UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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YOEL WEISSHAUS,

Plaintiff,

11 – CV – 6616 (RKE)

-against-

PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Defendant.
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND ITS APPLICATION FOR STAY OF PROCEEDINGS

Of Counsel:
Kathleen Gill Miller

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PRELIMINARY STATEMENT

The Port Authority of New York and New Jersey (the "Port Authority") submits this memorandum of law in support of its motion to dismiss Plaintiff, Yoel Weisshaus's Amended Complaint, or in the alternative, to stay proceedings pending a decision on the pending motion for summary judgment in *Automobile Club of New York, Inc. v. The Port Authority of New York and New Jersey*, No. 11 – CIV – 6746 (S.D.N.Y. filed Sept. 27, 2011) (the "*AAA* case"). Plaintiff's Amended Complaint *inter alia* challenges the constitutionality, under the dormant Commerce Clause, of the Port Authority's toll and fare increases, in effect since September 18, 2011, on all the Port Authority's bridges and tunnels within the Interstate Transportation Network ("ITN"). *See* U.S. Const., Art. I, § 8, cl. 3; *see also* Exhibit A to the Declaration of Kathleen Gill Miller dated May 8, 2014 ("Miller Decl.") the Amended Complaint.

This action should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which this Court may grant relief, since the complaint is factually deficient as to the dormant Commerce Clause claim, which is the only allowable claim. The decision of the Second Circuit in this case expressly limited the Plaintiff's Amended Complaint to a claim under the dormant Commerce Clause (a copy of that decision is annexed as Exhibit C to the Miller Decl.). The Plaintiff has failed to plead facts that remotely suggest that the Port Authority's toll increases fail the standard of reasonableness under *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), which the Second Circuit deemed applicable here. Plaintiff's entire case hinges on erroneous interpretations of press releases, conclusory statements, and allegations that, even under a liberal standard, do not implicate the dormant Commerce Clause. All of the toll revenues are completely absorbed by the ITN to the benefit of its users. Since the cost of maintaining the ITN in a state of good repair, operating expenses and essential capital

reinvestment leave the ITN with a deficit even after the toll increases, there are no funds available to divert the projects outside the ITN. Consequently, the increases do not discriminate against interstate commerce.

The Plaintiff's claim of discrimination under 42 U.S.C. § 1983 (first cause of action) and due process claims under the Fifth and Fourteenth Amendments (fifth cause of action) must also be dismissed pursuant to the Second Circuit's remand order and mandate expressly limiting the Amended Complaint to the claim under the dormant Commerce Clause. In addition, the Second Circuit directly addressed and affirmed Judge Batts' dismissal of the Plaintiff's § 1983 claim that the toll increase violated his right to travel. Miller Decl., Ex. C. Plaintiff's due process claims with respect to his Freedom of Information Law Act ("FOIL") requests are not properly before this Court under the remand order. Moreover, they are not legally cognizable because the Plaintiff does not have a protected property interest in the FOIL documents he requested.

Finally, a stay of these proceedings is warranted pending the decision in the *AAA* case to conserve judicial resources and avoid burdening a government agency with the expense of duplicative discovery. The Port Authority, a defendant in both matters, has participated in extensive and costly discovery for two-years in the *AAA* case. The *AAA* case, which contains a dormant Commerce Clause claim identical to the one Plaintiff attempts to raise here, is in the final phase of discovery. If the current matter is not stayed, the Port Authority will be forced to go through duplicative, costly, and burdensome discovery; a burden that will impact the Court as the parties seek rulings on disputed matters and create an inefficient use of the Court's resources.

STATEMENT OF FACTS

A) Procedural History

On September 19, 2011, the Plaintiff, Yoel Weisshaus, filed his original Complaint in this action against the Port Authority challenging the constitutionality of the toll increases implemented by the Port Authority in 2011. *See* Miller Decl., Ex. B, Complaint. The Complaint was never served on the Port Authority. On October 24, 2011, by order of District Judge Deborah A. Batts, this Court dismissed the Complaint *sua sponte* for failure to state a claim on which relief may be granted and on immunity grounds for other defendants. *See* Miller Decl., Ex. D, Judge Batts's Order of Dismissal. On December 8, 2011, by order of District Judge Loretta A. Preska, this Court denied Plaintiff's motion for reconsideration. *See* Miller Decl., Ex. E, Judge Preska's Order. The Plaintiff appealed the dismissal of his complaint, and the Second Circuit, on September 20, 2012, affirmed in part, but remanded the matter to the district court to determine whether the Plaintiff adequately pleaded a constitutional challenge to the reasonableness of the amount of the tolls under the dormant Commerce Clause, or should be granted leave to amend the claim. *See* Miller Decl., Ex. C. On December 19, 2013, this Court granted plaintiff's request that he be permitted to file an Amended Complaint. On December 20, 2013, the Plaintiff filed his Amended Complaint. Service was effected on March 10, 2014 by the U.S. Marshal's Service by mail.

