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August 12, 2011

VIA COURIER/HAND

Secretary Karen V. Gregory
Federal Maritime Commission
800 North Capitol Street, N.W.
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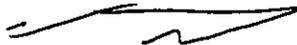
***Re: Maher Terminals, LLC v. The Port Authority of New York and New Jersey;
Docket 08-03; REDACTED VERSION FOR PUBLIC FILING***

Dear Secretary Gregory:

On behalf of our client, Maher Terminals, LLC ("Maher"), please find enclosed two (2) unbound copies of the agreed-upon redacted version for public filing of Maher's June 29, 2011 Reply in Opposition to Respondent's Exceptions to Initial Decision of May 16, 2011 Denying Respondent's Motion for Summary Judgment and Sustaining Maher's Cease and Desist Order Remedy Based on Lease-Term Discrimination Claims. Additionally, please find enclosed one disc containing a PDF copy of the aforementioned document.

Please advise if you have any questions or concerns with this submission.

Respectfully submitted,



Rand K. Brothers

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**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 IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO INITIAL
DECISION OF MAY 16, 2011 DENYING RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT AND SUSTAINING MAHER'S CEASE AND DESIST ORDER REMEDY
BASED ON LEASE-TERM DISCRIMINATION CLAIMS**

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REPLY IN OPPOSITION TO RESPONDENT'S EXCEPTIONS

Pursuant to the May 16, 2011 Initial Decision Granting In Part Motion for Summary Judgment and Dismissing Claim for Reparation Award Based on Lease-Term Discrimination Claims (the "I.D.") and Federal Maritime Commission ("FMC") Rules 227(b)(2) and 153, 46 C.F.R. §§ 502.227(b)(2) and 502.153, Complainant Maher Terminals, LLC ("Maher"), by and through undersigned counsel, submits this reply in opposition to the Port Authority of New York and New Jersey ("PANYNJ") Exceptions to the Initial Decision filed on June 7, 2011. ("PANYNJ Excpt." or "Excpt.")

PANYNJ Excpt.

The PANYNJ Excpt. appeals the portion of the I.D. that denied PANYNJ's summary judgment motion with respect to Maher's cease and desist order remedy for "lease discrimination" claims. PANYNJ Excpt., Ex. I at 9, App. 0489; I.D., Ex. H at 45-56, App. 0469-79 ("PANYNJ's motion to dismiss the claim seeking a cease and desist order based on alleged discrimination against Maher in the negotiations that resulted in EP-248 and in the terms of Lease EP-249 itself is **DENIED.**"). In brief, the PANYNJ Excpt. argues erroneously that Maher's cease and desist order remedy for the "lease discrimination" claims should be dismissed allegedly because (1) "Maher failed to present any evidence to show that there is any ongoing unlawful conduct with respect to lease discrimination for which a cease and desist order would be warranted," PANYNJ Excpt., Ex. I at 9, App. 0489; (2) "artful pleading cannot be used to evade a statute of limitations," *id.* at 10, App. 0490; and (3) "where the legal remedy sought in a cause of action is barred by the statute of limitations 'any equitable relief that might otherwise be available . . . in connection with [that] cause [] of action' is also barred," *id.* at 14, App. 0494.

PANYNJ also suggests in passing that it would be prejudiced because “[i]nvariably memories . . . have faded” and “information . . . has been lost,” *id.* at 16, App. 0496.

PANYNJ makes these legal points against the backdrop of its overarching fictional narrative arguing that fairness supports its motion for summary judgment. According to PANYNJ, Maher’s claims are allegedly stale, *i.e.* arising “over ten years ago;” Maher allegedly knew about the underlying “lease-discrimination” claims, but “sat on its rights for many years;” and Maher’s new owners allegedly brought the Shipping Act claim because of “financial decisions they evidently now regret.” *Id.* at 1-2, App. 0481-82.

Maher’s Reply in Opposition

Nothing could be further from the truth. What is really going on here is that having gotten away with violating the Shipping Act for 10 years so far, PANYNJ has petitioned the Commission to reward it further by *immunizing* it from ongoing and future violations for the next 20 years. Maher has already debunked PANYNJ’s false assertions that Maher knew of PANYNJ’s Shipping Act violations and sat on its rights in its previously submitted Exceptions to the Commission on June 7, 2011. *See* Maher’s Excpt., Ex. J at 6-10, App. 0512-16 (June 7, 2011). The record evidence established that Maher did not have “conclusive information” of PANYNJ’s violations until the year 2008, the year when PANYNJ contends the Maersk-APM “port guarantee” first went into effect, and that Maher filed its complaint promptly following key deposition testimony of PANYNJ and Maersk-APM witnesses in May 2008. PANYNJ presented neither evidence nor argument in its summary judgment motion regarding Maher’s alleged motive regarding “financial decisions.” PANYNJ’s unsupported assertion is false, and in all events, motive is irrelevant in a Shipping Act complaint. Contrary to PANYNJ’s fictional

narrative, this is not a circumstance where Maher “sat on its rights,” but rather one where PANYNJ’s violations only recently came to light.

Likewise, PANYNJ’s legal arguments are frivolous and should be rejected. As an initial matter, it is beyond cavil that the Shipping Act expressly provides a complainant like Maher the cease and desist order remedy pleaded, irrespective of the statute of limitation applicable to the reparations remedy. The Commission’s authority to that effect is well-established.

PANYNJ argued erroneously that “Maher failed to present any evidence to show that there is any ongoing unlawful conduct with respect to lease discrimination for which a cease and desist order would be warranted.” PANYNJ Excpt., Ex. I at 9, App. 0489. To the contrary, Maher presented substantial uncontroverted material evidence establishing that PANYNJ failed and continues to fail to fulfill its absolute statutory duty to provide Maher the same volume discount lease terms provided to Maersk-APM, allegedly because Maersk-APM provided a “port guarantee” (which PANYNJ contends went into effect in 2008) that PANYNJ alleges Maher could not provide. Maher’s Responding Stmt., Ex. D at ¶¶ 21-24, App. 0273-80. Maher repeatedly sought parity with Maersk-APM in late 2007 and 2008, but PANYNJ repeatedly refused to provide parity and stated that there was nothing PANYNJ could do because the Maher brothers had signed the deal. *Id.* at ¶ 24, App. 0278-80. Additionally, in February 2011, PANYNJ belatedly disclosed uncontroverted material evidence that in the year 2010 PANYNJ transformed the Maersk-APM “port guarantee” from a unique Maersk cargo guarantee for the port into a mere rent guarantee. *Id.* (“PANYNJ’s failure to enforce the cargo commitment in APM’s Port Guarantee contradicts PANYNJ’s sworn and verified responses that the Port Guarantee is a unique justification for charging Maher more than APM.”). Therefore, even though PANYNJ presented no evidence, the record establishes that Maher presented substantial

material evidence of ongoing unlawful conduct by PANYNJ with respect to lease discrimination for which a cease and desist order is warranted.

PANYNJ also argued erroneously that “artful pleading cannot be used to evade a statute of limitations.” PANYNJ Excpt., Ex. I at 10, App. 0490. The gravamen of this argument by PANYNJ is that Maher is allegedly “trying to obtain a portion of its time-barred reparations claim through the back door.” *Id.* To the contrary, the cease and desist order remedy is a separate and independent remedy provided by the Shipping Act to stop violations. Therefore, having alleged continuing violations of the Shipping Act and having provided substantial uncontroverted evidence of continuing and ongoing violations of the Shipping Act today, Maher’s prayer for a cease and desist order should be sustained and PANYNJ’s motion denied. Moreover, PANYNJ cited only inapposite authorities for support of its erroneous argument. PANYNJ cites no Shipping Act authority, nor provides any analysis and reasoning to explain why the authorities it cited are relevant to the Shipping Act. Moreover, the cases are consistent with Maher’s position, not PANYNJ’s.

PANYNJ also argued erroneously that “where the legal remedy sought in a cause of action is barred by the statute of limitations ‘any equitable relief that might otherwise be available . . . in connection with [that] cause [] of action’” is also barred.” *Id.* at 14, App. 0494. PANYNJ erroneously invokes what it misconstrues as an “analogous line of authority” of “federal courts” allegedly supporting “dismissal of the cease and desist claim here” *Id.* To the contrary, the cases cited by PANYNJ are inapposite and *do not* support dismissal of Maher’s cease and desist order remedy. First, the cases do not apply the Shipping Act. Second, PANYNJ provides neither analysis nor reasoning explaining why the cited cases are relevant to the Shipping Act. Third, none of the cases cited by PANYNJ involve a separate and independent

statutory cease and desist order remedy provided to a regulatory agency like the Commission charged with the supervisory duty to protect the public interest by scrutinizing agreements subject to the Shipping Act. Instead, the PANYNJ cited cases merely address an attempt to invoke declaratory relief, which is not at issue here, and other inapposite civil rights and banking statutes which are not comparable to the Shipping Act because the cases cited do not involve a statutory cease and desist order remedy provided to empower a regulatory agency like the Commission to prevent ongoing violations of the regulatory statute. And finally, PANYNJ misdirected the Commission by misstating the proposition it advanced which only applies when there is “concurrent” jurisdiction for the legal and equitable remedies which is not the case with the Shipping Act.

PANYNJ also suggests erroneously that PANYNJ would be prejudiced because “[i]nvariably memories . . . have faded” and “information . . . has been lost.” *Id.* at 16, App. 0496. However, PANYNJ presented no evidence in support of this mere suggestion in its summary judgment motion or its appeal, nor did it even seriously advance the suggestion in its motion or in its appeal. *Id.* Therefore, assuming for purposes of this reply that the Commission accords PANYNJ’s mere suggestion the status of an “argument,” it has been waived. Moreover, the evidence presented by Maher with respect to the underlying summary judgment motion and PANYNJ’s representations with respect to documents not missing made in this proceeding establish that PANYNJ has not been prejudiced by either fading memories or lost information. PANYNJ’s witnesses repeatedly and consistently testified that PANYNJ did not provide Maher the same preferential lease rate terms as Maersk-APM because Maersk-APM was unique because it provided a “port guarantee” that Maher could not provide. That is, they did not suffer from fading memories when it came to the material evidence about the central issue in the case.

Additionally, when pressed by Maher for discovery of documents on PANYNJ's computer backup tapes, PANYNJ reaffirmed in this proceeding that there was no material lost information.

In summary, PANYNJ's narrative is fictional and its arguments are frivolous. Therefore, the Commission should reject them as contrary to the Shipping Act, well-established Commission authority, and because they are not supported by the cases cited and evidence in the record with respect to the summary judgment motion.

BACKGROUND

Summary of Maher's Claims

This proceeding began as a straightforward application of the Commission's authority in *Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-77 (F.M.C. 1997) (hereinafter *Ceres*). Among other things, Maher alleged that PANYNJ violated the Shipping Act by failing to and *continuing* to fail to fulfill its statutory absolute duty to provide Maher preferential lease terms provided to Maersk Container Service Company, Inc. (now APM Terminals, North America, Inc.) ("APM") (collectively "Maersk-APM"). Although Maher guarantees more cargo and rent, PANYNJ unlawfully prefers Maersk-APM because PANYNJ views Maher as a mere captive terminal operator presenting no risk to leave the port. By contrast, PANYNJ prefers Maersk-APM as an ocean carrier because its affiliated ocean carrier threatened to leave the port. Having given preferential lease terms to Maersk-APM, PANYNJ continues to violate its absolute duty to make the same preferential volume discount lease rate terms available to Maher.

Maher's complaint alleged that PANYNJ (1) violated and continued to violate the Shipping Act as set forth in *Ceres*, 27 S.R.R. at 1270-77, and *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448-51 (F.M.C. 2003), by (1)

unlawfully preferring Maersk-APM and unlawfully prejudicing Maher; (2) unlawfully refusing to deal with Maher; and (3) unlawfully failing to establish, observe, and enforce just and reasonable regulations and practices, all in violation of 46 U.S.C. §§ 41106(2) and (3) and 41102(c) (Shipping Act §§ 10(b)(11), 10(b)(12), 10(b)(10) and 10(d)(1)). Evidence uncovered in discovery established the foregoing continuing violations and revealed additional Shipping Act violations by PANYNJ, including continuing violations reflected in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 280-82 (1968), enforcing 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)), because PANYNJ's charges on Maher are not reasonably related to the service provided. The newly discovered evidence also establishes that PANYNJ overcharges Maher to subsidize Maersk-APM and fails to credit Maher with additional payment and investment commitments of \$136 million provided to PANYNJ in 2007.

The proceeding also involves Maher's original counter-complaint from Dkt. 07-01 consolidated in this proceeding, regarding PANYNJ's multiple violations of the Shipping Act with respect to its violations of filed FMC Agreement No. 201131 ("EP-249"), e.g., failure to provide notice and transfer improved premises to Maher and discrimination prejudicing Maher and preferring Maersk-APM in lease terms by the imposition and enforcement of an unlawful indemnity provision against Maher by two lawsuits filed in 2007 and 2008, which PANYNJ did not require of Maersk-APM. These PANYNJ violations include continuing violations of the foregoing provisions of the Shipping Act and 46 U.S.C. § 41102(b)(2) (Shipping Act § 10(a)(3)) for failing to operate in accordance with the terms of EP-249.

Maher's Reparations Remedy

Maher seeks reparations for actual injury as set forth in the complaint in Dkt. 08-03, Maher's counter-complaint in Dkt. 07-01, and as uncovered in discovery. Maher's reparations

claims are cognizable because (1) the claims arise from continuing violations of the Shipping Act; (2) the “discovery rule” establishes that the claims did not accrue before May 2008; and (3) other claims arose more recently within the statutory period. The Commission has held that reparations are available when port authorities discriminate or fail to establish, observe, and enforce reasonable practices, including in the *Ceres* proceeding. 46 U.S.C. §§ 41301 and 41305. *Ceres*, 29 S.R.R. 356, 372-74 (F.M.C. 2001) (“the appropriate measure of damages for a violation of sections 10(b)(11) and (12), where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference or prejudice” and “the appropriate measure of damages for a violation of section 10(d)(1) is the . . . difference between the rates charged”).

Maher’s “Lease-Discrimination” Continuing Violations Claims

Commission authority provides Maher reparations for continuing violations for those acts and failures to act by PANYNJ in violation of the Shipping Act. *Ceres*, 27 S.R.R. at 1277 (“the violations are *continuing* in nature and the injury is suffered over a period of time”) (emphasis added). At a minimum, regarding the “lease-discrimination” claims at issue, Commission authority provides Maher reparations for the period after June 3, 2005 (three years prior to filing its complaint). *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 248, 277 (Morgan, A.L.J. 1992) (Complainant could recover discriminatory rate charges commencing *seven* years before its complaint was filed, but only for the three-year limitations period preceding filing of the complaint). Likewise, in *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, Chief Judge Kline rejected the port authority’s contention that claims were time-barred, agreeing with complainant NPR that “the Board’s practice in demanding payments over the life of the

cancelled lease constitutes ongoing conduct and that its complaint is therefore not time-barred” 28 S.R.R. 1011, 1014 (Kline, A.L.J. 1999). More recently, in *International Shipping Agency, Inc. v. Puerto Rico Ports Authority* (“*Intership*”), the A.L.J. applied Commission decisions, FMC Rule 63(b), and the Shipping Act to hold that even though respondent port authority’s alleged violations predated the complaint by *more than* three years, the claim for reparations was *not* barred because complainant had alleged an ongoing failure by respondent to operate in accordance with the Shipping Act, which constituted a continuing violation. 30 S.R.R. 407, 425-26 (Trudelle, A.L.J. 2004) (“Complaint was initiated due to . . . ongoing failure to operate in accordance with the requirements of the Shipping Act,” and alleged “liability arises from continued violations of obligations that continue to exist under the Agreement.”).

PANYNJ’s Ongoing Violations of the Shipping Act

Notwithstanding Maher’s repeated requests for parity, Maher’s counter-complaint in Dkt. 07-01, and its complaint in this proceeding, PANYNJ obstinately fails to fulfill its statutory duties to provide Maher the preferential terms it provides to Maersk-APM, fails to establish, observe, and enforce just and reasonable regulations and practices with respect to lease terms and its treatment of Maher, and refuses to deal with Maher.

The record evidence in this summary judgment motion establishes that Maher first began to get an inkling of potential Shipping Act claims in the summer of 2007. PANYNJ filed a Shipping Act third-party complaint against Maher on August 7, 2007 in Dkt. 07-01 and discovery ensued. By November 2007, Maher representatives met twice with PANYNJ leaders, including Port Commerce Director Rick Larrabee and his chief deputy Dennis Lombardi about the potential “lease-discrimination” claims, wherein these PANYNJ executives both vigorously and expressly denied that Maher had a *Ceres* claim against PANYNJ regarding disparate

treatment in lease terms because “the Maher brothers” had signed EP-249 and there was nothing they could do. *See* Maher’s Reply, Ex. B at App. A 2-3, App. 0061-62 (Crane and Buckley Test.); Maher’s Responding Stmt., Ex. D at ¶ 24, App. 0278-80 (Crane, Buckley, Larrabee Test.).

After another effort at outreach to PANYNJ failed, on January 17, 2008, Maher’s CEO John Buckley wrote to PANYNJ’s Larrabee and explained that Maher understood that PANYNJ “may be in violation of the Shipping Act” and that Maher requested parity with Maersk-APM, but PANYNJ rejected Maher’s proposal. *See id.* Over the next four months, culminating in the depositions of several key witnesses in Dkt. 07-01, including Maersk-APM’s witness Marc Oppenheimer (May 20, 2008) and PANYNJ witnesses, including Cheryl Yetka (May 28, 2008), Maher uncovered “conclusive information” that it had Shipping Act claims against PANYNJ. *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001). *See* Maher’s Reply, Ex. B, at App. A 3-9, App. 0062 (Oppenheimer and Yetka Test. and exhibits); Maher’s Responding Stmt., Ex. D at ¶ 24, App. 0279-80. Maher then filed this action *promptly* on June 3, 2008.

Discovery and depositions in recent months have revealed conclusive information of *additional* continuing violations of the Shipping Act because PANYNJ overcharges Maher to subsidize Maersk-APM. *Volkswagenwerk*, 390 U.S. at 280-82 (the question of liability turns upon whether the correlation of the benefit received to the charges imposed is reasonable); *Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist.*, 21 S.R.R. 1072 (F.M.C. 1982) (violation where complainants did not receive benefits proportionate to the costs allocated to them). PANYNJ has not satisfied Maher’s complaint in this proceeding, and therefore these violations are ongoing.

DISCUSSION

I. Legal Standards

A. Rule of Practice and Procedure 227(b)(2)

Commission Rule 227(b)(2) provides that an adverse party may file a reply to an appeal as in this instance. 46 C.F.R. § 502.227(b)(2); I.D., Ex. H at 46, App. 0470.

The Commission reviews an A.L.J. order granting summary judgment de novo. *See EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc.—Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. § 515.27*, 31 S.R.R. 540, 545 (F.M.C. 2008). This means that the FMC “look[s] at the case anew, the same as if it had not been heard before, and as if no decision previously had been rendered, and giving no deference to the [A.L.J.’s] determinations.” *McComish v. Bennett*, 611 F.3d 510, 519-20 (9th Cir. 2010), *rev’d on other grounds, Az. Free Enterp. Club’s Freedom Club PAC v. Bennett*, --- U.S. ----, 2011 WL 2518813 (2011) (internal quotation marks omitted) (emphasis added).

B. Summary Judgment

The I.D. denied PANYNJ’s summary judgment motion on the basis of the affirmative defense of a statute of limitations regarding certain of Maher’s “lease-discrimination” claims seeking a cease and desist order remedy. I.D., Ex. H at 45-46, 48, App. 0469-70, 0472. The I.D. also *sua sponte* granted PANYNJ leave to file an appeal pursuant to FMC Rule 153. On June 7, 2011 PANYNJ filed an appeal of this portion of the I.D. as permitted by the I.D.

As an initial matter, summary judgment is generally disfavored by the Commission. *See, e.g., McKenna Trucking Co. v. A.P. Moller-Maersk Line*, 27 S.R.R. 1045, 1051 (A.L.J. 1997) (cited with approval in *EuroUSA*, 31 S.R.R. at 546). The Commission’s standard for considering

such motions is to “ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible.” *EuroUSA*, 31 S.R.R. at 546. For that reason, summary judgment motions before the Commission “should be rarely granted in complex cases requiring more fully developed records or cases involving novel statutes or question [sic] of motive or intent.” *Id.* (quoting *McKenna Trucking*, 27 S.R.R. at 1051).

Summary judgment is “especially inappropriate” in discrimination cases such as this proceeding because, as the Commission stated almost four decades ago, “[c]itations to precedents of the Commission and its predecessors could be almost endlessly multiplied to show that questions of discrimination and prejudice or preference are questions of fact” *In re Denial of Petition for Rule Making, Cargo Diversion*, 14 S.R.R. 236, 238 (F.M.C. 1973); *see also NPR*, 28 S.R.R. at 1016 (quoting *Denial of Petition for Rule Making* and denying motion for summary judgment of lease discrimination claims for statute of limitations, stating that “questions of prejudice, preference and discrimination” in lease discrimination claims, “are questions of fact, making summary judgment especially inappropriate.”).

Summary judgment is also inappropriate here because it saves the Commission no resources. The continued vitality of Maher’s other claims which are not the subject of the I.D., *i.e.* other than the “lease discrimination” claims, necessitates a trial involving fundamental “questions of fact” about the underlying Shipping Act violations. Courts deny summary judgment where “the issues raised in the motion are closely meshed with issues to be tried and summary disposition of these issues would not materially expedite the proceedings.” *State of N.Y. v. Amfar Asphalt Corp.*, 1986 WL 27582, *2 (E.D.N.Y. Nov. 20, 1986); *see also Taylor v. Rederi A/S Volo*, 374 F.2d 545, 549 (3d Cir. 1967); *Dunham-Bush, Inc. v. Mills*, 72 F.R.D. 42, 46 (S.D.N.Y. 1976).

Where summary judgment is sought based on an affirmative defense, such as the statute of limitations at issue here, the *movant* “bears the burden of proof of establishing facts supporting the affirmative defense.” *Tech 7 Systems, Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 80 (D.D.C. 2009). The Commission recently reiterated that “the evidentiary burden on the [nonmoving party] at the summary judgment stage is not a heavy one;” the nonmoving party simply is “required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.” *EuroUSA*, 31 S.R.R. at 549 (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure § 2727, p. 490 (3d ed. 1998)). “[M]aterials offered in opposition to summary judgment are not offered to establish the truth of the matter asserted. They are offered to establish a genuine issue of material fact for trial. At 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.” *Id.* at 545 (ellipses, internal citations and quotation marks omitted). The non-moving party, therefore, “receives the benefit of all reasonable doubts and inferences to be drawn from the facts.” *Id.* at 546.

C. The Shipping Act Violations

1. Maher’s “Lease-Discrimination” Claims

Title 46 U.S.C. § 41106(2) (Shipping Act §§ 10(b)(10) & (11)) prohibits undue or unreasonable preference or prejudice with respect to lease terms where:

the parties were accorded different treatment, . . . the unequal treatment is not justified by differences in transportation factors, and . . . the resulting prejudice or disadvantage is the proximate cause of injury.

Ceres, 27 S.R.R. at 1270. The threshold criterion for unreasonable preference or disadvantage was established by *Volkswagenwerk*. 390 U.S. at 278-80 (discriminatory treatment when third party has enjoyed unfair advantage over the complainant). In *Ceres*, the Commission reaffirmed

that when a port authority makes a preference available to one tenant it must make it available to others. 27 S.R.R. at 1273.

Mere differences in treatment alone, however, *do not* violate the Shipping Act. *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958, 963 (D.C. Cir. 1988) (“the [Shipping] Act clearly contemplates the existence of *permissible* preferences or prejudices.”) (emphasis added). Therefore, only “undue or unreasonable preferences and prejudices would be violative of the Prohibited Acts.” *Seacon*, 26 S.R.R. at 900. Further, even if a discriminatory practice is shown to have a valid purpose, it may still be ruled unreasonable if “it goes beyond what is necessary to achieve that purpose.” *Distrib. Servs., Ltd. v. Trans-Pacific Freight Conf. of Japan*, 24 S.R.R. 714, 722 (F.M.C. 1988); *Ceres*, 27 S.R.R. at 1275 (discrimination with valid purpose unreasonable where “the degree of disparity is disproportionate to [port authority’s] goals”).

2. Failure to Establish, Observe, and Enforce Just and Reasonable Regulations

Title 46 U.S.C. § 41103(c) (Shipping Act § 10(d)(1)) provides that a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” “[A]s 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.” *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. 307, 329 (1966)); *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) (“*WGMA*”). “The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination.” *NPR*, 28 S.R.R. at 1531. In the context of monetary payments, the Commission considers “whether the charge

levied is reasonably related to the service rendered” by “measur[ing] the impact on the payer compared to other payers as well as the relative benefits received.” *Id.* at 1531-32 (quoting *Volkswagenwerk*, 390 U.S. at 282). “[Complainant] has the burden of persuading the Commission that [the Port]’s practice . . . [i]s unreasonable,” and “[i]f [Complainant] succeeds in that regard, the burden of proving justification shifts to [the Port].” *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1199, 1222 (F.M.C. 2003).

3. Unreasonable Refusal to Deal

Title 46 U.S.C. § 41103(c) (Shipping Act § 10(b)(10)) provides that a “marine terminal operator may not unreasonably refuse to deal or negotiate.” “This requires a two part inquiry: whether [the Port] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth.*, 29 S.R.R. at 1448. The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking and Lease Agreement By and Between City of Portland, Maine and Scotia Prince Cruises Limited*, 30 S.R.R. 377, 379 (F.M.C. 2004).

II. PANYNJ Exceptions Are Frivolous

A. The Cease and Desist Order Remedy Is Not Subject To the Reparations Statute of Limitations

The Shipping Act empowers the Commission to “make an appropriate order” following its investigation of a complaint. 46 U.S.C. § 41301(c). With respect to complaints, the statute also empowers the Commission to “investigate any conduct or agreement that the Commission believes may be in violation . . .” and “by order, disapprove, cancel, or modify any agreement that operates in violation” of the Shipping Act. 46 U.S.C. § 41302(a). These statutory powers of the Commission to issue appropriate orders are not subject to a statute of limitations.

