

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S MOTION
FOR PROTECTIVE ORDER FROM MAHER'S
REVISED DISCOVERY REQUESTS AND DEPOSITION NOTICES**

Pursuant to §§ 502.201 and 502.205 of the Federal Maritime Commission’s Rules of Practice and Procedure, the Port Authority of New York and New Jersey respectfully seeks a protective order from Maher Terminal LLC’s “Revised” First Set of Interrogatories, “Revised” First Set of Document Requests, and thirteen Notices of Deposition.¹²

PRELIMINARY STATEMENT

The Commission’s decision dismissing ten of fourteen claims in this action substantially “narrowed the issues” for discovery. Scheduling Order dated Jan. 29, 2016 (“Scheduling Order”) at 2-3; *see also* Commission’s Memorandum Opinion & Order dated Dec. 17, 2015 (“F.M.C. Order”). Of eight original issues, only two remain: Maher’s allegations regarding (i) consent fees collected in connection with changes of control; and (ii) the Global Terminal lease. Recognizing the narrowed issues remaining and the extensive discovery already conducted by the parties in this proceeding *and* related actions, the Presiding Officer directed that discovery proceed in an “expeditious manner,” with each party limited to issuing “a revised request that identifies prior discovery requests that it asserts *have not already been answered* and that *are relevant* to the remaining issues.” Scheduling Order at 2 (emphasis added).

This directive makes perfect sense given the substantial discovery already conducted. Upon filing this action—long before the Commission dismissed most of its claims—Maher sought the discovery it believed it needed on all fourteen claims in 2012. Nothing has changed since then to warrant re-starting discovery from square one. All that is needed to complete the task already undertaken is narrow follow-up discovery—exactly what the Presiding Officer’s instructions and schedule contemplated and what the Port Authority has sought in its requests.

¹ The exhibits attached to the Declaration of Peter Isakoff are cited herein as Ex. ____.

² Ex. N: Maher’s Rev. First Set of Interrog., dated February 16, 2016; Ex. O: Maher’s Rev. First Req. Produc. of Docs., dated February 16, 2016; Exs. P-AA: Maher’s Notices of Depositions, dated March 2, 2016.

Rather than adhering to the Presiding Officer’s directive, Maher has done precisely the opposite—misusing the opportunity as a springboard to launch into massive additional discovery that is plainly unnecessary and, in any event, grossly disproportionate to the two remaining claims in the action. Maher has propounded *thirty-eight additional* interrogatories,³ nineteen of which either are duplicative or far exceed the scope of prior requests, while others improperly parse the Port Authority’s prior complete answers, phrase-by-phrase, so as to multiply Maher’s requests. Maher’s “Revised” Document Requests similarly include requests that exceed the scope of previous requests. *See pp. 6-7 infra*. Maher also substantially *increased* the temporal scope of its demands in both directions, seeking information dating as far back as *1948* through *2016*, and requesting certain documents without any time limit at all. *See pp. 8-9 infra*. And, before even receiving the Port Authority’s documents, Maher served notices for thirteen depositions—including two 30(b)(6) notices of the Port Authority spanning nine topics, nine individual depositions, and two third-party 30(b)(6) notices—to be taken over ten business days.

In short, Maher has abused the opportunity for limited additional discovery to resume the same unbroken pattern of vexatious litigation it has employed to subject both the Port Authority and the Commission to enormous undue burden since 2008. Having already received substantial discovery on the two remaining issues, Maher’s obvious objective in serving 38 interrogatories, 24 document requests, and 13 deposition notices is not to obtain genuinely necessary discovery but simply to make this proceeding as expensive, disruptive, and burdensome as possible. If permitted to stand, Maher’s excessive demands will make it impossible to meet the expedited discovery schedule set in the case.

³ By contrast, the Port Authority served *eight* interrogatories, which simply follow up or seek clarification of information that it previously sought but Maher did not provide.

Prior to filing this motion, the Port Authority conferred with Maher in a good faith effort to resolve these issues, without success. Isakoff Decl. ¶ 14.

BACKGROUND

Maher initiated this proceeding on March 30, 2012, alleging fourteen Shipping Act violations. Compl. ¶ V. On January 30, 2015, the Presiding Officer granted the Port Authority's motion to dismiss the Complaint for failure to state a claim. Initial Decision at 1, 5. After Maher filed Exceptions, the Commission dismissed ten of the fourteen claims with prejudice and remanded four claims, Counts I, VI, VIII, and XII. F.M.C. Order at 1-2. Those claims concern only two issues: the Port Authority's change of control practices and letting of a relatively small 70-acre parcel adjoining the Global terminal (but not Maher's 450-acre leasehold) and now subject to the Global Lease. Compl. ¶ V.

