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FEDERAL MARITIME COMMISSION

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May 13, 2016

**VIA FEDERAL EXPRESS**

Office of the Secretary  
Federal Maritime Commission  
800 North Capitol Street, NW  
Washington, DC 20573

**Re: Maher Terminals, LLC v The Port Authority of New York and New Jersey,  
FMC Docket No. 12-02**

Dear Secretary Gregory:

Enclosed please find Mahe Terminals, LLC's Opposition to the Port Authority of New York and New Jersey's Motion to Strike Mahe Terminals, LLC's Second Motion to Compel, filed electronically at [secretary@fmc.gov](mailto:secretary@fmc.gov) on May 13, 2016, and the exhibits and authorities cited therein.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Bryant E. Gardner

Enclosures

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BEFORE THE  
FEDERAL MARITIME COMMISSION  
WASHINGTON, D C.

Federal Maritime Commission  
Office of the Secretary

DOCKET NO 12-02

Federal Maritime Commission  
Office of the Secretary

MAHER TERMINALS, LLC

COMPLAINANT,

v

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**MAHER TERMINALS, LLC'S OPPOSITION TO  
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S MOTION TO  
STRIKE MAHER TERMINALS, LLC'S SECOND MOTION TO COMPEL**

Maher Terminal, LLC ("Maher") opposes the Port Authority of New York and New Jersey's ("Port Authority") Motion to Strike Maher Terminal's LLC's Second Motion to Compel

**I Introduction**

The Port Authority's motion manifests its obstinate determination to delay this proceeding just like it did the Dkt. 08-03 proceeding, continuing its eight year long war-of-attrition litigation strategy to prevent Maher from securing the protection of the Shipping Act from the Port Authority's abuse of its monopoly power. Having failed to answer discovery requests, the Port Authority further delays this proceeding by its refusal to respond to the substance of the motion to compel for at least another three weeks.

Rather than responding to Maher's motion to compel, the Port Authority waited until the last minute to file a baseless motion to strike and request for an extension of time. The Port Authority failed to confer with Maher before filing its motion and never even asked Maher if it would agree to a reasonable extension of time. Thereby, the Port Authority's actions belie the real purpose of its motion. Delay.

II. The Rules and the Order

The Port Authority misconstrues the Commission Rules and the Presiding Officer's April 13, 2012 Amended Initial Order. There is no page limit applicable to Maher's Second Motion to Compel. The Commission Rule which specifically governs motions to compel, Rule 210, provides no page limit among its specific detailed requirements. Likewise, the Presiding Officer's April 13, 2012 Order confirms this interpretation. It imposes no page limit and expressly requires that motions to compel include the interrogatory or request, the response, and the argument on why the response is insufficient for each and every deficiency, thereby rendering a purported ten-page limit inapposite. Nevertheless, out of an abundance of caution Maher included a request for leave to exceed ten pages, anticipating that the Port Authority would argue that such a limit applied. And, indeed it has done just that.

The Port Authority also argues erroneously that Maher must have filed for relief from any page limitation *before* filing the motion to compel. The Port Authority asserts erroneously that Rule 71(d) expressly prohibits motions that exceed ten pages "*without first* obtaining leave of the Presiding Officer." The Port Authority cites no authority for this proposition and the Rule does not require that. Rule 71(d) provides "Neither the motion nor any response may exceed 10 pages, excluding exhibits or appendices, without leave of the presiding officer." In contrast, Rule 71(c) prohibiting the filing of replies provides. "The moving party *may not file* a reply to a

response to a non-dispositive motion unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstance” (Emphasis added) Read *in pari materia*, while a reply may not be *filed* without meeting the stated requirements, motions subject to the rule exceeding the page limits do not include any such prohibition—they only require leave of the presiding officer This interpretation is further reinforced by Rule 221(f) governing the filings of briefs, which provides for an eighty-page limit “unless the presiding officer allows the parties to exceed this limit for good cause shown and upon application filed not later than seven (7) days *before* the time fixed for filing of such a brief or reply” (Emphasis added.) Rule 221 shows that the Commission knows how to require page limit motions *before* the filing of a submission when it wishes—and the Commission included no such requirement in Rule 71 *If* Rule 71 applied to the motion to compel, which it does not, it does not require the filing of relief from page limitation *before* the filing of the motion to compel

The Port Authority quibbles with the obvious practical reality in this proceeding that the Amended Initial Order procedure mandates motions to compel that will necessarily exceed ten pages. For example, following the same procedure in the Dkt. 08-03 proceeding between the parties, each party filed motions to compel many pages in excess of ten pages and the Presiding Officer’s decision resolving the first two such motions was 84 pages in length *Maier Terminals, LLC v Port Authority of NY and N.J.*, Dkt. 08-03, *Memorandum and Order on Discovery Motions* (F.M.C. July 23, 2010) And here, the Port Authority has now requested “an extension to 50 total pages, not including matters that the Initial Order requires it to quote”

The Port Authority complains that, even without the required recitation of Maier’s requests and the Port Authority’s responses thereto, the motion to compel is still too long. But this assertion overlooks the specific express requirements of the Amended Initial Order The

Amended Initial Order requires not only that the movant copy and paste the request and the response into the motion, it further requires the movant to set forth its argument in each instance, or for each individually pasted request, why the response is insufficient. Thus, for example the movant must present separately and repeatedly its argument on the correct interpretation of the temporal limitation issue for each of the 32 requests for which the Port Authority blocked discovery on that ground. This mandated procedure—apparently for the convenience of the Presiding Officer—occurs in the instances of other requests too, including the tendering of documents in lieu of a response pursuant to Fed. R. Civ. P. 33, waiver of privilege, etc. Therefore, the Port Authority’s complaint is really with the Presiding Officer’s Amended Initial Order, not the page length of Maher’s motion to compel.

The Port Authority’s overwrought accusations against Maher for “grossly violating the FMC Rules,” “egregious violation,” “blatant defiance,” “ignor[ing] the FMC’s Rules,” submission of an “overblown, and meritless, diatribe,” “scorched earth litigation tactics,” “vacuity,” and “brazen” misconduct—even calling for sanctions—are both erroneous and uncivil. The Port Authority cites no order purportedly violated by Maher and therefore, sanctions are wholly inapposite. Here, Maher merely complied with the specific express requirements of Rule 210 and the Amended Initial Order to obtain the discovery sought for over four years.

III. The Port Authority’s Other Arguments

Beyond its misreading of the Rules and the Amended Initial Order, the Port Authority further misdirects the Presiding Officer with *red herrings*.

True to form, the Port Authority concentrates its motion on impugning Maher’s counsel instead of actually addressing *the merits*. Incongruously, the Port Authority asserts that the

Commission rewrote its rules because of Maher's successful motion to combat the Port Authority's stonewalling of discovery in the Dkt. 08-03 proceeding. *See, e.g. Maher Terminals, LLC v Port Authority of NY and N.J.*, Dkt. 08-03, *Memorandum and Order on Discovery Motions* (F M C July 23, 2010) And, the submission of public comments to the Commission by counsel about another rule in an administrative rulemaking has no bearing on the application of either Rule 210 or the Amended Initial Order in this proceeding.

The Port Authority erroneously strains to portray Maher as a purported page-limit violator by reference to an inapposite circumstance four years ago in another proceeding. First, the Port Authority references the submission of proposed findings of fact governed by Rule 221(f) Rule 221(f), in contrast to Rule 210 governing motions to compel, specifically includes a page limitation, and in further contrast to Rule 71 provides that such page limitation request must be filed seven days prior to the motion in question. Moreover, in the other proceeding the parties were attempting to conform to a briefing order that was silent with respect to the relevant points. Notably, in that instance the Presiding Officer *did not* strike the submissions. After all, the Commission is interested in deciding proceedings on the merits, not on the basis of procedural matters. Second, since those submissions occurred in 2012 the new Rules had not yet been adopted, and specifically, the page limit for non-dispositive motions in Rule 71 did not even exist. Third, the Port Authority fails to mention that in the same round of submissions in that proceeding, its own submission exceeded the purported limit by 49 pages The Port Authority's page-limit argument is really just a diversion from its obstinate refusal to produce the evidence in this proceeding so we can actually proceed to the merits.

The Port Authority also asserts that Maher's motion to compel is premature because the Port Authority is still working on its rolling document production But, Maher did not challenge

the sufficiency of the Port Authority's document production, Maher challenged the sufficiency of the discovery responses. The Port Authority also claims that the motion is premature because it has committed to supplementing "certain" interrogatory responses. As recounted at page six of the motion to compel, the Port Authority intimated it would supplement "some or all" of just the small subset of 2016 Interrogatory Nos. 21, 23-24, and 27-29 during the week of April 25<sup>th</sup>, but then it did not even do that much and still has not. So, Maher's motion is not premature.

The Port Authority also asserts erroneously that Maher's motion to compel is actually a motion for reconsideration in disguise. Maher did not move for reconsideration of the April 12<sup>th</sup> Order—Maher moved to enforce the Order's requirement that the Port Authority must respond to Maher's discovery requests within the temporal scope Maher initially requested, i.e. to the present. The Port Authority cites no support for the proposition that the Order "squarely rejected" the requirement that parties adhere to the temporal scope originally set forth—to the present—nor is there any basis for its argument.

The Port Authority argues that Maher failed to meet and confer regarding the 2012 Interrogatories. Not true. In 2012, Maher met its obligation to meet and confer in good faith with the Port Authority.<sup>1</sup> The Port Authority obstinately refused to cure the defects in its interrogatory responses, which necessitated Maher's September 10, 2012 motion to compel.<sup>2</sup> Once the proceedings had finally resumed four years later, Maher again met and conferred with

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<sup>1</sup> See e.g. Letter from L. Kiern to H. Loiseau (June 20, 2012) (notifying the Port Authority of its interrogatory response deficiencies), Ex. 1, Letter from L. Kiern to H. Loiseau (July 30, 2012) (notifying the Port Authority of remaining interrogatory deficiencies and requesting a meet and confer), Ex. 2, Letter from H. Loiseau to L. Kiern (July 31, 2012) (agreeing to meet and confer on August 1, 2012), Ex. 3, Declaration of Andrew G. Smith (Sept. 10, 2012), Ex. 4

<sup>2</sup> Maher Terminals, LLC's Motion to Compel Discovery from Respondent Port Authority of New York and New Jersey (Sept. 10, 2012)

the Port Authority regarding the 2012 Interrogatories still relevant and unanswered as set forth in the Second Motion to Compel<sup>3</sup> Indeed, the Port Authority cites no evidence or authority, or even a declaration supporting its assertion that Maher did not sufficiently meet and confer Maher thoroughly exhausted the meet and confer process and the subject of Maher's motion to compel is no surprise to the Port Authority

By notable contrast, the Port Authority failed to meet and confer with Maher regarding either its Motion to Strike or its *sub rosa* motions for an extension of time and enlargement of pages to respond to Maher's Second Motion to Compel The Port Authority cannot have it both ways—it cannot credibly argue on the one hand that Maher failed to meet and confer on its motion for page enlargement and then on the other hand fail to meet and confer with respect to its own motions to strike, for relief from page limit, and request for additional time to respond to Maher's Second Motion to Compel If the Port Authority had requested a reasonable extension of time, Maher would have agreed. But, the Port Authority did not even ask. The Port Authority preferred to have the issue rather than the solution Of course, Maher would likewise have agreed to an enlargement of pages request from the Port Authority, but no such request was made.

The Port Authority's war-of-attrition litigation strategy—which aims to delay and stonewall discovery at any cost—should not be countenanced After eight years in another proceeding, the Court of Appeals established the baselessness of the Port Authority's position *Maher Terminals, LLC v Fed. Mar Comm'n*, 2016 WL 1104774 at \*4 n.2 (D.C. Cir. 2016)

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<sup>3</sup> Declaration of Bryant E. Gardner (May 2, 2016) (discussing April 13, 2016 meet and confer), Ex. 5, Email from L. Kiern to J. Friedmann (Apr. 14, 2016) (notifying the Port Authority of its interrogatory deficiencies), Ex. 6, Email from J. Friedmann to L. Kiern (Apr. 18, 2016) (addressing the deficient interrogatories), Ex. 7, Email from L. Kiern to J. Friedmann (Apr. 19, 2016) (addressing the Port Authority's interrogatory deficiencies), Ex. 8

(explaining the position derived from a “*non sequitur*,” was “hopelessly convoluted,” relied on “lame distinctions,” was “quite unpersuasive,” and when confronted with judicial scrutiny even the Commission abandoned two of the three purported Port Authority justifications)

IV Conclusion

For the foregoing reasons, the Port Authority’s motion to strike and its motion for an extension of time to respond should be denied, and the Port Authority be compelled to respond forthwith to Maher’s discovery requests as set forth in Maher’s Second Motion to Compel

Dated May 13, 2016

Respectfully submitted,



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June 20, 2012

**VIA E-MAIL**

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**Re: *Maher Terminals v. PANYNJ*, FMC Docket 12-02**

Dear Holly

Maher has reviewed The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories served on May 7, 2012 ("PANYNJ's Responses") PANYNJ's Responses are materially deficient in key respects. PANYNJ's responses repeatedly fail to answer questions, fail to provide principal and material facts in response to interrogatories, and raise improper objections while refusing to properly and fully answer interrogatories. In key instances, PANYNJ's responses are evasive and intentionally misleading. As further highlighted herein, PANYNJ must supplement its Responses. Without waiving the right to raise additional deficiencies, this letter represents a good faith effort by Maher to resolve these discovery disputes and avoid needless motions practice

(1) Interrogatory No 1 asks PANYNJ to identify and describe its negotiations with PNCT with respect to expansion of the PNCT terminal—including, but not limited to, requests, proposals, draft terms, and the reasons that negotiations were successful or not successful PANYNJ does not provide specific information requested in Interrogatory No 1 and fails to provide principal and material facts in response to the interrogatory

PANYNJ responds that negotiations with PNCT to expand its terminal began "as early as 2008" and "took place over multiple years," but PANYNJ does not identify or describe any such requests, proposals, draft terms, or reasons for the success or lack thereof of the negotiations with PNCT prior to 2010 PANYNJ also admits that negotiations involving MSC to expand the PNCT terminal began in 2010, and that the Port Authority entered into an agreement with PNCT in 2011, but PANYNJ does not provide any principal and material facts of the negotiations with PNCT, MSC or others, or the reasons that the negotiations were or were not successful. Most of

PANYNJ Response to Interrogatory No 1 relates to PANYNJ's agreement with PNCT entered into in June 2011. But, the mere listing of selected terms of that agreement is not responsive to the request that seeks the principal and material facts of the *negotiations* and *reasons* that the negotiations for terminal expansion were and were not successful. PANYNJ must supplement its response to Interrogatory No 1.

(2) Interrogatory No 2 asks PANYNJ to describe in detail its involvement in the relocation of MSC's ocean carrier business from Maher to PNCT (including specifically "when and how you first became aware that the relocation was contemplated," and any requests to PANYNJ and actions taken by PANYNJ). PANYNJ does not provide specific information requested in Interrogatory No 2, fails to provide principal and material facts in response to the interrogatory, and contains inaccurate and misleading information.

PANYNJ does not answer the question of its involvement in the relocation of MSC's business. PANYNJ responds that it "does not *directly* involve itself with the relocation of ocean carrier cargo business from one marine terminal to another marine terminal" (emphasis added), but the question is not limited to only "direct involvement."

The inapposite response PANYNJ gives does not provide the principal and material facts of PANYNJ's involvement. PANYNJ does not provide a response specific to MSC. PANYNJ does not answer the question of when or how it first became aware that MSC or PNCT were contemplating the relocation, although PANYNJ's response implies that PANYNJ was aware at some point before October 1, 2009 that the relocation was contemplated. PANYNJ also does not provide any answer concerning requests by PANYNJ, PNCT or MSC related to the relocation or any reasons provided by PNCT and/or MSC for the relocation of its business.

PANYNJ also provides conflicting information concerning its involvement with the relocation of MSC's business that is inaccurate and intentionally misleading with respect to PANYNJ's actions. On one hand PANYNJ responds that it provided additional land to PNCT "to alleviate the severe traffic congestion and other disruptions caused by the relocation of MSC cargo business" and provided "police staff to control the flow of traffic and minimize the effect of the relocation on other Port tenants." On the other hand PANYNJ disclaims "direct" involvement and disclaims "assist[ing] carriers [] moving their business from one marine terminal to another marine terminal." Despite its contradictory response, PANYNJ's disclosed actions admitting its direct accommodation of MSC's ocean carrier business at PNCT constitute "involvement," and PANYNJ's actions assisted the relocation of MSC's ocean carrier business. PANYNJ must correct its intentionally misleading answer and supplement its response to Interrogatory No 2.

(3) Interrogatory No 3 asks PANYNJ to describe the effects of the relocation of MSC's cargo to PNCT pertaining to terminal handling capacity, terminal efficiency, operator and container revenue, lease compliance and industry reputation (including analyses, observations, or conclusions of the effects projected or that occurred). PANYNJ does not provide specific information requested in Interrogatory No 3 and fails to provide principal and material facts in response to the interrogatory.

PANYNJ does not answer the question concerning “analyses or conclusions of the effects that occurred.” PANYNJ responds that it “does not possess any analyses of the *future* effects of the relocation of MSC’s business to PNCT” (emphasis added), but does not respond with respect to any observations, analyses or conclusions with respect to effects that occurred or are occurring

PANYNJ does not answer the questions concerning (1) container terminal handling, (2) terminal operating revenues and (3) container revenue rates on the basis that it “does not possess specific detailed information” concerning the subjects. However, Maher’s question is not limited only to “specific detailed information,” but includes principal and material facts responsive to the question.

PANYNJ does not answer the questions at all concerning (1) the effect of the relocation on terminal industry reputation and (2) the effect of the relocation on lease covenant compliance/non-compliance. Accordingly, PANYNJ must supplement its response to Interrogatory No 3

(4) Interrogatory No 4 asks PANYNJ to identify “when PNCT was, at any time on or after October 1, 2009, in default of any of its leases with PANYNJ for any reasons”—“whether characterized as a technical or material default (whether or not notice of default was given or required, or whether or not cured or waived)”—and to provide a description of the nature of such default, actions by PANYNJ and the outcome. PANYNJ’s answer is intentionally misleading. PANYNJ’s response that it “has not determined that PNCT, on or after October 1, 2009, was in default” improperly limits its response to a current conclusion purportedly applied to past and present circumstances. PANYNJ does not answer the question that asks if PNCT was at any time on or after October 1, 2009 considered in default for any reasons. PANYNJ must correct its intentionally misleading answer and supplement its response to Interrogatory No 4

(5) Interrogatory No 5 asks PANYNJ to describe in detail its negotiations after October 1, 2009 with PNCT, MSC, and TIL with respect to (1) expansion of the PNCT marine terminal, (2) a restructured marine terminal lease, and (3) any cargo volume guarantee agreements, including requests, proposals, draft terms, approvals, and the reasons such negotiations were successful or not successful. PANYNJ does not provide the information requested in Interrogatory No 5 and fails to provide principal and material facts in response to the interrogatory

PANYNJ does not directly answer Interrogatory No 5, but rather responds by reference to its Response to Interrogatory No 1. However, the scope of Interrogatory No 5 is broader than Interrogatory No 1 (e.g., Interrogatory No 1 focuses on terminal expansion negotiations with PNCT), and PANYNJ’s response to Interrogatory No 1 is not a proper answer to Interrogatory No 5. PANYNJ’s Response to Interrogatory No 1 admits that a proposal was made in 2010, but PANYNJ does not identify who made the disclosed proposal, who reviewed the proposal, who considered the proposal, and does not identify drafts or exchanges of the proposal. PANYNJ’s Response to Interrogatory No 1 indicates that negotiations took place, but PANYNJ says nothing at all about negotiations of the disclosed proposal or reasons it was or was

not successful, and says nothing at all about any other proposals. And PANYNJ does not answer Maher's question about expressly identified entities, e.g. TIL. Accordingly PANYNJ must supplement its response to Interrogatory No. 5.

(6) Interrogatory No. 6 asks PANYNJ to (i) describe in detail when and how it first became aware (*after* the 2007 purchase of PNCT by AIG) that PNCT contemplated a change of control, (ii) the principal and material facts of each contemplated change of control, (expressly including without limitation divesting ownership or control interests of AIG and MSC TIL or others obtaining ownership or control interests of PNCT or its parent or affiliated entities) and (iii) the actions taken by PANYNJ to consider and/or consent or not consent to such changes of control or ownership interests. PANYNJ does not answer any part of Interrogatory No. 6.

PANYNJ does not answer "when and how [PANYNJ] first became aware" of each of PNCT's contemplated change of control or ownership interests after the 2007 AIG sale. PANYNJ's response that as part of the 2007 AIG sale and consent that it "became aware that AIG contemplated a seven-year plan pursuant to which AIG intended to divest its ownership or control interests [and that] the agreement was structured in such a way to allow for such a transaction after five to seven years," does not answer the question that asks when and how PANYNJ actually became aware when PNCT actually contemplated "such a transaction" at any time after its 2007 purchase by AIG.

PANYNJ does not answer Maher's question concerning each "*contemplated* change in control or ownership" involving PNCT. Instead PANYNJ limits its response to only contemplated consents that "*have occurred*." (emphasis added). And as a consequence, PANYNJ also does not answer Maher's question concerning actions taken by PANYNJ to *not* consider or *not* consent to contemplated PNCT changes of control or ownership interests.

PANYNJ does not provide the principal and material facts concerning the PNCT changes of control that PANYNJ actually discloses. PANYNJ discloses (i) "a seven-year plan to divest ownership or control" of PNCT and that its "agreement was structured in such a way to allow for such a transaction after five to seven years," but no principal or material facts about the plan or how the agreement was structured to allow for a later transaction or consent; (ii) PANYNJ discloses the 2007 "PNCT to AIG" consent made in exchange for \$50 million in financial consideration, but no further principal or material facts about the consent; and (iii) PANYNJ discloses a 2011 consent to "AIG to Highstar Capital L.P.," but does not expressly identify PNCT, nor in any event does PANYNJ provide principal and material facts of that consent, e.g. failing to identify any payment or economic consideration specifically exchanged for PANYNJ's consent or how the alleged seven-year plan and 2007 agreement structure related to the 2011 consent. Accordingly, PANYNJ must supplement its response to Interrogatory No. 6.

(7)-(8) Interrogatory Nos. 7 and 8 ask PANYNJ to describe in detail its "practice, policy, substantive standard, or procedure" with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ "including, but not limited to, requesting or not requesting payments and/or economic consideration" for "making

‘appropriate recommendations for Board consideration and action ’ prior to February 22, 2007 (Interrogatory No 7), and for “taking any action or inaction” after February 22, 2007 (Interrogatory No 8) PANYNJ does not answer any part of the Interrogatories, asserts baseless vagueness objections and in all events does not provide principal and material facts in response to the Interrogatories.

PANYNJ’s vagueness objection is baseless. The questions are straightforward and PANYNJ cannot credibly claim that it does not understand the questions because PANYNJ purports to answer them in Response to Interrogatory No 6 that PANYNJ references as its answer. Interrogatory No 6, however, does not request the same information as Nos 7 and 8. Moreover, PANYNJ’s response to Interrogatory No 6 does not contain principal and material facts responsive to Interrogatory Nos. 7 and 8. Rather than answer Maher’s questions directly, PANYNJ engages in misdirection. PANYNJ purports to respond in other interrogatories that do not seek the same information, and asserts vagueness objections with cross references that fail to specifically identify the allegedly responsive cross-referenced information, in order to conceal its otherwise clear refusal to answer the interrogatories asked and undercut the usefulness of its interrogatory responses.

PANYNJ does not answer Maher’s interrogatories. PANYNJ’s Response to Interrogatory No 6 says nothing about PANYNJ’s “practice, policy, substantive standard, or procedure” for PANYNJ’s “requesting or not requesting payments and/or economic consideration.” PANYNJ purports to describe a “substantive standard” applicable before and after February 22, 2007, but PANYNJ merely lists some factors purportedly “entailed” in reviews and decisions. The factors—including “integrity,” “financial capacity” and “ensur[ing] appropriate capital investments”—do not constitute a “substantive standard” and do not provide principal and material facts concerning requesting or not requesting payments and/or economic consideration. Among other things, PANYNJ provides no information on how the factors relate to economic consideration, how they are applied, or how much consideration is required or when it is not required at all. Accordingly, PANYNJ must supplement its responses to Interrogatory Nos. 7 & 8.

(9) Interrogatory No 9 asks PANYNJ to describe in detail its purpose for seeking economic consideration in exchange for its consent to transfers or changes of ownership or control interests before and after February 22, 2007. PANYNJ does not directly answer the interrogatory.

PANYNJ’s Response to Interrogatory No 9 is composed of a number of assertions, but PANYNJ does not identify if some or all of them reflect PANYNJ’s purpose for seeking or having sought payments and/or economic consideration for its consents in response to the Interrogatory, and PANYNJ does not identify if some or all of the assertions refer to the time before or after February 22, 2007 as requested. Accordingly, PANYNJ must supplement its response to Interrogatory No 9.

(10) Interrogatory No 10 asks PANYNJ for the principal and material facts of any (i) formula, model, calculation, or other basis (a “Model”) used by PANYNJ for its determination of

the amount of requesting consideration for consent to transfers or changes of ownership or control interests, (ii) differences in any Model before and after the February 22, 2007 Resolution, (iii) how PANYNJ applies any Model, and (iv) any determination by PANYNJ of the reasonableness of any Model and its application. PANYNJ does not answer Interrogatory No 10 in key respects and fails to provide principal and material facts in response to the remainder of the interrogatory

PANYNJ does not answer part (ii) of Maher's question concerning differences in any Model before or after the February 22, 2007 Resolution. PANYNJ responds that it had and applied a formulaic Model to determine the economic consideration sought from marine container terminal operators after providing its consent to AIG-PNCT in exchange for \$50 million in 2007 and that the 2007 AIG transaction was the "first transaction that required significant payments or consideration." However, PANYNJ's response that there were different financial outcomes before the 2007 AIG transaction does not answer the question that asks if there were differences in the Models that were employed.

PANYNJ does not answer part (iv) of Maher's question concerning any determination by PANYNJ of the reasonableness of any Model. PANYNJ represents that it obtained "significant payments or consideration" based on its Model and alleged "appropriate modifications," but does not explain how the Model or the "modifications" are appropriate or reasonable

PANYNJ's remaining response does not provide principal and material facts concerning parts (i) and (iii) of Maher's question asking for the principal and material facts of any PANYNJ Model and any application of a Model. PANYNJ's response that it had and applied at least one Model to "determin[] the amount of payment or consideration that was required in connection with a transfer of ownership," and that the Model was "based on the amount of [PANYNJ] investments scaled in comparison to the final outcome of PNCT's transfer of control to AIG" in 2007 does not disclose the principal and material facts of the Model, does not disclose the basis or Model underlying the consideration PANYNJ sought from PNCT in 2007 and does not disclose the "scaled" investments upon which PANYNJ responds its post-2007 PNCT Model was based. PANYNJ admits to a Model or Models and its application to marine terminal operators, but fails to provide the principal and material facts about it and its application. Accordingly, PANYNJ must supplement its response to Interrogatory No 10

(11) Interrogatory No 11 asks PANYNJ to identify each transfer or change of ownership or control interest since 1997 for which PANYNJ consent was requested, given, denied or that PANYNJ contemplated requiring, and for each (i) the principal and material facts of each proposed or effected change of ownership or control interests, (ii) the amount of payments or economic consideration committed to PANYNJ, and if no payments and/or economic consideration was committed, the reason therefore, (iii) how such amounts are related to service provided by PANYNJ to the marine terminal operator PANYNJ again does not directly answer to Interrogatory No 11, but rather asserts a baseless burdensomeness objection, responds merely by reference to another response to an interrogatory that does not request the same information and contains PANYNJ responses that do not fully answer Interrogatory No 11, and in all events PANYNJ does not provide the principal and material facts in response to Interrogatory No 11

Rather than answer Maher's questions directly, PANYNJ again engages in misdirection by cross referencing a different interrogatory that does not seek the same information and asserting a baseless burdensomeness objection to conceal its improper refusal to answer Interrogatory No 11. PANYNJ asserts without explanation that "seeking information going back to 1997" on the discrete subject of the question is unduly burdensome. However, all of the requested information is plainly within PANYNJ's knowledge. PANYNJ concedes in its answer to Interrogatory No 6 that the 1997 time period itself is not unduly burdensome and provides some information since that date. Without raising a burdensomeness objection, PANYNJ purports to provide in its Response to Interrogatory No 6 a list changes of ownership or control interests in marine terminal operator leases since 1997 that "have occurred" for which PANYNJ consent was requested, given, denied or that PANYNJ contemplated requiring. And PANYNJ provides no basis to claim that the number of consent requests made to PANYNJ or contemplated by PANYNJ that ultimately did not occur is substantially greater and more burdensome to convey than the thirteen instances that PANYNJ reported as having occurred in the same time period.

PANYNJ's cross reference to Interrogatory No 6 does not answer Interrogatory No 11. Interrogatory No 6 seeks only information with respect to PNCT after the 2007 AIG-PNCT transaction, while Interrogatory No 11 is broader in scope and time period. The limited list of instances that PANYNJ discloses since 1997 in Interrogatory No 6 does not answer the question in Interrogatory No 11 asking "how such amounts are related to service provided by PANYNJ" or the question asking for the reasons payments and/or economic consideration were not committed to PANYNJ.

The limited list of 13 instances provided in response to Interrogatory No 6 also fails to provide the principal and material facts concerning the disclosed consents. The one-sentence bullets provide only the type and amount of the economic consideration in some instances but not all and no information on what was requested, proposed, denied or that PANYNJ contemplated requiring, or why different amounts were committed or different types of consideration, *e.g.*, security deposits vs. guarantees vs. consent fee payments, vs. investment guarantees or a combination therefore. Moreover, PANYNJ provided no principal and material facts regarding the purported purposes for payments/economic consideration that it identifies in its response to Interrogatory No 9, *e.g.* to (1) ensure commitment to continued investment, (2) protect PANYNJ assets, and (3) to offset other PANYNJ revenue collections. The bullets present merely superficial identification of the existing tenant and the other involved entity, but not the principal and material facts on the nature of the change or transfer contemplated, *e.g.*, the type of lease, lease term, acreage involved, size of the entities involved, the type of change of ownership or control interests proposed or effected, *e.g.*, assignment, sale, reorganization, minority investment or majority investment, etc. Accordingly, PANYNJ must supplement its response to Interrogatory No 11.

(12) Interrogatory No 12 asks PANYNJ to describe in detail the reason or reasons it decided to negotiate and agree to PNCT's Restructured Lease Agreement. PANYNJ does not answer Interrogatory No 12, but instead responds by reference to its Response to Interrogatory No 1 which is a different question. Interrogatory No 1 seeks PANYNJ's "reasons that

negotiations [to expand the PNCT terminal] were successful or not successful,” while Interrogatory No 12 seeks PANYNJ’s “reason or reasons that [PANYNJ] decided to negotiate and agree to PNCT’s Restructured[] Lease Agreement” despite the previously unsuccessful negotiations with PNCT alone. The reasons inquired of in Interrogatory No 1 about PNCT terminal expansion negotiations that were unsuccessful, which PANYNJ admits began in 2008 and continued over a period of years, are not the same reasons inquired of in Interrogatory No 12 as to why PANYNJ decided to negotiate and ultimately agree with PNCT and ocean-carrier MSC together, which PANYNJ admits began in 2010, and they are not the same reasons inquired of for why PANYNJ ultimately agreed to the Restructured Lease Agreement, which PANYNJ admits involved more than PNCT’s terminal expansion and included ocean-carrier MSC’s cargo guarantee.

To the extent that PANYNJ’s Response to Interrogatory No 1 gratuitously argues purported reasons distinguishing the PNCT Restructured Lease Agreement from Maher’s lease and other information not requested, the Response also does not provide the principal and material facts actually responsive to Interrogatory 12. As discussed above with respect to the deficiencies in PANYNJ’s response to Interrogatory No 1, PANYNJ’s Response does not provide any *reasons* for PANYNJ’s decision ultimately to agree to the Restructured Lease Agreement involving ocean-carrier MSC, and thus the reference back to Response No 1 is not responsive to Interrogatory No 12. Accordingly, PANYNJ must supplement its response to Interrogatory No 12.

(13) Interrogatory No 13 asks PANYNJ to describe in detail the reason or reasons PANYNJ decided not to provide to Maher a comparable restructuring of Maher’s lease. PANYNJ’s response does not answer the question. PANYNJ responds with obfuscation arguing that “Maher never sought a ‘comparable restructuring of Maher’s lease’” and that PNCT did not deem its higher costs “unduly burdensome or disadvantageous” followed by assertions purporting to contrast terms of Maher’s existing lease to terms of PNCT’s new lease to portray PNCT’s lease as less favorable in some respects while omitting preferential aspects of the PNCT lease, e.g. lower rents and lease term extension. Whether or not PANYNJ’s assertions are true, they do not answer the question which is *why* PANYNJ did not provide Maher comparable lease terms. Accordingly, PANYNJ must supplement its response to this interrogatory with the actual contemporaneous reasons that PANYNJ had *at the time and continuing to the present* not to provide Maher comparable lease restructuring.

(14) Interrogatory No 14 asks PANYNJ to describe in detail the letting and/or redevelopment of the marine terminal facility which is the subject of LPJ-001, including but not limited to any requests, responses, or negotiations with Maher and PANYNJ’s alleged refusal to deal with Maher. PANYNJ’s partial response fails to provide the principal and material facts required.

