

RECEIVED

2011 OCT 25 PM 3:53

OFFICE OF THE SECRETARY  
FEDERAL MARITIME COM.

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

---

**Docket No. 08-03**

---

**MAHER TERMINALS, LLC**

**COMPLAINANT**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

---

**ERRATA  
TO  
MAHER'S INITIAL BRIEF AND PROPOSED FINDINGS OF FACT AND  
SUPPORTING EVIDENCE FILED AND SERVED ON OCTOBER 7, 2011**

---

Maher Terminals, LLC ("Maher"), by and through undersigned counsel, respectfully submits this Errata to correct inadvertent typographical errors and inaccurate cross-references to Appendix page numbers in Maher's Initial Brief, Proposed Findings of Fact, and Supporting Evidence, filed and served in this proceeding on October 7, 2011. Appending Maher's submissions with this Errata will avoid unnecessary confusion over the text and appendix cross-references corrected herein and improve the clarity of the record.

The following three typographical errors have come to Maher's attention in the Initial Brief:

- Page 26, first paragraph, line 8. the quote from 46 U.S.C. § 40301 contains an errant internal quotation mark after the ellipses and before the work "fix"

- Page 42, first sentence following the block quote, the word “recommended” should be “reported,” to read, “In response to questions about her forgoing revisions to the Richardson Report reported by Mr. Ragan . . . ”
- Page 72, second paragraph, the last sentence contains a misplaced closing quotation mark, and should read, “But, in the end, PANYNJ’s Borrone, told Maher that the Maersk-APM terms were “off the table”...”

The following typographical errors have come to Maher’s attention in the Proposed Findings of Fact and Supporting Evidence. The corrected paragraphs are reprinted in full in Attachment 1 hereto.

- Page 1, the first paragraph of the Proposed Facts omits the words “on the Brief,” and should read, “Complainant, Maher Terminals, LLC (“Maher”), by and through the undersigned on the Brief. . . ”
- Numbered paragraph (“¶”) 45, first sentence, the second line omits the word “not” and should read, “On July 13, 2007, the Presiding Officer denied PANYNJ’s Motion, finding that the filing exemption does not exempt PANYNJ’s marine terminal operator (“MTO”) lease . . . ”
- ¶ 108, the last line omits the end quotation mark, and should end, “. . . improvements of other types, etc.).”
- ¶ 124, fourth line, the parenthetical uses the word “were” instead of “was” and should read, “(Maher thought proposed lease terms too high, especially because Maher was already paying highest rates at the port at Fleet Street)”
- ¶ 140, first line, the date “March 3, 1998” should be “March 4, 1998”
- ¶ 166, second line, the date “August 14, 2008” should be “August 14, 1998”

- ¶ 203, the first word “On” should be “By”
- ¶ 228, second line, the figure “\$398 million” should be “\$389 million”
- ¶ 257, in the second line, “per yer” should be “per year”
- ¶ 272, the second line contains a misplaced quotation mark and ellipses in the question and answer exchange in the cited deposition transcript and should read: “Lillian Borrone testified that the deal given to SeaLand/Maersk was “a combination of . . . rate structures . . . negotiated . . . with other tenants,” and partially made up for “by increased rates charged to [Maher and] other tenants.””
- ¶ 280, third to last line, the parenthetical to the cited interrogatory question and verified interrogatory response omits two internal quotation marks and should read. “(“[N]o formal, written analyses were created prior to November 2000” showing that “differences in per acre rental rates and escalation terms are fully justified by the differences in the terminals.”)”
- ¶ 356, the first line omits “Safmarine” and should read, “. . . Maersk Line and Safmarine . . .”
- ¶ 398, the second line transposes two numbers, incorrectly referring to “259,085” instead of “295,085,” and contains a math error in the resulting percentage calculation and should read, “. . . between 1999 and 2010, Port Guarantee qualified cargo decreased over 15%, from 349,470 to 295,085 containers.”