B) The Factual History of the Toll Increase

The Port Authority, a bi-state governmental agency created by compact between the States of New York and New Jersey with the consent of the Congress of the United States, was created, in part, to better coordinate the terminal, transportation and other facilities of commerce in, about, and through the Port of New York. *See* McKinney's N.Y. Unconsol. Laws § 6401, *et*

seq., N.J.S.A. 32:1-1 *et seq.* As part of its essential governmental functions, the Port Authority is responsible for the construction, maintenance, operation and control of all vehicular bridges and tunnels connecting New York and New Jersey, which lie within an approximate 25-mile radius of the Statue of Liberty (*i.e.* the Bayonne Bridge, the Outerbridge Crossing, the Goethals Bridge, the George Washington Bridge, the Holland Tunnel and the Lincoln Tunnel). *See* McKinney's N.Y. Unconsol. Laws § 6501, *et seq.*, N.J.S.A. 32:1-118 *et seq.* These bridges and tunnels, together with the three Port Authority bus terminals, the Port Authority Trans-Hudson interurban rapid transit system between New York and New Jersey ("PATH") and the Trans-Hudson Ferry Service have been expressly held to constitute the Port Authority's "integrated, interdependent transportation system" ("ITN"). *See*, *Automobile Club of New York, Inc., et al. v. The Port Auth. Of New York and New Jersey*, 887 F.2d 417, 418, 421, 423 (2d Cir. 1989) (quoting *Automobile Club of New York, Inc., et al. v. Port Auth. Of New York and New Jersey*, 706 F. Supp. 264, 280 (S.D.N.Y. 1989)).

The Port Authority is governed by a board of twelve commissioners, six appointed by the respective governors of each state with the consent of that state's senate. The actions the commissioners take at meetings, which are open to the public, are subject to gubernatorial review for a period of ten business days. The governors may veto the action of the commissioners from their respective state at any time during the ten-business-day period.

In accordance with the bi-state statutes, the Port Authority is authorized to collect tolls at its bridge and tunnel facilities. *See* McKinney's N.Y. Unconsol. Laws § 6501, *et seq.*, N.J.S.A. 32:1-118 *et seq.* On August 5, 2011, the Port Authority announced in a press release a proposed toll increase on its tunnels and bridges and a fare increase for PATH. Pursuant to long-established policy, the Port Authority published notices in newspapers in both states of the

proposed toll and fare increases. *See* Miller Decl., Ex. H, Eastman Aff.¶ 2. The notices informed the public that hearings would be held at designated locations to provide the public with an opportunity to comment on the proposed toll and fare increases.

On August 19, 2011, the Port Authority Board of Commissioners met and approved a toll increase schedule beginning on September 18, 2011 that was modified from the initially proposed increases. *See* Miller Decl., Ex. H, Eastman Aff., ¶ 3. The initially proposed increases were reduced based upon a review of the comments received during public hearings and the guidance of the governors of New York and New Jersey, to the following: (1) tolls on cars using E-Z Pass® would be $7.50 for off-peak and $9.50 for peak effective September 18, 2011, and will increase 75 cents in December of each year from 2012-2015 for a total increase of $4.50 over five years; (2) tolls on cars paying with cash would increase to $12.00, and increase $1.00 in December each year through 2015. Fares on PATH will increase 25 cents per year for the next four years. After the Board of Commissioners approved the toll and fare increases, the Minutes of such action were forwarded to the Governors of New York and New Jersey for review. The ten-business-day gubernatorial review period expired without the exercise of a veto by either governor, and the increases went into effect on September 18, 2011. *See* Miller Decl., Ex. H, Eastman Aff, ¶¶ 4-5.

The toll and fare increases were necessitated by the Preliminary Capital Plan for maintaining the ITN in a state of good repair, providing security, and replacing aging infrastructure where necessary. *See* Miller Decl., Ex. I, Fabiano Aff. ¶¶ 2-5. Most of the facilities in the ITN are over fifty years old and require significant ongoing maintenance, repair, and security upgrades. The increased volume of traffic and the size of the vehicles has caused deterioration of the bridges, tunnels, and bus terminals, which the Port Authority determined

must be addressed by substantial capital expenditures over the next ten years. While the Preliminary Capital Plan of 2011 contemplated $10.8 billion in expenditures for the ITN, this number has increased in the intervening years.

