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.
----------X

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND APPLICATION FOR STAY OF PROCEEDINGS**

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## PRELIMINARY STATEMENT

The Port Authority of New York and New Jersey (the "Port Authority") submits this memorandum of law in reply to Plaintiff's opposition to the Port Authority's motion to dismiss and its application for a stay of proceedings. Plaintiff's amended complaint fails to state a claim under the dormant Commerce Clause because he has not and cannot plead sufficient facts to support this claim, and the Mandate Rule bars his additional claims.[1] A stay of proceedings is warranted to avoid needless burden on this Court of supervising discovery, since the same claim has been made in the *AAA* case where discovery has been completed, except for the motion on the privilege log.

## POINT I

## PLAINTIFF'S ARGUMENTS IN DEFENSE OF HIS DORMANT COMMERCE CLAUSE CLAIM ARE BASED ON A MISREADING OF THE LAW AND THE FACTS

### A) Claims Designated as First, Third, Fourth and Fifth Are Clearly Not Viable Under the Dormant Commerce Clause

Plaintiff describes his First Claim as one based on the preferential toll rate offered to E-Z Pass owners (Plaintiff's brief, p. 8). This claim, as discussed in Defendant's memorandum of law in support of the motion to dismiss has been rejected by this district court in *Saunders v. Port Authority of New York and New Jersey* (2004 WL 1077964) (S.D.N.Y. May 13, 2004 (*See* Defendant's memorandum of law, p. 14).

His Third Claim is based on an alleged unlawful burden on interstate commerce because the toll amount exceeds the minimum wage (Plaintiff's brief, p. 8). Plaintiff's argument in this regard is that the toll restricts his right to travel because it exceeds the minimum wage he

[1] See *APL Co. Pte. Ltd*, 779 F.Sup.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 governs the relationship between the appellate and trial courts and controls the scope of inquiry that a trial court may make in a case remanded from the circuit court).

occasionally earns when he commutes from his home in New Jersey via the George Washington Bridge to a job in New York (*See* Plaintiff brief, p. 8, pp. 24-28). Those same claims were raised and rejected by the court in *Janes v. Triborough Bridge & Tunnel Authority*, 977 F.Supp.2d 320 (S.D.N.Y. 2013). In that case, the plaintiffs who were largely New Jersey residents, were challenging the discounted toll available to residents in discrete areas of New York, including Staten Island, and the $15.00 cash tolls charged to cash users of the Verrazano Bridge. The Court rebuffed the challenge to the Verrazano tolls as excessive stating:

> As for the Verrazano Bridge, the nonresident charge for a roundtrip, assuming use of the E-ZPass discount, is $10.66, or just over twice the roundtrip cost of travel on the New York subway system. But plaintiffs have not demonstrated that such a *toll* presents more than a minor restriction on travel. And the Verrazano is the longest suspension bridge in the United States. A higher charge for use of such a facility, in one of the most expensive cities in the world, is not unreasonable. It does not shock the conscience.
>
> *Id.* at 334

Here, the George Washington Bridge, the busiest bridge for the United States, provides two levels of vehicular traffic with three lanes in each direction to facilitate the movement of traffic between New York and New Jersey. The cost for its use ($12.00 round trip cash/$9.50 for E-ZPass) is not unreasonable (*See* Muriello Affidavit, p. 5, Exhibit G to Miller Decl.). Plaintiff has not specifically mentioned the Lincoln or Holland tunnels, but they too represent engineering marvels that must be maintained both from the point of view of the physical plan as well as security. The amount of the toll charged for the Port Authority tunnels and bridges like those at issue in *Janes* "are not, in an absolute sense, so high as to constitute more than a minor burden in travel" *Id.* at 333. Moreover, as the Second Circuit noted, Plaintiff has no constitutional right to travel by car. He can travel across the Hudson River by means of public transportation using PATH or ferry.

Plaintiff's Fourth Claim seeks relief from tolls based on per axel charges on the ground it violates U.S. Const. Article 1 § 10.3 because it is subsidizing tonnage (*See* Plaintiff's brief, p. 8, pp. 29-30). The gist of plaintiff's argument appears to be that part of the toll increase is for the raising of the Bayonne Bridge so that the supertankers, that will arrive with the widening of the Panama Canal, can have access to Port Newark. The purpose of the clause forbidding the laying of a duty of tonnage by any state was to prevent any state from taxing vessels for the privilege of access. See *Clyde Mallory Lines v. State of Alabama ex rel. State Docks Commission*, 296 U.S. 26, 56 S.Ct. 194, 80 L.Ed. 215 (1935). Since there is no issue of denying vessels access here, this claim is without legal basis under Article 1. Moreover, it is outside the scope of the amended complaint permitted by the Second Circuit.

