

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

MAHER'S REPLY TO RESPONDENT'S BRIEF DUE DECEMBER 9, 2011

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INTRODUCTION

Pursuant to the Scheduling Order, Complainant Maher Terminals, LLC (“Maher”), by and through undersigned counsel, submits this Reply to Respondent’s Brief, accompanied by a separate filing of this date, Maher’s Reply to Respondent’s Proposed Findings of Fact.

SUMMARY OF MAHER’S REPLY

Respondent’s Brief (“PARB”), Proposed Findings of Fact (“PAFOF”), and Response to Maher’s Proposed Findings of Fact (“PAR-MTFOF”) filed on November 9, 2011, confirm Maher’s Complaint and Counter-Complaint and establish that the Respondent Port Authority of New York and New Jersey (“PANYNJ”) violated and continues to violate the Shipping Act of 1984, *as amended* (the “Shipping Act” or the “Act”) (46 App. U.S.C. 1701 note (1998), as alleged by Maher. Therefore, the Commission should enter an order sustaining Maher’s Complaint and Counter-Complaint, holding that PANYNJ violated and continues to violate the Shipping Act, ordering an award of reparations with interest, attorneys fees and costs, be paid by PANYNJ to Maher, and entering a cease and desist order to stop PANYNJ’s violations and prohibit them in the future.

Herein, Maher shows that the evidence establishes that PANYNJ: (1) effectively concedes its violations of the Shipping Act; (2) fails to carry its burden to show that the disparate treatment of Maher is justified by a valid transportation purpose; (3) fails to establish, observe and enforce just and reasonable regulations and practices in violation of the Shipping Act, (4) fails to operate in accordance with an agreement filed pursuant to the Shipping Act, and (5) unreasonably refuses to deal with Maher in violation of the Act. Maher shows that PANYNJ concedes the Commission’s authority in *Ceres Marine Terminal v. Md. Port Admin.*, 27 S.R.R. 1251 (F.M.C. 1997); 29 S.R.R. 356 (F.M.C. 2001) (hereinafter “*Ceres*”) and fails to distinguish it from this proceeding. Maher demonstrates that PANYNJ erroneously argues that the

Commission should defer to PANYNJ's business decision to refuse Maher parity. Maher establishes that the Maersk Container Service Company, Inc. (now APM Terminals, North America, Inc.) ("APM") (collectively "Maersk-APM") "port guarantee" does not justify the lease disparities. Maher debunks PANYNJ's legal argument that it cannot enforce the F.M.C. agreement providing for Maersk-APM's cargo guarantee. Maher exposes PANYNJ's misrepresentation of the Commission's authority. And, Maher establishes that PANYNJ's remaining arguments lack merit.

PANYNJ Effectively Concedes Its Violations Of The Shipping Act As A Matter Of Law

In essential respects, PANYNJ concedes the law and relevant facts establishing Maher's Complaint and Counter-complaint. PANYNJ concedes that Maersk-APM's *status* as affiliated with ocean-carrier Maersk was a cause of the disparities. PANYNJ's argument that *status* was not the *sole* reason is unavailing as a matter of law. The Shipping Act is not a sole-fault statute.

PANYNJ Effectively Concedes Maher's Prima Facie Case And Fails To Carry Its Burden

PANYNJ's also effectively concedes that the burden of proof has shifted to PANYNJ to prove that the disparities are justified by a valid transportation purpose. But, PANYNJ fails to carry its burden. Neither PANYNJ's expressed reason at the time, the Maersk-APM "port guarantee," nor the newly minted *post hoc* litigation rationalizations justify the disparities.

PANYNJ Effectively Concedes And The Evidence Establishes Maher's Remaining Claims

PANYNJ also effectively concedes the evidence establishing Maher's claims that PANYNJ failed to establish, observe, and enforce just and reasonable regulations and practices. PANYNJ fails to rebut Maher's evidence or argument that it is unreasonable to charge the marine terminal operator that guarantees more cargo and rent more than double what PANYNJ charges the ocean-carrier affiliated marine terminal operator tenant. This constitutes waiver.

PANYNJ concedes it unreasonably refused to deal with Maher before 2001 because of

Maher's *status* as a marine terminal operator. PANYNJ effectively concedes that it unreasonably refused to deal with Maher in 2007-2008 by confirming evidence establishing that PANYNJ Port Commerce Director Rick Larrabee refused to deal with Maher for the impermissible reasons of waiver and estoppel because the "Maher brothers" had signed the lease and that PANYNJ continues to refuse to deal with Maher for the impermissible reason of *status*. PAR-MTFOF ¶ 489. Likewise, PANYNJ confirms Maher's claim that PANYNJ unreasonably refused to deal with Maher with respect to Maher's Dkt. 07-01 Counter-Complaint by categorically refusing to deal with Maher with respect to Maher's Dkt. 07-01 claims.

With respect to Maher's Dkt. 07-01 Counter-Complaint claims, the evidence establishes PANYNJ's violations of the Shipping Act. PANYNJ's arguments, e.g. that PANYNJ did not require indemnification without fault from Maher, that Maher did not plead a violation, and that PANYNJ had no obligation to operate in accordance with the agreement to timely provide Maher certain premises before December 31, 2003 are incorrect and unavailing.

The Availability Of An Additional Rent Payment Remedy Does Not Bar PANYNJ From Enforcing The "Unique" Maersk Cargo Guarantee

PANYNJ argues erroneously that court decisions disfavoring specific performance and injunctive relief justify its 2010 decision to implement and enforce the purportedly *unique* Maersk "cargo" guarantee as requiring only an additional rent payment. PANYNJ's argument completely misses Maher's point which is simply that if, as PANYNJ now contends, the additional rent payment is the *only* enforcement remedy, then PANYNJ's newly asserted position confirms that the "port guarantee" simply cannot justify the discrimination against Maher which already guarantees greater rent and container volume. PANYNJ's argument effectively concedes Maher's point. PANYNJ also completely fails to even address its failure to seek an appropriate order from the Commission to enforce the F.M.C. filed agreement, EP-248, to require Maersk to

actually provide the so-called “guaranteed” cargo upon which the disparities are purportedly justified. PANYNJ invokes no Commission authority to support its position with respect to non-implementation and non-enforcement of the “cargo guarantee” requirement of the “port guarantee” and only cites inapposite contract law cases. PANYNJ fails to show that the additional rent payment from Maersk-APM is adequate compensation for the purported nearly \$50 billion value PANYNJ attributes to the Maersk “cargo” guarantee. Therefore, PANYNJ also fails to establish that specific performance is disfavored here.

PANYNJ’s Misrepresents Commission Authority

PANYNJ misrepresents the Commission’s authority in key respects. PANYNJ concedes the authority of seminal Commission decisions, but misapplies them. PANYNJ misconstrues the nature of the Shipping Act, which is not a sole-fault statute. PANYNJ ignores the Commission’s statutory duty to enforce the Shipping Act, rather than just deferring to PANYNJ’s business decision. PANYNJ also manifests a stunning lack of familiarity with the Commission’s liberal standards for pleadings and the admissibility of evidence which establish that Maher’s claims are properly and timely pleaded and that Dr. Kerr’s testimony will be admitted into evidence, etc.

LEGAL STANDARD FOR SHIPPING ACT VIOLATIONS

PANYNJ does not dispute the Shipping Act legal standard set forth by Maher. PANYNJ concedes that *Ceres* stands for what it describes as the “simple and undisputed legal principle that a port authority must not justify disparities in lease rates between tenants based on their ‘status alone’” and that “[a] port authority may not draw arbitrary distinctions between port users that are based on nothing other than their status.” PARB at 67-69 (*citing Ceres*, 27 S.R.R. at 1273). PANYNJ further concedes that “[f]or example, to the extent that a terminal user is equally capable of satisfying a port’s established criteria for reduced rent as a carrier, the port may not deny lower rates to a terminal operator.” PARB at 69 (*citing Ceres*, 27 S.R.R. at 1272-

74). Moreover, PANYNJ does not dispute the Commission’s “existing precedent that when a port establishes criteria for offering incentive rates, it must apply those criteria in a reasonable even-handed manner . . . [and] the violations are *continuing* in nature and the injury is suffered over a period of time.” *Id.* at 1274, 1277.

PANYNJ invokes *Ceres* which it argues “supports” its position because “[a] port authority *can*, however, distinguish between terminal operators and carriers to the extent that . . . they provide different benefits – or pose different risks – to the port” and the “Commission acknowledged this eminently sensible point in *Ceres* itself.” PARB at 56, 69. PANYNJ invokes *Ceres* for the propositions that a port authority can discriminate against a terminal operator and in favor of an ocean carrier if (1) the terminal operator cannot fulfill the port’s criteria, and (2) a port authority’s ability to take into consideration “market conditions, available locations, and facilities, and the nature and character of potential lessees.” PARB at 69 (*citing Ceres*, 27 S.R.R. at 1273-74).

Having both conceded the vitality of *Ceres* and invoked the decision for its own purposes, PANYNJ argues that this proceeding is consistent with *Petchem, Inc. v. Canaveral Port. Auth.*, 23 S.R.R. 974, 988 (F.M.C. 1986) and *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (F.M.C. 1993). PARB at 8-9, 56-57. But, having adopted the authority of *Ceres* as consistent with its position, and then even gone so far as to invoke it to support its argument, PANYNJ is likewise bound to *Ceres*’ treatment of *Petchem* and *Seacon*.

In *Ceres*, the Commission explained that its previous decisions in *Petchem* and *Seacon* *did not* control because deference was not warranted where the basis for the port authority’s disparate treatment is *unreasonable* because “[t]he Commission will not disregard its statutory responsibilities under the guise of granting deference to a port’s business decisions.” *Ceres*, 27

S.R.R. at 1274. As the Commission explained, “[b]efore granting deference in any case, the Commission must *first* assess the *reasonableness* of the practice involved and *then* evaluate the grounds articulated to justify the disparate treatment.” *Id.* (emphasis added).

Ceres Is Indistinguishable

PANYNJ argues erroneously that *Ceres* is distinguishable because *status* is not the *sole* reason for the disparity here. PARB at 8-9. But, the Shipping Act is not a sole-fault statute. Depending on the specific violation, the Shipping Act standard for a violation is merely *proximate* cause (Shipping Act §§ 10(d)(4) (formerly §§ 10(b)(11) and (12)) or *but for* cause (for injury and Shipping Act §10(d)(1)). *Ceres*, 27 S.R.R. at 1270-71 n. 48; *Distrib. Servs. LTD. v. Trans-Pac. Freight Conf. of Japan*, 24 S.R.R. 714, 720, 725 (F.M.C. 1988). Having effectively confessed that *status was a reason for the differences*, PANYNJ has also conceded its violations of the Shipping Act.

Additionally, PANYNJ’s legal argument invoking other “risks” and “benefits” to the port and Maher because of PANYNJ’s decision to induce ocean-carrier Maersk not to go to Baltimore fails as a matter of law. The Commission previously rejected this argument regarding ocean-carrier Maersk and marine terminal operator Ceres and the Port of Baltimore. *Ceres*, 27 S.R.R. at 1260-61, 1273-74 (“MPA [the Maryland Port Administration] asserts . . . Maersk brings important benefits to the Port” that Ceres could not, but “differentiation . . . not reasonable” where Ceres guaranteed more container volume).

As an initial matter, PANYNJ’s argument turns on erroneously conflating two different port authority business decisions: (1) inducing ocean-carrier Maersk to remain in the port, and (2) later refusing Maher parity with Maersk-APM. Likewise in *Ceres*, the Commission was presented with the same port authority misdirection, conflating two different port business decisions to justify discrimination, and the Commission soundly rejected the port authority’s

argument that it must provide ocean-carrier Maersk the preferential terms to retain it in the port and this distinction justified refusing parity to the marine terminal operator which could not satisfy the purportedly *unique* ocean-carrier “vessel call” guarantee advanced there. *Id.*

PANYNJ argues that in *Ceres*, Maersk had not issued an RFP (request for proposal) threatening to abandon Baltimore, that there was no evidence the loss of Maersk would be “disastrous” for the port, and there was no evidence that retention of Maersk was “essential to restore and protect the viability of the port,” etc. PARB at 8. But, PANYNJ misrepresents *Ceres* and highlights distinctions without a legal difference. PANYNJ fails to explain why purported distinctions, e.g. no Maersk RFP in *Ceres* where Maersk had already moved services to the Port of Norfolk, warrant a different outcome here. *Ceres*, 27 S.R.R. at 1260-61.

Moreover, in *Ceres*, the port authority averred that “it feared it was about to lose Maersk,” which it described as its “most important ocean carrier service.” *Id.* at 1260. The port authority asserted that “After a decade of suffering financial losses, . . . that the loss of Maersk would have been *devastating* to the Port.” *Id.* at 1260-61 (emphasis added). Therefore, according to the port authority, it “entered into its negotiations with Maersk with the goal of gaining a long term commitment of regular vessel calls and a return of the service it had lost to the Port of Norfolk.” *Id.* at 1261. The port authority argued that “given the keen competition it faces, it is entitled to make arrangements to expand steamship vessel calls at the Port of Baltimore in furtherance of its statutory responsibility of promoting the economic health of the region.” *Id.* at 1274.

Furthermore, in its Exceptions to the Initial Decision in *Ceres*, the port authority cited evidence from multiple witnesses and argued that:

MPA is an agency of the State of Maryland that operates the Port of Baltimore, which is one of the State’s most important capital investments. The cargo flowing

through the Port, and the many businesses that support and depend on the Port's operations, produce more than \$1 billion in revenues for the Baltimore region annually.

This case grows out of MPA's efforts to stem the decline in its vessel traffic and to respond to the fierce competition it faces from other ports, particularly its arch-rival, Norfolk/Hampton Roads. The ALJ correctly stressed that the Port of Baltimore faces strong competition from a number of East Coast ports. Significant changes in the shipping industry – including excess port capacity and the large increase in containerized freight that is not tied to any specific port – have intensified competition. In addition, the ocean carrier industry is consolidating [and] fewer global carriers are operating larger ships on very tight schedules. That industry restructuring is reducing both the number of ocean carriers and ships available to call at the Port. Furthermore the large global carriers are offering door-to-door service including intermodal links, rather than simply port-to-port transportation, and increasingly selecting the ports through which the cargo travels. . .

MPA has struggled to cope with these competitive pressures over the last several decades. . . . By the end of the 1980s, MPA believed that Baltimore's position as a major ocean port was in jeopardy, and decided it must forge strong, long-term relationships with major global carriers – including the Port's long time and most important "anchor" tenant, Maersk Line. Maersk is one of the world's largest shipping lines, operating over 50 large container vessels and many other cargo vessels. It has been the Port's largest ocean carrier customer, calling at Baltimore for 60 years. . . .

. . . At this critical juncture, MPA was threatened with the loss of all business from Maersk. At the end of 1989, Maersk switched one of its services from Baltimore to Norfolk/Hampton Roads. Maersk vessel calls and cargo tonnage at Baltimore decreased substantially as a result; at the same time, the Virginia Port Authority offered additional incentives to convince Maersk to switch *all* remaining Baltimore service to Norfolk. If that had happened, it would have been a devastating blow by sending a signal to the entire shipping industry that Baltimore's days as a major ocean port were numbered. . . .

Id. at 10-12, S. App. 1A-237-238 (internal record evidence citations omitted). Therefore, in *Ceres* the port authority advanced evidence and the same arguments PANYNJ advances here and the case is indistinguishable.

In *Ceres*, the Commission *did not* find that MPA's argument failed for lack of *evidence of potential regional economic loss* nor did the Commission suggest that the issuance or non-issuance of an RFP would have changed the result. Rather, the Commission did not find the evidence and argument of devastating economic harm to the Baltimore, Maryland region *relevant* to its decision that MPA's denial of parity to the marine terminal operator violated the

Shipping Act. *Ceres*, 27 S.R.R. at 1272-74. Likewise, here PANYNJ's submissions of purported economic advantage or disadvantage to the New York-New Jersey region, or the corresponding loss or gain to the Baltimore, Maryland region if ocean-carrier Maersk relocated operations there, are simply irrelevant to a proper Shipping Act analysis.

PANYNJ argues that the Commission accords public port authorities "discretion in making managerial decisions which affect port operations so long as the Port Authority has not acted unreasonably." PARB at 57 (*citing Agreement No. T-2880*, 19 F.M.C. 687, 700 (1976)). But, this is not in dispute. This proceeding decides the *threshold* question under the Shipping Act: Whether the PANYNJ's business decision to deny Maher parity is reasonable or not. As the Commission explained in *Ceres* when presented with the same appeal for deference to the port authority's business decisions:

However, this is not a case where deference can be appropriately applied. *Before* granting deference in *any* case, the Commission must *first* assess the reasonableness of the practice involved and then evaluate the grounds articulated to justify the disparate treatment. If it is determined that a port's actions are not unreasonable, then the Commission could grant deference to the port's business decision, rather than substitute its own judgment

It would appear in this case, however, that MPA wants the Commission simply to defer to its decision of granting preferential lease terms to carriers but not to MTOs, without analyzing the reasonableness of that practice under the 1984 Act. That is not an appropriate use of the concept of deference.

Ceres, 27 S.R.R. at 1274 (emphasis added).

PANYNJ's Post Hoc Litigation Rationalizations Cannot Justify Differences

Under applicable Shipping Act precedent only PANYNJ's contemporaneous "expressed reason," the Maersk-APM "port guarantee," is the relevant justification for the lease differences in this proceeding. *Ceres*, 27 S.R.R. at 1251, 1272. Maher's injury is established by "the difference between the rate charged and collected and the rate which would have been charged *but for* the unlawful preference or prejudice" and "an *additional* showing of injury is not

required. . . .” *Ceres*, 27 S.R.R. at 1271 n.48, 1272 (emphasis added). PANYNJ’s arguments and evidence about an alleged lack of competitive harm to Maher are wholly irrelevant. *Ceres*, 29 S.R.R. at 356, 372 (“[A] competitive relationship is not necessary to prove undue or unreasonable preference or prejudice, the proper measure of damages is the amount of unlawful excess exacted, which is akin to overcharge. The measure of damages is the difference between the rate charged and the rate that would have applied *but for* the unlawful discrimination or prejudice”) (emphasis added).

The Commission has explained why the port authority’s justification expressed at the time is the touchstone:

[o]nce MPA [the port authority] established its criteria and *said* it would grant preferential lease terms to entities who could match the *specified terms*, it *then* had a duty under the Shipping Act to apply *those criteria* in an even-handed, fair manner, and not differentiate based on invalid transportation factors, such as *Ceres*’ status as an MTO [marine terminal operator] MPA’s statutory duty arose *when it set forth the criteria* upon which it would grant preferential lease terms.

Ceres, 29 S.R.R. at 370 (emphasis added). Therefore, the *post hoc* litigation rationalizations conjured up by PANYNJ are totally irrelevant.

This proceeding represents a straightforward application of *Ceres*: The evidence has established Maher’s *prima facie* case by showing the disparate lease terms caused by PANYNJ’s refusal to provide Maher the preferential Maersk-APM terms, and PANYNJ has effectively conceded Maher’s case. PANYNJ must demonstrate valid contemporaneously considered and expressed transportation factors justifying the discrimination. *Ceres*, 27 S.R.R. at 1270-72. Having conceded that *status* is a reason for the disparities, PANYNJ has conceded its violations. And, with respect to PANYNJ’s additional *post hoc* litigation reasons, they are unavailing because they were not expressed at the time PANYNJ refused to provide Maher the Maersk-APM lease terms.

In *Ceres*, the Commission explained that:

The parties dispute whether MPA did in fact make a particular analysis of Ceres' ability to fulfill the terms of the Maersk lease. However, *even if* MPA did make a specific evaluation of Ceres and concluded that it was not satisfied with Ceres' willingness to enter into a long term lease with a vessel call commitment, *the fact remains that MPA's only expressed reason for denying Ceres the Maersk lease terms was Ceres' status as an MTO.*

Id. at 1272 (emphasis added). Accordingly, the Commission limited its analysis to the reason that MPA *expressed to Ceres at the time of the refusal to grant parity*, and rejected MPA's *post hoc* litigation rationalizations.

Furthermore, Commission precedent upon which PANYNJ relies for its own purposes stands for the same proposition and refutes the *post hoc* litigation rationalizations conjured up by PANYNJ here. The Commission explained in *In re Agreement No. T-2598*, that “[i]n view of the history of growth at the Port, it is tempting to allow a certain amount of speculation to enter our consideration [h]owever, this is a luxury we deem both inadvisable and inappropriate. At issue is the soundness of a decision made in 1971 with regard to the conditions prevailing then. We, therefore, restrict our consideration to those conditions.” 14 S.R.R. at 573.

Likewise, the Commission's authority in *Seacon* rejected the port authority's introduction of *post hoc* justifications. In *Seacon*, complainant Seacon Terminals challenged the Port of Seattle's decision to negotiate with Matson Navigation instead of Seacon for the lease of land for a marine terminal. 26 S.R.R. at 889. Seacon, like PANYNJ here, argued that the reasonableness of the port's decision should be evaluated not only by the facts available at the time of the challenged decision, but also by subsequent facts, citing to *Petchem*. *Id.* at 899 n. 29. The Commission rejected Seacon's argument and explained that:

[T]he two-part test in *Petchem* was used to evaluate the reasonableness of an ongoing exclusive franchise. Since the weight of the evidence indicates that there was no ongoing monopoly or exclusive franchise at the Port, the *Petchem* test is inapplicable here. *The*

reasonableness of the Port's actions should be judged according to the circumstances at the time, without applying hindsight or a consideration of later events.

Id. (emphasis added).

Therefore, *Petchem*, which PANYNJ cites approvingly for its own purposes, contradicts PANYNJ's resort to *post hoc* litigation rationalizations to justify its discrimination against Maher. *Petchem, Inc. v. Federal Maritime Comm'n* addressed an exclusive franchise tug monopoly granted to Hvide Shipping in Port Canaveral, Florida. 853 F.2d 958 (D.C. Cir. 1988). *Petchem* stands for the wholly unremarkable proposition that an ongoing exclusive franchise must not only be justified at the time it is granted, but also for as long as it maintained. Not only will the Commission look to see if the monopoly is still justified at the time of its decision on any complaint, the Commission mandates the port authority to monitor the arrangement to ensure that it is still necessary and will entertain any subsequent complaints challenging it irrespective of whether it might have been justified at the time it was made. *Petchem* contradicts PANYNJ's invocation of *post hoc* litigation rationalizations because there is no claim relating to an exclusive franchise as existed in *Petchem*.

Long before *Ceres*, the Commission consistently rejected *post hoc* rationalizations for conduct violating the Shipping Act. In *Port of Ponce v. P.R. Ports Auth.*, 25 S.R.R. 883, 889 n.7 (F.M.C. 1990), the Commission rejected *post hoc* rationalizations, ruling that the port authority violated the Shipping Act by charging identical port service charges for disparately provided services. Likewise, in “50 Mile Container Rules” *Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, the Commission rejected the “post hoc rationalization” argument that “artificial restrictions on containerization and intermodalism . . . do not affect shippers who can ‘truly benefit’ from such services” and finding the Rules “unlawful and violative of the Shipping Act.” 24 S.R.R. 411, 468 (F.M.C. 1987). The

Commission also rejects *post hoc* rationalizations because the evidence shows they were not real at the time of the discrimination. *See All Marine Moorings v. ITO Corp. of Balt. & The Md. Port Admin.*, 27 S.R.R. 342, 361-62 (A.L.J. 1995).¹ *See also Mar-Mol Co. & Copycorp. v. Sea-Land Serv., Inc.*, 27 S.R.R. 850, 865 (A.L.J. 1996) (Dolan, A.L.J.) (Sea-Land’s justification for violating section 18(a) of the Shipping Act was “clearly a post-hoc rationalization” as there was “no probative evidence” to support the Defendant’s principal defense.).² The Commission’s rejection of *post hoc* litigation rationalizations accords with the analytical approach of courts rejecting *post hoc* litigation rationalizations as not real and conjured up in defense as PANYNJ attempts here.³

Agreement No. T-2598, T-2880, Petchem, & Seacon Neither Confer Deference Nor Create

¹ The ALJ rejected ITO’s *post hoc* justifications of its exclusionary practice because there was no evidence that the *post hoc* justifications were the *real* reasons *at the time* of the discrimination. *Id.* at 361 (emphasis added). The unlawful decision to exclude All Marine from line handling services was not supported by evidence of either financial or operational capacity *at the time* ITO excluded it. *Id.* To the contrary, the evidence showed that the decision to exclude All Marine was made long after ITO’s alleged concerns about capacity and were really made because of ITO’s desire to profit. *Id.* (“the justification appears to be mainly a post hoc rationalization and not the real reason”); *see also All Marine Moorings v. ITO Corp. of Balt.*, 27 S.R.R. 539, 542 (F.M.C. 1996) (Commission adopted ALJ’s Initial Decision, which recognized Defendant’s concern about Complainant’s financial situation and competence as “mainly a post-hoc rationalization.” The Commission opined that the Respondent’s argument concerning Complainant’s financial situation which was a “post hoc rationalization” was also “unpersuasive.”).

² The Commission partially adopted the initial decision in *Mar-Mol Co.*, 27 S.R.R., ultimately agreeing with the ALJ that Sea-Land violated section 18(a) of the Shipping Act. The Commission did not disagree with the *post hoc* rationalization discussion.

³ *See, e.g., Mich. v. Clifford*, 464 U.S. 287, 301 (1984) (rejecting “*post hoc* justification” as “without apparent basis in reality.”) (Stevens, J., concurring); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 294-96 (3d Cir. 2011) (port authority *post hoc* justification not expressed at the time and thus a post hoc rationalization); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 279 (6th Cir. 2009) (rejecting “post-hoc rationalization concocted to skirt liability”); *E.E.O.C. v. Sears Roebuck & Co.*, 243 F.3d 846, 853 (4th Cir. 2001) (“post-hoc rationale, not a legitimate explanation”); *Tampa Pipeline Transp. Co. v. Chase Manhattan Serv. Corp.*, 928 F. Supp. 1568, 1582 n. 16 (M.D. Fla. 1995) (plaintiff’s argument was “not identified . . . as a separate basis for concern and thus seems to be a *post-hoc* rationalization. Accordingly, the contention should be discounted.”).

Exceptions To The Shipping Act For PANYNJ

PANYNJ erroneously misconstrues pre-*Ceres* authority by arguing that the decisions in *Agreement No. T-2598*, 14 S.R.R. 573, 584 (F.M.C. 1974), *Agreement No. T-2880*, 19 F.M.C. 687, 700-06 (F.M.C. 1976), *Petchem*, 23 S.R.R. at 988, 990, and *Seacon*, 26 S.R.R. at 990 stand for the propositions that (1) the Commission should accord a port authority's decision-making deference and that (2) "a port authority reasonably and legitimately treats two parties differently where it is necessary 'generally to advance the port's economic well being'" and the port "adduc[es] extensive economic and business testimony in support of the arrangement." PARB at 57-58 (citing *Seacon*, 26 S.R.R. at 899; *Petchem*, 23 S.R.R. at 988, 990; *Agreement No. T-2598*, 14 S.R.R. at 584; *Agreement No. T-2880*, 19 F.M.C. at 700). But contrary to PANYNJ's misrepresentation of those cases, the Commission *did not* merely defer to port authority business decisions and there *are not* general "economic well being" and "business risks and benefits" exceptions to the Shipping Act.

