No. 11-4934-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Yoel Weisshaus,

Petitioner-Appellant,

v.

Port Authority of New York and New Jersey et al

Respondent-Appellee.

On appeal from the United States District Court
For the Southern District of New York

PETITION FOR REHEARING EN BANC

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Circuit Local Rule 35.1, plaintiff-appellant moves for rehearing en banc of the panel decision rendered on September 20, 2012 (Exhibit 1).

Rule 35(b) Statement

1. In recognizing that there is some indication of a *Dormant Commerce Clause* claim without vacating for an opportunity to amend the complaint, the panel's decision conflicts with the uniformity of Second Circuit decisions and the Standard of Review vacating on the ground that "A *pro se* complaint 'should not be dismissed without the Court granting leave to amend at least once when a liberal

reading of the complaint gives *any indication* that a valid claim might be stated.'" *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010)(*emphasis*) as well *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999). Including three recent Summary Orders of *Gardner v. McArdle*, 461 F. App'x 64 (2d Cir. 2012), *Robles v. Evans*, 10-2343-PR, 2012 WL 1654951 (2d Cir. May 11, 2012), and *Hathaway v. Holder*, 10-5132, 2012 WL 2866271 (2d Cir. July 13, 2012).

2. The procedure by which a *pro se* is denied access to Court by not allowing him to provide sufficient facts to cure the complaint presents an issue of exceptional importance because of the inherit conflict that the panel's decision created with United States Supreme Court and authoritative decisions of other United States Courts of Appeals, which have addressed the issue.

I. THE MISAPPLICATION OF THE STANDARD OF REVIEW IN THIS CASE WILL MISLEAD THE PUBLIC AND CONFUSE THE DISTRICT COURTS IN THIS CIRCUIT.

In three recent threshold cases before this Court, involving the district court of Judge Preska, this Circuit vacated dismissals with instructions for leave to amend the complaint. This Circuit held and directed that an opportunity to amend the complaint is crucial despite "we recognize that it is not apparent from the face of the complaint that Robles pled sufficient facts showing a causal connection

between....” *Robles v. Evans*, (2nd Cir. 2012). This Circuit recognized the same precedent in *Gardner*, “We recognize that an amended complaint brought by Gardner faces several difficulties, to say the least. Among others, the circumstances of Gardner’s interrogation may have not been ‘so coercive as to amount to a constitutional violation.’” *Gardner v. McArdle*, (2d Cir. 2012) This Circuit recognized and instructed the district court that, despite all the weakness and deficiencies apparent in the complaints, *Gardner* and *Robles* “...should be afforded the opportunity to amend his complaint because we cannot ‘rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.’” Citing *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 796 (2d Cir. 1999). The same precedent of *Gomez*, Judge Pooler—who chaired the panel herein—applied to *Hathaway v. Holder*, 10-5132, 2012 WL 2866271 (2d Cir. July 13, 2012). Indeed, despite all the difficulties apparent by Yoel Weisshaus’ (“Weisshaus”) complaint and appeal pleadings, there were no extraordinary circumstances identified by the panel as required in *Gomez* to warrant affirmance of sua sponte dismissal without amending the complaint. The panel even recognized “some possibility” of stating a claim by remanding for further review. In overall, even by the panel’s own conclusion of an indication of a claim, its summary order in *Weisshaus* conflicts with Second Circuit precedent and

standard of review by not vacating for an opportunity to amend the complaint and issuance of a summons as this Circuit has uniformly done as the procedure.

The district court tampered with the procedural process for *Weisshaus* by dismissing sua sponte the complaint before issuing a summons, for failure to state a claim without consideration to amend the complaint, when the complaint alleged that the use of tolls to rebuild the World Trade Center is unjust and unreasonable. In contrast, in a subsequent action, of *AAA v. Port Authority* 11-cv-6746 filed after *Weisshaus*, the district court acknowledged the same facts, if the toll revenue is to rebuild the World Trade Center would be unjust and unreasonable, and is a valid claim.[1] At oral argument on September 11, the Port Authority was asked:

> JUDGE WESLEY: Well, he just said that he thought that the money was being used for buildings at the World Trade Center. And as to whether that's true or not is a matter to be resolved fairly quickly after an appearance and a short amount of discovery.
>
> PORT AUTHORITY: That's a conclusory allegation. He has no facts to support that.
>
> JUDGE WESLEY: How is he supposed to know that? I mean, I saw the governor's press release this morning. Apparently, tolls were being used to fund the 9/11 museum. I mean, the -- did you see the governor's press release this morning?