The $27.6 billion Capital Plan for 2014-2023, which was approved by the Board of Commissioners in February, 2014, includes $11.307 billion in capital expenditures for the ITN between 2014 – 2023. (The Capital Plan is available on the Port Authority's website and is also attached as Exhibit L to Miller Decl.) Capital expenditures for the ITN planned under the Preliminary Capital Plan, have been adopted in the new Capital Plan with some variation in the earlier estimated costs, which resulted in an overall one billion dollar increase. For example, the following capital projects within the ITN are scheduled over the next ten years or have already been undertaken: (1) George Washington Bridge – replace cables and suspenders at an estimated cost of $933 million; (2) Bayonne Bridge elevation and improvement at an estimated cost of $1.1billion; (3) PATH refurbish and replace infrastructure at an estimated cost of $3.3 billion; (4) Lincoln Tunnel reconstruction of the helix at an estimated cost of $1.4 billion, plus replacing access roadway infrastructure at an estimated cost of $1.7 billion for a total capital expenditure of $3.1 billion. These projects were also in the Preliminary Capital Plan which is discussed and analyzed in the affidavit of Michael Fabiano, sworn to November 4, 2011 (Ex. I to Miller Decl.).

The cash flow analyses prepared by the Port Authority in the *AAA* case based on the Preliminary Capital Plan show that every dollar generated by the toll and fare increases is absorbed by the ITN. *See* Miller Decl., Ex. I, Fabiano Aff. at ¶¶ 13-14, Ex E. The cash flow analysis for the ITN also shows that for 2007-2010, after deducting the cost of operations and allocated expenses, direct payment of capital expenditures, debt service allocated to the Port Authority's Consolidated Bonds issued for capital expenditures and private financing of the

Goethals Bridge replacement project and payments into the General Reserve Fund required as a result of the issuance of such Consolidated Bonds and private financing, the ITN showed a loss of $636 million. *See* Miller Decl., Ex. I, Fabiano Aff. ¶¶ 11. The Port Authority generally issues 30-year tax exempt Consolidated Bonds to finance a portion of its capital projects. Utilizing the Preliminary Capital Plan, it was projected based on payment of ITN capital expenditures by means of 50% cash (direct payment)/50% debt, using the identical amount of revenues, expenses, net revenues, current interest payments, current principal payments and the private financing of the Goethals Bridge replacement project that there would be $5.393 billion in cash payments. The balance of $5.393 billion of the then estimated $10.786 billion for the ITN would be financed by the issuance of Consolidated Bonds which are repaid over a 30-year period and the private financing of the Goethals Bridge replacement project. The spreading of these payments over 30 years reduced the net loss at year-end 2020 to $51 million. *See* Miller Decl., Ex. I, Fabiano Aff. at ¶¶ 12-13. The estimated increase over a billion dollars in the expenditures for the ITN does not alter the fact that the ITN operates at a deficit. The ITN will continue to operate at this deficit over the next decade *even with* the toll increase, and it is estimated that the future deficit will be as substantial as it was under the Preliminary Capital Plan.

POINT I

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED SINCE PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER THE DORMANT COMMERCE CLAUSE

Rule 12(b)(6) permits dismissal of a complaint "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 129 S.Ct. at 1949. "Thus the Court is 'not bound to accept as true a legal conclusion couched as a factual allegation' and 'threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Seifts v. Consumer Health Solutions, LLC*, 2011 WL 4542905, at *3 (S.D.N.Y. Sept 30, 2011) (quoting *Ashcroft*, 129 S.Ct. at 1949). If plaintiff's factual allegations "permit no reasonable inference stronger than the 'mere possibility of misconduct,' the complaint should be dismissed." *Seifts*, 2011 WL 4542905 at *3 (quoting *Starr v. Sony BMG Music Entertainment*, 595 F.3d 314 at 321 (2d Cir. 2010).

A) Plaintiff Fails to Allege Any Facts to Support His Claim That The Toll Increases Are Not Being Applied To The Capital And Operating Needs Of The ITN

Here, Plaintiff relies solely on a misinterpretation of a press release dated August 19, 2011 to support his claims. *See* Miller Decl., Exs. A and M to the Amended Complaint and ¶¶ 27,30. For example, Plaintiff alleges that the toll increases, and revenues therefrom, will fund non-ITN projects. *See* Miller Decl., Ex. A to the Amended Complaint and ¶¶ 27-38, 53-54, 88-102. However, this is an incorrect reading of the press release of August 19, 2011. The press release discusses the capital needs and expenditures for *all* Port Authority facilities over the next ten years, including the overall $25.1 billion budget to cover all the capital programs. *See* Miller Decl., Ex. J, Fabiano Reply Aff., ¶ 3. The statements contained in the press release of August 11, 2011, neither expressly assert, nor imply, that toll revenues will fund any project outside of the ITN. Plaintiff, throughout his complaint, fails to allege any facts, beyond conclusory statements and recitation of the phrases, that the toll increases are not based on the "fair approximate use of the facilities" or are "excessive in relation to the benefit conferred."

