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August 10, 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: *Weisshaus v. Port Authority*, 11-cv-6616 (RKE) and *Automobile Club of New York and New Jersey v. Port Authority*, 11-cv-6746 (RKE)

Dear Judge Eaton,

I, Yoel Weisshaus ("Weisshaus"), am the plaintiff in 11-cv-6616. I reply to distinguish leave to intervene in 11-cv-6746 from the imprecise conclusions drawn by the Port Authority of New York and New Jersey ("Port Authority") in its letter to the Court dated August 1, 2014.[1] My request to intervene is limited in support of the pleading of entry 104 in 11-cv-6746, and is further limited to data and communication between the Port Authority and governors of New York and New Jersey determining on August 18, 2011 the price for the Toll Rate. Indeed, this FRCP 24(b)(1)(B) intervention only objects to adopting the Opinion and Order of the Magistrate, Honorable Henry Pitman, dated June 4, 2014, to prevent a reciprocal effect on 6616.

Weisshaus must intervene because the Magistrate *inter alia* applied "the privilege in both FOIA and non-FOIA actions." D6746-102 at n1. Weisshaus's cause of action is that the Port Authority for retaliatory reasons refuses to process his September 26, 2011 Freedom of Information ("FOI") request. Consequently, such refusal denies Weisshaus access to data and communication, about setting the amount of the Toll Rate increase, between the Port Authority with the governors of New York and New Jersey (referred collectively as "governors").

In the alternative to intervention, the Court may construe Weisshaus's motion as amicus in support of *Automobile Club of New York and New Jersey* ("*AAA*")'s entry 104.

There is no better justification to intervene than the Port Authority's May 9, 2014 motion to stay 6616 pending 6746. With its motion, the Port Authority seeks to gain an unfair *res judicata* effect from 6746 onto 6616. As a result, so long the Port Authority's motion is active, Weisshaus has the unequivocal right

[1] I apologize for the delay to reply to the Port Authority's response, as it was no fault of my own. The Port Authority deliberately skipped serving me a copy of its letter. I did not learn of the Port Authority response until August 10, 2014.

to request leave to intervene in 6746 when appropriate to prevent an overreach of justice in 6616.

It follows that the Court of Appeals remanded 6616 to review "a constitutional challenge to the reasonableness of the amount of the tolls under the dormant Commerce Clause." *Weisshaus v. Port Authority of New York*, 497 Fed.Appx. 102, 105 (2nd Cir. 9-20-2012). While 6746 focuses on the distribution of toll revenues for the World Trade Center, Weisshaus certainly has an interest in knowing the reasonableness of the amount of the tolls, which the governors determined by communication with the Port Authority and reviewing its data. Therefore, intervention is appropriate to protect my rights and interests, to prevent a *res judicata* affect on 6616.

Contrary to the Port Authority's misconception, 6616 was filed 9-days in advance to 6746. Weisshaus has not slept on his rights one day. *See Miller v. Silbermann*, 832 F. Supp. 663, 669 (S.D.N.Y. 1993), the question of timeliness asks whether the intervener slept on his or hers rights. "The most important criterion in determining timeliness is 'whether the delay in moving for intervention has prejudiced any of the existing parties'." *Id.* "Absent any such prejudice, the motion for intervention will usually be deemed timely." *Id.* If any delay, it is for the unfortunate reason of being a *pro se*—unlike AAA a prominent organization—Weisshaus was rerouted to the Court of Appeals before gaining an opportunity to amend the complaint. Otherwise, 6616 and 6746 would have been on the same scheduling track and there would have been no delay.

"The timeliness requirement is flexible and the decision is one entrusted to the district judge's sound discretion." *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 594-5 (2nd Cir. 1986). Whether the Port Authority praises Weisshaus's amended complaint is irrelevant to the discussion because the instant motion rather to intervening in the entire case is limited in all aspects to support AAA's objections to 6746-102, to prevent a prejudicial *res judicata* effect in 6616. Therefore, this motion dated July 22, 2014 is timely to the Magistrate decision dated June 4, 2014, especially where the motion does not delay or impair any proceeding in 6746. At the same time, if anything, intervention will expedite resolving a cause of action in 6616.