In other words, the district court acknowledged in *AAA*, and the panel acknowledged at oral argument and in its summary order, that Weisshaus directed a colorable claim. Wherefore, while acknowledging a valid claim, by not

[1] *Auto. Club of New York, Inc. (AAA) v. Port Auth. of New York & New Jersey*, 842 F. Supp. 2d 672 (S.D.N.Y. 2012)

providing an opportunity to amend the complaint and issuing of a summons, the panel conflicted with Supreme Court authority that:

> [P]ro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears' 'beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.

Estelle v. Gamble, 429 U.S. 97, 106 (1976) (emphasis).

By the panel limiting its summary order to remand for a discretionary review of Weisshaus' complaint, without vacating for an opportunity to amend the complaint and issuance of a summons, it conflicted with the uniformity of Second Circuit decisions. "[W]e conclude that a *pro se* plaintiff who is proceeding *in forma pauperis* should be afforded the same opportunity as a *pro se* fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim, unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Cruz v. Gomez*, 202 F.3d 593, 597-98 (2d Cir. 2000) citing *Gomez v. USAA Fed. Sav. Bank.*

Not only does the panel decision conflict with the uniformity of Second Circuit decisions, but also established a newly legal process that is far beyond the judicial process of the Federal Rules of Civil Procedure and the process of Consolidation under Rule 42. The panel cited no authority for this new legal process that remands to "the case to the district court to determine in the first

instance whether Weisshaus has adequately pleaded such a claim" where the district court may "in its discretion, consider staying the action pending" *AAA* and defer its determination of the issuance of a summons. Simply put, the panel made an error by deferring amending the complaint and the issuance of a summons pending *AAA* before acquiring jurisdiction on the Port Authority in *Weisshaus*. The panel made this error notwithstanding that "The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases." 28 U.S.C. § 1915(d). Instead, if the panel sought to prevent a possible-duplicate action, the summary order could have directed a consolidation under FRCP 42 or another identifiable rule, after amending the complaint and the issuance of a summons. *Weisshaus* was filed nine (9) days before *AAA*; to treat Weisshaus differently because he is a *pro se* and not a prominent organization is of exceptional importance to evaluate when § 1915(d) is applicable because subsection (d) seeks to avoid such confusion as occurred here.

The panel made a clear error on a threshold review, without a fact-finding, that using toll revenue to rebuild the World Trade Center is a "minor restrictions on travel simply [and] do not amount to the denial of a fundamental right." To simply rule in a broad way without evaluating on a case-by-case basis if the "minor restriction" is for a legitimate cause—such as public safety—the panel presented

an irrational evaluation on what affects the right to travel. For instance, in *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140 (2d Cir. 2010) the issue was whether the isolated incident of withholding a person from boarding a plane for carrying—without a license—a concealed weapon, amounted to a right to travel claim, where the Port Authority police had a valid concern of public safety. In this case, the "minor restriction" on increasing toll prices amount to something more than a reasonable concern of public safety, as there is an economic impact on everyone crossing the river, and not just an isolated incident. Likewise, the panel made the same error by assuming "mere affect" without evaluating on a case-by-case basis the required precedent if an unreasonable amount is an "impedance of travel." The only time a *mere affect* does not impede travel is "Where a classification is found to implicate the right to travel, it will be upheld only if it is found to 'be necessary to promote a *compelling* governmental interest.'" *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 279 (2d Cir. 1985)(*emphasis*) No "legitimate" or "compelling" governmental interest to impede travel is or can be identified with using toll revenue to rebuild the World Trade Center. To assume a "compelling" governmental interest without a case-by-case evaluation is a far stretch. Indeed, neither do any case law by this or an associate Circuit nor Supreme Court support that using toll revenue for real estate investments is a compelling governmental interest as a mere affect. The only way

the panel made such clear errors of "minor restriction" and "mere affect" was by not following the basic standard set forth, that a "A *pro se* complaint 'should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives *any indication* that a valid claim might be stated.'" *Chavis* (2010), *Gomez* (1999), *Cruz* (2000), and *Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) (*emphasis*)

