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 RESPONSE TO MAHER TERMINAL LLC'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Pursuant to § 502.70(b) of the Federal Maritime Commission's Rules of Practice and Procedure ("Commission Rules"), the Port Authority of New York and New Jersey ("Port Authority") respectfully responds to Maher Terminal LLC's ("Maher") Motion to Strike the Port Authority's Affirmative Defenses.

PRELIMINARY STATEMENT

"There is nothing dumber than a motion to strike boilerplate affirmative defenses; it wastes the client's money and the court's time." *Raymond Weil, S.A. v. Theron*, 585 F. Supp. 2d 473, 489-90 (S.D.N.Y. 2008).

In its Motion to Strike the Port Authority's Affirmative Defenses ("Motion to Strike"), Maher presses the Commission to take drastic action supported by no Commission precedent and a minority position on the Federal Rules of Civil Procedure. Consistent with its prior practice,

Maher's abusive litigation tactics could have no purpose other than to make this case as unduly burdensome and expensive as possible for the Port Authority—and the Commission.

First, Maher wastes the Commission's time by attempting to strike defenses that are not affirmative. The Port Authority's First, Second, and Fifth Defenses—failure to state a claim, justified conduct under the Shipping Act, and lack of standing, respectively—are not affirmative defenses at all, *see* Fed. R. Civ. P. 8(c) (listing affirmative defenses), but rather denials that the Port Authority may maintain and raise at any time regardless of this motion's outcome. Even Maher concedes that the First and Second Defenses are denials and not affirmative defenses, demonstrating the futility and wastefulness of its own motion. Motion to Strike at 6-8.

Second, Maher is unable to cite any Commission precedent addressing the extent to which a defendant must plead "additional facts" when raising an actual affirmative defense pursuant to Commission Rule 62(b)(2)(iv). Nor does Maher cite a single instance where the Commission has struck a defendant's affirmative defense under Rule 62(b)(2)(iv). Instead, Maher suggests that because the Commission has adopted the *Twombly/Iqbal* plausibility requirement for ***complaints***, it should strike the Port Authority's affirmative defenses, without leave to amend, for insufficient factual pleading. As explained below, this argument fails for two critical reasons: (1) despite Maher's suggestion to the contrary, the majority of courts ***reject*** plausibility pleading requirements for affirmative defenses; and (2) even if the Commission adopted such a rule, it is well settled that courts should freely grant parties leave to amend pleadings. Accordingly, the Commission should deny Maher's motion.

BACKGROUND

Maher initiated this proceeding on March 30, 2012, alleging fourteen Shipping Act violations. Complaint ¶ V. On January 30, 2015, the Presiding Officer granted the Port

Authority's motion to dismiss the Complaint in its entirety based on its failure to state a claim. F.M.C. Initial Decision Granting Motion to Dismiss, *Maher Terminals, LLC v. Port Auth. of N.Y. and N.J.*, Dkt. 12-02 (Jan. 30, 2015) at 1, 5. After Maher filed Exceptions, the Commission sustained the dismissal as to ten of the fourteen claims, with prejudice, for failure to state a claim, while finding sufficiently pleaded and remanding the four surviving claims, Counts I, VI, VIII, and XII. *See* F.M.C. Memorandum Opinion and Order, *Maher Terminals, LLC v. Port Auth. of N.Y. and N.J.*, Dkt. 12-02 (Dec. 17, 2015) ("F.M.C. Order") at 1-2. The remaining claims concern two issues: the Port Authority's change of control practices and the letting of the marine terminal facility that is the subject of the Global Lease. *See* Complaint ¶ V.

The claims that the Commission remanded, while held sufficient to survive, remain relatively bare-bones. Faced with such thinly pleaded claims and unable to anticipate the factual bases upon which Maher might attempt to support its claims, the Port Authority asserted in its Amended Answer all potentially applicable defenses.

This section of the Amended Answer is titled "Defenses" and explains that it includes both "defenses and affirmative defenses to the Complaint." Amended Answer at 10. Each Defense is then labeled "First Defense," "Second Defense," and so on. *Id.* at 10-12. The five specific defenses can be summarized as:

1) Maher has failed to allege facts sufficient to state a claim upon which relief may be granted.

2) The Port Authority's actions were justified since it acted in accordance with the Shipping Act, a defense that the Port Authority supplemented with over a page of factual support.

3) The claims are barred, in whole or in part, by the applicable statute of limitations. The Port Authority specified that Counts I and VIII concern "allegations regarding a policy adopted outside the statute of limitations and upon certain changes of control that occurred outside the statute of limitations."

