

# FEDERAL MARITIME COMMISSION

MAHER TERMINALS, LLC

*Complainant,*

v.

THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY,

*Respondent.*

Docket No. 08-03

Served: January 31, 2013

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**BY THE COMMISSION:** Richard A. Lidinsky, Jr., *Chairman*, Rebecca F. Dye and Michael A. Khouri, *Commissioners*. Mario Cordero, *Commissioner*, dissenting; William P. Doyle, *Commissioner*, not participating.

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**Order granting in part and denying in part Respondent's  
Motion for Summary Judgment**

Before the Federal Maritime Commission (FMC or Commission) on exceptions is the May 16, 2011, determination (hereinafter Decision) of the Administrative Law Judge (ALJ), which granted the Port Authority of New York and New Jersey's (PANYNJ) motion for summary judgment that Maher Terminals, LLC's (Maher) claim for reparations for unreasonable discrimination in lease terms in violation of the Shipping Act of 1984 (Act) is barred by the Act's statute of limitations and denied PANYNJ's motion that Maher's claim for a cease and desist order

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is barred by any statute of limitations. Maher and PANYNJ both filed exceptions to the Decision. For the reasons set forth below, we grant PANYNJ's motion for summary judgment in part and deny in part.

Complainant Maher operates marine terminal facilities in Port Elizabeth, New Jersey on land leased from PANYNJ, pursuant to Lease EP-249 (a 30-year lease dated October 1, 2000, and filed with the Commission as FMC Agreement No. 201131 on March 8, 2002). APM Terminals North America, Inc. (APM) also operates marine terminal facilities on land leased from PANYNJ, pursuant to Lease EP-248 (a 30-year lease between PANYNJ and Maersk Container Service Company, Inc. (the predecessor of APM), dated January 6, 2000, and filed with the Commission as FMC Agreement No. 201106 on August 2, 2000). Lease EP-248 and Lease EP-249 contain differing terms for base annual rental rate per acre; investment requirements; throughput requirements; automobile first point of rest requirements; and security deposit requirements. Lease EP-248 contains a port guarantee which provides that a certain number of containers will be transported to or from the port of New York and New Jersey by APM's parent company (an ocean common carrier) and provides for an increase in base annual rent rates for failure to meet that number. Additionally, APM's parent company guaranteed the terms of the lease.

Maher filed this Complaint on June 3, 2008, naming PANYNJ as a respondent. Maher seeks a cease and desist order and reparations for the following alleged violations of the Shipping Act: 46 U.S.C. § 41106(2) (giving any undue or unreasonable preference or imposing any undue or unreasonable prejudice); 46 U.S.C. § 41106(3) (unreasonably refusing to deal or negotiate); and 46 U.S.C. § 41102(c) (failing to establish, observe and enforce just and reasonable regulations and practices). On February 28, 2011, PANYNJ filed a motion for summary judgment for the portions of Maher's complaint based on discrimination in lease terms, arguing that Maher's claims<sup>1</sup> are barred by the Act's three-

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<sup>1</sup> PANYNJ's motion encompassed both Maher's reparations claims and its

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year statute of limitations. PANYNJ argued Maher's claims are barred as the leases in question were entered into in 2000 and Maher's complaint was not filed with the Commission until 2008, outside the Act's three-year statute of limitations.<sup>2</sup> Maher filed a response to PANYNJ's motion, arguing that the Act's statute of limitations does not bar claims for reparation for violations of the Act, whether new, recurring or continuing, within the statutory period and also arguing that under a "discovery rule" theory, the statute of limitations did not begin to run until 2008 when Maher obtained information during discovery in a related Commission proceeding, Docket No. 07-01,<sup>3</sup> that it had a claim.

On May 16, 2011, the ALJ granted PANYNJ's motion for summary judgment that Maher's reparations claim was barred by the statute of limitations but denied its motion that Maher's claim for cease and desist relief was similarly barred. The dismissal of

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claims for a cease and desist order.