Weisshaus' complaint, read liberally, challenges the reasonableness of the toll-price increase. In questioning the reasonableness and the wisdom of the toll increase, Weisshaus presented facts of public notice, how the tolls affect him as an individual, and that tolls are for unauthorized uses such as rebuilding the World Trade Center. Unlike the misconstruction of the district court and the panel, the complaint does not challenge the general imposition of tolls when being a valid user-fee. The unrefined complaint was entirely limited to the method of *urgency* and *panic* the Port Authority invoked that it must increase the toll prices *right away*. While federal courts may limit personal or subject-matter jurisdiction involving state law claims, the facts that support the federal cause of action—even though not probative as a cause of action in federal court—may be used to support the graveness and seriousness of a defendant's conduct. As the Supreme Court *held*, "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character,

a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)

Let us assume that the district court and the panel properly reviewed Weisshaus' claims and found that it did fail to state a claim. To affirm sua sponte dismissal is not what the uniformity of circuit decisions and Second Circuit law provide where there is "any indication" that a claim might be stated. The rule is very clear to state "any indication" of a claim, an opportunity to amend the complaint is crucial before affirming a sua sponte dismissal. Even more, not only the panel provided no authority for reaching its conclusion on an appeal of a threshold dismissal that it does not need to vacate to amend the complaint. Each-and-every substantive case authority the panel relied on its summary order, did not deal with the question if amending the complaint would cure its deficiencies. In fact, all case authorities cited by the panel are cases where the adjudication occurred after amending the complaint and-or where there was no question about amending the complaint. Unlike the case authorities cited by the panel, on this appeal the question was and still is if amending the complaint can cure its deficiencies.

On the one hand, the uniformity of Second Circuit decisions mandate that a district court should not sua sponte dismiss an in forma pauperis complaint without affording to amend the complaint to cure its deficiencies when there is any indication of a colorable claim. On the other hand, this panel concluded that a district court does not have to provide an opportunity to amend the complaint even when there is an indication of a claim. The panel's contradiction does not provide the required same opportunity to this in forma pauperis as to others and confuses the district court as to when *Gomez, Cruz*, *Chavis*, and *Livingston* apply.

For the reasons stated in Section I of this Petition for Rehearing En Banc, the conclusions reached by the panel is of clear error and warrants en banc review. The panel in its summary order and the district court were not able to rule out any possibility of stating a claim and therefore remanding without vacating for the issuance of a summons is erroneous. In fact, the panel recognized a claim by questioning the reasonableness of the toll-price increase and the district court recognized a claim in *AAA*. The error of affirming on grounds that require a case-by-case evaluation without providing an opportunity to amend the complaint is a conflict with the uniformity of decisions of the Second Circuit presented in *Gomez* and applied in almost every subsequent procedural-case.

II. DENYING A *PRO SE* REASONABLE ACCESS TO COURT PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE

In denying for a *pro se* access to the judicial process by staying him from amending the complaint and service of a summons, for the sole reason that he did not plea the complaint "perfect," presents an issue of exceptional importance. There is an exceptional importance when the uniformity of federal court authorities provide an reasonable-equal access to the judiciary process, the same for a *pro se* as one represented by counsel.

The importance of crafting the in forma pauperis was to offer a fair opportunity for the less fortunate to access the legal system because "The right of a citizen of the United States to sue in a court having jurisdiction of the parties and of the cause of action includes the right to prosecute his claim to judgment" *Washington-S. Nav. Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924) In recognizing the probability of a claim, the panel's decision to allow staying an action before the issuance of summons, denies the access to justice.

In this case, the complaint was filed nine (9) days before *AAA*. Even as an inartfully drafted complaint, it is acknowledged that Weisshaus alleged facts about the reasonableness of the toll increase being used for building the World Trade

Center and similar related uses. It is unfortunate that the district court made an error and dismissed the action sua sponte before the issuance of a summons, without affording an opportunity to amend the complaint. While errors happen, and the district court made an error, it serves no good purpose for the appeals court to compile an error on top of a error; punishing a pro se proceeding in forma pauperis to the harsh penalty of staying his action because the complaint was not written artfully perfect and the district court made a human-reversible error.

