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19-161-cv

Weisshaus v. Port Authority

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 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 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of May, two thousand twenty.

PRESENT:

BARRINGTON D. PARKER,
DENNY CHIN,
SUSAN L. CARNEY,
Circuit Judges.

-x

YOEL WEISSHAUS,

Plaintiff-Appellant,

-v-

PORT AUTHORITY OF NEW YORK & NEW JERSEY,

Defendant-Appellee,

NEW YORK STATE, 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 THROUGH 20, JANE DOES 1 THROUGH 20,

Defendants.

-x

19-161-cv

FOR PLAINTIFF- YOEL WEISSHAUS, *pro se*,
APPELLANT: New Milford, New Jersey.

FOR DEFENDANT- KATHLEEN G. MILLER,
APPELLEE: The Port Authority of New York and New Jersey, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Eaton, J.).¹

¹ Judge Richard K. Eaton, of the United States Court of International Trade, sitting by designation.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED in part and VACATED in part, and the action is REMANDED for further proceedings consistent with this order.

Plaintiff-appellant Yoel Weisshaus, proceeding *pro se*, sued defendant-appellee Port Authority of New York and New Jersey (the "Port Authority"), claiming, *inter alia*, that toll increases for the Port Authority's river crossings violated his right to travel. His complaint was *sua sponte* dismissed in 2011. On appeal, we affirmed the dismissal of all claims, except we remanded for the district court to consider whether Weisshaus had adequately pleaded a dormant Commerce Clause claim. *See Weisshaus v. Port Auth. of N.Y. & N.J.*, 497 F. App'x 102, 104-05 (2d Cir. 2012). We noted that the district court could, in its discretion, stay the case pending resolution of a similar case brought against the Port Authority by AAA Northeast and other AAA entities (collectively, "AAA"). *Id.* at 105.

On remand, in an amended complaint, Weisshaus asserted three claims under the dormant Commerce Clause based on: (1) the setting of tolls to fund projects unconnected to the Port Authority's "interdependent transportation system" ("ITN"); the discount given to E-ZPass users as compared to those who pay tolls in cash; and the setting of tolls to fund future projects. He also asserted other claims not based on the dormant Commerce Clause. The Port

Authority moved to dismiss the new complaint for failure to state a claim, or to stay the case pending decision in the AAA case. The Port Authority provided exhibits from the AAA case in support. The district court stayed Weisshaus's case until summary judgment was granted for the Port Authority in the AAA case. D. Ct. Dkt. No. 56; *see also AAA Ne. v. Port Auth. of N.Y. & N.J. ("AAA")*, 221 F. Supp. 3d 374, 396 (S.D.N.Y. 2016). After the stay was lifted, Weisshaus moved to file a second amended complaint. The district court denied that motion. It considered converting the Port Authority's motion to dismiss to a motion for summary judgment, but did not do so; in the end, it granted the Port Authority's motion to dismiss, relying in part on factual findings the court had made in *AAA*.

This appeal followed. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

I. Standards of Review

We review *de novo* a district court's dismissal for failure to state a claim. *Smith v. Hogan*, 794 F.3d 249, 253 (2d Cir. 2015). While we ordinarily "review denial of leave to amend under an abuse of discretion standard, when the denial of leave to amend is based on a legal interpretation, such as a determination that amendment would be futile, a reviewing court conducts a *de novo* review." *Id.* (internal quotation marks and alterations omitted) (italics added).

II. Non-ITN Projects Claim

In deciding a motion to dismiss for failure to state a claim, this Court (and the district court) should not consider matters outside the pleadings. *See Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 202 (2d Cir. 2013). Courts must limit their consideration to: (1) "the factual allegations in the . . . complaint, which are accepted as true"; (2) "documents attached to the complaint as an exhibit or incorporated in it by reference"; (3) "matters of which judicial notice may be taken"; or "documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit." *Roth v. CitiMortgage Inc.*, 756 F.3d 178, 180 (2d Cir. 2014) (internal quotation and alterations marks omitted).

As for judicial notice, Federal Rule of Evidence 201(b) provides that courts may take judicial notice only of facts outside the trial record that are "not subject to reasonable dispute." Fed. R. Evid. 201(b). "Such facts must either be (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (internal quotation marks omitted). "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Id.* (internal quotation marks omitted). "Facts adjudicated in a prior case do

not meet either test of indisputability contained in Rule 201(b): they are not usually common knowledge, nor are they derived from an unimpeachable source." *Id.*; *see also Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992) (noting that the district court overstepped the bounds of judicial note when it relied on a finding of fact from a bankruptcy court order).

"[W]here matter outside the pleadings is offered and not excluded by the trial court, the motion to dismiss should be converted to a motion for summary judgment." *Nakahata*, 723 F.3d at 202-03; *see also* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). However, "reversal for lack of conversion is not required unless there is reason to believe that the extrinsic evidence actually affected the district court's decision and thus was not at least implicitly excluded." *Amaker v. Weiner*, 179 F.3d 48, 51 (2d Cir. 1999).

We conclude that the district court erred in dismissing the non-ITN projects claim. The Port Authority submitted with its motion evidence produced in AAA. The Port Authority relied on this evidence for the proposition that its ITN system was unprofitable. The district court did not convert the motion to one for summary judgment, but nonetheless

cited to factual findings in the *AAA* decision. In doing so, the district court apparently believed it could take judicial notice of the factfinding in *AAA*. For instance, in examining whether revenues were diverted to non-ITN projects, the court described the findings in *AAA* and then concluded:

Faced by the full weight of these facts, Weiss haus has not shown that his allegations of fact could lead the court to reasonably find the Port Authority liable on facts that have already been determined to foreclose liability. Thus, plaintiff's claim that portions of the 2011 Toll Increase are being diverted to projects not functionally related to the ITN fails to state a claim under the dormant Commerce Clause. Because the court previously decided that there were no toll revenues that could have been diverted to projects outside of the ITN, plaintiff's claim that the 2011 Toll Increase is being used to fund non-ITN projects . . . necessarily fails to allege facts sufficient to satisfy the pleading standard.

S. App'x at 29.

The findings in *AAA*, however, were not subject to judicial notice, and Weiss haus disputed or attempted to distinguish a number of facts drawn from those cases that were material to the decision to dismiss the non-ITN projects claim in this case. Because that use of facts from *AAA* was error, the matter is remanded for the district court to convert

the motion to one for summary judgment, in whole or in part, and to permit Weisshaus an opportunity to submit evidence in opposition to the motion. Of course, the district court is free, upon such conversion, to consider the evidentiary materials submitted by the Port Authority. We express no opinion as to the merits of Weisshaus's claim.

III. Points That Are Affirmed

Despite the error discussed above, there are aspects of the district court's decision that we affirm.

A. Other Dormant Commerce Clause Claims

Weisshaus argues that the Port Authority's cash toll surcharge violates the dormant Commerce Clause because it "penalize[es] drivers for not having E-ZPass." Appellant's Br. at 49. He contends that the district court erred when it considered the benefits that E-ZPass confers on all drivers -- that is, better traffic flow -- because the court "stepped outside the four corners of the complaint[]" to make such a finding. Appellant's Br. at 51. We disagree. Weisshaus attached a Port Authority press release to his amended complaint, which explained the Port Authority's reason for discounting the toll price for E-ZPass users: to decrease traffic congestion. In nearly a decade of litigation, Weisshaus has never contended that this benefit was inauthentic, nor does he do so on appeal. Accordingly, the district court appropriately relied on the documents incorporated into Weisshaus's amended complaint, and it did not err when it

dismissed his cash toll surcharge claim.

Similarly, we affirm the district court's dismissal of Weisshaus's future projects claim, also raised under the dormant Commerce Clause. There, he argues that the Port Authority cannot raise toll prices "to fundraise revenues for future facilities, years in advance" because it may never deliver a benefit to those paying the increased rate. Appellant's Br. at 54. When determining whether a fee charged by a government entity violates the Commerce Clause, we consider whether the fee "confer[s] an actual or *potential* benefit" on those who pay. *See Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 87 (2d Cir. 2009) (emphasis added). A fee is permissible if it supports a project with "at least a functional relationship to facilities used by the fee payers." *Id.* (internal quotation marks omitted). Here, the Port Authority plans to use the funds to "maintain and modernize the bridges and tunnels of the ITN," Appellee's Br. at 23, which satisfies the "functional relationship" requirement, *see Bridgeport*, 567 F.3d at 87. Accordingly, the district court did not err in dismissing Weisshaus's future projects claim.

B. Scope of Our Prior Mandate

"The scope of a mandate may extend beyond express holdings, and precludes relitigation both of matters expressly decided [and] . . . impliedly resolved by the appellate court." *In re Coudert Bros. LLP*, 809 F.3d 94, 99 (2d Cir. 2015) (internal quotation marks and alterations omitted). "A mandate, therefore, may expressly dispose of certain issues raised on appeal, or if the disposition of an issue is necessarily implied by our decision, a mandate may also foreclose such an issue from being considered by the lower court." *Id.* (internal quotation marks omitted). "The district court must follow both the specific dictates of the remand order as well as the broader spirit of the mandate." *Id.* (internal quotation marks omitted).

Here, our remand order directed the district court to "analyze the adequacy of Weisshaus's pleadings with respect to a dormant Commerce Clause claim by applying the standard the Supreme Court set out . . . for analyzing the reasonableness of fees charged for use of state-provided facilities." *Weisshaus*, 497 F. App'x at 105. We instructed 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." *Id.* at 104-05. We then affirmed the dismissal of Weisshaus's claims in all other respects. *Id.* at 106. To the extent that Weisshaus attempted on remand to raise claims other than the dormant Commerce Clause, the district court was correct to dismiss them as beyond the scope of this Court's mandate.