<sup>2</sup> The Act provides that "[a] person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

<sup>3</sup> Docket 07-01 was initiated by APM on December 29, 2006, when it filed a complaint alleging that PANYNJ violated the Act by failing to fulfill certain obligations owed to APM under Lease EP-248 regarding possession of property. APM alleged that the delay caused harm to APM and showed a preference for Maher in violation of the Act. PANYNJ filed an answer to APM's complaint denying liability and also filed a counter complaint against APM for allegedly failing to perform construction work required by Lease EP-248 in violation of 46 U.S.C. § 41102(b)(2) (operating contrary to a filed agreement). PANYNJ also filed a third-party complaint against Maher alleging that Maher failed to surrender property to PANYNJ as required by Lease EP-249. Maher denied liability and on September 7, 2007, filed a counter-complaint against PANYNJ seeking reparations, alleging violations of 46 U.S.C. § 41106(2) (giving any undue or unreasonable preference or imposing any undue or unreasonable prejudice); 46 U.S.C. § 41106(3) (refusal to deal); 46 U.S.C. § 41102(c) (failing to establish, observe and enforce just and reasonable regulations and practices); and 46 U.S.C. § 41102(b)(2) (operating contrary to a filed agreement). On April 1, 2009, the Commission approved a settlement agreement between APM and PANYNJ resolving their claims but consolidated the counter-complaint filed by Maher in that docket with this proceeding. See APM Terminals v. PANYNJ, 31 S.R.R. 623 (FMC 2009).

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Maher's claim for reparations is appealable<sup>4</sup> under 46 C.F.R. § 502.227(b)(1), which allows for the appeal of an ALJ's granting of a motion of dismissal in whole or in part. The ALJ granted leave, *sua sponte*, for PANYNJ to appeal the denial of summary judgment regarding cease and desist relief, finding that it was in the public interest to permit PANYNJ to appeal immediately.<sup>5</sup> Decision at 47. On June 7, 2011, Maher and PANYNJ filed exceptions to the Decision. Maher requested the Commission hear oral argument on its exceptions. On April 26, 2012, the Commission granted Maher's request for oral argument and also ordered oral argument on PANYNJ's exceptions. On May 17, 2012, the Commission heard oral argument.

I.

Under 46 C.F.R. § 502.227(a)(6), when the Commission reviews an initial decision, "the Commission, except as it may limit the issues upon notice or by rule, will have all the power which it would have in making the initial decision." The Commission has no procedural summary judgment rule. Accordingly, pursuant to 46 C.F.R. § 502.12, the Commission follows the Federal Rules of Civil Procedure and pertinent case law to the extent consistent with sound administrative practice. Fed. R. Civ. P. 56 governs motions for summary judgment which are reviewed *de novo*. George v. Leavitt, 407 F.3d 405, 410 (D.C. Cir. 2005); Kaempe v. Myers, 367 F.3d 958, 965 (D.C. Cir. 2004). Fed. R. Civ. P. 56 provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

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<sup>4</sup> We note that when discussing a motion to dismiss a claim in whole or in part, the proper term under either Rule 227(b)(1) or Rule 153(a) is "appeal" rather than "except," however, as both Maher and PANYNJ have used the term "exceptions" in their filings, we also use that term.

<sup>5</sup> Since Maher's claim for a cease and desist order was not dismissed, that portion of the ruling could not be the subject of exceptions pursuant to Rule 227, 46 C.F.R. § 502.227, but, rather, would only be appealable pursuant to Rule 153, 46 C.F.R. § 502.153(a), which allows for an interlocutory appeal if the presiding officer finds it necessary to "prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party."

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The burden on the party opposing summary judgment is “to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.” 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2727, p. 490 (3d ed. 1998). However, the inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1180 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2002). The nonmoving party, or the party opposing summary judgment, receives the benefit of all reasonable doubts and inferences to be drawn from the facts. Anderson at 255; Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986); Jeffreys v. City of New York, 426 F.3d 549, 553 (2d Cir. 2005); Niagara Mohawk Power Corp. v. Jones Chemical, Inc., 315 F.3d 171, 175 (2d Cir. 2003); Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980). As noted in Campbell v. Grand Trunk W. R. R. Co., “[b]ecause the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run. If the defendant meets this requirement, then the burden shifts to the plaintiff to establish an exception to the statute of limitations.” Campbell v. Grand Trunk W. R. R. Co., 238 F.3d 772, 775 (6th Cir. 2001)(citing Drazan v. United States, 762 F.2d 56, 60 (7th Cir. 1985)).<sup>6</sup>

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<sup>6</sup> The ALJ correctly determined that PANYNJ’s argument regarding the Act’s three year statute of limitations is an affirmative defense, per Fed. R. Civ. P. 8(c)(1), and that a party moving for summary judgment on an affirmative defense must establish all of the essential elements of the defense to warrant judgment in its favor. Decision at 22.

