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 REPLY IN OPPOSITION TO MAHER TERMINALS, LLC'S SECOND MOTION TO COMPEL DISCOVERY FROM RESPONDENT PORT AUTHORITY OF NEW YORK AND NEW JERSEY

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Respondent the Port Authority of New York and New Jersey ("Port Authority"), by and through undersigned counsel, respectfully submits this memorandum in opposition to Maher Terminals, LLC's ("Maher") Motion to Compel Discovery from Respondent Port Authority of New York and New Jersey ("Motion to Compel" or "Motion").

PRELIMINARY STATEMENT

Maher's latest Motion to Compel not only lacks any merit but displays a complete disregard for the decisions of the Commission and the Presiding Officer setting forth the boundaries for discovery in this case. When, in ruling upon the Port Authority's motion to dismiss, the Commission determined that only four of Maher's fourteen claims could proceed, Ex. L (Mem. Op. & Order, dated Dec. 17, 2015) at 72, the Commission affirmed the ALJ's dismissal of Maher's pending motion to compel as moot "[i]n light of the dismissal of most of Maher's claims," and pointedly observed "that many of the discovery requests at issue are overbroad on their face," *id.* at 71.[1] On remand, the Presiding Officer, mindful of this admonition, instructed the parties to limit the remaining discovery to the scope of the discovery requests issued in 2012, and identify those that remain relevant and not already answered. Ex. M (Scheduling Order, dated Jan. 29, 2016) at 2-3. Maher, however, blatantly defied those instructions, serving the Port Authority with voluminous "revised" requests that would greatly *expand* both the temporal scope and subject matter of discovery. Upon the Port Authority's motion, the Presiding Officer issued a Protective Order that, among other things, limited the number of interrogatories that could be propounded, limited the number of depositions that could be taken, and—after reciting (1) the Port Authority's observation "that the temporal scope of discovery has increased, from a time period of 1997 to 2012 for interrogatories and 2005 to 2012

[1] The exhibits attached to the Declaration of Jared Friedmann, dated June 8, 2016 ("Friedmann Decl.") are cited herein as Ex. __.

for document requests, to discovery requests seeking information from 1948 to 2016" and (2) Maher's assertion "that it requires discovery regarding the Port Authority's alleged terminal investments from 1948 and that discovery should be provided through 2016"—expressly ruled that "[t]he parties were instructed to limit, not expand, their discovery requests. Accordingly, temporal requests that are longer than initially requested will not be permitted." Ex. W (Protective Order, dated April 12, 2016) at 2-3 ("Protective Order").

Undeterred, Maher has now filed a "clearly excessive" 88-page Motion to Compel,[2] that is not only premature—as Maher knew, the Port Authority was still producing documents and in the process of amending certain interrogatory responses in light of the ruling on Maher's motion to compel—but is otherwise replete with meritless arguments that willfully ignore or mischaracterize the discovery constraints imposed by the Presiding Officer, the Commission and its Rules. First, Maher's Motion improperly reargues its failed effort to expand the temporal scope of discovery, from the already generous seven-year timeframe established by its 2012 Document Requests (2005-2012) and fifteen-year timeframe established by its 2012 Interrogatories (1997-2012), without even acknowledging that it is a motion for reconsideration or the stringent requirements it must meet for such a motion.

Next, Maher baselessly contends that the Port Authority has waived its attorney-client and work product privileges in its responses to certain 2012 Interrogatories. *See* pp. 16-17 *infra*. As explained below, Maher posed a number of interrogatories that could obviously implicate

[2] In ruling on the Port Authority's Motion to Strike Maher's overlong Motion to Compel, the Presiding Officer noted that it was "clearly excessive," but nonetheless permitted it to stand to prevent further "delay [to] the proceeding" and gave the Port Authority "50 total pages [to respond], not including matters that the Initial Order requires it to quote." Ex. CC (Order on Maher's Mot. for Page Limit. Relief and Port Auth.'s Mot. to Strike Maher's Second Mot. to Compel, dated May 18, 2016) at 2. Because the matters that the Port Authority is required to quote span 55 pages, the applicable page limitation for this opposition is 105 pages. Friedmann Decl. at ¶ 34.

privileged information, but in response, the Port Authority expressly objected on the basis of its attorney-client and work product privileges, and confined its responses to non-privileged facts.

Finally, Maher's myriad complaints that the Port Authority's interrogatory responses are insufficiently detailed are thoroughly meritless. The Port Authority has provided the principal and material facts in response to Maher's interrogatories, which is all that the rules require. Maher's repeated demands that the Port Authority provide additional exhaustive narrative accounts of numerous transactions dating back twenty years—all of which had little or nothing to do with Maher or the few surviving claims in this case—are wholly inappropriate. In short, Maher's Motion to Compel should be denied.

FACTUAL BACKGROUND

Maher commenced this proceeding on March 30, 2012, asserting some fourteen Shipping Act claims under the Shipping Act. Ex. A (Compl., dated Mar. 30, 2012) at ¶ V(B)-(O). Simultaneously, Maher issued its First Request for Production of Documents ("2012 Document Requests") and First Set of Interrogatories ("2012 Interrogatories"). Ex. B (Complainant's First Req. for Prod. of Docs. from the Port Auth., dated Mar. 30, 2012); Ex. C (Complainant's First Set of Interrogs. Propounded on the Port Auth., dated Mar. 30, 2012). As the Commission observed when ruling on the Port Authority's motion to dismiss, Maher's discovery requests were "overbroad on their face." Ex. L at 71. Among other things, both sets of requests imposed an unusually broad temporal scope for discovery. The 2012 Document Requests sought "documents prepared or obtained during the period 2005 to the present," *i.e.*, March 30, 2012—a span of *seven* years. Ex. B at 3. The 2012 Interrogatories were "limited to the period from 1997 to the present," again, March 30, 2012—this time a span of *fifteen* years. Ex. C at 3.

On April 27, 2012, citing a litany of deficiencies, the Port Authority moved to dismiss the Complaint, and also sought a stay of discovery at least until the Presiding Officer decided the

motion to dismiss. Shortly thereafter, notwithstanding its request for a stay of discovery and the gross overbreadth of Maher's discovery requests, the Port Authority provided over forty pages of initial and supplemental interrogatory responses. Ex. D (Port Authority's Objs. and Resps. to Complainant's First Set of Interrogs., dated May 7, 2012); Ex. E (Port Authority's Am. & Suppl. Objs. & Resps. to Complainant's First Set of Interrogs., dated July 12, 2012). It likewise provided detailed objections and responses to Maher's document requests. Ex. F (Port Authority's Objs. & Resps. to Maher's First Set of Doc. Req., dated May 7, 2012). Further, the Port Authority undertook the enormous and costly task of searching for and collecting responsive documents from over forty custodians as well as archives, keyed to the scope of discovery set by Maher's requests, including the specified temporal timeframes. The Port Authority alerted the Presiding Officer that it would await a decision or scheduling order before producing documents. Ex. J (Port Authority's Reply in Opp. to Maher's Mot. to Compel Disc. from Resp., dated Sept. 25, 2012). Maher also chose not to produce documents.

Despite the ample nature of the Port Authority's discovery responses, Maher filed an eighty-two-page motion to compel on September 10, 2012, challenging twenty-three out of twenty-eight of the Port Authority's interrogatory responses based on a series of legally flawed and meritless arguments. Ex. I (Maher's Mot. to Compel Disc. from Resp., dated Sept. 10, 2012). The Port Authority opposed Maher's motion in its entirety. Ex. J.

Maher's motion to compel was still pending when the Presiding Officer granted the Port Authority's motion to dismiss the Complaint for failure to state a claim. Ex. K (Initial Decision Granting Motion to Dismiss, dated Jan. 30, 2015) at 1, 5. The Presiding Officer dismissed all other pending motions, including Maher's motion to compel, as moot. *Id.* at 34.

The Commission affirmed the Presiding Officer's decision on the motion to dismiss in most respects, affirming the dismissal of ten of Maher's fourteen claims with prejudice. Ex. L at 1-2. The four claims that it remanded concern only two issues: the Port Authority's change of control practices and the letting of the Global terminal in 2010. Ex. A at ¶ V. The Commission specifically noted that Maher's change-of-control claims improperly relied on "legal conclusions" and "formulaic recitation of the elements of a Shipping Act claim," Ex. L at 31; contained "few factual allegations supporting the unreasonableness of the Port Authority's conduct," *id.* at 34; and did "not contain any dates regarding Maher's change-of-control claims" or "identify th[e] tenants []or indicate when the Port Authority consented to changes of control," *id.* at 66. Yet the Commission ruled that Maher "has pleaded enough" to survive a motion to dismiss on its change-of-control claims, primarily that, on its reading of the Complaint, Maher could be seen as alleging that in connection with changes of control, "some terminal tenants are charged nothing and other terminal tenants are charged millions of dollars." *Id.* at 32; *see also id.* at 34. (It is, of course, a matter of public record that Maher's own change of control, the sale of the terminal by the Maher brothers to an infrastructure fund of Deutsche Bank, occurred in 2007, *Maher Terminals, LLC v. Port. Auth. of N.Y. & N.J.*, 33 S.R.R. 821, 835-36 (F.M.C. 2014), some five years before the end of the timeframe contained in Maher's 2012 discovery requests.) As to Maher's claims regarding the negotiation of the Global lease, the Commission similarly remarked that "Maher's allegations of 'unreasonableness' are legal conclusions," but nevertheless allowed the claims to "go forward," based on Maher's allegation that the Port Authority "categorically excluded" Maher from consideration for what became the Global leasehold in 2010. *Id.* at 38; *see also id.* at 40. As noted above at 1, the Commission affirmed

the Presiding Officer's dismissal of the pending discovery motions as moot, adding, though, that "many of the discovery requests at issue are overbroad on their face." *Id.* at 71.

On remand, recognizing that "[t]he Commission's decision in this proceeding narrowed the issues," the Presiding Officer then directed the parties "to proceed in an expeditious manner." Ex. M at 2-3. In light of the narrower scope of the case and that the parties had already conducted extensive discovery in this and other cases—and in what appears to have been an attempt to rein in the potential for discovery disputes that have been the unfortunate norm in these proceedings—the Presiding Officer specifically instructed each party 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." *Id.* at 2. The Presiding Officer reiterated the Commission's admonition that "'many of the discovery requests at issue are overbroad on their face,'" and instructed the parties to "be prepared to identify the relevance of all of the revised requests." *Id.* at 2-3.

Maher defied those instructions in every respect. Rather than pursue limited additional discovery within the scope already established by its original requests, Maher propounded thirty-eight additional interrogatories ("2016 Interrogatories"), which not only greatly expanded the substantive scope of discovery but also attempted to increase the temporal scope substantially by seeking information dating as far back as 1948 and forward through 2016, even though Maher's own change in control occurred in 2007 and the Global lease was entered in 2010. Ex. O (Complainant's Rev. First Set of Interrogs. Propounded on the Port Auth., dated Feb. 16, 2016) at 3, 14. It also issued twenty-four document requests ("2016 Document Requests"), which similarly sought information through 2016. Ex. P (Complainant's Rev. First Req. for Prod. of Docs. from the Port Auth., dated Feb. 16, 2016) at 3. Maher additionally served notices for

thirteen depositions, which included two Rule 30(b)(6) depositions on numerous topics, all to be taken over ten consecutive business days.

The Port Authority promptly moved for a protective order because Maher's greatly expanded discovery demands violated the Scheduling Order by increasing both the "substantive scope" and "temporal scope" of discovery, flouted the Commission's admonition regarding overbroad discovery, exceeded the limits imposed by the Commission's Rules, and were wildly disproportionate to the scope of the case as narrowed through the motion to dismiss rulings. Ex. Q (Port Auth.'s Mot. for Protective Order from Maher's Rev. Disc. Req. & Dep. Notices, dated Mar. 10, 2016) at 5-10. Notwithstanding the unreasonableness of Maher's 2016 Interrogatories and 2016 Document Requests, the Port Authority responded to them on March 17, 2016, while preserving the objections set forth in its protective order motion. Ex. S (Port Authority's Objs. & Resps. to Complainant's Rev. First Set of Interrogs., dated Mar. 17, 2016); Ex. T (Port Authority's Objs. & Resps. to Complainant's First Rev. Req. for Produc. of Docs., dated Mar. 17, 2016).

On March 31, 2016, Maher sent the Port Authority its usual prolix and bombastic "deficiency" letter, purporting to catalogue the failures within the Port Authority's responses to its 2016 Interrogatories and 2016 Document Requests. Ex. V (Letter from B. Gardner to J. Friedmann, dated Mar. 31, 2016). Far from restricting itself to "certain limited" objections, as it represents, Mot. at 4, Maher challenged the Port Authority's response to virtually every 2016 Interrogatory, *see id.* at 2-5 (challenging Interrogatories Nos. 1, 2, 3, 4, 5, 6, 7, 9c-d, 10, 11, 12, 15, 17, 18, 20, 33, 34-48 and leaving only Nos. 8, 14, and 21 unaddressed in the letter), and eight of the Port Authority's 2016 Document Request responses, *see id.* at 1-2.

Before the parties met and conferred on Maher's "deficiency" letter, however, the Presiding Officer issued an order granting the Port Authority's motion for a protective order in most respects. Ex. W at 2-4. After acknowledging the Port Authority's assertion that Maher's discovery requests were "duplicative" of previous requests and discovery Maher had already obtained, the Presiding Officer held that Maher's "cumulative and duplicative discovery requests will not be permitted." *Id.* at 2. Next, after reciting the Port Authority's assertion "that the temporal scope of discovery has increased, from a time period of 1997 to 2012 for interrogatories and 2005 to 2012 for document requests, to discovery requests seeking information from 1948 to 2016" and Maher's contention "that it requires discovery regarding the Port Authority's alleged terminal investments from 1948 and that discovery should be provided through 2016 as a continuing violation is alleged," the Presiding Officer held that "[t]he parties were instructed to limit, not expand, their discovery requests. Accordingly, temporal requests that are longer than initially requested will not be permitted." *Id*. at 3. With respect to the Port Authority's contention that Maher sought to expand the substantive scope of discovery, the Presiding Officer agreed, finding that the "new requests clearly exceed the scope of discovery permitted by the Scheduling Order," but still "permitted an additional ten interrogatories" from each party, "in addition to the narrowed interrogatories permitted by the Scheduling Order" (and inclusive of "[a]ny interrogatory requested after the Scheduling Order" unless "withdrawn"). *Id*. at 3-4. Finally, in light of "the extensive discovery conducted in related proceedings," the Presiding Officer limited the parties to eight depositions per side.

The parties met and conferred the following day, April 13, 2016. Maher identified the 2016 Interrogatories that it intended to pursue as its ten additional interrogatories with expanded substantive scope, *see* Ex. X (Email from L. Kiern to J. Friedmann, dated Apr. 15, 2016)

(Interrogatory Nos. 9c, 9d, 11, 12, 21, 23, 24, 27, 28 and 29), but sought to confer only as to the Port Authority's responses to the first four listed interrogatories, *see* Ex. Y (Email from J. Friedmann to L. Kiern, dated Apr. 18, 2016). The Port Authority, having served only eight additional interrogatories in 2016, had no need to abandon any. Ex. N (Port Authority's Second Set of Interrogs. to Maher, dated Feb. 16, 2016). Maher further identified ten of its 2012 Interrogatory requests that it believed were "still relevant and have not already been answered," but failed to specify the nature of the alleged deficiencies in the Port Authority's 2012 responses. *See* Ex. X (Interrogatory Nos. 6-11, 15, 16, 26, 27). The parties conferred over Maher's challenges to the Port Authority's 2016 discovery responses, and the Port Authority advised Maher that it had determined no supplementation was warranted with respect to its written responses, as it had already provided ample responses, but that its document production was ongoing. Maher also advised that it intended to pursue its attempt to expand the temporal scope of discovery beyond the timeframe set in its 2012 Interrogatories (1997-2012) and 2012 Document Requests (2005-2012), despite the Presiding Officer having squarely rejected that attempt the very day before.

In emails subsequent to the meet and confer, Maher raised new, additional challenges to the Port Authority's discovery responses. On April 15, 2016, Maher stated that fourteen of the Port Authority's objections and responses to its 2012 Document Requests were "still relevant and have not already been answered," Ex. X (listing 2012 Document Request No. 1-3, 6-14, and 23-24), even though Maher had not raised these in the meet and confer, and did not elaborate on the nature of the deficiencies or seek to reconvene the parties' meet and confer. *Id.* On April 19, 2015, Maher raised several new issues with the Port Authority's responses to 2016 Interrogatory Nos. 21, 23, 24, 27, 28 and 29, that had not been raised before, either in its "deficiency" letter

or during the meet and confer. *Compare* Ex. V (Letter from B. Gardner to J. Friedmann, dated March 31, 2016) at pp. 2-5 *with* Ex. Z (Email from L. Kiern to J. Friedmann, dated Apr. 19, 2016). In response, the Port Authority pointed out that "[t]he specific issues raised in [Maher's] emails . . . regarding Maher's 2016 Interrogatories Nos. 21, 23, 24, 27, 28, and 29, were not previously raised," but, in an effort to resolve the dispute without need for motion practice, the Port Authority agreed to supplement its responses to some or all or those interrogatories, as it now has. Ex. AA (Email from J. Friedmann to L. Kiern, dated Apr. 20, 2016); Ex. DD (Port Authority's Am. and Suppl. Objs. and Resps. to Complainant's Rev. First Set of Interrogs., dated Jun. 6, 2016) (providing amended responses to 2016 Interrogatories 21, 23, 24, 27, 28 and 29).

Rather than await the Port Authority's supplemental responses, however, Maher instead filed its 88-page Motion to Compel. By order dated May 18, 2016, ruling on the Port Authority's motion to strike Maher's Motion to Compel as in gross violation of the page limits set forth in the Commission's Rules, the Presiding Officer agreed that Maher's motion was "clearly excessive" but allowed it to stand to prevent the further "delay [to] the proceeding" that would result from "[r]equiring Maher to resubmit the motion in a shorter form." Ex. CC at 2.

ARGUMENT

A "party moving to compel discovery has the burden of proving that the opposing party's answers were incomplete," as judged against the appropriate parameters for discovery. *Haynes v. Navy Fed. Credit Union*, 286 F.R.D. 33, 36 (D.D.C. 2012); *Versatile Metals, Inc. v. Union Corp.*, Civ. A No. 85-4085, 1987 WL 7686, at *2 (E.D. Pa. Mar. 10, 1987) ("The party seeking to show that answers to interrogatories are insufficient has the burden of proving that the answers are incomplete, inadequate, or false."); *Continental Ins. Co. v. McGraw*, 110 F.R.D. 679, 682 (D. Colo. 1986) (similar). Maher cannot meet this burden.

In Commission proceedings, "[i]t is fundamental that the scope of discovery is not limitless." *Am. President Lines, Ltd. v. Cyrus Mines Corp. & Cyprus Minerals Co.*, FMC Dkt. No. 91-27, 1994 WL 33488, at *12 (F.M.C. Jan. 31, 1994). "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." 46 C.F.R. § 502.201(e)(1). But the presiding officer "may limit the frequency or extent of discovery otherwise allowed by these rules if the presiding officer determines that":

> (A) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (B) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (C) 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). In other words, "discovery must have some reasonable limits," and the Commission "must be alert to the possibility that discovery may have to be restricted if its benefits begin to be outweighed by other factors." *Possible Unfiled Agreement Among A.P. Moller-Maersk Line, P&O Nedlloyd Ltd. & Sea-Land Serv., Inc.*, FMC Dkt. No. 97-08, 1998 WL 940873, at *3 (A.L.J. Aug. 3, 1998).

<u>Maher Cannot Relitigate the Temporal Scope of Discovery Set by The Presiding Officer</u>

Defying the reasonable limits that the Presiding Officer already imposed on discovery in this action, Maher's Motion improperly attempts to relitigate its failed effort to expand the temporal scope of discovery. Some thirty-two times throughout its Motion, Maher contends that the Port Authority's discovery responses are insufficient based on its "refusal to produce any documents created after March 30, 2012." Mot. at 16; *accord id.* at 17, 18, 19, 20, 21, 22, 23, 25, 27, 29, 30, 32, 37, 39, 41, 44, 48, 52, 55, 59, 62, 67, 72, 74, 77, 79, 81, 82, 84, 86. But, as noted above at 1-2, 8, Maher has already litigated and lost that exact argument.

Maher's original, 2012 interrogatories set the temporal scope of discovery as "limited to the period from 1997 to the present" – which was March 30, 2012, the date on which Maher's discovery requests were served. Ex. C at 3. Maher's original document requests set a temporal scope "limited to documents prepared or obtained during the period 2005 to the present" – which, again, was March 30, 2012. Ex. B at 3. Once discovery began anew in 2016, however, Maher served revised discovery requests that demanded discovery up through *2016*—even though the events of the last four years could not possibly have furnished the basis for Maher's claims filed in 2012, that in turn concern Maher's own change in control that occurred in 2007 and the letting of the Global Terminal in 2010. Ex. O at 3; Ex. P at 3. And certain Maher revised requests unreasonably go back to 1948, while some of the original requests purport to have *no* starting date at all. *See* Ex. O at ¶¶ 25, 23; Ex. P at ¶¶ 10, 16.

Upon receipt of these revised requests, the Port Authority promptly moved for a protective order that, among other things, would prevent Maher from "radically expand[ing] the temporal scope of discovery." Ex. Q at 8-9. The Port Authority specifically explained that Maher's original discovery requests set "a temporal scope of discovery, *i.e.*, *1997-2012*," and that the Port Authority had already "expended enormous time and resources" gathering responsive information and documents in reliance on that scope. *Id.* (emphasis added). The Port Authority asked the Presiding Officer to "limit[] the time frames for all discovery to those set forth in Maher's original discovery requests." *Id.* at 10.

In opposition, Maher made the same arguments that it now repeats in its Motion to Compel. Ex. R (Maher's Opp'n to Port Auth.'s Mot. for Protective Order, dated Mar. 17, 2016) at 7-8. In answer to the Port Authority's position that "Maher's inquiry should be limited to events that occurred prior to 2012," Maher expressly contended that it should be permitted to

conduct discovery into 2016 because "Maher alleged continuing violations of the Shipping Act" and so "its claims also pertain to PANYNJ's violations from 2012 and continuing to the present." *Id.* at 8. That is the same, identical argument that Maher brazenly attempts to remake now, as if it had never been made—and rejected—before. Mot. at 16 ("It is plainly improper to cut-off discovery over four years prior [to 2016] where continuing violations are alleged."); *see also id.* at 13-14.

The Presiding Officer squarely rejected Maher's argument in granting the Port Authority's motion for protective order in relevant part. Ex. W at 3. In that order, the Presiding Officer specifically noted the difference between the temporal scopes set by Maher's *original* 2012 requests and its revised 2016 requests, and ruled that there would be no expansion beyond that "initially requested," as follows:

> The Port Authority asserts that the temporal scope of discovery has increased, from a time period of *1997 to 2012* for interrogatories and *2005 to 2012* for document requests, to discovery requests seeking information from *1948 to 2016.* Maher asserts that it requires discovery regarding the Port Authority's alleged terminal investments from 1948 and that *discovery should be provided through 2016 as a continuing violation is alleged*. ***However, the Scheduling Order clearly indicated that discovery requests should be limited to 'prior discovery requests that it asserts have not already been answered.'*** Scheduling Order at 2-3. The parties were instructed to limit, not expand, their discovery requests. ***Accordingly, temporal requests that are longer than initially requested will not be permitted***.

Id. (citations omitted) (emphasis added). Thus, Maher is flat wrong in saying that the Presiding Officer's April 12, 2016 Order "did not adopt the Port Authority's request to cut-off discovery effective March 30, 2012." *See, e.g.*, Mot. at 16.