C. Minimum Wage Claim

In his original complaint, Weisshaus asserted that the post-2011 toll rate "exceeds the minimum wage guideline of what a person under such income conditions can afford Thus, these tolls are targeted to restrict minimum wage earners the right to travel." Our prior panel affirmed the dismissal of Weisshaus's right-to-travel claim, stating that "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." *Weisshaus*, 497 F. App'x at 104 (internal quotation marks omitted).

In his amended complaint, Weisshaus made essentially the same allegation that the toll was prohibitively expensive for a minimum wage earner, but instead presented it as the foundation of a dormant Commerce Clause claim. He asserted that the toll rate's chilling effect on travel for prospective minimum wage earners discriminated against interstate commerce. An independent review of the record and relevant case law reveals that the district court properly held that this claim fares no better when pursued under the Commerce Clause.

IV. Leave to Amend

The district court's denial of Weisshaus's motion to amend the complaint was based, at least in part, on the factfinding it drew from *AAA*, which Weisshaus disputed. *See* S. App'x at 34 ("To the extent that plaintiff's Proposed Second Amended Complaint

claims that the ITN was operating at a profit, and therefore, the need for the 2011 Toll Increase was motivated by an 'ulterior motive of setting the tolls at its highest level,' the court notes that it has previously addressed the issue in *AAA*"). The district court should reconsider its denial of that motion for the reasons discussed above.

We have considered all of Weisshaus's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court in part, **VACATE** in part, and **REMAND** the action for further proceedings consistent with this order.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

[Stamp]

United States
Court of Appeals
Second Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YOEL WEISSHAUS,	:	Before: Richard K.
Plaintiff,	:	Eaton, Judge*
v.	:	Court No. 11 Civ.
PORT AUTHORITY OF	:	06616 (RKE)
NEW YORK AND NEW	:	
JERSEY,	:	
Defendant.	:	

OPINION

Eaton, Judge: Before the court is defendant Port Authority of New York and New Jersey's ("defendant" or "Port Authority") motion to dismiss plaintiff Yoel Weisshaus' ("plaintiff" or "Weisshaus") December 20, 2013 amended complaint ("Amended Complaint"), *see* Def.'s Mem. Supp. Mot. Dismiss, ECF No. 37 ("Def.'s Br."); Def.'s Mem. Opp'n Pl.'s Mot. Leave to Am., ECF No. 66 ("Def.'s Suppl. Br."); *see also* Am. Compl., ECF No. 26, and plaintiff's cross-motion asking the court to grant him leave to file a second amended complaint ("Proposed Second Amended Complaint"). *See* Pl.'s Combined Mem. Suppl. Opp'n Mot. Dismiss and in Supp. Mot. Leave to Am., ECF No. 64 ("Pl.'s Suppl. Br."); Pl.'s Cross-Mot. Ex. 1, ECF No. 65-3 ("Proposed Second Am. Compl.").

* Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

Plaintiff opposes defendant's motion to dismiss, and defendant opposes plaintiff's motion to amend his complaint a second time. *See* Pl.'s Mem. Opp'n Mot. Dismiss, ECF No. 44 ("Pl.'s Br."); *see also* Pl.'s Suppl. Br. 1; Def.'s Suppl. Br. 1. Because in both the Amended Complaint, and the Proposed Second Amended Complaint, plaintiff fails to state a claim upon which relief can be granted, the court grants defendant's motion to dismiss, and denies plaintiff's cross-motion for leave to amend.¹

BACKGROUND

I. FACTS

This case arises out of the same facts as those that gave rise to the court's opinion in *AAA Northeast v. Port Authority of New York & New Jersey*, 221 F. Supp. 3d 374 (S.D.N.Y. 2016) ("AAA Northeast").

The Port Authority is a bi-state governmental agency created by compact between New York and New Jersey with consent of the United States Congress, and is responsible for construction, maintenance, operation, and control of all vehicular bridges and tunnels connecting New York and New Jersey, including the Bayonne Bridge, the Outerbridge

¹Previously, the court notified the parties that it was considering partially converting defendant's motion to dismiss into a motion for summary judgment, and invited the parties to submit their views. *See* Order dated Aug. 31, 2018, ECF No. 67. Upon consideration of the submissions, defendant's motion will not be partially converted into one for summary judgment.

Crossing, the Goethals Bridge, the George Washington Bridge, the Holland Tunnel, and the Lincoln Tunnel. *See* N.Y. UNCONSOL. LAWS § 6401, *et seq.* (McKinney 2018); N.J. STAT. ANN. § 32:1-118 (West 2018). In addition, the Port Authority operates “the interstate Port Authority Trans–Hudson (“PATH”) Rail System; three bus terminals (the Port Authority Bus Terminal, George Washington Bridge Bus Station, and Journal Square Transportation Center); two truck terminals; seven marine terminals; four airports; two heliports; and the sixteen-acre World Trade Center site.” *AAA Northeast*, 221 F. Supp. 3d at 376. The Tunnels, Bridges & Terminals Line Department, the PATH Rail System Line Department, and the ferries program collectively comprise the “Interstate Transportation Network” (the “ITN”).² *Id.*

The Port Authority is governed by a board of twelve commissioners, six from each state. N.Y. UN-

² As discussed in detail by the court in *AAA Northeast*:

While the concept of the ITN is rooted in the state laws implementing the compact that created the Port Authority, the term was first used in Judge Pollack’s opinion in *Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey (AAA 1989 I)*, 706 F. Supp. 264 (S.D.N.Y. 1989), which was affirmed by Chief Judge Oakes’ opinion in *Automobile Club of New York, Inc. v. Port Authority of New York & New Jersey (AAA 1989 II)*, 887 F.2d 417 (2d Cir. 1989).

AAA Northeast, 221 F. Supp. 3d at 376. Moreover, “[a]lthough the concept of the ITN is a fixture in case law and the Port Authority may take it into account in its capital plan, it does not otherwise account for it separately on its books and records.” *Id.* at 377.

CONSOL. LAW § 6405. The bi-state statutes allow the Port Authority to collect tolls at the bridge and tunnel facilities. *See id.* § 6501; N.J. STAT. ANN. § 32:1-118.

On August 5, 2011, the Port Authority announced, in a press release, a proposal to increase the tolls on its tunnels and bridges. Among other things, the press release stated:

Following direction by [the governors of New York and New Jersey], the Port Authority of New York and New Jersey Board of Commissioners today approved a two-part plan to restore fiscal health to the agency by increasing toll and fare rates at a lower level than originally proposed and demanding accountability through a stringent agency-wide review....

The \$25.1 billion immediate 10-year capital plan will generate more than 131,000 jobs and was achieved by giving critical attention to safety, security and state-of-good-repair projects, including completion of the World Trade Center, while and phasing in other less immediate projects over more than 10 years. Approximately 60 percent of the plan, \$15 billion, will be invested in the next four years supporting a much needed boost to the regional economy. The immediate projects funded in the plan include:

- George Washington Bridge suspender ropes
- Lincoln Tunnel Helix rehabilitation
- Bayonne Bridge roadway raising

- New Goethals Bridge with both Port Authority and private investment
- PATH Car, signal, and station modernizations
- Airport runway and taxiway modernizations
- Security enhancements at all facilities
- Port infrastructure improvements to rail and roads in the port
- Completion of the World Trade Center

The revised toll and fare rates recognize the severe financial constraints facing the agency and the financial limitations on regional commuters and businesses dependent on the Port Authority's transportation network each day.

Am. Compl. Ex. A, ECF No. 26-1.

On August 19, 2011, the Port Authority Board of Commissioners met and approved a toll increase that began on September 18, 2011 (the "2011 Toll Increase"). Am. Compl. Ex. A; *see also AAA Northeast*, 221 F. Supp. 3d at 376-77 (detailing the facts surrounding the toll increase). The 2011 Toll Increase included a \$1.50 increase for all users, and an additional \$2 penalty for users paying with cash (instead of with E-ZPass), rounded up to the nearest dollar. From December 2012 through December 2015, the tolls increased an additional \$0.75 each year. In addition, fares on the PATH train increased \$0.25 per year from 2011 to 2014. *See* Am. Compl. Ex. A.

II. PROCEEDINGS

On September 19, 2011, Weiss Haus, a New Jersey resident who has used the Port Authority's surface river crossings to commute to New York City, proceeding *pro se*, filed his original Complaint against the Port Authority, challenging the constitutionality of the Port Authority's 2011 Toll Increase. *See generally* Compl., ECF No. 2. On October 24, 2011, Judge Deborah A. Batts³ dismissed the Complaint *sua sponte*. *See* Order dated Oct. 24, 2011, ECF No. 4. On December 8, 2011, by order of Judge Loretta A. Preska, this Court denied plaintiff's motion for reconsideration. *See* Order dated Dec. 8, 2011, ECF No. 9. Plaintiff appealed Judge Batts' dismissal, and, on September 20, 2012, the Second Circuit affirmed in part and remanded. *See Weiss Haus v. Port Auth. of New York & New Jersey*, 497 F. App'x 102 (2d Cir. 2012). On remand, the court was directed to "determine in the first instance whether Weiss Haus has adequately pleaded [a dormant Commerce Clause claim] or should be granted leave to amend the claim." *Id.* at 105. The Second Circuit also indicated that "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)." *Id.*

³ This case was first assigned to Judge Deborah A. Batts. On October 24, 2011, Judge Batts directed the Clerk of Court to assign the case to Judge Loretta A. Preska. On June 10, 2013, following remand, this case was reassigned to Judge George B. Daniels until June 18, 2013, when the case was reassigned to the court.

