

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AUTOMOBILE CLUB OF NEW YORK, INC. d/b/a	:	11 Civ. 6746
AAA NEW YORK and AAA NORTH JERSEY, INC.,	:	(RJH)
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
THE PORT AUTHORITY OF NEW YORK AND	:	
NEW JERSEY,	:	
	:	
Defendant.	:	

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**BRIEF OF *AMICUS CURIAE* MARGARET DONOVAN AND RICHARD HUGHES,
FOR THE TWIN TOWERS ALLIANCE, IN SUPPORT OF PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

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STATEMENT OF INTEREST OF AMICUS CURIAE

We are the founders and directors of the Twin Towers Alliance, which since 2006 has promoted the public interest at the World Trade Center. In the course of seeking access to contracts and documents that would answer a number of questions that the public has a right to know – no matter what is built at the site – we have observed and extensively documented a disturbing lack of transparency on the part of the Port Authority of New York and New Jersey.

We believe that what is presented here materially reflects on the character and credibility of the Agency. We have addressed the PA Board of Commissioners on numerous occasions and filed dozens of Freedom of Information requests – many of them for documents that belong in the public domain but that nevertheless have been locked in limbo for too long. Our experience with the Port Authority was summed up when Margaret Donovan asked the Commissioners at the September 22, 2011, Board Meeting: “Why do you always act as if you have something to hide?” It was not a frivolous question.

Since our exclusive frame of reference and area of expertise is the redevelopment of the World Trade Center, mention of the Trade Center is offered only as a prime example of the contempt for the public that the Port Authority has institutionalized.

In our experience, the Port Authority’s credibility is suspect. We hope that sharing our experience will be helpful. We believe that an agency that deliberately contrives to keep the public from monitoring its decision making, thus stripping the public of any meaningful oversight, has no right to impose unreasonable toll hikes on that public as a way of managing its mismanagement.

PRELIMINARY STATEMENT

We are submitting this brief because we believe that the Port Authority of New York and New Jersey has been indulged by the politicians and insulated from public scrutiny for too long. The public is entitled to get straight answers to straight questions regarding Port Authority decisions, which translate into a direct tax on the people. Instead, it is met with a pattern of deception and contempt for the public good that culminated in the recent toll hikes.

This contempt for the public is noticeable in the way that Port Authority policy is almost exclusively developed behind closed doors, violating even the Agency's own version of the Open Meetings Law (OML); in its spotty compliance with the Freedom of Information Law (FOIL) and Open Public Records Access Law (OPRA) with which its own Freedom of Information Policy claims to be consistent; and it is particularly apparent in the cavalier manner in which it recently raised tolls an astonishing 50% only three days after holding pro forma hearings staged at inconvenient locations and inconvenient hours – with not a single Commissioner present to look the citizens in the eye.

Prior to the vote on August 19, 2011, Chairman Samson said, “We listened to the people of New York and New Jersey and thousands of them told us what they thought. A complete report including verbatim transcripts was provided to each Commissioner. Every comment has been reviewed and considered by this Board. As a result, we are mindful of the real genuine concerns over the amount of the proposal and the commuters’ ability to pay for such toll and fare increases.” *See, Port Authority Chairman Samson’s Comments Delivered Today at the Port Authority Board Meeting, August 19, 2011, at http://www.panynj.gov/press-room/press-item.cfm?headLine_id=1446.*

That was neither reassuring nor credible given that only two days followed the hearings in which to prepare the report and “consider every comment” – all 1500 of them.

This disdain for public input is evident at every PA board meeting. Concerned citizens are allowed no more than three minutes each in which to address complex and consequential matters, even though the meetings almost never exceed an hour and usually are considerably more brief.

To make matters worse, the Port Authority cares so little about what the public thinks, or is [so] put off by what the public has said, that when the Board Secretary sends the minutes of the meetings to the Governors, the public comments are omitted from the transcripts.

Allowing the public to say a few words before the Board rubber-stamps policies and actions that are decided in secret sessions makes for an exercise in civic futility. It is part of a pattern of deception and arrogance that has now reached a toxic level and endangers the public good.

We believe that if the Port Authority is allowed to continue to get away with this kind of contemptuous behavior, they will show even less regard for what they owe the public, while forcing us into paying for the Agency's follies.

Robert F. Kennedy once wrote that the problem of power is how to achieve its responsible use rather than its irresponsible and indulgent use; how to get men of power to live *for* the public rather than *off* the public. See, Robert F. Kennedy, *The Pursuit of Justice* Harper & Row, 1964 at p.6.