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II.

We address PANYNJ's arguments regarding Maher's claims for cease and desist relief and reparations separately.

In the Decision, the ALJ, citing Western Overseas Trade and Development Corp. v. ANERA, 26 S.R.R. 875, 885 n. 17 (FMC 1993) and A/S Ivarans Rederi at 1550, found that the Commission has held that the three year statute of limitations contained in the Act applies only to requests for reparations and that no time limit applies for filing a claim for other relief under the Shipping Act.<sup>7</sup> PANYNJ argues that Maher's lease-term discrimination claim arises from a discrete set of facts that concluded, at the latest, in October 2000, and Maher's request for cease and desist relief seeks to obtain indirectly what it is attempting to obtain through its time-barred request for reparations, *i.e.*, monetary relief from its contractual obligations. In A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasileiro, the ALJ found no merit to a similar argument that attempting to seek an order relieving a complainant of the obligation to pay money is the same thing as a claim for reparations. A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasileiro, 23 S.R.R. 1543, 1550 (ALJ 1986) (adopted by the Commission with clarification on an unrelated point, 24 S.R.R. 1468 (FMC 1998)). The language of the Act is clear that the three-year statute of limitations applies only to claims for reparations. PANYNJ's arguments that the Act's statute of limitations bars a claim for cease and desist relief are not persuasive.<sup>8</sup> Summary

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<sup>7</sup> See also, Rascator Mar., S.A. v. Cargill, Inc., 21 S.R.R. 1374 (FMC 1982) (Commission found the substantially similar two year statute of limitations in the Shipping Act, 1916 applies only to requests for reparations and the Commission retains jurisdiction over a complaint even though the actions which form the basis for the complaint took place outside the statute of limitations); International Shipping Agency, Inc. v. Puerto Rico Ports Auth., 30 S.R.R. 407, 425 (ALJ 2004) (Section 11(g) applies only to claims for reparations, not to claims seeking the Commission's intervention with respect to non-reparation orders such as orders to cease and desist, citing Inlet Fish at 313).

<sup>8</sup> The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. See Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express, 27 S.R.R. 1335, 1342 (ALJ 1997) ("a cease

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judgment on Maher’s claim for cease and desist relief was not warranted. PANYNJ’s motion that Maher’s claim for a cease and desist order is barred by any statute of limitations is denied.<sup>9</sup>

### III.

Prior to addressing the ALJ’s determination that Maher’s reparations claim based on discrimination in lease terms is barred by the Act’s statute of limitations, we must first address rulings made regarding the evidence submitted by the parties. The ALJ struck the following evidence:<sup>10</sup>

- a) Statements of material fact filed by PANYNJ, which the ALJ found were not material to the question of whether Maher’s claim accrued on October 1, 2000, and Maher’s responses to those statements;

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and desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses”); and Portman Square Ltd. – Possible Violations of Section 10 (a)(1) of the Shipping Act of 1984, 28 S.R.R. 80, 86 (ALJ 1998) (“the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities”). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

<sup>9</sup> After determining that the Act’s statute of limitations did not apply to Maher’s cease and desist relief claim, the ALJ went further, finding that if the Commission determines that terms in Lease EP-249 violate the Act by granting an undue preference, the Commission could issue a cease and desist order requiring PANYNJ eliminate the preference, citing Ballmill Lumber & Sales Corp v. Port of New York Auth., 10 S.R.R. 524, 526 (FMC 1968). Decision at 46. (The reference to Lease EP-249 may be a typographical error as it would be the terms in Lease EP-248 rather than those in Lease EP-249 which would grant an undue preference.) In Ballmill, the Commission, after deciding that an undue preference existed, left the determination of how to remove an illegal preference to the offending party (stating that “[T]he Port Authority could choose to remove the privilege from [its recipient] and thereby remove the preference” or it could choose to give the privilege to others similarly situated). Id. at 526. We believe this is the correct approach.

<sup>10</sup> The stricken statements are contained in an appendix to the Decision while the Decision on pages 14-21 sets forth the material facts considered by the ALJ.

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- b) Parts of Maher's responding statement to PANYNJ's statement of material facts, which the ALJ determined "set forth facts regarding events occurring after October 1, 2000, thus were not known by Maher on that date, otherwise are not material to this motion, and/or argumentative" Decision at 14; and
- c) Portions of PANYNJ's statement in response to the new facts contained in Maher's responding statement, on the basis they were argumentative.

