

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

JOINT STATUS REPORT

Complainant, Maher Terminals, LLC (“Maher”) and Respondent Port Authority of New York and New Jersey (“PANYNJ”) hereby submit this Joint Status Report pursuant to the Presiding Officer’s “Order Requiring Joint Status Report” dated December 23, 2015 (the “Order”). Pursuant to the Order, the Parties met and conferred on January 14, 2016. With respect to the specific matters in the Order, the Parties’ respective positions are set forth below.

The Parties agreed to exchange their respective positions for this Joint Status Report at 5:00 on January 19, 2016 by email. Immediately thereafter, and without responding to PANYNJ’s submission, or otherwise changing its own submission or PANYNJ’s position, Maher agreed to combine the Parties’ positions into a single document for submission to the Presiding Officer in this Joint Status Report.

I. Maheer's Position

Maheer's position is that PANYNJ defaulted by failing to answer within the time required, and therefore the Presiding Officer should enter default judgment in favor of Maheer on the remaining four counts of the Complaint. This will streamline the proceeding considerably.

As PANYNJ was well aware, its answer was due within ten days following the December 17, 2015 denial of its motion to dismiss as to remaining Counts I, VI, VIII, and XII. Rule 62(b). In its portion of the Joint Status Report of June 4, 2014, PANYNJ expressly acknowledged that its answer was due ten days after the decision on the motion to dismiss per Rule 62. Yet, it failed to file and serve its answer. Under Rule 62(b)(6), such failure "will be deemed to constitute a waiver of that party's right to appear and contest allegations." Therefore, PANYNJ has defaulted and an order should be entered in favor of Maheer with respect to the four counts. This is not the first time PANYNJ failed to file an answer in a proceeding before the Commission, having also failed to do so in Dkt. 07-01. In these circumstances, where PANYNJ again flagrantly ignores the Commission's rule requiring filing of an answer, default is particularly warranted because this proceeding has languished for almost four years before the Commission.

The Order directs the Parties to address specified matters and Maheer's position with respect to such matters is as follows:

- (1) Describe the status of discovery and what additional discovery is required:

The Parties exchanged interrogatories and responses thereto in 2012, which concluded with motions to compel production, subsequently dismissed by the

Commission's December 17, 2015 decision. The Parties have not exchanged documents, nor have they noticed depositions or conducted expert discovery.

In light of Respondent's default, remaining discovery pertains to remedies appropriate to redress PANYNJ's violations of the Shipping Act as set forth in Counts I, VI, VIII, and XII.

(2) Identify any expected motions:

At this juncture, it is difficult to predict expected motions. Maher previously submitted a stipulated protective order to the Presiding Officer on May 14, 2012, and PANYNJ has asked that it be entered, but no order has been issued protecting the Parties' confidential information. Issuing a protective order is essential to discovery in this proceeding.

(3) Discuss whether any stipulations or settlement are possible.

Maher's position is that the Parties should explore settlement again.

(4) Propose a schedule:

Maher's proposed schedule mirrors that previously submitted to the Presiding Officer in May 2012 and again in June 2012, but modified to account for the rules changes, PANYNJ's default, the meet and confer session and communications conducted by counsel for the Parties, and providing current dates considering counsel's schedule and previous commitments, particularly over the next several weeks:

February 16, 2016	The Parties serve initial disclosures and any additional discovery requests.
March 17, 2016	The Parties exchange documents and any supplemental interrogatory responses.
May 18, 2016-July 18, 2016	Deposition of fact witnesses.
August 18, 2016	Complainant designates affirmative expert witnesses and produces expert reports.
September 19, 2016	Respondent designates affirmative and rebuttal expert witnesses and produces expert reports.
October 19, 2016	Complainant designates rebuttal expert witnesses and produces rebuttal expert reports.
November 9, 2016-November 22, 2016	Depositions of expert witnesses.

During meet and confer communications, PANYNJ proposed a schedule similar to Maher's proposal, but longer in duration and with differences PANYNJ demanded that prejudice Maher and therefore, to which Maher could not agree.

First, PANYNJ demanded that Maher identify its experts on July 8, *three months* before PANYNJ identifies its experts. This is unfair, unbalanced, and unnecessary. PANYNJ asserted that it needs this time because it will not know the subjects or identities of Maher's experts until then. But, this ignores the fact that PANYNJ is in possession of the key evidence in this proceeding, which it has failed to produce. And considering that under PANYNJ's proposal, fact discovery will not close until July 8, Maher is entitled to have a reasonable amount of time *after* the conclusion of fact discovery to confer with its experts and take decisions about what subjects and experts it may elect to designate. Having to do so in the midst of fact discovery itself is unreasonable and prejudices Maher. Maher's proposal for 30 days to accomplish this is consistent with modern litigation practice, reasonable, and avoids needless delay. By contrast,

PANYNJ demands three months advance notice after the close of fact discovery before it designates experts.