While Plaintiff is correct that the elevation of the Bayonne Bridge is to meet the need for the larger container ships to have access to Port Newark, the project includes improvement of the span deck and New York and New Jersey access structures. *See* Exhibit L to Miller Decl. p. 9. These improvements directly benefit the users of the bridge. Moreover, the alternative, which would be the removal of the bridge entirely, would limit access to Staten Island and negatively impact on the ITN as a whole by increasing congestion and decreasing efficiency. Beyond his argument about the Bayonne Bridge, Plaintiff does not address any of the specific projects that absorb what the ITN generates as revenue, except to assert that various capital projects each require the joint legislation authorization of both states which the Port Authority lacks. *See* Amended Complaint, ¶¶ *28-29, 32-33, 35*. These allegations that the Port Authority is acting in excess of its jurisdiction, were not made in the original complaint and therefore, as discussed *infra* in Point II, should not be permitted here. Moreover, this type of claim can only be brought against a state agency under a CPLR Article 78 proceeding which is subject to a four month statute of limitations. Plaintiff is untimely and in the wrong forum for those claims.

Plaintiff has not alleged any facts that support a claim that monies are being diverted to rebuild the World Trade Center. There are precisely two paragraphs in the Amended Complaint that reference the World Trade Center as follows: 1) ¶ 37 "a facility of the World Trade Center has nothing to do with the passage of surface river crossings between New Jersey and the City of New York"; ¶ 95 "Defendants' purpose of rebuilding the World Trade Center exceeds the approximation of passage on a surface river crossing and is excessive to the benefit conferred". These oblique and conclusory statements do not meet the factual pleading standard set by the Supreme Court in *Iqbal, supra*. Plaintiff makes similar statements about Port infrastructure projects (¶ 94); airport runway and taxi modernization projects (¶ 92) and Port-wide security

enhancements (¶ 93). Nowhere does plaintiff plead facts to support a claim that toll increases are being used for these projects. Plaintiff has failed to support his claims with any financial data, although he has had access to the Port Authority's year-end financial statements which are posted on its website for the years 2003-2013.

Plaintiff's speculation that tolls are being diverted outside the ITN is rebutted by the Port Authority's cash flow analysis and Preliminary Capital Plan for 2011-2020, which demonstrates that even with the increases and 50% financing of the necessary capital expenditures, the Port Authority was projected to lose $51 million by the end of 2020. Miller Decl., Ex. I, Fabiano Aff. ¶¶ 13-14. Under the 2014-2023 capital plan adopted by the Board, the ITN will continue to show a deficit. No funds can be taken from the ITN for other projects, because there are no excess funds

B) The Toll Increases Do Not Violate the Dormant Commerce Clause Because They Are Being Spent on the ITN

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. The Supreme Court has long-held that this power contains negative implications, commonly referred to as the "dormant Commerce Clause" restricting States' power to regulate interstate commerce. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Supreme Court first announced its test for determining the constitutionality of airport user fees imposed on commercial airlines. The Supreme Court stated that:

> [A] charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed . . . so long as the toll is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate

> commerce nor excessive in comparison with the governmental benefit conferred. *Id.* at 714, 716-17.

In *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), the Supreme Court went back to its *Evansville* decision and formulated a three-prong test to determine the reasonableness of fees for the use of state-provided facilities. Under the Court's test, a fee is reasonable and constitutionally permissible "if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Id.* at 369 (citing *Evansville-Vandenburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972)). In 2009, the Second Circuit endorsed the *Northwest Airlines* test to evaluate the constitutionality of highway toll pricing. *See Selevan v. New York Thruway Authority*, 584 F.3d 82, 98 (2d Cir. 2009).

The Second Circuit has recognized that both the "fair approximation" and "excessiveness" prongs are related. *See Bridgeport and Port Jefferson Steamboat, Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86 (2d Cir. 2009) (addressing the two prongs together because "the 'fair approximation' and the 'excessiveness' criteria substantially overlap"). In *Bridgeport* the Court also recognized that "[a] user fee . . . may reasonably support the budget of a governmental unit that operates facilities that bear at least a 'functional relationship' to facilities used by the fee payers." *Id.* at 87. The Second Circuit has already held that because of a functional relationship, "the Port Authority's bridges, tunnels, bus terminals, bus programs and PATH constitute an 'integrated, interdependent transportation system'", which the Port Authority now refers to as the ITN. *Automobile Club of New York, Inc. v. Port Authority*, 887 F.2d 417, 423 (2d Cir. 1989).

According to the ten-year cash flow analysis prepared for the *AAA* case, all proceeds of the toll and fare increases are absorbed by the ITN, and are not, as the Plaintiff obliquely claims,

going into projects unrelated to the ITN (*i.e.* the WTC redevelopment, and airport runway and taxiway modernizations). At the time of the toll increases in 2011, it was estimated, based on necessary capital expenditures of $10.876 billion contemplated in the Preliminary Capital Plan 2011-2020, including the toll and fare increases, that the ITN would lose $51 million by the end of 2020. *See* Miller Decl., Ex. I, Fabiano Aff. at ¶ 13. The ten-year cash flow analysis prepared in the *AAA* case demonstrates that, with the system operating at a loss, there are no excess funds for other projects, even with the toll and fare increases and the use of bonds proceeds to fund 50% of the expenditures in the Preliminary Capital Plan. Based on projections, the increased spending for the ITN in the 2014-2023 Capital Plan will still produce a substantial deficit. In essence, the Port Authority must support the ITN through revenue obtained from sources other than the tolls and fares.