The Port Authority was created to serve the public and for decades it did just that. But in recent years it has been living off the public. It has lost its way. And the imperious and tone-deaf way it raised tolls recently is proof of that. There is no doubt that people are being robbed at the toll booth. But it would be even worse if they are robbed of their faith in the ability of our system of justice to protect and vindicate their best interest.

BACKGROUND

An entrenched lack of transparency is at the root of the contested toll hikes.

The Freedom of Information and Open Meetings laws, which have been adopted by all fifty states, are vital civic safeguards. The Port Authority of New York and New Jersey's bi-state nature complicates the enforcement of the rules of transparency that other State and Federal agencies must strictly observe. But that surely does not put the PA above the law when in fact the Agency's direct access to the public purse makes its transparency more of an imperative, not less.

On September 6, 2011, Robert J. Freeman, the highly regarded head of the New York Department of State's Committee on Open Government (COOG) responded to a Twin Towers Alliance (TTA) request for an Advisory Opinion. *See*, www.twintowersalliance.com/COOG_9-6-11.pdf He analyzed the different issues and made a number of observations. In comparing New York's Open Meetings Law to the PA's [Open Meetings Policy], he noted that the provision relating to entering into an executive session "is far broader than any ground for entry into executive session appearing in the OML..." *See* Advisory Opinion, Robert J. Freeman, the Committee on Open Government, September 6, 2011 at p. 7.

He proceeded to examine the Port Authority's policy regarding how the minutes of an executive session are reported and noted that the PA's provision "is, in my view, clearly inconsistent with both FOIL and OML as those statutes are generally applicable." *See* Advisory Opinion, Robert J. Freeman, the Committee on Open Government, September 6, 2011 at p. 7.

He concluded: "In short, while the Port Authority may be complying with its own internal policy regarding its meetings and the disclosure of minutes, the policy is in several respects more

restrictive with respect to public access than the OML.” *See*, Advisory Opinion, Robert J. Freeman, the Committee on Open Government, September 6, 2011 at p. 7.

He sent a copy of the Advisory Opinion to the PA Board of Commissioners “in an effort to encourage reconsideration of their actions and transparency...” *See*, Advisory Opinion, Robert J. Freeman, the Committee on Open Government, September 6, 2011 at p. 7.

Those observations are central to the current matter because a case can reasonably be made that if the Port Authority’s Freedom of Information and Open Meetings policies were truly consistent with the Sunshine Laws of the two states, and had been faithfully administered, it is a virtual certainty that the fabulously wealthy Agency’s financial difficulties would never have become a full-blown crisis, requiring sudden, crippling toll hikes, only three years after the last hefty hike.

The Port Authority took over billions of dollars of SPI’s burden for reasons that are not clear.

In almost eighty years, the toll for crossing the George Washington Bridge had only reached \$4. Since 2008, it has tripled to \$12 for cars paying with cash. Truck tolls have also skyrocketed, adding to the cost of goods coming into New York City, Long Island, and New England, thus raising consumer prices while we are in the middle of the worst recession in seventy years.

The redevelopment of the World Trade Center site is clearly what has so dramatically affected the tolls. Therefore, our organization’s efforts to get to the bottom of the Agency’s opaque spending decisions regarding the site run parallel to the matter at hand.

Following the attacks of September 11, 2001, the Port Authority’s responsibility for the recovery at Ground Zero was limited to repairing the transportation infrastructure, and, implicitly, to building a fitting memorial. Silverstein Properties (SPI), not the Port Authority, was contractually

obligated as the Leaseholder to clear away the debris and restore the 10 million square feet of office space. At its own expense. Eight years later, Mayor Bloomberg said, “Larry has everybody by the proverbials – he really does... Nobody likes it, but that’s the truth.” *See*, Josh Rogers, *Bloomberg says his powers are limited at the W.T.C.*, Downtown Express, October 16-22, 2009.

Answers to how the public went from being responsible for ground work and a memorial to where we are today is presumably going to be revealed in the contracts we have been requesting access to for going on two years. The Port Authority took over billions of dollars of SPI’s burden, for reasons that have never been explained to the public. Citizens have a right to know why the public’s servants at the Port Authority assumed many of the Leaseholder’s contractual obligations at the World Trade Center site, without the public’s knowledge or approval. If the public has been well-served, why has the PA avoided disclosure of contracts that belong in the public domain?

