11-4934-cv

United States Court of Appeals for the Second Circuit

YOEL WEISSHAUS

Appellant,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY;
THE STATE OF NEW YORK;
NEW YORK STATE ASSEMBLY;
NEW YORK STATE SENATE;
THE STATE OF NEW JERSEY;
NEW JERSEY STATE LEGISLATURE;
NEW JERSEY STATE GENERAL ASSEMBLY;
NEW JERSEY STATE SENATE;
AND JOHN AND JANE DOES, 1-20,

Appellees.

On Appeal from the United States District Court
for the Southern District of New York
Honorable Loretta A. Preska, Chief Judge

APPELLANTS REPLY BRIEF

Submitted and to be argued *by*:

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LOCAL RULE 32.2 DISCLOSURE

Per Local Rule 32.2, Yoel Weisshaus discloses that this document was written entirely by him.

LEGAL ARGUMENTS IN REPLY

This is Appellant-Yoel Weisshaus' ("Weisshaus") reply brief in support of his request for an opportunity to amend his complaint against the Port Authority of New York and New Jersey ("Port Authority") for the increase of toll prices beyond the reason of law.

The **perception** of dismissing with prejudice *sua sponte* the complaint of a *paupries* without an opportunity to cure its deficiencies greatly exaggerates the impact of judicial holdings in a number of cases. We "cannot rule out any possibility" in failure to state a claim without a reasonable opportunity to cure its deficiencies absent extraordinary circumstances. Gardner v. McArdle, 461 F. App'x 64 (2d Cir. 2012), Perez v. Ortiz, 849 F.2d 793, 797 (2d Cir. 1988), and Robles v. Evans, 10-2343-PR, 2012 WL 1654951 (2d Cir. May 11, 2012).

Weisshaus presented sufficient and valid facts establishing the toll prices past the benefit conferred, violating statutory rights of public notice or hearings, disproportionate from the fair approximation of facilities, and discriminating against interstate commerce. Weisshaus has repeatedly emphasized in his Opening Brief ("Open. Br.") that this suit is not about the legality of tolls as a valid user fee, while addressing a defect in the recent increase in toll prices

implemented, in many ways contrary to federal and state laws, hurts people for no reason, warranting judicial review.

Defendant-Appellee Port Authority of New York and New Jersey ("Port Authority") in their Appellee Brief ("PA Br.") offers no support to explain the toll prices inconsistency beyond the fair proximate use of facilities, past the benefit conferred, and why it is ok to discriminate against interstate commerce. Nonetheless, Port Authority presents no reason to support their imposing penalties and excessive price differentials on individuals like Weisshaus who cannot utilize a transponder/E-ZPass. No objection is present to Weisshaus' request for an opportunity to amend his complaint.

I. THE CASE HISTORY REFUTES THE SWEEPING "FAILURE TO STATE A CLAIM" ANALOGY ASSERTED BY APPELLEES.

The Port Authority's Appellee-Brief marshals fragments of deficiencies in Weisshaus' complaint with error of the district court to support its contention that the complaint did not flesh out all the requisites to support a colorable claim. PA Br. 6. Followed with error that "The legal violations alleged in Weisshaus's Complaint are largely made up; there are no legal requirements for the legislatures of both States to approve toll increases, put "signs or posters at the toll plazas."[1] Id 15.

There is, however, substantial proof to the contrary.

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[1] It appears that the Port Authority in its brief makes multiple personal attacks towards Weisshaus with extraneous wording like calling him "deliberate and repeated toll violator," "piggyback," etc and accusing him of making things up. "Personal attacks, however, are never appropriate in any court filing." Lewis, 2010 WL 3672240

Port Authority errs that Weisshaus had the assistance of legal counsel because a journalist mistakenly assumed "that Cardozo School of Law Professor Lucille Roussin helped Weisshaus prepare his Complaint" and "that Rule 32 Certification [was signed] by attorney Freddie J. Berg Esq." PA Br. 8. These assertions are incorrect. From commencing this action and up to this brief, Yoel Weisshaus prepared all the pleadings himself. Neither attorney offered any legal assistance to this case. Ensuring compliance on a word count is not assistance of counsel on the merits.

