

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 12-02

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 FOR PROTECTIVE ORDER**

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Maier Terminals, LLC (“Maier”), by and through undersigned counsel, respectfully submits this Opposition to the Port Authority of New York and New Jersey’s (“PANYNJ”) Motion for Protective Order (hereinafter “Motion” or “Mot.”).

INTRODUCTION

PANYNJ’s objections are baseless. Contrary to its wild assertions, Maier reduced the scope of its discovery to the remaining claims. Maier proposed specific steps to reduce the burden on the parties, but PANYNJ refused. *See* Declaration of Bryant E. Gardner, dated March 17, 2016 (“Gardner Dec.”) at ¶¶ 6–10. Maier did not agree to the PANYNJ’s demands to restrict discovery that prejudices Maier and for which PANYNJ provided no good reason. Gardner Dec. at ¶¶ 6–12. PANYNJ’s real aim is to frustrate prosecution of Maier’s claims and to stall this proceeding.

LEGAL STANDARD

FMC Rule 502.201(h) governs the scope of discovery, pursuant to which “[p]ersons 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” 46 C.F.R. § 502.201(h). PANYNJ does not argue that Maier’s requests are not relevant. It merely argues the subject discovery constitutes undue burden. Mot. at 4–5 (citing “undue burden” and invoking 46 C.F.R. §§ 502.201(e)(2)(ii) & (j)(1)).

The party resisting discovery bears the burden of establishing undue burden with respect to each specific request. *Maier Terminals LLC v. Port Authority of N.Y. and N.J.*, Dkt. 08-03, Memorandum and Order on Discovery Motions at 8 (F.M.C. July 23, 2010) (citing *St. Paul Ins. Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511–12 (N.D. Iowa 2000)) (hereinafter “Dkt. 08-03 Discovery Order”).

The Commission's specific rule provides the applicable legal standard, which is that:

The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

46 C.F.R. § 502.201(e)(2)(ii). But, PANYNJ failed to even address the rule's specific criteria. Moreover, PANYNJ failed to carry its burden as explained by Chief Judge Guthridge in a previous proceeding in which he ordered PANYNJ to produce discovery after another overruled PANYNJ "undue burden" objection:

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.

Dkt. 08-03 Discovery Order at 18. Both PANYNJ's motion and the declaration of PANYNJ's counsel lack the required detail and explanation of time, money, and procedure purportedly constituting undue burden.

Under the new Shipping Act standard pronounced by the Commission subsequent to Maher's initial discovery in this proceeding, PANYNJ's conduct may now be justified merely by "the potential existence of legitimate business reasons" for its conduct, including unspecified "different risks and benefits," and Maher must show that PANYNJ did not have a legitimate business reason. *Maher Terminals LLC v. Port Authority of N.Y. & N.J.*, Dkt. 12-02, 2015 WL 9426189, at *15-*19 (F.M.C. Dec. 18, 2015). Therefore, to prosecute its claims Maher *must* issue discovery about these potential justifications.

For interrogatories, the current rule, which became effective on November 12, 2012,

limits the number in a proceeding to 50 without leave of the Presiding Officer. 46 C.F.R. § 502.205(a)(1). The rule did not state that its application was retroactive and to apply it retroactively would prejudice Maher. Prior to the effective date of the new rule when the initial interrogatories were issued by each side in early 2012, there was *no limit*. There is also no limit on the number of document requests. 46 C.F.R. § 502.206. In this proceeding, the Presiding Officer ordered the parties to “issue a revised request that identifies prior discovery requests that it asserts have not already been answered and that are relevant to the remaining issues in this proceeding.” Scheduling Order at 2. The order did not otherwise purport to limit discovery.

Regarding the number of deposition notices, the Commission’s rule provides that a party may take 20 depositions as a matter of right. 46 C.F.R. § 502.203(a). Moreover, “[a] motion seeking to prevent the taking of a deposition is regarded unfavorably by the courts.” *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) (“By requesting the Court to prohibit plaintiff from deposing a witness, [the movant] assumes a heavy burden because protective orders which totally prohibit a deposition should be rarely granted absent extraordinary circumstances.”). The Presiding Officer ordered the parties “to complete all depositions and supplemental discovery . . . prior to the close of discovery” and reminded the parties of “their obligation to proceed in an expeditious manner.” Scheduling Order at 3.