The Shipping Act also provides that a person may file with the Commission a complaint alleging a violation of the statute, and if “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). While the statute expressly limits the time period for the filing of a request for a reparations award, it does not limit either the right of a complainant to seek or the Commission to employ the cease and desist order remedy for a violation of the Shipping Act.

The Shipping Act empowers the Commission to issue a cease and desist order directing a regulated entity to stop ongoing or potentially future violations of the Act. *William J. Brewer v. Saeid B. Maralan and World Line Shipping, Inc.*, 29 S.R.R. 6 (F.M.C. 2001). A cease and desist order is a “nonreparation” order. *See id.*; *see also*, 46 U.S.C. §§ 41308 and 41309, making the distinction between “orders” and “reparation orders.” Cease-and-desist orders are designed to ensure future compliance with the law, *Pacific Champion Express Co., Ltd.-Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1405 (2000) while reparations are awarded to remedy past violations of the Shipping Act, *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 695, 701 (A.L.J. 1996).

Moreover, the Commission has repeatedly held that the statute’s three-year statute of limitations applies only to requests for reparations. *Inlet Fish*, 29 S.R.R. at 313 (“[T]he Commission notes that the three-year statute of limitations does not apply to complaints seeking nonreparation orders”); *Western Overseas Trade and Dev. Corp. v. ANERA*, 26 S.R.R. 874, 885 n.17 (F.M.C. 1993) (“The 3 year statute of limitations in section 11(g) of the 1984 Act applies only to requests for reparations. It would not prevent the Commission from issuing a cease and desist order in a case brought over three years after the cause of action accrued.”). Apart from a reparations claim, the Commission has emphasized that “there is no time limit to the filing of the

claim.” *A/S Ivarans Rederi v. Companhia De. Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1550 (A.L.J. 1986).

PANYNJ conceded that it is not familiar with the Shipping Act authority, admitting that it found no Shipping Act authority for the proposition that a complainant can have a reparations claim time-barred, yet still obtain a cease and desist order. PANYNJ Excpt., Ex. I at 9, 13 n.8, App. 0489, 0493 n.8. However, the authority plainly exists. *See, e.g., CSC International, Inc. v. Orient Overseas Container Line, Inc.*, 16 S.R.R. 1239, 1240 (F.M.C. 1976) (“[W]hile the expiration of the two-year limit provided in Section 22 destroys the remedy to the shipper so that the Commission may no longer award reparation, it does not terminate the carrier’s liability for violating the statute.”); *Rascator Maritime, S.A. v. Cargill Inc.*, 21 S.R.R. 1374 (F.M.C. 1982) (even if statute of limitations has run on reparations claim, Commission retains jurisdiction to grant cease and desist order).

In *CSC International, Inc. v. Orient Overseas Container Line, Inc.*, a shipper sought reparations and a cease and desist order against a carrier for alleged freight overcharges. 16 S.R.R. at 1240. The A.L.J. concluded that the statute of limitations had run on the shipper’s claim and that it thus did not have jurisdiction over the complaint. *Id.* On review, the Commission concluded that cease and desist relief is not barred by the statute of limitations from recovering reparations: The Commission explained, “[W]hile the expiration of the two-year limit provided in Section 22 destroys the remedy to the shipper so that the Commission may no longer award reparation, it does not terminate the carrier’s liability for violating the statute.” *Id.*¹

¹ In *Ace Machinery Co. v. Hapag Lloyd Aktiengesellschaft*, 16 S.R.R. 1258, 1262 (F.M.C. 1976), the Commission distinguished reparations from an order to stop future violations, even where complainant’s claim for reparations was considered “clearly frivolous,” because complainant had paid nothing and the cease and desist order sought to restrain payment. The Commission held that “a private complaint action will lie under Section 22 of the Shipping Act regardless of

Similarly, in *Rascator Maritime, S.A. v. Cargill, Inc.*, the Commission rejected the argument that a time barred reparations claim should also preclude its jurisdiction to award a cease and desist order. 21 S.R.R. 1205, adopted 21 S.R.R. 1374 (1982). In *Rascator*, a shipper sought reparations and a cease and desist order against a marine terminal operator for alleged unreasonable berthing practices. 21 S.R.R. at 1205. The respondent claimed that its actions were justified by a long-standing tariff provision providing the terminal unilateral discretion in berthing matters. The respondent also asserted that the reparations claims were time barred because the events giving rise to the complaint arose outside the statutory period.

Following a settlement proposal submitted by the parties for approval, the A.L.J. addressed the question of Commission jurisdiction over the underlying reparations and cease and desist claims, concluding, as PANYNJ argues here, that because the reparations complaint is time barred, the Commission did not have jurisdiction to approve the settlement and dismissed both the cease and desist and the reparations claims. *Id.* at 1206.² On review, the Commission overturned the portion of the A.L.J.'s decision that concluded it did not have jurisdiction over the complaint because it was time barred. 21 S.R.R. at 1374. The Commission explained:

The two-year limitation in Section 22 of the Shipping Act applies only to requests for reparations. The complaint in this proceeding alleged violations of Section 17 of the Act and asked for a cease and desist order as well as reparations. Thus, the Commission

whether the complaint is accompanied by a valid demand for reparations. In this instance, Ace's complaint stated sufficient facts to adequately plead several potential Shipping Act violations” *Id.*

² The A.L.J. concluded that the Commission lacked jurisdiction over the cease and desist claims because “the settlement agreement on its face does not appear to be concerned with the present or future tariff provisions . . . and the parties are deemed to have abandoned their contentions” regarding a cease and desist order. *Id.* at 1206. Thus, like PANYNJ's erroneous argument, in *Rascator*, the A.L.J. found that the cease and desist claims were waived; here, PANYNJ claims erroneously the “undisputed facts demonstrated” that there are no current or future violations to restrain. Neither is a proper basis to deny jurisdiction over cease and desist claims.

retains jurisdiction over the complaint even though the actions which form its gravamen took place more than two years ago.

Id. (internal citations omitted).

B. The Shipping Act Does Not Immunize Long-term Violators

Notwithstanding PANYNJ's lament that Maher filed its complaint over seven and one-half years after concluding its lease with PANYNJ, the mere passage of time does not immunize PANYNJ from a cease and desist order. The Commission has issued cease and desist orders and reparations orders for ongoing and continuing violations many years after the agreement or events giving rise to the complaints first arose. *See, e.g., Compania Sud Americana de Vapores S.A. v. Inter-American Freight Conference*, 27 S.R.R. 931, 941 (A.L.J. 1997) (noting Commission authority where complainants were "allowed to file and prosecute complaints alleging that leases, agreements, or tariffs under which they had operated for some time were unlawful and to seek suitable relief"); "*50 Mile Container Rules*" *Implementation by Ocean Common Carriers Serving U.S. Atlantic & Gulf Coast Ports*, 24 S.R.R. 411 (F.M.C. 1987), *aff'd sub nom. N.Y. Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988) (issuing a cease and desist order on the enforcement of certain rules entered into over ten years before the filing of the complaint); *Se. Mar. Co. v. Ga. Ports. Auth.*, 23 S.R.R. 531 (A.L.J. 1985) (issuing a cease and desist order on an exculpatory clause in a tariff issued six years before the filing of the complaint).

The Commission's position on this issue is clearly stated in *U.S. Lines, Inc. v. Maryland Port Administration*:

It would appear that . . . MPA is trying to set up some kind of estoppel against the complainants and the Commission, i.e., since complainants have for a number of years 'consented' to the exculpatory clauses, they are precluded from challenging them now, and the Commission cannot find them invalid. Whatever

applicability such a theory may have in the realm of purely private contract, it has none here where the Commission has a continuing duty to ensure those subject to its jurisdiction under Section 17 [of the Shipping Act of 1916] 'establish, observe, and enforce just and reasonable regulations' The right to challenge those regulations before the Commission cannot be barred by some vaguely expressed theory of consent or estoppel.

20 S.R.R. 290, 299 (A.L.J. 1980), adopted 20 S.R.R. 646 (F.M.C. 1980).

In *Perry's Crane Service v. Port of Houston Authority*, a complainant stevedore sought reparations and a cease and desist order alleging that the port authority's crane use practice, reflected in a tariff, violated the Shipping Act. 16 S.R.R. 1459 (A.L.J. 1976), adopted in relevant part, 19 F.M.C. 548 (F.M.C. 1977). The tariff at issue had been in effect for approximately thirty years. *Id.* at 1464-67. The presiding officer held, and the Commission approved, that it was proper to issue a cease and desist order stopping the violations even though rejecting as time-barred any reparations accruing beyond the limitations period. *Id.* at 1487-93, 19 F.M.C. at 551 (the Commission approved the cease and desist order and time-barred reparations claims, holding that the complainant was only entitled to a reparations award for "losses occasioned by the unlawful practices" within the limitations period.). Thus, in *Perry's Crane*, time-barred reparations claims did not bar the cease and desist order.

PANYNJ's admitted lack of familiarity with Commission authority on this subject also extends to its misunderstanding of cases cited by Maher, which PANYNJ attempted to distinguish because they "involved instances where a reparations claim was either not asserted or was not time barred." PANYNJ Excpt., Ex. I at 9 n.4, 13 n.8, App. 0489 n.4, 0493 n.8.³ However, PANYNJ erroneously emphasized factual distinctions without a legal difference.

³ Citing *A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1550 (F.M.C. 1986); *Inlet Fish*, 29 S.R.R. 306; *Western Overseas*, 26 S.R.R. 874; *Ceres*, 29 S.R.R. 356; *Ballmill Lumber & Sales Corp. v. The Port of New York Authority*, 10 S.R.R. 131 (F.M.C.

For example, in *Ballmill Lumber*, a lumber wholesaler first leased terminal property from the Port Authority of New York ("Port") in 1950. 10 S.R.R. at 132. The largest lumber wholesaler at the Port renegotiated its lease with the Port in 1953, and in doing so was granted a preference not provided to other wholesalers. *Id.* In 1960, the complainant renegotiated its lease with the Port and was not provided the preferential terms. *Id.* The aggrieved wholesaler filed a complaint seeking reparations and a cease and desist order against the Port in 1966—six years after it renewed its lease with the knowledge that another tenant's lease included more favorable terms. *Id.* at 132.

Although PANYNJ tried to distinguish *Ballmill Lumber* on the ground that the Commission *did not* bar reparations on statute-of-limitations grounds, the reason the Commission did not find reparations time-barred was because the Port's continued failure to provide the preferential terms to other tenants was a continuing and ongoing violation of its obligations under the Shipping Act. As the Commission reiterated in *Ceres*, its "decision merely reflects existing precedent that when a port authority 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." 27 S.R.R. at 1274.⁴

1968); *Alex Parsinia d/b/a/ Pac. Int'l Shipping & Cargo Exp.*, 27 S.R.R. 1335, 1342 (A.L.J. 1997); *Portman Square Ltd. – Possible Violations of Sec. 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86-87 (A.L.J. 1998).

⁴ In *Western Overseas*, various shippers entered into service contracts in 1988, but did not bring claims until 1992. 26 S.R.R. at 875 n.2. Although the Commission found that it lacked jurisdiction over the service contract pursuant to section 8(c), the Commission explained its view that the shippers' claims for reparations were barred by the three-year statute of limitations, but that the statute of limitations would not have barred a cease and desist order. *Id.* at 885 n.17. In *A/S Ivarans*, the Commission found that a complaint seeking reparations and a cease and desist order was not time-barred even though the complaint was not filed until more than three years after the events initiating the complaint. 23 S.R.R. 1543. In *Ceres*, the Commission declared the lease unlawful and remanded for reparations, rejecting the argument that waiver or estoppel applied to immunize the violations of the Shipping Act. 29 S.R.R. at 372-74.

C. PANYNJ Failed to Carry Its Burden as Movant to Establish That There Is an Applicable Statute of Limitations

As a threshold matter, PANYNJ's motion for summary judgment and its appeal regarding Maher's cease and desist order remedy for "lease discrimination" claims fail because *there is simply no applicable statute of limitations* upon which judgment could be had as a matter of law. It is PANYNJ's burden to prove entitlement to judgment as a matter of law on the basis of its statute of limitations defense—a burden that includes proving that a statute of limitations is a valid affirmative defense to the claims upon which it seeks judgment. *See, e.g., RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503, 544-45 (D.N.J. 1999); *Hamilton v. CSX Transp., Inc.*, 2009 WL 3353557, *3 (N.D. Ohio Oct. 15, 2009) (dismissing motion for summary judgment on the basis of an affirmative defense not available under the applicable statute).

PANYNJ failed to cite an allegedly applicable statute of limitations. To the contrary, PANYNJ concedes the Commission's authority that there is no statute of limitations and that the statute of limitations for reparations does not apply. PANYNJ Excpt., Ex. I at 9 n.4, App. 0489 n.4 ("Commission . . . has the power to issue a cease and desist order even if a party's request for reparations is time-barred."); PANYNJ's Motion for Summary Judgment, Ex. A at 26, App. 0027 ("[a] cease and desist order is not subject to the Shipping Act's statute of limitations . . . "). PANYNJ's failure to fulfill its burden to establish as a matter of law that it is entitled to judgment on a statute of limitations defense despite the absence of a viable statute of limitations defense in the Shipping Act to a complaint seeking a cease and desist order compels dismissal of PANYNJ's motion and rejection of its appeal.

PANYNJ also asserts erroneously that a cease and desist order remedy is the same as a reparations remedy. PANYNJ Excpt., Ex. I at 10, App. 0490 ("Maher is . . . doing nothing more

. . . than trying to obtain a portion of its time barred reparations claim through the back door.”) But nothing could be further from the truth. Not only are the statutory remedies separate and independent as illustrated by the foregoing authorities, but the PANYNJ assertion ignores the purpose of the cease and desist remedy – to stop violations of the Shipping Act. *Portman Square Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86-87 (A.L.J. 1998), citing *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (A.L.J. 1997).

For its part, Maher seeks a cease and desist order remedy to *end* the ongoing unlawful discrimination and other violations of the Shipping Act. This accords with Shipping Act authority that terminal operators like PANYNJ have a continuing absolute duty to provide volume discount terms in a reasonable, even-handed manner. *Ceres*, 29 S.R.R. at 372-73 (the statutory duty is “absolute” to apply criteria for lower rates in an evenhanded manner); *Ceres*, 27 S.R.R. at 1274, 1277 (“This decision merely reflects existing precedent that when a port authority 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.”) (emphasis added). Furthermore, as a marine terminal operator, PANYNJ has a “duty to serve the public and treat all persons *alike*.” *Investigation of Free Time Practices – Port of San Diego*, 7 S.R.R. 307, 330 (F.M.C. 1966) (emphasis added). The Commission has repeatedly emphasized that when it comes to marine terminal operators, “[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.” *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.*, 11 S.R.R. 309, 317 (F.M.C. 1969) (emphasis added).

As the Commission has explained, the simplest way for a port authority to avoid running afoul of the Shipping Act when providing differing arrangements is by *offering to make those arrangements with other port users*. See *In the Matter of Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California*, 9 S.R.R. 390, 398 (F.M.C. 1967).

Therefore, Maher seeks a cease and desist order to stop PANYNJ's present and ongoing violations of the Shipping Act, prohibit future violations, and mandate that PANYNJ make the Maersk-APM terms available to Maher as originally promised by PANYNJ, repeatedly sought by Maher, and required by the Shipping Act. Simply put, in addition to reparations for past damages, Maher seeks a cease and desist order mandating parity as required by the Shipping Act. *Ceres*, 27 S.R.R. at 1272 (port authority violated the Shipping Act when it refused to grant parity with Maersk).

III. PANYNJ Erroneously Argued That There Is No Evidence of Ongoing Violation

PANYNJ erroneously argued that Maher is not "seeking a *legitimate* cease and desist order to prevent ongoing statutory violations" because: (1) "the Initial Decision correctly concluded" that there are no ongoing statutory violations; (2) "Maher failed to present any evidence" of ongoing statutory violations; and (3) "the undisputed facts established" that there are no ongoing statutory violations. PANYNJ Excpt., Ex. I at 9-10, App. 0489-90 (emphasis added). PANYNJ's argument is frivolous.

A. The I.D. Did Not Conclude There Are No Ongoing Violations

PANYNJ has misstated the I.D., which *expressly concluded* that PANYNJ's acts or failures to act with respect to Maher's lease may constitute violations warranting a cease and desist order. PANYNJ Excpt., Ex. I at 8, App. 0488(citing I.D., Ex.H at 46, Ex. 0470, saying "If the Commission determines that terms in Lease EP-249 violate the Shipping Act by granting an

undue preference, the Commission may issue a cease and desist order.”). Of course, there would have been no point in denying PANYNJ’s motion with respect to the cease and desist order remedy if the I.D. had decided that PANYNJ’s alleged violations did not actually violate the Shipping Act.

PANYNJ has also misrepresented the I.D.’s very limited “continuing violation” position regarding *reparations*⁵ as standing for the proposition that there is no ongoing lease discrimination for the purposes of a cease and desist order. PANYNJ Excpt., Ex. I at 9-10, App. 0489-90. Further evidence of PANYNJ’s misdirection appears in the recent order denying PANYNJ’s motion for a stay pending its appeal, which was denied. Memorandum Regarding Stay Pending Appeal, Ex. L, App. 0567-72. The order expressly rejected PANYNJ’s argument that Maher would not be injured by a stay and held to the contrary that:

Maher argues that under the May 16 Decision, it incurs higher costs under Lease EP-249 that cannot be recovered and will continue unless and until it obtains a ceases and desist order.

A stay while the Commission reviews the May 16 Decision could substantially harm Maher’s interest by delaying entry of a cease and desist order. . . .

Id. at 4, App. 0571. Thus, contrary to PANYNJ misrepresentations, the I.D. did not conclude that there is no ongoing violation of the Shipping Act.

Moreover, Maher has filed Exceptions to the I.D. with respect to the erroneous conclusion regarding the continuing violations at issue. PANYNJ’s present failures to comply

⁵ Regarding reparations, the I.D. concluded (1) that Maher’s claim for reparations accrued on or before the date Maher signed the lease; and (2) that any overt act by PANYNJ that resulted in discriminatory lease terms was completed on or before the date Maher signed the lease; and (3) therefore, that the continuing violation doctrine, as applied by the I.D., could not apply to Maher’s claim for reparations. I.D., Ex. H at 41, App. 0465 (“the continuing violation rule does not support Maher’s claim for a reparation award for alleged discrimination in negotiations leading up to signing Lease EP-249 and the terms of the Lease EP-249 itself”). None of these conclusions goes to the merits of PANYNJ’s ongoing violations of the Shipping Act nor to the availability of the cease and desist order remedy.

with its absolute duties to provide Maher volume discount terms provided to Maersk-APM and to establish, observe, and enforce just and reasonable regulations and practices with respect to lease rate terms, plus its ongoing unreasonable refusal to deal with Maher all by their very nature constitute present, ongoing, and future violations of the Shipping Act warranting a cease and desist order. *See* Maher Excpt., Ex. J at 15-19, App. 0521-25.

B. PANYNJ Did Not Argue That Maher Failed to Present Evidence

PANYNJ's summary judgment motion with respect to the cease and desist remedy was about the statute of limitations, not the merits of Maher's claims. Therefore, PANYNJ neither argued the merits of Maher's claims nor that Maher failed to present evidence of ongoing violations of the Shipping Act. PANYNJ's Motion for Summary Judgment, Ex. A at 26-28, App. 0027-29. PANYNJ asserts this "failure to present evidence" argument for the first time in its appeal. PANYNJ Excpt., Ex. I at 9, App. 0489. PANYNJ's summary judgment motion regarding the cease and desist remedy argued simply that the cease and desist claims should be time-barred *if* the reparations claims were time barred. PANYNJ's Motion for Summary Judgment, Ex. A at 26-28, App. 0027-29 (concluding its motion on the cease and desist claims that "[i]f summary judgment is granted on Maher's reparations claims, summary judgment should be granted on its claim for a cease and desist order as well").

Because PANYNJ did not argue the merits of Maher's claims, it did not advance any allegedly undisputed facts on the issue of past, current, or future violations of the Shipping Act. *See* PANYNJ's Motion for Summary Judgment, Ex. A at 5-9, App. 0006-10; *Id.* at 26-28, App. 0027-29; PANYNJ's Stmt. of Material Facts, Ex. C at ¶¶ 1-24, App. 0255-61. To the contrary, for purposes of its motion, PANYNJ assumed Maher's allegations as true, *i.e.* that the "lease-discrimination claims" arose from "the facial terms of the leases" that amounted to damages to

Maheer of “approximately \$474 million through the 30 year lease period,” *i.e.* from 2000 – 2030 and necessarily including today. PANYNJ’s Motion for Summary Judgment, Ex. A at 3 n.3, App. 0004 n.3 (PANYNJ “will assume, solely for purposes of this summary judgment motion” that Maheer’s “lease discrimination . . . claims are colorable”); *id.* at 5-9, App. 0006-10; PANYNJ’s *Stmt.* of Material Facts, Ex. C at ¶¶ 5-8, App. 0256-57.

PANYNJ’s summary judgment strategy assiduously avoided arguing that any of the evidence it submitted was for the purpose of disputing PANYNJ’s past, present, and likely future violations by *expressly stipulating* for the purposes of the motion that Maheer’s complaint advanced viable claims. PANYNJ’s Motion for Summary Judgment, Ex. A at 3 n.3, App. 0004 n.3 (“Although the Port Authority vigorously rejects the notion that Maheer’s lease term discrimination claims have any merit whatsoever, we will assume, solely for the purposes of this summary judgment motion based on the statute of limitations, that such claims are colorable.”).

Additionally, PANYNJ’s new assertion that the “undisputed facts demonstrated” that there are no ongoing violations of the Shipping Act defies PANYNJ’s previous argument in its summary judgment motion. PANYNJ devoted two pages of its motion to disputing “post-lease violations” previously alleged by Maheer. *Id.* at 24-25, App. 0025-26. Although PANYNJ’s argument is conclusory and factually unsupported, having itself disputed facts of alleged “post-lease” and ongoing violations, PANYNJ cannot be heard to argue that there is no dispute of fact over ongoing violations. *See also* Maheer’s Reply, Ex. B at 17-18, App. 0049-50.

PANYNJ’s new assertion that Maheer failed to present evidence ignores the strictly limited statute of limitations grounds for its motion. And since PANYNJ failed to present evidence and argument challenging the merits of Maheer’s claims, Maheer was not obliged to

submit contrary evidence. Nevertheless, there is ample evidence in the record establishing ongoing and future PANYNJ Shipping Act violations.

C. The Record Evidence Establishes PANYNJ's Ongoing Violations

PANYNJ erroneously asserted that “Maher failed to present any evidence” of Shipping Act violations. To the contrary, the record evidence establishes PANYNJ's ongoing violations.

PANYNJ has an ongoing duty to provide preferential terms in a reasonable, even-handed manner. *Ceres*, 29 S.R.R. at 372-73 (the statutory duty is “absolute” to apply rate and volume concession criteria in an evenhanded manner); *Ceres*, 27 S.R.R. at 1270-77. The Commission has explained that the simplest way for a port authority to avoid running afoul of the Shipping Act when providing differing arrangements is by *offering to make those arrangements with other port users*. *Agreement No. T-1870*, 9 S.R.R. at 398. PANYNJ has failed to fulfill this duty, and Maher presented ample evidence in opposition to PANYNJ's summary judgment motion establishing that. Maher's Responding *Stmt.*, Ex. D at ¶ 24, App. 0279 (Buckley Test.) (“[T]here's nothing the Port Authority can do about it.”).

Maher's complaint alleges ongoing violations and seeks a cease and desist order.⁶ PANYNJ's failure to fulfill its *absolute duty* to make volume discount terms available to Maher violated and *continues to violate* the Shipping Act *every day* that PANYNJ fails to offer Maher the preferential terms granted to Maersk-APM. *Ceres*, 29 S.R.R. at 372-73; *Ceres*, 27 S.R.R. at 1251; *Seatrains, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079, 1082

⁶ Maher Complaint, Ex. K at IV.A, App. 0561, and discussion and citations in Maher's MSJ Opp., Ex. B at 17 n.13, App. 0049 n.13; *see also* PANYNJ's Motion for Summary Judgment, Ex. A at 26, App. 0027 (“Maher's complaint also includes a prayer for a cease and desist order” and “a cease and desist order is not subject to the Shipping Act's statute of limitations”); *see also* PANYNJ Excpt., Ex. I at 9, App. 0489 (PANYNJ does not dispute that claims seeking cease and desist orders are not barred by the statute of limitations).

(A.L.J. 1979) (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 (1968) (recognizing continuing violations for conduct begun decades earlier that continues to violate the law in the limitations period); *Baker v. F & F Inv. Co.*, 489 F.2d 829, 836 (7th Cir. 1973) (for conduct in violation of law that continues into a limitations period, a new period began to run each day as to each day's damage).

As the evidence in the record establishes:

Maher's damages include the difference between Maher's base rent and APM's base rent that Maher must pay PANYNJ over the 30 year term of Maher's lease. This includes the difference between Maher's initial base rent of \$39,750 per acre and APM's base rent of \$19,000, plus difference owing to the 2 % annual rent escalator paid by Maher and not paid by APM. For example, Maher's 2008 rent is \$45,660 per acre, while APM's base rent remains unchanged at \$19,000. Thus in 2008 alone Maher must pay PANYNJ \$26,660 more per acre in base rent than APM pays PANYNJ. Based on this difference the base rent and escalator differential damages alone incurred by Maher since 2000 total approximately \$86 million. According to the disparate lease terms of leases EP-248 and EP-249, these damages total approximately \$474 million through the 30 year lease period based upon the disparate base rent and escalator.

I.D., Ex. H at 41-42, App. 00465-66 (quoting Maher's Resp. to Port Authority's First Set of Interrogatories at 9-10). Therefore, the record evidence shows that PANYNJ's ongoing violations cause Maher a minimum injury and damages averaging over \$1.3 million a month and will for the next 20 years. *Id.* at 41-44, App. 0465-468 (showing evidence of other discriminatory lease terms, e.g. higher container throughput requirements, higher finance fee paid to PANYNJ, higher costs for additional security deposit requirement, and lost profit, etc.)

