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July 22, 2014

To: The Honorable Richard K. Eaton
United State District Court Judge
Southern District of New York
500 Pearl Street - New York NY, 10007

Re: Weissshaus v. Port Authority, et al. 11-cv-6616 (RKE) and Automobile Club of
New York and New Jersey v. Port Authority, et al. 11-cv-6746 (RKE)

Dear Judge Eaton,

I, Yoel Weissshaus, am the plaintiff in 11-cv-6616. I write to intervene in support of the pleading of entry 104 in 11-cv-6746. I request the Court allow this intervention consistent with FRCP 24(b)(1)(B), because the subject of that pleading involves an issue where a determination of that pleading will affect my rights with the fifth claims for relief asserted in my Verified Amended Complaint in 11-cv-6616. Docket ("D") entry 26.

Accordingly, I write to request that the Court vacate the Opinion and Order of the Magistrate, Honorable Henry Pitman, dated June 4, 2014, which *inter alia* determined that the Port Authority's data and communication with the governors of New York and New Jersey revising the Toll Rate is not necessary to decide the case under the dormant Commerce Clause. As illustrated below, the data and communication with the governors are instrumental to determining this case on summary judgment because of issues of fact. Likewise, the data and communication between the Port Authority and governors of New York and New Jersey is not subject to the deliberative process privilege.

Presently, before the Court is the same issue in both cases for review. In my case, I filed a Freedom of Information ("FOI") request on September 26, 2011 to access the data and communication between the Port Authority of New York and New Jersey ("Port Authority") with the governors of New York and New Jersey (referred collectively as "governors"). The Port Authority has since September 2012 deprived me from its FOI process available through its FOI Policy and Procedure by refusing to process my FOI request.

In 11-cv-6746, the Port Authority refuses to produce in discovery to *Automobile Club of New York and New Jersey* ("AAA") the same data and communication I seek. AAA has rightfully requested discovery to these documents because the data and communication with the governors simplify whether the 2011 Toll Rate is just and reasonable. The Magistrate noted in his

opinion that “district courts in this Circuit and elsewhere frequently rely on authority applying the privilege in both FOIA and non-FOIA actions.” D102 at n1.

Further, in my case, I presented to the Court an alternative to the Port Authority’s concerns that consolidating the 11-cv-6616 with 11-cv-6746 for the limited purpose of producing the same documents already in discovery, and placing both cases on the same scheduling track will expedite this case, obviate duplicate opinions, and consolidate resources. Here, intervention for a favorable result to AAA’s objection will expedite resolving the merits of the fifth claim for relief in my amended complaint.

There are specific documents that the governors included in its letter by reference as part of its decision to increase the Toll Rate that made the data and communication subject to public disclosure, subsequently canceling any privity to these documents. The Port Authority must therefore release these document since it is obligated to the right of its citizens to “witness in full detail all phases of the deliberation, policy formulation, and decision making of the authority... at which any business affecting the public is discussed or acted upon.” *N.J. Stat. Ann.* § 32:1-6.1 and *N.Y. Unconsolidated Laws* § 6416-A (McKinney). Thus, the deliberative process privilege, if any, is revoked by statute. Likewise, the Port Authority FOI policy and procedure clearly state “inter-agency or intra-agency records other than statistical or factual tabulations of data, provided that instructions to staff that affect the public or final agency policy or determinations may not be exempted.” See attached exhibit 2.

See the attached letter exhibit 1, the following documents are part of the governors’ determination: (1) “the Port Authority proposed a significant toll hike in order to address a potentially destabilizing fiscal deficit facing the authority and its capital budget.” That *proposal* the Port Authority gave to the governors showing the fiscal deficit is subject to discovery. In the governors’ own words that proposal determined, “Without new revenue, the authority has said that it would have been unable to complete current projects and execute a capital plan that is needed to meet the critical and growing transportation needs of the region and jeopardize 167,000 jobs and \$9.7 billion in wages...” (2) “shortly after the Port Authority made the proposal, we jointly. . . directed our appointed commissioners to look at how the authority could immediately reduce costs and the future needs of the capital program in order to reduce the proposed toll hikes.” That *directed* document from the governors which is an Executive Order to their Commissioners tell the instructions of how and what the “reduce costs” should be done and calculated. (3) “As directed, those commissioners conducted a review of the current financial situation as well as the obligations under the proposed long-term capital plan and have informed our administrations that those reviews have identified \$5 billion in savings that