Following the remand, the case was reopened on February 15, 2013. Thereafter, on August 21, 2013, plaintiff filed a letter with the court asking for leave to file an amended complaint in accordance with the Second Circuit decision. Letter from Yoel Weiss haus (Aug. 21, 2013), ECF No. 19. The court granted plaintiff's request, and plaintiff filed his Amended Complaint on December 20, 2013. *See* Order dated Oct. 30, 2013, ECF No. 23; Am. Compl. Subsequently, defendant filed a motion to dismiss, which included an application to stay proceedings pending the decision in *AAA Northeast*, because of the substantial similarities between the cases.⁴ *See* Def.'s Br. 1. On June 8, 2015, the court stayed the case pending the results of *AAA Northeast*. Order dated June 8, 2015, ECF No. 56 ("June 8, 2015 Order"). On November 18, 2016, the court issued its decision granting the Port Authority's motion for summary judgment in *AAA Northeast*. *AAA Northeast*, 221 F. Supp. 3d at 392 (finding that plaintiffs "failed to create a triable issue of fact as to whether the toll and fare increases are not a 'fair approximation of use of the facilities' and are 'excessive in relation to the benefits conferred' to users of the ITN.").

Following the *AAA Northeast* decision, on March 20, 2017, the court held a status and scheduling conference with the parties, lifted the stay, and granted the parties an opportunity to submit supplemental

⁴ Like Weiss haus, the *AAA Northeast* plaintiffs claimed that the 2011 Toll Increase was unconstitutional, alleging that the Port Authority diverted toll revenue to fund non-ITN projects.

briefing. Order dated Mar. 20, 2017; ECF No. 62. In the supplemental briefing, plaintiff asks the court to deny defendant's motion to dismiss for failure to state a claim, and further seeks to amend his complaint for a second time "to flesh out further the facts that would aid in reviewing this case on its merits." Pl.'s Suppl. Br. ¶ 24. Defendant opposes as futile plaintiff's motion for leave to amend, and claims that, under *AAA Northeast*, this case should be dismissed in its entirety for failure to state a claim. *See* Def.'s Suppl. Br. 3. For the reasons stated below, the court denies as futile plaintiff's motion to amend his complaint a second time, and dismisses this case in its entirety.

STANDARD OF REVIEW

When reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court's role "is 'merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *Sims v. Farrelly*, No. 7:10-CV-4765 (VB), 2011 WL 4454942, at *1 (S.D.N.Y. Sept. 26, 2011) (quoting *Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984)). All factual allegations in the complaint must be accepted as true, and the complaint must be viewed in the light most favorable to the plaintiff. *Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). Threadbare assertions and mere legal conclusions, however, are insufficient to state a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Although *pro se* complaints must contain sufficient

factual allegations to meet the plausibility standard, the court reads *pro se* complaints with special liberality, and interprets them to raise the “strongest arguments that they suggest.” *Alroy v. City of New York Law Dep’t*, 69 F. Supp. 3d 393, 397-98 (S.D.N.Y. 2014) (quoting *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006)); *see Erickson v. Parodus*, 551 U.S. 89, 94 (2007).

Meeting the plausibility standard is a “context-specific” analysis, wherein the court must “draw on its judicial experience and common sense.” *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679). Where the defendant has set forth an “obvious alternative explanation” for the plaintiff’s alleged facts, the plaintiff must show “something more” to achieve plausibility. *See Twombly*, 550 U.S. at 554, 560, 567; *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 121 (2d Cir. 2013). Specifically, the plaintiff may need to provide facts that “tend[] to exclude the possibility that the [defendant’s] alternative explanation is true.” *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (citation omitted).

Federal Rule of Civil Procedure 15(a) declares that leave to amend shall be given “when justice so requires.” FED. R. CIV. P. 15(a)(2). Leave to amend should be granted when the court “cannot conclude that amendment would be futile.” *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012). “[I]t is within the sound discretion of the district court to grant or deny leave to amend.”

McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007). The adequacy of the proposed amended complaint is judged by the same standard as that applied to a motion to dismiss for failure to state a claim, under Rule 12(b)(6). See *Gen. Elec. Capital Fin. Inc. v. Bank Leumi Tr. Co. of New York*, No. 95 Civ. 9224, 1999 WL 33029, at *5 (S.D.N.Y. Jan. 21, 1999). Therefore, the allegations must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. Moreover, the claim must contain enough facts such that it is possible to show that the pleader is entitled to relief. *Id.* at 555. The complainant’s right to relief cannot be merely speculative. *Id.*

DISCUSSION

I. WEISSHAUS’ AMENDED COMPLAINT

In *Weisshaus v. Port Auth. of New York & New Jersey*, the Second Circuit affirmed the dismissal of all of plaintiff’s claims, except the claim relating to the dormant Commerce Clause. On remand, the Second Circuit directed the court to “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*] for analyzing the reasonableness of fees charged for use of state-provided facilities.” *Weisshaus*, 497 F. App’x at 105. The Commerce Clause gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States.” U.S. CONST. art. I, § 8, cl. 3. “From this federal grant of regulatory power flows [t]he negative or dormant implication of the Com-

merce Clause[, which] prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.” *AAA Northeast*, 221 F. Supp. 3d at 382 (quoting *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009)).

To determine whether the imposition of fees for the use of state-provided facilities violates the dormant Commerce Clause, the three-pronged test of *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), is used. Pursuant to the *Northwest Airlines* test, a fee is reasonable, and thus constitutionally permissible, “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.” *Id.* at 369 (citation omitted).

In his Amended Complaint, plaintiff asserts that the 2011 Toll Increase violates the dormant Commerce Clause because (1) the Port Authority’s “purpose of the *penalty per [axle]* for payment in cash⁵ is not based on the fair approximate use of facilities because the penalty is on the mode of payment,” and imposing a penalty for payment in cash “exceeds the benefit conferred” to users; (2) a “charge for *future* construction is for a *future* purpose that has yet to mature as service fruition for the user” and therefore “exceeds the approximation of facilities and exceeds the benefit conferred”; (3) the toll is being used to fund projects

⁵ Among plaintiff’s concerns is that those drivers who pay in cash are charged more than those who pay using E-ZPass.

that plaintiff claims are not functionally related to the ITN, including the raising of the Bayonne Bridge, airport runway and taxiway modernization, security enhancements, Port Authority infrastructure rail and roads in the port, and the World Trade Center rebuilding; and (4) it outweighs the benefit of earning local hourly wages in New York City.⁶ Am. Compl. ¶¶ 69, 70, 90-95, 101. For the following reasons, the court finds that plaintiff's Amended Complaint fails to state a claim on which relief can be granted.

A. Penalty for Payment in Cash

Plaintiff first argues that the 2011 Toll Increase's penalty for payment in cash "imposes an undue burden on interstate commerce and punishes those without a transponder from E-ZPass; exceeds the fair approximation of costs to collect a toll; and exceeds the benefits conferred." Pl.'s Br. 14. Plaintiff also claims

⁶ Although plaintiff's Amended Complaint makes other claims—including, *inter alia*, claims under the Coinage Clause, Tonnage Clause, Due Process Clause, and Freedom of Information Code—the Second Circuit specifically limited the court's review to the plausibility of Weiss haus' claims under the dormant Commerce Clause. Therefore, notwithstanding plaintiff's arguments that these claims are still related to his dormant Commerce Clause claim, the court will not address them here. *See Weiss haus*, 497 F. App'x at 105. Moreover, the court notes that while plaintiff asserts that various capital projects which received toll proceeds did not, according to plaintiff, get the required legislative approval, this claim was not in plaintiff's original Complaint, and therefore, is not properly before the court. Even if it were, however, such a claim does not arise under the dormant Commerce Clause, and therefore, in accordance with the remand order, is not for review here.

that “the purpose of the *penalty* is to compel plaintiff or similar situated individuals to purchase a transponder from E-ZPass before entering the City of New York.” Am. Compl. ¶ 70. Thus, plaintiff argues that the penalty for users paying in cash violates the dormant Commerce Clause.

The court disagrees. For plaintiff to succeed on this claim, he must allege facts which, if taken as true, show that he could be entitled to relief. *See Twombly*, 550 U.S. at 555, 570; *Iqbal*, 556 U.S. at 678. This Court has previously found that “discounts realized by frequent drivers are offset because in passing through the tolls more often, [E-ZPass] drivers are paying higher total amounts in tolls.” *Saunders v. Port Auth. of New York & New Jersey*, No. 02 Civ. 9768 (RLC), 2004 WL 1077964, at *4 (S.D.N.Y. May 13, 2004). Indeed, the *Saunders* Court went on to find that the E-ZPass discount program and other frequency-of-use discount programs are constitutional and do not discriminate against interstate commerce. *See id.* at *5 (emphasis added) (“The plaintiff[’s] argument fails on several grounds. Because the E-ZPass program is used in at least 5 other states in the region and eligibility is not contingent on residency, the burden [on interstate commerce] has not been demonstrated even if all facts are taken as true. *Also noteworthy are the benefits to local traffic flow. The electronic toll system facilitates traffic flow because drivers may pass through toll plazas without stopping to pay. The E-ZPass customer benefits from the expedited process of collection and is able to travel without interruption. The [E-ZPass program] also benefits drivers who are*

*not [E-ZPass] customers because [E-ZPass] drivers are removed from the lines intended for drivers paying in cash.”). Accordingly, because the court agrees with this Court’s decision in *Saunders*, plaintiff’s first claim fails to state a claim on which relief can be granted.*

B. Future Construction

Next, plaintiff argues that the 2011 Toll Increase “did not reflect a fair approximation of use of facilities” because the “price exceeded the benefit conferred by charging commuters for a service that has yet to mature.” Pl.’s Br. 21. For plaintiff, because the “Toll Rate increased in 2011, but most investments of the 10-Year Capital Plan will not take place before 2018,” the toll increase does not reflect a fair approximation of use, and violates the dormant Commerce Clause. Pl.’s Br. 20-21.