A. The Law of Public Notice

Here is the public notice law and basic procedure before establishing toll prices (**emphasis** added):

> No tolls or other charges authorized by this section shall hereafter be instituted or increased until after a public hearing thereon shall have been held, at which persons affected thereby shall be given **adequate opportunity** to be heard, **and notice** whereof shall be published by the port authority. N.J.S.A. § 32:1-128

The statutory right of public notice is confirmed by the Compact creating the Port Authority, containing identical language to the New Jersey Open Public Meetings Act § 10:4-7 as it reads:

> The Legislature finds and declares that the right of the public to be present at meetings of the Port Authority.... and declares it to be the public policy of this State to insure the right of its citizens to have **adequate advance notice** of and the right to attend all meetings of the authority at which any business affecting the public is discussed or acted upon in any way. N.J.S.A § 32:1-6.1; N.Y. Unconsol. Law § 6416-A (McKinney) ("Compact")[2]

The prerequisite to toll increases is "Adequate Notice"; its definition is defined in the public meeting laws in the following section of § 10:4-7, which language is identical to Compact § 32:1-6.1; § 6416-A, as:

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[2] Citations to the Port Authority compact and identical statutes between New Jersey Statutes Annotated and New York Unconsolidated Statutes are cited as "Compact" with its numerical reference. The term Compact is coined in Port Auth. Trans-Hudson Corp., 495 U.S. 299.

> "Adequate notice" means written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken and which shall be (1) **prominently posted in at least one public place reserved for such or similar announcements**. N.J.S.A. § 10:4-8

The State of New York defines the term "public notice" in the Public Officers Law as:

> Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be **conspicuously posted in one or more designated public locations** at a reasonable time prior thereto N.Y. Pub. Off. Law § 104

The plain reading of public notice allegations in the complaint, recited in Weisshaus' opening brief on pages 36 through 38, reviewed with the law, confirms that Weisshaus stated a colorable claim alleging that Port Authority did not provide public notice before establishing the toll prices, and in the absence of conspicuous notice at toll plazas. Moreover, the statements made by the Port Authority in its brief concede that no ***conspicuous*** public notice was made at toll plazas before establishing the increase in toll prices; the only place where the public can take conspicuous notice. The foregoing without more would be sufficient to confirm that Weisshaus stated a colorable.

"The existence of a statutory right, however, is certainly relevant to the Judiciary's power to decide." Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (March 2012) including public notice laws: Trial court did not abuse its discretion in invalidating all action taken at meeting... where record established that members of board violated notice requirement of Public Officers Law. [N]otice of meeting was not given to extent practicable, to news media, nor was it conspicuously posted in one or more designated public locations at reasonable time prior to meeting. White v. Battaglia, 79 A.D.2d 880 (N.Y. App. Div. 1980) *Also*: The Defendants violated § 104 of the New York Open Meetings Law by holding the special meeting... without giving any public notice—to the news media, by conspicuous postings or otherwise. Fortress Bible Church v. Feiner, 2004 WL 1179306. [T]the requirements of the OPMA N.J.S.A. § 10:4-8, were not satisfied for several reasons, including the failure to deliver timely the notice to two newspapers and the failure to post the notice forty-eight hours in advance of the meeting. Strict compliance is required to satisfy the purpose of the "sunshine" law. *Citing* Polillo v. Deane, 74 N.J. 562, 578 (1977). Carley v. Borough of N. Plainfield, 380 N.J. Super. 240, 242 (Ch. Div. 2005)

The Supreme Court *held* the Southern District of New York has jurisdiction of actions against the Port Authority, "The statutory consent to suit provision... establishes the States' waiver of any Eleventh Amendment immunity that might otherwise bar respondents' suits against PATH." Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 299 (1990). Further 28 U.S.C. § 1343(3) establishes jurisdiction where the controversy involves interstate commerce and the right to travel. "[T]he right to travel, is in truth, a 'personal' right." "Congress recognized these rights in 1871 when it enacted the predecessor of §§ 1983, 1343(3). We do no more than reaffirm the judgment of Congress today." in Lynch, 405 U.S. 538, 552 (1972).

Wherefore, the complaint stated sufficient facts that the Port Authority violated public notice laws in establishing toll prices without proper notice, the district court erred in dismissing with prejudice, *sua sponte*, a well pleaded colorable claim.

B. The Relief Seeking Legislator Approval before Enacting New Toll Prices is the Court's Jurisdiction.

The complaint seeks as a general remedy for injunctive relief, to prevent the supposed violations from repeating and ensuring the injunctive relief will not be costly to implement on a public agency; Weisshaus presents for declaratory and injunctive relief that further increases in toll prices shall be subject to legislature approval. As cited further, that relief is well grounded in the Compact.