This Court has recognized that the "fair approximation" prong requires reasonableness, not a "perfect fit", and "broad proportionality" instead of "precise tailoring." *Janes v. Triborough Bridge and Tunnel Authority*, 2013 WL 5630629, *18 (S.D.N.Y. October 16, 2013) (holding that this prong was satisfied despite different toll amounts based on residency discounts). Here, all toll and fare revenues are absorbed by a system that users benefit from and depend upon. To impose a toll and fare formula based on the cost to each individual use would be unreasonable. individual use or individual circumstance would be unreasonable. Likewise, there need not be a greater benefit conferred to an individual who may pay more, such as cash customers. Instead, it suffices that "such persons benefit in fair relation to the fees or tolls they pay." *Id.* at *19-20 (noting that everyone that uses the integrated system benefits from the system, and that in the alternative, a reduction of the system would negatively affect each user and the region it serves). Of note, a comparison to tolls set in 2010 for bridges and tunnels operated by the Metropolitan

Transit Authority ("MTA") shows that the Port Authority's toll increases fall below those of the MTA. *See* Miller Decl., Ex. G, Muriello Aff., ¶¶ 1-7.

The Plaintiff claims that the size of the toll increases is burdensome on low wage workers like himself. Miller Decl., Ex. A, ¶¶ 112-16. However, even if his allegation is true it is not a basis for finding the increases unreasonable under the dormant Commerce Clause standards in *Northwest Airlines*, which requires that the toll be based on a "fair approximation of use of the facilities" and are not "excessive to the benefit conferred." Moreover, the Plaintiff concedes that he often does not pay the toll and has accrued penalties as a result. *See* Miller Decl., Ex. A, ¶ 112; *Id.* at Exhibit Q.

Because the proceeds of the toll and fare increases are absorbed by the ITN, a system that operates at a deficit even with the increases in place, the Port Authority's toll increases are based on a "fair approximation of use of the facilities" and are not "excessive in relation to the benefit conferred."

C) The Toll Increases Do Not Discriminate By Favoring In-State Residents

The toll increases here do not discriminate against interstate commerce, and in fact, fairly promote interstate commerce. The point of the "'rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism.'" *Selevan v. New York Thruway Authority*, 584 F.3d 82, 95 (2009) (quoting *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994)). Discrimination in this sense "occurs where 'an[ ] in-state commercial interest . . . is favored, directly or indirectly, by the challenged statute at the expense of out-of-state competitors.'" *Janes v. Triborough Bridge and Tunnel Authority*, 2013 WL 5630629, *15 (S.D.N.Y. October 16, 2013) (quoting *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005)). The Second Circuit has held that to state a claim for discrimination

against interstate commerce, a plaintiff must identify, as a necessary component, the in-state interest favored at the expense of the out-of-state interest. *See Selevan*, 584 F.3d at 95; *see also Grand River*, 425 F.3d at 169. In *Janes*, a recent case out of this Court, a discount program based on in-state residency was held to not discriminate against interstate commerce despite out-of-state plaintiffs having to pay the non-discount rate while traveling in-state to work. *Id.* at *16. The Court held that "that fact is insufficient to show disadvantage to an out-of-state interest" and that any burden on the plaintiffs was merely an "'incidental' burden on interstate commerce.'" *Id.* at 16. Finally, this Court has previously held that both the E-ZPass program and frequency-of-use discount programs are constitutional and do not discriminate against interstate commerce. *See Saunders v. Port Authority of New York*, 2004 WL 1077964, *2, *5 (S.D.N.Y. May 13, 2004) (dismissing Commerce Clause claim and noting that, in addition to New York and New Jersey, E-ZPass is used in five other states in the region, the discount program is not based on residency, and that the electronic toll system benefits traffic flow and non-E-ZPass drivers by relieving congestion in cash lanes).

Here, the toll increases have no object remotely related to economic protectionism, nor is there any in-state (presumably within New York) interest favored to the detriment of an out-of-state interest. The toll revenues are fully absorbed by the ITN, a non-protectionist aim that is crucial to the existence of the system and the benefit it confers on its users. The tolls are the same amount for all commuters regardless of residency. New York users are subject to the same toll increases as New Jersey users. Further, because the ITN is partially supported by the toll revenues, and the ITN is essential to commerce between New York and New Jersey, the toll increases actually impact interstate commerce in a positive manner. *See Janes* 2013 WL 5630629 at *4, *16 (reasoning that TBTA bridge tolls promote interstate commerce and benefit users by

decreasing congestion where it supports an integrated transit system that provides toll-avoiding public transit, fund infrastructure within the system, and creates an overall commuter experience that is less costly and inefficient).