The Commission's Rules do not provide for motions for reconsideration on non-final orders, such as the protective order that Maher implicitly asks the Presiding Officer to revisit. *See* 46 C.F.R. § 502.261(a) ("Within thirty (30) days after issuance of a *final* decision or order by the Commission, any party may file a petition for reconsideration.") (emphasis added). Even if

Maher were permitted to seek reconsideration of a non-final order, its Motion does not meet the required standard, in that it does not present any previously unavailable argument, change in the law, or change in the material facts, but "merely elaborate[s] upon or repeat[s] arguments" already rejected. *Id.*

In any event, Maher's elaborations on its previously-rejected argument to expand the temporal scope are completely meritless. Maher relies on the duty to supplement discovery responses under Commission Rule 201(k), as if it somehow shifts the temporal scope of discovery to the present day as a matter of law. Mot. at 1; *see, e.g.*, *id.* at 13, 16. But Rule 201(k) simply provides that a party "must supplement or correct its disclosure or [discovery] response . . . [i]n a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in written communication." 46 C.F.R. § 502.201(k). Accordingly, if the Port Authority uncovers additional responsive information or documents from the relevant time period, 1997-2012, without which its prior disclosures would be "incomplete or incorrect," it would then be obligated to supplement its responses. But Rule 201(k) does not endlessly and automatically expand the discoverable time scope as every case inexorably moves forward through time.[3]

[3] Maher's belated reliance on federal court decisions addressing post-complaint discovery where continuing violations were alleged, is likewise misplaced. Mot. at 13-14. Having failed to cite these cases that were available to it in making the very same temporal scope argument the first time, Ex. R at 7-8, Maher cannot rely on them now. 46 C.F.R. § 502.261(a). In any event, the cases it now cites say only that the decision whether to allow "post-complaint discovery" turns on "relevan[ce]," which "is a matter very much for the discretion of the Court." *Charvat v. Valente*, 82 F. Supp. 3d 713, 717 (N.D. Ill. 2015); *see also Carlson Cos., Inc. v. Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1102 (D. Minn. 1973). None of the cases Maher cites involved a party's request to expand the scope of discovery *by four years*, *after* the opposing party had undertaken and completed an enormous collection of evidence in reliance on the original temporal scope.

Maher's attempt to expand the time frame for discovery also fails to meet the standard that permitted discovery be keyed to "the needs of the proceeding." 46 C.F.R. § 502.201(e)(2)(ii)(c); *see also* Fed. R. Civ. P. 26(b)(1) (requiring that discovery be constrained to what is "proportional to the needs of the case."). The negotiation of the Global lease, on which two of its remaining claims are premised, was concluded on June 23, 2010. Ex. A at ¶ IV(Z). There is nothing to suggest that anything in 2013 to 2016 had any relation to the alleged incident in which Maher claims the Port Authority categorically excluded Maher from consideration for what became the Global leasehold. Similarly, with respect to the two remaining claims based on the Port Authority's change-of-control practices, it is a matter of public record that Maher's own change in control occurred in mid-2007, *Maher Terminals, LLC v. Port. Auth. of N.Y. & N.J.*, 33 S.R.R. at 835-36, which is not only well outside the three-year statute of limitations applicable to this case, but some five years before the end of the temporal period specified in Maher's original 2012 discovery requests. Maher makes no attempt to show that discovery concerning the Port Authority's change in control practices over that subsequent five-year period would not be adequate to show whether there was any discrimination or inconsistent conduct in consent transactions by the Port Authority as Maher has alleged.

The Port Authority, at significant cost, undertook a massive search and collection of documents from over forty custodians and archives, across a period spanning 1980-2012—the scope of which was based on Maher's initial requests—and has completed its production to Maher of over 15,000 documents (as compared with the 533 total documents in Maher's paltry production). To impose Maher's demands for post-Complaint discovery for 2013 through 2016 on the Port Authority would be to require it to perform yet another massive collection and review

at enormous expenses, vastly disproportionate to any utility in the adjudication of Maher's surviving claims.

<u>There Has Been No Waiver of Privilege by the Port Authority</u>

Maher's Motion falsely contends that the Port Authority has waived attorney-client privilege in certain of its interrogatory responses supposedly by wielding it "both as a sword and a shield." Mot. at 14. The Port Authority has done no such thing. As further discussed below as to the interrogatories in question, *see* pp. 54-55, 66-67, 68-69 *infra*, Maher posed interrogatories that deliberately asked for privileged information. In response, the Port Authority declined to take the bait, and expressly *objected* on the basis of privilege, confining its responses only to nonprivileged facts.

In Commission proceedings, "[t]he attorney-client privilege, unlike [] other[] [privileges], is a true privilege that is virtually absolute and, unless waived, discovery is forbidden." *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Miss. River*, Dkt. No. 01-06, 2002 WL 207567, at *7 (A.L.J. Jan. 2, 2002); *see* 46 C.F.R. § 502.201(e)(1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense . . . .") (emphasis added). While the Commission apparently has not addressed the issue, courts hold that "implied waiver may be found where the privilege holder 'asserts a claim that in fairness requires examination of protected communications" – in other words, "when the party attempts to use the privilege both as 'a shield and a sword.'" *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000) (citation omitted).

While a party may not use a privilege as both a sword and a shield, as for example when a party asserts the advice of counsel as a defense while simultaneously refusing to disclose some

or all of the legal advice, *In re Grand Jury Proceedings*, 219 F.3d at 183,[4] at no time in these proceedings has the Port Authority raised the advice of counsel as a defense, or otherwise placed the advice of counsel at issue, whether by disclosure of privileged information or otherwise. On the contrary, the Port Authority has expressly preserved its privileges. Maher's argument to the contrary is frivolous.

The Port Authority Made Proper Objections and Meaningful Responses to Maher's Discovery Requests in Compliance with the Commission's Rules

Maher's critique of the Port Authority's objections to its discovery requests mischaracterizes both the Commission's rules and the content of the Port Authority's actual responses. Commission Rule 205, which governs interrogatories served in Commission proceedings, requires that each interrogatory must be answered only "to the extent it is not objected to," and "[t]he grounds for objecting to an interrogatory must be stated with specificity." 46 C.F.R. §§ 502.205(b)(3), (b)(4). Commission Rule 206, which governs document requests served in Commission proceedings, provides that, "[f]or each item or category, the response must either state that inspection and related activities [*i.e.*, production] will be permitted as requested or state an objection to the request, including the reasons." 46 C.F.R. § 502.206(b)(2)(ii). "An objection to part of a request must specify the part and permit inspection of the rest." *Id.* at § 502.206(b)(2)(iii). The Port Authority has fully complied.

[4] *See also Chevron Corp. v. Pennzoil Corp.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (privilege waived where party asserted defense "based on advice of counsel"); *Pesky v. U.S.*, Civ. No. 1:10-186 WBS, 2011 WL 3204713, at *1 (D. Idaho July 26, 2011) (privilege waived where party responded to allegation based on its "reli[ance] on the advice of counsel"); *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (privilege waived where party asserted defense that "he thought his actions were legal" and put at issue "[h]is conversations with counsel regarding the legality of his schemes")); *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 & n.19 (5th Cir. 1999) (party "waived the attorney-client privilege by selectively disclosing confidential communications"); *W.L. Gore & Assocs., Inc. v. Tetratec Corp.*, Civ. A. No. 89-3995, 1989 WL 144178, at *3 (E.D. Pa. Nov. 28, 1989) (party would waive privilege if it chose to "produce the opinions of its counsel" and "use[] [them] at trial").

Maher's suggestion that the Port Authority relied on "vague 'general objections,'" instead of objecting to specific requests, is incorrect. Mot. at 6; *id.* at 7-8. In every document request response challenged by Maher (quoted in full below), the Port Authority separately set forth the specific reasons for its objections to that particular request, in compliance with 46 C.F.R. § 502.206(b)(2)(ii). And, in accord with § 502.206(b)(2)(iii), each response confirmed that, "[s]ubject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control." Ex. F. Similarly, in every challenged response to the 2012 and 2016 Interrogatories (quoted in full below), the Port Authority separately set forth the "specific[]" "grounds" why it was objecting to that particular interrogatory, and answered the interrogatory "to the extent it is not objected to," in accord with § 502.205(b)(3), (b)(4).[5]

Maher's contention that the Port Authority's responses to document requests "must identify documents withheld on the basis of an objection," is meritless. Mot. at 6. Maher cites

[5] In its responses to Maher's 2016 interrogatories, the Port Authority incorporated by reference a category of generally applicable objections labelled "General Objections," which were set forth in detail in a separate section preceding its individualized responses. *See* Ex. S at 2-5. In addition, the Port Authority separately reiterated its specific objections to each interrogatory and the grounds therefore in each of the individual responses. *Id.* at 5-31; *see* pp. 72-103 *infra*. Notably, Maher adopted a similar practice in its 2012 initial and amended interrogatory responses, in which it set forth several generally applicable objections in a separate, initial section titled "Specific Objections" and then reiterated its objections within specific interrogatory responses. Ex. G (Maher's Resps. to Port Auth.'s First Set of Interrogs., dated June 6, 2012) at 1-6; Ex. H (Maher's Am. and Suppl. Resps. to Port Auth.'s First Set of Interrogs., dated July 27, 2012) at 1-6. Maher likewise employed this same practice in its 2016 document request responses, stating its generally applicable objections in a separate section labelled "Specific Objections to Definitions and Instructions" and then reiterating its objections within specific responses. Ex. U (Maher's Resps. to Port Auth.'s Am. First Req. for Produc. of Docs., dated Mar. 17, 2016) at 2-3. Maher's challenge to the Port Authority's use of generally applicable objections, later reiterated in specific responses, Mot. at 7-8, is, therefore, both disingenuous and hypocritical, to say the least.

no authority for this assertion, *id.*, because there is none. The Commission's Rules impose no such obligation. 46 C.F.R. § 502.206.

Maher is likewise mistaken in asserting that the Port Authority's responses to its 2012 Document Requests should have stated *whether* documents had been withheld based on stated objections and specified an end date for production. Mot. at 8. Again, the Commission's Rules impose no such obligations. 46 C.F.R. § 502.206. While Maher relies on Federal Rule of Civil Procedure 34, it ignores that such requirements were added to that Rule only in 2015—three years *after* the Port Authority provided the challenged responses to Maher's 2012 document requests. Mot. at 8.

In any event, Maher makes no case for applying Federal Rule 34 in this proceeding, much less the recently-amended version. Under Commission Rule 12, the Federal Rules apply only "for situations which are not covered by a specific Commission rule" and only then "to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Inasmuch as the Commission does have a specific rule governing document requests, 46 C.F.R. § 502.206, which imposes none of new Rule 34's requirements, the new version of FRCP 34 simply does not apply.

The Port Authority Has Provided the Principal and Material Facts in Its Interrogatory Responses, and Is Not Required to Do More

Maher erroneously contends that the Port Authority has failed to provide sufficient responses to its interrogatories. "'Interrogatories may . . . properly ask for the 'principal or material' facts which support an allegation or defense.'" Ex. 16 to Maher's Motion (*Maher Terminals LLC v. Port Auth. of N.Y. & N.J.*, Dkt. No. 08-03, Mem. & Order on Discovery Mots. (A.L.J. July 23, 2010) (citation omitted)) at 8. As ALJ Guthridge ruled in the Dkt. No. 08-03 action, "[i]nterrogatories should not require the answering party to provide a narrative account of

its case." *Id.* "'The court will generally find [interrogatories] overly broad and unduly burdensome on their face to the extent they ask for 'every fact' which supports identified allegations or defenses.'" *Id.* (quoting *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404-055 (D. Kan. 1998)); *see also Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 273 F.R.D. 367, 369 (S.D.N.Y. 2010) ("Defendants' requests, insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact—rather than, for example, certain principal or material facts, pieces of evidence, witnesses and legal applications—supporting the identified allegations, are overly broad and unduly burdensome.").

As will be obvious from the specific interrogatories discussed below, most of Maher's interrogatories at issue on its Motion are overly broad and unduly burdensome because, among other things, they seek all facts or evidence regarding the identified allegations or otherwise require a narrative account. *See, e.g.*, pp. 38-39, 51, 83, and 86 *infra*. Indeed, the Commission already noted that many of the 2012 discovery requests are "overbroad on their face." Ex. L at 71. Despite, Maher's endless demands for detail, Maher is entitled only to responses setting forth the principal and material facts, as the Port Authority has demonstrably provided.

The Port Authority's Responses to Certain Interrogatories by Specifying Documents that Provided the Answers Sought Were Wholly Proper

Maher's contention that it is *per se* "improper to respond to an interrogatory by citing to a document," Mot. at 12, is clearly wrong. Commission Rule 205 expressly provides that a party may respond to an interrogatory by "specifying the records" from which "the answer to an interrogatory may be determined," as long as the responding party identifies the records "in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could," and "giv[es] the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries." 46

C.F.R. § 502.205(d). As with Federal Rule 33(d), which is identical to Commission Rule 205(d), the "primary purpose or result [of the rule] is to shift the time and cost burden, of perusing documents in order to supply answers to discovery requests, from the producing party to the party seeking the information." *U.S. S.E.C. v. Elfindepan, S.A.*, 206 F.R.D. 574, 576 (M.D. N.C. 2002). "[A] party [that] files a motion to compel" challenging the exercise of the option to rely on documents in response to an interrogatory "must make a prima facie showing that the use of Rule 33(d) is somehow inadequate to the task of answering the discovery, whether because the information is not fully contained in the documents, is too difficult to extract, or other such reasons." *Id.*; *accord E.E.O.C. v. CRST Van Expedited, Inc.*, 256 F.R.D. 633, 639 (N.D. Ia. 2009). Only if the moving party meets that burden does the "burden then shift[] to the producing party to justify use of [the rule] instead of answering the interrogatories." *Elfindepan*, 206 F.R.D. at 576.

The Port Authority properly has exercised its Commission Rule 205(d) option in response to certain interrogatories where the interrogatory requested facts that can be derived from documents discoverable in the action and available to Maher. While the responding party must identify the documents in which the answer to an interrogatory may be found "in sufficient detail to enable the interrogating party to locate and to identify them," 46 C.F.R. § 502.205(d)(1), this requirement is met by "specify[ing] 'by category and location, the records from which answers to the interrogatories can be derived,'" *Dunkin' Donuts Inc. v. N.A.S.T., Inc.*, 428 F. Supp. 2d 761, 770 (N.D. Ill. 2005) (citation omitted); *accord U.S. ex rel. Englund v. Los Angeles Cty.*, 235

F.R.D. 675, 680 (E.D. Cal. 2006), as the Port Authority has done, and indeed in some instances has provided more specificity than the Rule requires. *See* pp. 59 *infra*.[6]

DISCUSSION OF SPECIFIC 2012 DOCUMENT REQUEST RESPONSES

Document Request No. 1: *All documents pertaining to your communications, deliberations, determinations, negotiations, practices, actions, inactions and omissions pertaining to the acts and allegations which are the subject of the Complaint.*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. Subject to and without waiving the foregoing objection, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery effective March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

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[6] To be sure, "a broad statement that the information sought is ascertainable generally from documents and that those documents are available for inspection is not a sufficient answer," as ALJ Guthridge noted in the 08-03 action. Ex. 17 to Maher's Motion (*Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Dkt. No. 08-03, Mem. & Order on Second Set of Discovery Mots. (A.L.J. Jan. 18, 2012)) at 26. *See also, e.g., Budget Rent-A-Car of Mo., Inc. v. Hertz Corp.*, 55 F.R.D. 354, 357 (W.D. Mo. 1972) (defendant's interrogatory answer that "[it] believes that [plaintiff] has in its files documents which set forth [the requested information]" was insufficient); *Dunkin' Donuts Inc.*, 428 F. Supp. 2d at 770 (defendant's interrogatory answer "simply referring [plaintiff] (and this Court) to 'documents in [plaintiff's] possession' and 'documents produced in this case' does not begin to meet the requirements of that Rule") (citation omitted); *Mullins v. Prudential Ins. Co. of Am.*, 267 F.R.D. 504, 514-515 (W.D. Ky. 2010) (defendant's "general reference to Rule 33(d) [was] insufficient," as was its "general reference to the administrative record, or 'claims file produced under seal'")); *see also* pp. 20-21 *supra*. The Port Authority's use of document references in its interrogatory responses bears no resemblance to that held inadequate in cases such as these.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

<u>Document Request No. 2</u>: *All of your rules, regulations, procedures, and/or practices pertaining to the allegations of the Complaint.*

<u>Port Authority Response</u>: *The Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

<u>Maher's Argument</u>: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery effective March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

<u>Document Request No. 3</u>: *All documents pertaining to establishing, observing and enforcing your rules, regulations, procedures, and/or practices that are the subject of the allegations of the Complaint. (This request is not subject to the time limitation of 2005 to the present generally applicable to the requests.)*

<u>Port Authority Response</u>: *The Port Authority objects to this request on the grounds that it is vague and overbroad in that it specifies no time limitation whatsoever, instead merely exempting the request from the time limitation of 2005 to the present generally applicable to the requests without proposing any alternative time limitation. 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created before 2005 or after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to limit discovery by date. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." This 2012 Document Request predating the Order required the production of documents created prior to 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

Furthermore, the Port Authority does not represent that it has no responsive documents predating 2005. Without specifying what/whether documents have been withheld, its objection is improper and the Port Authority must amend its response accordingly and produce the responsive documents. Nor does it explain why the request is purportedly vague or overbroad. To the contrary, the Port Authority has already admitted under oath that it consented to six changes of ownership or control before 2005. The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories, No. 6 (May 7, 2012), Ex. 4; The Port Authority of New York and New Jersey's Amended and Supplemental Objections to Complainant's First Set of Interrogatories, No. 11 (July 12, 2012), Ex. 5. And, in its sworn answer to Maher's 2012 Interrogatory No. 7, the Port Authority further stated in relevant part:

> *[P]rior to February 22, 2007 . . . Port Commerce Department staff would review each requested change on a case-by-case basis and consider whether a requested change of control would result in the same or better circumstances for the Port Authority. Port Authority staff in the Finance and Law departments would review the requested change of control and consider whether the new entity that acquired the ownership interest was suitable to control tenant operations at a Port Authority marine terminal in terms of integrity, financial capacity, security qualifications and operational ability; and ensured that the entity would commit to make the appropriate capital investment in the facility. Board consideration of changes of control was rare.*

*The Port Authority of New York and New Jersey's Amended and Supplemental Objections to Complainant's First Set of Interrogatories, No. 7 (July 12, 2012), Ex. 5. Therefore, these documents pertaining to the Port Authority's admitted practices are plainly relevant to the claims and defenses in this proceeding and should be produced. As the Commission has explained, the consent fee allegations involve some tenants being charged millions of dollars while others are charged nothing. Maher Terminals, LLC v. Port Auth. of N.Y. & N.J., Dkt. 12-02, 2015 WL 9426189, at *18 (F.M.C. Dec. 18, 2015).*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher's demand that the Port Authority additionally should be compelled to produce "any documents created before 2005" is likewise meritless. Mot. at 18. While Maher purports not to understand why such a request would be "purportedly vague or overbroad," *id.*, the Port Authority explained exactly why in its response. Maher's demand for all pre-2005 documents, particularly when combined with its demand for documents dating through today, "is vague and overbroad in that it specifies no time limitation whatsoever." Discovery requests that are "overly broad in scope and time . . . seek[] wholly irrelevant matter" and will not be enforced. *Stephens v. City of Chicago*, 203 F.R.D. 353, 363 (N.D. Ill. 2001). A discovery request with *no time limitation at all* – like Document Request No. 3 – *ipso facto* must qualify as overly broad in scope and time, and the Port Authority properly objected on that basis. *See Booth v. Davis*, No. 10-4010 RDR, 2011 WL 2008284, at *7 (D. Kan. May 23, 2011) ("discovery requests containing no temporal scope are often facially objectionable").

Maher's argument that the Port Authority is obligated to specify "what/whether documents have been withheld" pursuant to this objection lacks any basis in the Commission's Rules, as explained above. *See* pp. 17-19 *supra*.

Moreover, despite Maher's facially overbroad request, the Port Authority in good faith has collected and produced documents responsive to Document Request No. 3 within the 2005-2012 temporal scope otherwise applicable to Maher's document requests. While Maher protests that the Port Authority's interrogatory responses identified six changes of control before 2005, that was because Maher itself chose a different temporal scope of 1997-2012 for its interrogatories than the 2005-2012 temporal scope it selected for its document requests.

Compare Ex. B at 3, *with* Ex. C at 3. The Port Authority in good faith has done its part to resolve this discrepancy, created Maher, by producing the agreements for all changes of control dating between 1997 and 2012. Friedmann Decl. at ¶¶ 24.

Maher is incorrect in suggesting that, by objecting to Document Request No. 3's overbroad temporal scope, the Port Authority must have failed to produce documents regarding its pre-February 22, 2007 "case-by-case" handling of requested changes of control. Mot. at 19. Rather, in response to Maher's Document Request No. 10 specifically seeking documents pertaining to that pre-February 22, 2007 policy, the Port Authority explicitly represented that, subject to its objections, it would "produce non-privileged documents responsive to this request from 1997 to February 22, 2007 that are in the Port Authority's possession, custody, or control." *See* Mot. at 22-23 (reciting Port Authority's response to Document Request No. 10); pp. 29-30 *infra* (same). It has done so.

The Port Authority's general production of *seven years*-worth of documents – and its additional production of ***fifteen years***-worth of agreements for changes of control and documents pertaining to its pre-February 22, 2007 policy – was both generous and unquestionably sufficient to meet its discovery obligations in this case. *See Solyom v. World Wide Child Care Corp.*, Civ. No. 14-80241, 2015 WL 1886274, at *2 (S.D. Fla. Apr. 16, 2015) (holding that plaintiff's discovery requests were "overbroad in temporal scope" and "limit[ing] [them] to the timeframe pled in the First Amended Complaint: 2007 through 2012").

Document Request No. 6: *All documents pertaining to the letting and/or redevelopment of the marine terminal facility which is the subject of the PANYNJ lease agreement with Global Terminal & Container Services, LLC (Lease No. LPJ-001), including, but not limited to, communications, meetings, notes, proposals, term sheets, deliberations, concerns, issues, analyses, models, projections, negotiations, Board recommendations, discussions, resolutions, consents, approvals, summaries, documents related to or referenced in the Global Lease.*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. Subject to and without waiving the foregoing objection, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to limit discovery by date. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Document Request No. 7: *All documents pertaining to PANYNJ's alleged refusal to deal with Maher which is the subject of the Complaint concerning the letting and/or redevelopment of the marine terminal facility which is the subject of the PANYNJ lease agreement with Global Terminal & Container Services, LLC (Lease No. LPJ-001).*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. The Port Authority also objects to this request to the extent that it seeks information related to a "refusal to deal" because the Port Authority did not refuse to deal with Maher. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery with respect to documents created prior to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to*

supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Document Request No. 8: *All documents pertaining to your 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, e.g. the PANYNJ lease agreement with Global Terminal & Container Services, LLC (Lease No. LPJ-001).*

Port Authority Response: *The Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery with respect to documents created prior to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Document Request No. 9: *All documents pertaining to your rules, regulations, practices, and/or procedures related to "Qualified Transferees" and existing marine terminal operators, including Maher, with respect to the letting of facilities in the port, e.g. the PANYNJ lease agreement with Global Terminal & Container Services, LLC (Lease No. LPJ-001).*

Port Authority Response: *The Port Authority objects to this request on the grounds that it is vague and ambiguous, including in its use of the term "Qualified Transferees." Subject to and without waiving the foregoing objection, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery with respect to documents created prior to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k), and the law.*

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Document Request No. 10: *All documents pertaining to any PANYNJ practice, policy, substantive standard, or procedure for making "appropriate recommendations for Board consideration and action" or for taking any other action or inaction, including, but not limited to, requesting or not requesting payments and/or the providing of any economic consideration to PANYNJ, with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ prior to the February 22, 2007 adoption of PANYNJ Board Resolution "Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests." (This request is not subject to the time limitation of 2005 to the present generally applicable to the requests.)*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. The Port Authority further objects to this request on the grounds that it is vague and/or overly broad and burdensome, in that it specifies no time limitation, instead exempting the request from the time limitation of 2005 to the present generally applicable to the requests without proposing any alternative time limitation. The Port Authority also objects to this request in that it is overly broad and burdensome to the extent it requests "any PANYNJ practice, policy, substantive standard, or procedure for making 'appropriate recommendations for Board consideration and action' or for taking any other*

action or inaction. . . with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ [prior to February 2007]." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request from 1997 to February 22, 2007 that are in the Port Authority's possession, custody, or control.