While the Port Authority's motion to dismiss was pending, Maher served extensive discovery requests—28 interrogatories (not including discrete subparts) and 24 document requests. *See* Ex. J: Maher's First Set of Interrogs. and First Req. for Produc. of Docs. dated Mar. 30, 2012. As the Commission noted in affirming the Presiding Officer's dismissal of all discovery motions, many of these requests "[were] overbroad on their face." F.M.C. Order at 71.

Nonetheless, the Port Authority provided over 40 pages of initial and supplemental interrogatory responses—including to six interrogatories regarding consent fees and three regarding the Global Terminal lease. Ex. K: Port Authority's Obj. & Resp. to Compl.'s First Set of Interrogs. dated May 7, 2012; Ex. L: Port Authority's Am. & Supp. Obj. & Resp. to Compl.'s First Set of Interrogs. dated July 12, 2012. The Port Authority also provided detailed written responses and objections to Maher's document requests. Ex. M: Port Authority's Obj. & Resp. to Maher's First Set of Doc. Req. dated May 7, 2012. And, at significant cost, the Port Authority

undertook a massive search and collection of documents from over forty custodians as well from archives, across a period spanning 1980-2012—the scope of which was based on Maher’s initial requests—and also commenced review of thousands of potentially responsive documents.

Isakoff Decl. ¶ 8. All of this was in addition to the substantial discovery on the same consent fee issue obtained by Maher in its prior actions—for example, in FMC Dkt. No. 08-03. *Id.* at ¶3.

LEGAL STANDARD

The presiding officer has broad authority to “limit the frequency or extent of discovery” where “[t]he discovery sought is unreasonably cumulative or duplicative . . . [or] [t]he burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding[.]” 46 C.F.R. § 502.201(e)(2)(ii). For “good cause,” the presiding officer may “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including by “[f]orbidding the disclosure or discovery,” “or limiting the scope of disclosure or discovery to certain matters.” *Id.* at § 502.201(j)(1).

What constitutes unduly burdensome discovery is defined by the “needs of the proceeding.” 46 C.F.R. § 502.201(e)(2)(ii). The Federal Rules of Civil Procedure, “which the Commission’s Rules track,” were recently amended to rein in the breadth of discovery “because of the overuse and possible abuse of discovery.” *Exclusive Tug Franchises—Marine Terminal Operators Serving the Lower Miss. River*, Dkt. 01-06, 2002 WL 207564 at *2-3 (F.M.C. Jan. 3, 2002). The December 2015 Amendment of Federal Rule 26(b)(1), which 46 C.F.R. § 502.201 tracks, requires that discovery be constrained to what is “proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). This case vividly illustrates why Rule 26 was amended to rein in runaway, abusive discovery and confirms the wisdom of the proportionality rule.

ARGUMENT

Maheer's propounding of 38 *additional* interrogatories, 24 document requests, and 13 deposition notices, despite the significant narrowing of this case, directly violates the Scheduling Order and flouts the Commission's admonition that many of the far more limited original discovery requests were "overbroad on their face." F.M.C. Order at 71. Maheer's excessive 38 interrogatories, when added to its original 28 interrogatories, place it at 66—well beyond the Rules' limitation of "no more than 50 written interrogatories, including all discrete subparts." 46 C.F.R. § 502.205(a)(1); *see also* Advisory Comm. Notes to the 1993 Amend. of F.R.C.P. 33(a) ("because the [interrogatory] device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court[.]"). Maheer's expanded discovery demands, despite the *reduction* in the case's scope, also are inconsistent with the Federal Rules' mandate that discovery be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Because Maheer's discovery requests fail to account for the discovery already exchanged in this and related cases, ignore the Federal Rules and Presiding Officer's order to narrow the scope of discovery consistent with the narrowing of the case, a protective order should issue to protect the Port Authority from the undue burden wrought by Maheer's abusive litigation tactics.

1. Maheer's Requests Improperly Seek Information Previously Provided

Seven of Maheer's "revised" interrogatories are duplicative of its previous interrogatories to which the Port Authority provided detailed responses.⁴ For example, despite the Port Authority's detailed response to Maheer's request asking it to identify each change of control "since 1997 for which PANYNJ consent was requested, given, denied, or that PANYNJ

⁴ Compare Ex. N Nos. 9a-b, with Ex. J Nos. 6 and 11; Ex. N No. 17, with Ex. J. No. 7; Ex. N No. 18, with Ex. J. No. 8; Ex. N No. 26, with Ex. J. No. 10; Ex. N No. 32, with Ex. J. No. 15; Ex. N No. 37, with Ex. J. No. 26; Ex. N No. 38, with Ex. J No. 27.

contemplated requiring” (*see* Ex. E, No. 11), Maher again asks it to “[d]escribe in detail each actual, proposed, or contemplated change of control consent . . . since 1997[.]” (Ex. N, No. 9a-b). The only change is that Maher now demands answers for a far more expansive time period than previously requested—disregarding the Presiding Officer’s order to seek discovery within the scope of prior discovery requests, in an effort to unduly burden and harass the Port Authority.