Chief among the many unanswered questions is why the Port Authority assumed responsibility for building a financially troubled tower, and what the public received in return. *See*, Joe Nocera, *9/11’s White Elephant*, *N.Y. Times*, August 20, 2011, at p. A19.

ARGUMENT

I. How can the Port Authority claim to protect the public interest until that interest is identified? And how can that possibly be done except in consultation with the public?

The discrepancies that were noted in the Advisory Opinion by Mr. Freeman, a gentleman who has spent over forty years educating both officials and the public on the mandates of the Open Meeting and Freedom of Information laws, lead to a troubling question: When the Port Authority was drafting its in-house version of the two states’ laws, which they claim in their By-Laws are

“consistent with the open meetings laws of the two States,” why did they choose to revise certain provisions in ways that are “clearly inconsistent with both FOIL and OML as those statutes are generally applicable?” *See*, Advisory Opinion, Robert J. Freeman, the Committee on Open Government, September 6, 2011 at p. 7.

Why would the Commissioners create a policy that is “in several respects more restrictive with respect to public access than the OML?” *See*, Advisory Opinion, Robert J. Freeman, the Committee on Open Government, September 6, 2011 at p. 7. The Port Authority is not charged with protecting State Secrets – they are charged with spending the public's money on carefully defined missions to benefit the public good. Does the public have no say in how its money is spent? Does the Port Authority seriously believe that every policy decision over ten years regarding the WTC site had to be made behind closed doors because to do otherwise would “clearly endanger the public interest”? *See*, Port Authority By-Laws, at www.panynj.gov/corporate-information/pdf/by-laws-pa.pdf at p.4 Item G.

How can the public interest be protected until [that interest] is identified? And how can that possibly be done except in consultation with the public? Until that happens, treating the public as if it has to be protected from itself is absurd and perverse, when in fact, the only thing that clearly endangers the public interest is the Board's flagrant secrecy.

The blanket inference that PA executive sessions are closed to the public so as to preserve a market advantage cannot possibly be justified. There is no mechanism in place to protect the public from secrecy born of political, not financial, considerations. The PA is not a private company; it is a public entity. It should therefore be required to operate in the open.

As it now stands, access to contracts made in secret are the public's only way to monitor those decisions. Yet for nearly two years the Port Authority stonewalled our requests to examine the 2001 Silverstein Leases, the 2006 Master Development Agreement, and the 2003 Memorandum to the Leases. Then, yesterday, the PA sent us an email that it had put all of these documents in the mail to us. We believe the timing speaks for itself. [It] is a reminder that an Open Meetings Policy that allows the Port Authority Board to comply when it is convenient and suspend the rules when it isn't is not a policy – it is a subterfuge – and the inevitable result of such a practice is finally becoming painfully clear.

Port Authority officials brazenly exploit the Sunshine Laws enforcement loophole, knowing that it would be a fool's errand for citizens to bring a civil action against them. But that does them no credit and reinforces the appearance that they have something to hide, while they continue to spend billions of dollars of the public's money in any way they choose.

Since their By-Laws embrace the two states' Open Meeting and Freedom of Information laws and pledge to act consistent with them, it is worth noting that both New York and New Jersey have very similar enforcement provisions. According to the New York law: “Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. *In any such action or proceeding, if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part...* (emphasis added).” *See*, Open Meetings Law, Enforcement, NY Public Officers Law, §107(1).

II. Nothing is likely to change as long as the Port Authority is allowed to maintain the veil of secrecy that got us where we are today.

The Port Authority claims it is committed to the highest standards of accountability and transparency. *See*, Port Authority website, www.panynj.gov, *Transparency in Governance*. That is easy to say as long as there is no mechanism in place to monitor compliance. Until there is, the public can only use the “black hole” principle that detects an absolutely opaque object by the way surrounding matter reacts to its gravitational pull.

Nothing is likely to change as long as the Port Authority is allowed to maintain the veil of secrecy that got us where we are today. Unless the auditors face up to how much of the PA’s woes are of its own making – the result of its imperial culture – and look into what the real options are, how can this agency legitimately ask the public to grin and bear its burden?

We have a right to be protected from the excesses of our government and the two states have failed to do that. Now, the storm of protest over the recent toll hikes has resurrected “The Port Authority of New York and New Jersey Oversight Act,” which was introduced in 2007 in both State Legislatures, utilizing the simple device that identical bills would close the current loophole and be enforceable in either state. Unfortunately, in 2007, both states failed to enact a law that would have given the public valuable leverage. *See*, [NJ Legislature Sen. No. 2475](#).