Maher's Argument: *The Port Authority's refusal to produce any documents created before 1997 or after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to limit discovery by date. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." This 2012 Document Request predating the Order required the production of documents created prior to 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence prior to 1997 and to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

Furthermore, the Port Authority does not represent that it has no responsive documents predating 1997. Without specifying what/whether documents have been withheld, its objection is improper and the Port Authority must produce the responsive documents. It does not explain why the request is purportedly vague or overbroad. Nor does it carry its burden to establish undue burden. Dkt. 08-03 Discovery Order at 18, Ex. 16. To the contrary, the Port Authority has already admitted under oath that it consented to six changes of ownership or control from 1997-2005. The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories, No. 6 (May 7, 2012), Ex. 4; The Port Authority of New York and New Jersey's Amended and Supplemental Objections to Complainant's First Set of Interrogatories, No. 11 (July 12, 2012), Ex. 5. And, in its sworn answer to Maher's 2012 Interrogatory No. 7 the Port Authority further stated in relevant part:

> *[P]rior to February 22, 2007 . . . Port Commerce Department staff would review each requested change on a case-by-case basis and consider whether a requested change of control would result in the same or better circumstances for the Port Authority. Port Authority staff in the Finance and Law departments would review the requested change of control and consider whether the new entity that acquired the ownership interest was suitable to control tenant operations at a Port Authority marine terminal in terms of integrity, financial capacity, security qualifications and operational ability; and ensured that the entity would commit to make the appropriate capital investment in the facility. Board consideration of changes of control was rare.*

The Port Authority of New York and New Jersey's Amended and Supplemental Objections to Complainant's First Set of Interrogatories, No. 7 (July 12, 2012), Ex. 5. Therefore, these documents pertaining to the Port Authority's admitted practices are plainly relevant to the

*claims and defenses in this proceeding and should be produced. As the Commission has explained, the consent fee allegations involve some tenants being charged millions of dollars while others are charged nothing. Maher Terminals, LLC v. Port Auth. of N.Y. & N.J., Dkt. 12-02, 2015 WL 9426189, at *18 (F.M.C. Dec. 18, 2015).*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Further, post-2012 documents would be particularly irrelevant in response to Document Request No. 10, which by its terms pertains to events that occurred "prior to [] February 22, 2007."

Maher's demand that the Port Authority additionally should be compelled to produce "any documents created before 1997" is likewise meritless. Mot. at 23. As with Document Request No. 3 above, Maher falsely states that the Port Authority has "not explain[ed] *why* the request is purportedly vague or overbroad." *Id.* at 24. The Port Authority explained why in its response: Maher's exemption of Document Request No. 10 from the otherwise applicable temporal limitation of 2005-2012 "is vague and/or overly broad and burdensome, in that it specifies no time limitation." As explained above, p. 25 *supra*, discovery requests that are "overly broad in scope and time," *Stephens*, 203 F.R.D. at 363 – particularly those "containing no temporal scope," like this one – are "facially objectionable" and should not be enforced. *Booth*, 2011 WL 2008284, at *7.

Maher's argument that the Port Authority is obligated to specify "what/whether documents have been withheld" pursuant to this objection lacks any basis in the Commission's Rules, as explained above. *See* pp. 17-19 *supra*.

Moreover, despite Maher's facially overbroad request, the Port Authority responded that it would produce "nonprivileged documents responsive to this request from 1997 to February 22, 2007 that are in the Port Authority's possession, custody, or control." Maher's suggestion that

the Port Authority must have withheld relevant documents concerning the "*six* changes of ownership or control from 1997-2005" and the pre-February 22, 2007 "case-by-case" handling of requested changes of control, is without basis. Mot. at 24. The Port Authority explicitly said it would produce responsive documents from the 1997-2007 timeframe, and it has done so – including all the agreements for the six changes of control. Friedmann Decl. at ¶¶ 23. The Port Authority's production of documents dating back to 1997 was more than sufficient to meet its discovery obligations in this case.

Document Request No. 11: *All documents pertaining to any transfer or change of ownership or control interest involving any marine terminal operator lease with PANYNJ prior to the February 22, 2007 adoption of PANYNJ Board Resolution "Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests," including, but not limited to, any "report and appropriate recommendations for Board consideration and action," any documents forming the basis of any such report and recommendations, documents of deliberations, calculations, models and decisions (including decisions to approve, deny or neither approve nor deny), and documents reflecting requirements or conditions of decisions, including but not limited to any payments and/or the providing of any economic consideration to PANYNJ. (This request is not subject to the time limitation of 2005 to the present generally applicable to the requests, and for the avoidance of doubt, includes marine terminal operator leases with respect to Sealand, Maher, Maersk, Universal Maritime (UMS), Howland Hook and PNCT prior to February 22, 2007.)*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. The Port Authority further objects to this request on the grounds that it is vague and/or overly broad and burdensome, in that it specifies no time limitation, instead exempting the request from the time limitation of 2005 to the present generally applicable to the requests without proposing any alternative time limitation. The Port Authority also objects to this request as unduly broad and burdensome to the extent it requests "[a]ll documents pertaining to any transfer or change of ownership or control interest involving any marine terminal operator lease with PANYNJ prior to [2007]." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request from 1997 to February 22, 2007 that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created before 1997 or after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to these dates. Rather,*

the Order stated: "temporal requests that are longer than initially requested will not be permitted." This 2012 Document Request predating the Order required the production of documents created prior to 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence prior to 1997 and up to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.

Furthermore, the Port Authority does not represent that it has no responsive documents predating 1997. Without specifying what/whether documents have been withheld, its objection is improper and the Port Authority must produce the responsive documents. It does not explain why the request is purportedly vague or overbroad. Nor does it carry its burden to establish undue burden. Dkt. 08-03 Discovery Order at 18, Ex. 16. To the contrary, the Port Authority has already admitted under oath that it consented to six changes of ownership or control from 1997-2005. The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories, No. 6 (May 7, 2012), Ex. 4; The Port Authority of New York and New Jersey's Amended and Supplemental Objections to Complainant's First Set of Interrogatories, No. 11 (July 12, 2012), Ex. 5. And, in its sworn answer to Maher's 2012 Interrogatory No. 7 the Port Authority further stated in relevant part:

> *[P]rior to February 22, 2007 . . . Port Commerce Department staff would review each requested change on a case-by-case basis and consider whether a requested change of control would result in the same or better circumstances for the Port Authority. Port Authority staff in the Finance and Law departments would review the requested change of control and consider whether the new entity that acquired the ownership interest was suitable to control tenant operations at a Port Authority marine terminal in terms of integrity, financial capacity, security qualifications and operational ability; and ensured that the entity would commit to make the appropriate capital investment in the facility. Board consideration of changes of control was rare.*

*The Port Authority of New York and New Jersey's Amended and Supplemental Objections to Complainant's First Set of Interrogatories, No. 7 (July 12, 2012), Ex. 5. Therefore, these documents pertaining to the Port Authority's admitted practices are plainly relevant to the claims and defenses in this proceeding and should be produced. As the Commission has explained, the consent fee allegations involve some tenants being charged millions of dollars while others are charged nothing. Maher Terminals, LLC v. Port Auth. of N.Y. & N.J., Dkt. 12-02, 2015 WL 9426189, at *18 (F.M.C. Dec. 18, 2015).*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Further, post-2012 documents would be particularly irrelevant in response to Document Request No. 11, which by its terms pertains to events that occurred "prior to [] February 22, 2007."

Maher's demand that the Port Authority additionally should be compelled to produce "any documents created before 1997" is likewise meritless. Mot. at 25. As with Document Request Nos. 3 and 10 above, Maher falsely states that the Port Authority has "not explain[ed] *why* the request is purportedly vague or overbroad." *Id.* at 26. The Port Authority explained why in its response: Maher's exemption of Document Request No. 11 from the otherwise applicable temporal limitation of 2005-2012 "is vague and/or overly broad and burdensome, in that it specifies no time limitation." As explained above, p. 25 *supra*, discovery requests that are "overly broad in scope and time," *Stephens*, 203 F.R.D. at 363 – particularly those "containing no temporal scope," like this one – are "facially objectionable" and should not be enforced. *Booth*, 2011 WL 2008284, at *7.

Maher's argument that the Port Authority is obligated to specify "what/whether documents have been withheld" pursuant to this objection lacks any basis in the Commission's Rules, as explained above. *See* pp. 17-19 *supra*.

Moreover, despite Maher's facially overbroad request, the Port Authority responded that it would produce "nonprivileged documents responsive to this request from 1997 to February 22, 2007 that are in the Port Authority's possession, custody, or control." Maher's suggestion that the Port Authority must have withheld relevant documents concerning the "*six* changes of ownership or control from 1997-2005" and the pre-February 22, 2007 "case-by-case" handling of requested changes of control, is without basis. Mot. at 26. The Port Authority explicitly said

it would produce responsive documents from the 1997-2007 timeframe, and it has done so – including all the agreements for the six of changes of control. Ex. Friedmann Decl. at ¶¶ 24. The Port Authority's production of documents dating back to 1997 was more than sufficient to meet its discovery obligations in this case.

Document Request No. 12: *All documents pertaining to any PANYNJ practice, policy, substantive standard or procedure for taking any action or inaction, including, but not limited to, requesting or not requesting payments and/or the providing of any economic consideration to the PANYNJ, with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ after the February 22, 2007 adoption of PANYNJ Board Resolution "Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests."*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. The Port Authority also objects to this request in that it is overly broad and burdensome to the extent it requests "any PANYNJ practice, policy, substantive standard, or procedure for taking any action or inaction . . . with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ after [February 2007]." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to these dates. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order and Rule 201(k)(1).*

Furthermore, without specifying what/whether documents have been withheld, its objection is improper and the Port Authority must produce the responsive documents. It does not explain why the request is purportedly vague or overbroad. Nor does it carry its burden to establish undue burden. Dkt. 08-03 Discovery Order at 18, Ex. 16.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher's argument that the Port Authority is obligated to specify "what/whether documents have been withheld" pursuant to this objection lacks any basis in the Commission's Rules, as explained above. *See* pp. 17-19 *supra*.

<u>Document Request No. 13</u>: *All documents pertaining to any transfer or change of ownership or control interest involving any marine terminal operator lease with PANYNJ after the February 22, 2007 adoption of PANYNJ Board Resolution "Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests," including, but not limited to, any reports or recommendation for consideration or action, any documents forming the basis of any such report or recommendations, documents of deliberations, calculations, models and decisions (including decisions to approve, deny or neither approve nor deny), documents reflecting requirements or conditions of decisions, including but not limited to any payments and/or the providing of any economic consideration to PANYNJ and all "executed . . . agreements and other documents necessary to effectuate a Tenant Facility Change." (For the avoidance of doubt, this request includes marine terminal operator leases with respect to PNCT, NYCT, APM, Maher and Global after February 22, 2007.)*

<u>Port Authority Response</u>: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. The Port Authority also objects to this request in that it is overly broad and burdensome to the extent it requests "[a]ll documents pertaining to any transfer or change of ownership or control interest involving any marine terminal operator lease with PANYNJ after [2007]." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

<u>Maher's Argument</u>: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to these dates. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present"*

with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.

Furthermore, without specifying what/whether documents have been withheld, its objection is improper and the Port Authority must produce the responsive documents. It does not explain why the request is purportedly overbroad. Nor does it carry its burden to establish undue burden. Dkt. 08-03 Discovery Order at 18, Ex. 16.

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher's argument that the Port Authority is obligated to specify "what/whether documents have been withheld" pursuant to this objection lacks any basis in the Commission's Rules, as explained above. *See* pp. 17-19 *supra*.

Document Request No. 14: *All documents pertaining to the regulations, rules, practices, policies, and/or procedures that you observed in establishing and/or implementing any consent or transfer fees policy.*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery with respect to documents created prior to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Document Request No. 23: *All documents pertaining to whether or not your actions that are the subject of the Complaint in this proceeding violate the Shipping Act.*

Port Authority Response: *The Port Authority 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. In the event any privileged or otherwise protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity. Subject to and without waiving the foregoing objection, the Port Authority will produce non-privileged documents responsive to this request that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *The Port Authority's refusal to produce any documents created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to cut-off discovery with respect to documents created prior to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Document Requests predating the Order required the production of documents dated 2005 "to the present" and specified a duty to supplement pursuant to Rule 201(j) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its document production to include evidence to "the present" with a continuing duty to supplement as originally requested by the 2012 Document Requests and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

DISCUSSION OF SPECIFIC 2012 INTERROGATORY RESPONSES

2012 Interrogatory No. 6: *Describe in detail (i) when and how you first became aware (after the 2007 purchase of PNCT by AIG) that PNCT contemplated a change in control and or ownership interest, (ii) describe in detail the principal and material facts of each contemplated change in control and or ownership interest (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) for each contemplated change in control and or ownership interest, describe in detail the actions taken by PANYNJ to consider and consent or decline to consent, and the principle [sic] and material facts of the terms of any consent.*

Port Authority Response: *The Port Authority objects to Interrogatory No. 6 to the extent that it seeks more than the principal and material facts concerning the change of ownership of PNCT. Subject to and without waiving, but rather expressly preserving, the foregoing objections, the Port Authority responds that in 2007 AIG acquired, through a subsidiary fund, ownership of Ports America. Port Newark Container Terminal LLC was an indirect, wholly-owned subsidiary of Ports America. AIG paid a consent fee of $10 million to the Port Authority and agreed to a guaranteed investment of $40 million in the PNCT terminal as part of this transaction. In connection with the 2007 purchase of PNCT by AIG, by virtue of its acquisition of Ports America, the Port Authority became aware that AIG contemplated a seven-year plan pursuant to which AIG intended to divest its ownership or control interests in PNCT within five to seven years of acquiring it. The agreement was structured in such a way to allow for such a transaction.*

In 2011, two change of control events of the PNCT terminal occurred simultaneously: 1) AIG spun off its control of the fund that invested in Ports America to Highstar Capital LP, a private fund manager, and 2) Ports America and its new parent, Highstar Capital LP, sold 50% of their ownership of Port Newark Container Terminal LLC to TIL. The Port Authority consented to these two changes of control by means of the Amended and Restated Lease Agreement, dated June 14, 2011. The consideration and terms of the Port Authority's consent to these changes of control are reflected in the terms of the Amended and Restated Lease Agreement.

The Port Authority further responds that, pursuant to Fed. R. Civ. P. 33(d), it expects that nonprivileged, responsive documents describing the actions taken by the Port Authority to consider and consent to the changes of control described above will be produced in connection with this proceeding. These documents consist of emails by and between Port Authority staff, drafts of the amended lease agreement, draft term sheets, and documents reflecting Board consideration and approval, and may be found in the documents of Steve Borrelli, Dennis Lombardi, Richard Larrabee, and Linda Handel.

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's response to 2012 Interrogatory No. 6 provides inapposite information, and fails to provide the principal and material facts requested regarding post-2007 changes of control pertaining to PNCT. The Port Authority does not answer "when and how [it] first became aware" of each of PNCT's contemplated change of control or ownership interests after the 2007 AIG sale. The first paragraph of the Port Authority's response mentions its

awareness of certain terms of the 2007 AIG sale, regarding a possible future change of control to an undisclosed party on undisclosed terms. But 2012 Interrogatory No. 6 requests the Port Authority's awareness after the 2007 sale, and calls for the principal and material facts of the Port Authority's consideration of PNCT's requests for such changes of control or ownership: "describe in detail the actions taken by PANYNJ to consider and consent or decline to consent, and the principle [sic] and material facts of the terms of any consent." According to the Port Authority's sworn answers to interrogatories, it established a policy on February 22, 2007 governing the consideration of such consents whereby its executive director was required to consider requests for consent following "appropriate due diligence" applying the same substantive standard applied before February 22, 2007, e.g. suitability and commitment to make capital investments in the facility. The Port Authority of New York and New Jersey's Amended and Supplemental Objections and Responses to Complainant's First Set of Interrogatories, Nos. 7 & 8 (July 12, 2012), Ex. 5. The interrogatory asks for the principal and material facts concerning the Port Authority's "actions . . . to consider and consent . . . ." But, the Port Authority obstinately refuses to answer the question.

The Port Authority's answer discloses two changes of control that occurred in 2011. However, the Port Authority fails to disclose when or how it learned of these two changes of control. It also fails to disclose whether any consent fee or other financial consideration was requested or paid for consent, and if not, why not. It also does not disclose how the amount of any such consent fee or financial consideration was determined or waived. For example, if the Port Authority did not require PNCT to pay a consent fee or provide other financial consideration for each of these two changes of control in 2011, it should say so and explain why. The Port Authority's cryptic reference to the entire Port Authority-PNCT Amended and Restated Lease Agreement dated July 14, 2011 is not a proper answer. The Port Authority fails to identify which specific sections of this lengthy and complex document—with which the Port Authority as author is much more familiar—contains the purportedly responsive information. In all events, the Port Authority fails to commit to produce the lease, and even if it were produced, the lease contains only the terms arrived at—it does not contain the requested information regarding "actions taken by the Port Authority to consider and consent or decline to consent."

The mere disclosure of the two changes of control that apparently occurred also fails to answer Maher's question which concerns each "contemplated change in control and or ownership" involving PNCT. Thus, the Port Authority does not answer Maher's question concerning actions taken by the Port Authority to not consider or not consent to contemplated or requested PNCT changes of control or ownership interests, e.g., proposals and counter-proposals exchanged by the parties prior to the final agreement contained in the lease. Accordingly, the Port Authority should be ordered to answer properly the 2012 Interrogatory No. 6. It should not be allowed to evade a proper answer.

In its response to 2012 Interrogatory No. 6, the Port Authority again improperly resorts to Fed. R. Civ. P. 33(d) while failing to produce the documents it tenders in lieu of the principal and material facts it should have provided. Fed. R. Civ. P. 33(d) and FMC Rule 205(d) require a party responding to an interrogatory with documents to "make[] the records" specified in the interrogatory response "available for inspection," which the Port Authority has not done. Dkt. 08-03 Discovery Order at 8, Ex. 16 (quoting Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983)). The Port Authority does not even affirmatively

*represent that they even exist—it only opines that it "expects that nonprivileged, responsive documents describing the actions taken by the Port Authority to consider and consent to the changes of control described above will be produced in connection with this proceeding." Ex. 9. The Port Authority has not made the documents "available for inspection," and has not met its burden under Fed. R. Civ. P. 33(d) and FMC Rule 205(d). See Gen. Cigar Co., Inc. v. Cohiba Caribbean's Finest, Inc., 2007 WL 983855, *6 (D. Nev. 2007); Roger Kennedy Const., Inc. v. Amerisure Ins. Co., 2007 WL 1839394 at *2 & n.1 (M.D. Fla. 2007); Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 305 (D. Kan. 1996) ("Under the guise of Fed. R. Civ. P. 33(d) defendants may not simply refer generically to past or future production of documents. They must identify in their answers to the interrogatories specifically which documents contain the answer."). Further, the list must be specific. Qualifiers that render the list non-specific are not allowed under Fed. R. Civ. P. 33(d). Id. ("In one instance SPS qualifies the list of specified documents with the phrase, 'included among these documents.' This makes the list non-specific. It does not qualify as an election to produce business records. The answer must specify, without qualification, which documents contain the answer.").*

The Port Authority's response to 2012 Interrogatory No. 6 is deficient under the requirements of Fed. R. Civ. P. 33(d) and FMC Rule 205(d) because the Port Authority fails to specify the records "in sufficient detail to permit the interrogating party to locate and identify, as readily as [the Port Authority], the records from which the answer may be obtained." Dkt. 08-03 Discovery Order at 8, Ex. 16 (quoting Rainbow Pioneer # 44-18-04A, 711 F.2d at 906). The Port Authority's description of the responsive documents consists merely of a vague reference to "emails by and between Port Authority staff, drafts of the amended lease agreement, draft term sheets, and documents reflecting Board consideration and approval," under four different custodians. Judge Guthridge previously explained to the parties that "identifying the custodian or custodians with records does not necessarily 'specify the records from which the answer may be derived or ascertained.'" Id. at 14; Mem. and Order on Second Set of Discovery Mot., Dkt. 08-03 at 23 (Jan. 18, 2012), Ex. 17. This is particularly true where, as here, the Port Authority has produced over 13,000 documents under the four custodians identified. Decl. of R. Brothers, Ex. 18. "Rule 33 . . . cannot be used as a procedural device for avoiding the duty to give information by shifting the obligation to find out whether information is ascertainable from the records which have been tendered . . . . Rather, the interrogated party must state specifically and precisely identify which documents will provide the information to be elicited." Mem. and Order on Second Set of Discovery Mot., Dkt. 08-03 at 26 (Jan. 18, 2012), Ex. 17 (quoting Budget Rent-A-Car of Mo., Inc. v. Hertz Corp., 55 F.R.D. 354, 357 (W.D. Mo. 1972)). The Port Authority's description of documents here is not nearly enough to "specifically and precisely identify" the referred-to documents or to ensure that Maher can identify them "as readily as [the Port Authority]." Dkt. 08-03 Discovery Order at 13, Ex. 16.

To comply with Fed. R. Civ. P. 33(d) and FMC Rule 205(d), the Port Authority must (a) make the documents available to Maher for inspection, and (b) properly specify and identify the records containing responsive information with a sufficient level of detail.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Contrary to Maher's assertion, Mot. at 32, the Port Authority *has* provided the principal and material facts requested in 2012 Interrogatory No. 6, regarding PNCT's post-2007 changes of control. The response above sets forth the circumstances under which the Port Authority became aware of AIG's plan for post-2007 changes of control; and the number, time period, parties, and terms of those changes of control. The minute, additional details Maher demands regarding precisely "when and how" the Port Authority became aware of the two 2011 changes of control and "the actions taken by PANYNJ to consider" the changes of control, Mot. at 32-34, far exceed the principal and material facts regarding those transactions that may be appropriately requested by an interrogatory. The Port Authority is not required to provide a detailed narrative account concerning any and every detail in response to interrogatories, as explained above. *See* pp. 19-20 *supra*. To the extent additional information is available, Maher will have ample opportunity to obtain it upon review of the documents specified in the Port Authority's response, as well as in depositions.

Maher's contention that the Port Authority "fail[ed] to disclose" the "consent fee or other financial consideration" that it required for the 2011 changes of control is incorrect. Mot. at 33. The Port Authority properly directed Maher to the PNCT lease agreement for this information, in an exercise of its "[o]ption to produce business records" in response to interrogatories. 46 C.F.R. § 502.205(d); pp. 20-22 *supra*. The Port Authority has no obligation under Rule 205(d) to specify "specific sections" of documents as Maher protests, Mot. at 34, but only must specify the lease itself (which has a table of contents, as Maher doubtless knows). Nor did the Port Authority need to "commit to produce the lease," *id.*, since it is publicly available on the Port

Authority's website (and Maher appears to be familiar with it given its complaints on its length and complexity).

Maher's demand that the Port Authority set forth not only "the terms arrived at" for the changes of control but also those merely "consider[ed]," and not only the changes of control that occurred but also "each 'contemplated change in control . . .,'" is wholly inappropriate. Mot. at 34. Not only does this information far exceed the principal and material facts, just as the Port Authority appropriately objected in its response—it is also irrelevant. The basis on which the Commission determined that Maher's change-of-control claims could go forward was that it read Maher's complaint as alleging that some tenants were "charged millions of dollars" for the Port Authority's consent to their changes of control, while others were "charged nothing." Ex. L at 32. What is relevant, at most, then is the changes of control that actually occurred and on what terms. Potential changes of control that never occurred and where no terms were agreed upon or imposed are irrelevant to Maher's claims, or, at a minimum, sufficiently removed so as to render discovery concerning such uncompleted transactions disproportionate to what remains of this action.