Additionally, although Maher's Exhibit A was not stricken, the ALJ found that the facts contained in it were not material to the issues raised by PANYNJ's motion because they did not affect the outcome of the decision on when Maher's cause of action accrued. Decision at 27.

In Commission proceedings, all evidence that is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible. 46 C.F.R. § 502.156. Maher argues in its exceptions that, as the discovery rule and claim accrual questions, by their nature, concern events after the initiation of the lease, evidence of events occurring after October 1, 2000, was erroneously excluded. We agree that the evidence enumerated above was material as it might have shown that Maher neither knew nor should have known that PANYNJ was in violation of the Act until 2008. Therefore, such evidence should not have been excluded from consideration. As noted in EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of the Shipping Act of 1984 and the Commission's regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540 (FMC 2008), "[c]onsistent with the guidelines set out in the APA and Commission rules governing the admission of evidence, '[i]n comparison with court trials, administrative adjudications generally are governed by liberal evidentiary rules that create a strong presumption in favor of admitting questionable or challenged evidence,'" citing Ernest Gelhorn & Ronald M. Levin, *Administrative Law and Process* 255 (4th ed. 1997). In

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 9 considering a motion for summary judgment, the inferences to be drawn from the facts presented must be viewed in a light most favorable to the party opposing the motion. The nonmoving party, or the party opposing summary judgment, receives the benefit of all reasonable doubts and inferences to be drawn from the facts. To exclude evidence presented by the non-moving party that is not irrelevant, immaterial, or unduly repetitious is contrary to these principles.<sup>11</sup>

#### IV.

PANYNJ's statute of limitations argument is an affirmative defense. A party moving for summary judgment on an affirmative defense must establish all of the essential elements of the defense to warrant judgment in its favor. Fed. R. Civ. P. 8(c)(1); Fed. R. Civ. P. 54. The essential element of the statute of limitations defense for reparations claims under the Act is that the cause of action accrued more than three years prior to the filing of the complaint. *See* 46 U.S.C. § 41301(a). If the defendant/respondent meets its burden to show that the statute of limitations has run, as PANYNJ has done here, then plaintiff/complainant must establish an exception to the statute of limitations in order to avoid summary judgment. Campbell at 775.

Absent an exception, a claim accrues (and the statute of limitations begins to run) "when a defendant commits an act that injures a plaintiff's business." Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 338 (1971). Under the discovery

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<sup>11</sup> The ALJ asserts that "[i]n evaluating the evidence at the summary judgment stage, the court considers only those facts which are supported by admissible evidence." Decision at 9. The question of admissibility of evidence is not proper in an administrative proceeding considering a motion for summary judgment where the non-moving party is given the benefit of all reasonable doubts and inferences. In Opp Cotton Mills v. Administrator, the Supreme Court stated that "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed." 312 U.S. 126, 155 (1941); see also Anderson v. United States, 799 F.Supp 1198, 1202 (Ct. Int'l Trade 1992).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 10 rule, adopted by the Commission in Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc., a statute of limitations period will not begin to run until “a party knew or with reasonable diligence should have known that it had a claim.” Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc., 29 S.R.R. 306, 314 (FMC 2001), (*emphasis added*)(citing Connors v. Hallmark & Son Coal Co., 935 F.3d 336, 342 (D.C. Cir. 1991)).<sup>12</sup> As the ALJ noted, “the discovery rule is an exception to the time-bar provision and Maher has the burden of showing that it falls within the exception by demonstrating that, even with the exercise of reasonable diligence, it could not have known of the purported injury.” Decision at 27 (citing Cathedral of Joy Baptist Church at 713). There must be no genuine issue of material fact that the statute of limitations began to run (that is, Maher’s cause of action accrued) no more than three years prior to the filing of its complaint and there must be no genuine issue of material fact that Maher knew, or with reasonable diligence should have known, that it had a claim more than three years prior to the filing of its complaint. A dispute over a material fact is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson at 248. With respect to materiality, “the substantive law will identify which facts are material.” Id.