ARGUMENT

I. PANYNJ Failed To Carry Its Burden to Establish Undue Burden.

Neither PANYNJ’s motion nor the declaration of PANYNJ’s counsel provide the required showing of time, money, and procedure that would support an argument of undue burden, i.e. that the “burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding, the amount in controversy, the parties’ resources, the

importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” 46 C.F.R. § 502.201(e)(2)(ii). Therefore, PANYNJ’s motion fails.

The importance of the issues at stake is apparent. This proceeding pertains to ongoing economic discrimination in violation of the Shipping Act because of PANYNJ’s abuse of its monopoly power. Gardner Dec. at ¶ 13. PANYNJ has extracted hundreds of millions of dollars for consents from some port users—but not others—and it has categorically excluded existing terminal operators from the use of the only terminal not subject to the Bayonne Bridge aircraft restriction, at a time when global commerce relies upon larger ships which cannot call at Maher’s terminal and those other tenants inside the bridge. Compl. at 3–4 & 6–7. As the Commission explained: (1) “the marine terminal leases at issue are complex, long-term documents that are subject to extensive negotiations between the parties;” (2) the consent fee allegation involves some tenants being charged hundreds of millions of dollars while others are charged nothing; and (3) the categorical exclusion of Maher and other existing tenants without proper justification would violate the Shipping Act. *Maher Terminals LLC v. Port Authority of N.Y. & N.J.*, Dkt. 12-02, 2015 WL 9426189, at *18, *22 & *26 (F.M.C. Dec. 18, 2015).

The requested discovery is essential to Maher’s prosecution of its claims. Only PANYNJ possesses evidence of its purported “legitimate business reasons” or “risks and benefits,” whatever they are. Maher has no access to the evidence unless it can obtain the requested discovery from PANYNJ. Gardner Dec. at ¶ 15.

PANYNJ admits that it previously collected, processed, and reviewed documents responsive to Maher’s original document requests in May 2012. Mot. at 4 & 9; Isakoff Dec. at ¶ 9. And PANYNJ admits it provided discovery responses in previous proceedings. Mot. at 4 & 9; Isakoff Dec. at ¶¶ 12–13. So, this work already accomplished cannot be a source of undue

burden now. *Kleen Products LLC v. Packaging Corp. of Am.*, No. 10-C-5711, 2012 WL 4498465, at *15 (N.D. Ill. Sept. 28, 2012) (party opposing discovery cannot allege undue burden from efforts previously undertaken).

Moreover, PANYNJ's assertion is a red herring. Maher *did not* ask PANYNJ to reproduce previous productions or responses. To the contrary, during the meet and confer Maher plainly stated in response to PANYNJ's complaint about the new temporal scope of the requests that if PANYNJ had nothing to add then there would be no burden. Gardner Dec. at ¶ 10. And as has been the practice throughout the litigations between the parties, they have agreed to the use of evidence produced in other proceedings and that agreement is memorialized in the Rule 201 Report and the protective order in this proceeding. Compl.'s Rule 201 Rep. at Item I.A. (May 14, 2012); Protective Order at ¶ 2 (information may include information provided by the parties in other proceedings). In these circumstances, PANYNJ did not provide evidence of its purported undue burden and its motion fails.

With respect to resources, the monopoly PANYNJ enjoys exercises enormous economic power. Its annual budget authority is almost \$8 billion, including over \$36 million in "General Counsel/Law" budget authority. PANYNJ, 2016 Budget Schedules, *available at* <http://corpinfo.panynj.gov/pages/budget-capital-plan/> (reproduced at Gardner Dec., Ex. 1). Therefore, PANYNJ commands enormous resources to satisfy Maher's essential discovery requests in this important matter.

II. Maher Narrowed Its Discovery Requests Per The Scheduling Order.

It is undisputed that Maher eliminated discovery requests about the dismissed claims per the Scheduling Order. PANYNJ admits that Maher eliminated 19 such interrogatories: March 2012 Interrogatory Nos. 1, 2, 3, 4, 5, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

PANYNJ complains that Maher's revised Interrogatory Nos. 9a-b, 17, 18, 26, 43, 37, and 38 are "duplicative" of the March 2012 Interrogatory Nos. 6, 7, 8, 10, 11, 15, 26, and 27. Mot. at 5–6. But this is incorrect. The change in temporal scope means the requests perforce are not duplicative. As a practical matter, by its motion PANYNJ acknowledges that the change in temporal scope—caused by its continuing violations and PANYNJ's own invocation of purported investments of \$3.8 billion dating back to 1948 in its discovery responses (served on Maher *after* the service of Maher original discovery in order to justify its violations)—requires PANYNJ to provide the responsive evidence or verify under oath there is really no such evidence after all.