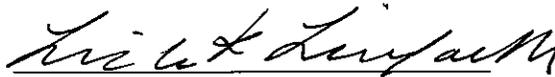
The following supporting evidence was identified and cited in the Proposed Findings of Fact and Supporting Evidence, but the cross-references to page numbers in the Appendix—intended to aid in locating the cited supporting evidence—include the following errors:

- ¶ 19. The aerial photograph at App. 1D-1921 is incorrect. The aerial photograph identified in ¶ 19, taken on August 1, 2007, is attached hereto as Attachment 2.
- ¶¶ 25, 26. The correct Appendix reference to Dep. Ex. 251 is App. 1C-1124.
- ¶ 100. The correct Appendix reference to Dep. Ex. 218 is App. 1A-65.
- ¶ 169. The correct Appendix reference to Dep. Ex. 74 is 1A-492.
- ¶ 247. The page and line references to the testimony of Randal Mosca are correctly cited as pages and lines 142:7-43:14, but the citation should be to pages in the Dkt. 08-03 deposition volume, which were inadvertently omitted and are attached hereto as Attachment 3.
- ¶ 256. The correct Appendix reference to the cited Brian Maher testimony is App. 2C-587.
- ¶ 311. The correct Appendix reference to ¶¶ 40-43, B. Kerr report, is App. 4-114-16.
- ¶ 315. The correct Appendix reference to Dep. Ex. 131 (EP-249) § 7(a)(1) is App. 5A-20-22.
- ¶ 326. The correct citation to the second reference to the Fischel report is ¶ 32, App. 4-316.
- ¶ 375. The citations to PANYNJ's First and Second Set of Interrogatory Responses inadvertently cited response No. 17, but should cite response No. 1 at page 17, which are at App. 3A-433 and 3B-479.

- ¶ 403. The correct citation to the quoted language in the referenced Maersk-APM lease supplement is 08PA00038153 at App. 1D-1541.
- ¶ 489. The correct Appendix reference to the cited testimony of Sam Crane at page and line 57:15-58:3 is App. 2A-109.
- 517. The correct citation to the Kerr report is ¶¶ 6-7, Ex. 4 and 12 at App. 4-3-4, 4-140-141, 4-170.

Dated: October 20, 2011

Respectfully submitted,



Lawrence I. Kiern  
Bryant E. Gardner  
Gerald A. Morrissey III  
Linda K. Leibfarth  
Winston & Strawn LLP  
1700 K Street, N.W.  
Washington, D.C. 20006

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 20th day of October, 2011, served the foregoing via e-mail on the following:

Holly E. Loiseau  
Peter D. Isakoff  
Alexander O. Levine  
WEIL, GOTSHAL & MANGES LLP  
1300 Eye Street, NW  
Suite 800  
Washington, DC 20005

Ashley W. Craig  
VENABLE LLP  
575 7<sup>th</sup> Street NW  
Washington, DC 20004

Richard A. Rothman  
Kevin F. Meade  
Robert Berezin  
WEIL, GOTSHAL &  
MANGES LLP  
767 Fifth Avenue  
New York, NY 10153

  
Eric S. Tufano

**Attachment 1**

## Attachment 1 to Errata

### Paragraphs of Proposed Findings of Fact and Supporting Evidence as Corrected

**[Opening paragraph].** Complainant, Maher Terminals, LLC (“Maher”), by and through the undersigned on the Brief, hereby files its Proposed Findings of Fact and Supporting Evidence, as directed by the January 11, 2011 Scheduling Order in this proceeding.

\*\*\*

**45.** On July 13, 2007, the Presiding Officer denied PANYNJ’s Motion, finding that the filing exemption does not exempt PANYNJ’s marine terminal operator (“MTO”) lease with Maersk-APM from the obligation to operate in accordance with the terms of the MTO agreement. Mem. and Order on Resp’t Mot. to Dismiss Compl., Dkt. 07-01 (July 13, 2007), App. 3A-32.

\*\*\*

**108.** In the Port Reinvestment Model, Cross-Kelly explained that “[p]lanning for the future . . . means a standard set of rates for each terminal, so that each terminal is equal with all the others, as far as the PA’s role is concerned. Then, where terminals will differ is on the level of service, and the prices that each offers, based on factors under the control of each individual operator (whether these are capital decisions, labor force usage decisions, productivity improvements of other types, etc.).” Dep. Ex. 55, App. 1A-115.

\*\*\*

**124.** Maher informed PANYNJ that it did not view PANYNJ’s proposed rental rates as commercially viable. Dep. Ex. 50, App. 1A-90; Dep. Ex. 290, App. 1A-92; Yetka Dep. at 142:24-44:19, App. 2B-564 (Maher thought proposed lease terms too high, especially because Maher was already paying highest rates at the port at Fleet Street); Schley Dep. at 38:2-:8, App. 2B-457; Borrone Dep. at 221:4-22:1, App. 2A-25.

