

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 08-03

MAHER TERMINALS LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

MEMORANDUM AND ORDER ON DISCOVERY MOTIONS

PART 1 – BACKGROUND

On June 3, 2008, complainant Maher Terminals, LLC (Maher) commenced this proceeding by filing a complaint with the Secretary alleging violations of the Shipping Act of 1984 (Shipping Act or Act) by respondent Port Authority of New York and New Jersey (PANYNJ) in the leasing of certain land and facilities at the Elizabeth Port Authority Marine Terminal. The parties filed several motions related to discovery. On October 9, 2008, I entered an order staying depositions until decisions were issued on the discovery motions. *Maher Terminals LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (ALJ Oct. 9, 2008) (Order Staying Depositions Pending a Decision on Pending Discovery Motions).

On April 14, 2010, I determined that rulings on the parties' discovery motions would be facilitated by a fuller understanding of the matters at issue and the effect that remedies Maher seeks may have on the scope of discovery. Therefore, I ordered the parties to file supplemental briefs on the effect the Act's statute of limitations on Maher's claim for reparations. *Maher v. PANYNJ*, FMC No. 08-03, Order at 10-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs). The parties have filed their briefs. This order addresses the discovery motions.

I. FACTS.¹

PANYNJ owns the Elizabeth Port Authority Marine Terminal. APM Terminals North America, Inc. (APM or APMT), formerly known as Maersk Container Service Company, Inc. (Maersk), occupies certain land and facilities at the Elizabeth Port Authority Marine Terminal for use as a marine terminal pursuant to Lease EP-248 with PANYNJ dated January 6, 2000, filed with the Commission as FMC Agreement No. 201106 on August 2, 2000. Complainant Maher occupies certain land and facilities at the Elizabeth Port Authority Marine Terminal for use as a marine terminal pursuant to Lease EP-249 with PANYNJ dated October 1, 2000, filed with the Commission as FMC Agreement No. 201131 on March 8, 2002.²

Maher alleges that PANYNJ violated sections 41106(2), 41106(3) and 41102(c) of the Shipping Act. These provision state: “A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106. “A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c).

Maher’s Complaint states:

- A. Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ’s violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.
- B. PANYNJ’s agreement with APMT, EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

¹ There is a more extensive discussion of the facts in *Maher v. PANYNJ*, FMC No. 08-03, Order at 10-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs).

² I take official notice of the leases pursuant to 46 C.F.R. § 502.226. They are available at http://www2.fmc.gov/agreements/mtos_npage.aspx (accessed March 8, 2010).

- C. In EP-248, PANYNJ provided and continues to provide APMT a base annual rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher.
- D. By contrast, in EP-249, PANYNJ required and continues to require Maher to pay a base annual rental rate of \$39,750 per acre and additionally required Maher to pay a basic rent escalator of two percent per annum such that by the end of the 30 year term of the lease Maher's basic rent rises to \$70,590 per acre, or an unreasonable difference of \$51,590 per acre more than the PANYNJ charges APMT.
- E. Over the approximately 30 year term of the agreements, this undue prejudice disadvantaging Maher and undue preference advantaging APMT totals million [*sic*] of dollars.
- F. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the investment requirements in the PANYNJ property that is the subject of the leases. PANYNJ required and continues to require Maher to invest greater sums than it required APMT to invest and PANYNJ provided and continues to provide APMT more favorable financing terms than it provided Maher, requiring Maher to repay the investment at a higher rate than PANYNJ provided APMT.
- G. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the container throughput requirements and consequences thereof that are the subject of the leases. PANYNJ required and continues to require Maher to provide greater throughput guarantees and risk greater consequences than it required and continues to require of APMT.
- H. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the first point of rest requirement imposed on Maher, but not required of APMT.
- I. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the security deposit requirement by requiring Maher to provide a \$1.5 million deposit not required of APMT.
- J. Despite Maher's request to the PANYNJ to be treated equally with APMT, the PANYNJ refused to deal with Maher and continues to refuse to deal with Maher and has required the foregoing undue and unreasonable preferences favoring APMT and prejudices disadvantaging Maher.

- K. With respect to EP-248, during the year 2008 the PANYNJ negotiated with APMT to address APMT's claim that the PANYNJ violated the Shipping Act by failing to provide certain premises in a timely fashion, but at the same time the PANYNJ refused to negotiate with Maher concerning its claim that the PANYNJ violated the Shipping Act with respect to EP-249 by failing to provide certain premises to Maher in a timely fashion.
- L. There is no valid transportation purpose for the foregoing undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging APMT or for the PANYNJ's refusal to deal with Maher.
- M. If there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose.

(Complaint at 3-5.) Maher alleges it has "sustained and continues to sustain injuries and damages . . . amounting to a sum of millions of dollars." *Id.* at 5. As remedies, Maher seeks a cease and desist order and reparations for its actual injury plus interest, costs, and attorneys fees, and any other damages determined. *Id.* at 6. PANYNJ admitted some allegations, denied some allegations, neither admitted nor denied some allegations, and raised several affirmative defenses. (Answer at 1-7.)

II. DISCOVERY MOTIONS.

The parties have filed the following motions relating to discovery:

Mahe Terminals, LLC's Motion to Compel Production from The Port Authority of New York and New Jersey;

The Port Authority of New York and New Jersey Motion to Compel Discovery from Complainant and Maher's Motion for a Protective Order embedded in its opposition to PANYNJ's motion;

[Maher's] Motion to Quash Subpenas Issued by The Port Authority of New York and New Jersey;

[Maher's] Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ;

Mahe Terminals, LLC's Motion to Compel Production of Evidence on Certain Backup Tapes from The Port Authority of New York and New Jersey.

I will apply the Commission's Rules of Practice and Procedure controlling discovery and, where appropriate, the Federal Rules of Civil Procedure.

A. Scope of Discovery.

The Commission promulgated its discovery rules in 1984 based on the discovery rules set forth in the Federal Rules of Civil Procedure at that time. The discovery rules in the Federal Rules have been significantly revised since 1984. Major amendments occurred in 1993 resulting from the determination that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." Fed. R. Civ. P. 26 advisory committee notes, 1993 amendments. For instance, the 1993 amendments added a requirement that the parties make initial disclosures of persons likely to have discoverable information, a copy or the location of documents the party may use to support claims or defenses, computation of damages, and insurance agreements that could be used to satisfy a judgment. Fed. R. Civ. P. 26(a)(1). "Amendments to Rules 30, 31, and 33 place[d] presumptive limits on the number of depositions and interrogatories, subject to leave of court to pursue additional discovery." Fed. R. Civ. P. 26 advisory committee notes, 1993 amendments. Amended Rule 30(d) provided rules for making objections in depositions and restricted instructions to a deposition witness not to answer questions. Fed. R. Civ. P. 30(d). Later amendments set forth procedures for handling electronically stored information. Fed. R. Civ. P. 26(b)(2)(B), 33(d), and 34.

Commission Rule 12 provides: "In proceedings under this part, *for situations which are not covered by a specific Commission rule*, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12 (emphasis added). I have applied a number of civil discovery rules and local discovery rules promulgated after the Commission promulgated its rules where I have found that the new or amended civil rule addresses a situation that is not covered by a specific Commission rule. *See, e.g., Maher v. PANYNJ*, FMC No. 08-03 (ALJ Aug. 1, 2008) (requiring parties to quote each interrogatory or request in full immediately preceding the answer, response, or objection; requiring parties to provide an electronic copy in a word processing format of discovery with the hard copy of all discovery served; requiring good faith conference prior to filing motion to compel; imposing Rule 26 amendments for disclosure of information regarding expert testimony and creation of a privilege log; ordering compliance with Rule 34 procedure for responding to a request for electronically stored information; imposing Rule 30 requirements on conduct of depositions). I have not ordered parties to follow other new or amended rules where the situation is covered by a specific rule. For instance, the limitations on the number of interrogatories and depositions were promulgated with and go hand-in-hand with the initial disclosure requirements. Without an initial disclosures requirement, the limitation on interrogatories may result in an insufficient opportunity for a party to obtain the information to which it is entitled. Therefore, I have not limited the number of interrogatories as provided by Civil Rule 33.

As promulgated in 1984, Commission Rule 201 provides:

Scope of examination. Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

46 C.F.R. § 502.201(h). Rule 201 was based on Civil Rule 26 as it existed in 1984.

In 2000, the Supreme Court prescribed amendments to Civil Rule 26 to restrict a party's right to enquire into any matter "which is relevant to the subject matter involved in the proceeding." Instead, a party must seek leave of court to enquire into these areas. As it now reads, Civil Rule 26 provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. *For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.* Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Fed. R. Civ. P. 26(b)(1) (emphasis added).

Although the Supreme Court has altered the scope of discovery pursuant to Civil Rule 26, the Commission has not altered the scope of discovery set forth in Rule 201. Commission Rule 201(h) is a specific rule that addresses the scope of discovery in Commission cases. Therefore, the scope of discovery as provided in Commission Rule 201(h) is applied in this proceeding: "Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party."

Rule 26 before the 2000 amendments was accorded broad and liberal treatment by the courts because "wide access to relevant facts serves the integrity and fairness of the judicial process by promoting the search for truth." *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995), quoting *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993). "The key phrase in this definition – 'relevant to the subject matter involved in the pending action' – has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), citing

Hickman v. Taylor, 329 U.S. 495, 501 (1947); *Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991). Accordingly, “discovery should be allowed unless the information sought has no conceivable bearing on the case.” *Jackson v. Montgomery Ward & Co., Inc.*, 173 F.R.D. 524, 528 (D. Nev. 1997). “If the interrogatory has a reasonable possibility of leading to admissible evidence then it complies with the purposes of the Federal Rules of Civil Procedure and is proper.” *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296 (E.D. Pa. 1980). However, the scope of discovery is not boundless and requests must be relevant and cannot be unreasonably cumulative, duplicative, or unnecessarily burdensome. *Jackson*, 173 F.R.D. at 526.

In order to fulfill discovery’s purposes of providing both parties with “information essential to the proper litigation of all relevant facts, to eliminate surprise, and to promote settlement,” the discovery rules mandate a liberality in the scope of discoverable material. *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 507, 509 (S.D. Iowa 1992) (citing *In re Hawaii Corp.*, 88 F.R.D. 518, 524 (D. Haw. 1980)); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) (“Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978); *SDI Operating Partnership, L.P. v. Neuwirth*, 973 F.2d 652 (8th Cir. 1992); *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230, 236 (2d Cir. 1985); *Miller v. Pancucci*, 141 F.R.D. 292, 298 (C.D. Cal. 1992) (stating that the federal policy of discovery is a liberal one). Thus, as long as the parties request information or documents relevant to the claims at issue in the case, and such requests are tendered in good faith and are not unduly burdensome, discovery shall proceed. *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 103 F.R.D. 635, 637 (D. Mass.1984).

The party resisting production bears the burden of establishing lack of relevancy or undue burden. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997) (“The objecting party has the burden to substantiate its objections.”) (citing *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1984), cert. dismissed, 469 U.S. 1199, 105 S. Ct. 983, 83 L. Ed. 2d 984 (1985)); accord *G-69 v. Degnan*, 130 F.R.D. 326, 331 (D.N.J. 1990); *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978). The party must demonstrate to the court “that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure” *Burke v. New York City Police Department*, 115 F.R.D. 220, 224 (S.D.N.Y. 1987). Further, the “mere statement by a party that the interrogatory [or request for production] was ‘overly broad, burdensome, oppressive and irrelevant’ is not adequate to voice a successful objection.” *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) (quoting *Roesberg v. Johns-Manville Corp.*, 85

F.R.D. at 296-97; *see also Oleson*, 175 F.R.D. 560, 565 (“The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request.”) (citation omitted). “On the contrary, the party resisting discovery ‘must show specifically how . . . each interrogatory [or request for production] is not relevant or how each question is overly broad, burdensome or oppressive.’ “ *Id.* at 992 (*quoting Roesberg*, 85 F.R.D. at 296-97); *see also Oleson*, 175 F.R.D. 560, 565 (“The objecting party must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (holding that it is not sufficient to merely state a generalized objection, but, rather, objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it); *Degnan*, 130 F.R.D. at 331 (D.N.J. 1990) (same).

St. Paul Reinsurance Co., Ltd. v. Commercial Financial Corp., 198 F.R.D. 508, 511-512 (N.D. Iowa 2000).

Interrogatories should not require the answering party to provide a narrative account of its case. They should not duplicate initial disclosures. The court will generally find them overly broad and unduly burdensome on their face to the extent they ask for “every fact” which supports identified allegations or defenses. Interrogatories may, however, properly ask for the “principal or material” facts which support an allegation or defense. Interrogatories “which seek underlying facts or the identities of knowledgeable persons and supporting exhibits for material allegations” may possibly survive objections that they are overly broad or unduly burdensome. Interrogatories which do not encompass every allegation, or a significant number of allegations, of the Complaint, reasonably places upon the answering party “the duty to answer them by setting forth the material or principal facts.”

Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404-405 (D. Kan. 1998) (citations omitted); *Odyssey Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, 29 S.R.R. 1392, 1394 (ALJ 2002).

A party may answer an interrogatory by specifying records from which the answers may be obtained and by making the records available for inspection. [46 C.F.R. § 502.205(d).] But the records must be specified “in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.”

Rainbow Pioneer # 44-18-04A v. Hawaii-Nevada Inv. Corp., 711 F.2d 902, 906 (9th Cir. 1983).

B. General Objections to Discovery.

Maher and PANYNJ each preface their responses to the interrogatories and requests for production with a series of “general objections.” (*See, e.g.*, Maher Terminals, LLC’s Responses to the Port Authority of New York and New Jersey’s First Set of Interrogatories to Maher Terminals, LLC at 1-4; The Port Authority of New York and New Jersey’s Objections and Responses to Complainant’s First Request for Production of Documents 1-3). The party objecting to discovery bears the burden of showing why discovery should not be permitted.

Objections to [discovery] must be specific and by supported by a detailed explanation why the [discovery is] improper. General objections may result in waiver of the objections. Plaintiffs’ catch-all objection named every conceivable ground including objections that the interrogatories are duplicative, not relevant to the subject matter of the litigation, oppressive, and overly vague. Plaintiffs’ response was so broad as to be meaningless.

In re Folding Carton Antitrust Litigation, 83 F.R.D. 260, 264 (N.D. Ill. 1979).

The parties set forth specific objections to the discovery sought by the motions. I will consider these specific objections, not the general objections, when ruling on the motions.

PART 2 – MAHER’S MOTION TO COMPEL PRODUCTION FROM PANYNJ

Maher moves to compel “complete and proper responses” by PANYNJ to several interrogatories and requests for production. Maher first voices its objection to what it characterizes as PANYNJ’s dumping of hundreds of thousands of non-responsive documents on Maher. Second, Maher seeks to compel fuller responses to a number of interrogatories and requests and addresses the specific items for which it seeks additional responses.

I. NON-RESPONSIVE DOCUMENTS.

Maher contends that for its August 29, 2008, discovery response,

PANYNJ delivered to Maher five hard drives containing 1.7 million pages of documents allocated under 138 separate custodians. The document production is replete with nonresponsive, irrelevant material including, for example, many thousands of personal e-mails regarding weddings, lunch dates, weekend plans, religious events, jokes, spam reports, and outlook contacts and appointments as shown in the attached samples and statistics.

(Maher Terminals, LLC’s Motion to Compel Production from the Port Authority of New York and New Jersey (Maher Motion to Compel) at 4 (footnotes omitted) (filed September 25, 2008).) In its

opposition filed October 10, 2008, PANYNJ states that “[o]n October 3, . . . the Port Authority produced to Maher an ‘overlay’ file containing the information necessary for Maher to filter out non-responsive documents from the Port Authority’s production, effectively eliminating roughly 300,000 documents from the purview of this litigation.” Memorandum in Opposition to Maher Terminals, LLC’s Motion to Compel Production from the Port Authority of New York and New Jersey (PANYNJ Opp. to Maher Motion to Compel) at 21.)

To ensure a complete record, on or before August 6, 2010, PANYNJ shall serve and file a Certificate of Counsel stating that it has identified for Maher all non-responsive documents produced with its August 29, 2008, production of documents and/or any subsequent production.

II. SPECIFIC MAHER INTERROGATORIES AND REQUESTS AT ISSUE.

A. Motion to Require Identification of Documents by Bates Numbers.

In each of its arguments regarding the interrogatories, Maher contends that “[a]lthough PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.” (*See, e.g.*, First Interrogatories No. 6, Maher’s Argument, *infra.*) PANYNJ’s actual response was “Bates numbers will be supplied when feasible.” (*See, e.g.*, First Interrogatories No. 6, PANYNJ’s Answer, *infra.*)

In an earlier litigation in which these parties were involved, I stated:

With regard to several interrogatories, PANYNJ argues that “Maher must provide a response that specifies the Bates stamp number of each such document without limitation.” While a party responding to an interrogatory has the option of giving its answer by producing business records, *see* Fed. R. Civ. P. 33(d) (“the responding party *may* answer by: (1) specifying the records that must be reviewed”) (emphasis added), PANYNJ sets forth no authority holding that the interrogating party can *require* the responding party to answer as set forth in Rule 33(d). Accordingly, PANYNJ’s motion to compel Maher to respond to PANYNJ interrogatories by specifying “the Bates stamp number of each such document without limitation” is denied, although Maher may at its option choose to respond as permitted by Rule 33(d).

APM Terminals, Inc. v. Port Authority of New York and New Jersey, FMC No. 07-01, Memorandum at 30 (ALJ June 4, 2008) (Memorandum and Order on Motions to Compel Responses to Discovery). Just as PANYNJ did not set forth any authority requiring a party to respond by identifying records by Bates number in Docket No. 07-01, Maher does not set forth any authority requiring a party to respond by identifying records by Bates number in this proceeding. I do not interpret PANYNJ’s statement that it would provide Bates numbers “when feasible” to be an enforceable promise to provide Bates numbers. Therefore, if PANYNJ supplements its responses to the interrogatories by identifying records, it may, but is not required to, identify the records by Bates number.

B. Specific Objections.

Maher seeks an order compelling additional responses to Interrogatories No. 6 and 7 of Maher's first set of interrogatories, Interrogatories No. 21 and 22 of Maher's second set of interrogatories, Requests for Production No. 1, 3, 4, 6, 7, 8, 9, 10, 12, 13, 13, and 17 from Maher's first set of requests for production of documents, and Requests for Production No. 34, 35, 36, and 37 from Maher's second set of requests for production of documents. PANYNJ is the party resisting production and "bears the burden of establishing lack of relevancy or undue burden," *Oleson v. Kmart Corp.*, 175 F.R.D. at 565, and "that the requested [information does] not come within the broad scope of relevance . . . or else [is] of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure" *Burke v. New York City Police Department*, 115 F.R.D. at 224.

First Interrogatories No. 6: Describe in detail, the investments that PANYNJ required APMT to make in PANYNJ port facilities per EP-248, including the dollar value thereof.

PANYNJ's Answer: Subject to and without waiving, but rather expressly preserving its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive information may be found in lease EP-248 and in the documents produced in connection with this litigation under custodians Cheryl Yetka and Rudy Israel, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose knowledgeable witnesses as to this topic, including Cheryl Yetka and Rudy Israel.

Maher's Argument: First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.