Finally, Plaintiff fails to plead any facts consistent with allegations of discrimination against interstate commerce, one of the prongs under *Northwest Airlines*. A liberal reading of the Amended Complaint may construe the Plaintiff's allegations that cash payers must pay more than E-ZPass payers, that Staten Island residents pay less than non-residents on the Staten Island bridges, and that New Jersey minimum wage workers are impacted by the toll increases, as allegations of discrimination against interstate commerce. *See* Miller Decl., Ex. A, Amended Complaint at ¶¶ 58-64, 66-78, 99. However, Plaintiff fails to identify, and the Amended Complaint fails to imply, any in-state interest that is favored to the detriment of an out-of-state interest. Thus, the threshold triggering a valid discrimination claim is not reached. It is important to note, that Plaintiff's allegations that Staten Island residents enjoy a discount that non-residents do not is erroneous. The Staten Island discount program is based on frequency of use, not residency, and is open to all users of the ITN should they choose to enroll. *See* Miller Decl., Ex. A, Amended Complaint at Ex. A (Plaintiff misread the press release to represent that the discount program was based on residency); *see also Saunders*, 2004 WL 1077964, at *4 (S.D.N.Y. May 13, 2004) (holding that frequency of use discounts were constitutional and did not discriminate against non-residents). Finally, any allegations that New Jersey minimum wage workers feel a greater impact from toll increases could also exist for New York minimum wage workers. The different impact that travel costs have on different individuals does not create an issue related to discrimination against interstate commerce.

Due to the foregoing, it is clear that the toll and fare increases do not violate the dormant Commerce Clause under the *Northwest Airlines* test. They are based on a fair approximate use of the facilities, are not excessive in relation to the benefit conferred, and do not discriminate against interstate commerce.

The Port Authority respectfully submits that the second, third and fourth cause of action which assert claims under the dormant Commerce Clause should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

POINT II
PLAINTIFF'S CLAIMS OTHER THAN THE CLAIM UNDER THE DORMANT COMMERCE CLAUSE ARE IMPROPER

A) Pursuant to the Mandate Rule, the Plaintiff is Limited to Claims Under the Dormant Commerce Clause

The law-of-the-case doctrine dictates that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). A subsidiary of the law-of-the-case doctrine, the mandate rule, "governs the relationship between appellate courts and trial courts, and it controls the scope of the inquiry a trial court may make in a case remanded from a circuit court." *APL Co. Pte. Ltd. v. Blue Water Shipping U.S. Inc.*, 779 F. Supp.2d 358, 366 (S.D.N.Y. 2011) (citing *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001). "The mandate rule provides: 'where issues have been explicitly or implicitly decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court.'" *APL Co. Pte. Ltd*, 779 F. Supp.2d at 366 (citing *Burrell v. United States*, 467 F.3d 160, 165 (2d Cir. 2006). A district court, in determining which issues to consider on remand, "'should look to both the specific dictates of the remand order as well as the broader spirit of the mandate.'" *APL Co. Pte. Ltd*, 779 F. Supp.2d at 366 (quoting *Ben Zvi*, 242 F.3d at

95). The district court "'must always look to the opinion to interpret the mandate.'" *FTC v. Standard Educ. Soc'y*, 148 F.2d 931, 932 (2d Cir. 1945).

In the instant case, the Second Circuit affirmed this Court's dismissal of the Plaintiff's complaint as to all claims, except that it remanded for consideration on the sole issue of whether Plaintiff "adequately pleaded a constitutional challenge to the reasonableness of the amount of the tolls under the dormant Commerce Clause." See *Weisshaus v. The Port Authority of New York and New Jersey*, 497 Fed. Appx. 102 at *105. Miller Decl., Ex. C, Second Circuit Order. The remand order specifically instructed the district court to analyze the Plaintiff's pleadings for a dormant Commerce Clause claim under the *Northwest Airlines* standard for reasonableness of charged fees for the use of state-provided facilities. *Id.* The Second Circuit then mandated that the case is "REMANDED to the district court for further proceedings consistent with this decision." *Id. at *106.*

The specific dictates of the remand order limit the scope of this Court's analysis to the adequacy of the pleading in light of the *Northwest Airlines* reasonableness standard under the dormant Commerce Clause. The Second Circuit remanded to this Court to determine in the first instance "whether Weisshaus has adequately pleaded *such a claim* or should be granted leave to amend *the claim*.") *Id.* at *105. (emphasis added). (Exhibit C to Miller Decl.) The specificity of the remand order and its mandate demonstrate that the appellate court intended to narrow the issue before the district court and limit the claims available to the Plaintiff.