PANYNJ responds that it was aware that Maher was interested in the marine terminal facility ultimately the subject of LPJ-001, but PANYNJ does not provide the principal and material facts concerning the admitted interest, Maher’s requests, PANYNJ’s responses or lack thereof, or its negotiations with or regarding Maher with respect to either the Global terminal or

the former North East Auto Marine Terminal ("NEAT") facility in Port Jersey, which is now subject to LPJ-001

PANYNJ also asserts, without providing principal and material facts, that it "considered it a priority to obtain ownership of the 100-acre Global site because it was the only remaining non-Port Authority container terminal in the Port," etc., that operating the former NEAT property as a "stand-alone" container terminal was impractical, and that a stand alone terminal would not "maximize the value of the parcel" and/or would have "eliminated BMW's waterfront access." However, PANYNJ does not provide the principal and material facts showing that the purported assertions applied to its "responses or negotiations with Maher" or its alleged decision to refuse to deal with Maher. For example, PANYNJ does not provide any facts that PANYNJ's "responses or negotiations with Maher" or its alleged refusal to deal with Maher was actually because of the reasons asserted. PANYNJ does not provide any facts showing that PANYNJ conducted a contemporaneous analysis supporting its assertions, e.g. ownership of all container terminals in the Port, valuation, and impracticality, etc., and PANYNJ does not provide principal and material facts showing that it considered these reasons at the time or provided these asserted reasons to Maher at the time. Accordingly, PANYNJ must supplement its response to Interrogatory No 14

(15) Interrogatory No 15 asks PANYNJ to describe in detail its rules, regulations, practices, and/or procedures for dealing with or refusing to deal with existing marine terminal operators, including Maher, with respect to the letting of facilities in the port, including LPJ-001. PANYNJ improperly objects on grounds of vagueness and that it "cannot ascertain what is being asked." The objection is frivolous. The interrogatory is plain. Moreover, PANYNJ does not explain its objection specifically, and in all events PANYNJ responds with self-serving conclusory assertions establishing that it understands the question.

PANYNJ does not provide principal and material facts in response to Maher's question. PANYNJ responds merely that it has an "established practice or procedure" to "consider all reasonable requests for the letting of facilities in the port," but PANYNJ does not provide the principal and material facts of the alleged practice or procedure, how such practice or procedure was established, observed, or enforced, or its reasonableness. PANYNJ mentions only a "part" of its admitted practice and procedure, not providing a complete responsive answer. PANYNJ briefly refers to the part it mentions merely with the assertion that it "considers all reasonable requests," which fails to provide the principal and material facts as to what constitutes a "reasonable request" or the principal and material facts of how PANYNJ's consideration of "reasonable requests" is subject to the [PANYNJ's] mission to promote the overall prosperity of the [port] and surrounding region." For example, the response provides no criteria or standard applied by PANYNJ. Accordingly, PANYNJ must supplement its response to Interrogatory No 15

(16) Interrogatory No 16 asks PANYNJ to describe in detail (i) its rules, regulations, practices, and/or procedures related to defining a "Qualified Transferee" in a marine terminal lease, (ii) the purpose of the "Qualified Transferee" provision in the Global Lease, (iii) its applicability to an existing marine terminal operator such as Maher, and (iv) the principal and

material facts of any determination by PANYNJ of the reasonableness of such a provision. PANYNJ improperly objects on the grounds of vagueness and that it "cannot ascertain what is being asked." PANYNJ does not explain its objection specifically. The interrogatory is plain and PANYNJ's objection is frivolous as established by PANYNJ's answer based on a purportedly privileged analysis.

PANYNJ's response does not provide the principal and material facts required for a proper response. PANYNJ responds that it "has no formal rule or regulation" responsive to the interrogatory, but does not expressly respond to Maher's question about "practices, and/or procedures" responsive to the interrogatory, except with the vague and conclusory assertion of a purported "practice and procedure to negotiate leases that comply with the Shipping Act" which was not the question. PANYNJ does not provide the principal and material facts of the practice or procedure or how the practice or procedure supporting the assertion that negotiating the Qualified Transferee provision, and/or its continued existence, comports with the asserted policy and practice to comply with the Shipping Act. PANYNJ provides no principal and material facts showing the basis for the different treatment based on status.

PANYNJ does not answer directly or provide the principal and material facts in response to Maher's question that asks for the purpose of the Qualified Transferee Provision. Initially, PANYNJ blames Global's lenders by asserting merely that the provision was "required to induce Global's lenders to consent to the conversion of their fee mortgage over the land Global owned in fee simple into a leasehold mortgage," but that does not explain PANYNJ's *purpose* for the Qualified Transferee provision that categorically subjects existing terminal operators to a different standard than other potential transferees based on *status*. PANYNJ admits that the provision "prohibits Global's lenders from transferring the Global lease to any existing marine terminal operator without consent," and adds obliquely that it could consent to a transfer to an existing marine terminal operator "but must have the ability to review any potential anticompetitive impacts on the region and other operators." PANYNJ's response to the interrogatory is intentionally misleading and evasive. If PANYNJ intends to answer the interrogatory by stating that PANYNJ's purpose of the Qualified Transferee provision is to provide PANYNJ "the ability to review any potential anticompetitive impacts on the region and other operators," then PANYNJ must state so plainly.

PANYNJ also does not answer properly Maher's question that asks for the principal and material facts of any determination by PANYNJ of the reasonableness of such a provision. PANYNJ provides a conclusory response that it "determined that such provision was reasonable and necessary to accomplish the Global sale and lease-back transaction, and to ensure that [PANYNJ's] ability to analyze any potential anticompetitive and concentrated risk effects that would impair the properties of the Port and the surrounding region." But PANYNJ provides no principal and material facts explaining why a provision that *restricts* lender rights was necessary to accomplish the transaction, how it made the asserted determination, how or the relative degree to which a potential transfer to an existing terminal operator could have potential anticompetitive and concentrated risk effects, why the provision treating existing tenants differently than others based on status was reasonable to protect against such risks, if any existed, and any facts of any fact specific analysis that the provision did not exceed such a purpose. Indeed, PANYNJ

advances its conclusory assertion that the provision is reasonable, but nevertheless claims that the underlying basis for the conclusion is protected by privilege. PANYNJ cannot properly object on the basis of privilege and proceed to answer without providing the principal and material facts in support of the answer. Any privilege that might have applied is waived and PANYNJ must answer fully with the principal and material facts. Accordingly, PANYNJ must supplement its response to Interrogatory No. 16.

(17) Interrogatory No. 17 asks PANYNJ to describe in detail (i) its rules, regulations, practices, and/or procedures pertaining to requesting, requiring or obtaining in marine terminal operator leases, lease extensions, and/or amendments and modifications, general releases and/or waivers of claims, including but not limited to, releasing PANYNJ from potential violations of the Shipping Act, and (ii) the principal and material facts of any determination by PANYNJ of the reasonableness of such rules, regulations, practices and/or procedures and/or application. PANYNJ refuses to answer the interrogatory on the basis of an improper privilege objection and in all events PANYNJ fails to provide the principal and material facts, including providing no information regarding its practice or procedure pertaining to providing lease extensions or modifications to some tenants and not others and what standard and criteria it uses in making lease extensions available to some tenants and not others.

PANYNJ objects to providing "privileged legal analysis relating to the waiver and liquidated damages provision." But despite asserting privilege, PANYNJ then responds that it "determined that such provision was reasonable," by requiring tenants to determine that PANYNJ leases are "fair, reasonable, and does not unduly or unreasonably prejudice or disadvantage it." and using liquidated damages clauses "intended to reflect the Port Authority's likely damages" if a tenant that agreed to a waiver files suit against PANYNJ for violations of the Shipping Act. But PANYNJ does not provide any principal and material facts in support of a determination that the practice and procedure it admits employing is reasonable. PANYNJ cannot properly object on the basis of privilege and then proceed to answer with a self-serving conclusory assertion without providing the principal and material facts in support of the answer. Any privilege that might have applied is waived and PANYNJ must answer fully. Accordingly, PANYNJ must supplement its response to Interrogatory No. 17.

(18) Interrogatory No. 18 asks PANYNJ to describe in detail its rules, regulations, practices, and/or procedures pertaining to requesting, negotiating, requiring, or obtaining in marine terminal leases, extensions and/or amendments or modifications, liquidated damages provisions, including provisions in excess of \$20,000,000 and/or designed to trigger if Shipping Act claims are brought against PANYNJ, as well as the principal and material facts of any determination by PANYNJ of the reasonableness under the Shipping Act of such rules, regulations, policies or practices. PANYNJ does not answer the question, but rather responds merely by reference to Interrogatory No. 17, which does not seek the same information, and in all events fails to provide the principal and material facts responsive to Interrogatory No. 18. PANYNJ must supplement its response to Interrogatory No. 18.

(19) Interrogatory No. 19 asks PANYNJ to (i) describe in detail its rules, regulations, practices, and/or procedures pertaining to requesting, negotiating, requiring, or obtaining in

marine terminal leases, provisions, including but not limited to extensions, amendments, or modifications that seek to establish future lease renewal or extension rates in advance and (ii) the principal and material facts of any determination of the reasonableness of such rules, regulations, practices, and/or procedures and/or application. PANYNJ improperly objects on grounds of vagueness. The objection is frivolous. The interrogatory is plain. Moreover, PANYNJ does not explain its objection specifically, and in all events PANYNJ responds with self-serving conclusory assertions establishing that it understands the question.

PANYNJ does not provide the principal and material facts in response to Maher's question. PANYNJ admits that it has a lease rate negotiation practice and procedure regarding "lease rates renewal" and "lease extension rates," but it fails to provide the principal and material facts of the admitted practice and procedure. PANYNJ's conclusory assertion that it conducts "case by case" analyses in accordance with its "obligation to treat all marine terminal operators fairly," provides nothing meaningful about the practice and procedure or any determination of how the practice and procedure is reasonable or fair. As a practical matter, PANYNJ's response fails to provide responsive information. PANYNJ must supplement its response to Interrogatory No. 19.

(20) Interrogatory No. 20 asks PANYNJ to describe in detail its rules, regulations, practices, and/or procedures pertaining to the granting or denying of deferrals of investment or capital expenditure obligations and/or provision of construction financing for terminal capacity expansion. PANYNJ improperly objects on grounds of vagueness. The objection is frivolous. The interrogatory is plain. Moreover, PANYNJ does not explain its objection specifically, and in all events PANYNJ responds with self-serving conclusory assertions establishing that it understands the question.

PANYNJ also does not answer the part of the interrogatory concerning financing for capacity expansion and fails to provide the principal and material facts in response to the part it purports to answer. PANYNJ admits that it has a practice and procedure to consider deferrals of investments or capital expenditure obligations on a "case by case basis" "to treat all marine terminal operators fairly," but PANYNJ does not provide any principal and material facts explaining how the "case by case" practice and policy has been established, observed, and enforced fairly, *e.g.*, what factors are considered, what standards and criteria are applied, and how they are applied, etc. PANYNJ must supplement its response to Interrogatory No. 20.

(21) Interrogatory No. 21 asks PANYNJ to describe in detail its decision to defer APM's required construction investment obligations, its valuation of the deferral granted to APM and of the consideration received from APM in exchange for the deferral, and the steps PANYNJ took to ensure that the deferral did not exceed the value of the consideration received from APM. PANYNJ does not answer the question. PANYNJ improperly responds to the interrogatory by reference to documents from the 07-01 proceeding. First, PANYNJ neither explains where or what part of the cited filing it relies upon. Second, *none* of the cited documents are responsive to Maher's interrogatory. The referenced filings do not identify (1) the value of the deferral of APM's capital expenditure obligations, (2) the actual value of the consideration received by PANYNJ from APM in exchange for the deferral, or (3) the steps taken by PANYNJ to ensure

that the value of the deferral given to APM did not exceed the consideration given to PANYNJ by APM. The assertion in the filings that, "both APMT and PANYNJ are getting something and giving up something under the Settlement Agreement and have determined, in their respective business judgments, that it is a fair and adequate trade," constitutes merely a self-serving conclusory assertion, not principal and material facts answering the question. The cited filings do not provide principal and material facts in response to the interrogatory. Accordingly, PANYNJ must supplement its response to Interrogatory No 21

(23) Interrogatory No 23 asks PANYNJ to describe in detail its decision to provide construction financing to APM for purposes not contemplated in EP-248, such as further expansion of APM's container terminal capacity. PANYNJ improperly objects on grounds of vagueness. The objection is frivolous. The interrogatory is plain. Moreover, PANYNJ does not explain its objection specifically, and in all events PANYNJ responds with self-serving conclusory assertions establishing that it understands the question.

But, PANYNJ does not answer the question. PANYNJ merely summarizes parts of the leasehold construction financing provisions of EP-248, but does not provide the principal and material facts pertaining to PANYNJ's decision to approve APM's use of PANYNJ's low cost construction financing to expand its terminal capacity beyond the capacity contemplated for the EP-248 construction financing instead of requiring it to be spent on the required construction work which PANYNJ allowed to be deferred. PANYNJ must supplement its response to Interrogatory No 23

(24) Interrogatory No 24 asks PANYNJ to describe in detail its decision not to provide construction financing to Maher for expansion of Maher's container terminal capacity beyond the capacity contemplated for the construction financing in EP-249. PANYNJ does not answer the question. PANYNJ's objection that it does not know that the interrogatory seeks information about PANYNJ's actions or inactions with respect to Maher is not credible, nor is its incredible objection that it does not understand what expansion of terminal capacity means. Rather than respond to the interrogatory asking about PANYNJ's decisions not to provide Maher the financing for terminal capacity expansion beyond the capacity contemplated in the leases as it provided to APM, PANYNJ merely recites provisions from the leases. Accordingly, PANYNJ must supplement its response to Interrogatory No 24

(25) Interrogatory No 25 asks PANYNJ to describe in detail the steps/actions it took/did not take to deal or negotiate with Maher with respect to the deferral of Maher's leasehold capital expenditure obligations and with respect to providing additional construction financing for terminal capacity expansion. PANYNJ improperly objects on grounds of vagueness. The objection is frivolous. The interrogatory is plain. Moreover, PANYNJ but does not explain its objection specifically, and in all events PANYNJ responds with self-serving conclusory assertions in the referenced responses to Interrogatory Nos. 20, 22-24 establishing that it understands the question.

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But, PANYNJ does not answer the question and its cross-referenced responses to Interrogatory Nos. 20, 22-24 fail to provide the principal and material facts responsive to

Interrogatory 25 Principal and material facts pertaining to steps or actions/inactions by PANYNJ with respect to dealing or negotiating with Maher are lacking from the referenced interrogatories. Accordingly, PANYNJ must supplement its response to Interrogatory No 25

(26) Interrogatory No 26 asks PANYNJ to describe in detail its rules, regulations, practices, policies, and/or procedures pertaining to the just and reasonable treatment of marine terminal operators. PANYNJ objects on the basis of privilege. But despite asserting privilege, PANYNJ then responds that its “staff and legal counsel” review all the agreements to “ensure they treat all marine terminal operators fairly.” But PANYNJ does not provide any principal and material facts about the substance of its practice and procedure of review. PANYNJ cannot properly object on the basis of privilege and then proceed to answer with a self-serving conclusory assertion without providing the principal and material facts in support of the answer. Any privilege that might have applied is waived and PANYNJ must answer fully.

PANYNJ’s response fails to provide the principal and material facts in responding to this interrogatory. PANYNJ asserts that it “complies with all laws and regulations, which includes its obligation to treat all marine terminal operators fairly” and responds that it has a practice “to review all agreements to ensure that they treat all marine terminal operators fairly and avoid causing undue preference to or imposing unreasonable prejudice on any marine terminal operator,” but PANYNJ’s response does not provide the principal and material facts of the asserted practice and procedure to review agreements, such as the standards imposed and the factors and criteria considered and how they are considered. PANYNJ must supplement its response to Interrogatory No 26.

(27) Interrogatory No 27 asks PANYNJ to describe in detail the principal and material facts showing that PANYNJ’s practices, policies, procedures, or lack thereof, and actions or inactions at issue in the Complaint do not violate the Shipping Act, including but not limited to the principal and material facts of any justifications and the principal and material facts that any justifications do not exceed what is necessary to achieve a valid transportation purpose.

PANYNJ improperly objects on grounds of vagueness. The objection is frivolous. The interrogatory is plain. Moreover, PANYNJ does not explain its objection specifically, and in all events PANYNJ repeatedly responds with self-serving conclusory assertions in its previously referenced interrogatory answers, including Nos. 7, 8, 15, 16, 19, 20, 22-24, and 25 establishing that it understands the question. PANYNJ incredibly asserts that it does not know what differences are the subject of the Complaint that sets forth the differences specifically. And in its answer to Interrogatory No 1, for example, PANYNJ demonstrates that it understands the differences by gratuitously seeking to justify the differences by arguing that PNCT has higher costs than Maher and that ocean-carrier MSC provided a cargo guarantee – all in a desperate effort to justify the PANYNJ preferences provided to PNCT and MSC, but not Maher.

PANYNJ does not answer the question. Instead, PANYNJ improperly refers Maher back to every one of its previous responses to Maher’s First Set of Interrogatories. And in all events, PANYNJ’s referenced responses nevertheless fail to adequately provide the principal and material facts of purported justifications for differences in treatment showing that they do not

exceed what is necessary to achieve a valid transportation purpose. As explained above, the responses to the interrogatories PANYNJ cross-references do not answer this question. Having failed to answer the specific questions, PANYNJ cannot rely on inapposite and insufficient previous responses to answer Interrogatory No. 27. Accordingly, PANYNJ must supplement its response to Interrogatory No. 27.

(28) Interrogatory No. 28 asks, in relevant parts, that PANYNJ identify the PANYNJ persons with knowledge about its practice, policy, or procedure pertaining to deferral of required capital expenditures and approval of PANYNJ construction financing for additional terminal capacity expansion and PANYNJ's implementation and/or decisions regarding this subject, as well as PANYNJ's practice, policy, or procedure pertaining to certain leasing, lease renewal, and lease modification practices. PANYNJ does not answer the Interrogatory in full.

PANYNJ improperly objects on grounds of vagueness and then argues with the interrogatory. The objection and argument are frivolous. First, PANYNJ's previous self-serving conclusory assertions in its referenced interrogatory responses, including Nos. 7, 8, 15, 16, 19, 20, 22-24, and 25, establish that it understands the question and debunks its objection of vagueness. Second, the interrogatory plainly requests PANYNJ to identify witnesses with knowledge of the subjects of the Complaint. PANYNJ argues with the "characterization" of certain aspects of the interrogatory, but fails to provide the names of witnesses for other aspects of the interrogatory that it does not dispute, e.g. persons with knowledge of the lease provisions regarding releases, liquidated damages, and lease renewal and or extension rates. Notwithstanding its argumentation over "characterization" it must still provide the names of witnesses with knowledge of the subjects requested. If it has no witnesses with knowledge that the PANYNJ's policies, practices, and procedures are reasonable, then it must so state. This will expedite the proceeding. Moreover, PANYNJ does not explain its objection specifically. And in all events, PANYNJ previously answered under oath that its staff and legal counsel reviewed leases containing the provisions inquired about to ensure they were fair. Therefore, it must identify these persons.

PANYNJ has refused to comply with its obligation to produce documents in response to Maher's First Requests for the Production of Documents. While PANYNJ continues at every turn to improperly reargue its frivolous Motion to Dismiss and Stay Discovery, PANYNJ knows its obligation to produce documents absent a stay. A stay has not been granted and PANYNJ's May 1, 2012 letter request for an emergency conference regarding a stay was not granted. PANYNJ has no basis for its unilateral refusal to fulfill its discovery obligations as required by the rules. PANYNJ's refusal to produce documents is abusive and prejudicial to Maher's claims, including hampering Maher's ability to respond to PANYNJ's interrogatories. Having refused to provide its documents, it is the height of hypocrisy for PANYNJ to demand that Maher provide documents while PANYNJ refuses to produce its own.

#### *PANYNJ's Objections to Maher's Interrogatory Responses*

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We are in receipt of your letter dated June 13, 2012. Maher rejects your letter's broad and unsubstantiated allegations of unidentified deficiencies in Maher's Responses to the Port

Authority's First Set of Interrogatories to Maher Maher has provided the principal and material facts for the interrogatories, and in some instances, also provided custodians with responsive records where appropriate for PANYNJ's requests. As you know all too well, you and PANYNJ are in possession of the evidence establishing PANYNJ's violations of the Shipping Act as alleged in the Complaint since PANYNJ is the violator You have no one to blame but yourself.

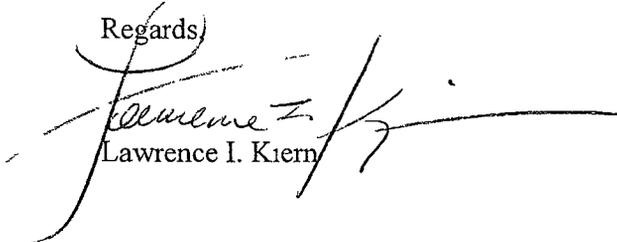
As stated in Maher's Responses, PANYNJ's interrogatories are vague and overbroad. PANYNJ's June 13<sup>th</sup> objections for the most part complain that Maher has not been specific enough, without identifying what it is, exactly, that PANYNJ is looking for in addition to what Maher has already provided in its detailed, 68-page response to PANYNJ's overbroad requests. If PANYNJ requires more, it should state specifically what additional information it requires so that Maher can consider the specific items. Maher is not required to guess.

Maher's allegations challenge the reasonableness of PANYNJ's policies, practices, procedures, and actions and inactions. As you are aware from prior proceedings, the unlawfulness of PANYNJ's conduct is based upon its own documents which you have refused to produce, and the bases for its actions and decisions expressed by it, at the time in question, as reflected in its files and the testimony of PANYNJ's witnesses. Since PANYNJ has failed to honor its discovery obligations, details surrounding PANYNJ's policies and conduct remain concealed from scrutiny Therefore, Maher requests that PANYNJ provide forthwith its responsive documents and supplement its responses to Maher's interrogatories pursuant to the above, in which case Maher will be able to supplement its responses to PANYNJ's interrogatories regarding PANYNJ's own misconduct.

Nevertheless, and subject to Maher's objections set forth above and in its Responses, Maher will revisit and supplement as appropriate its Responses to address specific items PANYNJ identifies as deficient. In light of other pressing matters, we will aim to provide its supplemental Responses by Monday, July 2, 2012

Finally, PANYNJ takes issue with the verification of Maher's Responses. Please provide the basis for PANYNJ's objection, if any, so that we can address it.

Regards)

  
Lawrence I. Kiern

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July 30, 2012

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**VIA E-MAIL**

Holly E. Loiseau  
Weil, Gotshal & Manges LLP  
1300 Eye Street, NW  
Suite 900  
Washington, DC 20005-3314

**Re: *Maher Terminals v. PANYNJ*, FMC Docket 12-02**

Dear Holly:

Maher has reviewed The Port Authority of New York and New Jersey's Supplemental Objections and Responses to Complainant's First Set of Interrogatories, served on July 12, 2012 in response to Maher's letter of June 20, 2012 setting forth material deficiencies in PANYNJ's initial interrogatory responses served on May 7, 2012. ("PANYNJ's Supplemental Responses")<sup>1</sup> While PANYNJ has provided some additional responsive information to certain Interrogatories, PANYNJ's Responses remain materially deficient in key respects.

(1) First, PANYNJ has not provided any supplemental information in response to 18 interrogatories, Interrogatory Nos. 3, 4, 9, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, or 27 Those responses remain deficient as set forth in my letter of June 20, 2012. Please supplement the responses forthwith as set forth in Maher's June 20, 2012 letter<sup>2</sup>

<sup>1</sup> See Letter from L. Kiern to H. Loiseau (June 20, 2012)(setting forth deficiencies with PANYNJ's interrogatory responses); Letter from H. Loiseau to L. Kiern (June 25, 2012)(reviewing June 20, 2012 letter and considering supplementing interrogatory responses); Letter from H. Loiseau to L. Kiern (July 5, 2012)(confirming that PANYNJ will supplement interrogatory responses in response to Maher's June 20, 2012 letter); Letter from L. Kiern to H. Loiseau (July 9, 2012)(confirming PANYNJ's concession that PANYNJ's interrogatory responses are deficient and its commitment to supplement); PANYNJ's "Status Report," Dk. 12-02 (July 13, 2012)(confirming that PANYNJ served supplemental interrogatory responses on July 12, 2012 in response to Maher's June 20, 2012 deficiency letter).

<sup>2</sup> PANYNJ has not directly communicated any basis for not supplementing the responses, or otherwise made any meaningful effort to confer with respect the identified deficiencies, merely noting to the Presiding Officer in a unspecific manner that "Upon further review, it became clear that many of the "deficiencies" claimed by Maher, were merely instances where Maher did not care for the phraseology of the Port Authority's Responses."

(2) Second, PANYNJ's Supplemental Responses purport to provide supplemental responsive information in response to 10 of the responses identified as deficient in Maher's June 20, 2012 letter Nos. 1, 2, 5, 6, 7, 8, 11, 12, 23 and 28(e). However, the Supplemental Responses are not only themselves deficient, but they substantially confirm and compound the existing deficiencies.

Supplemental Responses No. 1, 2, 5, and 6 purport to respond by reference to documents PANYNJ contends will be produced in this proceeding pursuant to Fed. R. Civ. P. Rule 33(d), but PANYNJ has failed to produce the documents containing the allegedly responsive evidence. Therefore, the responses do not cure the deficiencies, as Maher is not in a position to obtain the requested information from documents that PANYNJ refuses to produce.<sup>3</sup> Having now invoked Rule 33(d), while persisting in its refusal to produce the documents, PANYNJ's Supplemental Responses further compound the inadequacy of the original Responses. Please produce the documents to which you refer by reference or otherwise further supplement the responses forthwith.

Supplemental Responses No. 6, 7, 8, and 11 appear to have been supplemented largely for the purpose of addressing the facially deficient cross-referencing reflected in the original Responses, but without meaningfully addressing the substantive deficiencies. Removing the inadequate cross-references by re-cutting and re-distributing the prior responses, without adequately supplementing the responses, does not cure the deficiencies. Please further supplement the responses forthwith.

(3) Third, the supplemental information in Supplemental Responses No. 1, 2, 5, 6, 7, 8, and 11 contain only limited additional responsive information that at best reflects partial Responses that fail to address all of the deficiencies identified by Maher in its June 20, 2012 letter.<sup>4</sup> Please further supplement the responses set forth below forthwith.

As Maher explained in its June 20, 2012 letter, Supplemental Response No. 1

asks PANYNJ to identify and describe its negotiations with PNCT with respect to expansion of the PNCT terminal—including, but not limited to, requests, proposals, draft terms, and the reasons that negotiations were successful or not successful. PANYNJ does not provide specific information requested in Interrogatory No. 1 and fails to provide principal and material facts in response to the interrogatory

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PANYNJ's July 13, 2012 "Status Report" at 2. But, Maher's June 20 letter explains the deficiencies precisely in each instance, including PANYNJ's repeated failure to answer the questions, its failure to provide principal and material facts, and its improper attempt to use claims of privilege to conceal specifics.

<sup>3</sup> In addition, the references to documents fail to adequately identify and specify the documents in response to the Interrogatories pursuant to Rule 33(d). PANYNJ's Supplemental Responses 1, 2, 5, 6 refer to custodians and a vague category of documents, such as "emails and correspondence." Pursuant to the Presiding Officer's prior orders in related matters, more is required.

<sup>4</sup> Only PANYNJ's Supplemental Responses No. 12, 23 and 28(e) appear to supplement the Interrogatories in response to Maher's June 20, 2012 letter, although the Responses remain remarkably lean and conclusory.

PANYNJ responds that negotiations with PNCT to expand its terminal began “as early as 2008” and “took place over multiple years,” but PANYNJ does not identify or describe any such requests, proposals, draft terms, or reasons for the success or lack thereof of the negotiations with PNCT prior to 2010. PANYNJ also admits that negotiations involving MSC to expand the PNCT terminal began in 2010, and that the Port Authority entered into an agreement with PNCT in 2011, but PANYNJ does not provide any principal and material facts of the negotiations with PNCT, MSC or others, or the reasons that the negotiations were or were not successful. Most of PANYNJ Response to Interrogatory No. 1 relates to PANYNJ’s agreement with PNCT entered into in June 2011. But, the mere listing of selected terms of that agreement is not responsive to the request that seeks the principal and material facts of the negotiations and reasons that the negotiations for terminal expansion were and were not successful. PANYNJ must supplement its response to Interrogatory No. 1

Other than the improper response by reference to documents pursuant to Fed. R. Civ. P. 33(d) that PANYNJ refuses to produce, the only new information PANYNJ provides is that:

The negotiations between PNCT and the Port Authority with respect to expansion of the PNCT marine terminal were successful because evidently each party believed the negotiated deal was to its advantage.

PANYNJ’s supplemental information—purporting to provide a reason that negotiations were successful to expand PNCT—is inadequate. First, PANYNJ’s Supplemental Response does not provide responsive information with respect to reasons the admitted negotiations were *not successful* during the time period before the ocean carrier, MSC, became involved with the terminal. Second, the purported reason PANYNJ provides for why negotiations were later successful—“because evidently each party believed the negotiated deal was to its advantage”—is no-committal and non-responsive. The interrogatory on this point asks for “the reason or reasons,” not for what PANYNJ and/or PNCT “evidently believed.” On this point, if the response reflects PANYNJ’s “reason or reasons,” PANYNJ should so state.

As Maher explained in its June 20, 2012 letter, Supplemental Response No. 2

asks PANYNJ to describe in detail its involvement in the relocation of MSC’s ocean carrier business from Maher to PNCT (including specifically “when and how you first became aware that the relocation was contemplated,” and any requests to PANYNJ and actions taken by PANYNJ). PANYNJ does not provide specific information requested in Interrogatory No. 2, fails to provide principal and material facts in response to the interrogatory, and contains inaccurate and misleading information.

PANYNJ does not answer the question of its involvement in the relocation of MSC's business. PANYNJ responds that it "does not directly involve itself with the relocation of ocean carrier cargo business from one marine terminal to another marine terminal" (emphasis added), but the question is not limited to only "direct involvement."

The inapposite response PANYNJ gives does not provide the principal and material facts of PANYNJ's involvement. PANYNJ does not provide a response specific to MSC. PANYNJ does not answer the question of when or how it first became aware that MSC or PNCT were contemplating the relocation, although PANYNJ's response implies that PANYNJ was aware at some point before October 1, 2009 that the relocation was contemplated. PANYNJ also does not provide any answer concerning requests by PANYNJ, PNCT or MSC related to the relocation or any reasons provided by PNCT and/or MSC for the relocation of its business.

PANYNJ also provides conflicting information concerning its involvement with the relocation of MSC's business that is inaccurate and intentionally misleading with respect to PANYNJ's actions. On one hand PANYNJ responds that it provided additional land to PNCT "to alleviate the severe traffic congestion and other disruptions caused by the relocation of MSC cargo business" and provided "police staff to control the flow of traffic and minimize the effect of the relocation on other Port tenants." On the other hand PANYNJ disclaims "direct" involvement and disclaims "assist[ing] carriers [ ] moving their business from one marine terminal to another marine terminal." Despite its contradictory response, PANYNJ's disclosed actions admitting its direct accommodation of MSC's ocean carrier business at PNCT constitute "involvement," and PANYNJ's actions assisted the relocation of MSC's ocean carrier business. PANYNJ must correct its intentionally misleading answer and supplement its response to Interrogatory No 2.

Other than the improper response by reference to documents pursuant to Fed. R. Civ. P. 33(d) that PANYNJ refuses to produce, the new information PANYNJ provides in Supplemental Response No 2 effectively concedes that it did in fact have "involvement in the relocation of MSC's business, but continues the misdirection of the Original Response No 2 on this point by changing its Response from PANYNJ "does not prevent (or assist) carriers from moving their business from one marine terminal to another marine terminal" to PANYNJ "does not *purposely* prevent (or assist) carriers from moving their business from one marine terminal to another marine terminal." (emphasis added) The question is not limited to only "direct involvement" or purpose[ful] involvement." Maher asks for PANYNJ to describe in detail its involvement in the relocation of MSC's ocean carrier business from Maher to PNCT—involvement PANYNJ now admits—and therefore PANYNJ should clarify the misleading response and provide a complete response.

The only other new information provided in Supplemental Response No 2 admits that:

The Port Authority learned in mid-2009 that MSC contemplated moving its ocean carrier business from Maher to PNCT and participated in preliminary discussions with PNCT regarding logistical issues associated with the handling of MSC's volume. In August 2009, Donald Hamm of PNCT informed the Port Authority that PNCT had concluded negotiations to relocate a major shipping line to PNCT, though the identity of the shipping company was not disclosed to the Port Authority

Although PANYNJ's Supplemental Response contains additional information, PANYNJ's response remains misleading on the question of "when and how you first became aware that the relocation was contemplated." PANYNJ adds that it "learned in mid-2009 that MSC contemplated moving its ocean carrier business from Maher to PNCT and participated in preliminary discussions with PNCT regarding MSC's volume." But the question asks when PANYNJ *first* learned, as well as the related details, such as from whom PANYNJ learned, which are not directly answered. PANYNJ then adds that PNCT informed PANYNJ in August 2009 that it had concluded negotiations for a major line to move its cargo to PNCT, but that MSC was not disclosed to the Port Authority. Therefore, it appears from PANYNJ's Supplemental Response No 2 that PANYNJ did not first learn of the MSC move in Don Hamm's August 2009 letter, but from someone else in "mid-2009." PANYNJ continues to fail to disclose the requested information.