\*\*\*

**140.** On March 4, 1998, PANYNJ reiterated that “Maher has consistently stated its desire to have rates that will be comparable with competing terminals” and stated that “[i]n our current series of terminal negotiations, we expect to maintain rates that will be comparable among our tenants and that Maher will not be disadvantaged, relative to its competitors, in future lease arrangements.” Dep. Ex. 291, App. 1A-276.

\*\*\*

**166.** Following SeaLand/Maersk’s rejection of the August 14, 1998 offer, the PANYNJ Board directed PANYNJ staff to modify the August 14, 1998 offer to reduce SeaLand/Maersk’s per acre rent. Dep. Ex. 73, App. 1A-489 (rejecting PANYNJ’s August 14, 1998 offer); Dep. Ex. 84, App. 1B-696.

\*\*\*

**203.** By July 30, 1999, Maersk acquired SeaLand. 07-01 Dep. Ex. 14, App. 1B-764.

\*\*\*

**228.** At a Board meeting on May 27, 1999, PANYNJ discussed that the September 21, 1998 proposal to SeaLand/Maersk, which PANYNJ calculated would result in a \$389 million NPV deficit, applied the same concessions for the three terminals with leases up for renewal in the near future—Sea-Land/Maersk, Maher Tripoli Street and Hanjin—but not the two terminals with “a longer term remaining on their lease [because] we would have no legal obligation to provide rent concessions.” Dep. Ex. 86, App. 1B-732; McClafferty Dep. at 208:15-:19, App. 2B-366.

\*\*\*

**257.** PANYNJ reported in August 1999 lease negotiation meeting notes that Maher had informed PANYNJ that Maher had contracts for 600,000 container moves per year, many with long-standing ocean carrier customers of 20 years or more. Dep. Ex. 115, App. 1B-904; Dep. Ex. 201, App. 1B-907; Kerr Rebuttal ¶ 83, App. 4-418; Kerr Report Exhibit 2, App. 4-135.

\*\*\*

**272.** Lillian Borrone testified that the deal given to SeaLand/Maersk was “a combination of . . . rate structures . . . negotiated . . . with other tenants,” and partially made up for “by increased rates charged to [Maher and] other tenants.” Borrone Dep. at 461:7-62:7, App. 2A-56.

\*\*\*

**280.** PANYNJ also did not prepare any formal, fact-specific analysis prior to entering EP-248 and EP-249 showing that the differences in the Maher and Maersk-APM lease terms were justified. Yetka 30(b)(6) Dep. at 324:17-28:7 (PANYNJ never put “pen to paper” to analyze different characteristics of terminals), App. 2B-582-583; Borrone 30(b)(6) Dep. at 64:4-10, App. 2A-8 (“Q: So did The Port Authority ever sit down and put a pen-to-paper and produce a justification for why Maher should pay hundreds of millions of dollars more in base rent than the tenant paid under EP-248? A: Saying that directly, I would say no, we never put pen-to-paper in an explicit statement that said, “This is why Maher should pay a difference.”); PANYNJ Resp. to Maher’s Third Set of Interrogs., Dkt. 08-03, No. 33 (Oct. 8, 2008) (“[N]o formal, written analyses were created prior to November 2000” showing that “differences in per acre rental rates and escalation terms are fully justified by the differences in the terminals.”); Shiftan Dep. at 47:11-48:12, App. 2B-481.

\*\*\*

**356.** The “Port Guarantee” requires that Maersk Line and Safmarine ship 365,000, 440,000, and 515,000 loaded containers through the Port of New Jersey and New York for the first, second, and third port guarantee time periods, respectively. Dep. Ex. 16 (EP-248) § 42(b), App. 5A-347; Kerr Report, Exhibit 2, App. 4-135; Flyer Report ¶ 28, App. 4-186; Fischel Report ¶ 18, App. 4-307; Dep. Ex. 81, App. 1B-581 (Borrone explained that the originally proposed Maersk Line cargo guarantee of 550,000 containers was “set so that it is based slightly below what we

believe Maersk and Sea-Land are using for analytical purposes. Therefore, we don't expect that the guarantee would be viewed as a way to recoup what we are giving up on the basic rent."); Kerr Rebuttal, Exhibit 2, App. 4-441 (Maersk container throughput at APM-Maersk terminal in 1999 was 349,470 containers); 07-01 Dep. Ex. 130, App. 1B-948 (In October 1999, APM-Maersk projected Maersk container throughput at APM-Maersk terminal to be 515,000 in 2015); 08PA02181816, App. 1D-1862-1876 (Maersk-APM email and letter reporting 2010 port guarantee volume comprised of Maersk Line and Safmarine ocean carrier loaded containers).