can be immediately achieved within the capital plan.” Specifically, that *document* showing which items were shelved from the Capital Plan helped determine which “obligations under the proposed long-term capital plan” informed “our administrations” that the Toll Rate should be \$12 for 2012 or \$17 instead of \$8. As the governors said in their own words “the Port Authority practices [] led to the fiscal mismanagement that made these increases the only financially solvable solution in the first place.” The objective factor of a *Fiscal Mismanagement*—that caused to increase the Toll Rate—does not explain how the Toll Rate operates as just and reasonable, the core issue AAA and this case seek review. (4) “[G]iven the crisis facing the Port Authority and its finances, and the potential safety and economic risks to commuters and businesses, an increase cannot be avoided..... we will not oppose a revised proposal.” That *revised proposal* the Commissioners gave to the governors determined why the Toll Rate was \$12 in 2012 instead of \$8. Finally, (5) the data and communication between the Port Authority and the governors “pleased that our work together resulted in lowering of the original toll increase and going forward will result in a less costly, more efficient, more accountable authority than ever before.” While the governors’ work pleased themselves in revising the Toll Rate, plaintiffs like AAA and I are trying reasonably to calculate how the Toll Rate is just and reasonable when it is at the same time a product of the Port Authority’s fiscal mismanagement.

While AAA’s focus is the increase of the Toll Rate to fund rebuilding the World Trade Center, my case focuses on the rational of the price—the toll amount. The Magistrate decided that because “The law of this Circuit following *Northwest Airlines* demonstrates, however, that fair approximation and excessiveness are evaluated by objective factors — how a toll operates in practice — and not the internally stated reasons for its enactment.” D102 at 24-5 citing to *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 259 (2d Cir. 2013). Therefore, “AAA’s claims pursuant to the dormant Commerce Clause and the Highway Act do not turn on the internal deliberations of the Port Authority Commissioners, I conclude that AAA’s interest in disclosure is not sufficient to outweigh the interests protected by the deliberative process privilege.” D102 26-7. Besides, the findings in *Selevan* are distinguishable because *Selevan* was a facial challenge to a toll rate; AAA and this case are only an as-applied challenge to an **increase** in the Toll Rate.

Contrary to the Magistrate’s finding, the language in the governors’ August 18, 2011 letter leaves no room for doubt, that the governors review of Port Authority data and communication decided the operation and calculation of the toll amount. (Attached as exhibit 1). Especially, the letter’s language is unambiguous and makes clear that the governors determined the toll amount after reviewing Port Authority data and found “While we did not want to see

any toll increase, given the crisis facing the Port Authority and its finances, and the potential safety and economic risks to commuters and businesses, an increase cannot be avoided.” With that review of Port Authority data, the governors determined that “we will not oppose a revised proposal which reduces the first year toll increase from \$4.00 to 1.50 and reduces the proposed \$6.00 increase over four years to \$4.50 over five years. (Full details of the revised toll proposal are below.)” What factual data convinced the governors that the Toll Rate for 2012 should be \$12 instead of \$8, or \$17 as originally announced? This crucial question is answered only in the relevant documents that persuaded the price of the toll amount, which will then resolve this case in an instant. Thus, the production of the foregoing data and communication will make it possible to settle this case on summary judgment.

Even if the objective factors of the revenue determine the dormant Commerce Clause, my amended complaint with the pleadings in opposition to the Port Authority’s motion to dismiss establish a multitude of facts that make the Port Authority’s data and communication with the governors indispensable to discovery. By way of example, the amended complaint details how the Toll Rate increase announcement sought to raise \$4.18 billion for the 10-Year Capital Plan, yet despite the governors eliminating \$5 billion from that plan, the Toll Rate increased. D26¶49-57. Likewise, the August 5, 2011 press release stated that the 10-Year Capital Plan is \$33 billion; while the August 19, 2011 press release states that its 10-Year Capital Plan is \$25.1 billion. *Id.* Common sense dictates that the governors “line-by-line analysis” exclaimed in the Port Authority’s August 19, 2011 press release was based on data the parties have yet to review. Then the Port Authority comes to Court and says the Integrated Transportation Network (“ITN”) Preliminary 10-Year Capital Plan is “\$10.786 billion,” D36-9¶5; instead of all other numbers cited to the public, including the number of “\$15 billion” annexed to amended complaint as exhibit A. Fine, assuming that this case is determined on the budgets the Port Authority already produced, these contradicting numbers do not allow summary judgment on numbers that are not conclusive. As demonstrated in my June 17, 2014 affirmation, the over projections of the 2011 budget by approximately \$87 million, and for 2012 by approximately \$183 million begs the question of whether the \$51 million deficit the Port Authority anticipates for 2020—cited in its converted motion for summary judgment—is a real number or a product of its own imagination. D43¶5.