The Port Authority' brief states, "After the Board of Commissioners approved and adopted the toll and fare increases, they were forwarded to the Governors of New York and New Jersey for review. The ten-day veto period expired and the increases went into effect on September 18, 2011." PA Br. 5. The Port Authority misapplies its "ten-day veto period" practice of statutes Compact § 32:2-9, § 7152-3, although the preceding statute clearly reads that:

> Sections 32:2-6 to 32:2-9 of this title shall not apply to such minutes of the port authority as relate to the fixing of tolls of any bridge between the states of New York and New Jersey authorized or to be authorized by the legislatures of said states. N.J.S.A. § 32:2-8

Further, the Port Authority's brief states that toll increases are for purposes of "replacing the suspender cables on the George Washington Bridge, replacement of the Lincoln Tunnel Helix, and raising the Bayonne Bridge" (PA

Br. 5). The law clearly specifies that the Port Authority shall not proceed with "additional" construction without consent of the states as it reads:

> The Port Authority shall not proceed with the construction of any such additional vehicular bridges and tunnels over or under said interstate waters, **until hereafter expressly authorized by the 2 said States.** N.J.S.A. § 32:1-119

The statute describes when "consent by the states" is required:

> The port authority shall from time to time make plans for the development of said district, **supplementary to or amendatory** of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force... N.J.S.A. § 32:1-12

Enacting section 1-119 confirmed the decision of Port of New York Auth. v. Weehawken Twp., 14 N.J. 570, 579 (1954) the Supreme Court of New Jersey declared that projects beyond the comprehensive plan approved by the legislatures, "prior authorization by the two States was prerequisite to its construction." We see similar holding to a project within the New Jersey borders, "Port Authority of New York and New Jersey did not have power to participate in funding of project involving construction of new turnpike interchange and highway connection with roads in Elizabeth without approval by Legislatures of New Jersey and New York." State, Dept. of Transp. v. Port Auth. of New York & New Jersey, 159 N.J. Super. 102 (App. Div. 1978)

Section § 32:1-119 of legislature approval for "supplementary to or amendatory" apply to all bridges and tunnels. For good cause, there is a requirement of legislative approval: the two States consented to liability on part of the Port Authority in suits, actions, or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation. Compact § 32:1-162, § 7106

As pertain herein, for example, the Port Authority allegedly increased the toll prices partially "to raise the Bayonne Bridge." The Supreme Court of New Jersey holding applies to the Bayonne Bridge since statute providing for its tolls reads:

> The moneys appropriated by this act shall be applied by the port authority to the construction of the bridge **hereinbefore** mentioned and purposes incidental thereto and to no other purpose whatsoever. N.J.S.A. § 32:1-109.

Supposedly, the height of the Bayonne Bridge was the subject in the original approval by the legislature; therefore, any "supplementary to or amendatory of any plan theretofore adopted, are subject to legislature approval." N.J.S.A. § 32:1-12. In short, any "supplementary to or amendatory" plans through tolls require legislature approval. As the complaint clearly stated: If tolls are to be assessed beyond the scope of its original authority, legislatures

should first approve it because it infringes on the rights of the people to pursue happiness. Joint Appendix ("JA") 24 ¶72.

Moreover, section § 32:1-140.5 and § 32:1-35.12 provides that upon the satisfaction of the Bayonne Bridge debt obligations, the tolls should be terminated. Therefore, obligations of debt for new construction on the imposition of tolls are subject to legislature approval.

This Court *settled*: "Article XVIII authorized the Authority, subject to the exercise of the power of Congress, to make rules and regulations relating to navigation and commerce, which rules, however, **were to be effective only when concurred in by the legislatures of both states.** The states agreed by Article XIX to provide penalties and means of enforcement of the orders and regulations of the Authority." Comm'r of Internal Revenue v. Shamberg's Estate, 1945 C.B. 335 (2d Cir. 1944) (emphasis).

Moreover, the grounds of this action establish a claim to warrant the remedy of requiring legislature approval before establishing new toll prices. To accuse Weisshaus of "making things up" is one thing but to impose tolls with penalties, disregard public notice laws, and expand river crossings without legislature approval, largely by disregarding entire statutes thereof, a valid claim might be stated. Therefore, the concept sought by Weisshaus of declaratory

relief along with injunctive relief to require legislature approval before enacting new toll prices, is within the jurisdiction of this Court as a remedy.

II. DEFENDANT-APPELLEE'S BRIEF MAKES NO ARGUMENT SUPPORTING THE CONSTITUTIONALITY OF A $2 PENALTY FOR PAYMENT IN CASH ALONG WITH A $5 DIFFERENTIAL PRECLUDING ANY OBJECTION TO WEISSHAUS AMENDING HIS COMPLAINT.

The Port Authority concedes in its brief that the "the toll structure focuses the greatest increase on cash users and trucks that cause the most traffic congestion" P.A. Br. 17. However, it does not provide a meaningful answer to explain the logic behind a penalty for payment in cash.