The use of en banc is to "'determine the major doctrinal trends of the future' for a particular Circuit." *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (U.S.N.C. 1974) As found in this case, the determination of how and when to stay a case, especially when the stay is contingent on a subsequent case of a different action filed after the current one, presents an issue of exceptional and recurring importance for a number of reasons. First, the Second Circuit standard is to vacate sua sponte dismissals for failure to state a claim, where there was no opportunity to amend the complaint to cure its deficiencies in the circumstances when there is "any indication" of a claim. Given the length of time an appeal to takes complete, reasonable errors for reversal by the district court become prejudicial to the appellant in a way that invalidates any progress made on appeal. To stay an action—before the issuance of a summons—because the district court made an "error" and therefore the plaintiff must be deprived from access to court, subjects

the moving party to highly prejudicial and unreasonable expectations of the judicial procedure. Second, assuming that Weisshaus failed to state a § 1983, antitrust, right to travel, and unjust enrichment claims to challenge the reasonableness of the amount, all these deficiencies are likely to be cured by amending the complaint with sufficient facts that resolve any issue the district court has with the original complaint. In fact, amending the complaint may even advance a substantive claim that would assist the district court in reviewing the reasonableness of the amount in conjunction with *AAA*. Thirdly, the evaluation of how and who is able to represent an individual's own interest is a question of exceptional importance. At oral argument, the Port Authority presented a new argument not present in their appellee brief that *AAA* being a prominent organization is "more ably [to] represent than plaintiff would, the owners and drivers of motor vehicles, and they're better qualified to pursue that litigation." Apparently—even though this argument was not present in the Port Authority's brief, is appears the panel bought into it even though Weisshaus represents entirely his own interests, and his interests are not adequately represented by *AAA*. "28 U.S.C. § 1654, provid[e] that 'parties may plead and conduct their own cases personally or by counsel.'" *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993). Since the panel concluded that the district court may stay this action—without citing a single legal authority for that

conclusion—because AAA is more ably to represent Weisshaus, the panel conflicted with Supreme Court authority and § 1654 "allowing parties to prosecute their own claims pro se." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 521 (2007)

The exceptional situation in this case, which is very likely to replicate in further cases, was that Weisshaus was deprived from an opportunity to amend the complaint before the entry of with-prejudice judgment. When he presented to file for reconsideration and later on appeal, some sufficient facts that may aide in the court's determination to amend the complaint, the response he received was its *too late* judgment is already entered; thereby conflicting with other circuits and the Second Circuit with its strike that addressed the issue. "Materials submitted to Court of Appeals after district court had dismissed complaint for failure to state claim, although not part of official record and having no standing as evidence, were usable… to show that the complaint should not have been dismissed on its face, provided that material was not inconsistent with allegations of complaint." *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909 (7th Cir. 1985). Fed. R. App. P. 10. "If the district court fails to give notice before *sua sponte* granting summary judgment and the moving party was, as a result, procedurally prejudiced, we must reverse. A party is procedurally prejudiced if it is surprised by the district court's action and that surprise results in the party's failure to present evidence in

support of its position." *Global Aerospace, Inc. v. Hartford Fire Ins. Co.*, 354 F. App'x 501, 503 (2d Cir. 2009)

Overall, the panel's decision conflicts with other circuits who have addressed the issue as "Lacking any authority to the contrary either in statutory text or legislative history" to dismiss without notice or affording to amend the complaint. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002) although, "The Federal Rules of Civil Procedure do not address the situation in which a deficiency in a complaint could be cured by amendment but leave to amend is not sought. Circuit case law, however, holds that leave to amend must be given in this situation as well." *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000). Also *Crozier v. Endel*, 447 F. App'x 859, 860 (9th Cir. 2011) citing *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) Also "The clerk then compounded the problem by entering judgment with prejudice-rather than without prejudice." *Griffiths v. Amtrak*, 106 F. App'x 79, 80 (1st Cir. 2004)

CONCLUSION

For the foregoing reasons, rehearing en banc should be granted.

Dated: October 3, 2012

Respectfully submitted,

Yoel Weisshaus
516 River Road 6
New Milford NJ, 07646

11-4934
Weisshaus v. Port Auth. of N.Y. & N.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of September, two thousand twelve.

PRESENT:

ROSEMARY S. POOLER,
BARRINGTON D. PARKER,
RICHARD C. WESLEY,
Circuit Judges.