PANYNJ provides no identifying data to assist Maher other than the custodians, but as set forth above, PANYNJ's production contains 1.7 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state under which custodians the responsive documents can be found. By stating that the responsive documents are found under "Cheryl Yetka, Rudy Israel, among other Port Authority custodians," PANYNJ is doing little more than directing Maher to go root through its entire document production of 1.7 million pages. The Presiding Officer

has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ. P. 33(d)—and that was when PANYNJ's production was much, much smaller. Finally, even if PANYNJ had limited its response to Ms. Yetka and Mr. Israel, that would require Maher to sift through no less than 8,000 documents (approximately 24,000 pages), much of it nonresponsive chaff—and that is not even counting the files PANYNJ has categorized under the potentially applicable central department files, including, e.g., 9,404 Port Commerce Department documents (approximately 28,000 pages), and 12,567 Engineering documents (approximately 38,000 pages).

PANYNJ's response it [sic] inadequate. Therefore, PANYNJ should be required to fulfill to its original commitment to provide Bates numbers of documents responsive to the interrogatory.

*Port Authority's Response: The Port Authority complied with the requirements of Fed. R. Civ. P. 33(d) by identifying the principal witnesses whose documents would provide information responsive to this interrogatory. Moreover, Maher's complaint that the Port Authority has identified the principal witnesses with responsive documents but has not provided Bates numbers for each responsive document is remarkable in its hypocrisy, and Maher should be estopped from pursuing this burdensome demand. That is because Maher has steadfastly refused to identify even the custodians with responsive documents when it invoked Fed. R. Civ. P. 33(d) and referenced unspecified documents in responding to the Port Authority's interrogatories. Thus, when the shoe was on the other foot, Maher not only took the position in the parties' September 12 meet-and-confer that FMC precedent did not require the production of Bates numbers and that consequently Maher would not provide them (see 07-01 Motion to Compel Mem. at 30 (holding that Bates numbers were not required to be listed in interrogatory responses)), but also refused, contrary to FMC precedent, see *id.* at 18-19, even to identify the principal custodians (as the Port Authority has done) or otherwise indicate where responsive documents may be found. Maher's refusal is even more egregious in light of the negligible burden it would incur to do so as compared to that which it seeks to foist upon the Port Authority given that Maher's production suspiciously consisted of only two boxes. See Loiseau Declaration at ¶ 27. Instead, Maher's responses merely (and repeatedly) referred the Port Authority to "business records produced as kept in the ordinary course of business" or "the documents produced by the parties in Dkt. No. 07-01" as supposedly sufficient under the same standard Maher applies in critiquing the Port Authority's responses. See Maher's First Interrogatory Responses, Response to Interrogatory No. 9; Maher's Second Interrogatory Responses, Response to Interrogatory Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, & 16. Under these circumstances, Maher's motion with respect to this issue should be summarily denied.*

In any event, Maher's complaint that it would have to sift through 1.7 million pages of documents to find the documents belonging to the listed custodians because the Port Authority's production contained non-responsive documents is groundless for at least three reasons. First, the Port Authority has since identified non-responsive documents in its production, enabling Maher to quickly filter out the non-responsive documents. Second, the metadata provided by the Port Authority for each and every produced document included a readily searchable "Custodian" field. Third, the large number of responsive documents is directly correlated with the breadth, depth, and sheer number of document requests that Maher has served in this matter (see supra at p. 8-9).

For all these reasons, Maher's hypocritical attempt to foist this enormous burden on the Port Authority should be summarily rejected, especially because it will obtain any additional information it needs in the numerous Rule 30(b)(6) depositions that it has noticed with respect to the same issues covered by its interrogatories.

RULING: Maher argues that:

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found . . . in the documents produced in connection with this litigation under custodians Cheryl Yetka and Rudy Israel, *among other Port Authority custodians*" and contends that it has identified "the *principal* witnesses whose documents would provide information responsive to this interrogatory." When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified 'in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.'" *Rainbow Pioneer # 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 6 is insufficient.

PANYNJ is ordered to supplement its answer to Maher First Interrogatory No. 6 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 6 may be derived or ascertained.

First Interrogatories No. 7: Describe in detail the investments that the PANYNJ required Maher to make in PANYNJ port facilities per EP-249, including the dollar value thereof.

PANYNJ's Answer: Subject to and without waiving, but rather expressly preserving its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive information may be found in lease EP-249 and in the documents produced in connection with this proceeding under custodians Cheryl Yetka and Rudy Israel, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose knowledgeable witnesses as to this topic, including Cheryl Yetka and Rudy Israel.

Maher's Argument: First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it renegeed on that promise during the September 12, 2008 telephone conference between the Parties.

PANYNJ provides no identifying data to assist Maher other than the custodians, but as set forth above, PANYNJ's production contains 1.7 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state which custodians the responsive documents will be found under. By stating that the responsive documents are found under "Cheryl Yetka, Rudy Israel, among other Port Authority custodians," PANYNJ is doing nothing more than directing Maher to go dig through its entire document production of 1.7 million pages. The Presiding Officer has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ. P. 33(d). Finally, even if PANYNJ had limited its response to Ms. Yetka and Mr. Israel, that would require Maher to sift through no less than 8,000 documents (approximately 24,000 pages), much of it nonresponsive—and that is not even counting the files PANYNJ has categorized under the central department files, including, e.g., 9,404 Port Commerce Department documents (approximately 28,000 pages), and 12,567 Engineering documents (approximately 38,000 pages). PANYNJ should be required to fulfill to its original commitment to provide Bates numbers.

Port Authority's Response: In order to avoid burdening the Presiding Officer with too much redundant argumentation, the Port Authority respectfully refers to its response to First Interrogatory No. 6 at pp. 42-44, supra. Furthermore, with respect to this particular interrogatory, the reference that the Port Authority included to EP-249 was plainly sufficient under Fed. R. Civ. P. 33(d) since the lease itself specifically sets forth the work that Maher agreed to perform.

RULING: Maher argues that:

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or

ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found . . . in the documents produced in connection with this litigation under custodians Cheryl Yetka and Rudy Israel, *among other Port Authority custodians*" and contends that it has identified "the *principal* witnesses whose documents would provide information responsive to this interrogatory." When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified 'in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.'" *Rainbow Pioneer # 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 7 is insufficient.

PANYNJ is ordered to supplement its answer to Maher First Interrogatory No. 7 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 7 may be derived or ascertained.

Second Interrogatories No. 21: Identify agreements, communications, and other documents pertaining to payments received by PANYNJ, or other requirements imposed by PANYNJ or benefits received by PANYNJ, including investments in PANYNJ facilities, on lessees or terminal operators in connection with the sale or change of control of such lessees or terminal operators, property, or leases or other agreements, including but not limited to such payments or requirements imposed in connection with APMT, the Port Newark Container Terminal, and the Howland Hook Marine Terminal, and New York Container Terminal, Inc.

PANYNJ's Answer: The Port Authority objects to Interrogatory No. 21 as overbroad, unduly burdensome, and vague. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive

information may be found in the documents produced in connection with this litigation under custodians Paul Blanco, Richard Larrabee, Dennis Lombardi, and Robert Evans, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose knowledgeable witnesses as to this topic, including Richard Larrabee, Dennis Lombardi, and Robert Evans.

*Maher's Argument: First, PANYNJ's objection of "overbroad, unduly burdensome, and vague" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the objection to the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Despite Mahe*r's effort to resolve these objections, PANYNJ has provided no explanation or justification for the objections that would facilitate resolution.

Second, the response fails to provide the principal and material facts responsive to the request as required by the Presiding Officer's June 4th Order.

*Third, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Mahe*r to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it reneged on that promise during the September 12, 2008 telephone conference between the Parties.

*PANYNJ provides no identifying data to assist Mahe*r other than the custodians, but as set forth above, PANYNJ's production contains 1.7 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state under which custodians the responsive documents will be found. By stating that the responsive documents are found under "Paul Blanco, Richard Larrabee, Dennis Lombardi, and Robert Evans, among other Port Authority custodians," PANYNJ is doing nothing more than directing Maher to go see its entire document production of 1.7 million pages. The Presiding Officer has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ. P. 33(d). Finally, and as also discussed above, the universe of documents to which PANYNJ directs Maher is vast and unorganized. Maher has no way of knowing where to search within the document production to have conducted a complete search. By contrast, PANYNJ has access to PANYNJ witnesses and staff to ascertain where to search and to help locate responsive documents they know about. Therefore, the burden of finding the responsive information really is not the same as between the

Parties. It plainly is less burdensome for PANYNJ than Maher. Therefore, PANYNJ should be required to honor its original commitment to provide Bates numbers.

Port Authority's Response: In order to avoid burdening the Presiding Officer with too much redundant argumentation, the Port Authority respectfully refers to its response to First Interrogatory No. 6 at pp. 42-44, supra. Furthermore, with respect to this particular interrogatory, the Port Authority's objection that the interrogatory was overbroad, unduly burdensome, and vague was clearly correct. Indeed, this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources. Maher's lack of good faith is perhaps best illustrated by the fact that almost none of its own interrogatory responses would comply with the requirements that Maher seeks to apply unilaterally to the Port Authority's responses. For example, Maher does not include any "affidavit or other sworn statement" accompanying its burden objections, which are pervasive in its responses and objections. Moreover, to the extent that such affidavits are nonetheless sometimes used to buttress burden claims, they should have no bearing on the Port Authority's objection on vagueness grounds, which is apparent on the face of the interrogatory.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ contends that

with respect to this particular interrogatory, the Port Authority's objection that the interrogatory was overbroad, unduly burdensome, and vague was clearly correct. Indeed, this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources.

PANYNJ does not explain *how* its objection is clearly correct or how this particular interrogatory exemplifies Maher's use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources. Therefore, PANYNJ's objection that the interrogatory is overbroad, unduly burdensome, and vague is overruled.

Maher argues that:

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found . . . in the documents produced in connection with this litigation under custodians Paul Blanco, Richard Larrabee, Dennis Lombardi, and Robert Evans, *among other Port Authority custodians.*" When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified 'in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.'" *Rainbow Pioneer # 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 21 is insufficient.

PANYNJ is ordered to supplement its answer to Maher Second Interrogatory No. 21 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from which the answer to Interrogatory No. 21 may be derived or ascertained.

Second Interrogatories No. 22: Identify all documents and communications pertaining to parity of treatment or lack thereof regarding PANYNJ's treatment of Maher and APMT, including but not limited to Maher's requests for treatment by PANYNJ equal to that provided by PANYNJ to APMT, and PANYNJ's responses thereto.

PANYNJ's Answer: The Port Authority objects to Interrogatory No. 22 on the grounds that it is unduly burdensome to require that the Port Authority identify "all documents and communications," as to these subjects by way of interrogatory response. The Port Authority also objects to this interrogatory on the grounds that it is vague and ambiguous. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds, pursuant to Fed. R. Civ. P. 33(d), that responsive information may be found in the documents produced in connection with this litigation under custodians Dennis Lombardi, Edmond Harrison, Cheryl Yetka, and Rudy Israel, among other Port Authority custodians. Bates numbers will be supplied when feasible. In addition, the Complainant will have an opportunity to depose individuals who may be knowledgeable as to this topic.

Maher's Argument: First, PANYNJ's objections to the request as "unduly burdensome" and "vague and ambiguous" require a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Second, the response fails to provide the principal and material facts responsive to the request as required by the Presiding Officer's June 4th Order.

Third, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained. Although PANYNJ promises in its response to provide Bates numbers, it renegeed on that promise during the September 12, 2008 telephone conference between the Parties.

PANYNJ provides no identifying data to assist Maher other than the custodians, but as set forth above, PANYNJ's production contains 1.7 million pages of documents, including a wide variety of wholly non-responsive materials, making it extremely difficult for Maher to locate the truly responsive documents contained therein. Moreover, PANYNJ's response is inadequate because it does not even state under which custodians the responsive documents will be found. By stating that the responsive documents are found under "Dennis Lombardi, Edmond Harrison,

Cheryl Yetka, and Rudy Israel, among other Port Authority custodians,” PANYNJ is doing nothing more than directing Maher to go see its entire document production of 1.7 million pages. The Presiding Officer has already found such a response by PANYNJ to be inadequate for it to invoke the privilege of Fed. R. Civ. P. 33(d). Finally, and as also discussed above, the universe of documents to which PANYNJ directs Maher is vast and unorganized. Maher has no way of knowing where to search within the document production to have conducted a complete search. By contrast, PANYNJ has access to PANYNJ witnesses and staff to ascertain where to search and to help locate responsive documents they know about. Therefore, the burden of finding the responsive information really is not the same as between the Parties. It plainly is less burdensome for PANYNJ than Maher. Therefore, PANYNJ should be required to honor to its original commitment to provide Bates numbers.

Port Authority’s Response: In order to avoid burdening the Presiding Officer with too much redundant argumentation, the Port Authority respectfully refers to its response to Second Interrogatory No. 21 at pp. 46-47, supra.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ contends that “it is unduly burdensome to require that the Port Authority identify ‘all documents and communications,’ as to these subjects by way of interrogatory response. The Port Authority also objects to this interrogatory on the grounds that it is vague and ambiguous.” PANYNJ does not explain *how* its objection is clearly correct or how this particular interrogatory exemplifies Maher’s use of interrogatories as a tool of harassment rather than as a means to obtain relevant information not otherwise obtainable through other sources.

Maher argues that the response “fails to provide the principal and material facts responsive to the request” and “fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.”

First, the response fails to provide the principal and material facts responsive to the request. Second, PANYNJ resorts to Fed. R. Civ. P. 33(d), but fails to identify the records from which the answer can be derived in sufficient detail to permit Maher to locate and identify, as readily as PANYNJ, the records from which the answer may be obtained.

Commission Rule 205 provides:

Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

46 C.F.R. § 502.205(d). Rule 205 does not require the responding party to provide the principal and material facts responsive to the request *and* identify the records from which the answer can be derived in sufficient detail to permit the interrogating party to locate and identify, as readily as the responding party, the records from which the answer may be obtained.

PANYNJ's response specifies the records from which the answer may be derived or ascertained by stating "responsive information may be found . . . in the documents produced in connection with this litigation under custodians Dennis Lombardi, Edmond Harrison, Cheryl Yetka, and Rudy Israel, *among other Port Authority custodians.*" When responding to an interrogatory by identifying the records from which the answer may be derived or ascertained, "the records must be specified 'in sufficient detail to permit the interrogating party to locate and identify, as readily as the party served, the records from which the answer may be obtained.'" *Rainbow Pioneer # 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d at 906. PANYNJ's response does not tell Maher what other custodians of records may have records with information responsive to this interrogatory. Furthermore, identifying the custodian or custodians with records does not necessarily "specify the records from which the answer may be derived or ascertained." Therefore, PANYNJ's response to Maher First Interrogatory No. 22 is insufficient.

PANYNJ is ordered to supplement its answer to Maher Second Interrogatory No. 22 by setting forth the material or principal facts on which it relies for its response, or, in the alternative, by identifying all custodians with records responsive to this interrogatory and specifying in sufficient detail the particular records of each custodian from with the answer to Interrogatory No. 22 may be derived or ascertained.

First Requests No. 1: All documents reflecting the communications, deliberations, negotiations, and actions of the Commissioners, the board of directors, the officers, employees, agents and representatives of the PANYNJ pertaining to the acts which are the subject of the Complaint.

PANYNJ's Answer: *The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents "pertaining to the acts which are the subject of the Complaint." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

Maheer's Argument: *PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Additionally, the Presiding Officer has already ruled that requests for documents concerning the allegations of a complaint are proper and not overbroad and unduly burdensome.*

Port Authority's Response: *It is standard practice in discovery responses of this nature to assert that one is producing documents notwithstanding the stated objections, so as not to waive them for the future. In fact, Maheer employed this same structure throughout its objections to the Port Authority's document requests. See, e.g., Maheer Terminals, LLC's Responses to the Port Authority of New York and New Jersey's First Request for Production of Documents to Maheer Terminals, LLC ("Maheer's First RFP Responses"). In any event, although the Port Authority's objections were reasonable and appropriate in light of Maheer's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maheer's complaint is groundless, as well as moot.*

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maheer whether it produced any documents

pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 1 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 1 by stating whether it produced any documents pursuant to this request.

First Requests No. 3: All documents pertaining to the preparation, proposal, consideration, negotiation, and drafting of EP-248, including but not limited to the meaning of any provision of term of EP-248.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control.

Maher's Argument: APMT's undue preferences, as enshrined in lease EP-248, are directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Moreover, The Presiding Officer has already held that an almost identical request for "All documents pertaining to the negotiation and drafting of EP-249, including but not limited to the meaning of any provision or term of EP-249" was not overbroad.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot. The Port Authority also notes that this document request is substantially duplicative of the testimony Maher seeks via two separate August 4, 2008 30(b)(6) notices, which request "the most knowledgeable person concerning the . . . negotiation of agreement[] EP-248 (August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 22) and "the most knowledgeable person concerning the provisions of lease agreement[] EP-248." August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 23.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request “on the grounds that it is overbroad and unduly burdensome.” PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it “*will* produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maher’s First Requests No. 3 is insufficient.

PANYNJ is ordered to supplement its answer to Maher’s First Requests No. 3 by stating whether it produced any documents pursuant to this request.

First Requests No. 4: All documents pertaining to the preparation, proposal, consideration, negotiation and drafting of EP-249, including but not limited to the meaning of any provision or term of EP-249.

PANYNJ’s Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody, or control.

Maher’s Argument: Maher’s lease EP-249, which contains terms less favorable than those afforded APMT in EP-248, is directly at issue in this matter. PANYNJ’s objection of “overbroad and unduly burdensome” requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Moreover, The Presiding Officer has already held that an almost identical request for “All documents pertaining to the negotiation and drafting of EP-249, including but not limited to the meaning of any provision or term of EP-249A” was not overbroad.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot. The Port Authority also notes that this document request is substantially duplicative of the testimony Maher seeks via its August 4, 2008 30(b)(6) notice, which requests "the most knowledgeable person concerning the . . . negotiation of agreement[] . . . EP-249 (August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 22) and "the most knowledgeable person concerning the provisions of lease agreement[] . . . EP-249." August 4, 2008 Maher Terminals, LLC Notice of Deposition of the Port Authority of New York and New Jersey, attached to the Loiseau Declaration as Ex. 23.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 4 is insufficient. PANYNJ "notes that this document request is substantially duplicative of the testimony Maher seeks via its August 4, 2008 30(b)(6) notice," but does not cite any authority holding that a discovering party must choose between a request for production of documents and a Rule 30(b)(6) deposition when it is seeking discoverable information.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 4 by stating whether it produced any documents pursuant to this request.

First Requests No. 6: All documents in any way pertaining to meetings or communications between the PANYNJ and APMT pertaining to lease proposals.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument: The Maher and APMT lease proposals are directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 6 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 6 by stating whether it produced any documents pursuant to this request.

First Requests No. 7: All documents in any way pertaining to meetings or communications concerning the reasons why PANYNJ provided APMT the terms of EP-248.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument: PANYNJ's award of the unduly preferential terms contained in lease EP-248 are [sic] directly at issue in this matter. PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome." PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 7 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 7 by stating whether it produced any documents pursuant to this request.