4) The claims are barred, in whole or in part, by collateral estoppel.

5) The claims are barred, in whole or in part, by Complainant's lack of standing.

See id.

Of these defenses, only the statute of limitations and collateral estoppel are defined as "affirmative defenses" by the Federal Rules of Civil Procedure. *See* Federal Rule of Civil Procedure 8(c)(1) (including "statute of limitations" and "estoppel" among the enumerated affirmative defenses).[1] To the extent possible at this juncture, and given the terse character of the Complaint, the Port Authority supplemented its defenses with additional facts, and noted that the facts supporting its First, Fourth and Fifth Defenses would otherwise be developed during discovery. Amended Answer at 10-12.

In any event, Maher filed this motion to strike the Port Authority's defenses and affirmative defenses. Maher's motion is directed at all of the Port Authority's defenses, including the ones that it concedes are not in fact affirmative defenses and therefore will remain in the case regardless of the outcome of its motion.

LEGAL STANDARD

Commission Rule 62(b)(2)(iv) provides that an answer must contain "any affirmative defenses, including allegations of any additional facts on which the affirmative defenses are based." 46 C.F.R. § 502.62(b)(2)(iv). The Rule does not specify the extent of detail as to which defendants must plead additional facts and it does not appear that any Commission authority has ever addressed the issue.

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[1] Although the First and Fifth defenses inadvertently included the word "affirmative" when stating that the Port Authority would supplement with additional facts developed during discovery, the mere inclusion of the word "affirmative" cannot transform a denial into an affirmative defense. *See, e.g., Lugo v. Cocozella, LLC*, 2012 WL 5986775, *1 (S.D. Fla. Nov. 29, 2012).

As noted above, the Commission has adopted the *Twombly/Iqbal* plausibility requirements of Federal Rule of Civil Procedure 8(a) for complaints. *See* F.M.C. Order at 16-17 (noting the F.M.C.'s adoption of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). But the Commission's adoption of *Twombly/Iqbal* dealt only with a complainant's affirmative claim pleading requirements under Commission Rule 62(a)(3)(iii), not Rule 62(b)(2), which governs affirmative defense pleading. Neither the Commission nor any Circuit Court of Appeals has applied the *Twombly/Iqbal* plausibility pleading requirements to affirmative defenses under either Commission Rule 62(b)(2)(iv) or Federal Rule of Civil Procedure 8(c). *See Tardif v. City of New York*, 302 F.R.D. 31, 33 (S.D.N.Y. 2014). And indeed, despite Maher's misleading argument to the contrary, *see* Motion to Strike at 10, the majority of federal district courts *reject* applicability of the *Twombly/Iqbal* plausibility pleading requirements for affirmative defenses.[2] "There is indeed today a national majority on the issue of [*Twombly* and *Iqbal*]'s applicability to affirmative defenses, but it is decidedly in the direction of refusing to apply 'plausibility' to such pleadings." *Certain Underwriters at Lloyd's Subscribing to Policy no. TCN034699 v. Bell*, No. 5:13-cv-113-DCB-MTP, 2014 WL 4546046, at *2 (S.D. Miss. Sept. 11, 2014).

Although the F.M.C. rules do not address striking defenses from an answer, Federal Rule of Civil Procedure 12(f) permits a federal court to "strike from a pleading an insufficient defense

[2] *See, e.g., Tardif*, 302 F.R.D. at 33-34; *Serby v. First Alert, Inc.*, 934 F. Supp. 2d 506, 515-516 (E.D.N.Y. 2013); *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893 (E.D. Pa. 2011); *Signature Bank v. Check-X-Change, LLC*, 2013 WL 3286154, *5 (D.N.J. 2013) (holding that *Twombly/Iqbal* standard does not apply to analysis of Rule 12(f) motions to strike affirmative defenses); *Strauss v. Centennial Precious Metals, Inc.*, 291 F.R.D. 338, 343 (D. Neb. 2013) (finding that where there is no binding authority, minimum pleading standards apply).

or any redundant, immaterial, impertinent, or scandalous matter."[3] "Motions to strike affirmative defenses are generally disfavored," however, and "[t]he standard to prevail on a motion to strike an affirmative defense is demanding." *Tardif*, 302 F.R.D. at 32 (quoting *New England Health Care Emps. Welfare Fund v. iCare Mgmt., LLC*, 792 F. Supp. 2d 269, 288 (D. Conn. 2011)).