PANYNJ contends that the key Maersk-APM lease term—Maersk's cargo guarantee—justifies the difference in lease rate terms. This "port guarantee" did not go into effect until 2008. But the evidence discovered during belated disclosures by PANYNJ in February 2011 and

sought for years by Maher establishes that the “port guarantee” provision is merely a rent guarantee. See Maher’s Reply, Ex. B at App. A 4, App. 0063. Maher actually provides PANYNJ a greater rent guarantee, so the “port guarantee” cannot justify the lease discrimination. PANYNJ decided in the year 2010 not to enforce the “port guarantee” requirement against Maersk-APM, its parent, Maersk, Inc., or their affiliated ocean carrier to actually require the allegedly guaranteed cargo to be provided to the port. See PANYNJ’s *Stmt.* of Material Facts, Ex. C at ¶¶ 21-23, App. 0260-61; PANYNJ’s Responding *Stmt.*, Ex. E at ¶¶ 21-23, App. 0390-95.

This same record evidence also establishes PANYNJ violations for an ongoing failure to “establish observe, and enforce just and reasonable regulations and practices.” 46 U.S.C. § 41103(c) (Shipping Act § 10(d)(1)). In the context of monetary payments, the Commission considers “whether the charge levied is reasonably related to the service rendered” by “measur[ing] the impact on the payer compared to other payers as well as the relative benefits received.” *NPR*, 28 S.R.R. at 1531-32 (quoting *Volkswagenwerk*, 390 U.S. at 282). In like circumstances where a port authority provided preferential lease rate terms to one tenant and denied the preferential terms to another, the Commission ruled that the evidence established a violation of Shipping Act § 10(d)(1). *Ceres*, 27 S.R.R. at 1275.

Evidence in the record also establishes PANYNJ violations of the Shipping Act because of PANYNJ’s ongoing refusal to deal with Maher with respect to the lease rate terms. For example, in November 2007, Maher representatives met twice with PANYNJ leaders, including Port Commerce Director Rick Larrabee and his chief deputy Dennis Lombardi about the potential “lease-discrimination” claims, wherein these PANYNJ executives both vigorously and expressly denied that Maher had a *Ceres* claim against PANYNJ regarding disparate treatment in

lease terms because “the Maher brothers” had signed EP-249 and there was nothing they could do. *See* Maher’s Reply, Ex. B at App. A 2-3, App. 0061-62 (Crane and Buckley Test.); Maher’s Responding Stmt., Ex. D at ¶ 24, App. 0278-80 (Crane, Buckley, Larrabee Test.). After another effort at outreach to PANYNJ failed, on January 17, 2008, Maher’s CEO John Buckley wrote to PANYNJ’s Larrabee and explained that Maher understood that PANYNJ “may be in violation of the Shipping Act” and Maher requested parity with Maersk-APM, but PANYNJ rejected Maher’s proposal. *See id.*

Port authorities may not unreasonably refuse to deal with port users like Maher, and a refusal to deal constitutes a continuing violation. *Canaveral Port Auth.*, 29 S.R.R. at 1451 (violation continued after the initial refusal to consider port user’s application); *Seatrain*, 18 S.R.R. at 1082 (port authority’s refusal to provide berthing access for over two years, commencing outside the limitations period, constituted a continuing violation). PANYNJ repeated refusals to deal with Maher with respect to the “lease-discrimination” claims continue to this day, are ongoing, and are likely to continue in the future as established by the evidence and PANYNJ’s frivolous appeal.

IV. PANYNJ Erroneously Argued That Maher’s Cease and Desist Order Remedy Is Nothing More Than “Artful Pleading”

PANYNJ’s erroneously asserted that Maher’s cease and desist remedy is “artful pleading . . . used to evade a statute of limitations.” PANYNJ Excpt., Ex. I at 10, App. 0490. However, PANYNJ’s erroneous assertion fails because the cease and desist remedy is an express statutory remedy afforded to complainants like Maher by the Shipping Act, and a specific statutory power provided to the Commission to stop violations. Section 11(b) of the Shipping Act, codified at 46 U.S.C. 41301(c), expressly provides that the Commission can, in response to a complaint, issue “an appropriate order.” and this includes cease and desist relief. *Western Overseas Trade & Dev.*

Corp. v. ANERA, 26 S.R.R. 1066, 1072 (A.L.J. 1993) (“The authority to issue a cease and desist order is found in section 11(b) of the Act, 46 U.S.C. App. § 1710(b).”). Under this statutory authority, the cease and desist remedy is a well-established power of the Commission and not the product of what PANYNJ erroneously mischaracterized as “artful pleading” by Maher.

Furthermore, the cases cited by PANYNJ for the proposition that Maher’s request for cease and desist relief is “artful pleading” support Maher’s request for the cease and desist order remedy and the Commission’s exercise of this power. All of the cases cited by PANYNJ concern plaintiffs whose claims were governed by, and time-barred under, a comprehensive statutory scheme meant to resolve those particular types of claims. Therefore, not surprisingly in those cases, the court held that the plaintiffs could not then rely on other theories to circumvent the comprehensive statutory schemes and the respective statutes of limitations. *Block v. North Dakota, ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (where “Congress intended the [Quiet Title Act] to provide the exclusive means by which adverse claimants could challenge the United States’ title to real property,” claimants could not bring an officer’s suit not provided for in the statute to recover disputed lands); *Shavnee Trail Conservancy v. U.S. Dep’t of Agric.*, 222 F.3d 383, 388 (7th Cir. 2000) (“Because we believe that Congress intended for suits that require resolution of a disputed claim to real property in which the United States claims an interest to be brought under the [Quiet Title Act],” plaintiff could not challenge Government’s use of land through a constitutional challenge); *Hall v. Dow Corning Corp.*, 114 F.3d 73, 78 (5th Cir. 1997) (in diversity case, where Texas law provided that all medical malpractice claims are governed by a particular health care liability statute, court rejected suit against allegedly negligent doctor under separate fraud theory so as to “guard[] carefully against the erosion of the [statute]”); *Minehan v. United States*, 75 Fed. Cl. 249, 259-60 (Ct. Fed. Cl. 2007) (where statute provided

the mechanism for seeking a tax refund from the Government, plaintiff could not seek the same tax refund under a tort theory); *Raymond v. Mobile Oil Corp.*, 7 F.3d 184, 185 (10th Cir. 1993) (restyling the claim barred where Age Discrimination in Employment Act (“ADEA”) statute of limitations applied).

Unlike the cases PANYNJ cited, Maher does not seek to venture outside of the relevant exclusive statute or to restyle a claim to invoke alternative theories and remedies to avoid the statute of limitations of a statutory regime. Rather, Maher simply seeks its lawful remedies under separate and independent statutory provisions of the relevant statute, the Shipping Act. The statute provides separate and independent remedies—section 11(g) for reparations and section 11(b) for a cease and desist order—for which the reparations remedy is subject to an express statute of limitations, but the cease and desist remedy is not. *Western Overseas*, 26 S.R.R. at 885 n.17. Therefore, the cases PANYNJ cited are inapposite, and resolution of the reparations remedy on statute of limitations grounds does not dispose of Maher’s cease and desist order remedy. Maher is engaged in statutory- pleading, not “artful pleading.”

V. PANYNJ Erroneously Argued That Maher’s Cease and Desist Order Remedy Is Nothing More Than a Reparations Remedy

Founded on the false premise that Maher’s cease and desist claims do not seek to bar any ongoing or potential future violations,⁷ PANYNJ erroneously asserts that the claims “fundamentally seek[] one thing—a reduction in the amount of rent paid to the Port Authority.” PANYNJ Excpt., Ex. I at 11, App. 0491. PANYNJ ignores Maher’s complaint and cites instead to an out of context excerpt from an interrogatory response concerning the damages calculation

⁷ PANYNJ asserts that “it is beyond reasonable dispute that Maher’s request for a cease and desist order, which does not seek to bar any ongoing illegal lease-term discrimination conduct, is nothing more nor less than an attempt to recover a portion of its time-barred reparations.” Excpt., Ex. I at 12, App. 0492.

established by the Commission in *Ceres Terminal*.⁸ In response to PANYNJ's interrogatory about damages, the response provided an estimate of damages if PANYNJ were to continue violating the Shipping Act for the entire term of the lease. It does not state that Maher seeks *only* reparations, nor does it take into consideration the date that a cease and desist order would be entered—after which recoverable reparations would cease—because the date of any cease and desist order is not yet known. Maher's request for the cease and desist order remedy is in the complaint, not in PANYNJ's assertions or misleading excerpts from inapposite interrogatory responses.

Nor does the fact that damages continue to accrue prior to a cease and desist order support PANYNJ's contention that the cease and desist claims are reparations claims. Even if the complaint sought only an order relieving Maher of making payments under the lease agreement, the claim would still be a cease and desist claim, not a reparations claim. *See A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1550 (F.M.C. 1986) (complaint seeking an order relieving a party of a contractual obligation to pay money is a claim for a cease and desist order, not a claim for reparations).

VI. PANYNJ Erroneously Argued That Maher's Cease and Desist Order Remedy Aims to "Punish Past Conduct"

PANYNJ erroneously asserted that Maher's cease-and-desist claim merely "punish[es] past conduct" of PANYNJ instead of "prevent[ing] future violations." PANYNJ Excpt., Ex. I at

⁸ *Ceres*, 29 S.R.R. at 372-74 ("the appropriate measure of damages for a violation of sections 10(b)(11) and (12), where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference or prejudice" and "the appropriate measure of damages for a violation of section 10(d)(1) is the . . . difference between the rates charged").

12, 13, 16, App. 0492, 0493, 0496.⁹ But PANYNJ cites no authority for the proposition that preventing ongoing and future violations of the Shipping Act somehow “punish[es] past conduct.” Instead, PANYNJ merely cites to Commission and Federal Trade Commission authorities for the unremarkable proposition that a cease and desist order does not aim to punish past conduct. However, none of the cases PANYNJ cites support its bald assertion that Maher’s request for the cease and desist order remedy would actually punish past conduct. *World Line Shipping, Inc. v. Saeid B. Maralan (aka Sam Bustani) Order to Show Cause*, 29 S.R.R. 384 (A.L.J. 2001) only concerns civil penalties for violation of a cease-and-desist order. *Id.* at 393. PANYNJ Excpt., Ex. I at 12-13, App. 0492-93 And *Alex Parsinia d/b/a Pac. Int’l Shipping & Cargo Exp.*, 27 S.R.R. 1335 (A.L.J. 1997) and *Portman Sq. Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80 (A.L.J. 1998) do not support PANYNJ’s ill-conceived argument. PANYNJ Excpt., Ex. I at 12 n.6, App. 0492. Neither case addressed ongoing violations of the Shipping Act. They merely reflect the unexceptional proposition that cease and desist orders are warranted not only in the case of ongoing violations, as alleged by Maher in this case, but also to protect the public.

Without Commission authority to support its erroneous assertion, PANYNJ cites a string of inapposite Federal Trade Commission (“FTC”) cases. PANYNJ Excpt., Ex. I at 13 n.7, 16, App. 0493 n.7, 0496. But these cases lend no support to PANYNJ’s argument about Maher’s request for the cease and desist order remedy, and merely stand for the unremarkable proposition discussed above that the purpose of a cease and desist order is to stop ongoing violations and restrain potential future violations—which is Maher’s point—and for which there is ample Commission authority.

⁹ “A cease and desist order in this case would merely punish the Port Authority for past conduct allegedly committed long ago, rather than restrain future violations.”

VII. PANYNJ Erroneously Argues That Maher's "Equitable Remedy" Should Be Dismissed Because Maher's "Legal" Remedy Was Dismissed by the I.D.

In support of its position that the Commission should limit the cease and desist remedy to the three-year limitations period applicable to reparations claims under the Shipping Act, PANYNJ erroneously cites to four cases for the sweeping but inapposite proposition that once a legal remedy expires pursuant to a statute of limitations, any equitable remedy is also barred. PANYNJ Excpt., Ex. I at 14, App. 0494. These cases are neither applicable to the Shipping Act, nor in any event, do they establish PANYNJ's overbroad proposition.

The Commission has explained that when a party seeks to argue for the application of outside statutes or cases to be applied to the Shipping Act, that party must first explain why such non-Shipping Act jurisprudence should be adopted. *See Inlet Fish*, 29 S.R.R. at 313 (Commission underscoring the essential analytical step "to illustrate why the particular cases . . . cite[d] are consistent with or relevant to the Shipping Act."). PANYNJ failed to satisfy this threshold requirement and provided no analysis whatsoever justifying why the cases and the peculiar underlying statutes addressed in those cases are "consistent with or relevant to the Shipping Act." *Id.*

The disparate cases cited by PANYNJ include a civil rights employment claim by a former employee against his employer under the Civil Rights Act of 1871 (42 U.S.C. § 1983); a banking shareholder liability claim under the Federal Reserve Act (12 U.S.C §§ 63-64; repealed by Pub. L. 86-230, § 7, Sept. 8, 1959); a claim under section 16 of the Farm Loan Act of 1916 (12 U.S.C. § 812); and suits for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, for violations of the Securities Exchange Act of 1934 (15 U.S.C. § 78cc(b)) and Pennsylvania law. None of the cases cited are Shipping Act cases or even tangentially related to the Shipping Act or circumstances akin to this proceeding.

The cases concern courts exercising “equity” jurisdiction and in some instances involving “concurrent” jurisdiction. But the Commission is not a court exercising “equity” jurisdiction, nor does this proceeding present a circumstance of “concurrent” jurisdiction. The cease and desist order remedy afforded to a complainant like Maher and invested in the Commission constitutes an independent *statutory* remedy for a complainant and an enforcement power of an independent regulatory agency under the Shipping Act that is separate and apart from the statute’s reparations remedy. *Western Overseas*, 26 S.R.R. at 885 n.17 (“The authority to issue a cease and desist order is found in section 11(b) of the Act.”); *Inlet Fish*, 29 S.R.R. at 313 (“[T]he Commission notes that the three-year statute of limitations [§ 11(g)] does not apply to complaints seeking nonreparation orders.”).

The statutes and circumstances at issue in the cases PANYNJ cited also bear no relevance to the Shipping Act’s specific regulatory purpose of continuing agency oversight to prohibit violations of the Shipping Act. See *Volkswagenwerk*, 390 U.S. at 271, 274, 276 n.21 (purpose of the Shipping Act is to “subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry;” because the Shipping Act permits some conduct that would otherwise be barred by antitrust law, “[t]he condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement[s]”).

PANYNJ cited *Russell v. Todd*, 309 U.S. 280, 289 (1940), as the foundation for its purported proposition that “when the jurisdiction of the federal court is concurrent with that of law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations.” PANYNJ Excpt., Ex. I at 14, App. 0494. However, PANYNJ’s reliance on *Russell* is wholly misplaced because the decision contradicts the

sweeping proposition PANYNJ proffered. The question before the Supreme Court was “whether the court below correctly held that the doctrine of laches and not the three-year statute of limitations is controlling.” *Russell*, 309 U.S. at 290. The Court determined that plaintiffs’ claim was *exclusively* in equity and *not* concurrent with any legal claim, thereby contradicting PANYNJ’s position. *Id.*

In the same vein, PANYNJ cited to *Cope v. Anderson*, 331 U.S. 461, 463 (1947). PANYNJ Excpt., Ex. I at 14, App. 0494. The language PANYNJ cited from *Cope* merely repeats the same irrelevant overbroad proposition where jurisdiction is “concurrent.” It neither analyzes nor applies the proposition in any way that would render it relevant here. The issue before the Supreme Court was simply which state’s statute of limitations applied via operation of the Ohio and Pennsylvania state statutes of limitations, which in turn each “borrowed” the statutes of limitations from other states where the respective cause of action arose. *Id.* at 463-67. The Court concluded that the “cause of action” arose in Kentucky and applied that state’s statute of limitations. *Id.* at 467-68. The decision is irrelevant to this proceeding.

PANYNJ also cited *Williams v. Walsh*, 558 F.2d 667 (2d Cir. 1977), for its proposition. PANYNJ Excpt., Ex. I at 14, App. 0494. *Williams* involved constitutional torts pursuant to the Civil Rights Act of 1871 (42 U.S.C. § 1983) seeking damages and reinstatement. The court simply invoked decisional authority from other section 1983 cases and applied Connecticut’s tort statute of limitations to bar the plaintiff’s equitable claim for reinstatement. *Williams*, 558 F.2d at 671-73. But these cases only apply to circumstances where legal and equitable jurisdiction is “concurrent.” *Id.* Therefore, *Williams* and the cases it relies on are inapposite to the issue presented here.

Finally, PANYNJ cited *Algrant v. Evergreen Valley Nurseries*, 126 F.3d 178 (3d Cir. 1997), in support of its inapplicable and overbroad proposition. PANYNJ Excpt., Ex. I at 14, App. 0494. *Algrant* addressed actions pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, Pub. L. No. 80-773, 64 Stat. 964 (1948), §29(b) of the Securities Exchange Act, and state law. *Id.* at 180-81. The court explained that § 29(b) of the Securities Exchange Act expressly provided a limitations period for “an action pursuant to that section” and that, in an action for declaratory relief, the rule required application of “the statute of limitations from the corollary action” *Id.* Therefore, it is not surprising that the court barred plaintiffs’ declaratory relief claim pursuant to the Declaratory Judgment Act on the grounds that the Declaratory Judgment Act complaint had been filed beyond the statute of limitations provided by § 29(b) of the Securities Exchange Act. Plaintiffs’ other claims likewise sought declaratory relief under other statutes, the Pennsylvania Securities Act, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Pennsylvania common law. *Id.* at 185-88. Likewise, the court ruled that these claims were time-barred, explaining that “[o]therwise the statute of limitations can be circumvented merely by ‘[d]raping their claim in the raiment of the Declaratory Judgment Act.’” *Id.* at 185 (citing *Gilbert v. City of Cambridge*, 923 F.2d 51, 58 (1st Cir. 1991)). Maher has not sought to extend a corollary statutory limitations period by draping it “in the raiment of the Declaratory Judgment Act” as the plaintiffs did in *Algrant*.

By employing these cases for such an inapposite sweeping proposition, PANYNJ has misdirected the Commission, doing it a manifest disservice. As the Shipping Act and Commission jurisprudence expressly establish, the reparations and cease and desist order remedies are not “concurrent” such that the latter depends on the former. Therefore, PANYNJ’s argument in this respect is frivolous and should be rejected.

VIII. PANYNJ Failed to Show Prejudice from the Passage of Time

PANYNJ mentions merely in passing that the policies underlying the statute of limitations—preventing prejudice to defendants due to failing memories, lost evidence, and missing witnesses—support its position that the cease and desist remedy should be barred. But PANYNJ forfeited this potential argument by not supporting a potential claim of prejudice with any evidence. PANYNJ Excpt., Ex. I at 16, App. 0496. PANYNJ did not advance this argument in its Motion for Summary Judgment, and belatedly merely suggests it for the first time in its Exceptions. But in both submissions, PANYNJ failed to present any evidence or argument showing *actual* prejudice. Moreover, even if the Commission does consider the policies underlying the statute of limitations for reparations, which is inapposite to the cease and desist order remedy, the evidence shows that PANYNJ has not been prejudiced by the passage of time. To the contrary, the ample discovery process has established that fading memory, lost evidence, and missing witnesses are not factors in this proceeding. PANYNJ’s mere passing reference to “inevitable” prejudice therefore does not support its position.

A. PANYNJ Waived Any Potential Prejudice Argument

Nowhere in its Motion for Summary Judgment did PANYNJ present evidence and argument that it was *actually* prejudiced in defending Maher’s claims because of the passage of time. In its Exceptions, PANYNJ offers only a passing reference at the end of its submission in the form of a vague and unsupported assumption. By only making a cursory reference and failing to present any evidence and argument to support the mere suggestion, PANYNJ waived any potential argument on this basis. *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 407 (7th Cir. 2007), *aff’d* 553 U.S. 442 (2008) (plaintiff “waived (forfeited would be the better term) his discrimination claim by devoting only a skeletal argument” to the issue in connection with

summary judgment motion) (parenthetical in original); *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 300 (2d Cir. 2006) (declining to consider argument since “[i]ssues not sufficiently argued in the briefs are considered waived”); *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) (“We review only issues which are argued specifically and distinctly in a party’s opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.”) (citation omitted).

When seeking summary judgment, the moving party must show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FRCP 56(a). In establishing a fact for which there is no material dispute,

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, ... or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FRCP 56(c)(1). This process contemplates the moving party presenting some form of evidence to support its factual contentions, and summary judgment is barred where the moving party does not present any valid evidence in support of its position. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156-57, 160 (1970) (“[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.”)

Here, PANYNJ has failed to present any evidence in support of a potential argument that it was prejudiced by the passage of time. The summary judgment process requires the moving party to support its position with evidence, and its complete failure to do so precludes PANYNJ from relying on this argument as a basis for summary judgment.

B. PANYNJ Has Not Been Prejudiced

The uncontroverted evidence presented by Maher in its reply to PANYNJ's summary judgment motion establishes that none of the underlying concerns supporting the policy for statutes of limitations is implicated here. Discovery is nearly complete, with millions of pages of documents produced and deposition testimony taken from 39 witnesses (including depositions from Dkt. No. 07-01). Complainant's Rule 201 Report, at 2-3, n.2, n.3, Dkt. No. 08-03 (May 16, 2011). This evidence establishes a clear record of PANYNJ's unlawful discrimination in violation of the Shipping Act. *See* Maher's Reply, Ex. B at 3-9, App. 0062-68; Maher's Responding Stmt., Ex. D at ¶¶ 21-24, App. 273-80.

Additionally, notwithstanding PANYNJ's desperate attempts to frame the "lease discrimination" claims in this proceeding as simply involving events that occurred before October 2000, Maher has presented evidence establishing that key events giving rise to Maher's complaint only occurred more recently: (1) PANYNJ enforced an unlawful indemnity requirement on Maher in lawsuits PANYNJ filed in 2007 and 2008; (2) Maher repeatedly sought lease-rate parity from PANYNJ in the years 2007 and 2008 only to be refused; and (3) PANYNJ only confessed in February 2011 during discovery that during 2010 PANYNJ transformed the Maersk-APM "port guarantee" (which in all events only went into effect in the year 2008) into a mere rent guarantee. Therefore, since these "lease discrimination" claim events all occurred within three years before Maher filed its complaint in this proceeding on June 3, 2008 or thereafter, the statute of limitations policies which PANYNJ mentions are unavailing.

Additionally, with respect to documentary evidence in this proceeding, PANYNJ has previously disclaimed any prejudice because of missing documents. When Maher sought production of backup tapes containing electronically stored information, PANYNJ vigorously objected, asserting that there was no "information that was absent from the Port Authority's

document production that seems likely to have existed at one time.” PANYNJ’s Opposition to Maher’s Motion to Compel Production of Evidence on Certain Backup Tapes, at 24. PANYNJ referred to Maher’s suggestion that the backup tapes might contain evidence which was otherwise lost or unavailable as “idle speculation,” “groundless,” “rank speculation,” and “conjecture.” *Id.* at 1, 4, 5. In ultimately accepting PANYNJ’s claims as to the completeness of its production, the Presiding Officer recognized only *one single document* which appears to have gone missing (a document whose absence prejudices Maher, not PANYNJ), and noted that as for that one document, draft versions are available and the information contained in the document is available from other sources. Memorandum and Order on Maher’s Motion to Compel Production of Information on Backup Tapes, at 20. Indeed, in light of PANYNJ’s representations, the Presiding Officer stated with respect to whether there might exist other missing or lost documents on the backup tapes: “I do not believe that it is likely.” *Id.* at 21. In these circumstances, where PANYNJ has previously represented that there is nothing material missing from its documentary record of the events at issue, it cannot now be heard to hint at “inevitable” prejudice from unspecified “lost evidence.”

Contrary to PANYNJ’s suggestion, the policies underlying the statute of limitations are least compelling under these circumstances and do not favor PANYNJ’s motion to extend the statute of limitations for reparations to bar Maher’s cease and desist remedy and the Commission’s power to stop violations of the Shipping Act. The Commission recognizes that

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.

A & A Int'l v. Kawasaki Kisen Kaisha, Ltd., 23 S.R.R. 1174, 1175 (F.M.C. 1986) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

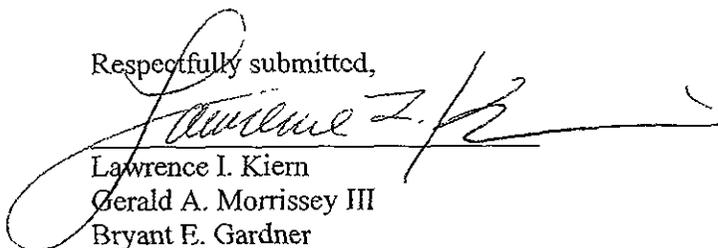
Where a proceeding such as this one *does not* implicate these principles, particularly in situations where a defendant has shown no actual prejudice due to the passage of time, statutes of limitations are least useful to the pursuit of justice, and courts are more willing to find exceptions to their harsh dictate. *Seattle Audubon Soc'y v. Robertson*, 931 F.2d 590, 597 (9th Cir. 1991) (“This is certainly not . . . a stale claim. Memories have not faded. Witnesses have not disappeared. Documents are accessible.”); *Davis v. Egbert*, 2010 WL 99113, *4 (D.N.J. Jan. 6, 2010) (rejecting statute of limitations bar where “no apparent prejudice”); *Paden v. Testor Corp.*, 2004 WL 2491633, *2 (N.D. Ill. Nov. 2, 2004) (granting extension of statute of limitations because “[d]efendant’s vague assertion about potential faded memories does not demonstrate actual prejudice.”).

CONCLUSION

For the foregoing reasons, PANYNJ’S Exceptions should be rejected as frivolous. Congress did not establish the Commission to immunize Shipping Act violators. Rather, as the Supreme Court has explained, Congress established the Commission as the “specialized government agency . . . entrusted with the duty to protect the public interest” by prohibiting such violations. *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 271, 274, n.21, 276 (1968).

Dated: June 29, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lawrence I. Kiern", written over a horizontal line.