First Requests No. 8: All correspondence, notes, records, memoranda, or other documents in any way pertaining to meetings or communications concerning EP-249 and allegations of the Complaint.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents "concerning . . . allegations of the Complaint." Subject to and without waiving the foregoing conclusions, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument: PANYNJ's objection of "overbroad and unduly burdensome" and "vague and ambiguous" requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. These blanket and general objections, unsupported or clarified by a memorandum of law, are not valid. There is nothing vague or ambiguous about the request for evidence concerning the complaint allegations and this is a proper request, as evidenced by the Presiding Officer's June 4th Order ruling that PANYNJ must produce all documents "pertaining to the allegations of Third Party Complainant that Maher breached EP-249" in Docket 07-01.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly

burdensome” and that it is “vague and ambiguous.” PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it “*will* produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maher’s First Requests No. 8 is insufficient.

PANYNJ is ordered to supplement its answer to Maher’s First Requests No. 8 by stating whether it produced any documents pursuant to this request.

First Requests No. 9: All correspondence, notes, records, memoranda, or other documents in any way pertaining to meetings or communications concerning the reasons why PANYNJ did not provide Maher the terms provided to APMT in EP-248.

PANYNJ’s Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody, or control.

Maher’s Argument: PANYNJ’s refusal to provide the advantageous APMT terms to Maher is directly at issue in this matter. PANYNJ’s objection of “overbroad and unduly burdensome” requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. There is nothing vague or overbroad about the request and PANYNJ must produce the responsive documents.

Port Authority’s Response: Although the Port Authority’s objections were reasonable and appropriate in light of Maher’s request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher’s complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide

sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request “on the grounds that it is overbroad and unduly burdensome.” PANYNJ does not meet its burden of showing specifically how the request is overbroad and unduly burdensome.

In its Answer, PANYNJ states that it “will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maher’s First Requests No. 9 is insufficient.

PANYNJ is ordered to supplement its answer to Maher’s First Requests No. 9 by stating whether it produced any documents pursuant to this request.

First Requests No. 10: All PANYNJ rules, regulations, and practices pertaining to leases and the allegations of the Complaint.

PANYNJ’s Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents “pertaining to . . . allegations of the Complaint.” The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody, or control.

Mahe’s Argument: The Presiding Officer’s June 4th Order ruling that PANYNJ be required to produce all documents “pertaining to the allegations of Third Party Complainant that Mahe breached EP-249” in Docket 07-01 establishes that requests such as this, which request documents “pertaining to . . . allegations of the Complaint” are proper and not overbroad or confusing. Moreover, PANYNJ’s objection of “overbroad and unduly burdensome” or “vague and ambiguous” requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and

requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 10 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 10 by stating whether it produced any documents pursuant to this request.

First Requests No. 12: All documents pertaining to the settlement communications between PANYNJ and APMT during 2007 and 2008 regarding APMT's claims as set forth in Federal Maritime Commission ("FMC") Docket No. 07-01.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. 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. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maier's Argument: PANYNJ's errs in its objection that the interrogatory relates to information that is irrelevant to this proceeding. PANYNJ's utter refusal to deal with Maier meaningfully to settle its claims, while all the while engaging APMT and awarding a whole new series of undue preferences and advantages, bears directly upon the allegations in this proceeding which explicitly invoked PANYNJ's refusal to deal and undue preference in this regard.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maier's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maier's complaint is groundless, as well as moot.

RULING: PANYNJ has not met its burden of showing that this request is not relevant. *Roesberg*, 85 F.R.D. at 296-97.

In its Answer, PANYNJ states that it “will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maier whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maier’s First Requests No. 12 is insufficient.

PANYNJ is ordered to supplement its answer to Maier’s First Requests No. 12 by stating whether it produced any documents pursuant to this request.

PANYNJ 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.” Maier challenged PANYNJ’s assertion of this privilege. In its Response, PANYNJ stated that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ is ordered to supplement its Answer to Maier’s First Requests No. 12 by stating whether it withheld any responsive documents pursuant to this Request. If so, PANYNJ is ordered to identify these documents in a privilege log. *Maier v. PANYNJ*, FMC No. 08-03, Order at 5 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order).

First Requests No. 13: All documents that PANYNJ contends support the existence of a valid transportation purpose justifying the difference in terms provided to APMT under EP-248 as compared to the terms PANYNJ provided to Maier under EP-249.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port

Authority further objects to this request on the grounds that it is vague and ambiguous, including in the use of the term “valid transportation purpose.” The Port Authority further objects to this request to the extent that it calls for a legal conclusion. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody, or control.

Mahe’s Argument: First, PANYNJ’s objection of “overbroad and unduly burdensome” requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. PANYNJ’s objection to the term “valid transportation purpose” as “vague and ambiguous” in this Shipping Act proceeding borders upon the frivolous. Indeed, PANYNJ’s letter to the Presiding Officer dated July 23, 2008, in describing discovery requests on this point as “a roadmap to the Port Authority’s defense,” certainly evinced an understanding of the term “valid transportation purpose.”

Second, PANYNJ fails to explain how the production of responsive documents could constitute a legal conclusion. To the extent that the production of responsive documents requires the application of the law to the facts of the case, this is permissible and appropriate. Rule 205 provides:

[A request] otherwise proper is not necessarily objectionable merely because an answer to the [request] involves an opinion or contention that relates to fact or the application of law to fact

The application of law to fact is also specifically authorized by Rule 33(a)(2): “An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to . . . the application of law to fact” In the same vein, the advisory committee’s note to the 1970 amendment to Rule 33 explains: “[R]equests for opinions or contentions that call for the application of law to fact . . . can be most useful in sharpening the issues, which is a major purpose of discovery.” To further that “major purpose,” pursuant to Rule 33 parties are “required to disclose, to some extent, mental impressions, opinions, or conclusions” in response to contention interrogatories. “[T]he only kind of interrogatory that is objectionable without more as a legal conclusion is one that extends to ‘legal issues unrelated to the facts of the case.’”

Port Authority’s Response: Although the Port Authority’s objections were reasonable and appropriate in light of Mahe’s request, as stated in the response itself, no documents were withheld in response to this request based on the

challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's First Requests No. 13 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's First Requests No. 13 by stating whether it produced any documents pursuant to this request.

First Requests No. 14: All documents that PANYNJ contends support PANYNJ's contention that its actions do not exceed what is necessary to achieve a valid transportation purpose justifying the difference in terms provided to APMT under EP-248 as compared to the terms PANYNJ provided to Maher under EP-249.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous, including in the term "valid transportation purpose." The Port Authority further objects to this request to the extent that it calls for a legal conclusion. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument: First, PANYNJ's reasons for discriminating against Maher are directly at issue in this proceeding, and PANYNJ's objection of "overbroad and unduly burdensome" requires a specific explanation, such as an affidavit or other

sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Such blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Moreover, PANYNJ objects to this request as vague and ambiguous with regard to the term "valid transportation purpose", yet in its July 23, 2008 letter to the Presiding Officer, indicated that PANYNJ's objection to the term "valid transportation purpose" as "vague and ambiguous" in this Shipping Act proceeding is frivolous.

Second, PANYNJ fails to explain how the production of responsive documents could constitute a legal conclusion. To the extent that the production of responsive documents requires the application of the law to the facts of the case, this is permissible and appropriate. Rule 205 provides:

[A request] otherwise proper is not necessarily objectionable merely because an answer to the [request] involves an opinion or contention that relates to fact or the application of law to fact

The application of law to fact is also specifically authorized by Rule 33(a)(2): "An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to . . . the application of law to fact" In the same vein, the advisory committee's note to the 1970 amendment to Rule 33 explains: "[R]equests for opinions or contentions that call for the application of law to fact . . . can be most useful in sharpening the issues, which is a major purpose of discovery." To further that "major purpose," pursuant to Rule 33 parties are "required to disclose, to some extent, mental impressions, opinions, or conclusions" in response to contention interrogatories. "[T]he only kind of interrogatory that is objectionable without more as a legal conclusion is one that extends to 'legal issues unrelated to the facts of the case.'"

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request “on the grounds that it is overbroad and unduly burdensome” and that it is “vague and ambiguous.” PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it “will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maher’s First Requests No. 14 is insufficient.

PANYNJ is ordered to supplement its answer to Maher’s First Requests No. 14 by stating whether it produced any documents pursuant to this request.

First Requests No. 17: All communications, including all documents, between PANYNJ and APMT pertaining to the subject matter of the Complaint not covered by the foregoing requests.

PANYNJ’s Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in requesting all documents “pertaining to the subject matter of the Complaint not covered by the foregoing requests.” Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody, or control.

Maher’s Argument: PANYNJ’s objection of “overbroad and unduly burdensome” requires a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. Additionally, requests for documents pertaining to the allegations in the complaint are proper, and cannot be blocked with objections of overbreadth and confusion.

Port Authority’s Response: Although the Port Authority’s objections were reasonable and appropriate in light of Maher’s request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher’s complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request “on the grounds that it is overbroad and unduly burdensome” and that it is “vague and ambiguous.” PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it “will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maher’s First Requests No. 17 is insufficient.

PANYNJ is ordered to supplement its answer to Maher’s First Requests No. 17 by stating whether it produced any documents pursuant to this request.

Second Requests No. 34: All documents pertaining to payments to PANYNJ, investment commitments obtained by PANYNJ, or other conditions imposed by PANYNJ on lessees or terminal operators in connection with the sale or change of control of lessees or terminal operators, property, or other agreements, including but not limited to such requirements imposed in connection with APMT, the Port Newark Container Terminal and the Howland Hook Marine Terminal/New York Container Terminal, Inc.

PANYNJ’s Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous, including in the use of the term “terminal operators.” The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody, or control.

Maher’s Argument: PANYNJ’s discrimination against Maher with respect to the change of ownership interest/control provision of EP-249 are [sic] the subject of this

proceeding. PANYNJ's objections of "overbroad and unduly burdensome" and "vague and ambiguous" require a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly burdensome" and that it is "vague and ambiguous." PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

In its Answer, PANYNJ states that it "will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody or control." In its Response, it states that "no documents were withheld in response to this request based on the challenged objections." PANYNJ's answer and response do not tell Maher whether it produced any documents pursuant to this request. Therefore, PANYNJ's response to Maher's Second Requests No. 34 is insufficient.

PANYNJ is ordered to supplement its answer to Maher's Second Requests No. 34 by stating whether it produced any documents pursuant to this request.

Second Requests No. 35: All documents pertaining to attempts by Maher or PANYNJ to settle or resolve claims which are the subject of this proceeding.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. 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. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maier's Argument: The request goes to PANYNJ's response to the allegations of the instant Complaint and communications regarding potential settlement of such claims, and PANYNJ's refusal to deal with Maier regarding its claims, in contrast to the unduly preferential concessions it granted APMT in exchange for its claims in Docket 07-01, and is therefore wholly relevant to the matters at issue and the allegations of the Complaint.

As to PANYNJ's assertion of the attorney client privilege and work product doctrine, it has failed to identify how or why that privilege applies, or to provide any privilege log. The vague assertion of privilege, without further detail or justification, cannot stand.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maier's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maier's complaint is groundless, as well as moot.

RULING: PANYNJ has not met its burden of showing that this request is not relevant. *Roesberg*, 85 F.R.D. at 296-97.

In its Answer, PANYNJ states that it “will produce non-privileged documents responsive to this request, if any, that are in the Port Authority’s possession, custody or control.” In its Response, it states that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ’s answer and response do not tell Maier whether it produced any documents pursuant to this request. Therefore, PANYNJ’s response to Maier’s Second Requests No. 35 is insufficient.

PANYNJ is ordered to supplement its answer to Maier’s Second Requests No. 35 by stating whether it produced any documents pursuant to this request.

PANYNJ 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.” Maier challenged PANYNJ’s assertion of this privilege. In its Response, PANYNJ stated that “no documents were withheld in response to this request based on the challenged objections.” PANYNJ is ordered to supplement its Answer to Maier’s Second Requests No. 35 by stating whether it withheld any responsive documents pursuant to this Request. If so, PANYNJ is ordered to identify these documents in a privilege log. *Maier v. PANYNJ*, FMC No. 08-03, Order at 5 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order).

Second Requests No. 36: All documents pertaining to PANYNJ's refusal to deal with Maher in connection with the resolution or settlement of the claims at issue in this proceeding or FMC Docket No. 07-01.

PANYNJ's Answer: The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request in that it seeks documents and information that is not relevant to any claim or defense in this action and/or likely to lead to the discovery of admissible evidence. The Port Authority further objects to the characterization in the request regarding "PANYNJ's refusal to deal with Maher." 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. Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.

Maher's Argument: First, PANYNJ's errs in its objection that the interrogatory relates to information that is irrelevant to this proceeding. Although the conduct at issue arises from PANYNJ's handling of settlement in Docket 07-01, PANYNJ's utter refusal to engage Maher meaningfully to settle its claims, while all the while engaging APMT and awarding a whole new series of undue preferences and advantages, bears directly upon the allegations in this proceeding.

Second, as to PANYNJ's assertion of the attorney client privilege and work product doctrine, it has failed to identify how or why that privilege applies, or to provide any privilege log. This vague assertion of privilege, without further detail or justification, cannot stand.

Port Authority's Response: Although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.

RULING:

Maher's Complaint alleges that PANYNJ "has and continues unreasonably to refuse to deal or negotiate with Maher." (Maher Complaint ¶ IV.A.(c).) Maher's use of the phrase "PANYNJ's refusal to deal with Maher" makes Second Requests No. 36 a loaded question that assumes a legal conclusion that PANYNJ violated the Shipping Act. Maher's motion to compel additional response to Second Requests No. 36 is denied.

Second Requests No. 37: *All documents pertaining to requests for PANYNJ's parity of treatment as between Maher and APMT, including but not limited to Maher's requests for treatment by PANYNJ equal or better to that provided by PANYNJ to APMT, and PANYNJ's responses thereto.*

PANYNJ's Answer: *The Port Authority repeats and incorporates the General Objections as if fully set forth herein. The Port Authority further objects to this request on the grounds that it is overbroad and unduly burdensome. The Port Authority further objects to this request on the grounds that it is vague and ambiguous in the use of the phrase "parity of treatment." Subject to and without waiving the foregoing objections, the Port Authority will produce non-privileged documents responsive to this request, if any, that are in the Port Authority's possession, custody, or control.*

Maher's Argument: *PANYNJ's failure to grant Maher's requests for the same treatment as that afforded APMT are directly at issue here. PANYNJ's objection of "overbroad and unduly burdensome" and "vague" require a specific explanation, such as an affidavit or other sworn statement from a person with knowledge of the facts as will permit the Presiding Officer and requesting party to evaluate the request. Blanket or general objections, unsupported or clarified by a memorandum of law, are not valid. PANYNJ's objection to the phrase "parity of treatment" in the context of this proceeding is frivolous. PANYNJ knows full well that Maher requested "parity" with APM and that PANYNJ ultimately refused to provide APM the same terms. Indeed, in its answers to Maher's interrogatories PANYNJ has conceded that it provided Maher disparate treatment in every respect.*

Port Authority's Response: *The Port Authority made no such concession regarding disparate treatment in its interrogatory responses, nor does Maher cite any particular response to support its vacuous assertion to the contrary. In any event, although the Port Authority's objections were reasonable and appropriate in light of Maher's request, as stated in the response itself, no documents were withheld in response to this request based on the challenged objections. Accordingly, Maher's complaint is groundless, as well as moot.*

RULING: As the party resisting discovery, [PANYNJ has] the burden to show facts justifying its objection by demonstrating that the time or expense involved in responding to requested discovery is unduly burdensome. This imposes an obligation to provide sufficient detail and explanation about the nature of the burden in terms of time, money and procedure required to produce the requested documents.

Horizon Holdings, L.L.C. v. Genmar Holdings, Inc., 209 F.R.D. 208, 213 (D. Kan. 2002). PANYNJ objects to production in response to this request "on the grounds that it is overbroad and unduly

burdensome” and that it is “vague and ambiguous.” PANYNJ does not meet its burden of showing specifically how the request is overbroad, unduly burdensome, vague, and ambiguous.

Maher’s Complaint alleges that PANYNJ “(a) gave and continues to give an undue and unreasonable prejudice or disadvantage with respect to Maher [and] (b) gave and continues to give an undue and unreasonable preference or advantage with respect to APMT.” (Maher Complaint ¶ IV.A.) Maher’s use of the phrase “parity of treatment” makes Second Requests No. 37 a loaded question that assumes a legal conclusion that PANYNJ violated the Shipping Act. That said, Maher is entitled to documents “pertaining to requests for changes or amendments to Lease EP-249 and PANYNJ’s responses thereto.” PANYNJ is ordered to supplement its answer to Maher’s Second Requests No. 37 by stating whether it produced any documents “pertaining to requests for changes or amendments to Lease EP-249 and PANYNJ’s responses thereto.”

On or before August 6, 2010, PANYNJ shall serve the supplemental responses as set forth above and shall file with the Secretary a Certificate of Compliance stating that it has served the supplemental responses.

PART 3 – PANYNJ’S MOTION TO COMPEL PRODUCTION FROM MAHER; MAHER’S MOTION FOR A PROTECTIVE ORDER

PANYNJ moves to compel additional responses by Maher to Interrogatory No. 7 of PANYNJ’s first set of interrogatories, Interrogatories No. 2, 14, 15, 16, and 17 of PANYNJ’s second set of interrogatories, Requests for Production No. 18 and 22 from PANYNJ’s first set of requests for production of documents, and Requests for Production No. 16, 19, 20, and 22 from PANYNJ’s second set of requests for production of documents. Maher is the party resisting production and “bears the burden of establishing lack of relevancy or undue burden,” *Oleson v. Kmart Corp.*, 175 F.R.D. at 565, and “that the requested [information does] not come within the broad scope of relevance . . . or else [is] of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure” *Burke v. New York City Police Department*, 115 F.R.D. at 224.

Maher Terminals, LLC, is a limited liability company. (Complaint ¶ I.A.) In 2007, the entity or entities that owned Maher in 2000 when it entered into Lease EP-249 with PANYNJ sold Maher to RREEF Infrastructure, part of Deutsche Asset Management’s RREEF Alternative Investments (RREEF). Each of PANYNJ’s interrogatories and requests at issue seeks:

- documents and information concerning Maher’s financial performance and profitability, operational efficiency, and benefits obtained from PANYNJ throughout the period covered by the lease, together with the identity of third party consultants who may have performed analyses of such matters; [or]

- documents and information concerning Maher's presentation to potential buyers in 2007, including RREEF, in which it is highly probable that representations and analyses concerning Maher's terminal and long term lease, as well as its competitive position vis-à-vis other marine terminals in the Port, were conveyed.

(The Port Authority of New York and New Jersey's Motion to Compel Discovery from Complainant (PANYNJ Motion to Compel) at 18.) Maher seeks to protect this information from discovery.

In *Ceres Marine Terminal*, the Commission articulated the elements of proving a violation of the sections of the Act that PANYNJ violated in its dealings with Maher.

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres Marine Terminal v. Md. Port Admin., No. 94-01, 27 S.R.R. 1251, 1270-71 (F.M.C. Oct. 10, 1997)[, *aff'd in part, rev'd in part sub nom. Maryland Port Admin. v. Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table)].

Maher contends that:

This proceeding represents a straightforward application of *Ceres*: Maher makes out its *prima facie* case by showing the disparate lease terms caused by PANYNJ's refusal to give it the APM/Maersk lease terms, and then the burden shifts to PANYNJ to demonstrate valid contemporaneously considered and expressed transportation factors justifying the discrimination. *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, No. 94-01, 27 S.R.R. 1251, 1270-72 (F.M.C. Oct. 10, 1997). Thus, PANYNJ must prove valid transportation factors justifying the discrimination, and that is the only proper object of its discovery – not a rank fishing expedition into how the discrimination affected Maher's profitability.