Finally, Maher's arguments that the Port Authority "improperly" invoked its option to specify documents in response to interrogatories are entirely baseless. Mot. at 34-36. Maher first contends that the Port Authority has failed to make the specified records "available for inspection," as required by Rule 205(d)(2). *Id.* at 34. Maher entirely ignores that the Port Authority has produced over 15,000 documents, *see* p. 15 *supra*, including every category of document specified in its response. Indeed, Maher's specious assertion that the Port Authority has not produced the specified documents appears to be the byproduct of its rote, and likely cut-

and-pasted, recitation of identical arguments from its 2012 motion to compel, filed at a time when neither party had produced documents.

Maher is also wrong in contending that the Port Authority's specification of documents lacked "'sufficient detail.'" Mot. at 35. The Port Authority did not merely refer Maher to its general document production. Instead, the Port Authority identified the four custodians by name and specified the categories of responsive documents ("emails," "drafts of the amended lease agreement," "draft term sheets," and "documents reflecting Board consideration and approval"), the parties between whom the documents were sent ("Port Authority staff"), the time period over which the documents could be found ("2007" to "2011"), and the topic that the documents would discuss ("actions taken by the Port Authority to consider and consent" to the two 2011 changes of control). PANYNJ Interrog. Resp. No. 6 *supra*. This response properly specifies the "categor[ies] and location" of responsive documents, in full compliance with the Port Authority's obligations in exercising its option to produce documents in response to interrogatories. *Dunkin' Donuts Inc.*, 428 F. Supp. 2d at 770; pp. 20-22 *supra*.

2012 Interrogatory No. 7: *Describe in detail PANYNJ's practice, policy, substantive standard, or procedure for making "appropriate recommendations for Board consideration and action" or for taking any other action or inaction, including, but not limited to, requesting or not requesting payments and/or the providing of any economic consideration to PANYNJ, with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ prior to the February 22, 2007 adoption of PANYNJ Board Resolution "Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests."*

Port Authority Response: *The Port Authority objects to Interrogatory No. 7 on the grounds that the interrogatory is vague and ambiguous in that it purports to seek the Port Authority's "practice, policy, substantive standard, or procedure . . . for taking any other action or inaction . . . with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with [the Port Authority before February 2007]." Subject to and without waiving, but rather expressly preserving, the foregoing objections, the Port Authority responds that prior to February 22, 2007 the Port Authority did not have a formal written policy concerning marine terminal operator requests for changes in ownership interests. Port Commerce Department staff would review each requested change on a case-by-case basis and consider whether a requested change of control would result in the same or better circumstances*

for the Port Authority. Port Authority staff in the Finance and Law departments would review the requested change of control and consider whether the new entity that acquired the ownership interest was suitable to control tenant operations at a Port Authority marine terminal in terms of its integrity, financial capacity, security qualifications and operational ability; and ensured that the entity would commit to make the appropriate capital investments in the facility. Board consideration of changes of control was rare.

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's response to 2012 Interrogatory No. 7 is also deficient because the Port Authority fails to answer parts of the Interrogatory, and in other respects does not provide the responsive principal and material facts. The Port Authority objects that Maher's Interrogatory is "vague and ambiguous," but provides neither specifics nor any explanation whatsoever regarding why it is allegedly "vague or ambiguous." This is therefore an improper general objection lacking in specifics sufficient to permit Maher or the Presiding Officer to determine its validity, or what information has been withheld pursuant to the objection, if any.

While admitting that it had no formal written policy, the Port Authority purports to describe its practice before February 22, 2007. But the Port Authority fails to provide what it later, in its answer to 2012 Interrogatory No. 8, refers to as its "substantive standard" whereby it considered and approved or disapproved the requests and set the requirements for financial consideration. The Port Authority merely lists some of the factors purportedly involved in the Port Authority's staff "review . . . on a case-by-case basis." The purported factors—including "integrity, financial capacity, security qualifications and operational ability" and "ensur[ing] . . . appropriate capital investments"—do not constitute a "substantive standard" and do not provide principal and material facts concerning the Port Authority's practice of requesting or not requesting payments and/or economic consideration or for taking action or not. Indeed, the Port Authority provides no principal or material facts about its standard for considering the factors and how the purported factors were actually applied.

Accordingly, the Port Authority must provide the principal and material facts describing the Port Authority's practices for considering requests for consent to change of control or ownership, including requiring economic consideration for consent, before the February 22, 2007 Board Resolution, explaining how and why such factors were applied or not to arrive at the consent fee or other financial consideration required or not required, for changes of control consent by the Port Authority.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Contrary to Maher's contention, Mot. at 37-38, the Port Authority explained exactly why 2012 Interrogatory No. 7 is vague and ambiguous. Maher asks for a detailed description of every "practice, policy, substantive standard, or procedure for making 'appropriate recommendations for Board consideration and action' or for taking *any other action or inaction*," and then follows this with the clause "including, but not limited to." This interrogatory therefore could cover all actions taken by the Port Authority. It also is unclear *whose* actions the interrogatory encompasses, whether simply the Port Authority Board or any employee.

To the extent 2012 Interrogatory No. 7 is limited to the Port Authority's practice or policy for requesting consideration in exchange for consent to changes of control prior to February 22, 2007, the Port Authority has provided the principal and material facts responsive to the interrogatory. The Port Authority explained that it had no "formal written policy" prior to February 22, 2007. Its response explained who reviewed requests for changes of control, how they reviewed those requests, and the reasons why such requests would be approved. The Port Authority also provided the factors it considered, as Maher acknowledges. Mot. at 38. Maher's argument that these factors "do not constitute a 'substantive standard'" is argumentative word-play. *Id.* Similarly, Maher's contention that the Port Authority must provide "its standard for considering the factors" is circular. *Id.* And, while Maher now demands details on "how and why such factors were applied" as to each "change[] of control," *id.*, that is not what 2012 Interrogatory No. 7 requested. Maher asked for the pre-February 22, 2007 "practice, policy, substantive standard, or procedure" regarding changes of control, and the Port Authority responded with the principal and material facts.

2012 Interrogatory No. 8: *Describe in detail PANYNJ's practice, policy, substantive standard, or procedure for taking any action or inaction, including, but not limited to, requesting or not requesting payments and/or the providing of any economic consideration to PANYNJ, with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ after the February 22, 2007 adoption of PANYNJ Board Resolution "Port Facilities – Consent to Transfer of Leases and Changes of Ownership Interests."*

Port Authority Response: *The Port Authority objects to Interrogatory No. 8 on the grounds that the interrogatory is vague and ambiguous in that it purports to seek the Port Authority's "practice, policy, substantive standard, or procedure . . . for taking any other action or inaction . . . with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with [the Port Authority after February 2007]." Subject to and without waiving, but rather expressly preserving, the foregoing objections, the Port Authority responds that after the February 22, 2007 Board resolution, the substantive standard that the Port Authority applied to evaluating requests for consent to changes of ownership interests in marine terminal operators remained the same, except that the decision-making authority concerning container terminal lease transfers was delegated to the Port Authority's Executive Director. This change in the delegation of decision-making authority was made to allow the Port Authority to respond to requests for its consent to proposed changes in ownership interests in a uniform, efficient and timely manner.*

Discussion: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's response to 2012 Interrogatory No. 8 fails to answer the question asked. The Port Authority's response simply states that "after the February 22, 2007 Board resolution, the substantive standard that the Port Authority applied to evaluating requests for consent to changes of ownership interests in marine terminal operators remained the same" as it was before the February 22, 2007 Board Resolution, except regarding the decision-making authority. Of course, as explained above with respect to the Port Authority's answer to 2012 Interrogatory No. 7, the Port Authority provided no "substantive standard" in its answer. Therefore, the Port Authority's reference to its deficient answer to 2012 Interrogatory No. 7 is unavailing.

The Port Authority objects that Maher's Interrogatory is "vague and ambiguous," but again provides no specifics or explanation why it is purportedly "vague or ambiguous." This is

therefore an improper general objection lacking in specifics sufficient to permit Maher or the Presiding Officer to determine its validity, or what information has been withheld pursuant to the objection, if any.

The Port Authority's response does not provide principal and material facts about its purported "substantive standard" beyond what was provided in the Port Authority's response to 2012 Interrogatory No. 7. However, as stated above in Maher's discussion of the Port Authority's response to 2012 Interrogatory No. 7, the description of what the Port Authority refers to now as the "substantive standard" in its answer to this Interrogatory consists only of a list of factors purportedly involved in the Port Authority's "review . . . on a case-by-case basis." The mere listing of the factors—including "integrity, financial capacity, security qualifications and operational ability" and "ensur[ing] . . . appropriate capital investments" applied on a "case-by-case basis"—does not constitute any meaningful "substantive standard" and does not provide principal and material facts concerning requesting or not requesting payments and/or economic consideration or for taking action or not on requests for changes of control or ownership. Once again, the Port Authority provides no principal or material facts about its purported standard for each of the factors and how the purported factors were applied.

Accordingly, the Port Authority should be compelled to provide the principal and material facts about the Port Authority's policy and purported substantive standard for requiring consent fees and economic consideration or for taking action or inaction after the February 22, 2007 Board Resolution, including an explanation of how and why such factors were applied to arrive at the consent fee and economic consideration required or not, for changes of ownership or control consent by the Port Authority.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

As with 2012 Interrogatory No. 7, the Port Authority explained precisely why 2012 Interrogatory No. 8 is vague and ambiguous. Maher asks for a detailed description of every "practice, policy, substantive standard, or procedure for taking any action or inaction," and then follows this with the clause "including, but not limited to." This interrogatory could cover any action, by any Port Authority employee, and therefore is hopelessly vague (not to mention overly broad).

Moreover, to the extent 2012 Interrogatory No. 8 is limited to the Port Authority's practice or policy for requesting consideration in exchange for consent to changes of control after

February 22, 2007, the Port Authority has provided the principal and material facts responsive to the interrogatory. The Port Authority explained how its policy remained the same and how it changed after February 22, 2007. As with 2012 Interrogatory No. 7, Maher's contention that the factors described by the Port Authority "do[] not constitute any meaningful 'substantive standard'" is argumentative word-play. Mot. at 40. And, here again, Maher's demand that the Port Authority provide "its purported standard for each of the factors" is circular, while its demand for "how and why such factors were applied" as to each "change[] of ownership or control" bears no relation to what 2012 Interrogatory No. 8 actually asked.

2012 Interrogatory No. 9: *Describe in detail the purpose for your seeking, or having sought, payments and/or the providing of any economic consideration to PANYNJ with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ before and after the February 22, 2007 Resolution.*

Port Authority Response: *The Port Authority objects to Interrogatory No. 9 to the extent that it seeks more than the principal and material facts concerning the Port Authority's purpose for seeking payments and economic considerations with respect to a transfer in the ownership interests of a marine terminal operator lease. Subject to and without waiving the foregoing objection, the Port Authority responds that the terminal facility and the leases are assets that belong to the Port Authority. The Port Authority, functioning as a landlord port, has invested over $3.8 billion in marine terminals and basic Port infrastructure since 1948. When an existing marine terminal tenant transfers its interest in its lease, the Port Authority may have no relationship with the new entity and, absent a change of ownership clause, would not have adequate means of ensuring that the new owners will devote sufficient capital investment in its terminal or will uphold the obligations of the lease. Seeking payments, increased investment obligations, or an increased security deposit is meant (1) to ensure that such new owners are committed to continued investment in the terminal, (2) to protect the Port Authority's investments and assets, and (3) in instances where private parties are deriving significant capital gains from increases in the value or productivity of Port Authority controlled land and facilities, to return a portion of the Port Authority's significant investment in the Port to the Port and to offset the need for increases in Port revenue collection.*

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to*

cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.

The Port Authority's response to 2012 Interrogatory No. 9 is deficient because it does not answer the Interrogatory and is plainly evasive. The Port Authority must therefore supplement its response. The Port Authority's response to 2012 Interrogatory No. 9 consists of conclusory assertions, not principal and material facts of what occurred. The Port Authority fails to identify if some or all of the assertions reflect the Port Authority's actual purpose for seeking payments and/or economic consideration for its consent. Curiously, the Port Authority asserts that it purportedly invested over $3.8 billion in terminal and port infrastructure since 1948. But, the Port Authority does not state forthrightly that it sought to levy consent fees and other economic consideration to compensate for these alleged $3.8 billion in expenditures. Later in its answer to 2012 Interrogatory No. 11, the Port Authority asserts with respect to consent fees and economic consideration levied on its tenants since 1997 that "Such amounts are intended to compensate the Port Authority, inter alia, in part for the large sums it has invested in the terminals and surrounding infrastructure investments which contribute significantly to the asset value of the Port's marine terminal operators - and also for risks to which it may be subjected due to the change in control." If a Port Authority purpose is to recover costs for services provided to other port users dating back to 1948 via consent fees and other economic consideration levied from February 22, 2007 to the present, as its answers suggest, it should so state unambiguously. The Port Authority should also provide the principal and material facts identifying the specific $3.8 billion in terminal and infrastructure projects, e.g., roadway improvements, intermodal rail, navigational channel dredging, compensated by the consent fees and economic consideration required.

The Port Authority also fails to identify if some or all of its conclusory assertions refer to the periods before or after February 22, 2007. Accordingly, the Port Authority must supplement its response to 2012 Interrogatory No. 9 to provide a clear answer providing the responsive principal and material facts showing its purpose for having sought consent fees and other requirements for economic consideration on its tenants.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

The Port Authority has provided the principal and material facts responsive to 2012 Interrogatory No. 9, which asks for its "purpose" for seeking consideration for changes of control over marine terminal leases before and after February 22, 2007. The Port Authority has provided that information in more than sufficient detail, setting forth the background of its historical

investment in its assets at the Port, its concerns regarding the risks presented by a change of control, and the reasons why it seeks consideration for changes of control, *i.e.*, to protect its investments and control against those risks. Thus, Maher is wrong that the Port Authority responds with "conclusory assertions." Mot. at 42. And Maher's contention that the Port Authority has "fail[ed] to identify" its "*actual* purpose" is meritless, as the Port Authority set forth its purpose in detail. *Id.* Maher's desire for an answer that aligns with its view of the case does not render the Port Authority's response deficient.

The remainder of Maher's argument improperly demands minute, follow-up details regarding the principal and material facts that the Port Authority set forth in its response. Mot. at 42-43. For example, Maher asserts that the Port Authority should have disclosed what kinds of "terminal and infrastructure projects" were involved in the Port Authority's investment of $3.8 billion since 1948. *Id.* at 43. But, 2012 Interrogatory No. 9 did not ask for such details. Nor did it ask to what degree, if at all, consent fees compensate the Port Authority for its historical investment since 1948, as Maher now contends. *Id.* at 42. Maher is only permitted to seek the principal and material facts, which it has already received.

2012 Interrogatory No. 10: *Describe in detail the principal and material facts of (i) any formula, model, calculation or other basis that has been used to determine the amount of requesting payments and/or the providing of any economic consideration to PANYNJ with respect to transfers or changes of ownership or control interests involving marine terminal operator leases with PANYNJ including, without limitation, the principal elements, criteria, inputs, assumptions and/or variables of any such basis, (ii) differences in any such basis before and after the February 22, 2007 Resolution, (iii) how you apply any such basis and (iv) the principal and material facts of any determination by PANYNJ of the reasonableness under the Shipping Act of such basis and/or application.*

Port Authority Response: *The Port Authority objects to Interrogatory No. 10 to the extent it seeks information that is not in the possession, custody or control of the Port Authority. The Port Authority further objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving the foregoing objections, the Port Authority responds that it determined the amount of payment or consideration that was required in connection with a transfer of ownership based on the amount of Port Authority investments scaled in comparison to the final outcome of PNCT's transfer of*

control to AIG, which was the first transaction that required significant payments or consideration. Prior to the transaction with AIG, the Port Authority had not required any significant payment or consideration in connection with transfers of ownership. The Port Authority used the PNCT payments and consideration as a basis for subsequent transactions and made appropriate modifications based on the facts and circumstances of each tenant seeking consent.

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority failed to provide the principal and material facts requested. Regarding part (i) of the Interrogatory, the Port Authority responds that it "determined the amount of payment or consideration that was required in connection with a transfer of ownership based on the amount of Port Authority investments scaled in comparison to the final outcome of PNCT's transfer of control to AIG," and that "[p]rior to the transaction with AIG, the Port Authority had not required any significant payment or consideration in connection with transfers of ownership." The Port Authority represents that it required "significant payments or consideration" based on "Port Authority investments" and its "PNCT payments and consideration" levied in 2007 and thereafter, made "appropriate modifications" for subsequent transactions. However, the Port Authority fails to provide the principal and material facts about how the Port Authority determined the consent fee in the case of PNCT-AIG transaction in 2007 in the first instance. Thereby, the Port Authority evades the question. The Port Authority should be ordered to provide the principal and material facts pertaining to its determination of the PNCT-AIG consent fee and requirement for economic consideration which purportedly forms the basis for the subsequent consent fees, etc. Likewise, the Port Authority fails to provide the principal and material facts pertaining to the subsequent consent fees based upon the 2007 PNCT-AIG model with "appropriate modifications." The Port Authority fails to provide the principal and material facts pertaining to the basis for the purported "appropriate modifications," or how they were "scaled in comparison to the final outcome of PNCT's transfer of control to AIG." With respect to part (iii) of the Interrogatory, the Port Authority does not explain how it applied its consent fee model or formula (if it even had one) to the transfer of ownership/control transactions that did occur.

The Port Authority provides no answer to part (ii) of the Interrogatory, asking for the principal and material facts regarding "differences in any such basis [to determine the amount of economic consideration to the Port Authority in exchange for the Port Authority's consent] before and after the February 22, 2007 Resolution." The Port Authority is not entitled to ignore

Maher's request for the details of its pre-2007 consent fee methodology just because it asserts that there were not any "significant payment or consideration in connection with transfers of ownership" prior to the 2007 AIG-PNCT transfer, since the Interrogatory is not limited to "significant" consideration and in any event it is not clear what the Port Authority considers to be "significant" consideration for a change of ownership/control consent payment by a tenant.

Additionally, the Port Authority fails to provide any meaningful response to part (iv) of the Interrogatory, asking for the principal and material facts "of any determination by the Port Authority of the reasonableness under the Shipping Act of such basis and/or application." Instead, the Port Authority merely asserts an objection based on privilege. This is improper. The Port Authority must provide the principal and material facts "of any determination by the Port Authority of the reasonableness under the Shipping Act of such basis and/or application." If it made no such determination, it should so state forthrightly and not dodge the question. If it did make any such determination, it must identify it. Finally, because the Port Authority's response disclosed the conclusion of its purportedly privileged determination of reasonableness under the Shipping Act, it has waived the privilege and should be ordered to disclose the purported reasonableness determination in its entirety. The privilege cannot properly be used as both a sword and a shield as the Port Authority does here. Further, as the authorities establish, even

> *[t]he shield-sword metaphor fails to capture the sense of the doctrine fully. If followed literally, it could lead to upholding erroneously a claim of privilege, for often the client asserts the privilege defensively. The preferred approach is to require that the client either permit a fair presentation of the issues raised by the client or protect the right to keep privileged communications secret by not raising at all an issue whose fair exposition requires examining the communications.*

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80, Reporter's Note cmt. b (2012) (emphasis added). Having raised the issue and objection, the Port Authority has waived the privilege and a "fair presentation of the issues" should be ordered to disclose the reasonableness determination in its entirety, if it really exists.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher once more incorrectly contends that the Port Authority's response has "failed to provide the principal and material facts," and then proceeds to recite the principal and material facts, which the Port Authority has already provided in its response, and then demand more. Mot. at 44. In response to subpart (i) regarding any basis for determining the amount of

consideration requested for changes of control, the Port Authority explained that it determined the amount that it would seek based on the amount of its investments scaled in comparison to the consideration required for PNCT's transfer of control to AIG. Contrary to Maher's claim that it "ignore[d]" subpart (ii) regarding any differences in the basis pre- and post- February 22, 2007, Mot. at 45, the Port Authority set forth that before the 2007 PNCT change of control, it had no formal basis and further explained that it had not required significant consideration for changes of control before the 2007 PNCT transfer (which was the first of its kind at the Port). In response to subpart (iii) regarding application of the basis, the Port Authority explained that it adjusted the basis (the 2007 PNCT consideration) for each change of control scaled to its investments and made appropriate modifications based on each tenant's facts and circumstances.

This response is more than sufficient. The minute details Maher demands in its Motion, including specifics on "how [the Port Authority] applied its consent fee model or formula" for *each* change of control and the "basis for the purported 'appropriate modifications'" in *each* instance, far exceed the principal and material facts into which an interrogatory appropriately may inquire. Mot. at 45-46. Maher is not entitled to a narrative account or to every fact regarding changes of control at the Port in response to an interrogatory. *See* pp. 19-20 *supra*.

Finally, the Port Authority has not waived attorney-client privilege in response to subpart (iv), and Maher's contention that it did is frivolous. Mot. at 46. Subpart (iv) asks for "any determination by PANYNJ of the reasonableness under the Shipping Act of such basis and/or application." 2012 Interrog. No. 10. While this inquiry asks for privileged information on the Port Authority's determination of the legality of its actions, far from waiving privilege, the Port Authority "object[ed] to this interrogatory to the extent that it seeks information protected by the attorney-client privilege and/or work product doctrine," and, accordingly, gave no response to

subpart (iv). PANYNJ Resp. to 2012 Interrog. No. 10. Indeed, Maher acknowledges as much, accusing the Port Authority of "merely assert[ing] an objection based on privilege," yet then immediately but inconsistently stating that "the Port Authority's response disclosed the conclusion of its purportedly privileged determination of reasonableness under the Shipping Act." Mot. at 46. The Port Authority obviously did no such thing. Maher's "sword and shield" waiver argument has no application here. *See* pp. 16-17 *supra*.

2012 Interrogatory No. 11: *Identify each transfer or change of ownership or control interest in a marine terminal operator lease since 1997 for which PANYNJ consent was requested, given, denied or that PANYNJ contemplated requiring, and for each, (i) describe the principal and material facts of the proposed or effected change of ownership or control interest, (ii) the amount of payments and/or economic consideration committed to PANYNJ, and if no payments and/or economic consideration was committed, the reason therefor, and (iii) how such amounts are related to service provided by PANYNJ to the marine terminal operator.*

Port Authority Response: *The Port Authority objects to Interrogatory No. 11 on the grounds that it is unduly burdensome by seeking information going back to 1997. The Port Authority further objects to Interrogatory No. 11 to the extent that it seeks information going back to 1997 that is no longer in the Port Authority's possession, custody or control. The Port Authority additionally objects to Interrogatory No. 11 to the extent that it implies that the amount of payment or economic consideration provided to the Port Authority in connection with a change of ownership or control is, or should be, "related to service provided by PANYNJ to the marine terminal operator." Such amounts are intended to compensate the Port Authority, inter alia, in part for the large sums it has invested in the terminals and surrounding infrastructure investments which contribute significantly to the asset value of the Port's marine terminal operators - and also for risks to which it may be subjected due to the change in control. Subject to the foregoing objections, the Port Authority responds that since 1997, the following transfers or changes of ownership or control interest in marine terminal operator leases have occurred for which PANYNJ consent was requested and given:*

- *Continental Terminals to Commodity Storage in 1998, security deposit was established at $100,000*
- *Interamerican Juice Company to Citrus Products in 2000, security deposit was increased from $100,000 to $200,000*
- *Kent Steel to Port Storage & Handling in 2000, a guaranty was provided by Bushwick Metals*
- *M.J. Rudolph Corporation to Kinder Morgan Bulk Terminals in 2002, a guaranty was provided by Kinder Morgan Energy Partners*

- *Continental Gypsum to LaFarge in 2002, a consent fee was given of $175,000*

- *Howland Hook Container Terminal to New York Container Terminal in 2004, security deposit was established at $1,000,000*

- *United Transport to Jakon in 2006, security deposit was increased to $10,200*

- *PNCT to AIG in 2007, a consent fee of $10 million was given to the Port Authority, a guaranteed investment of $40 million was agreed to*

- *Maher to RREEF in 2007, consent fee of $22 million was given to the Port Authority, guaranteed investment of $114 million and the security deposit was increased to $26 million*

- *ASA Apple to Anchor Logistics in 2007, a guaranty was provided by ASA Apple*

- *OOIL owned NYCT - Orient Overseas International Lines ("OOIL") to Ontario Teacher's Pension Fund in 2007, a consent fee of $16 million was given to the Port Authority, guaranteed investment of $30 million was agreed to and the security deposit was increased to $9 million*

- *Cargotec USA merged with Hiab in 2009 and Cargotec assumed Hiab's lease, minimum insurance established at $5,000,000 for commercial general liability*

- *AIG to Highstar Capital L.P. in 2011 for the consideration detailed in the Response to Interrogatory No. 1*

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.