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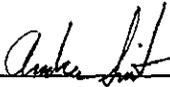
CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of June, 2011, served the foregoing via federal express and e-mail on the following:

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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

APPENDIX VOLUME I

Exhibit A	PANYNJ's Motion for Summary Judgment of Maher's Lease-Term Discrimination Claims (Feb. 25, 2011)
Exhibit B	Maher's Reply in Opposition to Respondent's Motion for Summary Judgment (March 14, 2011)
Exhibit C	PANYNJ's Statement of Material Facts as to Which There is No Genuine Dispute (Apr. 8, 2011)
Exhibit D	Maher's Responding Statement to PANYNJ's Statement of Material Facts as to Which PANYNJ Contends There is No Genuine Dispute (Apr. 15, 2011)

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

APPENDIX VOLUME II

Exhibit E	PANYNJ's Responding Statement to the New Facts Contained in Maher's Responding Statement and in Further Support of its Motion for Summary Judgment (Apr. 20, 2011)
Exhibit F	Maher's Motion to Strike PANYNJ's "Responding Statement" Reply and Supplemental Brief (Apr. 26, 2011)
Exhibit G	PANYNJ's Opposition to Maher's Motion to Strike (Apr. 28, 2011)
Exhibit H	Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims (May 16, 2011)
Exhibit I	PANYNJ's Exceptions to the Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparations Award Based on Lease-Term Discrimination Claims (June 7, 2011)
Exhibit J	Maher's Exceptions to the Initial Decision of May 16, 2011 Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims (June 7, 2011)
Exhibit K	Maher's Complaint (June 3, 2008)
Exhibit L	Memorandum Regarding Stay Pending Appeal (June 9, 2011)

Exhibit A

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

[REDACTED]

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY'S MOTION FOR SUMMARY JUDGMENT OF MAHER
TERMINALS, LLC'S LEASE-TERM DISCRIMINATION CLAIMS**

Respondent, The Port Authority of New York and New Jersey (the "Port Authority"), pursuant to sections 502.63 and 502.73 of the Federal Maritime Commission Rules of Practice and Procedure (the "Commission Rules"), moves the Federal Maritime Commission ("FMC") for summary judgment with respect to Maher Terminals, LLC's ("Maher") claims of Shipping Act violations based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations.

PRELIMINARY STATEMENT

The Shipping Act's statute of limitations for claims seeking reparations is three years. *See* 46 U.S.C. § 41301(a). It is well settled that this three-year period begins to run upon the later of when the cause of action accrued or when the complainant first

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discovered (*i.e.*, knew or should have known) that it had a cause of action. *See Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 314 (FMC 2001).

The central claim of Maher's Complaint is that its lease agreement with the Port Authority, Lease No. EP-249 (the "Maher Lease"), 08PA00001884, attached to the Levine Declaration as Ex. A, entered into as of October 1, 2000, was unreasonably discriminatory in that, according to Maher, it provided less favorable terms in several specified respects than the lease agreement between the Port Authority and Maersk Container Service Company, Inc., EP-248 (the "Maersk Lease"), 08PA00020315, attached to the Levine Declaration as Ex. B,¹ that was entered into as of January 6, 2000. *See* Maher's Complaint at 3, attached to the Levine Declaration as Ex.C.² Throughout the course of this litigation, Maher has repeatedly asserted that its lease-term discrimination claims are based squarely on the facial terms of the leases that were signed in 2000, and not upon any conduct that occurred in the years that followed. *See, e.g.*, Maher's Reply in Opp'n to Respondent's Mot. to Compel Produc. from Complainant & Mot. for Protective Order, Oct. 9, 2008, at 3, attached to the Levine Declaration as Ex. D (denying that it was seeking "additional" damages beyond those allegedly created by the

¹ Maersk Container Service Company, Inc is now known as APM Terminals North America, LLC ("APMT").

² This motion does not seek summary judgment with respect to any non-lease term claims asserted by Maher, such as that the Port Authority has "refused to deal" with Maher, inasmuch as any such claim appears to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.*, within the three-year limitations period. While any such claims are wholly without factual or legal merit, the Port Authority does not seek their dismissal on summary judgment at this time.



facial disparities in the lease terms). The undisputed facts³ establish that Maher knew or should have known about all of the lease terms at issue by the time it executed its lease in 2000. For example, the Maersk lease had been publicly filed with the FMC in August 2000, before Maher executed its lease in October 2000. Yet this action was not filed until more than seven-and-a-half years later, on June 2, 2008. Accordingly, Maher's claims both accrued and were "discovered" much more than three years before Maher commenced this action.

Statutes of limitations serve the dual purposes of repose and the prevention of problems associated with stale claims. They "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted). To hold that claims based on assertedly discriminatory lease provisions need not be brought within three years of the leases' execution, and that they can instead be brought within three years of any performance thereunder, would render the Shipping Act's statute of limitations meaningless. In the context of the thirty-year leases at issue here, Maher would effectively be arguing that it could bring its claims as late as thirty-three years after the lease signing, rather than within the three-year period provided for in the statute. The notion that a party could wait to challenge asserted acts of discrimination that had been completed decades earlier -- many years after important

³ Although the Port Authority vigorously rejects the notion that Maher's lease term discrimination claims have any merit whatsoever, we will assume, solely for purposes of this summary judgment motion based on the statute of limitations, that such claims are colorable.

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fact witnesses may have died, retired or simply forgotten what happened and why -- would totally undermine the purposes of the statute of limitations, *i.e.*, repose and preventing the litigation of stale claims.

Nor is there any reason for the Commission to deviate from a straightforward application of the statute. To the contrary, there is every reason to apply the statute of limitations as written in the usual way. Maher deliberately chose to enter into its lease with its eyes wide open to the differences between the terms of its own and the Maersk Lease. It then proceeded to operate prosperously under its lease for six-and-a-half years without bringing suit before its owners -- the Maher brothers -- sold the company to RREEF Infrastructure ("RREEF"), a private equity investor, for over one billion dollars. *See* PA Consent to Transfer of Ownership to RREEF, Supplement No. 1 to EP-249, 08PA01456019, June 29, 2007, attached to the Levine Declaration as Ex. E; *see also* Mosca Dep. 94:4-94:6, June 11, 2008, attached to the Levine Declaration as Ex. F. It was only after the new owners took over the terminal and saddled the business with a high level of debt that Maher suddenly decided to challenge the lease terms that had been fixed -- and known to Maher-- many years earlier. *See* Mosca Dep. 108:10-110:11, June 11, 2008, Levine Decl. Ex. F. But nothing had changed. It is perfectly obvious that Maher's lease discrimination claims are based squarely upon the original terms of these very same leases. *See, e.g.*, Complainant's Scheduling Report, July 23, 2008 at 5, attached to the Levine Declaration as Ex. G (admitting that it "is apparent from Maher's complaint and the plain language of the leases themselves, the lease terms of the two leases are manifestly different to Maher's prejudice and APM's preference"). There is no reason to reward these new owners by distorting the Shipping Act's three-year statute of

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limitations beyond recognition. Inasmuch as it is well settled that where, as here, there are no new violative acts by the respondent within the limitations period, and where the complainant is relying solely upon the lingering effects of agreed-upon terms of a contract entered into prior to the limitations period, the claim is clearly time-barred.

Nor can Maher evade the bar of the statute of limitations by purporting to seek a cease and desist order based upon these same lease-term discrimination claims. The lease provisions themselves do not amount to ongoing conduct and there is therefore no unlawful conduct from which the Port Authority could be ordered to cease and desist. To the contrary, were the FMC to issue a cease and desist order to rewrite Maher's lease, as Maher requests, it would simply be granting Maher indirectly what the statute of limitations prevents it from obtaining directly, *i.e.*, the economic equivalent of a portion of its time-barred reparations claims. Accordingly, to the extent that Maher's reparations claims are barred, the cease and desist claim based upon the same assertedly discriminatory lease terms should be dismissed as well.

STATEMENT OF UNDISPUTED FACTS

The Maersk Lease was executed as of January 6, 2000, and was publicly filed with the FMC as FMC Agreement No. 201106, date-stamped August 2, 2000. *See* Maersk Lease, 08PA00020315, Levine Decl. Ex. B. As Maher has admitted, the Maersk Lease became publicly available upon its filing with the FMC. *See* Maher's Resp. to Port Authority's First Set of Interrogs., at 6, Aug. 29, 2008, attached to the Levine Declaration as Ex. H ("[T]he terms of this agreement are publicly available, the subject of media coverage, and therefore, likely are widely known by many persons."). Maher signed its

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lease as of October 1, 2000, *i.e.*, after the public filing of the Maersk Lease. *See* Maher Lease, 08PA00001884, Levine Decl. Ex. A.

The essence of Maher's lease-term discrimination claims is that the Maher Lease provides for differing rental and financing rates and differing investment, throughput, first point of rest for automobiles, and security deposit requirements as compared with the Maersk Lease. Maher's Complaint at IV.B, Levine Decl. Ex. C. As noted, it is undisputed that all of the Maersk lease terms had been publicly filed and thus available to Maher before it signed its own lease in October 2000.

Indeed, not only is it undisputed that Maher should have known of the Maersk Lease terms at the time it signed its own lease, but it is beyond dispute that Maher had actual knowledge of all of the individual lease differences it complains of in this action for far longer than the three years prior to the filing of the Complaint on June 2, 2008. Thus, Maher admits that it "learned of PANYNJ's preference of APM Terminals North America, Inc. ("APM") during negotiation of EP-249." Maher's Resp. to Port Authority's First Set of Interrogs., at 4-5, Aug. 29, 2008, Levine Decl. Ex. H. Brian Maher, Chairman and Chief Executive Officer of Maher at the time of the Maher Lease negotiations, admitted that Maher was on notice of the Maersk Lease terms from the date the Maersk Lease was publicly filed, and that, before signing the Maher Lease, he and Maher "certainly knew that Maersk had lower rates than we did." Brian Maher Dep. 194:10-195:4, 287:12-19, June 9, 2008, attached to the Levine Declaration as Ex. I.

Similarly, Randall Mosca, Maher's former Chief Financial Officer, who was part of the core team in the Maher Lease negotiations, confirmed that Maher was aware of the Maersk Lease terms when it negotiated the Maher Lease: "[w]e were aware

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of the financial terms in the Maersk lease, which were considerably less than, on a base-rent basis, the Maher proposed lease arrangement.” Mosca Dep. 34:7-35:5, 155:1-16, June 11, 2008, Levine Decl. Ex. F. Mosca testified further that Maher had even performed a financial analysis to compare the base annual rental rate of the Maersk Lease with the Maher Lease. *Id.* at 172:15 – 20. And, when Maher decided to sign the lease, Mosca testified that “Maher knew the differential between the Maersk and the Maher lease. It was considerable.” *Id.* at 169:15 – 170:10.

In August of 2001, almost seven years prior to the filing of the Complaint, an internal Maher memorandum was sent to Maher’s top management, including Brian and Basil Maher and Mr. Mosca, analyzing and spelling out the differences between the Maher and Maersk Leases in detail. See Memorandum from M. Davis to R.P. Mosca Regarding Maersk Lease, Aug. 1, 2001, MT005220-5224, attached to the Levine Declaration as Ex. J. The memorandum specifically compared the Maersk lease terms to the Maher lease terms, including the per acre annual charges, the infrastructure financing terms, and the security deposit requirement. See *id.* at MT005220. The memorandum also identifies and analyzes other differences that figure in Maher’s current claims, *i.e.* the differing investment requirements and differing volume/throughput guarantees. See *id.* at MT005220-5222.⁴ Accordingly, 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.

⁴ To the extent that there are differences in the leases which are not mentioned in the Davis memorandum, such as the first point of rest term in the Maher Lease, the failure to mention any such differences is indicative only of their lack of importance, not of any lack of knowledge on Maher’s part. Maher clearly had to have had possession of a copy of the Maersk Lease in August of 2001 in order to perform the detailed analysis reflected in the memorandum.

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The Maher Lease was negotiated by Brian and Basil Maher, and signed by Brian Maher. *See* Maher Lease, at 08PA00001998, Levine Decl. Ex. A (signed by Brian Maher); Brian Maher Dep. 27:11-17, June 9, 2008, Levine Decl. Ex. I. Brian Maher ran Maher's business for thirty years prior to the lease's execution, and continued to operate the business for some six-and-a-half years thereafter. *See* Brian Maher Dep. 12:22-14:5, June 9, 2008, Levine Decl. Ex. I. In mid-2007, the Maher brothers sold the Maher business to RREEF, which saddled Maher with a high level of debt in conjunction with the purchase. *See* Mosca Dep. 108:10-110:11, June 11, 2008, Levine Decl. Ex. F.

Maher's new owners filed the Complaint instituting this action on June 2, 2008, more than seven-and-a-half years after Maher executed its Lease. Since bringing this claim, Maher's new owners have repeatedly admitted that their lease-term discrimination claims are based squarely on the facial terms of the two leases agreed to more than seven-and-a-half years before. Maher's own Complaint acknowledges that it is based upon a direct comparison of the Maher Lease with the Maersk Lease, which supposedly shows that the latter provides "unduly and unreasonably more favorable lease terms." Maher's Complaint at IV. B., Levine Decl. Ex. C. Indeed, Maher admits that "[t]he terms of leases EP-248 and EP-249, on their face, show the inequity of treatment as between Maher and APM and these are set forth in the complaint which is incorporated by reference." Maher's Resp. to Second Set of Interrogs., at 4, Aug. 29, 2008, attached to the Levine Declaration as Ex. K; *see also* Complainant's Scheduling Report, July 23, 2008 at 5, Levine Decl. Ex. G (admitting that it "is apparent from Maher's complaint and the plain language of the leases themselves, the lease terms of the two leases are manifestly different to Maher's prejudice and APM's preference");

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Maheer's Resp. to Port Authority's First Set of Interrogs., Aug. 29, 2008, at 10, Levine Decl. Ex. H (stating that Maheer's damages "are contained in the disparate terms of leases EP-248 and EP-249").

Furthermore, Maheer has admitted that its claims for reparations arising from its lease-term discrimination allegations were fixed at the time its lease was signed. See Maheer's Reply in Opp'n to Respondent's Mot. to Compel Produc. from Complainant & Mot. for Protective Order, Oct. 9, 2008, at 3, Levine Decl. Ex. D (denying that it was seeking "additional" damages beyond those allegedly created by the facial disparities in the lease terms); Maheer's Complaint at VI. A, Levine Decl. Ex. C (alleging that Maheer is entitled to "millions of dollars" due to "higher rents, costs, and other undue and unreasonable payments and obligations to [the Port Authority] not required of APMT"); Maheer's Resp. to Port Authority's First Set of Interrogs., at 10, dated Aug. 29, 2008, Levine Decl. Ex. H (claiming damages based on the disparities in the lease terms for the entire period of the lease, calculated to be "approximately \$474 million through the 30 year lease period"). Maheer's Complaint does not allege that the Port Authority undertook any new or independent acts with respect to such allegedly discriminatory lease terms at any time after 2000, *i.e.*, during the more than seven-and-a-half years prior to filing this action.⁵

⁵ The only actions alleged to have taken place during the limitations period concern Maheer's "refusal to deal" claim, as to which the Port Authority does not seek dismissal at this time. See n. 2, *supra*.

ARGUMENT

I. Legal Standard Governing a Motion for Summary Judgment

The Commission Rules do not specifically address motions for summary judgment. When there is no specific Commission Rule, the FMC applies the Federal Rules of Civil Procedure “to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12.

Rule 56 of the Federal Rules of Civil Procedure governs motions for summary judgment. When there is “no genuine dispute as to any material fact,” the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)⁶; *see Carolina Marine Handling, Inc. v. S.C. State Ports Auth.*, 30 S.R.R. 1017, 1036 (FMC 2006). Material facts are “facts that might affect the outcome of the suit under the governing law Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56 applies equally to both claiming and defending parties, allowing either to seek summary judgment on all or part of the claim. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing, based upon the materials in the record, that there is no genuine dispute as to any material fact. *See* Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to come forward with evidence demonstrating that there is a genuine dispute of material fact that can be resolved only at trial. *Celotex*, 477 U.S. at 324. Where the undisputed facts show

⁶ Federal Rule 56 was amended effective December 1, 2010. The rule was amended “to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The standard for granting summary judgment remains unchanged.” Committee Notes on 2010 Amendments.

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that a claim is barred by the statute of limitations, summary judgment for the defendant is appropriately granted. *See, e.g., Hancock v. HomeEq Servicing Corp.*, 526 F.3d 785 (D.C. Cir. 2008); *Colbert v. Potter*, 471 F.3d 158 (D.C. Cir. 2006).

II. Maher's Claims for Reparations are Barred by the Statute of Limitations

A. Legal Standards Governing The Statute of Limitations

1. The statute of limitations begins to run when a cause of action accrues, i.e., upon the commission of a violation of the Shipping Act that causes injury to the complainant

Section 11(g) of the Shipping Act provides that a complainant must seek reparations "within 3 years after the claim accrues." 46 U.S.C. § 41301(a). Such a statute of limitations serves the dual purposes of repose and the prevention of problems associated with the litigation of stale claims. *See, e.g., Kubrick*, 444 U.S. at 117 (statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them") (citations omitted); *see also Western Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 651, 659 (ALJ 1992) ("The objective of statutes of limitations is to prevent stale claims of which the defendant had no prior notice and the facts and merits of which become less susceptible of determination due to the fading of memories and loss of records and evidence."). Statutes of limitations also protect broader systemic goals, such as facilitating the administration of claims and promoting judicial efficiency. *John R. Sand & Gravel Co. v. United States.*, 552 U.S. 130, 133 (2008). Statutes of limitations "are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). On the contrary,

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conscientious adherence to statutes of limitations is “the best guarantee of evenhanded administration of the law.” *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

The policies behind the statute of limitations provide the basis for the general rule that a cause of action accrues at the time when an assertedly violative act first results in the claimant’s injury. *See, e.g., W. Overseas Trade & Dev. Corp.*, 26 S.R.R. at 659 (application of statute of limitations should be determined “in light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought”) (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967)). In analyzing when a claim accrues, the Supreme Court has stated that “[g]enerally, a cause of action 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). The FMC, citing *Zenith* in support, follows the same principle in construing the Shipping Act’s statute of limitations. *See Seatrain Gitmo, Inc. v. P.R. Mar. Shipping Auth.*, 18 S.R.R. 1079, 1081 (ALJ 1979); *see also Western Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 874, 885 (FMC 1993) (following *Seatrain*’s reliance on *Zenith*, and holding that the statute of limitations began to run when the complainant first accepted independent action tariff rates (and thereby first incurred injury) rather than when the rates had first been published by the respondent).

2. The discovery rule

The FMC follows the “discovery rule,” under which the statute of limitations period will begins to run as soon as “a party knew or with reasonable

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diligence should have known that it had a claim.” *Inlet Fish Producers, Inc.*, 29 S.R.R. at 311 (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991)); see also *Western Overseas Trade & Dev. Corp.*, 26 S.R.R. at 660. The public filing of a fact necessary to a claim is sufficient to put a claimant on notice of that fact and satisfies the “should have known” prong of the discovery rule for purposes of triggering the statute of limitations. *Western Overseas Trade & Dev. Corp.*, 26 S.R.R. at 660.

In *Western Overseas*, the complainants alleged that the filing of independent action tariffs for commodities that were lower than those agreed upon in a service contract was a violation of the Shipping Act. *See Id.* In determining when the claim accrued for statute of limitations purposes, the Administrative Law Judge (“ALJ”) held that it ran from the first time that the complainants “knew or should have known” of the basis of their claim, and that “complainants knew or should have known of their claims at the time the filing occurred because the [independent action rates] are filed in publicly available tariffs.” *Id.*⁷

3. The continuing course of conduct exception.

As the Supreme Court held in *Zenith Radio Corp.*, where there is a continuing course of illegal conduct, such as the alleged continuing antitrust conspiracy in that case, “each time a plaintiff is injured by an act of the defendants a cause of action

⁷ On appeal, the FMC upheld the ALJ’s decision on other grounds and agreed with the ALJ’s conclusion that the statute of limitation begins to run at the first commission of an act which causes injury. *W. Overseas Trade & Dev. Corp.*, 26 S.R.R. at 885. The Commission disagreed with the ALJ, however, about when the injury first occurred, holding that the cause of action accrued at the time that the respondent’s member lines first took the independent action rates, since the mere prior filing of the rates did not itself cause any injury. *Id.* Similarly while the filing of the Maersk Lease itself did not cause any injury to Maher, it did put Maher on notice of the lease provisions contained therein. Accordingly, Maher’s Shipping Act claims accrued when Maher executed its own lease several months after the Maersk Lease had been publicly filed.

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accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.” *Zenith Radio Corp.*, 401 U.S. at 338 (1971). In *Seatrain Gitmo Inc.*, 18 S.R.R. at 1081, the FMC adopted the same approach to the Shipping Act’s statute of limitations.⁸ In that case, the complainant alleged that the respondent had engaged in a continuing course of conduct by refusing to allow it access to a particular berth. *See id.* Quoting the foregoing language from *Zenith*, the ALJ held that while the statute of limitations would have barred the claim if it had been based upon a single refusal of access that occurred outside the limitations period, “(a)s alleged, each and every berthing barred is a new act giving rise to alleged injury. Damages for unlawful acts prior to [the limitations period], are, of course, barred by the statute of limitations.” *Id.* at 1082.

The issue of whether a respondent has engaged in a discrete act or set of acts outside the limitations period that may have continuing effects -- for which relief is barred by the statute of limitations -- as opposed to a continuing course of conduct begun outside the statute of limitations period but continuing within it -- as to which the statute of limitations is not a complete bar -- turns on whether the respondent has committed overt acts in violation of the law during the statute of limitations period. *See, e.g., Varner v. Peterson Farms*, 371 F.3d 1011, 1019 (8th Cir. 2004) (noting that “when a plaintiff

⁸ As noted above at 12-13, in analyzing the Shipping Act’s statute of limitations defense, the FMC has regularly relied on guidance from decisions construing other federal statutes of limitations. *See, e.g., Seatrain Gitmo, Inc.*, 18 S.R.R. at 1081 (citing two antitrust Supreme Court cases, *Zenith Radio Corp.*, 401 U.S. 321, and *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)); *Inlet Fish Producers, Inc.*, 29 S.R.R. at 314 (relying on *Connors*, 935 F.2d at 342, for the principle that the discovery rule applies in determining when the statute of limitations period begins to run).

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alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act”) (quoting *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990)). In *Varner*, the complainant claimed that performance and enforcement during the limitations period of an allegedly illegal contract -- that had been entered into prior to the limitations period -- was an overt act that restarted the running of the statute of limitations. *Id.* at 1019-20. As the court held, however, in order for conduct to qualify as an overt act that restarts the running of the statute of limitations:

(1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff. Acts that are merely “unabated inertial consequences” of a single act do not restart the statute of limitations.

Id. (citation omitted). In ruling that the statute of limitations barred the plaintiff’s claims, the Eighth Circuit held that where the alleged anticompetitive contract had been entered into outside the limitations period, “[p]erformance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.” *Id.* at 1020 (emphasis added). The court further noted that

when a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed; thus, the limitations period typically is not tolled by the requirements placed on the parties under the agreement.

Id.

Other cases confirm that the “performance of an allegedly anticompetitive, pre-existing contract is not a new predicate act.” *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 229 (E.D.N.Y. 2003); see *Kaiser Aluminum &*

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Chem. Sales v. Avondale Shipyards, Inc., 677 F.2d 1045 (5th Cir. 1982); *see also* *Hamilton County Bd. of County Comm'rs v. NFL*, 445 F. Supp. 2d 835 (S.D. Ohio 2006), *aff'd* 491 F.3d 310 (6th Cir. 2007) (actions pursuant to a lease did not restart the statute of limitations).⁹ The court in *Ciprofloxacin* held that the payments during the limitations period -- that were made pursuant to the (supposedly) illegal contract entered into prior to the limitations period -- were nothing more than the continuing consequences of the initial act of entering into the contract, and thus did not serve to restart the statute of limitations. *Id.* at 228-30.

Similarly, in *Kaiser Aluminum & Chemical Sales*, 677 F.2d at 1051-55, a contractor unsuccessfully argued that continued receipt of payments pursuant to an allegedly anticompetitive subcontract restarted the statute of limitations. Because the contract at issue had fixed the prices, quantities, and delivery schedule terms, the court ruled that the rights and liabilities were established at the contract's execution date. *Id.* at 1053. As the court stated:

[W]here a defendant commits an act injurious to plaintiff outside the limitations period, and damages continue to result from that act within the limitations period, no new cause of action accrues for the damages occurring within the limitations period because no act committed by the defendant within that period caused them.

Id. (quoting *Imperial Point Colonnades Condo., Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977)).¹⁰

⁹ *See also* cases discussed in April 14, 2010 Order to File Supplemental Briefs ("April 14 Order") at 9.

¹⁰ Previously, Maher has cited several cases in support its position that the alleged discrimination here is "continuing" in nature. *See* Maher Brief Per the Discovery Order of April 14, 2010, dated

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In *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 29 S.R.R. 356, 372 (FMC 2001), the Commission rejected an estoppel defense to a Shipping Act lease discrimination claim that was based upon the fact that the complainant waited some eighteen months before filing the action challenging its lease. The Commission reasoned that “any party seeking to file a complaint under the Shipping Act has three years to do so and should not be punished for waiting the full statutory period of limitation.” *Id.*¹¹ This statement reflects that the Shipping Act’s statute of limitations in a lease-term discrimination case begins to run at the time that the complainant entered into the assertedly discriminatory lease and does not begin to run anew with each act of performance thereunder. The Commission’s use of the phrase, “full statutory period of limitation,” would make no sense if the Commission had believed that *none* of the limitations period had actually yet elapsed when the complainant filed the complaint eighteen months after executing its lease. On the contrary, it is clear that the Commission

May 7, 2010 (“Maher Brief”) at 5-6; Levine Decl. Ex. L. But the cases it has cited are inapposite, in that, unlike here, the challenged allegedly discriminatory conduct in those cases took place *within* the statutory period. See *NPR, Inc. v. Bd. of Comm’rs of the Port of New Orleans*, 28 S.R.R. 1011, 1014 (ALJ 1999) (complaint filed in 1998 challenged payments under Cancellation Agreement signed in 1996, within limitations period); *Seacon Terminals Inc. v. Port of Seattle*, 26 S.R.R. 248, 277 (ALJ 1992) (comments regarding time bar are *dicta* given complaint’s dismissal on other grounds, and reflect a lack of analysis on confused facts). The Commission itself criticized the *Seacon* analysis on this point as “ambiguous and not entirely dispositive of the issue.” *Seacon Terminals Inc. v. Port of Seattle*, 26 S.R.R. 886, 901-02 (FMC 1993) (dismissing discrimination arguments as having “no merit”).

