UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW YORK SHIPPING ASSOCIATION, INC., on behalf of its members; METROPOLITAN MARINE MAINTENANCE CONTRACTORS' ASSOCIATION, INC., on behalf of its members; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, on behalf of its members and affiliated local in the Port of New York and New Jersey; LOCAL 1804-1, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, on behalf Of its members; and LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, on behalf of its members,

Plaintiffs,

v.

Civ. Action No. 13-7115(SDW)(MCA)

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant.

BRIEF OF DEFENDANT WATERFRONT COMMISSION OF NEW YORK HARBOR IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

Defendant Waterfront Commission of New York Harbor submits this Memorandum of Law in support of its Motion to Dismiss Plaintiffs' Complaint for failure to state a claim pursuant to Fed. R. Civl. P. 12(b)(6).

Since the enactment of the Waterfront Commission Act in 1953, Plaintiffs – disgruntled by its limiting effect on their perceived absolute collective bargaining rights to engage conduct that promotes discriminatory hiring practice – have challenged virtually every attempt by the Commission to ensure that Plaintiffs abide by the spirit and the letter of the Act. In this instance, to combat continued discriminatory practices, the Commission has asked that the industry implement a hiring plan that will result in individuals being hired in a fair and non-discriminatory basis in accordance with state and federal laws - - as is required of all other employers.

In response, Plaintiffs filed their Complaint alleging that the Commission has "gone of the rails," and is improperly interfering with their collective bargaining process. Moreover, Plaintiffs now staggeringly attempt to completely eradicate Section 5-p of the Act, which requires employers to certify that the selection of waterfront workers was made in a fair and non-discriminatory basis in accordance with the requirements of the laws of the United States and the states of New York and New Jersey dealing with equal employment opportunities. As argued below, the Complaint – which is completely meritless – is just another attempt by Plaintiffs to prevent the Commission from fulfilling its mandate to ensure the fair hiring of a diverse workforce in the Port.

For the reasons set forth below, Plaintiffs' Complaint should be dismissed for failure to state a claim.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

For purposes of this motion only, Defendant Waterfront Commission of New York Harbor will accept as true the following facts alleged in Plaintiffs' Complaint.

I. THE PARTIES

Defendant Waterfront Commission of New York Harbor (hereinafter, "Commission" or "Defendant") is a bi-state corporate and politic entity created by compact between the states of New York and New Jersey in 1953. (N.J. STAT. ANN. § 32:23-1; MCK. UNCONSOLIDATED LAWS § 9801; (Complaint. ¶ 9, attached to the Affidavit of Phoebe S. Sorial, Esq.["SORIAL AFFIDAVIT", as Exhibit A)) "The Compact creates the Waterfront Commission as an agency of both states, with the authority to license or register workers, and, for good cause, to refuse licenses or registrations, and to regulate labor and hiring practices on the waterfront." *In Re Application of*

[1] In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint, and matters of public record. *Pittsburgh v. W. Penn Power Co.*, 147 F3d 256, 259 (3d Cir. 1998); *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*: Civil 3d § 1357 (3d ed. 2007); *see also Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196–97 (3d Cir. 1993)("a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document."). "Plaintiffs cannot prevent a court from looking at the texts of documents on which its claim is based by failing to attach or explicitly cite them." *In re Burlington Coat Factory Sec. Litig*. 114 F. 3d 1410, 1426 (3d Cir. 1997).

Matters of public record have been understood to include "copies of pleadings and other materials filed in other courts." *Caldwell Trucking PRP Group v. Spaulding Composites Co*., 890 F. Supp. 1247, 1252 (D.N.J. 1995); *see also Jean Alexander Cosmetics, Inc. v. L'Oreal USA*, Inc., 458 F. 3d 244, 256 n. 5 (3d Cir. 2006) (finding that consideration of pleadings from other court proceedings did not require the district court to convert a motion to dismiss into one for summary judgment because, "to resolve a 12(b)(6) motion, a court may properly look at public records, including judicial proceedings, in addition to the allegations in the complaint.")(internal quotations and alteration marks omitted).

In this motion, the facts are derived from (1) Plaintiffs' Complaint, (2) undisputedly authentic documents specifically referenced in the Complaint; (3) exhibits attached to pleadings filed by Plaintiffs on December 11, 2013 in this litigation in support of their Motion for Preliminary Injunction; and (4) public records of which the Court may take judicial notice, including press releases, publicly available transcripts of public hearings, publicly available Resolutions by the Commission, and copies of pleadings filed in other courts.

Waterfront Commission, 32 N.J. 323 (1960). The Commission is a fully recognized law enforcement agency, vested with licensing, regulatory and investigative powers. N.J. STAT. ANN. § 32:23-10 (West 1990 & Supp. 2010); N.Y. UNCONSOLIDATED LAWS § 9811 (McKinney 2002).

Plaintiff New York Shipping Association, Inc. (hereinafter, "NYSA") is a membership organization that represents marine terminal operators, stevedoring companies and vessel operators engaged in international trade and commerce in the Port of New York-New Jersey (hereinafter, "the Port"). (Compl. ¶ 4) Plaintiff Metropolitan Marine Maintenance Contractors' Association, Inc. (hereinafter, "MMMCA") is a membership organization that represents maintenance contractor employers in the Port. (Compl. ¶ 5)

Plaintiff International Longshoremen's Association, AFL-CIO (hereinafter, "ILA") is an association and labor organization certified by the National Labor Relations Board as the exclusive collective bargaining representative of longshoremen and other waterfront workers employed by the NYSA's members. (Compl. ¶ 6) The ILA negotiates and administers with the NYSA the NYSA-ILA Collective Bargaining Agreement (hereinafter, "NYSA-ILA CBA"), which prescribes the terms and conditions of employment for longshoremen and checkers/clerks who are included in the Deep-Sea Register, as discussed below, in the Port. (*Id.*)

Plaintiff ILA Local 1804-1 in an association and labor organization that represents workers who are employed by members of the NYSA and MMMCA in the maintenance and repair of containers, chassis and cargo-handling equipment predominantly on the New Jersey side of the Port. (Compl. ¶ 7) ILA Local 1804-1 is a party to the collective bargaining agreement with NYSA and MMMCA prescribing the terms and conditions of employment for maintenance and repair workers, who mostly comprise the "A" Register, as discussed below. (*Id.*) Plaintiff ILA Local 1814 is an association and labor organization that represents

maintenance and repair workers who are employed by members of the NYSA and MMMCA on the New York side of the Port. (Compl. ¶ 8) ILA Local 1814 is a party to collective bargaining agreements with NYSA and MMMCA prescribing the terms and conditions of employment of maintenance and repair workers, and also represents deep sea longshoremen covered by the NYSA-ILA CBA. (*Id.*)

II. THE WATERFRONT COMMISSION ACT

A. Enactment

In 1953, the New York State Crime Commission issued a report detailing pervasive crime and widespread corruption on the waterfront. (FOURTH REPORT OF THE NEW YORK STATE CRIME COMMISSION, New York State Leg.Doc.No. 70)(1953)(hereinafter, "CRIME COMMISSION REPORT"). The Report described "skullduggeries on the waterfront [that] were largely due to the domination over waterfront employment gained by the International Longshoremen's Association, as then conducted. Its employment practices easily led to corruption, and many of its officials participated in dishonesties." *De Veau v. Braisted*, 363 U.S. 144 (1960). In the wake of that report, the legislatures of the states of New York and New Jersey, with the consent of Congress, created the Commission by enacting the Waterfront Commission Compact. (N.J.S.A. 32:23-1; N.Y. UNCONSOL. 9801-9873) That Compact, along with the implementing provisions enacted by the two legislatures, are known as the Waterfront Commission Act (hereinafter, "Act"). (N.J.S.A. 32:23-1 *et seq*; N.Y. UNCONSOL 9801 *et seq*.)

As set forth in the Findings and Declarations of the Act, the legislatures found that:

> [t]he conditions under which waterfront labor is employed with the Port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive nor responsible to the employers . . . that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity . . .and a loss of respect for the

> law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the Port of New York district.