Weisshaus advanced facts that will cure the deficiencies attributed to his complaint, something the Port Authority makes no effort to rebut or contest. The facts establish the inconsistency of toll prices because the Defendant-Port Authority subjects cash payers to an unjustifiable difference in toll prices, starting as low as $5. In addition to the differential, a $2 penalty for payment in cash will start December 2012.

As *held*: The 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 New York & New Jersey, 615 F.3d 129, 140 (2d Cir. 2010). The facts show all three circumstances that

implicate travel are present. First, the Port Authority concedes that the goal of high pricing is to punish those "cash users and trucks" that cause traffic congestion. How does a high price fix accomplish a reduction in traffic congestion if not by impeding travel? How does charging a premium price differential with penalties in tolls solve the supposed traffic problem other than deterring from travel and forcing travelers to avoid Southern New York? Second, the facts outline that toll prices are fixed beyond what a person earns under a reasonable wage. This results in the proximate prosecution for those who cannot afford the toll when crossing the border of New Jersey into Southern New York, implicating the right to travel. The toll prices are set so high that even a person like Weisshaus who pays tolls on a regular basis, is confronted with circumstances where he is charged more than what he earns, resulting in embarrassing events where he cannot pay the toll. The Port Authority follows up on those events with fines and penalties including arrest. Since the September 2011 increase, over 100 people were arrested for not having money to pay tolls. Third, the law prohibits "any classification, which serves to penalize the exercise" of the right to travel. Here, the classification-penalty starts by charging cash users a price difference starting $5 for not having E-ZPass. Then a $2 penalty added to the $5 difference is expected this coming December 2012, as a reprimand for payment in cash. As explained in the

opening brief by Weisshaus, it does not cost a $5 dollar difference to collect a toll in cash anywhere else.[3] Open. Br. 54. The classification continues that only residents from particular areas like Staten Island receive the greatest discount in toll prices.

It is interesting to note that the Port Authority argues, "several projects that are contingent upon the toll and fare increases" most notably "raising the Bayonne Bridge," a bridge that connects Staten Island to New Jersey. PA. Br. 5. On June 28, 2012, after submission of appellee brief, the Port Authority reduced toll prices for Staten Island residents to $4.75, a rate far lower—regardless of cash or E-ZPass, than $8 charged before the September 2011.[4] JA J. While the Port Authority raised toll prices for everyone, Staten Island residents receive the greatest discount. This further questions how the Port Authority establishes toll prices, whether the toll is based on the fair proximate use of faculties and benefit conferred.

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[3] On June 26, 2012, the Chairperson for New Jersey Turnpike Authority stated at public conference that toll collection cost through E-ZPass 15¢, through cash 65¢.

[4] *See* letter by Assemblywoman Valerie V. Huttle (NJ-37) and Assemblymen John S. Wisnieski (NJ-19) addressing the toll discount for Staten Island residents is not fair to New Jersey residents, assemblydems.com/pdf/SITollDiscountLetter.pdf (visited July 2, 2012).

The Port Authority erroneously concludes that "the differential effect of uniform tolls on persons of different incomes by itself is not grounds for a right to travel claim" PA. Br. 12. However, the Supreme Court of the United States recently noted that the "Loss of the ability to travel abroad is itself a harsh penalty, made all the more devastating if it means enduring separation from close family members living abroad." In the notes: "Freedom of movement across frontiers ... may be as close to the heart of the individual as the choice of what he eats, or wears, or reads;" the right to travel, "at home and abroad, is important for... business[,]... cultural, political, and social activities—for all the commingling which gregarious man enjoys." Vartelas v. Holder, 132 S. Ct. 1479, 1488 (2012)(internal omitted).

The Port Authority misquotes Monarch Travel Services, Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552, 554 (9th Cir. 1972) where the high prices of private "carrier" was at stake, not a state function of travel. The claims *here* are of a State function violating the right to travel. For right to travel purposes of the Fifth Amendment "a private corporation is not a state actor." Anderson v. USAir, Inc., 818 F.2d 49, 56 (D.C. Cir. 1987). "The Authority is a body politic and corporate created by a compact made between the States of New York, Laws N.Y. 1921, c. 154, and New Jersey on April 30,

1921, N.J.SA. § 32:1-1 et seq. and approved by Congress on August 23, 1921, 42 Stat. 174. It is fully owned by the two states and its projects are all operated in the interest of the public without profit to private persons." Comm'r of Internal Revenue, 1945 C.B. 335. Thus, the Port Authority is not a private corporation and Monarch is inapplicable.