Second, in the meet and confer communications PANYNJ proposed February 8 as the “Parties’ last day to identify previously sought discovery relating to Counts I, VI, VIII and XII that they believe to still be outstanding.” This is unnecessary and redundant since the Parties previously filed motions to compel and oppositions on the interrogatories, and because per PANYNJ’s proposed schedule no documents will have been produced by that date, and indeed will not be due for over another month.

II. The Port Authority's Positions on the Status of This Action

The competing proposals submitted herein by the Port Authority and Maher may initially appear rather similar, but on closer examination, there are several aspects of Maher's proposal that either (i) are inconsistent with Your Honor's order that the parties "identify what additional discovery, beyond that obtained in this and the other related proceedings, is required"; or (ii) are designed to give Maher an unfair advantage in these proceedings.

Although Maher participated in the meet and confer process, Maher refused the Port Authority's request to discuss the parties' prior discovery requests to determine what previously sought discovery relating to Counts I, VI, VIII, and XII (the only claims remaining after the Port Authority's motion to dismiss) the parties believe to still be outstanding. The Port Authority's schedule addresses this critical issue; Maher's does not.

During the meet and confer itself, the parties also exchanged proposed discovery schedules, and the Port Authority agreed to revise its schedule to incorporate certain elements contained only in Maher's proposal, such as an exchange of initial disclosures—notwithstanding the fact that both parties have already responded to interrogatories and supplemented their initial responses—and a period of time between when the parties complete their document productions and the commencement of depositions. At the same time, Maher's schedule was deficient insofar as it did not adequately account for the previously served discovery and unfairly required the Port Authority to serve its expert reports only thirty (30) days after learning who Maher's experts would be and what topics they would offer opinions on – and after Maher will have had approximately seven months from now (not to mention all the time that has elapsed since the beginning of this case) to select its experts and prepare their reports.

The Port Authority did its best to reconcile the two schedules, but consistent with its past practice, Maher was not willing to compromise and instead suggested the parties simply file competing positions. Accordingly, the Port Authority had no alternative but to submit its own proposed schedule immediately below. Thereafter, the Port Authority discusses the areas of difference, which are designated with asterisks [**] in the chart, and explains why the Port Authority's proposal is the more workable, more efficient, and fairer option.

The Port Authority's Proposed Schedule

Deadline	Description
February 1, 2016	**The Port Authority serves its Answer to the Complaint**
February 8, 2016	**Parties' last day to identify previously sought discovery relating to Counts I, VI, VIII, and XII that they believe to still be outstanding**
February 16, 2016	Parties exchange initial disclosures
February 19, 2016	**Parties' last day to serve interrogatories. No additional document requests may be served**
March 15, 2016	Parties begin rolling production of documents
April 15, 2016	Parties complete production of documents
May 18, 2016	Parties conduct depositions of fact witnesses
July 8, 2016	**Fact discovery closes, and Maher identifies expert witnesses and the topics on which it will offer opinion testimony**
August 8, 2016	Maher produces expert reports
October 7, 2016	**The Port Authority designates expert witnesses and produces expert reports**
November 7, 2016	Maher produces rebuttal expert reports
November 16- December 16, 2016	Parties conduct expert witness depositions

1. Filing of an Answer: The Port Authority initially responded to the Complaint by filing a motion to dismiss on April 26, 2012. Given the time that has since passed, the need to review older information (much of which had been “mothballed” to save on third-party hosting fees), and the need to confer with certain now-former Port Authority employees and prepare a response to the remaining claims, more than the standard statutory period provided under FMC Rule § 502.62(b) was required, particularly since the Answer would have otherwise been due in the middle of the winter holiday. Accordingly, the Port Authority’s schedule respectfully proposes to file an Answer by February 1, 2016.

2. Limitations on Discovery in light of the Narrowing of the Complaint and Previously Served (and Exchanged) Discovery: Both parties previously served significant discovery in the form of document requests and interrogatories. Both parties responded to each other’s interrogatories and both parties also supplemented their interrogatory responses to provide fuller responses.¹ With respect to document requests, both parties served written responses and objections to the discovery responses, but neither produced documents in this litigation in light of the Port Authority’s motion to dismiss and request to stay discovery.²

Of course, the scope of all the prior discovery requests was based on the initial complaint, which broadly included some fourteen causes of action. Now that ten of those counts have been dismissed, only a small subset of what was previously sought in discovery is relevant to the few claims that survived the motion to dismiss, specifically, Counts VI and XII, which relate solely to the Global terminal allegations, and Counts I and VIII, which relate to Maher’s change of

¹ Each side also filed a motion to compel. The FMC affirmed the Presiding Officer’s dismissal of those discovery motions as moot. *See* FMC December 17 Opinion at 71. The FMC also noted that “many of the discovery requests at issue are overbroad on their face.” *Id.*

² The Port Authority has already produced documents in the Dkt. No. 08-03 litigation that are relevant to Maher’s change of control allegations in this action.