As the Presiding Officer knows from the motions to compel which were filed in this proceeding and never decided, Maher disputes PANYNJ's assertion that it already provided sufficient answers to the eight interrogatories that PANYNJ claims are "duplicative" in the revised 2016 interrogatories. PANYNJ does not allege that Maher's revised 2016 interrogatories overlap with 2012 Interrogatories that were *not* the subject of Maher's motion to compel, i.e., Nos. 12, 14, 22, 23, and 28.

PANYNJ also asserts erroneously that Maher has issued 66 interrogatories in this proceeding—purportedly more than the 50 allowed by the rule. But, PANYNJ's assertion fails to account for the fact that the first 28 interrogatories served by Maher in 2012 predated the effective date of the new rule governing the number of interrogatories and in most instances pertained to claims subsequently dismissed. And, it fails to account for the fact that per the Scheduling Order Maher eliminated 19 of the original interrogatories not pertaining to the remaining claims. Thus, Maher has not exceeded the new 50 interrogatory limit in any respect. Moreover, although PANYNJ does not inform the Presiding Officer, Maher was required to add

six new interrogatories following PANYNJ's filing of its Answer which alleged six defenses without *any* factual support in the Answer as mandated by the Commission's rule.

III. PANYNJ's "Substantive Scope" Objections Are Baseless Because Maher's Requests Concern Only The Issues That Remain In This Proceeding.

After first complaining that Maher's 2016 requests duplicate its 2012 requests, PANYNJ next argues incongruously that they aren't duplicates. Mot. at 6 (complaining that Maher delved into "new topics"). Maher asked about the consent fee and the Global claims. Mot. at 3. And, the examples of "new topics" PANYNJ cites confirm this. *Id.* at 6-7.

PANYNJ complains that it should not be required to provide evidence about changes of control that it did not grant because they are "of no moment." *Id.* at 7. PANYNJ is incorrect. Evidence about PANYNJ not granting consent and the reasons for not granting consent are plainly relevant to Maher's claims. Maher's claims pertain to PANYNJ's policy, practice, and procedure about requests for consent to change of control. Compl. at 2-3 & Counts I & VIII. For example, PANYNJ's purportedly legitimate business reasons for not granting consent, e.g. the requesting party did not agree to pay the PANYNJ's required tribute, are relevant to the claims. Notably, by its motion PANYNJ effectively admits such evidence exists.

PANYNJ hypocritically complains that Maher "larded its revised requests" because it asked questions referencing PANYNJ's insufficient answers to Maher's 2012 interrogatories. Mot. at 7. PANYNJ did the same. Gardner Dec., Ex. 3 at Interrog. Nos. 2 & 7. And, there is nothing improper about this, nor does PANYNJ cite any rule purportedly violated.

IV. The "Temporal Scope" Of Maher's Requests Is Directly Based On The Timeframe Of PANYNJ's Improper Conduct And/Or Alleged Defenses.

PANYNJ complains at length that Maher has expanded the "temporal scope" of discovery. Mot. at 8-9. As before, Maher's interrogatories state that they go back to 1997

except where otherwise indicated. *See* Isakoff Dec., Ex. P at 3 & Isakoff Dec., Ex. A at 3. And as before, Maher’s document requests state that they go back to 2005. *See* Isakoff Dec., Ex. P at 3 & Isakoff Dec., Ex. B at 3. Maher’s revised 2016 discovery requests cite specific events and dates for the responsive information more often than not. *Id.* The one extension back in time that PANYNJ protests—the request for information regarding terminal investments going back to 1948—followed PANYNJ’s interrogatory answer that its purported \$3.8 billion of investments going back to 1948 constitute the legitimate business reason for its consent fees. Mot. at 2 & 9; Isakoff Dec., Ex. Q at Interrog. No. 9. Having advanced this purported justification defense, PANYNJ cannot properly be allowed to block inquiry into the very same evidence it now claims justify the challenged consent fees and consideration.