The court finds that this argument also fails to state a claim under the dormant Commerce Clause. This Circuit has held that a “user fee,” such as the toll increase at issue here, “may reasonably support the budget of a governmental unit that operates facilities that bear at least a ‘functional relationship’ to facilities used by the fee payers.” *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 87 (2d Cir. 2009). An obvious part of that budget are capital projects required to improve infrastructure and keep facilities in a state of good repair. Thus, as the *Bridgeport* Court made clear, if facilities or projects in a governmental unit’s capital plan are “functionally related” to the facilities used by toll pay-

ers, allocating portions of a toll to construct or improve such projects is constitutional. *See id.* at 87-88. Simply because certain projects may not have begun at the time the toll increase went into effect does not make the toll inherently “excessive.” *Cf. AAA Northeast*, 221 F. Supp. 3d at 392 (“At bottom, plaintiffs have simply failed to create a triable issue of fact as to whether the toll and fare increases are not a ‘fair approximation of use of the facilities’ and are ‘excessive in relation to the benefits conferred’ to users of the ITN.”).⁷

Plaintiff points to no authority tending to suggest that the dormant Commerce Clause demands that newly built projects or repairs be operational at the time increased tolls are imposed. Therefore, the court finds that plaintiff’s argument regarding the 2011 Toll Increase being applied to future construction fails to state a claim under the dormant Commerce Clause.

C. Functional Relationship to the ITN of Projects Funded by 2011 Toll Increase

Next, plaintiff claims that the 2011 Toll Increase violates the dormant Commerce Clause because it is being applied to projects that are not functionally related to the ITN. Specifically, plaintiff claims that,

⁷ The *AAA Northeast* court also found that certain contested projects, such as the Bayonne Bridge and the Lincoln Tunnel Access Project (also contested here), were “functionally related” to the ITN. *AAA Northeast*, 221 F. Supp. 3d at 389. Moreover, as noted above, the court found that even “after improperly eliminating the expense of [these] contested ITN projects,” the ITN would be operating at a deficit. *See id.* at 386.

based on a Port Authority press release, “[t]he Port Authority gave to the public the impression that the Toll Rate increase[was] to subsidize the World Trade Center, aviation, port commerce, and the security of non-ITN facilities,” and therefore, “[d]iscovery is necessary to verify whether the Port Authority designates any toll revenues for these non-ITN purposes.” Pl.’s Br. 24.

This claim is almost identical to the claim in *AAA Northeast*.⁸ In *AAA Northeast*, the plaintiffs argued that “the toll and fare increases were unlawful because a portion of the proceeds would be diverted for reconstruction of the World Trade Center site which[] would cause an apparent, but sham, deficit for the ITN.”⁹ *AAA Northeast*, 221 F. Supp. 3d at 378. The court found, however, that the ITN was not generating excess funds that the Port Authority could divert for projects outside of the ITN. See *id.* at 386 (“[T]he ITN would show a deficit in 2010 leading up to the [2011] toll increase—and that deficit exists [even] after improperly eliminating the expense of [the] contested

⁸ Indeed, as discussed above, the court stayed this case pending resolution of *AAA Northeast* because of the “substantial similarities” between the two cases. See Order dated Mar. 27, 2015, ECF No. 55; see also June 8, 2015 Order.

⁹ Specifically, the claim alleged “that the increases were unreasonable under the Dormant Commerce Clause because the inclusion of the World Trade Center . . . improperly distorts the Port Authority’s rate of return, creating the illusion that a toll increase is justified when in fact the Port Authority’s integrated, interdependent transportation system is providing a significant surplus.” *AAA Northeast*, 221 F. Supp. 3d at 378.

ITN projects.”); *see also id.* (“[I]t was made clear repeatedly that the revenue . . . being raised at the crossings, the PATH, the bus terminals, [and the] bus stations . . . was growing a deficit when compared to the growing expenditure need[s] of those very facilities. [Thus, the ITN] had a deficit of those facilities upon [the Port Authority Deputy Executive Director’s] arrival, . . . a deficit prior to the August 5th memorandum [concerning the toll and fare increases], . . . a deficit after the toll and fare increase went into effect, and . . . ha[s] a deficit today.”). Because the ITN had been operating at a deficit, even with the 2011 Toll Increase in effect, and because the plaintiffs did not produce any evidence tending to suggest that funds were being diverted toward non-ITN projects, the court dismissed the plaintiffs’ claim that the 2011 Toll Increase violated the dormant Commerce Clause. *See id.* at 386-87 (“[T]here would have been negative cash flows from the ITN during the period [from 2007-2010].’ . . . In the absence of evidence that the tolls have or will produce a surplus in the ITN, AAA’s rate of return arguments fail.”).

A well-pleaded complaint “calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence” supporting the plaintiff’s claim. *Twombly*, 550 U.S. at 556. When the defendant has established an “obvious alternative explanation” to the plaintiff’s allegations of fact, plaintiff’s claim will fail unless he can “nudge[his claim] across the line from conceivable to plausible.” *Id.* at 567, 570. Here, Weiss haus claims that portions of the 2011 Toll Increase were being diverted toward certain non-ITN projects,

including the World Trade Center. As the Port Authority emphasizes, the court has previously addressed the question of whether the Port Authority was using the 2011 Toll Increase proceeds for non-ITN purposes, and found that there was no money left over, after capital expenditures and reserve requirements for ITN projects had been allocated, that could be diverted toward such projects. *AAA Northeast*, 221 F. Supp. 3d at 383 n.6, 387 (“Based on the testimony of its officers, the Port Authority claims that its version of a cash flow analysis shows there was no surplus resulting from the toll and fare increases, and therefore no funds are available to be used on projects outside of the ITN.”); *see* Def.’s Suppl. Br. 4-6. Indeed, the court found that there was no evidence indicating that the toll monies were being used for non-ITN projects. *See AAA Northeast*, 221 F. Supp. 3d. at 391 (“[I]t is apparent that plaintiffs have presented no evidence tending to show that revenue from the toll and fare increases was, or would be, used in a manner that violated the Dormant Commerce Clause.”). The Port Authority presents the *AAA Northeast* finding as an established and plausible explanation of their conduct, and Weiss haus has not meaningfully distinguished his allegations of fact from those that failed to expose the Port Authority to liability in *AAA Northeast*. The court agrees that the opinion in *AAA Northeast* establishes an obvious alternative explanation to plaintiff’s factual allegations, and thus, to his claims.

In further support of the Port Authority’s alternative explanation, AAA, in its case, conducted extensive discovery into the Port Authority’s finances and pre-

sented its findings to the court. Based on this discovery, the court concluded that there was simply no money, obtained from the increased tolls, to subsidize any non-ITN project. *AAA Northeast*, 221 F. Supp. 3d at 386 (“[I]t is apparent that AAA’s other arguments are without merit. First, as the Port Authority points out, and as revealed by the Navigant and Rothschild Reports, even under the flawed rate of return analysis that the AAA sponsors, the ITN would show a deficit in 2010 leading up to the toll increase—and that deficit exists after improperly eliminating the expense of [the] contested ITN projects.”). Indeed, the court stayed this case pending resolution of any and all motions for summary judgment in *AAA Northeast*. The clear reason for the court’s specific provision for a stay was so that the decision in *AAA Northeast* would influence the findings here. Faced by the full weight of these facts, Weiss haus has not shown that his allegations of fact could lead the court to reasonably find the Port Authority liable on facts that have already been determined to foreclose liability. Thus, plaintiff’s claim that portions of the 2011 Toll Increase are being diverted to projects not functionally related to the ITN fails to state a claim under the dormant Commerce Clause. Because the court previously decided that there were no toll revenues that could have been diverted to projects outside of the ITN, plaintiff’s claim that the 2011 Toll Increase is being used to fund non-ITN projects, such as the “airport runway” or “taxiway modernization,” necessarily fails to allege facts sufficient to satisfy the pleading standard. *See, e.g., Twombly*, 550 U.S. at 554.

D. Minimum Wage Workers

Next, plaintiff claims that the 2011 Toll Increase violates the dormant Commerce Clause because it “burdens the benefit that someone from New Jersey earns in the City of New York on a day’s local hourly earnings in wages,” by “outweighing the benefit of earnings under the local hourly wage,” *i.e.*, the minimum wage. Am. Compl. ¶¶ 109, 115.

To the extent that Weisshaus is asserting that the 2011 Toll Increase discriminates against interstate commerce because New Jersey residents working minimum wage jobs in New York are less inclined to commute for work because of the tolls, his claim fails as a matter of law. “[A] state regulation discriminates against interstate commerce only if it impose[s] commercial barriers or discriminate[s] against an article of commerce by reason of its origin or destination out of State.” *Angus Partners LLC v. Walder*, 52 F. Supp. 3d 546, 560-61 (S.D.N.Y. 2014) (quoting *Selevan*, 584 F.3d at 95). Moreover, “in order to state a claim for discrimination in violation of the Commerce Clause, a plaintiff must identify an[] in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors.” *Selevan*, 584 F.3d at 95 (citation omitted). The “critical consideration” in determining whether a toll discriminates against interstate commerce “is the overall effect of the [regulation] on both local and interstate activity.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). Here, plaintiff’s complaint fails to allege any facts that there is an in-state interest favored to the

detriment of an out-of-state interest. Indeed, although a toll may be collected from a traveler going in one direction, the toll itself is for a roundtrip. Accordingly, plaintiff fails to state a claim that the toll discriminates against interstate commerce.