Plaintiff's Fifth Claim is based on his FOIL Request (Plaintiff's brief, p. 8, pp. 31-35). This claim too is clearly outside the scope of the remand and is not cognizable in this action as discussed in the Port Authority's memorandum of law in support of dismissal (*See* Defendant's memorandum of law, pp. 18-19).

**B) Plaintiff's Second Claim, Under the Dormant Commerce Claim Is Factually Deficient**

Plaintiff mistakenly argues in his affirmation that the ITN does not operate at a deficit, but rather operates at a profit and therefore has funds which can be diverted to pay for the World Trade Center and other non-ITN projects. This argument is based upon a misreading of the Port Authority's financial information. Plaintiff relies upon revenues and expenses reported on the Port Authority's December 31, 2012 Financial Statement at page 85 (Exhibit N to Plaintiff's Affirmation). In that statement, the Port Authority reported operating figures which showed that for 2012 the tunnels, bridges and terminals had net operating revenues of $560,209,000.00 and that rail operations (PATH & Journal Square) showed a net operating loss of $17,251,000.00.

However, these figures have little relation to the capital plan, which is the basis for the toll increase. As the Port Authority's former Comptroller, Mike Fabiano stated in paragraph 11 of his affidavit for the years 2007-2010 the ITN generated actual net revenues of $1.193 billion, but after deducting direct payout for capital expenditures, debt service allocated to the Port Authority's Consolidated Bonds issued for capital expenditures, and required payments to the General Reserve Fund as a result of the bonds, the ITN showed a loss of $636 million (*See* Fabiano Affidavit, Exhibit I to Miller Decl. and Exhibit C thereto). Projected cash flow for the ITN for the period 2011-2020 with the planned capital expenditures for the ITN, debt service and the Reserve Requirement, even assuming 50% financing, leaves the ITN with a projected deficit of $51.1 million in 2020 (*See* Exhibit B to the Fabiano Affidavit). There are no excess funds to divert to the World Trade Center or any other facility outside the ITN.

Plaintiff also challenges individual line items, such as raising the Bayonne Bridge which also involves improvements to the bridge structure, the Goethals Bridge modernization, as well as the repair of the Pulaski Skyway as an access road to the Lincoln Tunnel as unnecessary or inappropriate. These contentions do not rise to the level of a dormant Commerce Clause claim since they do not involve questions of "fair approximation of use", tolls "excessive in relation to the benefit conferred," or "discrimination against interstate commerce" *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994). Moreover, the Second Circuit has specifically recognized that the Bayonne Bridge and the Goethals Bridge are part of the "bridges, tunnels, bus terminals, bus programs and PATH" which constitute the ITN *Automobile Club of New York Inc. v. Port Authority*, 887 F.2d 417, 423 (2d Cir. 1989). Plaintiff's argument that these projects cannot be undertaken without joint legislative approval is contrary to the Port Authority's

enabling legislation, and is not supported by anything other than plaintiff's conclusory assertion. *See* N.Y. Unconsol. Laws § 6401 et seq.

Finally, plaintiff's contention that the tolls cannot be raised to support future capital expenditures on the ITN is not supported by any case law. No doubt, this is because it would not be feasible to base a capital plan and the projected revenues necessary to support it on such a proposition.

## POINT II

## PLAINTIFF FAILS TO DEMONSTRATE THAT THE MANDATE RULE DOES NOT APPLY

### A) Mandate Rule Applies and Plaintiff Concedes He is Limited to the Dormant Commerce Clause

Plaintiff argues that the Mandate Rule does not bar his claim under the dormant Commerce Clause (*See* Plaintiff's brief, pp. 37-38, 40). The Port Authority agrees: the remand order limits Plaintiff to a dormant Commerce Clause claim under the *Northwest Airlines* standard. Plaintiff then asserts in his brief that he pleads other causes of action solely to support his claim under the dormant Commerce Clause (*See* Plaintiff's brief, pp. 37-38 "claims for relief" under the Coinage Clause, Tonnage Clause, due process clause, Freedom of Information Code, "etc." are "limited" to demonstrate "facial plausibility" of his commerce claim). Plaintiff essentially concedes that he is not placing any claims other than the dormant Commerce Clause before this Court. Further, he fails to contest that claims other than the dormant Commerce Clause violate the remand order and are not properly before this Court.

Plaintiff's assertion that the Second Circuit did not decide his dormant Commerce Clause claim fails to negate the effect of the remand order (*See* Plaintiff's brief, at p. 37). The Port Authority agrees that the Second Circuit order remanded the case to this Court to determine

whether Plaintiff had pled a dormant Commerce Clause claim or to allow him to replead to do so. Plaintiff has repled and for the reasons set forth in the Port Authority's memorandum of law in support of its motion to dismiss and Point I hereof, the amended complaint is deficient.