Also, during the protracted—and at times abusive—discovery taken of the Port Authority in the 08-03 matter, in which Maher propounded eleven separate sets of interrogatories and ten sets of document requests, Maher sought substantial discovery regarding the same consent fee issue.⁵ The Port Authority responded in considerable detail, including a chart with Bates numbers identifying relevant documents. *See, e.g.*, Ex. G: Port Authority’s Supp. Obj. & Resp. to Compl.’s First Set of Interrog., dated Dec. 17, 2010, No. 21. Likewise, Maher’s “revised” document requests significantly overlap with its document requests in the 08-03 proceeding, in response to which the Port Authority produced thousands of documents.⁶ The Port Authority should not be required to answer discovery requests to which it previously responded—specifically, “Revised” Interrogatories Nos. 9a-b, 17, 18, 26, 32, 37, 38.

2. Maher’s Requests Improperly Expand the Substantive Scope of Discovery

Maher also substantially expanded the substantive scope in its “revised” discovery requests, instead of narrowing them to seek only information not previously answered. Maher included twelve requests that cover new topics not addressed in its initial discovery requests.⁷ As just a few examples, Maher now asks the Port Authority to “[d]escribe in detail”:

⁵ Thirteen of Maher’s discovery requests in the 08-03 litigation sought information on the Port Authority’s change of control practices. *See, e.g.*, Exs. A-I (various 08-03 discovery requests).

⁶ *Compare, e.g.*, Ex. E No. 34, *with* Ex. N Nos. 16, 17.

⁷ *See* Ex. N, Nos. 9e, 12, 13, 16, 22-25, 34-36.

- why Maher was not given multiple change of control consents for the price of one (*see* Ex. N, No. 16)
- how consent fees and consideration required since 1997 have been applied to recover PANYNJ’s specific expenditures on the port (*see* Ex. N, No. 22)
- the basis for applying the Qualified Transferee provision to impose the ability to review transfers for any potential anticompetitive impacts on the region and other operators (*see* Ex. N, No. 34)

The Presiding Officer instructed the parties to issue requests limited to “identif[ying] prior discovery requests that it asserts have not already been answered.” Scheduling Order at 2. The Port Authority should not be required to respond to “Revised” Interrogatories Nos. 9e, 12, 13, 16, 22, 23, 24, 25, 34, 35, and 36, which far exceed the scope of Maher’s prior requests.

In addition, with respect to discovery regarding Counts I and VIII, Maher should be limited to seeking discovery about changes of control that have actually taken place, since the crux of the surviving claims is that some tenants were required to pay millions of dollars and others were charged nothing. FMC Order at 32, 34. Discovery regarding potential or hypothetical changes of control that have not yet happened are of no moment to that claim and are therefore not a proper subject of discovery.

3. Maher’s Requests Improperly Multiply the Volume of Discovery

In response to Maher’s initial interrogatories, the Port Authority answered by setting forth the principal and material facts regarding the consent fee and Global lease issues. *See* Scheduling Order at 2. Nonetheless, and despite noticing depositions—including several 30(b)(6) depositions—presumably to follow up on these responses, Maher larded its revised requests with numerous “new” interrogatories that parse the Port Authority’s prior responses, phrase-by-phrase. In doing so, Maher effectively demands that the Port Authority go well beyond its obligation to provide principal and material facts. Ex. N, Nos. 18-20, 25, 27-31, 36.

For example, in response to Maher’s previous interrogatory about the Port Authority’s purpose for seeking consideration for changes of control, the Port Authority explained in detail that it has invested over \$3.8 billion in the Port “since 1948,” and “seeking payments, increased investment obligations, or an increased security deposit” ensures the new owners’ continued investment, protects the Port Authority’s investment, and “return[s] a portion of the Port Authority’s significant investment in the Port to the Port and [] offset[s] the need for increases in Port revenue collection.” Ex. K, No. 9. Maher has utilized this proper response to manufacture new interrogatories asking for detailed explanations of each of the quoted phrases.⁸ Ex. N, No. 30; *see id.* at No. 25. It even demands, in a breathtakingly overbroad request, that the Port Authority “[d]escribe in detail” whether it has applied consent fees to recoup investment “dating back to the period 1948-February 21, 2007.” *Id.* at No. 25. The Port Authority should not be required to respond to “Revised” Interrogatories Nos. 18, 19, 20, 25, 27, 28, 29, 30, 31, and 36.