As Maher explained in its June 20, 2012 letter, Supplemental Response No 5

asks PANYNJ to describe in detail its negotiations after October 1, 2009 with PNCT, MSC, and TIL with respect to (1) expansion of the PNCT marine terminal, (2) a restructured marine terminal lease, and (3) any cargo volume guarantee agreements, including requests, proposals, draft terms, approvals, and the reasons such negotiations were successful or not successful. PANYNJ does not provide the information requested in Interrogatory No 5 and fails to provide principal and material facts in response to the interrogatory

PANYNJ does not directly answer Interrogatory No 5, but rather responds by reference to its Response to Interrogatory No 1. However, the scope of Interrogatory No 5 is broader than Interrogatory No 1 (e.g., Interrogatory No 1 focuses on terminal expansion negotiations with PNCT), and PANYNJ's response to Interrogatory No 1 is not a proper answer to Interrogatory No 5. PANYNJ's Response to Interrogatory No 1 admits that a proposal was made in 2010, but PANYNJ does not identify who made the disclosed proposal, who reviewed the proposal, who considered the proposal, and does not identify drafts or exchanges of the proposal. PANYNJ's Response to Interrogatory No 1 indicates that negotiations took place, but PANYNJ says nothing at all about

negotiations of the disclosed proposal or reasons it was or was not successful, and says nothing at all about any other proposals. And PANYNJ does not answer Maher's question about expressly identified entities, e.g. TIL. Accordingly, PANYNJ must supplement its response to Interrogatory No. 5.

PANYNJ provides no new responsive information other than the improper response by reference to documents pursuant to Fed. R. Civ. P. 33(d) that PANYNJ refuses to produce.

As Maher explained in its June 20, 2012 letter, Supplemental Response No. 6

asks PANYNJ to (i) describe in detail when and how it first became aware (after the 2007 purchase of PNCT by AIG) that PNCT contemplated a change of control, (ii) the principal and material facts of each contemplated change of control, (expressly including without limitation divesting ownership or control interests of AIG and MSC, TIL or others obtaining ownership or control interests of PNCT or its parent or affiliated entities) and (iii) the actions taken by PANYNJ to consider and/or consent or not consent to such changes of control or ownership interests. PANYNJ does not answer any part of Interrogatory No. 6.

PANYNJ does not answer "when and how [PANYNJ] first became aware" of each of PNCT's contemplated change of control or ownership interests after the 2007 AIG sale. PANYNJ's response that as part of the 2007 AIG sale and consent that it "became aware that AIG contemplated a seven-year plan pursuant to which AIG intended to divest its ownership or control interests [and that] the agreement was structured in such a way to allow for such a transaction after five to seven years," does not answer the question that asks when and how PANYNJ actually became aware when PNCT actually contemplated "such a transaction" at any time after its 2007 purchase by AIG.

PANYNJ does not answer Maher's question concerning each "contemplated change in control or ownership" involving PNCT. Instead, PANYNJ limits its response to only contemplated consents that "have occurred." (emphasis added). And as a consequence, PANYNJ also does not answer Maher's question concerning actions taken by PANYNJ to not consider or not consent to contemplated PNCT changes of control or ownership interests.

PANYNJ does not provide the principal and material facts concerning the PNCT changes of control that PANYNJ actually discloses. PANYNJ discloses (i) "a seven-year plan to divest ownership or control" of PNCT and that its "agreement was structured in such a way to allow for such a transaction after five to seven years," but no principal or material

facts about the plan or how the agreement was structured to allow for a later transaction or consent; (ii) PANYNJ discloses the 2007 "PNCT to AIG" consent made in exchange for \$50 million in financial consideration, but no further principal or material facts about the consent; and (iii) PANYNJ discloses a 2011 consent to "AIG to Highstar Capital L.P.," but does not expressly identify PNCT, nor in any event does PANYNJ provide principal and material facts of that consent, e.g. failing to identify any payment or economic consideration specifically exchanged for PANYNJ's consent or how the alleged seven-year plan and 2007 agreement structure related to the 2011 consent. Accordingly, PANYNJ must supplement its response to Interrogatory No 6

Other than the improper response by reference to documents pursuant to Fed. R. Civ P 33(d) that PANYNJ refuses to produce, the new information PANYNJ provides in Supplemental Response No 6 admits to one PNCT change of control event in 2007 and two PNCT change of control events in 2011, but PANYNJ continues to fail to answer "'when and how [PANYNJ] first became aware' of each of PNCT's contemplated change of control or ownership interests after the 2007 AIG sale," "the principal and material facts of each contemplated change of control" such as the "actions taken by PANYNJ to consider and/or consent or not consent to such changes of control or ownership interests"

As Maher explained in its June 20, 2012 letter, Supplemental Response Nos. 7-8

ask PANYNJ to describe in detail its "practice, policy, substantive standard, or procedure" with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ "including, but not limited to, requesting or not requesting payments and/or economic consideration" for "making 'appropriate recommendations for Board consideration and action'" prior to February 22, 2007 (Interrogatory No 7), and for "taking any action or inaction" after February 22, 2007 (Interrogatory No 8). PANYNJ does not answer any part of the Interrogatories, asserts baseless vagueness objections and in all events does not provide principal and material facts in response to the Interrogatories.

PANYNJ's vagueness objection is baseless. The questions are straightforward and PANYNJ cannot credibly claim that it does not understand the questions because PANYNJ purports to answer them in Response to Interrogatory No 6 that PANYNJ references as its answer. Interrogatory No 6, however, does not request the same information as Nos. 7 and 8. Moreover, PANYNJ's response to Interrogatory No 6 does not contain principal and material facts responsive to Interrogatory Nos. 7 and 8. Rather than answer Maher's questions directly, PANYNJ engages in misdirection. PANYNJ purports to respond in other interrogatories that do not seek the same information, and asserts vagueness objections with

cross references that fail to specifically identify the allegedly responsive cross-referenced information, in order to conceal its otherwise clear refusal to answer the interrogatories asked and undercut the usefulness of its interrogatory responses.

PANYNJ does not answer Maher's interrogatories. PANYNJ's Response to Interrogatory No. 6 says nothing about PANYNJ's "practice, policy, substantive standard, or procedure" for PANYNJ's "requesting or not requesting payments and/or economic consideration." PANYNJ purports to describe a "substantive standard" applicable before and after February 22, 2007, but PANYNJ merely lists some factors purportedly "entailed" in reviews and decisions. The factors—including "integrity," "financial capacity" and "ensur[ing] appropriate capital investments"—do not constitute a "substantive standard" and do not provide principal and material facts concerning requesting or not requesting payments and/or economic consideration. Among other things, PANYNJ provides no information on how the factors relate to economic consideration, how they are applied, or how much consideration is required or when is its not required at all. Accordingly, PANYNJ must supplement its responses to Interrogatory Nos. 7 & 8

PANYNJ's Supplemental Responses to Interrogatory Nos. 7 and 8 remove the improper cross-references to non-responsive interrogatory responses, and provide some additional information, but the Supplemental Responses 7 and 8 remain incomplete, for among other reasons reflected in the June 20, 2012 letter, because PANYNJ says nothing about the practices for asking for economic consideration or for taking action or inaction, either before or after the February 2007 Board resolution.

As Maher explained in its June 20, 2012 letter, Supplemental Response Nos. 11

asks PANYNJ to identify each transfer or change of ownership or control interest since 1997 for which PANYNJ consent was requested, given, denied or that PANYNJ contemplated requiring, and for each (i) the principal and material facts of each proposed or effected change of ownership or control interests, (ii) the amount of payments or economic consideration committed to PANYNJ, and if no payments and/or economic consideration was committed, the reason therefore, (iii) how such amounts are related to service provided by PANYNJ to the marine terminal operator. PANYNJ again does not directly answer to Interrogatory No. 11, but rather asserts a baseless burdensomeness objection, responds merely by reference to another response to an interrogatory that does not request the same information and contains PANYNJ responses that do not fully answer Interrogatory No. 11, and in all events PANYNJ does not provide the principal and material facts in response to Interrogatory No. 11

Rather than answer Maher's questions directly, PANYNJ again engages in misdirection by cross referencing a different interrogatory that does not seek the same information and asserting a baseless burdensomeness objection to conceal its improper refusal to answer Interrogatory No 11. PANYNJ asserts without explanation that "seeking information going back to 1997" on the discrete subject of the question is unduly burdensome. However, all of the requested information is plainly within PANYNJ's knowledge. PANYNJ concedes in its answer to Interrogatory No 6 that the 1997 time period itself is not unduly burdensome and provides some information since that date. Without raising a burdensomeness objection, PANYNJ purports to provide in its Response to Interrogatory No 6 a list changes of ownership or control interests in marine terminal operator leases since 1997 that "have occurred" for which PANYNJ consent was requested, given, denied or that PANYNJ contemplated requiring. And PANYNJ provides no basis to claim that the number of consent requests made to PANYNJ or contemplated by PANYNJ that ultimately did not occur is substantially greater and more burdensome to convey than the thirteen instances that PANYNJ reported as having occurred in the same time period.

PANYNJ's cross reference to Interrogatory No 6 does not answer Interrogatory No 11. Interrogatory No 6 seeks only information with respect to PNCT after the 2007 AIG-PNCT transaction, while Interrogatory No 11 is broader in scope and time period. The limited list of instances that PANYNJ discloses since 1997 in Interrogatory No 6 does not answer the question in Interrogatory No 11 asking "how such amounts are related to service provided by PANYNJ" or the question asking for the reasons payments and/or economic consideration were not committed to PANYNJ.

The limited list of 13 instances provided in response to Interrogatory No 6 also fails to provide the principal and material facts concerning the disclosed consents. The one-sentence bullets provide only the type and amount of the economic consideration in some instances but not all and no information on what was requested, proposed, denied or that PANYNJ contemplated requiring, or why different amounts were committed or different types of consideration, e.g., security deposits vs. guarantees vs. consent fee payments, vs. investment guarantees or a combination therefore. Moreover, PANYNJ provided no principal and material facts regarding the purported purposes for payments/economic consideration that it identifies in its response to Interrogatory No 9, e.g. to (1) ensure commitment to continued investment, (2) protect PANYNJ assets, and (3) to offset other PANYNJ revenue collections. The bullets present merely superficial identification of the existing tenant and the other involved entity, but not the principal and material facts on the nature of the change

or transfer contemplated, e.g., the type of lease, lease term, acreage involved, size of the entities involved, the type of change of ownership or control interests proposed or effected, e.g., assignment, sale, reorganization, minority investment or majority investment, etc. Accordingly, PANYNJ must supplement its response to Interrogatory No 11

The only new information provided in Supplemental Response No 11, other than adding an additional objection, revises the response in a manner that confirms the deficiency of the original Response as well as the Supplemental Response No 11

First, PANYNJ's original Response to Interrogatory No 11 purported to include responsive information pertaining to "transfers or changes of ownership or control interest in marine terminal operator leases have occurred for which PANYNJ consent was requested, and given, denied or the PANYNJ contemplated requiring." As Maher pointed out in its letter, among other deficiencies, PANYNJ's Response did not in fact respond with respect to the instances where consent was "denied or the PANYNJ contemplated requiring" consent. Instead of supplementing Response No 11 to include the omitted information, PANYNJ's Supplemental Response No 11 *expressly omits* the responsive information by deleting the reference to consents that were "denied or the PANYNJ contemplated requiring." Merely altering the Response so that it is not patently false—by purporting to provide responsive information not provided—but not providing the omitted responsive information does not cure the deficiency, it confirms it.

Second, PANYNJ admits that: "The Port Authority further responds that it is currently aware of one preliminary request for a change of control that was initially considered by the Port Authority, but which never reached the stage of formal approval or denial." Yet, PANYNJ's admission that it is "currently aware" of a single, vague instance of a "preliminary request" that was considered but "never reached the state of formal approval or denial" neither provides adequate details of considered changes of control, and moreover, highlights that PANYNJ has considered other changes of control, but has not responded fully to the Interrogatory

In light of PANYNJ's obstinate refusal to supplement its Interrogatory Responses, Maher requests that we meet and confer with respect to the deficiencies in an effort to resolve them. We propose to accomplish this at 2 p.m., Wednesday, August 1, 2012, at our office in Washington, D C Please confirm your availability

Regards,

*Lawrence I Kiern*  
Lawrence I. Kiern

cc Peter D Isakoff, Esq  
Richard A. Rothman, Esq  
Kevin F Meade, Esq  
Robert S Berezin, Esq  
Marcie R. Kaufman, Esq

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**Weil, Gotshal & Manges LLP**

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July 31, 2012

BY EMAIL

Lawrence I. Kiern, Esq  
Winston & Strawn LLP  
1700 K Street, N W  
Washington, DC 20006-3817

Re Maher Terminals, LLC v The Port Authority of New York and New Jersey LLC 12-02 (FMC)

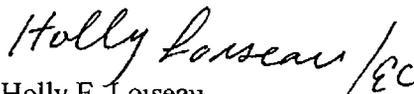
Dear Larry:

We write in response to your letter dated July 30 2012 setting forth what Maher claims are material deficiencies in the Port Authority's original and amended and supplemental responses to Maher's first set of interrogatories. The Port Authority has provided the principal and material facts in response to Maher's interrogatories and we are in full compliance with both the Federal Maritime Commission's Rules and the Federal Rules of Civil Procedure with respect to our interrogatory responses. The Port Authority disagrees with each and every contention raised in your letter and we do not intend to further supplement or amend the Port Authority's interrogatory responses at this time.

While we disagree with your letter in its entirety and do not intend to address each of your baseless contentions, we wish to address one overarching issue. Pursuant to Federal Rule of Civil Procedure 33(d), the Port Authority has identified categories of documents responsive to certain of Maher's interrogatories. Contrary to Maher's assertions, the Port Authority has not "refused" to produce documents in this case. Instead, it is the Port Authority's position that it should not be required to produce documents until the Presiding Officer has had an opportunity to address the Port Authority's Motion to Dismiss and Motion to Stay. When the Presiding Officer issues a scheduling order, the Port Authority will produce documents in due course. We note that Maher has not produced any documents in response to the Port Authority's document requests.

The Port Authority is available to meet and confer by telephone on Wednesday, August 1, 2012 at 2pm if Maher believes that such a discussion will be constructive.

Sincerely,

  
Holly E. Loiseau

cc: Gerald Morrissey, Esq  
Bryant Gardner, Esq.  
Richard A. Rothman, Esq  
Peter D Isakoff, Esq

BEFORE THE  
FEDERAL MARITIME COMMISSION  
WASHINGTON, D C.

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DOCKET NO 12-02

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MAHER TERMINALS, LLC

COMPLAINANT,

v

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

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**DECLARATION OF ANDREW G SMITH IN SUPPORT OF  
MAHER TERMINALS LLC'S MOTION TO COMPEL DISCOVERY FROM  
RESPONDENT THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

I, Andrew Smith, declare under penalty of perjury that the following is true and accurate:

- 1 I am an attorney at Winston & Strawn LLP
2. I have personal knowledge of the following facts
- 3 I participated in a meet and confer between Maher Terminals, LLC ("Maher"), represented by attorneys Lawrence I. Kiern, Gerald A. Morrissey III, and myself, of Winston & Strawn LLP, and The Port Authority of New York and New Jersey ("PANYNJ"), represented by attorneys Holly E Loiseau, Marcie Kaufman, and Eileen Citron, of Weil, Gotshal & Manges LLP, on August 1, 2012, at 2:00 p.m.

4 During the meet and confer, Maher asked PANYNJ if it was maintaining its position set forth in its July 31, 2012 letter to Maher refusing to further supplement PANYNJ's interrogatory responses, to which PANYNJ responded that it would not further supplement its responses to Maher's First Set of Interrogatories beyond its Amended and Supplemental Responses and that it believed its current responses to have satisfied its discovery obligations to Maher

5 Maher asked PANYNJ whether it would supplement those responses identified in Maher's letters to PANYNJ of June 20, 2012 and July 30, 2012, identifying certain PANYNJ interrogatory responses that Maher asserts do not answer the questions asked by Maher, to which PANYNJ responded that it would not further supplement its responses to Maher's First Set of Interrogatories beyond its Amended and Supplemental Responses and that it believed its current responses to answer Maher's interrogatories.

6 Maher asked if PANYNJ would alter certain designations of privilege in its interrogatory responses that Maher finds improper, but PANYNJ refused to make any changes to its privilege designations.

7 Maher asked if PANYNJ would produce a privilege log with respect to PANYNJ's claims of privilege; PANYNJ agreed to produce such a privilege log, but refused to do so until after it produced documents in response to Maher's Document Requests.

8 Maher asked whether PANYNJ would supplement its interrogatory responses referring Maher to documents under Fed. R. Civ P 33, in response to Maher's concerns that PANYNJ's current responses provide insufficient identification of the documents reported to contain responsive information, but PANYNJ responded that it will not supplement these responses and believes its responses to be sufficient.

9 Maher asked PANYNJ whether it would produce the documents referred to in PANYNJ's interrogatory responses pursuant to Fed. R. Civ P 33, to which PANYNJ responded that it is withholding these documents until the Presiding Officer issues a scheduling order in this proceeding and/or a ruling on PANYNJ's Motion to Dismiss Maher's Complaint and Request for a Stay of Litigation Pending the Presiding Officer's Resolution of the 08-03 Litigation or, at a Minimum, Pending Decision on PANYNJ's Motion to Dismiss ("Motion to Dismiss & Stay")

10 Maher followed up by asking whether PANYNJ would agree to produce the documents referred to in PANYNJ's interrogatory responses pursuant to Fed. R. Civ P 33 within one week or 30 days of the meet and confer, to which PANYNJ reaffirmed that it is withholding these documents until the Presiding Officer issues a scheduling order and/or a ruling on PANYNJ's Motion to Dismiss & Stay

11 Lastly, Maher asked PANYNJ whether it had any additional reasons not already provided to Maher in correspondence between the parties for its decision to refuse to supplement or revise its interrogatory responses pursuant to Maher's requests, to which PANYNJ responded that it had no such additional reasons.

12. At no point during the meet and confer did PANYNJ ask Maher to clarify any Interrogatories that it found vague or ambiguous.

13 Maher concluded the meet and confer by noting that no progress was made to resolve the outstanding issues, and PANYNJ agreed with this conclusion.

Dated. September 10, 2012

  
\_\_\_\_\_  
Andrew G Smith

BEFORE THE  
FEDERAL MARITIME COMMISSION  
WASHINGTON, D C.

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DOCKET NO 12-02

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MAHER TERMINALS, LLC

COMPLAINANT,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

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**DECLARATION OF BRYANT E. GARDNER IN SUPPORT OF  
MAHER TERMINALS LLC'S SECOND MOTION TO COMPEL DISCOVERY**

I, Bryant E. Gardner, declare under penalty of perjury that the following is true and accurate

- 1 I am an attorney at Winston & Strawn LLP
- 2 I have personal knowledge of the following facts.
- 3 I participated in a meet and confer between Maher Terminals, LLC ("Maher"), represented by attorneys Lawrence I Kiern and Bryant E. Gardner, of Winston & Strawn LLP, and the Port Authority of New York and New Jersey ("Port Authority"), represented by attorneys Jared Friedmann, of Weil, Gotshal & Manges LLP, on April 13, 2016
- 4 Maher conferred in good faith with the Port Authority in an effort to obtain the Port Authority's compliance without the necessity of a motion.

- 5 During the meet and confer, Maher asked if the Port Authority would supplement the responses which Maher identified as deficient in its March 31, 2016 letter, or otherwise.
- 6 Maher expressly identified 2012 Interrogatory Nos. 6-11, 15-16, and 26-27 and 2012 Document Request Nos. 1-3, 6-14, and 23-24 as "still relevant and have not already been answered" for the reasons previously set forth in Maher's 2012 motion to compel.
- 7 Maher explained its position that because its original 2012 requests concerning continuing violations were "to the present" and specified a duty to supplement pursuant to Rule 201(j) (now Rule 201(k)(1)), the Port Authority was obligated to produce current information pursuant to the Presiding Officer's order
- 8 The Port Authority stated it would not produce any information later than March 30, 2012.
- 9 The Port Authority indicated during the meet and confer that it did not intend to supplement or cure any of its answers to discovery, with the possible exception of 2016 Interrogatory Nos. 9(c) and (d), which the Port Authority indicated it might supplement by producing additional documents at some date in the future.
- 10 The Port Authority did not offer any additional specifics in supports of its objections to Maher's discovery requests.
- 11 At no point during the meet and confer did the Port Authority ask Maher to clarify any discovery requests that it found vague or ambiguous.

Dated. May 2, 2016



---

Bryant E. Gardner

## Gardner, Bryant

---

**From:** Kiern, Larry  
**Sent:** 15 April, 2016 17:05  
**To:** Friedmann, Jared  
**Cc:** Rothman, Richard; Isakoff, Peter; Mitchell, Alea; Gardner, Bryant; Kiern, Larry  
**Subject:** RE. Maher v PA - 12-02 - Meet and Confer of April 13, 2016, Etc.

Jared – Further to our meet and confer conducted on Wednesday, April 13<sup>th</sup>, for the avoidance of any doubt we take this opportunity to memorialize a few key points.

- (1) We informed you that Maher contends that of Complainant's First Set of Interrogatories Propounded on the Port Authority of New York and New Jersey served March 30, 2012, Nos. 6-11, 15-16, and 26-27 as "still relevant and have not already been answered" within the meaning specified in the January 29, 2016 Scheduling Order and the Presiding Officer's April 12, 2016 Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests.
- (2) We also informed you that, pursuant to the April 12, 2016 Order, Maher's ten additional interrogatories are Nos. 9(c), 9(d), 11, 12, 21, 23, 34, 27, 28, and 29 from Complainant's Revised First Set of Interrogatories Propounded on the Port of New York and New Jersey served February 16, 2016. We understood your position to be that the Port Authority will not supplement or amend its answers to these interrogatories to cure its deficiencies. Additionally, you indicated that the Port Authority does not intend to supplement or amend its responses to Maher's document requests. For the avoidance of any doubt, Maher's position is that Nos. 1-3, 6-14, and 23-24 from Complainant's First Request for Production of Documents from the Port Authority of New York and New Jersey served March 30, 2012 are "still relevant and have not already been answered"
- (3) We explained our position that the Port Authority should supplement its discovery responses, including with respect to the pertinent time period, to the present and with a continuing obligation to supplement per Rule 201, and with respect to additional detail requested per the April 12, 2016 Order. You indicated that you disagreed with our position and would not be supplementing in these respects.
- (4) In light of the Port Authority's position that it will not supplement its answers to interrogatories or its document production with any information after March 30, 2012, etc., we explained that we must seek the assistance of the Presiding Officer

Regards, Larry

**Lawrence I Kiern**

**Partner**

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**From:** Friedmann, Jared [<mailto:Jared.Friedmann@weil.com>]

**Sent:** Wednesday, April 13, 2016 10:12 PM

**To:** Kiern, Larry; Gardner, Bryant

**Cc:** Rothman, Richard, Isakoff, Peter; Mitchell, Alea

**Subject:** Maher v PA 12-02

Further to our discussion today, based on current pace of review and barring any unexpected setbacks, I anticipate the PA completing its document production within the next 30 days. Please advise when Maher expects to complete its production.

Thanks,  
Jared



**Jared R. Friedmann**

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## Gardner, Bryant

---

**From:** Friedmann, Jared <Jared.Friedmann@weil.com>  
**Sent:** 18 April, 2016 17:37  
**To:** Kiern, Larry  
**Cc:** Rothman, Richard; Isakoff, Peter; Mitchell, Alea; Gardner, Bryant; Oliver, Jennifer  
**Subject:** RE. Maher v PA - 12-02 - Meet and Confer of April 13, 2016, Etc.

Larry,

Thank you for your email

1. During our call last week, you advised that Maher's position is that Interrogatory Nos. 6-11, 15-16, and 26-27 from Maher's first set of interrogatories back in 2012 are "still relevant and have not already been answered" We disagree. The Port Authority previously provided the principal and material facts in response to each of those interrogatories. See Port Authority's Response to Maher's Motion to Compel, dated Sept. 25, 2012 at 33-54, 56-63, and 87-92.
2. Maher also advised as to its ten "additional" interrogatories, but our discussion was otherwise limited to those previously identified in Maher's March 31, 2016 letter (*i.e.*, Nos. 9(c), 9(d), 11, and 12) We did not discuss the other interrogatories that you identified (*i.e.*, Nos. 21, 23, 24\*, 27, 28, and 29) \* Your note below lists No 34, but we believe this is a typo and that you meant 24, which is what our notes of the call reflect.

With regard to the last sentence of your second paragraph, our understanding was that Maher's revised document requests (served on March 17) were intended to supersede the document requests served on March 30, 2012. Please advise which specific requests in which set of document requests Maher is pressing. In any event, the referenced Request Nos. 1-3 and 23 in Maher's initial March 30, 2012 requests are precisely the type of requests that the Federal Maritime Commission held were "overbroad on their face." See FMC Memorandum and Order dated December 17, 2015, at 71 With respect to Request No. 24 (in Maher's initial March 30, 2012 requests), that request is premature and, as previously stated and subject to its objections, the Port Authority will produce its expert disclosures in accordance with the Scheduling Order

3. Your position that "the Port Authority should supplement its discovery responses, including with respect to the pertinent time period, to the present" is at odds with the Presiding Officer's April 12, 2016 Order, which specifically noted that Maher's original discovery requests sought information only through 2012, then recited Maher's assertion that it "requires discovery regarding the Port Authority's alleged terminal investments. through 2016. ." but then ruled "[t]emporal requests that are longer than initially requested will not be permitted" April 12 Order at 3 Your reference to Rule 201 is a *non sequitur*, and cannot expand the temporal limits set forth in the Presiding Officer's April 12 Order
4. Because the Presiding Officer has already ruled on this issue in connection with the Port Authority's recent motion for a protective order, which specifically sought, *inter alia*, relief from having to produce discovery from after the Complaint was filed, any such motion by Maher would be an improper motion for reconsideration

Please let me know if you would like to discuss any of these issues.

Regards,  
Jared



Jared R. Friedmann

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+1 212 310 8007 Fax

---

**From:** Kiern, Larry [<mailto:LKiern@winston.com>]  
**Sent:** Friday, April 15, 2016 5:05 PM  
**To:** Friedmann, Jared  
**Cc:** Rothman, Richard; Isakoff, Peter; Mitchell, Alea; Gardner, Bryant; Kiern, Larry  
**Subject:** RE: Maher v PA - 12-02 - Meet and Confer of April 13, 2016, Etc.

Jared – Further to our meet and confer conducted on Wednesday, April 13<sup>th</sup>, for the avoidance of any doubt we take this opportunity to memorialize a few key points.

- (1) We informed you that Maher contends that of Complainant's First Set of Interrogatories Propounded on the Port Authority of New York and New Jersey served March 30, 2012, Nos. 6-11, 15-16, and 26-27 as "still relevant and have not already been answered" within the meaning specified in the January 29, 2016 Scheduling Order and the Presiding Officer's April 12, 2016 Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests.
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- (4) In light of the Port Authority's position that it will not supplement its answers to interrogatories or its document production with any information after March 30, 2012, etc., we explained that we must seek the assistance of the Presiding Officer.

Regards, Larry

**Lawrence I. Kiern**

**Partner**

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**From** Friedmann, Jared [<mailto:Jared.Friedmann@weil.com>]  
**Sent:** Wednesday, April 13, 2016 10:12 PM  
**To:** Kiern, Larry; Gardner, Bryant  
**Cc:** Rothman, Richard; Isakoff, Peter; Mitchell, Alea  
**Subject:** Maher v PA 12-02

Further to our discussion today, based on current pace of review and barring any unexpected setbacks, I anticipate the PA completing its document production within the next 30 days. Please advise when Maher expects to complete its production

Thanks,  
Jared



**Jared R. Friedmann**

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## Gardner, Bryant

---

**From:** Kiern, Larry  
**Sent:** 19 April, 2016 11.32  
**To:** Friedmann, Jared  
**Cc:** Rothman, Richard; Isakoff, Peter; Mitchell, Alea; Gardner, Bryant; Oliver, Jennifer; Kiern, Larry  
**Subject:** RE. Maher v PA - 12-02 - Discovery Matters & Meet and Confer of April 13, 2016, Etc.

Thanks for your attached email of late yesterday. This responds to your points *seriatim*.

(1) With respect to Interrogatory Nos. 6-11, 15-16, and 26-27 from Maher's first set of interrogatories of 2012, we understand that you refuse to supplement.

(2) Regarding Maher's 2016 Interrogatories -- Nos. 21, 23, 24, 27, 28, and 29 identified per the Presiding Officer's most recent order -- Maher identified your answers as deficient for the reasons already outlined to you in our letter and discussion, i.e., improper use of general objections and failure to comply with the Presiding Officer's order regarding the temporal and additional details expansion permitted by the order, including your duty to supplement through the present, and failure to answer the questions posed.

- No. 21 requests the legitimate business reasons if any, for each consent fee/consideration sought (whether or not achieved) since 1997. The Port Authority's response is to point Maher back to its response to 2012 Interrogatory No. 9, which provided three general factors but did not identify the reasons for each instance such consideration was sought. And the Port Authority's reference to unidentified leases also does not answer the question, since the Port Authority has not provided or committed to provide those documents, and the Port Authority is much more familiar with them such that it must identify the answering provisions in the leases for each such instance.

- No. 23 calls on the Port Authority to identify which expenditures are those it claims justify the change of control consent consideration, explaining which fees are justified by which expenditures. The Port Authority's reference back to its 2016 Interrogatory No. 22 response provides no answer. There, the Port Authority again references the three vague factors from its response to 2012 Interrogatory No. 9. But that does not indicate which expenditures are those that justify the extracted consideration. The 2016 Interrogatory No. 22 response indicates that the Port Authority did not and cannot correlate the consent fees it charged to any particular investments, but it fails to even identify the investments at all and it should supplement its answer to do so. Additionally, the Port Authority claims the investments are only loosely tied to the consent fees. So, are the investments impossible to correlate, or are they loosely tied, and if the latter, which investments are loosely tied to which fees and what does "loosely" tied mean?

- No. 24 asks the Port Authority if, as it claims, the consent fees are justified by investments it has made, whether the Port Authority uses consent fees levied on some operators to recover investments made in other operators' facilities or for the benefit of other operators. The Port Authority offers only objections in response and does not answer.

- The Port Authority's response to No. 27 replies only with the assertion that the Port Authority "expects" documents might be produced responsive to the request. First, the Port Authority has not committed whether such documents will be produced, and if so, when. Second, the Port Authority has failed to sufficiently identify such documents.

- The Port Authority's response to No. 28 provides no substantive response, only objections.

- The Port Authority's response to No. 29 provides no substantive response, only objections.

Per your request for us to identify the "specific requests in which set of document requests Maher is pressing," we did that in our previous email to you per the Presiding Officer's order: "For the avoidance of any doubt, Maher's position is

that Nos. 1-3, 6-14, and 23-24 from Complainant's First Request for Production of Documents from the Port Authority of New York and New Jersey served March 30, 2012 are "still relevant and have not already been answered" We disagree with your objection to the requests as overbroad

(3) As we discussed on April 13, we disagree with your interpretation of the Presiding Officer's order. Contrary to your assertion, the order did not cut off discovery at March 30, 2012 and notably you quote no language from the order stating that. Moreover, you ignore the order's plain language allowing the parties to issue new interrogatories to "expand" the scope and pursue more "details" than previously requested. We understand your position is that discovery is cut off at March 30, 2012, but that is not what the order states and your argument invites the Presiding Officer to abuse her discretion by denying Maher discovery of evidence relevant to its claims.

(4) For the foregoing reasons, we do not agree that our pursuit of the discovery plainly permitted and ordered in this proceeding via a motion to compel would be an improper motion for reconsideration.

Based upon our meet and confer conferences on these subjects and your oral and written refusals to supplement, we must seek the assistance of the Presiding Officer to obtain the evidence of the Port Authority's violations of the Shipping Act.

Regards, Larry

**Lawrence I. Kiern**

**Partner**

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**From:** Friedmann, Jared [mailto:Jared.Friedmann@weil.com]

**Sent:** Monday, April 18, 2016 5:37 PM

**To:** Kiern, Larry

**Cc:** Rothman, Richard; Isakoff, Peter; Mitchell, Alea; Gardner, Bryant; Oliver, Jennifer

**Subject:** RE: Maher v PA - 12-02 - Meet and Confer of April 13, 2016, Etc.

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2. Maher also advised as to its ten "additional" interrogatories, but our discussion was otherwise limited to those previously identified in Maher's March 31, 2016 letter (*i.e.*, Nos. 9(c), 9(d), 11, and 12). We did not discuss the other interrogatories that you identified (*i.e.*, Nos. 21, 23, 24\*, 27, 28, and 29). \* Your note below lists No. 34, but we believe this is a typo and that you meant 24, which is what our notes of the call reflect.