If the Port Authority can’t serve the region and at the same time faithfully and scrupulously observe the transparency that the Open Meeting and Freedom of Information Laws were adopted nationwide to guarantee, then perhaps the public interest would be best served by dismantling an agency that sees itself as above the law and beyond its reach.

The PA Board's clandestine methods are no secret. We were interviewed a year ago for a *Star-Ledger* article that was examining the curious record of "unanimous votes on 302 resolutions during 42 meetings since January 2008, which means they cast 2,068 votes in favor – and none against." See, Steve Strunsky, *For Port Authority commissioners, votes of dissent are nearly extinct*, The Star-Ledger, November 21, 2010. Years earlier, on November 5, 2006, the *New York Times* published an editorial calling for "An Accountable Port Authority" that we include in full because, in hindsight, it is so revealing, especially in its conclusion that "An agency as integral as the Port Authority is to the life of everyone who lives or works in the metropolitan area must be held accountable for its actions:"

For most of its 85 years, the Port Authority of New York and New Jersey has operated with all the unchecked authority and the secrecy of the old Soviet Union. Appointed by the governors of New York and New Jersey, the board and its executive director have pretty much done whatever they wanted in the way they wanted. It's time for the legislatures of both states to say — enough.

The Port Authority is no run-of-the-mill public agency, but one with a huge impact on all metropolitan area residents. It has built and now operates, among other facilities, the George Washington and Goethals Bridges and the Lincoln and Holland Tunnels. It runs all the area's major airports and the PATH underground rail system, and it wants to build an underground commuter rail link between northern New Jersey and Midtown Manhattan. It built and operated the World Trade Center and has a major say in what will replace it. It has a crucial role in the security of the metropolitan area and an operating budget of \$5 billion — about a sixth of that of the state of New Jersey.

In the past few weeks, there have been encouraging signs that the Port Authority's near-complete autonomy may have finally ended. Last month, the chairman, Anthony Coscia, announced that for as long as he holds power the agency's meetings would be open to the public, votes would be taken publicly and in a manner that onlookers would understand what was going on, and the public would be allowed to speak.

About the same time, New Jersey's governor, Jon Corzine, demonstrated his commitment to openness by issuing an order requiring the Turnpike Authority and all others that he has exclusive authority over to conduct their business in

public. For such a change to become permanent at the Port Authority, the legislatures and governors of both New York and New Jersey would have to take action. Assemblyman Richard Brodsky of New York, a Westchester County Democrat who has long wanted the legislatures to do just that, has recently won some backing from a few important New Jersey lawmakers, most notably Senator Loretta Weinberg, a Democrat from Bergen County.

Both Ms. Weinberg and Mr. Brodsky, who has long condemned what he calls the authority's "culture of arrogance," say they are impressed with Mr. Coscia's changes, but point out that he serves only on a year-to-year basis and that his reforms could be rescinded by any successor. They want the legislatures not only to codify Mr. Coscia's new openness but also to adopt requirements for competitive bidding, fiscal accountability and, if Mr. Brodsky has his way, an independent inspector general and independent budget office to serve as permanent watchdogs. These kinds of reforms are essential.

So far, it is anyone's guess whether the legislatures will go far enough in reining in the agency. Mr. Coscia says he will support legislation to make permanent the openness and transparency that is needed, but he has yet to commit himself to any details. Ms. Weinberg, though committed to real change, says she wants to hear the argument for an independent inspector general, and another significant player, Assemblyman John Wisniewski, a Middlesex County Democrat and chairman of the Assembly transportation committee, has warned against taking actions that could "hamstring" the agency.

Obviously, that should not occur, but there is a more urgent consideration. An agency as integral as the Port Authority is to the life of everyone who lives or works in the metropolitan area must be held accountable for its actions. The legislatures and governors of New York and New Jersey have a responsibility to make sure that happens. *See*, Editorial, *An Accountable Port Authority*, *N.Y. Times*, N.Y./Region Opinions, November 5, 2006

III. The best way to save the Port Authority is by refusing to allow it to force the public to bail it out. The consequences of the Agency's choices should be borne by it alone...

Then, maybe, the PA will get serious about the jeopardy it has put itself in. The Port Authority's bi-state character merely complicates enforcement – it does not dilute its obligation to the public. The only body a corporation has is its charter and by-laws. Willfully

subverting its Open Meetings and Freedom of Information obligations are not the equivalent of corporate jaywalking. The suspension-at-will of its by-laws by a public entity in command of billions of public dollars is a breach that compromises the integrity of the Agency's entire being.