(N.J.S.A. 32:23-2; N.Y. UNCONSOL. 9802) The legislatures also found that the occupation of longshoremen and stevedores, among others, are "affected with a public interest requiring their regulation and that such regulation shall be deemed an exercise of the police power of the two States for the protection of public safety, welfare, prosperity, health, peace and living conditions of the people of the two States." (N.J.S.A. 32:23-5; N.Y. UNCONSOL. 9805)

B. Regulation of Longshoremen and Stevedores

"In accordance with its statutory mandate to eliminate the pervasive involvement of criminals in waterfront activity, the Waterfront Commission established by the Act proceeded to regulate employment practices in the Port of New York." *Waterfront Commission of New York Harbor v. Mercedes-Benz* (*citing* N.J.S.A. 32:23-7; N.Y. UNCONSOL. 9807) The Act required that all those deep sea longshoremen who loaded and unloaded cargo on and off vessels in the Port (i.e., "deep sea longshoremen") be hired through employment information centers operated by the Commission. (N.J.S.A. 32:23-52; N.Y. UNCONSOL. 9852-9853) The Commission was required to maintain a list, known as the "longshoremen's register," of all individuals qualified to work as longshoremen. (N.J.S.A. 32:23-7; N.Y. UNCONSOL. 9827; Compl. ¶ 15) Pursuant to the Act, "no person shall act as a longshoreman within the port of New York district[2] unless at the time he is included in the longshoremen's register. . ." (N.J.S.A. 32:23-7; N.Y. UNCONSOL. 9827) The Act also delegated to the Commission the power to issue licenses to stevedoring companies that wish to operate in the Port. (N.J.S.A. 32:23-19 to 32:23-23.1; N.Y. UNCONSOL. 9819-9823) A "stevedore" was originally defined as "a contractor engaged by a carrier of freight

[2] The "port of New York district" generally encompasses the region within approximately a 25-mile radius of the Statue of Liberty. (N.J.S.A. 32:23-6; N.Y. UNCONSOL. 9806)

by water to move waterborne freight on ships berthed at piers, on piers, or at other waterfront terminals." (N.J.S.A. 32:23-06; N.Y. UNCONSOL. 9806) Stevedores who employ deep-sea longshoremen, as defined above, are known as "general stevedores." *Bozzi v. Waterfront Commission of New York Harbor*, 1994 U.S. Dist. LEXIS 15664 at *6 (S.D.N.Y. 1994)

In order to be permanently licensed as a stevedoring company by the Commission, the Commission must be satisfied that the applicant – and all if its members, officers and stockholders required by the Act to sign or be identified in the application – possess "good character and integrity." (N.J.S.A. 32:23-21(b); N.Y. UNCONSOL. 9821(b)) The standard of good character and integrity remains in effect at all times while licensed with the Commission, and the Commission may, in its discretion, deny applications for such licenses and revoke licenses as it deems in the public interest. (N.J.S.A. 32:23-24; N.Y. UNCONSOL. 9824)

C. 1966 Legislation – Section 5-p and the Deep Sea Longshoremen's Register

When the Act was first adopted, the longshoremen's register was open, and any individual who was qualified to become a longshoreman was entitled to be registered by the Commission. *Bozzi*, 1994 U.S. Dist. LEXIS 15664 at *6. However, with the advent in the early 1960's of a new method of transporting freight by containers, the need for labor in the Port drastically reduced. *Id.* In 1964, in order to avoid having the existing workforce bear the entire cost of containerization and the concomitant elimination of jobs, a collective bargaining agreement was entered into between the NYSA and ILA. (*Id.*; Compl. ¶ 20). According to the terms of that agreement, employers were permitted to reduce the number of employees in exchange for their promise that registered displaced longshoremen would receive a Guaranteed Annual Income (GAI), whether or not there was work available. (*Id.*)

In 1966, these developments led to the enactment of Section 5-p of the Act, often referred to as the "closed-register" statute.[3] (*Bozzi*, *supra* at *6; Compl. ¶ 21) Under Section 5-p, the Commission is empowered to suspend the acceptance of applications for inclusion in the longshoremen's register, thereby closing and opening the register in order to "balance the longshoreman's workforce with the demand for waterfront labor." (*Id.*) When Section 5-p was first adopted, once the Commission determined that additional longshoremen were needed, applications were required to be processed in the order that they were filed with the Commission (i.e., on a first-come first-served basis). *Bozzi*, supra at *6. In determining whether to open or close the register, the Commission is required to observe certain standards including, *inter alia*:

> [t]o encourage as far as practicable the regularization of the employment of longshoremen . . .[t]o eliminate oppressive and evil hiring practices injurious to waterfront labor and waterborne commerce in the Port of New York district including, but not limited to, those oppressive and evil hiring practices that may result from either a surplus or shortage of waterfront labor [and] . . .[t]o protect the public interest in the Port of New York district.

(N.J.S.A. 32:23-114; N.Y. UNCONSOL. 9920)

D. 1969 Legislation – "A" Register

In 1969, in the wake of the technological advances described above, the statutory definitions of a stevedore and longshoreman were further expanded to include a new class of longshore workers, known as "A" registrants.[4] (Compl. ¶ 22; *Bozzi*, *supra* at *5). These longshoremen do not load and unload ships but perform services incidental to the loading and unloading operations. (*Id.*) These longshoremen that are registered by the Commission pursuant to the 1969 amendments to the Act are known as "1969 longshoremen" or "A registrants," and

[3] In 1965, the ILA and NYSA sought legislation for a closed register which could only be opened under their joint control. (MEMORANDUM IN SUPPORT, NEW YORK STATE SENATE, reprinted in 1999 N.Y. Laws (McKinney) at 1842) This bill was vetoed by New York Governor Nelson A. Rockefeller, since it gave control of the register to private parties and not to the Commission. *Id.*

[4] The term "A" registrants is derived from the "A" prefix before the multi-digit number that appears on licenses issued by the Commission to those registrants. *Bozzi*, *supra* at *5.

are distinguished from "deep-sea longshoremen." *Bozzi*, supra at *5. "A" registrants are not permitted to perform work involving the discharge or loading of general cargo vessels, and are not eligible to receive the GAI payments described above. *Id.*

The amendments also expanded the definition of stevedore to include contractors that were involved in the loading and unloading of containers, cargo storage, cargo repairing, coopering, general maintenance, carpentry, mechanical and miscellaneous work. *Id*. These contractors included in the 1969 amended definition of a stevedore are known as "1969 stevedores," as distinguished from the "general stevedores" defined earlier. *Bozzi, supra at* 5. The industry adapted to the 1969 legislation by creating separate workforces. In accordance with the NYSA-ILA CBA, NYSA's members employed the deep-sea longshoremen and checkers/clerks, and MMMCA's members employed the "A" registrants in accordance with the MMMCA-ILA CBA. (Compl. ¶¶ 4-8)

E. 1982 Amendment to Section 5-p – Clarification of "A" Registrants

In the early 1980's, the Commission proposed legislation that would clarify the status of "A" registrants as they related to the closed register statute, and provide an exception for certain classes of individuals to the existing statute. *Bozzi, supra* at *10. In the Commission's Memorandum in Support of the Bill, the background of the bill was presented as follows:

> Under [Section 5-p], the Waterfront Commission is specifically empowered to suspend the acceptance of applications for the inclusion in the Longshoremen's Register until such time as it determines that additional longshoremen are needed in the Port (commonly known as the "closed Register" statute). When the Commission does determine that additional longshoremen are needed, the statute requires that the agency process the applications for such registration in the order they are filed with the Commission (i.e., on a first-come, first-served basis).
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> The proposed bill provides for an exception to the "closed Register" statute for . . . persons who do work incidental to the movement of waterborne freight, [who] are required to be registered pursuant to amendments to the Waterfront Commission Act enacted in 1969 [s9905(6)] and who are not subject to the guaranteed annual income provisions of a collective bargaining agreement relating to longshoremen. Thus, these classes of persons would not be subject to the requirement that the Register be

> open for their admission pursuant to [Section 5-p] of the Act and their applications for registration would not require that they be processed on a first-come, first-served basis.
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> ** *
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> [This] class of persons the Commission wishes to have an exception to the "closed Register" statute are persons who perform work incidental to the movement of waterborne freight in the harbor, who are required to be registered by amendments to the Act enacted in 1969, and who are not subject to the guaranteed annual income provisions pertaining to traditional longshoremen which led to the enactment of the "closed Register" statute. Since 1969, the Commission has administratively excluded these persons from the "closed Register" statute since the reasons for the enactment does not pertain to such registrants. In order to clarify the status of such registrants with respect to the existing law, the Commission is now proposing that an exception be made to them in the "closed Register" statute.

Bozzi, *supra* at *10-11 (citing memorandum). The Commission added, "[t]he Commission also believes that those persons who have been and are being added to the Register pursuant to the 1969 amendments to the Act should also be excluded from the closed Register provisions." *Bozzi*, *supra* at *11. Accordingly, Section 5-p was amended to provide that:

> Notwithstanding any other provision of this act, the commission may include in the longshoremen's register under such terms and conditions as the commission may prescribe: . . . (b) a person defined as a longshoreman in [S 9905(6)] of this act who is employed by a stevedore defined in [s9905(1)(b)&(c)] and whose employment is not subject to the guaranteed annual income provisions of any collective bargaining agreement relating to longshoremen.

Today, this provision is set forth at Section 5-p(5)(b).