"[T]o prevail on a motion to strike: (1) there may be no question of fact which might allow the defense to succeed; (2) there may be no substantial question of law, a resolution of which could allow the defense to succeed; and (3) the moving party must show that it is prejudiced by the inclusion of the defense." *Id.*[4]

"With a motion to strike, just as with a motion to dismiss, the court should view the pleading in the light most favorable to the nonmoving party." *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004). Moreover, when a party mistakenly labels a denial as an affirmative defense, the proper remedy is not to strike the claim but to simply treat it as a specific denial. *Lugo*, 2012 WL 5986775, *1. Finally, even where courts strike affirmative defenses, they freely give leave to amend so long as no prejudice to the moving party results. *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 826 (9th Cir. 1979).

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[3] Commission Rule § 502.12 provides, in pertinent part, that "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."

[4] *Jacobson v. Persolve, LLC*, a case that Maher cites in its motion (at p. 1), emphasizes that motions to strike are disfavored and "should not be granted unless the matter to be stricken clearly could have **no possible bearing** on the subject of the litigation . . . . If there is **any doubt** whether the portion to be stricken might bear on an issue in the litigation, the court **should deny the motion**." No. 14–CV–00735 (LHK), 2014 WL 4090809, at *2 (N.D. Cal. Aug. 19, 2014) (emphasis added).

ARGUMENT

I. The *Twombly* and *Iqbal* Plausibility Requirements Do Not Apply To Affirmative Defenses

A. Commission Rules Require Greater Pleading Specificity for Complaints than for Answers

Commission Rule 62(a)(3)(iii) requires that a complaint must contain:

> A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the facts or practices alleged to be in violation of the law, and a statement showing that the complainant is entitled to relief.

46 C.F.R. § 502.62(a)(3)(iii).

These requirements of "reasonable definiteness" and "a statement showing that the complainant is entitled to relief" are notably absent from Commission Rule 62(b)(2)(iv), which merely requires that an answer contain "any affirmative defenses, including allegations of any additional facts on which the affirmative defenses are based." 46 C.F.R. § 502.62(b)(2)(iv). When read together, the plain language of Commission Rules 62(a)(3)(iii) and 62(b)(2)(iv) differentiates between a complainant's obligation to plead with greater specificity under the Commission Rules and the less stringent requirements of a respondent's answer.[5]

B. *Twombly* and *Iqbal* do not Apply to Affirmative Defenses Under the Federal Rules of Civil Procedure

Likewise, *Twombly/Iqbal* plausibility requirements do not apply to affirmative defenses under Federal Rule of Civil Procedure 8(c). The rationale behind *Twombly*, as discussed in the Commission's Order that dismissed most of Maher's claims, was the concern that "the threat of

[5] This difference makes sense in light of the fact that complainants have the entire statute of limitations period—which lasts years—to prepare their complaint and to find supporting facts, whereas respondents must respond to the complaint within 25 days under Commission Rule 62(b). 46 C.F.R. § 502.62(b).

discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment or trial. *Twombly*, 550 U.S. at 559; F.M.C. Order at 17.

"The Federal Rules of Civil Procedure provide an easy mechanism to remedy deficient complaints, but only a last resort for insufficient defenses, which indicates that defenses must meet less strict requirements." *Jackson v. City of Centreville*, 269 F.R.D. 661, 663 (N.D. Ala. 2010). "The concerns voiced in *Iqbal* that high discovery costs will induce undeserved settlements do not apply in the context of affirmative defenses." *Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc.*, 287 F.R.D. 119, 123 (D. Mass. 2012); *see also Leon v. Jacobson Transp. Co.*, No. 10-C-4939, 2010 WL 4810600, at *1 (N.D. Ill. Nov. 19, 2010) ("The [Supreme] Court . . . has never once lost sleep worrying about defendants filing nuisance affirmative defenses.").

Without any Commission authority to point to, Maher turns to cases interpreting the pleading standards under the Federal Rules of Civil Procedure. A textual analysis of Rule 8 underscores the majority position that *Twombly/Iqbal* plausibility pleading does *not* apply to affirmative defenses. Rule 8(a) requires that the pleading "show[ ] that the pleader is entitled to relief." Fed. R. Civ. P. 8. Subsection 8(c), on the other hand, requires only that a defendant "state" her defense. *Id.* Like the Commission Rules, the Federal Rules of Civil Procedure require plaintiffs to plead affirmative claims with much greater factual detail. Several courts have refused to extend *Twombly* and *Iqbal* to affirmative defenses specifically noting the different formulations as between Federal Rules of Civil Procedure 8(a) and 8(c). *See Hansen*, 287 F.R.D. at 122-23; *Kohler v. Islands Rests., LP*, 280 F.R.D. 560, 566 (S.D. Cal 2012).