Just as PANYNJ does here, port authorities have erroneously invoked the "shibboleth of deference" to avoid compliance with the Shipping Act. *Flanagan Shipping Corp. v. Lake Charles Harbor & Term. Dist.*, 27 S.R.R. 1123, 1130 (F.M.C. 1997) (citing examples of port authorities in New York, Seattle, and San Francisco invoking deference). However, the Commission has emphasized that it will not "turn a blind eye to the Port's activities under the shibboleth of deference," but instead will "review the Port's determinations, in order to ensure that the provisions of the [Shipping] Act are not violated." *Id.* This is because as the Commission has emphasized, "[p]ort authorities are regulated entities under the Shipping Act, and their conduct is governed by the prohibited acts provisions set forth therein." *Ceres*, 29 S.R.R. at 371-72. Likewise, in *Ceres* the Commission rejected the port authority's appeal for deference, explaining that the Commission must first assess the reasonableness of the practice

involved and then evaluate the grounds articulated to justify the disparate treatment. *Ceres*, 27 S.R.R. at 1274.

The authorities PANYNJ invokes for deference actually contradict its argument. In *Agreement No. T-2598*, the Commission *did not* merely defer to port authority business decisions, instead it critically examined each of the complaints and the port authority's justifications for an exclusive terminal arrangement on the basis of the record evidence concluding that:

In light of our finding that CPA [the port authority] has acted reasonably as to each of these considerations, we cannot conclude that there has been shown such undue preference, undue or unreasonable preference or disadvantage, unjust or unreasonable practices to the detriment of Protestants as warrants a finding of violation . . . of the Act.

. . . The managerial decisions by CPA which led to the adoption of an exclusive terminal operator concept are on this record "fit and appropriate to the end in view" to provide satisfactory and responsible terminalling services at minimum cost to the public.

14 S.R.R. at 587. The same is true in *Agreement No. T-2880*, wherein the Commission *did not* merely defer to the business decision of the Port of New York Authority, but instead conducted a searching examination of the evidence of record justifying the port's new "mini-max" lease rate formula. 19 F.M.C. at 700-01. The Commission found that the evidence established that the port's new formula did not recover the port's fully allocable costs as the Commission had previously required, but that:

. . . [T]he record herein establishes that the circumstances which prompted the Port Authority's decision to implement the mini-max rental agreements were compelling and should not be viewed as unreasonable or contrary to provisions of the Shipping Act, 1916

. . . .

Although the minimum revenues would not be compensatory on a fully distributed basis, the evidence does support the conclusion that it is compensatory on an incremental basis

The record shows that the \$2.00 per ton charge proposed [by the port authority's mini-max formula] exceeds the charges of other pier landlords in the Port of New York and also at other ports on the Atlantic, Gulf and Pacific Coasts. To that

extent, it cannot be said that the Port Authority devised rentals to undercut and eliminate competitors. Rather, it is concluded that the proposed rentals are fair and reasonable when measured by general market conditions.

Id. at 700-01. And specifically with respect to the complaint filed by Pouch Terminals in that proceeding, the Commission concluded that the evidence showed there simply was no causation of Pouch's injury:

The record also compels the conclusion that the continued vacancy of the Pouch piers . . . must be attributed to general market conditions and not to the rentals proposed by the Port Authority

. . . .

The record reveals that the Pouch piers regrettably are obsolescent. Built in 1918, before the needs of today's break-bulk transport were developed, the Pouch piers in large measure cannot service the current carriers in an efficient and economic manner

. . . .

It cannot be found on this record that the economic detriment which has befallen Pouch can be attributed to any action by the Port Authority. Rather, we find that an obsolescent facility has been overtaken by the economic ills of the times.

Id. at 704-06.

Likewise, in *Petchem* the Commission *did not* merely defer to the port authority's business decision, but rather "scrutinize[d] the circumstances obtaining in December 1983, when the Port Authority denied Petchem's application for a franchise and also the situation at the Port during the period of the record subsequent to that denial." *Petchem*, 23 S.R.R. at 990. Based on that scrutiny, the Commission concluded that the record evidence established that (1) with respect to tug operator Petchem "there was reason to question . . . it would be equipped sufficiently to provide the reliable commercial service," (2) "Petchem required some time to learn the tug business," (3) "the Port's peculiar requirements continued to apply throughout the period of record," (4) "there [wa]s not yet enough such [commercial tug] business to allow one operator to break even, let alone two," and (5) "the lack of enough business . . . removes any

significant possibility” of harm. *Id.* at 991, 993-94.

Finally, in *Seacon* the Commission rejected the port authority’s argument that the Commission had “no authority to review the reasonableness of the Port’s actions regarding *Seacon*.” *Seacon*, 26 S.R.R. at 893. Instead, the Commission expressly reaffirmed its statutory “jurisdiction . . . over the Port’s leasing activities” *Id.* at 898. In exercising its jurisdiction, the Commission “exercises its responsibility to consider whether, through its decision-making, the port violated the 1984 Act.” *Id.* Relying on the record evidence, the Commission concluded that because of “*Seacon*’s protracted uncertainty” about “its business future,” that the “Port’s decision to go forward with negotiations with *Matson*” was not unreasonable. *Id.* at 899. And with respect to the other alleged violations, the Commission concluded that based on the “record” that *Seacon* failed to establish its claims regarding land discrimination and that the “weight of the evidence indicates that the Port . . . did not violate the MFN [most favored nation] clause.” *Id.* at 900-01. Regarding the crane fuel discrimination claim, the pre-*Ceres* Commission concluded the claim failed because under then-prevailing authority that “*Seacon* was not similarly situated to other operators.” *Id.* at 902.

The Commission’s subsequent decisions in *Ceres* and *Flanagan* also refute PANYNJ’s purported general “economic well being” and business “risks” and “benefits” exceptions to the Shipping Act. In *Ceres*, despite cries by the port authority of a potentially “devastating blow” to the Port of Baltimore and the regional economy, the Commission soundly rejected MPA’s plea for deference based on MPA’s “statutory responsibility of promoting the economic health of the region.” *Ceres*, 27 S.R.R. at 1261, 1274.

In *Flanagan*, the Commission likewise rejected the port authority’s argument for deference in levying a port rail switching fee on stevedore *Flanagan*. 27 S.R.R. at 1132. The

port authority argued that “the disputed charges are reasonably related to the services provided and represent the rational decision of the Port, to whose judgment the Commission must defer.” *Id.* at 1128. But, the Commission ruled that “for the Commission to examine whether the Port acted unreasonably in allocating the supplemental switching fee to stevedores . . . is consistent with its express statutory responsibilities.” *Id.* at 1130.

On the merits, the Commission rejected the port authority’s justification for the fee on the purported basis that stevedore *Flanagan* benefited from the rail switching. Thereby, the Commission soundly rejected the port authority’s erroneous business decisions. First, the port authority had levied a fee on the stevedore for an activity that occurred before the cargo was tendered to the stevedore. Thus, the stevedore was neither a user nor a beneficiary of the service for which it was charged. Second, the Commission rejected the port authority’s general benefits argument that without the switching service, there would be no cargo for *Flanagan* to stevedore. As the Commission explained:

The benefits that are alleged to flow to Flanagan are very general in nature, and are the sort of benefits that accrue from the business as a whole. Under . . . the Port’s rationale, one could assign to stevedores benefits from nearly anything that assists the general flow of cargo to the port. Such an allocation of benefits is not consistent with Commission case law. Shippers are billed for the preliminary switching and unloading, so to charge stevedores for the process that occurs between these two is unreasonable. Under the *Volkswagenwerk* test and Commission precedent, *a substantial, correctly allocable benefit from rail switching has not been shown to flow to the stevedore; absent such a benefit, no charge can be reasonable.* The Commission therefore, holds that imposing rail switching charges on stevedores is an unreasonable practice under section 10(d)(1) of the Act.

Id. at 1132 (emphasis added). In summary, these authorities establish that the Commission *does not* accord deference to a port authority such that it would “turn a blind eye to the Port’s activities.” *Id.* at 1130. Instead, the authorities establish that in circumstances such as those present here, PANYNJ’s general “risks and benefits” justification is unavailing and that

PANYNJ is required to prove that “a substantial, correctly allocable benefit . . . has been shown to flow to” Maher from the service provided, the letting. *Id.* at 1132. PANYNJ failed to carry its burden.

PANYNJ Misrepresents Commission Authority

PANYNJ erroneously asserts that “[t]his case is far more like *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation District of Jefferson Cnty., Texas*, 10 S.R.R. 1037 (FMC 1969)” than *Ceres*. PARB at 75. PANYNJ misrepresents *Lake Charles*.

In *Lake Charles*, the Port of Beaumont assessed higher port charges on the Texas-origin rice coming from the Beaumont Mill than it did for Arkansas-origin rice moving through the Port of Beaumont. 10 S.R.R. at 1040. The Commission found that “[a]lthough the Beaumont Mill is the only shipper utilizing respondent’s port paying higher unloading and wharfage charges, it strongly supports the differential. This mill is heavily dependent upon the export rice business and the major portion of its production is sold to export merchandisers who frequently combine the Beaumont Mill production with rice from other origins in order to accumulate the volume necessary to fill orders.” *Id.*

As an initial matter, in a brazenly dishonest effort to make it appear that *Lake Charles* rather than *Ceres* governs this case, PANYNJ misrepresents that in *Lake Charles*, “the complainant’s participation in the export rice business was contingent on its product’s combination with Arkansas rice to meet the required volume needed to fill export orders. . . .” PARB at 75 (*citing Lake Charles*, 10 S.R.R. at 1042). Thereby, PANYNJ misidentifies the complainant which was Lake Charles Harbor & Terminal District, not the Beaumont Mill. Compounding its flagrant misrepresentation of *Lake Charles* PANYNJ doubles down and also misrepresents *Ceres* in the same breath. PANYNJ argues erroneously that “[p]erhaps most importantly, unlike in *Ceres*, where the challenged port conduct served no purpose other than to

injure *Ceres*, Maher clearly benefitted, very substantially, from the concessions made to retain Maersk Line, just as the complainant in *Lake Charles* benefited from the concessions made in the form of the lower rents [sic] charged on Arkansas rice.” PARB at 75-76.

As an initial matter, PANYNJ misrepresents the port authority’s aims in *Ceres*, which was not just to harm terminal operator *Ceres*, but as shown above, to protect the port from a “devastating” economic blow no different than PANYNJ asserts here. *Ceres*, 27 S.R.R. at 1261. Moreover, the benefiting rice mill in *Lake Charles*, the Beaumont Mill, was *not* the complainant in that proceeding. Not only did Beaumont Mill not allege any harm or file a complaint, but it “strongly support[ed] the differential and [had] demonstrated that it in fact derive[d] an indirect benefit from it.” *Id.* at 1042. The real complainant in the case, Lake Charles Harbor & Terminal District, failed to provide evidence sufficient to demonstrate that it actually suffered any harm as a result of the Port of Beaumont’s rate structure, because Lake Charles was not directly subject to the rates at issue and because it failed to demonstrate that the rate practice had resulted in the loss of any cargo to Beaumont, in part because it was found that Lake Charles was too congested to handle the Arkansas rice in any event. *Id.* at 1040, 1043-1044.

Therefore, contrary to PANYNJ’s argument, this proceeding is not “far more like” the Commission’s decision in *Lake Charles* than its decision in *Ceres*. Here, Maher *is* the complainant, unlike Beaumont Mill which was not, despite PANYNJ’s misrepresentation. And, Maher, unlike Beaumont Mill, *does not* “strongly support[] the differential.” Moreover, unlike the complainant, Lake Charles Harbor & Terminal District, in that proceeding, here Maher *is* subject to PANYNJ’s discriminatory lease rates and terms, and as a result it has been injured and directly sustained damages measured at least by the difference in the lease rate terms of approximately \$500 million. Unlike *Lake Charles*, PANYNJ has provided no evidence that

Maher could not have handled additional cargo as was the case with Lake Charles Harbor & Terminal district. Finally, unlike *Lake Charles* where the Commission concluded that the “specific rate levels [differing one to two cents or about 10-15%] are not shown to be unreasonably high or low,” *id.* at 1040, 1043, here, PANYNJ has levied lease rates on Maher that are more than *double* the rates provided to Maersk-APM and which are therefore, patently unreasonable. See *Ceres*, 27 S.R.R. at 1275 (finding differential unreasonable where lease rental rates were more than double Maersk’s).

The Commission’s Liberal Pleading And Evidentiary Standards Govern

The Commission has embraced a lenient pleading standard, particularly with regard to the sufficiency of complaints alleging Shipping Act violations. *Interconex, Inc. v. Fed. Mar. Comm’n*, 572 F.2d 27, 30 (2d Cir. 1978) (“[A] liberal attitude toward pleadings has been held specifically appropriate in FMC proceedings.”); *Int’l Ass’n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 187, 194 (F.M.C. 1989) (pleading rules “should be liberally construed and be subject to liberal amendment”) (*quoting* 3 J. Moore Federal Practice § 15.15(2)); *Pac. Coast European Conference-Limitation on Membership*, 5 F.M.B. 39, 42 n. 8 (F.M.B. 1956) (“The most important characteristic of pleadings in the administrative process is their unimportance.”); *Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exchange, Inc.*, 28 S.R.R. 1411, 1412 (A.L.J. 2000) (“Initial pleadings in administrative proceedings are primarily designed to give notice and are not considered otherwise to be critical. It is not necessary for complainants to plead their evidence in their initial complaints and it is customary for the facts to be developed, among other ways, by means of discovery rules.”) (Kline, A.L.J.).

Rule 62 codifies the Commission’s liberal treatment of pleadings. It permits the amendment of complaints “if the complaint fails to indicate the section of the acts alleged to have been violated or clearly to state facts which support the allegations” This rule has long

been applied to allow the prosecution of Shipping Act violations where an imperfect complaint might otherwise present an obstacle to fulfillment of the Commission's duty to protect the public policy inherent in the Act. *See Int'l Ass'n of NVOCCs*, 25 S.R.R. at 196 (permitting amendment of complaint where the original complaint charged only violations of the 1916 Act provisions because deficient pleading was "irrelevant to the clear notice given to respondents that, as the proceeding evolved, complainants might expand their theory of relief").⁴

Likewise, in a complaint proceeding Rules 62(c) and 71 provide that the Commission and a party to the proceeding may seek further clarification about the violations and the facts that support the allegations. In the case of the Commission, it may require the complaint to be amended, or in the case of a party it may "move for a more definite statement. . . ." 46 C.F.R. §§ 502.62(c), 502.71 (2010). Neither the Commission nor PANYNJ sought such amendment or statement. Indeed, PANYNJ did not even file and serve an answer to Maher's Counter-Complaint in the Dkt. 07-01 proceeding.⁵ In such circumstances, "it cannot be heard now to claim lack of notice. . . ." *Agreement No. 9955-1*, 14 S.R.R. at 1183.

Additionally, "the Commission's rule regarding admission of evidence (46 C.F.R. §502.156) is rather broad . . . It is also true that discovery materials and other materials have been admitted into evidence under these broad standards and that the stricter court rules as to admission of evidence are considerably relaxed in Commission as well as other administrative proceedings." *Matson Navigation Co.*, 25 S.R.R. 943, 944 (A.L.J. 1990).⁶

⁴ *See also Stallion Cargo Inc.*, 29 S.R.R. 204, 206 (A.L.J. 2001) (Kline, A.L.J.); *Holt Cargo Sys., Inc. v. Del. River Port Auth.*, 28 S.R.R. 432, 437 (A.L.J. 1998); *Agreement No. 9955-1*, 14 S.R.R. 1151 (F.M.C. 1974); *Agreement No. 9955-1*, 14 S.R.R. 1151, 1182 (A.L.J. 1974).

⁵ Declaration of Gerald Morrissey (PANYNJ did not answer Maher's Counter-complaint), MTR-PAFOF ¶ 288.

⁶ *See also Unapproved Section 15 Agreements – South African Trade*, 1 S.R.R. 855, 866 (F.M.C. 1962); *Pac. Champion Express*, 28 S.R.R. 1105, 1106 (A.L.J. 1999); *The Port Auth. of N.Y. &*

ANALYSIS

I. PANYNJ Concedes The Law And Facts Establishing Maher's Complaint and Counter-Complaint

In essential respects, PANYNJ concedes the law and relevant facts establishing Maher's Complaint and Counter-complaint. PANYNJ concedes the Commission's authority in *Ceres* (status not permissible basis for differences and port authority has an absolute duty and continuing duty to apply its criteria for granting preferential lease terms in a fair and even-handed manner). 27 S.R.R. at 1270-77; 29 S.R.R. at 369-74. PANYNJ concedes that it is a marine terminal operator over which the Commission has jurisdiction. PAR-MTFOF ¶¶ 4, 15. PANYNJ concedes the service provided to Maher and Maersk-APM is the same, letting land to marine terminal operators, but that PANYNJ charges Maher much higher rents, etc. PAR-MTFOF ¶¶ 4, 277, 305, 349. PANYNJ concedes the lease differences which form the basis for Maher's claims, including the approximately \$500 million difference in rents, the investment difference, the container throughput difference, the security deposit difference, and the first point of rest difference.⁷ Having conceded *Ceres* and the differences, PANYNJ also necessarily confesses the injury to Maher from the disparities.

Moreover, PANYNJ concedes that Maersk-APM's *status* as affiliated with ocean-carrier Maersk was a cause of the disparities and the resulting harm. It concedes this initially by stipulating to the testimony of its own PANYNJ executives, 30(b)(6) witnesses, and its sworn interrogatory answers verified by its executives. PAR-MTFOF ¶¶ 250, 253-255, 258-260, 262. Furthermore, PANYNJ also concedes that *status* was a cause by arguing affirmatively that the

N.J. v. N.Y. Shipping Ass'n, 22 S.R.R. 1217, 1219 n.4 (A.L.J. 1984); *Sanrio Co. v. Maersk Line*, 19 S.R.R. 1627, 1635 (A.L.J. 1980).

⁷ PAR-MTFOF ¶¶ 277, 305, 349 (conceding differences in rents); 317, 372 (conceding difference in investments); 313, 353 (conceding differences in container throughput); 325, 378 (conceding that Maher had to provide a \$1.5 million security deposit); 330-333, 375 (stipulating to the existence of Maher's first point of rest and that Maersk's lease did not contain one).

differing “risks” presented by the tenants justify the differences. PAR-MTFOF ¶¶ 223, 253; PAFOF ¶¶ 167, 170. According to PANYNJ, ocean-carrier Maersk was a risk to leave the port while marine terminal operator Maher was not. PAFOF ¶¶ 167, 170. Having advanced the central role of *status* to its refusal to provide Maher parity with Maersk-APM, PANYNJ is left to argue that *status* was not the *sole* reason.

But, that is no defense in this Shipping Act proceeding as a matter of law. *Status* is not a valid transportation purpose. *Ceres*, 27 S.R.R. at 1270-71 n.48. And, the Shipping Act is *not* a sole-fault statute. Rather, it is a *but for* cause or *proximate* cause statute depending on the particular violation at issue. With respect to violations of 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)) the standard is merely “*but for*” causation. *Distrib. Servs.*, 24 S.R.R. at 725 (complainant awarded reparations if it would have qualified for the lower rates *but for* the unreasonable practice). And with respect to violations of 46 U.S.C. § 41106(2) (Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12))), the standard is merely that the resulting prejudice or disadvantage is the *proximate* cause of injury. *Ceres*, 27 S.R.R. at 1270 (citing *Distrib. Servs.*, 24 S.R.R. at 720); *Bermuda Container Line Ltd. v. SHG Int’l Sales Inc.*, 28 S.R.R. 492, 500 (A.L.J. 1998) (reviewing the Commission’s application of proximate cause standard).

Therefore, having confessed that *status* is a cause of the disparities, PANYNJ has effectively confessed violations of the Shipping Act. As the Commission has explained, “‘Proximate cause’ is not the same as ‘sole cause.’ While there must be sufficient evidence to show that [it] is the cause in fact of the [result], there is no authority for the proposition that so long as other factors contribute to the [result], the Commission is powerless to act.” *Port Auth.*

of *N.Y. & N.J. v. N.Y. Shipping Ass'n*, 23 S.R.R. 21, 50 (F.M.C. 1985).⁸ Therefore, in circumstances such as those present here, where PANYNJ now argues that in addition to *status* that there are other *post hoc* justifications or contributing causes for the disparities, the law provides that the existence of these other purported *post hoc* contributing causes, even if they were real which they are not, is simply no defense.

Status is the *proximate* cause or the *but for* cause of the applicable violation where it was a “substantial factor” in bringing about the disparate treatment which is the injury.⁹ Where PANYNJ’s own witnesses’ sworn testimony and the contemporaneous documentary evidence establish the cornerstone role of *status*, and PANYNJ’s reply brief and stipulations have now effectively conceded that *status* was a “substantial factor” and that it “played a material part” in bringing about the disparate treatment, then the evidence establishes *status* as both a *proximate* and *but for* cause of the disparate treatment and the Shipping Act violations irrespective of other purported *post hoc* contributing causes. Thus, as a practical matter PANYNJ has conceded its Shipping Act violations.

⁸ See also *Exxon v. SOFEC*, 517 U.S. 830, 837 (1996) (multiple proximate causes recognized); *Hopkins v. Jordan Marine, Inc.*, 271 F.3d 1, 4 (1st Cir. 2001) (“the wrongful act or condition need not be sole and exclusive cause.”); *The Joseph B. Thomas*, 86 F. 658, 664 (9th Cir. 1898) (proximate cause of an injury need not be the sole cause); 2 *Admiralty & Mar. Law* § 19-18 Marine Insurance (5th ed.) (“A cause need not be exclusive to be proximate.”); *W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 41, at 264-66 (5th ed. 1984) (injuries are often caused by multiple legal causes); Restatement (Second) Torts § 430, Com. d. (1965) (it is not necessary for an actor’s conduct to be *the* cause, using the word “the” as meaning the sole and even the predominant cause).

⁹ *Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 289 (5th Cir. 1978) (cause must be a “substantial factor” in bringing about the harm); 1 *Admiralty and Maritime Law* § 5-3 Causation (2d ed. 1994). See also *Hernandez v. Trawler Miss Vertie Mae*, 187 F.3d 432, 439 (4th Cir. 1999) (proximate cause is a substantial cause of the injury); *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 73 (3d Cir. 1996) (“Causation in fact depends upon whether an act or omission played a material part in bringing about an event . . . [w]hen more than one act or omission could have caused an event, then the . . . conduct must be shown to have been a substantial factor in causing the harm.”).

II. PANYNJ Also Concedes Maher's Prima Facie Case And PANYNJ Failed To Carry Its Burden

Beyond PANYNJ's concession that *status* caused the disparity and resulting Shipping Act violations, PANYNJ's also effectively conceded that the burden of proof has shifted to PANYNJ to prove that a valid transportation purpose justifies the lease disparities. PANYNJ has effectively conceded (1) the governing legal authority, *Ceres*; (2) the letting service provided by PANYNJ is the same; (3) the lease differences are as alleged; and (4) that Maher sustained injury.¹⁰ Therefore, in these circumstances PANYNJ must show that the complained of lease differences preferring Maersk-APM and prejudicing Maher are justified by a valid transportation purpose. But, having conceded that *status* was a cause of the disparities PANYNJ *cannot* carry its burden. Nevertheless, PANYNJ trots out the Maersk-APM "port guarantee" and multiple newly minted *post hoc* litigation rationalizations that are mere proxies for *status*, which is not a valid transportation purpose.

Furthermore, PANYNJ argues that "the base rental terms in the two leases cannot be facially compared. . . ." and "differing rental terms cannot be compared in isolation, and can only be evaluated in the context of all gives and takes," but then PANYNJ fails to carry its burden to provide just such a comprehensive comparison of the lease terms showing that the "gives and takes" it *asserts* justify the lease disparities *actually* justify them. PANYNJ's own economist expert Dr. Flyer confessed that he concluded it was "difficult if not impossible" to compare the Maher and Maersk-APM leases and therefore, he performed no such comparison. PARB at 35; Flyer Dep. at 130:6-132:6, 162:8-163:7. In these circumstances, where PANYNJ has failed to even attempt the comparison it argues is necessary, PANYNJ has failed to carry its burden of

¹⁰ See *supra* n.7; PAR-MTFOF ¶¶ 4, 223 (citing Shiftan's testimony that unlike Maersk, Maher was not a threat to leave the Port), 253 (stating that "Sea-Land/Maersk offered materially different benefits and risks than Maher"), 277, 305; PAFOF ¶¶ 167, 170.

proof.

A. The Port Guarantee Does Not Justify the Lease Differences

PANYNJ's decisive concession in its initial brief that *status* is a justification for the lease differences derives directly from PANYNJ's sworn interrogatory answers, sworn testimony of PANYNJ executives, and PANYNJ's argument that "PA reasonably required APM/Maersk to guarantee that Maersk Line's loaded cargo would come through the Port, or else APM/Maersk would lose its substantial rent concession." PARB at 60.¹¹ Thereby, PANYNJ has conceded that the Maersk-APM "port guarantee" was the proprietary provision available *only* to Maersk-APM, and merely a proxy for Maersk's ocean-carrier *status*.¹² The undisputed contemporaneous evidence also establishes that the "port guarantee," i.e. Maersk's ocean-carrier status, was the cornerstone reason PANYNJ expressed to Maher at the time that it refused Maher parity on September 23, 1999. As Maher's then-CEO testified "the port guarantee . . . was the cornerstone of the reason why The Port Authority -- why The Port Authority gave Maersk more favorable terms than Maher"¹³

Moreover, whether the reason for PANYNJ's decision to provide a volume rate incentive of \$120 million net present value (\$336 million nominal) to keep Maersk-APM from relocating to Baltimore was reasonable or not neither explains the reason, nor the reasonableness, of PANYNJ's later refusal to provide the equivalent volume rate incentive rent concession to

¹¹ PANYNJ argues that the Port Guarantee made up the difference between Maher and Maersk-APM's rents. PAR-MTFOF ¶ 183 ("To the extent APM/Maersk did not meet the Port Guarantee levels, it lost its rent concession and its base rent was increased."); PAR-MTFOF ¶ 123 ("Therefore, if Maersk Line and Sea-Land did not bring the required cargo to the Port, it would lose the rent concession").

¹² PAR-MTFOF ¶¶ 250 (stipulating to Borrone's testimony that "the port guarantee was unique for carriers, terminal operators who were carriers"), 253-254, 258-260.

¹³ Brian Maher Dep. at 20:22-21:3, MTFOF ¶ 251; Brian Maher Dep. at 198:17-199:17, MTFOF ¶ 242 (Q: What reason, if any, did she [Lillian Borrone] give you for the rates that she agreed to with you? A: Her reason was that Maersk provided a port guarantee, and that they -- Maersk was going to make larger investments in their facility than we were.).

Maher as mandated by the Shipping Act. *Ceres*, 29 S.R.R. at 369-74; 27 S.R.R. at 1270-77 (port authority has an absolute duty and continuing duty to apply its criteria for granting preferential lease terms in a fair and even-handed manner).

PANYNJ's expressed reason at the time for refusing to provide Maher the Maersk-APM lease terms and rates was then and remains now nothing more than a proxy for *status*. PANYNJ stipulates that "Brian Maher testified that "the port guarantee . . . was the cornerstone of the reason why the PA —why the PA gave Maersk more favorable terms than Maher" Brian Maher Dep at 20:22-21:3, MTFOF ¶ 251. And PANYNJ stipulates that it answered in sworn interrogatory responses that "[T]he port guarantee only applies to companies who are carriers or have a significant ownership interest in one."¹⁴ PANYNJ stipulates that it "answered in sworn interrogatory responses that PANYNJ "did not offer Maher the option to provide a Port Guarantee because it was not a carrier and did not have a significant ownership interest in a carrier."¹⁵ The facts, according to PANYNJ's own stipulations, show that PANYNJ violated the Shipping Act by refusing to offer Maher the "port guarantee" volume rate incentive lease rates and terms because Maher is not an ocean carrier or affiliated with an ocean carrier that controlled cargo. *Ceres*, 29 S.R.R. at 369-74; 27 S.R.R. at 1270-77 (status not permissible basis for differences and port authority has an absolute duty and continuing duty to apply its criteria for granting preferential lease terms in a fair and even-handed manner).