F. 1999 Amendment to Section 5-p – Certification by Employers that Selection is Made in a Fair and Non-Discriminatory Basis

In the late 1990's, the procedures described above pertaining to the opening of the deep-sea longshoremen's register became outdated as a result of the increased business in the Port, significant changes to the provisions of the collective bargaining agreement between management and labor, and attrition in the waterfront labor force. (MEMORANDUM IN SUPPORT, NEW YORK STATE SENATE, reprinted in 1999 N.Y. Laws (McKinney) at 1843) The Commission determined that changes needed to occur to then-existing provisions of Section 5-p, and initiated discussions with representatives of management and labor to develop a more expeditious manner

to meet the demand for waterfront labor. *Id.* On April 28 and 29, 1998, the Commission held public hearings to determine whether and in what manner Section 5-p should be amended. *Id.* Prior to the hearing representatives of management and labor, government officials, individual dockworkers and other interested parties were provided with a draft of the proposed amendments to Section 5-p, and were invited to testify and present their views on the subject. *Id.*

The proposed amendment permitted controlled openings of the deep-sea register through the use of an employer sponsorship procedure. *Id.* The total number of new workers needed in the industry would ultimately be determined by the Commission, which pursuant to the amendment would be tasked with bringing the number of longshoremen into balance with the demand for labor without reducing the number of longshoremen below that necessary to meet the requirements of the Port. *Id.* No longer were applications to be processed in the order that they were received by the Commission but instead, contingent on the employer sponsorship procedure. (*Id*.) Inasmuch as applications were no longer processed on a first-come, first-served basis, the proposed amendment contained a provision that "the sponsoring employer shall certify that the selection of the persons so sponsored was made in a fair and non-discriminatory basis in accordance with the requirements of the laws of the United States and the states of New York and New Jersey dealing with equal employment opportunities." (*Id.*)

Numerous witnesses from the Commission, ILA, NYSA, MMMCA and other interested parties testified at the hearing. (*Id.*) There was a general consensus that the proposed amendatory language to Section 5-p was the joint product of the Commission's collaboration with the industry. (WATERFRONT COMMISSION OF NEW YORK HARBOR PUBLIC HEARING ON PROCEEDING TO DETERMINE WHETHER AND IN WHAT MANNER SECTION 5-P OF THE WATERFRONT COMMISSION ACT SHOULD BE AMENDED, April 28, 1998 Tr. 131-133, attached to SORIAL AFFIDAVIT as Exhibit B) Indeed, James A. Capo, then president of the NYSA, testified,

"[t]he legislation before us today as [sic] a result of the hard work of this Commission, its staff, NYSA, its staff and its members, both carriers and terminal operators, as well as the ILA, its officers and its hardworking, dedicated members." (*Id.* at Tr. 120:20 to 121:2)

At the hearing, the Commission specifically presented the proposed amendatory language pertaining to the certification required of employers and explained:

> [t]he proposed amendment to Section 5-p, although it shifts the emphasis of sponsorship from the Contract Board to each individual employer, still retained that which the Contract Board has continued to provide to the Commission for the past twenty years, that is, a certification that the selection of the sponsoring persons was made in a fair and nondiscriminatory basis, in accordance with the laws of the United States and the states of New York and New Jersey dealing with equal employment opportunities.

(*Id.* at Tr. 99:20-100:10) During the hearing, David J. Tolan, a Director of the NYSA, was asked why he considered the employer sponsorship method an improvement over the 5-p system that existed at the time. (*Id.* at Tr. 179:9-17) He testified:

> Well, I think this opportunity for the employers to have a role in the selection process and the referral of personnel really, in effect, puts the onus back on the employer to make the right selection, and to have the criteria. You can't complaint to anyone else, because they don't have the right skills when they come into the workforce. That's why I believe it's better.

(*Id.* at Tr. 179:18 to 180:4) When asked how these individuals would be hired, Mr. Tolan responded:

> Well, what I would envision is that the employers will engage in the selection of personnel that they're going to refer to the Joint Committee, and that those persons that they select are going to have to be able to demonstrate certain basic skills and intelligence, and that they would have the right racial and sexual mix, and that those person would be then referred over to the Joint Committee, and the Joint Committee would ensure that the overall mix of employees, both from a skill, intelligence level, physical attribute level and equal employment opportunity requirement would be met before they come to the Commission for introduction to the workforce.

(*Id.* at Tr. 182:12 to 183:6)

Following those hearings, the Commission proposed the statutory codification of the sponsorship certification that is now at issue in this litigation. (MEMORANDUM IN SUPPORT, NEW YORK STATE SENATE, reprinted in 1999 N.Y. Laws (McKinney) at 1843) As set forth in the bill's Memorandum of Support, the certification provision was specifically included, "to protect against possible discrimination." *Id.* at 1841. The Commission explained:

> Any "opening" of the register will be controlled, and will not only be in full accordance with the Commission's mandate to balance the number of longshorepersons with the demand for their services but will "protect the public interest of the port of New York district." . . . Throughout the agency's history of authorizing temporary registrations pursuant to its special and emergency the Commission steadfastly made sure that all persons sponsored for temporary registration were selected on a fair and non-discriminatory basis in accordance with the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities. The proposed amendment continues this requirement.

(*Id.* at 1843-44) Notably, the NYSA issued a statement in support of the legislation unreservedly endorsing the suggested amendatory language, particularly concerning the certification requirement that hiring be done in a fair and non-discriminatory manner:

> Of equal importance, this legislation makes is sure that future additions to the workforce contain a number of women, Blacks and Hispanics. The amendatory language differs from the process required by the current law under which would-be longshore workers apply to the Commission, and the Commission considers each application on a first come, first served basis, which obviously does not result in a guarantee that any members of the aforementioned groups would be added to the workforce on a permanent basis.
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> S.4488-B, A 7634-B requires that the applications of sponsorship by the prospective employers include a certification that the applicants were selected in a fair non-discriminatory basis, that complies with state and federal equal employment opportunity laws. **The parties believe that this language is more than adequate** to assure that the persons sponsored will include a number of women, Blacks and Hispanics.
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> . . . NYSA and ILA wish to assure you that the industry is committed to further increase the representation of minority groups within its workforce.

(Emphasis added)(Letter to Honorable George E. Pataki dated June 28, 1999 [attached as Exhibit 3 to the Certification of James R. Campbell, Esq., in Support of Plaintiffs' Motion for

Preliminary Injunction] attached to SORIAL AFFIDAVIT as Exhibit C) Thereafter, the bill amending Section 5-p was passed by legislatures of the states of New York and New Jersey.

III. NEW YORK STATE DIVISION OF HUMAN RIGHTS CHARGES AGAINST THE NYSA, ILA AND ILA LOCALS

Notwithstanding Section 5-p's requirement that the selection of persons sponsored be made on a fair and non-discriminatory basis, it is well reported that the Commission has taken the position that there remains a lack of diversity in waterfront employment as well as an income gap among those few minorities that are employed there. The issues between the Commission and the NYSA, ILA and ILA locals relating to this matter are well documented.[5] (*See, e.g.*, Patrick McGeehan, *Longshoreman's Union Remains Defiant Over Diversity Plan*, The New York Times, March 20, 2012, http://www.nytimes.com/2012/03/21/nyregion/longshoremens-union-in-new-york-defiant-over-diversity-plan.html; *see also*, Patrick McGeehan, *Told to Diversify, Dock Union Offers a Nearly All-White Retort*, The New York Times, November 30, 2011, http://www.nytimes.com/2011/12/01/nyregion/told-to-diversify-dock-union-offers-nearly-all-white-list.html)

On August 7, 2012, the New York State Division of Human Rights (hereinafter, "DHR") filed a Complaint against the NYSA, MMMCA, ILA and ILA Local 1814, among others, alleging violations of New York State human rights laws for failing to employ individuals on the New York docks because of their race, color, national origin or sex, and for the exclusion of applicants from union membership because of their race, color, national origin, or sex. (DHR Complaint, attached to SORIAL AFFIDAVIT as Exhibit D) The DHR's Complaint alleges, *inter alia*, that: the ILA workforce in New York harbor lacks racial diversity and does not reflect the racial composition of the communities surrounding the ports; the ILA workforce in the New

[5] Inasmuch as they are not set forth within the parameters of the Complaint, they will not be reiterated herein.

York harbor lack diversity as it relates to sex because the number of women working on the docks is minimal (DHR Compl. ¶ 39); the ILA referral practices and the employer sponsorship system have caused a disproportionate number of minorities and women to be excluded from ILA membership and employment opportunities with the NYSA and MMMCA (*Id*., ¶ 40); and the NYSA, ILA and various ILA locals have refused to integrate their workforce to allow minorities and women to be gainfully employed union members on the New York docks. (*Id.*, ¶¶ 38-41) The Complaint specifically alleges:

> In March of 2011, the NYSA and ILA sent a formal "joint proposal" [to the Waterfront Commission of New York Harbor] requesting new baggage handlers for the ports of New York and New Jersey. After negotiations, the Commission agreed in May of 2011 to open the Deep Sea Register in order to add 50 new temporary baggage handlers. Additionally it was agreed that the NYSA and ILA would each provide 25 individuals to the pool of candidates and ensure diversity existed among the new temporary registrants. The Commission would select an additional 50 individuals from its prequalified candidates and all names would be submitted to a lottery. The NYSA did not have a hiring process and as a result deferred its 25 candidates to the ILA.
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> In late May of 2011, the president of the NYSA, Mr. Joseph Curto, certified that the 50 candidate pool provided to the Commission was chosen in a fair and nondiscriminatory way . . .The Commission began to qualify the ILA-NYSA candidates as baggage handlers. However, despite its agreement to provide a diverse pool of registrants the process revealed that virtually all ILA-NYSA candidates were White men, except for 3 White women and 1 African American who did not wish to proceed with the certification process. As a result of the ILA-NYSA's failure to provide a diversified pool, the Commission stopped certifying the ILA-NYSA candidates, leaving 8 candidates uncertified and unable to work.