Maher's Argument: *The Port Authority's refusals to provide responsive information created (i) as far back as 1997 or (ii) after March 30, 2012, is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012, nor did it relieve the Port Authority from providing responsive information dating to 1997. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period 1997 to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority fails to provide the principal and material facts responsive to 2012 Interrogatory No. 11 because it improperly narrows the scope of the question asked and ignores key aspects of the Interrogatory. 2012 Interrogatory No. 11 requires information regarding changes of ownership or control for which the Port Authority's consent was "requested, given, denied, or that the Port Authority contemplated requiring." However, the Port Authority's response includes only "transfers or changes of ownership or control for which Port Authority consent was requested and given." The Port Authority omits those instances in which the Port Authority's consent was denied, or where the Port Authority only contemplated requiring that its consent be given for such change of control, e.g., where a tenant requested the consent but the Port Authority pocket vetoed the request. Notably, the Port Authority also adds 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," but provides no information about the entity that made the request, when it was made, how much consideration was offered or considered, etc. The Port Authority has answered only part of the question and must supplement.

The skeletal listing that the Port Authority provides regarding the transactions that did occur fails to include the principal and material facts requested. In the nine instances when the Port Authority obtained no payment or economic consideration, it failed to provide the reason why "no payments and/or economic consideration was committed." Maher also requested the Port Authority to identify how the payments and/or economic consideration "related to service provided," but the Port Authority failed do so.

The Port Authority objects that its charges need not be "related to a service provided by the Port Authority to the marine terminal operator." Whether or not the Port Authority's objection is correct, it provides no proper justification for the Port Authority's failure to provide the principal and material facts in response. If as the Port Authority's answer suggests, the Port Authority actually provided no services for the consent fees and economic consideration levied, it just should forthrightly admit it. Moreover, if as the Port Authority suggests, "[s]uch amounts are intended to compensate the Port Authority, inter alia, in part for the large sums it has invested in the terminals and surrounding infrastructure investments which contribute significantly to the asset value of the Port's marine terminal operators - and also for risks to which it may be subjected due to the change in control," then the Port Authority must provide the principal and material facts pertaining to the purported investments and risks which it asserts are the basis for the levies.

With respect to the consent provided to "AIG to Highstar Capital L.P. in 2011 for the consideration detailed in the Response to [2012] Interrogatory No. 1," the Port Authority fails to provide the principal and material facts pertaining to the "consideration" actually provided in return for the Port Authority's consent, if any. The Port Authority's answer to 2012 Interrogatory No. 1, which the Port Authority incorporates by reference, does not specify what portion of the purported "consideration," i.e., $500 million of investments and the MSC ocean-carrier cargo guarantee, was for the consents and what part was for the other valuable Port Authority concessions to PNCT-MSC. Rather, the Port Authority's answer to 2012 Interrogatory No. 1 lumped together all of the purported considerations from PNCT-MSC in its continuing effort at obfuscation to prevent the Commission from scrutinizing the Port Authority's consent

fee practices.[7] *In addition to the Port Authority's consents to transfer ownership/control, PNCT-MSC received from the Port Authority other valuable concessions, including millions of dollars of rent reductions, a 20-year lease extension, and 110 additional acres for its terminal operations, but the Port Authority has failed to identify what part of the purported $500 million of investments, etc. were for the Port Authority's consent.*[8] *The Port Authority should be ordered to provide the principal and material facts pertaining to any consent fee and economic consideration it required of PNCT-MSC for the Port Authority's consent.*

The Port Authority's reference to its response to 2012 Interrogatory No. 1 is also improper because of the answer's reference to documents under Fed. R. Civ. P. 33(d) failed to specify the records "in sufficient detail to permit the interrogating party to locate and identify, as readily as [the Port Authority], the records from which the answer may be obtained." Dkt. 08-03 Discovery Order at 8, Ex. 16 (quoting Rainbow Pioneer # 44-18-04A, 711 F.2d at 906). The Port Authority's response merely refers to vague "emails and correspondence" and "draft term sheets" of six different custodians. However, more specific detail is required. "[I]dentifying the custodian or custodians with records does not necessarily 'specify the records from which the answer may be derived or ascertained.'" Id. at 14; Ex. 17, Mem. and Order on Second Set of Discovery Mot., Dkt. 08-03 at 23 (Jan. 18, 2012). This is particularly the case here, where the Port Authority has produced 16,416 documents under the identified custodians. Ex. 18, Declaration of R. Brothers. "Rule 33 . . . cannot be used as a procedural device for avoiding the duty to give information by shifting the obligation to find out whether information is ascertainable from the records which have been tendered . . . . Rather, the interrogated party must state specifically and precisely identify which documents will provide the information to be elicited." Ex. 17, Mem. and Order on Second Set of Discovery Mot., Dkt. 08-03 at 26 (Jan. 18, 2012) (quoting Budget Rent-A-Car of Mo., Inc. v. Hertz Corp., 55 F.R.D. 354, 357 (W.D. Mo. 1972)). In circumstances such as those present here where the Port Authority has already reviewed the specific documents in preparation of its interrogatory responses and the Port Authority has greater familiarity with its documents, the burden on Maher is greater to search for and locate the same documents and the Port Authority must specify them with enough detail for Maher to find the answer to the question. Ex. 17, Mem. and Order on Second Set of Discovery Mot. at 24-25 & 26-27 n.4.

Finally, the Port Authority's skeletal listing of consents granted also fails to provide the principal and material facts showing why it levied multimillion-dollar consent fees and economic consideration requirements for three consents in 2007 (PNCT, NYCT, and Maher), but not in connection with nine others listed. Therefore, the Port Authority has failed to provide the principal and material facts requested and should be ordered to provide them.

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[7] *This obfuscation was subsequently confirmed by the Port Authority's answer to 2016 Interrogatory No. 11 wherein it confessed: "The Port Authority further responds that, unlike subsequent change of control events, no one obligation of the parties under PNCT's Amended and Restated Lease Agreement was parsed out and tied to the Port Authority's consent to the changes of control."*

[8] *See Maher's Supp. Resp. to the Port Authority's Interrogs., at No. 1, at 9-10, Ex. 19; Memo from W. Baroni to D. Samson, Feb. 23, 2011, 08PA02200081, Ex. 20 (explaining agreed-to PNCT lease terms).*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher's contention that the Port Authority additionally "refus[ed] to provide responsive information created . . . as far back as 1997," is simply wrong. Mot. at 48. Despite the overbreadth of Maher's interrogatory, the Port Authority explicitly identified each change of control that has occurred at the Port "*since 1997*." PANYNJ Resp. to 2012 Interrog. No. 11.

Contrary to Maher's contention, Mot. at 48-49, the Port Authority *has* provided the principal and material facts responsive to 2012 Interrogatory No. 11 regarding changes of control since 1997 and the amounts of consideration obtained. The Port Authority identified all changes of control since 1997 and, for each, set forth, (i) the transferor, (ii) the transferee, (iii) the date, (iv) the form of consideration (*e.g.*, "security deposit" or "increase[]" in security deposit, "guaranty," "consent fee," "guaranteed investment," and/or "minimum insurance" for "commercial general liability"), *and* (v) the amount. These details more than fulfill the Port Authority's discovery obligations.

Maher contends that, for "the nine instances when the Port Authority obtained no payment or economic consideration," it "failed to provide the reason why." Mot. at 49; *id.* at 52. But there are no such instances. As detailed in the Port Authority's response, it *has* required economic consideration for each change of control. PANYNJ Resp. to 2012 Interrog. No. 11.

Maher's assertion that the Port Authority failed to identify the "'consideration' actually provided" for the 2011 PNCT change of control likewise is meritless. Mot. at 50. The Port Authority cross-referenced its response to 2012 Interrogatory No. 1, which identified the financial commitments PNCT made in 2011, and addressed Maher's attempt to parse those commitments in response to Maher's 2016 Interrogatory No. 11, as Maher itself notes. *Id.* at 50

& n.1. The Port Authority's specification of documents in response to 2012 Interrogatory No. 1, incorporated by reference, fully complied with the requirements of Commission Rule 205(d). The Port Authority clearly identified the six custodians by name, the types of responsive documents, the parties between which the documents were sent, the relevant time period, and the topic discussed in the documents. This is sufficient. *See* pp. 20-22 *supra*.

Maher's demand that the Port Authority disclose changes of control that were merely "contemplated" is inappropriate. Mot. at 49. This information not only far exceeds the principal and material facts, it is irrelevant to Maher's claims alleging that some tenants paid millions of dollars for consent to changes of control while others paid nothing. *See* pp. 19-20 *supra*.

Maher incorrectly contends that the Port Authority failed to address subpart (iii) regarding "how such amounts are related to service provided by PANYNJ to the marine terminal operator." Mot. at 47. The Port Authority explained that this subpart rests on an unfounded assumption that economic consideration for consent is, or should be, "related to service provided" to tenants. PANYNJ Resp. to 2012 Interrog. No. 11. The Port Authority then explained the factors to which the amount of economic consideration *did* bear relation, including its investments in the terminal and the risks presented by the transfer. *Id.* While Maher now contends that the Port Authority had to detail how specifically its change of control fees related to those investments and risks, 2012 Interrogatory No. 11 does not request that information.

2012 Interrogatory No. 15: *Describe in detail your 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, e.g. the PANYNJ lease agreement with Global Terminal & Container Services, LLC (Lease No. LPJ-001).*

Port Authority Response: *The Port Authority objects to Interrogatory No. 15 on the grounds that it is vague and ambiguous, and the Port Authority therefore cannot ascertain what is being asked. Subject to and without waiving, but rather expressly preserving, the foregoing objections, the Port Authority responds that it has an established practice and procedure of dealing with existing marine terminal operators with respect to the letting of facilities in the port. As part of that practice and procedure, the Port Authority considers all reasonable requests for the letting*

of facilities that the Port Authority owns and controls, and works with existing marine terminal operators to accommodate reasonable requests subject to the Port Authority's mission to promote the overall prosperity of the Port of New York and New Jersey and the surrounding region.

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority fails to provide any principal and material facts in its response to 2012 Interrogatory No. 15. Maher requests the Port Authority to provide the principal and material facts pertaining to "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." The Port Authority asserts that it has such a practice or procedure, but refuses to provide the principal and material facts describing this alleged practice or procedure, how such practice or procedure was established, observed, or enforced, or its reasonableness. The Port Authority mentions only a part of this admitted practice or procedure merely by way of a cursory assertion that it "considers all reasonable requests," which also fails to provide the principal and material facts as to what constitutes a "reasonable request" or the principal and material facts of how the Port Authority's consideration of "reasonable requests" is subject to its "mission to promote the overall prosperity of the Port of New York and New Jersey and the surrounding region."

In its response, the Port Authority makes a frivolous objection based on alleged grounds of vagueness and that it "cannot ascertain what is being asked." The Interrogatory is plain on its face. Moreover, the Port Authority does not explain its improper general objection with any specificity, nor does it indicate whether any responsive information has been withheld pursuant to this objection. However, the Port Authority responds with self-serving conclusory assertions establishing that, contrary to its objection, it plainly understands the question asked.

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher's attempt to undermine the Port Authority's vagueness objection is unavailing. Mot. at 54. 2012 Interrogatory No. 15 on its face encompasses the Port Authority's letting of facilities to existing terminal operators generally, information irrelevant to Maher's claims. Maher's argument that the Port Authority is obligated to specify "whether any responsive information has been withheld pursuant to [its] objection" of vagueness lacks any basis in the Commission's Rules, as explained above. *See* pp. 17-19 *supra*.

Despite the vagueness and overbreadth of 2012 Interrogatory No. 15, the Port Authority in good faith provided the principal and material facts that appear to be sought. The Port Authority explained that its practice is to "deal[] with existing marine terminal operators with respect to the letting of facilities in the port" and described its general approach. The Port Authority is unable to answer Maher's vague and ambiguous inquiry more specifically. Although Maher demands follow-up details on the principal and material facts the Port Authority disclosed, Mot. at 53, those details were not requested by 2012 Interrogatory No. 15.

2012 Interrogatory No. 16: *Describe in detail (i) your 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 Terminal & Container Services, LLC (Lease No. LPJ-001), (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 under the Shipping Act of such rules, regulations, practices, and/or procedures and/or application.*

Port Authority Response: *The Port Authority objects to Interrogatory No. 16 on the grounds that it is vague and ambiguous, and the Port Authority therefore cannot ascertain what is being asked. The Port Authority objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving, but rather expressly preserving, the foregoing objections, the Port Authority responds that it has no formal rule or regulation specifically with respect to the definition of "Qualified Transferee," a phrase which the Port Authority believes appears only in the Global lease, but that such term was negotiated between the parties as part of a negotiation that was undertaken consistent with the Port Authority's practice and procedure to negotiate leases that comply with all applicable laws and regulations, including the Shipping Act.*

The "Qualified Transferee" provision was negotiated as part of the Port Authority's purchase of Global's 100-acre terminal and lease-back to Global of an expanded terminal that combined the

100-acre former Global terminal with an additional 70 acres of adjacent property. The Qualified Transferee 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, and allows Global's lenders, in the event of a default by Global on its credit facility, the right to foreclose on Global's leasehold interest and transfer the lease to a Qualified Transferee.

The Qualified Transferee provision is applicable to existing marine terminal operators in that it prohibits Global's lenders, in the context of a mortgage foreclosure on the Global Lease, from transferring the Global lease to any existing marine terminal operator without the consent of the Port Authority. The Port Authority could consent to such a transfer but must have the ability to review any potential anticompetitive impacts on the region and other operators.

While the Port Authority objects to Maher's request for privileged legal analysis relating to the Qualified Transferee provision, the Port Authority states generally that it determined that such provision was reasonable and necessary as described above to accomplish the Global sale and lease-back transaction, and to ensure the Port Authority's ability to analyze any potential anticompetitive and concentrated risk effects that could impair the prosperity of the Port and the surrounding region.

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's response to 2012 Interrogatory No. 16 fails to provide the principal and material facts requested by the Interrogatory. Once again, at the outset, the Port Authority makes a frivolous objection on the ground that the Interrogatory is purportedly "vague and ambiguous," so the Port Authority purportedly "cannot ascertain what is being asked." This is an improper general objection. Moreover, the Port Authority objects that it does not understand the question, but then purportedly seeks to answer it with self-serving legal conclusions shielded from Commission scrutiny by improper privilege claims.

First, the Port Authority responds that it "has no formal rule or regulation" responsive to the Interrogatory, but it ignores Maher's request which also extends to "practices, and/or procedures" or informal rules/regulations responsive to the Interrogatory. Maher's Interrogatory was not limited to the Port Authority's "formal rules and regulations." The Port Authority provides the general self-serving conclusory assertion that it maintains a "practice

and procedure to negotiate leases that comply with all applicable laws and regulations, including the Shipping Act," but does not answer specifically with respect to the "Qualified Transferee" provision which is the question posed. The Port Authority fails to provide the principal and material facts of this purported practice and procedure or how the Qualified Transferee provision comports with the Port Authority's professed "practice and procedure" of complying with all applicable laws and regulations, including the Shipping Act." The Port Authority should provide the principal and material facts pertaining to its purported practice or procedure of ensuring compliance with applicable law regarding the provision that is the subject of the question. The Port Authority's practices and procedures in violation of the Shipping Act, including the "Qualified Transferee provision," are at the heart two of the four remaining counts against the Port Authority, and the Port Authority must provide more than just self-serving conclusory assertion while withholding the basis for its practice under the guise of the privilege.

Second, the Port Authority fails to answer directly or provide the principal and material facts in its response to the aspect of 2012 Interrogatory No. 16 inquiring into the purpose of the Qualified Transferee provision, which prevents only an existing marine terminal operator in the port, e.g., Maher, from obtaining the Global lease, but permits other classes of potential successors to obtain the Global lease. Strangely, the Port Authority blames Global's lenders by asserting 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, and allows Global's lenders, in the event of a default by Global on its credit facility, the right to foreclose on Global's leasehold interest and transfer the lease to a Qualified Transferee," but that does not explain the Port Authority's purpose for providing a different standard from other potential transferees based solely on status. Furthermore, the Port Authority's answer defies credulity. The Port Authority does not explain why Global's lenders would require that they be prohibited from transferring the facility to any potential transferee—including other marine terminal operators in the port. Thereafter, the Port Authority concedes that the provision "prohibits Global's lenders . . . from transferring the Global lease to any existing marine terminal operator without consent," from the Port Authority and adds obliquely that it "could consent to such a transfer but must have the ability to review any potential anticompetitive impacts on the region and other operators," for reasons left unexplained. In these respects, the Port Authority's response to the Interrogatory is intentionally misleading and evasive. If the Port Authority's real answer is that the purpose of the Qualified Transferee provision is to provide the Port Authority "the ability to review any potential anticompetitive impacts on the region and other operators," then the Port Authority should simply say so and cease the misdirection and attempts to shift the onus of the provision onto Global's lenders, who manifestly would have no interest in limiting the universe of potential transferees.

Third, the Port Authority also does not answer the aspect of the Interrogatory that asks for the principal and material facts of any determination by the Port Authority of the reasonableness of such a provision. The Port Authority provides only a conclusory, self-serving statement that it "determined that such provision was reasonable and necessary . . . to accomplish the Global sale and lease-back transaction, and to ensure that [the Port Authority's] ability to analyze any potential anticompetitive and concentrated risk effects that would impair the properties of the Port and the surrounding region." Rather than explain the basis for its self-

serving conclusory assertion, the Port Authority conceals the principal and material facts behind an improper assertion of privilege, employing privilege as both a sword and a shield.

*Thereby, the Port Authority has waived the claims of privilege. With respect to the Qualified Transferee provision, it has affirmatively disclosed the conclusions of its counsel as a "sword" for its own purposes to establish that "such term was negotiated between the parties as part of a negotiation that was undertaken consistent with the Port Authority's practice and procedure to negotiate leases that comply with all applicable laws and regulations, including the Shipping Act" and that "that it determined that such provision was reasonable and necessary," but simultaneously invoked the privilege as a "shield" to prevent the Commission from learning the basis for the Port Authority's conclusions, which purportedly justified the provision. Since the Port Authority admits that it "has no formal rule or regulation," and evades the issue of whether it has any informal practices or procedures regarding qualified transferees, the Port Authority has chosen to defend itself by affirmatively injecting into this proceeding the conclusions of its counsel regarding the Port Authority's compliance with the law upon which it relied. In doing so, the Port Authority has "placed in issue" the advice of counsel regarding the reasonableness of the Qualified Transferee term. Bilzerian, 926 F.2d at 1292; Pesky, 2011 WL 3204713 at *1; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 ("The attorney-client privilege is waived for any relevant communication if the client asserts as a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct."). Accordingly, the Port Authority's assertion of the attorney-client and work product privileges is waived regarding the underlying basis for the conclusions the Port Authority has asserted in its defense.*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

The Port Authority properly objected to 2012 Interrogatory No. 16 as vague because it asks about the Port Authority's "rules, regulations, practices, and/or procedures related to defining a 'Qualified Transferee' in a marine terminal lease," as if this were a general occurrence. It is not. As the Port Authority responded, the phrase "Qualified Transferee" appears only in the Global lease. Maher's demand for additional "principal and material facts" regarding a supposed practice for defining a "Qualified Transferee" ignores the facts provided. Because the term is used only in the Global lease, there is no practice to disclose.

The Port Authority likewise has provided the principal and material facts regarding the "purpose of the 'Qualified Transferee' provision in the Global" lease. The Port Authority

explained how Global's lenders, to consent to the Global terminal's sale and leaseback, required the right to transfer the lease to a third party if Global defaulted. The Port Authority also explained how it agreed, as long as it had the right to approve a transfer to an existing marine terminal operator after reviewing any potential anticompetitive effects. This answer provided the principal and material facts regarding the provision's purpose. Maher's objections are simply an attempt to dictate the Port Authority's answer. Thus, Maher wrongly asserts that the provision "prevents" existing marine terminal operators "from obtaining the Global lease," Mot. at 56-57, whereas the Port Authority's answer makes clear that it did no such thing. While Maher attacks the Port Authority for "blam[ing] Global's lenders," *id.* at 57, the Port Authority was simply explaining the origin of the Qualified Transferee provision, as requested.

Finally, the Port Authority did not waive attorney-client privilege in answering subpart (iv), regarding any determination of the Qualified Transferee provision's "reasonableness under the Shipping Act," but rather *expressly objected* to Maher's "request for privileged legal analysis." Mot. at 55. It then answered to the extent possible, without disclosing privileged information, that it determined the provision was "reasonable and necessary" to effect its purpose, *i.e.*, allowing Global's lenders to transfer the lease if Global defaulted, while preserving the Port Authority's ability to protect against anticompetitive effects. This answer does not disclose *any* privileged information *or* invoke the advice of counsel as a defense. *See* pp. 16-17 *supra*. Maher's specious waiver argument, Mot. at 57-58, is entirely meritless.

2012 Interrogatory No. 26: *Describe in detail your rules, regulations, practices, policies and/or procedures pertaining to the just and reasonable treatment of marine terminal operators, including, but not limited to, rules, regulations, practices, policies and/or procedures to prevent the granting of undue preferences or prejudices to marine terminal operators.*

Port Authority Response: *The Port Authority objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine. Subject to and without waiving, but rather expressly preserving, the foregoing objection, the Port Authority responds by stating that it complies with all applicable laws and regulations, which*

includes its obligation to treat all marine terminal operators fairly and to avoid causing undue preference to or imposing unreasonable prejudice on any marine terminal operator. Additionally, it is the practice of the Port Authority to review all agreements made with marine terminal operators 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. This review is conducted by Port Authority staff and legal counsel before agreements between marine terminal operators and the Port Authority are presented to the Board for approval.

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority has waived the attorney-client and work product privilege. With respect to its practices and procedures for the just and reasonable treatment of marine terminal operators, protestation of privilege notwithstanding, the Port Authority has chosen to rely on the "review . . . conducted by Port Authority . . . legal counsel" as the basis for asserting that it "treat[s] all marine terminal operators fairly and avoid[s] causing undue preference to or imposing unreasonable prejudice on any marine terminal operator." Since the Port Authority has chosen to bolster its defense that its practices and procedures are reasonable based on counsel's review of the agreements, the Port Authority has "placed in issue" the advice of counsel regarding whether and on what basis counsel made these determinations. Rhone-Poulenc Rorer Inc. v. Home Indemnity Co., 32 F.3d 851, 863 (3d Cir. 1997); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 ("The attorney-client privilege is waived for any relevant communication if the client asserts as a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct."); see also Bilzerian, 926 F.2d 1292 ("[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes" and "the privilege may be implicitly waived when a defendant asserts a claim that in fairness requires examination of protected communications.").