In order to understand which facts would give rise to knowledge of claim accrual for determining whether the affirmative defense applies, we briefly review the substantive elements of the claims presented by the claimant. The substantive law regarding unreasonable prejudice or preferences in marine terminal lease terms is Ceres Marine Terminals Inc. v. Maryland Port Administration, 27 S.R.R. 1251 (FMC 1997), where the Commission articulated the elements of proving a violation of

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<sup>12</sup> The question in Inlet Fish was whether the cause of action accrued on the dates that shipments were made or on a later date when Inlet Fish obtained knowledge that freight rates for those shipments were calculated without subtracting the tare weight from the cargo weight while other customers’ rates were calculated by subtracting the tare weight from the cargo. In Inlet Fish, the Commission found that “[i]mplementing a rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeal.” Id.

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section 10(b)(11) and 10(b)(12)(recodified as 46 U.S.C. § 41106(2)) as follows: In order to establish an allegation of unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. *Id.* at 1270. Following the terminology used by the ALJ in the Decision, this memorandum and order refers to these factors as Ceres Elements 1-4. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. Ceres at 1270-1271.

The ALJ found that undisputed material facts establish that when Maher signed Lease EP-249 on October 1, 2000, it knew all of the contents of and the differences between Lease EP-249 and Lease EP-248 and that, as of that date, had information that would permit it to plead and prove each element of its *prima facie* case as established in Ceres, which the ALJ found consists of Ceres Elements 1, 2 and 4. The burden then would have shifted to PANYNJ to establish Element 3, that is, to justify the difference based on legitimate transportation factors. The ALJ found that Ceres Element 3 is not part of Maher's *prima facie* case but rather an affirmative defense for PANYNJ. Decision at 25. The ALJ also determined that under the discovery rule, Maher "discovered" that it had a cause of action when it knew it had a *prima facie* case (Ceres Elements 1, 2 and 4), and that Maher knew it had a *prima facie* case on October 1, 2000. The ALJ determined that on October 1, 2000, Maher knew ("discovered") that it had been injured by the differences between Lease EP-248 and Lease EP-249 and knew that PANYNJ caused the injury. The ALJ found that whether Maher realized it had a legal injury is not material to the issue of whether its claim accrued on October 1, 2000. Decision at 29.

Maher argues in its exceptions that the Decision misconstrues the Inlet Fish rule by finding that claim accrual

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occurs when complainant knew or should have known that it had part of a *prima facie* case (Ceres Elements 1, 2 and 4) as opposed to a cause of action. Maher argues that a cause of action is a factual situation that entitles one person to obtain a remedy in court from another person while a *prima facie* case is merely the establishment of a legally required rebuttable presumption. Maher argues that the Decision misconstrued the determination in Ceres that once a complainant meets its burden of proving that it was subjected to different treatment and was injured, that the respondent has the burden of justifying the difference based on legitimate transportation factors. Maher argues that this determination does not make Ceres element 3 an affirmative defense but merely identifies it as a burden-shifting procedure.

As noted in Eliminating the Limitations of Limitations Law, “[o]ccasionally, a statute will define the concept of accrual, but usually, the definition is left to the courts. From jurisdiction to jurisdiction, courts have diverged in their definition. In some jurisdictions, a claim ‘accrues at the time when the plaintiff could have first maintained the claim to a successful conclusion.’ Other courts hold that ‘a claim accrues when all its elements have come into existence.’” Eli J. Richardson, Eliminating the Limitations of Limitations Law, 29 Ariz. St. L.J. 1015, 1038 (1997). See Cathedral of Joy Baptist Church v. Village of Hazel Crest, 22 F.3d 713, 717 (7th Cir. 1994) (“[g]enerally, a claim accrues when all its elements have come into existence.”). We agree that claim accrual occurs when a complainant knew or should have known that it had a cause of action as opposed to a *prima facie* case. Therefore, Maher’s claim accrued when it knew, or should have known, that it had a cause of action, that is, when it knew, or should have known, whether the four Ceres factors existed.

Having settled that the statute of limitations begins to run from the date at which the claimant knew, or should have known, of the existence of facts involving all four Ceres factors, we now turn to examine whether there exist any factual issues related to the affirmative defense of statute of limitations. The parties do not dispute that a copy of the lease between APM and PANYNJ, Lease EP-248, was filed with the Commission (and therefore available to

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the public, including Maher) on August 2, 2000, nor do they dispute that the lease between Maher and PANYNJ, Lease EP-249, was signed on October 1, 2000. Maher admits that it knew of the differences between the two leases when it signed its lease. PANYNJ argues that Maher's cause of action accrued, at the latest, on the date that Lease EP-249 was signed, October 1, 2000, and that because Maher did not file its complaint until June 3, 2008, more than seven years later, the Act's three-year statute of limitations bars any claim for reparations.