\*\*\*

**398.** PANYNJ and Maersk-APM data on container throughput at NJMT show that, between 1999 and 2010, Port Guarantee qualified cargo decreased over 15%, from 349,470 to 295,085 containers. Kerr Rebuttal, Exhibit 2, App. 4-441; 08PA02181818, App.1D-1864.

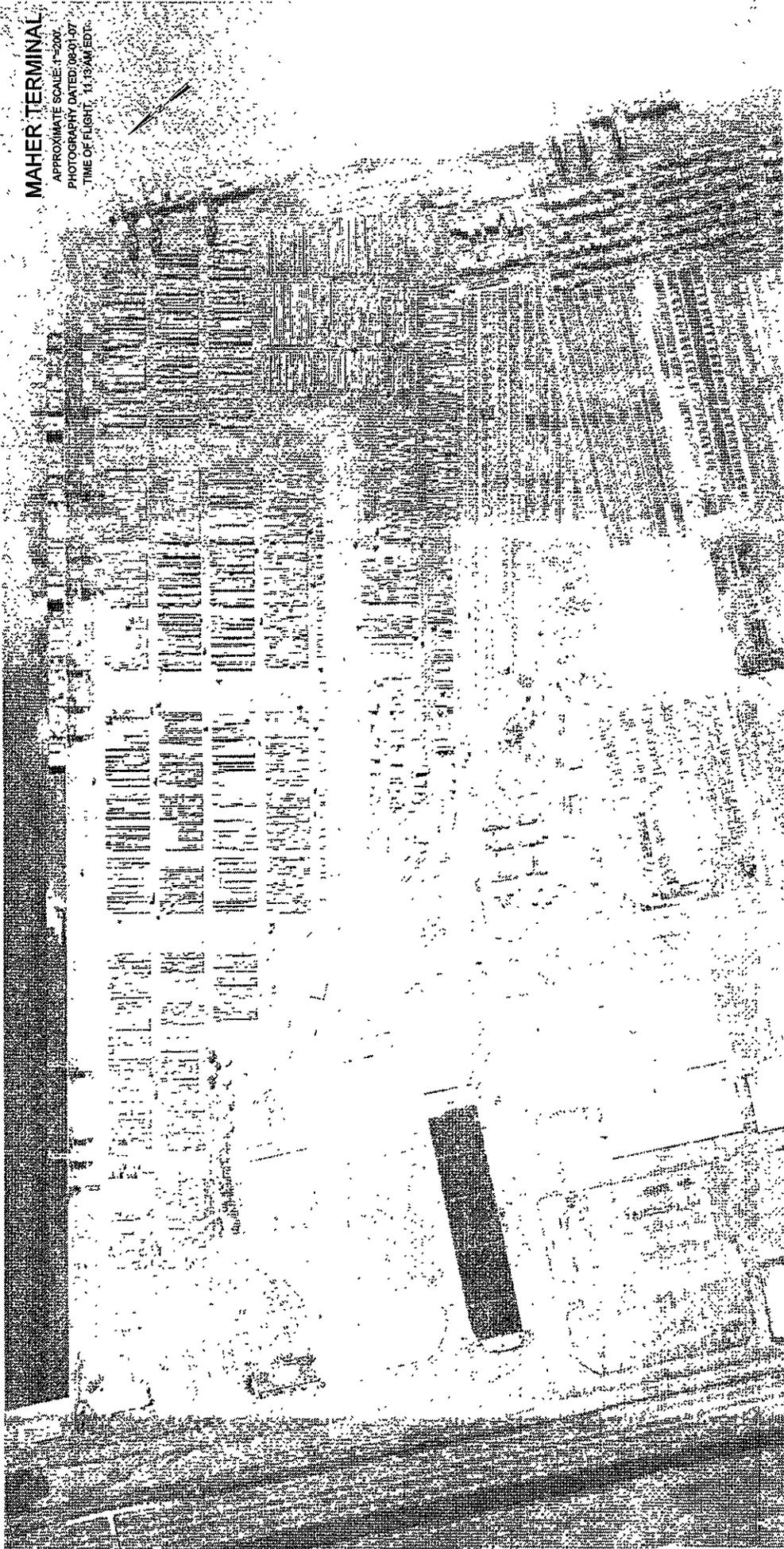
**Attachment 2**

**MAHER TERMINAL**

APPROXIMATE SCALE: 1"=200'