Thus, portions of the Plaintiff's Amended Complaint, to the extent it sounds in claims that go beyond a dormant Commerce Clause cause (*i.e.* references to 33 U.S.C. § 508 and the tonnage clause), are not properly before this Court and should be disregarded. Pursuant to the

mandate rule, the only claim before the district court is one for a violation of the dormant Commerce Clause under the *Northwest Airlines* reasonableness standard.

B) The Dismissal of Plaintiff's First Cause of Action Was Expressly Affirmed By The Second Circuit

In the first cause of action in the Amended Complaint, the Plaintiff purports to assert a claim under 42 U.S.C. § 1983, claiming that the toll is a "penalty" imposed on "interstate travel." Miller Decl., Ex. A, ¶ 66. In it decision in this case, the Second Circuit expressly stated that "the district court did not err in construing Weisshaus's constitutional claims as having been asserted pursuant to 42 U.S.C. § 1983." *Id.* at *104. Miller Decl., Ex.C. In affirming the dismissal of the Plaintiff's claims the Court held:

> We conclude that the district court properly dismissed Weisshaus's claims based on his constitutional right to travel insofar as it analyzed his claims under the above standard, and thus affirm the district court's dismissal of his constitutional claims to the extent that they were brought as a challenge to the Port Authority's imposition of tolls, regardless of amount. *Id.* at *104.

The Court noted that there is no constitutional right to the most convenient form of travel and that minor restrictions do not rise to the level of a denial of a fundamental right. *Id.* (citing *Torraco v. Port Authority*, 615 F.3d 129, 140-41 (2d Cir. 2010)).

Accordingly, the first cause of action must be dismissed because the Second Circuit already affirmed a dismissal of the same claim in this case.

C) Plaintiff's Claim With Respect to the Port Authority's Alleged Failure to Respond to His FOIL Request Is Outside the Scope of the Remand and Does Not Present a Legally Cognizable Claim in this Court

Plaintiff's fifth cause of action for violation of his alleged constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution was not made in the original complaint and is therefore outside the scope of the remand. Compare Miller Decl., Ex. A, ¶¶

126-136 and Ex. B.

This Court has recently held that it is without jurisdiction to consider Freedom of Information Law Act ("FOIL") claims because New York State law requires that a claimant pursue remedies in state court pursuant to a C.P.L.R. Article 78 proceeding after exhaustion of the administrative process. *See Posr v. City of New York*, 2013 WL 2419142, *14 (S.D.N.Y. June 4, 2013); *see also* N.Y. Pub. Off. Law § 89. New York State law provides adequate process to a person denied access to requested documents, and thus, absent exhaustion of that process coupled with a showing of its inadequacy, FOIL allegations do not give rise to a federal claim. *See Blount v. Brown*, 2010 WL1945858, *2 (E.D.N.Y. May 11, 2010); *see also Papay v. Haselhuhn*, 2010 WL4140430, *7-8 (S.D.N.Y. October 21, 2010).

Even assuming *arguendo* that the Plaintiff could bring his FOIL claim in this Court, the claim would still fail because he cannot meet the threshold to a Fifth and Fourteenth Amendment claim since the Plaintiff does not have a property interest in FOIL documents. *See Posr*, 2013 WL2419142 at *14 (discussing a FOIL claim under the Fifth Amendment); *see also Blount*, 2010 WL1945858 at *2 (discussing a FOIL claim under the Fourteenth Amendment). Before a due process claim is cognizable, the threshold issue is "whether the plaintiff has a property . . . interest protected by the Constitution." *Blount*, 2010 WL1945858 at *2 (quoting *Narumanchi v. Bd. Of Trustees of Conn. State. Univ.*, 850 F.2d 70, 72 (2d Cir. 1988)). Only after identification of a protected property interest, will a court consider the issue of deprivation of that interest without due process. *Id.* Courts within the Second Circuit have consistently held that a plaintiff does not have a property interest in FOIL documents; rather, a person requesting documents via FOIL merely has an expectation. *See Posr*, 2013 WL2419142 at *14; *see also Blount*, 2010 WL1945858 at *2; *Papay*, 2010 WL4140430 at *7.

Here, the Plaintiff cannot claim federal due process violations under the Fifth and Fourteenth Amendments because he has not utilized the remedies provided under New York state law. Further, pursuant to the case law in this Circuit, the Plaintiff does not have a constitutionally protected property interest in FOIL documents. Thus, he cannot meet the threshold requirement to a claim under the Fifth and Fourteenth Amendments. For the aforegoing reasons, the Plaintiff's fifth cause of action must be dismissed.