With regard to the last sentence of your second paragraph, our understanding was that Maher's revised document requests (served on March 17) were intended to supersede the document requests served on March 30, 2012. Please advise which specific requests in which set of document requests Maher is pressing. In any event, the referenced Request Nos. 1-3 and 23 in Maher's initial March 30, 2012 requests are precisely the type of requests that the Federal Maritime Commission held were "overbroad on their face" See FMC Memorandum and Order dated December 17, 2015, at 71. With respect to Request No. 24 (in Maher's initial March 30, 2012 requests), that request is premature and, as previously stated and subject to its objections, the Port Authority will produce its expert disclosures in accordance with the Scheduling Order

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- 4 Because the Presiding Officer has already ruled on this issue in connection with the Port Authority's recent motion for a protective order, which specifically sought, *inter alia*, relief from having to produce discovery from after the Complaint was filed, any such motion by Maher would be an improper motion for reconsideration

Please let me know if you would like to discuss any of these issues.

Regards,  
Jared



Jared R. Friedmann

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**Sent:** Friday, April 15, 2016 5:05 PM  
**To:** Friedmann, Jared  
**Cc:** Rothman, Richard, Isakoff, Peter; Mitchell, Alea, Gardner, Bryant; Kiern, Larry  
**Subject:** RE: Maher v PA - 12-02 - Meet and Confer of April 13, 2016, Etc.

Jared – Further to our meet and confer conducted on Wednesday, April 13<sup>th</sup>, for the avoidance of any doubt we take this opportunity to memorialize a few key points.

- (1) We informed you that Maher contends that of Complainant's First Set of Interrogatories Propounded on the Port Authority of New York and New Jersey served March 30, 2012, Nos. 6-11, 15-16, and 26-27 as "still relevant and have not already been answered" within the meaning specified in the January 29, 2016 Scheduling Order

and the Presiding Officer's April 12, 2016 Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests.

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Regards, Larry

**Lawrence I Kiern**

**Partner**

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**Sent:** Wednesday, April 13, 2016 10:12 PM

**To:** Kiern, Larry; Gardner, Bryant

**Cc:** Rothman, Richard, Isakoff, Peter; Mitchell, Alea

**Subject:** Maher v PA 12-02

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Thanks,  
Jared



**Jared R. Friedmann**

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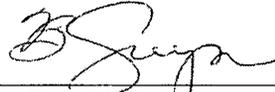
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of May, 2016, a copy of the foregoing was served by e-mail and Federal Express on the following:

Jared R. Friedmann  
Richard A. Rothman  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153

Peter D. Isakoff  
WEIL, GOTSHAL & MANGES LLP  
1300 Eye Street, NW  
Suite 900  
Washington, DC 20005



---

Brooke F. Shapiro

816 F.3d 888

United States Court of Appeals,  
District of Columbia Circuit.

MAHER TERMINALS, LLC, Petitioner

v

FEDERAL MARITIME COMMISSION and

United States of America, Respondents.

Port Authority of New York  
and New Jersey, Intervenor

No. 15-1035.

|  
Argued Feb 8, 2016

|  
Decided March 22, 2016

**Synopsis**

**Background** Marine terminal operator petitioned for review of final decision of Federal Maritime Commission, which authorized preferential lease terms given to operator's competitor by Port Authority of New York and New Jersey

**Holding:** The Court of Appeals, Silberman, Senior Circuit Judge, held that Commission did not adequately explain decision.

Petition granted, remanded.

West Headnotes (1)

[1] **Shipping**

⇒ Port authorities and regulations

**Water Law**

⇒ Leases and licenses to use harbor premises or facilities

Federal Maritime Commission did not adequately explain decision denying marine terminal operator's complaint alleging that lease terms offered to competitor by Port Authority of New York and New Jersey gave unreasonable preference to competitor in violation of Shipping Act, and thus Court of Appeals would grant

operator's petition for review and remand case to Commission, Commission offered circular reasoning to justify Port Authority's decision not to offer same lease terms to both operator and competitor, and Commission's explanation that preference given to competitor was permissibly based on competitor's threat to leave port was hopelessly convoluted. 46 U.S.C.A. § 41106(2).

Cases that cite this headnote

\*888 On Petition for Review of Final Memorandum Opinion and Order of the Federal Maritime Commission.

**Attorneys and Law Firms**

Richard P Bress argued the cause for petitioner With him on the briefs were Melissa Arbus Sherry and Benjamin W Snyder

Joel F Graham, Attorney, Federal Maritime Commission, argued the cause for respondents. With him on the briefs were William J Baer, Assistant Attorney General, U.S Department of Justice, Robert B Nicholson and Robert J Wiggers, Attorneys, and Tyler J Wood, General Counsel, Federal Maritime Commission.

Richard A. Rothman and Peter D Isakoff were on the briefs for intervenor the Port Authority of New York and New Jersey in support of respondent.

Before: GARLAND, Chief Judge, TATEL, Circuit Judge, and SILBERMAN, Senior Circuit Judge.

**Opinion**

Opinion for the Court filed by Senior Circuit Judge SILBERMAN

SILBERMAN, Senior Circuit Judge.

\*\*1 Petitioner Maher, a marine terminal operator, challenges a decision of the Federal Maritime Commission authorizing preferential lease terms to a competitor, APM-Maersk. We grant the petition and remand because we think the Commission provided an inadequate explanation.

## I.

In the late 1990s, the Port Authority began negotiating new leasing terms for maritime terminal operators servicing the Port of New York and New Jersey. This was a part of an overall effort to modernize <sup>\*889</sup> the port's facilities and make it an attractive location for shipping into the future. Among the companies the Port Authority negotiated with were Maher and APM–Maersk. Maher is an independent marine terminal operator, which means that it has no affiliated carrier fleet, and services only third party carriers and shippers through its rented terminal. APM–Maersk, on the other hand, is affiliated with the largest ocean carrier-fleet in the United States, Sea–Land, though it also services third party cargo through its terminals.<sup>1</sup>

Lease negotiations between Maher and the Port Authority began in 1995. Maher sought an agreement that would make it competitive with other terminal operators, and tentative terms, including an effective annual rate of \$68,750 per acre, were reached in late 1997. Negotiations with Maher were suspended in 1998, however, when the Port Authority began negotiating with APM–Maersk. That larger terminal operator had found the initial terms offered by the Port Authority too expensive, and threatened to go to Baltimore. APM–Maersk's business was critical to the Port of New York and New Jersey because of the high volume of container business it could bring through its affiliated carriers. Indeed, Maher's CEO expressed great concern over the potential departure, writing a letter to the Governor of New Jersey warning of the “grave” risk to the port.

The Port Authority opened negotiations with APM–Maersk in July by offering a 350-acre terminal at a rate of \$63,000 per acre, per year. That was rejected. Later, in September, the offer was reduced to \$36,000 per acre, but again rebuffed. APM–Maersk made clear that it would require as much as \$120 million in cost reduction in order to make the port as attractive as other options. The Port Authority finally agreed, and submitted terms that included \$30 million in capital and structural improvements paid for by the Port Authority at the terminal, as well as \$90 million in basic rent reduction. Those concessions, of \$120 million total, reduced APM–Maersk's effective base rent to \$19,000 per acre, per year.

Since the purpose of the concessions was to keep APM–Maersk, because of its affiliated carrier fleet and the promise of additional tonnage of cargo, the Port Authority got a

“port guarantee,” requiring APM–Maersk to actually bring cargo from its affiliated carriers through the port. The Port Authority hoped that meant APM–Maersk would not entice third party carriers away from other terminal operators, like Maher. A deal was reached at an effective annual base rent of \$19,000 per acre, with certain penalties designed to increase the rent where the port guarantee was not met.

<sup>\*\*2</sup> With APM–Maersk secured as a tenant, the Port Authority turned back to negotiations with Maher. Maher sought parity with APM–Maersk, but the Port Authority was unwilling to offer the same terms. Lacking the bargaining power enjoyed by APM–Maersk, Maher ultimately agreed to an initial base rent of \$39,750 per acre, with an escalator, such that the average base rent over the life of the lease would amount to \$53,753 per acre. While the exact annual base rent charged to APM–Maersk may be somewhat variable over the period of the 30-year lease (due to the possibility of penalties for failure to meet cargo guarantees), it is undeniable that Maher was forced to pay substantially more than APM–Maersk.

<sup>\*890</sup> Maher was purchased by Deutsche Bank in 2007. As the global recession hit in 2008, the port's total container traffic fell for the first time in almost 15 years. Maher lost nearly 15% of its business, while APM–Maersk failed to meet its port guarantees in 2008, 2009, and 2010.

On June 3, 2008, nearly 8 years after executing its lease, Maher filed a complaint against the Port Authority, alleging that the differential terms between its and APM–Maersk's leases violated the Shipping Act. It alleged that the Port Authority had violated 46 U.S.C. § 41106(2) in offering an “unreasonable preference” to APM–Maersk.

After some dispute regarding the applicable statute of limitations for the claims,<sup>2</sup> the merits came before an ALJ, who issued a decision on April 25, 2014, denying the claims. Maher appealed, and the Federal Maritime Commission affirmed on December 17, 2014.

The Commission did not deny that the Port Authority had treated Maher and APM–Maersk differently, but the Commission explained the difference was justified, on three counts. First, APM–Maersk had threatened credibly to abandon the port. Maher could make no such threat. Second, APM–Maersk was able to make a port guarantee, relying on its affiliated carrier fleet, that Maher was not. Finally, Maher's terminal was of a higher quality than was APM–

Maersk's, thus justifying a higher rent. The Commission similarly dismissed a separate unreasonable practices claim, explaining that Maher had not met its assigned burden under the applicable regulations.

II

It is common ground in this case that differences between similar entities contracting with Port Authorities must be based on "transportation factors." That term goes back to the Interstate Commerce Act and was extended into the earliest Shipping Act.<sup>3</sup> It is not clear whether it was originally articulated as an interpretation of the statutory term "undue or unreasonable preference"<sup>4</sup> or whether it was a policy choice. Perhaps that is why petitioner conflates its challenge as both a statutory claim and an arbitrary/capricious one. And the dispute is further limited by the Commission's concession that neither the port guarantee nor Maersk's supposed superior terminal quality would justify the lower rent. The Commission's decision thus rises or falls on APM-Maersk's credible threat to leave the Port of New York and New Jersey—which the Commission claims is a "transportation factor," justifying the distinction in the treatment of APM-Maersk and Maher

**\*\*3** Before considering the issue on which the dueling briefs concentrate—whether a large terminal operator's threat to leave can be legitimately regarded as a "transportation factor"—the more obvious question raised by petitioner is why the same **\*891** rates were not offered to it, which would avoid the issue of discrimination altogether. In that regard, the Commission's explanation in its Order is circular. It said, "The Port's decision *not* to give Maher certain [the same] lease terms cannot be divorced from its decision to give those terms to APM-Maersk." (Emphasis added.) In other words, we understand the Commission to be saying that the reasons APM-Maersk were given new terms somehow necessarily implies that petitioner should not be given the same terms. But that is a *non sequitur*. Whatever the reason the port determined to give lower rates to APM-Maersk, it doesn't at all follow that those same or similar rates should not be offered to petitioner. After all, the Commission has previously ordered that same remedy.<sup>5</sup> (Indeed, APM-Maersk sought lower lease rent for itself; it did not seek preferential rates *vis-a-vis* competitors in the Port of New York.)

To be sure, the intervenor, the Port Authority, argued that it would be commercially irrational for it to extend the same terms to Maher. Even if we could accept intervenor's explanations for that of the Commission—which, of course, we cannot—that terse comment is hardly adequate. There are all sorts of factors that might bear on that issue, including economic conditions in the port and the competitive impact of the preference.

Assuming *arguendo* that the Commission adequately responded to petitioner's contention that the same rates should be extended to it, the Commission's explanation as to why APM-Maersk's preference was based on a "transportation factor" was hopelessly convoluted, particularly in light of its precedent. The two cases upon which petitioner relies are *Ballmill Lumber v Port of New York*, 10 S.R.R. 131 (FMC 1968) and *Ceres Marine Terminal v Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997).

In *Ballmill*, Port Newark granted an exception to the largest lumber wholesaler, Weyerhaeuser, from a general policy previously applied to Ballmill. That policy obliged lumber wholesaler tenants to contract for logistical services with either the Port Authority itself or certain approved vendors. Weyerhaeuser was instead permitted to provide these services from its own in-house entity. The port sought to justify the preference based on Weyerhaeuser's bargaining position. The wholesaler was threatening to leave the Port of Newark if it didn't get the terms it wanted. The Commission rejected that justification, and thus held it was an "unreasonable preference." Interestingly, the Commission never even referred to the term "transportation factor."

Then, more recently, in *Ceres*, the Commission rejected the preferential rates the Maryland Port Authority granted Maersk at the Port of Baltimore for dockage, crane rental and land rental charges. The port presented a strikingly similar argument to that presented in our present case; that Maersk, then operating its own shipping line, threatened to switch to Norfolk, Virginia, which was seeking additional Maersk business.<sup>6</sup> The Commission was told Maersk's loss would be a devastating blow to Baltimore. The Commission, nevertheless, held that the cargo guarantees Maersk offered, and its size, did not justify the differential *vis-a-vis* Ceres. Put succinctly, the Commission said, "status alone is not a sufficient basis by which to distinguish between lessees."

**\*892** **\*\*4** The Commission did not overrule these cases. Instead, it offered rather lame distinctions we find quite

unpersuasive. It stated that in *Ballmill*, the Commission did not *in hoc verba* reject the threat to leave the port as a legitimate justification. Therefore, it supposedly could have thought the threat was not credible (even though that was not even argued). And the Commission “interpreted” *Ceres* as holding only that preferential rates could not be based on status alone (a terminal operator's affiliation with a carrier), even though the port's argument had been squarely based on Maersk's threat to leave—with its affiliated carrier

We express no views on whether the Commission could overrule or modify its previous decisions, but it must do so in a forthright manner. The distinctions the Commission offered were utterly unpersuasive. *See Bush–Quayle #92 Primary Committee, Inc. v FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997) (“Without adequate elucidation, this court has no way of ascertaining whether cases are indeed distinguishable, whether the Commission has a principled reason for distinguishing them, or whether the Commission is refusing to treat like cases alike.”)

We note that in *Ceres*, although at the outset of its opinion the Commission describes the governing law as permitting discrimination based on “transportation factors,” its following discussion only asked whether the

discrimination was “reasonable.” This “reasonableness” standard was also applied in our case; the Commission said Maher had not “met its burden of showing that the Port's reasons [were] unreasonable.” Does that mean the term “transportation factor” is simply a synonym for reasonable? If so, how does the Commission distinguish between reasonable and unreasonable preferences?

In sum, we must remand this case to the Commission for an adequate explanation of its decision and its policy. It is obvious the underlying problem is competition between ports for a larger share of carrier traffic. We wonder if there is not a regulatory solution to the problem.

\* \* \*

For the foregoing reasons, the Order is remanded back to the Commission.

*So ordered.*

**All Citations**

816 F.3d 888, 2016 WL 1104774

**Footnotes**

- 1 What we refer to as APM–Maersk now as a result of mergers and acquisitions over the period in question, includes both Sea–Land and Maersk shipping companies.
- 2 Shipping Act claims as relevant here, have a statute of limitations of three years. On that basis, summary judgment was requested against Maher. The FMC ultimately held that Maher's request for a cease-and-desist order was not time-barred, and that in the event a violation was found, Maher was entitled to reparations for the full three-year period, though not for the period before that running back to the execution of the lease.
- 3 *See generally Distribution Services, Ltd. v Transpacific Freight Conference of Japan*, 24 S.R.R. 714 719–21 (FMC 1988).
- 4 46 U.S.C. § 41106(2) instructs that a ‘marine terminal operator’ may not give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.
- 5 *See Ballmill Lumber & Sales Corp. v Port of N.Y. Auth.* 10 S.R.R. 131 (FMC 1968).
- 6 That was prior to its affiliation with Sea–Land.

S	E	R	V	E	D
July 23, 2010					
FEDERAL MARITIME COMMISSION					

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 08-03**

**MAHER TERMINALS LLC**

**v.**

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

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**MEMORANDUM AND ORDER ON DISCOVERY MOTIONS**

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**PART 1 – BACKGROUND**

On June 3, 2008, complainant Maher Terminals, LLC (Maher) commenced this proceeding by filing a complaint with the Secretary alleging violations of the Shipping Act of 1984 (Shipping Act or Act) by respondent Port Authority of New York and New Jersey (PANYNJ) in the leasing of certain land and facilities at the Elizabeth Port Authority Marine Terminal. The parties filed several motions related to discovery. On October 9, 2008, I entered an order staying depositions until decisions were issued on the discovery motions. *Maher Terminals LLC v Port Authority of New York and New Jersey*, FMC No. 08-03 (ALJ Oct. 9, 2008) (Order Staying Depositions Pending a Decision on Pending Discovery Motions).

On April 14, 2010, I determined that rulings on the parties' discovery motions would be facilitated by a fuller understanding of the matters at issue and the effect that remedies Maher seeks may have on the scope of discovery. Therefore, I ordered the parties to file supplemental briefs on the effect the Act's statute of limitations on Maher's claim for reparations. *Maher v PANYNJ*, FMC No. 08-03, Order at 10-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs). The parties have filed their briefs. This order addresses the discovery motions.

## I. FACTS.<sup>1</sup>

PANYNJ owns the Elizabeth Port Authority Marine Terminal APM Terminals North America, Inc. (APM or APMT), formerly known as Maersk Container Service Company Inc. (Maersk), occupies certain land and facilities at the Elizabeth Port Authority Marine Terminal for use as a marine terminal pursuant to Lease EP-248 with PANYNJ dated January 6, 2000 filed with the Commission as FMC Agreement No. 201106 on August 2, 2000. Complainant Maher occupies certain land and facilities at the Elizabeth Port Authority Marine Terminal for use as a marine terminal pursuant to Lease EP-249 with PANYNJ dated October 1, 2000 filed with the Commission as FMC Agreement No. 201131 on March 8, 2002.<sup>2</sup>

Maher alleges that PANYNJ violated sections 41106(2), 41106(3) and 41102(c) of the Shipping Act. These provisions state: "A marine terminal operator may not – (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person, or (3) unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106. "A marine terminal operator may not fail 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).

Maher's Complaint states.

- A. Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.
- B. PANYNJ's agreement with APMT EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

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<sup>1</sup> There is a more extensive discussion of the facts in *Maher v PANYNJ*, FMC No. 08-03, Order at 10-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs).

<sup>2</sup> I take official notice of the leases pursuant to 46 C.F.R. § 502.226. They are available at [http://www2.fmc.gov/agreements/mtos\\_npage.aspx](http://www2.fmc.gov/agreements/mtos_npage.aspx) (accessed March 8, 2010).

- C. In EP-248, PANYNJ provided and continues to provide APMT a base annual rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher
- D. By contrast, in EP-249, PANYNJ required and continues to require Maher to pay a base annual rental rate of \$39,750 per acre and additionally required Maher to pay a basic rent escalator of two percent per annum such that by the end of the 30 year term of the lease Maher's basic rent rises to \$70,590 per acre. or an unreasonable difference of \$51,590 per acre more than the PANYNJ charges APMT
- E. Over the approximately 30 year term of the agreements, this undue prejudice disadvantaging Maher and undue preference advantaging APMT totals million [*sic*] of dollars.
- F. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the investment requirements in the PANYNJ property that is the subject of the leases. PANYNJ required and continues to require Maher to invest greater sums than it required APMT to invest and PANYNJ provided and continues to provide APMT more favorable financing terms than it provided Maher, requiring Maher to repay the investment at a higher rate than PANYNJ provided APMT
- G. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the container throughput requirements and consequences thereof that are the subject of the leases. PANYNJ required and continues to require Maher to provide greater throughput guarantees and risk greater consequences than it required and continues to require of APMT
- H. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the first point of rest requirement imposed on Maher, but not required of APMT
- I. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the security deposit requirement by requiring Maher to provide a \$1.5 million deposit not required of APMT
- J. Despite Maher's request to the PANYNJ to be treated equally with APMT, the PANYNJ refused to deal with Maher and continues to refuse to deal with Maher and has required the foregoing undue and unreasonable preferences favoring APMT and prejudices disadvantaging Maher

- K. With respect to EP-248, during the year 2008 the PANYNJ negotiated with APMT to address APMT's claim that the PANYNJ violated the Shipping Act by failing to provide certain premises in a timely fashion, but at the same time the PANYNJ refused to negotiate with Maher concerning its claim that the PANYNJ violated the Shipping Act with respect to EP-249 by failing to provide certain premises to Maher in a timely fashion.
- L. There is no valid transportation purpose for the foregoing undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging APMT or for the PANYNJ's refusal to deal with Maher
- M. If there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose.

(Complaint at 3-5 ) Maher alleges it has "sustained and continues to sustain injuries and damages amounting to a sum of millions of dollars." *Id.* at 5 As remedies, Maher seeks a cease and desist order and reparations for its actual injury plus interest, costs, and attorneys fees, and any other damages determined. *Id.* at 6. PANYNJ admitted some allegations, denied some allegations, neither admitted nor denied some allegations, and raised several affirmative defenses. (Answer at 1-7 )

## II. DISCOVERY MOTIONS.

The parties have filed the following motions relating to discovery:

Maher Terminals, LLC's Motion to Compel Production from The Port Authority of New York and New Jersey;

The Port Authority of New York and New Jersey Motion to Compel Discovery from Complamant and Maher's Motion for a Protective Order embedded in its opposition to PANYNJ's motion,

[Maher's] Motion to Quash Subpenas Issued by The Port Authority of New York and New Jersey;

[Maher's] Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ,

Maher Terminals, LLC's Motion to Compel Production of Evidence on Certain Backup Tapes from The Port Authority of New York and New Jersey

I will apply the Commission's Rules of Practice and Procedure controlling discovery and, where appropriate, the Federal Rules of Civil Procedure.

**A. Scope of Discovery.**

The Commission promulgated its discovery rules in 1984 based on the discovery rules set forth in the Federal Rules of Civil Procedure at that time. The discovery rules in the Federal Rules have been significantly revised since 1984. Major amendments occurred in 1993 resulting from the determination that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." Fed. R. Civ. P. 26 advisory committee notes, 1993 amendments. For instance, the 1993 amendments added a requirement that the parties make initial disclosures of persons likely to have discoverable information, a copy or the location of documents the party may use to support claims or defenses, computation of damages, and insurance agreements that could be used to satisfy a judgment. Fed. R. Civ. P. 26(a)(1). "Amendments to Rules 30, 31, and 33 place[d] presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery." Fed. R. Civ. P. 26 advisory committee notes, 1993 amendments. Amended Rule 30(d) provided rules for making objections in depositions and restricted instructions to a deposition witness not to answer questions. Fed. R. Civ. P. 30(d). Later amendments set forth procedures for handling electronically stored information. Fed. R. Civ. P. 26(b)(2)(B), 33(d), and 34.

Commission Rule 12 provides: "In proceedings under this part, *for situations which are not covered by a specific Commission rule* the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12 (emphasis added). I have applied a number of civil discovery rules and local discovery rules promulgated after the Commission promulgated its rules where I have found that the new or amended civil rule addresses a situation that is not covered by a specific Commission rule. *See, e.g., Maher v PANYNJ*, FMC No. 08-03 (ALJ Aug. 1, 2008) (requiring parties to quote each interrogatory or request in full immediately preceding the answer, response, or objection, requiring parties to provide an electronic copy in a word processing format of discovery with the hard copy of all discovery served, requiring good faith conference prior to filing motion to compel, imposing Rule 26 amendments for disclosure of information regarding expert testimony and creation of a privilege log; ordering compliance with Rule 34 procedure for responding to a request for electronically stored information; imposing Rule 30 requirements on conduct of depositions). I have not ordered parties to follow other new or amended rules where the situation is covered by a specific rule. For instance, the limitations on the number of interrogatories and depositions were promulgated with and go hand-in-hand with the initial disclosure requirements. Without an initial disclosures requirement, the limitation on interrogatories may result in an insufficient opportunity for a party to obtain the information to which it is entitled. Therefore, I have not limited the number of interrogatories as provided by Civil Rule 33.

As promulgated in 1984, Commission Rule 201 provides.

*Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

46 C.F.R. § 502.201(h). Rule 201 was based on Civil Rule 26 as it existed in 1984

In 2000, the Supreme Court prescribed amendments to Civil Rule 26 to restrict a party's right to enquire into any matter "which is relevant to the subject matter involved in the proceeding." Instead, a party must seek leave of court to enquire into these areas. As it now reads, Civil Rule 26 provides:

Unless otherwise limited by court order the scope of discovery is as follows. Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. *For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.* Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Fed. R. Civ P 26(b)(1) (emphasis added).

Although the Supreme Court has altered the scope of discovery pursuant to Civil Rule 26, the Commission has not altered the scope of discovery set forth in Rule 201. Commission Rule 201(h) is a specific rule that addresses the scope of discovery in Commission cases. Therefore, the scope of discovery as provided in Commission Rule 201(h) is applied in this proceeding: "Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party"

Rule 26 before the 2000 amendments was accorded broad and liberal treatment by the courts because "wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for truth." *Epstein v MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir 1995), quoting *Shoen v Shoen*, 5 F.3d 1289, 1292 (9th Cir 1993). "The key phrase in this definition – 'relevant to the subject matter involved in the pending action' – has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v Sanders*, 437 U.S. 340, 351 (1978), citing

*Hickman v Taylor*, 329 U.S. 495, 501 (1947), *Daval Steel Products v M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir 1991). Accordingly "discovery should be allowed unless the information sought has no conceivable bearing on the case." *Jackson v Montgomery Ward & Co., Inc.*, 173 F.R.D. 524, 528 (D Nev 1997). "If the interrogatory has a reasonable possibility of leading to admissible evidence then it complies with the purposes of the Federal Rules of Civil Procedure and is proper" *Roesberg v Johns-Manville Corp.*, 85 F.R.D. 292, 296 (E.D Pa. 1980) However the scope of discovery is not boundless and requests must be relevant and cannot be unreasonably cumulative, duplicative, or unnecessarily burdensome. *Jackson*, 173 F.R.D. at 526.

In order to fulfill discovery's purposes of providing both parties with "information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement," the discovery rules mandate a liberality in the scope of discoverable material. *Jochims v Isuzu Motors, Ltd.*, 145 F.R.D. 507, 509 (S.D Iowa 1992) (citing *In re Hawaii Corp.*, 88 F.R.D. 518, 524 (D Haw 1980)); see also *Seattle Times Co. v Rhinehart*, 467 U.S. 20, 34, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) ("Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."); *Oppenheimer Fund, Inc v Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978); *SDI Operating Partnership, L.P v Neuwirth*, 973 F.2d 652 (8th Cir 1992), *Lozano v Maryland Casualty Co.*, 850 F.2d 1470 1472 (11th Cir 1988), *Gary Plastic Packaging Corp v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 236 (2d Cir 1985); *Miller v Pancucci*, 141 F.R.D. 292, 298 (C.D Cal. 1992) (stating that the federal policy of discovery is a liberal one). Thus, as long as the parties request information or documents relevant to the claims at issue in the case, and such requests are tendered in good faith and are not unduly burdensome, discovery shall proceed. *M. Berenson Co., Inc. v Faneuil Hall Marketplace, Inc.*, 103 F.R.D. 635, 637 (D Mass.1984)

The party resisting production bears the burden of establishing lack of relevancy or undue burden. *Oleson v Kmart Corp.*, 175 F.R.D. 560 565 (D Kan. 1997) ("The objecting party has the burden to substantiate its objections.") (citing *Peat, Marwick, Mitchell & Co v West*, 748 F.2d 540 (10th Cir 1984), cert dismissed, 469 U.S. 1199, 105 S. Ct. 983, 83 L. Ed. 2d 984 (1985)); accord *G-69 v Degnan*, 130 F.R.D. 326, 331 (D.N.J. 1990); *Flora v Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978). The party must demonstrate to the court "that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Burke v New York City Police Department*, 115 F.R.D. 220 224 (S.D.N.Y. 1987). Further, the "mere statement by a party that the interrogatory [or request for production] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection." *Josephs v Harris Corp.*, 677 F.2d 985 992 (3d Cir 1982) (quoting *Roesberg v Johns-Manville Corp.*, 85

F.R.D. at 296-97, *see also Oleson* 175 F.R.D. 560, 565 (“The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request.”) (citation omitted). “On the contrary, the party resisting discovery ‘must show specifically how each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or oppressive.’” *Id.* at 992 (quoting *Roesberg*, 85 F.R.D. at 296-97), *see also Oleson*, 175 F.R.D. 560, 565 (“The objecting party must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”); *Cipollone v Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (holding that it is not sufficient to merely state a generalized objection, but, rather, objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it); *Degnan*, 130 F.R.D. at 331 (D.N.J. 1990) (same).

*St. Paul Reinsurance Co., Ltd. v Commercial Financial Corp.*, 198 F.R.D. 508 511-512 (N.D. Iowa 2000).

Interrogatories should not require the answering party to provide a narrative account of its case. They should not duplicate initial disclosures. The court will generally find them overly broad and unduly burdensome on their face to the extent they ask for “every fact” which supports identified allegations or defenses. Interrogatories may, however, properly ask for the “principal or material” facts which support an allegation or defense. Interrogatories “which seek underlying facts or the identities of knowledgeable persons and supporting exhibits for material allegations” may possibly survive objections that they are overly broad or unduly burdensome. Interrogatories which do not encompass every allegation, or a significant number of allegations, of the Complaint, reasonably places upon the answering party “the duty to answer them by setting forth the material or principal facts.”

*Hiskett v Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404-405 (D. Kan. 1998) (citations omitted), *Odyssey Stevedoring of Puerto Rico, Inc. v Puerto Rico Ports Auth.*, 29 S.R.R. 1392, 1394 (ALJ 2002).

A party may answer an interrogatory by specifying records from which the answers may be obtained and by making the records available for inspection. [46 C.F.R. § 502.205(d).] But the records must be specified “in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.”

*Rainbow Pioneer # 44-18-04A v Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983).

## **B. General Objections to Discovery.**

Maher and PANYNJ each preface their responses to the interrogatories and requests for production with a series of "general objections." (*See, e.g.*, Maher Terminals, LLC's Responses to the Port Authority of New York and New Jersey's First Set of Interrogatories to Maher Terminals, LLC at 1-4, The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Request for Production of Documents 1-3). The party objecting to discovery bears the burden of showing why discovery should not be permitted.

Objections to [discovery] must be specific and by supported by a detailed explanation why the [discovery is] improper. General objections may result in waiver of the objections. Plaintiffs' catch-all objection named every conceivable ground including objections that the interrogatories are duplicative, not relevant to the subject matter of the litigation, oppressive, and overly vague. Plaintiffs' response was so broad as to be meaningless.

*In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 264 (N.D. Ill. 1979).

The parties set forth specific objections to the discovery sought by the motions. I will consider these specific objections, not the general objections, when ruling on the motions.

## **PART 2 – MAHER'S MOTION TO COMPEL PRODUCTION FROM PANYNJ**

Maher moves to compel "complete and proper responses" by PANYNJ to several interrogatories and requests for production. Maher first voices its objection to what it characterizes as PANYNJ's dumping of hundreds of thousands of non-responsive documents on Maher. Second, Maher seeks to compel fuller responses to a number of interrogatories and requests and addresses the specific items for which it seeks additional responses.

### **I. NON-RESPONSIVE DOCUMENTS.**

Maher contends that for its August 29, 2008, discovery response.

PANYNJ delivered to Maher five hard drives containing 1.7 million pages of documents allocated under 138 separate custodians. The document production is replete with nonresponsive, irrelevant material including, for example, many thousands of personal e-mails regarding weddings, lunch dates, weekend plans, religious events, jokes, spam reports, and outlook contacts and appointments as shown in the attached samples and statistics.

(Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey (Maher Motion to Compel) at 4 (footnotes omitted) (filed September 25, 2008).) In its

opposition filed October 10, 2008. PANYNJ states that “[o]n October 3, . . . the Port Authority produced to Maher an ‘overlay’ file containing the information necessary for Maher to filter out non-responsive documents from the Port Authority’s production, effectively eliminating roughly 300,000 documents from the purview of this litigation.” Memorandum in Opposition to Maher Terminals, LLC’s Motion to Compel Production from the Port Authority of New York and New Jersey (PANYNJ Opp to Maher Motion to Compel) at 21 )

To ensure a complete record, on or before August 6, 2010, PANYNJ shall serve and file a Certificate of Counsel stating that it has identified for Maher all non-responsive documents produced with its August 29, 2008, production of documents and/or any subsequent production.

## **II. SPECIFIC MAHER INTERROGATORIES AND REQUESTS AT ISSUE.**

### **A. Motion to Require Identification of Documents by Bates Numbers.**

In each of its arguments regarding the interrogatories, Maher contends that “[a]lthough PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.” (See, e.g., First Interrogatories No. 6, Maher’s Argument, *infra* ) PANYNJ’s actual response was “Bates numbers will be supplied when feasible.” (See, e.g., First Interrogatories No. 6, PANYNJ’s Answer, *infra* )

In an earlier litigation in which these parties were involved, I stated

With regard to several interrogatories, PANYNJ argues that “Maher must provide a response that specifies the Bates stamp number of each such document without limitation.” While a party responding to an interrogatory has the option of giving its answer by producing business records, *see* Fed. R. Civ P 33(d) (“the responding party *may* answer by: (1) specifying the records that must be reviewed”) (emphasis added), PANYNJ sets forth no authority holding that the interrogating party can *require* the responding party to answer as set forth in Rule 33(d). Accordingly, PANYNJ’s motion to compel Maher to respond to PANYNJ interrogatories by specifying “the Bates stamp number of each such document without limitation” is denied, although Maher may at its option choose to respond as permitted by Rule 33(d).