PHOTOGRAPHY DATED: 08/01/07

TIME OF FLIGHT: 11:09 AM EDT



**Attachment 3**

0001

1                                    RANDALL MOSCA  
                                   BEFORE THE  
 2  - - - - -XSSION  
 MAHER TERMINALS, LLC,           :  
 3                                   :  
 4                                   Complainant,                   :  
 5            vs.            Docket No. 08-03                   :  
 6 THE PORT AUTHORITY OF NEW YORK                   :  
 AND NEW JERSEY,                   :  
 7                                   Respondent.                   :  
 8  - - - - -X

9

March 14, 2011

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

0002

1

A P P E A R A N C E S

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

WINSTON & STRAWN LLP  
 BY: LAWRENCE I. KIERN , ESQUIRE  
 1700 K Street, N.W.  
 Washington, DC 20006-3817  
 202.282.5000  
 lkiern@winston.com  
 Counsel for Claimant

WEIL, GOTSHAL & MANGES LLP  
 BY: PETER ISAKOFF, ESQUIRE  
 BY: ALEXANDER O. LEVINE, ESQUIRE  
 1300 Eye Street, N.W.  
 Washington, DC 20005-3314  
 202.682.7000  
 peter.isakoff@weil.com  
 alex.levine@weil.com  
 Counsel for Respondent

ALSO PRESENT:  
 HARRIS TERAN  
 Legal Video Specialist

20  
21  
22  
23  
24  
25  
0003

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

R. Mosca  
THE VIDEOGRAPHER: Good morning.  
We're now on the record. My name is Harris  
Teran of Merrill Legal Solutions, 225 Varick  
Street, New York, New York 10014. Today is  
March 14th, 2011. The time is currently  
9:37 a.m.  
We're at the offices of Essex Equity,  
70 South Orange Avenue, in Livingston,  
New Jersey, to take the videotaped deposition  
of Mr. Randy Mosca in the matter of Maher  
Terminals, LLC v. The Port Authority of  
New York and New Jersey, before the Federal  
Maritime Commission, Docket Number 08-03.  
Will counsel present please identify  
themselves for the record.  
MR. ISAKOFF: Peter Isakoff and Alex  
Levine of Weil Gotshal & Manges, LLP for the  
Port Authority.  
MR. KIERN: Lawrence Kiern for Winston  
& Strawn, LLP for the deponent and Maher  
Terminals.  
THE VIDEOGRAPHER: Our court reporter  
is Jamie Moskowitz.  
Ms. Court Reporter, would you please

0004

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

R. Mosca  
swear in the witness.  
\* \* \*  
RANDALL P. MOSCA, after having been  
first duly sworn, was examined and testified as  
follows:  
\* \* \*  
EXAMINATION BY  
MR. ISAKOFF:  
Q State your full name for the record.  
A Randall P. Mosca.  
Q Have you ever testified at a  
deposition, other than in the 0701 case before the  
Federal Maritime Commission?  
A Yes.  
Q On how many occasions?  
A Approximately three or four times.  
Q Were any of them connected with Maher  
Terminals?  
A I believe so, yes.  
Q All of them or just some?  
A Probably most of them.  
Q What type of case have you testified  
in, that is unrelated to Maher Terminals?  
A I just don't recall right now.

0005

1  
2  
3  
4

R. Mosca  
Q Have you ever been a party yourself in  
a lawsuit?  
A No.

23 negotiations with The Port Authority, did The Port  
24 Authority tell Maher that one of the reasons that  
25 there was a difference in the terms it was providing

0141

1 R. Mosca  
2 Maher as compared to the terms it was providing  
3 Maersk was because of the Port Authority's need to  
4 compete for the Asian market?

5 A No.  
6 Q Did The Port Authority tell Maher that  
7 one of the reasons for the difference between the  
8 terms it extended to Maersk versus Maher was because  
9 The Port Authority needed to address competition  
10 from the Port of LA/Long Beach?