*The Port Authority's actions are comparable to the situation in Netalog, Inc. v. Griffin Tech., 2006 WL 1666747, at *1 (M.D.N.C. June 7, 2006), where a defendant sought to prove that it acted reasonably in manufacturing a product which infringed a patent based on the advice of counsel that it could do so. The court determined that "if a party asserts it acted reasonably when charged with patent infringement because it obtained 'competent legal advice,' then, naturally, the party's adversary should have some access to the relevant documents and the*

*opinion-giving attorney, information that may be work-product protected or attorney-client privileged." Id. at *2. Similarly, the Port Authority asserts that it acted reasonably because counsel determined that it "treat[ed] all marine terminal operators fairly and avoid[ed] causing undue preference to or imposing unreasonable prejudice on any marine terminal operator." See also Nguyen v. Excel Corp., 197 F.3d 200, 208 (5th Cir. 1999) (waiver found where party "testified about the directions that they provided their attorneys, and they testified about the legal research undertaken by their attorneys"). The Port Authority could have "ke[pt] the privileged communications secret by not raising [them] at all," RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80, Reporter's Note cmt. b (emphasis added), but instead chose to do so and opened them up to discovery. Panter v. Marshall Field & Co., 80 F.R.D. 718, 725 (D. Ill. 1978) (holding that "[w]hether styled as a showing of a sufficiently compelling need or as a waiver of the work-product privilege, we find that the defendants' reliance in this litigation upon the advice of counsel as a major justification for their actions . . . renders the advice and actions of counsel a central issue, and as such overcomes the attorneys' work-product privilege").*

*Permitting the Port Authority to offer the conclusions of its counsel to assert the reasonableness of its treatment of marine terminal operators, without allowing Maher commensurate discovery as to these conclusions, would allow the Port Authority "to prejudice [its] opponent's case or to disclose some selected communications for self-serving purposes." Bilzerian, 926 F.2d at 1292; Pesky, 2011 WL 3204713, at *1; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 (disclosure should permit a fair representation of the issues raised). Accordingly, the Port Authority's assertion of attorney-client and work product privilege is waived as to the underlying basis for the conclusions the Port Authority has entered into the record in its defense so that the Commission can scrutinize the basis for the Port Authority's conduct.*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Once again, Maher has posed a question that deliberately implicates privileged information by inquiring into the Port Authority's practices for ensuring the just and reasonable treatment of its tenants. In responding, the Port Authority did not waive privilege, but rather expressly objected "to the extent [the interrogatory] seeks information protected by the attorney-client privilege and/or work product doctrine," and added, without disclosing privileged information, that it complies with its legal obligations to treat tenants fairly and that its staff and legal counsel review agreements to ensure fair treatment, without disclosing any confidential communications or advice.

The Port Authority did *not* "'place[] in issue' the advice of counsel." Mot. at 60. Although *Maher* was transparently trying to place counsel's advice at issue, by asking about the Port Authority's practices for fair treatment of tenants, the Port Authority answered with the simple facts that it complies with the law and that counsel review its agreements. It did not, and will not, mount a defense that its actions were reasonable *because* its counsel said they were, as occurred in the cases Maher cites. *See id.* Nor did it disclose any of counsel's privileged advice or conclusions. Maher's waiver argument is meritless.

2012 Interrogatory No. 27: *Describe in detail any principal and material facts showing that PANYNJ's practices, policies, procedures, or lack thereof, and actions or inactions that are the subject of the Complaint in this proceeding do not violate the Shipping Act, including but not limited to, the principal and material facts of any justifications of the differences in treatment PANYNJ accorded to the marine terminal operators that are the subject of the Complaint in this proceeding, and the principal and material facts that any such justifications do not exceed what is necessary to achieve a valid transportation purpose justifying the differences.*

Port Authority Response: *The Port Authority objects to this interrogatory to the extent it requires the Port Authority to interpret Maher's Complaint and to provide facts to prove a negative proposition. As detailed in the Port Authority's Motion to Dismiss and Stay filed on April 26, 2012 as well as in the Port Authority's answers to interrogatories 7, 8, 15, 16, 19, 20, 22, 23, 24 and 25, the Complaint and the actions Maher points to as pertaining to the subject of the Complaint are vague, ambiguous, insufficiently detailed and confusingly worded. The Port Authority further objects as vague, ambiguous and overly broad the phrase "the differences in treatment PANYNJ accorded to the marine terminal operators that are the subject of the Complaint" as the Port Authority is not sure what is meant by this phrase. The Port Authority is therefore not sure what is being asked and is unable to answer this interrogatory fully. Subject to and without waiving, but rather expressly preserving, the foregoing objections, the Port Authority responds by directing Complainant to its Motion to Dismiss and Stay filed on April 26, 2012 and Responses to Interrogatory Numbers 1-26.*

Maher's Argument: *The Port Authority's refusal to provide responsive information created after March 30, 2012 is improper. The Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not adopt the Port Authority's request to so limit discovery to March 30, 2012. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." The 2012 Interrogatories predating the Order required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as*

originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.

Instead of providing any meaningful response to 2012 Interrogatory No. 27, the Port Authority makes a series of frivolous vagueness objections and then refers Maher to every other Interrogatory response, which despite the 26 responses referenced, still fails to provide the responsive principal and material facts. The vagueness objection is improper, because the Interrogatory is plain on its face, and in all events, the Port Authority repeatedly responded with self-serving, conclusory assertions in its previously referenced interrogatory responses, including 2012 Interrogatory Nos. 7, 8, 15, 16, 19, 20, 22-24, and 25, suggesting that it did understand the question. The Port Authority asserts falsely that it does not know what differences are the subject of the Complaint that sets forth these differences specifically.[9]

*Similarly, the Port Authority's argument that it should not have to "provide facts to prove a negative proposition" is nonsense. Maher has not asked the Port Authority to prove a negative proposition, Maher has asked the Port Authority for the principal and material facts supporting its assertions of compliance with the Shipping Act, including justifications of the differences in lease terms and other disparate treatment alleged by Maher in the Complaint, and any facts tending to show that such justifications do not exceed what is necessary to achieve a valid transportation purpose justifying the differences. The Commission explained this concisely when it ruled in pertinent part: (1) "it is reasonable to infer from the fact that some terminal tenants are charged nothing and other terminal tenants are charged millions of dollars that the Port Authority's practices might be excessive and not fit and appropriate to the end in view"; (2) "it is also reasonable at this stage to infer from the magnitude of the consideration that the Port Authority's treatment of the port tenants is not supported by legitimate factors"; and (3) "Maher has adequately alleged that the Port Authority has a practice of excluding Maher and existing port tenants for consideration as tenants, operators, or Qualified Transferees of the Global terminal." Maher Terminals, LLC v. Port Auth. of N.Y. & N.J., Dkt. 12-02, 2015 WL 9426189 at *18, 20, & 22* (F.M.C. Dec. 18, 2015).*

*The Port Authority's reference to every one of its previous interrogatory responses fails to adequately provide the principal and material facts of purported justifications for differences in treatment. Courts "ordinarily" hold that "responses to interrogatories should not incorporate outside material by reference" and that "[a]nswers to interrogatories must be responsive to the question, complete in themselves, and should not refer to pleadings, depositions, other documents, or other interrogatories, at least when a reference to another interrogatory makes it difficult to ascertain if the original interrogatory has been answered completely without a detailed comparison of answers." Nguyen v. Bartos, 2011 WL 4443314, *2 (E.D. Cal. Sept. 22, 2011) (citing 7-33 Moore's Fed. Prac. § 33.013); see also Starlever Hydraulik GmBH v. Mohawk Res. Ltd., 1996 WL 172712, *5 (N.D.N.Y. Apr. 10, 1996) ("'[B]are, ambiguous cross-references to general answers' are not sufficient.") (quoting Cine*

[9] *For instance, in The Port Authority's response to 2012 Interrogatory No. 1, the Port Authority demonstrates that it understands the differences by gratuitously seeking to justify the differences in its treatment of marine terminal operators 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 Port Authority preferences provided to PNCT and MSC, but not to Maher.*

Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1064 (2d Cir. 1979)). While cross-references to other interrogatory responses may be sufficient elsewhere, in these circumstances the Port Authority's reference to twenty-six different interrogatory responses provides no plain answer, and thus is improper. The Port Authority cannot rely on inapposite and insufficient previous responses to answer 2012 Interrogatory No. 27. Accordingly, the Port Authority must be required to provide the principal and material facts regarding any purported justifications for its practices, policies, procedures, or lack thereof, and actions or inactions at issue in the remaining claims in the proceeding.

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

The Port Authority properly objected to 2012 Interrogatory No. 27 as vague and overbroad because it asks why all of the Port Authority practices "that are the subject of the Complaint . . . do not violate the Shipping Act." This interrogatory is vague because the Complaint about which it asks is vague—and, indeed, the majority of it has been dismissed as a result. The interrogatory is overbroad because it asks for "any justifications" for *all* of the challenged practices—thereby improperly seeking essentially every fact in support of the Port Authority's positions. *See* pp. 19-20 *supra*. To the extent any answer is required, the Port Authority properly responded by reference to its responses to 2012 Interrogatories Nos. 1 through 26, which provide the principal and material facts concerning its practices, policies, procedures, actions, and inactions that are the subject of Maher's claims. A more detailed response to Maher's catch-all, general and vague interrogatory is wholly unwarranted.

DISCUSSION OF SPECIFIC 2016 INTERROGATORY RESPONSES

2016 Interrogatory No. 9(c) & (d): *Describe in detail each actual, proposed, or contemplated change of control consent ("change of control consent") in the Port of New York and New Jersey since 1997 to the present, including but not limited to:*

a. the date of the change of control consent;
b. the consent fee or consideration that PANYNJ required;
c. the basis for the consent fee or consideration, whether legitimate business reasons or otherwise;

d. how the consent fee or consideration was calculated; and
e. the specific sections or portions of agreements between PANYNJ and the marine terminal operator or its affiliate setting forth the terms or the change of control and consent fee or consideration provided therefor.

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory as unduly burdensome to the extent that it requires the Port Authority to "[d]escribe in detail" facts under each subpart for every such change of control event since 1997. The Port Authority also objects to this interrogatory to the extent that it seeks information concerning events occurring after March 30, 2012 because such information could not furnish the basis of the claims filed in 2012. The Port Authority further objects to this interrogatory as beyond the proper scope of discovery as narrowed by the FMC Order to the extent that it seeks discovery about any consent fee or changes of control that have not actually taken place, for the reasons stated in the Port Authority's Motion for a Protective Order filed on March 10, 2016. The Port Authority also objects to this interrogatory to the extent that it is duplicative of previous interrogatories in this matter to which the Port Authority provided detailed responses. The Port Authority further objects to this interrogatory to the extent that it seeks information regarding new topics not addressed in Maher's initial discovery requests in this matter. The Port Authority also objects to this interrogatory to the extent that it calls for information subject to the attorney-client privilege and/or work product doctrine. The Port Authority further objects to this interrogatory to the extent that this information is publicly available or otherwise equally accessible to the Complainant. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds to each subpart as follows:*

a. the date of the change of control consent;
b. the consent fee or consideration that PANYNJ required

Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to Interrogatories No. 9(a) and (b). The Port Authority refers Maher to the response to Interrogatory No. 11 in its Amended and Supplemental Objections and Responses to Maher's First Set of Interrogatories. The Port Authority further responds that it has consented to the following assignment of leases and transfers of ownership:

- *Bay Avenue L.L.C. assigned its lease to Njind Bay Avenue LLC in 2012, and a security deposit was set at $18,000*

- *1201 Corbin L.L.C. assigned its leases, EP-254 and EP-255, to Njind Corbin Street LLC in 2012, and security deposits were set at $4,800 and $6,000, respectively*

- *Cargill Incorporated assigned its lease to Wild Flavors, Inc. in 2012, an Assignment Consent Fee was paid of $133,792.35 and a security deposit was set at $55,000*

c. the basis for the consent fee or consideration, whether legitimate business reasons or

otherwise

The Port Authority further objects to Interrogatory No. 9(c) to the extent that it seeks information beyond principal and material facts. The Port Authority also objects to the characterization "legitimate business reasons or otherwise." Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority refers the Complainant to the Port Authority's response to No. 9 of its Objections and Responses to Complainant's First Set of Interrogatories.

d. how the consent fee or consideration was calculated

The Port Authority further objects to Interrogatory No. 9(d) to the extent that it seeks information beyond principal and material facts. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority refers Maher to its response to No. 10 of the Port Authority's Objections and Responses to Complainant's First Set of Interrogatories. The Port Authority further responds that it considers the specific circumstances of the requesting tenant within the context of their specific lease terms and the proposed change of control transaction, and any final arrangement is subject to negotiations between the parties. As the Port Authority explained in its response to No. 9 of its Objections and Responses to Complainant's First Set of Interrogatories, the Port Authority considers such factors as the risk the proposed transaction exposes the Port Authority to and the amount of investment the Port Authority has made in the marine terminal facility. In certain cases, the consent fees and consideration may be determined by reference to specific provisions in the tenant's lease.

e. the specific sections or portions of agreements between PANYNJ and the marine terminal operator or its affiliate setting forth the terms or the change of control and consent fee or consideration provided therefor

Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to this request. The Port Authority further responds that marine terminal operator leases and agreements are publicly available on the Port Authority's website.

Maher's Argument: *The Port Authority's refusals to provide responsive information (i) back to 1997 or (ii) after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off, nor did the Presiding Officer sustain the Port Authority's objection to providing information back to 1997. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to*

cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

Parts 9(a), (b), and (e) of this interrogatory were the subject of the Port Authority's motion for protective order; Parts 9(c) and (d) were not, other than the general limitations that the Port Authority objects to providing information with respect to changes of control prior to 1997, after March 30, 2012, or which were contemplated but did not occur. Parts 9(c) and (d) ask: (1) the basis for the consent fees or consideration and (2) how the consent fees or consideration charged by the Port Authority were calculated, respectively. Maher challenges the unlawfulness of the Port Authority's consent fee/consideration practice and complains that it was not applied in an evenhanded manner. Therefore, Maher has propounded narrowly targeted and relevant discovery to determine the "why" of the consent charges in 9(c) and the "how" of the consent charges in 9(d), with respect to each of the instances of such conduct, so that they can be evaluated and compared. The Port Authority's response promotes confusion and misdirection instead of simply providing a straightforward complete answer to the important questions presented for those changes of control which actually occurred during the 1997-March 30, 2012.

For its answer to 9(c), the Port Authority refers Maher back to its response to 2012 Interrogatory No. 9, but all that the Port Authority provided there were three vague factors: (1) "new owners are committed to investment in the terminal;" (2) "protect the Port Authority's investments and assets;";and (3) "capital gains." The Port Authority does not identify how or whether these vague factors applied in each of the change of control events it has identified. Nor does the Port Authority describe in detail in each instance how the vague factors pertain to the consent fee payments and economic consideration terms required. See The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories (May 7, 2012), Ex. 4.

For 9(d), the Port Authority still refuses to explain how it arrived at the sums extracted from some of its marine terminal operators. All the Port Authority answer does is refer back to the same three factors in 2012 Interrogatory No. 9 and to its response to 2012 Interrogatory No. 10, which disclosed that the Port Authority determined consent obligations "scaled in comparison to the outcome of PNCT's transfer of control to AIG" with "appropriate modifications." See The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories (May 7, 2012), Ex. 4. The Port Authority must identify and describe in detail how, in each of the changes of control or ownership, the required consent fee and economic considerations terms were determined. As the Commission ruled when sustaining Maher's change of control claims against the Port Authority's motion to

dismiss, the Port Authority must justify the reasonableness of its practices and its disparate treatment of marine terminal operators, because some are required to pay millions of dollars in consent fees and other consideration to the Port Authority while others are not. Maher Terminals, LLC v. The Port Auth. of N.Y. & N.J. Dkt. 12-02 at 33 (F.M.C. Dec. 19, 2015) ("it is reasonable to infer from the fact that some terminal tenants are charged nothing and other tenants are charged millions of dollars that the Port Authority's practices might be excessive and not fit and appropriate to the end in view"). The Port Authority must explain how it calculated the fees charged, or not charged, as the case may be. Having known about its basis for disparate treatment and these claims for years, the Port Authority should have precise answers for these simple questions and it must supplement its answer.

*Lastly, the Port Authority's response to 2016 Interrogatory No. 9(d) is improper because the Port Authority answers that how it calculated the consent fees/consideration can be found in tenant leases "in certain instances," but it does not provide or commit to provide them, or identify them. Instead, it refers Maher to the Port Authority's Internet site to rummage around for them. Although it is proper for a responding party to refer the requester to public documents which are equally available to the requester rather than producing them, this exception only applies when the documents are equally available to requester and the responding party has identified the records with sufficient detail. Mem. and Order on Second Set of Discovery Mot., Dkt. 08-03 at 24-25 (Jan. 18, 2012), Ex. 17 (quoting 8B Wright & Miller, Fed. Prac. & Proc. § 2178, at 94-97 (2008)); Evenson v. Palisades Collection, LLC, No. 2:13-cv-1226, 2014 WL 5439791 *4 (S.D. Ohio Oct. 23, 2014) (directing respondent to produce records where not clear they are equally accessible to requester); Mullins v. Prudential Ins. Co. of Am., 267 F.R.D. 504, 515 (W.D. Ky. 2010) ("A party that attempts to rely upon Rule 33(d) with a mere general reference to a mass of documents or records has not adequately responded.").*

Moreover, Maher has looked at the Port Authority's website, and finds leases for only a handful of tenants, not for the 18 tenants for which the Port Authority identified changes of control that actually occurred. Compare Port Authority Website, http://corpinfo.panynj.gov/pages/port-leases/ with The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories, No. 6 (May 7, 2012), Ex. 4 & Response to Interrogatory No. 9(b) (above). It is improper for the Port Authority to answer an interrogatory by pointing it to purportedly publicly available documents that are not actually available.

As the Commission noted, the leases to which the Port Authority refers are lengthy and complex documents, and Maher cannot locate the answers within the multitude of hundred page, complex lease documents on the Port Authority's website as easily as the Port Authority can, if Maher can even find them. Maher Terminals, LLC v. The Port Auth. of N.Y. & N.J. Dkt. 12-02 at 45 (F.M.C. Dec. 19, 2015). See also Maxtera, Inc. v. Marks, 289 F.R.D. 427, 437 (D. Md. 2012) (reliance upon Rule 33 tendering of business records inappropriate where responding party has superior knowledge of the documents and therefore the burden of determining the answer is not substantially the same for him to extrapolate the answer); T.N. Taube Corp. v. Marine Midland Morg. Corp., 136 F.R.D. 449 (W.D.N.C. 1991) ("An important—often key—factor in weighing the respective burdens on the parties is the interrogated party's familiarity with its own documents."). Maher has no way to know which of these leases are the "certain instances" that contain the calculations requested, or where in these large and complex documents the

calculations can be found. The Port Authority answer sends Maher on a search for the proverbial needle in a haystack. In contrast, the Port Authority negotiated and wrote these documents, and is therefore much more familiar with them and their application. Therefore, even if they were on the Internet in a publicly available location, they are not "equally available" to Maher, and the Port Authority should be required to produce the leases containing the responsive information, identify where the answers can be found within them, and answer the interrogatories fully and directly.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*.

Maher likewise is incorrect in suggesting that the *2016* Interrogatories specifically are somehow exempt from the Protective Order's temporal limitations. Mot. at 67. In moving for a protective order, the Port Authority asked for limitations on (i) the substantive scope, *i.e.*, the topics of inquiry, *and* (ii) the temporal scope, *i.e.*, the time frame, for the remaining discovery. *See* pp. 11-15 *supra*. As to the "substantive scope," the Protective Order permitted "an additional ten interrogatories" besides the "narrowed interrogatories permitted by the Scheduling Order." Ex. W at 3. However, it limited the *temporal* scope without qualification: "temporal requests that are longer than initially requested will not be permitted." *Id*.

Maher's assertion that the Port Authority "refus[ed] to provide responsive information . . . back to 1997" is false. Mot. at 67. The Port Authority did not object to the 1997 starting date but to Maher's demand "to '[d]escribe in detail' . . . every [] change of control event since 1997."

Maher's challenge to the Port Authority's "general objections" is a red herring. Mot. at 65-66. The Port Authority properly reiterated its specific objections within its response to 2016 Interrogatory No. 9 and explained its reasons.

Maher's argument that the Port Authority is obligated to specify "what, if any, responsive information it has withheld" pursuant to these objections, *id.*, lacks any basis in the Commission's Rules, as explained. *See* pp. 17-19 *supra*.

Maher is wrong that the Port Authority has refused to "provid[e] a straightforward complete answer" to 2016 Interrogatory No. 9(c)-(d) (the only subparts at issue). Mot. at 68; *see id.* at 6 (identifying only 9(c)-(d) among Maher's ten additional interrogatories). Subpart 9(c) seeks "the basis for the consent fee or consideration, whether legitimate business reasons or otherwise." The Port Authority *already answered* that question in response to 2012 Interrogatory No. 9, which nearly identically seeks the Port Authority's "purpose" for seeking "economic consideration" for changes of control. *See* p. 49 *supra*. Similarly, subpart 9(d) seeks "how the consent fee or consideration was calculated," a question the Port Authority already answered in responding to the nearly identical 2012 Interrogatory No. 10 seeking the "formula" or "basis" for determining the amount of consent fees. *See* p. 51 *supra*. Because 9(c) and 9(d) are duplicative of previous interrogatories, just as the Port Authority objected, it properly cross-referenced to its earlier responses, which gave the principal and material facts.

Maher's demand that the Port Authority provide additional minute details on how exactly the Port Authority applied the factors it considered and how exactly it scaled each transaction in comparison to the PNCT transfer, "in each of the change of control events it has identified," exceeds the principal and material facts. *See* pp. 19-20 *supra*. As Maher concedes, the Commission identified the heart of Maher's change-of-control claims as its allegation that "'some terminal tenants are charged nothing and other tenants are charged millions of dollars'" for changes of control. Mot. at 69. The Port Authority has disclosed all changes of control, over a span of *fifteen years*, and identified the transferor, transferee, year of transfer, form of consideration, and amount of consideration, the basis for the change of control fees, and the formula generally applied, based on the PNCT transaction. *See* pp. 55-56, 73 *supra*. Maher's demand for *additional* details, dating back twenty years, for over a dozen transactions in which it

had no part, is wholly inappropriate and disproportionate to the remaining claims in the case, particularly in response to an interrogatory. *See* pp. 19-20 *supra*. Maher can obtain further detail by reviewing documents produced by the Port Authority and through depositions.

Maher complains that the Port Authority's response to 9(d), regarding how consideration was calculated, referred Maher to "tenant leases." Mot. at 70-71. But what the Port Authority stated was that, when negotiating consideration for changes of control, *the Port Authority and the transferor tenant* in some cases determine the amount of consideration "by reference to specific provisions in the tenant's lease." PANYNJ Resp. to 2016 Interrog. No. 9(d). In any event, the Port Authority has produced the agreements for all changes of control and any leases not publicly available to Maher (all of which contain a table of contents). That is all that is required.