*APM Terminals Inc. v Port Authority of New York and New Jersey*, FMC No. 07-01, Memorandum at 30 (ALJ June 4, 2008) (Memorandum and Order on Motions to Compel Responses to Discovery). Just as PANYNJ did not set forth any authority requiring a party to respond by identifying records by Bates number in Docket No 07-01, Maher does not set forth any authority requiring a party to respond by identifying records by Bates number in this proceeding. I do not interpret PANYNJ’s statement that it would provide Bates numbers “when feasible” to be an enforceable promise to provide Bates numbers. Therefore, if PANYNJ supplements its responses to the interrogatories by identifying records, it may, but is not required to, identify the records by Bates number.

## B. Specific Objections.

Maher seeks an order compelling additional responses to Interrogatories No 6 and 7 of Maher's first set of interrogatories, Interrogatories No 21 and 22 of Maher's second set of interrogatories, Requests for Production No. 1, 3, 4, 6, 7, 8, 9, 10, 12, 13, 13, and 17 from Maher's first set of requests for production of documents, and Requests for Production No 34, 35, 36, and 37 from Maher's second set of requests for production of documents. PANYNJ is the party resisting production and "bears the burden of establishing lack of relevancy or undue burden." *Oleson v Kmart Corp.*, 175 F.R.D. at 565, and "that the requested [information does] not come within the broad scope of relevance or else [is] of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure" *Burke v New York City Police Department*, 115 F.R.D. at 224

First Interrogatories No. 6 Describe in detail, the investments that PANYNJ required APMT to make in PANYNJ port facilities per EP-248, including the dollar value thereof.

PANYNJ's Answer Subject to and without waiving, but rather expressly preserving its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive information may be found in lease EP-248 and in the documents produced in connection with this litigation under custodians Cheryl Yetka and Rudy Israel, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose knowledgeable witnesses as to this topic, including Cheryl Yetka and Rudy Israel.

Maheer's Argument. First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.

PANYNJ provides no identifying data to assist Maher other than the custodians, but as set forth above, PANYNJ's production contains 1.7 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state under which custodians the responsive documents can be found. By stating that the responsive documents are found under "Cheryl Yetka, Rudy Israel, among other Port Authority custodians," PANYNJ is doing little more than directing Maher to go root through its entire document production of 1.7 million pages. The Presiding Officer

has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ P 33(d)—and that was when PANYNJ's production was much, much smaller. Finally, even if PANYNJ had limited its response to Ms. Yeika and Mr. Israel, that would require Maher to sift through no less than 8,000 documents (approximately 24,000 pages) much of it nonresponsive chaff—and that is not even counting the files PANYNJ has categorized under the potentially applicable central department files including, e.g. 9,404 Port Commerce Department documents (approximately 28,000 pages), and 12,567 Engineering documents (approximately 38,000 pages).

PANYNJ's response is [sic] inadequate. Therefore, PANYNJ should be required to fulfill its original commitment to provide Bates numbers of documents responsive to the interrogatory.

Port Authority's Response The Port Authority complied with the requirements of Fed. R. Civ P 33(d) by identifying the principal witnesses whose documents would provide information responsive to this interrogatory. Moreover, Maher's complaint that the Port Authority has identified the principal witnesses with responsive documents but has not provided Bates numbers for each responsive document is remarkable in its hypocrisy, and Maher should be estopped from pursuing this burdensome demand. That is because Maher has steadfastly refused to identify even the custodians with responsive documents when it invoked Fed. R. Civ P 33(d) and referenced unspecified documents in responding to the Port Authority's interrogatories. Thus, when the shoe was on the other foot, Maher not only took the position in the parties' September 12 meet-and-confer that FMC precedent did not require the production of Bates numbers and that consequently Maher would not provide them (see 07-01 Motion to Compel Mem. at 30 (holding that Bates numbers were not required to be listed in interrogatory responses)), but also refused, contrary to FMC precedent, see *id.* at 18-19, even to identify the principal custodians (as the Port Authority has done) or otherwise indicate where responsive documents may be found. Maher's refusal is even more egregious in light of the negligible burden it would incur to do so as compared to that which it seeks to foist upon the Port Authority given that Maher's production suspiciously consisted of only two boxes. See Loiseau Declaration at ¶ 27. Instead, Maher's responses merely (and repeatedly) referred the Port Authority to "business records produced as kept in the ordinary course of business" or "the documents produced by the parties in Dkt. No. 07-01" as supposedly sufficient under the same standard Maher applies in critiquing the Port Authority's responses. See Maher's First Interrogatory Responses, Response to Interrogatory No. 9, Maher's Second Interrogatory Responses, Response to Interrogatory Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, & 16. Under these circumstances, Maher's motion with respect to this issue should be summarily denied.

*In any event, Maher's complaint that it would have to sift through 17 million pages of documents to find the documents belonging to the listed custodians because the Port Authority's production contained non-responsive documents is groundless for at least three reasons. First, the Port Authority has since identified non-responsive documents in its production, enabling Maher to quickly filter out the non-responsive documents. Second, the metadata provided by the Port Authority for each and every produced document included a readily searchable "Custodian" field. Third, the large number of responsive documents is directly correlated with the breadth, depth, and sheer number of document requests that Maher has served in this matter (see supra at p. 8-9).*

*For all these reasons, Maher's hypocritical attempt to foist this enormous burden on the Port Authority should be summarily rejected, especially because it will obtain any additional information it needs in the numerous Rule 30(b)(6) depositions that it has noticed with respect to the same issues covered by its interrogatories.*

**RULING** Maher argues that:

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

*Option to produce business records* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found in the documents produced in connection with this litigation under custodians Cheryl Yetka and Rudy Israel among other Port Authority custodians" and contends that it has identified "the principal witnesses whose documents would provide information responsive to this interrogatory." When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained." *Rainbow Pioneer # 44-18-04A v Hawaii-Nevada Inv Corp*, 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 6 is insufficient.

PANYNJ is ordered to supplement its answer to Maher First Interrogatory No. 6 by setting forth the material or principal facts on which it relies for its response, or in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 6 may be derived or ascertained.

First Interrogatories No. 7 Describe in detail the investments that the PANYNJ required Maher to make in PANYNJ port facilities per EP-249, including the dollar value thereof

PANYNJ's Answer Subject to and without waiving, but rather expressly preserving its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive information may be found in lease EP-249 and in the documents produced in connection with this proceeding under custodians Cheryl Yetka and Rudy Israel, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose knowledgeable witnesses as to this topic, including Cheryl Yetka and Rudy Israel.

MaHer's Argument First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.

*PANYNJ provides no identifying data to assist Maher other than the custodians, but as set forth above, PANYNJ's production contains 17 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state which custodians the responsive documents will be found under. By stating that the responsive documents are found under "Cheryl Yetka, Rudy Israel, among other Port Authority custodians," PANYNJ is doing nothing more than directing Maher to go dig through its entire document production of 17 million pages. The Presiding Officer has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ. P. 33(d). Finally, even if PANYNJ had limited its response to Ms. Yetka and Mr. Israel, that would require Maher to sift through no less than 8,000 documents (approximately 24,000 pages), much of it nonresponsive—and that is not even counting the files PANYNJ has categorized under the central department files, including, e.g., 9,404 Port Commerce Department documents (approximately 28,000 pages), and 12,567 Engineering documents (approximately 38,000 pages). PANYNJ should be required to fulfill to its original commitment to provide Bates numbers.*

*Port Authority's Response In order to avoid burdening the Presiding Officer with too much redundant argumentation, the Port Authority respectfully refers to its response to First Interrogatory No. 6 at pp. 42-44, supra. Furthermore, with respect to this particular interrogatory, the reference that the Port Authority included to EP-249 was plainly sufficient under Fed. R. Civ. P. 33(d) since the lease itself specifically sets forth the work that Maher agreed to perform.*

**RULING:** Maher argues that.

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

*Option to produce business records* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or

ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. §.502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found in the documents produced in connection with this litigation under custodians Cheryl Yetka and Rudy Israel, *among other Port Authority custodians*" and contends that it has identified "the *principal* witnesses whose documents would provide information responsive to this interrogatory." When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified 'in sufficient detail to permit the interrogating party to locate and identify as readily as the party served, the records from which the answer may be obtained.'" *Rainbow Pioneer # 44-18-04A v Hawaii-Nevada Inv Corp.*, 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 7 is insufficient.

PANYNJ is ordered to supplement its answer to Maher First Interrogatory No. 7 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 7 may be derived or ascertained.

*Second Interrogatories No. 21 Identify agreements, communications, and other documents pertaining to payments received by PANYNJ, or other requirements imposed by PANYNJ or benefits received by PANYNJ, including investments in PANYNJ facilities, on lessees or terminal operators in connection with the sale or change of control of such lessees or terminal operators, property or leases or other agreements, including but not limited to such payments or requirements imposed in connection with APMT, the Port Newark Container Terminal, and the Howland Hook Marine Terminal, and New York Container Terminal, Inc.*

*PANYNJ's Answer The Port Authority objects to Interrogatory No. 21 as overbroad, unduly burdensome, and vague. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive*

information may be found in the documents produced in connection with this litigation under custodians Paul Blanco, Richard Larrabee, Dennis Lombardi, and Robert Evans, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose knowledgeable witnesses as to this topic, including Richard Larrabee, Dennis Lombardi, and Robert Evans.

Mahe's Argument First, PANYNJ's objection of "overbroad, unduly burdensome, and vague" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the objection to the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Despite Mahe's effort to resolve these objections, PANYNJ has provided no explanation or justification for the objections that would facilitate resolution.

Second, the response fails to provide the principal and material facts responsive to the request as required by the Presiding Officer's June 4th Order

Third, PANYNJ resorts to Fed. R. Civ P 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Mahe to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.

PANYNJ provides no identifying data to assist Mahe other than the custodians, but as set forth above, PANYNJ's production contains 17 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Mahe to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state under which custodians the responsive documents will be found. By stating that the responsive documents are found under "Paul Blanco, Richard Larrabee, Dennis Lombardi, and Robert Evans, among other Port Authority custodians." PANYNJ is doing nothing more than directing Mahe to go see its entire document production of 17 million pages. The Presiding Officer has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ P 33(d). Finally, and as also discussed above, the universe of documents to which PANYNJ directs Mahe is vast and unorganized. Mahe has no way of knowing where to search within the document production to have conducted a complete search. By contrast, PANYNJ has access to PANYNJ witnesses and staff to ascertain where to search and to help locate responsive documents they know about. Therefore, the burden of finding the responsive information really is not the same as between the

*Parties. It plainly is less burdensome for PANYNJ than Maher. Therefore, PANYNJ should be required to honor its original commitment to provide Bates numbers.*

*Port Authority's Response.* *In order to avoid burdening the Presiding Officer with too much redundant argumentation, the Port Authority respectfully refers to its response to First Interrogatory No. 6 at pp. 42-44, supra. Furthermore, with respect to this particular interrogatory, the Port Authority's objection that the interrogatory was overbroad, unduly burdensome, and vague was clearly correct. Indeed, this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources. Maher's lack of good faith is perhaps best illustrated by the fact that almost none of its own interrogatory responses would comply with the requirements that Maher seeks to apply unilaterally to the Port Authority's responses. For example, Maher does not include any "affidavit or other sworn statement" accompanying its burden objections, which are pervasive in its responses and objections. Moreover, to the extent that such affidavits are nonetheless sometimes used to buttress burden claims, they should have no bearing on the Port Authority's objection on vagueness grounds, which is apparent on the face of the interrogatory.*

**RULING:** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ contends that

with respect to this particular interrogatory, the Port Authority's objection that the interrogatory was overbroad, unduly burdensome, and vague was clearly correct. Indeed, this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources.

PANYNJ does not explain *how* its objection is clearly correct or how this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources. Therefore, PANYNJ's objection that the interrogatory is overbroad, unduly burdensome, and vague is overruled.

Maher argues that

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

*Option to produce business records* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found in the documents produced in connection with this litigation under custodians Paul Blanco, Richard Larrabee, Dennis Lombardi, and Robert Evans, among other Port Authority custodians. When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, 'the records must be specified 'in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.'" *Rainbow Pioneer # 44-18-04A v Hawaii-Nevada Inv. Corp* 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 21 is insufficient.

PANYNJ is ordered to supplement its answer to Maher Second Interrogatory No. 21 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 21 may be derived or ascertained.

Second Interrogatories No. 22 Identify all documents and communications pertaining to parity of treatment or lack thereof regarding PANYNJ's treatment of Maher and APMT, including but not limited to Maher's requests for treatment by PANYNJ equal to that provided by PANYNJ to APMT, and PANYNJ's responses thereto

PANYNJ's Answer The Port Authority objects to Interrogatory No. 22 on the grounds that it is unduly burdensome to require that the Port Authority identify "all documents and communications," as to these subjects by way of interrogatory response. The Port Authority also objects to this interrogatory on the grounds that it is vague and ambiguous. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive information may be found in the documents produced in connection with this litigation under custodians Dennis Lombardi, Edmond Harrison, Cheryl Yetka, and Rudy Israel, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose individuals who may be knowledgeable as to this topic.

Maher's Argument First, PANYNJ's objections to the request as "unduly burdensome" and "vague and ambiguous" require a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Second, the response fails to provide the principal and material facts responsive to the request as required by the Presiding Officer's June 4th Order

Third, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.

PANYNJ provides no identifying data to assist Maher other than the custodians, but as set forth above, PANYNJ's production contains 17 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state under which custodians the responsive documents will be found. By stating that the responsive documents are found under "Dennis Lombardi, Edmond Harrison,

*Cheryl Yetka, and Rudy Israel, among other Port Authority custodians," PANYNJ is doing nothing more than directing Maher to go see its entire document production of 17 million pages. The Presiding Officer has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ P 33(d). Finally, and as also discussed above, the universe of documents to which PANYNJ directs Maher is vast and unorganized. Maher has no way of knowing where to search within the document production to have conducted a complete search. By contrast, PANYNJ has access to PANYNJ witnesses and staff to ascertain where to search and to help locate responsive documents they know about. Therefore, the burden of finding the responsive information really is not the same as between the Parties. It plainly is less burdensome for PANYNJ than Maher. Therefore, PANYNJ should be required to honor its original commitment to provide Bates numbers.*

*Port Authority's Response. In order to avoid burdening the Presiding Officer with too much redundant argumentation, the Port Authority respectfully refers to its response to Second Interrogatory No 21 at pp 46-47, supra.*

**RULING** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ contends that "it is unduly burdensome to require that the Port Authority identify 'all documents and communications,' as to these subjects by way of interrogatory response. The Port Authority also objects to this interrogatory on the grounds that it is vague and ambiguous." PANYNJ does not explain *how* its objection is clearly correct or how this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources.

Maier argues that the response "fails to provide the principal and material facts responsive to the request" and "fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ the records from which the answer may be obtained "

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ P 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained

Commission Rule 205 provides:

*Option to produce business records* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found in the documents produced in connection with this litigation under custodians Dennis Lombardi, Edmond Harrison, Cheryl Yetka, and Rudy Israel, among other Port Authority custodians." When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified in sufficient detail to permit the interrogating party to locate and identify as readily as the party served, the records from which the answer may be obtained." *Rainbow Pioneer # 44-18-04A v Hawaiian-Nevada Inv Corp.*, 711 F.2d at 906 PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 22 is insufficient.

PANYNJ is ordered to supplement its answer to Maher Second Interrogatory No. 22 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 22 may be derived or ascertained.

*First Requests No. 1* All documents reflecting the communications, deliberations, negotiations, and actions of the Commissioners, the board of directors, the officers, employees, agents and representatives of the PANYNJ pertaining to the acts which are the subject of the Complaint.

PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents "pertaining to the acts which are the subject of the Complaint." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Mahe's Argument PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Additionally, the Presiding Officer has already ruled that requests for documents concerning the allegations of a complaint are proper and not overbroad and unduly burdensome.

Port Authority's Response It is standard practice in discovery responses of this nature to assert that one is producing documents notwithstanding the stated objections, so as not to waive them for the future. In fact, Mahe employed this same structure throughout its objections to the Port Authority's document requests. See, e.g., Mahe Terminals, LLC's Responses to the Port Authority of New York and New Jersey's First Request for Production of Documents to Mahe Terminals, LLC ("Mahe's First RFP Responses") In any event, although the Port Authority's objections were reasonable and appropriate in light of Mahe's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Mahe's complaint is groundless, as well as moot.

**RULING** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Mahe whether it produced any documents

pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 1 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 1 by stating whether it produced any documents pursuant to this request.

First Requests No. 3 All documents pertaining to the preparation, proposal, consideration, negotiation, and drafting of EP-248, including but not limited to the meaning of any provision of term of EP-248.

PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request if any, that are in the Port Authority's possession, custody or control.

Maher's Argument APMT's undue preferences, as enshrined in lease EP-248, are directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law are not valid. Moreover, The Presiding Officer has already held that an almost identical request for "All documents pertaining to the negotiation and drafting of EP-249 including but not limited to the meaning of any provision or term of EP-249" was not overbroad.

Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself no documents were withheld in response to this request based on the challenged objections. Accordingly Maher's complaint is groundless, as well as moot. The Port Authority also notes that this document request is substantially duplicative of the testimony Maher seeks via two separate August 4, 2008 30(b)(6) notices, which request "the most knowledgeable person concerning the negotiation of agreement[] EP-248 (August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 22) and "the most knowledgeable person concerning the provisions of lease agreement[] EP-248." August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 23

**RULING.** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 3 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 3 by stating whether it produced any documents pursuant to this request.

*First Requests No. 4 All documents pertaining to the preparation, proposal, consideration, negotiation and drafting of EP-249 including but not limited to the meaning of any provision or term of EP-249*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

*Maher's Argument. Maher's lease EP-249, which contains terms less favorable than those afforded APMT in EP-248, is directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Moreover, The Presiding Officer has already held that an almost identical request for "All documents pertaining to the negotiation and drafting of EP-249, including but not limited to the meaning of any provision or term of EP-249A" was not overbroad.*

*Port Authority's Response.* Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot. The Port Authority also notes that this document request is substantially duplicative of the testimony Maher seeks via its August 4, 2008 30(b)(6) notice, which requests "the most knowledgeable person concerning the negotiation of agreement[]" EP-249 (August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 22) and "the most knowledgeable person concerning the provisions of lease agreement[]" EP-249 " August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 23

**RULING:** As the party resisting discovery [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No 4 is insufficient. PANYNJ "notes that this document request is substantially duplicative of the testimony Maher seeks via its August 4, 2008 30(b)(6) notice," but does not cite any authority holding that a discovering party must choose between a request for production of documents and a Rule 30(b)(6) deposition when it is seeking discoverable information.

PANYNJ is ordered to supplement its answer to Maher's First Requests No 4 by stating whether it produced any documents pursuant to this request.

*First Requests No. 6* All documents in any way pertaining to meetings or communications between the PANYNJ and APMT pertaining to lease proposals.

*PANYNJ's Answer* The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

*Maier's Argument* The Maier and APMT lease proposals are directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

*Port Authority's Response* Although the Port Authority's objections were reasonable and appropriate in light of Maier's request as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maier's complaint is groundless, as well as moot.

**RULING.** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C v Genmar Holdings, Inc.*, 209 F.R.D 208 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections. PANYNJ's answer and response do not tell Maier whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maier's First Requests No. 6 is insufficient.

PANYNJ is ordered to supplement its answer to Maier's First Requests No. 6 by stating whether it produced any documents pursuant to this request.

First Requests No. 7 All documents in any way pertaining to meetings or communications concerning the reasons why PANYNJ provided APMT the terms of EP-248.

PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control.

Maheer's Argument PANYNJ's award of the unduly preferential terms contained in lease EP-248 are [sic] directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maheer's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maheer's complaint is groundless, as well as moot.

**RULING:** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maheer whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maheer's First Requests No. 7 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 7 by stating whether it produced any documents pursuant to this request.

First Requests No. 8 *All correspondence, notes, records, memoranda, or other documents in any way pertaining to meetings or communications concerning EP-249 and allegations of the Complaint*

PANYNJ's Answer *The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents "concerning allegations of the Complaint." Subject to and without waiving the foregoing conclusions, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control*

Maher's Argument *PANYNJ's objection of "overbroad and unduly burdensome" and "vague and ambiguous" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. These blanket and general objections, unsupported or clarified by a memorandum of law, are not valid. There is nothing vague or ambiguous about the request for evidence concerning the complaint allegations and this is a proper request, as evidenced by the Presiding Officer's June 4th Order ruling that PANYNJ must produce all documents "pertaining to the allegations of Third Party Complainant that Maher breached EP-249" in Docket 07-01*

Port Authority's Response *Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

**RULING:** As the party resisting discovery [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly

burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 8 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 8 by stating whether it produced any documents pursuant to this request.

*First Requests No. 9 All correspondence, notes, records, memoranda, or other documents in any way pertaining to meetings or communications concerning the reasons why PANYNJ did not provide Maher the terms provided to APMT in EP-248.*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

*Maher's Argument. PANYNJ's refusal to provide the advantageous APMT terms to Maher is directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. There is nothing vague or overbroad about the request and PANYNJ must produce the responsive documents.*

*Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

**RULING:** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide

sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 9 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 9 by stating whether it produced any documents pursuant to this request.

*First Requests No. 10 All PANYNJ rules, regulations, and practices pertaining to leases and the allegations of the Complaint*

*PANYNJ's Answer* The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents "pertaining to allegations of the Complaint." The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

*Mahe's Argument*. The Presiding Officer's June 4th Order ruling that PANYNJ be required to produce all documents "pertaining to the allegations of Third Party Complainant that Mahe breached EP-249" in Docket 07-01 establishes that requests such as this, which request documents "pertaining to allegations of the Complaint" are proper and not overbroad or confusing. Moreover, PANYNJ's objection of "overbroad and unduly burdensome" or "vague and ambiguous" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and

*requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.*

*Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot*

**RULING.** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control " In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No 10 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No 10 by stating whether it produced any documents pursuant to this request.

*First Requests No. 12 All documents pertaining to the settlement communications between PANYNJ and APMT during 2007 and 2008 regarding APMT's claims as set forth in Federal Maritime Commission ("FMC") Docket No. 07-01*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. The Port Authority further objects to this request to the extent that it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

*Mahe's Argument* PANYNJ's errs in its objection that the interrogatory relates to information that is irrelevant to this proceeding. PANYNJ's utter refusal to deal with Maher meaningfully to settle its claims, while all the while engaging APMT and awarding a whole new series of undue preferences and advantages, bears directly upon the allegations in this proceeding which explicitly invoked PANYNJ's refusal to deal and undue preference in this regard.

*Port Authority's Response* Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

**RULING:** PANYNJ has not met its burden of showing that this request is not relevant. Roesberg, 85 F.R.D. at 296-97

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 12 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 12 by stating whether it produced any documents pursuant to this request.

PANYNJ objects to this request "to the extent that it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity." Maher challenged PANYNJ's assertion of this privilege. In its Response, PANYNJ stated that "no documents were withheld in response to this request based on the challenged objections." PANYNJ is ordered to supplement its Answer to Maher's First Requests No. 12 by stating whether it withheld any responsive documents pursuant to this Request. If so, PANYNJ is ordered to identify these documents in a privilege log. *Mahe v PANYNJ*, FMC No. 08-03, Order at 5 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order).

*First Requests No. 13* All documents that PANYNJ contends support the existence of a valid transportation purpose justifying the difference in terms provided to APMT under EP-248 as compared to the terms PANYNJ provided to Maher under EP-249

*PANYNJ's Answer* The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port

Authority further objects to this request on the grounds that it is vague and ambiguous, including in the use of the term "valid transportation purpose." The Port Authority further objects to this request to the extent that it calls for a legal conclusion. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument First, PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. PANYNJ's objection to the term "valid transportation purpose" as "vague and ambiguous" in this Shipping Act proceeding borders upon the frivolous. Indeed, PANYNJ's letter to the Presiding Officer dated July 23, 2008, in describing discovery requests on this point as "a roadmap to the Port Authority's defense," certainly evinced an understanding of the term "valid transportation purpose."

Second, PANYNJ fails to explain how the production of responsive documents could constitute a legal conclusion. To the extent that the production of responsive documents requires the application of the law to the facts of the case, this is permissible and appropriate. Rule 205 provides

*[A request] otherwise proper is not necessarily objectionable merely because an answer to the [request] involves an opinion or contention that relates to fact or the application of law to fact*

The application of law to fact is also specifically authorized by Rule 33(a)(2) "An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to the application of law to fact." In the same vein, the advisory committee's note to the 1970 amendment to Rule 33 explains "[R]equests for opinions or contentions that call for the application of law to fact can be most useful in sharpening the issues, which is a major purpose of discovery." To further that "major purpose," pursuant to Rule 33 parties are "required to disclose, to some extent mental impressions, opinions, or conclusions" in response to contention interrogatories. "[T]he only kind of interrogatory that is objectionable without more as a legal conclusion is one that extends to 'legal issues unrelated to the facts of the case.'"

Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself no documents were withheld in response to this request based on the

*challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

**RULING:** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D. 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control " In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No 13 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 13 by stating whether it produced any documents pursuant to this request.

*First Requests No. 14 All documents that PANYNJ contends support PANYNJ's contention that its actions do not exceed what is necessary to achieve a valid transportation purpose justifying the difference in terms provided to APMT under EP-248 as compared to the terms PANYNJ provided to Maher under EP-249*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous, including in the term "valid transportation purpose." The Port Authority further objects to this request to the extent that it calls for a legal conclusion. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

*Maher's Argument. First, PANYNJ's reasons for discriminating against Maher are directly at issue in this proceeding, and PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other*

sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Such blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Moreover, PANYNJ objects to this request as vague and ambiguous with regard to the term "valid transportation purpose" yet in its July 23, 2008 letter to the Presiding Officer, indicated that PANYNJ's objection to the term "valid transportation purpose" as "vague and ambiguous" in this Shipping Act proceeding is frivolous.

Second, PANYNJ fails to explain how the production of responsive documents could constitute a legal conclusion. To the extent that the production of responsive documents requires the application of the law to the facts of the case, this is permissible and appropriate. Rule 205 provides

*[A request] otherwise proper is not necessarily objectionable merely because an answer to the [request] involves an opinion or contention that relates to fact or the application of law to fact*

The application of law to fact is also specifically authorized by Rule 33(a)(2) "An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to the application of law to fact" In the same vein, the advisory committee's note to the 1970 amendment to Rule 33 explains "[R]equests for opinions or contentions that call for the application of law to fact can be most useful in sharpening the issues, which is a major purpose of discovery" To further that "major purpose" pursuant to Rule 33 parties are "required to disclose, to some extent, mental impressions, opinions, or conclusions in response to contention interrogatories. "[T]he only kind of interrogatory that is objectionable without more as a legal conclusion is one that extends to 'legal issues unrelated to the facts of the case. "

Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

**RULING:** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any that are in the Port Authority's possession, custody or control " In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 14 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 14 by stating whether it produced any documents pursuant to this request.

First Requests No. 17 *All communications, including all documents, between PANYNJ and APMT pertaining to the subject matter of the Complaint not covered by the foregoing requests.*

PANYNJ's Answer *The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents "pertaining to the subject matter of the Complaint not covered by the foregoing requests." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

Maher's Argument *PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Additionally, requests for documents pertaining to the allegations in the complaint are proper, and cannot be blocked with objections of overbreadth and confusion.*

Port Authority's Response. *Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

**RULING** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208 213 (D Kan. 2002) PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control " In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No 17 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No 17 by stating whether it produced any documents pursuant to this request.

*Second Requests No. 34 All documents pertaining to payments to PANYNJ investment commitments obtained by PANYNJ, or other conditions imposed by PANYNJ on lessees or terminal operators in connection with the sale or change of control of lessees or terminal operators, property, or other agreements, including but not limited to such requirements imposed in connection with APMT, the Port Newark Container Terminal and the Howland Hook Marine Terminal/New York Container Terminal, Inc.*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous, including in the use of the term "terminal operators." The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control*

*Maher's Argument PANYNJ's discrimination against Maher with respect to the change of ownership interest/control provision of EP-249 are [sic] the subject of this*

*proceeding. PANYNJ's objections of "overbroad and unduly burdensome" and "vague and ambiguous" require a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.*

*Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

**RULING.** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan 2002) PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control " In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's Second Requests No. 34 is insufficient

PANYNJ is ordered to supplement its answer to Maher's Second Requests No. 34 by stating whether it produced any documents pursuant to this request.

*Second Requests No. 35 All documents pertaining to attempts by Maher or PANYNJ to settle or resolve claims which are the subject of this proceeding.*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. The Port Authority further objects to this request to the extent that it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or*

*immunity Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

*Maier's Argument The request goes to PANYNJ's response to the allegations of the instant Complaint and communications regarding potential settlement of such claims, and PANYNJ's refusal to deal with Maier regarding its claims, in contrast to the unduly preferential concessions it granted APMT in exchange for its claims in Docket 07-01, and is therefore wholly relevant to the matters at issue and the allegations of the Complaint.*

*As to PANYNJ's assertion of the attorney client privilege and work product doctrine, it has failed to identify how or why that privilege applies, or to provide any privilege log. The vague assertion of privilege, without further detail or justification, cannot stand.*

*Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maier's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maier's complaint is groundless, as well as moot.*

**RULING** PANYNJ has not met its burden of showing that this request is not relevant. *Roesberg*, 85 F.R.D. at 296-97

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maier whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maier's Second Requests No. 35 is insufficient.

PANYNJ is ordered to supplement its answer to Maier's Second Requests No. 35 by stating whether it produced any documents pursuant to this request.

PANYNJ objects to this request "to the extent that it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity." Maier challenged PANYNJ's assertion of this privilege. In its Response, PANYNJ stated that "no documents were withheld in response to this request based on the challenged objections." PANYNJ is ordered to supplement its Answer to Maier's Second Requests No. 35 by stating whether it withheld any responsive documents pursuant to this Request. If so, PANYNJ is ordered to identify these documents in a privilege log. *Maier v PANYNJ*, FMC No. 08-03, Order at 5 (ALJ Aug. 1 2008) (August 1, 2008, Discovery Order).

*Second Requests No. 36. All documents pertaining to PANYNJ's refusal to deal with Maher in connection with the resolution or settlement of the claims at issue in this proceeding or FMC Docket No. 07-01*

*PANYNJ's Answer The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. The Port Authority further objects to the characterization in the request regarding "PANYNJ's refusal to deal with Maher " The Port Authority further objects to this request to the extent that it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any that are in the Port Authority's possession, custody, or control*

*Maher's Argument First, PANYNJ's errs in its objection that the interrogatory relates to information that is irrelevant to this proceeding. Although the conduct at issue arises from PANYNJ's handling of settlement in Docket 07-01, PANYNJ's utter refusal to engage Maher meaningfully to settle its claims, while all the while engaging APMT and awarding a whole new series of undue preferences and advantages, bears directly upon the allegations in this proceeding.*

*Second, as to PANYNJ's assertion of the attorney client privilege and work product doctrine, it has failed to identify how or why that privilege applies, or to provide any privilege log. This vague assertion of privilege, without further detail or justification, cannot stand.*

*Port Authority's Response Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

**RULING:**

Maher's Complaint alleges that PANYNJ "has and continues unreasonably to refuse to deal or negotiate with Maher " (Maher Complaint ¶ IV.A.(c).) Maher's use of the phrase "PANYNJ's refusal to deal with Maher" makes Second Requests No 36 a loaded question that assumes a legal conclusion that PANYNJ violated the Shipping Act. Maher's motion to compel additional response to Second Requests No. 36 is denied.

Second Requests No. 37 All documents pertaining to requests for PANYNJ's parity of treatment as between Maher and APMT, including but not limited to Maher's requests for treatment by PANYNJ equal or better to that provided by PANYNJ to APMT, and PANYNJ's responses thereto.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in the use of the phrase "parity of treatment." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument PANYNJ's failure to grant Maher's requests for the same treatment as that afforded APMT are directly at issue here. PANYNJ's objection of "overbroad and unduly burdensome" and "vague" require a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. PANYNJ's objection to the phrase "parity of treatment" in the context of this proceeding is frivolous. PANYNJ knows full well that Maher requested "parity" with APM and that PANYNJ ultimately refused to provide APM the same terms. Indeed, in its answers to Maher's interrogatories PANYNJ has conceded that it provided Maher disparate treatment in every respect

Port Authority's Response. The Port Authority made no such concession regarding disparate treatment in its interrogatory responses; nor does Maher cite any particular response to support its vacuous assertion to the contrary. In any event, although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

**RULING** As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

*Horizon Holdings, L.L.C. v Genmar Holdings, Inc.*, 209 F.R.D 208, 213 (D Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly

burdensome” and that it is “vague and ambiguous.” PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

Mahe’s Complaint alleges that PANYNJ “(a) gave and continues to give an undue and unreasonable prejudice or disadvantage with respect to Mahe [and] (b) gave and continues to give an undue and unreasonable preference or advantage with respect to APMT ” (Mahe Complaint ¶ IV.A.) Mahe’s use of the phrase “parity of treatment” makes Second Requests No 37 a loaded question that assumes a legal conclusion that PANYNJ violated the Shipping Act. That said, Mahe is entitled to documents “pertaining to requests for changes or amendments to Lease EP-249 and PANYNJ’s responses thereto.” PANYNJ is ordered to supplement its answer to Mahe’s Second Requests No. 37 by stating whether it produced any documents “pertaining to requests for changes or amendments to Lease EP-249 and PANYNJ’s responses thereto ”

On or before August 6, 2010, PANYNJ shall serve the supplemental responses as set forth above and shall file with the Secretary a Certificate of Compliance stating that it has served the supplemental responses.