¹¹ See also *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1277 n.59 (FMC 1997) (barring such a claim would be “penalizing a party for waiting the full statutory period of limitation before bringing a claim”); *Maryland Port Admin. v. Fed. Mar. Comm’n*, 28 S.R.R. 545, 547 (4th Cir. 1998) (agreeing with the FMC’s conclusion that “finding waiver on the basis of such delay would render the statute of limitations a nullity by penalizing a party for waiting the full statutory period of limitation before bringing a claim”).

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believed that the complainant's cause of action in Ceres accrued upon the lease signing, and that the "full" three-year limitations period would expire three years thereafter.¹²

4. The speculative damages exception

The statute of limitations period may also be extended if the damages arising from the conduct at issue are unrecoverable because "their accrual is speculative or their amount and nature unprovable." *Zenith*, 401 U.S. at 339. The rationale behind the exception is that the "refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered." *Id.* Thus, "[t]he speculative damages exception will only delay accrual of a cause of action when future damages are not susceptible of proof at the time of the antitrust defendant's unlawful act." *Wilson Learning Corp. v. Schlechte*, No. Civ. 04-4703DSDSN, 2005 WL 2063944, at *3 (D. Minn. Aug. 24, 2005) (citing *Zenith*, 401 U.S. at 339). In applying this exception,

federal courts have distinguished "uncertain damages" from "uncertain extent of damages." The former constitutes a

¹² In an analogous case decided under the Maritime Labor Agreements Act of 1980 ("MLAA"), *The Port Authority of New York & New Jersey v. New York Shipping Association*, 22 S.R.R. 1329 (ALJ 1984), various complainants challenged certain provisions of a labor agreement filed with the FMC. Under the MLAA, the two-year statute of limitations begins to run from the public filing of a labor agreement. *Id.* at 1338. As the ALJ made clear, performance of that agreement thereafter does not restart the limitations period. *See id.* at 1338-39. Accordingly, the ALJ suggested that if parties want to insulate a labor agreement from challenge under the MLAA after a period of two years, they could choose to "enter[] into labor contracts which do not expire for ten years and require only one filing of the assessment portion of the labor agreement every ten years." *Id.* at 1339.

To the extent that Maher seeks to rely upon *International Shipping Agency, Inc v. Puerto Rico Ports Authority*, 30 S.R.R. 407 (ALJ 2004), that case would offer Maher no support. There, the complainant alleged that the respondents were in violation of continuing contractual obligations under its agreement, violations that occurred during the limitations period. *Id.* at 426. Here, by contrast, Maher's contention is not that the Port Authority has violated the terms of the lease, but rather that the terms of the lease itself -- which were fixed at the time of signing well prior to the limitations period -- violated the Shipping Act.

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plaintiff's inability to establish an injury, and, thus, a cause of action. The latter constitutes mere imprecision in the calculation of damages, which may be settled by the jury's reasonable estimation.

Id. at *3 n.6.

In *Kaiser*, an antitrust action based upon an anticompetitive contract, damages were not considered to be so speculative as to prevent the accrual of the claim and thus to delay the start of the statute of limitations period, because the terms and conditions of the contract had been set, and any damages were provable and recoverable, as of the signing date. 677 F.2d at 1053-54. The need to rely upon experts to prove the extent and calculation of the damages does *not* make damages too speculative for purposes of this exception to the usual rule of claim accrual. *See Wilson Learning Corp. v. Schlechte*, 2005 WL 2063944, at *3.

B. On The Undisputed Facts, Maher's Reparations Claims are Barred by the Statute of Limitations

1. All of the claims subject to this motion accrued more than seven-and-a-half years before Maher filed its Complaint.¹³

As Your Honor has recognized, all of the acts underlying Maher's lease discrimination Shipping Act claims had occurred as of the date Maher signed its lease, more than seven-and-a-half years before Maher filed its Complaint. *See* April 14 Order at 9 ("The negotiations between PANYNJ and Maher that resulted in Lease EP-249 ended when they signed the lease on October 1, 2000. Therefore, any unlawful preferential treatment by PANYNJ in favor of APM and against Maher occurred no later than October 1, 2000."); *id.* ("Maher's claim for reparations for harm caused by

¹³ *See* p. 2 n.2, *supra*.

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PANYNJ's alleged violations of the Shipping Act in the period prior to the formation of Lease EP-249 would appear to be barred by the Act's three-year statute of limitations."). Maher's lease-term causes of action are explicitly based upon the differing terms of the Maersk and Maher leases, which were both executed in 2000. *See* p. 8, *supra*. Because both leases were signed as of October 1, 2000, that was the date of Maher's injury, if any. Thus, as Maher itself explained in response to an interrogatory requiring Maher to identify and describe any damages claimed:

Maher's damages include the difference between Maher's base rent and APM's base rent that Maher must pay PANYNJ over the 30-year term of Maher's lease. . . . Based on this difference the base rent and escalator differential damages alone incurred by Maher since 2000 total approximately \$86 million. According to the disparate lease terms of leases EP-248 and EP-249, these damages total approximately \$474 million through the 30-year lease period based upon the disparate base rent and escalator.

Maher's Resp. to Port Authority's First Set of Interrogs., at 10, Aug. 29, 2008, Levine Decl. Ex. H. Maher confirmed that all of its lease-term discrimination damages stem from the entry into its lease with the Port Authority in October 2000 and not upon any subsequent acts:

Maher's Complaint alleges damages for the difference between terms of its lease that are prejudicial to Maher as compared with the preferential terms in APM's lease. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. [Citation omitted.] Nevertheless, PANYNJ asserts that "In addition to seeking damages for the period from 2000 to date, Maher claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT." But Maher makes no such "additional" damage claim.

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Maher's Reply in Opp'n to Respondent's Mot. to Compel Produc. from Complainant & Mot. for Protective Order, Oct. 9, 2008, at 3, Levine Decl. Ex. D. Maher has thus clearly and affirmatively asserted that all of its damages for its lease-term discrimination claims, including those over the entire thirty-year lease period, were fixed by the time Maher entered into its lease in October 2000. Accordingly, that is when its lease-term discrimination claims accrued. See April 14 Order at 9 ("Maher's claim for reparations for harm caused by PANYNJ's alleged violations of the Shipping Act in the period prior to the formation of Lease EP-249 would appear to be barred by the Act's three-year statute of limitations."); *id.* ("[A]ny unlawful preferential treatment by PANYNJ in favor of APM and against Maher occurred no later than October 1, 2000.").

Yet, Maher did not file its Complaint until June 2, 2008, over seven-and-a-half years later. Thus, unless some exception applies, Maher's Lease discrimination claims are barred by the Shipping Act's three-year statute of limitations.

2. The undisputed facts demonstrate that Maher knew or should have known of the factual basis for its claims several years prior to the limitations period.

In accordance with the discovery rule that applies to the Shipping Act's statute of limitations, the three-year limitations period began to run when Maher first knew or should have know the basis of its claims, which were based on the differences between the terms of the two leases at issue. It is undisputed that Maher should have known of all such differences when it signed its lease, inasmuch as the Maersk lease had been publicly filed with the FMC several months earlier. See p. 5, *supra*. Moreover, it is equally undisputed that Maher had *actual* knowledge of the differences in the lease terms

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many years prior to the limitations period in this case. *See pp. 6-7, supra.* Accordingly, the discovery rule provides no assistance to Maher and, to the contrary, clearly bars its lease-term discrimination claims.

Faced with these facts, Maher has attempted to rely on a self-created “rule,” under which the statute of limitations does not begin to run until the complaining party obtains “conclusive information” concerning the merits of its claims. *See* Maher Brief at 6; Levine Decl. Ex. L. In doing so, Maher purports to rely upon *Inlet Fish Producers*. *Inlet Fish Producers*, however, referenced “conclusive information” simply as a factual reference, and did not redefine the discovery rule. *See* April 14 Order at 8 (quoting *Inlet Fish Producers* for the proposition that the statute of limitations begins to run when the plaintiff “*should reasonably* [have] discovered” the injury) (emphasis added). Receipt of “conclusive information” is not the test:

It is not a barrier to accrual that a plaintiff has failed to discover a cause of action if a reasonably diligent person, similarly situated, would have made such a discovery. In other words, a plaintiff can be charged with inquiry notice, sufficient to start the limitations clock, once he possesses information fairly suggesting some reason to investigate whether he may have suffered an injury.

Warren Freendenfeld Assoc., Inc. v. McTigue, 531 F.3d 38, 45-46 (1st Cir. 2008) (citations omitted). “If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitations period begins to run, many claims would never be time-barred.” *Erickson v. Upjohn Co.*, Case No. 95-35207, 1996 WL 95249, at *2 (9th Cir. Mar. 5, 1996) (unpublished opinion). Therefore, any allegations

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that Maher only recently obtained “conclusive information,”¹⁴ even if true, are entirely irrelevant in light of its prior admissions of earlier knowledge.

3. The continuing violation exception does not apply since no new overt acts occurred during the limitations period.

As Your Honor also has recognized, and as the case law discussed at 15-18, *supra*, confirms, Maher cannot argue that mere continuing performance of its lease obligations serves either to toll or restart the running of the statute of limitations on its lease-term discrimination claims. *See* April 14 Order at 9 (“this ‘continuing violation’ would not appear to support a claim for reparations”). Absent proof of a new and independent overt act of lease-term discrimination by the Port Authority in violation of the Shipping Act during the limitations period, *i.e.*, after June 2, 2005, Maher’s lease-term discrimination claims are time-barred.¹⁵ And it is undisputed that there were no such new, independent acts. Rather, Maher relies exclusively upon the differing provisions of the allegedly discriminatory leases themselves, which were fixed in October 2000. *See* pp. 8-9, *supra*. To the extent that the Port Authority received payments or other benefits under Maher’s lease during the limitations period, such payments and benefits were simply the “unabated inertial consequences” of pre-limitations actions. *Varner*, 371 F.3d at 1019-20. Indeed, Maher’s interrogatory responses with respect to damages, *see* p. 9, *supra*, made clear that all thirty years’ worth of its alleged damages -- such as they are -- were fixed as of the signing of its lease.

¹⁴ *See* Maher Brief at 6-7.

¹⁵ Even assuming, *arguendo*, that any such overt act had occurred during the limitations period, Maher’s reparations would be limited to those damages traceable to any such new overt act during the limitations period, and would not include any damages traceable to pre-limitations period conduct, including the entry into the lease. *See Seatrain Gitmo*, 18 SRR at 1082.

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4. **Maher cannot rely upon purported post-lease violations**

In an effort to salvage its claims, Maher may once again fabricate a litany of alleged post-lease violations. *See* Maher Brief at 10; Levine Decl. Ex. L. None of these allegations entitle Maher to the relief it seeks in any event, and each is flatly contradicted by Maher's prior representations in this proceeding as well as to the Commission. Virtually all of these newly-minted allegations are missing from Maher's interrogatory responses, in which Maher provided a detailed account of the "principal and material facts" underlying its allegations and the evidence upon which it relies, all of which were tied inextricably to the facial terms of the leases. *See* Maher's Response to the Port Authority's Second Set of Interrogatories at 4-8; Levine Decl. Ex. K. For example, the alleged preference relating to PANYNJ's lease with Port Newark Container Terminal—asserted for the first time in Maher's Brief—is entirely unrelated to the leases at issue in the instant proceeding. Maher has also raised two claims concerning actions of APM that PANYNJ somehow "permitt[ed]." These claims have nothing to do with the lease discrimination allegations at the heart of Maher's complaint *and would not entitle Maher to either the reparations or the cease and desist relief it seeks*. Moreover, Maher has not asserted any basis—and there is none—to hold PANYNJ responsible for APM's own independent actions.

Finally, in a desperate attempt to find post-lease violations where there are none, Maher may also rehash arguments from its rejected opposition to the APM-PANYNJ settlement. These assertions are not only unrelated to Maher's 08-03 discriminatory lease term claims, but have already been explicitly rejected and discredited by both Your Honor and the Commission. For instance, Maher has reiterated

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that the APM “change in ownership” provision was an undue preference, despite Your Honor’s finding that the “provision is similar to the change in corporate structure for which Maher sought permission in 2006.” *APM Terminals N. Am., Inc. v. PANYNJ* (“Initial Decision”), 31 S.R.R. 455, 479 (ALJ 2008). Maher has also rehashed its allegation that the deferral of APM’s Class A work was an undue preference despite Your Honor’s rejection of that argument and conclusion that it “is not the case” that PANYNJ refused to negotiate with Maher regarding deferral of its Class A work completion date. Initial Decision at 478. Finally, the Commission itself considered and repudiated these arguments: “We have considered the other arguments presented by Maher such as refusal to deal, collusion, and procedural errors, but deem them immaterial in view of our finding and conclusions as set forth above.” *APM Terminals N. Am., Inc. v. PANYNJ* (“Final Decision”), 31 S.R.R. 623, 627 (FMC 2009).

5. Maher’s prior discovery responses and representation preclude it from asserting that its alleged damages were so speculative at the time of lease signing as would delay accrual of its lease-term discrimination claims.

Maher itself has claimed that its damages may be computed simply by comparing the terms of the Maersk and Maher leases and totaling up such differences over their thirty-year terms. *See* Maher’s Resp. to Port Authority’s First Set of Interrogs., at 10, Aug. 29, 2008, Levine Decl. Ex. H (computing all thirty years’ worth of Maher’s supposed damages and admitting that “[t]hese damages are contained in the disparate

[REDACTED]

terms of leases EP-248 and EP-249”); *see also* p. 9, *supra*. Accordingly, any damages were not so speculative as to trigger any exception to the usual claims accrual rule.¹⁶

* * * * *

In short, Maher’s lease discrimination claims accrued in October 2000 when it signed its lease, over seven-and-a-half years before Maher filed its Complaint, well outside the applicable three-year statute of limitations period. Accordingly, reparations for all of its lease-term discrimination claims are time-barred.

III. If Maher’s Reparation Claims are Time-Barred, its Cease and Desist Claim Fails as Well.

Maher’s Complaint also includes a prayer for a cease and desist order. While the FMC has held that its authority to enter a cease and desist order is not subject to the Shipping Act’s statute of limitations, Maher cannot validly invoke such authority as the basis for seeking relief on its lease-term discrimination claims. As discussed above, there are no allegations of any overt acts of discrimination within the limitations period. All of the acts of which Maher complains occurred more than eight years ago. In other words, there is no ongoing *conduct* with respect to the alleged lease-term discrimination from which the Port Authority can be ordered to cease and desist. As your Honor stated:

[A] cease and desist order entered in this proceeding would not necessarily result simply from a finding that PANYNJ unlawfully discriminated against Maher when they entered into Lease EP-249 as Maher seems to claim. A finding would have to be made that there is a reasonable

¹⁶ As the case law indicates, mere uncertainty as to the exact extent of damages does not restart the statute of limitations. *See Wilson Learning Corp.*, 2005 WL 2063944, at *3 n.6. Indeed, Maher itself claims that any uncertainty on the amount of damages can be resolved through expert opinion testimony. Maher’s Resp. to Port Authority’s First Set of Interrogs., at 11, Levine Decl. Ex. H.

[REDACTED]

likelihood that future operations of Lease EP-249 in its current form and in current circumstances would be unlawful.

April 14 Order at 10.¹⁷

Moreover, any attempt by Maher to invoke the FMC cease and desist authority to rewrite its lease on a prospective basis would be nothing more than an attempt to obtain indirectly the reparations that it cannot obtain directly. As noted above, *see*, p. 9, *supra*, Maher has already claimed that it could compute its damages based upon a comparison of the facial differential between the APM and Maher leases over their entire thirty-year term. Assuming that the Commission agrees that Maher's reparations claims are barred by the Shipping Act's three-year statute of limitations, the only effect of issuing the "cease and desist order" Maher has requested --which would rewrite Maher's lease on a prospective basis so as to match the APM terms-- would be to award Maher reparations for however many years of Maher's lease remain as of the date the Commission issues its decision in this case. Permitting such an end-run around the statute of limitations would be an inappropriate exercise of the Commission's cease and desist authority as a matter of law.¹⁸ Accordingly, if summary judgment is granted on

¹⁷ As Your Honor further noted, a cease and desist should issue as a "means of restraining recalcitrant parties from future violations" (April 14 Order at 10), and "when there is a reasonable likelihood that respondents will resume their unlawful activities" *id.*, neither of which is applicable here. Indeed, if mere performance of an allegedly discriminatory lease constituted a continuing violation, not only would a cease and desist order be proper in every such case, but the statute of limitations on reparations would be effectively read out of the Shipping Act, contrary to settled principles of statutory construction. *See, e.g., Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983) (applying "settled principle of statutory construction that [courts] must give effect, if possible, to every word of the statute.")

¹⁸ To be sure, certain dicta in *A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1550 n.7 (ALJ 1986), suggests that a claim seeking to prevent the collection of a payment is not barred even if a reparations claim arising from the same subject matter would be time-barred. But that question was not squarely presented in *Ivarans*, since, as the ALJ held, no

[REDACTED]

Maher's reparations claims, summary judgment should be granted on its claim for a cease and desist order as well.¹⁹

valid claim for reparations had been interposed in that case. *See id.* at 1551. Thus, there was no occasion for the ALJ to decide how a time-barred reparations claim would affect a related, indeed inextricably intertwined, claim for a cease and desist order. For the reasons discussed in the text, we submit that the *Ivarans* dicta should not be deemed persuasive here.

¹⁹ Even if summary judgment is not granted on the cease and desist claim at this time, we submit that a cease and desist remedy will prove to be inappropriate for any number of reasons beyond the simple reason that the underlying discrimination claims are meritless. The Port Authority fully expects that the evidence will demonstrate that Maher prospered for many years under the lease it now challenges, and that it was only when the new owner saddled the business with massive debt and/or otherwise mismanaged the terminal that Maher belatedly commenced this attack on the Port Authority. "The issuance of [a cease and desist] order lies within the sound discretion of the Commission and depends upon the facts of each case." *Saeid B. Maralan, et. al. – Possible Violations of the Shipping Act of 1984*, 28 S.R.R. 932, 941 (ALJ 1999). The Port Authority submits that the exercise of the Commission's discretion to issue a punitive cease and desist order would be entirely unwarranted in this case.

We further note that even if a cease and desist remedy were ultimately granted, FMC case law allows the Port Authority to use its business judgment to determine how to remedy any undue preferences that are held to exist, rather than to force the Port Authority to adopt contract terms that it never agreed to. *See Ballmill Lumber & Sales Corp. v. Port of New York Auth., et. al.*, 10 S.R.R. 524, 526 (FMC 1968) (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 the complainant).



CONCLUSION

For the foregoing reasons, the Port Authority's motion should be granted, and Maher's lease-term discrimination claims should be dismissed in their entirety.

Dated: February 25, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

<p><u><i>Via Federal Express</i></u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at New York, NY this 25th day of February, 2011</p>
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Kevin F. Meade

Kevin F. Meade

Exhibit B

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

**BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.**

DOCKET NO. 08-03

MAHER TERMINALS, LLC

COMPLAINANT,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT.

**MAHER TERMINALS, LLC'S REPLY IN OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Complainant Maher Terminals, LLC ("Maher"), by and through undersigned counsel, hereby submits its opposition to the Port Authority of New York and New Jersey's ("PANYNJ's") "Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims" (the "Motion" or "MSJ").

INTRODUCTION

PANYNJ seeks partial summary judgment of certain Shipping Act claims¹ in this proceeding—including for reparations and for a cease and desist order—purportedly because "all such claims are barred by the Shipping Act's three-year statute of limitations." (MSJ 1). As the movant seeking judgment on an affirmative defense,

¹ PANYNJ characterizes the claims for which it seeks judgment as claims "based on supposed unreasonable discrimination in lease terms." (MSJ 1).

[REDACTED]

PANYNJ bears the burden of proof to establish that (i) there is no genuine dispute as to any material fact necessary to prove its defense of statute of limitations and (ii) that judgment should be had as a matter of law. PANYNJ's motion must be denied because PANYNJ fails to meet its burden.

PANYNJ's motion regarding Maher's cease and desist claims fails utterly because *there is no applicable statute of limitations* upon which judgment could be had as a matter of law. PANYNJ cites none, and indeed admits that the statute of limitations for reparations does not apply to cease and desist claims. PANYNJ cannot satisfy its burden to prove entitlement to judgment as a matter of *law* on an affirmative defense that it confesses does not exist.

Further, PANYNJ's assertions that the Shipping Act statute of limitations should bar all claims after three years, including for cease and desist orders, exposes PANYNJ's misdirection. Even though waiver and estoppel are not defenses to Maher's Shipping Act claims, PANYNJ continues to assert them in this motion under the guise of a statute of limitations defense. PANYNJ's waiver and estoppel arguments have no place in this proceeding and should be rejected, no matter how elaborately disguised.

PANYNJ's motion regarding Maher's claims seeking reparations also fails because the statute of limitations *does not* bar reparations claims for violations of the Shipping Act that occur *inside* the limitations period. Whether styled as new, one-time, reoccurring, continuing or any other label, section 11(g) of the Shipping Act, 46 U.S.C. § 41301, permits complaints seeking reparations for violations within three years prior to the complaint. Maher's complaint properly alleges violations and continuing violations

[REDACTED]

of the Shipping Act, which PANYNJ does not contest. PANYNJ fails utterly to meet its burden of establishing with uncontested facts that the continuing violations Maher alleges are not violations of the Shipping Act.

PANYNJ's motion fundamentally misapprehends its duties under the Shipping Act. The Shipping Act, including the Shipping Act prohibitions, applies to PANYNJ today regardless of whether actions alleged to violate the Shipping Act were agreed to in a prior contract. As *Ceres Terminal* explains, entering into an agreement that violates the Shipping Act does not immunize the violator. Under Shipping Act authority, an agreement that violates the Shipping Act, including after the passage of seven years, constitutes a continuing violation of the Shipping Act.

Commission authority, including *Seatrain*, and Commission Rule 63(b), treat each act in violation of the Shipping Act as an *independent* violation for the purpose of the statute of limitations and *any unlawful act* that continues is treated not as one act "but a series of individual actions each time it is enforced and the statute of limitations is to be measured against each act." Unlike the inapposite authority PANYNJ cites in its motion, the Shipping Act's continuing violation rule does not immunize continuing violations of the Shipping Act pursuant to the requirements of a lease. PANYNJ's continuing violations of the Shipping Act, including its discriminatory lease, are clearly not barred by the statute of limitations for reparations or Rule 63(b).

PANYNJ's motion also misapprehends the Commission's "discovery rule," both regarding its relevance in the motion and in its application. The "discovery rule" articulated in *Inlet Fish* governs claim accrual for the purpose of the Shipping Act. But

[REDACTED]

because Maher's complaint properly alleges continuing violations, the discovery rule does not bar Maher's reparations complaint.

Moreover, accrual of a cause of action for a violation of the Shipping Act does not occur until the complainant "knew or should have known that it had a case," when it possesses "conclusive information." The Shipping Act does not require a port authority to offer a lease to everyone, or identical terms in the leases it offers. Rather, it prohibits discrimination absent valid transportation purposes. Accrual of a lease discrimination violation therefore occurs 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 violating the Shipping Act.

Maher does not contest that it knew or should have known of differing lease terms more than three years prior to the complaint—indeed the only party in this proceeding to contest that the leases differed was PANYNJ. But it has now shifted ground and conceded the facial differences as uncontested fact in its motion. What is decisive is that Maher did not know nor should it have known that the different lease terms were an undue prejudice violating the Shipping Act until it possessed conclusive information in May 2008.

Because PANYNJ applies an inapposite "discovery rule"—in effect PANYNJ applies the "time of injury rule" rejected in *Inlet Fish*—PANYNJ merely conflates both elements and asserts that accrual occurred at the time of the lease. But even if the discovery rule could apply to bar a reparations claim for a continuing violation, which it does not, PANYNJ fails to show with undisputed facts that Maher knew that the lease

[REDACTED]

differences were not justified by valid transportation factors prior to July 3, 2005. Moreover, the developing evidence in ongoing discovery establishes that PANYNJ actively concealed and misrepresented the undue nature of the lease differences, including that the vaunted "Port Guarantee," which is now exposed as a sham transportation purpose.

RESPONSE TO PANYNJ

"STATEMENT OF UNDISPUTED FACTS"

PANYNJ's motion contains a "Statement of Undisputed Facts" ("PANYNJ's Facts") containing a five-page narrative statement and record citations that PANYNJ represents comprise facts that it does not dispute in this proceeding. (MSJ 5-9) PANYNJ's narrative does not facilitate responding meaningfully to separately identifiable alleged facts. As a general matter, PANYNJ's Facts focus almost exclusively on statements intended to demonstrate that Maher knew or should have known of the facial differences between the terms of the PANYNJ lease with APM and the PANYNJ lease with Maher prior to three years before Maher's complaint was filed in this proceeding. Although the narrative contains various inaccuracies and unsupported assertions, Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to July 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.

[REDACTED]

Certain of PANYNJ's Facts pertain to matters other than when Maher knew or should have known of the facial differences in the lease term and Maher contests the remainder.

LAW APPLICABLE TO SUMMARY JUDGMENT

A motion for Summary Judgment in a FMC proceeding, when otherwise properly filed pursuant to the general motions Rule 502.73(a) and Rule 502.12, may be brought pursuant to Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), which provides that a party may move for summary judgment "identifying each claim or defense – or part of each claim or defense – on which summary judgment is sought." FRCP 56(a). Summary judgment shall be granted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Id. A party asserting that a fact cannot be, or is, genuinely disputed must support the assertion by: (i) citing to materials in the record, or (ii) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact. *Id.* at 56(c)(1).

A material fact is a fact in dispute that might affect the outcome of the case: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). A dispute about a material fact is a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

[REDACTED]

Where summary judgment is sought based on an affirmative defense, the *movant* bears the burden of proof establishing facts supporting the affirmative defense. *Tech 7 Systems, Inc. v. Vacation Acquisition, LLC*, 594 F. Supp. 2d 76, 80 (D.D.C. 2009). In a statute of limitations affirmative defense, it is the movant's burden to establish facts that a statute of limitations bars the non-movant's claims. *See, e.g., In RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503, 544-45 (D.N.J. 1999) (in motion for summary judgment on statute of limitations "the Court must deny a motion for summary judgment if disputed issues of fact exist surrounding the 'discovery' of an injury.") quoting *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976).