Even under the so-called *Pike* test, where a non-discriminatory regulation that “regulates evenhandedly to effectuate a legitimate local public interest” is nevertheless unconstitutional if “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits,” plaintiff’s claim fails as a matter of law. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citation omitted). Put simply, plaintiff fails to allege any facts that there is a local public interest that, presumably, New York seeks to effectuate by way of the Port Authority’s 2011 Toll Increase.¹⁰ *See United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (“[The *Pike* test] is reserved for laws directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.”) (citation omitted). Accordingly, plaintiff’s claim regarding the burden on minimum wage workers fails under the dormant Commerce Clause.

II. WEISSHAUS’ PROPOSED SECOND AMENDED COMPLAINT

¹⁰ It is not entirely clear what the “local” interest would be here as the Port Authority is a bi-state governmental agency created by compact between New York and New Jersey, and the 2011 Toll Increase applies equally to both New York residents and out-of-state residents.

Finally, in an attempt to get around *AAA Northeast*, plaintiff asks the court to grant him leave to amend his complaint a second time, claiming that “[t]he proposed second amended complaint has the exact same legal theories as the amended complaint” and that “[t]he basis for amending is to flesh out further the facts that would aid in reviewing this case on its merits.” Pl.’s Suppl. Br. ¶ 24.

Even a liberal reading of both the Amended Complaint and the Proposed Second Amended Complaint, however, demonstrates that plaintiff’s proposed complaint creates an entirely new legal theory of the case. In particular, plaintiff asserts that defendant “first concocted an affordability envelope,^[11] a figure that sets the maximum price of tolls the public can be asked to bear,” and “later . . . went digging for capital projects that would overshadow the need for the [2011] increase in the toll price.”^[12] Pl.’s Aff. Supp. Leave to Am. ¶ 18, ECF No. 65-1. In other words, by way of his Proposed Second Amended Complaint, plaintiff now claims that the 2011 Toll Increase was enacted not to

^[11] In his Proposed Second Amended Complaint, plaintiff defines an “affordability envelope” as “an accounting term-of-art defining the maximum balloon of the price a constituent or consumer can be pushed to pay under affordable constraints.” Proposed Second Am. Compl. ¶ 38 n.1.

^[12] Plaintiff claims that documents produced by the Port Authority on November 5, 2015, form the basis for his request to amend. The documents attached to plaintiff’s Proposed Second Amended Complaint, however, appear to have been either publicly available at the time plaintiff filed his Amended Complaint or were previously a part of the record in the *AAA Northeast* case.

cover various capital expenditures, but rather, to charge commuters as much as possible. Thus, for plaintiff, the 2011 Toll Increase is not “based on some fair approximation of use of the facilities,” and is “excessive in relation to the benefits conferred.” *See* Pl.’s Suppl. Br. ¶ 8 (“The invention of an affordability envelope came after the Port Authority concluded that the 2008-Toll Rate is too low compared to other agenc[ies] that charge toll[s] and must be increased. The push for a toll rate increase was not based to compensate costs because the Port Authority was already operating on a positive net income.”).

Taken as a whole, plaintiff’s Proposed Second Amended Complaint claims that the “affordability envelope” theory “will show the reasons to raise [the] toll prices [were] motivated by an ulterior motive of setting the tolls at its highest level and then inventing an excessive capital plan to excuse the excessive increase in the toll rate,” and will “[aid] in showing that the Toll Rate is not a compensation for service conferred on commuter[s] and is the product of an ulterior motive.” Pl.’s Suppl. Br. ¶ 26. In other words, plaintiff would have the court assess the Port Authority’s motive for the 2011 Toll Increase rather than look to standards already set out in *AAA Northeast*.

The court finds that plaintiff’s Proposed Second Amended Complaint fails to state a claim on which relief can be granted. Moreover, the court further finds that Weiss Haus’ attempt to add a new theory is futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (citations omitted) (“[W]e do not find that the

[*pro se*] complaint liberal[ly] read . . . suggests that the plaintiff has a claim that she has inadequately or inartfully pleaded and that she should therefore be given a chance to reframe. . . . The problem with [the plaintiff's] causes of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied."); *see also AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 726 (2d Cir. 2010) (citation omitted) ("Leave to amend may be denied on grounds of futility if the proposed amendment fails to state a legally cognizable claim or fails to raise triable issues of fact.").

In particular, even accepting plaintiff's alleged facts as true, Weishauss' Proposed Second Amended Complaint would nevertheless fail to state a claim for relief under the dormant Commerce Clause. This is because "[t]he law of this Circuit following *Northwest Airlines* demonstrates . . . that fair approximation and excessiveness are evaluated by objective factors-how a toll operates in practice-and not the internally stated reasons for its enactment." *Auto. Club of New York, Inc. v. Port Auth. of New York & New Jersey*, No. 11 Civ. 6746 (RKE/HBP), 2014 WL 2518959, at *10 (S.D.N.Y. June 4, 2014). In other words, motive does not matter. The *Northwest Airlines* test is entirely objective, *i.e.*, it is concerned with whether the governmental unit is using its toll proceeds on facilities or projects that are functionally related to facilities used

by toll payers, or whether any profit realized is too high.¹⁸ Indeed, as this Court has found:

Applying the “fair approximation” prong of the *Northwest Airlines* test requires the Court to look at one thing only: the toll payers’ use (or potential for use) of the facilities for which the toll is paid.... The “excessiveness” prong compares the amount paid by the payer to the benefits conferred on him *in his capacity as a consumer of those benefits*.... [T]o the extent a user fee that was spent for services [is] of no “actual or potential benefit” to fee payers, it would “exceed the bounds of what may reasonably serve as the basis for the ... fee”—unless the governmental unit were using that fee to support[] facilities that bore “at least a ‘functional relationship’” to facilities used by fee payers.

Am. Trucking Ass’ns, Inc. v. N.Y. State Thruway Auth., 199 F. Supp. 3d 855, 878, 879, 881 (S.D.N.Y. 2016) (citations omitted), vacated on other grounds 238 F. Supp. 3d 527 (S.D.N.Y. 2017); see also *Auto. Club of New York*, 2014 WL 2518959, at *10 (“[The Second Circuit] did not consider the [New York Thruway] Authority’s motivations for enacting the toll policy or its internal deliberations in assessing prongs (1) and (2) of the *Northwest Airlines* test. Other decisions in this Circuit and elsewhere have utilized the

¹⁸ In this regard, however, it is not clear how much of a profit would be too high, as “the cases indicate that tolls are permitted to generate a fair profit or rate of return.” *AAA Northeast*, 221 F. Supp. 3d at 387 (citation omitted).

same objective approach and have not considered either the intent of the decision makers or the process by which the decision makers made their determination.”); *Janes v. Triborough Bridge & Tunnel Auth.*, 977 F. Supp. 2d 320, 340 (S.D.N.Y. 2013) (emphasis added) (“[T]he requirement of a ‘fair approximation’ seeks reasonableness and broad proportionality. It does not require precise tailoring, or a *pre-enactment administrative record*, for toll amounts to be justified.”), *aff’d*, 774 F.3d 1052 (2d Cir. 2014).

Therefore, to the extent that plaintiff’s Proposed Second Amended Complaint claims that the affordability envelope theory “will show the reasons to raise . . . toll prices [were] motivated by an ulterior motive of setting the tolls at its highest level and then inventing an excessive capital plan to excuse the excessive increase in the toll rate,” it fails to state a legally cognizable claim because it looks only to the subjective intention of the Port Authority, and not to how the toll operates in practice.¹⁴ Pl.’s Suppl. Br. ¶ 26. To the extent that plaintiff’s Proposed Second Amended

¹⁴ It is worth repeating that “the relevant question in this case is what the revenue from the toll and fare increases was actually used for, not what potential uses were considered during preliminary planning and budgeting.” *AAA Northeast*, 221 F. Supp. 3d at 394 n.14; *see also id.* at 392 (emphasis added) (“To support [its] allegations . . . [plaintiff] points to no record evidence that tends to show the increases were not a fair approximation of the use of the ITN by its users [S]uch a claim would need to include more than speculation as to particular items in the Port Authority’s 2011 ITN Capital Plan or the deliberations of its Board of Commissioners.”).

Complaint claims that the ITN was operating at a profit, and therefore, the need for the 2011 Toll Increase was motivated by an “ulterior motive of setting the tolls at its highest level,” the court notes that it has previously addressed the issue in *AAA Northeast*, and therefore, for the reasons discussed above, the Proposed Second Amended Complaint does not satisfy the pleading standard. *See AAA Northeast*, 221 F. Supp. 3d at 378 (“[T]he ITN would show a deficit in 2010 leading up to the [2011] toll increase—and that deficit exists [even] after improperly eliminating the expense of [the] contested ITN projects.”); *see also Twombly*, 550 U.S. at 570 (discussing the need for plaintiff to “nudge” his claim “from conceivable to plausible”).

Any remaining claims in plaintiff’s Proposed Second Amended Complaint are identical or nearly identical to those addressed above regarding plaintiff’s Amended Complaint,¹⁵ and therefore, the court

¹⁵ Plaintiff’s Proposed Second Amended Complaint also claims that “the majority of capital projects” used to justify the 2011 Toll Increase have yet to break ground, and therefore, the “benefits do not yet exist[] for commuters.” Pl.’s Suppl. Br. ¶ 13. This claim, however, is similar to that in Weisshaus’ Amended Complaint that “[d]efendant’s charge for *future* construction is for a *future* purpose that has yet to mature as service fruition for the user, and is not for the current use a payer is levied for when passing through a surface river crossing, and exceeds the approximation of facilities and exceeds the benefit conferred.” Am. Compl. ¶ 90; *see* Proposed Second Am. Compl. ¶ 174. Because the court already explained why such a claim cannot survive a motion to dismiss in the context of plaintiff’s Amended Complaint, it need not address the claim again here.

will not address them again here, as the same rationale must lead to their dismissal.