(*Id.* at 19.) Maher argues that “under applicable Shipping Act precedent only PANYNJ's contemporaneous ‘expressed reason’ [for differences between Lease EP-248 and Lease EP-249] is relevant and ‘the proper measure of damages is the difference between the rate charged and collected and the rate which would have been charged but for the unlawful preference or prejudice.’” (Maher Opp. to PANYNJ Mot. to Compel at 17, *quoting Ceres.*)

Maher argues that PANYNJ asserts “the untenable proposition that the Commission should consider events occurring after the discriminatory decision in evaluating whether discrimination is justified by valid transportations [*sic*] factors.” (*Id.* at 20.) By seeking this information, Maher contends that:

PANYNJ . . . seeks improperly to expand dramatically the scope of discovery in this matter to include confidential and sensitive financial information that cannot have any bearing on the decisions in this case.

First, whether PANYNJ’s refusal to provide Maher the same terms it provided to APM is lawful turns on PANYNJ meeting its burden of proof that it *expressed* legitimate transportation factors justifying the discrimination *at the time*. PANYNJ’s belated proffer of *post-hoc* rationalizations of alleged transportation factors that did not exist prior to conclusion of the Maher lease in October 2000 is not a legal basis to obtain discovery into wholly unrelated events occurring after PANYNJ imposed disparate terms on Maher. Moreover, to the extent that PANYNJ did express or even rely upon such justifications at the time of the discrimination, any such documents would be found in PANYNJ’s files, not Maher’s. Rather than look to its own documents, as it should, PANYNJ seeks license to launch not only a rank fishing expedition, but also seeks to burden unduly this proceeding under a mountain of documents, to oppress Maher and the witnesses with burdensome questioning of no relevance, and to provoke further discovery disputes that increase the cost and burden on Maher to prosecute its claims.

Second, PANYNJ misconstrues the damages alleged in the Complaint. Maher’s Complaint alleges damages for the difference between terms of its lease that are prejudicial to Maher as compared to the preferential terms in APM’s lease. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. *Id.* at 1271 n.48. Nevertheless, PANYNJ asserts that “In addition to seeking damages for the period from 2000 to date, Maher claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT.” But Maher makes no such “additional” damage claim. Misconstruing “competitive harm” as a separate and additional element of damages akin to lost profits or lost business, PANYNJ improperly seeks to explore years of Maher’s financial and operational information totally that is irrelevant [*sic*] to the measure of the damages provided by the Commission authority.

(Maher Terminals, LLC’s Reply in Opposition to Respondent’s Motion to Compel Production from Complainant and Motion for Protective Order at 1-3 (emphasis in original). *See also, id.* at 14-15 (similar discussion).)

The Act has a three-year statute of limitations for claims for reparations. “A person may file with the . . . Commission a sworn complaint alleging a violation of this part If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. § 41301(a). *See also* 46 U.S.C. § 41305(b) (“If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.”).

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

Inlet Fish Producers, Inc. v. Sea-Land Service, Inc., 29 S.R.R. 306, 314 (FMC 2001) (quoting *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991)).

Maher filed its Complaint June 2, 2008, nearly eight years after Maher and PANYNJ signed Lease EP-249. Therefore, in the April 14 Order, I asked the parties to address the effect of the statute of limitations on the information sought in discovery. I also asked them to address the question of whether the prospective nature of a cease and desist order would require consideration of current “transportation factors.” *Maher v. PANYNJ*, FMC No. 08-03, Order at 7-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs).

Question 1 of the April 14, 2010 Order asked:

1. Does Maher seek reparations for actual injury it claims resulted from acts in violation of the Shipping Act allegedly committed by PANYNJ in the period ending October 1, 2000, when Maher and PANYNJ entered into Lease EP-249? If so,
 - a. What is the legal theory that Maher contends permits an award of reparations for those acts?
 - b. What are the dates for which Maher seeks reparations?

Maher v. PANYNJ, FMC No. 08-03, Order at 10-11 (ALJ Apr. 14, 2010) (Order to File Supplemental Briefs). Maher’s short answer to this question is “Yes.” (Maher’s Brief per the Discovery Order of April 14, 2010 at 4.) Maher further responds by stating that “Maher’s reparations claims are cognizable because they (1) arise from continuing violations of the Shipping Act, (2) the ‘discovery rule’ establishes that the claims did not accrue until May 2008, and (3) others arose more recently within the statutory period.” (*Id.* at 5.)

With regard to the “discovery rule,” Maher argues:

[T]he Commission applies the ‘discovery rule,’ so that if there was no continuing violation the limitations period only begins to run when the complainant possesses “conclusive information about such a dispute.” *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001). The case illustrates that suspicion of violations and knowledge of different terms is not enough. Only when complainant had “conclusive information” that the difference constituted an undue prejudice violating the Shipping Act did the claim accrue.

(*Id.* at 6.)

Whatever doubt may have existed that the information sought by PANYNJ’s discovery fits within the broad scope of Rule 201(h), *see* Part 1, II.A, *supra*, is removed by Maher’s response to the April 14 Order. Maher claims that its “understanding of its potential claims first arose during the summer, prior to the July 3, 2007 PANYNJ consent to the sale of Maher” and that it “only uncovered ‘conclusive information’ that it had Shipping Act claims against PANYNJ following the deposition of several key witnesses in Dkt. 07-01 [in 2008].” (Maher’s Brief per the Discovery Order of April 14, 2010 at 6.) Maher also claims that “other[] [Shipping Act violations] arose more recently within the statutory period.” (*Id.* at 5.) Not only is the information sought by PANYNJ’s discovery “relevant to the subject matter involved in the proceeding,” but it relates to PANYNJ’s statute of limitations defense and Maher’s claim that other violations arose more recently. Even if the financial information itself is not admissible, the discovery sought could lead to the discovery of admissible evidence about Maher’s knowledge of Lease EP-248 and how its compared to Lease EP-249 during the period from the signing of Lease EP-249 through the date Maher filed its Complaint and the other alleged violations that “arose more recently within the statutory period.”

Accordingly, PANYNJ’s discovery is reasonably calculated to lead to the discovery of admissible evidence and Maher does not meet its burden of establishing that the requested information does not come within the broad scope of relevance.

Maher moves for an order “prohibiting PANYNJ from inquiring into the above areas of dispute during . . . depositions.” (Maher Opp. to PANYNJ Mot. Compel at 39-41.) For the reasons stated above, the motion for protective order is denied.

Interrogatory No.7 (First Set): Identify any and all bank presentations, bank books, prospectuses, financial analyses, and investor presentations, reports, and charts created by Greenhill and/or any other investment banking firm with respect to the transaction in which RREEF acquired the stock of Maher.

Maher’s Response: Maher objects to this request as overbroad, unduly burdensome, and seeking information not reasonably calculated to lead to the discovery of

admissible evidence in this matter. The acquisition of Maher shares by RREEF in the summer of 2007 is immaterial to the claims and defenses in this proceeding. The PANYNJ actions that gave rise to the Shipping Act violations occurred before RREEF's acquisition of Maher shares last summer.

PANYNJ's Argument: This request is reasonably calculated to lead to the discovery of admissible evidence for multiple reasons. While we obviously cannot know exactly what is in the documents that Maher has so desperately sought to withhold, the presentations to prospective purchasers would have undoubtedly contained statements candidly characterizing its premises and its long-term lease in positive terms, or may contain quantitative analysis demonstrating their great value, fully justifying the more than \$1 billion purchase price the business ultimately obtained, rather than as the unfair, discriminatory, uncompetitive albatross Maher now claims them to be. This type of evidence would not only tend to undermine the claims of discrimination, but could also reveal the new owner's recent claim of Shipping Act violation for the sham it is and certainly would also inform the Commission's discretion were it to consider re-writing any of the lease terms by way of a cease and desist order.

Second, it is highly likely that such materials contained analyses and representations concerning Maher's business, and the value and competitive advantages of Maher's lease and terminal. Maher likely explained, for example, that its terminal's particular location within the East Coast's busiest port is highly advantageous, that its physical configuration and access to truck and rail transportation give rise to particular efficiencies, how those physical characteristics compare with those of other terminals in the Port, etc. All such representations would be directly relevant to help prove that some or all of the differences between the APMT and Maher lease terms are attributable to differences in the premises leased.

Third, there was likely commentary in such materials as to Maher's competitive position in the Port (and who it viewed as its competitors) that may either support or contradict its position in this case that it is at a competitive disadvantage vis-à-vis APMT due to differing lease terms. For example, the presentations may say that Maher's location, access to ExpressRail, or linear berth space give it competitive advantages over its competitors in the Port. Or there may be statements to the effect that the APMT terminal is devoted largely to Maersk-related business and is not in competition with APMT (contrary to its litigation position in this case).

Fourth, the presentations may describe all of the efforts at the Port to improve its infrastructure and the turnaround in the Port's fortunes and position in the marketplace. This would be admissible against Maher to support PANYNJ's

point that its business strategy in entering the lease it did with APMT was successful, which certainly reinforces that its actions were reasonable and well-founded at the time.

In short, there are myriad ways that this interrogatory could lead to admissible evidence. Of course, until we see the documents, we cannot know what is in them. But, as noted above on page 20, the standard is whether the discovery request at issue is reasonably calculated to lead to the discovery of admissible evidence. And this particular interrogatory, which asks Maher to identify documents in a defined category in which statements bearing on any number of relevant matters might reasonably be expected to be found, and which otherwise could lead to other admissible evidence (whether documentary or testimonial), is clearly within the permissible scope of discovery under FMC Rule § 502.201(g).

Maher's Specific Opposition: This request is not reasonably calculated to lead to the discovery of admissible evidence because it seeks to discover information that can have absolutely no bearing on the outcome of this proceeding as set forth in Section I, supra, and any interest in its disclosure is outweighed by the burden upon Maher and the likelihood that a foray into the detailed financials, operations, and purchases of Maher, APM, and their competitors is likely to lead to needless burden and expense and to unnecessarily complicate this proceeding as set forth in Section II above.

For example, PANYNJ seeks sales presentation material prepared by Maher in 2007 in the hopes that Maher, in an environment in which it was attempting to paint its business in the best possible light for would-be purchasers, will undermine its claim of discrimination by showing the Maher terminal's "great value", the "value and competitive advantages of Maher's lease and terminal", and its "competitive position in the port". PANYNJ's explanation of its request establishes its irrelevancy. Maher does not dispute that its business had value and was competitive when sold in 2007, and none of that is at issue. As explained by the Commission in both Ceres and Seacon, what is at issue here is simply whether PANYNJ's refusal to grant Maher the APM terms was based upon valid transportation factors according to the circumstances at that time, "without the benefit of hindsight or a consideration of later events." Any information concerning the sale of Maher's business in 2007 is wholly irrelevant. What is relevant is PANYNJ's contemporaneously expressed reason for the refusal—that ocean carrier Maersk was a risk to leave the port and Maher was not. The evidence of this improper reason is found in the testimony of PANYNJ's own witnesses and files, and not in sales presentations Maher may have created years later in a wholly different context.

RULING: For the reasons stated above, Maher is ordered to respond to this interrogatory.

Interrogatory No. 15 (Second Set): Identify all analyses of Maher's profitability, financial information, books, and records performed by RREEF.

Maher's Response: Maher objects to this request as vague, overbroad, unduly burdensome, seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter.

PANYNJ's Argument: Like the last interrogatory just discussed, this one is similarly calculated to lead to the discovery of admissible evidence. RREEF is the entity that acquired the Maher terminal from the Maher brothers in 2007 for over \$1 billion. Along with its financial advisers, RREEF undoubtedly carefully analyzed Maher's terminal and the lease terms to which it is subject, including Maher's competitive advantages, terminal characteristics, and profitability under its lease, as well as how Maher stacked up against other competitors in the Port, including, potentially, APMT. These analyses may well show that RREEF knows that Maher's premises and its long-term lease were particularly valuable and served as the basis for this flourishing business warranting the hefty price tag it paid for the business. Again, this would tend to undermine RREEF's current claim that the lease is either unduly discriminatory or a competitive albatross. In short, the interrogatory asks Maher to identify any such analyses performed by RREEF of which it is aware, which would facilitate PANYNJ's discovery of them and therefore is calculated to lead to the discovery of admissible evidence.

Maher's Specific Opposition: Maher agrees with PANYNJ's assessment that this request is "like the last interrogatory just discussed" and it is therefore not the proper subject of discovery for the reasons discussed in Maher specific opposition thereto. However, this material is even further removed from the realm of potentially relevant material. What calculations RREEF may have made when considering its purchase of Maher in 2007 cannot form the basis for PANYNJ's actual analysis and stated reasons for its refusal to grant Maher the requested APM deal in 2000. The information did not exist at the time PANYNJ refused to provide Maher the APM terms and PANYNJ could not have considered it. It is wholly irrelevant to this proceeding.

RULING: For the reasons stated above, Maher is ordered to respond to this interrogatory.

Document Request No. 18 (First Set): All documents provided to prospective or actual purchasers of Maher (including RREEF), including bank presentations, bank books, prospectuses, financial analyses, investor presentations, reports and charts prepared by investors or investment banks, and the "Bank Book" or prospectuses prepared by Greenhill & Co., Inc.

*Mahe**r's Response*: *Mahe**r* *objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter.*

PANYNJ's Argument: *This document request is the cognate of Interrogatory No. 7 (First Set) discussed above at page 24, and is proper for the same reasons.*

*Mahe**r's Specific Opposition*: *This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 7 (First Set).*

RULING: For the reasons stated above, Mahe*r* is ordered to respond to this request.

Document Request No. 20 (Second Set): *All documents concerning any analyses conducted or performed by RREEF of the financial, accounting and operational books and records of Mahe**r*.

*Mahe**r's Response*: *Mahe**r* *objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter.*

PANYNJ's Argument: *This document request is cognate of Interrogatory No. 15 (Second Set) discussed above at page 26-27, and is proper for the same reasons.*

*Mahe**r's Specific Opposition*: *This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 15 (Second Set).*

RULING: For the reasons stated above, Mahe*r* is ordered to respond to this request.

Document Request No. 22 (First Set): *All documents concerning the financial condition of Mahe**r* *for each year since 1997 to the present, including but not limited to financial statements and reports, income tax returns, general ledgers, income or cash flow statements, balance sheets, profit and loss statements, annual reports, periodic reports, statements of change in financial condition and forecasts, including projections of revenues, costs, earnings or profits.*

*Mahe**r's Response*: *Mahe**r* *objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter.*

PANYNJ's Argument: Maher cannot have it both ways. It cannot assert that it has been operating at a competitive disadvantage relative to APMT, on one hand, and then argue that it need not provide discovery concerning its financial performance, on the other. PANYNJ is entitled to challenge the basis for Maher's claim of competitive disadvantage through discovery and analysis. Maher's own financial documents showing its actual performance are the most relevant evidence on this point, not Maher's unsupported conclusory allegations.

The same financial materials are also relevant in analyzing the efficiencies inherent in the premises leased by Maher and in demonstrating advantages it has reaped through PANYNJ's actions in improving roadways and other benefits proximate to Maher's terminal. This would go directly to whether there was any discrimination at all, given the obvious differences in the characteristics of Maher's and APMT's premises.

The records sought will also likely show a marked deterioration in performance by Maher after its sale to RREEF – a reflection of the heavy debt burden and/or operational changes imposed by new management -- that could help explain Maher's current motivation and good faith (or lack of it) in raising issues of discrimination after many years of performing under the lease without there having been any suggestion of a complaint of undue or unreasonable discrimination, and which could then be considered by the Commission in deciding whether to exercise its discretion to enter a cease and desist order in this case.

In short, there is a host of potential admissible uses for the documents sought, depending on what we find in them. Clearly, the request is reasonably calculated to lead to the discovery of admissible evidence.

Maher's Specific Opposition: This request is not reasonably calculated to lead to the discovery of admissible evidence because it seeks to discover information that can have absolutely no bearing on the outcome of this proceeding as set forth in Section I, supra, and any interest in its disclosure is outweighed by the burden upon Maher and the likelihood that a rank fishing expedition into the detailed financials, operations, and purchases of Maher and APM, will cause needless burden and expense and to unnecessarily complicate this proceeding as set forth in Section II above.

Maher's financial performance before and after PANYNJ refused to provide Maher the APM terms simply cannot, and does not, have any bearing upon the reason PANYNJ expressed at the time for refusing Maher the APM terms. There is no suggestion that PANYNJ relied upon the requested Maher financials when it decided to deny Maher the APM terms and, in fact, Maher has not disclosed this

information to PANYNJ. Of course, as emphasized above, if we embark on the rank fishing expedition PANYNJ desires it will be necessary to conduct the same discovery with respect to APM, Maersk shipping lines, the parent, and their financial institutions and advisors. If Maher's alleged profitability, value, and financial details from November 2000 to the year 2008 can be used to justify PANYNJ's discrimination, that can only be so in comparison to the same information from the APM entities.

PANYNJ improperly seeks to expand this proceeding into a needless morass of profitability, valuation, and efficiency to derail the proceeding. PANYNJ knows full well that the proper Shipping Act analysis is simple and discrete, as described above, and does not call for the kind of detailed financial and competitiveness analysis found in antitrust litigation. See, e.g. All Marine Moorings, Inc. v. ITO Corp. of Baltimore, No. 94-10, 27 S.R.R. 539, 546 (F.M.C. May 15, 1996) (adopting initial decision and quoting Judge Kline for the maxim that "[I]t is well to bear in mind that despite the use of antitrust terminology, such as 'monopoly', the Commission is not the Department of Justice nor the Federal Trade Commission but instead an agency that applies Shipping Act standards, not those of the antitrust laws."), aff'g No. 94-10, 27 S.R.R. 342, 355 (A.L.J. Oct. 6, 1995) (also stating in the same analysis that "In recent years the Commission has confirmed this principle and resisted being drawn into complex antitrust analyses which the Commission was not set up to handle by Congress."); Exclusive Tug Franchises, No. 01-06, 2002 29 S.R.R. 751, 756 (A.L.J. Jan. 3, 2002) ("the Commission is admittedly not an antitrust court or the Federal Trade Commission").

RULING: For the reasons stated above, Maher is ordered to respond to this request.

Document Request No. 19 (Second Set): All documents concerning and/or constituting Maher's financial, accounting and operational books and records for the period from 1997 through the present.

Maher's Response: Maher objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter.

PANYNJ's Argument: The same justification for Document Request No. 22 (First Set) discussed above at page 28 applies to this document request as well.

Maher's Specific Opposition: This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 22 (First Set).

RULING: For the reasons stated above, Maher is ordered to respond to this request.

Interrogatory No. 16 (Second Set): Identify all documents and communications concerning the efficiency and/or profitability of the Maher terminal at Port Elizabeth, the efficiency and/or profitability of other terminals at Port Elizabeth or Port Newark, and/or the efficiency and/or profitability of terminal business models (i.e., straddle carrier model or transcontainer model) from 1997 through the present.

Mahe's Response: Maher objects to this request as vague, overbroad, unduly burdensome, seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter. In addition to all of the foregoing, see also Maher business records produced as kept in the ordinary course of business.