If the movant successfully discharges its initial burden of showing an apparent absence of any genuine dispute of material fact, and movant's entitlement to judgment as a matter of law on the basis of the undisputed facts, then the burden shifts to the non-movant to demonstrate that there is a genuine dispute of material fact. *See, e.g., Moore's* § 56.13[1]. The Commission recently reiterated that "[a]t the summary judgment stage, the burden . . . on the nonmoving party is '...not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.'" *In re EuroUSA Shipping, Inc.*, 31 S.R.R. 540, 545 (F.M.C. 2008), quoting 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2727, p. 490 (3d ed. 1998). "Materials offered in opposition to summary judgment are not offered to establish the truth of the matter asserted. They are offered to establish a genuine issue of material fact for trial. At 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

[REDACTED]

determine whether there is a genuine issue for trial.” *EuroUSA*, 31 S.R.R. at 545 (internal citations and quotations omitted).

If the burden shifts to the non-movant in a properly made motion for summary judgment, the non-movant may discharge its burden of showing facts that present a genuine issue worthy of trial without proving its case to the same standard that it would at trial or hearing. *Id.* at 545-46, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“[w]e do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.... Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(e) except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing [required in Rule 56(e)]....”). The non-moving party, therefore, “receives the benefit of all-reasonable doubts and inferences to be drawn from the facts.” *EuroUSA*, 31 S.R.R. at 546 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Summary judgment is generally disfavored by the Commission. *See, e.g. NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1011 (ALJ 1999), cited with approval in *EuroUSA*, 31 S.R.R. at 546. The Commission’s standards for considering such motions is to “ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible.” *Id.* (citing *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1011 (ALJ 1999)). For that reason, summary judgment motions before the Commission “should be rarely granted in complex cases requiring more fully developed records or cases

[REDACTED]

involving novel statutes or question [sic] of motive or intent.” *Id.* (citing *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk, Inc.*, 27 S.R.R. 1045 (ALJ 1997)). Summary judgment is “especially inappropriate” in Shipping Act discrimination cases because, as the Commission stated almost four decades ago, “[c]itations to precedents of the Commission and its predecessors could be almost endlessly multiplied to show that questions of discrimination and prejudice or preference are questions of fact....” *In re Denial of Petition for Rule Making, Cargo Diversion*, 14 S.R.R. 236, 238 (F.M.C. 1973); *see also NPR*, 28 S.R.R. at 1016 (quoting *In re Denial of Petition for Rule Making, Cargo Diversion* and denying motion for summary judgment of lease discrimination claims for lack of jurisdiction and statute of limitations, stating that “questions of prejudice, preference and discrimination” in lease discrimination claims, “are questions of fact, making summary judgment especially inappropriate.”).

ARGUMENT

I. MAHER’S CLAIMS SEEKING A CEASE AND DESIST ORDER ARE NOT BARRED BY A STATUTE OF LIMITATIONS.

A Shipping Act complaint seeking a cease and desist order is not limited by the three year statute of limitations in section 11(g) of the Shipping Act. 46 U.S.C. § 41301(a) (“A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part . . .”). *See, e.g., Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001) (“the Commission notes that the three-year statute of limitations does not apply to complaints seeking nonreparation orders”); *Western Overseas Trade and Dev. Corp. v. ANERA*, 26 S.R.R. 874, 885 n.17 (1993) (“The 3 year statute of limitations in section 11(g) of the 1984 Act applies only to requests for

[REDACTED]

reparations. It would not prevent the Commission from issuing a cease and desist order in a case brought over three years after the cause of action accrued”).

PANYNJ’s motion for summary judgment of Maher’s cease and desist claims fails utterly because *there is no applicable statute of limitations* upon which judgment could be had as a matter of law. It is PANYNJ’s burden to prove entitlement to judgment as a matter of law on the basis of its statute of limitations defense—a burden that includes proving that a statute of limitations is a valid affirmative defense to the claims upon which it seeks judgment. *See, e.g., In RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503, 544-45 (D.N.J. 1999); *Hamilton v. CSX Transp., Inc.*, 2009 WL 3353557 (N.D. Ohio Oct. 15, 2009) (dismissing motion for summary judgment on the basis of an affirmative defense not available under the applicable statute).

PANYNJ does not cite an allegedly applicable statute of limitations. Indeed, PANYNJ concedes the Commission’s authority that there is no statute of limitations and that the statute of limitations for reparations does not apply. (MSJ 26 “[a] cease and desist order is not subject to the Shipping Act’s statute of limitations. . .”). Because it is PANYNJ’s burden to prove an entitlement as a matter of law to judgment on a statute of limitations defense, the absence of a viable statute of limitations defense in the Shipping Act to a complaint seeking a cease and desist order compels dismissal of PANYNJ’s motion.

Because PANYNJ’s motion fails as a threshold matter, there is no need to rebut PANYNJ’s underlying arguments for limiting cease and desist claims. However, Maher responds because they reveal that the real position PANYNJ is advancing is that waiver

[REDACTED]

and estoppel should bar Maher's claims because Maher waived its rights to bring Shipping Act claims when it signed the lease.

There is no doubt that PANYNJ is aware that waiver and estoppel have been rejected by the Commission. *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 29 S.R.R. 356, 372 (FMC 2001) ("the common law doctrines of waiver and estoppel may not may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act."). PANYNJ proceeds nonetheless, but instead of using the terms "waiver" or "estoppel," PANYNJ advances the same argument under the guise of the statute of limitations for reparations.

Moreover, a valid defense to Maher's reparations claims would not extinguish Maher's cease and desist claim.² The April 14, 2010 Order in this proceeding addressed the point specifically: "irrespective of the effect of the statute of limitation on Maher's claim for reparations, the Commission could enter a cease and desist order if appropriate." Order of April 14, 2010 at 10. Nevertheless, PANYNJ obstinately persists in arguing that the reparations statute of limitations is *dispositive* of Maher's cease and desist claims.³

² The right to seek, and if warranted obtain, a cease and desist order is also wholly independent of a reparations remedy. Indeed, a Shipping Act complaint seeking a cease and desist order can be brought by any person, including whether or not the person even has money damages or seeks money damages. *Int'l Freight Forwarders & Custom Brokers Ass'n of New Orleans v. LASSA*, 27 S.R.R. 392, 394-96 (ALJ 1995) ("The principle that any person may file a complaint whether or not seeking money damages for injury caused the complainant has been followed and confirmed many times since the Isthmian decision."); *Cargill v. Waterman Steamship Corp.*, 21 S.R.R. 287, 300 (FMC 1981) ("standing to prosecute a complaint under section 22 of the Shipping Act even if it were not alleging injuries to itself.").

³ PANYNJ explains that it seeks summary judgment of Maher's cease and desist claims if summary

[REDACTED]

Considering a cease and desist claim as dependent on a reparations claim ignores the purpose of the cease and desist remedy to stop violations of the Shipping Act. *Portman Square Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), citing *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997).⁴

PANYNJ simply ignores that it has a *continuing duty* under the Shipping Act with respect to its lease with Maher. It asserts that “there is no ongoing conduct with respect to the alleged lease-term discrimination from which the Port Authority can be ordered to cease and desist” because the lease was signed “more than eight years ago,” and there were no new “overt acts” of discrimination since. (MSJ 26)⁵ The “mere performance of an allegedly discriminatory lease,” PANYNJ asserts, does not constitute a “continuing violation.” (MSJ 27 n.17). But, PANYNJ could not be more mistaken. The performance of a discriminatory lease constitutes a continuing violation, and expressly recognized in *Ceres*, and to which waiver and estoppel do not apply: “To hold otherwise would abrogate the Commission's statutory duty to promote a transportation and marine terminal system free from undue and unreasonable discrimination.” *Ceres*, 29 S.R.R. at 372.

PANYNJ's motion for summary judgment of Maher's cease and desist claim not only must be dismissed, but its assertion of waiver and estoppel in this motion and in this proceeding have no place before the Commission.

judgment is granted on Maher's reparations claims. (MSJ 27-28)

⁴ PANYNJ's assertion that providing Maher parity with the APM terms “would be to award Maher reparations for how many years of Maher's lease remain . . . [and] would be an inappropriate exercise of the Commission's cease and desist authority as a matter of law” is baseless. The Shipping Act does not provide that violators should be allowed to violate the Act because their violations were concealed for more than three years.

⁵ By “overt acts” PANYNJ means its conception of the term in the motion that PANYNJ argues would not include performance of the lease.

[REDACTED]

II. MAHER'S REPARATIONS CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Maher's reparations claims are also not barred by the Shipping Act's three year statute of limitations because: (1) they allege violations of the Shipping Act within the applicable limitations period for which the Commission rules and authorities permit recovery of reparations—specifically including “continuing violations” of the Shipping Act; and (2) even if PANYNJ had ceased the violations of the Shipping Act complained of more than three years before the complaint was filed, Maher's reparations claims accrued in May 2008—as accrual is determined by the Shipping Act's “discovery rule.”

A. The Shipping Act Statute of Limitations Does Not Bar Claims for Reparations for Violations of the Shipping Act within the Statutory Period—Whether New, Re-Occurring, or Continuing Violations.

The Shipping Act plainly permits Maher to bring a complaint for reparations, and recover reparations, for violations of the Shipping Act by PANYNJ within the three-year limitations period, in this case after June 3, 2005. *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079 (ALJ 1979).

In *Seatrain*, the complainant sought reparations for a port authority's refusal to provide access to certain port facilities. *Id.* at 1081. The respondent port authority sought dismissal of the reparations complaint on the basis of its argument that the cause of action accrued at the time of the first refusal—outside the statutory period—barred the reparations claims for the subsequent violations inside the statutory period. *Id.* at 1081.⁶

⁶ Section 22 of the 1916 Act was at issue in *Seatrain*. Other than its shorter two-year period, section 22 is materially similar on this issue to section 11(g) in 1984 Act.

[REDACTED]

Seatrain rejected respondent's argument and held that (i) each act in violation of the Shipping Act is a new act for the purpose of the statute of limitations, and that (ii) each day of a continuing violation is a new act for the purpose of the statute of limitations:

As alleged, *each and every berthing barred is a new act giving rise to alleged injury. Damages for unlawful acts prior to July 29, 1979, are of course, barred by the statute of limitations. Any unlawful act, however, which continues becomes not one act but a series of individual actions each time it is enforced and the statute of limitations is to be measured against each act giving rise to an alleged new injury. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502 (1968); see also Baker v. F & F Investment Co., 489 F.2d 829 (7th Cir. 1973).*

As regards the requirement pursuant to Section 22 of the Act and Rule 63 that the Commission has jurisdiction to order payment of reparation only if the complaint is filed within two years after the cause of action has accrued, it is determined that the complaint is timely filed and the Commission has jurisdiction to determine whether payment of reparation should be directed.

Id. 1082 (emphasis added). As *Seatrain* explains, claims accruing *outside* of the limitations period *do not bar complaints* seeking reparations for claims of continuing violations *inside* the limitations period.⁷ Rather, the statute of limitations *bars the damages* recoverable from accrued claims outside the limitations period.⁸

The continuing violation rule is infused in Commission precedent. In *Seacon Terminals, Inc. v. Port of Seattle*, complainant's reparations claims for discriminatory rate charges pursuant to a lease that initially accrued *seven years* before the complaint were not barred. 26 S.R.R. at 277. Damages were limited to the accrued acts within three years prior to the complaint. *Id.* The rule was clearly presented in the initial decision:

⁷ "[I]t is clear that *Seatrain* has properly and appropriately filed the complaint in accordance with [the statute of limitations]" and that "the Commission has jurisdiction to determine whether payment of reparation should be directed."

⁸ "Damages for unlawful acts prior to [the statutory period were] . . . barred by the statute of limitations," *Id.* at 1082.

[REDACTED]

The original complaint herein was filed at the Office of the Secretary of the Commission on May 30, 1990, served on June 5, 1990, and the amended complaint was served on April 9, 1991. *Section 11(g) of the Shipping Act of 1984 (the 84 Act) provides for payment of reparations limited to certain conditions, including that complaints be filed within three years after the cause of action accrued. Under this rule reparations for the period prior to May 30, 1987, are barred.*

Id. at 251. And the Presiding Officer applied the rule in his conclusions with similar clarity:

[the disputed] fuel charges (rates) were established by the Port in its tariffs, which became effective on October 1, 1982, and which remained unchanged until July 1, 1990. *Thus, Seacon's cause of action as to a disparity in fuel costs began to accrue over seven years before its complaint was filed in May 1990, and, of course, the Port was obliged to charge the fuel costs specified in its tariff, unless its lease agreements were amended in this respect. To the extent that the disparity in fuel costs continued after May 30, 1987, these costs would not be barred.*

Id. at 277 (*emphasis added*). Pursuant to the continuing violation rule, the Presiding Officer recognized the legal vitality of the alleged Shipping Act discrimination claims for a Port Authority's alleged ongoing violation of the Shipping Act in charges that *began to accrue over seven years prior to the complaint.*⁹

In *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, Judge Kline rejected the port authority's contention that claims were time-barred, agreeing with complainant NPR that "the Board's practice in demanding payments over the life of the

⁹ PANYNJ attempts to rebut *Seacon* because the Commission ultimately dismissed the discrimination claims *on the merits* and, PANYNJ asserts, that the "comments regarding time bar" "reflect a lack of analysis on confused facts." (MSJ 17 n.10) The Commission's dismissal on the merits does not suggest that the Commission disagreed with the Presiding Officer's application of the continuing violation rule, which was clearly described and applied, and required no further analysis. PANYNJ's "confused facts" critique does not relate to the application of the continuing violation rule, but relates to whether the facts were sufficient to prove the damages, which the ALJ noted were unclear and for which he did not award damages in the initial decision: "To the extent that *Seacon's* crane terms provided that it had to pay diesel fuel rates, or rates higher than electricity rates . . . *Seacon* appears probably to have suffered rate discrimination, but . . . *Seacon* ceased operation at T-25 in July 1988, so that the unbarred fuel disparity was for a relatively short period, and perhaps was offset by payments or lack of payments by *Seacon* for acres less than suitable for container yard operations." *Id.* at 277.

[REDACTED]

cancelled lease constitutes ongoing conduct and that its complaint is therefore not time-barred. . . .” 28 S.R.R. 1011, 1014 (Mar. 25, 1999) (Kline, ALJ). Judge Kline’s expression of the law was also clear:

NPR argues, correctly in my opinion, that the Board’s practice in demanding payments over the life of the canceled lease constitutes ongoing conduct and that its complaint is therefore not time-barred even by the two-year statute of limitations set forth in section 22 of the 1916 Act, which is inapplicable, nor by the three-year statute of limitations set forth in section 11 of the 1984 Act, which is applicable.

28 S.R.R. at 1014.¹⁰ Pursuant to the continuing violation rule, Judge Kline rejected the port authority’s argument that an agreement to pay cancellation fees executed outside an allegedly applicable limitations period would immunize the port authority’s allegedly wrongful conduct in demanding excessive payments over the life of the cancelled lease. *Id.*

In *International Shipping Agency, Inc. v. Puerto Rico Ports Authority* (“*Intership*”), the respondent port authority moved to dismiss complainant’s reparations claims arising out of a lease executed over *seven years prior* to the complaint. 30 S.R.R. 407, 425-26 (Sept. 17, 2004) (Trudelle, ALJ). The Presiding Officer denied the motion, expressly applying the FMC’s continuing violation rule 502.63 on the basis that “the complainant clearly includes allegations of continuing offenses and seeks reparations in connection with those violations.” *Id.* at 425.¹¹ The Presiding Officer also articulated the

¹⁰ PANYNJ disregards *NPR* as *dicta* because the “complaint filed in 1998 challenged allegedly discriminatory payments under Cancellation Agreement signed in 1996, within limitations period.” (MSJ 16-17 n.10) But labeling a clear proposition *dicta*, of course, does not mean that a proposition is not *correct*, particularly a clear statement of the law.

¹¹ Regarding *Intership*, PANYNJ’s assertion that it “would offer Maher no support [because in *Intership*], the complainant alleged that the respondents were in violation of continuing contractual obligations under its agreement . . . during the limitations period,” as opposed to challenging that the lease itself violates the Shipping Act (MSJ 18 n.12), is neither accurate, nor relevant, and ignores the crux of the holding that the

[REDACTED]

Commission's position on continuing violations in unique, but similarly clear, terms: "[t]here is no competent evidence or rule of law that [a] complaint should be dismissed because some of the harm occurred before the [limitations period] and [complainant] knew or should have known of the harm."¹² *Id.* at 425.

Under the Shipping Act, the relevant question for a continuing violations analysis is not whether violations began accruing before a limitations period, but whether violations of the Shipping Act accrued or continued into the limitations period. *Seatrain*, 18 S.R.R. at 1081-82. The Maher complaint in this proceeding expressly alleges continuing violations, *see, e.g.*, Maher Complaint, IV.A.¹³ PANYNJ does not, and indeed cannot, show that PANYNJ's discrimination against Maher, enforcement of the discriminatory lease, and other actions or inactions in violation of the Shipping Act alleged in this proceeding, do not constitute continuing violations of the Shipping Act.¹⁴

"continuing violations" are the port authority's failures to comply with its obligations under the Shipping Act, some of which began accruing prior to the limitations period.

¹² The rule was similarly applied in *Odyssey Stevedoring of Puerto Rico, Inc. v. PRPA*, 30 S.R.R. 484 (Nov. 9, 2004) (Trudelle, ALJ). In *Odyssey*, the complaint alleged continuing violations of the lease, alleged that enforcement of the lease itself was a continuing violation and that the respondent's conduct was a continuing violation. *Id.* at 503.

¹³ *E.g.*, Maher Complaint, 08-03, IV.A. "Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMI, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property."

¹⁴ PANYNJ asserts two "facts concerning "new or independent" acts that PANYNJ misconceives are relevant to a continuing violation analysis, but which are not germane. In any event, neither are support with references to the record for the asserted point of fact, they are principally legal conclusions not facts, and they are disputed by Maher. PANYNJ asserts on page 23 of its motion that it is "undisputed" that there were "no such new, independent acts." The assertion is not supported and appears to refer to the "facts" noted above that Maher disputes.

[REDACTED]

In any event, the motion must be denied because PANYNJ itself identifies numerous alleged continuing violations of the Shipping Act that it proceeds for a page and a half of its motion to dispute. (MSJ 24-25) For example, the first sentence in PANYNJ's section II.B.4 casts a dispute of fact over the veracity of numerous alleged continuing and new violations.¹⁵ The second sentence goes on to contest Maher's entitlement to relief on new and continuing violation allegations, and further asserts that "each is flatly contradicted" in the record, although PANYNJ cites no record evidence in support of its claimed contradictions. (MSJ 24)

PANYNJ's motion fundamentally misapprehends its duties under the Shipping Act. The Shipping Act, including the Shipping Act prohibitions, applies to PANYNJ today regardless of whether actions alleged to violate the Shipping Act were agreed to in a prior contract. As *Ceres Terminal* explains, entering into an agreement that violates the Shipping Act does not immunize the enforcement of that agreement from constituting a violation of the Shipping Act. 29 S.R.R. at 369-70. Under Shipping Act authority, the continued enforcement of an agreement that violates the Shipping Act, including after the passage of seven years, is a continuing violation of the Shipping Act. *See id.* at 370-71 (citing Commission precedents of Shipping Act challenging to agreement entered into and operated under for years longer than the statutory limitation period). As discussed above, Commission Authority, including *Seatrain*, and Rule 63(b), treat each act in violation of the Shipping Act as an *independent* violation for the purpose of the statute of limitations and *any unlawful act* that continues is treated not as one act "but a series of

¹⁵ "Maher may once again fabricate a litany of alleged post-lease violations." (MSJ 24). Neither the basis for PANYNJ's attack, nor what PANYNJ means by it is apparent, but the veracity of Maher's allegations of new and continuing violations is a question of fact introduced by PANYNJ.

[REDACTED]

individual actions each time it is enforced and the statute of limitations is to be measured against each act.” *Seatrain*, 18 S.R.R. 1082.

Astonishingly, PANYNJ cites *Seatrain* as its lead Shipping Act authority, but twists the continuing violation rule beyond recognition with a wholly-unwarranted overlay of inapposite, non-FMC authorities.¹⁶ Stating that “the FMC has regularly relied on guidance from decisions construing other federal statutes of limitations,”¹⁷ PANYNJ conjures up decisions plainly not “regularly relied” on for guidance in the FMC that certainly provide no “guidance” on *Shipping Act* continuing violations.¹⁸ PANYNJ’s inapposite “guidance” on the Shipping Act’s continuing violation rule is a misleading ruse.

Indeed, the ruse is further exposed by the two cases *Seatrain* specifically cites—*Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 392 U.S. 481, 502 (1968) and *Baker v. F. F. Investment Co.*, 489 F. 2d 829 (7th Cir. 1973)—both of which directly support the Shipping Act’s continuing violation rule. PANYNJ discusses neither.

¹⁶ PANYNJ cites *Seatrain* in support of its position that an unlawful act outside a limitations period cuts off a reparations claim for an unlawful act that continues into a limitations period. As discussed above, *Seatrain* stands for the opposite proposition: “[a]ny unlawful act, however, which continues becomes not one act but a series of individual actions each time it is enforced and the statute of limitations is to be measured against each act giving rise to an alleged new injury.” *Id.* at 1082.

¹⁷ PANYNJ states that “the FMC has regularly relied on guidance from decisions construing other federal statutes of limitations.” (MSJ 14 n.8)

¹⁸ The inapposite line of antitrust cases that PANYNJ cites, e.g., *Varnier v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004), *Imperial Point Colonades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th Cir. 1977), etc. requiring “continuous courses of conduct” and “overt acts” and finding that performance of a alleged anti-competitive contract does not “restart” a limitations period, plainly does not reflect the Commission’s view of its authority. Nor, in any event, do PANYNJ’s selective citations reflect antitrust authority on continuing enforcement of contracts that violate antitrust laws cited by the Commission in *Seatrain* or otherwise. See, e.g., *Nat’l Souvenir Ctr, Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 514 (D.C. Cir. 1984) (anticompetitive effect of enforcement of agreement allegedly in violation of the Sherman Antitrust Act executed beyond the statutory period is a continuing violation).

[REDACTED]

In *Hanover Shoe, Inc.*, Supreme Court held that plaintiff could recover damages for antitrust violations under the Sherman Act, stemming from defendant's practice of leasing and refusing to sell its machinery to plaintiff that had begun beyond the limitations period, stating that:

We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

392 U.S. 481, 502 n.15 (1968). Even though defendant started the unlawful practice *more than 40 years before the complaint* was filed, as a continuing harm, plaintiff could recover for damages suffered during the limitations period.

In *Baker*, the court held that Civil Rights Act and antitrust claims based on defendants selling property to plaintiffs under installment sale contracts at excessive prices and making loans based on false and excessive appraisals were not time barred because defendants' wrongful conduct continued after the contracts were signed, injury to plaintiffs continued to accrue after the contracts were signed, and "had defendants at any time ceased their wrongful conduct, further injury to plaintiffs could have been avoided." 489 F.2d 829, 836 (7th Cir. 1973). "[A] new injury was inflicted in plaintiffs each day until the federal defendants abandoned their discriminatory policies or the respective installment contracts were completely performed, whichever occurred first. Consequently, a new limitations period began to run each day as to that day's damage. . . . Of course, plaintiffs cannot recover against them any items of damage which accrued" outside of the limitations period." *Id.*

[REDACTED]

The authorities cited in *Seatrain* support the Shipping Act's continuing violation rule. PANYNJ cites *The Port Authority of New York & New Jersey v. New York Shipping Ass'n*, 22 S.R.R. 1329 (ALJ 1984) as "analogous" authority for barring a lease discrimination claim challenging terms agreed more than three years prior to entering into the lease because "the ALJ made clear [that] performance" of a labor agreement "does not restart the limitations period." (MSJ at 18 n.12, citing *New York Shipping Ass'n* at 1338-39).

The statutory provisions at issue in *New York Shipping Ass'n*, however, are materially different than in this proceeding. As Judge Kline explained, while the statute of limitations for reparations begins to run after a cause of action accrues, the statute of limitations at issue in *New York Shipping Ass'n* runs "simply from the filing of the assessment agreement." 22 S.R.R. at 1339 n.5. Unlawful performance cannot restart the limitations period in the MLAA, of course, because the limitations provision runs from filing alone.

In any event, *New York Shipping Ass'n* rejects PANYNJ's basic premise, holding that an action challenging provisions in an extension of an existing agreement, which were materially agreed upon more than 10 years before the action was filed, are not barred by the two-year statute of limitations. *Id.* at 1337-38. The determination of the lawfulness of the rate terms in the MLAA "depends upon current circumstances and conditions, not upon previous circumstances and conditions which warranted findings

[REDACTED]

against a previous agreement.” *Id.* at 1338 (citing *New York Shipping Association v. F.M.C.*, 495 F. 2d 1215 (2d Cir. 1974)).¹⁹

B. The Shipping Act Statute of Limitations Does Not Bar Claims for Reparations for Violations of the Shipping Act Discovered within the Statutory Period.

Commission applies a “discovery rule” to the determination of accrual of a cause of action seeking reparations. *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 313 (F.M.C. 2001). Accrual of a cause of action for a violation of the Shipping Act does not occur until the complainant “knew or should have known that it had a case,” when it possesses “conclusive information.” *Id.* at 313. *Inlet Fish* illustrates that suspicion of violations and knowledge of different terms is not enough. A Shipping Act claim alleging lease discrimination accrues under the Commission’s discovery rule 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 were an *undue* prejudice violating the Shipping Act.

As an initial matter, in light of Rule 63(b) and the Commission’s continuing violation rule, except where the alleged violations of the Shipping Act ceased prior to the three year period, the discovery rule is not practically relevant to determine whether the statute of limitations *bars* a complaint.²⁰ Because the violations Maher complains of are

¹⁹ PANYNJ’s cites to dicta in *New York Shipping Ass’n* as “analogous” to *Ceres Marine Terminals, Inc v. Maryland Port Admin.*, 29 S.R.R. 356, 372 (FMC 2001), which PANYNJ asserts stands for the proposition that enforcement of an agreement that violates the Shipping Act cannot constitute a continuing violation. *Ceres*, of course, does not say or hold what PANYNJ asserts. Neither the statute of limitations nor claim accrual were addressed in *Ceres*, nor are the applicable authorities addressed in *Ceres*. Contrary to the inference that PANYNJ as a practical matter attempts to draw, the Commission in *Ceres* did not establish a 3 year estoppel rule, the Commission rejected estoppel outright.