This is definitely not an attempt on our part to smear the many fine people who are or have been part of an agency that has done remarkable things. But one definition of malignancy is a refusal to recognize boundaries and when that characterizes an agency that has direct access to the public purse, the public has good reason to be alarmed. If the agency is allowed to hold onto its ill-gotten gains, it will be a slap in the face of every citizen in New York and New Jersey.

Only a brutally honest audit can save the Port Authority. Unless the special committee in charge of the audit is ready to recognize the destructive nature of the agency's penchant for secrecy, there is very little point in analyzing the way that the PA spends money, prioritizes its projects, or compensates its people. That would be like allowing a lung cancer patient to keep smoking.

President Lincoln said, "Nearly all men can stand adversity, but if you want to test a man's character, give him power." The Port Authority is in a sense drunk with power. No one ever says no to them. The only thing the Agency really has to fear is judicial discretion, because clever lawyering can't disguise what is written between the lines any more than an alcoholic can keep from reeking even when sober.

The Port Authority has billions of dollars in public holdings that should be subject to privatization in order to repair its balance sheet, before another dime is coerced from the public. Until it is required to face that reality, it will always treat the public as its captive lender. Threats to cut back on needed maintenance and improvements are holding the region hostage to the

Agency's imperial pretensions. Forcing the Agency to sell off whatever holdings they need to in order to fund required maintenance, instead of raiding the public purse like a piggy bank, would be the best medicine for the Agency's future viability.

We are not enemies of the Port Authority. The Twin Towers Alliance has tremendous admiration for what the Port Authority has accomplished in the past and could again, if only its current culture of entitlement and omnipotence is exposed and corrected.

CONCLUSION

The shifting justification for the toll hikes is a shell game that insults the intelligence of all concerned. The repairs and upgrades that are being trotted out to justify a massive toll hike were hardly unexpected and should have been saved for all along.

If the Port Authority were a private corporation, there would have been a shareholder revolt months ago. But their culture of secrecy makes them secure in their ability to hold on to their privileges and prerogatives.

The only hope the people have is in the judiciary. An editorial in the December 2, 2011, *Asbury Park Press* perhaps said it best: "Given the apparent mendacity at play here, the courts need to block the toll increases to ensure the Port Authority will not be tempted to pull this sort of chicanery again." *See, Asbury Park Press*, December 2, 2011

If the Port Authority's stratagem succeeds, it would solidify the belief held by many that even though we all know what is going on, there is nothing we can do about it. Reversing the toll hikes could not possibly be more damaging than allowing the perception to grow that the public has no power and no rights in the matter.

There is no harm Port Authority officials can point to that would be more damaging to the public good than allowing the Agency's master manipulators to prevail in this matter. It is not in the public interest to once again bail out those who have mismanaged the public's funds just because in their own estimation they are too big to fail. Preserving the Port Authority's hubris is not high on the list of the public's legitimate concerns. Getting to the truth of the matter is.

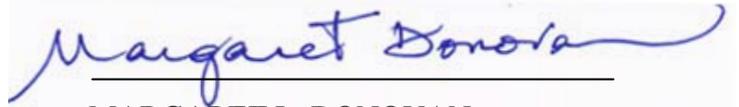
The public has a right to discovery that has consistently been thwarted by the Port Authority. The public must be allowed to find out the true financial condition of the Agency and how our money is really being spent *before* the Agency is allowed to raise tolls. The current tolls should be rolled back until these conditions have been met.

Finally, our experience with the Port Authority is that it is deeply resistant to communicating with the public in any substantive way. Its habit of obfuscation means that the public has no real idea how decisions were arrived at regarding why tolls needed suddenly to be raised by a preposterous amount in the middle of a recession any more than how decisions were arrived at regarding rebuilding at Ground Zero.

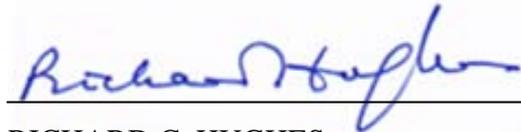
The Port Authority has been allowed to operate in the dark for too long. We need to raise the blinds and let the sun shine in. Because they are not spending their own money; they are spending ours.

For all the reasons set forth above, *Amici* respectfully urge the Court to grant Plaintiff's motion for a temporary injunction and to deny Defendant's Motion to Dismiss.

Dated: New York, New York
December 7, 2011



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