Further, as my June 17, 2014 plaintiff’s memorandum detailed, the Port Authority has somehow managed to spend ITN capital first on rebuilding the Pulaski Skyway before 2018, a bridge that is not part of the ITN; while leaving the supposed critical-actual ITN capital expenditures hanging until 2018. See D44, 20-22. Yet, the spending for the Pulaski Skyway was authorized March

2011, five months before increasing the Toll Rate but was not disclosed by the Port Authority in its Financial Statements or 10-Year Capital Plan until 2014. D43¶22. A crucial fact buried in the data and communication with the governors, but not disclosed to the public in the financial data.

Moreover, as my June 17, 2014 affirmation detailed, the governors' letter proclaims that the Commissioners were able to reduce the 10-Year Capital Plan by \$5 billion dollars, yet-to date, nowhere in the minutes of the Board of Commissioners is there any reduction of the 10-Year Capital Plan showing a \$5 billion change in capital plans. D43¶8. This type of concealment begs the question whether the governors really revised the Toll Rate, can the statements made by the Port Authority be trusted, or whether the governors' review was just a show for the game to deceive the Court and the public. An answer carried only in the data and communications between the Port Authority and the governors.

To the credit of Justice Pitman, AAA's arguments were not persuasive enough because it lacked specific detail to overcome the deliberative privy. It is however, no reason to assume that summary judgment can rely on the Port Authority's constant misgivings without prejudicing a favorable judgment for AAA. It goes against the interest of justice to let the Magistrate's decision stand when that decision may prejudice me directly or indirectly at a time where Justice Pitman did not consider the factual issues my case raises. Especially, where "Judge Holwell's decision confined discovery to 'financial documents or correspondence not yet provided for public review.'" D102 at 3.

Without a doubt, if the Magistrate had considered the factual issues I raise, AAA's motion would have been granted. As the Magistrate cited, "a document is not 'deliberative' where it concerns 'purely factual' information regarding, for example, investigative matters or factual observations. D102, 8-9. Especially, as relevant to this case, there is a pure factual question to know how the governors decided the toll should be \$12 instead of \$8, the core issue of my case. "Thus, factual findings and conclusions, as opposed to opinions and recommendations, are not protected." Id at 9. Therefore, each document AAA seeks and as I outlined above carry the weight of discovery and should not be subject to the deliberative process privilege.

Moreover, as the Magistrate explained, "Importantly, 'the Supreme Court has held that materials are not to be withheld on the basis of the deliberative process privilege simply because the agency deems them confidential and would prefer not to disclose them.'" Id. "The deliberative process privilege does not provide a blanket basis upon which to withhold documents that an agency has created during its decision-making process." Id. "Indeed, if that were the case, the deliberative process privilege would provide an exemption from the

Yoel Weissshaus letter to Judge Eaton

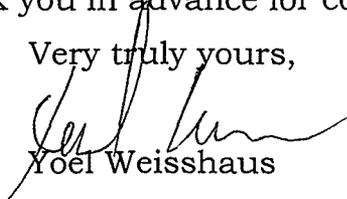
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discovery rules for decision-making agencies generally — and that, of course, is not the law.” *Id.* Thus, because the data and communication the Port Authority made with the governors answer a purely factual question, explain how the governors revised the toll amount of the Toll Rate, the deliberative process privilege was misplaced and should be vacated.

WHEREFORE, I write to request that the Court accept this letter as intervention in support of entry 104 in 11-cv-6746. I also request that the Court vacate the Magistrate’s June 4, 2014 decision, and hold that the data and communication that revised the Toll Rate amount to what became the final Toll Rate, which is the subject of this suit, is not entitled to the deliberative process privilege.

I thank you in advance for consideration of this matter.

Very truly yours,



Yoel Weissshaus

Cc: the parties by ECF