4. Maher’s Requests Improperly Expand the Temporal Scope of Discovery

Maher’s revised requests and 30(b)(6) deposition notices also radically expand the temporal scope of discovery, again in defiance of the Presiding Officer’s instruction. Discovery should be limited to the scope set forth in Maher’s original discovery requests. There Maher set forth a temporal scope of discovery, *i.e.*, 1997-2012, presumably covering the allegations upon which its Complaint is based. Ex. J at 3 (defining the temporal scope as 1997 to 2012 for interrogatories and 2005 to 2012 for document requests). Maher now improperly seeks to extend these already broad time frames in *both* directions. Its “revised” requests seek discovery through 2016—even though the events of the last four years could not possibly have furnished the basis

⁸ Maher used this same abusive tactic in the 08-03 litigation, demanding that the Port Authority “[d]escribe in detail” statements made in documents produced in the ordinary course of business. *See* Ex. C, Nos. 6-8.

for its claims filed in 2012. Ex. N at 3; Ex. O at 3. And certain of its “revised” requests date back as far as “the period 1948.” *See, e.g.*, Ex. N, No. 25. Maher even exempts “Revised” Document Requests Nos. 10, 15, and 16 from the otherwise applicable time frame without proposing *any* timeframe whatsoever. *See* Ex. O, Nos. 10, 15, 16.

The Port Authority has expended enormous time and resources to gather information and documents responsive to Maher’s original “overbroad” requests. F.M.C. Order at 71. It gave extensive information in initial and supplemental responses, collected documents from archives and over forty custodians, and commenced review of those documents. Isakoff Decl. ¶ 8. All of these efforts relied upon the scope of discovery as set in Maher’s initial discovery requests, and the Port Authority is prepared to produce these documents within the time frame set by the Scheduling Order. If Maher is permitted to now expand the scope of discovery, the Port Authority will need to perform a whole new document collection, including from custodians no longer at the Port Authority, to capture documents that cannot possibly form the basis of Maher’s claims, tasks that cannot be completed within the current schedule.

5. Maher’s Notice of Thirteen Depositions Far Exceeds the Needs of This Case

Finally, Maher has served notice of thirteen depositions to be taken across ten business days. In addition to noticing two 30(b)(6) depositions of the Port Authority—on nine topics—Maher has noticed nine individual depositions and two third-party 30(b)(6) depositions. Maher’s deposition demands are grossly disproportionate to the case’s needs and yet another abuse of the discovery process for purposes of harassment. Had all of its fourteen claims survived, it would have been limited to 20 depositions. It defies logic that Maher could still require thirteen depositions to litigate the two remaining issues. Instead, each side should be limited to four depositions, with the ability to seek leave to take additional depositions upon a showing of good cause.

Maher improperly propounded more discovery on its four remaining claims than it sought to litigate all fourteen claims initially brought. Its scorched-earth approach disregards the Presiding Officer's directive and the Federal Rules. If Maher's discovery requests stand, the expedited discovery schedule—entirely appropriate when issued—would not be feasible. Among other reasons, the Port Authority would be unable to rely on its prior exhaustive document collection and would have to conduct a new collection to cover the expanded time frame and issue scope. Further, there is no way the thirteen depositions Maher has noticed—and the few that the Port Authority will need—could be conducted in the limited time allotted.

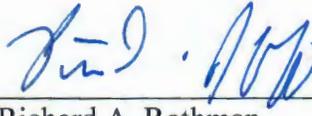
CONCLUSION

For the foregoing reasons, the Port Authority requests a protective order (i) relieving it from responding to Maher's "revised" discovery requests that seek information previously provided; (ii) relieving it from responding to Maher's "revised" discovery requests that expand the scope of discovery in violation of the Scheduling Order; (iii) limiting discovery regarding Counts I and VIII to only changes of control that have actually taken place; (iv) limiting the time frames for all discovery to those set forth in Maher's original discovery requests; and (v) limiting each party to four fact depositions, including third parties, with leave to take additional depositions to be granted only upon a showing of good cause.

A proposed Order is attached hereto as Exhibit DD.

Dated: March 10, 2016

Respectfully submitted,



Richard A. Rothman
Jared R. Friedmann
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, NY 10153
richard.rothman@weil.com
jared.friedmann@weil.com

Peter D. Isakoff
WEIL, GOTSHAL & MANGES, LLP
1300 Eye Street, NW
Suite 900
Washington, DC 20005
peter.isakoff@weil.com

*Attorneys for the Port Authority of
New York and New Jersey*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons listed below in the matter indicated.

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| <p><u>Via U.S. Mail and E-mail:</u> Lawrence I Kiern Bryant E. Gardner Gerald A. Morrissey III Rand K. Brothers Brook F. Shapiro Winston & Strawn LLP 1700 K Street, N.W. Washington DC 20006-3817</p> | <p>Dated at New York, NY this 10 day of March, 2016</p> |
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Alea Mitchell