II. The Port Authority's Defenses Are Sufficient Under the Commission Rules

The Port Authority adequately pleaded each of its five defenses, including the affirmative defenses related to the statute of limitations and collateral estoppel, under Commission Rule

62(b)(2)(iv). Where the Port Authority reasonably expected to develop facts supporting affirmative defenses during discovery, it stated so in each defense, taking proactive measures to plead all potentially applicable defenses at the outset to avert the inevitable future arguments and motion by Maher claiming that the Port Authority waived any such defenses by not raising them at this stage. *See* Amended Answer at 10-12. At bottom, the Port Authority plainly satisfied its obligation of providing adequate notice to Maher regarding its defenses. *See Willis v. Arp*, No. 1:15-cv-0791-AT, 2016 WL 861345, at *6 (N.D. Ga. Feb. 29, 2016).

A. Maher Failed to Demonstrate Prejudice Because Striking the Port Authority's Specific Denials Would Have No Effect

Maher argues that what the Port Authority pleads as affirmative defenses are actually denials. Motion to Strike at 8. While the Port Authority's First, Second, and Fifth Defenses are non-affirmative defenses, striking them would serve absolutely no purpose because doing so would not preclude the Port Authority from raising them at a later time.

Under the Federal Rules of Civil Procedure, "failure to state a claim upon which relief can be granted" may be raised in any pleading allowed or ordered under Rule 7(a), by a motion under Rule 12(c), or at trial. Fed. R. Civ. P. 12(h)(2); *see also Hernandez v. Dutch Goose, Inc.*, No. 13-3537, 2013 WL 5781476, at *7 (N.D. Cal. Oct. 25, 2013).

Similarly, the Port Authority's Second Defense simply denies that Maher can prove the required elements of its claims. The Second Defense includes over a page of specific factual support showing the reasonableness of the Port Authority's conduct that is relevant to counteract the requisite unreasonableness element of Maher's Shipping Act claims, on which Maher bears the ultimate burden of proof. *See* F.M.C. Memorandum Opinion and Order, *Maher Terminals, LLC v. Port Auth. of N.Y. and N.J.*, Dkt. 08-03 (Dec. 17, 2014) at 26-27. Specifically, the Second Defense details information regarding (1) how the Port Authority intended to use

consideration paid in exchange for the Port Authority's consent to transfers or changes of ownership, (2) the Port Authority's priorities in obtaining terminal ownership, and (3) the reasons the Port Authority and Global negotiated for the inclusion of the "Qualified Transferee" provision as part of its purchase and leaseback to Global Terminal & Container Services, LLC. Amended Answer at 10-11.

And finally, the Port Authority's Fifth Defense, that Maher lacks standing, is again not affirmative because Maher must prove it has standing "in the same way as any other matter on which the plaintiff bears the burden of proof," and subject matter jurisdiction may be challenged at any time. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

In sum, Maher's motion to strike these defenses is nothing other than a waste of time and resources for both the Commission and the Port Authority; striking the defenses would have no bearing on the Port Authority's ability to raise the same arguments at a later time. And because any leave to amend is freely given in those circumstances that an affirmative defense is stricken, *see infra* at 6, even if Maher's motion was granted—which it plainly should not be—the Port Authority could simply amend the Answer by deleting the word affirmative from the First and Fifth Defenses, further demonstrating how pointless and wasteful this motion is.[6]

B. The Port Authority's Affirmative Defenses are Adequately Pleaded

The Port Authority's Third and Fourth Defenses related to the statute of limitations and collateral estoppel, respectively, are affirmative defenses. The Third Defense clearly includes sufficient factual support by stating that Counts I and VIII of Maher's Complaint—which concern the Port Authority's change of control practices–are "premised upon allegations regarding a policy outside the statute of limitations and upon certain changes of control that

[6] The Second Defense does not state that it was asserted as an affirmative defense.

occurred outside the statute of limitations." Amended Answer at 12. Maher argues the Port Authority's Third Defense is premised on an "unidentified statute of limitations," despite the fact that Commission Rule 62(a)(4)(iii) plainly states the applicable statute of limitations for alleged Shipping Act violations: "[a] complaint seeking reparation must be filed within three years after the claim accrues." 46 C.F.R. § 502.62(a)(4)(iii). There is no mystery about what statute of limitations applies to Shipping Act claims.