Weisshaus presents the minimum wage guideline as additional support of fact that the toll prices exceed the benefit conferred and the price is the proximate causation that prosecutes those individuals who cannot afford them. That analogy is well grounded in case law. "The law sought to protect workers, particularly non-unionized workers, by establishing federal minimum wage, maximum hour." Knepper v. Rite Aid Corp., 675 F.3d 249, 253-54 (3d Cir. 2012). *See* Goldfarb, holding there is a right to sue for antitrust a requirement that County Bar members conduct title examination, where fees were equal or exceeded fees of standard real estate transactions. In that regard, significant amount of funds furnished for financing the purchase of homes in a county came from outside the state. It was not necessary to show that homebuyers were discouraged by the challenged activities or that the fee schedule raised fees. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). As in Goldfarb when government services are rigid to the markets rather than advisory, there is no

exemption from suit under the Robinson-Patman Act. The Third Circuit in Bedell: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *citing* Parker v. Brown, 317 U.S. 341, 351 (1943) States cannot authorize private parties to set a price and then enforce those prices without any evaluation of their reasonableness. Only an affirmative decision by the state itself, acting in its sovereign capacity, and with active supervision, can immunize otherwise anticompetitive activity. A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc., 263 F.3d 239, 255 (3d Cir. 2001). The Port Authority's brief concedes that legislature approval did not sanction the price fixing in tolls; thus, antitrust jurisdiction applies.

The Rules of Civil Procedure Rule 15(a)provide that "A party may amend its pleading once as a matter of course." That right ends as a matter of course "with the entry of judgment dismissing the action. Thereafter, the pleading could be amended only with leave of the court." Feddersen Motors v. Ward, 180 F.2d 519, 523 (10th Cir. 1950). As held in Williams: Rule 15's liberty is tempered by considerations of finality. As a procedural matter, party seeking to file an amended complaint post-judgment must first have the judgment vacated or set aside pursuant to [Rules] 59(e) or 60(b). *citing* Ruotolo v. City of New

York, 514 F.3d 184, 191 (2d Cir. 2008); Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 245 (2d Cir. 1991)("it would be contradictory to entertain a motion to amend the complaint.") Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011). The only comment the Port Authority's brief makes regarding Weisshaus' request to amend his complaint is that Weisshaus' "October 29, 2011 letter requesting leave to file a motion for reconsideration" did "not ask for leave to file an amended complaint," P.A. Br. p8.[5] After the entry of final *sua sponte* judgment, according to Williams, Weisshaus was correct in asking the district court for an opportunity to file for reconsideration, especially considering that the district court did not consider the ruling in Perez, 849 F.2d 793. "[T]he general rule is that a district court has no authority to

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[5] . Port Authority incorrectly asserts so despite the clear reading "This case was dismissed prematurely, and Weisshaus is entitled to relief because:" "(ii) There was no opportunity to correct the deficiencies in the complaint" JA 44.

Port Authority errs that the district court "District Court fairly construed his October 29, 2011 letter" as "made pursuant to Fed. R. Civ. P. 60(b)" PA 8, despite the following exhibit, a follow up letter, states: "My request to the Court was submitted timely, and the Court should grant my request to file a motion for reconsideration due by November 28...." JA p48

Based on the procedure, Weisshaus' October letter served no more than a short outline to the district court to obtain November 28 as the deadline, in good conscious pursuant SDNY Local Rule 6.3 that reconsideration is filed within 14-days of judgment. The district court misconstruing the October 29 letter as the actual motion, seeing a request not called for is far more reaching than expected.

dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard."

In any regard, Port Authority provides no reason or justification why sanctioning a price differential and penalties are justified to implicate the right to travel, to somehow explain the "toll structure" that "focuses the greatest increase on cash users and trucks." Weisshaus recognized in his opening brief that his complaint might be somewhat too profuse in particularizing the grounds of this action. Open. Br. 15, 57. However, the deficiencies can be cured by amending the complaint. That deficiency of economic discrimination was stated in the complaint, alleging that the price structure by the Port Authority is fixed beyond the workings of the open market, by exceeding the minimum wage parameter. It is the fact that the district court provided Weisshaus no opportunity to amend his complaint that brings him to the Court of Appeals. The Port Authority does not contest or object to an opportunity for Weisshaus to amend his complaint. Therefore, Weisshaus' appeal for an opportunity to amend his complaint is actually without an objection.

III. DEFENDANT-APPELLEE'S FAIL TO EXPLAIN THE DIFFERENCE, HOW AAA IS DIFFERENT FROM WEISSHAUS IN A CAUSE OF ACTION ALLEGING THAT TOLL REVENUE TO REBUILD THE WORLD TRADE CENTER IS ILLEGAL.