11 A No.  
12 Q Did they tell you that one of the  
13 reasons for the differences in the terms extended to  
14 Maersk and Maher was because of the need for the  
15 port to compete with the Port of Baltimore?

16 A No.  
17 Q Did they tell you that one of the  
18 reasons for the differences in the terms of the  
19 leases between Maersk and Maher was because of The  
20 Port Authority's need to compete with the Port of  
21 Halifax?

22 A No.  
23 Q Did The Port Authority tell Maher  
24 during the lease negotiations that one of the  
25 reasons for the difference in the lease terms

0142

1 R. Mosca  
2 between Maersk and Maher was because of a  
3 self-enforcing downward cycle of port business?  
4 A I don't know if I understand what that  
5 means, but I don't recall any conversation like  
6 that.

7 Q Did The Port Authority during the  
8 negotiations with Maher explain -- ever explain that  
9 one of the reasons for the differences between the  
10 terms it would extend to Maersk versus Maher was  
11 because the Maher terminal was more valuable than  
12 the APM terminal?

13 A No.  
14 Q Did The Port Authority ever state to  
15 Maher during the negotiations over the lease that  
16 one of the reasons that -- for the differences in  
17 the terms that it provided to Maersk versus Maher  
18 was because of the distance between the berths and  
19 the trucks?

20 A No.  
21 Q Did The Port Authority ever tell Maher  
22 during the lease negotiations that one of the  
23 reasons for the differences in the lease terms  
24 between Maersk and Maher's lease is because of the  
25 linear feet of berth-to-acreage ratio?

0143

1 R. Mosca  
2 A No.  
3 Q Did The Port Authority ever tell Maher  
4 during the lease negotiations that one of the  
5 reasons for the differences between the lease terms  
6 provided to Maersk and Maher was because Maher had  
7 better access to ground transportation?

8 A No.  
9 Q Did The Port Authority ever tell Maher  
10 during the lease negotiations that one of the  
11 reasons for the differences in the terms The Port  
12 Authority extended to Maersk versus Maher was  
13 because in the past Maher had operated express rail?  
14 A No.  
15 Q Did they ever tell Maher that one of  
16 the reasons for the differences in the lease terms  
17 between Maersk and Maher was because of Maher's  
18 operation of express rail from the years 2000 to  
19 2004?  
20 A No.  
21 Q Did The Port Authority ever say that  
22 one of the reasons for the differences in the lease  
23 terms that it provided to Maersk versus Maher was  
24 because The Port Authority had to make more  
25 investment in Maher's leasehold than it had to make

0144

1 R. Mosca  
2 in APM's leasehold?  
3 A No.  
4 Q Did The Port Authority ever tell you  
5 one of the reasons for the differences in the terms  
6 between the lease -- lease terms that it extended to  
7 Maersk versus Maher was because The Port Authority  
8 was forgoing valuable income streams from the  
9 demolished warehouses?  
10 A No.  
11 Q Did The Port Authority ever say that  
12 one of the reasons for the difference between the  
13 terms that it extended to Maersk versus the terms  
14 that it extended to Maher was because the cost to  
15 The Port Authority of maintenance dredging was  
16 greater for Maher than it was for Maersk?  
17 A No.  
18 Q Did The Port Authority ever tell Maher  
19 that its corporate parent was not qualified to  
20 provide a corporate guarantee?  
21 A No.  
22 Q Did The Port Authority ever tell Maher  
23 during the lease negotiations that it considered  
24 Maher to be less creditworthy than Maersk APM?  
25 A No.

0145

1 R. Mosca  
2 Q And during the lease negotiations, in  
3 explaining the differences between the lease terms  
4 that it extended to Maersk as compared to those it  
5 extended to Maher, did The Port Authority ever state  
6 that Maersk APM or APM could not provide a  
7 first-point-of-rest because they were not in the  
8 auto stevedoring business?  
9 A No.  
10 MR. KIERN: No further questions.  
11 MR. ISAKOFF: No redirect.  
12 THE VIDEOGRAPHER: This concludes  
13 today's videotape deposition. The time is  
14 currently 2:08 p.m. This is going to be the  
15 end of tape 2 of 2. Off the record.  
16  
17 (Whereupon, the deposition concluded at  
18 2:08 p.m.)