PANYNJ stipulates that Brian Maher testified that Maher could not offer the port

¹⁴ MTFOF ¶ 253 (*citing* PANYNJ Resp. to Maher's First and Second Sets of Interrogs., No. 1, Dkt. 08-03 (Aug. 29, 2008); PANYNJ Resp. to Maher's Third Set of Interrogs., No. 3, Dkt. 08-03 (Oct. 8, 2008)).

¹⁵ PANYNJ Resp. to Maher's Third Set of Interrogs., MTFOF ¶ 254 (verified by Dennis Lombardi, Deputy Director of the Port Commerce Department, PANYNJ); Dep. Ex. 283 ("The major difficulty in keeping the structure of this guarantee is that it cannot be included, in the same form, with Maher or Howland Hook. As stevedores, those companies only bid on providing a service for the cargo and do not directly carry and control the cargo.").

guarantee as defined by PANYNJ because it did not control cargo.¹⁶ And as PANYNJ's 30(b)(6) witness, PANYNJ's then Port Commerce Director Lillian Borrone, testified—and as PANYNJ also stipulates—as defined by PANYNJ “the port guarantee was unique for carriers, terminal operators who were carriers. Maher Terminal is not a carrier and it couldn't commit to assuring that particular carrier's cargoes could come to the harbor as part of their negotiation with us.”¹⁷ Maher was not an ocean carrier that controlled cargo, but what Maher did offer, and what PANYNJ stipulates Maher told PANYNJ during the lease negotiations, is that Maher had large container volume. “Maher had contracts for 600,000 container moves per year, many with long-standing ocean carrier customers of 20 years or more.”¹⁸ Just as in *Ceres*, in these circumstances the Shipping Act mandated PANYNJ to consider “the practical significance of . . . [Maher's] cargo commitment and . . . [Maher's] ability to attract customers.” *Ceres*, 27 S.R.R. at 1273. In *Ceres*, the Commission rejected the port authority's misplaced reliance on a “particular guarantee,” the “vessel call guarantee” that “[did] not guarantee to the port any more than *Ceres* could have guaranteed had it been allowed.” *Id.* at 1272. Likewise, here Maher guaranteed more container volume and rent than Maersk-APM.¹⁹ Therefore, notwithstanding PANYNJ's assertion, the “port guarantee” simply cannot justify the disparate treatment complained of here.

Having stipulated to the reason PANYNJ expressed to Maher at the time for refusing to provide Maher the preferential Maersk-APM rates, PANYNJ is left to disavow its own sworn interrogatory responses regarding the port guarantee as “misleading” and “incomplete” because

¹⁶ Brian Maher Dep. at 165:14-18, MTFOF ¶ 256 (When asked why he was never given the option of a Port Guarantee, B. Maher responded that “My interpretation of a port guarantee is cargo controlled . . . by an individual entity that they can direct to the port. We were not in a position to do that.”).

¹⁷ Borrone Dep. at 84:4-13; MTFOF ¶ 250.

¹⁸ MTFOF ¶ 257 (*citing* Dep. Ex. 115; Dep. Ex. 201; Kerr Rebuttal ¶ 83; Kerr Report Exhibit 2.)

¹⁹ MTFOF, Comparison EP-249 and EP-248 Lease Differences.

Maher allegedly “was unable to provide a similar guarantee and would not do so.” PAR-MTFOF ¶ 254. But, PANYNJ’s strained attempt to reform its sworn discovery answers amounts to nothing more than a reaffirmation of *status* as the reason for PANYNJ’s discrimination, i.e. the “similar guarantee” that PANYNJ posits *cannot be* satisfied by a marine terminal operator like Maher.

The evidence establishes that in August 1999, “Maher had contracts for 600,000 container moves per year, many with long-standing ocean carrier customers of 20 years or more.”²⁰ With respect to the container volume throughput guarantee provisions the lessees’ have in common, *i.e.* the rent and terminal guarantee provisions of the leases, Maher provides higher container volume throughput guarantee levels in each period and therefore, must pay higher gross throughput rent.²¹ Maher’s rent guarantee to PANYNJ exceeds the Maersk-APM guarantee in each period by a minimum of (1) 75,000 containers in the third period, (2) 150,000 containers in the first period, and (3) a maximum of 175,000 containers in the second period.²² Likewise, Maher’s terminal container volume throughput guarantee requirements are much higher than those of Maersk-APM. During the third period, which is half the lease term (15 years), Maher guarantees annually 510,000 more containers than Maersk-APM.²³ And during the first two periods, Maher also guarantees more containers annually than Maersk-APM: (1) 70,000 more in the first period, and (2) 90,000 more in the second period.²⁴ On a per-acre basis, Maher guarantees almost twice as many containers for half the lease term, i.e. 68% of the period

²⁰ MTFOF ¶ 257 (*citing* Dep. Ex. 115; Dep. Ex. 201; Kerr Rebuttal ¶ 83; Kerr Report Exhibit 2.)

²¹ Kerr Expert Report at Ex. 1, MTFOF ¶ 510; MTFOF, Comparison of EP-249 and EP-248 Lease Differences.

²² MTFOF, Comparison of EP-249 and EP-248 Lease Differences.

²³ *Id.*

²⁴ *Id.*

during which throughput guarantees are in effect, i.e. 2008- 2030.²⁵ Therefore, Maher guarantees PANYNJ both more throughput rent and terminal throughput volume than Maersk-APM.²⁶

Moreover, the evidence establishes that Maher also exceeded the loaded container volume requirements of the Maersk-APM “port guarantee.” From 2008 to date, PANYNJ concedes that the Maersk-APM port guarantee required Maersk to handle at least 365,000 loaded Maersk containers, i.e. “qualified containers,” through the port annually and that it has failed to do so every year since then to date, i.e. 2008, 2009 and 2010.²⁷ During the same years, however, Maher has exceeded that 365,000 number of loaded containers by a wide margin. In 2008 Maher handled 824,846 loaded containers, in 2009 it handled 642,011, and in 2010 it handled 784,975.²⁸ Indeed, even if a higher “port guarantee” “qualified container” requirement were required of Maher based on the same per-acre throughput rate as applied to Maersk-APM, Maher exceeded that number too. Applying the “port guarantee” “qualified container” number used by PANYNJ for Maersk-APM of 1043 per acre would yield an equivalent “port guarantee threshold for Maher of 464,135 vice 365,000 for Maersk-APM.²⁹ Therefore, had PANYNJ provided the opportunity to Maher to satisfy a similar loaded container “port guarantee” volume requirement to qualify for the preferential lower lease rate terms as required by the Shipping Act, the evidence shows that Maher easily qualified during the same period in which Maersk-APM has

²⁵ MTR-PAFOF ¶ 186.

²⁶ Kerr Expert Report ¶ 39, MTFOF ¶ 350 and Kerr Expert Report Ex. 2 (explaining and applying the container throughput exempt amounts for comparison), PAFOF ¶ 193 n.7.

²⁷ PAR-MTFOF ¶¶ 362, 406-408

²⁸ Kerr Expert Rebuttal Report Ex. 4, MTR-PAFOF ¶ 176 (showing Maher’s actual performance compared to guarantee based on the same per acre throughput); Kerr Expert Report Ex. 2 (showing equivalent “port guarantee” throughput volume for Maher based on same Maersk-APM throughput per acre).

²⁹ *Id.*, MTR-PAFOF ¶ 176.

repeatedly failed.³⁰ Moreover, the record shows that PANYNJ offers no evidence showing that Maher could not perform the provisions of the “port guarantee,” other than the requirement that ocean-carrier Maersk be acting as “common carrier” for the loaded containers.³¹ Therefore, the evidence establishes that the “port guarantee” is nothing more than a proxy for *status* and does not justify the lease differences.

The “port guarantee” is also not the purportedly *unique* Maersk ocean-carrier cargo guarantee PANYNJ represented to Maher at the time PANYNJ refused Maher parity with Maersk-APM. As implemented and enforced by PANYNJ in 2010, the evidence shows that PANYNJ implemented and enforced it merely as an additional rent payment. MTFOF ¶¶ 407-409. But, an additional rent payment cannot justify the differences because Maher already guaranteed more rent and container throughput volume than Maersk-APM. Maher’s starting basic rent rate is more than double the Maersk-APM rate and escalates 2% annually, unlike Maersk-APM.³² By the end of the 30 year term of the lease Maher’s basic rent is 3.7 times the basic rental rate provided by PANYNJ to Maersk-APM.³³ PANYNJ provided no evidence that Maher could not make such an additional rent payment “if it had been allowed to match the Maersk lease terms.” *Ceres*, 27 S.R.R. at 1273. Therefore, the “port guarantee” does not justify the lease differences. No doubt because of these undisputed facts, PANYNJ belatedly shifted ground to its newly minted *post hoc* litigation rationalizations.

B. PANYNJ Post Hoc Rationalizations Do Not Justify the Lease Disparities

³⁰ MTR-PAFOF ¶ 176, Kerr Expert Report ¶ 49, Ex. 2 (explaining and calculating a “port guarantee” equivalent for Maher on a per acre basis); Kerr Rebuttal Report ¶ 20-21; Kerr Rebuttal Report Ex. 2, 3 & 4; MTFOF ¶ 313; MTFOF, Comparison of EP-249 and EP-248 Lease Differences n.8-11.

³¹ EP-248 § 42(a)(1) & (2), MTFOF ¶ 355 (“Carrier’s Containers” shall mean containers carrying cargo for which a disclosed principal of Maersk, Inc. is acting as common carrier.”).

³² MTFOF ¶¶ 305, 348, Comparison EP-249 and EP-248 Lease Differences.

³³ Kerr Expert Report at Ex. 1, MTFOF Comparison of EP-249 and EP-248 Lease Differences.

Having conceded the governing legal authority, that the service is the same, that the lease differences are as alleged, and that Maersk-APM's *status* was a cornerstone reason for the differences, at a minimum PANYNJ has also effectively conceded that the burden of proof shifted to PANYNJ to show that the lease differences preferring Maersk-APM and prejudicing Maher are otherwise justified by a valid transportation purpose.

To satisfy what is squarely its burden, PANYNJ raises newly minted *post hoc* litigation rationalizations as justifications for the lease differences. But, the evidence establishes that PANYNJ's *post hoc* litigation rationalizations are not real. They were not the contemporaneous reason expressed by PANYNJ when it refused Maher parity which was *status*, and in all events are mere proxies for *status*.

Oddly, PANYNJ argues affirmatively that “the base rental terms in the two leases cannot be facially compared” and “differing rental terms cannot be compared in isolation, and can only be evaluated in the context of all gives and takes,” but then PANYNJ fails to provide the comprehensive comparison of the lease terms it argues is necessary and for which it has the burden of proof. PARB at 35. PANYNJ concedes it performed no such particularized analysis as required by the Shipping Act at the time it denied Maher parity. PAR-MTFOF ¶ 280 (stipulating that PANYNJ 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). And, in all events, in *Ceres*, the Commission rejected the port authority's “gives and takes” argument. 27 S.R.R. at 1263, 1273 (port authority argued “each party made several proposals . . . and concessions . . . to reach an agreement,” and ruled instead that the “port authority must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of the lessees”). Thereby, PANYNJ again effectively confesses its violations.

1. PANYNJ Erroneously Argues That Retaining Maersk In The Port Justifies Lease Differences

Besides *status*, PANYNJ relies principally for justification of the lease differences on its purported wisdom in retaining the ocean-carrier Maersk in the port to benefit the New York-New Jersey regional economy rather than letting Maersk relocate to benefit the Baltimore, Maryland regional economy. Thereby, PANYNJ erroneously attempts to conflate its decision to meet the demand of ocean-carrier Maersk for concessions totaling \$120 million net present value (\$336 nominal) to retain it in the port with its later decision *not* to provide Maher parity with Maersk-APM as mandated by the Shipping Act.

In *Ceres*, the Maryland Port Authority (“MPA”) erroneously advanced the same *post hoc* rationalization. *Id.* at 1251, 1260-61, 1274. MPA asserted that “[a]fter a decade of suffering financial losses . . . the loss of Maersk would have been devastating to the Port” and that “given the keen competition it faces, it is entitled to make arrangements to expand steamship vessel calls at the Port of Baltimore in furtherance of its statutory responsibility of promoting the economic health of the region.” *Id.* at 1260-61, 1274. But, the Commission rejected MPA’s purported justification as not an “appropriate use of the concept of deference” to “the port’s business decision.” *Id.* at 1274.

Maher’s Complaint and Counter-Complaint are *not* about the wisdom or lack of wisdom of PANYNJ’s decision to subsidize ocean-carrier Maersk by providing it a \$120 million net present value concession (\$336 million nominal) *not* to relocate to Baltimore. Neither Maher’s Complaint nor its Counter-Complaint allege that PANYNJ violated the Shipping Act by inducing ocean-carrier Maersk to remain in the port rather than relocating to Baltimore, Maryland. Nor do Maher’s Complaint and Counter-Complaint seek an appropriate order from the Commission that PANYNJ’s decision to induce ocean-carrier Maersk to remain violated the Shipping Act.

Rather, Maher's Complaint and Counter-Complaint allege Shipping Act violations for PANYNJ's *later* refusals to provide Maher parity with Maersk-APM as required by *Ceres* and the Commission's "existing precedent." *Id.* at 1272-74; 29 S.R.R. 370, 372 (port authority had a statutory absolute and continuing duty to apply its criteria for granting preferential lease terms in a fair and even-handed manner).

PANYNJ concedes that "[a]fter the PA succeeded in avoiding a . . . Maersk Line exodus, . . . Maher obtained a lease. . . ." PARB at 61 (emphasis added), PAR-MTFOF ¶ 129. Just as occurred in *Ceres*, where the port authority secured Maersk in the Port of Baltimore in November 1991 and later refused *Ceres* parity in May 1992, *id.* at 1253; here PANYNJ had already secured Maersk-APM's commitment to remain in the port on May 7, 1999, months *before* it refused to provide Maher parity *later* on September 23, 1999.³⁴

Nor did PANYNJ provide any evidence that Maersk-APM *required* PANYNJ to deny Maher parity as a necessary condition to stay in the port. To the contrary the PANYNJ-Maersk-APM lease agreement, EP-248, features a merger clause that expressly disclaims any such commitment not expressly set forth in the agreement.³⁵

³⁴ MTFOF ¶ 190 (PANYNJ secured Maersk-APM in the port by May 7, 1999); MTFOF ¶ 243 (PANYNJ refused to provide Maher parity on September 23, 1999). Subsequent corresponding events establish the same sequence: (1) PANYNJ and Maersk-APM concluded its agreement, EP-248, in December 1999 whereas Maher did not conclude its agreement, EP-249, until October 2000, Dep. Ex. 181 (EP-248 signed by Maersk on December 15, 1999); Dep. Ex. 131 (EP-249 signed by Maher on October 25, 2000); (2) Maersk-APM's agreement was effective as of January 6, 2000, whereas Maher's was not effective until October 1, 2000, MTFOF ¶ 348 (Maersk-APM lease commenced on January 6, 2000); MTFOF ¶ 303 (Maher lease commenced on October 1, 2000); and (3) PANYNJ's board approved Maersk-APM's agreement on June 2, 2000, whereas Maher's agreement wasn't finalized until October 2000, MTFOF ¶ 212 (approval of Maersk-APM lease on June 2, 2000); MTFOF ¶ 303 (Maher lease commenced on October 1, 2000).

³⁵ EP-248 § 51, MTR-PAFOF ¶ 118 ("The within Agreement . . . constitutes the entire agreement between the Port Authority and the Lessee [Maersk-APM] on the subject of the

When PANYNJ informed Maher that it refused to provide Maher parity on September 23, 1999, PANYNJ *did not* justify its refusal to provide Maher the preferential Maersk-APM rates with its previous decision to induce ocean-carrier Maersk to remain in the port. Instead, PANYNJ expressly provided different reasons justifying the Maersk-APM preference: (1) the purportedly larger Maersk-APM terminal investment commitment and (2) the purportedly *unique* Maersk-APM cargo guarantee designated the “port guarantee.” MTFOF ¶¶ 242-244.

PANYNJ also erroneously attributes a litany of port improvements to its wisdom in retaining ocean-carrier Maersk in the port. PARB at 44-52. However, the evidence does not support PANYNJ’s assertion. PANYNJ’s own paid expert *did not* testify that the improvements were *caused* by ocean-carrier Maersk and he acknowledged that he did not identify and disaggregate the various obvious potential other causes and attribute a respective portion of improvements to each cause.³⁶ Therefore, PANYNJ’s argument falls prey to the *post hoc ergo propter hoc* fallacy. Merely because port improvements may have occurred *after* ocean-carrier Maersk concluded its new lease with PANYNJ in June 2000, does not mean that they occurred *because* of that event.

Furthermore, in the circumstance of PANYNJ’s purported improvement in market share *afterward*,³⁷ the evidence actually establishes that PANYNJ’s market share was improving

matter. . . . The Lessee agrees that no representations or warranties shall be binding upon the Port Authority unless expressed in writing in this Agreement.”)

³⁶ For example, PANYNJ expert economist Dr. Flyer discusses the Port Authority’s improved market share. However, he provides no evidence or analysis showing the *causes*. He merely observes that the market share was higher in 2000 than in 1990 and attributes the purported increase to existence of the lease, ignoring all other explanatory factors. Flyer Report, ¶¶ 41-46, PAFOF ¶ 158. Flyer Dep. at 312:7-14:3, MTR-PAFOF ¶ 158.4 (admitting that he did not perform an analysis differentiating the impact of different factors on market share improvement).

³⁷ PANYNJ argues that the port’s market share of U.S. Atlantic Coast container traffic had fallen from 29% in 1990 to 23% in 2000 and its share of U.S.-Canada Atlantic Coast container traffic had fallen from 25% to 21%. PANYNJ argues erroneously that this trend was reversed

beforehand and that PANYNJ's presentation of select irrelevant market share data erroneously exaggerates the purported decline and improvement in the port's relevant market share. The entire U.S.-Canada Atlantic Coast market share data used by PANYNJ's expert shows that its relevant market was 21% in 1998 and began improving in 1999, increasing by 2% to 23%, *before* the PANYNJ-Maersk-APM lease was approved on June 2, 2000³⁸ and long before key port infrastructure work was completed in 2004 and later years.³⁹ Furthermore, the data show that the port's container volume increase was *not* caused by Maersk- APM container volume.⁴⁰

PANYNJ erroneously selected purportedly "competitive" ports that were not competitors at all thereby exaggerating changes in the port's market share. PANYNJ's expert Dr. Flyer erroneously used container volumes for the entire U.S.-Canada and the U.S. Atlantic Coast. Flyer Report, ¶¶ 42-46, PAFOF ¶ 158. These data selections include irrelevant U.S. ports, including San Juan, Puerto Rico and Palm Beach and Miami, Florida and others that do not compete with the Port of New York and New Jersey for container traffic. The contemporaneous

beginning in 2000, following the execution of the EP-248 and EP-249 leases. PAFOF ¶¶ 158-159. The data shows the trend began improving in 1999, before the leases were concluded, not 2000.

³⁸ [http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=900_08PA02201894-912], MTR-PAFOF ¶¶ 158.2, 158.3.

³⁹ Flyer Dep. at 314:4-:15, MTR-PAFOF ¶ 158.4 (PANYNJ's expert economist Dr. Flyer admitted under oath that the port's Atlantic Coast market share improved between 1998 and 1999.); but PANYNJ's 45 foot channel deepening project was not completed until December 2004, March 9, 2007 PANYNJ Presentation for A. Shorris, et al. at 08PA01673630, MTR-PAFOF ¶ 20.1; and the new ExpressRail intermodal facility did not open until October 4, 2004, Dep. Ex. 386, MTFOF ¶ 459; Maher Supp. Resp. to PANYNJ Third Set of Interrogs., Dkt. 07-01, No. 3 (June 20, 2008), MTFOF ¶ 459.

⁴⁰ From 2000 to 2010, virtually none of the gain in the port's container throughput arose from an increase of containers through the Maersk-APM terminal. Between 2000 and 2010, while Maersk-APM's volume rose approximately 37%, "other terminal operators combined experienced an increase in volume . . . of approximately 79%." PAFOF ¶ 161. The same is true for the period between 1998 and 2000. Maersk-APM's volume *declined* by 19% while other terminal operators' combined volumes grew by approximately 49%. MTR-PAFOF ¶ 158.3. *See*, PA App. I-2593 and PA App. I-63 (Maersk-APM data) and overall volumes (<http://www.panynj.gov/port/pdf/port-trade-statistics-summary-2001-2010.pdf>).

evidence establishes that PANYNJ considered itself to be in competition with ports on the *North Atlantic* coast, *not* ports in Florida or Puerto Rico.⁴¹ By contrast, considering PANYNJ's market share of the North Atlantic Coast (defined as Hampton Roads, Virginia and further north), the data contradict PANYNJ's argument. Compared with other North Atlantic ports, the Port's performance in the 1990s is not consistently below par. In fact, for the period PANYNJ cites as significant, from 1990 to 2000, its market share actually *increased* from 54% to 56%. The Port's North Atlantic market share declined from 54% in 1990 to 51% in 1998. But between 1998 and 1999, *prior* to approval the Maersk-APM lease on June 2, 2000, the Port's North Atlantic market share grew 3%, increasing to 54% in 1999 before reaching 56% in 2000.⁴² PANYNJ's own pronouncement trumpeted its North Atlantic market share increase in December 1997.⁴³ This data establishes that at the time PANYNJ attributed the port's market share improvement in 1997 to other factors, including its "natural advantage as the port of entry to the largest and most affluent local market in the United States," and decisions to reduce rates.⁴⁴

2. PANYNJ Erroneously Argues That Purported "Risks And Benefits" Justify Lease Disparities

PANYNJ fails to acknowledge that in *Ceres* the port authority *unsuccessfully* advanced the same "risks" and "important benefits" justifications that PANYNJ argues here. *Ceres*, 27

⁴¹ MTR-PAFOF ¶ 158.2, Dep. Ex. 51; Dep. Ex. 281; the Drewry Report relied upon by the PANYNJ in PAFOF ¶¶ 224, 275; MT000168, MT002216 and MT002226; Dep. Ex. 152; Dep. Ex. 321.

⁴² <http://www.aapa-ports.org/Industry/content.cfm?ItemNumber=900>; 08PA02201894-912, MTR-PAFOF ¶ 158.2.

⁴³ PANYNJ Press Release No. 175-97 – Port of NY & NJ Trade Continues Strong Growth – Dec. 23, 1997, MTR-PAFOF ¶ 158.2 ("The port also enjoyed an increase in its North Atlantic market share for containerized cargo, up to 54.2 percent from 53.3 percent after three quarters in 1996.").

⁴⁴ PANYNJ Press Release No. 131-97 – Port of NY & NJ Trade Continues Strong Growth – Oct. 12, 1997, MTR-PAFOF ¶ 80 (Reporting an 11.7% increase in containerized cargo in the first half of 1997. Port Commerce Director Lillian Borrone attributed the improvement to enhancements to the "port's cost competitiveness.")

S.R.R. at 1260-61 (MPA asserted that Maersk’s departure from the port would be a “devastating” and that “its lease with Maersk brings important benefits to the Port, accomplishing its goals and resulting in a long-term relationship with Maersk.”). And, PANYNJ fails to acknowledge that the Commission previously soundly rejected both arguments.⁴⁵

Contrary to PANYNJ’s assertion, the evidence establishes that PANYNJ’s purported “benefits” to Maher were unrelated to the PANYNJ decision to subsidize Maersk-APM not to relocate to Baltimore. For example, PANYNJ has stipulated that its decision to confer “benefits” on Maher by consolidating Maher’s two separate marine terminals, Maher Tripoli Street and Fleet Street terminals into a single terminal of 443 acres which was much larger than any other terminal then in existence or contemplated, occurred long before PANYNJ secured ocean-carrier Maersk in the port on May 7, 1999.⁴⁶ Indeed, the evidence establishes that during 1996 and 1997 PANYNJ separately negotiated the consolidation of the two separate Maher terminals into one 443 acre marine terminal when it negotiated a new marine terminal for ocean-carrier Hanjin and that at the time PANYNJ considered the terms it provided to Hanjin and Maher as substantially the same. MTFOF ¶¶ 116-123. Therefore, the principal purported “benefit” to Maher that PANYNJ erroneously attributes to its decision to induce ocean-carrier Maersk to

⁴⁵ The Commission expressly rejected the risk presented to the Port of New York Authority that a major tenant, Weyerhaeuser, would leave the port if it did not retain its preferences in *Ballmill Lumber & Sales Corp. v. Port of N.Y. Auth.*, 10 S.R.R. 131, 138 (F.M.C. 1968). Likewise, the Commission rejected the general “benefits derived” justification PANYNJ raises here and instead enforces the comparative cost/benefits standard of reasonableness based on “actual use” of the service. *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 280-82 (1968); *James J. Flanagan Shipping Corp. d/b/a/ James J. Flanagan Stevedores v. Lake Charles Harbor & Terminal Dist. & Lake Charles Stevedores, Inc.*, 27 S.R.R. 1123, 1131 (F.M.C. 1997) (“The applicable legal standard is in *Volkswagenwerk*, in which the [Supreme] Court . . . stated that the inquiry does not look at whether a substantial benefit was enjoyed, but rather ‘whether the correlation of that benefit to the charges imposed is reasonable.’”).

⁴⁶ MTFOF ¶ 122 (PANYNJ proposed a consolidated terminal of 443 acres on June 26, 1997), Vickerman Report ¶¶ 10, 76; Dep. Ex. 135; Dep. Ex. 136; Dep. Ex. 48; Yetka Dep. at 146:7-47:12.

remain in the port is unrelated. To increase its own revenues, PANYNJ decided *years before* to consolidate Maher's separate terminals into a single terminal which would then be the largest single terminal with all of the attendant purported benefits of a consolidated larger terminal.⁴⁷

Moreover, PANYNJ offers no explanation of how PANYNJ's decision to consolidate the Maher Fleet Street and Tripoli Street terminals into one terminal differs from its like decision to consolidate the Maersk/UMS and Sealand terminals into one terminal. The PANYNJ-Maersk-APM lease negotiations resulted in the consolidation of the 160 acres of the Maersk/UMS terminals with the Sealand terminal which was expanded from 266 acres to 350 acres pursuant to the Maersk-Sealand request for proposal which PANYNJ satisfied.⁴⁸ Just like Maher, Maersk-APM was allowed to consolidate separate previously existing terminals into one terminal larger than each of the previously existing terminals with all the attendant "benefits."⁴⁹ Accordingly, Maher's consolidated terminal, *does not* justify PANYNJ's disparate treatment of Maher with respect to the lease differences which are the subject of its claims.