2016 Interrogatory No. 11: *With respect to the PNCT change(s) in control or ownership resulting in Highstar Capital, L.P., TIL, or MSC control or ownership of PNCT in or around 2010/2011, describe in detail what consideration, specifically, was agreed in exchange for PANYNJ's consent to the change of control or ownership, what of that has been paid or provided to PANYNJ, and what if any remains to be paid or provided.*

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. Subject to and without waiving, but rather expressly preserving, its General Objections, the Port Authority refers Maher to its response to Interrogatory No. 6 in its Amended and Supplemental Objections and Responses to Maher's First Set of Interrogatories. The Port Authority further responds that, unlike subsequent change of control events, no one obligation of the parties under PNCT's Amended and Restated Lease Agreement was parsed out and tied to the Port Authority's consent to the changes of control. The terms of the Amended and Restated Lease Agreement reflect the consideration and terms of the Port Authority's consent.*

Maher's Argument: *The Port Authority's refusal to provide responsive information after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years*

prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority also fails to answer 2016 Interrogatory No. 11. The Port Authority merely refers to a different but overlapping set of vague factors from those identified in its response to 2016 Interrogatory No. 9, this time in its response 2012 Interrogatory No. 6, which include: (1) "whether the new entity . . . was suitable to control . . . in terms of its integrity, financial capacity, security qualifications and operational ability;" and (2) "the entity would commit to make appropriate capital investments in the facility." See The Port Authority of New York and New Jersey's Amended and Supplemental Objections and Responses to Complainant's First Set of Interrogatories (July 12, 2012), Ex. 5. While the Port Authority now confesses that "no one obligation" of the tenant was correlated to the Port Authority's consent, this fails to answer the questions: (1) what consideration was agreed, (2) what was paid, and (3) what was not. If there was no consideration agreed and no payment made for consent, the Port Authority only need say so, or if there was consideration agreed, explain what has been paid and what has not.

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

The Port Authority properly responded to 2016 Interrogatory No. 11, regarding the consideration paid for PNCT's 2011 change of control, by, among other things, cross-referencing to its response to 2012 Interrogatory No. 6, which requested the same information. *See* p. 38-39

supra. Contrary to Maher's false claim that the cross-referenced answer "merely refers to . . . vague factors," Mot. at 73, the Port Authority explained the terms of the 2011 change of control and properly exercised its Rule 205(d) option to specify documents containing responsive information. *See* pp. 20-22 *supra*.

2016 Interrogatory No. 12: *With respect to the PNCT change(s) in control or ownership resulting in Highstar Capital, L.P., TIL, and/or MSC control or ownership of PNCT in or around 2010/2011, describe in detail what services, benefits, terminal investments, or projects, specifically, PANYNJ provided or will provide to PNCT in exchange for the consent fee paid or agreed to be paid to PANYNJ.*

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it attempts to expand the substantive scope of discovery by improperly seeking information regarding new topics not addressed in Maher's initial discovery requests in this matter. The Port Authority also objects to this interrogatory on the grounds that it implies that the amount of payment or economic consideration provided to the Port Authority in connection with a change of ownership or control is, or should be, related to "services, benefits, terminal investments, or projects, specifically, PANYNJ provided or will provide to PNCT in exchange for the consent fee paid or agreed to be paid to PANYNJ." Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016 asking the Presiding Officer to excuse it from responding to this request. The Port Authority further states, as has already been explained in Nos. 9 and 11 of the Port Authority's Objections and Responses to Maher's First Set of Interrogatories, that such amounts are sought to compensate the Port Authority, inter alia, in part for the large sums it has invested in the terminals and surrounding infrastructure—investments which contribute significantly to the asset value of the Port's marine terminal operators—and also for risks to which the Port Authority may be subjected due to the change in control.*

Maher's Argument: *The Port Authority's refusal to provide responsive information after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the*

present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority's response to 2016 Interrogatory No. 12 objects to the Port Authority's perception that the question implies that change of control fees paid by tenants are or should be related to services, benefits, etc., provided by the Port Authority, but that is no answer. Nor is it sufficient for the Port Authority to point vaguely to "large sums it has invested in the terminals and surrounding infrastructure," "inter alia" that the Port Authority neglects to specify, and unspecified "risks" as justifications for the 2010/2011 PNCT change of control. The response does not answer the question. The Port Authority must disclose the: (1) "large sums . . . invested in the terminals and surrounding infrastructure;" (2) "inter alia;" and (3) purported "risks to which the Port Authority may be subjected due to the change of control."

Nor do the Port Authority's responses to 2012 Interrogatories No. 9 and 11 provide a sufficient response. 2016 Interrogatory No. 12 calls upon the Port Authority to disclose what, specifically, the Port Authority provided in exchange for the consideration extracted in connection with the change of control at issue. 2012 Interrogatory No. 9 requests the purpose for having sought such consideration and in response the Port Authority discloses three broad goals purportedly applicable in some degree or another to a variety of undisclosed transactions. 2012 Interrogatory No. 11 requests that the Port Authority identify the details of each change of control since 1997, including the payments received an how they correlate to services or benefits the Port Authority provided in exchange for the consideration extracted. In response, the Port Authority referred Maher back to the Port Authority's response to 2012 Interrogatory No. 6. See The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories (May 7, 2012), Ex. 4. However, the Port Authority's response to 2012 Interrogatory No. 6 provides no answer to 2016 Interrogatory No. 12 because it does not disclose what the Port Authority provided in exchange for the consideration extracted in connection with the 2010/2011 PNCT/MSC/TIL/Highstar change of control consent. Rather, for this transaction, 2012 Interrogatory No. 6 again redirects Maher, this time to its answer to 2012 Interrogatory No. 1. Alas, the Port Authority's response there provides no answer either. Instead, it simply states that there was a negotiation from 2008 through 2011, pursuant to which the Port Authority provided some additional acreage in exchange for additional capital investments by PNCT. The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories (May 7, 2012), Ex. 4.

As with so many of its responses, the Port Authority's intractable labyrinth of cross-references, and the great lengths to which the Port Authority strains to make its answers as confusing as possible, only highlight the absence of an answer. Vague, evasive, and convoluted cross-references are not an answer.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

The Port Authority properly objected to 2016 Interrogatory No. 12 because it implies that the economic consideration provided for consent to the PNCT change of control is, or should be, "related to 'services, benefits, terminal investments, or projects, specifically, PANYNJ provided or will provide to PNCT." PANYNJ Resp. to 2016 Interrog. No. 12. The Port Authority then properly cross-referenced to its response to 2012 Interrogatory No. 11, where it explained the factors to which the amount of economic consideration *did* bear relation. *See* pp. 78-79 *supra*. Maher cannot dictate the Port Authority's response by framing its interrogatories to ask inapposite or irrelevant questions.

The Port Authority set forth the principal and material facts regarding the factors on which consideration for the PNCT changes of control *was* premised, in its response to this interrogatory as well as to its cross-referenced responses to 2012 Interrogatories Nos. 9 and 11 (which cross-reference its responses to 2012 Interrogatories Nos. 1 and 6). These responses fully set forth the principal and material facts regarding the circumstances of, and reasons for, the consideration requested for the 2011 PNCT changes of control. While Maher complains about the use of cross-references, Mot. at 76, such usage is the consequence of Maher's numerous, repetitious and overlapping interrogatories.

2016 Interrogatory No. 21: *Describe in detail the legitimate business reasons, if any, for the specific consent fees and other consideration sought for each of the transfers or changes of ownership or control interests involving marine terminal operator leases since 1997, or if no consent fees or consideration were sought, the legitimate business reasons why not, if any.*

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein The Port Authority further objects to this interrogatory to the extent that it is duplicative of previous interrogatories in this matter to which the Port Authority provided detailed responses. The Port Authority also objects to this interrogatory as unduly burdensome to the extent that it requires the Port Authority to "[d]escribe in detail" facts regarding every change of control event since 1997. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds by referring Maher to No. 9 of the Port Authority's Objections and Responses to Complainant's First Set of Interrogatories. The Port Authority further responds that the Port Authority's decision regarding whether to seek a fee or consideration obligation is driven by the specific language in the requesting tenant's negotiated lease. A proposed transaction that does not trigger a Change of Control event as defined under a marine terminal operator's lease, for example, may not require the consent of the Port Authority and payment of a fee or consideration obligation.*

Port Authority's Amended Response: *The Port Authority incorporates by reference each of its General Objections from the Port Authority's Objections and Responses to the Complainant's Revised First Set of Interrogatories, dated March 17, 2016 ("General Objections"), as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it is duplicative of previous interrogatories propounded by Maher in this matter to which the Port Authority has already provided detailed responses. The Port Authority also objects to this interrogatory as unduly burdensome to the extent that it requires the Port Authority to "[d]escribe in detail" facts regarding every change of control event since 1997. The Port Authority will provide the principal and material facts as required. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that in considering a proposed change of control, its actions are driven by a number of factors, including ensuring that tenants of the Port will be well-positioned for growth opportunities and achieving maximum value for the Port Authority and the region within the framework of the specific language of the marine terminal lease at issue. Some earlier marine terminal leases did not expressly require tenants to seek the Port Authority's consent to a change of control transaction and/or allow the Port Authority to seek consideration for such a transaction, for example, the Howland Hook Container Terminal lease assignment to NYCT in 2004. More recent marine terminal leases now reflect the Port Authority's particular concern—"because of the nature of the obligations of the Lessee"—regarding the "qualifications and identity of Lessee and its indirect controlling holders," and require lessees to seek the Port Authority's prior written approval before any transfers or changes of ownership (as defined by the specific lease). See, e.g., PNCT Amended and Restated Lease (LPN-264) § 48(d); Global Lease (LPJ-001) § 48(a)(3); Maher Lease Suppl. 1a (EP-249) § 45(b); see also NYCT Lease Suppl. 14 (HHT-4) § 3. The specific language of each lease determines whether a proposed transaction triggers a Change of Control event (as defined). Notably, no lease provision in any marine terminal lease obligates the Port Authority to give its consent.*

Because each marine terminal facility and lease is a valuable asset and the Port Authority has invested considerable resources into maintenance, improvements and infrastructure at the marine terminals to increase their value and efficiency, the Port Authority has a vested interest in and concern with any proposed transfer of a marine terminal lease or interest in such a lease to a new entity. The Port Authority may consider, among other things, and depending on the particular circumstances of any proposed change of control, whether a new owner (1) is suitable to control tenant operations at a Port Authority marine terminal; (2) is committed to making continued investment in the terminal; and (3) will protect the Port Authority's investments and assets, as well as the particular circumstances of any proposed change of control. The Port Authority's negotiation of consent deals that bring value to the terminal, through, inter alia*, consent fee payments, increased investment obligations, or an increased security deposit, ensures that the proposed change of control is a net-gain for the Port Authority.*

The Port Authority seeks to employ a rational and reasonable approach to its treatment of the proposed marine terminal change of control transactions by considering the language of the lease and factors specific to the parties (e.g., size of the leased premises and the future tenant's long-term plans for the premises). Since Maher's change of control in 2007, there has been no significant change of control transaction involving a marine terminal lease for which no consideration was sought.

Maher's Argument: *The Port Authority's refusals to provide responsive information (i) back to 1997 or (ii) after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off, nor did it sustain the Port Authority's objection to providing responsive information back to 1997. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority's response to 2016 Interrogatory No. 21 is also nonresponsive. The interrogatory requests the legitimate business reasons, if any, for each change of control consent fee or other consideration sought by the Port Authority (whether or not actually obtained) since

1997. The response by reference back to the Port Authority's response to 2012 Interrogatory No. 9 does not answer the question. There, the Port Authority offered the three vague factors purportedly considered in assessing such fees/consideration ((1) "new owners are committed to investment in the terminal;" (2) "protect the Port Authority's investments and assets;" and (3) "capital gains"), but did not identify the "legitimate business reasons" that such consideration was sought in each instance. The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories (May 7, 2012), Ex. 4. Nor does the Port Authority explain how these factors operate in connection with the similarly vague, but different and overlapping, factors it specifies in its response to 2012 Interrogatory No. 6. The Port Authority of New York and New Jersey's Objections and Responses to Complainant's First Set of Interrogatories (May 7, 2012) ((1) "whether the new entity . . . was suitable to control . . . in terms of its integrity, financial capacity, security qualifications and operational ability;" and (2) "the entity would commit to make appropriate capital investments in the facility."). Id. Finally, the Port Authority's reference back to some unidentified leases which "for example, may not require the consent of the Port Authority and payment of a fee or consideration obligation" is also insufficient, as discussed above in connection with 2016 Interrogatory No. 9(d), because they have not been provided, the Port Authority has not committed to provide them, and they are not "equally accessible" to Maher given their complexity and the Port Authority's greater familiarity with them, as discussed above. Finally, the Port Authority's response to documents must be conclusive, not "for example." Pulse-card, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 305 (D. Kan. 1996).

The Port Authority's Response:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Moreover, Maher's assertion that the Port Authority "refus[ed] to provide responsive information . . . back to 1997" is simply false. Mot. at 77. The Port Authority did not object to the 1997 starting date but to the undue burden imposed by Maher's demand "to '[d]escribe in detail' facts regarding every change of control event since 1997." PANYNJ Resp. to 2016 Interrog. No. 21. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

Further, Maher's challenge to the Port Authority's response to 2016 Interrogatory No. 21 was premature. Following the Presiding Officer's decision on the protective order motion, Maher for the first time objected to the Port Authority's response to this interrogatory, and the Port Authority agreed to supplement its answer. *See* p. 10 *supra*. Yet Maher filed its motion rather than await the promised supplemental responses, which the Port Authority served on June 6, 2016, after completing the necessary fact investigation. Ex. DD at pp. 2-4. The Port Authority therein sets forth the principal and material facts requested, on the reasons why it seeks consideration for changes of control and the factors it considers. *Id.* To the extent Maher seeks additional, minute detail on "each change of control" over a fifteen-year period, Mot. at 77, its request is unduly burdensome, as the Port Authority objected. The Port Authority is not required to set forth every fact or a narrative account in response to interrogatories. *See* pp. 19-20 *supra*.

2016 Interrogatory No. 23: *Describe in detail what terminal investments or other projects constitute the $3.8 billion in expenditures which PANYNJ levied the consent fees to recover, and which consent fees correlate to, are attributed to, or are justified by, which specific expenditures or projects making up the $3.8 billion in expenditures.*

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond principal and material facts by parsing the Port Authority's prior response to Interrogatory No. 9 of the of its Objections and Responses to Complainant's First Set of Interrogatories to manufacture additional discovery. The Port Authority also objects as overly burdensome and oppressive the Complainant's attempt to seek "detail[ed]" information spanning a 64-year span—as the prior response stated that the Port Authority "has invested over $3.8 billion in marine terminals and basic Port infrastructure since 1948." The Port Authority further objects to this interrogatory to the extent that it attempts to expand the substantive scope of discovery by improperly seeking information regarding new topics not addressed in Maher's initial discovery requests in this matter. The Port Authority also objects to this interrogatory on the grounds that it implies that the consent fee or economic consideration provided to the Port Authority in connection with a change of ownership or control is directly correlated with a specific expenditure on a marine terminal facility. The Port Authority further objects to this interrogatory on the grounds that it conflates the consent fee (an obligation borne by the requesting tenant) with consideration (such as a security deposit or capital investment in the facility that is borne by the new owner) provided to the Port Authority. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to this*

request. The Port Authority further responds by referring Maher to its response to Interrogatory No. 22.

Port Authority's Amended Response: *The Port Authority incorporates by reference each of its General Objections as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it demands the Port Authority "describe in detail" various facts, which is inconsistent with the requirement that a party provide principal and material facts. The Port Authority also objects to this interrogatory as overly burdensome and oppressive to the extent that it asks "which consent fees correlate to, are attributed to, or are justified by, which specific expenditures or projects making up the $3.8 billion in expenditures," because the details regarding the $3.8 billion in specific expenditures dating back to 1948 go far beyond the principal and material facts to which Complainant is entitled. The Port Authority further objects to this interrogatory to the extent that it exceeds the temporal scope of discovery established by the Protective Order at page 3 by seeking information regarding specific expenditures dating back to 1948. The Port Authority also objects to this interrogatory on the grounds that it implies that the consent fee or economic consideration provided to the Port Authority in connection with a change of ownership or control is directly tied to a specific expenditure on a marine terminal facility.*

Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that its marine terminal investments include, among other things, the 40-foot, 45-foot, and 50-foot channel dredging projects to allow modern container ships to traverse the Port; construction, expansion and maintenance of railways; improvements to roadways, including widening, paving, relocating, and constructing streets; major infrastructure improvements, such as berth replacement, maintenance and reconstruction, and demolition and rehabilitation of terminal facilities; and significant expansion and improvements to security, particularly those required by law after the September 11 attacks. These Port Authority investments have increased the efficiency of the Port and the volume of cargo entering the New York/New Jersey region, and greatly increased the value of the terminals and leases at the Port. As the Port Authority set forth in its response to Revised Interrogatory No. 22, although it may have been a goal of the Port Authority to try to recoup some portion of its terminal-related investments, each consent fee arrangement is the product of negotiations and can be, at most, only loosely tied to any particular investment or set of investments.

Maher's Argument: *The Port Authority's refusal to provide responsive information after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its*

interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority's response to 2016 Interrogatory No. 23 is also not responsive. The interrogatory calls upon 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 response to 2016 Interrogatory No. 22 provides no answer. There, again, the Port Authority identifies three general factors which purportedly underlay its change of control decisions. But it does not indicate which expenditures are those that purportedly justify the extracted consideration. After having previously invoked the purported $3.8 billion of investments in to justify its consent fees, the response to 2016 Interrogatory No. 22 indicates that the Port Authority did not and cannot correlate the fees it charged to any particular investments it claims justify the fees. Then, the Port Authority claims the investments are "loosely tied" to the fees, but it still fails to identify them which it must do to answer the question. The Port Authority must indicate whether the investments are either impossible to correlate, or "loosely tied" and, if the latter, indicate which investments are loosely tied to which fees, and how.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

Further, Maher's challenge to the Port Authority's response to 2016 Interrogatory No. 23 was premature. As explained above, Maher filed this motion even though the Port Authority had agreed to provide a supplemental response, which it served on June 6, 2016, after completing the

necessary fact investigation. *See* p. 10 *supra*. The Port Authority therein sets forth the principal and material facts requested, regarding the kinds of terminal investments and other projects constitute the $3.8 billion that the Port Authority has invested in the Port since 1948. Ex. DD at pp. 4-5. The remainder of this interrogatory, which asks "which consent fees correlate to, are attributed to, or are justified by, which specific expenditures or projects making up the $3.8 billion in expenditures," is overly burdensome and oppressive. The requested details regarding $3.8 billion in specific expenditures dating back to 1948 go far beyond the principal and material facts to which Maher is entitled. The Port Authority is not required to set forth every fact or a narrative account in response to interrogatories. *See* pp. 19-20 *supra*.

2016 Interrogatory No. 24: *Describe in detail whether PANYNJ has charged consent fees to recover terminal investments made on terminals other than those undergoing the change of control or ownership for which the consent fee was charged.*

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it attempts to expand the substantive scope of discovery by improperly seeking information regarding new topics not addressed in Maher's initial discovery requests in this matter. The Port Authority also objects to this interrogatory on the grounds that it implies that the consent fee or economic consideration provided to the Port Authority in connection with a change of ownership or control is directly tied to a specific expenditure on a marine terminal facility. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to this request.*

Port Authority's Amended Response: *The Port Authority incorporates by reference each of its General Objections as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it implies that the consent fee or economic consideration provided to the Port Authority in connection with a change of ownership or control is directly tied to a specific expenditure on a marine terminal facility. The Port Authority also objects to this interrogatory to the extent that it implies that consent fees are the only form of consideration we have received in exchange for our consent to changes of control. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that no, it has not sought consent fees taking into account the need to recover terminal investments made on terminals other than those undergoing the change of control or ownership for which the consent fee was sought.*

<u>Maher's Argument</u>: *The Port Authority's refusal to provide responsive information after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority's response to 2016 Interrogatory No. 24 is also nonresponsive because it is composed wholly of objections and includes no substantive response to the propounded question.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

Further, Maher's challenge that the Port Authority gave "no substantive response" to this interrogatory was premature. As explained above, Maher filed this motion even though the Port Authority had agreed to provide a supplemental response, which it served on June 6, 2016, after

completing the necessary fact investigation. *See* p. 10 *supra*. The Port Authority therein responds, subject to its objections, that "it has not sought consent fees taking into account the need to recover terminal investments made on terminals other than those undergoing the change of control or ownership for which the consent fee was sought." Ex. DD at p. 6. This response fully answers Maher's inquiry.

2016 Interrogatory No. 27: *With respect to each marine terminal change of ownership or control since PNCT's transfer of ownership or control to AIG, describe in detail how specifically PANYNJ has determined the consent fee based on the amount of PANYNJ investments "scaled in comparison to the final outcome of PNCT's transfer of control to AIG."*

Port Authority Response: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond the principal and material facts by parsing the Port Authority's prior response to Interrogatory No. 10 of the of its Objections and Responses to Complainant's First Set of Interrogatories to manufacture additional discovery. Subject to and without waiving, but rather expressly preserving, the foregoing objection and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to this request. The Port Authority further responds that, pursuant to Fed. R. Civ. P. 33(d), it expects that nonprivileged documents responsive to this request will be produced in connection with this proceeding.*

Port Authority's Amended Response: *The Port Authority incorporates by reference each of its General Objections as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond the principal and material facts. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that each marine terminal change of control presents a multitude of unique considerations, including, but not limited to, market circumstances, terminal size, extent and amount of the Port Authority's investments in the terminal at issue, length of time left on the lease at issue, amount of throughput at the terminal (both actual and projected), and risks and opportunities presented by the proposed new owner.*

The 2007 PNCT transfer of ownership to AIG Global presented the first requested consent for a change of control of its kind in the world, *and the Port Authority faced a number of highly complicated and unique challenges in negotiating the consent deal. The PNCT transfers of ownership from Dubai Port World and Maersk Inc. to AIG Global were not voluntary transactions but rather part of a high profile and politically charged "forced sale" in which none of PNCT's then-controlling holders wished to relinquish their interests in PNCT, yet public pressure demanded the sale. At the same time, the Port Authority was in the midst of suing PNCT over its previous, unauthorized change of control, which precipitated the forced sale. Further, the proposed transfer to AIG Global presented major potential risk to the Port Authority because it would involve the transfer of a lease from experienced marine terminal*

operators and shipping lines (with substantial contractual throughput obligations) to an investment entity with no significant experience in operating a marine terminal or ships, and with long-term goals and interests potentially inconsistent with the Port Authority's goals and mandates.

With these challenges in mind, the Port Authority sought to develop a methodology for assessing the value of an overall change of control consent deal that would adequately protect the asset—one that considered, for example, the lessees, the buyers, the relevant, specific language of the lease at issue, the unique circumstances of the transaction, the risk to the Port and the region, and the substantial amount of public investment made by the Port Authority in the terminal at issue. As applied to the PNCT deal, the Port Authority initially sought to recoup a percentage of its investments at the PNCT marine terminal (notwithstanding that it was a "forced sale"), obtain security against the risk posed by the transaction, and obtain a commitment from the incoming owners to invest in the terminal. The value that the Port Authority received included a negotiated consent fee of $10 million, and PNCT's commitment to invest at least $40 million in capital on the marine terminal over ten years, as well as the release of all litigation between the parties, both actual and threatened, a resolution to the national security concerns surrounding the transaction, and the elimination of a potential anticompetitive advantage had Maersk retained its interest in PNCT. In addition, as a condition for its consent, APM also agreed to surrender to the Port Authority 0.75 acres of land at the intersection of Tripoli and McLester Streets, which allowed the Port Authority to proceed with its plans to widen these roadways in order to improve container throughput capacity throughout the Port.

The Port Authority applied a similar approach to seeking value in subsequent change of control transactions by considering, among other things, the identities of the lessees and buyers, circumstances under which the transaction was undertaken, risk to the Port and region, and investment made by the Port Authority at that terminal.

For example, in negotiations with NYCT for its consent to a proposed change of ownership, the Port Authority considered the facts that the proposed transaction was not a forced sale but rather a sale of a lease; that NYCT proposed to transfer ownership from a major shipping company to an investment entity with no experience in running a container terminal and no ability to guarantee throughput; and the fact that the Port Authority had made a much larger direct investment in the NYCT marine terminal as compared to the PNCT marine terminal. In light of these transaction-specific factors, the Port Authority initially proposed a consent fee equivalent to roughly one-third of its direct investment in the NYCT marine terminal, plus a significant capital commitment calculated using the acreage of the terminal and number of years remaining on the terminal lease. The Port Authority's initial proposal was then subject to intense negotiations. In the end, the value that the Port Authority obtained in exchange for its consent included a consent fee of $16 million to be used for future capital projects, a capital commitment from NYCT that it would invest $30 million in the terminal during the remaining term of the lease, and NYCT's reimbursement of $5 million in ramp and roadwork improvements made by the Port Authority to facilitate access to the terminal.