### **PART 3 – PANYNJ’S MOTION TO COMPEL PRODUCTION FROM MAHER, MAHER’S MOTION FOR A PROTECTIVE ORDER**

PANYNJ moves to compel additional responses by Mahe to Interrogatory No 7 of PANYNJ’s first set of interrogatories, Interrogatories No. 2, 14, 15, 16, and 17 of PANYNJ’s second set of interrogatories, Requests for Production No 18 and 22 from PANYNJ’s first set of requests for production of documents, and Requests for Production No 16, 19, 20, and 22 from PANYNJ’s second set of requests for production of documents. Mahe is the party resisting production and “bears the burden of establishing lack of relevancy or undue burden.” *Oleson v Kmart Corp.* 175 F.R.D at 565, and “that the requested [information does] not come within the broad scope of relevance or else [is] of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure ” *Burke v New York City Police Department*, 115 F.R.D at 224

Mahe Terminals, LLC, is a limited liability company (Complaint ¶ I.A.) In 2007 the entity or entities that owned Mahe in 2000 when it entered into Lease EP-249 with PANYNJ sold Mahe to RREEF Infrastructure, part of Deutsche Asset Management’s RREEF Alternative Investments (RREEF). Each of PANYNJ’s interrogatories and requests at issue seeks.

- documents and information concerning Mahe’s financial performance and profitability, operational efficiency, and benefits obtained from PANYNJ throughout the period covered by the lease, together with the identity of third party consultants who may have performed analyses of such matters, [or]

- documents and information concerning Maher's presentation to potential buyers in 2007, including RREEF, in which it is highly probable that representations and analyses concerning Maher's terminal and long term lease, as well as its competitive position vis-à-vis other marine terminals in the Port, were conveyed.

(The Port Authority of New York and New Jersey's Motion to Compel Discovery from Complainant (PANYNJ Motion to Compel) at 18 ) Maher seeks to protect this information from discovery

In *Ceres Marine Terminal*, the Commission articulated the elements of proving a violation of the sections of the Act that PANYNJ violated in its dealings with Maher

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

*Ceres Marine Terminal v Md. Port Admin.*, No. 94-01, 27 S.R.R. 1251, 1270-71 (F.M.C. Oct. 10, 1997)[, *aff'd in part, rev'd in part sub nom. Maryland Port Admin. v Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table)].

Maher contends that.

This proceeding represents a straightforward application of *Ceres*. Maher makes out its *prima facie* case by showing the disparate lease terms caused by PANYNJ's refusal to give it the APM/Maersk lease terms, and then the burden shifts to PANYNJ to demonstrate valid contemporaneously considered and expressed transportation factors justifying the discrimination. *Ceres Marine Terminal, Inc. v Md. Port Admin.* No. 94-01, 27 S.R.R. 1251, 1270-72 (F.M.C. Oct. 10, 1997). Thus, PANYNJ must prove valid transportation factors justifying the discrimination, and that is the only proper object of its discovery – not a rank fishing expedition into how the discrimination affected Maher's profitability.

(*Id.* at 19) Maher argues that “under applicable Shipping Act precedent only PANYNJ's contemporaneous ‘expressed reason’ [for differences between Lease EP-248 and Lease EP-249] is relevant and ‘the proper measure of damages is the difference between the rate charged and collected and the rate which would have been charged but for the unlawful preference or prejudice.’” (Maher Opp. to PANYNJ Mot. to Compel at 17, quoting *Ceres* )

Maier argues that PANYNJ asserts "the untenable proposition that the Commission should consider events occurring after the discriminatory decision in evaluating whether discrimination is justified by valid transportation [sic] factors." (*Id.* at 20.) By seeking this information, Maier contends that

PANYNJ seeks improperly to expand dramatically the scope of discovery in this matter to include confidential and sensitive financial information that cannot have any bearing on the decisions in this case.

First, whether PANYNJ's refusal to provide Maier the same terms it provided to APM is lawful turns on PANYNJ meeting its burden of proof that it *expressed* legitimate transportation factors justifying the discrimination *at the time*. PANYNJ's belated proffer of *post-hoc* rationalizations of alleged transportation factors that did not exist prior to conclusion of the Maier lease in October 2000 is not a legal basis to obtain discovery into wholly unrelated events occurring after PANYNJ imposed disparate terms on Maier. Moreover, to the extent that PANYNJ did express or even rely upon such justifications at the time of the discrimination, any such documents would be found in PANYNJ's files, not Maier's. Rather than look to its own documents, as it should, PANYNJ seeks license to launch not only a rank fishing expedition, but also seeks to burden unduly this proceeding under a mountain of documents, to oppress Maier and the witnesses with burdensome questioning of no relevance, and to provoke further discovery disputes that increase the cost and burden on Maier to prosecute its claims.

Second, PANYNJ misconstrues the damages alleged in the Complaint. Maier's Complaint alleges damages for the difference between terms of its lease that are prejudicial to Maier as compared to the preferential terms in APM's lease. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. *Id.* at 1271 n.48. Nevertheless, PANYNJ asserts that "In addition to seeking damages for the period from 2000 to date, Maier claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT." But Maier makes no such "additional" damage claim. Misconstruing "competitive harm" as a separate and additional element of damages akin to lost profits or lost business, PANYNJ improperly seeks to explore years of Maier's financial and operational information totally that is irrelevant [sic] to the measure of the damages provided by the Commission authority

(Maier Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 1-3 (emphasis in original). *See also, id.* at 14-15 (similar discussion).)

The Act has a three-year statute of limitations for claims for reparations. "A person may file with the Commission a sworn complaint alleging a violation of this part. If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). *See also* 46 U.S.C. § 41305(b) ("If the complaint was filed within the period specified in section 41301(a) of this title, the Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.").

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury

*Inlet Fish Producers, Inc v Sea-Land Service, Inc.*, 29 S.R.R. 306, 314 (FMC 2001) (quoting *Connors v Hallmark & Son Coal Co*, 935 F.2d 336, 342 (D.C. Cir. 1991)).

Maher filed its Complaint June 2, 2008, nearly eight years after Maher and PANYNJ signed Lease EP-249. Therefore, in the April 14 Order, I asked the parties to address the effect of the statute of limitations on the information sought in discovery. I also asked them to address the question of whether the prospective nature of a cease and desist order would require consideration of current "transportation factors." *Maher v PANYNJ*, FMC No. 08-03, Order at 7-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs).

Question 1 of the April 14, 2010 Order asked.

- 1 Does Maher seek reparations for actual injury it claims resulted from acts in violation of the Shipping Act allegedly committed by PANYNJ in the period ending October 1, 2000, when Maher and PANYNJ entered into Lease EP-249? If so.
  - a. What is the legal theory that Maher contends permits an award of reparations for those acts?
  - b. What are the dates for which Maher seeks reparations?

*Maher v PANYNJ*, FMC No. 08-03, Order at 10-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs). Maher's short answer to this question is "Yes." (Maher's Brief per the Discovery Order of April 14, 2010 at 4.) Maher further responds by stating that "Maher's reparations claims are cognizable because they (1) arise from continuing violations of the Shipping Act, (2) the 'discovery rule' establishes that the claims did not accrue until May 2008, and (3) others arose more recently within the statutory period." (*Id.* at 5.)

With regard to the "discovery rule," Maher argues:

[T]he Commission applies the 'discovery rule,' so that if there was no continuing violation the limitations period only begins to run when the complainant possesses "conclusive information about such a dispute." *Inlet Fish Prod., Inc. v Sea-Land Serv, Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001). The case illustrates that suspicion of violations and knowledge of different terms is not enough. Only when complainant had "conclusive information" that the difference constituted an undue prejudice violating the Shipping Act did the claim accrue.

(*Id.* at 6.)

Whatever doubt may have existed that the information sought by PANYNJ's discovery fits within the broad scope of Rule 201(h), *see* Part 1, II.A, *supra*, is removed by Maher's response to the April 14 Order. Maher claims that its "understanding of its potential claims first arose during the summer, prior to the July 3, 2007 PANYNJ consent to the sale of Maher" and that it "only uncovered 'conclusive information' that it had Shipping Act claims against PANYNJ following the deposition of several key witnesses in Dkt. 07-01 [in 2008]" (Maher's Brief per the Discovery Order of April 14, 2010 at 6.) Maher also claims that "other[] [Shipping Act violations] arose more recently within the statutory period." (*Id.* at 5 ) Not only is the information sought by PANYNJ's discovery "relevant to the subject matter involved in the proceeding," but it relates to PANYNJ's statute of limitations defense and Maher's claim that other violations arose more recently. Even if the financial information itself is not admissible, the discovery sought could lead to the discovery of admissible evidence about Maher's knowledge of Lease EP-248 and how its compared to Lease EP-249 during the period from the signing of Lease EP-249 through the date Maher filed its Complaint and the other alleged violations that "arose more recently within the statutory period."

Accordingly, PANYNJ's discovery is reasonably calculated to lead to the discovery of admissible evidence and Maher does not meet its burden of establishing that the requested information does not come within the broad scope of relevance.

Maher moves for an order "prohibiting PANYNJ from inquiring into the above areas of dispute during depositions." (Maher Opp. to PANYNJ Mot. Compel at 39-41 ) For the reasons stated above, the motion for protective order is denied.

Interrogatory No. 7 (First Set) *Identify any and all bank presentations, bank books, prospectuses, financial analyses, and investor presentations, reports, and charts created by Greenhill and/or any other investment banking firm with respect to the transaction in which RREEF acquired the stock of Maher*

Maher's Response *Maher objects to this request as overbroad, unduly burdensome, and seeking information not reasonably calculated to lead to the discovery of*

*admissible evidence in this matter. The acquisition of Maher shares by RREEF in the summer of 2007 is immaterial to the claims and defenses in this proceeding. The PANYNJ actions that gave rise to the Shipping Act violations occurred before RREEF's acquisition of Maher shares last summer.*

*PANYNJ's Argument This request is reasonably calculated to lead to the discovery of admissible evidence for multiple reasons. While we obviously cannot know exactly what is in the documents that Maher has so desperately sought to withhold, the presentations to prospective purchasers would have undoubtedly contained statements candidly characterizing its premises and its long-term lease in positive terms, or may contain quantitative analysis demonstrating their great value, fully justifying the more than \$1 billion purchase price the business ultimately obtained, rather than as the unfair, discriminatory, uncompetitive albatross Maher now claims them to be. This type of evidence would not only tend to undermine the claims of discrimination, but could also reveal the new owner's recent claim of Shipping Act violation for the sham it is and certainly would also inform the Commission's discretion were it to consider re-writing any of the lease terms by way of a cease and desist order.*

*Second, it is highly likely that such materials contained analyses and representations concerning Maher's business, and the value and competitive advantages of Maher's lease and terminal. Maher likely explained, for example, that its terminal's particular location within the East Coast's busiest port is highly advantageous, that its physical configuration and access to truck and rail transportation give rise to particular efficiencies, how those physical characteristics compare with those of other terminals in the Port, etc. All such representations would be directly relevant to help prove that some or all of the differences between the APMT and Maher lease terms are attributable to differences in the premises leased.*

*Third, there was likely commentary in such materials as to Maher's competitive position in the Port (and who it viewed as its competitors) that may either support or contradict its position in this case that it is at a competitive disadvantage vis-à-vis APMT due to differing lease terms. For example, the presentations may say that Maher's location, access to ExpressRail, or linear berth space give it competitive advantages over its competitors in the Port. Or there may be statements to the effect that the APMT terminal is devoted largely to Maersk-related business and is not in competition with APMT (contrary to its litigation position in this case).*

*Fourth, the presentations may describe all of the efforts at the Port to improve its infrastructure and the turnaround in the Port's fortunes and position in the marketplace. This would be admissible against Maher to support PANYNJ's*

*point that its business strategy in entering the lease it did with APMT was successful, which certainly reinforces that its actions were reasonable and well-founded at the time*

*In short, there are myriad ways that this interrogatory could lead to admissible evidence. Of course, until we see the documents, we cannot know what is in them. But, as noted above on page 20, the standard is whether the discovery request at issue is reasonably calculated to lead to the discovery of admissible evidence. And this particular interrogatory, which asks Maher to identify documents in a defined category in which statements bearing on any number of relevant matters might reasonably be expected to be found, and which otherwise could lead to other admissible evidence (whether documentary or testimonial), is clearly within the permissible scope of discovery under FMC Rule § 502.201(g).*

*Maher's Specific Opposition. This request is not reasonably calculated to lead to the discovery of admissible evidence because it seeks to discover information that can have absolutely no bearing on the outcome of this proceeding as set forth in Section I, supra, and any interest in its disclosure is outweighed by the burden upon Maher and the likelihood that a foray into the detailed financials, operations, and purchases of Maher, APM, and their competitors is likely to lead to needless burden and expense and to unnecessarily complicate this proceeding as set forth in Section II above.*

*For example, PANYNJ seeks sales presentation material prepared by Maher in 2007 in the hopes that Maher, in an environment in which it was attempting to paint its business in the best possible light for would-be purchasers, will undermine its claim of discrimination by showing the Maher terminal's "great value", the "value and competitive advantages of Maher's lease and terminal", and its "competitive position in the port" PANYNJ's explanation of its request establishes its irrelevancy. Maher does not dispute that its business had value and was competitive when sold in 2007, and none of that is at issue. As explained by the Commission in both Ceres and Seacon, what is at issue here is simply whether PANYNJ's refusal to grant Maher the APM terms was based upon valid transportation factors according to the circumstances at that time, "without the benefit of hindsight or a consideration of later events." Any information concerning the sale of Maher's business in 2007 is wholly irrelevant. What is relevant is PANYNJ's contemporaneously expressed reason for the refusal—that ocean carrier Maersk was a risk to leave the port and Maher was not. The evidence of this improper reason is found in the testimony of PANYNJ's own witnesses and files, and not in sales presentations Maher may have created years later in a wholly different context.*

**RULING:** For the reasons stated above, Maher is ordered to respond to this interrogatory

Interrogatory No. 15 (Second Set) Identify all analyses of Maher's profitability, financial information, books, and records performed by RREEF

Mahe r's Response Mahe r objects to this request as vague overbroad, unduly burdensome, seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter

PANYNJ's Argument Like the last interrogatory just discussed, this one is similarly calculated to lead to the discovery of admissible evidence. RREEF is the entity that acquired the Mahe r terminal from the Mahe r brothers in 2007 for over \$1 billion. Along with its financial advisers, RREEF undoubtedly carefully analyzed Mahe r's terminal and the lease terms to which it is subject, including Mahe r's competitive advantages, terminal characteristics, and profitability under its lease, as well as how Mahe r stacked up against other competitors in the Port, including, potentially, APMT These analyses may well show that RREEF knows that Mahe r's premises and its long-term lease were particularly valuable and served as the basis for this flourishing business warranting the hefty price tag it paid for the business. Again, this would tend to undermine RREEF's current claim that the lease is either unduly discriminatory or a competitive albatross. In short, the interrogatory asks Mahe r to identify any such analyses performed by RREEF of which it is aware, which would facilitate PANYNJ's discovery of them and therefore is calculated to lead to the discovery of admissible evidence.

Mahe r s Specific Opposition. Mahe r agrees with PANYNJ s assessment that this request is "like the last interrogatory just discussed" and it is therefore not the proper subject of discovery for the reasons discussed in Mahe r specific opposition thereto. However, this material is even further removed from the realm of potentially relevant material. What calculations RREEF may have made when considering its purchase of Mahe r in 2007 cannot form the basis for PANYNJ's actual analysis and stated reasons for its refusal to grant Mahe r the requested APM deal in 2000 The information did not exist at the time PANYNJ refused to provide Mahe r the APM terms and PANYNJ could not have considered it. It is wholly irrelevant to this proceeding.

**RULING.** For the reasons stated above, Mahe r is ordered to respond to this interrogatory

Document Request No. 18 (First Set) All documents provided to prospective or actual purchasers of Mahe r (including RREEF), including bank presentations, bank books, prospectuses, financial analyses, investor presentations, reports and charts prepared by investors or investment banks, and the "Bank Book" or prospectuses prepared by Greenhill & Co., Inc.

Mahe r s Response Mahe r objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter

PANYNJ's Argument. This document request is the cognate of Interrogatory No. 7 (First Set) discussed above at page 24, and is proper for the same reasons.

Mahe r's Specific Opposition. This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 7 (First Set)

**RULING:** For the reasons stated above, Mahe r is ordered to respond to this request.

Document Request No. 20 (Second Set) All documents concerning any analyses conducted or performed by RREEF of the financial, accounting and operational books and records of Mahe r

Mahe r's Response Mahe r objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter

PANYNJ's Argument This document request is cognate of Interrogatory No 15 (Second Set) discussed above at page 26-27, and is proper for the same reasons.

Mahe r s Specific Opposition This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 15 (Second Set)

**RULING:** For the reasons stated above, Mahe r is ordered to respond to this request.

Document Request No. 22 (First Set) All documents concerning the financial condition of Mahe r for each year since 1997 to the present, including but not limited to financial statements and reports, income tax returns, general ledgers, income or cash flow statements, balance sheets, profit and loss statements, annual reports, periodic reports, statements of change in financial condition and forecasts, including projections of revenues, costs, earnings or profits.

Mahe r's Response Mahe r objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter

PANYNJ's Argument. *Maier cannot have it both ways. It cannot assert that it has been operating at a competitive disadvantage relative to APMT, on one hand, and then argue that it need not provide discovery concerning its financial performance, on the other. PANYNJ is entitled to challenge the basis for Maier's claim of competitive disadvantage through discovery and analysis. Maier's own financial documents showing its actual performance are the most relevant evidence on this point, not Maier's unsupported conclusory allegations.*

*The same financial materials are also relevant in analyzing the efficiencies inherent in the premises leased by Maier and in demonstrating advantages it has reaped through PANYNJ's actions in improving roadways and other benefits proximate to Maier's terminal. This would go directly to whether there was any discrimination at all, given the obvious differences in the characteristics of Maier's and APMT's premises.*

*The records sought will also likely show a marked deterioration in performance by Maier after its sale to RREEF -- a reflection of the heavy debt burden and/or operational changes imposed by new management -- that could help explain Maier's current motivation and good faith (or lack of it) in raising issues of discrimination after many years of performing under the lease without there having been any suggestion of a complaint of undue or unreasonable discrimination, and which could then be considered by the Commission in deciding whether to exercise its discretion to enter a cease and desist order in this case.*

*In short, there is a host of potential admissible uses for the documents sought, depending on what we find in them. Clearly, the request is reasonably calculated to lead to the discovery of admissible evidence.*

Maier's Specific Opposition. *This request is not reasonably calculated to lead to the discovery of admissible evidence because it seeks to discover information that can have absolutely no bearing on the outcome of this proceeding as set forth in Section I, supra, and any interest in its disclosure is outweighed by the burden upon Maier and the likelihood that a rank fishing expedition into the detailed financials, operations, and purchases of Maier and APM, will cause needless burden and expense and to unnecessarily complicate this proceeding as set forth in Section II above.*

*Maier's financial performance before and after PANYNJ refused to provide Maier the APM terms simply cannot, and does not, have any bearing upon the reason PANYNJ expressed at the time for refusing Maier the APM terms. There is no suggestion that PANYNJ relied upon the requested Maier financials when it decided to deny Maier the APM terms and, in fact, Maier has not disclosed this*

information to PANYNJ. Of course, as emphasized above, if we embark on the rank fishing expedition PANYNJ desires it will be necessary to conduct the same discovery with respect to APM, Maersk shipping lines, the parent, and their financial institutions and advisors. If Maher's alleged profitability, value, and financial details from November 2000 to the year 2008 can be used to justify PANYNJ's discrimination, that can only be so in comparison to the same information from the APM entities.

PANYNJ improperly seeks to expand this proceeding into a needless morass of profitability, valuation, and efficiency to derail the proceeding. PANYNJ knows full well that the proper Shipping Act analysis is simple and discrete, as described above, and does not call for the kind of detailed financial and competitiveness analysis found in antitrust litigation. See, e.g. *All Marine Moorings, Inc. v ITO Corp of Baltimore*, No 94-10, 27 S.R.R. 539, 546 (F M C. May 15, 1996) (adopting initial decision and quoting Judge Kline for the maxim that "[I]t is well to bear in mind that despite the use of antitrust terminology, such as 'monopoly' the Commission is not the Department of Justice nor the Federal Trade Commission but instead an agency that applies Shipping Act standards, not those of the antitrust laws."), *aff'g* No 94-10, 27 S.R.R. 342, 355 (A.L.J Oct 6, 1995) (also stating in the same analysis that "In recent years the Commission has confirmed this principle and resisted being drawn into complex antitrust analyses which the Commission was not set up to handle by Congress."), *Exclusive Tug Franchises*, No 01-06, 2002 29 S.R.R. 751, 756 (A.L.J Jan. 3 2002) ("the Commission is admittedly not an antitrust court or the Federal Trade Commission").

**RULING.** For the reasons stated above, Maher is ordered to respond to this request.

Document Request No. 19 (Second Set) All documents concerning and/or constituting Maher's financial, accounting and operational books and records for the period from 1997 through the present

Mahe's Response. Maher objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter

PANYNJ's Argument The same justification for Document Request No. 22 (First Set) discussed above at page 28 applies to this document request as well

Mahe's Specific Opposition. This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 22 (First Set).

**RULING** For the reasons stated above, Maher is ordered to respond to this request.

*Interrogatory No. 16 (Second Set)* - Identify all documents and communications concerning the efficiency and/or profitability of the Maher terminal at Port Elizabeth, the efficiency and/or profitability of other terminals at Port Elizabeth or Port Newark, and/or the efficiency and/or profitability of terminal business models (i.e. straddle carrier model or transcontainer model) from 1997 through the present.

*Mahe's Response.* Maher objects to this request as vague, overbroad, unduly burdensome, seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter. In addition to all of the foregoing, see also Maher business records produced as kept in the ordinary course of business.

*PANYNJ's Argument.* This interrogatory, much like the last two requests just discussed, seeks the identification of documents in a category in which it is reasonable to expect to find admissible evidence showing, potentially, that the Maher Terminal has been particularly efficient and profitable under the terms of its lease due to its physical characteristics and configuration (which configuration was made possible by the negotiation of the APMT and Maher leases) and is not at any competitive disadvantage, or that Maher's recent lack of profitability, if any, is a consequence of massive new debt and its own management decisions, as opposed to the lease terms. Again, until we see them, we cannot anticipate all the ways in which such documents can be used in the defense of the case, but it is obvious that the interrogatory is calculated to lead to the discovery of admissible evidence. And that is the applicable standard.

*Mahe's Specific Opposition.* This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 22 (First Set)

**RULING:** For the reasons stated above, Maher is ordered to respond to this interrogatory

*Document Request No. 22 (Second Set)* All documents concerning the efficiency and/or profitability of the Maher terminal at Port Elizabeth, including but not limited to internal and external evaluations and analyses during the period of January 1997 through the present

*Mahe's Response* Maher objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter

PANYNJ's Argument This document request is the cognate of Interrogatory No. 16 (Second Set) just discussed, and is proper for the same reasons.

Maier's Specific Opposition. This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 16 (Second Set)

**RULING:** For the reasons stated above, Maier is ordered to respond to this request.

Interrogatory No. 17 (Second Set) Identify all consultants regarding terminal efficiency and/or profitability retained by Maier during the period from 1997 through the present

Maier's Response Maier objects to this request as overbroad, unduly burdensome, seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter. Maier further objects to this request as seeking information subject to the attorney work product doctrine. Subject to the foregoing specific objection and the general objections and in an effort to be responsive, Maier retained the engineering consultants listed on the spreadsheet titled "Listing of Engineering Consultants" produced to PANYNJ but they are not "consultants regarding terminal efficiency and/or profitability."

PANYNJ's Argument This interrogatory is related to Interrogatory No. 16 (Second Set) just discussed in that it seeks the identity of third parties who may have analyzed Maier's efficiency and profitability so that PANYNJ can seek relevant information and documents in such consultants' possession, custody and control. Accordingly, the interrogatory is reasonably calculated to lead to the discovery of admissible evidence.

Maier's Specific Opposition: Subject to Maier's objections, Maier provided the responsive information requested. Maier is not aware of any other persons who might qualify as "consultants regarding terminal efficiency and/or profitability retained by Maier during the period from 1997 to the present." Maier further submits that discovery is continuing in this matter, and to the extent that it becomes aware of any further responsive, discoverable, and non-privileged information, it will produce such information.

**RULING:** For the reasons stated above, Maier is ordered to respond to this interrogatory

Interrogatory No. 14 (Second Set) *Identify all actual and projected revenues and expenses concerning all operating agreements for the Express Rail facility for the period from 2000 through the present, including but not limited to any sharing of revenues and/or expenses with APMT*

Maier's Response. *Maier objects to this request as vague, overbroad, unduly burdensome, exceeding principle and material facts seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter*

PANYNJ's Argument *Information regarding the operation, revenues and expenses related to the Express Rail facility is directly relevant to the Port Authority's defense in this case that to the extent that the provisions of the APMT and Maier leases differ to some extent, that is not a reflection of any unreasonable or undue discrimination, particularly considering the entire relationship between the parties, including the opportunities and benefits that PANYNJ made available to Maier but not to APMT See pp 12-15, supra. The information sought by this request will likely show the extent of Maier's control over the operations and which cargo was loaded or unloaded or given priority, as well the revenues and profits Maier generated from the operation of the facility All of this is relevant to demonstrate that when Maier exclusively operated the Express Rail from 2000 until 2004, it was afforded a significant opportunity that was not afforded to APMT, which tends to undermine the notion of unreasonable or undue discrimination. Indeed, like much of the give and take in the complex relationships between the Port Authority and Maier and APMT, this evidence bears directly on the question whether, considering all the circumstances, Maier is the victim of any discrimination at all. Accordingly, the interrogatory is reasonably calculated to lead to the discovery of admissible evidence.*

Maier's Specific Opposition *This request is not reasonably calculated to lead to the discovery of admissible evidence because it seeks to discover information that can have absolutely no bearing on the outcome of this proceeding as set forth in Section I, supra, and any interest in its disclosure is outweighed by the burden upon Maier and the likelihood that a fishing expedition into the detailed operational data and financials of Maier and APM will impose undue burden and expense and unnecessarily complicate this proceeding as set forth in Section II above. Maier's operation of ExpressRail from 2000 - 2004 was not the "expressed reason" for denying Maier the APM terms.*

*Any revenues or expenses related to the ExpressRail during the period after October 2000 cannot as a matter of law be relevant to PANYNJ's decision to deny Maier the APM terms in October 2000 Additionally, as a matter of fact it could not have been considered because it did not then exist. Nor is there any evidence it was*

*even considered by PANYNJ in denying Maher the APM terms. Finally, any information regarding the PANYNJ decision resides with PANYNJ, not Maher or others. However, as explained above Maher's detailed operational and financial information is voluminous and exceptionally sensitive and therefore constitutes an offsetting burden that significantly outweighs any possible benefit that could be obtained.*

**RULING:** For the reasons stated above, Maher is ordered to respond to this interrogatory

*PANYNJ Document Request No. 16 (Second Set) All documents concerning any operating agreement for the Express Rail facility, including but not limited to actual and projected revenues and expenses.*

*Mahe's Response Maher objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter*

*PANYNJ's Argument This document request is the cognate of Interrogatory No 14 (Second Set) just discussed and is proper for the same reasons.*

*Mahe's Specific Opposition. This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No 14 (Second Set)*

**RULING:** For the reasons stated above, Maher is ordered to respond to this request.

On or before August 6, 2010, Maher shall serve the responses as set forth above and shall file with the Secretary a Certificate of Compliance stating that it has served the responses.

**PART 4 – MAHER’S MOTION FOR DETERMINATION OF CLAIMS OF  
PRIVILEGE AND DETERMINATION OF WAIVER OF PRIVILEGE**

**I. BACKGROUND.**

“The inadvertent production of a privileged document is a specter that haunts every document intensive case.” *F.D.I.C. v Marine Midland Realty Credit Corp.*, 138 F.R.D 479, 479-480 (E.D Va. 1991). In this proceeding, PANYNJ contends that it inadvertently produced fifty-seven documents that are protected by the attorney-client privilege or as work product. It contends that the documents should be returned or destroyed. After Maher received PANYNJ’s letter requesting return or destruction and the parties engaged in negotiations to resolve their dispute, Maher filed this motion for determination of PANYNJ’s claims of privilege and determination of waiver of privilege.

The Secretary served Maher s first set of interrogatories and requests for production of documents on PANYNJ with Maher’s complaint. When the parties could not agree on a discovery schedule pursuant to Commission Rule 201, Maher proposed a schedule that would require responses to initial discovery requests to be served by August 16, 2008, and PANYNJ proposed a schedule that would require responses to discovery served prior to August 1, 2008, by September 10, 2008. *Maher v PANYNJ*, FMC 08-03, Order at 3 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order). I entered an Order requiring responses to initial discovery requests by August 29, 2008. *Id.* at 4

Maher states that on August 29, 2008, PANYNJ produced 460,000 electronic documents comprising approximately 1.7 million pages on several computer hard drives. (Maher Rule 26(b)(5)(B) Motion at 3 )<sup>3</sup> In a letter dated October 8, 2008, counsel for Maher notified counsel for PANYNJ that Maher’s counsel had identified three documents that Maher’s counsel thought may have been inadvertently produced. Later on October 8, 2008, PANYNJ served a privilege log. On October 9, 2008, counsel for PANYNJ sent a letter to counsel for Maher identifying fifty-eight documents that PANYNJ claimed were privileged or protected and that it had inadvertently produced on August 29 in response to Maher’s discovery requests. The letter cited Federal Rule of Civil Procedure 26(b)(5)(B) and newly-enacted Federal Rule of Evidence 502(b), which establishes provisions to “apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.” Fed. R. Evid. 502 PANYNJ claimed that each of the fifty-eight documents is protected by attorney client privilege and/or work product, the disclosure was inadvertent, and the documents should be returned. The fifty-eight documents are listed in the privilege log in Exhibit E attached to the Declaration of Holly E. Loiseau

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<sup>3</sup> Maher also states that PANYNJ later “conceded that nearly 300,000 of the 460,000 documents it produced were not responsive.” (Maher Rule 26(b)(5)(B) Motion at 3 ) PANYNJ states that “out of the 170,000 responsive documents it produced, only fifty-seven are at issue here.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 42.) Therefore, it appears that PANYNJ produced between 160,000 and 170,000 responsive documents on August 29

filed with PANYNJ's opposition to Maher's Rule 26(b)(5)(B) motion. A copy of Exhibit E is included with this Memorandum and Order as Attachment A.

Maher declined to return the documents. The parties conferred, but were not able to resolve their differences. On November 12, 2008, Maher filed a confidential version of its Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ (Maher Rule 26(b)(5)(B) Motion), followed by a public version of the motion on December 22, 2008. Maher designated five documents (1994, 1998, 2019, 2020, and 2021) for which it contends PANYNJ's assertion of attorney-client privilege is unwarranted (Maher Rule 26(b)(5)(B) Motion at 7-15) and thirteen documents (1991, 1989, 1990, 1992, 1993, 2008, 2009, 2010, 2012, 2013, 2014, 2015, and 1994) for which it contends PANYNJ's assertion of work-product protection is unwarranted. (*Id.* at 15-27.) Document 1994 is on both lists. Apparently, Maher agrees that the rest of the fifty-eight documents are privileged or protected. (*See id.* at 2 ("certain of the documents plainly do not qualify for the asserted protections") (emphasis added); at 9 ("counsel agreed during the October 24, 2008 meet and confer on this issue that Maher would not challenge the underlying claim of privilege for a document solely on the basis of an inadequate description if a review of the document itself demonstrated sufficiently that a privilege or protection attached. Accordingly, Maher has focused the foregoing challenge to PANYNJ's assertion of attorney-client privilege on five documents that do not appear on their face to warrant privilege protection."); at 16 (Maher has focused the foregoing challenge to PANYNJ's assertions of work-product protection to only 14 documents that do not appear on their face to warrant protection."))<sup>4</sup>

Whether or not the seventeen documents identified above are privileged or protected, Maher contends that PANYNJ waived any privilege and protection on all fifty-eight documents by producing them in response to Maher's discovery (*id.* at 27-45), and that this waiver extends to other documents concerning the subject matters contained in the documents. (*Id.* at 45-47.) Maher contends that newly-enacted Rule 502 should not be applied, but that resolution should be controlled by the law as it existed prior to the effective date of Rule 502. Maher claims that one document (Document 1994) should lose any protection it had because it was used to prepare witnesses for their depositions. (*Id.* at 9-12.)

On November 25, 2008, PANYNJ filed a confidential version of its memorandum in opposition to Maher's motion, followed by a public version on December 17, 2008. PANYNJ withdrew its designation as to Document 2021 for which it had claimed attorney-client privilege in the privilege log. (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 1 n.1.) PANYNJ contends that either the attorney-client privilege, work-product protection, or both applies to each of the other fifty-seven documents. (Memorandum in Opposition to Complainant's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion) at 23-27, 29-39.) PANYNJ

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<sup>4</sup> Maher states "14 documents" but only challenges thirteen documents. (Maher Rule 26(b)(5)(B) Motion at 16-27.)

attached affidavits of several persons with knowledge of the documents. PANYNJ contends that it produced the documents inadvertently it has not waived the privilege or protection to the documents, and the Maher should be ordered to return or destroy the documents. (*Id.* at 39-49 ) Even if it waived the privilege to some or all of the documents, PANYNJ contends that the waiver should not extend to undisclosed communications. (*Id.* at 49-51 ) PANYNJ contends that resolution of the motion is controlled by Rule 502. It contends that despite Maher's arguments to the contrary, Document 1994 retains its protection.