Nor does PANYNJ's erroneous invocation of the *post hoc* Empire Report stand for the proposition PANYNJ argues, i.e. that "favorable infrastructure attributes" account for the

⁴⁷ MTFOF ¶¶ 112, 114, 115, 121, 122, 130; Dep. Ex. 100 (PANYNJ Board resolution from July 31, 1997 approving development of plans to provide Hanjin "a new container terminal at the Elizabeth-Port Authority Marine Terminal, and the reconfiguration of certain neighboring terminals that is necessary for the creation of the new terminal"); Dep. Ex. 222 (Container Terminal Redevelopment Project Proposal stating that "[a]t this time [Nov. 24, 1997], the Port Commerce Department has letters of intent with both Maher and Hanjin to implement this [redevelopment] plan which assure a substantial increase in the rental rates for a majority of the container terminal acreage in New Jersey.").

⁴⁸ MTFOF ¶ 24 (prior to entering into lease EP-248, Maersk and SeaLand had separate terminals); 08PA00033678, Container Terminal Pricing, Terminal Specifications (April 18, 1996) (SeaLand terminal was formerly 266 acres); Dep. Ex. 69 (Maersk/UMS terminal 160 acres before consolidation with Sealand); MTFOF ¶ 156 (On July 6, 1998, PANYNJ submitted to SeaLand/Maersk a preliminary response to the RFP, proposing to expand the SeaLand terminal to 350 acres); MTFOF ¶ 28 (Maersk closed the former Maersk/UMS terminal at the end of March 2000 to consolidate with SeaLand).

⁴⁹ *Id.*

“differences in basic rental amount (and per acre rental amount)” at issue. PARB at 51-52. The evidence establishes that this *post hoc* litigation rationalization was not expressed by PANYNJ to Maher at the time PANYNJ denied Maher parity. MTFOF ¶¶ 245-247. And the evidence also establishes that PANYNJ did not perform such a particularized analysis at the time as required by the Shipping Act.⁵⁰ *Ceres*, 27 S.R.R. at 1273 (“[P]ort must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees.”). As previously set forth in the submissions of third-parties and Maher, including sworn declarations, deposition testimony, and PANYNJ documents, the report compared Maher and the Howland Hook terminal, not the Maersk-APM terminal.⁵¹ The plain language of the report establishes that Empire defined Howland Hook as part of “Port Elizabeth” as that defined term is set forth in the report, and expressly *did not* define Maersk-APM therein. MTR-PAFOF ¶ 272.3. Moreover, for two of the four key characteristics of the terminals expressly compared in the report as justifying the rent differences, Maher and Maersk-APM do not differ: (1) depth of channel, and (2) intermodal access.⁵² Therefore, PANYNJ brazenly misrepresents the report.

⁵⁰ Yetka 30(b)(6) Dep. at 324:17-28:7, MTFOF ¶ 280 (PANYNJ never put “pen to paper” to analyze different characteristics of terminals); PANYNJ Resp. to Maher’s Third Set of Interrogs., Dkt. 08-03, No. 33 (Oct. 8, 2008), MTFOF ¶ 280 (“[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.”)

⁵¹ MTR-PAFOF ¶ 273.2 (*citing* Maher’s Opp’n to PANYNJ’s Mot. to Compel at 23-28 (May 9, 2011); RREEF Reply to PANYNJ’s Opp. to RREEF Mot. to Quash at 7-9 (May 9, 2011); Maher Reply to PANYNJ’s Opp. to Empire Mot. to Quash at 8-14 (Apr. 26, 2011); Soos Reply to PANYNJ’s Opp’n to Soos’ Mot. to Quash at 4-10 (June 8, 2011); Empire Reply to PANYNJ’s Opp. to Empire Mot. to Quash at 9-10 (Apr. 26, 2011)).

⁵² MTR-PAFOF ¶ 273.2 (*citing* Maher’s Opp’n to PANYNJ’s Mot. to Compel at 27-28 (May 9, 2011); Soos Reply to PANYNJ’s Opp’n to Soos’ Mot. to Quash at 8 (June 8, 2011); Schley Dep. at 203:18-:21 (“The depth of channel to our facility and Maersk’s facility . . . I think were identical. They were both deep in the 45 and 50 feet at the same time.”), 205:13-:25 (“Again, if you’re talking about Holland [sic] Hook or PNCT, Maher and Maersk had far superior intermodal. But Maher and Maersk had absolute equal intermodal access. They built the new

And in all events, PANYNJ's argument is fatally flawed because it only considers the alleged "benefits" to Maher from PANYNJ's having retained ocean-carrier Maersk in the port and wholly ignores Maher's well-established benefits to the port as its largest independent terminal operator. Long before ocean-carrier Maersk committed to remain in the port on May 7, 1999, Maher's benefits to the port were legend. A leading maritime industry publication, *American Shipper* reported that "By the time of Michael [Maher's] death in 1995, Maher Terminals was the largest container terminal in the Port of New York and New Jersey."⁵³ According to PANYNJ's own internal board documents from February 1996:

Maher is the largest public container terminal operator in the Harbor. It has maintained an operating presence at Port Newark/Elizabeth since 1948, when the Port Authority assumed responsibility for the operation of Port Newark. Maher handles nearly 50 percent of the complex's annual container traffic.⁵⁴

Likewise, in November 1997, PANYNJ acknowledged that "Maher currently moves approximately 500,000 to 525,000 containers per year through its terminals. Maher handles the largest volume of containers of any terminal operator in the port."⁵⁵ And, by August 1999, *before* concluding its lease agreement with Maher, PANYNJ was fully aware that Maher had contracts from its customers at its two terminals for over 600,000 container moves per year many with long-standing ocean carrier customers of 20 years or more.⁵⁶ Furthermore, PANYNJ's skewed "benefits" argument completely ignores Maher's unmatched massive investment

ExpressRail right between the two terminals, so that we could get access and Maersk could get access, equally.")).

⁵³ *American Shipper* – New York Connection (Oct. 25, 2007), 08PA01789473 at 08PA01789474, MTR-PAFOF ¶ 172.

⁵⁴ Agenda Item from Board Meeting of 2.8.96 at 08PA00070617 at 08PA00070617, MTR-PAFOF ¶ 172. *See also* Agenda Item from 6.2.00 Board Meeting, Elizabeth-Port Authority Marine Terminal – Maher Terminals, Inc.-Lease Agreements, 08PA01773762 at 08PA01773767-8, MTR-PAFOF ¶ 172.

⁵⁵ MAHER-Questions & Answers, 11.20.97, 08PA01441003 at 08PA01441003, MTR-PAFOF ¶ 172.

⁵⁶ MTR-PAFOF ¶ 257 (*citing* Dep. Ex. 115; Dep. Ex. 201; Kerr Rebuttal ¶ 83; Kerr Report Exhibit 2).

commitment to the port. It is undisputed that Maher invested over \$465 million in leasehold improvements, including approximately \$100 million in equipment.⁵⁷ And, in 2007 PANYNJ required Maher to pay \$22 million and agree to make another \$114 million in terminal investments for PANYNJ's consent to a change of control. PAR-MTFOF ¶¶ 315-317, 322. Therefore, it is undisputed that Maher invested and committed to invest over \$465 million initially and \$136 million more in 2007 for a total of \$601 million. As a result of Maher investments and management decisions, PANYNJ's own expert witness testified, "[t]he terminal investments in physical infrastructure, equipment and information technology accomplished for the Maher Terminal from 2000 to 2010 have made the Maher Terminal one of the most productive and advanced marine container terminals in North America."⁵⁸ Even before these investments were completed, in 2004 PANYNJ had acknowledged Maher's "benefits" to the port by reporting that, "Maher is the largest single operator and has long been the '**Anchor**' tenant of the Port."⁵⁹ Specifically, PANYNJ emphasized Maher's superior management's "use of 1-over-3 high Straddle carriers resulting in a higher per acre usage efficiency than that of [marine terminal operator] PNCT"⁶⁰ According to PANYNJ, "[w]ith the current stack height factor of 3.3, Maher has employed a denser, more efficient operating strategy using the same general equipment."⁶¹ Yet, PANYNJ's skewed "benefits" argument completely fails to credit Maher's benefits to the port and therefore, is fatally flawed.

PANYNJ also argues erroneously that the testimony about "marine terminals" of Maher's expert witness, Dr. Kerr, "must be excluded and disregarded completely." PARB at 64-66. As an

⁵⁷ Kerr Rebuttal Report ¶ 12, MTFOF ¶ 322.

⁵⁸ Vickerman Dep. at 264:2-265:18, PAFOF ¶ 163.

⁵⁹ Port Strategic Business Assessment, Final Report, July 2009, 08PA01948525 at 08PA01948694, MTR-PAFOF ¶ 70.1.

⁶⁰ *Id.*, MTR-PAFOF ¶ 172.

⁶¹ *Id.*, MTR-PAFOF ¶ 172.

initial matter, PANYNJ misrepresents Dr. Kerr's qualifications, his opinions, and his purported testimony and argues that only an expert in "marine terminal logistics" can testify under Federal Rule of Evidence ("FRE") 702. PARB at 64-65. Yet, PANYNJ's only specific complaint about Dr. Kerr's opinions identifies a single statement at ¶ 80 of his report about physical and economic values of the properties which is well within Dr. Kerr's expertise.⁶² PANYNJ misapprehends the Commission's liberal standard on the admissibility of evidence set forth above. Additionally, even under FRE 702 jurisprudence the Kerr testimony is permitted because the courts recognize the practical reality that the admission of expert testimony in a bench trial, akin to these proceedings, is adjudicated under a lenient standard.⁶³

PANYNJ also argues erroneously that Maher's greater acreage in the resulting consolidated terminal as compared to Maersk-APM's consolidated terminal (445 acres versus 350) provided Maher a "huge benefit" which PANYNJ argues for the first time is worth \$425 million.⁶⁴ PARB at 49 n.58. Of course, this *post hoc* litigation rationalization was not expressed

⁶² Kerr Dep. at 16:23-17:19 (describing previous work on marine terminal projects); 22:5-31:23 (describing previous work on maritime valuation project); 32:25-33:2 (experience performing valuations of business assets).

⁶³ *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 312 (D. Vt. 2007) ("The Rules' liberal approach to the admission of expert testimony is particularly appropriate in a bench trial."). "Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702." *In re Salem*, 465 F.3d at 777. See also *United States v. Kalymon*, 541 F.3d 624, 636 (6th Cir. 2008) (finding a court's broad discretion in the matter of the admission or exclusion of expert evidence "is at its zenith during a bench trial"); *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."); *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) ("Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury.").

⁶⁴ PANYNJ's methodology and calculations are erroneous and misleading. For example, PANYNJ provides no authority or expert opinion as a foundation for its calculation. Notably, this approach was not offered by any of PANYNJ's *three* expert witnesses. PANYNJ erroneously uses the figure \$1.86 billion from the Empire Report as the purported "value" of the

by PANYNJ at the time it denied Maher parity. MTFOF ¶¶ 245-247. PANYNJ's new argument applies a 2007 sale price to justify PANYNJ's refusal to provide parity to Maher seven years earlier. The evidence establishes that (1) PANYNJ did not conduct any contemporaneous valuation of the leasehold properties, (2) land valuation was not the reason for the lease rate disparities, and (3) the HDR report prepared for PANYNJ in 1997 concluded that differential pricing was not warranted and in all events the land that eventually became Maersk-APM's leasehold was the most valuable land.⁶⁵ The contemporaneous evidence establishes that PANYNJ *did not* have a practice of levying higher rental rates for greater acreage. For example, in July 1997 PANYNJ proposed charging Hanjin basic rental for 106 acres, only about 5% less than proposed for Maher's 443 acre consolidated terminal because Hanjin would not be able to expand.⁶⁶ And, on June 2, 2000, PANYNJ's Board approved charging both Maher and Howland

Maier leasehold which it is not. The Empire Report was not a valuation. It was a purchase price allocation which expressly cannot be used for any other purpose. Additionally, Empire Report merely allocated the fair value of the purchased intangible assets and goodwill of the U.S. business. It allocated \$830 million to the category of lease rights and customer relationships, which were *inseparable*. Therefore, according to the Empire Report itself over \$1 billion of the \$1.86 billion paid by RREEF for Maher's U.S. operations which PANYNJ used in its calculation *does not* relate to the value of the Maher lease as argued erroneously by PANYNJ. And the remaining amounts cannot correctly be attributed to lease rights because they are *inseparable* from the customer relationships.

⁶⁵ Yetka 30(b)(6) Dep. at 324:17-328:7, MTFOF ¶ 280 (PANYNJ never put "pen to paper" to analyze different characteristics of terminals); PANYNJ Resp. to Maher's Third Set of Interrogs., Dkt. 08-03, No. 33 (Oct. 8, 2008), MTFOF ¶ 280 ("[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."); Dep. Ex. 46 (HDR Report determined that "[t]he question of a basis for fair, justifiable and acceptable differential pricing was not clearly answered by the survey"), MTFOF ¶¶ 98 & 99 (HDR Report terminal rankings in order of most to lease desirable physical characteristics: (1) SeaLand, (2) Tripoli Street, (3) Fleet Street, (4) New Terminal Fleet, (5) Maersk/Universal.); Kerr Rebuttal Rep. ¶ 65, MTR-PAFOF ¶ 134.2 (HDR Report, "the only study conducted contemporaneously" with lease negotiations, shows that the SeaLand terminal is the most valuable, followed by the Tripoli Street terminal and then the Maher Fleet Street terminal).

⁶⁶ MTR-PAFOF ¶ 228.1 (*citing* Dep. Ex. 52, 08PA00069952 (PANYNJ wrote "It is our intention to charge the same lease rates to all terminal operators at the New Jersey Marine Terminals

Hook \$39,750 per acre basic rent for materially differing acreages: 445 acres for Maher and 147 acres for Howland Hook.⁶⁷ In 2000, PANYNJ also charged P&O/ITO more basic rent, \$65,100 per acre, for less acreage.⁶⁸

PANYNJ's argument that ocean-carrier Maersk presented "risks" to leave the port not presented by Maher is nothing more than a proxy for its ocean-carrier *status*, an impermissible basis for the lease differences. *Ceres*, 27 S.R.R. at 1272 (finding the port authority's reliance on "status as a carrier, is patently unreasonable in light of Ceres' abilities to fulfill the terms of the Maersk lease"). And in all events, the Commission has repeatedly previously rejected the "risk" presented when a major tenant threatens to leave a port. In *Ballmill*, the Commission rejected the pleas of the Port of New York Authority that its major tenant, Weyerhaeuser, threatened to leave the port if not granted preferences. 10 S.R.R. at 138. The Commission has explained that it understands that "it is not uncommon for common carriers to change from one port to another for various reasons, including inducements offered." *In the Matter of Agreements No. T-2108 & T-2108-A Between the City of L.A. & Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., & Yamashita-Shinnihon S.S. Co.*, 10 S.R.R. 556, 564 (A.L.J. 1968). But, the Commission has rejected the risk that a common carrier, there an ocean-carrier, may change from one port to another as a valid transportation reason that would justify a violation of the

complex, subject to a recognition, as we have discussed, that the new Hanjin terminal is disadvantaged, because of its size and the inability to increase the size, absent an agreement with [Maher]."); Borrone Dep. at 251:5-56:17; Yetka Dep. at 155:1-161:5; Maher entered a non-binding agreement with PANYNJ in response to PANYNJ's letter representing that it intended to charge the same rental rates to all container terminal operators subject to the 5% rate concession for Hanjin, Dep. Ex. 137.)

⁶⁷ MTR-PAFOF ¶ 228.1 (*citing* Dep. Ex. 182, (June 2, 2000 board resolution approving Howland Hook's amended lease whereby "HHCT will pay a basic rental at the annual rate of \$39,750 per acre for the 147 acre terminal, which annual rate will escalate at 2% per year") & (Board resolution of the same date approving Maher's lease)).

⁶⁸ Dep. Ex 169 – 08PA00382960, MTR-PAFOF ¶ 228.1.

Shipping Act. *Id.* at 562-64 (disapproving port/ocean-carrier agreement in violation of the Shipping Act § 15 prohibiting “unjustly discriminatory or unfair” agreements and § 16 First for undue preference or prejudice for “requiring other users of the port to bear a portion of the cost of the use by the preferred customers” and for “offering services at less than cost”). Likewise, the Commission has rejected commercial inducements by ports to carriers to attract business that violate the Shipping Act. *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. 307, 330 (F.M.C. 1966) (“terminal charges . . . should be . . . dependent upon efficiency, economy, and soundness of operation . . . not in our view . . . conditioned on promotional inducements which dissipate essential revenues”). *See also Perry’s Crane Serv. v. Port of Houston Auth. of Harris Cnty., Tex.*, 16 S.R.R. 1459, 1480, 1492 (A.L.J. 1976), *partially adopted by the Comm’n, settlement approved*, 19 S.R.R. 517 (justifications for discrimination based on self-serving commercial grounds rejected).

Additionally, PANYNJ’s argument that differing “benefits” justify the lease disparities is purely *post hoc* litigation rationalization. Straining desperately to support its argument, PANYNJ reverses its previous position in this proceeding. PANYNJ highlights repeatedly that Brian Maher, was “well aware of the differences between the Maher and Maersk lease terms,” and furthermore that he “never believed that he had been the victim of unlawful discrimination” PARB at 4-5, 32, 49, 60, 73; PAFOF ¶¶ 277, 279. But, the doctrine of judicial estoppel bars PANYNJ’s contradictory argument reversing its position in the summary judgment motion⁶⁹ and

⁶⁹ PANYNJ’s Mot. for Summ. J. of Maher’s Lease-Term Discrimination Claims at 7; PANYNJ’s Responding Statement to the New Facts Contained in Maher’s Responding Statement and in Further Supp. of its Mot. for Summ. J. at 2-3; PANYNJ’s Reply Br. Pursuant to the Order to File Supplemental Brs. at 2, 6.

its Reply to Maher’s Exceptions pending before the Commission.⁷⁰ PANYNJ argued in its summary judgment motion and in its Reply to Maher’s Exceptions that Maher knew or should have known of its claim because of the differences in the lease terms and the Presiding Officer was misled by that argument.⁷¹ PANYNJ has now reversed itself and exposed its corruption. PANYNJ’s directly contradictory positions are manifest and contrary to law:

| PANYNJ Motion for Summary Judgment/Exceptions Position that Maher Knew/Should Have Known | Contradictory, November 9, 2011 PANYNJ Position that Maher Did Not Know/Should Not Have Known |
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| <p>“Maher not only had reason to know, but had actual knowledge of, any potential lease term discrimination claims . . . the day it signed its lease” PANYNJ’s Reply in Opp’n to Maher’s Exceptions to Initial Decision of May 16, 2011 Granting in Part Mot. for Summ. J. and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims at 15-16.</p> <p>“Maher’s own internal documents prove that it knew the basis of its lease-term discrimination claims more than three years prior to the commencement of this proceeding.” PANYNJ’s Mot. for Summ. J. of Maher’s Lease-Term Discrimination Claims at 7.</p> <p>“Maher had actual knowledge of the differences between the terms of the Maersk and Maher leases and was therefore on inquiry notice that it had a potential claim based upon an ‘undue or unreasonable preference.’” PANYNJ’s Responding Statement to the New Facts Contained in Maher’s Responding Statement and in Further</p> | <p>“Maher . . . knew that there had been no unlawful discrimination notwithstanding the marginal difference in rental rates.” PARB at 35 .</p> <p>“Maher . . . never believed that [it] had been the victim of unlawful discrimination” PARB at 32.</p> <p>“Maher recognized in 2000 and for the seven years thereafter that . . . the PA in no way discriminated against Maher.” PARB at 48.</p> <p>“Maher believed [it] has no legitimate basis for claiming that the rates it paid under its lease are in any way discriminatory.” PARB at 64.</p> <p>“Maher never believed it had cause to sue” PARB at 73.</p> <p>“Maher . . . never believed . . . that [its]</p> |

⁷⁰ PANYNJ’s Reply in Opp’n to Maher’s Exceptions to Initial Decision of May 16, 2011 Granting in Part Mot. for Summ. J. and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims at 15-16.

⁷¹ Initial Decision Granting In Part Motion for Summary Judgment and Dismissing Claim for Reparation Award Based on Lease-Term Discrimination Claims of May 16, 2001 at 29. According to the May 16 Order Maher’s “lease discrimination” claims accrued upon knowledge of a difference in lease terms: “On October 1, 2000, Maher knew (“discovered”) that it had been injured by the differences between Lease EP-248 and Lease 249 and knew that PANYNJ caused the injury.”

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| <p>Supp. of its Mot. for Summ. J. at 2-3.</p> <p>“[N]ot only did Maher have reason to know the facts upon which it bases its lease discrimination claims before signing its lease, but it had <i>actual</i> knowledge of such facts.” PANYNJ’s Reply Br. Pursuant to the Order to File Supplemental Brs. at 6.</p> <p>“Maher not only had reason to know, but had actual knowledge, of the allegedly unlawful differences between the APM and Maher leases well before the limitations period.” PANYNJ’s Reply Br. Pursuant to the Order to File Supplemental Brs. at 2.</p> | <p>terms violated the Shipping Act.” PARB at 49.</p> <p>“Maher believed . . . the differences between the APM/Maersk and Maher lease terms did not pose any violation of the Shipping Act. PAFOF ¶¶ 277, 279.” PARB at 62-63.</p> <p>“Maher . . . never believed that Maher had any claim under the Shipping Act. PAFOF ¶ 277.” PANYNJ’s Mem. of Law at 5.</p> |
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“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position” *N.H. v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). See also *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996).⁷² Having argued in its motion for summary judgment and Reply to Maher’s

⁷² Judicial estoppel is not limited to the courts alone, and can be applied in administrative proceedings such as the FMC. See *Muellner v. Mars, Inc.*, 714 F. Supp. 351, 357-58 (N.D. Ill. 1989) (applying judicial estoppel after noting that “[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.”). See also *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist. & Lake Charles Stevedores, Inc.*, 27 S.R.R. 1123 (F.M.C. 1997) (acknowledging the doctrine of judicial estoppel and deciding not to apply it because representations were made before the same tribunal, citing no authority and contrary to the weight of authority); *Alcohol Monitoring Sys., Inc. v. ActSoft, Inc.*, No. 07-cv-02261-PAB, 2011 WL 5075619, at *5 (D. Colo. Oct. 25, 2011) (“The Court agrees that judicial estoppel may be based on statements made in administrative proceedings.”). The Supreme Court and other courts agree that the balance of equities weighed in favor of applying judicial estoppel within the same litigation. *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000); *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 100 (3d Cir. 2000) (holding district court did not abuse its discretion by deciding that plaintiffs were judicially estopped from seeking further discovery by their counsel’s representation, in affidavit opposing motion to dismiss case, that plaintiffs did not require further discovery); *Shire Labs., Inc. v. Corepharma, LLC*, No. 06-2266, 2008 WL 4822186, at *9 (D.N.J. Nov. 3, 2008) (holding a patentee’s adoption of inconsistent

Exceptions that Maher *knew* of the discriminatory lease differences in 2000, PANYNJ cannot now reverse itself and argue that Maher *never knew* it was being discriminated against in violation of the Shipping Act. “Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000). “Judicial estoppel, . . . also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996). It seeks to “protect the integrity of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 749-50.⁷³ Likewise, the Commission rejects arguing contradictory and inconsistent positions.⁷⁴

And in all events, PANYNJ provided neither evidence nor authority that even if this *post hoc* litigation rationalization were true, which it is not, that the purported “benefits” constitute a valid transportation purpose under the Shipping Act. A valid transportation purpose for a port authority’s disparate pricing of the same service, e.g. letting land for a marine terminal in this

positions regarding infringement manifested bad faith sufficient for a finding of judicial estoppel); *De Puy Inc. v. Biomedical Eng’g Trust*, 216 F. Supp. 2d 358, 371-77 (D.N.J. 2001) (holding manufacturer was judicially estopped from arguing that testimony by an expert was unreliable in post-trial motion for judgment as a matter of law).

⁷³ See also *San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1568 (Fed. Cir. 1997) (finding that since the Claims Court denied summary judgment on the basis of plaintiff’s damages argument, plaintiff was estopped from claiming, later in the same proceedings, that damages should be calculated in a way that proved more favorable to it).

⁷⁴ See, e.g., *Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 903 (A.L.J. 2002) (“Complainants’ present claim . . . blatantly conflicts with their earlier position. . . .”); *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 S.R.R. 826, 850 (A.L.J. 1984) (“Prudential’s inconsistent theories of recovery seem to present an insuperable obstacle as a matter of law. . . .”); *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 315 n.5 (F.M.C. 2001) (“These are not legal arguments in the alternative. Rather, they are conflicting factual assertions.”).

case, refers to a *legitimate* difference between the cost or value of the service provided. In *United States v. Ill. Cent. R.R.*, 263 U.S. 515, 523-524 (1924), the Supreme Court established that cost and value of service are transportation conditions that may be used to justify a difference in rates. There, the Court enforced the Interstate Commerce Act (ICA). Subsequent decisions by the Commission establish that the ICA and the Shipping Act are alike in key respects such that the Commission cites ICA precedent in determining what constitutes a valid transportation purpose under the Shipping Act.⁷⁵

In circumstances not presented here, differing physical characteristics of leaseholds that affect transportation have also been found to justify disparate rates.⁷⁶ In *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (F.M.C. 1993) the Commission explained that lease rates for port land may differ as “justified by the circumstances.” In *Ceres*, the port authority made the same argument because of alleged “chrome contamination that caused the pavement to heave” at the Maersk/UMS terminal and *Ceres* was apparently aware of the circumstances when it agreed to the lease. *Ceres*, 27 S.R.R. at 1258, 1263 (“MPA also points out that the chromium

⁷⁵ Within a decade of *Illinois Central Railroad*, the United States Maritime Commission expressly adopted the Supreme Court’s ruling that the value and cost of service are valid transportation circumstances that can justify a difference in price. *Atl. Refining Co. v. Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242, 249-250 (U.S.M.C. 1932). The Commission explained that “[t]o paraphrase [*Illinois Central Railroad*]: To bring a difference in rates within the prohibition of these sections it must be shown that such a difference is not justified by the cost of the respective services, by their values, or by other transportation conditions.” *Id.* at 250. See also *N. Atl. Mediterranean Freight Conference - Rates on Household Goods*, 9 S.R.R. 775, 783 (F.M.C. 1967) (“It is well settled that the provisions of the Shipping Act closely parallel those of the Interstate Commerce Act”) (internal citations omitted).

⁷⁶ For example, in *Jordan Int’l Co. v. Flota Mercante Grancolombiana*, 5 S.R.R. 1077, 1081 (F.M.C. 1965), the Commission determined that the charges for shipping logs was roughly double that of lumber when measuring price against recoverable board feet, but allowed that the varying properties of the wood cargoes justified the rate difference. See also *Thatcher Glass Mfg. Co. v. Sea-Land Service, Inc.*, 6 S.R.R. 329, 332 (F.M.C. 1965) (upholding rate difference because the cost of providing the service differed); *United States v. Am. Exp. Lines, Inc.*, 5 S.R.R. 222, 232 (A.L.J. 1964) (finding a substantial difference in shipping characteristics of natural vs. synthetic rubber in the New York/Istanbul trade).

ore problem at the Universal terminal made the Ceres terminal more advantageous” than the Maersk/UMS terminal.). But, the Commission rejected the port authority’s purported justification that the land quality justified the disparity in the context of its rejection of the port authority’s “waiver” and “estoppel” defenses which the Commission rejected as inapplicable to the Shipping Act. *Ceres*, 29 S.R.R. at 372.