The district court treated a *pro se* plaintiff in Weisshaus different from one represented by counsel in AAA. The suit AAA v. Port Authority 11-cv-6746 (RJH) was filed September 27, 2011, 9-days after September 19 when Weisshaus was filed. Both lawsuits stated a same or a similar fact creating the cause of action that the use of toll revenue to rebuild the World Trade Center ("WTC") is prohibited, warranting adjudication.

The Port Authority asserts that the instant cause of action in Weisshaus is somehow different from AAA because the plea of different venues. The maxim is well settled, facts are what create a cause of action. As this Court *held*: "[T]he complaint must allege facts that, if true, would create a judicially cognizable cause of action." Kittay v. Kornstein, 230 F.3d 531, 537 (2d Cir. 2000). The Supreme Court *held*: Two suits are the same cause of action when they are "based on substantially the same operative facts." A cause of action refers to the operative facts and not on the remedies, an aggrieved party might later request. *See* United States v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1728 (2011).

Thus, the grievance in AAA against the use of toll revenue to rebuild WTC is the same alleged in Weisshaus. The district court in Weisshaus treated differently a *pro se* party without reviewing if the cause of action of using toll revenues to rebuild WTC stated a claim, despite 28 U.S.C. § 1915(d) requires same process to a *paupries* as provided for others by law. Indeed, in AAA the district court acknowledged that the use of toll revenue to rebuild WTC is a valid claim that can be bolstered through discovery. AAA, 2012 WL 362010, JA 115.

While Weisshaus alleged many allegations against the Port Authority including public notice allegations, the allegation in AAA that increasing toll prices to use the revenue to rebuild WTC is indistinguishable from Weisshaus based on the merits from every angle. Weisshaus recites these allegations of the complaint in his opening brief *see* pages 49-50. Taking one example of an allegation in the complaint, filed September 19, 2011:

> Because the statue allowing the Port Authority to assess toll has been so broadly interpreted and is used to raise money for privileged projects not fundamental to the implied rights to travel, such as the development of The World Trade Center, a real estate development that has nothing in common with the basic person crossing the Hudson River, an actual controversy exists. Op. Br. p49, JA p22 ¶62-3.

The facts are indistinguishable according to the district court:

> "On September 27, 2011, AAA brought an action in this Court, seeking *inter alia* a declaratory judgment that the toll increases are illegal. AAA alleges that the toll increases are being used to fund real estate development at the World Trade Center site."

Auto, 2012 WL 362010, J.A p104. It is common sense that two plaintiffs are present; both claim individually the use of toll revenue to rebuild WTC is unacceptable.

To avoid dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw reasonable inference that the defendant is liable for alleged misconduct. Ashcroft v. Iqbal, 556 U.S. 662 (2009). Pacheco v. Connecticut, WL 1948675 (2d Cir. May 31, 2012)(summary order). "Rule 8(a)(2) is satisfied when the plaintiff pleads factual content that allows the court to draw the reasonable inference" of alleged misconduct. Hamilton v. Palm, 621 F.3d 816, 817 (8th Cir. 2010)

Moreover, Port Authority errs that the difference in Weisshaus from AAA is Weisshaus somehow failed to state a claim upon which relief can be granted because he asserts "a right to travel claim" PA Br. 13. However, the Port Authority acknowledges that AAA advanced "cognizable legal claims." PA Br. 16. Nonetheless, Port Authority incorrectly concludes that a "separate litigation

by Weisshaus would be duplicative and unnecessarily burdensome upon the judicial system," id, despite that Weisshaus filed his lawsuit, 9-days prior to AAA. This contradiction brings into question the authenticity of this entire "different case" argument advanced by Port Authority. It is obvious that AAA does not represent Weisshaus' interest.

At this early stage of judicial review, the question before the district court was not whether the plaintiff will ultimately prevail, but whether he has a considerable cause of action to offer supporting facts.[6] The Port Authority's take of "different" alleging this case is under the statute of "§ 1983" and AAA is under "dormant Commerce Clause or Highway Act claim" squarely conflicts with the Supreme Court that facts create the causes of action; seeks to confuse the district court's task in a threshold-judicial-review to those tasked with upon an adversary response.

Wherefore, where the district court did acknowledge that the allegation of using toll revenue to rebuild the WTC "can be bolstered through discovery"

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[6] "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Bell Atl. Corp., 550 U.S., 583

Weisshaus' complaint, which stated a same or similar allegation, should be given leave to proceed.