POINT III

THIS COURT SHOULD STAY THIS ACTION PENDING A DECISION IN *AUTOMOBILE CLUB OF NEW YORK, INC. V. PORT AUTHORITYOF NEW YORK & NEW JERSEY*

The Court's "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). In deciding an application for a stay the courts must "exercise . . . judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55. As stated in *Kappel v. Comfort*, 914 F.Supp 1056 (S.D.N.Y. 1996), this Court has adopted a five-factor balancing test when deciding whether to grant a stay of proceedings. With a goal of avoiding prejudice, the Court has balanced the following factors on a case-by-case basis:

> (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest. *Id.*

Of note, particularly with respect to the present case, is that a stay can be appropriate even when the parties and issues to the two causes are not identical. *See Landis*, 299 U.S. at 254-55 (refusing to limit the power to stay proceedings by requiring identical parties and issues, and

noting that although a pending action may not settle every issue, it may "settle many and simplify them all"); *see also HMT, Inc. v. Bell BCI, Co.*, 2007 WL 295328, *3 (W.D.N.Y. 2007) (granting a stay where plaintiffs in both cases were different in order to narrow the issues and save the litigants and the court from needless or duplicative expenditures of resources). Finally, this Court, in a similar case to the instant one, recently stayed proceedings pending a decision of the Second Circuit in a different case because "there was substantial overlap between the issues presented there . . . ." *Janes v. Triborough Bridge Authority*, 2013 WL 5630629, *6 (S.D.N.Y. October 16, 2013).

On September 27, 2011, the *AAA* commended an action against the Port Authority for injunctive relief[1] and a declaratory judgment that the toll increases at issue here were illegal, *inter alia*, under the dormant Commerce Clause and the Highway Act, 33 U.S.C. § 508. After the Port Authority moved to dismiss, the Court, in a memorandum and order, converted the motion to dismiss into a Rule 56 motion for summary judgment and ordered that the parties undergo limited discovery to further that end. *See* Miller Decl., Ex. F, Memorandum Opinion and Order. Since then, the parties in the *AAA* case have been litigating the issues, including dormant Commerce Clause claim identical to the one asserted here and relating to the same toll increases at issue here. During the past two years that discovery has been ongoing in that case, the Port Authority has produced approximately "30,000 pages of documentary evidence relating to the finances of the ITN that exhaustively detail ITN revenues, expenses, state-of-good-repair costs, and critical capital needs." Miller Decl., Ex. K, Excerpts from the Port Authority's Opposition to Plaintiffs' Motion to Compel in the *AAA* case. In addition, the senior executives of

[1] Plaintiff here seeks alternative relief in the form of an injunction, but has failed to plead any facts in support of irreparable harm. Rather, he has pled only money damages incurred in paying the toll. He has therefore failed to plead a critical element of a claim for injunctive relief. See *Jackson Dairy Inc. v. H. P. Hood & Sons*, 596 F.2d 70 (2d Cir. 1979).

the Port Authority have been deposed, including Michael Fabiano, the now retired Chief Financial Officer. Discovery proceedings in that case have been ongoing since February 2012 and are now in the final phase.

Even assuming the Plaintiff has alleged a claim under the dormant Commerce Clause, this Court should stay the proceedings here pending the decision on the motion in the *AAA* case, since the claim here is duplicative. It would be a waste of government resources for the Port Authority to have to duplicate the discovery and a burden on the Court to have to resolve discovery disputes. *See National Football League Properties, Inc. v. Hi-Pro Marketing, Inc.*, 1992 WL 204370, *3 (S.D.N.Y. August 11, 1992) (granting stay where same issue was being litigated in a pending matter and to preserve judicial resources and avoid duplicative litigation). Ultimately, the duplicative discovery that will result will serve no purpose, since by the time this matter reaches a stage comparable to the *AAA* case, the issue will most likely be resolved. Granting a stay will also better serve the public interest by focusing all resources on resolving an issue that, by its nature, will affect the lives of all users of the ITN. Finally, the Plaintiff here will suffer no prejudice if the Court implements a stay. As demonstrated in the *AAA* case, the Port Authority can refund excess tolls to those users who have records of their payment in the event the *AAA* is successful in challenging the toll increase. Indeed, the Plaintiff's private interest in proceeding expeditiously towards a resolution is better served if the *AAA* case fully resolves the issue. Without a stay, it is possible that each matter will hinder the other's progress toward final resolution.

The Port Authority respectfully submits that, if the Court does not dismiss the Amended Complaint, that in the alternative, it stay the proceedings pending a decision in the *AAA* case, which will resolve the identical claim made in this case.

CONCLUSION

For the foregoing reasons, the Port Authority respectfully requests that this Court dismiss the Plaintiff's Amended Complaint with prejudice, or in the alternative, grant a stay of proceedings pending a decision in *Automobile Club of New York, Inc. v. The Port Authority of New York and New Jersey,* and grant such other and further relief as this Court deems proper and just.

Dated: May 8, 2014
New York, New York

Respectfully submitted,
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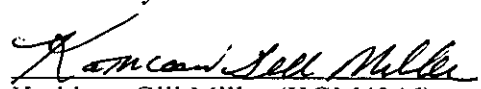
BY: 
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