Yoel Weisshaus,

Plaintiff-Appellant,

v. **11-4934**

Port Authority of New York and New Jersey, *et al.*,

Defendants-Appellees.

FOR PLAINTIFF -APPELLANT: Yoel Weisshaus, *pro se*, New Milford, New Jersey.

FOR DEFENDANTS-APPELLEES: Kathleen Gill Miller, The Port Authority of New York and New Jersey, *for* Defendant-Appellee Port Authority of New York and New Jersey.

No appearance for Defendants-Appellees State of New York, New York State Assembly, New York State Senate, State of New Jersey, New Jersey State Legislator, New Jersey State General Assembly, New Jersey State Senate, John Does 1-20, Jane Does 1-20.

Appeal from a judgment of the United States District Court for the Southern District of New York, (Batts, J.), and its subsequent order denying reconsideration (Preska, C.J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART**, and the case is **REMANDED** to the district court for further proceedings.

Appellant Yoel Weisshaus, proceeding *pro se*, appeals the district court's judgment *sua sponte* dismissing his civil rights complaint, to the extent it dismissed his claims against the Port Authority of New York and New Jersey ("Port Authority") for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). He also appeals the district court's subsequent order denying his construed Federal Rule of Civil Procedure 60(b) motion for reconsideration. The Port Authority moves to strike certain exhibits from the appendix to Weisshaus's appellate brief, and the portions of the brief that cite to those exhibits. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a dismissal made pursuant to 28 U.S.C. § 1915(e)(2)(B). *See Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim will have "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." *Id.* While *pro se* complaints must contain sufficient factual allegations to meet the plausibility standard, we read *pro se* complaints with "special solicitude," and interpret them to raise the "strongest arguments that they *suggest*." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474-75 (2d Cir. 2006) (per curiam) (citations omitted).

I. Constitutional Claims

As an initial matter, we conclude that the district court did not err in construing Weisshaus's constitutional claims as having been asserted pursuant to 42 U.S.C. § 1983. Section 1983 provides a remedy where a plaintiff alleges that the defendant, acting under the color of state law, deprived him of a federal right. *See Ahlers v. Rabinowitz*, 684 F.3d 53, 60-61 (2d Cir. 2012). In this case, with respect to his constitutional claims, Weisshaus's challenge to the Port Authority's actions is that, while exercising its state law authority to regulate toll rates, the Port Authority violated his federal constitutional rights, which is precisely the type of claim for which § 1983 provides a remedy.

As a general matter, "[t]he right to travel is implicated in three circumstances: (1) when a law or action deters such travel; (2) when impeding travel is its primary objective; and (3) when a law uses any classification which serves to penalize the exercise of that right." *Torraco v. Port Auth. of N.Y. & N.J.*, 615 F.3d 129, 140 (2d Cir. 2010). However, "travelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right." *Id.* at 140-41 (internal quotation marks and citation omitted); *see also Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 278 (2d Cir. 1985) ("Merely having an effect on travel is not sufficient to raise an issue of constitutional dimension.").

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. However, we conclude that the district court erred in failing to consider whether Weisshaus had adequately pleaded a constitutional challenge to the reasonableness of the amount of the tolls under the dormant Commerce Clause, and, accordingly, we remand the case to the district court to determine in the first instance whether Weisshaus has adequately pleaded such a claim or should be granted leave to amend the claim.

On remand, the district court should analyze the adequacy of Weisshaus's pleadings with respect to a dormant Commerce Clause claim by applying the standard the Supreme Court set out in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), for analyzing the reasonableness of fees charged for use of state-provided facilities. See *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009) (concluding that the appropriate test for analyzing the constitutionality and reasonableness of highway tolls under the dormant Commerce Clause was that set out in *Northwest Airlines*). Under *Northwest Airlines*, a fee is reasonable 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." *Nw. Airlines*, 510 U.S. at 369. In the alternative, the district court may, in its discretion, consider staying the action pending a decision in *Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey*, No. 11-CV-6746 (S.D.N.Y. filed Sept. 27, 2011) (order denying preliminary injunction published at 842 F. Supp. 2d 672 (S.D.N.Y. 2012)). We express no opinion as to the merits of a dormant Commerce Clause claim, and leave it to the district court to determine the best way to address the issue on remand. In all other respects, the district court's dismissal of Weisshaus's constitutional claims is affirmed.