Accordingly, the court denies plaintiff's motion for leave to amend as futile because the Proposed Second Amended Complaint, like the Amended Complaint, fails to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons, the court holds that the claims in both plaintiff's Amended Complaint and his Proposed Second Amended Complaint fail to state a claim upon which relief can be granted. Accordingly, the court denies plaintiff's motion for leave to amend his complaint for a second time, and grants defendant's motion to dismiss in its entirety. Judgment shall be entered accordingly.

/s/ Richard K. Eaton

Richard K. Eaton, Judge

Dated: December 17, 2018

New York, New York

FACED WITH CONSTRAINED CAPACITY DUE TO HISTORIC ECONOMIC RECESSION, COUPLED WITH BILLIONS IN WTC AND POST 9-11 SECURITY COSTS, AND UNPRECEDENTED NEED FOR INFRASTRUCTURE OVERHAUL, PORT AUTHORITY PROPOSES TOLL AND FARE INCREASE

Date: Aug 5, 2011

Press Release Number: 50

- Proposal comes after three-consecutive years of 0 percent growth in operating expenses, \$5 billion in cut projects, and billions more deferred
- \$2.6 billion revenue decline from original capital plan projections due to economic recession, over \$11 billion necessary to rebuild WTC, and \$6 billion in required security costs
- Failure to act risks 240 critical infrastructure projects, immediate loss of 3,900 construction jobs and \$438 million in investment in 2011 alone

Faced with three unprecedented challenges at once – (1) a historic economic recession that has sharply decreased revenue below projections, (2) steep increases in post-9/11 security costs, which have nearly tripled, and the overall cost of the WTC rebuilding, and (3) the need for the largest overhaul of facilities in the agency's 90-year history – the Port Authority of New York and New Jersey today proposed a two-phase toll and fare increase to fully fund a new \$33 billion ten-year capital plan, which will generate 167,000 jobs.

The proposal comes only after the Port Authority initiated an aggressive cost-cutting plan started in 2008 to manage

its resources as the impact of the economic recession became clear: cutting \$5 billion in capital projects and deferring billions more; holding operating expenses at zero-growth for three consecutive years; and cutting agency headcount to the lowest levels in 40 years – an 11 percent reduction of non-police staff in the last five years.

The Port Authority does not receive tax revenue, making its toll and fare structure the primary way to fund the region's critical interstate transportation network. At this point, after a multiyear effort to control spending in recognition of declining capital capacity, failure to act risks 240 critical infrastructure projects and thousands of jobs, and will prevent the overhaul of the agency's aging facilities.

The factors leading to the agency's financial position include:

- A historic economic recession during which the agency's revenue declined \$2.6 billion from projections made when the agency's original ten-year capital plan was sized. Example: 11 million fewer vehicles are crossing its bridges and tunnels – it will take until 2020 to reach the levels projected information the year 2011.
- More than \$11 billion in funding necessary to rebuild the WTC site.
- \$6 billion in increased security requirement costs since the September 11 attacks, nearly tripling security expenditures from pre-9/11 annual budgets (18 percent increase).
- The need for the largest overhaul in agency facilities in its 90-year history.

The new 10-year capital plan would deliver significant economic benefits to the region, including the generation of 167,000 jobs, \$38.4 billion in sales, and \$9.7 billion in wages within the 17-county New York-New Jersey Port District.

The agency's proposed toll structure, which would be adjusted in September 2011 and in 2014, focuses the greatest increase on cash users and trucks that cause the most traffic congestion and wear and tear. In addition, the agency proposes raising the PATH fare in September 2011, while fully preserving PATH's deep discount for multi-trip users.

Projects contingent on the proposed toll/fare plan include:

- The first replacement of all 592 suspender ropes at the 80-year old George Washington Bridge, the world's busiest crossing, joining other suspension bridges like the Golden Gate and RFK, which have already replaced theirs. (\$1 billion)
- The replacement of the Lincoln Tunnel Helix. It will require major lane closures and load restrictions if not replaced. (\$1.5 billion)
- The raising of the Bayonne Bridge, which will solve the current clearance problem, preventing post-PANAMAX ships from accessing key ports. (\$1 billion)
- A new bus garage connected to the Port Authority Bus Terminal, which will serve as a traffic reliever to the Lincoln Tunnel and midtown Manhattan streets, saving two-thirds of the empty bus trips that must make two extra trips through the tunnel each day. (\$800 million)
- Significant security investments at the region's

airports, including the installation of security barriers. (\$360 million)

- The Port Authority also plans to direct 100 percent of the revenue from the proposed PATH fare increase back into the PATH system to complete projects that will replace 340 PATH cars, replace the 100-year-old signal system and duct bank network, upgrade PATH security with tunnel hardening and flood mitigation measures, and rehabilitate the system's aging stations, including new 10-car platforms.

To fund these major transportation and security projects, the Port Authority's toll/fare proposal calls for:

- Tolls for autos using E-ZPass on the Port Authority's crossings to increase from \$6 to \$10 roundtrip for off-peak travel and from \$8 to \$12 in peak hours. An additional \$2 increase during peak and off-peak hours will be implemented in 2014.
- A cash toll surcharge of \$3 to increase the cash rate from \$8 to \$15 in 2011 for the 25 percent of toll-payers who still use the optional cash system, similar to the MTA. The surcharge is expected to increase the E-ZPass market share to approximately 85 percent, which will reduce travel delays during the peak of traffic congestion by 10 to-20 minutes. The surcharge will increase by an additional \$2 in 2014.
- Truck tolls per axle using E-ZPass off-peak to increase from \$7 to \$13 roundtrip and peak from \$8 to \$14, with an additional \$2 per-axle-increase in

2014 for both off-peak and peak hours. A similar cash surcharge of \$3 per axle will be applied to trucks in 2011 that continue to use the optional cash system with an additional \$2 per axle in 2014.

- To further incentivize trucks to cross during the overnight period to reduce congestion during the day, there will be no toll increase on trucks that cross during the overnight discount period and the Port Authority will expand this overnight period an extra two hours each weekday night from 10 p.m. to 6 a.m. (previously midnight to 6 a.m.). This will result in a 61 percent discount for a typical two-axle truck, which will continue to pay \$11 overnight as compared to the \$28 toll in 2011 for the same truck using E-ZPass during the peak period. Truck traffic results in the greatest wear and tear on the bridges and tunnels – a fully-loaded tractor trailer causes as much damage to roadway surfaces as 10,000 passenger cars.
- Fully preserving the Staten Island Bridge “Discount Plan” for E-ZPass users, giving these frequent users a 50 percent toll discount on the peak E-ZPass toll. In addition, qualified energy efficient vehicles with GreenPasses will see no toll increase during off-peak hours in 2011, and the car-poolers discount rate is preserved in 2011 with a 50 percent discount off the E-ZPass peak hour rate. Both GreenPasses and car-poolers would see a \$2 increase in 2014.
- The base PATH fare would increase from \$1.75

to \$2.75 in 2011, with the average fare increasing to \$2.10 from \$1.30 given the steep 25 percent discount, which will be fully preserved. The 30-day unlimited pass will increase to \$89 from \$54.

Before the Board of Commissioners considers a final toll/fare plan at a Board meeting on August 19, the agency has announced a public hearing schedule on August 16 with nine total hearings across both states, which will be held at the following times and places:

Newark Liberty International Airport
1 Conrad Road
Building 157, Bay 3
Newark, NJ 07114
973-961-6161
8 a.m.

Port Authority Technical Center
241 Erie Street, Room 212
Jersey City, NJ 07310
201-216-2700
8 a.m.

Port Ivory/Howland Hook
40 Western Ave.
Staten Island, NY 10303
718-330-2950
8 a.m.

Port Authority Bus Terminal
625 8th Avenue
Times Square Conference - 2nd Floor
New York, NY 10018

a47

212-502-2240

8 a.m.

George Washington Bridge Administration Building
220 Bruce Reynolds Way
Conference Room
Fort Lee, NJ 07024
201-346-4005
6 p.m.

Holland Tunnel Administration Building,
13th Street & Provost Street
Conference Room
Jersey City, NJ 07310 -
201-360-5021
6 p.m.

George Washington Bridge Bus Station
4211 Broadway
Lower Level Conference Room
New York, NY 10033
201-346-4005
6 p.m.

John F. Kennedy International Airport
Port Authority Administration
Building 14.2nd Floor Conference Room
Jamaica, NY 11430
718-244-3501
6 p.m.

Online Hearing, 2 p.m.

www.panvnj.gov

CONTACT:

The Port Authority of New York and New Jersey

Steve Coleman or Ron Marsico, 212 435-7777

The Port Authority of New York and New Jersey, which is self-sufficient and does not receive tax dollars from either state, operates many of the busiest and most important transportation links in the region. They include John F. Kennedy International, Newark Liberty International, LaGuardia, Stewart International and Teterboro airports, AirTrain JFK and AirTrain Newark; the George Washington Bridge and Bus Station; the Lincoln and Holland tunnels, the three bridges between Staten Island and New Jersey; the PATH (Port Authority Trans-Hudson) rapid-transit system; Port Newark, the Elizabeth-Port Authority Marine Terminal; the Howland Hook Marine Terminal on Staten Island; the Brooklyn Piers/Red Hook Container Terminal; the Port Authority-Port Jersey Marine Terminal and the Port Authority Bus Terminal in midtown Manhattan. The agency also owns the 16-acre World Trade Center site in Lower Manhattan.