**B) There is No Exception to the Mandate Rule Here Because There is No Intervening Change of Controlling Law**

Plaintiff erroneously contends that a change in the controlling law in the *sua sponte* dismissal of his Complaint exempts his Amended Complaint from the Mandate Rule. *See* Plaintiff's brief at 39). This Court dismissed Plaintiff's Complaint *sua sponte* for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B) (*See* Miller Decl., Ex. D, Judge Batts' Decision citing *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434 (2d. Cir. 1988)). Plaintiff argues that Judge Batts would not have dismissed his complaint because the case she relied upon, *Livingston*, is no longer good law. The basis for his erroneous belief is that a case cited within the *Livingston* case, *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997), was overruled by *LaFountain v. Harry*, 716 F.3d 944 (6th Cir. 2013). Plaintiff misinterprets the effect of the overruling, and mischaracterizes *McGore* as controlling law.

Simply, *McGore* was not controlling in *Livingston*. The court in *Livingston* merely cited to *McGore* on an issue that the *Livingston* court explicitly left open *See Livingston*, 114 F.3d at 437 (comparing circuit decisions on the standard of review in *sua sponte* dismissals but refusing to decide because court erred under either standard). Significantly, *LaFountain* overruled *McGore* on a separate issue, a point undecided by *Livingston* and inapplicable here. *See LaFountain*, 716 F.3d at 951 (whether a *sua sponte* dismissal can include leave to amend). This Court has already granted Plaintiff leave to amend. The citation to *Livingston* in Judge Batts' Order related to the standard for statutory *sua sponte* dismissals (*See* Miller Decl., Ex. D). There is no exception to the Mandate Rule involved in this case.

## POINT III

## PLAINTIFF FAILS TO DEMONSTRATE WHY THIS COURT SHOULD NOT STAY THESE PROCEEDINGS

### A) Plaintiff's reliance on *Hilton v. Braunskill* is Misplaced Because it Offers the Incorrect Standard

Plaintiff incorrectly relies on *Hilton v. Braunskill*, 481 U.S. 770 (1987) to contest a stay of proceedings (*See* Plaintiff's brief at p. 41). The standard in *Hilton* related to a stay of a judgment/order pending an appeal of the same. *See Hilton*, 481 U.S. at 770, 776-779 (discussing factors for stays under F.R.A.P 23(c) and F.R.C.P. 62(c)). Unlike *Hilton*, here, the basis for the stay is the court's power incidental to its inherent power to manage its own docket with economy of time and effort for itself, counsel, and litigants (*See* Defendant's memorandum of law in support of dismissal at p. 20).

Further, Plaintiff's mistakenly relies upon *Louis Vuitton Malletier v. LY USA, Inc.*, 676 F.3d 83 (2d Cir. 2012) for the proposition that the Port Authority must show undue prejudice. (*See* Plaintiff's brief at p. 42). *Louis Vuitton* is distinguishable from the case at hand since it dealt with Fifth Amendment implications caused by related civil and criminal actions. *See Louis Vuitton, Inc.*, 676 F.3d 83. The factors in *Louis Vuitton* were tailored to the matter before that court *Id.* at 99 (related civil and criminal proceedings).

### B) Plaintiff Has Failed to Show There Is No Burden of Duplicative Discovery on the Court As Well As Port Authority and He Cannot Show Irreparable Harm

In addition, Plaintiff has failed to show that he could avoid the burden of duplicative discovery on this Court which must oversee discovery and resolve the disputes arising therefrom or the burden of the expense of duplicative discovery on the Port Authority. Plaintiff's suggestion that he will cover attorney's fees or sanctions if they are imposed, rather assumes that

litigious discovery and frivolous conduct will occur. His offer supports the Port Authority argument, that discovery should be stayed (*See* Plaintiff's brief at 42).

Plaintiff argues he will suffer irreparable harm with a stay, and that the public interest does not support a stay. First, there is no irreparable harm since, as Judge Holwell recognized in *AAA v. The Port Authority,* since 78.9% of the drivers can receive refunds through E-Z Pass credits, and the remaining cash users could receive a discount (*See* Decision, Exhibit F to Miller Decl. at p. 7). Plaintiff's reliance on media reports to define public interest is unavailing. To the contrary, a stay offers a chance for a more expeditious resolution on the merits of the issue before this Court.

**C) The Court Should Not Consolidate This Action with the *AAA* Case**

Consolidating this action fails to further consolidation's cost-saving and efficiency purposes because on the *AAA* case, discovery is complete except for the privilege log motion, while in the present case discovery has yet to begin *See Romeo v Suffolk Ready Mix LLC*, 2010 WL 3925260 (EDNY Sept. 30, 2010) (noting the inefficiency in consolidating two cases in opposite ends of the discovery phase). For this reason, consolidation would only serve to delay the *AAA* case which is close to resolution.

## CONCLUSION

For the foregoing reasons, the Port Authority respectfully requests that this Court dismiss this action in its entirety with prejudice, or in the alternative, grant a stay of proceedings, and such other and further relief as this Court deems proper and just.

Dated: June 27, 2014
New York, New York

Respectfully yours
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