charging containers of equal size an equal rate. Thus, the only remaining question is whether carriers that are responsible for the cargo as it transits the port—as opposed to cargo owners, rail carriers, motor carriers, or any of the other players that have some role in the transportation of cargo from point to point—are the appropriate point in the chain of operations at which to assess the CFC. *See supra* at 39 (citing cases upholding efficient collection of fees through parties that can either absorb them or pass them to others).

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<sup>54</sup> This argument also is plagued by the fact that it is premised on the false assertions that “K” Line is a mere “vessel operator” and that the CFC is charged to vessel operators. As noted throughout this brief, “K” Line has conceded that it is not only a “vessel operator” but that, along with its subsidiaries, it also coordinates overland transportation of cargo. *See, e.g., supra* at 22-23. And the CFC is charged to the ocean common carrier responsible for the container, not whatever company might be the vessel operator. *See supra* at 10-11.

Here, the carriers—including “K” Line—are the most appropriate parties to be charged the CFC because they stand at the center of the logistical transport chain in which shippers, carriers, intermediaries, trucking companies, and rail carriers move cargo through the port. *See supra* at 11-12, 22-23, 38-39.<sup>55</sup> As noted, the carriers coordinate point-to-point transportation by negotiating directly (or through their own subsidiaries) with all the major players involved: the beneficial owners of the cargo; the terminal operators and stevedores that load and unload the vessels; and the rail and motor carriers that move cargo through the port and inland. *See id.* In many instances, the carriers and their own subsidiaries *are* those major players. *See id.* Thus, the carriers’ position at the hub of cargo transportation through the port puts them in the best position either to absorb the CFC or further allocate it to others in the chain as it sees fit.<sup>56</sup>

In sum, in light of “K” Line’s concessions, there are only two possibilities: either (1) to the extent that the concessions mean what they say, “K” Line cannot possibly prevail, and indeed must lose as a matter of law, or (2) to the extent that “K” Line continues to waffle, hedge, and mislead in order to change the story and/or evade the force of its concessions, that only serves to underscore that Judge Wirth was absolutely correct in ordering the limited and obviously relevant discovery that “K” Line adamantly refused to provide, in flagrant violation of her orders, and that dismissal was clearly proper on that ground. In either event, and for all the reasons discussed above, the dismissal was entirely proper.

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<sup>55</sup> Adopting Complainant’s suggestion that the CFC be charged to other port users instead, such as the tens of thousands of beneficial cargo owners that hire Complainants to ship their cargo through the Port, would likely result in a hit-and-miss or unequal assessment of the CFC, would sharply raise the administrative costs (and with them the amount of the CFC), and could take years to implement. *See* SOF ¶ 145.

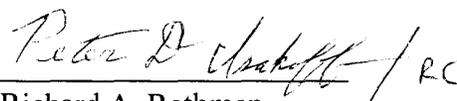
<sup>56</sup> *See* Supplemental Declaration of Frederick Flyer and Allan Champine, dated January 31, 2013, ¶ 14 (“[T]he carriers can pass on the full amount of the CFC to their customers without reducing customers’ demand, so long as the ExpressRail system and roadway infrastructure improvements provide transportation efficiencies that are greater than the costs imposed by the CFC, which our prior analysis concludes is the case.”).

**CONCLUSION**

For the foregoing reasons, the Commission should affirm dismissal of the proceeding with prejudice.

Dated: May 22, 2014

Respectfully submitted,

Handwritten signature of Peter D. Isakoff in cursive, followed by the initials "RC".

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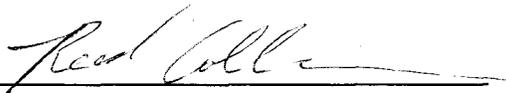
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## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2014, a copy of the foregoing document was served on the following by e-mail and Federal Express:

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