PANYNJ's Argument: This interrogatory, much like the last two requests just discussed, seeks the identification of documents in a category in which it is reasonable to expect to find admissible evidence showing, potentially, that the Maher Terminal has been particularly efficient and profitable under the terms of its lease due to its physical characteristics and configuration (which configuration was made possible by the negotiation of the APMT and Maher leases) and is not at any competitive disadvantage; or that Maher's recent lack of profitability, if any, is a consequence of massive new debt and its own management decisions, as opposed to the lease terms. Again, until we see them, we cannot anticipate all the ways in which such documents can be used in the defense of the case, but it is obvious that the interrogatory is calculated to lead to the discovery of admissible evidence. And that is the applicable standard.

Mahe's Specific Opposition: This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 22 (First Set).

RULING: For the reasons stated above, Maher is ordered to respond to this interrogatory.

Document Request No. 22 (Second Set): All documents concerning the efficiency and/or profitability of the Maher terminal at Port Elizabeth, including but not limited to internal and external evaluations and analyses during the period of January 1997 through the present.

Mahe's Response: Maher objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter.

PANYNJ's Argument: This document request is the cognate of Interrogatory No. 16 (Second Set) just discussed, and is proper for the same reasons.

Maher's Specific Opposition: This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 16 (Second Set).

RULING: For the reasons stated above, Maher is ordered to respond to this request.

Interrogatory No. 17 (Second Set): Identify all consultants regarding terminal efficiency and/or profitability retained by Maher during the period from 1997 through the present.

Maher's Response: Maher objects to this request as overbroad, unduly burdensome, seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter. Maher further objects to this request as seeking information subject to the attorney work product doctrine. Subject to the foregoing specific objection and the general objections and in an effort to be responsive, Maher retained the engineering consultants listed on the spreadsheet titled "Listing of Engineering Consultants" produced to PANYNJ, but they are not "consultants regarding terminal efficiency and/or profitability."

PANYNJ's Argument: This interrogatory is related to Interrogatory No. 16 (Second Set) just discussed in that it seeks the identity of third parties who may have analyzed Maher's efficiency and profitability so that PANYNJ can seek relevant information and documents in such consultants' possession, custody and control. Accordingly, the interrogatory is reasonably calculated to lead to the discovery of admissible evidence.

Maher's Specific Opposition: Subject to Maher's objections, Maher provided the responsive information requested. Maher is not aware of any other persons who might qualify as "consultants regarding terminal efficiency and/or profitability retained by Maher during the period from 1997 to the present." Maher further submits that discovery is continuing in this matter, and to the extent that it becomes aware of any further responsive, discoverable, and non-privileged information, it will produce such information.

RULING: For the reasons stated above, Maher is ordered to respond to this interrogatory.

Interrogatory No. 14 (Second Set): Identify all actual and projected revenues and expenses concerning all operating agreements for the Express Rail facility for the period from 2000 through the present, including but not limited to any sharing of revenues and/or expenses with APMT.

Maier's Response: Maier objects to this request as vague, overbroad, unduly burdensome, exceeding principle and material facts seeking information not relevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence in this matter.

PANYNJ's Argument: Information regarding the operation, revenues and expenses related to the Express Rail facility is directly relevant to the Port Authority's defense in this case that to the extent that the provisions of the APMT and Maier leases differ to some extent, that is not a reflection of any unreasonable or undue discrimination, particularly considering the entire relationship between the parties, including the opportunities and benefits that PANYNJ made available to Maier but not to APMT. See pp 12-15., supra. The information sought by this request will likely show the extent of Maier's control over the operations and which cargo was loaded or unloaded or given priority, as well the revenues and profits Maier generated from the operation of the facility. All of this is relevant to demonstrate that when Maier exclusively operated the Express Rail from 2000 until 2004, it was afforded a significant opportunity that was not afforded to APMT, which tends to undermine the notion of unreasonable or undue discrimination. Indeed, like much of the give and take in the complex relationships between the Port Authority and Maier and APMT, this evidence bears directly on the question whether, considering all the circumstances, Maier is the victim of any discrimination at all. Accordingly, the interrogatory is reasonably calculated to lead to the discovery of admissible evidence.

Maier's Specific Opposition: This request is not reasonably calculated to lead to the discovery of admissible evidence because it seeks to discover information that can have absolutely no bearing on the outcome of this proceeding as set forth in Section I, supra, and any interest in its disclosure is outweighed by the burden upon Maier and the likelihood that a fishing expedition into the detailed operational data and financials of Maier and APM will impose undue burden and expense and unnecessarily complicate this proceeding as set forth in Section II above. Maier's operation of ExpressRail from 2000 – 2004 was not the "expressed reason" for denying Maier the APM terms.

Any revenues or expenses related to the ExpressRail during the period after October 2000 cannot as a matter of law be relevant to PANYNJ's decision to deny Maier the APM terms in October 2000. Additionally, as a matter of fact it could not have been considered because it did not then exist. Nor is there any evidence it was

even considered by PANYNJ in denying Maher the APM terms. Finally, any information regarding the PANYNJ decision resides with PANYNJ, not Maher or others. However, as explained above Maher's detailed operational and financial information is voluminous and exceptionally sensitive and therefore constitutes an offsetting burden that significantly outweighs any possible benefit that could be obtained.

RULING: For the reasons stated above, Maher is ordered to respond to this interrogatory.

PANYNJ Document Request No. 16 (Second Set): All documents concerning any operating agreement for the Express Rail facility, including but not limited to actual and projected revenues and expenses.

Maher's Response: Maher objects to this Request as overbroad, unduly burdensome, and seeking the production of documents not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter.

PANYNJ's Argument: This document request is the cognate of Interrogatory No. 14 (Second Set) just discussed and is proper for the same reasons.

Maher's Specific Opposition: This discovery request is not reasonably calculated to lead to the discovery of admissible evidence for the reasons set forth above with respect to Interrogatory No. 14 (Second Set).

RULING: For the reasons stated above, Maher is ordered to respond to this request.

On or before August 6, 2010, Maher shall serve the responses as set forth above and shall file with the Secretary a Certificate of Compliance stating that it has served the responses.

PART 4 – MAHER’S MOTION FOR DETERMINATION OF CLAIMS OF PRIVILEGE AND DETERMINATION OF WAIVER OF PRIVILEGE

I. BACKGROUND.

“The inadvertent production of a privileged document is a specter that haunts every document intensive case.” *F.D.I.C. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 479-480 (E.D. Va. 1991). In this proceeding, PANYNJ contends that it inadvertently produced fifty-seven documents that are protected by the attorney-client privilege or as work product. It contends that the documents should be returned or destroyed. After Maher received PANYNJ’s letter requesting return or destruction and the parties engaged in negotiations to resolve their dispute, Maher filed this motion for determination of PANYNJ’s claims of privilege and determination of waiver of privilege.

The Secretary served Maher’s first set of interrogatories and requests for production of documents on PANYNJ with Maher’s complaint. When the parties could not agree on a discovery schedule pursuant to Commission Rule 201, Maher proposed a schedule that would require responses to initial discovery requests to be served by August 16, 2008, and PANYNJ proposed a schedule that would require responses to discovery served prior to August 1, 2008, by September 10, 2008. *Maher v. PANYNJ*, FMC 08-03, Order at 3 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order). I entered an Order requiring responses to initial discovery requests by August 29, 2008. *Id.* at 4.

Maher states that on August 29, 2008, PANYNJ produced 460,000 electronic documents comprising approximately 1.7 million pages on several computer hard drives. (Maher Rule 26(b)(5)(B) Motion at 3.)³ In a letter dated October 8, 2008, counsel for Maher notified counsel for PANYNJ that Maher’s counsel had identified three documents that Maher’s counsel thought may have been inadvertently produced. Later on October 8, 2008, PANYNJ served a privilege log. On October 9, 2008, counsel for PANYNJ sent a letter to counsel for Maher identifying fifty-eight documents that PANYNJ claimed were privileged or protected and that it had inadvertently produced on August 29 in response to Maher’s discovery requests. The letter cited Federal Rule of Civil Procedure 26(b)(5)(B) and newly-enacted Federal Rule of Evidence 502(b), which establishes provisions to “apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.” Fed. R. Evid. 502. PANYNJ claimed that each of the fifty-eight documents is protected by attorney client privilege and/or work product, the disclosure was inadvertent, and the documents should be returned. The fifty-eight documents are listed in the privilege log in Exhibit E attached to the Declaration of Holly E. Loiseau

³ Maher also states that PANYNJ later “conceded that nearly 300,000 of the 460,000 documents it produced . . . were not responsive.” (Maher Rule 26(b)(5)(B) Motion at 3.) PANYNJ states that “out of the 170,000 responsive documents it produced, only fifty-seven . . . are at issue here.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 42.) Therefore, it appears that PANYNJ produced between 160,000 and 170,000 responsive documents on August 29.

filed with PANYNJ's opposition to Maher's Rule 26(b)(5)(B) motion. A copy of Exhibit E is included with this Memorandum and Order as Attachment A.

Maher declined to return the documents. The parties conferred, but were not able to resolve their differences. On November 12, 2008, Maher filed a confidential version of its Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ (Maher Rule 26(b)(5)(B) Motion), followed by a public version of the motion on December 22, 2008. Maher designated five documents (1994, 1998, 2019, 2020, and 2021) for which it contends PANYNJ's assertion of attorney-client privilege is unwarranted (Maher Rule 26(b)(5)(B) Motion at 7-15) and thirteen documents (1991, 1989, 1990, 1992, 1993, 2008, 2009, 2010, 2012, 2013, 2014, 2015, and 1994) for which it contends PANYNJ's assertion of work-product protection is unwarranted. (*Id.* at 15-27.) Document 1994 is on both lists. Apparently, Maher agrees that the rest of the fifty-eight documents are privileged or protected. (*See id.* at 2 (“*certain* of the documents plainly do not qualify for the asserted protections”) (emphasis added); at 9 (“counsel agreed during the October 24, 2008 meet and confer on this issue that Maher would not challenge the underlying claim of privilege for a document solely on the basis of an inadequate description if a review of the document itself demonstrated sufficiently that a privilege or protection attached. Accordingly, Maher has focused the foregoing challenge to PANYNJ's assertion of attorney-client privilege on five documents that do not appear on their fact to warrant privilege protection.”); at 16 (Maher has focused the foregoing challenge to PANYNJ's assertions of work-product protection to only 14 documents that do not appear on their face to warrant protection.”).)⁴

Whether or not the seventeen documents identified above are privileged or protected, Maher contends that PANYNJ waived any privilege and protection on all fifty-eight documents by producing them in response to Maher's discovery (*id.* at 27-45), and that this waiver extends to other documents concerning the subject matters contained in the documents. (*Id.* at 45-47.) Maher contends that newly-enacted Rule 502 should not be applied, but that resolution should be controlled by the law as it existed prior to the effective date of Rule 502. Maher claims that one document (Document 1994) should lose any protection it had because it was used to prepare witnesses for their depositions. (*Id.* at 9-12.)

On November 25, 2008, PANYNJ filed a confidential version of its memorandum in opposition to Maher's motion, followed by a public version on December 17, 2008. PANYNJ withdrew its designation as to Document 2021 for which it had claimed attorney-client privilege in the privilege log. (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 1 n.1.) PANYNJ contends that either the attorney client privilege, work-product protection, or both applies to each of the other fifty-seven documents. (Memorandum in Opposition to Complainant's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion) at 23-27; 29-39.) PANYNJ

⁴ Maher states “14 documents” but only challenges thirteen documents. (Maher Rule 26(b)(5)(B) Motion at 16-27.)

attached affidavits of several persons with knowledge of the documents. PANYNJ contends that it produced the documents inadvertently, it has not waived the privilege or protection to the documents, and the Maher should be ordered to return or destroy the documents. (*Id.* at 39-49.) Even if it waived the privilege to some or all of the documents, PANYNJ contends that the waiver should not extend to undisclosed communications. (*Id.* at 49-51.) PANYNJ contends that resolution of the motion is controlled by Rule 502. It contends that despite Maher's arguments to the contrary, Document 1994 retains its protection.

II. CONTROLLING AUTHORITY.

As a preliminary matter, I must determine what controlling authority should apply in this controversy. On September 19, 2008, Federal Rule of Evidence 502 was added to the Rules to "apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Fed. R. Evid. 502. "The amendments made by this Act [enacting Rule 502] shall apply in all proceedings commenced after [September 19, 2008] and, insofar as is just and practicable, in all proceedings pending on [September 19, 2008]." Pub. L. No. 110-322, § 1(c), 122 Stat. 3537, 3538 (2008).

The Secretary received Maher's Complaint on June 3, 2008, and served the Complaint and Maher's initial discovery on June 11, 2008. (Letter dated June 11, 2008 from Karen V. Gregory to PANYNJ.) Therefore, Maher commenced this proceeding before September 19, 2008, and it was pending on that date. When the parties could not agree on a discovery schedule, I entered a discovery order requiring the parties to serve responses to initial discovery requests by August 29, 2008. *Maher v. PANYNJ*, FMC No. 08-03, Order at 4 (ALJ Aug. 1, 2008) (August 1, 2008, Discovery Order). As noted above, on August 29, 2008, PANYNJ produced 406,000 electronic documents comprising approximately 1.7 million pages on several computer hard drives, including all but two of the fifty-seven documents that are the subject of Maher's motion regarding privilege and waiver. PANYNJ discovered its error on September 25, 2008, and demanded return of the documents on October 9, 2008.

In its motion, Maher summarizes the pre-Rule 502 standard governing waiver of attorney-client privilege and work product protection through inadvertent production. Maher argues that:

Whether an inadvertent disclosure of privileged communications or work product constitutes waiver has been addressed by courts across the country in three different ways: (1) the "strict accountability" approach; (2) the "never waived" approach and (3) the "middle test" approach.

The never waived approach finds that a disclosure that is merely negligent can never effect a waiver. The strict accountability approach finds that disclosure automatically constitutes a waiver regardless of the intent or inadvertence of the privilege holder. The middle test approach, often cited as the "Hydraflow Test", decides waiver by balancing five factors: (i) the reasonableness of precautions taken

to prevent disclosure; (ii) the number of documents inadvertently disclosed; (iii) the extent of the inadvertent disclosure; (iv) the promptness of rectification measures; and (v) whether “the overriding interest of justice would be served by relieving” the disclosing party of error.

The two Federal Circuits where appeals in the proceeding could be taken – the DC Circuit and the Third Circuit – take different approaches. The DC Circuit adopted the strict accountability rule . . . while the *Hydraflow* test and variations of the middle test have become the majority rule in district courts in the Third Circuit and other federal courts. The middle test is described as fairly addressing waiver in modern litigation, but treats carelessness with privileged material as an indication of waiver. . . . It does not appear that the FMC has addressed the question of the waiver standard in published opinions.

(Maher Rule 26(b)(5)(B) Motion at 27-28 (citations and footnotes omitted).)

Maher contends that Rule 502 should not apply in this proceeding.

PANYNJ has asserted the Fed. R. Evid. 502(b) applies in this instance, but has not articulated why it would be “just and practicable” to apply 502(b) here. And as the facts demonstrate, it is not just to apply Rule 502(b) to PANYNJ’s disclosures here.

First, the document review and production undertaken by PANYNJ that is at issue in this motion took place entirely before Fed. R. Evid. 502 was enacted. The production in which the allegedly inadvertently disclosed documents were produced was delivered to Maher on August 29, 2008, before the new rule was enacted. The only reason that the new rule is at issue is because PANYNJ did not take any action to identify the allegedly inadvertently produced documents until five weeks after the documents were produced and just 18 days after the new Rule 502 was enacted. PANYNJ should not obtain the benefit of a more lenient rule governing waiver of inadvertently disclosed information after the parties should have reviewed for privilege under the then existing rules and after the disclosures had taken place. Had Congress intended Fed. R. Evid. 502 to have retroactive effect over all documents already produced in pending litigations, it could have so provided. It did not.

Second, PANYNJ was on notice during its review of the documents at issue that preexisting privilege waiver rules would apply to its August 29, 2008 document production. The parties engaged in negotiations of a protective order early in this proceeding. PANYNJ initially proposed a provision addressing inadvertent privilege waiver that would have effectively precluded waiver for inadvertently produced documents. Maher objected because of the scope of the provision and because in its view waiver was adequately addressed by existing law. Thereafter, PANYNJ removed the provision from its drafts. Moreover, when the parties were ultimately

unable to reach an agreement on a stipulated protective order, PANYNJ did not include a claw back provision in its version of the proposed protective order submitted to the Presiding Officer. Indeed, PANYNJ counsel stated that it “took measures to avoid disclosure of privileged documents” knowing that existing law applied, not a more lenient agreement regarding waiver. Thus, PANYNJ was affirmatively on notice of the applicability of existing law to its privilege review and production and according to its own representation acted accordingly, PANYNJ should be estopped from claiming otherwise now. It is simply unjust for Maher to have undertaken a rigorous privilege review in light of the applicability of the existing waiver standard, but for PANYNJ to obtain the benefit of the more lenient standard to excuse its carelessness.

Given that the strict accountability approach of the District of Columbia Circuit does not require any factor analysis and simply considers the privileged waived, Maher will analyze waiver by inadvertent disclosure pursuant to the five factor “middle test” approach.

(*Id.* at 29-31 (footnotes omitted).)

PANYNJ contends that Rule 502 should apply to this proceeding. (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 18-23.) It argues that this proceeding is a “pending case” within the meaning of Rule 502; therefore, the inquiry “turns on whether it is ‘just and practicable’ to apply FRE 502 in the instant case.” (*Id.* at 19-23.)

Maher contends that Rule 502 should not apply because PANYNJ produced the documents before the new rule was enacted and PANYNJ did not take any action to identify the documents until after the documents were produced and 18 days after the new Rule 502 was enacted. (Maher Rule 26(b)(5)(B) Motion at 27-28 (citations and footnotes omitted).)

The reason that the new Rule 502 is “at issue” is not because “PANYNJ did not take any action to identify the allegedly inadvertently produced documents until five weeks after the documents were produced and just 18 days after the new Rule 502 was enacted,” but because the statute enacting the rule says “[t]he amendments made by this Act shall apply in all proceedings commenced after [September 19, 2008] and, insofar as is just and practicable, in all proceedings pending on [September 19, 2008].” Pub. L. No. 110-322, § 1(c), 122 Stat. 3537, 3538 (2008) (emphasis added). In cases filed before September 19, 2008, courts have applied Rule 502 in controversies over waiver for information produced before Rule 502 took effect. *See, e.g., Heriot v. Byrne*, 257 F.R.D. 645, 650-651, 654 (N.D. Ill. 2009) (complaint filed April 21, 2008; documents produced August 25, 2008, claim of inadvertent disclosure asserted October 23, 2008, motion filed November 14, 2008); *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216, 218, 222-223 (E.D. Pa. 2008) (complaint filed in 2007; documents produced February and May 2008, privilege asserted June 5, 2008, privilege logs produced June 6, 2008, new privilege log produced June 30, 2008, with letter invoking Rule 26(b)(5)(B) seeking sequestration inadvertently

produced documents, motion to deem privilege waived filed August 19, 2008). Although Congress may not have intended Rule 502 to have retroactive effect over *all* documents already produced in pending litigations, it did intend for Rule 502 to have effect insofar as is just and practicable. Congress definitely did not *prohibit* Rule 502's application to documents produced prior to its effective date as Maher seems to contend.