Also as part of its “temporal scope” objection, PANYNJ complains that Maher’s inquiry should be limited to events that occurred prior to 2012 and should not continue to the present. However, Maher alleged continuing violations of the Shipping Act. And, its claims also pertain to PANYNJ’s violations from 2012 and continuing to the present. Indeed, PANYNJ continues to demand exorbitant consent fees. Otherwise, it would have no complaint about the discovery requests. Once again, PANYNJ provided no evidence of its alleged undue burden of providing the more recent evidence of its consent fee demands, so its motion fails.

V. Maher’s Deposition Notices Conform To The Rules And PANYNJ’s Answers.

In its sworn interrogatory answers, PANYNJ identified nine current or former employees knowledgeable about the remaining claims. Additionally, key third parties with knowledge of the claims include PANYNJ consultants DCG Corplan Consulting, L.L.C and Evercore Group L.L.C, which designed the consent fee model schemes used by PANYNJ. Per the Scheduling Order’s mandate that discovery finish forthwith, Maher promptly noticed depositions of the witnesses that PANYNJ identified as having knowledge, the two PANYNJ consultants, and one

30(b)(6) notice for each of the two remaining claims. Isakoff Dec., Ex. Q at Interrog. No. 28(b) & (d) & Isakoff Dec. at ¶ 5, Exs. C–O. Maher repeatedly asked PANYNJ to confirm that it would produce the witnesses, but PANYNJ did not and instead filed its motion. During the meet and confer, Maher proposed a procedure whereby the parties could agree to reduce the number of depositions, e.g. where witnesses had nothing to add and PANYNJ would agree not to bring such witnesses forward later to offer different testimony. In all events, PANYNJ does not establish how Maher violates the rule on depositions, nor what evidence purportedly show this constitutes an undue burden.

PANYNJ's argument that Maher should be limited to no more than four depositions flatly contradicts the Commission's own rule and fails to account for the number of knowledgeable witnesses PANYNJ has itself previously identified and as revealed by previously provided PANYNJ documents. Furthermore, lacking both documents and interrogatory responses from PANYNJ in response to the most recent discovery requests, it is more likely that additional witnesses and consultants will be identified for deposition in the coming days. In these circumstances, there is no good reason to limit depositions as PANYNJ proposes.

PANYNJ also complains in its motion that Maher scheduled thirteen depositions to be taken across ten business days. Mot. at 9. PANYNJ did not raise this at the meet and confer. Maher scheduled the depositions (1) to comply with the Scheduling Order and (2) to share equally the available business days in the deposition period. If PANYNJ is not interested in taking depositions, then more time would be available for Maher to take depositions and they can be more easily be spread out. So this is a non-issue.

Additionally, as Maher explained to PANYNJ during the meet and confer conference, Maher scheduled the most knowledgeable witnesses first, and may avoid the need for other

depositions provided satisfactory protections can be provided by PANYNJ in writing. Gardner Dec. at ¶ 7. Maher aims to avoid a reprise of the Dkt. 08-03 “Borrelli Declaration” whereby PANYNJ improperly offered new evidence contradicting PANYNJ witnesses who actually appeared and testified at deposition and that PANYNJ failed to disclose until long after the close of discovery in the course of merits briefing when Maher had no opportunity to examine Mr. Borrelli. Gardner Dec., Ex. 2 at 60–70. Maher only seeks to protect itself from these PANYNJ abuses again.

Here, we have already witnessed PANYNJ’s penchant for abuse because it flagrantly violated the agreement of the parties in this proceeding and the rules governing service. PANYNJ failed to properly serve Maher with its voluminous exhibits for its motion and also failed to serve and file a proper certificate of service. Gardner Dec. at ¶ 18. In these circumstances, with only seven days to reply, Maher is prejudiced. Gardner Dec. at ¶ 18.

CONCLUSION

For the foregoing reasons, Maher respectfully requests that the Presiding Officer deny PANYNJ’s Motion for Protective Order and instead order PANYNJ to respond to Maher’s discovery requests forthwith so that we can abide by the Scheduling Order.

Dated: March 17, 2016

Respectfully submitted,



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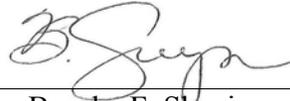
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 2016, a copy of the foregoing was served by e-mail and Federal Express on the following:

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