Maher, citing the discovery rule, argues that it did not know, nor should it have known, that the different lease terms violated the Act until May 2008 when it claims to have obtained conclusive information that the lease differences were not justified by valid transportation factors, specifically the port guarantee contained in Lease EP-248. Maher argues that, under the discovery rule adopted by the Commission in Inlet Fish, accrual of a cause of action for a violation of 46 U.S.C. § 41106(2) occurs only when a complainant (i) knows or should have known of different lease terms; and (ii) knows or should have known that the different lease terms constituted an undue prejudice in violation of the Shipping Act. Maher argues that it learned for the first time on May 20, 2008, that the port guarantee was a sham and therefore, that the unequal treatment was not justified by differences in transportation factors.<sup>13</sup>

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<sup>13</sup> Maher argued in its Exhibit A, that

As document discovery commenced and progressed in this proceeding, additional facts have established that the 'Port Guarantee'...was a sham....In the May 20, 2008 deposition of APM's corporate designee, Marc Oppenheimer, for example, Maher learned that neither APM nor Maersk control the cargo they supposedly 'Guarantee'. Ex. 14, Mark Oppenheimer Dep. (May 20, 2008). APM has only a stevedoring agreement with the carrier, but without any cargo commitment, *id.* at 53, and Maersk, Inc. has neither a volume commitment nor any other contractual ability to 'guarantee' Maersk cargo to satisfy the Port guarantee. *Id.* at 52. The Port Guarantee did not in fact 'commit the Maersk shipping lines to continue using the Port even if volumes declined in the future' as PANYNJ claimed.

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We do not find Maher's argument compelling. We find that no later than October 1, 2000, the date that the terms of its lease with PANYNJ were fixed, Maher knew, or should have known, all the information it needed to determine whether the difference in terms between the two leases were or were not justified by valid transportation factors (Ceres Element 3). No later than that date, Maher knew, or should have known, the terms contained in Lease EP-248 and knew, or should have known, that they were different than the terms contained in their lease with PANYNJ. No later than that date, Maher knew, or should have known, that the remedy contained in Lease EP-248 for the failure of APM to meet the port guarantee for whatever reason was an increase in the basic annual rental rate, that is, higher rental rates. Maher's argument that the port guarantee was otherwise enforceable, e.g. by specific performance, is not persuasive. No later than October 1, 2000, Maher knew, or should have known, that the remedy available to PANYNJ for the failure to satisfy the port guarantee contained in Lease EP-248 was increased annual rental rates. Put another way, PANYNJ was willing to accept certain lease terms and either the satisfaction of the port guarantee or a certain amount of money in increased rent if the port guarantee was not met. Maher knew, or should have known this, no later than October 1, 2000. Maher knew, or should have known, the terms of the two leases and PANYNJ's remedy for failure to meet the port guarantee and, no later than three years after it signed its lease with PANYNJ, could have determined whether those terms

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Maher Exhibit A, Third page (Exhibit A is not numbered.)

Maher also cited to another section of Exhibit A:

Indeed, Maher just learned, through PANYNJ's most recent supplemental productions, that APM has been failing to meet the Port Guarantee for at least two years, by a large margin. While PANYNJ has sought a contractual rent increase from APM, it has not enforced the Port Guarantee, either as to APM, or as to Maersk, Inc. under the corporate guarantee.

Maher Exhibit A, Fourth page.

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were or were not justified by valid transportation factors (Ceres  
element 3).

Considering all of Maher's evidence, including that struck by the ALJ, according Maher the benefit of all reasonable doubts and inferences to be drawn from that evidence and applying the discovery rule of Inlet Fish, it does not appear that a reasonable trier of fact could find that the date on which Maher's cause of action accrued was other than prior to June 3, 2005, more than three years from the date Maher filed its complaint. Therefore, there is no genuine issue of material fact as to whether Maher's cause of action accrued within three years from the date Maher filed its complaint and PANYNJ is entitled to judgment as a matter of law.

V.