IV. WEISSHAUS RESPECTFULLY SUGGESTS THAT THIS COURT MAKE PLAIN THE VISIBILITY OF WEISSHAUS' CONSTITUTIONAL CLAIMS AND THE PROPRIETY OF PURSUING THOSE CLAIMS UNDER 28 U.S.C. § 1343.

This case raises important issues ripe for clarification from this Court. Weisshaus respectfully suggests that this Court should briefly and plainly issue an opinion holding that 1) based on the preponderance of evidence, Weisshaus claims is an actual controversy, and 2) such rights can be pursued under the applicable statues of 28 U.S.C. § 1343(3).

This case presents this Court with an opportunity to address serious and potentially recurring questions that are causing confusion for the Port Authority on how the toll prices are to be just to meet fair proximity of facilities used, considerate towards the benefit conferred, and in no way discriminatory against interstate commerce. Weisshaus respectfully suggests that this Court take the opportunity to make plain that the right to travel is violated when charging an unjust price differential and a penalty for exercising the right to travel.

Specifically, the Defendants' conduct (assuming Weisshaus is able to prove the truth of the allegations in his complaint) seek to deter travel by fixing toll prices beyond of what a person earns and attaching a price differential of $5 along with a $2 penalty. All these claims are cognizable for relief through 28 §§

U.S.C. 2201, and 2202 under a cause of action of 28 U.S.C. §§ 1331, 1343(3) and 15 U.S.C. § 13(a) and (f).

The need for such clarity that this case is an actual controversy is highlighted by the recent Supreme Court decision in Knox, June 21, 2012. "The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference. The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves. (Internal omitted) Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277 (2012) The Port Authority, an governmental agency, seeks to compel travelers to buy E-ZPass and prohibit travel to—or punish—those who pay toll with cash, present a controversy yet evading review.

In Knox, the Supreme Court went on to define and clarify if one can be forced to pay "compulsory" money for exercising a constitutional right. "We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless" the "compulsory fees can be levied only insofar as they are a 'necessary incident'" of the "larger regulatory purpose which justified the required association." Knox, 132 S. Ct. 2277. Constitutional violations of the rights of travel fall under

the Fifth and Fourteenth Amendments, but in circumstances where individuals choose their exercise in the open market to pay toll with cash or E-ZPass, a First Amendment controversy exists. "The First Amendment does not require States to regulate for problems that do not exist." Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2680 (2011). "Whatever its source, a State may neither tax nor penalize a citizen for exercising his right to leave one State and enter another." Jones v. Helms, 452 U.S. 412, 419 (1981) Moreover, to punish travelers with price differentials and penalties for paying toll in cash is discrimination against interstate commerce, attacks the fundamental concept that toll prices must not exceed the benefits conferred. The district court appears to have made similar error in Weisshaus as in Gardner, 461, and Robles 2012, in dismissing with prejudice potential valid claims without offering the *paupries* an opportunity to cure the complaint deficiencies. Offering an opportunity to amend the complaint is critical because "Untimely dismissal may prove wasteful of the court's limited resources rather than expeditious, for it often leads to a shuttling of the lawsuit between the district and appellate courts." Lewis v. State of N. Y., 547 F.2d 4, 6 (2d Cir. 1976) Therefore, "[w]e must reverse a district court's dismissal pursuant to § 1915A whenever a liberal reading of the complaint gives any indication that a valid claim might be stated." McEachin v. McGuinnis, 357 F.3d 197, 201 (2d Cir. 2004). When there is indication that a complaint might be

stated, there is no way of ruling out any possibility without offering a *paupries* an opportunity to amend the complaint, even as unlikely the claims might be. Gardner, and Robles.

In this case, the district court took the position that Weisshaus should have no right to challenge the price differential because "EZ Pass has, however, survived constitutional challenge before" with Saunders v. Port Auth. of New York, 2004 WL 1077964 . That position was premature because the district court had not seen, yet, Weisshaus' full and complete facts creating the grievance on price differentials. As outlined in the opening brief, page 58, this case is different from Saunders in every aspect. A district court's prediction of an amended complaint without seeing the text is clearly a misapplication of the legal standard "that a district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard."