(Id. ¶¶ 45-48) Among its requests for relief, the DHR has demanded outreach and advertising to local communities regarding the availability of jobs on the New York Harbor, and the requirement that respondents certify that their employment practices are done in a fair and non-discriminatory manner. (Id. ¶¶ 56, 58)

IV. THE COMMISSION'S AMENDMENT TO REGULATION 4.4(d) REQUIRING EMPLOYER CERTIFICATION THAT THE SELECTION OF "A" REGISTRANTS WAS MADE IN A FAIR AND NONDISCRIMINATORY BASIS

Section 4.4(d) of the Commission's Rules and Regulations (hereinafter "Rule 4.4(d)"), which pertains to the hiring of "A" registrants, provides that "no application shall be accepted from any person seeking inclusion in the 'A' register unless that person is sponsored for employment by a stevedore or by any person, within the meaning of those terms contained in the 1969 amendments to the Act." In May 2013, the Commission advised NYSA employers that it would permit them to sponsor and hire "A" registrants directly to perform maintenance and other tasks incidental to cargo handling. (Compl. ¶ 34)

The hiring procedures set forth in the NYSA-ILA CBA and the MMMCA-ILA CBA with regard to "A" registrants provide, in pertinent part:

> With respect to new employees, the Employer shall notify the [ILA] of the number and classifications of employees required. It shall be the responsibility of the [ILA] to furnish the necessary employees requested by the Employer. The Employer shall have the right to determine the competency and qualifications of the employees referred. In the event the [ILA] is unable to supply qualified employees within thirty (30) days, then the Employer may secure the employees from any available source provided they abide by the Union Security Clause and Checkoff provisions.

(Compl. ¶ 30) The Commission determined that the hiring procedures set forth in those collective bargaining agreements promote the very same deleterious conditions expressly enumerated in the Act, including, *inter alia*, the lack of a systematic method of hiring, irregularity of employment, the lack of adequate information as to the availability of employment, and the selection of employees by those who are neither responsive nor responsible to the employers. (Compl. ¶ 48 - Exh. 2)

On August 26, 2013, the Commission sent the NYSA an email advising that a proposed modification to Rule 4.4(d) was going to be presented to the Commissioners for adoption at the

September 9, 2013 Commission meeting. (Compl. ¶ 36) Attached to that email was the following proposed revision, as designated by the shaded language, to Rule 4.4(d):

> (d) No application shall be accepted from any person seeking inclusion in the "A" register unless that person is sponsored for employment by a stevedore or by any person, within the meaning of those terms contained in the 1969 amendments to the Act. The sponsoring employer shall submit a letter setting forth the name and address of the person, and the labor service(s) to be performed, and shall certify that the selection of the persons so sponsored was made in a fair and nondiscriminatory basis in accordance with the requirements of the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities.

(Compl. ¶ 36) (August 26, 2013 Email between NYSA and Commission, attached to SORIAL AFFIDAVIT as Exhibit E)

By letter dated September 6, 2013, NYSA opposed the certification requirement in the Commission's proposed amendment. (Compl. ¶ 37) Instead of the language set forth above, NYSA proposed that the employer certify that "to the extent of its involvement the hiring of the employee was fair and nondiscriminatory in accordance with the requirements of the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities." (Compl. ¶ 38) The Commission adopted the Resolution amending Section 4.4(d) on September 9, 2013. (Compl. ¶ 40; WATERFRONT COMMISSION OF NEW YORK HARBOR RESOLUTION DATED SEPT. 9, 2013, attached to SORIAL AFFIDAVIT as Exhibit F)

V. REQUEST TO OPEN DEEP SEA LONGSHOREMEN'S REGISTER AND COMMISSION RESOLUTION TO HOLD PUBLIC HEARINGS

By letter dated September 9, 2013, the NYSA and ILA requested that the Commission, on its own initiative pursuant to Section 5-p, add 682 employees to the deep sea register. (Compl. ¶ 42; September 9, 2013 Letter from NYSA-ILA Letter to WCNYH, attached to SORIAL AFFIDAVIT as Exhibit G) The NYSA and ILA advised that they, along with the terminal operators, will recruit, hire, and train as per the terms of the Recruitment and Hiring Plan (hereinafter, "Hiring Plan") of the new NYSA-ILA collective bargaining agreement. (*Id.*) That

Hiring Plan provides that "[t]he selection process for new hires will include three designated referral sources: Military Veterans (51%), ILA (25%), and NYSA/Employers (24%)." (Compl. ¶32; Compl. - Exh. 1)

On October 8, 2013, the Commission adopted a Resolution scheduling public hearings on November 14, 18, and 25, 2013. (Compl. ¶ 46; Compl. Exh. 2) The purpose of the hearings was to determine the number of individuals that would be appropriate to add to the deep sea longshoremen's register, and to determine the appropriate manner for the recruitment, referral, selection, hiring and training of individuals to be include in the deep sea longshoremen's register and the "A" register. (*Id.*) On October 22, 2013, the Commission adopted a second Resolution establishing rules of procedure for the public hearing. (Compl. ¶ 47; Compl. - Exh. 3).

On November 6, 2013, the Commission met with the NYSA and representatives of The Port Authority of New York & New Jersey (hereinafter "PANYNJ") in order to address various port hiring issues. (Port Authority Press Release, dated November 7, 2013, http://www.panynj.gov/press-room/press-item.cfm?headLine_id=1848) A week later, on November 14, 2013, the Commission met with the NYSA, MMMCA and representatives of the PANYNJ to continue discussions on port hiring issues. (Port Authority Press Release, dated November 14, 2013 http://www.panynj.gov/press-room/press item.cfm?headLine_id=1856) As a result of perceived progress, the Commission agreed to adjourn its public hearings pending final resolution of the issues. (*Id.*)

VI. CURRENT PROCEEDINGS

Plaintiffs filed their Complaint on November 22, 2013 seeking declaratory, injunctive, and other relief under the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201-2202 (West 2006). On December 11, 2013, Plaintiffs filed a Motion for Preliminary Injunction seeking an Order

restraining the Commission from implementing or enforcing the September 9, 2013 amendment to Rule 4.4(d). That motion is returnable on December 17, 2013.

For the reasons set forth herein, it is respectfully submitted that Plaintiffs' Complaint fails to state a claim upon which relief can be granted, and must therefore be dismissed in its entirety.

ARGUMENT

I. STANDARD OF REVIEW FOR MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), the Court must "'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The adequacy of pleadings is governed by Fed. R. Civ. P. 8(a)(2), which requires that a complaint allege "a short and plain statement of the claim showing that the pleader is entitled to relief." Additionally, an adequate complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555 (internal citations omitted)

Generally, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged. The plausibility requirement is not akin to a probability requirement and instead, asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 129 S. Ct. at 1949 (*quoting Twombly*, 550 U.S. at 556–57) (internal citations omitted). Determining whether the allegations in a complaint are "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. If the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint should be dismissed for failing to show that the pleader is entitled to relief, as required by Rule 8(a)(2). *Id.*

As set forth above in reviewing a motion to dismiss pursuant to Rule 12(b)(6), a court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint, and matters of public record. *Pittsburgh*, 147 F3d at 259; *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*: Civil 3d § 1357 (3d ed. 2007). In this matter, for the reasons set forth below, Plaintiffs' Complaint fails to state a claim upon which relief can be granted and must therefore be dismissed.

II. COUNT I OF PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE THE COMMISSION'S RULES FOR ITS NOTICED PUBLIC HEARING DO NOT VIOLATE THE DUE PROCESS RIGHTS OF PLAINTIFFS AND THEIR MEMBERS

In Count I, Plaintiffs generally aver that the Commission's public hearing rules of procedure "do not comport with the due-process rights guaranteed by the Fifth and Fourteenth Amendments," and seek injunctive relief prohibiting the use of these rules for the noticed hearings. (Compl. ¶ 58) Plaintiffs point out that the hearing rules do not permit Plaintiffs to cross-examine witnesses called by the Commission, or to call their own witnesses. (Compl. ¶56) Plaintiffs refer to Part 6 of the Commission's Rules and Regulations pertaining to its

administrative hearings, contending that those procedural rules are "conducive to ensuring that parties are provided due process." (*Id.*)

The Fourteenth Amendment provides in part that "[n]o state. . . shall. . .deprive any person of life, liberty or property, without due process of law." As a threshold matter, a plaintiff must establish that he has a protected property interest to which the Fourteenth Amendment's due process protection applies. *Gikas v. Washington School District,* 328 F.3d 731, 735 (3d Cir.2003). This provision has been interpreted as having both substantive and procedural components. *See, Planned Parenthood of S.E. Pennsylvania v. Casey,* 505 U.S. 833 846-847 (1992). In this instance, from what may be gleaned from the Complaint, it appears that Plaintiffs are making a procedural claim on their belief that the public hearings should be conducted in the same manner as the Commission's administrative hearings.

In evaluating procedural due process claims for sufficiency, courts employ a two-step analysis inquiring into (1) whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of life, liberty or property and (2) whether the procedures available provided the plaintiff with due process of law. *Alvin v. Suzuki,* 227 F.3d 107, 116 (3d Cir.2000). In the context of the instant case, Plaintiffs have failed to allege sufficient facts to support a finding of a legitimate claim of entitlement and on this basis alone, Count I must be dismissed.

Plaintiffs have also failed to state a claim for violation of the takings clause of the Fifth Amendment. "In order to succeed in a due process or takings case under the Fifth Amendment, a plaintiff must first show that a legally cognizable property interest is affected by the Government's action in question." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir. 2004). Here, as set forth above, the Complaint does not allege sufficient facts to support such a finding.