control allegations. Accordingly, the Port Authority's schedule would require that, at the outset of discovery, the parties identify previously sought discovery requests relating to Counts I, VI, VIII, and XII that they believe to still be outstanding.³ With that information, the parties can immediately proceed to the document review/production process (and can avoid spending any additional time searching for, reviewing or producing discovery that was only sought in connection with claims that have since been dismissed). Moreover, both parties will know which requests the other plans to produce documents responsive to without unnecessary arguments and, if they believe that production to be too narrow, can meet and confer and then, if necessary, seek relief from Your Honor without any further delay.⁴

Further, any additional discovery should be limited not only by the reduction of this case from fourteen claims to four but also in light of the significant discovery exchanges already completed by the parties. Both parties previously served extensive document requests and, although no documents have been produced in this litigation, the parties have already expended significant resources preparing written objections and responses to the other party's requests. The Port Authority submits that there is no reason for any additional document requests to be propounded (or for the parties then to have to respond and object to them, with the potential for yet more discovery disputes). Rather, as set forth in the Port Authority's proposal, the parties

³ The Port Authority is still analyzing Maher's prior discovery responses, and reserves the right to supplement the following list of discovery requests prior to February 8, 2016, but states that Maher should at least produce documents responsive to Requests 8-14, which are germane to the Global terminal claims (Counts VI and XII) and Requests 22-25, which are germane to the change of control claims (Counts I and VIII), of the Port Authority's First Request for Documents dated May 7, 2012.

⁴ For example, the Port Authority proposes that, subject to the objections and limitations already set forth in its Objections and Responses to Complainant's First Request for Production of Documents dated May 7, 2012, the Port Authority should produce documents responsive to Requests 6-9, which are germane to the Global terminal claims (Counts VI and XII), and Requests 10-14, which are germane to the change of control claims (Counts I and VIII), of Maher's First Request for Production of Documents dated March 30, 2012.

should simply produce documents pursuant to the prior document requests after exchanging positions on which requests are relevant to the remaining claims.

To the extent that that the parties do serve additional discovery, in the form of interrogatories, requests to admit, or deposition notices, the scope of such requests should be targeted and proportional to the narrowed scope of this case. *See* Fed. R. Civ. P. 26(b)(1) (recently amended to emphasize that the scope of discovery should be “proportional to the needs of the case,” applicable immediately to all pending federal civil cases). The Port Authority intends to serve a very limited set of interrogatories and/or requests for admission focused on ascertaining whether the surviving claims can satisfy a variety of threshold criteria or are subject to a dispositive defense, which may lead to early resolution of some or all of the rest of this case.

3. The Port Authority Needs Sufficient Time to Identify Its Expert(s) and to Allow the Expert(s) to Prepare Report(s): The Port Authority must have adequate time to identify and work with experts in response to the expert reports that will be served by Maher, which is why the Port Authority’s proposal requires that Maher merely give notice of the names and topics of its experts thirty days before actually serving its reports, and provides sixty days after receipt of Maher’s reports for the Port Authority to serve its expert reports. As of now, the Port Authority has no idea of even the topics on which Maher might submit expert reports, and accordingly cannot anticipate whom to engage at this time. Maher’s proposed schedule would allow the Port Authority only thirty (30) days after Maher’s revelation of the names and topics of its experts (simultaneous with the service of its expert reports) to both identify and retain the Port Authority’s responsive experts and prepare responsive reports. The unnecessary hardship that Maher’s unrealistic timetable would impose upon the Port Authority would be particularly unjust

given that Maher's proposed schedule affords it some seven months from now (and years since the beginning of the case) to identify its own experts and prepare their reports.

The Port Authority's proposal requires Maher to identify its expert witnesses and the topics on which they will offer opinion testimony a month before it serves its reports. This will allow the Port Authority time to begin to identify and retain potential experts in the subject matter areas to be addressed by Maher's experts in order to be ready when the Port Authority receives the actual reports. The Port Authority's proposed schedule then provides a modest, but reasonable, sixty (60) days from the service of Maher's expert reports for the Port Authority's experts to prepare and produce their own reports.

Pursuant to Your Honor's December 23 Order, the parties also addressed (a) any motions that the parties intend to file, (b) whether any stipulations are possible, and (c) discuss whether any settlement is possible. *See* December 23 Order.

a) Intent to File Additional Motions: The parties agree that they do not intend to file any additional motions at this time. The Port Authority reserves the right to file any necessary discovery motions and also may file a dispositive motion for judgment with respect to some or all of the remaining claims after taking some targeted discovery.

b) Stipulations: The parties agree that they are unable to stipulate as to any issues at this time. The parties will continue to assess whether they can limit the scope of discovery through stipulations

c) Settlement: The Port Authority does not believe that there is any basis for settlement of the surviving claims at this time, but will continue to assess this issue.

Dated: January 19, 2016

Respectfully submitted,

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