Also in circumstances not present here, the Commission has also ruled that ability to perform can be valid transportation purpose.⁷⁷ And, the ability to perform a contract may include the ability to fulfill a minimum volume guarantee.⁷⁸ But, it is beyond cavil that where volume discounts are offered, they must be available to all who can meet them. *Ceres*, 27 S.R.R. at 1273. (“[I]f a port determines to offer volume-type discounts, it must make them available to all users who meet the criteria.”). Moreover, the Commission looks behind the formalism of the label applied by a port authority to justify the disparity, e.g. the purported “essential terms of the Maersk Lease,” the “vessel call guarantee,” to consider the “practical significance” of a port user’s ability to satisfy the volume guarantee. *Id.* (The port authority’s “reliance on this particular guarantee to justify the disparate treatment of the two lessees is inconsistent with the

⁷⁷ *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, 25 S.R.R. 1213 (F.M.C. 1990) (failure to perform minimum volume commitments); *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 991, 993 (F.M.C. 1986) (reason to question reliable service); *Seacon*, 26 S.R.R. at 899-900 (reasonable concerns over the unsuccessful candidate’s ability to obtain a shipping line commitment; the unsuccessful candidate’s history of “inconsistent profitability,” the unsuccessful candidate had pursued lease concessions, the unsuccessful candidate had declined to enter into a commitment longer than a month-to-month tenancy, as compared to the successful tenant that offered to (1) pay higher rents, (2) provide increased volumes, and (3) guarantee a longer term commitment).

⁷⁸ In *Co-Loading Practices by NVOCCs*, 23 S.R.R. 123, 132 (F.M.C. 1985) the Commission approved discounts based on “time/volume rates, and consolidated cargo rates.” In its consideration of minimum volume requirements as applied to marine terminal operators, in *Ceres* the Commission explained that if “there were a realistic indication that Ceres would have been unable to fulfill [minimum container] requirements, MPA [the port authority] could have legitimately denied Ceres the more favorable lease terms.” 27 S.R.R. at 1273.

practical significance of [the marine terminal operator's] cargo commitment and its ability to attract customers.”) (emphasis added).

Moreover, distinctions based on *status*, e.g., proprietary versus non-proprietary cargo, government versus commercial cargo; ocean-carrier versus non-vessel operating common carriers (NVOCCs), ocean-carrier versus marine terminal operator, are *not* valid transportation purposes.⁷⁹ Fulfilling a collective bargaining agreement is not a valid transportation purpose for a price difference.⁸⁰ Nor is commercial convenience a valid transportation purpose justifying a disparity in rates offered as an inducement to retain or capture business.⁸¹

And in all events, if a valid transportation purpose exists the Commission will rule it unreasonable where “it goes beyond what is necessary to achieve that purpose.”⁸² In *Ceres*, the Commission held that “MPA’s reliance on Maersk’s vessel call guarantee, which does not guarantee anything more than Ceres could have guaranteed, as its only justification for treating the parties differently, is not proportional to the degree of difference in the rates, particularly where the difference so greatly disfavors the party committed to moving the substantially higher volumes of cargo.” *Id.* at 1275. The Commission acknowledged that in different circumstances

⁷⁹ See e.g., *Co-Loading Practices by NVOCCs*, 23 S.R.R. 123, 131-32 (F.M.C. 1985) (class distinction must be supported by specifically established transportation factors, not generalities).

⁸⁰ “50 Mile Container Rules” *Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, 24 S.R.R. 411, 414-15 (F.M.C. 1987) *aff’d sub nom N.Y. Shipping Ass’n, Inc. v. Fed. Mar. Comm’n*, 854 F.2d 1338 (D.C. Cir. 1988).

⁸¹ *Investigation of Free Time Practices- Port of San Diego*, 7 S.R.R. 307 (FMC 1966) (“Commercial convenience cannot justify a practice which is otherwise unreasonable,” and ordered the port to reduce its free time allowance *Id.* at 323-24; *Ballmill Lumber & Sales Corporation v. Port of N.Y. Auth.*, 10 S.R.R. 131, 137-38 (FMC 1968) (rejecting the port authority’s justification that the preferred tenant, Weyerhaeuser, threatened to leave the port if its preferences were discontinued). The Commission’s authority derives from seminal Supreme Court’s precedent establishing that an inducement to retain a customer that enjoyed access to other options was not a valid transportation purpose. *Wight v. United States*, 167 U.S. 512, 516-17 (1897).

⁸² *Distrib. Servs., Ltd. v. Trans-Pac. Freight Conference of Japan and its Member Lines*, 24 S.R.R. 714, 722 (1988).

a vessel call guarantee might be a valid transportation factor by which ports can distinguish between lessees. *Id.* at 1273. However, “in order to differentiate between port users and offer favorable lease terms to some users and not to others, . . . the port must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees.” *Id.*

PANYNJ provided neither authority nor evidence showing that: (1) the physical properties of the cargo, ocean-shipping containers, (2) the service provided, letting of land, or (3) differing characteristics of the land, actually justify the disparities here. Furthermore, PANYNJ failed utterly to correlate the disparate charges and other lease terms, e.g. approximately \$500 million in rent differentials, etc., to the purported “risks and benefits.” PANYNJ erroneously argues that the purported differing “risks and benefits” presented by ocean-carrier Maersk and marine terminal operator Maher justifies the differences. But, PANYNJ’s argument is nothing more than a proxy for impermissible reasons: (1) *status* and (2) *business convenience*.

None of PANYNJ’s *post hoc* litigation rationalizations constitutes a valid transportation purpose. PANYNJ’s principal *post hoc* justification, promoting the New York-New Jersey regional economy over the Baltimore-Maryland regional economy, is simply not a valid transportation purpose. As the Commission established in *Ceres*, “promoting the economic health of the region” is nothing more than “the port’s business decision.” *Ceres*, 27 S.R.R. at 1274 (treating the port’s “arrangements . . . in furtherance of its statutory responsibility of promoting the economic health of the region” as the “port’s business decision”).

According to PANYNJ’s argument, Maher benefited from PANYNJ’s decision to retain ocean-carrier Maersk in the port. PAFOF ¶¶ 74-85. But that decision is not the subject of Maher’s claim. Maher has not alleged that PANYNJ should *not* have retained Maersk in the port

or that a decision to retain Maersk in the port violated the Shipping Act. Maher's core discrimination claim brought in the Dkt. 08-03 proceeding is that once having retained Maersk in the port, PANYNJ violated the Shipping Act by later refusing to provide Maher parity. Therefore, any purported "risks" to the port presented by the relocation to Baltimore of the ocean-carrier Maersk or "benefits" that may have flowed to Maher and others in the port because of PANYNJ's decision to induce Maersk to stay occurred prior to PANYNJ's refusal to provide Maher parity and are irrelevant to Maher's claim. The evidence establishes that whatever "risks" may have been presented to the port by the relocation to Baltimore of ocean-carrier Maersk were avoided by May 7, 1999 when Maersk committed to stay.⁸³ Nor did PANYNJ provide any evidence that the purported potential "benefits" to Maher that PANYNJ belatedly alleges *post hoc* actually correlate to and justify the complained of lease disparities as compared to Maersk-APM, including the approximately \$500 million lease rate differential.

3. PANYNJ Erroneously Argues It Cannot Enforce Maersk-APM's Cargo "Guarantee"

PANYNJ stipulates that Maersk-APM failed to satisfy the purportedly *unique* Maersk cargo guarantee requirement of the "port guarantee" since the starting year alleged by PANYNJ, 2008. PAR-MTFOF ¶¶ 404-408. Moreover, PANYNJ stipulates that it has implemented and enforced the "port guarantee" as merely requiring an additional rent payment from Maersk-APM and not the actual transportation of the Maersk cargo through the port that purportedly made the "port guarantee" unique in the first place.⁸⁴ Having conceded these points, PANYNJ is left to introduce the *post hoc* litigation argument that mandatory injunctions and specific performance are not legally available. PARB at 78-80 ("courts do not grant the extraordinary remedy of

⁸³ Dep. Ex. 84, MTFOF ¶ 190.

⁸⁴ PAR-MTFOF ¶¶ 356, 364, 407-409 (port guarantee only enforced as an additional rent payment)

specific performance in any event where, as here, there is an adequate remedy at law,” or where the order “would require the kind of ongoing supervision that strains judicial resources.”). Thereby, PANYNJ misrepresents Maher’s position. Maher did not argue in its Initial Brief that PANYNJ must seek a court-ordered mandatory injunction to compel Maersk-APM or Maersk Line to specifically perform transportation of the cargo through the port. Therefore, PANYNJ’s straw man and the case law PANYNJ cites about courts’ purported “great disfavor” of mandatory injunctions and specific performance are irrelevant. PARB at 79.

Maher’s actual position, as contrasted to PANYNJ straw man argument, is straight forward: Now that PANYNJ has confessed that the purportedly unique Maersk Line cargo guarantee was not implemented and enforced in 2010 as such, the evidence establishes that the “port guarantee” is simply not a valid transportation purpose justifying the disparities. Maher already guarantees greater rent and container volume.⁸⁵

PANYNJ’s argument that courts disfavor mandatory injunctions and specific performance also ignores the PANYNJ’s remedies otherwise available. For example, Maersk-APM’s failure to perform the cargo guarantee requirement plainly violates the F.M.C. filed agreement, EP-248. Pursuant to 46 U.S.C. § 41102(b)(2), PANYNJ can file a Shipping Act complaint against Maersk-APM for its failure to operate in accordance with the agreement and seeking an “appropriate order” from the Commission directing Maersk-APM operate in accordance with the agreement. 46 U.S.C. § 41301(c) (“If the complaint is not satisfied, the Commission shall investigate the complaint in an appropriate manner and make an appropriate order.”).⁸⁶ PANYNJ also could have filed a complaint seeking reparations for actual injury

⁸⁵ MTFOF, Comparison EP-249 and EP-248 Lease Differences.

⁸⁶ *William J. Brewer v. Saeid B. Maralan*, 29 S.R.R. 9 (F.M.C. 2001) (noting that the Shipping Act empowers the Commission to issue an order directing a regulated entity to stop ongoing or

caused by Maersk-APM's violation and sought recovery of the purported "nearly \$50 billion" it argues turn on Maersk-APM operating in accordance with the agreement. PARB at 59; 46 U.S.C. §§ 41305 & 41309(a). But, in stark contrast to PANYNJ's vigorous enforcement of its Shipping Act claims against Maher in Dkt. 07-01, PANYNJ did not to pursue its Shipping Act remedies against Maersk-APM.

PANYNJ also mistakes its court remedies for specific performance, injunctive relief, or termination of the letting under EP-248. PANYNJ's lease with Maersk-APM reserves to PANYNJ the option to take enforcement measures beyond the rent penalty, including equitable measures such as specific performance.⁸⁷ PANYNJ also exaggerates the purported difficulty of obtaining an order requiring specific performance of EP-248. Governing New Jersey law provides for specific performance in these circumstances.⁸⁸ Additionally, New Jersey law

potentially future violations of the Act); *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1199, 1229-30 (A.L.J. 2003); *Crowley Liner Servs., Inc. v. P.R. Ports Auth.*, 29 S.R.R. 394, 409 (A.L.J. 2001).

⁸⁷ See PANYNJ Lease EP-248 with Maersk-APM § 30, MTFOF ¶ 368 ("All remedies provided in this Agreement shall be deemed cumulative and additional and not in lieu of or exclusive of each other *or of any other remedy available to the Port Authority at law or in equity*, and neither the exercise of any remedy, nor any provision in this Agreement for a remedy or an indemnity shall prevent the exercise of any other remedy.") (emphasis added).

⁸⁸ See *Ciba-Geigy Corp. v. Liberty Mut. Ins. Co.*, 149 N.J. 278, 294-96 (N.J. 1997); *First Nat'l State Bank of New Jersey v. Commonwealth Fed. Sav. & Loan*, 455 F. Supp. 464, 469 (D. N.J. 1978) (directing specific performance on contract for the financing of a shopping mall where damage to mall did not lend itself to accurate evaluation and that award of damages would fail to make plaintiff whole); *Fleischer v. James Drug Stores*, 1 N.J. 138, 146-47 (N.J. 1948) (finding that without specific performance, there would be irreparable injury because failure to perform contract would deprive plaintiff of a business with "peculiar and special value" defying damage calculation). Specific performance is ordered "where the subject-matter of the contract is of such a 'special nature' or 'peculiar value' that damages ascertained by legal rules 'would not be a just and reasonable substitute for or representative of that subject-matter in the hands of the party who is entitled to its benefit.'" *First Nat'l State Bank of N.J.*, 455 F. Supp. at 469 (quoting *Fleischer*, 1 N.J. at 146-47 and Pomeroy's Equity Jurisprudence (5th ed. 1941)) (citing as examples including performance of a unique lease in a particular shopping center). See also *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 159-60 (3d Cir. 1999) (finding, under Pennsylvania law, that damages from a breach of contract for business merger cannot be

permits specific performance in this percentage lease. *See Dover Shopping Ctr. v. Cushman's Sons, Inc.*, 63 N.J. Super. 384, 393 (App. Div. 1960). Percentage leases are leases where rent depends on a performance measure of the business conducted on the leased premises. In *Dover*, the New Jersey Superior Court Appellate Division, affirming the lower court's decision, found that specific performance was necessary because the damages involved in a percentage lease dispute were not readily measurable. *Id.* at 393. The court ordered specific performance mandating the defendant to re-open and operate a business in the shopping center. *Id.* at 393, 395. The court explained that the breach of a percentage lease agreement in addition to the cooperative nature of a shopping center where each store's success is dependent on the continued operation of the other stores, made it hard to accurately ascertain plaintiff's damages. *Id.* at 393. The court concluded that "remedy by way of damages at law would be impractical and unsatisfactory." *Id.* at 394. These are the same considerations PANYNJ argues with respect to its justification for keeping Maersk-APM as the "anchor tenant" operating under throughput-rent based lease to sustain the port and its terminal operators. *Dover*, 63 N.J. Super at 393.⁸⁹

PANYNJ repeatedly asserted that the Maersk-APM lease agreement is "unique" and that Maersk-APM is "an anchor tenant that presented unique risks and benefits to the Port." PARB at

accurately ascertained, and consequently do not constitute an adequate remedy at law in lieu of specific performance, because subject matter of the agreement, the business to be merged, is a unique asset which cannot be purchased on the open market).

⁸⁹*See also Mass. Mutual Life Ins. Co. v. Assoc. Dry Goods Corp.*, 786 F. Supp. 1403, 1417 (N.D. Ind. 1992) (granting injunctive relief to mall owner requiring "anchor tenant" to continue operating in shopping mall where extent of damage to mall's overall operation could not be predicted with certainty, and finding that immeasurable damages are irreparable even though they are "exclusively economic"); *Moorestown Mgmt., Inc. v. Moorestown Bookshop, Inc.*, 104 N.J. Super 250 (N.J. Super Ct. Ch. Div. 1969) (granting injunction directing tenant of shopping mall to join an association because of its importance to the overall success of the mall such that money damages would be difficult to calculate and because, "where there are no unique, skilled, or personal services required of the tenant," concerns about long term judicial supervision are inapplicable).

58, 60, 72; PAFOF ¶¶ 29, 74-94, 170. PANYNJ also argues that “the consequences of [the loss of Maersk-APM] to the competitiveness of the Port and associated regional economic activity would be *severe and irrevocable*.” *Id.* at 2 (emphasis added); *see also* PAFOF ¶¶ 87-88, 93. Likewise, PANYNJ asserts that the value of its agreement with Maersk-APM can be described as “nearly \$50 billion.” PARB at 59; PAFOF ¶ 94. PANYNJ argues that it needed Maersk-APM, to perform under its lease agreement or the result would be “disastrous” and “catastrophic.” PARB at 4, 24, 59, 60. By contrast, the additional rent payment remedy that PANYNJ has implemented and enforced for Maersk-APM’s failure to meet its cargo guarantee requirement is miniscule and fails to compensate the damages for the “nearly \$50 billion in harm to the region and to the economic vitality of the Port’s cargo transportation function” PARB at 28. PANYNJ’s arguments establish that New Jersey law provides for the specific performance remedy.

PANYNJ strains to salvage its argument that it cannot seek specific performance to defend its decision not to require the Maersk cargo, by misdirection to inapposite cases.⁹⁰

⁹⁰ In *Park Village Apt. Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011), the court applied an inapposite statutory scheme and required plaintiff and defendant to enter into *new* contracts. *O Centro Espirita Beneficiante Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), addressed a preliminary injunction not at issue here and in all events upheld it. The language PANYNJ quotes is mere inapposite *dicta*. Likewise, *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008), addressed a preliminary injunction. And, in that case the plaintiff failed because of an inability to show likelihood of success on the merits which PANYNJ satisfies because it is undisputed that Maersk-APM failed to provide the guaranteed cargo. *D.D. ex rel. V.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006) considered another inapposite statutory scheme and addressed a preliminary injunction where the plaintiff failed to show irreparable harm. Here, of course, PANYNJ argues strenuously that it will sustain irreparable harm absent Maersk’s cargo in the port. *Pritzker v. Yari*, 42 F.3d 53, 72 (1st Cir. 1994), applies the Puerto Rico Civil Code, but actually supports the availability of specific performance explaining that “a legal remedy (e.g., a sum of money) is presumptively favorable to an equitable remedy (e.g., specific performance), *so long as the former is adequate and ascertainable*.” *Id.* at 72 (emphasis added). Likewise, *INEOS Ams. LLC v. Dow Chem. Co.*, 378 F. App’x 74, 77 (2d Cir. 2010), accords with this general proposition. In *N. Ind. Pub. Serv. Co.*

PANYNJ argues specific performance would require supervision that would “strain judicial resources.”⁹¹ PARB at 80. However, the cases do not address the Commission’s enforcement of the Shipping Act or New Jersey law’s application in the present circumstances.⁹²

4. PANYNJ Erroneously Argues “Creditworthiness” Justifies Differences

PANYNJ stipulates to the facts that it imposed more onerous financial terms on Maher with respect to a higher financing rate than it charged Maersk-APM and the requirement that Maher post a security deposit not required of Maersk-APM which it subsequently increased to \$22 million, and furthermore, that these disparate requirements caused Maher injury.⁹³

PANYNJ argues erroneously that Maher did not plead the increase as a violation of the Shipping Act. PARB at 43. But, that mistakes the Commission’s liberal pleading standard discussed above. PANYNJ asserts that the increase was “bargained-for,” once again invoking the impermissible waiver and estoppel defense. *Id.* PANYNJ also argues erroneously that its *post*

v. Carbon Cnty. Coal Co., 799 F.2d 265, 279 (7th Cir. 1986), the court declined to order specific performance of a coal production contract because of circumstances not present here, specifically because the coal was no longer needed and the mine had since closed because the “coal costs far more to get out of the ground than it is worth in the market.”

⁹¹ *TAS Distributing Co. v. Cummins Engine Co.*, 491 F.3d 625, 637 (7th Cir. 2007); *Lowe’s Home Centers, Inc. v. LL & 127, LLC*, 147 F. App’x 516, 521 (6th Cir. 2005); *LLB Realty, L.L.C. v. Core Laboratories, LP*, 123 Fed. App’x 490, 492 (3d. Cir. 2005).

⁹² *Compare TAS Distributing Co.*, 491 F.3d 625, 637 (specific performance denied where performance required monitoring of vague and “indefinite requirements” such as whether a party required under contract to “all reasonable efforts” to manufacture and market subject technology) *with Dover Shopping Center*, 63 N.J. Super. at 395 (specific performance granted where lessor of space in shopping center requested only that lessee be compelled to reopen and resume business and did not request judicial supervision, requested relief was not so difficult as to preclude grant of specific performance) *and Fleischer*, 1 N.J. at 148 (specific performance granted for performance of existing negotiated contract since “so long as the contract subsists and complainant observes the stipulations on his part to be performed, service and supplies identical in nature, quality and measure with such as are rendered to all other participating members under the contract. This will reduce judicial superintendence to the minimum; and the supervision required to coerce obedience will offer no practical difficulties.”).

⁹³ PAR-MTFOF ¶¶ 319, 373 (conceding Maher was charged a higher financing rate) 325, 378 (conceding that Maher had to provide a \$1.5 million security deposit), 328 (conceding Maher’s security deposit was increased to \$22 million).

hoc litigation rationalization of “creditworthiness” justifies these disparities. PARB at 38, 42. However, PANYNJ *did not* express to Maher on September 23, 1999, when it refused Maher the Maersk-APM terms, that the refusal was based on creditworthiness.⁹⁴ The only purported “evidence” PANYNJ presents in support of its *post hoc* litigation rationalization is the untimely and improperly submitted Declaration of Steven A. Borrelli, dated November 4, 2011 and served on Maher on November 9, 2011. (“Borrelli Dec.”) The Borrelli Dec. *does not* state that PANYNJ told Maher at the time that the reason for the disparities and its refusal to provide Maher parity was Maher’s purportedly inferior creditworthiness. MTR-PAFOF ¶ 201.1.

PANYNJ submitted the Borrelli Dec. with its reply brief on November 9, 2011 in a failed attempt to plug a gaping evidentiary hole in its case created by PANYNJ’s own sworn interrogatory answers and the testimony of its 30(b)(6) witnesses. As Maher’s Initial Brief showed, PANYNJ failed to provide any *evidence* justifying the disparate treatment with respect to the financing rate and the security deposit. IB at 35, 37, 61-65. Despite PANYNJ’s *post hoc* litigation rationalization presented via the untimely Borrelli Dec., PANYNJ required Maher to pay a higher financing rate and provide a security deposit not required of Maersk-APM costing

⁹⁴ Brian Maher Dep. at 20:22-21:3, MTFOF ¶ 251; 198:17-199:17, MTFOF ¶ 242 (Q: What reason, if any, did she [Lillian Borrone] give you for the rates that she agreed to with you? A: Her reason was that Maersk provided a port guarantee, and that they -- Maersk was going to make larger investments in their facility than we were.). As Maher’s former General Counsel testified, . . . specifically, at that meeting [on September 23, 1999], we were told that our rates were not the same as the Maersk lease, but that there were specific reasons for that. And the two reasons, as I recall, they gave were -- one was the port -- that Maersk was making significantly greater improvements to the facility which would have justified that, and the other reason that they gave was that the port -- that Maersk was giving a port guarantee, something that we could not give to -- and that because of those reasons, the -- our rents would not be exactly the same. Schley Dep. at 66:25-67:13, MTFOF ¶ 243; 266:22-267:14, MTFOF ¶ 252 (PANYNJ did not provide Maher the opportunity to provide a cargo guarantee provided to Maersk-APM).

Maher \$16,272,057 without any particularized analysis of *comparative* financial capacity.⁹⁵ IB at 35, 37; *Ceres*, 27 S.R.R. 1273 (“port authority must ensure that any such differentiation is reasonable, based on the *particular facts and circumstances of the lessees*”) (emphasis added).

The evidence establishes that PANYNJ refused to provide Maher parity in these respects because of impermissible reasons: (1) *status* and (2) *business convenience*. IB at 39-57. Maher also showed that PANYNJ’s purported justifications for the disparities were untrue and in all events unreasonable even if true. IB at 61-65. The evidence shows the purported “corporate guarantee” from a parental entity is bogus. PANYNJ failed to provide any evidence showing *why* the so-called “parental” nature of the guarantee mattered, especially since Maersk, Inc. was not the “shipping giant” erroneously alleged by PANYNJ,⁹⁶ and it is not longer a parent of Maersk-APM.⁹⁷ Moreover, as a practical matter Maher already provides a corporate guarantee

⁹⁵ PANYNJ’s Response to Maher’s Third Set of Interrogatories, No. 42-43, MTFOF ¶ 327 (PANYNJ answered with respect to the security deposit that “. . . financing terms provided to Maersk were based upon creditworthiness and the negotiations of the parties, and that no formal, written analysis was prepared by the Port Authority with respect to Maersk’s assets prior to February 2000.”) and PANYNJ’s Response to Maher’s Sixth Set of Interrogatories, No. 26, MTFOF ¶ 327 (PANYNJ answered with respect to the security deposit that “any formal written analysis performed in consideration of Maersk’s creditworthiness prior to November 2000 would have been destroyed [in 9/11]. The Port Authority’s credit and collection department reviewed the assets of Maersk to make a determination that Maersk’s parental guarantee would support the value of the lease and had the wherewithal to meet any other lease obligations. . .”).

⁹⁶ PANYNJ’s Response to Maher’s First Set of Interrogatories, No. 1, MTFOF ¶ 379 (“Maher did not have or provide any other collateral or source of financial guarantee. By contrast, APMT’s parent, shipping giant, Maersk, Inc., provided a full guarantee of the entire APMT lease”); PANYNJ’s Response to Maher’s Second Set of Interrogatories, No. 1, MTFOF ¶ 379 (same).

⁹⁷ Joint Motion in Support of Settlement, Dkt. 07-01, Ex. A, ¶ 3 (Aug. 14, 2008), MTFOF ¶ 430 (PANYNJ consenting “to the transfer of Maersk Inc.’s interest in APMT to any affiliate of Maersk Inc.”); Dep. Ex. 16, EP-248, Contract of Guaranty, MTFOF ¶ 376-377 (financial and monetary obligations guaranteed by Maersk, Inc.); 08PA01795031, Email from Raeburn to Evans (June 2, 2008), MTFOF ¶ 427 (containing organizational charts where Maersk, Inc. is no longer a parent entity of APM Terminals); Hartwyk Dep. at 116:13-117:21, MTFOF ¶ 431 (PANYNJ agreed to change of Maersk-APM, Inc. affiliation *without* analysis of effect on APM’s “parental” guarantee).

of lease performance.⁹⁸ Indeed, PANYNJ's own expert's report opined that Maher had substantial assets at the time it entered into the lease agreement far exceeding the amount of the security deposit as originally imposed (\$1.5 million) or as later increased in 2007 and subsequent years to \$22 million today.⁹⁹

The Borrelli Dec.'s *post hoc* attempt to justify the disparate treatment of Maher ultimately fails because it lacks foundation, is unreliable, and not probative. Mr. Borrelli, declares that in his previous capacity as credit manager he was "familiar with the credit analysis and review that the PA performed specific to its leases with APM and Maher." Borrelli Dec. ¶ 2; MTR-PAFOF ¶ 201.2. The Borrelli Dec. errs from the start, incorrectly defining APM as meaning "Maersk Container Services, Inc." Borrelli Dec. ¶ 1, MTR-PAFOF ¶ 210. The company's actual name was "Maersk Container Service Company, Inc."

The declarant does not profess *personal* knowledge of the events. MTR-PAFOF ¶ 201.2. Nor did declarant *personally* perform any creditworthiness analysis with respect to the allegations. *Id.* The Borrelli Dec. only states that a deceased PANYNJ employee "performed a credit analysis or review of both APM and Maher." Borrelli Dec. ¶ 4, MTR-PAFOF ¶ 201.2. The Borrelli Dec. does not state it was written. The Borrelli Dec. also glaringly fails to address PANYNJ's previous false assertion in its interrogatory answers that Maersk-APM's parental

⁹⁸ Dep. Ex. 131, EP-249 §§ 25(a)(10)-(11) & (d), 28(a) & (b), MTFOF ¶ 324 (PANYNJ reserves all remedies at law and equity to enforce lease and Maher obligated to fulfill lease terms and notwithstanding termination Maher's lease obligations continue until the end of the lease term).