Even if Plaintiffs' nebulous allegations could state a claim that the public hearings rules infringes on their property rights, their claim would still fail. In this instance, the public hearings noticed by the Commission are to explore issues regarding hiring in the Port. (Compl. - Exh. 2) The Commission is empowered to advise and consult with representatives of labor and industry and with public officials and agencies concerned with the effectuation of the purposes of the Act, upon all matters which the Commission may desire, including but not limited to the form and substance of rules and regulations, the administration of the Act, maintenance of the longshoremen's register. N.J.S.A. 32:23-10; N.Y. UNCONSOL. 9810. The Commission is also empowered to make investigations, collect and compile information concerning waterfront practices generally within the Port of New York district and upon all matters relating to the accomplishment of the objectives of the Act. *Id.* Finally, the Commission may, by its members and its properly designated officers, agents and employees, administer oaths and issue subpoenas to compel the attendance of witnesses and the giving of testimony and the production of other evidence. *Id.*[6]

The hearings at issue are not for the purposes of revoking or denying licenses of Plaintiffs or their members, or any other individual or entity. When a hearing is noticed by the Commission for that purpose, then, as prescribed by the Act, the Commission may not deny any application for a license or registration without giving the applicant or prospective licensee reasonable prior notice and an opportunity to be heard. N.J.S.A. 32:23-45; N.Y. UNCONSOL. 9845. Indeed, in accordance with the Act, Part 6 of the Commission's Rules and Regulations set forth extensive procedural guidelines for administrative hearings, including the appearance

[6] Defendant has extensively reviewed the form and content of public hearing rules and notices issued by federal and state legislatures and administrative agencies, as well as those issued by bi-state agencies. It has not found any support for Plaintiffs' position that a witness called to testify regarding public matters before a public body has been, or should, afforded the right to cross examination of witnesses called by that governing body, or to call their own witnesses.

before an administrative law judge, the right to be represented by counsel, the opportunity to testify and cross examine witnesses, and the admission of evidence in the record. Plaintiffs' reference to the Commission's administrative hearing rules in the context of public hearings is without any basis.

Plaintiffs have failed to plead sufficient facts in support of their argument that the Commission's public hearing rules are in violation of their Fifth and Fourteenth Amendment due process rights. Count I of the Complaint must therefore be dismissed.

III. COUNT II THROUGH COUNT V OF PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE THE COMMISSION'S ADOPTION OF THE SEPTEMBER 9, 2013 AMENDMENT TO RULE 4.4(d) WAS REASONABLE AND WITHIN ITS REGULATORY AND STATUTORY AUTHORITY UNDER THE ACT

In general, the Commission is empowered to make and enforce such rules and regulations as the Commission may deem necessary to effectuate the purposes of the Act, "or to prevent the circumvention or evasion thereof." N.J.S.A. 32:23-10(7); N.Y. UNCONSOL. 9810. It is well settled that "an agency's grant of authority to promulgate regulations is to be liberally construed to enable the agency to accomplish its statutory goals." *Waterfront Commission of New York Harbor v. Construction and Marine Equipment Co., Inc.*, 928 F. Supp. 1388, 1488 (D.N.J. 1996)(citation omitted). "A court must accord substantial deference to the regulations adopted by administrative agencies, based on our recognition that certain subjects are within the peculiar competence of that agency." *Id.* Under this framework, regulations of an agency are accorded a presumption of reasonableness, and "courts must not substitute their judgment for the expertise of the agency." *Id.* Moreover, "courts generally place considerable weight on the construction of a statute given by the agency charged with enforcing it, and understand that agencies must be flexible and responsive to changing situations in adopting regulations." *Waterfront Commission of New York Harbor*, 928 F. Supp. at 1400.

As detailed in Section IV of Defendant's Statement of Facts, above, the hiring procedure set forth in the NYSA-ILA CBA and the MMMCA-ILA CBA with regard to "A" registrants provides, in pertinent part, that "[w]ith respect to new employees, the Employer shall notify the [ILA] of the number and classifications of employees required. It shall be the responsibility of the [ILA] to furnish the necessary employees requested by the Employer." In short, the NYSA and MMMCA – the employers – have surrendered to the ILA the exclusive right to initially recruit and select those individuals that are referred to the employers to be considered for employment as "A" registrant mechanics. Under this framework, the employers' selection and sponsorship of individuals is only from the applicants supplied to them by the ILA.

As argued below, this agreed upon manner of hiring simply advances the "shape-up" method of employment that is specifically prohibited by the Act. The Commission's regulation is a means by which to ensure that employers will remain diligent in ensuring that the hiring of "A" registrants is done in a fair and discriminatory manner.

A. Count II of Plaintiffs' Complaint Must be Dismissed Because the Commission's Amendment to the Rule 4.4(d) is in Furtherance of the Goals of the Compact and Therefore Within the Commission's Regulatory Authority

In Count II of the Complaint, Plaintiffs allege that the Commission acted outside of its statutory authority in amending Regulation 4.4(d) because, in short, "[t]he purposes of the Compact did not include requiring employers to certify that the selection of longshoremen to be registered complied with federal and state laws dealing with equal employment opportunities because those laws did not exist at the time that the Compact was enacted." (Compl. ¶ 66) This argument is without merit.

In accordance with the ordinary rules for construction of interstate compacts, the Act "shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." (N.J.S.A. 32:23-72; N.Y. UNCONSOL. 9872) That purpose of the Act, as

articulated in 1953, was "[t]o eliminate oppressive and evil hiring practices injurious to waterfront labor and waterborne commerce in the Port of New York district." In the Act's introductory language, the legislatures of the states of New York and New Jersey described depressing and degrading labor conditions, corrupt hiring practices and irregularity of employment. The legislatures noted that that such hiring practices result in "a destruction of the dignity of an important segment of American labor." (N.J.S.A. 32:23-2; N.Y. UNCONSOL. 9802) For these reasons, the legislatures deemed the regulation of longshoremen and stevedores to be in the public interest, and that such regulation by the Commission was "an exercise of the police power of the two States for the protection of public safety, welfare, prosperity, health, peace and living conditions of the people of the two States." N.J.S.A. 32:23-23-5; N.Y. UNCONSOL. 9805.

It cannot be cogently alleged, as Plaintiffs have pled in the Complaint, that discrimination in hiring based on race, color, national origin or sex does not fall within these enumerated categories and within the purview of the Act. *See, e.g.*, *Connolly v. O'Malley,* 234 N.Y.S2d 889, 896 (App. Div. 1st Dept. 1962)("the purposes of the Act were to eliminate depressing and degrading labor conditions, corrupt hiring practices and . . . to control and regulate in the public interest the occupations of longshoremen, stevedores. . . Clearly, in the administration and enforcement of the provision of the Act, paramount considerations are the public interest and orderly waterfront employment and the protection of the public health, safety and welfare of the people).

This issue was squarely addressed in *Cernadas v. The Waterfront Commission of New York Harbor*, Index No. 22405/80, Sup. Ct. Sp. Term 1981)(attached to SORIAL AFFIDAVIT as Exhibit H) (holding that a business agent was required to obey a subpoena issued by the Commission pertaining to its inquiry concerning possible racial discrimination in dock

employment. In the Court's decision, it addressed the Act's introductory language set forth above, and held:

> to combat these conditions, the Commission has promulgated certain regulations . . .designed to effectuate the purposes of the Waterfront Commission Act and to prevent circumvention and evasion thereof. The regulations are designed to further the public policies of the States of New York and New Jersey by providing fair and equal employment opportunities and by establishing a systematic method of hiring.
>
> To further these ends, it is necessary that the Commission conducts an investigation to determine whether racial discrimination has played a part in the hiring of longshoremen. Upon a finding that in fact racial quotas have been employed in determining which longshoremen are hired, it could, if it be so advised, revoke, suspend or reprimand the license of one or more persons governed by it . . .Such potential disciplinary action is, of course, not covered by any collective bargaining agreement.

Id at 3-4. (internal citations and alteration marks omitted) Under this backdrop, there can be no question that Rule 4.4(d), which requires employers to certify that the selection of longshoremen complied with federal and state laws dealing with equal employment opportunities, is in furtherance of, and effectuates, the purposes of the Act. For these reasons, Count II of Plaintiffs' Complaint fails to state a claim and must therefore be dismissed.

B. Count III of Plaintiffs' Complaint Must be Dismissed Because the Commission's Amendment to Rule 4.4(d) is Within the Commission's Statutory Authority and its Promulgation Is Therefore Not Arbitrary and Capricious

In Count III of the Complaint, Plaintiffs allege that the Commission's amendment to Rule 4.4(d) was arbitrary and capricious because neither Section 5-p nor any other provision of law authorizes the Commission to require employers to submit a certification with respect to the hiring of "A" registrants. Throughout their Complaint, Plaintiffs contend that Section 5-p does not apply to "A" registrants, and that on its face, Section 5-p "applies only to those employed at marine terminals to perform work involving the loading and off-loading of ships, known as Deep-Sea longshoremen." (Compl. ¶ 23) In support of their allegations, Plaintiffs cite to *Bozzi,*

supra, for the proposition that the Commission "has consistently interpreted [section 5-p] as applying only to the Deep-Sea longshoremen's register and not to the A Register." (Compl. ¶ 71)

This argument is without any legal basis. Plaintiffs ignore the clear language of Section 5-p(5)(b) which provides that, "[n]otwithstanding any other provision of this act, the commission may include in the longshoremen's register **under such terms and conditions as the commission may prescribe**: . . . (b) a person defined as a longshoreman in [§ 9905(6)] of this act who is employed by a stevedore defined in [§9905(1)(b)&(c)] and whose employment is not subject to the guaranteed annual income provisions of any collective bargaining agreement relating to longshoremen." (Emphasis added)(McK. Unconsol. Laws 9920; N.J.S.A. 32:23-114). "A" registrants fall squarely within the subdivision of longshoremen under Section 5-p(5)(b).