Maher also argues that "PANYNJ was on notice during its review of the documents at issue that preexisting privilege waiver rules would apply to its August 29, 2008 document production." (Maher Rule 26(b)(5)(B) Motion at 30.) Maher contends that the combination of its rejection of PANYNJ's proposal to include a provision addressing inadvertent privilege waiver that would have effectively precluded waiver for inadvertently produced documents, PANYNJ's failure to include a claw back provision in the protective order, and PANYNJ's counsel's statement that PANYNJ also took measures to avoid the disclosure of privileged documents given that Maher's counsel had refused to agree to a standard provision governing the inadvertent production of privileged documents should estop PANYNJ from arguing that Rule 502 applies to PANYNJ's production. (*Id.*) PANYNJ contends that "[t]here was no implicit or explicit agreement between the parties to be bound by then existing law." (Loiseau Decl. ¶ 10.)

Maher does not cite any authority supporting a finding that PANYNJ's inability to convince Maher to include a provision "effectively preclud[ing] waiver for inadvertently produced documents" (equivalent to the "never waived" approach that Maher describes) in the protective order and/or failure to include a claw back provision in the protective order and/or counsels' measures to avoid the disclosure of privileged documents should estop PANYNJ from claiming Rule 502 applies in this proceeding, a rule based on the "middle ground" approach. Similarly, the fact that Maher did not seek to include a provision in the protective order establishing either the strict accountability or the pre-Rule 502 "middle test" approach does not estop Maher from arguing that Rule 502 does not apply.

As Maher states, it does not appear that the Commission addressed the question of the waiver standard in published opinions prior to enactment of Rule 502. Therefore, application of Rule 502 would not conflict with any Commission precedent. Furthermore, it is not clear whether the law of the Third Circuit or the D.C. Circuit would have applied if there were no Rule 502. (Maher Rule 26(b)(5)(B) Motion at 27-28.) Accordingly, neither party could have had an expectation that either the strict accountability or the "middle test" would have been used. Rule 502 "opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error." Fed. R. Evid. 502, Explanatory Note (Revised 11/28/2007). With no clearly controlling law, if Rule 502 were not to be used in this proceeding, given Congress's elimination of the strict accountability rule, it would appear that use of the middle ground approach as articulated prior to Rule 502 rather than strict accountability would be appropriate.

PANYNJ produced the disputed documents shortly before the effective date of Rule 502. The first indication in the record that anyone realized there may be a problem came on September 25, 2008, after the effective date of Rule 502. As stated above, the courts have not hesitated to apply Rule 502 in cases filed before its effective date even when the dispute about whether waiver had occurred began before the effective date. See *Heriot v. Byrne*, *supra*; *Rhoads Industries, Inc. v. Building Materials Corp. of America*, *supra*.

I find that it would be just and practicable to apply Rule 502 in this proceeding. Therefore, I will decide the motion pursuant to Rule 502.

III. APPLICATION OF FEDERAL RULE OF EVIDENCE 502.

With regard to inadvertent disclosures, Rule 502 provides:

When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(b). The following test is used to apply Rule 502.

First, a court determines whether the disclosed material is privileged. If it is not, the inquiry ends. If the material is privileged, the court applies FRE 502(b). If the court concludes that disclosing party satisfied all of the elements in FRE 502(b), the privilege is not waived. If, however, the disclosing party fails to satisfy any of the FRE 502 elements, the privilege is waived.

Heriot v. Byrne, 257 F.R.D. at 655. “The three-part test [for the 502(b) elements] finds that the disclosure is not a waiver if: (1) the disclosure was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.” *Amobi v. District of Columbia Dep’t of Corrections*, 262 F.R.D. 45, 52 (D.D.C. 2009). Whether the attorney client privilege or work product protection has been waived is a mixed question of fact and law. See *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992) (attorney client privilege).

A. Are the Documents That PANYNJ Produced Communications or Information Covered by the Attorney-Client Privilege or Work-Product Protection?

PANYNJ contends that it inadvertently produced fifty-seven documents that are covered by attorney-client privilege, work product protection, or both. Rule 502 “makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client

privilege or work-product immunity as an initial matter.” Fed. R. Evid. 502, explanatory note (revised 11/28/2007).

Maher contends that of the fifty-seven documents a tissue, sixteen are not privileged or protected: 1989, 1990, 1991, 1992, 1993, 1994, 1998, 2008, 2009, 2010, 2012, 2013, 2014, 2015, 2019, and 2020. (Maher Rule 26(b)(5)(B) Motion at 7-27) Since Maher does not contend otherwise, the other forty-one documents are found to be information covered by attorney-client privilege or work-product protection.

Document 1994 requires separate mention. PANYNJ claims both attorney-client privilege and work product protection for this document. Maher contends that Document 1994 was used by PANYNJ witnesses to refresh their recollections as part of preparation for depositions in FMC Docket No. 07-01 and “[a]s a document used to refresh witness recollection before testimony, Maher is entitled to the document regardless of the claimed privilege.” (*Id.* at 9, 26.) In its discussion of this document, Maher does not challenge the PANYNJ’s claim that Document 1994 is protected by attorney-client privilege and work product protection. (Maher Rule 26(b)(5)(B) Motion at 9-12, 26-27). Federal Rule of Evidence 612 governs production of a writing used by a witness to refresh recollection for the purpose of testifying. Therefore, I need not determine whether Document 1994 is privileged or protected, but must determine whether PANYNJ waived protection of Document 1994 under Rule 612 of the Federal Rules of Evidence.

1. Attorney-Client Privilege.

The attorney-client privilege “is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). By assuring confidentiality, the privilege encourages clients to make “full and frank” disclosures to their attorneys, who are then better able to provide candid advice and effective representation, which, in turn, serves “broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Whether or not the privilege exists in a particular situation is “a mixed question of law and fact.” *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990).

The following factors control whether a communication is protected by the attorney client privilege:

- A party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication;
- The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice as well as an attorney’s advice in response to such disclosures;

- The fact that a person is a lawyer does not make all communications with that person privileged;
- Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed;
- An eight-part test determines whether information is covered by the attorney-client privilege:
 - (1) Where legal advice of any kind is sought;
 - (2) from a professional legal adviser in his capacity as such;
 - (3) the communications relating to that purpose
 - (4) made in confidence
 - (5) by the client,
 - (6) are at his instance permanently protected
 - (7) from disclosure by himself or by the legal adviser,
 - (8) unless the protection be waived;
- The party asserting the privilege bears the burden of proving each essential element.

United States v. Ruehle, 583 F.3d 600, 606-608 (9th Cir. 2009). The attorney-client “privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn Co. v. United States*, 449 U.S. at 390. The privilege includes communications involving corporate officers and agents who possess the information requested by the attorney or who will act on the legal advice. *Id.*; *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993). Corporations may communicate privileged information at various levels without waiving the attorney-client privilege. *Santrade*, 150 F.R.D. at 545.

Document 1998 (Exhibit 2).⁵

Document 1998 is a thread of emails written on January 22 and 23, 2008, among several PANYNJ officials discussing Docket 07-01, the APM proceeding. The email “relates the legal advice provided to [the writer] by . . . an attorney for the Port Authority.” (Affidavit of Dennis Lombardi ¶ 11.) Communication of that advice among corporate levels does not waive the privilege. I find that PANYNJ has met its burden of establishing that Document 1998 is protected by attorney-client privilege.

⁵ The parties submitted more than one copy of the documents at issue to the Commission. For convenience, I will identify the documents attached as exhibits to Maher’s Rule 26(b)(5)(B) motion.

Documents 2019 and 2020 (Exhibit 3).

Documents 2019 and 2020 are drafts of resolutions prepared by PANYNJ counsel ultimately presented to the PANYNJ board (apparently in a revised form) for approval. Maher contends that “the documents do not contain legal advice. Rather, they reflect the Commission’s decision to enter into the lease amendment.” (Maher Rule 26(b)(5)(B) Motion at 14.) It contends that the documents are business related, not legal advice, and intended for public disclosure and therefore, they are not privileged. (*Id.*) PANYNJ argues that the documents were authored by an attorney as drafts of resolutions, not the final public version. I find that PANYNJ has met its burden of establishing that Documents 2019 and 2020 are protected by attorney-client privilege.

2. Work Product Protection.

Maher disputes PANYNJ’s assertion that Documents 1991, 1989, 1990, 1992, 1993, 2008, 2009, 2010, 2012, 2013, 2014, and 2015, are protected as work product. Production of trial preparation materials is governed by Rule 26(b)(3):

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

Fed. R. Civ. P. 26(b)(3). The work-product doctrine reflects the strong “public policy underlying the orderly prosecution and defense of legal claims.” *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). It is distinct from and broader than the attorney-client privilege. *Id.* at 508. Documents prepared by agents as well as attorneys themselves are protected as work product. *United States v. Nobles*, 422 U.S. 225, 238-239 and n.13 (1975). “The courts have . . . continued to provide a high degree of protection for attorneys’ litigation-preparation mental impressions.” Wright, Miller & Marcus, *Federal Practice and Procedure* § 2026 (3d ed. 2010). Production of opinion work product will only be required in “rare situations.” *Id.*

The Fourth Circuit held that the protection given an attorney’s mental impressions by the predecessor provision to Rule 26(b)(3)(B) is absolute and that “no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney’s mental impressions, conclusions, opinions or legal theories.” That

court has also held that the protection of opinion material applies equally to lawyers and nonlawyers. Other courts have stopped short of absolute protection while recognizing that only remarkable circumstances would overcome protection.

Id. (footnotes omitted). As I find that “remarkable circumstances” are not present that would overcome work product protection, I do not find it necessary to decide between that standard and the “absolute” standard of the Fourth Circuit.

Document 1991 (Exhibit 5).

Document 1991 (dated 2/20/08) is a draft memorandum addressing Maher – APM Terminals. Although marked “ATTORNEY CLIENT PRIVLEDGED [*sic*] & CONFIDENTIAL” and bearing the initials DFB, it otherwise does not indicate the identity of the author. Document 1989 also states “COMMENTS 2-26-08.” Document 1991 discusses the then-ongoing FMC No. 07-01 proceeding and the proceeding that Maher contemplated filing that eventually became this proceeding. Maher contends that even if PANYNJ can establish work product protection, Maher has substantial need for Document 1991 that overcomes the protection. (Maher Rule 26(b)(5)(B) Motion at 16-22.)

PANYNJ states that Document 1991 was authored by Robert Evans, a non-attorney, with the assistance of others including Donald Burke, a PANYNJ attorney, in preparation and anticipation of Docket 07-01 and this proceeding. (Affidavit of Robert Evans II ¶ 3.)

Document 1991 states the authors’ litigation-preparation mental impressions about then-ongoing Docket No. 07-01 and the potential for this proceeding. PANYNJ has established that the documents are protected as opinion work product, and Maher has not established remarkable circumstances that would require their production. Document 1991 is protected as work product.

Document 1989 (Exhibit 6).

Document 1989 (dated 2/20/08) is a later version of a Document 1991. Document 1989 also states “COMMENTS 2-26-08.” PANYNJ states that Document 1989 was authored by Robert Evans, a non-attorney, and Donald Burke, a PANYNJ attorney, in preparation and anticipation of Docket 07-01 and this proceeding. (Affidavit of Robert Evans II ¶ 2.) For the reasons stated for Document 1991, Document 1989 is protected as work product.

Document 1990 (Exhibit 7).

Document 1990 is an undated “DRAFT” “ATTORNEY CLIENT PRIVLEDGED [*sic*] & CONFIDENTIAL” memorandum entitled “APM & Maher Issues – Discussion paper.” It sets forth the author’s opinions about PANYNJ’s controversies with APM and Maher. Maher does not address Document 1990’s status as work product. Maher argues that Document 1990 contains a “key admission” pertaining to the alleged improper enforcement of the indemnity provision of EP-249

against Maher by PANYNJ when PANYNJ filed its third-party complaint against Maher in Docket No. 07-01. (Maher Rule 26(b)(5)(B) Motion at 22-23.)

PANYNJ states that Document 1990 was authored by Robert Evans, a non-attorney, with the assistance of others including Donald Burke, a PANYNJ attorney, in preparation and anticipation of Docket 07-01 and this proceeding. (Affidavit of Robert Evans II ¶ 2.)

Document 1990 states the authors' litigation-preparation mental impressions about then-ongoing Docket No. 07-01 and the potential for this proceeding. PANYNJ has established that Document 1990 is protected as opinion work product, and Maher has not established remarkable circumstances that would require their production. With regard to the "key admission" of a fact claimed by Maher, Maher has not established it has substantial need for the material to prepare its case. Document 1990 is protected as work product.

Documents 1992 and 1993 (Exhibit 8).

Documents 1992 and 1993 are two draft versions of PowerPoint presentations intended for "Resolution Discussions with APM." (Document 1993.) Maher contends that even if PANYNJ can establish the documents are work product, it has a substantial need for the documents as proof of "collusion" between PANYNJ and APM.

PANYNJ states that Documents 1992 and 1993 are draft presentations prepared at the direction of PANYNJ attorneys to prepare for settlement discussions with APM. (Affidavit of Robert Evans II ¶ 2.) They were not provided or communicated to APM or any other outside party. (Declaration of Holly E. Loiseau ¶ 18.)

Documents 1992 and 1993 identify the issues in Docket No. 07-01 and state the authors' opinions about opportunities and issues for settlement and potential resolution of the controversy between PANYNJ and APM. PANYNJ has established that the documents are protected as opinion work product, and Maher has not established remarkable circumstances that would require their production. Documents 1992 and 1993 are protected as work product.

Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 (Exhibit 9).⁶

Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 are seven copies of what appear to be four versions a draft Third Supplemental Lease amending Lease EP-248 between PANYNJ and APM Terminals. Document 2012 also includes a letter dated May 13, 2008, from PANYNJ official R.F. Israel to APM Terminals. Israel states that the letter is a draft and that he does "not recall signing this draft letter or sending this letter to its noted recipient." (Affidavit of Rudy Israel ¶ 3.)

⁶ The cover page to this exhibit does not list Document 2008, but lists Document 2009 twice. Maher describes Exhibit 9 as including Document 2008. (Maher Rule 26(b)(5)(B) motion at 25 n.59.) I assume that the first document in this exhibit is Document 2008.

Maher does not explicitly address the Israel letter. Maher recognizes that the other documents are drafts, but contends that “[w]ithout information as to the authors, recipients, and whether the drafts were shared with APM, PANYNJ cannot satisfy its burden for demonstrating the work product protection. In addition, the documents are primarily business documents, not documents prepared for the purpose of preparing litigation.” (Maher Rule 26(b)(5)(B) Motion at 25.)

PANYNJ contends that the documents are

copies of lease agreements drafted in connection with the settlement agreement [in FMC No. 07-01] and constitute protected attorney work product. . . . As the documents’ custodians affirm, these documents are non-final lease drafts, which Port Authority counsel prepared and circulated to a select number of Port Authority employees, in connection with counsels’ drafting of the settlement agreement. *See* Borrelli Aff. ¶ 2; Israel Aff. ¶ 2; Lombardi Aff. ¶ 14; Evans Aff. ¶ 7. These draft settlement documents are internal Port Authority documents that were not shared with APM or any other third-party (*see* Loiseau Decl. ¶ 18), and are therefore protected as attorney work product.

(PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 39 (footnote omitted).)

Normally, a draft of a supplemental lease provision amending an existing lease would probably be considered a business document not entitled to work product protection. In this case, however, the Borrelli, Israel, Lombardi, and Evans affidavits and the Loiseau declaration establish that PANYNJ counsel drafted the Third Supplemental Leases and Israel drafted the letter in Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 during the settlement negotiations between PANYNJ and APM in FMC Docket No. 07-01, *see APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (ALJ Oct. 24, 2008) (Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice), and the drafts were not shared with APM or any other third-party. Drafts of documents created as part of settlement negotiations are protected by the work product privilege. *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 263 (N.D. Ill. 2000); *Ferranti Intern., Inc. v. Willard*, No. Civ. A. 02-CV-404, 2003 WL 21960716, *4 (E.D. Pa. June 25, 2003); *In re Subpoena Duces Tecum Served on Rosenman & Colin*, 3:92 CV 00301-WWE, 1996 WL 527331, at *5 (S.D.N.Y. Sept. 16, 1996). “The work product doctrine applies in a subsequent case even if the documents were prepared in a prior litigation. The two cases need not be related as long as the documents were created by the parties to subsequent litigation.” *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. at 263 (citations omitted). Therefore, PANYNJ has established that Documents 2008, 2009, 2010, 2012, 2013, 2014, and 2015 are protected as work product.

B. Has PANYNJ Waived the Privilege or Protection by Producing the Documents?

Rule 502 itself does not provide any guidance on who has the burden of proving waiver. In this district, prior to the enactment of the rule, “the proponent of the

privilege . . . [had] the burden of showing that it [had] not waived attorney-client privilege.” I see no reason why Rule 502 can be interpreted to modify that rule and I will apply it.

Amobi v. District of Columbia Dept. of Corrections, 262 F.R.D. 45, 53 (D.D.C. 2009) (citations omitted).

Maier addressed the “middle ground” standards in its motion. I will apply those arguments to the analogous Rule 502 factors.

1. Was the disclosure inadvertent?

Neither party directly addresses the question of whether the production of the contested documents was “inadvertent.”

The first step of the analysis is determining whether the disclosure was inadvertent. Rule 502 does not define inadvertent disclosure. . . . Other courts have found that Rule 502(b) provides for a more simple analysis of considering if the party intended to produce a privileged document or if the production was a mistake. This interpretation seems to be in line with one of the goals of the drafting committee: to devise a rule to protect privilege in the face of an innocent mistake.

Additionally, defining inadvertent as mistaken comports with the dictionary definition of the word: “Of persons, their dispositions, etc.: Not properly attentive or observant; inattentive, negligent; heedless. . . . Of actions, etc.: Characterized by want of attention or taking notice; hence, unintentional.” *The Oxford English Dictionary* (2d ed.1989), available at OED Online, Oxford University Press, <http://dictionary.oed.com/cgi/entry/50113734>. There is every reason to suppose that Congress uses this definition. Additionally, permitting “inadvertence” to be a function of, for example, the amount of information that had to be reviewed or the time taken to prevent the disclosure melds two concepts, “inadvertence” and “reasonable efforts,” that should be kept distinct. One speaks to whether the disclosure was unintended while the other speaks to what efforts were made to prevent it. I will therefore use the word “inadvertent” from Rule 502 to mean an unintended disclosure.

Amobi v. District of Columbia Dept. of Corrections, 262 F.R.D. at 53 (citations omitted). See also *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009) (citations omitted) (“In this court’s view, the structure of Rule 502 suggests that the analysis under subpart (b)(1) is intended to be much simpler, essentially asking whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake.”).

Maher does not contend that PANYNJ deliberately produced the contested documents for some undisclosed motive, then changed its mind and requested their return. PANYNJ's efforts to secure return of the documents discussed below supports a finding that it did not intend to produce documents revealing information that it believes should be protected or privileged. Therefore, I find that production of the disputed documents was "inadvertent" within the meaning of Rule 502(b)(1).

2. Did PANYNJ take reasonable steps to prevent disclosure?

Maher contends that PANYNJ "simply did not take its responsibility to safeguard privilege seriously and failed to implement reasonable precautions to avoid disclosing privileged and/or work product protected documents." (Maher Rule 26(b)(5)(B) Motion at 31.) As stated, the burden is on PANYNJ to demonstrate that it took reasonable steps to prevent disclosure.

Maher contends that:

PANYNJ's reasons for the disclosures, expressed by counsel during the October 24, 2008 meet and confer, were that the production was large, there was not a lot of time, and that PANYNJ had conducted "multiple searches" electronically for privilege, including for the term "privileged" and for persons identified as PANYNJ's counsel, but that for unknown reason [*sic*] PANYNJ's electronic searches failed to discover the documents prior to their disclosure for Maher.