To the benefit of the district court, this error occurred as a question as "survived constitutional challenge." However, the Port Authority misapplies Saunders as a license to impose extreme price differentials and penalties, without reflecting the price on the incidental cost difference, rule of reason, or cost savings analysis. This misapplication has gone so far that authorities all

over the United States, in the past months, are raising toll prices with extreme differentials and penalties for payment in cash. This misapplication of Saunders is destined to escalate further. As *held* in Turner: disputes that are "capable of repetition" while "evading review." S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911). A dispute falls into that category, and a case based on that dispute remains live, if "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *citing* Weinstein, 423 U.S. 147, 149 (U.S.N.C. 1975)(per curiam). Turner v. Rogers, 131 S. Ct. 2507, 2515 (U.S.S.C. 2011)

A plain statement of the rights of travelers will help prevent similar difficulties in the future. The right is not, of course, absolute; the Port Authority (in general, and on remand in this case) may raise legitimate concerns, e.g., why penalties and price differentials are appropriate. "At the same time, the condition was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used." Nat'l Fed'n of Indep. Bus. v. Sebelius, WL 2427810 (U.S. June 28, 2012) "In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." Holding that reversal of threshold dismissal does adjudge the claims. Zivotofsky ex rel.,

132 S. Ct., 1430. But when, as here, there is no authority stating that price differentials with penalties may be imposed without a logical reason, which brings the question to this Court to make plain the visibility of Weisshaus' claims.

In sum, Weisshaus respectfully suggests that a brief, direct opinion clarifying the issues in this case would be of benefit to all parties, and district courts alike.

V. THIS CASE IS JUSTICIABLE

This appeal presents an exceptional importance in case law, in which no appellee has contested, of how toll prices are set warranting judicial review. The lower courts are commissioned by this Court not to apply *sua sponte* the statute of 28 U.S.C. § 1915(e)(B) for failure to state a claim without allowing to cure its deficiencies. The plaintiff has met a far-reaching burden for "a colorable claim warranting further development of the facts." Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998). This case came before the Second Circuit and the district court on fact that toll prices are set beyond the legal requisite of Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth., 567 F.3d 79 (2d Cir. 2009).

The laws surrounding tolls and the right to travel take into consideration the cost and reflection of price. As the Supreme Court held: [S]tate or local tolls must reflect a 'uniform, fair and practical standard' relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least 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, it will pass constitutional muster. Evansville-Vanderburgh Airport Auth. Dist. v. Delta

Airlines, Inc., 405 U.S. 707, 716-17 (1972). The consideration specifically takes into account the "amount" in price.

In this case, the district court looked the other side of the complaint by assuming "EZ Pass has survived constitutional challenge." The legal standard of § 1915(e)(B) *sua sponte* for "failure to state a claim" is inapplicable when an actual controversy is present. Weisshaus respectfully submits that this case is justiciable under the facts; the toll prices were increased in the absence of public notice requirements, exceeding the proximate use of facilities, not conferred with the benefit received, and discriminatory against interstate commerce. The "failure to state a claim" assumption should be based on sound reasoning that the plaintiff cannot set forth practical facts to identify a violation. Allowing a defendant to get away with conduct because the plaintiff is a *paupries* pursuing *pro se*, presents an exceptional importance to protect the guidelines of justice clinching to the law.

The Port Authority concedes, "[T]he toll structure focuses the greatest increase on cash users and trucks that cause the most traffic congestion." The rule of law prohibits penalties and extreme price differentials on interstate commerce. The rule of law also applies to those under the name of state authority. To punish the claimant with blame for not pleading his complaint

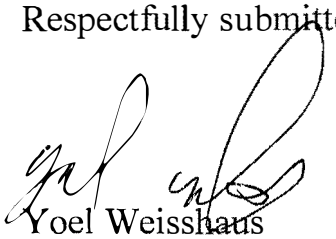
"perfect," by denying an opportunity to amend the complaint invalidates the rule of law with respect to defendants who discriminately target travelers of lower classes, the cash payer who lives on a minimum wage and does not have a bank account or a credit-card to afford E-ZPass.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Yoel Weisshaus respectfully requests that this Court vacate and reverse the district court's orders of dismissal and judgment as well the denial order, and remand this case to the district court with an opportunity for Weisshaus to amend his complaint for further proceedings.

Dated: July 11, 2012

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

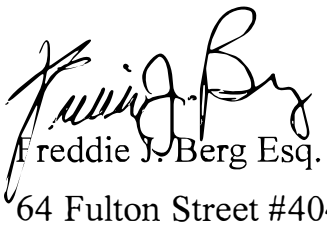
WITH RULE 32(a)

I, Freddie J Berg Esq., hereby certify that I am an attorney at law in the State of New York. I certify that I reviewed the rules pursuant to Fed. R. App. P. 32(a)(7)(B) and that the attached brief according to Microsoft Word processing system is proportionally spaced, has a typeface (New Times Roman) of 14 points, double spaced, and contains less than 7,000 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In addition, the principle brief is formatted as 1" inch margins from top to bottom and right to left excluding page numbers.

This certification is for compliance purposes only and nothing more.

Dated: July 11, 2012

New York NY,



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