⁹⁹ According to PANYNJ's own expert, in 2000 Maher held approximately \$18.8 million in cash, cash equivalents, and government securities and had an enterprise value of \$547.7 million. Fischel Expert Report ¶¶ 26, 32, MTFOF ¶ 326. And, PANYNJ's expert opined that in 2007 when PANYNJ increased the security deposit requirement Maher's enterprise value was approximately \$1.8 billion. Flyer Expert Report ¶ 20 ("In July 2007, RREEF Americas, a subsidiary of Deutsche Bank, acquired the privately held Maher Terminals for approximately \$2.11 billion, of which \$1.86 billion is attributable to New Jersey Marine terminal."). In 2007, PANYNJ increased Maher's security deposit requirement and this greater requirement injures Maher. Kerr Expert Report ¶¶ 6-7, MTFOF ¶¶ 518, 521, 552.

guarantee was a “vastly greater source of security” because it was provided by “APMT’s parent, shipping giant, Maersk, Inc.”¹⁰⁰ As Maher showed, Maersk, Inc. was not a “shipping giant.” Maersk Line, the real “shipping giant,” *did not* provide the “parental” corporate guarantee. IB at 62-63; MTFOF ¶ 376. Declarant also fails to disclose his view that PANYNJ was “materially worse off with only the guarantee from Maersk, Inc.”¹⁰¹ (emphasis added).

The Borrelli Dec. also does not state what the purported “analysis or review” showed, or how it was performed. The Borrelli Dec. does not state that declarant ever *saw* or *verified* the purported “credit analysis or review;” nor does it state that he knows how Maersk-APM and Maher *compared* in terms of creditworthiness and on the measure of what criteria the disparate treatment was based, which is after all the essential point.¹⁰² Although the Borrelli Dec. confesses that PANYNJ charged Maher a “higher interest rate” of “25 basis points,” it fails to explain *why*. Borrelli Dec. ¶ 3, MTR-PAFOF ¶ 201.2. The Borrelli Dec. states merely that one of the “primary considerations” is “whether the Lessee has historically paid its obligations on time.” Borrelli Dec. ¶ 7, PAFOF ¶ 201. However, the Borrelli Dec. does not state that was the reason. Nor does it explain how that justified the disparate treatment here, especially in light of Maersk Container Service Company, Inc.’s contemporaneous arrearage in rent payments of over

¹⁰⁰ PANYNJ’s Response to Maher’s First Set of Interrogatories, No. 1, MTFOF ¶ 379 (“ . . . APMT’s parent, shipping giant, Maersk, Inc., provided a full guarantee of the entire APMT lease, a vastly greater source of security for the Port Authority than Maher’s half month’s rent”); PANYNJ’s Response to Maher’s Second Set of Interrogatories, No. 1, MTFOF ¶ 379 (same).

¹⁰¹ Dep. Ex. 117 (Sept. 20, 1999), MTR-PAFOF ¶ 210 (PANYNJ Port Commerce leasing manager Ed Harrison expressed concern about losing the Sea-Land corporate guarantee and wrote Lillian Borrone that Mr. Borrelli “expressed that the Port Authority is materially worse off with only the guarantee from Maersk, Inc. and no longer having the separate guarantee from Sea-Land. It is their general feeling that the Port Authority is now dealing with a smaller asset base.” Mr. Harrison’s memorandum to Ms. Borrone shows no comparative creditworthiness analysis was performed because Maher and Maersk-APM were being treated disparately because of *status*).

¹⁰² MTR-PAFOF ¶ 201.2.

\$3 million during 2000, before the Maher lease was concluded in October 2000.¹⁰³ Indeed, the Borrelli Dec.'s failure to disclose the contemporaneous Maersk-APM arrearages is particularly troubling and undercuts the veracity, reliability, and probative value of the self-serving declaration.

Contemporaneous PANYNJ evidence from Mr. Borrelli's predecessor, John G. Nolan, contradicts the Borrelli Dec. by showing that in 1997 PANYNJ concluded that Maher's circumstances warranted a *reduction* in the PANYNJ interest rate premium from 250 basis points to 175 basis points Maher paid for berth deepening construction rent.¹⁰⁴ Although the *post hoc* Borrelli Dec. fails to detail the application of PANYNJ's criteria, methodology, and standards for the "analysis or review," Mr. Nolan's contemporaneous memorandum highlights criteria not disclosed in the Borrelli Dec. that favored Maher: (1) "improved financial statements," (2) "their payment record for the past fifteen months," and (3) "their projected business plan."¹⁰⁵

Additionally, the Borrelli Dec. avers that "Maher had been in arrears for *two* years on its monthly rent payment for one of its two terminals and was still making arrearage payments during the credit review process." Borrelli Dec. ¶ 10, PAFOF ¶ 202. However, the Borrelli Dec. cites no evidence showing that the arrearage was for *two* years and the record evidence in this

¹⁰³ 08PA00035729 – March 6, 2000 memo from PANYNJ's Steven Borrelli re "Sealand Billing," MTR-PAFOF ¶ 201.3 (stating that "as of 3/6/00 Sealand's accounts receivable balance totals \$3.3 million (Terminal Rent – 1/00 – 3/00 \$798,000 per month \$2.4 million, Building Rent – retro 8/98 – 11/99 \$714,000 and 12/99 – 3/00 \$1800 \$45,000 per month)"); 08PA01442522-3, Letter from PANYNJ's Bob Evans to Maersk-APM's John Loepprich (July 20, 2000), MTR-PAFOF ¶ 201.3 ("I am advised that the rent, for Maersk's leasehold under Port Authority Lease No. EP-248, for the months of May, June, and July 2000 are outstanding The total for the three months is \$1,263,500.01.").

¹⁰⁴ 08PA00035988, Memorandum from John G. Nolan, PANYNJ Manager, Credit, Collection and Accounts Receivable Div. to PANYNJ's Bob Evans, "**MAHER TERMINALS BASIS POINT REDUCTION**" (Feb 12, 1997) (emphasis in original), PAFOF ¶ 203.

¹⁰⁵ *Id.*

proceeding is that it only pertained to the year 1990.¹⁰⁶ Moreover, contrary to the impression left by the Borrelli Dec., the arrearage amount was less than one-half the 1990 basic rent, not *two* years worth of basic rent.¹⁰⁷ But the Borrelli Dec. omits the facts regarding the arrearage, Maher's successful repayment, and PANYNJ's subsequent acknowledgement that the Maher Fleet Street rates PANYNJ imposed on Maher were commercially unsustainable.¹⁰⁸ Therefore, Maher's arrearage referenced by the Borelli Dec. was *not* the result of lesser creditworthiness, but instead, PANYNJ's unrealistic volume predictions. Contrary to the Borrelli Dec.'s suggestion, the facts evince Maher's creditworthiness, not a lack of creditworthiness.

Nor does declarant provide any evidence about any criteria, methodology, or standards that may or may not have been applied by the deceased PANYNJ employee and the results of applying each particular standard to each tenant. Declarant. offers only conclusory statements and his description of how the financing rate provided to Maher dropped from 300 basis points to 175 basis points "following negotiations," contradicts PANYNJ's argument that the 25 basis point disparity between the financing rates provided by PANYNJ had anything to do with creditworthiness. Borrelli Dec. ¶ 13, PAFOF ¶ 203.

¹⁰⁶ *Id.* (referencing Maher's "1990" arrearage), MTR-PAFOF ¶ 202.

¹⁰⁷ The arrearage amount was \$3,057,735, less than half the basic rent for 1990, \$6,410,000. Dep. Ex. 18; EP-148 Supp No. 2 § 4(b)(4), MTR-PAFOF ¶ 202 (Maher's 1990 basic rent pre-1991 revision set at \$6,410,000). See 08PA00035988, Memorandum from J. Nolan to R. Evans, Feb. 12, 1997 (identifying Maher's arrearage *only* as "its 1990 arrearage"), MTR-PAFOF ¶ 202.

¹⁰⁸ Maher's arrearage pertained only to the Fleet Street Terminal rent, which was by far the highest rent in the port, and resulted from the port's failure to increase container volume during the late 1980s and early 1990s. Maher entered into the 1986 Fleet Street lease agreement "based on the assumption that volume was going to continue to grow as it had, and volume did not continue to grow. In fact, volume – volume significantly reduced over the next few years." Brian Maher Dep. at 101:23-02:4. "These special circumstances led to Maher and the Port Authority renegotiating the terms of the Fleet St. lease in the early 1990s to reflect the actual market conditions at the time." Dep. Ex. 198 (Feb. 16, 1999 (letter explaining arrearage) Brian Maher Dep. 228:7-29:2. In 1991, PANYNJ cut the Maher Fleet Street basic rental rate in half and also agreed to a repayment plan for the arrearage which Maher satisfied in full with interest. MTR-PAFOF ¶ 202.

For the first time PANYNJ reveals through the Borrelli Dec. that PANYNJ's practice was that "the PA did not, and does not, permit a terminal operator to guarantee its own lease" *Id.* ¶ 10, MTR-PAFOF ¶ 211. The Borrelli Dec. states that PANYNJ's policy was to permit a guarantor to avoid the security deposit requirement under "certain circumstances" where the guarantor has "extensive assets separate from the Lessee's and sufficient to meet the obligations of the lease" *Id.* ¶ 6, MTR-PAFOF ¶ 211. But, the Borrelli Dec. identifies no reasons for this belatedly disclosed justification for disparate treatment which "does not permit a terminal operator to guarantee its own lease" MTR-PAFOF ¶ 211. Nor does he identify what "certain circumstances" means. *Id.* Therefore, PANYNJ has failed to carry its burden of proof to show that its disparate treatment of Maher was justified by a valid transportation purpose and that it is reasonably applied.

Likewise, with respect to PANYNJ's increase of Maher's security deposit from \$1.5 million to \$22 million in 2007, the Borrelli Dec. attributes the requirement to "PA's policy requiring one year's rent as a security deposit following a change of control." Borrelli Dec. ¶ 11-12, PAFOF ¶ 208. According to the Borrelli Dec., "APM did not have a similar change of control." Borrelli Dec. ¶ 11-12, PAFOF ¶ 208. While the Borrelli Dec. confirms the disparate treatment, it provides no evidence that the purported policy is a valid transportation purpose and that it was reasonably applied under the circumstances. The evidence establishes the contrary. PANYNJ consented to corporate ownership changes that divested Maersk, Inc. of ownership of Maersk-APM.¹⁰⁹ The vaunted "parental" quality of the Maersk, Inc. guarantee sworn to in PANYNJ's interrogatory answers as justifying the disparity was thereby rendered illusory.

¹⁰⁹ Joint Motion in Support of Settlement, Dkt. 07-01, Ex. A, ¶ 3 (Aug. 14, 2008), MTFOF ¶ 430 (PANYNJ consenting "to the transfer of Maersk Inc.'s interest in APMT to any affiliate of Maersk Inc."); Hartwyk Dep. at 116:13-117:21, MTFOF ¶ 431 (PANYNJ agreed to change of Maersk-APM, Inc. affiliation without analysis of effect on APM's "parental" guarantee).

Moreover, the financial capacity of Maersk, Inc. to satisfy the corporate guarantee that it provided for Maersk-APM in 1999 was thereby dramatically diminished because Maersk, Inc. no longer owned Maersk-APM or the other APM Terminals North American assets that it apparently did at the time the agreements were concluded. MTFOF ¶¶ 427-429. The Borrelli Dec. provides no explanation of how PANYNJ could approve these ownership changes that *diminished* the value of the illusory “parental” corporate guarantee all the while requiring a \$22 million security deposit from Maher.

The Borrelli Dec. was served on Maher over six months after the fact witness deposition discovery deadline expired. Therefore, consideration of it as evidence against Maher prejudices Maher, and it should be excluded for that purpose as required by the rules. Moreover, for the first time, PANYNJ has belatedly identified Mr. Borrelli as a knowledgeable person with respect to the disparities regarding the financing rate and the security deposit. Therefore, PANYNJ failed to supplement its responses to Maher’s discovery requests as required by FMC Rule 201(j). Furthermore, PANYNJ attempts to use the Borrelli Dec. to introduce new evidence not disclosed in its answers to Maher’s interrogatories or in the answers of its 30(b)(6) witnesses at deposition and for these reasons it should be excluded from consideration against Maher.

Pursuant to Maher’s 30(b)(6) deposition notices, PANYNJ designated 30(b)(6) representatives regarding the financial aspects of EP 248 and 249 and provisions of agreements EP-248 and EP-249 pertaining to investment requirements and security deposit requirements. However, neither of these PANYNJ 30(b)(6) witnesses, Cheryl Yetka and Lillian Borrone, provided the information PANYNJ belatedly offers for the first time long after the close of fact discovery in the Borrelli Dec. When questioned about the of security deposit discussions, Ms. Yetka explained that “the decisions were made by the credit manager,” and that even though she

was the designated 30(b)(6) witness, she did not “know what their standards were for assets and liabilities and minimum deposits on account.” Yetka 30(b)(6) Dep. at 309:22-310:7, MTR-PAFOF ¶ 206. In fact, she testified that she never saw any written analysis supporting PANYNJ’s decisions with respect to security deposits. *Id.* at 310:4-8, MTR-PAFOF ¶ 206. She then identified the “credit manager”—who generally made the decisions regarding security deposits—as Steven Borrelli. But, she did not identify the deceased employee who purportedly performed the review. *Id.* at 310:3, MTR-PAFOF ¶ 206.¹¹⁰ During Ms. Borrone’s deposition, she testified that as it relates to the differences in their lease terms, she said PANYNJ “never put pen-to-paper in an explicit statement that said, ‘This is why Maher should pay a difference.’” Borrone Dep. at 64:8-15, MTR-PAFOF ¶ 201.2. Nor did she explain the security deposits or interest rate calculations or creditworthiness as it relates to Maher or Maersk-APM.¹¹¹ PANYNJ is bound by its sworn answers to Maher’s interrogatories and the testimony of its corporate designees.¹¹² Belatedly realizing its failure to justify the disparate treatment during discovery,

¹¹⁰ “[T]he mere mention of an individual’s identity during the course of a deposition is not sufficient, to meet discovery disclosure requirements,” *Eli Lilly & Co. v. Actavis Elizabeth LLC*, 2010 WL 1849913, at *4 (D.N.J. May 7, 2010), and cannot excuse PANYNJ’s obligation to fully answer interrogatories and prepare its corporate witnesses pursuant to Rule 30(b)(6).

¹¹¹ Other PANYNJ fact witnesses identified by PANYNJ as knowledgeable, including Ed Harrison, PANYNJ’s former general manager of leasing, labor, and terminal development for the Port Commerce Department, and PANYNJ’s former CFO Charles McClafferty testified that they did not know. Although he was directly involved with Lillian Borrone in negotiating the terms of the Maher lease agreement, Harrison testified that he did not know why Maher was assessed a security deposit, but Maersk-APM was not. Harrison Dep. at 261:20-264:23, MTR-PAFOF ¶ 206 (Harrison stated that the “credit manager” who would have known the reasoning was probably Charlie McClafferty (as opposed to Mr. Borrelli). PANYNJ’s former CFO Mr. McClafferty, who supervised Mr. Borrelli, subsequently testified that he did not know the basis for the decision or the standards applied. McClafferty Dep. at 181:19-84:25, MTR-PAFOF ¶ 207.

¹¹² Commission’s Rule 12 provides that it will follow the Federal Rule of Civil Procedure (“FRCP”). FRCP 26(e) requires parties to “supplement or correct its disclosure or response” to an interrogatory. *See* Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii), (e); *In re LG Front Load Washing Mach. Class Action Litigation*, 2011 WL 13868, *2 (D. N.J. Jan. 4, 2011). And under FRCP

PANYNJ conjured up the untimely Borrelli Dec. which should be excluded, or if considered against Maher it should be discounted as lacking foundation, reliability, and probative value.

5. PANYNJ Erroneously Argues Other Differences Were Justified

PANYNJ erroneously argues that the remaining disparities between the Maersk-APM and Maher lease terms are either “groundless,” or “clearly justified and the product of different characteristics, needs, and priorities.” PARB at 10. Regarding the differences conceded, PANYNJ decries a “term-by-term comparison divorced from the complete picture of unique and unified lease packages. . . .” PARB at 86. Yet, as explained above, PANYNJ fails to carry its burden to provide such a comprehensive comparison of the “unified” lease terms showing that the “gives and takes” it *asserts* justify the lease term differences *actually do* justify them.

To the contrary, PANYNJ’s former Deputy Executive Director Shiftan testified that at the time PANYNJ did not “tote and tally” the lease term differences because “I don’t think the Port Authority felt that they had an obligation or a need to justify anything. . . . There was no need to look at the specific – at any of the specific components of either party’s lease in order to reach a conclusion that those leases were appropriate and fair.”¹¹³ PANYNJ’s expert Dr. Flyer confessed that he concluded it was “difficult if not impossible” to compare the Maher and Maersk-APM leases and therefore, he performed no such comparison. PARB at 35; Flyer Dep. 130:6-132:6, 162:8-163:7, MTR-PAFOF ¶ 239.

The Commission previously rejected the same “gives and takes” argument advanced by a

Rule 37(c), “[a] party that without substantial justification fails to disclose information required by Rule 26(a) or (e) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” Fed. R. Civ. P. 37(c)(1). The burden of establishing substantial justification and harmlessness is on the party that failed to make the required disclosure. PANYNJ failed to make the required showing.

¹¹³ Shiftan Dep. at 47:24-48:14; 50:12-51:14, MTR-PAFOF ¶ 239 (Confirming PANYNJ’s discrimination based on *status* he testified that “The Port Authority had the ability to differentiate Maher and Maersk based on the nature of their operations and the substance of the companies.”)

port authority with respect to lease negotiations. *Ceres*, 27 S.R.R. at 1263. In *Ceres*, the port authority argued that the “discrimination claims must fail” because the marine terminal operator “was aware of the terms” and “each party made several proposals and counter-proposals and each made concessions on a number of issues in order to reach an agreement.” *Id.* The Commission, however, pierced the port authority’s veil of “gives and takes” to analyze the lease rates and rule they were discriminatory despite other myriad lease provisions. *Id.* at 1272, 1275, 1276 (lease rates violated Shipping Act §§ 10(b)(11) and (12) and 10(d)). This is not surprising in circumstances such as the present where the burden of proof is squarely on the port authority to show a valid transportation purpose justifying the disparities. Hiding behind a veil of “gives and takes” does not satisfy the burden.

Additionally, according to PANYNJ: (1) Maher was not required to invest more than Maersk-APM, (2) Maher received more low cost PANYNJ financing than Maersk-APM, (3) the differing start dates and compliance periods, three years for Maher versus four years for Maersk-APM justify the Maersk-APM and Maher terminal guarantee disparities, and (4) Maher’s insistence on stevedoring automobiles justifies the First Point of Rest requirement and in all events Maher was not harmed by it. PARB at 10-11. Thereby, PANYNJ effectively confesses the disparities and fails to carry its burden to justify them with a valid transportation purpose.

a. PANYNJ Argues Erroneously That Maher Was Not Required To Invest More

PANYNJ unlawfully preferred and continues to prefer Maersk-APM over Maher with respect to the investment requirements. PANYNJ required and continues to require Maher to invest greater sums than it required Maersk-APM to invest and PANYNJ provided and continues to provide Maersk-APM more favorable financing terms than it provided Maher, requiring

Maher to repay the investments at a higher rate.¹¹⁴ PANYNJ concedes the 25 basis point financing rate difference and argues erroneously that it is justified by creditworthiness.¹¹⁵ The evidence establishes that Maher invested \$459,000 per acre (\$204 million divided by 450 acres) versus Maersk-APM which invested \$408,000 per acre (\$143 million divided by 350 acres). Including the sums that did not have to be repaid, the total amount per acre for Maher was \$561,798 (\$250 million divided by 445 acres) and the total for Maersk-APM was \$494,286 (\$173 million divided by 350 acres).¹¹⁶ PANYNJ also stipulates that Maher invested far more in its marine terminal operation than Maersk-APM. Maher invested over \$450 million in leasehold improvements, including approximately \$100 million in equipment.¹¹⁷ By contrast, according to PANYNJ, Maersk-APM invested only \$143 million.¹¹⁸ PANYNJ stipulates that Maersk-APM also failed to perform \$50 million of its required investment and that in 2007 PANYNJ required Maher to pay \$22 million and agree to make another \$114 million in terminal investments for PANYNJ's consent to a change of control. PAR-MTFOF ¶¶ 315-317, 322. Therefore, it is undisputed that as a practical matter Maher invested and committed to invest approximately \$465 million initially and \$136 million more in 2007 for a total of \$601 million. This is far more than Maersk-APM.

¹¹⁴ MTFOF, Comparison EP-249 and EP-248 Lease Differences.

¹¹⁵ PAR-MTFOF ¶¶ 319, 373.

¹¹⁶ Kerr Report ¶ 49, MTFOF Comparison of EP-249 and EP-248 Lease Differences; PANYNJ's Responses to Maher's Third Interrogatories, No. 37, MTFOF ¶ Comparison of EP-249 and EP-248 Lease Differences; MTR-PAFOF ¶ 196.3. The PANYNJ numbers differ from Dr. Kerr's numbers because his calculation of per acre investment includes the sums that did not have to be repaid while PANYNJ's numbers do not.

¹¹⁷ PAR-MTFOF ¶ 322; Kerr Rebuttal Report ¶ 12.

¹¹⁸ Kerr Report ¶ 49, MTFOF Comparison of EP-249 and EP-248 Lease Differences; PANYNJ's Responses to Maher's Third Interrogatories, No. 37, MTFOF Comparison of EP-249 and EP-248 Lease Differences. The PANYNJ numbers differ from Dr. Kerr's numbers because his calculation of per acre investment includes the sums that did not have to be repaid while PANYNJ's numbers do not.

PANYNJ disputes Maher's presentation of the evidence as "very misleading." Nevertheless, the evidence establishes that PANYNJ erroneously employs misdirection to argue Maher was not required to invest more than Maersk-APM. PARB at 37. PANYNJ's slights of hand involve its misrepresentation of the (1) basis for the "free capital" provided to the tenants and (2) the purportedly optional nature of the Class C work identified in the Maher lease. PARB at 36-37. First, PANYNJ erroneously equates the "free capital" provided to Maher with the "free capital" provided to Maersk-APM when they represent substantively different credits. In Maersk-APM's case, the \$30 million "free capital" was part of PANYNJ's \$120 million (\$336 million nominal) concession to ocean-carrier Maersk because of *status*. MTFOF ¶ 202. By contrast, Maher's \$46 million "free capital" compensated Maher for improvements Maher made to the Tripoli Street terminal which Maher was required by PANYNJ to surrender to satisfy Maersk-APM's demand for 84 more acres and an adjoining intermodal rail facility.¹¹⁹ PANYNJ does not actually dispute the contemporaneous documentary evidence and testimony of its own 30(b)(6) witness and former Port Commerce Director Lillian Borrone who explained that regarding construction funding "the approach they [PANYNJ] would like to present would be as a credit for what we [Maher] give up at Tripoli Street").¹²⁰ Ms. Borrone's evidence is likewise fully corroborated by the testimony of Maher executives who negotiated the lease with her, Messrs. Brian Maher, Roger Nortillo, and Scott Schley.¹²¹ Instead, PANYNJ offers only an objection that the evidence is "misleading." But such an objection without any contrary evidence, does not satisfy PANYNJ's burden to show that the difference was justified by a valid

¹¹⁹ Kerr Rebuttal ¶ 33, MTFOF ¶¶ 317-318.

¹²⁰ Dep. Ex. 144, MTFOF ¶¶ 317-318 (PANYNJ's Port Commerce Director Borrone explained that regarding construction funding "the approach they [PANYNJ] would like to present would be as a credit for what we [Maher] give up at Tripoli Street").

¹²¹ *Id.*

transportation purpose. Second, PANYNJ's mischaracterization of Maher's Class C work as "optional" as compared to Maersk-APM's "mandatory" Class A and B work elevates form over substance contrary the Commission's admonition that it will consider the "practical significance" and not just formalistic labels. *Ceres*, 27 S.R.R. at 1273 (The port authority's "reliance on this particular guarantee to justify the disparate treatment of the two lessees is inconsistent with the *practical significance* of [the marine terminal operator's] cargo commitment and its ability to attract customers.") (emphasis added). The evidence establishes that as a practical matter Maher's so-called "optional" Class C work was neither substantively nor practically different from Maersk-APM's "mandatory" investments which Maersk-APM did not perform anyway. Maher's purportedly "optional" Class C work was comprised of the same work that made up Maersk-APM's purportedly mandatory Class A and B work.¹²² Moreover, PANYNJ overlooks the evidence establishing that Maersk-APM did not perform the so-called "mandatory" Class A and B work in all events and that in 2008, forgave Maersk-APM's failure and provided Maersk-APM another \$23 million preference by allowing Maersk-APM to postpone completion of \$50 million of the Class A work from 2006 to 2017. MTFOF ¶¶ 69-72. Additionally, the only difference between the types of investments identified in the Class A, B, and C categories is the option for Maher to purchase cranes which it did not do. Therefore, the only purported distinction is one without a substantive difference. Nor does PANYNJ provide any evidence that there is any practical significance regarding this purported distinction that justifies the disparity.

¹²² Compare EP-249 § 7(a)(1) with EP-248 § 7(a)(1) (projects (i) and (ii) of Maher's Class C work mirrors project (i) of APM's Class A work (structural strengthening of crane rail foundation); projects (iii) and (iv) of Maher's Class C work mirrors project (v) of APM's Class A work (upgrade of electric services); project (v) of Maher's Class C work mirrors project (vii) of APM's Class B work (construction of a maintenance and repair building); project (vi) of Maher's Class C work mirrors project (viii) of APM's Class B work (upgrade of gate complex); and project (vii) of Maher's Class C work mirrors project (ix) of APM's Class B work (demolition of buildings)), MTR-PAFOF ¶ 192.2.

b. Maher’s Receipt of More PANYNJ Financing Does Not Justify The Disparity

PANYNJ also mentions merely in passing that Maher received “proportionally more cheap PA financing than APM/Maersk.” PARB at 36. However, PANYNJ does not follow-up that mere assertion with any substantive explanation about why that matters or justifies the disparity in financing rates. In effect, the substance of PANYNJ’s comments (PARB at 36) merely serve to confirm Maher’s position that “PANYNJ required and continues to require Maher to invest greater sums than it required Maersk-APM to invest and PANYNJ provided and continues to provide Maersk-APM more favorable financing terms than it provided Maher, requiring Maher to repay the investments at a higher rate than PANYNJ provided APM.” IB at 31. Nor does PANYNJ show why requiring Maher to invest greater sums at higher interest rates than Maersk-APM justifies the disparities. Therefore, PANYNJ has failed to carry its burden to show that these disparities are justified by a valid transportation purpose.

c. PANYNJ Argues Erroneously That The Rent and Terminal Guarantees Cannot Be Compared Thereby Conceding Its Failure To Carry Its Burden

PANYNJ effectively concedes the disparate and more onerous throughput requirements imposed on Maher as compared to Maersk-APM. PAR-MTFOF ¶¶ 313, 353. There is no dispute that PANYNJ required and continues to require Maher to provide greater gross throughput guarantees and suffer more severe penalties than it required of Maersk-APM. IB at 35-36. PANYNJ argues erroneously that Maher’s evidence of the disparity is “an oversimplification,” “completely false,” and the terms “must be evaluated separately.” PARB at 38-39.