(*Id.*) After receiving the letter from counsel for PANYNJ asking for return of the documents, one of Maher's counsel states that he conducted an electronic search of the documents.

11. Also on October 9, 2008, I compared the new tag for the 58 documents against the "reviewed" tag and determined that 51 of the 58 documents had previously been reviewed by Maher counsel.
12. The database also reported that the 58 documents comprised 320 pages and that 44 of the 58 documents were native electronic documents (and therefore contained full metadata).
13. During the preparation of the Rule 26(b)(5)(B) motion, I conducted a series of searches in the database against the document records tagged as inadvertently produced. Searches for "privileged" and "Confidential" identified the records for 4 of the 58 documents, including Documents 1989, 1990, 1991, and 1994. Searches for prominent PANYNJ counsel, such as "Burke" and "Berry" identified 33 of the 58. Each search took approximately 10 seconds to type and returned results virtually immediately.

(Morrissey Aff.) Maher argues that “PANYNJ either did not run *basic* searches properly, or if it did, then it failed to properly segregate the allegedly privileged documents for production.” (Maher Rule 26(b)(5)(B) Motion at 32 (emphasis in original).)

PANYNJ contends that it “produced approximately one million pages of documents withing just several weeks time. . . . Extensive safeguards were implemented to identify potentially privileged documents, but a handful nonetheless were inadvertently produced. This is the precise circumstance for which FRE 502(b) was intended.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 40.)

PANYNJ and its counsel retained Huron Consulting Group (Huron), an electronic discovery vendor, to assist in collecting, processing, reviewing, and producing the documents. PANYNJ attached an affidavit of George Marinos, a Managing Director for Huron, and a declaration of Holly E. Loiseau, a partner in Weil, Gotshal & Manges LLP (Weil Gotshal), PANYNJ’s outside counsel, setting forth the steps PANYNJ took to prevent disclosure of protected and privileged information. (Marinos Aff. ¶ 2; Loiseau Decl. ¶ 5.)

PANYNJ states that during collection of the documents, custodians were questioned about the potential for privileged information in their documents so that “custodian-specific” precautions could be taken. PANYNJ and Huron created a privilege filter to apply to the documents to identify documents that might be privileged or subject to work product protection. Huron guided the selection of the eighteen legal terms and 150 other search terms used in the filters. These terms included the identities of in-house and outside counsel and law firms. (Marinos Aff. ¶¶ 3, 4; Loiseau Decl. ¶ 6.) Counsel identified some documents that were determined not to need review because the custodian did not have contact with counsel. All reviewed documents that hit one or more terms of the privilege filter were reviewed by at least one attorney for privilege. (Marinos Aff. ¶ 5; Loiseau Decl. ¶ 7.) “More than seventy . . . Huron legal review professionals (each with a *juris doctorate* degree) assisted with the document review. All of the review professionals underwent training by Weil Gotshal attorneys and Huron document review coordinators regarding how to conduct the privilege review.” (Marinos Aff. ¶ 6.)

In addition, over ten Weil Gotshal attorneys assisted in the privilege review. The attorneys who participated in the review were instructed to err on the side of tagging documents “privileged” if there was a potential of claiming privilege, so that any potentially privileged documents would receive at least one additional level of attorney review in connection with preparing the privilege log. All documents marked privileged underwent a close review by one or more attorneys in connection with constructing the privilege log.

(Loiseau Decl. ¶ 8.) A seven member quality control team of seven review professionals and a Huron project manager conducted a second-level quality control review. The reviewed a sampling of the documents to be produced; that is, the documents designated as responsive and not tagged as privileged in the first-level review. The team also looked for potential errors made by individual

reviewers. (Marinos Aff. ¶ 7.) “Huron review professionals and employees logged over 1,600 hours performing the quality control analysis.” (*Id.*) Huron professionals reviewed nearly 300,000 documents that hit the privilege filter. Over 4,000 were determined to be privileged and were not produced. More than 1,200 documents that did not hit the filter were also tagged as privileged. (Marinos Aff. ¶ 8.) PANYNJ also initially withheld all documents collected from certain custodians so they could be reviewed by Weil Gotshal attorneys prior to production. (Marinos Aff. ¶ 9.)

PANYNJ describes the errors that led to the production of the documents at issue as follows:

10. On or about October 7, 2008, Weil Gotshal brought to Huron’s attention a produced document that should have been withheld as privileged. Huron immediately investigated the issue, and determined that the document (and several other documents) were inadvertently produced because a third-party processing vendor, supervised by Huron, assisting in the review committed a configuration error with regard to one “batch” of documents belonging to a particular custodian (Robert Evans) (the “Evans Batch”). Huron informed Weil Gotshal of this error on the afternoon of October 8, 2008.
11. The following is a description of the error: In order to process the collected electronic documents for review, Huron’s processing vendor used iPRO, a widely-used industry accepted software application. While processing the Evans Batch, a vendor technician erroneously selected the wrong setting as part of a standard process to eliminate exact duplicate documents with the custodian’s population. This improper selection cause certain documents to entirely bypass the processing-review-QC-production workflow, which was carefully designed to prevent inadvertent production of privileged documents. The documents in the Evans Batch were thus not subjected to the privilege filter or the review and QC processes at all. As a result, certain privileged documents were inadvertently produced. Under the circumstances, there was no practical or reasonable way for the error to have been detected by anyone prior to production.
12. Huron has reviewed a list of the 57 documents that Weil Gotshal has identified in the instant motion. Thirty-four of the documents were inadvertently produced on August 29, 2008 as a result of the error described in ¶ 11 above. As to the remaining 23 documents, 11 of the documents did not “hit” the privilege filter, as they do not contain any of the search terms or names used in the filter, and were therefore not reviewed prior to being produced on August 29, 2008. The remaining 12 documents “hit” the privilege filter and were reviewed by a Weil Gotshal attorney and/or Huron review professional prior to production, but the documents were not tagged as privileged due to professional error and so were inadvertently produced,

10 as part of the August 29 production, and 2 as part of a September 29 supplemental production.

(Marinos Aff.)

The Advisory Committee's Explanatory Note sets forth the multiple factors that had been applied in the middle ground standard, then states:

The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure.

Fed. R. Evid. 502, explanatory note (revised 11/28/2007).

Maher focuses its argument on the fact that PANYNJ produced privileged documents; therefore, PANYNJ must not have taken reasonable steps to prevent disclosure. If no privileged documents are produced, then the producing party took reasonable steps. If documents are produced, then the producing party did not take reasonable steps, because reasonable steps would have prevented production. Maher's argument seems to vitiate Rule 502.

The proper focus should be on the steps that producing party took to avoid disclosure, not whether those steps actually prevented disclosure. Otherwise, Rule 502 would always result in waiver of protection and privileges when documents are inadvertently produced. This clearly is not the intent of the Rule.

As set forth above, the affidavits submitted by PANYNJ support a finding that it used advanced analytical software applications and linguistic tools in screening for privilege and work product. Although those steps were not entirely successful, they were reasonable. Therefore, PANYNJ has established that it took reasonable steps to avoid disclosure within the meaning of Rule 502.

3. Did PANYNJ promptly take reasonable steps to rectify the error?

Maher contends that PANYNJ did not act promptly to protect its privilege and work product. As stated above, the burden is on PANYNJ to demonstrate that it promptly took reasonable steps to rectify the error.

Maher argues that:

PANYNJ first notified Maher of its inadvertent disclosure *five weeks* after its initial document production. During that time, PANYNJ continued to extensively review its document production. Following Maher's motion to compel on September 24, 2008, PANYNJ was engaged in re-reviewing the same 1.7 million page production to remove non-responsive documents. PANYNJ was apparently able to conduct that review between September 24, 2008 and October 3, 2008 when PANYNJ provided Maher the list of 300,000 non-responsive documents that had nevertheless been produced. PANYNJ similarly re-reviewed the initial production for confidentiality during the same general time frame. PANYNJ also supplemented its production twice before this issue arose, on September 22, 2008 and September 26, 2008. Indeed, PANYNJ admits that "roughly half" of over \$4 million in document review costs were expended in the review activities after the initial production, including \$1 million for contract attorney review after the initial production. PANYNJ should have also identified the allegedly inadvertently produced documents during the time it was re-reviewing the same documents a second and third time, yet despite the extensive re-reviewing and additional document production, PANYNJ still did not perform a proper privilege review.

It was not until Maher first notified PANYNJ on October 8, 2008 about three potentially inadvertently disclosed document Maher came across during its review of PANYNJ's production that PANYNJ took action to notify Maher. And while PANYNJ may portray its response the following day identifying 58 allegedly inadvertently produced document as evidence of promptness, PANYNJ's next-day response underscores the simplicity and ease of the *basic* privilege review that PANYNJ should have accomplished before its production, and again in the ensuing weeks while it repeatedly re-reviewed the same production. Moreover, the fact that PANYNJ's action was prompted by Maher further undermines the suggestion that it acted "promptly."

(Maher Rule 26(b)(5)(B) Motion at 39-40 (emphasis in original) (footnotes omitted).)

PANYNJ contends that it learned that it had produced protected and privileged documents in late September while reviewing its production in connection with deposition preparation and related tasks.⁷

More specifically, on or about September 25, 2008, Weil Gotshal discovered that approximately six documents had been inadvertently produced, at which point it immediately took steps to determine whether the production contained and duplicate documents, or any other inadvertently produced privileged documents. Multiple versions of three additional privileged documents that had been inadvertently

⁷ I do not credit Maher's apparent contention that PANYNJ's October 9 letter was prompted solely by Maher's October 8 letter.

produced were identified as a result of these efforts. Weil Gotshal also reached out to Huron to determine whether there was any processing or other issues that could have caused the inadvertent production.

(Loiseau Decl. ¶ 11.) This discovery led to the review described in paragraphs 10-12 in the Marinos affidavit set forth above.

PANYNJ states that it then took the following actions:

12. On or about October 8, 2008, Weil Gotshal drafted a letter to Maher's counsel recalling the inadvertently-produced privileged document it had discovered. Just as the letter was being finalized, two events occurred. First, Huron identified a technical error on its part that had resulted in a batch of documents erroneously having been included in the production. *See* Marinos Aff. ¶¶ 10-11 Second, the Port Authority received a letter from Maher's counsel alerting it to three privileged documents they had identified in the Port Authority's production. *See* October 8, 2008 letter from G. Morrissey to H. Loiseau All three of these documents were produced due to Huron's processing error. . . .
13. As a result of these developments, the Port Authority immediately reviewed the newly identified documents (several of which had already been identified by Weil Gotshal, and which Weil Gotshal was already intending to recall), and sent a letter on October 9, notifying Maher about the inadvertent production of fifty-eight specified documents. *See* October 9, 2008 letter from H. Loiseau to L. Kiern The Port Authority intentionally included on its privilege log, served on October 8, complete descriptions of those inadvertently-produced privileged documents of which it was aware at the time the privilege log was completed (a list of Port Authority counsel was sent to Maher along with the privilege log.) Detailed descriptions of all the documents now at issue were included in the Port Authority's revised privilege log, served October 20.

(Loiseau Decl.)

The Advisory Committee's Explanatory Note to Rule 502 states:

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

Fed. R. Evid. 502, explanatory note (revised 11/28/2007).

The first consideration is whether PANYNJ acted promptly once it learned that documents it considered to be protected or privileged had been produced. Forty-one calendar days elapsed between August 29 when PANYNJ produced all but two of the documents at issue and October 9 when it sent the letter to Maher requesting their return. PANYNJ states that on September 25, “Weil Gotshal discovered that approximately six documents had been inadvertently produced, *at which point it immediately took steps to determine* whether the production contained any duplicate documents, or any other inadvertently produced privileged documents.” (Loiseau Decl. ¶ 11 (emphasis added).)

PANYNJ states that it “identified approximately six privileged documents on or about September 25, 2008, and then immediately took steps to search the production for duplicate or additional privileged documents that may have been inadvertently produced.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion) at 44; Loiseau Decl. ¶ 11.) Fourteen calendar days elapsed between September 25 when PANYNJ states it discovered that it had produced the protected or privileged documents and October 9 when it first contacted Maher. PANYNJ identified the other protected and privileged documents in its review between September 25 and October 8.

Prior to Rule 502, courts in [the Seventh Circuit] looked to the time between a party’s learning of the disclosure and that party’s taking action to remedy it, rather than the time that elapsed since the document was placed in the hands of the other party. *See e.g. [Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 389 (7th Cir. 2008)]* (looking to the time between the filing of the disputed document as an exhibit and the producing party’s request for return); *U.S. v. Natl. Assn. of Realtors, 242 F.R.D. 491, 495 (N.D. Ill. 2007)* (no waiver where several years elapsed between production and party’s knowledge of the disclosure but the party took “virtually no time” to rectify the error). The Committee’s comment that Rule 502 does not require a post-production review supports this view that the relevant time under subpart (b)(3) is how long it took the producing party to act after it learned that the privileged or protected document had been produced.

Coburn Group v. Whitecap Advisors, 640 F. Supp. 2d at 1040-1041. Therefore, I conclude that September 25 is the appropriate starting date to determine whether PANYNJ promptly took reasonable steps to rectify the error.

Despite learning of the inadvertent production September 25, PANYNJ did not draft a letter to Maher requesting return until October 8, thirteen days later, and did not send the letter until October 9. (Loiseau Decl. ¶ 13.) More importantly, however, Huron apparently did most of the work screening the documents prior to production as “[m]ore than seventy . . . Huron legal review professionals . . . assisted with the document review. (Marinos Aff. ¶ 6.) Yet PANYNJ did not bring “to Huron’s attention a produced document that should have been withheld as privileged” until October 7. (Marinos Aff. at ¶ 10.) When confronted by the specter of inadvertent production of

privileged and protected documents, PANYNJ delayed twelve days before contacting the vendor that was the likely (and turned out to be the actual - Marinos Aff. at ¶ 11-12; Loiseau Decl. ¶ 12) cause of the inadvertent production of most of the documents. It was another two days before PANYNJ sent its letter to Maher asserting the privilege. (Loiseau Decl. ¶ 13.) PANYNJ does not explain this delay.

It is appropriate to look to cases decided pursuant to Rule 502 and to pre-Rule 502 cases regarding the meaning of “promptly.” See *Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP*, 2010 WL 275083, at *5 (S.D. Cal. January 13, 2010); *Coburn Group v. Whitecap Advisors, supra*.

PANYNJ argues that “[t]his entire series of events spanned but two weeks, well within the bounds of ‘promptness’ for investigating and addressing such a serious matter.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 44.) PANYNJ relies on *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, No. 96 Civ. 7590, 1997 WL 736726 (S.D.N.Y. Nov. 26, 1997) to support its claim that “no inordinate delay occurred where counsel began a post-production review to uncover other inadvertently-produced material and sent the defendants a list of documents one month after initially becoming aware of an inadvertent disclosure.” (PANYNJ Opp. to Maher Rule 26(b)(5)(B) Motion at 44 n.75.) In *Prescient Partners*, the court found that:

No inordinate delay occurred in this case because PRescient’s [*sic*] counsel wrote defendants’ counsel *the day after learning of the error* to demand return of the documents. After receiving the defendants’ final refusal to return the documents on August 22, 1997, PRescient’s counsel began a comprehensive review to uncover other inadvertently produced privileged material and sent the defendants what they believed was a comprehensive list of inadvertently produced documents eighteen days later, on September 9, 1997.

Id. at *6 (emphasis added). The immediate demand for return of the documents by Prescient contrasts with PANYNJ’s fourteen day delay in seeking return of the documents from Maher. In the other cases cited by PANYNJ, three business days was the longest period to elapse before the producing party contacted the receiving party to seek return of the documents. See *Rhoads Industries, Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. at 225-227 (Rule 502) (upon being informed of apparent production of privileged documents, immediate response of producing party stating that no privilege had been waived and this was likely a case of inadvertent production favored producing party; producing party’s three week delay in producing a privilege log of the inadvertently produced documents once it was aware of its mistake favored receiving party; “promptness” factor overall favored receiving party, but “interest of justice” precluded waiver); *Bensel v. Air Line Pilots Ass’n*, 248 F.R.D. 177, 179-181 (D.N.J. 2008) (“promptly taking reasonable steps to rectify” factor found to be neutral where new counsel for producing party learned of production and asserted privilege for one document during a deposition September 19, 2006, identified other documents on a privilege log dated November 6, 2006, then waited almost one year to file motion for protective order); *U.S. Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, Nos. 97 Civ. 6124 (JGK)(THK),

98 Civ. 3099 (JGK)(THK), 2000 WL 744369 (S.D.N.Y. June 8, 2000) (documents available for inspection from January 11-28, 2000; informing counsel of inadvertent production on January 21 followed by letter to counsel the next business day constituted prompt action to rectify the disclosure); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 577 (D. Kan. 1997) (counsel for party producing documents contacted opposing counsel the day the inadvertent disclosure was discovered, and attempted to rectify the error by requesting return); *Georgia-Pacific Corp. v. GAF Roofing Mfg. Co.*, No. 93 Civ. 5125, 1995 WL 117871, at *2 (S.D.N.Y. Mar. 20, 1995) (reacting two business days after discovery of the inadvertent disclosure was not a delay); *In re Grand Jury Investigation*, 142 F.R.D. 276 (M.D.N.C. 1992); (January 2, 1992 (Thursday) – discovered that a single privileged document had been produced; January 7 (Tuesday) (three business days later) – contacted the appropriate attorney within DOJ, identified document, advised of inadvertent disclosure, and requested return; re-reviewed documents produced and identified seventeen more privileged for a total of eighteen; January 31, DOJ advised it would not return documents; February 3, producing party filed motion for a protective order).

Other cases applying Rule 502 and pre-Rule 502 law have similarly short periods. *See e.g.*, *Kandel v. Brother Intern. Corp.*, 683 F. Supp. 2d 1076, 1085 (C.D. Cal. 2010) (Rule 502) (after discovering inadvertent production in mid-August, immediately contacting third-party consultant to run omitted searches followed by letter requesting return on August 24 determined to be prompt); *Rhoades v. Young Women's Christian Ass'n of Greater Pittsburgh*, Civil Action No. 09-261, 2009 WL 3319820, at *3 (W.D. Pa. Oct. 14, 2009) (Rule 502) (letter to receiving party demanding return of privileged documents sent five days after production found to be prompt); *Synergetics USA, Inc. v. Alcon Laboratories, Inc.*, No. 08 CIV. 3669 (DLC), 2009 WL 2016795, at *1 (S.D.N.Y. July 09, 2009) (Rule 502) (request for return three days after discovery of inadvertent production is timely); *Metso Minerals Inc. v. Powerscreen Intern. Distribution Ltd.*, No. CV-06-1446 (ADS)(ETB), 2007 WL 2667992, at *5 (E.D.N.Y. 2007) (requesting either their immediate return or certification of destruction of documents two business days later is not inordinate delay); *United States v. Rigas*, 281 F. Supp. 2d 733, 741 (S.D.N.Y. 2003) (sending letter asserting privilege on same day producing party became aware of the inadvertent production and following up the next day clearly weighs against a finding of waiver); *Aramony v. United Way of America*, 969 F. Supp. 226, 237 (S.D.N.Y. 1997) (“[A] request for the return of the privileged material within twenty-four hours of learning of the inadvertent production weighs against a loss of privilege.”); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 445 (S.D.N.Y. 1995) (no waiver of privilege by inadvertent production where “[a]s soon as plaintiffs’ counsel were alerted to the production [of the privileged documents], they asserted the privilege and sought the return of the documents”).