It is well settled that courts must defer to reasonable agency interpretations of administrative statutes. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "Interpretation given a statute by an agency charged with its enforcement is, as a general matter, given great weight and judicial deference, so long as the interpretation is neither irrational, unreasonable nor inconsistent with the governing statute." *Bozzi, supra* at *9 (citations omitted). In this instance, the Act specifically empowers the Commission to prescribe the terms and conditions pursuant to which "A" registrants may be included. The Commission's amendment to Rule 4.4(d) was therefore expressly permitted under Section 5-p(5)(b), and the Commission's requirement – as a term and condition for inclusion of individuals in the "A" register – that employers submit the certification at issue in this litigation was not arbitrary or capricious.

In the Complaint, Plaintiffs misstate both the issue and legal holding of *Bozzi*, supra. In that case, two longshoremen who had initially been brought in to the industry as "A" registrants under Section 5-p(4)(a) sought inclusion in the closed register as unrestricted deep sea

longshoremen. The court extensively reviewed the legislative history, as set forth in the statement of facts above, and agreed with the Commission's position that the two "A" registrants could not be included in the closed deep-sea register. In making this argument, the Commission maintained – as it continues to do today – that persons who have been and are being added to the Register pursuant to the 1969 amendments to the Act should be excluded from the closed Register provisions of Section-5p.

Indeed, as noted by the *Bozzi* Court, the very purpose of the 1982 amendments to Section 5-p was to clarify the status of "A" registrants. (*Bozzi*, supra at *11) It was noted that while "A" men were exempt from the closed register statute, these persons have been and are being added to the Register pursuant to the 1969 amendments. The court specifically noted that Section 5-p(4)(b) "was proposed simply to clarify that the practice of registering the '1969' amendment longshoremen without regard to the closed register was to continue." *Bozzi*, *supra* at *11. Plaintiffs have taken the Commission's statement that the closed register provisions of Section 5-p do not apply to "A" registrants completely out of context. As set forth above, the Commission is best suited to interpret its administrative statute and Plaintiffs' Complaint must therefore be dismissed.

C. Counts IV and V of Plaintiffs' Complaint Must be Dismissed Because the Commission's Amendment to Rule 4.4(d) Is Not an Improper Interference With the Parties' Collective Bargaining Rights, and Does Not Violate National Labor Policy

Plaintiffs allege that by requiring employers to certify that the selection of "A" registrants was made in a fair and non-discriminatory basis, the Commission is forcing them to choose between breaching their collective bargaining agreements or seeking to renegotiate them. (Compl. ¶79) As a result of the recently amended Rule 4.4(d), members of the NYSA and MMMCA claim that they will have to "eschew" the union-referral systems of their labor contracts pertaining to the employment of "A" registrants. (Compl. ¶85) Plaintiffs generally

allege that the Commission has interfered with Plaintiffs' collective bargaining rights in violation of the Act, and that it has violated national labor policy by attempting to dictate the substantive terms of Plaintiffs' collective bargaining agreements. These arguments are without merit.

It is well settled that, in approving the Act, Congress expressly granted the Commission the authority to infringe upon federally guaranteed collective bargaining rights traditionally reserved to Plaintiffs' exclusive control:

> If the Waterfront Commission Act were purely a creature of bi-state law, the doctrine of preemption would be applicable to remedy any existing conflicts between it and federal labor law. State attempts to influence the substantive terms of collective-bargaining agreement may conflict with federal labor law. It is recognized that matters of seniority classification, hiring priorities and employee transfers from section to section, are commonly matters subject to collective bargaining and generally within the exclusive province of employers and unions. Thus, where a state law empowers a state commission to intrude into areas normally reserved to collective bargaining, federal preemption might bar such state action whenever it directly infringes upon rights guaranteed by the federal Labor Act. However, the touchstone to finding a basis to preemption in this type of controversy must be Congressional intent to preempt.
>
> Here, Congress has specifically adopted the bi-state legislation. **In approving the Act, Congress has already authorized the impairment of collective bargaining rights are provided by federal labor law. Inasmuch as the Commission was granted total control over the expansion or reduction of the workforce, the Commission's authority already "infringes" upon collective bargaining function normally reserved only to employers and unions.** Thus, Congress has already created an exception and specifically anticipated the need for future enactments and other action necessary to the carrying out and effectuation of the compact. **In vesting the Commission with the sole power to control the size and character of the labor force, Congress specifically sanctioned the Waterfront Act, with full knowledge and intention that its specific provisions would override the general polices of federal labor rights if the two came in conflict.** In contemplating the Commission's need to enact, *in futuro*, further edits to continue to effectuate the policies of the compact, Congress approved those additional interferences with federal labor law which might arise as a natural consequence thereof.

New York Shipping Association, Inc., et al. v. Waterfront Comm'n of New York Harbor, Civ. A. No. 78-995 (D.N.J. June 1, 1978), *aff'd* 582 F.2d 1275 (3d Cir. 1978)(Emphasis added, internal citations omitted)(attached to SORIAL AFFIDAVIT as Exhibit I).

Going forward, the Commission may continue to "infringe" on such collective bargaining rights if its actions are in furtherance of the original policies and purposes of the Act. *Id.* ("If it does so, then that impairment was specifically anticipated by Congress and has its approbation, for in approving the compact Congress also put its imprimatur on future legislation in furtherance of the original policies and purposes of the compact.") As the Supreme Court noted:

> It is of great significance that in approving the [Waterfront Commission] compact Congress did not merely remain silent regarding supplementary legislation by the States. Congress expressly gave its consent to such implementing legislation not formally part of the compact. This provision in the consent by Congress to a compact is so extraordinary as to be unique in the history of compacts. Of all the instances of congressional approval of state compacts – the process began in 1791, with more than one hundred compacts approved since – we have found no other in which Congress expressly gave its consent to implementing legislation. It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of a peculiarly local nature of the problem, the inference is strongest that local polices are not to be thwarted.

De Veau, 80 S. Ct. at 1152. As set forth above, one of the Commission's critical statutory mandates under the Act is to ensure that longshoremen are employed using systematic hiring methods. While the Act safeguards the collective bargaining rights of labor and management to agree upon methods for the selection of longshoremen by way of seniority, experience, regular gangs, or otherwise, such methods cannot be in conflict with the Act. N.J.S.A. 32:23-69(2); N.Y. UNCONSOL. 9869.

In this instance, the method of hiring advances the "shape-up"[7] method of employment that is specifically prohibited by the Act - - the ILA exclusively recruits and initially selects those individuals that are referred to the employers to be considered for employment as "A" registrant mechanics, and the employers' selection and sponsorship of individuals is only from those individuals supplied to them by the ILA. This procedure promotes the very same deleterious conditions expressly enumerated in the Act, including the lack of a systematic method of hiring, irregularity of employment, the lack of adequate information as to the availability of employment, and the selection of employees by those who are neither responsive nor responsible to the employers. Indeed, it specifically goes against the testimony of the employers at the public hearings as cited above, that the opportunity for the employers to have a role in the selection process and the referral of personnel puts the onus back on the employer to make the right selection, in accordance with relevant criteria. By amending Rule 4.4(d) to require the certification of employers that their selection was done in a fair and nondiscriminatory manner, the Commission – while not dictating to employers the manner in

[7] Prior to the advent of the Commission, the New York State Crime Commission in its Fourth Report described the "shape up" method of hiring as a distressing condition faced by waterfront labor:

> Among the more unhealthy conditions existing on the waterfront are the present shape-up system of hiring dock workers and the practice of compelling employers to accept undesirable men as hiring foremen. . .Under the shape-up the hiring foremen holds the key position on the pier, and has the absolute right to use any method he desires and to employ anyone he wishes. The right, therefore to select and control the hiring foreman is of vital importance to all concerned. . . The power to hire not only enables an unscrupulous hiring foreman to exact tribute from the dock worker but also makes it possible for him to dispense patronage to relatives, friends and criminal associates.

As described by the Supreme Court, the Crime Commission reported that "the skullduggeries on the waterfront were largely due to the domination over waterfront employment gained by the International Longshoremen's Association, as then conducted. Its employment practices easily led to corruption, and many of its officials participated in dishonesties." *De Veau*, 80 S. Ct. at 1148.

which employees are to be selected – is ensuring that employers will be active participants in the process in light of their accountability. Rule 4.4(d) is consistent with, and in furtherance of, the underlying purposes of the Act, and as such, it is not an improper interference with Plaintiffs' collective bargaining rights and does not interfere with national labor law. For these reasons, Counts IV and V of Plaintiffs' Complaint should be dismissed.