However, PANYNJ’s argument concedes Maher’s position that it “guarantees PANYNJ

both more throughput rent and terminal throughput volume.”¹²³ IB at 36. PANYNJ’s only point in response to Maher’s much greater gross rent and volume guarantees is that “APM/Maersk’s rent guarantee in the third period . . . is higher per acre than Maher’s, an obvious advantage for *Maher*.” PARB at 39. But, PANYNJ does not explain why that matters, especially since it is undisputed that Maher’s terminal guarantee throughput number during the same period is almost double that required of Maersk-APM on a per acre basis. PARB at 39-40; PAR-MTFOF ¶¶ 313, 353 (conceding throughput volume differences). The undisputed evidence shows that Maher’s per acre throughput guarantee required by the terminal guarantee provision is almost double Maersk-APM’s (2,022 versus 1,114) for the last 15 years of the 30 year lease term. PAR-MTFOF ¶¶ 313, 353. By contrast Maersk-APM’s greater per acre throughput rent guarantee rate is only marginally higher than Maher’s (2,000 versus 1,742), and Maher’s gross rent guarantee remains much higher than that of Maersk-APM during the same period.¹²⁴

PANYNJ concedes that Maher’s throughput rent guarantee exceeds the Maersk-APM guarantee in each period by a minimum of (1) 75,000 containers in the third period, (2) 150,000 containers in the first period, and (3) a maximum of 175,000 container in the second period. PARB at 39-40; PAR-MTFOF ¶ 312, 352. Likewise, Maher’s terminal guarantee requirements are much higher than those of Maersk-APM. PARB at 40. PANYNJ also concedes that during the third period, which is half the lease term (15 years), Maher guarantees annually 510,000 more containers than Maersk-APM (900,000 versus 390,000). PAR-MTFOF ¶ 313, 353. And during the first two terminal guarantee periods, Maher also guarantees more containers annually than Maersk-APM: 70,000 more in the first period and 90,000 more in the second period. *Id.*

¹²³ PAR-MTFOF ¶¶ 313, 353 (conceding throughput volume differences); PAR-MTFOF ¶¶ 312, 352 (conceding rent differences); Kerr Expert Report ¶ 39, MTFOF ¶ 350 and Kerr Report Ex. 2, PAFOF ¶ 193 n.7 (explaining and applying the exempt amounts for comparison).

¹²⁴ MTFOF, Comparison of EP-249 and EP-248 Lease Differences.

PANYNJ concedes further that on a per acre basis, Maher guarantees almost twice as many containers for half the lease term, *i.e.* for the fifteen-year third period of the terminal guarantee: 2,022 containers for Maher and only 1,114 containers for Maersk-APM when on a per acre basis. PARB at 40; PAR-MTFOF ¶ 313, 353. Consequently, the evidence establishes that Maher guarantees PANYNJ both more throughput rent and terminal throughput volume than Maersk-APM.¹²⁵ PANYNJ does not dispute these facts or the evidence establishing them. PARB at 38-42.

PANYNJ merely suggests that differing guarantee start and “trigger” dates distinguish the differing container throughput requirements. PARB at 40-41. But, PANYNJ fails to carry its burden to provide any evidence showing that these differing start and trigger dates justify the disparities in container throughput requirements. *Id.* For example, with respect to the start date, PANYNJ fails to acknowledge that as a practical matter they are the same. From the start, PANYNJ committed to completion of the 50 foot dredging before 2015 and current the completion of the 50 foot dredging is still scheduled before 2015.¹²⁶

Likewise, with respect to the periods of shortfall that “trigger” PANYNJ’s right of leasehold termination, PANYNJ fails to provide evidence that the purported difference of “two

¹²⁵ Kerr Expert Report ¶ 39, MTFOF ¶ 350 and Kerr Expert Report Ex. 2, PAFOF ¶ (explaining and applying the exempt amounts for comparison).

¹²⁶ MTR-PAFOF ¶ 189 (*citing* 07-01 Dep. Ex. 122 at APM01299 (Aug. 14, 1998) (stating that, regarding the 50 foot dredging, “[c]urrently, the Port Authority estimates that construction would be initiated in 2003, as the 45-foot project is being completed. Overall construction to 50 feet in the Kill van Kull and Newark Bay Channels would require approximately six years with the project being completed in 2009.”); Memorandum from PANYNJ’s R. Larrabee to A. Coscia, April 25, 2003 (“Critical to the Port’s ability to remain competitive is the Harbor Deepening Project that will provide 50-foot channels throughout the harbor by 2014.”) at 08PA01717620,; Presentation by PANYNJ’s Peter J. Zantal, April 10, 2008 (estimated completion date for the entire Harbor Deepening Project to be 2014) at 08PA01733479; PANYNJ Emails with Press Release Article, Feb. 16, 2011 (Christopher Ward discussing budget proposals to ensure the Harbor Deepening Project stays on schedule and is completed in 2014) at 08PA01963191)

consecutive years” for Maersk-APM versus “three consecutive years” for Maher actually justifies the container throughput disparity that is the subject of Maher’s Complaint. As an initial matter, PANYNJ fails to disclose that this purported difference upon which it relies does not even exist prior to 2015.¹²⁷ IB at 36. Nor does PANYNJ explain why what it describes as the “extremely onerous” PANYNJ penalty against Maher, termination of the entire leasehold which is based on almost double per acre throughput as compared to Maersk-APM during the same period, is justified by a valid transportation purpose. Instead, PANYNJ concedes that the *real* comparable shortfall period for Maersk-APM is four years not three. PARB at 41-42 (“In Maher’s case the PA’s right to terminate is for the entire leasehold, *whereas in APM/Maersk’s case, absent a failure to hit even lower levels, the right of termination applies only to the 84 acres . . .*”) (emphasis added); PAFOF ¶¶ 185, 188. As the evidence establishes, Maher could be forced to return the entire marine container terminal to PANYNJ if it fails to meet its Terminal Guarantee for two consecutive years (prior to 2015), and three consecutive years during the lease’s third Terminal Guarantee period after 2015, when Maher’s terminal guarantee per acre is nearly double that of Maersk-APM.¹²⁸ For Maersk-APM, if the Terminal Guarantee is not met for two years, PANYNJ can reclaim only a portion of the terminal (PANYNJ contends only 84 acres of the 350 acre terminal) for an initial shortfall and can only reclaim the entire facility after a shortfall exceeds *even lower* levels after an additional two years. PAFOF ¶¶ 185. Therefore, as a practical matter, PANYNJ concedes that the penalty for Maersk-APM’s failure to satisfy its two-stages of terminal guarantee minimums means that it does not risk losing the

¹²⁷ Dep. Ex. 131 (EP-249) § 42(d)-(e), MTFOF ¶ 314 (Maher’s Terminal Guarantee); Dep. Ex. 16 (EP-248) § 43(c)-(d), MTFOF ¶ 354 (APM’s Terminal Guarantee); Kerr Report ¶ 43, MTFOF ¶ 314 & 354.

¹²⁸ MTFOF ¶ 312 (*citing* Dep. Ex. 131 (EP-249) § 42(d)-(e); Kerr Report ¶ 43; Flyer Report ¶ 37); MTFOF, Comparison of EP-249 and EP-248 Lease Differences.

entire terminal for four years.¹²⁹ PARB at 41-42. PANYNJ concedes that to face termination of its entire leasehold for two years of shortfall it would have to fail to satisfy terminal guarantees far lower than Maher's both gross and on a per acre basis. PAFOF ¶¶ 185. For example, during the third period, i.e. the last half of the lease term or 15 years, when Maher's guarantee amount per acre is 2,022, in order for APM-Maersk to face the equivalent threat of termination of its leasehold it would have to fail to achieve a per acre throughput of 686 containers per acre. PARB at 41-42 n. 49 (240,000 containers divided by 350 acres equals 686 containers per acre); PAR-MTFOF ¶¶ 313, 353. In the end, PANYNJ is left only to argue that the difference is "without great significance" because of the low risk the levels will be breached. PARB at 41-42. While that may be a reason for PANYNJ to abandon the terminal guarantee requirement entirely, it provides no justification for PANYNJ's disparate treatment of Maher with respect to the guarantee penalty. Having decided to impose a terminal guarantee requirement, the Shipping Act requires that PANYNJ treat Maher with equality. *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.*, 11 S.R.R. 309, 317 (F.M.C. 1969) ("[t]he manifest purpose of . . . the Shipping Act is to impose upon 'persons subject to this Act' the duty to serve the public *impartially*. In no other area is this requirement of *equality of treatment* between similarly situated persons more important than in the terminal industry.") (emphasis added).

d. PANYNJ Argues Erroneously That Maher's Automobile Stevedoring Business Justified the First Point of Rest Disparity

PANYNJ concedes the leases differ with respect to the requirement for a first point of rest for the loading and offloading of automobiles.¹³⁰ PANYNJ concedes it *did not* require

¹²⁹ Dep. Ex. 131 (EP-249) § 42(d)-(e), MTFOF ¶ 314 (Maher's Terminal Guarantee); Dep. Ex. 16 (EP-248) § 43(c)-(d), MTFOF ¶ 354 (APM's Terminal Guarantee); Kerr Report ¶ 43, MTFOF ¶¶ 314 & 354.

¹³⁰ PAR-MTFOF ¶¶ 330 (not denying Maher's lease has a first point of rest), 375 (not denying that Maersk-APM's lease does not have a first point of rest)

Maersk-APM to provide a first point of rest for the loading and unloading of automobiles, but *did* impose this requirement on Maher. PARB at 43 (the “first point of rest for automobiles . . . has no cognate in the APM/Maersk lease”); *supra* n.130. The first point of rest requirement mandated that Maher set aside a berth and ten acres of its terminal for use by automobile processors for the loading/unloading of automobiles upon 48 hours notice.¹³¹ The evidence establishes that as a practical matter, this disparate requirement prejudiced Maher which could not use the first point of rest berth and acreage for container yard operations and storage. As a practical matter, it required Maher to stevedore automobiles it did not want to stevedore.¹³²

PANYNJ erroneously suggests by misrepresenting evidence that the disparity was not important and that Maher simply ignored it. PARB at 44. The evidence establishes that Maher did not need and opposed the requirement imposed by PANYNJ for a first point of rest in order to service automobile processors in the loading or unloading of automobiles.¹³³ PANYNJ does not dispute that PANYNJ requires Maher to pay much higher rents than Maersk-APM on the area while prohibiting Maher from charging automobile processors for maintaining the first point

¹³¹ Dep. Ex. 131 (EP-249) § 48(a), MTFOF ¶ 330-347 (requiring Maher to “make available a ship berth and upland area for the purpose of receiving and loading automobiles and other motor vehicles . . . [u]pon 48 hours advance notice” consisting of “berth 52 . . . and the open area upland of Berth 52 of approximately ten (10) acres. . .”).

¹³² Kerr Expert Report ¶ 51, MTFOF ¶ 333; Dep. Ex. 131 (EP-249) § 48(a), MTFOF ¶ 330-33; former Maher General Counsel Schley Dep. at 297:4-16, MTFOF ¶ 333 (Maher opposed to first point of rest requirement because it was a “double-whammy” requiring Maher to keep the facility available for a less productive purpose); Brian Maher Dep. at 195:4-196:5, MTFOF ¶ 333 (Maher opposed to first point of rest requirement because it was a “big issue” to have to keep ten acres vacant); Kerr Rebuttal Report at ¶ 75, MTFOF ¶ 333 (“Because of this provision, under the lease . . . berth space would not have been available for containers.”). Basil Maher Dep. at 89:21-24, MTFOF ¶ 333 (PANYNJ required Maher to stevedore cars that it did not want to stevedore).

¹³³ Former Maher President Curto Dep. at 230:20-233:2, MTFOF ¶ 333 (Maher opposed to the first point of rest requirement as unnecessary to stevedore cars and because Maher didn’t want to have to dedicate the area to one purpose);

of rest acreage available for the loading and unloading of automobiles.¹³⁴ Nor does PANYNJ dispute the evidence showing PANYNJ's imposition of the requirement on Maher. To the contrary, PANYNJ now confesses it did so to benefit another PANYNJ port user, Nissan. PARB at 44; PAFOF ¶ 214. PANYNJ states that the operation of Nissan's automobile processor, DAS, was "very close to Maher." PARB at 44; PAFOF ¶ 215. The purported significance of PANYNJ assertion is unclear, but in all events it does not explain the disparity because the DAS operation was actually closer to the Maersk-APM terminal than the Maher terminal.¹³⁵ PANYNJ fails to address Maher's evidence and argument showing that in March 2008 PANYNJ enforced the first point of rest requirement against Maher and expressly threatened Maher with *termination* of the letting of the berth and ten acres. PANYNJ also fails to rebut Maher's evidence that it sustained injury and damages from the first point of rest requirement and PANYNJ's enforcement of the unduly prejudicial requirement.¹³⁶

PANYNJ argues erroneously that Maher simply "ignored" the first point of rest requirement by "constructing a building on the designated site" and moving the first point of rest area to "different places for its own convenience." PARB at 44. Of course, even if the substance

¹³⁴ PANYNJ letter from First Deputy General Counsel Christopher Hartwyk to Maher (Mar. 24, 2008), MTFOF ¶ 344 (PANYNJ notice to Maher alleging breach of EP-249 and the obligation of good faith and fair dealing and threatening enforcement of the lease provision providing for termination of the letting and asserting that Maher could only charge dockage and wharfage for use of the first point of rest berth and acreage); Maher letter from General Counsel J.Ruble to PANYNJ, MTFOF ¶ 344 (Apr. 2, 2008) (rejected PANYNJ's assertion of breach, objecting to PANYNJ's manipulation of the provision with one vessel call, and explaining the circumstances, and requesting a meeting to resolve the dispute).

¹³⁵ Harrison Dep. at 51:7-54:24, MTR-PAFOF ¶ 213.2 (Harrison admits that DAS is closer to Maersk-APM than to Maher in response to viewing map in Dep. Ex. 47).

¹³⁶ PANYNJ letter from General Manager Kenneth Spahn to Maher (Mar. 14, 2008), MTFOF ¶ 344 (Notice of Non-compliance with EP-249 § 48 and assertion of right to terminate the letting of the first point of rest 10 acre area and berth); PANYNJ letter from First Deputy General Counsel Christopher Hartwyk to Maher at 2 (Mar. 24, 2008), MTFOF ¶ 344 (PANYNJ notice to Maher alleging breach of EP-249).

of these assertions meant that the first point of rest requirement was eliminated by PANYNJ, which it does not, PANYNJ's assertions do not constitute a valid transportation purpose for PANYNJ's imposition and enforcement of the disparate requirement on Maher. Therefore, PANYNJ has failed to carry its burden. Additionally, if the thrust of PANYNJ's assertions is to suggest that Maher was harmed less by the requirement, then PANYNJ's mere assertions do not rebut Maher's evidence of injury. The significance of PANYNJ's assertions, if true, is merely that Maher mitigated its damages which in all events Maher was required to do. Therefore, PANYNJ's assertions are of no legal significance with respect to PANYNJ's violations of the Shipping Act in this respect for imposing disparate treatment on Maher.

Furthermore, it is undisputed that PANYNJ approved the construction of the "building on the designated site" and therefore, PANYNJ approved the resulting change in the location of the first point of rest area.¹³⁷ Importantly, PANYNJ does not acknowledge that the construction of the building *did not* eliminate the first point of rest provision, it merely changed its location.¹³⁸ Indeed, despite the changed location, the undisputed evidence establishes that PANYNJ enforced the requirement against Maher in March 2008 and threatened to *terminate* the letting of the ten acre area and berth. PAR-MTFOF ¶¶ 344, 345 (not denying that PANYNJ enforced the

¹³⁷ MTR-PAFOF ¶ 217.2 (*citing* Dep. Ex. 285 ("Through discussions with Redevelopment staff, I have become aware that Maher is planning to construct a new maintenance building in the northwest corner of the Fleet St Terminal. Apparently, conditional approval for the construction of the foundation has already been provided. This building and its service area are positioned in the area for the FPOR for cars. Maher has made no attempt to designate a new area and we are approving a building inside the existing area. I am concerned that if we allow the situation to continue the PA will effectively become a party to the elimination of the FPOR."); Evans Dep. at 283:21-284:1 (admitting that he was aware in 2003 "that The Port Authority was approving the construction of a maintenance building on Maher's first point of rest"), 287:3-:5 (admitting that the building was ultimately constructed), 287:6-288:5 (PANYNJ did not "require Maher to provide the first point of rest in a different location" in conjunction with the building construction approval)).

¹³⁸ Evans Dep. at 287:15-17, MTR-PAFOF ¶ 217.2 (for several years after 2003 Maher stevedored automobiles at its terminal).

requirement). It is also undisputed that Maher changed the location of the first point of rest area within its leasehold from time to time due to operational requirements until it was last used in March 2007. PAFOF ¶ 217 (stating that Maher moved the first point of rest area periodically). However, in those instances PANYNJ did not charge Maher with violating the agreement and did not then seek to enforce the provision by threatening the letting as it later did in March 2008. Therefore, PANYNJ's mere assertions are of no consequence. It is undisputed that the changes in location did not eliminate the requirement to provide the first point of rest ten acres and berth as demonstrated by PANYNJ's enforcement of the provision in March 2008. MTFOF ¶ 344.

III. PANYNJ Failed To Establish, Observe, and Enforce Just and Reasonable Regulations In Violation of 46 U.S.C. § 41102(c)

PANYNJ also effectively concedes the relevant evidence establishing Maher's claims regarding PANYNJ's failure to establish, observe, and enforce just and reasonable regulations and practices. PANYNJ makes no serious effort to rebut Maher's evidence or argument that according to *Ceres* it is unreasonable to charge the marine terminal operator tenant that guarantees more cargo and rent more than *double* what PANYNJ charges the ocean-carrier affiliated tenant. *Ceres*, 27 S.R.R. at 1271-72, 1275. Instead, PANYNJ merely asserts that this claim is "identical" to the preference/prejudice claim when it is actually an independent violation of the Shipping Act. PARB at 87-88.

The preference/prejudice and unreasonable practice claims are legally distinct as set forth by Maher and as established by Commission precedent. *Id.* at 1271, 1272, 1275. The Commission has explained:

The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice, or discrimination. It may cause none of these but still be unreasonable. . . . [A] regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose. . . . [C]omplainants made a *prima facie* case under Section 17 [requiring practices of terminals be just and reasonable] where they showed that the charges assessed did not

bear a reasonable relationship to the comparative benefit obtained from the port services by the assessed parties. . . . [C]omplainants did not receive benefits proportionate to the costs allocated to them, and moreover, other users of the port received equal or greater benefits, but did not pay their share of the port's costs.

Ceres, 27 S.R.R. at 1274-75. Title 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)) provides that no marine terminal operator “may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” The Commission has explained that “as applied to terminal practices, we think that ‘just and reasonable practice’ most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.”¹³⁹ The same “non excessive” and “fit and appropriate to the end in view” standards apply to a determination of whether a port’s rate practices violate § 10(d)(1) - including in cases in which a port imposes different rates on different customers for substantially similar services.¹⁴⁰ In these circumstances, PANYNJ’s complete failure to address substantively Maher’s 46 U.S.C. § 41102(c) (Shipping Act §10(d)(1)) claim constitutes waiver.¹⁴¹ PANYNJ merely refers to its previous erroneous

¹³⁹ *NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, 28 S.R.R. 1512, 1531 (A.L.J. 2000) (quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. at 329); *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) (“WGMA”).

¹⁴⁰ *Sec’y of the Army v. Port of Seattle*, 24 S.R.R. 595, 601-02 (F.M.C. 1987); *Sec’y of the Army v. Port of Seattle*, 24 S.R.R. 1242, 1248 (F.M.C. 1988) (The Commission held that the large rate differential was excessive given the similarity of the services provided, and hence violated the “reasonable relationship” requirement of section 10(d)(1) of the 1984 Act.).

¹⁴¹ It is not for the judge to “sift the trial record for novel arguments a defendant could have made but did not.” *United States v. Laureys*, 653 F.3d 27, 32 (D.C. Cir. 2011) (“[J]udges ‘are not like pigs, hunting for truffles buried . . . in the record.’”) (citing *Potter v. District of Columbia*, 558 F.3d 542, 553 (D.C. Cir. 2009)); *United States v. Giovannetti*, 919 F.2d 1223, 1230 (7th Cir. 1990) (“A litigant who fails to press a point by supporting it with *pertinent* authority, or by showing why it is a good point despite a lack of supporting authority or in the face of contrary authority, forfeits the point.”); *Dudley v. Astrue*, No. 1:10-cv-01142-WTL-TAB, 2011 WL 3739366, at *2 (S.D. Ind. Aug. 3, 2011) briefs with “sparse argumentation” which “compel ‘the court to take up a burdensome and fruitless scavenger hunt for arguments is a drain on its time and resources” and will result in waiver of such arguments); *Tsitsoulis v. Twnshp. of*

prejudice/preference arguments. PARB at 88 (“PA has already explained why the facial differences . . . are entirely reasonable”).

PANYNJ’s only response to Maher’s unreasonable practice claim evidence that PANYNJ subsidizes APM-Maersk with Maher revenues to reduce its accounting deficit is to confess that it actually *does* subsidize Maersk-APM, but then to assert that it *also* subsidizes Maher.¹⁴² PARB at 75 n.77. Putting aside PANYNJ’s obvious legal error that it is no defense to a violation of the Shipping Act to confess that PANYNJ also violated the Shipping Act in another respect, the PANYNJ’s own contemporaneous documentary evidence establishes that PANYNJ *does not* subsidize Maher which is by far the port’s largest profit center. As PANYNJ explained in 2008:

From the PANYNJ’s financial statements, it is understood that Elizabeth Marine Terminal [where Maher is the largest terminal operator] is the only asset within the PANYNJ’s portfolio that has generally generated an operating profit. Conversely, the facilities at Port Newark, Howland Hook and Brooklyn are all understood to generally have generated an operating loss during the recent past.¹⁴³

Additionally, a review of PANYNJ’s official financial reports establishes that “[o]ver the period from 2001 to 2009, the Elizabeth Marine Terminal [where Maher is the largest terminal operator] generated almost \$17 million in net income for PANYNJ.”¹⁴⁴ Although, PANYNJ’s financial statements do not separately report its revenue from Maher and APM-Maersk, it is undisputed that during the reporting period that Maher paid much greater rents, both basic and throughput,

Denville, Civ. A. No. 2:07-4544, 2009 WL 5205276, at *8 (D.N.J. Dec. 23, 2009) (“an argument left undeveloped is waived”).

¹⁴² According to PANYNJ, “neither APM/Maersk’s lease nor Maher’s is fully compensatory of the PA’s costs, the PA, in effect, subsidizes them both to some extent,” citing to PAFOF ¶¶ 46, 122, 149, 151-52 which *do not* show that PANYNJ subsidizes Maher.

¹⁴³ Port Strategic Business Assessment Update (May 28, 2008), 08PA00151796, MTR-PAFOF ¶ 41.1.

¹⁴⁴ Kerr Report ¶¶ 19-20 & Table 5, MTR-PAFOF ¶ 41.1 – showing PANYNJ’s profit from Maher and APM-Maersk during the period 2001-2009.

and a higher financing rate for its construction rent than Maersk-APM.¹⁴⁵ For example, Dr. Kerr's report shows that in year ten of the leases, 2009, Maher paid PANYNJ total rents of \$31,211,686 compared to Maersk-APM's total rent of only \$14,571,445.¹⁴⁶ Of course, this does not include the additional higher construction rent paid by Maher which as of May 31, 2011 was over \$3 million more than Maersk-APM paid at its lower financing rate.¹⁴⁷

PANYNJ also erroneously suggests that its annual cost per acre of the land that it lets to Maher is \$78,000. PARB at 84; PAFOF ¶ 152. However, that number only pertained to PANYNJ's port redevelopment scenario in 1997 that *assumed* PANYNJ would perform construction which Maher *actually completed* and pays for with interest.¹⁴⁸ PANYNJ's own contemporaneous internal documents show that before Maher's lease, EP-249, was concluded in October 2000 that PANYNJ's own operations and maintenance costs (O&M) for the land were estimated at approximately only \$20,000 per acre per year.¹⁴⁹ And, of course under Maher's lease, EP-249, Maher is responsible for maintenance costs that had previously been PANYNJ's responsibility as reflected in the approximately \$20,000 per acre PANYNJ O&M cost estimates

¹⁴⁵ Kerr Expert Report at Ex. 1, MTFOF Comparison of EP-249 and EP-248 Lease Differences; MTFOF ¶ 510; Kerr Report ¶ 7, Ex. 3, MTFOF ¶ 512.

¹⁴⁶ Kerr Expert Report at Ex. 1, MTR-PAFOF ¶ 41.1, Year 10 – 2009 – Total Rent Maher compared to Total Rent Maersk/APMT.

¹⁴⁷ Kerr Expert Report at ¶ 62, MTR-PAFOF ¶ 41.1 (“Maher has paid to date \$3,064,719 in excess interest.”)

¹⁴⁸ PAFOF ¶ 56 (erroneously citing Dep. Ex. 290, July 2, 1997 memo which does not contain the \$78,000 number); *see*, Dep. Ex. 48, MTR-PAFOF ¶ 56.2 (PANYNJ model dated June 26, 1997 showing 2000 Fixed Rental for Tripoli Street = \$18,978,300 / 243 acres = \$78,100 per acre, or approximately \$78,000).

¹⁴⁹ Dep. Ex. 288 at 08PA01720163, MTR-PAFOF ¶ 56.2 (PANYNJ's Dennis Lombardi's container pricing model calculation of port O&M costs for container terminals @ \$.48 per square foot or \$19,200 per acre, i.e. \$.48 multiplied times 40,000 square feet per acre) (Mar. 27, 1996); 08PA00033609, MTR-PAFOF ¶ 56.2 (Cheryl Yetka's calculations of per acre port O&M costs ranging from \$14,316 to \$25,029 depending on year and assumptions) (Jan. 30, 1998).

prepared in 1996 and 1998.¹⁵⁰ Therefore, PANYNJ's cost per acre per year to provide the letting of the land is substantially *less* than Maher's average basic and throughput rental payments provided by the lease of \$93,366 per acre.¹⁵¹ Therefore, PANYNJ's bald assertion that it subsidizes Maher is contradicted by its own official financial statements, its internal contemporaneous calculations of the cost of letting the land, and the evidence of Maher's basic and throughput rent payments required by the lease.

Additionally, PANYNJ argues erroneously that Maher "twists" certain evidence to show "discriminatory intent." PARB at 85 n.83. Having erected this straw man, PANYNJ discounts the "discriminatory intent" evidence as not as damning as it actually is. *Id.* ("There is plainly nothing unusual about a port authority considering legal and economic impact of a proposed transaction prior to effectuating a deal.") But, it is beyond cavil that Maher need not prove "discriminatory intent." Rather, considering Maher's evidence the burden here is squarely on PANYNJ to produce evidence of the reasonableness of its practices. Here, as the Commission explained in *Ceres*, "[C]omplainants did not receive benefits proportionate to the costs allocated to them, and moreover, other users of the port received equal or greater benefits, but did not pay their share of the port's costs. 27 S.R.R. at 1274-75.

Factually PANYNJ's argument is a *red herring*. The evidence establishes that PANYNJ provided ocean-carrier Maersk the \$120 million net present value (\$336 million nominal) concession to induce it not to go to Baltimore. MTFOF ¶¶ 201-203. Furthermore, the evidence establishes that PANYNJ refused to provide parity to Maher because of *status* and *business convenience* reasons. MTFOF ¶¶ 250, 253-255, 258-260, 262. The evidence that PANYNJ

¹⁵⁰ EP-249 § 16, MTR-PAFOF ¶ 56.2 (maintenance of premises the lessee's responsibility, except for wharf, water and underground sanitary systems).

¹⁵¹ Kerr Expert Report at Ex. 1(Maher's annual average total basic and throughput rent per acre \$93,366, *not* including construction rent.)

attempts to sugar-coat establishes that PANYNJ required the higher revenue from Maher to reduce its accounting deficit because it wanted the money. IB at 46-52.