²⁰ PANYNJ’s assertions that “the discovery rule provides no assistance to Maher and, to the contract, clearly bars its lease terms discrimination claims” is incorrect for compound reasons. (MSJ 20). PANYNJ

[REDACTED]

continuing violations, the discovery rule analysis concerns the length of time for which Maher can recover reparations under its complaint, not whether the statute of limitations bars Maher's complaint.²¹

The Commission adopted the discovery rule favoring "a flexible approach to the accrual of a cause of action" because "a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct" whereas a "stricter rule would exonerate certain respondents even if their conduct was unlawful, simply because a potential complainant was unable to identify the existence of its cause of action." *Inlet Fish*, 29 S.R.R. at 313. It is not enough that complainant had "some suspicion" of a disparity and had documents showing a disparity, or in that case even both. To the contrary, the existence of a disparity is not "conclusive information" without the knowledge that the disparity was *undue* in violation of the Shipping Act. *Id.* at 309.

PANYNJ advances a different version of the "discovery rule" in its Motion. According to PANYNJ, Maher's reparations claims accrued when Maher "knew or should have known the *basis of its claims*, which were based on the differences between the terms of the two leases at issue." (MSJ 21 emphasis added). Further, citing to *Western Overseas Trade & Dev. Corp.*, 26 S.R.R. 651, 660 (ALJ 1992), PANYNJ asserts that the mere fact of publicly-filing the lease terms satisfies the discovery rule: it "put

wrongly applies a *Western Overseas* "time of Injury Rule" to base *accrual* on knowledge of the differences alone, instead of the *Inlet Fish* discovery rule which looks to knowledge of the difference and that the difference is and undue preference. Second, PANYNJ ignores the continuing violation rule, which applies to consider every day of a continuing violation a new day for the purpose of the statute of limitations.

[REDACTED]

Maher on notice of the lease provision contained therein” and once the APM lease was filed, “Maher’s Shipping Act claims accrued when Maher executed its own lease.” (MSJ 13, n.7). It is not clear whether PANYNJ means “basis of its claims” to mean *any basis of the claim* or that Maher’s claim only has *one basis*, but either way, the sole focus on Maher’s knowledge of lease differences makes it evident that PANYNJ’s is applying the wrong test.²²

Maher’s reparations claims accrued under the Commission’s discovery rule when Maher “knew or should have known that it *had a case*,” not when it had a *piece* of a case. PANYNJ’s formulation omits the defining element of the discovery rule in *Inlet Fish*--knowledge that the disparity was *undue* in violation of the Shipping Act—and therefore as a practical matter PANYNJ applies a “time of injury rule.” But the “time of injury rule,” and PANYNJ apparent view that *Western* narrows the discovery rule, were both rejected by the Commission in *Inlet Fish*. 29 S.R.R. at 313-14 (rejecting respondent’s reliance on *Western*, *Seatrain* and *Carton-Print, Inc.* for the position that accrual occurs only at the time of the unlawful act.).²³

The question of whether Maher knew that the lease disparity was *undue* in

²² PANYNJ’s quotation of the *Inlet Fish* rule on page 22 as “when the plaintiff should reasonable have discovered the *injury*” (MSJ 22 ea) is plainly wrong. Rather than address the correct rule, PANYNJ labels the Commission’s “conclusive information” language as Maher’s “self-created rule” and responds to its own straw-man argument that the “rule” can’t require that a that a party have “conclusive proof” of a claim. (MSJ 22) PANYNJ, of course, does not cite to Shipping Act authority, and in all events does not meaningfully address *Inlet Fish*.

²³ *Western* is in any event not informative of the pre-*Inlet Fish* approach to accrual of a discrimination claim. As *Western* explains, the particular standards for accrual are a function of nature of the action. *Western* is a commodity rate unreasonableness case, which itself employs differing rules of accrual. “Claims for reparation on individual commodity rates exceeding a maximum reasonable level generally have been held to accrue at the time they are paid. But the cause of action for reparation due to a carrier’s proposed general rate increase did not accrue until the Commission issued its decision finding the increase unreasonable.” *Western*, 26 S.R.R. at 659.

[REDACTED]

violation of the Shipping Act is a question of fact. *See, e.g., In RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503 (D.N.J. 1999) 58 F. Supp. 2d at 544-45 citing *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976) (disputes concerning discovery of an injury for the purpose of accrual are issues of material fact). PANYNJ makes *no effort* to satisfy its burden to show the absence of any material fact in dispute. Indeed, PANYNJ rests on its legal position that the discovery rule requires nothing more than Maher's knowledge of lease differences. (MSJ 23) (asserting that Maher's evidence of its knowledge that the lease was undue, "Even if true, [is] entirely irrelevant.").

Maher only uncovered "conclusive information," as outlined in Maher's attached Exhibit A, that it had Shipping Act claims against PANYNJ following the depositions of several key witnesses in Dkt. 07-01, including APM Terminals' witness Marc Oppenheimer (May 20, 2008) and Port Authority witnesses, including Cheryl Yetka (May 28, 2008), and then Maher filed this action *promptly* on June 3, 2008.



CONCLUSION AND PRAYER FOR RELIEF

Therefore, for the reasons set forth above, Maher respectfully requests that PANYNJ's Motion to for Summary Judgment be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2011, a copy of the foregoing was served by e-mail and U.S. Mail on the following:

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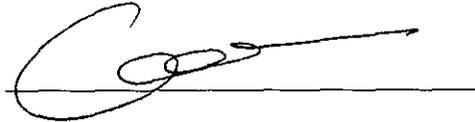
A handwritten signature in black ink, appearing to read "Michael G. Roberts", is written over a horizontal line. The signature is stylized with a large, sweeping initial "M" and a long horizontal stroke extending to the right.

EXHIBIT A

**MAHER'S REPLY IN OPPOSITION TO
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

Maher uncovered "conclusive information" that it had Shipping Act claims against PANYNJ following the depositions of several key witnesses in Dkt. 07-01, including APM Terminals' witness Marc Oppenheimer (May 20, 2008) and Port Authority witnesses, including Cheryl Yetka (May 28, 2008) and then Maher filed this action *promptly* on June 3, 2008.

Maher's First Request for Production of Documents from the Port Authority of New York and New Jersey in this proceeding, dated June 3, 2008, asked PANYNJ to "[d]escribe in detail any valid transportation purpose that PANYNJ contends justifies the foregoing differences between the terms of EP-248 and EP-249?" Request No. 18. PANYNJ responded that it had "valid transportation justifications for negotiating the lease terms it did with APMT and Maher" and therefore. "[t]here was no undue or unreasonable discrimination or preference whatsoever." *Id.* at 17. Among the justifications highlighted by PANYNJ was the "Port Guarantee" in the APMT lease:

Significantly, unlike anything in leases with other terminal operators, the Maersk lease provided for a Port Guarantee through which APMT (and Maersk, Inc.) guaranteed that a certain volume of Maersk containers would go through the Port on an annual basis, regardless of which terminal it came through. The Port Guarantee was an important term that neither Maher nor any other port tenant could provide. The Port Guarantee committed the Maersk shipping lines to continue using the Port even if volumes declined in the future. And the fact that Maersk volumes through the Port have exceeded the levels of the Port Guarantee underscores how successful the entire process was in securing this critical relationship with Maersk. The increased container volume has benefited not only the Port Authority, but also other port tenants, including Maher.

Also significant, APMT's parent company, Maersk, Inc. executed a guarantee of the entire lease (not just the Port Guarantee), backed by its extensive assets, in lieu of a security deposit. In short, the APMT lease assured the Port Authority that APMT would maintain the Port as its East Coast hub and that Maersk, Inc.'s new mega-ships would continue to come through the Port.

Response to request No. 18, and No. 1, 10-11, 34. PANYNJ's responses were sworn and verified by Port Commerce Director Richard Larrabee on August 29, 2008.

As Maher explained in its Responses to PANYNJ's First Set of Interrogatory Responses, also verified on August 29, 2008, "Maher learned of PANYNJ's *preference* of APMT" at the time of the leases, but did not begin to learn that the preferences were "unduly or unreasonable preferential" until events in 2007 and 2008. See Ex. H to the Declaration of Alexander O. Levine, February 25, 2011 ("Levine Dec.") at 4-5 (preference), at 8 (preference unduly or unreasonably preferential). As described therein, Maher was initially tipped off by PANYNJ in the summer of 2007 when PANYNJ wanted a release from Maher to include a release from a "rent disparity" claim. *Id.* 8. Witnesses with knowledge of these events are currently scheduled to testify.

Shortly thereafter, on August 9, 2007, PANYNJ filed a Shipping Act third-party complaint against Maher in Dkt. 07-01 and discovery began. See FMC Dkt. 07-01. In November 2007, Maher representatives met twice with PANYNJ leaders, including Port Commerce Director Rick Larrabee and his Chief Deputy Dennis Lombardi, wherein these PANYNJ executives denied that Maher had claim against PANYNJ regarding disparate treatment, etc. in EP-249 because "the Maher brothers" had signed the lease (EP-249) and there was nothing they could do.

The first two witnesses to testify in this proceeding, this past week, testified to these facts and other similar PANYNJ interactions. [REDACTED]

As document discovery commenced and progressed in this proceeding, additional facts have established that the "Port Guarantee"—that PANYNJ claimed only APM could offer—and that PANYNJ attested in sworn responses was a valid transportation related factor justifying the differences in the APM and Maher's lease—was a sham. A sham that PANYNJ used as a fig leaf to cover over its undue discrimination for years until Maher began to uncover conclusive information in depositions in the 07-01 proceeding that lead to the discovery of its claim.

In the May 20, 2008 deposition of APM's corporate designee, Mark Oppenheimer, for example, Maher learned that neither APM nor Maersk, Inc. 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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The discovery in this proceeding has continued to establish facts of the "Port Guarantee" sham.

PANYNJ's own May 19, 1999 internal memorandum from Robert E. Boyle, PANYNJ Director to "All Commissioners" and prepared by "Gary Arcus/Cheryl Yetka, Comptrollers" explains PANYNJ's unlawful discrimination. PANYNJ initially sought to charge APM the same standard leasehold rental rate to be paid by Maher and other MTOs. Memorandum from Robert E. Boyle, Director PANYNJ, to All Commissioners, PANYNJ, 08PA01625998, 08PA01625998 (May 19, 1999), Ex. 1.

When that approach foundered, PANYNJ explained that it would give APM a rent subsidy on the order of \$120 million, net present value, but that it would not extend the subsidy to MTOs like Maher. And knowing that such discriminatory treatment would violate the Shipping Act—which PANYNJ euphemistically referred to in its internal memorandum as the "FMC considerations"—PANYNJ devised a fig leaf to conceal its unlawful action. According to the Boyle memorandum, it was conceivable that a port or "harbor wide" guarantee requiring a 70% Maersk increase in containers to PANYNJ might withstand scrutiny by the Commission.

The third mechanism we proposed was a harbor wide guarantee of a 70% increase of Sea-Land/Maersk's own boxes by 2003, which serves two purposes. First, it assures that the throughput revenue is not just realignment of revenue between terminals which is important because the financial forecasts depend upon growth in

total boxes in the harbor. If Sea-Land/Maersk were not obligated to bring in new business, but rather absorbed business from other operators because of their more favorable arrangement, the risk exists that overall revenues might be less than anticipated. . . .
Second, it is conceivable that the harbor wide guarantee might be a mechanism which distinguishes the Sea-Land/Maersk deal sufficiently so that the \$120 million concession could be limited solely to Sea-Land/Maersk and still withstand Federal Maritime Commission (FMC) scrutiny.

Memorandum from Robert E. Boyle, Director PANYNJ, to All Commissioners, PANYNJ, 08PA01625998, 08PA01625 (May 19, 1999), Ex. 1 (emphasis added). Ultimately, as manifested by the EP-248 lease terms, PANYNJ was unable to extract even the fig leaf from Maersk, yet Maersk was awarded a rent lower than all similar container terminals, including Maher's. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The memorandum continues with PANYNJ's financial analysis in which PANYNJ concludes that the APM rental rate becomes too expensive for PANYNJ if it provides the same terms to others. If required to provide the same terms to others, according to the PANYNJ's own memorandum, it would be cheaper to let Maersk leave:

The rental levels originally agreed to by Hanjin and Maher, if attainable port wide, would have fully covered the costs of the New Jersey segment of the port business. While a desirable goal, it was widely recognized at the outset that such a result would be difficult to achieve in view of Sea-Land's widely recognized ability to mobilize public opinion and garner support from elected officials. In anticipation of this, staff performed myriad analyses to quantify the effect of various reductions to the original level. Whereas the Hanjin offer would allow for full cost recovery, the August 14 [PANYNJ] proposal would leave the New Jersey segment of the port business with an NPV deficit of well over \$300 million if rental rates were applied to all new container terminal leases. This NPV deficit grew to almost \$400 million at the rental

level included in the September 21 proposal, and would grow to over \$600 million if the \$120 million Sea-Land/Maersk concession were to be provided to all new terminal leases because of FMC considerations.

. . . Since it is likely the port will continue in any event, staff compared the estimated future financial results of the New Jersey segment of the port business under the various proposed Sea-Land/Maersk levels to those which could be expected if Sea-Land and Maersk were to actually leave. Depending upon growth and other assumptions, the August 14 proposal, while resulting in a total NPV loss of well over \$300 million, actually results in a slight financial improvement relative to what could be expected if Sea-Land and Maersk were to leave. Similarly, the September 21 proposal, while resulting in a total NPV loss of slightly under \$400 million, actually results in very little deterioration to what the financial results could be expected if Sea-Land and Maersk were to leave. In contrast, if the \$120 million Sea-Land/Maersk concession has to be made available to other operators because of FMC considerations, the financial results could be well over \$200 million worse than what could be expected if Sea-Land and Maersk were to leave.

Memorandum from Robert E. Boyle, Director PANYNJ, to All Commissioners, PANYNJ, 08PA01625998, 08PA01626000-1 (May 19, 1999), Ex. 1.

In the same vein, testimony from Cheryl Yetka, one of the authors of the foregoing memorandum and member of the PANYNJ lease negotiation team, explained that although there was talk about the State of New Jersey providing the subsidy to Maersk/APM, that did not come to pass, and PANYNJ provided the subsidy:

Question 2: During the course of the negotiation of the Maersk Container Service Company Lease, EP-248, do you recall there being a New Jersey commitment discussed of approximately \$100 million? (Yetka Tr. 66-67).

Answer: To my knowledge there was never a New Jersey commitment of funds to this lease. There was a request from the State that the Port Authority make a lease offer to Maersk that was competitive with the Baltimore proposal.

...

Question 5: Was any other subsidy offered, provided, or in any other way credited to Maersk?

Answer: As I recall, the total value of the lease proposal was approximately \$120 million and included a combination of reduced rentals and capital investments in the terminal.

Declaration of Cheryl Yetka at 1 (June 17, 2008), Ex. 3. *See also* Dennis Lombardi Dep. at 194-96 (explaining that plan was for New Jersey to provide funds to permit subsidy of APM rent to \$19,000 per acre level), Ex. 4; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Furthermore, Ms. Yetka testified how she calculated terminal rents on a port-wide basis to be assessed the leases and at no point did she testify that PANYNJ's new *post hoc* justifications regarding alleged valuation of Maher's leasehold, etc. played any role. Indeed, she testified that she calculated the rents based on only operating and maintenance expenses, capital investment, and capital return:

7 Q Okay. Are financial analyses performed for
8 all leases that are negotiated, like 248, 249?
9 A Yes.
10 Q Okay. That's a matter of routine at the
11 Port Authority?
12 A Yes.
13 Q It's a matter of practice?
14 A Absolutely.
...
22 Q Okay. Well, tell us how you did it.

1 A I forecasted rent streams, Port Authority
2 O&Ms.
3 Q What does "O&M" mean?

4 A Operating and maintenance expenses.

5 Q All right.

6 A We looked at our projected capital
7 investment to determine whether the Port Authority
8 would make a sufficient return to consider the deal.

9 Q And what is a sufficient return to consider
10 the deal?

11 A The Port Authority generally looks at its
12 hurdle rate.

13 Q I'm sorry?

14 A The Port Authority generally looks for a
15 return at its hurdle rate.

16 Q What does that mean?

17 A It's our cost of capital plus some
18 additional return which guarantees our bond covenants.

19 Q And in -- with respect to 248 and 249, the
20 APM and the Maher leases, what was that hurdle rate?

21 A I do not recall.

22 Q Do you recall what the hurdle rate was at

1 that point in time?

2 A The Port Authority hurdle rate
3 specifically? I don't recall specifically. Somewhere
4 between seven and a quarter and eight and a quarter.

5 Q And that was your return on what?

6 A On any investment the Port Authority would
7 have made, capital investments.

...

10 Q Very good. Now, let's go back to your
11 financial analyses that you prepared.
12 How would you prepare those analyses?

...

6 A I developed a forecast of the rents that
7 were being negotiated. I developed a forecast of our
8 operating and maintenance expense for the port. We
9 looked at what capital investment was going to be made
10 and the period of time over which it would be made,
11 and we add all that up together, and we do a
12 discounted cash flow.

13 In this particular instance we also looked
14 at other parts of the port because we were trying to
15 get a picture of the whole port. So I was doing

16 forecasts of the auto businesses and the warehouse
17 businesses as well.
18 Q I see. What's the bottom line then did you
19 come out with? Did I understand you to say discounted
20 value cash flow?
21 A Yes. But it was a -- an entire facility
22 number. Do I recall --

1 Q For the terminal?
2 A For Newark and Elizabeth in total.
3 Q Okay. I'm just trying to understand. Did
4 the bottom line reflect a bottom line of the
5 discounted value cash flow from, let's say, the APM
6 terminal and the Maher terminal, or separately or
7 together? How did you --
8 A It was everything. It was Maher, it was
9 APM, it was a projection on what we might get out of
10 the vacated terminal in Port Newark, it was a
11 projection of what was coming out of our auto leases
12 and our warehouse leases as well. So it was an entire
13 picture of the whole port.
14 Q And was that -- all of that data considered
15 together in the development of a discounted value cash
16 flow?
17 MR. BURKE: Objection.
18 A Yes. We discounted all of that together as
19 one big picture.

Cheryl Yetka Dep. at 46-48 & 60-63 (May 28, 2008), Ex. 5. *See also* Dennis Lombardi Dep. at 60-63 (June 5, 2008) (explaining that PANYNJ calculated rent based upon recovery of PANYNJ investments and maintenance costs, not upon differentiating value characteristics of the land), Ex. 6.

The extensive testimony from the Maher witnesses who participated in the EP-248 negotiations corroborates the PANYNJ witness testimony and contemporaneous documents supplied by PANYNJ, and explains that although Maher expressly requested the APM terms, PANYNJ refused because Maher was seen as a mere marine MTO that presented no risk to leave the port like the ocean carrier Maersk. Maher's former CFO who negotiated EP-249 for Maher,

Randall Mosca, explained Maher's relative position in the lease negotiations and its inability to insist upon the APM terms:

3 Q Did anyone at the Port Authority express
4 the view that Maher was not a threat to leave the
5 port?

6 MR. BURKE: Objection.

7 A The -- The Port Authority -- I don't know
8 if anyone specifically said that, but there was
9 discussion many times about Maher being a terminal
10 operator that was only in the Port of New York and we
11 really had no place to go other than conduct our
12 business in the Port of New York.

13 Q Now, Mr. Mosca, was Maher aware that if it
14 was not successful in negotiating a new lease with the
15 Port Authority that the Port Authority could put
16 Maher's leasehold up for bid?

17 A Internally Maher Terminals was very
18 concerned with the lease negotiation. We felt that if
19 we couldn't conclude a lease arrangement, that if the
20 terminal went out for bid we would not necessarily be
21 the winners of the bid, and that would, in effect, put
22 us out of business.

1 Q Did anyone at the Port Authority tell you,
2 during your negotiations with the Port Authority over
3 the terms of Lease EP-249, Exhibit 79, tell you that
4 the Maersk terms were off the table?

5 A Yes.

6 MR. BURKE: Objection.

7 Q Tell us what happened.

8 A We were aware of the financial terms in the
9 Maersk lease, which were considerably less than, on a
10 base-rent basis, the Maher proposed lease arrangement.
11 And we had asked to replace the Maher lease rate with
12 the Maersk lease rate, and we were told that the
13 Maersk lease rates were off the table, it was not
14 something the Port Authority was willing to negotiate.

15 Q Who told you that?

16 A Lillian Borrone.

17 Q Now, did -- At the end of the negotiation,
18 did the Port Authority essentially tell you that the
19 terms that they were offering were take-it-or-leave-it
20 terms?

21 MR. BURKE: Objection.

22 A We reached the point in the lease

1 negotiation where that was -- the Port Authority said
2 it was their final offer. So we had to decide if we
3 wanted to accept the lease terms.

4 Q And did you understand the Port Authority's
5 position at the end of the negotiation to be that the
6 terms were take it or leave it?

7 MR. BURKE: Objection.

8 A We understood very clearly that the -- this
9 was the final offer for the Port Authority and that
10 they were not going to negotiate any further.

Randall Mosca Dep. at 154-56 (June 11, 2008), Ex. 7.

Former CEO of Maher, Brian Maher, explained his requests for the APM terms during negotiations with PANYNJ, and Maher's ultimate capitulation to the lease in order to stay in business in the port. Brian M. Maher Dep. at 274-75 (June 9, 2008), Ex. 8. Thus, when PANYNJ negotiators asked Mr. Maher if he would be willing accept rent terms irrespective of what rent levels were ultimately agreed between PANYNJ and APM/Macrsk, Mr. Maher responded:

[I]n our view it is the Port Authority's responsibility to set rent levels that are competitive with other Ports on the East Coast and which produce a level playing field with within the Port itself. Therefore, we would expect that the Port Authority would offer us rates, terms, and conditions for our Tripoli Street renewal which are competitive with other Ports on the East Coast and in line with the prevailing terms, conditions and rates being offered to other tenants at this time.

Letter from Brian M. Maher, Maher Terminals, to Robert Boyle, Executive Director of PANYNJ, MT002597, MT002598 (Feb. 16, 1999), Ex. 9.

Exhibit 1

Port Authority of NY & NJ

Memorandum

To: Robert E. Boyle, Executive Director
From: Lillian C. Borrone
Date: May 19, 1999
SUBJECT: SEA-LAND SERVICES INC./MAERSK INC.
Copy To: R. Shiftan, J. Green, C. McClafferty, C. Ward, L. LaCapra

Since the Sea-Land/Maersk New Jersey announcement on May 7th, staff and I have proceeded to hold conversations with Sea-Land/Maersk, Maher, Maersk Lines individually and Hanjin regarding how we might proceed to resolve physical planning, operational scheduling, and lease term issues.

In each discussion, from which I've attached notes for your review, I have pointed out that because the States have not yet resolved the larger Port Authority issues, we do not yet have guidance from the Board, so what we are hoping to do is frame issues which we can bring before the Board, possibly by the end of June to receive direction. In the Sea-Land/Maersk discussions, I suggested we could consider pursuing a dual track discussion of terms – one track which assumes the September Port Authority \$36,000 per acre offer and the New Jersey enhancement, which as you know does not currently offer us the cargo and terminal guarantees and investment commitment we were seeking. The other track would be to develop terms consistent with the February/April conceptual discussion which would result in a \$19,000 per acre rent with cargo, terminal and investment guarantees we were looking for. They have agreed to pursue these alternatives to develop term sheets for Board consideration by June.

I raise this because I need your guidance. Do you agree with this approach?

I have been clear with Maher and Hanjin that we cannot speak with them about rates until the direction on Sea-Land and Maersk is resolved. Without this resolution we are essentially stymied because all of the terminal, physical and operational plans are keyed around our ability to move Maersk into Sea-Land. That move, in turn will be dependent on Hanjin being able to move into the Maersk terminal for which we need rates and finally, our ability to move Maher into a consolidated terminal arrangement for which we will need rates. As Brian has pointed out his willingness to invest, and the level of and speed of the investment he will make, will depend on the lease rate we offer.

Given the background memo to the Board we will be sending this week, I hope that a June dialogue on the two term sheets would enable a clear direction.

Exhibit 2

EXHIBIT 2 OMITTED AS REDACTED

Exhibit 3

DONALD F. BURKE, ESQ.
One PATH Plaza
Jersey City, New Jersey 07306
(201) 216-6370
Attorney for Respondent/Third Party
Complainant
Port Authority of New York and New Jersey

BEFORE THE FEDERAL MARITIME
COMMISSION

APM TERMINALS NORTH AMERICA,
INC.
COMPLAINANT
v.
PORT AUTHORITY OF NEW YORK AND
NEW JERSEY
RESPONDENT,
COUNTERCOMPLAINANT, AND THIRD-
PARTY COMPLAINANT
v.
MAHER TERMINALS, LLC
THIRD-PARTY RESPONDENT AND
COUNTERCOMPLAINANT

DOCKET NO.: 07-01

DECLARATION OF CHERYL YETKA

I, Cheryl Yetka, hereby declares as follows:

Question 1: When did you receive a request from your attorney or any other person to produce any records responsive to requests in this proceeding? (Yetka Tr. 37-38).

Answer: I received a request early on in the proceedings, but I don't remember an exact date.

Question 2: During the course of the negotiation of the Maersk Container Service Company lease, EP-248, do you recall there being a New Jersey commitment discussed of approximately \$100 million? (Yetka Tr. 66-67).

Answer: To my knowledge there was never a New Jersey commitment of funds to this lease. There was a request from the State that the Port Authority make a lease offer to Maersk that was competitive with the Baltimore proposal.

Question 3: What do you know about it?

Answer: The Port Authority developed a revised lease proposal to Maersk.

Question 4: Was it provided to Maersk?

Answer: A revised lease was negotiated with Maersk.

Question 5: Was any other subsidy offered, provided, or in any way credited to Maersk?

Answer: As I recall, the total value of the lease proposal was approximately \$120 million and included a combination of reduced rentals and capital investment in the terminal.

I declare under penalty of perjury that the foregoing statements are true and accurate.

Executed on this 17th day of June, 2008.



Cheryl Yetka
Aviation Department

Dated: June 17, 2008

Exhibit 4

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BEFORE THE

FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC. :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

ORIGINAL

Third-Party Complainant :

----- X

(Caption continued on Page Two)

Videotaped Deposition of DENNIS LOMBARDI

Newark, New Jersey

Thursday, June 5, 2008,

9:41 a.m.