As another example, for the Maher change of control in 2007, the Port Authority similarly considered that the proposed transaction was not a forced sale but rather a voluntary business transaction, from an experienced marine terminal operator to an investment vehicle

that had no significant experience in marine terminal operations and no ability to guarantee throughput, and that the marine terminal was significantly larger than any of those that had undergone changes of control prior to it, and that the Port Authority had made an even larger direct investment in that terminal than it had in the prior two marine terminals that sought its consent for a change of control. The Port Authority therefore initially requested a consent deal that featured a consent fee equivalent to roughly one-third of the Port Authority's direct investments in the Maher marine terminal, a credit guarantee, and a capital commitment calculated using the acreage of the terminal and number of years remaining on the terminal lease. Following negotiations, the Port Authority received a consent fee of $22 million (or, less than one-third of the Port Authority's investments) to be used for future capital projects, a capital commitment of $114 million to be made by Maher over the remaining term of the lease, and an increased security deposit of $26 million to be paid incrementally over four years.

The 2011 PNCT restructuring was not a traditional change of control transaction but rather a complex and complete restructuring of the PNCT lease, yet the Port Authority's approach to how it considered the proposed transaction effectively remained the same. The Port Authority first assessed the overall value of the proposed deal. It considered, among other things, the facts that the proposed transaction was not a forced sale but rather a transfer of ownership on a portion of the lease; that the restructuring would result in ownership by a subsidiary of the Mediterranean Shipping Company ("MSC"), one of the largest major shipping companies in the world (that relatedly provided a throughput guarantee); the overall risks to and opportunities for the Port and region; and investment made by the Port Authority at that terminal.

In lieu of a standard Consent Agreement, the parties negotiated a complete amendment and restructuring of the PNCT lease under which AIG/High Star Capital and TIL would share ownership of PNCT, the terminal would be expanded by eighty acres, and the lease term would be extended by 20 years. The value the Port Authority obtained upon its consent to the deal included an increased security deposit of $15 million, a capital commitment from PNCT that it would invest over $500 million in that terminal over the term of the lease, and a throughput guarantee from MSC to expand its annual container volume at that terminal.

When TIL subsequently sought the Port Authority's consent to the sale of 35% of TIL's ownership interests to Global Infrastructure Partners ("GIP"), the Port Authority underwent its then-standard value assessment of the proposed transaction. The Port Authority considered that the proposed transaction was not a forced sale but rather a voluntary transfer of ownership; that the proposed transfer would be of a non-controlling portion of TIL's ownership interest to an investment entity; the risk and overall value of the deal to the Port and region; and the Port Authority's investment at that terminal. In keeping with the language of PNCT's restructured lease and TIL's existing change of control letter agreement, the Port Authority did not seek a consent fee at the point of the initial internal restructuring that left all of TIL's controlling-holders the same, and which was done solely in anticipation of the sale to GIP. The Port Authority did require a consent fee at the point of actual transfer of ownership that occurred when GIP purchased 35% of all of TIL's ownership interests, resulting in GIP owning 35% of TIL's 50% interest in PNCT. The Port Authority calculated the $4.7 million consent fee it sought and received from GIP directly from the formula expressly stated in the change of control provision in PNCT's Amended and Restructured lease.

Maher's Argument: *The Port Authority's refusal to provide responsive information after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

*The Port Authority's response to 2016 Interrogatory No. 27 is insufficient insofar as its only response is that it "expects" it might make documents available which could answer the question. The Port Authority again improperly resorts to Fed. R. Civ. P. 33(d) while failing to produce the documents it tenders in lieu of the principal and material facts it should have provided. Fed. R. Civ. P. 33(d) and FMC Rule 205(d) require that a party responding to an interrogatory with documents to "make[] the records" specified in the interrogatory response "available for inspection," which the Port Authority has not done. Dkt. 08-03 Discovery Order at 8, Ex. 16 (quoting Rainbow Pioneer # 44-18-04A, 711 F.2d at 906). The Port Authority does not even affirmatively represent that they even exist—it only opines that it "expects that nonprivileged, responsive documents describing the actions taken by the Port Authority to consider and consent to the changes of control described above will be produced in connection with this proceeding." The Port Authority has not made the documents "available for inspection," and has not met its burden under Fed. R. Civ. P. 33(d) and FMC Rule 205(d). See Gen. Cigar Co., 2007 WL 983855, at *6; Roger Kennedy Const., 2007 WL 1839394, at *2 & n.1; Pulse-card, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 305 (D. Kan. 1996) ("Under the guise of Fed. R. Civ. P. 33(d) defendants may not simply refer generically to past or future production of documents. They must identify in their answers to the interrogatories specifically which documents contain the answer."). Further, the list must be specific. Qualifiers that render the list non-specific are not allowed under Fed. R. Civ. P. 33(d). Id. ("In one instance SPS qualifies the list of specified documents with the phrase, 'included among these documents.' This makes the list non-specific. It does not qualify as an election to produce business records. The answer must specify, without qualification, which documents contain the answer.").*

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

Further, Maher's challenge that the Port Authority's "only response" was to rely on future document production, Mot. at 83, was premature. Maher filed this motion even though the Port Authority had agreed to provide a supplemental response, which it served on June 6, 2016, after completing the necessary fact investigation. *See* p. 10 *supra*. The Port Authority therein responds with the principal and material facts regarding how it scaled the economic consideration for changes of control, based on the consideration for the 2007 PNCT transfer to AIG, adjusted to the unique circumstances presented by each subsequent transaction. Ex. DD at pp. 6-11. This response fulfills the Port Authority's discovery obligations. To the extent that Maher seeks additional, minute details, it may obtain them by reviewing the Port Authority ample document production and through depositions.

<u>2016 Interrogatory No. 28</u>: *Describe in detail how, specifically, PANYNJ determined the consent fee applicable to PNCT's transfer of control to AIG which it used to determine subsequent consent fees "scaled in comparison".*

<u>Port Authority Response</u>: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond the principal and material facts by parsing the Port Authority's prior response to Interrogatory No. 10 of its Objections and Responses to Complainant's First Set of Interrogatories to manufacture additional discovery. Subject to and without waiving, but rather expressly preserving, the foregoing objection and its General*

Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to this request.

Port Authority's Amended Response: *The Port Authority incorporates by reference each of its General Objections as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond the principal and material facts. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that each marine terminal change of control presents a multitude of unique considerations, including, but not limited to, market circumstances, terminal size, extent and amount of the Port Authority's investments in the terminal at issue, length of time left on the lease at issue, amount of throughput at the terminal (both actual and projected), and risks and opportunities presented by the proposed new owner.*

The 2007 PNCT transfer of ownership to AIG Global presented the first requested consent for a change of control of its kind in the world, *and the Port Authority faced a number of highly complicated and unique challenges in negotiating the consent deal. The PNCT transfers of ownership from Dubai Port World and Maersk Inc. to AIG Global were not voluntary transactions but rather part of a high profile and politically charged "forced sale" in which none of PNCT's then-controlling holders wished to relinquish their interests in PNCT, yet public pressure demanded the sale. At the same time, the Port Authority was in the midst of suing PNCT over its previous, unauthorized change of control, which precipitated the forced sale. Further, the proposed transfer to AIG Global presented major potential risk to the Port Authority because it would involve the transfer of a lease from experienced marine terminal operators and shipping lines (with substantial contractual throughput obligations) to an investment entity with no significant experience in operating a marine terminal or ships, and with long-term goals and interests potentially inconsistent with the Port Authority's goals and mandates.*

With these challenges in mind, the Port Authority sought to develop a methodology for assessing the value of an overall change of control consent deal that would adequately protect the asset—one that considered, for example, the lessees, the buyers, the relevant, specific language of the lease at issue, the unique circumstances of the transaction, the risk to the Port and the region, and the substantial amount of public investment made by the Port Authority in the terminal at issue. As applied to the PNCT deal, the Port Authority initially sought to recoup a percentage of its investments at the PNCT marine terminal (notwithstanding that it was a "forced sale"), obtain security against the risk posed by the transaction, and obtain a commitment from the incoming owners to invest in the terminal. The value that the Port Authority received included a negotiated consent fee of $10 million, and PNCT's commitment to invest at least $40 million in capital on the marine terminal over ten years, as well as the release of all litigation between the parties, both actual and threatened, a resolution to the national security concerns surrounding the transaction, and the elimination of a potential anticompetitive advantage had Maersk retained its interest in PNCT. In addition, as a condition for its consent, APM also agreed to surrender to the Port Authority 0.75 acres of land at the intersection of Tripoli and McLester Streets, which allowed the Port Authority to proceed with its plans to widen these roadways in order to improve container throughput capacity throughout the Port.

The Port Authority applied a similar approach to seeking value in subsequent change of control transactions by considering, among other things, the identities of the lessees and buyers, circumstances under which the transaction was undertaken, risk to the Port and region, and investment made by the Port Authority at that terminal.

For example, in negotiations with NYCT for its consent to a proposed change of ownership, the Port Authority considered the facts that the proposed transaction was not a forced sale but rather a sale of a lease; that NYCT proposed to transfer ownership from a major shipping company to an investment entity with no experience in running a container terminal and no ability to guarantee throughput; and the fact that the Port Authority had made a much larger direct investment in the NYCT marine terminal as compared to the PNCT marine terminal. In light of these transaction-specific factors, the Port Authority initially proposed a consent fee equivalent to roughly one-third of its direct investment in the NYCT marine terminal, plus a significant capital commitment calculated using the acreage of the terminal and number of years remaining on the terminal lease. The Port Authority's initial proposal was then subject to intense negotiations. In the end, the value that the Port Authority obtained in exchange for its consent included a consent fee of $16 million to be used for future capital projects, a capital commitment from NYCT that it would invest $30 million in the terminal during the remaining term of the lease, and NYCT's reimbursement of $5 million in ramp and roadwork improvements made by the Port Authority to facilitate access to the terminal.

As another example, for the Maher change of control in 2007, the Port Authority similarly considered that the proposed transaction was not a forced sale but rather a voluntary business transaction, from an experienced marine terminal operator to an investment vehicle that had no significant experience in marine terminal operations and no ability to guarantee throughput, and that the marine terminal was significantly larger than any of those that had undergone changes of control prior to it, and that the Port Authority had made an even larger direct investment in that terminal than it had in the prior two marine terminals that sought its consent for a change of control. The Port Authority therefore initially requested a consent deal that featured a consent fee equivalent to roughly one-third of the Port Authority's direct investments in the Maher marine terminal, a credit guarantee, and a capital commitment calculated using the acreage of the terminal and number of years remaining on the terminal lease. Following negotiations, the Port Authority received a consent fee of $22 million (or, less than one-third of the Port Authority's investments) to be used for future capital projects, a capital commitment of $114 million to be made by Maher over the remaining term of the lease, and an increased security deposit of $26 million to be paid incrementally over four years.

The 2011 PNCT restructuring was not a traditional change of control transaction but rather a complex and complete restructuring of the PNCT lease, yet the Port Authority's approach to how it considered the proposed transaction effectively remained the same. The Port Authority first assessed the overall value of the proposed deal. It considered, among other things, the facts that the proposed transaction was not a forced sale but rather a transfer of ownership on a portion of the lease; that the restructuring would result in ownership by a subsidiary of the Mediterranean Shipping Company ("MSC"), one of the largest major shipping companies in the world (that relatedly provided a throughput guarantee); the overall risks to and opportunities for the Port and region; and investment made by the Port Authority at that terminal.

In lieu of a standard Consent Agreement, the parties negotiated a complete amendment and restructuring of the PNCT lease under which AIG/High Star Capital and TIL would share ownership of PNCT, the terminal would be expanded by eighty acres, and the lease term would be extended by 20 years. The value the Port Authority obtained upon its consent to the deal included an increased security deposit of $15 million, a capital commitment from PNCT that it would invest over $500 million in that terminal over the term of the lease, and a throughput guarantee from MSC to expand its annual container volume at that terminal.

When TIL subsequently sought the Port Authority's consent to the sale of 35% of TIL's ownership interests to Global Infrastructure Partners ("GIP"), the Port Authority underwent its then-standard value assessment of the proposed transaction. The Port Authority considered that the proposed transaction was not a forced sale but rather a voluntary transfer of ownership; that the proposed transfer would be of a non-controlling portion of TIL's ownership interest to an investment entity; the risk and overall value of the deal to the Port and region; and the Port Authority's investment at that terminal. In keeping with the language of PNCT's restructured lease and TIL's existing change of control letter agreement, the Port Authority did not seek a consent fee at the point of the initial internal restructuring that left all of TIL's controlling-holders the same, and which was done solely in anticipation of the sale to GIP. The Port Authority did require a consent fee at the point of actual transfer of ownership that occurred when GIP purchased 35% of all of TIL's ownership interests, resulting in GIP owning 35% of TIL's 50% interest in PNCT. The Port Authority calculated the $4.7 million consent fee it sought and received from GIP directly from the formula expressly stated in the change of control provision in PNCT's Amended and Restructured lease.

Maher's Argument: *The Port Authority's refusal to provide responsive information after March 30, 2012 is improper. First, the Presiding Officer's April 12, 2016, Order on Subpoena Requests and Respondent's Motion for Protective Order From Revised Discovery Requests did not impose a date limitation on the ten additional interrogatories served in 2016, which called for the production of information "to the present." Second, the Order did not adopt the Port Authority's request to so limit discovery to the Port Authority's March 30, 2012 discovery cut-off. Rather, the Order stated: "temporal requests that are longer than initially requested will not be permitted." Both the 2012 Interrogatories predating the Order and the ten revised 2016 Interrogatories required the production of information from 1997 "to the present" and specified a duty to supplement pursuant to Rule 201(j)(2) (Now Rule 201(k)(1)). Moreover, as set forth above the law is well-established. It is plainly improper to cut-off discovery over four years prior where continuing violations are alleged. Therefore, the Port Authority must supplement its interrogatory response to include responsive information from the period from 1997 up to "the present" with a continuing duty to supplement as originally requested by the 2012 Interrogatories and as required by the Order, Rule 201(k)(1), and the law.*

The Port Authority's use of vague general objections, without specific explanation of how those objections apply to the particular interrogatory, make it impossible to know what, if any, responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority's response to 2016 Interrogatory No. 28 is also nonresponsive because it is composed wholly of objections and includes no substantive response to the propounded question.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

Further, Maher's challenge that the Port Authority gave "no substantive response" to this interrogatory was premature. Mot. at 85. As explained above, Maher filed this motion even though the Port Authority had agreed to provide a supplemental response, which it served on June 6, 2016, after completing the necessary fact investigation. *See* p. 10 *supra*. The Port Authority therein responds with the principal and material facts regarding how it determined the consent fee for PNCT's change of control and how it was used to scale the consideration for subsequent changes of control. Ex. DD at pp. 11-15. This response fulfills the Port Authority's discovery obligations. To the extent that Maher seeks additional, minute details, it may obtain them by reviewing the Port Authority ample document production and through depositions.

<u>2016 Interrogatory No. 29</u>: *Describe in detail what "appropriate modifications" PANYNJ made to the PNCT/AIG consent fee in order to determine other consent fees, how it determined such "appropriate modifications," and the legitimate business reasons therefor, if any.*

<u>Port Authority Response</u>: *The Port Authority incorporates each of its General Objections into this Response as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond the principal and material facts by parsing the Port Authority's prior response to Interrogatory No. 10 of the of its Objections and Responses to Complainant's First Set of Interrogatories to manufacture additional discovery. The Port*

Authority also objects to this interrogatory on the grounds that it mischaracterizes the Port Authority's prior response, which stated that "[t]he Port Authority used the PNCT payments and consideration as a basis for subsequent transactions and made appropriate modifications based on the facts and circumstances of each tenant seeking consent." Subject to and without waiving, but rather expressly preserving, the foregoing objection and its General Objections, the Port Authority responds that it has filed a Motion for a Protective Order, dated March 10, 2016, asking the Presiding Officer to excuse it from responding to this request.

Port Authority's Amended Response: *The Port Authority incorporates by reference each of its General Objections as if fully set forth herein. The Port Authority further objects to this interrogatory to the extent that it seeks information beyond the principal and material facts. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that each marine terminal change of control presents a multitude of unique considerations, including, but not limited to, market circumstances, terminal size, extent and amount of the Port Authority's investments in the terminal at issue, length of time left on the lease at issue, amount of throughput at the terminal (both actual and projected), and risks and opportunities presented by the proposed new owner.*

The 2007 PNCT transfer of ownership to AIG Global presented the first requested consent for a change of control of its kind in the world, *and the Port Authority faced a number of highly complicated and unique challenges in negotiating the consent deal. The PNCT transfers of ownership from Dubai Port World and Maersk Inc. to AIG Global were not voluntary transactions but rather part of a high profile and politically charged "forced sale" in which none of PNCT's then-controlling holders wished to relinquish their interests in PNCT, yet public pressure demanded the sale. At the same time, the Port Authority was in the midst of suing PNCT over its previous, unauthorized change of control, which precipitated the forced sale. Further, the proposed transfer to AIG Global presented major potential risk to the Port Authority because it would involve the transfer of a lease from experienced marine terminal operators and shipping lines (with substantial contractual throughput obligations) to an investment entity with no significant experience in operating a marine terminal or ships, and with long-term goals and interests potentially inconsistent with the Port Authority's goals and mandates.*

With these challenges in mind, the Port Authority sought to develop a methodology for assessing the value of an overall change of control consent deal that would adequately protect the asset—one that considered, for example, the lessees, the buyers, the relevant, specific language of the lease at issue, the unique circumstances of the transaction, the risk to the Port and the region, and the substantial amount of public investment made by the Port Authority in the terminal at issue. As applied to the PNCT deal, the Port Authority initially sought to recoup a percentage of its investments at the PNCT marine terminal (notwithstanding that it was a "forced sale"), obtain security against the risk posed by the transaction, and obtain a commitment from the incoming owners to invest in the terminal. The value that the Port Authority received included a negotiated consent fee of $10 million, and PNCT's commitment to invest at least $40 million in capital on the marine terminal over ten years, as well as the release of all litigation between the parties, both actual and threatened, a resolution to the national security concerns surrounding the transaction, and the elimination of a potential anticompetitive advantage had Maersk retained its interest in PNCT. In addition, as a condition for its consent,

APM also agreed to surrender to the Port Authority 0.75 acres of land at the intersection of Tripoli and McLester Streets, which allowed the Port Authority to proceed with its plans to widen these roadways in order to improve container throughput capacity throughout the Port.

The Port Authority applied a similar approach to seeking value in subsequent change of control transactions by considering, among other things, the identities of the lessees and buyers, circumstances under which the transaction was undertaken, risk to the Port and region, and investment made by the Port Authority at that terminal.

For example, in negotiations with NYCT for its consent to a proposed change of ownership, the Port Authority considered the facts that the proposed transaction was not a forced sale but rather a sale of a lease; that NYCT proposed to transfer ownership from a major shipping company to an investment entity with no experience in running a container terminal and no ability to guarantee throughput; and the fact that the Port Authority had made a much larger direct investment in the NYCT marine terminal as compared to the PNCT marine terminal. In light of these transaction-specific factors, the Port Authority initially proposed a consent fee equivalent to roughly one-third of its direct investment in the NYCT marine terminal, plus a significant capital commitment calculated using the acreage of the terminal and number of years remaining on the terminal lease. The Port Authority's initial proposal was then subject to intense negotiations. In the end, the value that the Port Authority obtained in exchange for its consent included a consent fee of $16 million to be used for future capital projects, a capital commitment from NYCT that it would invest $30 million in the terminal during the remaining term of the lease, and NYCT's reimbursement of $5 million in ramp and roadwork improvements made by the Port Authority to facilitate access to the terminal.

As another example, for the Maher change of control in 2007, the Port Authority similarly considered that the proposed transaction was not a forced sale but rather a voluntary business transaction, from an experienced marine terminal operator to an investment vehicle that had no significant experience in marine terminal operations and no ability to guarantee throughput, and that the marine terminal was significantly larger than any of those that had undergone changes of control prior to it, and that the Port Authority had made an even larger direct investment in that terminal than it had in the prior two marine terminals that sought its consent for a change of control. The Port Authority therefore initially requested a consent deal that featured a consent fee equivalent to roughly one-third of the Port Authority's direct investments in the Maher marine terminal, a credit guarantee, and a capital commitment calculated using the acreage of the terminal and number of years remaining on the terminal lease. Following negotiations, the Port Authority received a consent fee of $22 million (or, less than one-third of the Port Authority's investments) to be used for future capital projects, a capital commitment of $114 million to be made by Maher over the remaining term of the lease, and an increased security deposit of $26 million to be paid incrementally over four years.

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subsidiary of the Mediterranean Shipping Company ("MSC"), one of the largest major shipping companies in the world (that relatedly provided a throughput guarantee); the overall risks to and opportunities for the Port and region; and investment made by the Port Authority at that terminal.

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When TIL subsequently sought the Port Authority's consent to the sale of 35% of TIL's ownership interests to Global Infrastructure Partners ("GIP"), the Port Authority underwent its then-standard value assessment of the proposed transaction. The Port Authority considered that the proposed transaction was not a forced sale but rather a voluntary transfer of ownership; that the proposed transfer would be of a non-controlling portion of TIL's ownership interest to an investment entity; the risk and overall value of the deal to the Port and region; and the Port Authority's investment at that terminal. In keeping with the language of PNCT's restructured lease and TIL's existing change of control letter agreement, the Port Authority did not seek a consent fee at the point of the initial internal restructuring that left all of TIL's controlling-holders the same, and which was done solely in anticipation of the sale to GIP. The Port Authority did require a consent fee at the point of actual transfer of ownership that occurred when GIP purchased 35% of all of TIL's ownership interests, resulting in GIP owning 35% of TIL's 50% interest in PNCT. The Port Authority calculated the $4.7 million consent fee it sought and received from GIP directly from the formula expressly stated in the change of control provision in PNCT's Amended and Restructured lease.

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responsive information it has withheld pursuant to such objections or how they might apply to the interrogatory at issue, if at all. As discussed above, the use of general objections is improper and, therefore, the Port Authority's response is improper.

The Port Authority's response to 2016 Interrogatory No. 29 is also nonresponsive because it is composed wholly of objections and includes no substantive response to the propounded question.

<u>The Port Authority's Response</u>:

Maher's properly rejected attempt to expand the temporal scope of discovery beyond March 30, 2012 cannot be relitigated. *See* pp. 11-14 *supra*. Maher also is wrong in suggesting the 2016 Interrogatories are somehow exempt from the Protective Order's temporal limitations, which were entered without qualification. *See* p. 13 *supra*. Maher's boilerplate challenge to "general objections" is a red herring, since the Port Authority set forth its specific objections, with reasons, and has no obligation to specify what, if any, responsive information has been withheld. *See* pp. 17-19 *supra*.

Further, Maher's challenge that the Port Authority gave "no substantive response" to this interrogatory was premature. Mot. at 87. As explained above, Maher filed this motion even though the Port Authority had agreed to provide a supplemental response, which it served on June 6, 2016, after completing the necessary fact investigation. *See* p. 10 *supra*. The Port Authority therein responds with the principal and material facts regarding what appropriate modifications it made to the PNCT consent fee to determine consideration for subsequent changes of control, as well as how and why it made those modifications. Ex. DD at pp. 15-20. This response fulfills the Port Authority's discovery obligations. To the extent that Maher seeks additional, minute details, it may obtain them by reviewing the Port Authority ample document production and through depositions.

CONCLUSION

For the foregoing reasons, Maher's Motion to Compel should be denied in its entirety.

Dated: June 8, 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 U.S. Mail and E-mail: 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	Dated at New York, NY this 8 day of June, 2016

Alea Mitchell