PANYNJ's strained effort to disavow the May 19, 1999 memorandum to PANYNJ Executive Director Boyle by diminishing PANYNJ officials Yetka and Arcus as mere "non-lawyers" highlights the damaging nature of the memorandum and the other contemporaneous PANYNJ documentary evidence establishing that PANYNJ conjured up the "port guarantee" or "harbor wide guarantee" as referenced in the memorandum as a *device* to "withstand Federal Maritime Commission (FMC) scrutiny."¹⁵² IB at 49-54. As PANYNJ's 30(b)(6) witness Cheryl Yetka testified about the device, "What I understood it to mean is that having a guarantee, putting an additional obligation on SeaLand that you couldn't put on any of the other terminal operators, would be enough to distinguish the one lease from another for the purposes of FMC . . . scrutiny."¹⁵³ And, it is undisputed that PANYNJ's Lillian Borrone confirmed under oath that the memorandum's analysis accurately reflected the PANYNJ staff's assessment at the time, including that of Executive Director Robert Boyle, of the impact of providing other marine container terminal operators the Maersk-APM concessions.¹⁵⁴ And PANYNJ ignores the undisputed evidence that Ms. Borrone presented materially the same analysis to the PANYNJ Board at a meeting on May 27, 1999.¹⁵⁵ Similarly, PANYNJ ignores the presentations to the PANYNJ Board to the effect that "under Federal Maritime Law you cannot discriminate against similar tenants," and further that "[i]f we were to give SeaLand/Maersk a better deal and try to make up the difference with a tenant(s) such as Maher, then they would file suit and win, unless

¹⁵² Dep. Ex. 84, MTR-PAFOF ¶ 175.1.

¹⁵³ Yetka 30(b)(6) Dep. at 273:9-274:20, MTR-PAFOF ¶ 175.1.

¹⁵⁴ Borrone 30(b)(6) Dep. at 556:13-580:15, MTFOF ¶ 227.

¹⁵⁵ *Id.* at 589:8- 590:14, MTFOF ¶ 227.

we could prove there were significant distinctions between the leases. . . .”¹⁵⁶ The memorandum expressly states that this is what PANYNJ was doing at the time, i.e. devising a “significant distinction between the leases” to “withstand Federal Maritime Commission (FMC) scrutiny.”¹⁵⁷ Furthermore, the evidence from 30(b)(6) witness Cheryl Yetka establishes that PANYNJ’s documented concern about FMC scrutiny in 1998 and 1999 remained palpable on August 15, 2001 when the Commission issued its second decision in *Ceres* demolishing the waiver and estoppel defenses.¹⁵⁸ According to Ms. Yetka, following the decision in August 2011 PANYNJ officials met to discuss their concerns that the PANYNJ rates charged Maher rates would be “subject to scrutiny in an FMC case.”¹⁵⁹ And in conjunction with those meetings, PANYNJ’s former first deputy general counsel, Hugh Welsh wrote an email on August 27, 2001 describing “a major problem stemming from the Maersk lease” as a “\$400 million” . . . “disaster.”¹⁶⁰

IV. PANYNJ Unreasonably Refused To Deal In Violation of 46 U.S.C. § 41106(3)

Likewise, PANYNJ effectively concedes that it unreasonably refused to deal with Maher in 2007-2008 by failing to address meaningfully the evidence establishing that PANYNJ’s Port Commerce Director Larrabee refused to deal with Maher because the “Maher brothers” had signed the lease. But, the fact that Maher signed the lease is not a valid reason to refuse to deal or negotiate with a lessee. Contractual doctrines of waiver and estoppel *do not* immunize a violation of the Shipping Act. *Ceres*, 29 S.R.R. at 372. Notwithstanding this well-established authority, PANYNJ Port Commerce Director Larrabee categorically refused to deal or negotiate with Maher in November 2007 relying on the inapplicable doctrines by stating emphatically that

¹⁵⁶ Dep. Ex. 71 at 08PA1770792, MTFOF ¶ 226; Borrone 30(b)(6) Dep. at 454:2-5, MTFOF ¶ 226 (most likely said by either then PANYNJ General Counsel Jeff Green or current PANYNJ Executive Director Chris Ward).

¹⁵⁷ Dep. Ex. 84, MTR-PAFOF ¶ 175.1.

¹⁵⁸ Yetka 30(b)(6) Dep. at 316:16-21, PAR-MTFOF ¶ 292.

¹⁵⁹ *Id.*

¹⁶⁰ PAR-MTFOF ¶ 296; Dep Ex. 338; Welsh Dep. at 176:12-177:19

“the Maher brothers” had signed the lease and there was nothing PANYNJ could do.

The undisputed sworn testimony of former Maher vice president Sam Crane, at the first meeting on or about November 6, 2007,¹⁶¹ establishes that Mr. Larrabee told Basil Maher, “Basil, you and Brian knowingly signed this lease and there’s nothing we can do about it -- or nothing we can do for you about this, or there’s nothing -- no remedy we can take. . . .”¹⁶² And at the second meeting on or about November 28, 2007, the undisputed sworn testimony of Mr. Crane establishes that Mr. Larrabee repeated the same PANYNJ position to Maher CEO John Buckley, “They signed it, there’s nothing we can do they knew about it. . . .”¹⁶³ The undisputed testimony of Mr. Buckley was to the same effect referring to Port Commerce Director Larrabee and Deputy Director Lombardi he testified that, “All they were saying was the Maher Brothers have signed the lease. Game over. Nothing we can do about it. That’s what they were telling us.”¹⁶⁴ Mr. Buckley also testified specifically that Mr. Lombardi said “that the Maher brothers have signed the -- have signed the lease and there’s nothing the Port Authority can do about it.”¹⁶⁵ When asked about his recollection of the meeting, Mr. Buckley explained, “The Port Authority really -- you know, what -- what I took from . . . the interaction from the Port Authority is that they were putting us on the long finger. . . . When you put someone on the long finger, means you have no intention of doing anything about the problem that’s being discussed.”¹⁶⁶ PANYNJ’s Larrabee testified that he did not recall the foregoing account of

¹⁶¹ 08PA01428664, MTFOF ¶ 483 (PANYNJ Meeting calendar entry of R.Evans for Maher-PANYNJ meeting).

¹⁶² Crane Dep. at 24:13-18, MTFOF ¶ 484.

¹⁶³ *Id.* at 38:6-20, MTFOF ¶ 489.

¹⁶⁴ Buckley Dep. at 72:14-17, MTFOF ¶ 489.

¹⁶⁵ *Id.* at 50:9-19, MTFOF ¶ 490.

¹⁶⁶ *Id.* at 58:8-16, MTFOF ¶ 489.

Messrs. Crane and Buckley, but he did not dispute it.¹⁶⁷ In these circumstances, PANYNJ did not and has not given actual consideration to Maher's efforts at negotiation from 2007 onward because as Messrs. Larrabee and Lombardi stated at the time, "the Maher brothers" signed the lease.

PANYNJ now argues erroneously that its original and ongoing refusals to deal with Maher are justified by the same *post hoc* litigation rationalizations which it belatedly argues justify its underlying discrimination against Maher, i.e. the purported "risks and benefits" justification. But, the evidence establishes these *post hoc* litigation rationalizations were not the reasons PANYNJ refused to deal with Maher in the first instance, nor were they expressed at the time of the refusals to deal in 2007-2008. For example, in 2007-2008, with respect to Maher's *Ceres* claims the only reason expressed by PANYNJ's Larrabee and Lombardi for PANYNJ's refusal to deal was that the "Maher brothers" had signed the lease and later in May 2008, PANYNJ refused to deal with Maher at all absent a stay of all litigation. IB at 73-79; MTFOF ¶¶ 488, 489, 503.

On July 22, 2008, John Buckley transmitted a letter to Anthony Coscia, the Chairman of the PANYNJ Board of Directors requesting the Board's intervention in PANYNJ's continuing refusal to deal with Maher.¹⁶⁸ On August 29, 2008, PANYNJ explained under oath in this proceeding for the first time, including in interrogatory answers verified by Messrs. Larrabee and Lombardi that the differences in Maher and Maersk-APM lease rate basic rent terms are justified by Maersk-APM's *status* because it is affiliated with an ocean carrier that can satisfy a "port

¹⁶⁷ Larrabee Dep. at 23:1-16, 25:21-26:2, MTFOF ¶ 484, 489 (Larrabee repeatedly denying any recollection but not disputing the testimony of Messrs. Crane and Buckley).

¹⁶⁸ Maher Letter from J. Buckley to PANYNJ Board Chairman A. Coscia (July 22, 2008), MTFOF ¶ 507.

guarantee” which Maher cannot satisfy.¹⁶⁹ PANYNJ answered under oath that the “Port Guarantee was an important term that neither Maher nor any other port tenant could provide. The Port Guarantee committed Maersk shipping lines to continue using the Port even if volumes declined in the future.”¹⁷⁰ And when asked why that is the case, PANYNJ answered under oath that “the Port Guarantee *only* applies to companies who are carriers or have a significant ownership interest in one.”¹⁷¹ Moreover, when asked if PANYNJ offered Maher the option to provide a Port Guarantee, PANYNJ answered under oath “that it did not offer Maher the option to provide a Port Guarantee *because it was not a carrier and did not have a significant ownership interest in a carrier*”¹⁷² (emphasis added). This evidence establishes that PANYNJ’s ongoing refusal to deal is also because of the impermissible basis, *status*.¹⁷³ PANYNJ did not alter its position and continued to refuse to deal or negotiate with Maher and has failed to satisfy Maher’s Complaint in this proceeding. Thereby, PANYNJ has violated and continues to violate the Shipping Act for unreasonably refusing to deal with Maher.

PANYNJ also effectively concedes Maher’s claim that PANYNJ unreasonably refused to deal with Maher with respect to Maher’s Dkt. 07-01 Counter-Complaint. PANYNJ concedes that it categorically refused to deal with Maher about its Counter-Complaint from November 2007 and after, while on July 24, 2008, it concluded a deal which provided Maersk-APM

¹⁶⁹ PANYNJ Responses to Complainant’s First and Second Sets of Interrogatories at 10 (Aug. 29, 2008), MTFOF ¶ 253 (verified by Richard Larrabee, Director of the Port Commerce Department, PANYNJ).

¹⁷⁰ *Id.*

¹⁷¹ PANYNJ’s Responses to Complainant’s Third Set of Interrogatories at 6 (Oct. 8, 2008), MTFOF ¶ 253 (verified by Dennis Lombardi, Deputy Director of the Port Commerce Department, PANYNJ) (emphasis added).

¹⁷² *Id.* at 8, MTFOF ¶ 254.

¹⁷³ PANYNJ Responses to Complainant’s First and Second Sets of Interrogatories at 10 (Aug. 29, 2008), MTFOF ¶ 253 (verified by Richard Larrabee, Director of the Port Commerce Department, PANYNJ).

additional preferences of “substantial value” exceeding \$23 million.¹⁷⁴

PANYNJ’s only excuse, that it did not have to deal with Maher because 18 months later, in April 2009, it would ultimately drop its groundless FMC and state actions against Maher, might explain why PANYNJ refused to discuss *its* claim against Maher, but provides no justification about why PANYNJ refused to deal with Maher about *Maher’s* Counter-Complaint in Dkt. 07-01 in November 2007 and thereafter.

V. PANYNJ Violated The Shipping Act Regarding The 07-01 Dkt Claims

With respect to Maher’s Counter-Complaint claims originating from the Dkt. 07-01 proceeding, the evidence establishes that PANYNJ imposed and enforced an unlawful indemnification requirement on Maher. PANYNJ does not contest and therefore effectively concedes that the alleged requirement to indemnify irrespective of fault is unlawful under Commission authority and New Jersey law. Thus, PANYNJ is left to argue erroneously that it did not seek to impose the indemnification requirement on Maher for PANYNJ’s fault. But the evidence establishes that PANYNJ sought to impose indemnity without fault on Maher and PANYNJ’s misdirection contradicts the contemporaneous evidence. MTFOF ¶¶ 439, 442-444.

With respect to Maher’s Counter-Complaint claim for PANYNJ’s operating contrary to the FMC agreement which originated in the Dkt. 07-01 proceeding, PANYNJ erroneously asserts that this Shipping Act violation was not pleaded when it was expressly pleaded by Maher and in

¹⁷⁴ 07-01 Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Ex. A, MTFOF ¶ 70 (settlement agreement between PANYNJ and APM entered into on July 24, 2008); 07-01 Maher’s Reply in Opposition to Joint Motion for Settlement (Aug. 29, 2008), MTFOF ¶¶ 71, 75 (the settlement agreement provides Maersk-APM with additional preferences in the form of forgiving APM’s failure to make terminal investments of \$50-73 million required by EP-248, granting APM until 2017 to make certain improvements, providing a consent to a change in ownership without any consent fee that PANYNJ required from Maher and other marine terminal operators, etc. PANYNJ and Maersk APM conceded that “[t]he mutual releases and concessions are of *substantial value to both parties.*”) (*quoting* 07-01 Joint Motion for Approval of Settlement at 4) (*emphasis added*); PAR-MTFOF ¶¶ 69-70 (stipulating to settlement agreement and that it was of “substantial value to both parties”).

all events is governed by the Commission's liberal pleading authority as set forth above. PANYNJ misdirects by failing to acknowledge its own failure to seek discovery about Maher's damages with respect to the Dkt. 07-01 claim except at deposition. Furthermore, PANYNJ's misdirection is particularly hypocritical since it did not even answer Maher's Dkt. 07-01 Counter-Complaint and therefore, the only lack of pleading in this proceeding is PANYNJ's failure to serve and file an answer to Maher's Counter-Complaint in Dkt. 07-01. The evidence establishes that Maher prosecuted this Shipping Act violation claim in discovery, providing ample notice to PANYNJ about the nature and substance of the damages sought, and that PANYNJ elected only to seek discovery about Maher's damages with respect to the claim at deposition. MTR-PAFOF ¶ 287.1-288. Finally, PANYNJ's assertion that Maher's damages with respect to this claim are entirely speculative is not supported by its purported "expert" Mr. Fischel, who said no such thing. Fischel opined that Dr. Kerr's lost profit calculation of \$25.3 million should be reduced to \$15.4 million.¹⁷⁵ But, in all events Mr. Fischel is not qualified to offer such an opinion since he is neither an economist nor a certified public accountant.¹⁷⁶ Moreover, PANYNJ's actions responding to Maersk-APM's assertion of the same damages claims for delay in receiving the 84 acres discredit PANYNJ's assertion. There PANYNJ considered APM's delay claim meritorious enough to warrant a lease concession of "substantial value" to settle the claim.¹⁷⁷

Finally, PANYNJ asserts erroneously that Maher's delay damages claim pleaded in its

¹⁷⁵ Fischel Expert Report at ¶¶ 38-40

¹⁷⁶ Fischel Dep. at 56:1-58:4 (no degree, license, or certificate in economics or finance).

¹⁷⁷ MTFOF ¶ 71 (In a July 24, 2008 PANYNJ Board resolution approving PANYNJ's settlement with Maersk-APM, the incomplete Class A work was valued at \$50 million. Maher's Reply in Opp'n to the Joint Mot. for Approval of Settlement Agreement, Exhibit 1, Dkt. 07-01 (Aug. 29, 2008)); MTFOF ¶ 72 (The benefit to Maersk-APM of deferring the Class A work was valued at \$23 million. Joint Mot. for Approval of Settlement Agreement, Dkt. 07-01 (Aug. 14, 2008)).

Counter-Complaint in the Dkt. 07-01 proceeding is barred by a three-year statute of limitations. PARB at 53-54, 93. PANYNJ cites no authority for its argument other than a misapplication of the statute of limitations for a “complaint,” not a “counter-complaint.” Maher’s Counter-Complaint is not a “complaint;” it is a responsive pleading provided by the Commission’s rules.

The provision PANYNJ cites, 46 U.S.C. § 41301 does not bar Maher’s Counter-Complaint. Under the Shipping Act, the three year statute of limitations for reparations applies *only* to a “complaint,” not a responsive pleading. 46 U.S.C. 41301(a). *See also*, 46 U.S.C. 41305(b) which accords limiting the award of reparations *only* with respect to a “complaint.” Furthermore, the statute empowers the Commission to regulate the timing of responsive pleadings. 46 U.S.C. 41301(b) (“Within a reasonable time specified by the Commission, the person [named in the complaint] shall satisfy the complaint or answer it in writing.”) FMC Rule 63 confirms the Commission’s understanding that Shipping Act’s three-year statute of limitations provision applies *only* to a “Complaint seeking reparation.” 46 C.F.R. § 502.63(a) (“Complaints seeking reparation pursuant to section 11 of the Shipping Act of 1984 (46 U.S.C. §§ 41301-41302, 41305-41307(a)) shall be filed within three years after the cause of action accrues.”). With respect to responsive pleadings, including a “counter-complaint,” the Commission expressly permits the filing in “addition to filing an answer” provided this is accomplished “within 20 days after service of the complaint by the Commission.”¹⁷⁸ Therefore, Maher’s

¹⁷⁸ Through its development of the FMC Rules, the Commission applied the Shipping Act provision that a respondent’s responsive pleading shall be filed within “a reasonable time specified by the Commission.” 46 U.S.C. § 41301(b). FMC Rules 12, 63, and 64, permit the assertion of any answer within twenty days of service of the Complaint, consistent with the Federal Rules of Civil Procedure. Rule 12; Rule 64(c); Final Rules in Subchapter A; General and Administrative Provisions, 49 Fed. Reg. 44,362-01 (Nov. 6, 1984). Subsequent to the original enactment of the FMC Rules in 1984, the Commission amended Rule 64 to include within the ambit of the Rule “counter complaints” and explicitly provided for the application of the Federal Rules of Civil Procedure, reasoning that the changes merely codified longstanding

Counter-Complaint is filed pursuant to Rule 64. 46 C.F.R. § 502.64(d). *See also*, 46 C.F.R. § 502.71, confirming that a “counter-complaint [is] filed pursuant to . . . § 502.64.” Therefore, Maher’s Counter-Complaint is not subject to the three-year statute of limitations for a “complaint,” but rather the statutory provision that provides that the Commission set a reasonable time for the filing of responsive pleadings. Maher’s Counter-Complaint conformed to that limitation and therefore, it is properly filed. The Commission’s approach is consistent with that of the courts which recognize the difference between complaints which derive from statute and counterclaims which derive from the filing of responsive pleadings.¹⁷⁹

Furthermore, the PANYNJ’s latest invocation of the statute of limitations to defend its Shipping Act violations set forth in Maher Counter-Complaint is barred by *res judicata*/preclusion. Maher properly pleaded its Shipping Act claims against PANYNJ with respect to the PANYNJ actions violating the FMC agreement and delayed delivery of certain premises, etc. in its Answer and Counter-Complaint in the Dkt. 07-01 in September 2007. *See* Answer to Complaint and Third Party Complaint ¶¶ 38, 40-41 (“Among other things, the Agreement required PANYNJ to provide Maher reasonable specified dates for the surrender of

Commission policy. Miscellaneous Amendments to the Rules of Practice and Procedure, 58 Fed. Reg. 27,208-01 (May 7, 1993) (“The Commission has consistently endorsed the policy of following the Federal Rules of Civil Procedure (“FRCP”) in situations not covered by a specific Commission rule and where there is no conflict with administrative law or another FMC rule. This policy is well established. . . . The Commission currently has no rule permitting or governing the filing of counter-complaints in complaint proceedings, even though in practice they have been allowed.”); *A/S Ivarans v. Lloyd Brasileiro*, 24 S.R.R. 1029, 1032, n.7 (F.M.C. June 22, 1988) (permitting counter-complaint prior to rule change; *Vinmar v. China Ocean Shipping Co.*, 26 S.R.R. 38 (A.L.J. 1991) (same).

¹⁷⁹ For example, in *Jonathon H. v. Souderton Area School Dist.*, 562 F.3d 527, 529 (3d Cir. 2009), the Third Circuit allowed the counterclaim filed outside of the applicable 90-day statute of limitations to proceed based upon its holding that the statute of limitations did not apply to the counterclaim. *Id.* at 529. The statute of limitations applied only to “the party bringing the action,” and the Third Circuit explained that a defendant does not “bring an action” by asserting a counterclaim; only a plaintiff may “bring an action.” *Id.*

certain premises and to make specified improvements to certain premises prior to Maher's surrender of premises."). However, PANYNJ *did not* file and serve a verified answer to Maher's Counter-complaint, and therefore it has defaulted on Maher's Counter-Complaint and is barred from asserting defenses to it. Pursuant to Fed. R. Civ. P. 8(b)(6), "An allegation — other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied." Thus, courts will find that a plaintiff's failure to reply to a defendant's counterclaim operates as an admission of the allegation.¹⁸⁰ Similarly, FMC Rule 64 governing the failure to answer a "counter-complaint" provides that such failure means that the "[r]ecitals of material and relevant facts . . . shall be admitted as true." 46 C.F.R. § 502.64(a) & (d).

The PANYNJ's statute of limitations argument also fails because any applicable statute of limitations period as to Maher's Counter-Complaint would have been tolled by the filing of the original complaint in the Dkt. 07-01 proceeding. The persuasive majority rule in federal courts applying the FRCP is that the filing of a complaint tolls the statute of limitations applicable to a counterclaim, as long as the counterclaim was not already time-barred and the counterclaim arises out of the same transaction or occurrence as the complaint. *See* 46 C.F.R. § 502.12 (the FMC will consult the FRCP for guidance absent a specific Commission rule of procedure on the matter in question); FRCP 13(a) (A pleading must state as a counterclaim that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim). The Commission's adoption of the FRCP means that the general federal rule requiring tolling of the statute of limitations as to compulsory counterclaim applies with equal force to counter-

¹⁸⁰ *Peters & Russell Inc. v. Dorfman*, 188 F.2d 711, 713 (7th Cir. 1951) (plaintiff's failure to reply was an admission of the allegation, rejecting the plaintiff's appeals to equity and its argument that the court was divested of jurisdiction when the underlying complaint was dismissed; *Kelleran v. Andrijevic*, 825 F.2d 692 (2d Cir. 1987) (default judgment against plaintiff on defendant's counterclaim for failure to answer).

complaints filed by respondents before the Commission. Thus, in *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982), defendant's compulsory counterclaims were not time barred as the statute of limitations was tolled by the institution of plaintiff's action).¹⁸¹ This is because "where a counterclaim arises out of the same transaction as the complaint, the repose purpose of the statute of limitation would not be served by denying relation back, for the counterclaim is no more stale than the complaint and evidentiary proof is no less available." *Oahu Gas Serv. Inc. v. Pacific Resources, Inc.*, 473 F. Supp. 1296, 1297-98 (D. Haw. 1979). In this case, the underlying Complaint initiating the Dkt. 07-01 matter was filed on December 29, 2006, within three years of December 31, 2003, thus tolling Maher's Counter-Complaint.

Finally, even if Maher's Counter-Complaint were treated as a Shipping Act "Complaint" for purposes of the three-year statute of limitations governing reparations, which it is not, PANYNJ's statute of limitations argument is unavailing because of the discovery rule. The Commission applies the "discovery rule," not the "time of violation rule" or the "time of injury rule." Under the Commission's discovery rule, the limitations period begins to run only when the complainant possesses "conclusive information about such a dispute." *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001).

Maher's Shipping Act violations counterclaims against PANYNJ alleged in its Counter-Complaint for PANYNJ's failure to operate in accordance with the agreement, EP-249, etc., as set forth in Maher's Counter-Complaint and its Initial Brief did not accrue until 2007-2008, *after*

¹⁸¹ "The institution of a plaintiff's suit suspends the running of limitations on a compulsory counterclaim while the suit is pending." *Employers Ins. of Wausau v. U.S.*, 764 F.2d 1572, 1576 (Fed. Cir. 1985); Wright & Miller § 1419 ("Although there is some conflict on the subject, the majority view appears to be that the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim. This approach precludes plaintiff, when the claim and counterclaim are measured by the same period, from delaying the institution of the action until the statute has almost run on defendant's counterclaim so that it would be barred by the time defendant advanced it.").

PANYNJ asserted in correspondence to Maher, sworn pleadings, sworn discovery responses, and finally, testimony in the Dkt. 07-01 proceeding, that PANYNJ was required to provide Maher certain premises to Maher in a timely fashion to permit for Maher to in turn provide the 84 acres to PANYNJ before December 31, 2003. This conclusive concession by PANYNJ, that it was required by the FMC agreement to provide the premises to Maher *before* December 31, 2003, provided Maher conclusive information that it had the alleged Shipping Act claims for the \$56,559,566 in damages arising from PANYNJ's two-year delay beyond the required date. *See* Maher's Initial Brief at 96-99. Since Maher did not have this conclusive information before then, Maher's Counter-Complaint claims did not accrue until then and the claim is *not* barred by the statute of limitations. As the Commission has explained, it is not when a complainant has "some suspicion" of an injury that determines when a cause of action accrues; it is only when there is "conclusive information" that there has been an actual violation. *Inlet Fish Producers, Inc. v. Sea-Land Serv. Inc.*, 29 S.R.R. 306, 309 & 313 (F.M.C. 2001). PANYNJ provided Maher with the "conclusive information" about PANYNJ's now-conceded obligation to provide Maher with certain improved premises in time to turn-over the 84 acres before December 31, 2003, and Maher filed and prosecuted its Counter-Complaint.

The Commission has explained that it has "an interest in the precedent established by its adjudication of alleged Shipping Act violations," and a "flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow [us] to pass on the legality of allegedly injurious conduct." *Id.* at 309. Further, "application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action." *Id.*

In these circumstances, Maher's Counter-Complaint did not accrue until PANYNJ's

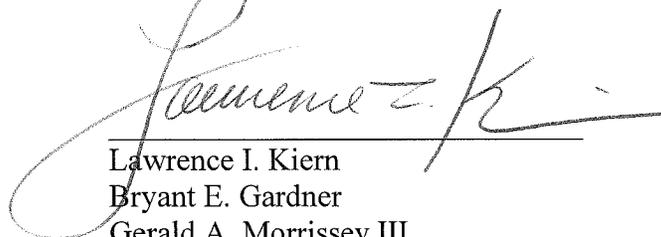
confessed “conclusive information” in 2007-2008 that it was required by the filed FMC agreement to provide Maher certain premises in advance of December 31, 2003 so that Maher could transfer the 84 acres before that date, and Maher’s Counter-Complaint was timely filed in 2007 and prosecuted in discovery in 2008 and thereafter.

CONCLUSION

For the foregoing reasons, Maher’s Complaint and Counter-Complaint should be granted as set forth above, with an award of reparations for actual injuries incurred as of May 31, 2011 of \$182,367,866.75, additional actual injury incurred thereafter, additional amounts not to exceed twice the amount of the actual injury for PANYNJ’s violation of 46 U.S.C. § 41102(b), attorneys fees, costs, and interest, and the Commission should issue an order *prohibiting* PANYNJ from requiring of Maher (1) a base rent lease rate of Maher in excess of \$19,000 per acre, (2) a financing rate greater than that provided to Maersk-APM in EP-248, (3) a security deposit requirement in lieu of its existing corporate guarantee in EP-249; (4) a terminal guarantee more onerous than that provided by Maersk-APM in EP-248; and (5) indemnification to PANYNJ for PANYNJ’s own actions or inactions.

Dated: December 9, 2011

Respectfully submitted,



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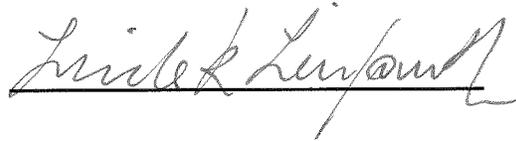
CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of December, 2011, served the foregoing via federal express and e-mail on the following:

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