Maher also argues that the difference in terms between the two leases establishes a continuing violation for statute of limitations purposes such that it would be entitled to reparations. The ALJ noted that Maher argued, citing Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth., 18 S.R.R. 1079 (ALJ 1979), that the continuing violation rule permits it to seek a reparation award for any violations that occurred in the period beginning three years prior to the date it filed its complaint. The ALJ found that, to the extent Maher is claiming a right to seek a reparation award in the absence of an overt discriminatory act by PANYNJ within the limitations period, Maher is incorrect. Decision at 34. The ALJ provided an extensive discussion of employment and anti-trust case law requiring an overt act in order to restart a statute of limitations, citing in particular Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), and Varner v. Peterson Farms, 371 F.3d 1011 (8th Cir. 2004). Decision at 35. The ALJ analyzed the four ALJ decisions<sup>14</sup> upon which Maher relied as support for

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<sup>14</sup> Those cases are Seatrain supra, Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 248 (ALJ 1992); NPR, Inc. v. Board of Comm'rs. of the Port of New Orleans, 28 S.R.R. 1011 (ALJ 1999); and Int'l Shipping Agency, Inc. v. Puerto Rico Ports Auth., 30 S.R.R. 407 (ALJ 2004).

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its argument that the terms of Lease EP-249 constitutes a continuing violation of the Shipping Act and determined that none of the Commission cases supported Maher's argument. Decision at 36-40.

The ALJ found Maher's claim for a reparation award arises from acts that occurred in the past and are now complete. Decision at 40. The ALJ also found that the higher rent and the rental increases imposed by Lease EP-249 are the unabated inertial consequences of the negotiations and the lease itself; PANYNJ did not inflict any new injuries on Maher after October 1, 2000, due to the terms of Lease EP-249; and the passive receipt by PANYNJ of rental payments is not an overt act that will restart the statute of limitations. Decision at 42-44. It was not necessary to make such findings and we do not find them binding. Although the signing of the two leases occurred in the past, the leases have not expired and the terms of the leases continue to bind the parties. To the extent the terms in the leases violate the Act, they may be inflicting new injuries on Maher. At this stage of the proceeding, we make no finding on that issue.

Given the structure of the Act, we do not find it necessary to adopt the analysis of the above cited employment<sup>15</sup> and antitrust<sup>16</sup> cases, which requires an overt act to restart a statute of limitations. Unlike other statutory schemes, there is no

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<sup>15</sup> The Ledbetter case involved Title VII of the Civil Rights Act of 1964 which makes it an "unlawful employment practice" to discriminate "against any individual with respect to his compensation ... because of such individual's ... sex." 42 U.S.C. § 2000e-2(a)(1). An individual wishing to challenge an employment practice under this provision must first file a charge with the Equal Employment Opportunity Commission within a specified period (generally either 180 or 300 days). 42 U.S.C. § 2000e-5(e)(1).

<sup>16</sup> As discussed in Varner, "[f]ederal antitrust causes of action are governed by a four-year limitations period. 15 U.S.C. § 15b. Claims under the Packers and Stockyards Act, 7 U.S.C. § 209(b), must also be brought within four years after an action accrues. Jackson v. Swift Eckrich, Inc., 53 F.3d 1452, 1460 (8th Cir.1995) (PSA claims are governed by the four-year statute of limitations borrowed from the Sherman Antitrust Act). Generally, the period commences on the date the cause of action accrues, that being, the date on which the wrongdoer commits an act that injures the business of another." Varner at 1018, citing Zenith at 338.

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overarching statute of limitations in the Act--that is, parties are not barred from alleging and proving a violation of the Act at any time. The Act merely prohibits a complainant from seeking reparations for an injury to the complainant if the complaint is filed more than three years after the cause of action accrued. 46 U.S.C. § 41301(a). Even after the remedy of reparations is no longer available, the remedy of a cease and desist order is available to a complainant who is able to prove a violation of the Act and show that unlawful conduct is ongoing or likely to resume.<sup>17</sup> If Maher is able to prove a violation of the Act and show that unlawful conduct is ongoing or likely to resume, relief in the form of a cease and desist order could be available.

## VI.

Maher also alleges that its claims for reparations for violations of Section 10(d)(1), 46 U.S.C. § 41102(c), were barred erroneously when the ALJ found that its claims under that section of the Act accrued at the same time as its other claims without providing any basis for this conclusion.<sup>18</sup> PANYNJ argues that it was not error for the ALJ to grant summary judgment with respect to Maher's unreasonable practices claim as all of Maher's unreasonable practice claims are based on the injury it purportedly suffered by reason of the facial differences between the terms of the two leases. PANYNJ's motion for summary judgment only addressed Maher's claims of violations of the Act based on supposed unreasonable discrimination in lease terms, that is violations of 46 U.S.C. § 41106(2), and not claims based on violations of 46 U.S.C. § 41102(c). Therefore, the decision to grant PANYNJ's motion for summary judgment applies only to Maher's reparations claims for injuries caused by violations of 46 U.S.C. § 41106(2). We make no determination regarding the accrual of Maher's unreasonable practices claim or any other claim for reparations.