## II. CONTROLLING AUTHORITY.

As a preliminary matter, I must determine what controlling authority should apply in this controversy On September 19, 2008. Federal Rule of Evidence 502 was added to the Rules to "apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Fed. R. Evid. 502. "The amendments made by this Act [enacting Rule 502] shall apply in all proceedings commenced after [September 19, 2008] and, insofar as is just and practicable, in all proceedings pending on [September 19, 2008]" Pub L. No. 110-322, § 1(c), 122 Stat. 3537, 3538 (2008).

The Secretary received Maher's Complaint on June 3, 2008, and served the Complaint and Maher's initial discovery on June 11, 2008. (Letter dated June 11, 2008 from Karen V Gregory to PANYNJ ) Therefore, Maher commenced this proceeding before September 19, 2008, and it was pending on that date. When the parties could not agree on a discovery schedule, I entered a discovery order requiring the parties to serve responses to initial discovery requests by August 29, 2008. *Maher v PANYNJ* FMC No 08-03 Order at 4 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order) As noted above, on August 29 2008, PANYNJ produced 406,000 electronic documents comprising approximately 1.7 million pages on several computer hard drives, including all but two of the fifty-seven documents that are the subject of Maher's motion regarding privilege and waiver PANYNJ discovered its error on September 25 2008, and demanded return of the documents on October 9, 2008

In its motion, Maher summarizes the pre-Rule 502 standard governing waiver of attorney-client privilege and work product protection through inadvertent production. Maher argues that:

Whether an inadvertent disclosure of privileged communications or work product constitutes waiver has been addressed by courts across the country in three different ways. (1) the "strict accountability" approach, (2) the "never waived" approach and (3) the "middle test" approach.

The never waived approach finds that a disclosure that is merely negligent can never effect a waiver The strict accountability approach finds that disclosure automatically constitutes a waiver regardless of the intent or inadvertence of the privilege holder The middle test approach, often cited as the "Hydraflow Test", decides waiver by balancing five factors: (i) the reasonableness of precautions taken

to prevent disclosure; (ii) the number of documents inadvertently disclosed, (iii) the extent of the inadvertent disclosure; (iv) the promptness of rectification measures; and (v) whether “the overriding interest of justice would be served by relieving” the disclosing party of error

The two Federal Circuits where appeals in the proceeding could be taken – the DC Circuit and the Third Circuit – take different approaches. The DC Circuit adopted the strict accountability rule while the *Hydraflow* test and variations of the middle test have become the majority rule in district courts in the Third Circuit and other federal courts. The middle test is described as fairly addressing waiver in modern litigation, but treats carelessness with privileged material as an indication of waiver. It does not appear that the FMC has addressed the question of the waiver standard in published opinions.

(Maher Rule 26(b)(5)(B) Motion at 27-28 (citations and footnotes omitted).)

Maher contends that Rule 502 should not apply in this proceeding.

PANYNJ has asserted the Fed. R. Evid. 502(b) applies in this instance, but has not articulated why it would be “just and practicable” to apply 502(b) here. And as the facts demonstrate, it is not just to apply Rule 502(b) to PANYNJ’s disclosures here.

First, the document review and production undertaken by PANYNJ that is at issue in this motion took place entirely before Fed. R. Evid. 502 was enacted. The production in which the allegedly inadvertently disclosed documents were produced was delivered to Maher on August 29, 2008, before the new rule was enacted. The only reason that the new rule is at issue is because PANYNJ did not take any action to identify the allegedly inadvertently produced documents until five weeks after the documents were produced and just 18 days after the new Rule 502 was enacted. PANYNJ should not obtain the benefit of a more lenient rule governing waiver of inadvertently disclosed information after the parties should have reviewed for privilege under the then existing rules and after the disclosures had taken place. Had Congress intended Fed. R. Evid. 502 to have retroactive effect over all documents already produced in pending litigations, it could have so provided. It did not.

Second, PANYNJ was on notice during its review of the documents at issue that preexisting privilege waiver rules would apply to its August 29 2008 document production. The parties engaged in negotiations of a protective order early in this proceeding. PANYNJ initially proposed a provision addressing inadvertent privilege waiver that would have effectively precluded waiver for inadvertently produced documents. Maher objected because of the scope of the provision and because in its view waiver was adequately addressed by existing law. Thereafter, PANYNJ removed the provision from its drafts. Moreover, when the parties were ultimately

unable to reach an agreement on a stipulated protective order, PANYNJ did not include a claw back provision in its version of the proposed protective order submitted to the Presiding Officer. Indeed, PANYNJ counsel stated that it "took measures to avoid disclosure of privileged documents" knowing that existing law applied, not a more lenient agreement regarding waiver. Thus, PANYNJ was affirmatively on notice of the applicability of existing law to its privilege review and production and according to its own representation acted accordingly, PANYNJ should be estopped from claiming otherwise now. It is simply unjust for Maher to have undertaken a rigorous privilege review in light of the applicability of the existing waiver standard, but for PANYNJ to obtain the benefit of the more lenient standard to excuse its carelessness.

Given that the strict accountability approach of the District of Columbia Circuit does not require any factor analysis and simply considers the privileged waived, Maher will analyze waiver by inadvertent disclosure pursuant to the five factor "middle test" approach.

(*Id.* at 29-31 (footnotes omitted).)

PANYNJ contends that Rule 502 should apply to this proceeding. (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 18-23.) It argues that this proceeding is a "pending case" within the meaning of Rule 502, therefore, the inquiry "turns on whether it is 'just and practicable' to apply FRE 502 in the instant case." (*Id.* at 19-23.)

Maher contends that Rule 502 should not apply because PANYNJ produced the documents before the new rule was enacted and PANYNJ did not take any action to identify the documents until after the documents were produced and 18 days after the new Rule 502 was enacted. (Maher Rule 26(b)(5)(B) Motion at 27-28 (citations and footnotes omitted).)

The reason that the new Rule 502 is "at issue" is not because "PANYNJ did not take any action to identify the allegedly inadvertently produced documents until five weeks after the documents were produced and just 18 days after the new Rule 502 was enacted," but because the statute enacting the rule says "[t]he amendments made by this Act shall apply in all proceedings commenced after [September 19, 2008] and, insofar as is just and practicable, in all proceedings pending on [September 19, 2008]" Pub. L. No. 110-322, § 1(c), 122 Stat. 3537, 3538 (2008) (emphasis added). In cases filed before September 19, 2008, courts have applied Rule 502 in controversies over waiver for information produced before Rule 502 took effect. *See, e.g., Heriot v Byrne*, 257 F.R.D. 645, 650-651, 654 (N.D. Ill. 2009) (complaint filed April 21, 2008, documents produced August 25, 2008, claim of inadvertent disclosure asserted October 23, 2008, motion filed November 14, 2008); *Rhoads Industries, Inc. v Building Materials Corp. of America*, 254 F.R.D. 216, 218, 222-223 (E.D. Pa. 2008) (complaint filed in 2007, documents produced February and May 2008, privilege asserted June 5, 2008, privilege logs produced June 6, 2008, new privilege log produced June 30, 2008, with letter invoking Rule 26(b)(5)(B) seeking sequestration inadvertently

produced documents, motion to deem privilege waived filed August 19 2008) Although Congress may not have intended Rule 502 to have retroactive effect over *all* documents already produced in pending litigations, it did intend for Rule 502 to have effect insofar as is just and practicable. Congress definitely did not *prohibit* Rule 502's application to documents produced prior to its effective date as Maher seems to contend.

Maher also argues that "PANYNJ was on notice during its review of the documents at issue that preexisting privilege waiver rules would apply to its August 29, 2008 document production." (Maher Rule 26(b)(5)(B) Motion at 30 ) Maher contends that the combination of its rejection of PANYNJ's proposal to include a provision addressing inadvertent privilege waiver that would have effectively precluded waiver for inadvertently produced documents, PANYNJ's failure to include a claw back provision in the protective order, and PANYNJ's counsel's statement that PANYNJ also took measures to avoid the disclosure of privileged documents given that Maher's counsel had refused to agree to a standard provision governing the inadvertent production of privileged documents should estop PANYNJ from arguing that Rule 502 applies to PANYNJ's production. (*Id.*) PANYNJ contends that "[t]here was no implicit or explicit agreement between the parties to be bound by then existing law" (Loiseau Decl. ¶ 10 )

Maher does not cite any authority supporting a finding that PANYNJ's inability to convince Maher to include a provision "effectively preclud[ing] waiver for inadvertently produced documents" (equivalent to the "never waived" approach that Maher describes) in the protective order and/or failure to include a claw back provision in the protective order and/or counsels' measures to avoid the disclosure of privileged documents should estop PANYNJ from claiming Rule 502 applies in this proceeding, a rule based on the "middle ground" approach. Similarly, the fact that Maher did not seek to include a provision in the protective order establishing either the strict accountability or the pre-Rule 502 "middle test" approach does not estop Maher from arguing that Rule 502 does not apply

As Maher states, it does not appear that the Commission addressed the question of the waiver standard in published opinions prior to enactment of Rule 502. Therefore, application of Rule 502 would not conflict with any Commission precedent. Furthermore, it is not clear whether the law of the Third Circuit or the D.C. Circuit would have applied if there were no Rule 502. (Maher Rule 26(b)(5)(B) Motion at 27-28.) Accordingly, neither party could have had an expectation that either the strict accountability or the "middle test" would have been used. Rule 502 "opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error." Fed. R. Evid. 502, Explanatory Note (Revised 11/28/2007). With no clearly controlling law, if Rule 502 were not to be used in this proceeding, given Congress's elimination of the strict accountability rule, it would appear that use of the middle ground approach as articulated prior to Rule 502 rather than strict accountability would be appropriate.

PANYNJ produced the disputed documents shortly before the effective date of Rule 502. The first indication in the record that anyone realized there may be a problem came on September 25, 2008, after the effective date of Rule 502. As stated above, the courts have not hesitated to apply Rule 502 in cases filed before its effective date even when the dispute about whether waiver had occurred began before the effective date. *See Heriot v Byrne, supra; Rhoads Industries, Inc. v Building Materials Corp. of America, supra.*

I find that it would be just and practicable to apply Rule 502 in this proceeding. Therefore, I will decide the motion pursuant to Rule 502.

### III. APPLICATION OF FEDERAL RULE OF EVIDENCE 502.

With regard to inadvertent disclosures, Rule 502 provides.

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(b). The following test is used to apply Rule 502.

First, a court determines whether the disclosed material is privileged. If it is not, the inquiry ends. If the material is privileged, the court applies FRE 502(b). If the court concludes that disclosing party satisfied all of the elements in FRE 502(b), the privilege is not waived. If, however, the disclosing party fails to satisfy any of the FRE 502 elements, the privilege is waived.

*Heriot v Byrne*, 257 F.R.D. at 655 “The three-part test [for the 502(b) elements] finds that the disclosure is not a waiver if: (1) the disclosure was inadvertent, (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error” *Amobi v District of Columbia Dep’t of Corrections* 262 F.R.D. 45, 52 (D.D.C. 2009). Whether the attorney client privilege or work product protection has been waived is a mixed question of fact and law *See United States v de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) (attorney client privilege).

#### A. Are the Documents That PANYNJ Produced Communications or Information Covered by the Attorney-Client Privilege or Work-Product Protection?

PANYNJ contends that it inadvertently produced fifty-seven documents that are covered by attorney-client privilege, work product protection, or both. Rule 502 “makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client

privilege or work-product immunity as an initial matter” Fed. R. Evid. 502, explanatory note (revised 11/28/2007).

Maier contends that of the fifty-seven documents a tissue, sixteen are not privileged or protected. 1989, 1990, 1991, 1992, 1993, 1994, 1998, 2008, 2009, 2010, 2012, 2013, 2014, 2015, 2019, and 2020 (Maier Rule 26(b)(5)(B) Motion at 7-27) Since Maier does not contend otherwise, the other forty-one documents are found to be information covered by attorney-client privilege or work-product protection.

Document 1994 requires separate mention. PANYNJ claims both attorney-client privilege and work product protection for this document. Maier contends that Document 1994 was used by PANYNJ witnesses to refresh their recollections as part of preparation for depositions in FMC Docket No. 07-01 and “[a]s a document used to refresh witness recollection before testimony, Maier is entitled to the document regardless of the claimed privilege.” (*Id.* at 9, 26 ) In its discussion of this document, Maier does not challenge the PANYNJ’s claim that Document 1994 is protected by attorney-client privilege and work product protection. (Maier Rule 26(b)(5)(B) Motion at 9-12, 26-27) Federal Rule of Evidence 612 governs production of a writing used by a witness to refresh recollection for the purpose of testifying. Therefore, I need not determine whether Document 1994 is privileged or protected, but must determine whether PANYNJ waived protection of Document 1994 under Rule 612 of the Federal Rules of Evidence.

#### **1. Attorney-Client Privilege.**

The attorney-client privilege “is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v United States*, 524 U.S. 399, 403 (1998). By assuring confidentiality, the privilege encourages clients to make “full and frank” disclosures to their attorneys, who are then better able to provide candid advice and effective representation, which, in turn, serves “broader public interests in the observance of law and administration of justice.” *Upjohn Co. v United States*, 449 U.S. 383, 389 (1981). Whether or not the privilege exists in a particular situation is “a mixed question of law and fact.” *United States v Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990).

The following factors control whether a communication is protected by the attorney-client privilege.

- A party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication;
- The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice as well as an attorney’s advice in response to such disclosures;

- The fact that a person is a lawyer does not make all communications with that person privileged;
- Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed,
- An eight-part test determines whether information is covered by the attorney-client privilege:
  - (1) Where legal advice of any kind is sought;
  - (2) from a professional legal adviser in his capacity as such,
  - (3) the communications relating to that purpose
  - (4) made in confidence
  - (5) by the client,
  - (6) are at his instance permanently protected
  - (7) from disclosure by himself or by the legal adviser,
  - (8) unless the protection be waived,
- The party asserting the privilege bears the burden of proving each essential element.

*United States v Ruehle*, 583 F.3d 600, 606-608 (9th Cir 2009). The attorney-client “privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn Co. v United States*, 449 U.S. at 390. The privilege includes communications involving corporate officers and agents who possess the information requested by the attorney or who will act on the legal advice. *Id.*, *Santrade, Ltd. v General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993). Corporations may communicate privileged information at various levels without waiving the attorney-client privilege. *Santrade*, 150 F.R.D. at 545

**Document 1998 (Exhibit 2).<sup>5</sup>**

Document 1998 is a thread of emails written on January 22 and 23 2008, among several PANYNJ officials discussing Docket 07-01, the APM proceeding. The email “relates the legal advice provided to [the writer] by an attorney for the Port Authority” (Affidavit of Dennis Lombardi ¶ 11.) Communication of that advice among corporate levels does not waive the privilege. I find that PANYNJ has met its burden of establishing that Document 1998 is protected by attorney-client privilege.

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<sup>5</sup> The parties submitted more than one copy of the documents at issue to the Commission. For convenience, I will identify the documents attached as exhibits to Maher’s Rule 26(b)(5)(B) motion.

## Documents 2019 and 2020 (Exhibit 3).

Documents 2019 and 2020 are drafts of resolutions prepared by PANYNJ counsel ultimately presented to the PANYNJ board (apparently in a revised form) for approval. Maher contends that “the documents do not contain legal advice. Rather, they reflect the Commission’s decision to enter into the lease amendment.” (Maher Rule 26(b)(5)(B) Motion at 14 ) It contends that the documents are business related, not legal advice, and intended for public disclosure and therefore, they are not privileged. (*Id.*) PANYNJ argues that the documents were authored by an attorney as drafts of resolutions, not the final public version. I find that PANYNJ has met its burden of establishing that Documents 2019 and 2020 are protected by attorney-client privilege.

### 2. Work Product Protection.

Maher disputes PANYNJ’s assertion that Documents 1991, 1989, 1990, 1992, 1993 2008, 2009, 2010, 2012, 2013, 2014, and 2015, are protected as work product. Production of trial preparation materials is governed by Rule 26(b)(3)

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1) and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

Fed. R. Civ P 26(b)(3). The work-product doctrine reflects the strong “public policy underlying the orderly prosecution and defense of legal claims.” *Hickman v Taylor*, 329 U.S. 495, 510 (1947). It is distinct from and broader than the attorney-client privilege. *Id.* at 508. Documents prepared by agents as well as attorneys themselves are protected as work product. *United States v Nobles*, 422 U.S. 225, 238-239 and n.13 (1975). “The courts have . . . continued to provide a high degree of protection for attorneys’ litigation-preparation mental impressions.” Wright, Miller & Marcus, *Federal Practice and Procedure* § 2026 (3d ed. 2010). Production of opinion work product will only be required in “rare situations.” *Id.*

The Fourth Circuit held that the protection given an attorney’s mental impressions by the predecessor provision to Rule 26(b)(3)(B) is absolute and that “no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories.” That

court has also held that the protection of opinion material applies equally to lawyers and nonlawyers. Other courts have stopped short of absolute protection while recognizing that only remarkable circumstances would overcome protection.

*Id.* (footnotes omitted). As I find that “remarkable circumstances” are not present that would overcome work product protection, I do not find it necessary to decide between that standard and the “absolute” standard of the Fourth Circuit.

#### **Document 1991 (Exhibit 5).**

Document 1991 (dated 2/20/08) is a draft memorandum addressing Maher – APM Terminals. Although marked “ATTORNEY CLIENT PRIVILEGED [*sic*] & CONFIDENTIAL” and bearing the initials DFB, it otherwise does not indicate the identity of the author. Document 1989 also states “COMMENTS 2-26-08.” Document 1991 discusses the then-ongoing FMC No. 07-01 proceeding and the proceeding that Maher contemplated filing that eventually became this proceeding. Maher contends that even if PANYNJ can establish work product protection, Maher has substantial need for Document 1991 that overcomes the protection. (Maher Rule 26(b)(5)(B) Motion at 16-22.)

PANYNJ states that Document 1991 was authored by Robert Evans, a non-attorney, with the assistance of others including Donald Burke, a PANYNJ attorney, in preparation and anticipation of Docket 07-01 and this proceeding. (Affidavit of Robert Evans II ¶ 3.)

Document 1991 states the authors’ litigation-preparation mental impressions about then-ongoing Docket No. 07-01 and the potential for this proceeding. PANYNJ has established that the documents are protected as opinion work product, and Maher has not established remarkable circumstances that would require their production. Document 1991 is protected as work product.

#### **Document 1989 (Exhibit 6).**

Document 1989 (dated 2/20/08) is a later version of a Document 1991. Document 1989 also states “COMMENTS 2-26-08.” PANYNJ states that Document 1989 was authored by Robert Evans, a non-attorney, and Donald Burke, a PANYNJ attorney, in preparation and anticipation of Docket 07-01 and this proceeding. (Affidavit of Robert Evans II ¶ 2.) For the reasons stated for Document 1991, Document 1989 is protected as work product.

#### **Document 1990 (Exhibit 7).**

Document 1990 is an undated “DRAFT” “ATTORNEY CLIENT PRIVILEGED [*sic*] & CONFIDENTIAL” memorandum entitled “APM & Maher Issues – Discussion paper.” It sets forth the author’s opinions about PANYNJ’s controversies with APM and Maher. Maher does not address Document 1990’s status as work product. Maher argues that Document 1990 contains a “key admission” pertaining to the alleged improper enforcement of the indemnity provision of EP-249

against Maher by PANYNJ when PANYNJ filed its third-party complaint against Maher in Docket No 07-01. (Maher Rule 26(b)(5)(B) Motion at 22-23 )

PANYNJ states that Document 1990 was authored by Robert Evans, a non-attorney, with the assistance of others including Donald Burke, a PANYNJ attorney, in preparation and anticipation of Docket 07-01 and this proceeding. (Affidavit of Robert Evans II ¶ 2.)

Document 1990 states the authors' litigation-preparation mental impressions about then-ongoing Docket No. 07-01 and the potential for this proceeding. PANYNJ has established that Document 1990 is protected as opinion work product, and Maher has not established remarkable circumstances that would require their production. With regard to the "key admission" of a fact claimed by Maher, Maher has not established it has substantial need for the material to prepare its case. Document 1990 is protected as work product.

#### **Documents 1992 and 1993 (Exhibit 8).**

Documents 1992 and 1993 are two draft versions of PowerPoint presentations intended for "Resolution Discussions with APM." (Document 1993 ) Maher contends that even if PANYNJ can establish the documents are work product, it has a substantial need for the documents as proof of "collusion" between PANYNJ and APM.

PANYNJ states that Documents 1992 and 1993 are draft presentations prepared at the direction of PANYNJ attorneys to prepare for settlement discussions with APM. (Affidavit of Robert Evans II ¶ 2.) They were not provided or communicated to APM or any other outside party (Declaration of Holly E. Loiseau ¶ 18.)

Documents 1992 and 1993 identify the issues in Docket No. 07-01 and state the authors opinions about opportunities and issues for settlement and potential resolution of the controversy between PANYNJ and APM. PANYNJ has established that the documents are protected as opinion work product, and Maher has not established remarkable circumstances that would require their production. Documents 1992 and 1993 are protected as work product.

#### **Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 (Exhibit 9).<sup>6</sup>**

Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 are seven copies of what appear to be four versions a draft Third Supplemental Lease amending Lease EP-248 between PANYNJ and APM Terminals. Document 2012 also includes a letter dated May 13 2008. from PANYNJ official R.F Israel to APM Terminals. Israel states that the letter is a draft and that he does "not recall signing this draft letter or sending this letter to its noted recipient." (Affidavit of Rudy Israel ¶ 3 )

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<sup>6</sup> The cover page to this exhibit does not list Document 2008, but lists Document 2009 twice. Maher describes Exhibit 9 as including Document 2008. (Maher Rule 26(b)(5)(B) motion at 25 n.59 ) I assume that the first document in this exhibit is Document 2008

Maher does not explicitly address the Israel letter. Maher recognizes that the other documents are drafts, but contends that “[w]ithout information as to the authors, recipients, and whether the drafts were shared with APM, PANYNJ cannot satisfy its burden for demonstrating the work product protection. In addition, the documents are primarily business documents, not documents prepared for the purpose of preparing litigation.” (Maher Rule 26(b)(5)(B) Motion at 25.)

PANYNJ contends that the documents are

copies of lease agreements drafted in connection with the settlement agreement [in FMC No. 07-01] and constitute protected attorney work product. As the documents custodians affirm, these documents are non-final lease drafts, which Port Authority counsel prepared and circulated to a select number of Port Authority employees, in connection with counsel’s drafting of the settlement agreement. See Borrelli Aff. ¶ 2, Israel Aff. ¶ 2, Lombardi Aff. ¶ 14, Evans Aff. ¶ 7. These draft settlement documents are internal Port Authority documents that were not shared with APM or any other third-party (see Loiseau Decl. ¶ 18), and are therefore protected as attorney work product.

(PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 39 (footnote omitted).)

Normally, a draft of a supplemental lease provision amending an existing lease would probably be considered a business document not entitled to work product protection. In this case, however, the Borrelli, Israel, Lombardi, and Evans affidavits and the Loiseau declaration establish that PANYNJ counsel drafted the Third Supplemental Leases and Israel drafted the letter in Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 during the settlement negotiations between PANYNJ and APM in FMC Docket No. 07-01, see *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 24, 2008) (Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice), and the drafts were not shared with APM or any other third-party. Drafts of documents created as part of settlement negotiations are protected by the work product privilege. *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 263 (N.D. Ill. 2000); *Ferranti Intern., Inc. v. Willard*, No. Civ. A. 02-CV-404, 2003 WL 21960716, \*4 (E.D. Pa. June 25, 2003), *In re Subpoena Duces Tecum Served on Rosenman & Colin*, 3-92 CV 00301-WWE, 1996 WL 527331, at \*5 (S.D.N.Y. Sept. 16, 1996). “The work product doctrine applies in a subsequent case even if the documents were prepared in a prior litigation. The two cases need not be related as long as the documents were created by the parties to subsequent litigation.” *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. at 263 (citations omitted). Therefore, PANYNJ has established that Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 are protected as work product.

**B. Has PANYNJ Waived the Privilege or Protection by Producing the Documents?**

Rule 502 itself does not provide any guidance on who has the burden of proving waiver. In this district, prior to the enactment of the rule, “the proponent of the

privilege [had] the burden of showing that it [had] not waived attorney-client privilege ” I see no reason why Rule 502 can be interpreted to modify that rule and I will apply it.

*Amobi v District of Columbia Dept of Corrections*, 262 F.R.D 45, 53 (D.D.C. 2009) (citations omitted).

Maher addressed the “middle ground” standards in its motion. I will apply those arguments to the analogous Rule 502 factors.

### 1. Was the disclosure inadvertent?

Neither party directly addresses the question of whether the production of the contested documents was “inadvertent.”

The first step of the analysis is determining whether the disclosure was inadvertent. Rule 502 does not define inadvertent disclosure. Other courts have found that Rule 502(b) provides for a more simple analysis of considering if the party intended to produce a privileged document or if the production was a mistake. This interpretation seems to be in line with one of the goals of the drafting committee: to devise a rule to protect privilege in the face of an innocent mistake.

Additionally, defining inadvertent as mistaken comports with the dictionary definition of the word. “Of persons, their dispositions, etc. Not properly attentive or observant, inattentive, negligent, heedless. Of actions, etc. Characterized by want of attention or taking notice; hence, unintentional.” *The Oxford English Dictionary* (2d ed.1989), available at *OED Online*, Oxford University Press, <http://dictionary.oed.com/cgi/entry/50113734> There is every reason to suppose that Congress uses this definition. Additionally, permitting “inadvertence” to be a function of, for example, the amount of information that had to be reviewed or the time taken to prevent the disclosure melds two concepts, “inadvertence” and “reasonable efforts.” that should be kept distinct. One speaks to whether the disclosure was unintended while the other speaks to what efforts were made to prevent it. I will therefore use the word “inadvertent” from Rule 502 to mean an unintended disclosure.

*Amobi v District of Columbia Dept. of Corrections*, 262 F.R.D at 53 (citations omitted). See also *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F Supp. 2d 1032, 1038 (N.D Ill 2009) (citations omitted) (“In this court’s view, the structure of Rule 502 suggests that the analysis under subpart (b)(1) is intended to be much simpler, essentially asking whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake.”).

Maher does not contend that PANYNJ deliberately produced the contested documents for some undisclosed motive, then changed its mind and requested their return. PANYNJ's efforts to secure return of the documents discussed below supports a finding that it did not intend to produce documents revealing information that it believes should be protected or privileged. Therefore, I find that production of the disputed documents was "inadvertent" within the meaning of Rule 502(b)(1).

## 2. Did PANYNJ take reasonable steps to prevent disclosure?

Maher contends that PANYNJ "simply did not take its responsibility to safeguard privilege seriously and failed to implement reasonable precautions to avoid disclosing privileged and/or work product protected documents." (Maher Rule 26(b)(5)(B) Motion at 31 ) As stated, the burden is on PANYNJ to demonstrate that it took reasonable steps to prevent disclosure.

Maher contends that:

PANYNJ's reasons for the disclosures, expressed by counsel during the October 24 2008 meet and confer, were that the production was large, there was not a lot of time, and that PANYNJ had conducted "multiple searches" electronically for privilege, including for the term "privileged" and for persons identified as PANYNJ s counsel, but that for unknown reason [*sic*] PANYNJ's electronic searches failed to discover the documents prior to their disclosure for Maher

(*Id.*) After receiving the letter from counsel for PANYNJ asking for return of the documents, one of Maher's counsel states that he conducted an electronic search of the documents.

- 11 Also on October 9, 2008, I compared the new tag for the 58 documents against the "reviewed" tag and determined that 51 of the 58 documents had previously been reviewed by Maher counsel.
12. The database also reported that the 58 documents comprised 320 pages and that 44 of the 58 documents were native electronic documents (and therefore contained full metadata)
- 13 During the preparation of the Rule 26(b)(5)(B) motion, I conducted a series of searches in the database against the document records tagged as inadvertently produced. Searches for "privileged" and "Confidential" identified the records for 4 of the 58 documents, including Documents 1989, 1990, 1991 and 1994 Searches for prominent PANYNJ counsel, such as "Burke" and "Berry" identified 33 of the 58. Each search took approximately 10 seconds to type and returned results virtually immediately

(Morrissey Aff.) Maher argues that "PANYNJ either did not run *basic* searches properly, or if it did, then it failed to properly segregate the allegedly privileged documents for production." (Maher Rule 26(b)(5)(B) Motion at 32 (emphasis in original) )

PANYNJ contends that it "produced approximately one million pages of documents within just several weeks time. Extensive safeguards were implemented to identify potentially privileged documents, but a handful nonetheless were inadvertently produced. This is the precise circumstance for which FRE 502(b) was intended." (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 40 )

PANYNJ and its counsel retained Huron Consulting Group (Huron), an electronic discovery vendor, to assist in collecting, processing, reviewing, and producing the documents. PANYNJ attached an affidavit of George Marinos, a Managing Director for Huron, and a declaration of Holly E. Loiseau, a partner in Weil, Gotshal & Manges LLP (Weil Gotshal), PANYNJ's outside counsel setting forth the steps PANYNJ took to prevent disclosure of protected and privileged information. (Marinos Aff ¶ 2, Loiseau Decl. ¶ 5 )

PANYNJ states that during collection of the documents, custodians were questioned about the potential for privileged information in their documents so that "custodian-specific" precautions could be taken. PANYNJ and Huron created a privilege filter to apply to the documents to identify documents that might be privileged or subject to work product protection. Huron guided the selection of the eighteen legal terms and 150 other search terms used in the filters. These terms included the identities of in-house and outside counsel and law firms. (Marinos Aff ¶¶ 3, 4, Loiseau Decl ¶ 6.) Counsel identified some documents that were determined not to need review because the custodian did not have contact with counsel. All reviewed documents that hit one or more terms of the privilege filter were reviewed by at least one attorney for privilege. (Marinos Aff. ¶ 5, Loiseau Decl ¶ 7 ) "More than seventy Huron legal review professionals (each with a *juris doctorate* degree) assisted with the document review. All of the review professionals underwent training by Weil Gotshal attorneys and Huron document review coordinators regarding how to conduct the privilege review." (Marinos Aff ¶ 6 )

In addition, over ten Weil Gotshal attorneys assisted in the privilege review. The attorneys who participated in the review were instructed to err on the side of tagging documents "privileged" if there was a potential of claiming privilege, so that any potentially privileged documents would receive at least one additional level of attorney review in connection with preparing the privilege log. All documents marked privileged underwent a close review by one or more attorneys in connection with constructing the privilege log.

(Loiseau Decl. ¶ 8 ) A seven member quality control team of seven review professionals and a Huron project manager conducted a second-level quality control review. The team reviewed a sampling of the documents to be produced, that is, the documents designated as responsive and not tagged as privileged in the first-level review. The team also looked for potential errors made by individual

reviewers. (Marinos Aff ¶ 7) "Huron review professionals and employees logged over 1,600 hours performing the quality control analysis." (*Id.*) Huron professionals reviewed nearly 300,000 documents that hit the privilege filter. Over 4,000 were determined to be privileged and were not produced. More than 1,200 documents that did not hit the filter were also tagged as privileged. (Marinos Aff. ¶ 8) PANYNJ also initially withheld all documents collected from certain custodians so they could be reviewed by Weil Gotshal attorneys prior to production. (Marinos Aff. ¶ 9)

PANYNJ describes the errors that led to the production of the documents at issue as follows.

- 10 On or about October 7, 2008, Weil Gotshal brought to Huron's attention a produced document that should have been withheld as privileged. Huron immediately investigated the issue, and determined that the document (and several other documents) were inadvertently produced because a third-party processing vendor, supervised by Huron, assisting in the review committed a configuration error with regard to one "batch" of documents belonging to a particular custodian (Robert Evans) (the "Evans Batch"). Huron informed Weil Gotshal of this error on the afternoon of October 8, 2008.
- 11 The following is a description of the error: In order to process the collected electronic documents for review, Huron's processing vendor used iPRO, a widely-used industry accepted software application. While processing the Evans Batch, a vendor technician erroneously selected the wrong setting as part of a standard process to eliminate exact duplicate documents with the custodian's population. This improper selection caused certain documents to entirely bypass the processing-review-QC-production workflow, which was carefully designed to prevent inadvertent production of privileged documents. The documents in the Evans Batch were thus not subjected to the privilege filter or the review and QC processes at all. As a result, certain privileged documents were inadvertently produced. Under the circumstances, there was no practical or reasonable way for the error to have been detected by anyone prior to production.
12. Huron has reviewed a list of the 57 documents that Weil Gotshal has identified in the instant motion. Thirty-four of the documents were inadvertently produced on August 29, 2008 as a result of the error described in ¶ 11 above. As to the remaining 23 documents, 11 of the documents did not "hit" the privilege filter, as they do not contain any of the search terms or names used in the filter, and were therefore not reviewed prior to being produced on August 29, 2008. The remaining 12 documents "hit" the privilege filter and were reviewed by a Weil Gotshal attorney and/or Huron review professional prior to production, but the documents were not tagged as privileged due to professional error and so were inadvertently produced.