IV. COUNT VI OF PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE THE CERTIFICATION PROVISION OF SECTION 5-P IS A VALID AMENDMENT OF THE COMPACT AND ANY ACTION BY PLAINTIFFS TO CHALLENGE ITS LEGISLATIVE PROPRIETY MUST BE AGAINST THE STATES THAT ENACTED THAT LEGISLATION

As discussed above, Section 5-p was amended in 1999 to permit controlled openings of the deep-sea register through the use of an employer sponsorship procedure. The total number of new workers needed in the industry is now determined by the Commission, which is tasked with bringing the number of longshoremen into balance with the demand for labor without reducing the number of longshoremen below that necessary to meet the requirements of the Port. As a result of that amendment, applications are no longer required to be processed in the order that they are received by the Commission, but instead, contingent on the employer sponsorship procedure. Inasmuch as applications are no longer processed on a first-come, first-served basis, Section 5-p requires that the sponsoring employer certify "that the selection of the persons so sponsored was made in a fair and non-discriminatory basis in accordance with the requirements of the laws of the United States and the states of New York and New Jersey dealing with equal employment opportunities."

Plaintiffs again allege (as they do in Count II) that the purposes of the Compact could not include requiring employers to certify that the selection of longshoremen to be registered complied with federal and states laws dealing with equal employment opportunities because those laws did not exist at the time that the Compact was enacted. (Compl. ¶ 91). They contend

that the certification provision in Section 5-p is therefore an invalid amendment of the Act. These arguments are without merit.

As an initial matter, the amendatory language at issue was included in Section 5-p by the legislatures of the states of New York and New Jersey. It is well established that "[l]egislatures are presumed to have acted constitutionally." *See, e.g., McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969).[8] As previously argued in Point III(A) above, the purposes of the Act that were specifically articulated by the legislatures in 1953 included the elimination of oppressive and evil hiring practices injurious to waterfront labor in the Port. The Commission was established to remedy and rectify degrading labor conditions, corrupt hiring practices and irregularity of employment. Discrimination in hiring based on race, color, national origin or sex

[8] Notably, NYSA has introduced several bills to the New York State Legislature to repeal various sections of 5-p. As detailed in the NYSA's 2012 annual report, their ongoing attempts stalled last year:

> The import of a number of stories in the local and regional press provide to be detrimental to that effort, which described workplace condition in the industry as drug infested, and the scathing findings of a special report issued by the Waterfront Commission of New York Harbor in March of 2012. The Waterfront Commission report, which was the result of an investigation and hearings convened by the Commission between October and December of 2010, depicted conditions in the Port's maritime industry that evolved over decades as a result of "custom and practice" as an environment that fostered unfair employment practices. The report portrayed the collective bargaining agreement between the New York Shipping Association and the International Longshoremen's Association (ILA) as an agreement which "breeds waste and favoritism and detracts from the competitiveness of the Port of New York & New Jersey," through excess manning and relief practices, and also provides prime positions described as low-show and no-show jobs to members of our workforce who have a questionable or an actual history of association with organized crime figures (which is of course not permitted under the law). After meetings with [members of the New York State Senate], it became evident that there are a number of housekeeping issues that need to be addressed by the industry before serious consideration could be given to the amending section 5-p.

(New York Shipping Association 2012 Annual Report, Governmental Affairs, *Waterfront Commission of New York Harbor – New York Legislation*, at 30-31 [Dec. 2012])(found at http://www.nysanet.org/documents/NYSA_2012%20_annual_report.pdf) Apparently frustrated with their failed attempts, Plaintiffs have instead opted to file this lawsuit.

clearly falls within these enumerated categories, and is well within the purview of the Act. Thus, the enactment of 5-p clearly implements the purposes of the Act. *See, Waterfront Comm'n of New York Harbor v. Construction and Marine Equipment Company*, Inc., 928 F. Supp. at 1403 ("[i]t is determined, therefore, that Section 5-p is an 'enactment in furtherance' of the compact or an 'amendment or supplement to the compact to implement the purposes thereof": Section 5-p received Congressional approval in advance.") For this reason alone, Plaintiffs' allegations are without merit and must be dismissed.

Moreover, the allegations in Count VI of Plaintiffs' Complaint are completely belied by Plaintiffs' sworn testimony of before this Commission in 1999 and the written statement of the NYSA to then Governor Pataki in support of the 1999 5-p legislation.[9] As detailed in Defendant's Statement of Facts, above, Plaintiffs unreservedly supported the purposes and language of the 1999 legislation amending Section 5-p. Plaintiffs specifically endorsed the suggested amendatory language, particularly concerning the certification requirement that hiring be done in a fair and non-discriminatory manner. Plaintiff's allegations to the contrary are totally unsupportable and Count VI must therefore be dismissed.

V. COUNTS VII AND VIII OF PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE THE COMMISSION IS SPECIFICALLY AUTHORIZED TO DETERMINE MATTERS CONTAINED IN PLAINTIFFS' COLLECTIVE BARGAINING AGREEMENTS AND THE COMMISSION HAS NOT VIOLATED NATIONAL LABOR

[9] The June 28, 1999 letter, which directly undermines every allegation by Plaintiffs pertaining to Section 5-p, was inexplicably attached to the Certification of James R. Campbell, counsel for the NYSA, in Support of the NYSA and ILA's Motion for Preliminary Injunction filed in this Court on December 11, 2013. It is certainly not for Defendant to comment on Plaintiffs' puzzling litigation strategy, but only to observe that this document – which is fatal to several counts of Plaintiffs' Complaint – would not have otherwise been relied upon by Defendant in support of its Motion to Dismiss, since it was not attached to, or referenced in, the Complaint. As set forth above, this Court may now properly consider this document a matter of public record for purposes of this Rule 12(b)(6) motion to dismiss, inasmuch as it has been filed with the Court. *See, e.g., Caldwell Trucking PRP Group*, 890 F. Supp. at 1252.

POLICY WITH REGARD TO PLAINTIFFS' COLLECTIVE BARGAINING AGREEMENTS

Plaintiff allege that the Commission has improperly infringed upon their collective bargaining agreements in seeking to determine the appropriate method for the recruitment, referral, selection, hiring and training of individuals to be include in the deep sea and "A" registrant registers, and by its determination of issues related to their Hiring Plan.[10] As in Counts IV and V of the Complaint, Plaintiffs generally aver that the Commission has interfered with Plaintiffs' collective bargaining rights in violation of the Act, and that it has violated national labor policy by attempting to dictate the substantive terms of Plaintiffs' collective bargaining agreements.

Plaintiffs have failed to state a claim for two reasons. First, as argued at length in Section III.C., above, the Commission has the express authority to infringe upon federally guaranteed collective bargaining rights traditionally reserved to Plaintiffs' exclusive control. *New York Shipping Association, Inc., et al.,* Civ. A. No. 78-995. This includes various matters relating to hiring that are subject to collective bargaining and generally within the exclusive province of employers and unions. *Id.* When Congress vested the Commission with "the sole power to

[10] Plaintiffs allege that "the Commission has informed NYSA and ILA that it will not accept their Recruitment and Hiring Plan as written . . ." (Compl. ¶ 96) This allegation may be contradicted by facts that can be judicially noticed. The Commission has informed Plaintiffs that it has determined that "**the Hiring Plan is, in fact, appropriate** if it is (1) implemented according to its terms; (2) not utilized as a means by which to deny particular groups of persons the opportunity to become longshore workers; and (3) not utilized as a subterfuge to permit a referral source to exceed the percentages allotted to it by the Hiring Plan through the inclusion of its referrals in other referral pools." WATERFRONT COMMISSION OF NEW YORK HARBOR, DETERMINATION 35, *In the Matter of Determining, Pursuant to Section 5-p of the Waterfront Commission Act, to Include Persons in the Longshoremen's Register* (Dec. 3, 2013)(SORIAL AFFIDAVIT, Exhibit J) (found at http://www.wcnyh.gov/news/determination35.pdf). Determination 25, which was ordered at a public Commission meeting and posted on the Commission's website is a public record of which this Court may take judicial notice. Plaintiffs' allegation in ¶96 of the Complaint may therefore be deemed not to be true. *See* 5A Wright & Miller, Federal Practice and Procedure, § 1364 (2004)(If the facts that are alleged to be true in a complaint are contradicted by facts that can be judicially noticed, the contradicted facts in the complaint are not to be deemed as true upon consideration of the motion to dismiss).

control the size and character of the labor force," it was with the full knowledge and intention that the Act's specific provisions would override the general polices of federal labor rights if the two came in conflict. *Id.* The Commission may "infringe" on such collective bargaining rights if its actions are in furtherance of the original policies and purposes of the Act. *Id.*

Second, the Complaint must be dismissed because the Act specifically allows the Commission, under the circumstances, to determine the "appropriate" manner to accept longshoremens' applications for employment. As detailed above, the NYSA and ILA have requested that the Commission open the deep-sea longshoremen's register "on its own initiative pursuant to Section 5-p of the Waterfront Commission Act." (Compl. ¶ 42)(SORIAL AFFIDAVIT, Exhibit G) Section 5-p of the Act specifically provides that "[n]otwithstanding any of the foregoing, where the commission determines to accept applications for inclusion in the longshoremen's register on its own initiative, shall acceptance shall be accomplished **in such manner deemed appropriate by the Commission**." N.J.S.A. 32:23-114; N.Y. UNCONSOL. 9920 (Emphasis added).