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<sup>17</sup> See Footnote 8.

<sup>18</sup> See Footnote 3 of the Decision.

**CONCLUSION**

For the reasons set forth above, we grant PANYNJ's motion for summary judgment in part and deny in part.

THEREFORE, IT IS ORDERED, That PANYNJ's motion for summary judgment that Maher's claim for reparations based on unreasonable discrimination in lease terms for violations of the Act is barred by the Act's statute of limitations is granted; and IT IS FURTHER ORDERED, That PANYNJ's motion that Maher's claim for a cease and desist order is barred by any statute of limitations is denied.

By the Commission.

Karen V. Gregory  
Secretary

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*Dissenting Opinion*

**Mario Cordero, Commissioner, Dissenting.**

I respectfully dissent. It is my opinion that the Commission should reverse the Administrative Law Judge's decision to grant Respondent's motion for summary judgment on the Complainant's claim for reparations.

When making its decision, it is critical that the Commission recognize the procedural posture of the case. In evaluating a summary judgment motion based on a statute of limitations, the Commission does not determine when the Complainant's cause of action accrued; rather, the Commission determines only *whether there is a genuine dispute* as to any fact material to that issue. Fed.R. Civ.P. 56(a). A fact is considered material if it is such that ". . . a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The party opposing the summary judgment motion, here Maher, is to receive the benefit of all reasonable doubts and inferences to be drawn from the facts. Id.

While our review of the ALJ's decision is *de novo*, the Commission has specifically stated that, "[a]t the summary judgment stage, the role of the judge ' . . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" EuroUSA Shipping Inc, Tober Group, Inc, and Container Innovations, Inc. - Possible Violations of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 546 (FMC 2008). Dispute over a single material fact is sufficient to tip the scales in favor of the non-moving party, and allow the case to continue to a trial on the merits.

The Commission has maintained a strong policy of denying summary judgment in favor of hearing fact-intensive cases on the merits, declaring that ". . . summary judgments are not appropriate in cases involving complex factual matters or having widespread importance that need a more fully developed record." Int'l. Frt.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 20 Fwdrs. & Custom Bkrs. Assn of New Orleans v. LASSA, 27 S.R.R. 392, 395-96 (ALJ 1995). Here the parties have been involved in complex litigation since 2008, totaling numerous filings in litigation that has spanned over four years. To make a preliminary determination of accrual under a standard of review weighted heavily in favor of the non-moving party is, in my opinion, counter to sound administrative policy in this area.

Further, the ALJ misconstrued the law when he treated an element of the alleged violation (unequal treatment not justified by differences in transportation factors) as an affirmative defense. Maher Terminal, 32 S.R.R. 1, 18 (ALJ 2011). In doing so, the ALJ appears to have misinterpreted Ceres Marine Terminals, Inc. v. Maryland Port Administration, by erroneously eliminating the “undue” element from the claim-accrual analysis and making that element an affirmative defense. 27 S.R.R. 1251, 1270 (FMC 1997).

The majority opinion finds correctly that the ALJ erred in his interpretation of Ceres. However, by proceeding to grant summary judgment on the 10(d)(4) claim, the Commission majority appears to have missed an issue worthy of trial: whether the Complainant knew, or should have known, before June 3, 2005, that differences in its lease and that of its competitor were arguably not justified by valid transportation factors.

The parties disagree as to when Maher was on notice that the leasing practices of the Port Authority could be characterized as not merely preferential, but *unduly* and *unreasonably* preferential, within the meaning of section 10(d)(4) of the Shipping Act of 1984. See, Maher Terminal, LLC’s Responding Statement to PANYNJ’s Statement of Material Facts as to Which PANYNJ Contends There Is No Genuine Dispute, at 5. In other words, the parties do clearly dispute facts that are material to when the Complainant’s cause of action accrued.

Viewing the evidence in the light most favorable to the non-moving party, and giving that party the benefit of all reasonable doubts and inferences to be drawn therefrom, it is clear

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that material issues of fact remain. Therefore summary judgment  
cannot be granted.