10 as part of the August 29 production, and 2 as part of a September 29 supplemental production.

(Marmos Aff)

The Advisory Committee's Explanatory Note sets forth the multiple factors that had been applied in the middle ground standard, then states.

The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure.

Fed. R. Evid. 502, explanatory note (revised 11/28/2007).

Maher focuses its argument on the fact that PANYNJ produced privileged documents, therefore, PANYNJ must not have taken reasonable steps to prevent disclosure. If no privileged documents are produced, then the producing party took reasonable steps. If documents are produced, then the producing party did not take reasonable steps, because reasonable steps would have prevented production. Maher's argument seems to vitiate Rule 502.

The proper focus should be on the steps that producing party took to avoid disclosure, not whether those steps actually prevented disclosure. Otherwise, Rule 502 would always result in waiver of protection and privileges when documents are inadvertently produced. This clearly is not the intent of the Rule.

As set forth above, the affidavits submitted by PANYNJ support a finding that it used advanced analytical software applications and linguistic tools in screening for privilege and work product. Although those steps were not entirely successful, they were reasonable. Therefore, PANYNJ has established that it took reasonable steps to avoid disclosure within the meaning of Rule 502.

### **3. Did PANYNJ promptly take reasonable steps to rectify the error?**

Maher contends that PANYNJ did not act promptly to protect its privilege and work product. As stated above, the burden is on PANYNJ to demonstrate that it promptly took reasonable steps to rectify the error

Maher argues that:

PANYNJ first notified Maher of its inadvertent disclosure *five weeks* after its initial document production. During that time, PANYNJ continued to extensively review its document production. Following Maher's motion to compel on September 24, 2008, PANYNJ was engaged in re-reviewing the same 17 million page production to remove non-responsive documents. PANYNJ was apparently able to conduct that review between September 24, 2008 and October 3, 2008 when PANYNJ provided Maher the list of 300,000 non-responsive documents that had nevertheless been produced. PANYNJ similarly re-reviewed the initial production for confidentiality during the same general time frame. PANYNJ also supplemented its production twice before this issue arose, on September 22, 2008 and September 26, 2008. Indeed, PANYNJ admits that "roughly half" of over \$4 million in document review costs were expended in the review activities after the initial production, including \$1 million for contract attorney review after the initial production. PANYNJ should have also identified the allegedly inadvertently produced documents during the time it was re-reviewing the same documents a second and third time, yet despite the extensive re-reviewing and additional document production, PANYNJ still did not perform a proper privilege review.

It was not until Maher first notified PANYNJ on October 8, 2008 about three potentially inadvertently disclosed documents Maher came across during its review of PANYNJ's production that PANYNJ took action to notify Maher. And while PANYNJ may portray its response the following day identifying 58 allegedly inadvertently produced documents as evidence of promptness, PANYNJ's next-day response underscores the simplicity and ease of the *basic* privilege review that PANYNJ should have accomplished before its production, and again in the ensuing weeks while it repeatedly re-reviewed the same production. Moreover, the fact that PANYNJ's action was prompted by Maher further undermines the suggestion that it acted "promptly."

(Maher Rule 26(b)(5)(B) Motion at 39-40 (emphasis in original) (footnotes omitted) )

PANYNJ contends that it learned that it had produced protected and privileged documents in late September while reviewing its production in connection with deposition preparation and related tasks.<sup>7</sup>

More specifically, on or about September 25, 2008, Weil Gotshal discovered that approximately six documents had been inadvertently produced, at which point it immediately took steps to determine whether the production contained and duplicate documents, or any other inadvertently produced privileged documents. Multiple versions of three additional privileged documents that had been inadvertently

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<sup>7</sup> I do not credit Maher's apparent contention that PANYNJ's October 9 letter was prompted solely by Maher's October 8 letter.

produced were identified as a result of these efforts. Weil Gotshal also reached out to Huron to determine whether there was any processing or other issues that could have caused the inadvertent production.

(Loiseau Decl. ¶ 11 ) This discovery led to the review described in paragraphs 10-12 in the Marmos affidavit set forth above.

PANYNJ states that it then took the following actions:

12. On or about October 8, 2008, Weil Gotshal drafted a letter to Maher s counsel recalling the inadvertently-produced privileged document it had discovered. Just as the letter was being finalized, two events occurred. First, Huron identified a technical error on its part that had resulted in a batch of documents erroneously having been included in the production. *See* Marinos Aff. ¶¶ 10-11 Second, the Port Authority received a letter from Maher s counsel alerting it to three privileged documents they had identified in the Port Authority's production. *See* October 8, 2008 letter from G. Morrissey to H. Loiseau All three of these documents were produced due to Huron's processing error
- 13 As a result of these developments, the Port Authority immediately reviewed the newly identified documents (several of which had already been identified by Weil Gotshal, and which Weil Gotshal was already intending to recall), and sent a letter on October 9, notifying Maher about the inadvertent production of fifty-eight specified documents. *See* October 9, 2008 letter from H. Loiseau to L. Kiern The Port Authority intentionally included on its privilege log, served on October 8, complete descriptions of those inadvertently-produced privileged documents of which it was aware at the time the privilege log was completed (a list of Port Authority counsel was sent to Maher along with the privilege log.) Detailed descriptions of all the documents now at issue were included in the Port Authority's revised privilege log, served October 20

(Loiseau Decl.)

The Advisory Committee's Explanatory Note to Rule 502 states:

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently

Fed. R. Evid. 502, explanatory note (revised 11/28/2007).

The first consideration is whether PANYNJ acted promptly once it learned that documents it considered to be protected or privileged had been produced. Forty-one calendar days elapsed between August 29 when PANYNJ produced all but two of the documents at issue and October 9 when it sent the letter to Maher requesting their return. PANYNJ states that on September 25 “Weil Gotshal discovered that approximately six documents had been inadvertently produced, *at which point it immediately took steps to determine* whether the production contained any duplicate documents, or any other inadvertently produced privileged documents.” (Loiseau Decl ¶ 11 (emphasis added).)

PANYNJ states that it “identified approximately six privileged documents on or about September 25, 2008, and then immediately took steps to search the production for duplicate or additional privileged documents that may have been inadvertently produced.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion) at 44, Loiseau Decl. ¶ 11 ) Fourteen calendar days elapsed between September 25 when PANYNJ states it discovered that it had produced the protected or privileged documents and October 9 when it first contacted Maher PANYNJ identified the other protected and privileged documents in its review between September 25 and October 8

Prior to Rule 502, courts in [the Seventh Circuit] looked to the time between a party’s learning of the disclosure and that party’s taking action to remedy it, rather than the time that elapsed since the document was placed in the hands of the other party. See e.g. [*Judson Atkinson Candies, Inc. v Latini-Hohberger Dhimantec*, 529 F.3d 371, 389 (7th Cir. 2008)] (looking to the time between the filing of the disputed document as an exhibit and the producing party’s request for return), *U.S. v Natl. Assn. of Realtors*, 242 F.R.D. 491, 495 (N.D. Ill. 2007) (no waiver where several years elapsed between production and party’s knowledge of the disclosure but the party took “virtually no time” to rectify the error). The Committee’s comment that Rule 502 does not require a post-production review supports this view that the relevant time under subpart (b)(3) is how long it took the producing party to act after it learned that the privileged or protected document had been produced.

*Coburn Group v Whitecap Advisors*, 640 F. Supp. 2d at 1040-1041. Therefore, I conclude that September 25 is the appropriate starting date to determine whether PANYNJ promptly took reasonable steps to rectify the error.

Despite learning of the inadvertent production September 25 PANYNJ did not draft a letter to Maher requesting return until October 8, thirteen days later, and did not send the letter until October 9 (Loiseau Decl. ¶ 13 ) More importantly, however, Huron apparently did most of the work screening the documents prior to production as “[m]ore than seventy Huron legal review professionals assisted with the document review (Marinos Aff. ¶ 6.) Yet PANYNJ did not bring “to Huron’s attention a produced document that should have been withheld as privileged” until October 7 (Marinos Aff. at ¶ 10 ) When confronted by the specter of inadvertent production of

privileged and protected documents, PANYNJ delayed twelve days before contacting the vendor that was the likely (and turned out to be the actual - Marinos Aff. at ¶ 11-12, Loiseau Decl. ¶ 12) cause of the inadvertent production of most of the documents. It was another two days before PANYNJ sent its letter to Maher asserting the privilege. (Loiseau Decl ¶ 13 ) PANYNJ does not explain this delay

It is appropriate to look to cases decided pursuant to Rule 502 and to pre-Rule 502 cases regarding the meaning of “promptly” See *Luna Gaming-San Diego, LLC v Dorsey & Whitney LLP*, 2010 WL 275083, at \*5 (S.D Cal. January 13, 2010); *Coburn Group v Whitecap Advisors*, *supra*

PANYNJ argues that “[t]his entire series of events spanned but two weeks, well within the bounds of ‘promptness’ for investigating and addressing such a serious matter” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 44 ) PANYNJ relies on *Prescient Partners, L.P v Fieldcrest Cannon, Inc.*, No 96 Civ 7590, 1997 WL 736726 (S.D.N Y Nov 26, 1997) to support its claim that “no inordinate delay occurred where counsel began a post-production review to uncover other inadvertently-produced material and sent the defendants a list of documents one month after initially becoming aware of an inadvertent disclosure.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 44 n.75 ) In *Prescient Partners*, the court found that:

No inordinate delay occurred in this case because PRescient’s [sic] counsel wrote defendants’ counsel *the day after learning of the error* to demand return of the documents. After receiving the defendants’ final refusal to return the documents on August 22, 1997, PRescient’s counsel began a comprehensive review to uncover other inadvertently produced privileged material and sent the defendants what they believed was a comprehensive list of inadvertently produced documents eighteen days later on September 9, 1997

*Id.* at \*6 (emphasis added). The immediate demand for return of the documents by Prescient contrasts with PANYNJ’s fourteen day delay in seeking return of the documents from Maher. In the other cases cited by PANYNJ, three business days was the longest period to elapse before the producing party contacted the receiving party to seek return of the documents. See *Rhoads Industries, Inc. v Building Materials Corp. of Am.*, 254 F.R.D at 225-227 (Rule 502) (upon being informed of apparent production of privileged documents, immediate response of producing party stating that no privilege had been waived and this was likely a case of inadvertent production favored producing party; producing party’s three week delay in producing a privilege log of the inadvertently produced documents once it was aware of its mistake favored receiving party; “promptness” factor overall favored receiving party, but “interest of justice” precluded waiver); *Bensel v Air Line Pilots Ass’n*, 248 F.R.D 177, 179-181 (D.N.J 2008) (“promptly taking reasonable steps to rectify” factor found to be neutral where new counsel for producing party learned of production and asserted privilege for one document during a deposition September 19, 2006, identified other documents on a privilege log dated November 6, 2006, then waited almost one year to file motion for protective order); *U.S. Fidelity & Guaranty Co. v Braspetro Oil Services Co.* Nos. 97 Civ 6124 (JGK)(THK),

98 Civ 3099 (JGK)(THK). 2000 WL 744369 (S.D.N.Y. June 8, 2000) (documents available for inspection from January 11-28, 2000; informing counsel of inadvertent production on January 21 followed by letter to counsel the next business day constituted prompt action to rectify the disclosure), *Zapata v IBP, Inc.*, 175 F.R.D. 574, 577 (D. Kan. 1997) (counsel for party producing documents contacted opposing counsel the day the inadvertent disclosure was discovered, and attempted to rectify the error by requesting return); *Georgia-Pacific Corp v GAF Roofing Mfg. Co* No. 93 Civ 5125 1995 WL 117871, at \*2 (S.D.N.Y. Mar 20 1995) (reacting two business days after discovery of the inadvertent disclosure was not a delay); *In re Grand Jury Investigation*, 142 F.R.D. 276 (M.D.N.C. 1992); (January 2, 1992 (Thursday) – discovered that a single privileged document had been produced, January 7 (Tuesday) (three business days later) – contacted the appropriate attorney within DOJ, identified document, advised of inadvertent disclosure, and requested return; re-reviewed documents produced and identified seventeen more privileged for a total of eighteen, January 31, DOJ advised it would not return documents, February 3, producing party filed motion for a protective order).

Other cases applying Rule 502 and pre-Rule 502 law have similarly short periods. *See e.g.*, *Kandel v Brother Intern. Corp.*, 683 F. Supp. 2d 1076, 1085 (C.D. Cal. 2010) (Rule 502) (after discovering inadvertent production in mid-August, immediately contacting third-party consultant to run omitted searches followed by letter requesting return on August 24 determined to be prompt); *Rhoades v Young Women's Christian Ass'n of Greater Pittsburgh*, Civil Action No. 09-261, 2009 WL 3319820, at \*3 (W.D. Pa. Oct. 14, 2009) (Rule 502) (letter to receiving party demanding return of privileged documents sent five days after production found to be prompt); *Synergetics USA, Inc. v Alcon Laboratories, Inc.*, No. 08 CIV 3669 (DLC), 2009 WL 2016795 at \*1 (S.D.N.Y. July 09, 2009) (Rule 502) (request for return three days after discovery of inadvertent production is timely), *Metso Minerals Inc. v Powerscreen Intern. Distribution Ltd.*, No. CV-06-1446 (ADS)(ETB), 2007 WL-2667992, at \*5 (E.D.N.Y. 2007) (requesting either their immediate return or certification of destruction of documents two business days later is not inordinate delay); *United States v Rigas*, 281 F. Supp. 2d 733, 741 (S.D.N.Y. 2003) (sending letter asserting privilege on same day producing party became aware of the inadvertent production and following up the next day clearly weighs against a finding of waiver); *Aramony v United Way of America*, 969 F. Supp. 226, 237 (S.D.N.Y. 1997) (“[A] request for the return of the privileged material within twenty-four hours of learning of the inadvertent production weighs against a loss of privilege.”); *Bank Brussels Lambert v Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437 445 (S.D.N.Y. 1995) (no waiver of privilege by inadvertent production where “[a]s soon as plaintiffs’ counsel were alerted to the production [of the privileged documents], they asserted the privilege and sought the return of the documents”).

Longer delays have resulted in a determination that the privilege or protection was waived. *See e.g.*, *North American Rescue Products, Inc. v Bound Tree Medical, LLC*, No. 2:08-CV-101, 2010 WL 1873291, at \*8 (S.D. Ohio May 10, 2010) (Rule 502) (three month delay between discovery of inadvertent production and assertion of privilege was not prompt); *Preferred Care Partners Holding Corp. v Humana, Inc.*, 258 F.R.D. 684, 699-700 (S.D. Fla. 2009) (Rule 502) (three-week lag time to assert a privilege weighed in favor in finding a waiver of privilege); *Relion, Inc. v Hydra Fuel Cell Corp.*, No. CV06-607-HU, 2008 WL 5122828, at \*3 (D. Or. Dec. 4, 2008)

(Rule 502) (four-month delay between discovery of production of privileged documents and assertion of privilege does not disprove waiver); *LaSalle Bank Nat Ass'n v Merrill Lynch Mortg. Lending, Inc.*, No 04 Civ 5452 (PKL), 2007 WL 2324292, at \*3-5 (S.D.N.Y. Aug. 13, 2007) (one month delay between discovery of production and assertion of privilege contributes to finding of waiver); *S.E.C. v Cassano* 189 F.R.D. 83, 84-86 (S.D.N.Y. 1999) (when producing party granted request by receiving party for immediate copying of one produced document out of fifty boxes without determining contents of document, "no excuse" for twelve day delay by producing party to inspect document to discover contents); *Harmony Gold U.S.A., Inc. v FASA Corp.*, 169 F.R.D. 113 117 (N.D. Ill. 1996) (two weeks reviewing copy of the produced documents in an attempt to determine how the inadvertent disclosure occurred before sending letter requesting the return of the documents followed by another two weeks preparing motion for protective order supports finding that "attempt to rectify the error was lax at best"); *Liz Claiborne, Inc. v Mademoiselle Knitwear, Inc.* No. 96 Civ 2064 (RWS), 1996 WL 668862, at \*5 (S.D.N.Y. Nov. 19, 1996) ("Here, Plaintiffs counsel discovered its disclosure of work product within twenty-four hours. Counsel immediately asserted work product privilege in objecting to deposition questions based on the Privileged Notes. However, Plaintiffs' counsel waited a month before requesting that Mademoiselle return the Privileged Notes. Plaintiffs' delay in requesting the return of the privileged documents supports a finding of waiver.")

This case is similar to *Kandel v Brother Intern. Corp.*, *supra*. The producing party in *Kandel* had also retained a consultant to assist it with the identification of privileged and protected documents. When the party learned that it had inadvertently produced protected and privileged documents, it *immediately* contacted its consultant to run omitted searches. In what appears to be a shorter period than the twelve days PANYNJ delayed before contacting its consultant, the producing party sent the receiving party a letter listing the inadvertently produced documents and asking for their return. It is also similar to *Harmony Gold* where the court determined that a two week delay before sending a letter requesting return of the documents was "lax at best." Furthermore, by November 4, 2008, it was clear to PANYNJ that the parties would not be able to reach a compromise regarding return of some, if not all, of the documents. (Loiseau Decl. ¶ 16 and Exhibit J) PANYNJ did not take the reasonable step of filing a motion seeking return of the documents, but waited to respond to the motion for determination of claims of privilege Maher filed on November 12, 2008.

Based on the foregoing, I find that PANYNJ has not established that it promptly took reasonable steps to rectify the error within the meaning of Rule 502.

#### 4. Conclusion.

PANYNJ has established some, but not all, of the elements of Rule 502(b). Therefore, I conclude that PANYNJ waived the attorney-client privilege and work product protection for the documents listed in Attachment A to this Memorandum and Order.

**C. What is the extent of the waiver?**

Rule 502(a) provides:

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional, (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together

Fed. R. Evid. 502(a) As found above, PANYNJ's disclosure was inadvertent; that is, not intentional. Therefore, the waiver is limited to the documents produced and does not extend to undisclosed communications or information.

**IV. CONCLUSION ON MAHER'S RULE 26(b)(5)(B) MOTION.**

PANYNJ has established that Documents 1994, 1998, 2019, and 2020 are protected by attorney-client privilege and Documents 1989, 1990, 1991, 1992, 1993, 2008, 2009, 2010, 2012, 2013, 2014, 2015 and 1994 are protected by attorney-client privilege.

Maher commenced this proceeding on June 3, 2008, and it was pending on September 19, 2008, when Federal Rule of Civil Procedure 502 went into effect. PANYNJ produced the documents at issue on August 29 2008. For the reasons stated above, it is just and practicable to apply Rule 502 to this dispute.

PANYNJ has established that it inadvertently produced privileged and protected documents and that it took reasonable steps to prevent disclosure. PANYNJ has not established that it promptly took reasonable steps to rectify the error once it learned of the inadvertent production. On September 25, PANYNJ identified six privileged or protected documents. It then waited twelve calendar days after determining that some documents privileged and protected documents had been inadvertently produced before it contacted its contractor to identify other inadvertently produced documents and two more days before it contacted Maher. Regardless of whether the steps PANYNJ took to rectify the error were reasonable, it did not take those steps promptly. Therefore, PANYNJ has waived attorney-client privilege and work product protection of the documents that it produced. Because the production was inadvertent, the waiver does not extend to undisclosed communications or information. Fed. R. Evid. 502(a).

Because of this ruling, it is not necessary to reach the question of whether Document 1994 should be produced as a document used to prepare a witness for deposition.

**PART 5 – MOTION TO QUASH SUBPENAS ISSUED BY THE  
PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

On September 30, 2008, PANYNJ requested issuance of six third-party subpoenas. On October 20, 2008, Maher filed a motion to quash the subpoenas. PANYNJ filed an opposition to the motion.

It appears that the information sought by the subpoenas substantially duplicates the information sought by PANYNJ in the interrogatories and requests for production addressed in Part 3 above. If PANYNJ receives this information through the production ordered by Part 3, it may not be necessary to require the third parties to incur the expense of producing the information. Therefore, I will defer ruling on Maher's motion to quash the subpoenas pending PANYNJ's receipt and review of the information it receives pursuant to Part 3. On or before August 20, 2010, PANYNJ shall file a notice stating whether it still seeks the information described in the subpoenas.

**PART 6 – MAHER TERMINALS, LLC'S MOTION TO COMPEL  
PRODUCTION OF EVIDENCE ON CERTAIN BACKUP TAPES FROM THE  
PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

On November 19, 2008, Maher filed a motion to compel PANYNJ to produce information stored on a series of backup tapes containing information created before September 11, 2001. PANYNJ file an opposition to the motion that contains what Maher characterizes as a motion to shift to Maher the costs of retrieving the information from the backup tapes if their production is ordered.

I will defer ruling on Maher's motion to compel production of the evidence on the tapes.

**ORDER**

Upon consideration of Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey and its attachments, the Memorandum in Opposition to Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey and its attachments, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey be **GRANTED IN PART AND DENIED IN PART**. On or before August 6, 2010, respondent Port Authority of New York and New Jersey shall serve supplemental responses and the Certificate of Counsel required by Part 2.

Upon consideration of The Port Authority of New York and New Jersey's Motion to Compel Discovery from Complainant and its attachments, Maher Terminals, LLC Reply In Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order and its attachments, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that The Port Authority of New York and New Jersey's Motion to Compel Discovery from Complainant be **GRANTED IN PART AND DENIED IN PART** On or before August 6, 2010, complainant Maher Terminals, LLC shall serve the supplemental responses and Certificate of Counsel required by Part 3 It is

**FURTHER ORDERED** that Maher's Motion for Protective Order be **DENIED**

Upon consideration of Maher Terminals, LLC's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ and its attachments, the Memorandum in Opposition to Complainant's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents and its attachments, and the record herein, and for the reasons stated above, it is hereby

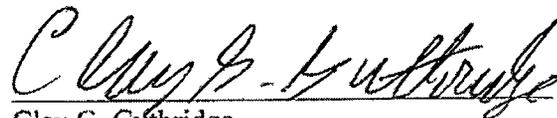
**ORDERED** that Maher Terminals, LLC's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ be **GRANTED IN PART AND DENIED IN PART** Respondent Port Authority of New York and New Jersey has waived attorney-client privilege and work product protection for the documents identified in Attachment A to this Memorandum and Order Because the production was inadvertent, the waiver does not extend to undisclosed communications or information.

Upon consideration of Maher Terminals, LLC's Motion to Quash Subpenas Issued by the Port Authority of New York and New Jersey and its attachments, the Port Authority of New York and New Jersey's Opposition to Maher Terminals, LLC's Motion to Quash Subpenas Issued by the Port Authority of New York and New Jersey and its attachments, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that consideration of the motion be **DEFERRED** On or before August 6, 2010, respondent Port Authority of New York and New Jersey shall serve supplemental responses and the Certificate of Counsel required by Part 5

Upon consideration of Maher Terminals, LLC's Motion to Compel Production of Evidence on Certain Backup Tapes from the Port Authority of New York and New Jersey and its attachments, Memorandum in Opposition to Maher Terminals, LLC's Motion to Compel Production of Evidence on Certain Backup Tapes from The Port Authority of New York and New Jersey, and the record herein, it is hereby

**ORDERED** that consideration of the motion be **DEFERRED**

  
Clay G Guthridge  
Administrative Law Judge

*Maher Terminals, LLC v. The Port Authority of New York and New Jersey LLC 08-03 (FMC)*  
 Inadvertently Produced Documents  
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
172	Draft stipulation prepared by inside counsel in connection with litigation	Unknown			5/15/2008	WP	Inadvertently produced at 08PA01604069 [requested return of document on 10/9/08]	
191	Draft letter to opposing counsel prepared by inside counsel in connection with litigation	Burke, Donald	Ruher, James		5/15/2008	AC/WP	Inadvertently produced at 08PA01604070 [requested return of document on 10/9/08]	
199	Draft letter to Maher counsel prepared by inside counsel in connection with litigation	Burke, Donald			5/16/2008	WP	Inadvertently produced at 08PA01604074 [requested return of document on 10/9/08]	
207	Draft pleading prepared by inside counsel in connection with litigation	Burke, Donald			5/7/2008	WP	Inadvertently produced at 08PA01604076 [requested return of document on 10/9/08]	
243	Draft verified complaint prepared by inside counsel in connection with litigation	Unknown			5/7/2008	WP	Inadvertently produced at 08PA01604753 [requested return of document on 10/9/08]	
246	Draft pleading prepared by inside counsel in connection with litigation	Unknown			6/5/2008	WP	Inadvertently produced at 08PA01604767 [requested return of document on 10/9/08]	08PA01765917
1989	Draft memorandum re. Maher-APM issues prepared in connection with litigation	Unknown			2/26/2008	WP	Inadvertently produced at 08PA01442836 [requested return of document on 10/9/08]	

*Maher Terminals LLC v. Port Authority of New York and New Jersey, FMC No 08-03 (ALJ July 23, 2010) (Memorandum and Order on Discovery Motions)*  
 Attachment A

*Maier Ferminis, LLC v. The Port Authority of New York and New Jersey LLC*, 08-03 (FMC)  
 Inadvertently Produced Documents  
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
1900	Draft memorandum re Maier AFM issues prepared in connection with litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01443407 [requested return of document on 10/9/08]	
1991	Draft memorandum re Maier AFM issues prepared in connection with litigation	Unknown			2/20/2008	WP	Inadvertently produced at 08PA01443052 [requested return of document on 10/9/08]	
1992	Presentation re AFM settlement discussions prepared at the request of counsel in connection with pending litigation	Unknown			3/12/2008	WP	Inadvertently produced at 08PA00377886 [requested return of document on 10/9/08]	
1993	Presentation re AFM settlement discussions prepared at the request of counsel in connection with pending litigation	Unknown			1/23/2008	WP	Inadvertently produced at 08PA00382008 [requested return of document on 10/9/08]	
1994	Memorandum from counsel re 07-01 discovery matters	Donald Burke	Richard Larrabee	J. Begley, D. Buchbinder, C. Hartwyk, C. McIntyre	7/27/2007	AC/WP	Inadvertently produced at 08PA01442865 [requested return of document on 10/9/08]	
1995	Draft chronology prepared at the request of counsel in anticipation of litigation	Robert Evans	Dennis Lombardi, Kenneth Stalin	Donald Burke	1/25/2008	AC/WP	Inadvertently produced at 08PA00382016 [requested return of document on 10/9/08]	

*Mater Terminalis, LLC v. The Port Authority of New York and New Jersey LLC*, 08-03 (FMC)  
 Inadvertently Produced Documents  
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DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
1996	Draft chronology prepared at the request of counsel in anticipation of litigation	Robert Evans			Undated	WP	Inadvertently produced at 08PA00373217 [requested return of document on 10/9/08]	
1997	Correspondence from counsel re. APM lease language with attached excerpt from lease	Donald Burke	Evans, Robert; Larrabee, Richard	Hartwyk, Chris; Israel, Rudy; Kirlin, Jason; Lombardi, Dennis; Saportu, Andrew; Spahn, Kenneth	1/22/2008	AC	Inadvertently produced at 08PA00382000 [requested return of document on 10/9/08]	
1998	Correspondence re. APM lease language reflecting legal advice of counsel	Evans, Robert	Saportu, Andrew	Spahn, Kenneth; Lombardi, Dennis	1/23/2008	AC	Inadvertently produced at 08PA00381997 [requested return of document on 10/9/08]	
1999	Correspondence among counsel re. 07-01 litigation	Hartwyk, Chris	Burke, Donald	Begley, James; Larrabee, Richard; Lombardi, Dennis	1/22/2008	AC	Inadvertently produced at 08PA00381995 [requested return of document on 10/9/08]	
2000	Correspondence among counsel re. 07-01 litigation	Hartwyk, Chris	Burke, Donald	Begley, James; Larrabee, Richard; Lombardi, Dennis	1/23/2008	AC	Inadvertently produced at 08PA00381998 [requested return of document on 10/9/08]	
2001	Draft Request for Admissions	Unknown			Unknown	WP	Inadvertently produced at 08PA00377927 [requested return of document on 10/9/08]	

*Mather Terminals, LLC v The Port Authority of New York and New Jersey LLC 08-03 (FMC)*  
 Inadvertently Produced Documents  
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2002	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442824 [requested return of document on 10/9/08]	
2003	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442838 [requested return of document on 10/9/08]	
2004	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442842 [requested return of document on 10/9/08]	
2005	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442855 [requested return of document on 10/9/08]	
2006	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442881 [requested return of document on 10/9/08]	
2007	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442896 [requested return of document on 10/9/08]	
2008	Draft third supplemental agreement with APM setting 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01443872 [requested return of document on 10/9/08]	

*Mother Terminals, LLC v. The Port Authority of New York and New Jersey LLC 08-01 (FMC)*  
 Inadvertently Produced Documents  
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2009	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01443882 [requested return of document on 10/9/08]	
2010	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01604035 [requested return of document on 10/9/08]	08PA01604031
2011	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01604045 [requested return of document on 10/9/08]	08PA01604060
2012	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA0012963 [requested return of document on 10/9/08]	
2013	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA00193330 [requested return of document on 10/9/08]	
2014	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01723734 [requested return of document on 10/9/08]	
2015	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01723745 [requested return of document on 10/9/08]	

*Maheer Terminals, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)*  
 Inadvertently Produced Documents  
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV.	BATES NUMBER	RELATED DOCS
2016	Draft pleading from 07-01 litigation	Unknown			Unknown 1/10/2008	WP	Inadvertently produced at 08PA00377923 [requested return of document on 10/9/08]	
2017	Draft 07-01 Pleading	Unknown			2/14/2003	WP	Inadvertently produced at 08PA01435818 [requested return of document on 10/9/08]	
2018	Email to counsel re future maintenance issues with APM, Maheer and PNC T	Evans, Robert	Berry, John; Nguyen, Paul	Raczynski, Jerrit; Duernig, Patricia; Israel, Raul; Saporito, Andrew; Van Toll, Aric	6/21/2002	AC	Inadvertently produced at 08PA01436194 [requested return of document on 10/9/08]	
2019	Board proposal prepared by counsel re. Maheer lease	J. Berry			10/18/2002	AC	Inadvertently produced at 08PA01437111 [requested return of document on 10/9/08]	
2020	Board proposal prepared by counsel re. Maheer lease	J. Berry			Undated	AC	Inadvertently produced at 08PA01437181 [requested return of document on 10/9/08]	
2021	Chronology re. Maheer GOB deal reflecting legal advice of counsel	Unknown			11/15/2002	AC	Inadvertently produced at 08PA01437223 [requested return of document on 10/9/08]	
2022	Email correspondence with counsel re. draft Maheer lease (EP-25f)	Scollo, Elaine	Berry, John	Evans, Robert		AC	Inadvertently produced at 08PA01437504 [requested return of document on 10/9/08]	

*Maier Terminals LLC v The Port Authority of New York and New Jersey LLC 08-03 (FMC)*  
 Inadvertently Produced Documents  
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DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2023	Email correspondence reflecting comments of counsel to Revised Lease EP-250	Scollo, Elaine	Evans, Robert	Lombardi, Dennis; Raczynski, Jerri	5/19/2003	AC	Inadvertently produced at 08PA01437508 [requested return of document on 10/9/08]	
2024	Memorandum to counsel re: Request for Revisions to EP-250	Scollo, Elaine	Berry, John	Evans, Robert; Lombardi, Dennis; Raczynski, Jerri; Scollo, Elaine	3/8/2003	AC	Inadvertently produced at 08PA01437571 [requested return of document on 10/9/08]	
2025	Email from counsel re: PA tenant insurance requirements	Berry, John	Fung, Winston		2/10/2003	AC	Inadvertently produced at 08PA01437603 [requested return of document on 10/9/08]	
2026	Email to counsel seeking legal advice re: EP-250	Scollo, Elaine	Berry John, Evans, Robert, Lombardi, Dennis, Raczynski, Jerri		1/7/2003	AC	Inadvertently produced at 08PA01438047 [requested return of document on 10/9/08]	
2027	Email correspondence with counsel re: Maher/GOB negotiations	Scollo, Elaine	Berry, John	Evans, Robert; Lombardi, Dennis; Raczynski, Jerri	11/6/2002	AC	Inadvertently produced at 08PA01438048 [requested return of document on 10/9/08]	
2028	Email correspondence with counsel re: Maher Right of Entry	Berry, John	Scollo, Elaine	Evans, Robert; Raczynski, Jerri	10/31/2002	AC	Inadvertently produced at 08PA01438063 [requested return of document on 10/9/08]	
2029	Email correspondence reflecting legal advice re: GOB-Maher Right of Entry	Scollo, Elaine	F. Martinez	Evans, Robert; Raczynski, Jerri	10/29/2002	AC	Inadvertently produced at 08PA01438065 [requested return of document on 10/9/08]	

*Mohr, Temin & L.L.C. v. The Port Authority of New York and New Jersey LLC '08-03 (FMC)*  
 Inadvertently Produced Documents  
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DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2037	Draft pleading from 07-01 litigation	unknown			5/27/2008	WP	Inadvertently produced at OBP#A01442857 [requested return of document on 10/9/08]	
2038	Draft pleading from 07-01 litigation	unknown			3/5/2007	WP	Inadvertently produced at OBP#A01442928 [requested return of document on 10/9/08]	
2039	Draft pleading from 07-01 litigation	unknown			3/5/2007	WP	Inadvertently produced at OBP#A01442941 [requested return of document on 10/9/08]	
2040	Draft pleading from 07-01 litigation	unknown			4/21/2008	WP	Inadvertently produced at OBP#A01443417 [requested return of document on 10/9/08]	