The Commission, as it is statutorily empowered to do, therefore noticed public hearings to determine whether the Hiring Plan submitted by the NYSA and ILA is appropriate, and that its implementation is not done in a manner that will circumvent the purposes of the Act, (e.g., that will promote the lack of a systematic method of hiring, irregularity of employment, the lack of adequate information as to the availability of employment, and the selection of employees by those who are neither responsive nor responsible to the employers). As set forth in the Commission's Resolution (Compl. Exh. 2), the Commission was within its authority to hold public hearings to determine the number of individuals that would be appropriate to add to the deep sea longshoremen's register, and to determine the appropriate manner for the recruitment,

referral, selection, hiring and training of individuals to be include in the deep sea longshoremen's register and the "A" register.

VI. COUNT IX OF PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE THE COMMISSION IS NOT PREEMPTED BY THE PRIMARY AND EXCLUSIVE JURISDICTION DOCTRINE FROM ENSURING THAT HIRING IN THE PORT IS DONE IN A FAIR AND NON-DISCRIMINATORY MANNER

Plaintiffs allege that the Commission is using the Section 5-p certification as a "sword" to deny registration to new applicants chosen in a manner that the Commission believes is in violation of employment discrimination laws. (Compl. ¶ 105) Generally citing the "primary and exclusive jurisdiction doctrine," Plaintiffs contend that the Commission may not determine violations of federal or state employment discrimination laws, and that the Commission should instead refer such matters to "agencies that are statutorily mandated to determine purported violation of employment-discrimination laws." (Compl. ¶ 106) Plaintiff seek injunctive relief prohibiting the Commission from using such laws, which they allege it is not authorized to enforce, to deprive them of their right to hire workers, and to a declaration that the Commission lacks jurisdiction to determine violations of federal or state employment discrimination laws. (Compl. ¶ 108)

Plaintiffs have failed to plead facts sufficient to state a claim under the doctrine of exclusive primary jurisdiction, which is inapplicable in this matter. "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into place whenever enforcement

of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States v. Western Pacific R. Co.*, 352 U.S. 59, 77 S. CT. 161, 1 L. Ed. 2d 126 (1956).

The doctrine does not, as Plaintiffs' Complaint seems to suggest, focus on the interplay between administrative agencies but rather, between the courts and agencies. It allows for agencies to exercise discretion "in cases raising issues of fact not within the conventional experience of judges or cases…" *United States v. Western Pac. R. Co.,* 352 U.S. 59, 64 (1956). Under the doctrine of primary jurisdiction, a court will first decide whether "the controversy, in the first instance, can and should be resolved in whole or in part before an administrative tribunal, or whether it must immediately be considered by the judiciary." *Abbott v. Burke*, 100 N.J. 269 (1985). "[W]hen the legislature provides an agency with 'exclusive primary jurisdiction,' it preempts the courts' original jurisdiction over the subject matter." *Greate Bay Hotel & Casino v. Tose,* 34 F.3d 1227, 1230 n.5. (3d Cir. 1994) (citations omitted). "If the legislature has vested an administrative agency with exclusive primary jurisdiction, the agency is the only forum in which complaints within that jurisdiction may be adjudicated originally." *Id.*

In this instance, Plaintiffs' reliance on the doctrine is misplaced and their claims must therefore be dismissed. Notably, it must be emphasized that the Commission, which is vested with the authority to insure that waterfront workers are not subjected to depressing and degrading hiring practices, is responsible for ensuring that the stevedoring companies, who are licensed by the Commission to operate in the Port, are not engaging in discriminatory hiring practices or in a system of employment that perpetuates such practices. As discussed above, in order to be permanently licensed as a stevedore by the Commission, the Commission must be satisfied that the applicant – and all if its members, officers and stockholders required by the Act to sign or be

identified in the application – possess "good character and integrity." N.J.S.A § 32:23-21(b); N.Y. UNCONSOL. § 9821(b). The standard of good character and integrity remains in effect at all times while licensed with the Commission, and the Commission may, in its discretion, deny applications for such licenses and revoke licenses as it deems in the public interest.

If discrimination in hiring is practiced by Commission licensees, then the Commission – and not some other agency – is in the best position to take expeditious remedial action. Those licenses would be subject to appropriate censure after notice, an administrative hearing and determination of charges. Moreover, the Commission is empowered to turn over any evidence of discrimination to the New Jersey Division of Human Rights, the New York State Division of Human Rights, or to the Equal Employment Opportunity Commission.[11] Advancement of the public interest through interagency cooperation was specifically contemplated by the States of New York and New Jersey during the enactment of the Waterfront Commission Act, which empowers the Commission:

> To co-operate with and receive from any department, division, bureau, board, commission, or agency of either or both States, or of any county or municipality thereof, such assistance and data as will enable it to carry out its powers and duties hereunder; and to request any such department, division, bureau, board, commission, or agency, with the consent thereof, to execute such of its functions and powers, as the public interest may require.

(N.J.S.A. 32:23-10, NY UNCONSOL. 9810) Plaintiff's allegations to the contrary are without merit, and Count IX must be dismissed for failure to state a claim.

VII. COUNT X OF PLAINTIFFS' COMPLAINT MUST BE DISMISSED BECAUSE THE CERTIFICATION PROVISION IN RULE 4.4(d) IS CLEAR AND ITS ENFORCEMENT DOES NOT VIOLATE PLAINTIFFS' DUE PROCESS RIGHTS

[11] Indeed, as discussed in detail above, there is a case currently pending by the New York State Division of Human Rights against Plaintiffs (excluding ILA Local 1804-1 which maintains a New Jersey office and operates on the New Jersey side of the Port), alleging discriminatory referral and hiring practices in the Port.

The certification provision of Rule 4.4(d) is the identical to that of Section 5-p. Both require the sponsoring employer to "certify that the selection of the persons so sponsored was made in a fair and nondiscriminatory basis in accordance with the requirements of the laws of the United States and the States of New York and New Jersey dealing with equal employment opportunities." In what may be their most far reaching claim, Plaintiffs allege that "the matter to be certified," as set forth in the very same certification provision with which they agreed and unreservedly supported in the 1999 5-p legislation, "cannot be determined by an individual conversant in English." (Compl. ¶ 111) They allege that it is so vague that its enforcement would violate due process.

Plaintiffs' argument must fail for several reasons. First, their argument regarding the language of the certification is, again, completely belied by Plaintiffs' sworn testimony of before this Commission in its 1999 public hearings, and the written statement of the NYSA in support of the 1999 5-p legislation. Notably, that statement specifically lauded the proposed certification requirement that hiring be done in a fair and non-discriminatory manner:

> S.4488-B, A 7634-B requires that the applications of sponsorship by the prospective employers include a certification that the applicants were selected in a fair non-discriminatory basis, that complies with state and federal equal employment opportunity laws. **The parties believe that this language is more than adequate** to assure that the persons sponsored will include a number of women, Blacks and Hispanics.

Second, Plaintiffs have failed to plead facts sufficient to prove that the certification is in violation of their due process rights. To establish a claim under Section 1983, a plaintiff must demonstrate that the challenged conduct deprived him of right, privileges, or immunities secured by the Constitution or the laws of the United States. *See Parratta v. Taylor*, 451 U.S. 527, 525 (1981). "[T]he first step in evaluating a section 1983 claim is to identify the exact contours of the underlying right said to have been violated and to determine whether the plaintiff has alleged a deprivation of a constitutional right at all." *Chainey v. Street*, 523 F.3d 200, 219 (3d Cir.

2008)(citation omitted). The first thread of substantive due process applies when a plaintiff challenges the validity of a legislative act. Typically, a legislative act will withstand challenge if the government identifies a legitimate state interest that the legislature could rationally conclude was served by the statute, although legislative acts that burden certain fundamental rights may be subject to stricter scrutiny. Applying these principles in the context of a motion to dismiss, the Third Circuit has held that "to state a claim, [plaintiff's] complaint would have to allege facts that would support a finding of arbitrary or irrational legislative action by the [legislative body]." Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1035 (3d Cir. 1987).

In this instance, Rule 4.4(d), which is aimed at ensuring fair and nondiscriminatory hiring in the Port, falls within the police power of the states of New York and New Jersey. *See, e.g., Waterfront Comm'n of New York Harbor*, 928 F. Supp. 1403 ("such power is broadly defined to include virtually any health, safety, or general welfare goal.") As long as there is a "minimally rational relation between the means chosen and the end being pursued, courts must defer to the exercise of the state's police power. Unless the state legislature has acted in an 'arbitrary and irrational way', there is a presumption that such regulation is constitutional." *Waterfront Comm'n of New York Harbor*, 928 F. Supp. 1403 (citation omitted). The Complaint states no facts which, if proven, would support a finding of irrational action. Count X of the Complaint fails to state a valid claim must therefore be dismissed.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be granted.

Dated: December 16, 2013

Respectfully submitted,

/s/ Phoebe S. Sorial
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the methods of service noted below, a true and correct copy of Defendant's Notice of Motion and Motion to Dismiss In Lieu of Answer were served electronically through CM/ECF on the following:

Dated: December 16, 2013

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