II. Robinson-Patman and State Law Claims

We also affirm the district court's dismissal of Weisshaus's claims brought under the Robinson-Patman Act, 15 U.S.C. § 13, as well as his state law unjust enrichment claim. In order to state a claim under the Robinson-Patman Act, a plaintiff must adequately plead the existence of an antitrust injury, *see E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 32-33 (2d Cir. 2006), and here, there is nothing to suggest that any antitrust-related issue is implicated by the allegations in Weisshaus's complaint. As for Weisshaus's state law unjust enrichment claim,

although the district court did not specifically address the issue, we conclude that the claim was properly dismissed because the district court would have lacked jurisdiction over the claim. *See Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir. 1990) ("[W]e are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied."). Pursuant to the statutes waiving the Port Authority's statutory sovereign immunity, an individual wishing to bring a state law claim against the Port Authority must file a notice of claim sixty days *prior* to commencing suit, *see* N.Y. Unconsol. Laws § 7107 (McKinney); N.J. Stat. Ann. § 32:1-163, and Weisshaus conceded in his district court filings that he had failed to do so. Compliance with the sixty-day notice requirement is jurisdictional in nature, *see Caceres v. Port Auth. of New York & New Jersey*, 631 F.3d 620, 624-25 (2d Cir. 2011), and, thus, Weisshaus's failure to serve the notice of claim before filing suit deprived the district court of jurisdiction over any state law claims. Accordingly, we affirm the district court's dismissal of Weisshaus's Robinson-Patman and state law unjust enrichment claims.

Although Weisshaus also argues the merits of a number of claims that he did not assert in the district court, we decline to address those claims as they are not properly before the Court. *See United States v. Lauersen*, 648 F.3d 115, 115 (2d Cir. 2011). We also decline to address any claims Weisshaus raised for the first time in his Rule 60(b) motion, as the district court properly declined to address the merits of those claims. *Cf. Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("It is well-settled that Rule 59 [governing motions to alter or amend a judgment] is not a vehicle for . . . presenting the case under new theories . . . or otherwise taking a second bite at the apple[.]" (internal quotation marks omitted)).

III. Conclusion

Given our decision to remand the case to the district court, we find it unnecessary to address the issue of whether the district court erred in construing Weisshaus's post-judgment submission as a Rule 60(b) motion and denying the construed motion. We have considered Weisshaus's remaining arguments and find them to be without merit. Accordingly, the district court's judgment is **AFFIRMED IN PART**, and the case is **REMANDED** to the district court for further proceedings consistent with this decision. It is further **ORDERED** that the Port Authority's motion to strike is **GRANTED**, as we generally do not consider on appeal materials that were not part of the record before the district court, *see IBM v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975), and do not find that extraordinary circumstances warranting the review of such materials exist in the instant case.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOEL WEISSHAUS Plaintiff-Appellant vs. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY et al. Defendants-Appellees.	:	**Case: 11-4934-cv** **SDNY 11-cv-6616 (LAP)**

AFFIRMATION OF SERVICE

I, YOEL WEISSHAUS make the following affirmation:

1. I, effected service on Defendant-Appellee Port Authority of New York and New Jersey, at 225 Park Avenue South 13th Floor, New York NY, 10003 by certified mail of the attached Petition for Rehearing En Banc with its accompanying documents on October 3, 2012 ..

7009 2250 0003 3557 7144

2. I, effected service on Defendant- Non-Appellee The State of New York and its Legislators, at 120 Broadway, New York NY, 10271 by certified mail of the attached Petition for Rehearing En Banc with its accompanying documents on October 3, 2012.

7009 2250 0003 3557 7281

3. I, effected service on Defendant- Non-Appellee The State of New Jersey and its Legislators, at Hughes Justice Complex 1st. Floor, West Wing 25 Market Street, Trenton, NJ 08625 by certified mail of the attached Petition for Rehearing En Banc with its accompanying documents on October 3, 2012 within the State of New York.

7009 2250 0003 3557 7076

4. I declare that the foregoing is true and correct.

Dated: 3 October 2012

Bergen, NJ

Yoel Weisshaus
516 River Road 6
New Milford NJ, 07646