PORT AUTHORITY BOARD APPROVES TWO-PART FISCAL HEALTH PLAN THAT INCLUDES REVISED TOLL AND FARE RATES AND DEMANDS AGENCY ACCOUNTABILITY THROUGH COMPREHENSIVE REVIEW

Date: Aug 19, 2011

Press Release Number: 93

- Plan reduces originally proposed rates
- Balances transportation and economic development needs of region with toll and fare payers' economic realities
- Approval contingent on requirement of comprehensive review of the agency's capital plan and operations to ensure accountability
- \$25.1 billion capital plan funds key projects and will generate more than 131,000 jobs with approximately 60% invested in next four years

Following direction by Governors Chris Christie and Andrew Cuomo, the Port Authority of New York and New Jersey Board of Commissioners today approved a two-part plan to restore fiscal health to the agency by increasing toll and fare rates at a lower level than originally proposed and demanding accountability through a stringent agency-wide review.

Under the Governors' direction, the Capital Plan was reviewed in a line-by-line analysis and was able to be reduced by \$5 billion. This allowed a reduction in the proposed toll rates while still ensuring the agency's finances would be stabilized.

The \$25.1 billion immediate 10-year capital plan will

generate more than 131,000 jobs and was achieved by giving critical attention to safety, security and state-of-good-repair projects, including completion of the World Trade Center, while phasing in other less immediate projects over more than 10 years. Approximately 60 percent of the plan, \$15 billion, will be invested in the next four years supporting a much needed boost to the regional economy. The immediate projects funded in the plan include:

- George Washington Bridge suspender ropes
- Lincoln Tunnel Helix rehabilitation
- Bayonne Bridge roadway raising
- New Goethals Bridge with both Port Authority and private investment
- PATH Car, signal, and station modernizations
- Airport runway and taxiway modernizations
- Security enhancements at all facilities
- Port infrastructure improvements to rail and roads in the port
- Completion of the World Trade Center

The revised toll and fare rates recognize the severe financial constraints facing the agency and the financial limitations on regional commuters and businesses dependant on the Port Authority's transportation network each day. The details of the revised toll and fare rates approved today include:

- Tolls on cars using E-ZPass will increase \$1.50 in September 2011 and then 75 cents in December each year from 2012-2015 for a total increase of \$4.50 over five years, down from the proposed \$6

increase over four years.

- Cars paying with cash will have the same increase, but will be subject to an additional \$2 penalty (rounded up to the nearest whole dollar).
- Tolls on trucks using E-ZPass will pay an additional \$2 per axle in September 2011, and then an additional \$2 per axle in December of each year from 2012 -2015
- Tolls on trucks paying cash will have the same increase but will be subject to an additional \$3 per axle cash penalty.
- Fares on the PATH train will increase 25 cents per year for the next four years.

Text of the Port Authority of New York and New Jersey Toll Report and Resolution is copied below. The Board resolutions will also be posted on the Port Authority's website www.panynj.gov following the Board meeting.

TOLL INCREASES FOR VEHICULAR CROSSINGS – REPORT

Faced with multiple unprecedented challenges at once – an historic economic recession that has sharply decreased Port Authority revenues below projections; steep increases in post-9/11 security costs, which have nearly tripled, and the overall cost of the World Trade Center rebuilding, and the need for the largest overhaul of facilities in the Port Authority's 90-year history, on August 5, 2011, the Port Authority announced proposed bridges and tunnels toll and PATH fare increases and public hearings to be conducted in connection therewith.

Consistent with that announcement, on August 16, 2011,

testimony and comments were received from public officials, private citizens and interested organizations at the nine public hearings (four in each State and one via the Internet) and one meeting held within the Port District.

On August 18, 2011, a letter was received from the Governors of New York and New Jersey reiterating their previous public statements that the toll and fare increases, as proposed by the Port Authority were unacceptable and directing the Commissioners to examine how the Port Authority could immediately reduce costs and the future needs of the capital program in order to reduce the toll and fare increases. The Governors further directed the Port Authority to craft a toll and fare increase that reduced the burden on drivers, commuters and businesses but insured that the Port Authority's finances would be stabilized.

The Governors directed a two-part approach to future financial management, demanding accountability, review and approval of internal practices and tracking how dollars are being spent. 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 will increase \$1.50 in September 2011 and then 75 cents in December of each year from 2012-2015;
- Tolls on cars paying with cash will have the same increase but will be subject to an additional \$2 penalty (rounded up to the nearest whole dollar);
- Tolls on trucks using E-ZPass will pay an additional \$2 per axle in September 2011, and then an additional \$2 per axle in December of each year from 2012-2015;

- Tolls on trucks paying cash will have the same increase but will be subject to an additional \$3 per axle cash penalty;
- Fares on the PATH system will increase 25 cents a year for four years.

As a condition for these toll and fare increases the Governors directed the Commissioners to immediately commence a comprehensive audit of the Port Authority focusing on both a financial audit of the Port Authority's ten-year capital plan to reduce its size and cost and a review of the Port Authority's management and operations to find ways to lower costs and increase efficiencies.

Based upon a review of the public comments received during the public hearings and the guidance of the Governors, staff has concluded that the toll and fare increases outlined above provides a viable alternative that balances capital needs with regional economic realities.

At its meeting today, the PATH Board of Directors is also considering a change in the PATH fare structure.

TOLL INCREASE FOR VEHICULAR CROSSINGS – RESOLUTION

Pursuant to the foregoing report, the following resolution was adopted:

RESOLVED, that the toll schedule contained in the resolution of the Board of Commissioners establishing tolls for the use of Port Authority vehicular crossings, adopted on January 4, 2008, be and the same hereby is revised to provide that vehicles in the classes set forth below shall be subject to the tolls indicated for such classes, effective at 3:00 a.m. on the dates indicated, for passage on the vehicular

crossings of the Port Authority in the New York-bound direction, no tolls to be collected for New Jersey-bound passage:

Class 1 vehicles - two axles, single rear wheels: E-ZPass® off-peak toll shall be \$7.50 effective September 18, 2011; \$8.25 effective the first Sunday in December, 2012; \$9.00 effective the first Sunday in December, 2013; \$9.75 effective the first Sunday in December, 2014; and \$10.50 effective the first Sunday in December, 2015; and the E-ZPass peak toll shall be \$9.50 effective September 18, 2011; \$10.25 effective the first Sunday in December, 2012; \$11.00 effective the first Sunday in December, 2013; \$11.75 effective the first Sunday in December, 2014; and \$12.50 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$12.00 effective September 18, 2011; \$13.00 effective the first Sunday in December, 2012; \$14.00 effective the first Sunday in December, 2014; and \$15.00 effective the first Sunday in December, 2015.

Class 2 vehicles - two axles, dual rear wheels: E-ZPass® off-peak toll shall be \$18.00 effective September 18, 2011; \$22.00 effective the first Sunday in December, 2012; \$26.00 effective the first Sunday in December, 2013; \$30.00 effective the first Sunday in December, 2014; and \$34.00 effective the first Sunday in December, 2015; the E-ZPass® peak toll shall be \$20.00 effective September 18, 2011; \$24.00 effective the first Sunday in December, 2012; \$28.00 effective the first Sunday in December, 2013; \$32.00 effective the first Sunday in December, 2014; and \$36.00 effective the first Sunday in December, 2015; E-ZPass® weekday overnight tolls for trucks shall be \$15.00 effective September 18, 2011; \$19.00

effective the first Sunday in December, 2012; \$23.00 effective the first Sunday in December, 2013; \$27.00 effective the first Sunday in December, 2014; and \$31.00 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$26.00 effective September 18, 2011; \$30.00 effective the first Sunday in December, 2012; \$34.00 effective the first Sunday in December, 2013; \$38.00 effective the first Sunday in December, 2014; and \$42.00 effective the first Sunday in December, 2015.

Class 3 vehicles - three axles: E-ZPass® off-peak toll shall be \$27.00 effective September 18, 2011; \$33.00 effective the first Sunday in December, 2012; \$39.00 effective the first Sunday in December, 2013; \$45.00 effective the first Sunday in December, 2014; and \$51.00 effective the first Sunday in December, 2015; the E-ZPass® peak toll shall be \$30.00 effective September 18, 2011; \$36.00 effective the first Sunday in December, 2012; \$42.00 effective the first Sunday in December, 2013; \$48.00 effective the first Sunday in December, 2014; and \$54.00 effective the first Sunday in December, 2015; E-ZPass® weekday overnight tolls for trucks shall be \$22.50 effective September 18, 2011; \$28.50 effective the first Sunday in December, 2012; \$34.50 effective the first Sunday in December, 2013; \$40.50 effective the first Sunday in December, 2014; and \$46.50 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$39.00 effective September 18, 2011; \$45.00 effective the first Sunday in December, 2012; \$51.00 effective the first Sunday in December, 2013; \$57.00 effective the first Sunday in December, 2014; and \$63.00 effective the first Sunday in December, 2015.

Class 4 vehicles - four axles: E-ZPass® off-peak toll shall be

\$36.00 effective September 18, 2011; \$44.00 effective the first Sunday in December, 2012; \$52.00 effective the first Sunday in December, 2013; \$60.00 effective the first Sunday in December, 2014; and \$68.00 effective the first Sunday in December, 2015; the E-ZPass® peak toll shall be \$40.00 effective September 18, 2011; \$48.00 effective the first Sunday in December, 2012; \$56.00 effective the first Sunday in December, 2013; \$64.00 effective the first Sunday in December, 2014; and \$72.00 effective the first Sunday in December, 2015; E-ZPass® weekday overnight tolls for trucks shall be \$30.00 effective September 18, 2011; \$38.00 effective the first Sunday in December, 2012; \$46.00 effective the first Sunday in December, 2013; \$54.00 effective the first Sunday in December, 2014; and \$62.00 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$52.00 effective September 18, 2011; \$60.00 effective the first Sunday in December, 2012; \$68.00 effective the first Sunday in December, 2013; \$76.00 effective the first Sunday in December, 2014; and \$84.00 effective the first Sunday in December, 2015.