The Port Authority cannot show any prejudice by intervention because the governors August 18, 2011 letter setting the Toll Rate was attached and relied on as exhibits to both AAA and Port Authority's pleadings before the Magistrate. As such, the issues regarding the governors' letter were preserved for review before the Magistrate. My motion to intervene merely points to the substantive specifics of that letter showing which documents is part of the *working law* of the Toll Rate and not subject to any privy. "Even when a

document is predecisional and deliberative, it falls outside the privilege '(1) when the contents of the document have been adopted, formally or informally, as the agency position on an issue or are used by the agency in its dealings with the public; and (2) when the document is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy, in other words, its working law'." *See Federal Housing Finance Agency v. Hsbc North America Holdings* (S.D.N.Y. 5-13-2014) citing *Brennan Center for Justice v. Dept. of Justice*, 697 F.3d 184, 194-95 (2nd Cir. 9-19-2012). Thus, those documents enunciated in my letter motion, as parts of the governor's decision as *working law,* are documents not subject to any privy.

Furthermore, the Magistrate's decision shows that AAA does not adequately represent Weisshaus. As the Magistrate stated "AAA has failed to make specific challenges to individual entries in the Port Authority's privilege log." 6746-102 at 27. "The information in the Port Authority's privilege log provides AAA with more than enough information to make challenges to individual categories of documents, but AAA has declined to do so." Id. These observations shows that Weisshaus "does not have anyone in the [6746] action who could or would adequately represent [hi]s interests." *See In RE Bear Stearns Companies, Inc. Secs., Deriv.* 297 F.R.D. 90, 97 (S.D.N.Y. 12-12-2013), stating the lack of a party's interest is inadequate representation. Therefore, any *res judicata* impact the Magistrate decision may have on 6616 is based on AAA's inadequate representation, thus, intervention is appropriate for Weisshaus to protect his rights and interests.

Weisshaus cited in its motion an alternative to the Port Authority's stay of 6616 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 serve the interest of justice by expediting the cases, obviate duplicate opinions, and consolidate resources. In opposition, the Port Authority claims to itself the liberty to half-quote 13 words out of a sentence 47 words—from an inference Weisshaus made in his letter motion referring the Magistrate reasoning—and the Port Authority draws from it a misconstruction of that statement. In its thorough decision, the Magistrate stated, "the internal deliberations of the Port Authority Commissioners are not central to AAA's Highway Act claim either." *See* 6746-102 at 26-27. As such, Weisshaus referred to the Magistrate's statement and stated "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 indispensible to discovery." *See* 6746-111, 4-5, which categorizes the issues of fact that on its face the objective analysis of Port Authority's data does not answer as undisputed for summary

judgment. In other words, Weisshaus brings attention to the facts that the communication with the governors can expedite resolving the cases on summary judgment. Especially since the Port Authority did not care to answer to the facts showing that, its budgetary predictions of a $51 million deficit by the year 2020 is a product of its own imagination by over projecting the budget with an average of $100 million for each year.

Moreover, by not addressing Weisshaus's points, the Port Authority's silence in the response concede that its 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." Likewise, the Port Authority does not address the specifics cited from the governors August 18, 2011 letter that shows which deliberative documents are *working law* as part and parcel of the governors price determination, not subject to any privy. Similarly, the Port Authority does not address the misgivings of its data and reasons made public, which only the communication with the governors can clarify as substantive facts.

Indeed, since organizations like AAA and citizens like Weisshaus have the statutory right 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 Law*s § 6416-A (McKinney). AAA and Weisshaus are entitled as a matter of law to witness in full detail all phases of the governors August 18, 2011 price deliberation, which formulated the price that the Port Authority enacted as its decision-making on August 19, 2011. Simply put, the Port Authority does not even try to explain— because it cannot explain—how the data and communication with the governors were not part of the price decision the Board of Commissioners enacted August 19, 2011. *See* attached "The Governors also indicated that they would not oppose a revised toll and fare increase proposal along the following lines: Tolls on cars using E-ZPass® would increase $1.50 in September 2011 and then 75 cents in December of each year from 2012-2015; Tolls on cars paying with cash would have the same increase, but would be subject to an additional $2 penalty…." Further "Based upon … the guidance of the Governors, staff has concluded that the toll and fare increases outlined above provide a viable alternative that balances capital needs with regional economic realities." Thus, the data and communication with the governors are the decision making of the Port Authority and indispensible from resolving this matter judiciously.

WHEREFORE, I write to request that the Court accept my 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 6616, is not entitled to the deliberative process privilege. In the alternative to intervention, the Court may construe Weisshaus's motion as amicus in support of entry 104 in 6746.

I thank you in advance for consideration of this matter.

Very truly yours,

Yoel Weisshaus

Cc: the parties by ECF