Longer delays have resulted in a determination that the privilege or protection was waived. *See e.g.*, *North American Rescue Products, Inc. v. Bound Tree Medical, LLC*, No. 2:08-CV-101, 2010 WL 1873291, at *8 (S.D. Ohio May 10, 2010) (Rule 502) (three month delay between discovery of inadvertent production and assertion of privilege was not prompt); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 699-700 (S.D. Fla. 2009) (Rule 502) (three-week lag time to assert a privilege weighed in favor in finding a waiver of privilege); *Relion, Inc. v. Hydra Fuel Cell Corp.*, No. CV06-607-HU, 2008 WL 5122828, at *3 (D. Or. Dec. 4, 2008)

(Rule 502) (four-month delay between discovery of production of privileged documents and assertion of privilege does not disprove waiver); *LaSalle Bank Nat. Ass'n v. Merrill Lynch Mortg. Lending, Inc.*, No. 04 Civ. 5452 (PKL), 2007 WL 2324292, at *3-5 (S.D.N.Y. Aug. 13, 2007) (one month delay between discovery of production and assertion of privilege contributes to finding of waiver); *S.E.C. v. Cassano*, 189 F.R.D. 83, 84-86 (S.D.N.Y. 1999) (when producing party granted request by receiving party for immediate copying of one produced document out of fifty boxes without determining contents of document, “no excuse” for twelve day delay by producing party to inspect document to discover contents); *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996) (two weeks reviewing copy of the produced documents in an attempt to determine how the inadvertent disclosure occurred before sending letter requesting the return of the documents followed by another two weeks preparing motion for protective order supports finding that “attempt to rectify the error was lax at best”); *Liz Claiborne, Inc. v. Mademoiselle Knitwear, Inc.*, No. 96 Civ. 2064 (RWS), 1996 WL 668862, at * 5 (S.D.N.Y. Nov. 19, 1996) (“Here, Plaintiffs’ counsel discovered its disclosure of work product within twenty-four hours. Counsel immediately asserted work product privilege in objecting to deposition questions based on the Privileged Notes. However, Plaintiffs’ counsel waited a month before requesting that Mademoiselle return the Privileged Notes. Plaintiffs’ delay in requesting the return of the privileged documents supports a finding of waiver.”).

This case is similar to *Kandel v. Brother Intern. Corp.*, *supra*. The producing party in *Kandel* had also retained a consultant to assist it with the identification of privileged and protected documents. When the party learned that it had inadvertently produced protected and privileged documents, it *immediately* contacted its consultant to run omitted searches. In what appears to be a shorter period than the twelve days PANYNJ delayed before contacting its consultant, the producing party sent the receiving party a letter listing the inadvertently produced documents and asking for their return. It is also similar to *Harmony Gold* where the court determined that a two week delay before sending a letter requesting return of the documents was “lax at best.” Furthermore, by November 4, 2008, it was clear to PANYNJ that the parties would not be able to reach a compromise regarding return of some, if not all, of the documents. (Loiseau Decl. ¶ 16 and Exhibit J.) PANYNJ did not take the reasonable step of filing a motion seeking return of the documents, but waited to respond to the motion for determination of claims of privilege Maher filed on November 12, 2008.

Based on the foregoing, I find that PANYNJ has not established that it promptly took reasonable steps rectify the error within the meaning of Rule 502.

4. Conclusion.

PANYNJ has established some, but not all, of the elements of Rule 502(b). Therefore, I conclude that PANYNJ waived the attorney client privilege and work product protection for the documents listed in Attachment A to this Memorandum and Order.

C. What is the extent of the waiver?

Rule 502(a) provides:

When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.

Fed. R. Evid. 502(a). As found above, PANYNJ's disclosure was inadvertent; that is, not intentional. Therefore, the waiver is limited to the documents produced and does not extend to undisclosed communications or information.

IV. CONCLUSION ON MAHER'S RULE 26(b)(5)(B) MOTION.

PANYNJ has established that Documents 1994, 1998, 2019, and 2020 are protected by attorney-client privilege and Documents 1989, 1990, 1991, 1992, 1993, 2008, 2009, 2010, 2012, 2013, 2014, 2015, and 1994 are protected by attorney-client privilege.

Maher commenced this proceeding on June 3, 2008, and it was pending on September 19, 2008, when Federal Rule of Civil Procedure 502 went into effect. PANYNJ produced the documents at issue on August 29, 2008. For the reasons stated above, it is just and practicable to apply Rule 502 to this dispute.

PANYNJ has established that it inadvertently produced privileged and protected documents and that it took reasonable steps to prevent disclosure. PANYNJ has not established that it promptly took reasonable steps to rectify the error once it learned of the inadvertent production. On September 25, PANYNJ identified six privileged or protected documents. It then waited twelve calendar days after determining that some documents privileged and protected documents had been inadvertently produced before it contacted its contractor to identify other inadvertently produced documents and two more days before it contacted Maher. Regardless of whether the steps PANYNJ took to rectify the error were reasonable, it did not take those steps promptly. Therefore, PANYNJ has waived attorney-client privilege and work product protection of the documents that it produced. Because the production was inadvertent, the waiver does not extend to undisclosed communications or information. Fed. R. Evid. 502(a).

Because of this ruling, it is not necessary to reach the question of whether Document 1994 should be produced as a document used to prepare a witness for deposition.

**PART 5 – MOTION TO QUASH SUBPENAS ISSUED BY THE
PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

On September 30, 2008, PANYNJ requested issuance of six third-party subpoenas. On October 20, 2008, Maher filed a motion to quash the subpoenas. PANYNJ filed an opposition to the motion.

It appears that the information sought by the subpoenas substantially duplicates the information sought by PANYNJ in the interrogatories and requests for production addressed in Part 3 above. If PANYNJ receives this information through the production ordered by Part 3, it may not be necessary to require the third parties to incur the expense of producing the information. Therefore, I will defer ruling on Maher's motion to quash the subpoenas pending PANYNJ's receipt and review of the information it receives pursuant to Part 3. On or before August 20, 2010, PANYNJ shall file a notice stating whether it still seeks the information described in the subpoenas.

**PART 6 – MAHER TERMINALS, LLC'S MOTION TO COMPEL
PRODUCTION OF EVIDENCE ON CERTAIN BACKUP TAPES FROM THE
PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

On November 19, 2008, Maher filed a motion to compel PANYNJ to produce information stored on a series of backup tapes containing information created before September 11, 2001. PANYNJ file an opposition to the motion that contains what Maher characterizes as a motion to shift to Maher the costs of retrieving the information from the backup tapes if their production is ordered.

I will defer ruling on Maher's motion to compel production of the evidence on the tapes.

ORDER

Upon consideration of Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey and its attachments, the Memorandum in Opposition to Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey and its attachments, and the record herein, and for the reasons stated above, it is hereby

ORDERED that Maher Terminals, LLC's Motion to Compel Production from the Port Authority of New York and New Jersey be **GRANTED IN PART AND DENIED IN PART**. On or before August 6, 2010, respondent Port Authority of New York and New Jersey shall serve supplemental responses and the Certificate of Counsel required by Part 2.

Upon consideration of The Port Authority of New York and New Jersey's Motion to Compel Discovery from Complainant and its attachments, Maher Terminals, LLC Reply In Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order and its attachments, and the record herein, and for the reasons stated above, it is hereby

ORDERED that The Port Authority of New York and New Jersey's Motion to Compel Discovery from Complainant be **GRANTED IN PART AND DENIED IN PART**. On or before August 6, 2010, complainant Maher Terminals, LLC shall serve the supplemental responses and Certificate of Counsel required by Part 3. It is

FURTHER ORDERED that Maher's Motion for Protective Order be **DENIED**.

Upon consideration of Maher Terminals, LLC's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ and its attachments, the Memorandum in Opposition to Complainant's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents and its attachments, and the record herein, and for the reasons stated above, it is hereby

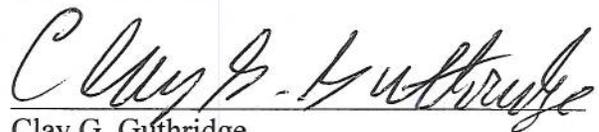
ORDERED that Maher Terminals, LLC's Rule 26(b)(5)(B) Motion for Determination of Claims of Privilege and Determination of Waiver of Privilege of Certain Documents Produced to Maher by PANYNJ be **GRANTED IN PART AND DENIED IN PART**. Respondent Port Authority of New York and New Jersey has waived attorney-client privilege and work product protection for the documents identified in Attachment A to this Memorandum and Order. Because the production was inadvertent, the waiver does not extend to undisclosed communications or information.

Upon consideration of Maher Terminals, LLC's Motion to Quash Subpenas Issued by the Port Authority of New York and New Jersey and its attachments, the Port Authority of New York and New Jersey's Opposition to Maher Terminals, LLC's Motion to Quash Subpenas Issued by the Port Authority of New York and New Jersey and its attachments, and the record herein, and for the reasons stated above, it is hereby

ORDERED that consideration of the motion be **DEFERRED**. On or before August 6, 2010, respondent Port Authority of New York and New Jersey shall serve supplemental responses and the Certificate of Counsel required by Part 5.

Upon consideration of Maher Terminals, LLC's Motion to Compel Production of Evidence on Certain Backup Tapes from the Port Authority of New York and New Jersey and its attachments, Memorandum in Opposition to Maher Terminals, LLC's Motion to Compel Production of Evidence on Certain Backup Tapes from The Port Authority of New York and New Jersey, and the record herein, it is hereby

ORDERED that consideration of the motion be **DEFERRED**.



Clay G. Guthridge
Administrative Law Judge

Maier Terminals, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
172	Draft stipulation prepared by inside counsel in connection with litigation	Unknown			5/15/2008	WP	Inadvertently produced at 08PA01604069 [requested return of document on 10/9/08]	
191	Draft letter to opposing counsel prepared by inside counsel in connection with litigation	Burke, Donald	Richter, James		5/15/2008	AC/WP	Inadvertently produced at 08PA01604070 [requested return of document on 10/9/08]	
199	Draft letter to Maier counsel prepared by inside counsel in connection with litigation	Burke, Donald			5/16/2008	WP	Inadvertently produced at 08PA01604074 [requested return of document on 10/9/08]	
207	Draft pleading prepared by inside counsel in connection with litigation	Burke, Donald			5/17/2008	WP	Inadvertently produced at 08PA01604076 [requested return of document on 10/9/08]	
243	Draft verified complaint prepared by inside counsel in connection with litigation	Unknown			5/17/2008	WP	Inadvertently produced at 08PA01604753 [requested return of document on 10/9/08]	
246	Draft pleading prepared by inside counsel in connection with litigation	Unknown			6/5/2008	WP	Inadvertently produced at 08PA01604767 [requested return of document on 10/9/08]	08PA01765917
1989	Draft memorandum re: Maier-APM issues prepared in connection with litigation	Unknown			2/26/2008	WP	Inadvertently produced at 08PA01442836 [requested return of document on 10/9/08]	

Maier Terminals LLC v. Port Authority of New York and New Jersey, FMC No. 08-03 (ALJ July 23, 2010) (Memorandum and Order on Discovery Motions)
 Attachment A

Maher Terminix, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
1990	Draft memorandum re: Maher-APM issues prepared in connection with litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01443407 [requested return of document on 10/9/08]	
1991	Draft memorandum re: Maher-APM issues prepared in connection with litigation	Unknown			2/20/2008	WP	Inadvertently produced at 08PA01443052 [requested return of document on 10/9/08]	
1992	Presentation re: APM settlement discussions prepared at the request of counsel in connection with pending litigation	Unknown			3/12/2008	WP	Inadvertently produced at 08PA00377886 [requested return of document on 10/9/08]	
1993	Presentation re: APM settlement discussions prepared at the request of counsel in connection with pending litigation	Unknown			1/23/2008	WP	Inadvertently produced at 08PA00382008 [requested return of document on 10/9/08]	
1994	Memorandum from counsel re: 07-01 discovery matters	Donald Burke	Richard Larrabee	J. Begley, D. Buchbinder, C. Hartwyk, C. McIntyre	7/27/2007	AC/WP	Inadvertently produced at 08PA01442865 [requested return of document on 10/9/08]	
1995	Draft chronology prepared at the request of counsel in anticipation of litigation	Robert Evans	Dennis Lombardi, Kenneth Spain	Donald Burke	1/25/2008	AC/WP	Inadvertently produced at 08PA00382016 [requested return of document on 10/9/08]	

Maher Terminals, LLC v. The Port Authority of New York and New Jersey LLC; 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
1996	Draft chronology prepared at the request of counsel in anticipation of litigation	Robert Evans			Undated	WP	Inadvertently produced at 08PA01435217 [requested return of document on 10/9/08]	
1997	Correspondence from counsel re: APM lease language with attached excerpt from lease	Donald Burke	Evans, Robert; Larrabee, Richard	Hartwyk, Chris; Israel, Rudy; Kirin, Jason; Lombardi, Dennis; Saporito, Andrew; Spahn, Kenneth	1/22/2008	AC	Inadvertently produced at 08PA00382000 [requested return of document on 10/9/08]	
1998	Correspondence re: APM lease language reflecting legal advice of counsel	Evans, Robert	Saporito, Andrew	Spahn, Kenneth; Lombardi, Dennis	1/23/2008	AC	Inadvertently produced at 08PA00381997 [requested return of document on 10/9/08]	
1999	Correspondence among counsel re: 07-01 litigation	Hartwyk, Chris	Burke, Donald	Begley, James; Larrabee, Richard; Lombardi, Dennis	1/22/2008	AC	Inadvertently produced at 08PA00381995 [requested return of document on 10/9/08]	
2000	Correspondence among counsel re: 07-01 litigation	Hartwyk, Chris	Burke, Donald	Begley, James; Larrabee, Richard; Lombardi, Dennis	1/23/2008	AC	Inadvertently produced at 08PA00381999 [requested return of document on 10/9/08]	
2001	Draft Request for Admissions	Unknown			Unknown	WP	Inadvertently produced at 08PA0037927 [requested return of document on 10/9/08]	

Maher Terminals, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2002	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA00377924 [requested return of document on 10/9/08]	
2003	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442838 [requested return of document on 10/9/08]	
2004	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442842 [requested return of document on 10/9/08]	
2005	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442855 [requested return of document on 10/9/08]	
2006	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442881 [requested return of document on 10/9/08]	
2007	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01442896 [requested return of document on 10/9/08]	
2008	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01443872 [requested return of document on 10/9/08]	

Maher Terminals, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2009	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01443882 [requested return of document on 10/9/08]	
2010	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01604035 [requested return of document on 10/9/08]	08PA01604031
2011	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01604045 [requested return of document on 10/9/08]	08PA01604060
2012	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA00012963 [requested return of document on 10/9/08]	
2013	Draft third supplemental agreement with APM settling 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA00193330 [requested return of document on 10/9/08]	
2014	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01723734 [requested return of document on 10/9/08]	
2015	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA01723745 [requested return of document on 10/9/08]	

Maher Terminals, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2016	Draft pleading from 07-01 litigation	Unknown			Unknown	WP	Inadvertently produced at 08PA00377923 [requested return of document on 10/9/08]	
2017	Draft 07-01 Pleading	Unknown			1/10/2008	WP	Inadvertently produced at 08PA01435818 [requested return of document on 10/9/08]	
2018	Email to counsel re: future maintenance issues with APM, Maher and PUNCT	Evans, Robert	Berry, John; Nguyen, Paul	Raczynski, Jerri; Duening, Patricia; Israel, Rudy; Saporito, Andrew; Van Toll, Aric	2/14/2003	AC	Inadvertently produced at 08PA01436194 [requested return of document on 10/9/08]	
2019	Board proposal prepared by counsel re: Maher lease	J. Berry			6/21/2002	AC	Inadvertently produced at 08PA01437111 [requested return of document on 10/9/08]	
2020	Board proposal prepared by counsel re: Maher lease	J. Berry			10/18/2002	AC	Inadvertently produced at 08PA01437181 [requested return of document on 10/9/08]	
2021	Chronology re: Maher GOB deal reflecting legal advice of counsel	Unknown			Undated	AC	Inadvertently produced at 08PA01437223 [requested return of document on 10/9/08]	
2022	Email correspondence with counsel re: draft Maher lease (EP-250)	Scolto, Elaine	Berry, John	Evans, Robert	11/15/2002	AC	Inadvertently produced at 08PA01437504 [requested return of document on 10/9/08]	

Maier Terminals, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2023	Email correspondence reflecting comments of counsel to Revised Lease EP-250	Scollo, Elaine	Evans, Robert	Lombardi, Dennis; Raczynski, Jerri	5/19/2003	AC	Inadvertently produced at 08PA01437508 [requested return of document on 10/9/08]	
2024	Memorandum to counsel re: Request for Revisions to EP-250	Scollo, Elaine	Berry, John		3/8/2002	AC	Inadvertently produced at 08PA01437571 [requested return of document on 10/9/08]	
2025	Email from counsel re: PA tenant insurance requirements	Berry, John	Fung, Winsun	Evans, Robert; Lombardi, Dennis; Raczynski, Jerri; Scollo, Elaine	2/10/2003	AC	Inadvertently produced at 08PA01437603 [requested return of document on 10/9/08]	
2026	Email to counsel seeking legal advice re: EP-250	Scollo, Elaine	Berry, John; Evans, Robert; Lombardi, Dennis; Raczynski, Jerri		1/3/2003	AC	Inadvertently produced at 08PA01438047 [requested return of document on 10/9/08]	
2027	Email correspondence with counsel re: Maier/GOB negotiations	Scollo, Elaine	Berry, John	Evans, Robert; Lombardi, Dennis; Raczynski, Jerri	11/6/2002	AC	Inadvertently produced at 08PA01438048 [requested return of document on 10/9/08]	
2028	Email correspondence with counsel re: Maier Right of Entry	Berry, John	Scollo, Elaine	Evans, Robert; Raczynski, Jerri	10/31/2002	AC	Inadvertently produced at 08PA01438063 [requested return of document on 10/9/08]	
2029	Email correspondence reflecting legal advice re: GOB-Maier Right of Entry	Scollo, Elaine	F. Martinez	Evans, Robert; Raczynski, Jerri	10/29/2002	AC	Inadvertently produced at 08PA01438065 [requested return of document on 10/9/08]	

Mohr Terminal, LLC v. The Port Authority of New York and New Jersey LLC, 08-03 (FMC)
 Inadvertently Produced Documents
 Privilege Log Entries

DOC	DESCRIPTION	AUTHOR	RECIPIENTS	CC	DATE	PRIV	BATES NUMBER	RELATED DOCS
2037	Draft pleading from 07-01 litigation	unknown			5/27/2008	WP	Inadvertently produced at 08PA01442857 [requested return of document on 10/9/08]	
2038	Draft pleading from 07-01 litigation	unknown			3/5/2007	WP	Inadvertently produced at 08PA01442928 [requested return of document on 10/9/08]	
2039	Draft pleading from 07-01 litigation	unknown			3/5/2007	WP	Inadvertently produced at 08PA01442941 [requested return of document on 10/9/08]	
2040	Draft pleading from 07-01 litigation	unknown			4/21/2008	WP	Inadvertently produced at 08PA01443417 [requested return of document on 10/9/08]	