The Port Authority's Fourth Defense, collateral estoppel, requires further factual development for the Port Authority to fully develop its potential arguments. Maher's still-terse Complaint does not specify the factual bases for its change of control claims, issues about which it has litigated with the Port Authority before the Commission in prior actions. Maher may be estopped from raising certain issues based on prior rulings in those previous litigations. *See, e.g.*, F.M.C. Initial Decision Approving Settlement Agmt., *APM Terminals of N. Am., Inc. v. Port Auth. of N.Y. and N.J.*, Dkt. 07-01 (Oct. 24, 2008) at 39-40 (ruling on Maher objection to proposed settlement that corporate reorganization within Maersk family of companies was not a true change in control under APM lease). The Port Authority raised this affirmative defense at the outset to avoid any argument of waiver, but without knowing for certain whether it will need to interpose the defense or exactly how. The Port Authority cannot reasonably be expected to plead any "additional facts" at this juncture, and in any event, Maher has failed to show that there is "no question of fact which might allow the defense to succeed." *Tardif*, 302 F.R.D. at 32.

III. The Commission Should Deny Maher's Motion Because the Port Authority's Affirmative Defenses Will Not Unfairly Prejudice Maher

Maher has also failed to meet its burden of proving that it would suffer prejudice from the inclusion of each defense, *see Tardif*, 302 F.R.D. at 32, and instead argues that granting its

motion would "unburden[] the parties and the Commission with needless discovery and discovery disputes . . . ." Motion to Strike at 14. To the contrary, far from streamlining this litigation by reducing needless disputes, by this very motion, it has imposed a needless burden on both the Port Authority and the Commission. Because three of the defenses are not affirmative—which even Maher admits as to two of them—the defenses necessarily will remain in the case and be the subject of discovery, regardless of the outcome of Maher's motion.

Moreover, in its latest discovery requests, Maher sought both interrogatory responses and document productions spanning ten years related to the Port Authority's affirmative defenses. But Maher fails to explain how the assertion of two affirmative defenses (regarding statute of limitations and estoppel) will substantively expand the scope of the already overbroad discovery that Maher seeks.[7] In reality, nothing about Maher's litigation conduct, now or in the past, is about streamlining litigation or reducing the need for discovery and other disputes. Maher's cries of prejudice from the mere assertion of defenses in an answer ring hollow indeed.

Denial of this motion will hopefully discourage Maher from further pursuing needless and harassing litigation tactics going forward. Conversely, granting Maher's motion would cause substantial harm to the Port Authority by potentially depriving it of defenses that could definitively end this litigation by means of dismissal or summary judgment.

IV. The Commission Should Deny Maher's Motion Because Striking Affirmative Defenses Without Leave to Amend is a Drastic, Disfavored Action.

Maher urges the Commission to not only strike the Port Authority's affirmative defenses, but to also deny the Port Authority leave to amend its Answer. This position contradicts well-settled principles of law and authority, including some that Maher cites in its own motion. When

[7] The overbreadth of Maher's discovery requests is a separate issue from the sufficiency of the Port Authority's affirmative defenses and is the subject of the Port Authority's Motion for Protective Order filed on March 10, 2016, which will not be further addressed here.

striking an affirmative defense, leave to amend is freely given so long as no prejudice to the moving party results. *Wyshak*, 607 F.2d at 826.

Moreover, even courts that take the minority position of requiring *Twombly/Iqbal* plausibility pleading for affirmative defenses still permit defendants to plead additional affirmative defenses if they uncover new facts at a later stage in litigation. *See Ear v. Empire Collection Auths., Inc.*, No. 12-1695-SC, 2012 WL 3249514, at *1 (N.D. Cal. Aug. 7, 2012). It would be nonsensical to preclude the Port Authority from raising potentially applicable affirmative defenses in its Answer when it is plainly permitted to add new defenses later in the litigation.[8]

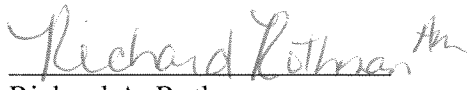
CONCLUSION

For the foregoing reasons, Maher's Motion to Strike the Port Authority's Affirmative Defenses should be denied.

[8] Maher argues that if the Commission grants its motion, the parties' "prior history," and the fact that they have "engaged in extensive discovery" would somehow justify denying the Port Authority leave to amend its Answer. Motion to Strike at 14. To the contrary, the parties' history undercuts Maher's argument by demonstrating Maher had adequate notice of the grounds for the Port Authority's affirmative defenses.

Dated: March 17, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

Via Federal Express and E-mail: Lawrence I Kiern Bryant E. Gardner Gerald A. Morrissey III Rand K. Brothers Jarrod Rainey Winston & Strawn LLP 1700 K Street, N.W. Washington DC 20006-3817	Dated at New York, NY this 17th day of March, 2016

Alea Mitchell