Class 5 vehicles - five axles: E-ZPass® off-peak toll shall be \$45.00 effective September 18, 2011; \$55.00 effective the first Sunday in December, 2012; \$65.00 effective the first Sunday in December, 2013; \$75.00 effective the first Sunday in December, 2014; and \$85.00 effective the first Sunday in December, 2015; the E-ZPass® peak toll shall be \$50.00 effective September 18, 2011; \$60.00 effective the first Sunday in December, 2012; \$70.00 effective the first Sunday in December, 2013; \$80.00 effective the first Sunday in December, 2014; and \$90.00 effective the first Sunday in December, 2015; E-ZPass® weekday overnight tolls for trucks shall be \$37.50 effective September 18, 2011; \$47.50 effective

the first Sunday in December, 2012; \$57.50 effective the first Sunday in December, 2013; \$67.50 effective the first Sunday in December, 2014; and \$77.50 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$65.00 effective September 18, 2011; \$75.00 effective the first Sunday in December, 2012; \$85.00 effective the first Sunday in December, 2013; \$95.00 effective the first Sunday in December, 2014; and \$105.00 effective the first Sunday in December, 2015.

Class 6 vehicles - six axles or more, or combination of vehicles totaling at least six axles: E-ZPass® off-peak toll shall be \$54.00 effective September 18, 2011 (additional axle \$9.00); \$66.00 effective the first Sunday in December, 2012 (additional axle \$11.00); \$78.00 effective the first Sunday in December, 2013 (additional axle \$13.00); \$90.00 effective the first Sunday in December, 2014 (additional axle \$15.00); and \$102.00 effective the first Sunday in December, 2015 (additional axle \$17.00); the E-ZPass® peak toll shall be \$60.00 effective September 18, 2011 (additional axle \$10.00); \$72.00 effective the first Sunday in December, 2012 (additional axle \$12.00); \$84.00 effective the first Sunday in December, 2013 (additional axle \$14.00); \$96.00 effective the first Sunday in December, 2014 (additional axle \$16.00); and \$108.00 effective the first Sunday in December, 2015 (additional axle \$18.00); E-ZPass® weekday overnight tolls for trucks shall be \$45.00 effective September 18, 2011 (additional axle \$7.50); \$57.00 effective the first Sunday in December, 2012 (additional axle \$9.50); \$69.00 effective the first Sunday in December, 2013 (additional axle \$11.50); \$81.00 effective the first Sunday in December, 2014 (additional axle \$13.50); and \$93.00 effective the first Sunday in December, 2015 (additional axle \$15.50); and cash tolls at all times shall be \$78.00

effective September 18, 2011 (additional axle \$13.00); \$90.00 effective the first Sunday in December, 2012 (additional axle \$15.00); \$102.00 effective the first Sunday in December, 2013 (additional axle \$17.00); \$114.00 effective the first Sunday in December, 2014 (additional axle \$19.00); and \$126.00 effective the first Sunday in December, 2015 (additional axle \$21.00).

Class 7 vehicles - recreational vehicles and Class 1 and 11 vehicles with trailers: E-ZPass® off-peak toll shall be \$14.00 effective September 18, 2011 (additional axle \$6.50); \$15.50 effective the first Sunday in December, 2012 (additional axle \$7.25); \$17.00 effective the first Sunday in December, 2013 (additional axle \$8.00); \$18.50 effective the first Sunday in December, 2014 (additional axle \$8.75); and \$20.00 effective the first Sunday in December, 2015 (additional axle \$9.50); the EZPass ® peak toll shall be \$16.00 effective September 18, 2011 (additional axle \$6.50); \$17.50 effective the first Sunday in December, 2012 (additional axle \$7.25); \$19.00 effective the first Sunday in December, 2013 (additional axle \$8.00); \$20.50 effective the first Sunday in December, 2014 (additional axle \$8.75); and \$22.00 effective the first Sunday in December, 2015 (additional axle \$9.50); and cash tolls at all times shall be \$22.00 effective September 18, 2011 (additional axle \$10.00); \$25.00 effective the first Sunday in December, 2012 (additional axle \$12.00); \$27.00 effective the first Sunday in December, 2013 (additional axle \$13.00); \$30.00 effective the first Sunday in December, 2014 (additional axle \$15.00); and \$33.00 effective the first Sunday in December, 2015 (additional axle \$17.00).

Class 8 vehicles - two-axle buses and mini buses: E-ZPass® off-peak toll shall be \$10.00 effective September 18, 2011;

\$10.75 effective the first Sunday in December, 2012; \$11.50 effective the first Sunday in December, 2013; \$12.25 effective the first Sunday in December, 2014; and \$13.00 effective the first Sunday in December, 2015; and the E-ZPass® peak toll shall be \$10.00 effective September 18, 2011; \$10.75 effective the first Sunday in December, 2012; \$11.50 effective the first Sunday in December, 2013; \$12.25 effective the first Sunday in December, 2014; and \$13.00 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$20.00 effective September 18, 2011; \$21.00 effective the first Sunday in December, 2012; \$22.00 effective the first Sunday in December, 2013; \$23.00 effective the first Sunday in December, 2014; and \$24.00 effective the first Sunday in December, 2015.

Class 9 vehicles - three-axle buses and mini buses: E-ZPass® off-peak toll shall be \$10.00 effective September 18, 2011; \$10.75 effective the first Sunday in December, 2012; \$11.50 effective the first Sunday in December, 2013; \$12.25 effective the first Sunday in December, 2014; and \$13.00 effective the first Sunday in December, 2015; and the E-ZPass® peak toll shall be \$10.00 effective September 18, 2011; \$10.75 effective the first Sunday in December, 2012; \$11.50 effective the first Sunday in December, 2013; \$12.25 effective the first Sunday in December, 2014; and \$13.00 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$20.00 effective September 18, 2011; \$21.00 effective the first Sunday in December, 2012; \$22.00 effective the first Sunday in December, 2013; \$23.00 effective the first Sunday in December, 2014; and \$24.00 effective the first Sunday in December, 2015.

Class 11 vehicles - motorcycles: E-ZPass® off-peak toll

shall be \$6.50 effective September 18, 2011; \$7.25 effective the first Sunday in December, 2012; \$8.00 effective the first Sunday in December, 2013; \$8.75 effective the first Sunday in December, 2014; and \$9.50 effective the first Sunday in December, 2015; and the E-ZPass® peak toll shall be \$8.50 effective September 18, 2011; \$9.25 effective the first Sunday in December, 2012; \$10.00 effective the first Sunday in December, 2013; \$10.75 effective the first Sunday in December, 2014; and \$11.50 effective the first Sunday in December, 2015; and cash tolls at all times shall be \$11.00 effective September 18, 2011; \$12.00 effective the first Sunday in December, 2012; \$13.00 effective the first Sunday in December, 2013; \$14.00 effective the first Sunday in December, 2014; and \$15.00 effective the first Sunday in December, 2015.

Carpool Plan - Class 1 or 11 vehicles with three or more people: E-ZPass® off-peak toll shall be \$3.50 effective September 18, 2011; \$4.25 effective the first Sunday in December, 2012; \$5.00 effective the first Sunday in December, 2013; \$5.75 effective the first Sunday in December, 2014; and \$6.50 effective the first Sunday in December, 2015; and the E-ZPass® peak toll shall be \$3.50 effective September 18, 2011; \$4.25 effective the first Sunday in December, 2012; \$5.00 effective the first Sunday in December, 2013; \$5.75 effective the first Sunday in December, 2014; and \$6.50 effective the first Sunday in December, 2015.

GREENPass - eligible low-emission Class 1 vehicles: E-ZPass® off-peak toll shall be \$4.00 effective September 18, 2011; \$4.75 effective the first Sunday in December, 2012; \$5.50 effective the first Sunday in December, 2013; \$6.25 effective the first Sunday in December, 2014; and \$7.00

effective the first Sunday in December, 2015; and the E-ZPass® peak toll shall be \$9.50 effective September 18, 2011; \$10.25 effective the first Sunday in December, 2012; \$11.00 effective the first Sunday in December, 2013; \$11.75 effective the first Sunday in December, 2014; and \$12.50 effective the first Sunday in December, 2015.

The Port Authority Staten Island Bridges Plan: The toll for enrolled E-ZPass® users with non-commercial plates shall be \$95.00 for 20 trips in a 35-day period at the Goethals Bridge, Outerbridge Crossing and Bayonne Bridge effective September 18, 2011; \$105.00 effective the first Sunday in December, 2012; \$110.00 effective the first Sunday in December, 2013; \$120.00 effective the first Sunday in December, 2014; and \$125.00 effective the first Sunday in December, 2015; and it is further

RESOLVED, that, effective September 18, 2011, "peak hours" shall be weekdays from 6:00 a.m. to 10:00 a.m. and 4:00 p.m. to 8:00 p.m., and Saturdays and Sundays from 11:00 a.m. to 9:00 p.m.; "off peak hours" shall be all other times, except that "weekday overnight hours" for classes 2, 3, 4, 5 and 6 shall be from 10:00 p.m. Sundays through Thursdays to 6:00 a.m. Mondays through Fridays, respectively; and it is further

RESOLVED, that all the other terms and conditions set forth in the resolution of the Board of Commissioners establishing tolls for the use of vehicular crossings, adopted on January 4, 2008 shall remain in full force and effect; and it is further

RESOLVED, that the Executive Director be and he hereby is authorized to evaluate, and recommend to the Board of Commissioners, the establishment of a "Truck

Repeat Volume Program"; and it is further

RESOLVED, that the Executive Director be and he hereby is authorized to make any selection, designation, determination, or estimate, to formulate and express any opinions, to exercise any discretion or judgment, and to take all action necessary or appropriate or which may be or is required to be made, taken, formulated, expressed, or exercised to implement the provisions of this resolution.

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