Job No.: 1-130626

Pages 1 through 301

Reported by: Debra A. Whitehead



VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

		8	
1	P R O C E E D I N G S		09:38:20
2			09:38:20
3	(Lombardi Deposition Exhibit 148 marked for		09:40:41
4	identification, to be retained by counsel.)		09:40:41
5	VIDEO SPECIALIST: Here begins Videotape		09:40:43
6	Number 1 in the deposition of Dennis Lombardi, in the		09:40:46
7	matter of APM Terminals North America, Incorporated,		09:40:51
8	Complainant, versus Port Authority of New York and New		09:40:57
9	Jersey, Respondent, Counter-Complainant and		09:41:00
10	Third-Party Complainant, versus Maher Terminals, LLC,		09:41:04
11	Third-Party Respondent and Counter-Complainant, in the		09:41:09
12	Federal Maritime Commission, Docket Number 07-01.		09:41:15
13	Today's date is June 5th, 2008. The time		09:41:19
14	on the video monitor is 9:41 a.m. The video operator		09:41:24
15	today is David Lane. This video deposition is taking		09:41:27
16	place at Winston & Strawn, One Riverfront Plaza,		09:41:31
17	Newark, New Jersey.		09:41:32
18	Counsel, will you please identify		09:41:33
19	yourselves and state whom you represent.		09:41:36
20	MR. KIERN: I'm Larry Kiern, with Winston &		09:41:39
21	Strawn, LLP. I represent Maher Terminals.		09:41:42
22	MR. BURKE: Donald Burke, B-U-R-K-E. I		09:41:47
	represent the Port Authority of New York and New		09:41:47

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

194

1	Exhibit 21. Exhibit 21 in the first stack here,	15:13:00
2	Mr. Lombardi.	15:13:08
3	Indeed, why don't we look at Exhibit 20 and	15:13:20
4	Exhibit 21.	15:13:22
5	Take a moment, please, and take a look at	15:13:31
6	Exhibits 20 and 21. Let me know when you've had a	15:13:34
7	chance to look at them.	15:13:37
8	MR. KIERN: And for the record, these	15:13:39
9	exhibits have been previously identified. Exhibit 20	15:13:40
10	is a letter from New Jersey Commerce, dated May 7,	15:13:42
11	1999. It's a three-page exhibit. Exhibit 21 is a	15:13:46
12	two-page letter from Christine Todd Whitman, the	15:13:49
13	Governor of New Jersey, to John Snow of CSX	15:13:53
14	Corporation and Tommy Thomsen of Maersk.	15:14:01
15	A I've had a chance to look at them.	15:16:26
16	Q Okay. Thank you very much.	15:16:27
17	Do these documents refresh your	15:16:29
18	recollection in any regard with respect to the New	15:16:32
19	Jersey participation?	15:16:35
20	A Yes, they do.	15:16:36
21	Q Okay. And what do you recall now?	15:16:37
22	A This was a mechanism at the time, from what	15:16:43

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

195

1 I recall, to lower the rent from \$36,000 an acre to 15:16:49
2 \$19,000 an acre. 15:16:55
3 Q Okay. And do you recall anything else 15:16:56
4 about it? 15:16:58
5 A Even as I read these today, this 15:17:02
6 complicated transactions of money, and -- being 15:17:05
7 exchanged and how it related to the dredging and -- I 15:17:08
8 don't really recall much else. I don't think I read 15:17:13
9 these carefully enough. 15:17:16
10 But, I mean, I -- the gist of the issue is 15:17:17
11 the state gave the Port Authority money for dredging 15:17:19
12 so that you could lower the rent, essentially. 15:17:22
13 Q And is that what happened? 15:17:24
14 A Well, I know for sure that the rent went 15:17:28
15 from our RFP proposal to the \$19,000 an acre. That's 15:17:31
16 a fact. 15:17:35
17 Q And what was the RFP proposal? 15:17:36
18 A Yeah, I -- this \$36,000 per acre number 15:17:38
19 looks and sounds very familiar to me as a number that 15:17:42
20 was probably in the proposal. 15:17:46
21 Q Okay. Is that the Port Authority's 15:17:48
22 response to the solicitor's RFP? 15:17:51

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

196

1	A	That's correct.	15:17:54
2	Q	Okay. Good. Thank you. That's very	15:17:54
3		helpful. You can just leave those exhibits right	15:17:57
4		there. We'll get them back into order.	15:18:00
5		Now, Mr. Lombardi, earlier today you	15:18:02
6		testified that you estimated that you -- if I remember	15:18:05
7		you correctly, you estimated that you went to the	15:18:12
8		Aviation department in approximately April of '99; is	15:18:15
9		that right?	15:18:21
10	A	That's correct.	15:18:21
11	Q	Okay. All right. Well, I've got documents	15:18:21
12		here of meeting notes which show that you were still	15:18:25
13		at Port Commerce until at least August of '99. And	15:18:28
14		I'm going to go through those. And I just want to --	15:18:32
15		I just ask you about those and see if you recall them	15:18:35
16		and if you can explain why you're on here as a	15:18:39
17		recipient of these notes.	15:18:42
18	A	I think I -- excuse me. I think I can.	15:18:43
19		My -- the only thing more stressful that	15:18:46
20		you will remember of your first day on the job when	15:18:49
21		you show up for a job is not showing up for your first	15:18:52
22		day at work.	15:18:54

Exhibit 5

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BEFORE THE

FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC. :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

Third-Party Complainant :

----- X

COPY

(Caption continued on Page Two)

Videotaped Deposition of CHERYL YETKA

Newark, New Jersey

Wednesday, May 28, 2008

2:03 p.m.

Job No.: 1-129547

Pages 1 through 172

Reported by: Debra A. Whitehead



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VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

		7
1	VIDEO SPECIALIST: Here begins Videotape	14:03:15
2	Number 1 in the deposition of Cheryl Yetka in the	14:03:17
3	matter of APM Terminals North America, Incorporated,	14:03:20
4	Complainant, versus Port Authority of New York and New	14:03:25
5	Jersey, Respondent, Counter-Complainant, and	14:03:29
6	Third-Party Complainant, versus Maher Terminals,	14:03:33
7	Counter-Complainant, in the Federal Maritime	14:03:36
8	Commission, Docket Number 07-01.	14:03:41
9	Today's date is May 28, 2008. The time on	14:03:45
10	the video monitor is 2:03 p.m. The video operator	14:03:48
11	today is David Lane. This video deposition is taking	14:03:54
12	place at Winston & Strawn, One Riverfront Plaza,	14:03:57
13	Newark, New Jersey.	14:04:03
14	Counsel, please identify yourselves and	14:04:05
15	state whom you represent.	14:04:06
16	MS. SPRING: I'm Heather Spring with Sher &	14:04:08
17	Blackwell, LLP, for APM Terminals North America, Inc.	14:04:10
18	MR. KIERN: I'm Larry Kiern, with Winston &	14:04:14
19	Strawn, and we represent Maher Terminals.	14:04:17
20	MR. BURKE: And Donald F. Burke, for the	14:04:19
21	Port Authority of New York and New Jersey.	14:04:22
22	VIDEO SPECIALIST: The court reporter today	14:04:24

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

46

1	A	I don't even know if they've been provided	14:48:53
2		to you as part of what -- something they might have	14:48:56
3		had at the facilities.	14:48:58
4	Q	Have you talked to anyone about these	14:48:59
5		financial analyses?	14:49:01
6	A	No, I haven't.	14:49:01
7	Q	Okay. Are financial analyses performed for	14:49:02
8		all leases that are negotiated, like 248, 249?	14:49:08
9	A	Yes.	14:49:12
10	Q	Okay. That's a matter of routine at the	14:49:12
11		Port Authority?	14:49:14
12	A	Yes.	14:49:14
13	Q	It's a matter of practice?	14:49:15
14	A	Absolutely.	14:49:17
15	Q	Is there any sort of a standard operating	14:49:17
16		procedure or guideline which people like you followed	14:49:19
17		at the time in the preparation of these financial	14:49:23
18		analyses?	14:49:24
19	A	No. I mean, no written -- there are no	14:49:25
20		written instructions on how to develop a financial	14:49:29
21		analysis.	14:49:32
22	Q	Okay. Well, tell us how you did it.	14:49:32

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

47

1	A	I forecasted rent streams, Port Authority	14:49:35
2	O&Ms.		14:49:39
3	Q	What does "O&M" mean?	14:49:40
4	A	Operating and maintenance expenses.	14:49:42
5	Q	All right.	14:49:45
6	A	We looked at our projected capital	14:49:46
7	investment to determine whether the Port Authority		14:49:48
8	would make a sufficient return to consider the deal.		14:49:49
9	Q	And what is a sufficient return to consider	14:49:53
10	the deal?		14:49:55
11	A	The Port Authority generally looks at its	14:49:55
12	hurdle rate.		14:50:00
13	Q	I'm sorry?	14:50:00
14	A	The Port Authority generally looks for a	14:50:02
15	return at its hurdle rate.		14:50:05
16	Q	What does that mean?	14:50:07
17	A	It's our cost of capital plus some	14:50:08
18	additional return which guarantees our bond covenants.		14:50:13
19	Q	And in -- with respect to 248 and 249, the	14:50:17
20	APM and the Maher leases, what was that hurdle rate?		14:50:23
21	A	I do not recall.	14:50:27
22	Q	Do you recall what the hurdle rate was at	14:50:28

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

48

1	that point in time?	14:50:31
2	A The Port Authority hurdle rate	14:50:32
3	specifically? I don't recall specifically. Somewhere	14:50:34
4	between seven and a quarter and eight and a quarter.	14:50:40
5	Q And that was your return on what?	14:50:43
6	A On any investment the Port Authority would	14:50:46
7	have made, capital investments.	14:50:50
8	Q Did the Port Authority attempt to make a	14:50:51
9	return on operating expenses?	14:50:58
10	MR. BURKE: Are you asking, again, these	14:51:02
11	questions to establish -- to substantiate your	14:51:04
12	argument about the indemnification provision?	14:51:07
13	Because, again, this is -- we're going far afield	14:51:09
14	again, and I think it's a fishing expedition on your	14:51:13--
15	second lawsuit about what justifies the Maersk deal	14:51:15
16	and the Maher deal.	14:51:19
17	This is an improper use of discovery.	14:51:20
18	I'm -- I'm reluctant to direct her not to answer, but	14:51:24
19	I think you're abusing the right that you have to take	14:51:27
20	discovery in this case. If you're going to file a	14:51:30
21	lawsuit, file it, and we'll have discovery in that	14:51:33
22	suit. But you shouldn't be using this lawsuit to	14:51:36

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

60

1	about these two guaranties?	15:00:26
2	A I can't really answer the question. I	15:00:31
3	don't really understand it, what you're trying to get	15:00:32
4	at.	15:00:35
5	Q Do you have any other information, any	15:00:36
6	other information that comes to mind that makes	15:00:37
7	them --	15:00:39
8	A Nothing else comes to mind right now.	15:00:40
9	Those were the general terms.	15:00:42
10	Q Very good. Now, let's go back to your	15:00:43
11	financial analyses that you prepared.	15:00:46
12	How would you prepare those analyses?	15:00:47
13	A I would develop --	15:00:50
14	MR. BURKE: You know, I'm going to -- you	15:00:51
15	know, I've been really bending over backwards giving	15:00:55
16	you leeway. But we're really off on your next	15:00:57
17	lawsuit, not on this lawsuit. So, where are we going	15:01:01
18	with this financial? I let her answer questions that	15:01:04
19	are way beyond the scope of discovery in this case.	15:01:07
20	MR. KIERN: I'm just asking her how she did	15:01:09
21	it, Don. This is not --	15:01:11
22	MR. BURKE: Are we going to end this line	15:01:12

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

61

1 soon or not? Because I'll let her go this far, but, I 15:01:14
2 mean -- 15:01:17
3 MR. KIERN: Yeah, I just have a few more 15:01:18
4 questions about the actual process and the 15:01:19
5 documentation, just so I get a sense of it. 15:01:21
6 A I developed a forecast of the rents that 15:01:25
7 were being negotiated. I developed a forecast of our 15:01:27
8 operating and maintenance expense for the port. We 15:01:30
9 looked at what capital investment was going to be made 15:01:33
10 and the period of time over which it would be made, 15:01:36
11 and we add all that up together, and we do a 15:01:40
12 discounted cash flow. 15:01:42
13 In this particular instance we also looked 15:01:45
14 at other parts of the port because we were trying to 15:01:48
15 get a picture of the whole port. So I was doing 15:01:51
16 forecasts of the auto businesses and the warehouse 15:01:54
17 businesses as well. 15:01:56
18 Q I see. What's the bottom line then did you 15:01:57
19 come out with? Did I understand you to say discounted 15:02:00
20 value cash flow? 15:02:03
21 A Yes. But it was a -- an entire facility 15:02:04
22 number. Do I recall -- 15:02:10

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

62

1 Q For the terminal? 15:02:12

2 A For Newark and Elizabeth in total. 15:02:13

3 Q Okay. I'm just trying to understand. Did 15:02:17

4 the bottom line reflect a bottom line of the 15:02:20

5 discounted value cash flow from, let's say, the APM 15:02:23

6 terminal and the Maher terminal, or separately or 15:02:26

7 together? How did you -- 15:02:28

8 A It was everything. It was Maher, it was 15:02:30

9 APM, it was a projection on what we might get out of 15:02:32

10 the vacated terminal in Port Newark, it was a 15:02:36

11 projection of what was coming out of our auto leases 15:02:38

12 and our warehouse leases as well. So it was an entire 15:02:41

13 picture of the whole port. 15:02:44

14 Q And was that -- all of that data considered 15:02:45

15 together in the development of a discounted value cash 15:02:47

16 flow? 15:02:49

17 MR. BURKE: Objection. 15:02:52

18 A Yes. We discounted all of that together as 15:02:52

19 one big picture. 15:02:55

20 Q Thank you. 15:02:57

21 And was this -- was this on the computer, 15:02:58

22 was this on paper? How is this -- 15:03:01

VIDEOTAPED DEPOSITION OF CHERYL YETKA
CONDUCTED ON WEDNESDAY, MAY 28, 2008

63

1	A	God help me, I don't know how to do it on	15:03:04
2		paper. No. It was on the computer.	15:03:06
3	Q	Okay. And was it ever printed out or was	15:03:07
4		it --	15:03:10
5	A	I -- yes, copies were printed out.	15:03:11
6	Q	And circulated.	15:03:13
7	A	Yes, I believe I said that earlier.	15:03:14
8	Q	Okay. Now, Charlie McClafferty --	15:03:16
9	A	Yes.	15:03:24
10	Q	-- I'm reluctant to even ask this. Is	15:03:24
11		he -- I mean, is he still with us?	15:03:27
12	A	Oh, he's still alive. He's no longer with	15:03:29
13		the Port Authority.	15:03:32
14	Q	Oh, okay. And is he retired, or ...	15:03:32
15	A	I believe he's retired, yes.	15:03:36
16	Q	Okay. Do you know where he lives?	15:03:37
17	A	Do I know? No. I'm not privy to his	15:03:40
18		personal information.	15:03:43
19	Q	All right. I'm not asking you for his	15:03:43
20		address.	15:03:45
21	A	I don't know where he lives.	15:03:46
22	Q	You don't know if he lives in New York or	15:03:47

Exhibit 6

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BEFORE THE

FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC. :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

ORIGINAL

Third-Party Complainant :

----- X

(Caption continued on Page Two)

Videotaped Deposition of DENNIS LOMBARDI

Newark, New Jersey

Thursday, June 5, 2008,

9:41 a.m.

Job No.: 1-130626

Pages 1 through 301

Reported by: Debra A. Whitehead



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VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

1	PROCEEDINGS	8	09:38:20
2	(Lombardi Deposition Exhibit 148 marked for		09:38:20
3	identification, to be retained by counsel.)		09:40:41
4	VIDEO SPECIALIST: Here begins Videotape		09:40:41
5	Number 1 in the deposition of Dennis Lombardi, in the		09:40:43
6	matter of APM Terminals North America, Incorporated,		09:40:46
7	Complainant, versus Port Authority of New York and New		09:40:51
8	Jersey, Respondent, Counter-Complainant and		09:40:57
9	Third-Party Complainant, versus Maher Terminals, LLC,		09:41:00
10	Third-Party Respondent and Counter-Complainant, in the		09:41:04
11	Federal Maritime Commission, Docket Number 07-01.		09:41:09
12	Today's date is June 5th, 2008. The time		09:41:15
13	on the video monitor is 9:41 a.m. The video operator		09:41:19
14	today is David Lane. This video deposition is taking		09:41:24
15	place at Winston & Strawn, One Riverfront Plaza,		09:41:27
16	Newark, New Jersey.		09:41:31
17	Counsel, will you please identify		09:41:32
18	yourselves and state whom you represent.		09:41:33
19	MR. KIERN: I'm Larry Kiern, with Winston &		09:41:36
20	Strawn, LLP. I represent Maher Terminals.		09:41:39
21	MR. BURKE: Donald Burke, B-U-R-K-E. I		09:41:42
22	represent the Port Authority of New York and New		09:41:47

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

60

1	numbers?	11:09:35
2	A Could you rephrase that?	11:09:49
3	Q Yeah. How did they come up with the	11:09:50
4	numbers?	11:09:52
5	MR. BURKE: Okay. Objection. For what?	11:09:52
6	MR. KIERN: The rent. That's what we've	11:09:55
7	been talking about.	11:09:58
8	MR. BURKE: I think we're talking about the	11:10:04
9	proposal; right?	11:10:06
10	MR. KIERN: Yeah, the numbers.	11:10:06
11	BY MR. KIERN:	11:10:09
12	Q This was a team. You've testified,	11:10:09
13	Mr. Lombardi, you know, that there was a team of	11:10:10
14	people that came up with the rent numbers that went in	11:10:12
15	your proposal. My question is, how did they do that?	11:10:14
16	A Well, I don't know everything that they	11:10:20
17	did, but they took into consideration investment and	11:10:21
18	desired levels of rent.	11:10:29
19	Q Do you recall anything else about how they	11:10:31
20	came up with those numbers?	11:10:37
21	A No.	11:10:45
22	Q And with respect to investment, what do you	11:10:46

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

61

1 have in mind when you say they considered investment? 11:10:48

2 A The lease extension considered who made the 11:10:54

3 investment, whether it was the Port Authority or the 11:10:57

4 tenant. 11:11:01

5 Q And so the rent was designed to recover the 11:11:02

6 investment; is that correct? 11:11:09

7 MR. BURKE: Objection. In this case? 11:11:11

8 Generally? I object to the form of the question. 11:11:18

9 BY MR. KIERN: 11:11:19

10 Q You're talking about the team of people who 11:11:20

11 worked on the rent proposal that you prepared to 11:11:23

12 Sea-Land. 11:11:27

13 A And the answer's yes to that question. 11:11:33

14 Q Okay. And then you said there were desired 11:11:35

15 levels of rent. What do you mean by that? 11:11:38

16 A We were looking to increase our rent 11:11:51

17 substantially at the time. 11:11:52

18 Q And why was that? 11:11:54

19 A Because a lot of original leases entered 11:12:02

20 into, the first-generation container terminal leases, 11:12:05

21 provided no escalation. 11:12:10

22 Q Okay. And was it the Ports Authority's 11:12:12

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

62

1	goal to obtain escalation from the lessees?	11:12:19
2	MR. BURKE: Objection.	11:12:25
3	A Yes.	11:12:33
4	Q Okay. And why was that?	11:12:33
5	MR. BURKE: In this case, at his proposal,	11:12:40
6	that's what --	11:12:42
7	MR. KIERN: That's what we're talking	11:12:43
8	about.	11:12:45
9	Q Mr. Lombardi, you know what we're talking	11:12:45
10	about.	11:12:48
11	MR. BURKE: Your questions go from general	11:12:48
12	to specific. So as long as we are still on the	11:12:49
13	proposal he prepared, I'm fine.	11:12:52
14	A Could you ask that last question again?	11:12:53
15	Q Sure. You said, and -- you testified under	11:12:55
16	oath, "Because a lot of original leases entered into,	11:12:58
17	the first-generation container terminal leases,	11:13:01
18	provided no escalation."	11:13:04
19	And then I asked you, "Was it the Port	11:13:06
20	Authority's goal to obtain escalation?"	11:13:09
21	And you said yes.	11:13:11
22	And then I said, "Why was that?"	11:13:12

VIDEOTAPED DEPOSITION OF DENNIS LOMBARDI
CONDUCTED ON THURSDAY, JUNE 5, 2008

63

1	A	Because in first-generation leases our	11:13:13
2		costs for maintenance responsibilities weren't	11:13:22
3		considered into -- into the equation.	11:13:25
4	Q	Okay. So the Port Authority wanted	11:13:26
5		escalation in the leases to cover maintenance cost; is	11:13:28
6		that correct?	11:13:32
7	A	Correct. Among other things.	11:13:34
8	Q	Okay. What are the other things?	11:13:35
9	A	To somehow be the equivalent of market	11:13:40
10		rates to keep pace with what market would be	11:13:43
11		considered.	11:13:45
12	Q	Any other factors that were considered in	11:13:46
13		the preparation of these rent proposals?	11:13:49
14	A	None that I recall.	11:13:52
15	Q	Okay. Now, was there some evaluation of	11:13:52
16		the maintenance and other costs that you've testified	11:13:57
17		about?	11:13:59
18	A	Yes.	11:14:03
19	Q	Okay. And tell us what you recall about	11:14:04
20		that.	11:14:06
21	A	The team I mentioned before to work on	11:14:15
22		container terminal rates did some analysis around	11:14:18

Exhibit 7

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BEFORE THE

FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC.. :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

Third-Party Complainant :

----- X

COPY

(Caption continued on Page Two)

Videotaped Deposition of RANDALL P. MOSCA

Newark, New Jersey

Wednesday, June 11, 2008

2:03 p.m.

Job No.: 1-131011

Pages 1 through 185

Reported by: Patricia Mulligan Carruthers, CSR



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VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

		6	
1	THE VIDEOGRAPHER: Here begins Videotape		14:01:27
2	Number 1 in the deposition of Randall P. Mosca in the		14:02:45
3	matter of APM Terminals North America, Incorporated,		14:02:49
4	Complainant, versus Port Authority of New York and New		14:02:53
5	Jersey, respondent, counter-complainant, and		14:02:59
6	third-party complainant; versus Maher Terminals LLC,		14:03:00
7	third-party respondent, counter-complainant, in the		14:03:05
8	Federal Maritime Commission, Docket Number 07-01.		14:03:09
9	Today's date is June 11, 2008. The time on		14:03:14
10	the video monitor is 2:03 p.m. The video operator		14:03:18
11	today is David Lane. This video deposition is taking		14:03:22
12	place at Winston & Strawn, One Riverfront Plaza,		14:03:26
13	Newark, New Jersey.		14:03:30
14	Counsel, would you please identify		14:03:31
15	yourselves and state whom you represent.		14:03:32
16	MR. BURKE: Donald F. Burke, B-U-R-K-E, for		14:03:34
17	the Port Authority of New York and New Jersey.		14:03:38
18	MS. SPRING: Heather Spring with Sher &		14:03:41
19	Blackwell, for APM Terminals North America, Inc.		14:03:42
20	MR. KIERN: Larry Kiern with Winston &		14:03:45
21	Strawn, representing Maher Terminals.		14:03:48
22	THE VIDEOGRAPHER: The court reporter today		14:03:50

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

154

1 different areas, so the concern was on the Maersk 17:18:44
2 side, not the Maher. 17:18:46
3 Q Did anyone at the Port Authority express 17:18:48
4 the view that Maher was not a threat to leave the 17:18:50
5 port? 17:18:52
6 MR. BURKE: Objection. 17:18:53
7 A The -- The Port Authority -- I don't know 17:18:58
8 if anyone specifically said that, but there was 17:19:01
9 discussion many times about Maher being a terminal 17:19:05
10 operator that was only in the Port of New York and we 17:19:08
11 really had no place to go other than conduct our 17:19:11
12 business in the Port of New York. 17:19:14
13 Q Now, Mr. Mosca, was Maher aware that if it 17:19:16
14 was not successful in negotiating a new lease with the 17:19:24
15 Port Authority that the Port Authority could put 17:19:31
16 Maher's leasehold up for bid? 17:19:37
17 A Internally Maher Terminals was very 17:19:39
18 concerned with the lease negotiation. We felt that if 17:19:43
19 we couldn't conclude a lease arrangement, that if the 17:19:49
20 terminal went out for bid we would not necessarily be 17:19:54
21 the winners of the bid, and that would, in effect, put 17:19:58
22 us out of business. 17:20:01

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

155

1 Q Did anyone at the Port Authority tell you, 17:20:05
2 during your negotiations with the Port Authority over 17:20:07
3 the terms of Lease EP-249, Exhibit 79, tell you that 17:20:10
4 the Maersk terms were off the table? 17:20:16

5 A Yes. 17:20:19

6 MR. BURKE: Objection. 17:20:19

7 Q Tell us what happened. 17:20:20

8 A We were aware of the financial terms in the 17:20:25
9 Maersk lease, which were considerably less than, on a 17:20:28
10 base-rent basis, the Maher proposed lease arrangement. 17:20:33
11 And we had asked to replace the Maher lease rate with 17:20:40
12 the Maersk lease rate, and we were told that the 17:20:53
13 Maersk lease rates were off the table, it was not 17:20:57
14 something the Port Authority was willing to negotiate. 17:21:02

15 Q Who told you that? 17:21:03

16 A Lillian Borrone. 17:21:04

17 Q Now, did -- At the end of the negotiation, 17:21:07
18 did the Port Authority essentially tell you that the 17:21:12
19 terms that they were offering were take-it-or-leave-it 17:21:17
20 terms? 17:21:19

21 MR. BURKE: Objection. 17:21:20

22 A We reached the point in the lease 17:21:22

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

156

1 negotiation where that was -- the Port Authority said 17:21:24
2 it was their final offer. So we had to decide if we 17:21:27
3 wanted to accept the lease terms. 17:21:31
4 Q And did you understand the Port Authority's 17:21:33
5 position at the end of the negotiation to be that the 17:21:35
6 terms were take it or leave it? 17:21:38
7 MR. BURKE: Objection. 17:21:40
8 A We understood very clearly that the -- this 17:21:42
9 was the final offer for the Port Authority and that 17:21:47
10 they were not going to negotiate any further. 17:21:51
11 Q Now, Mr. Mosca, during the redevelopment of 17:21:56
12 the Port of Elizabeth Terminal that occurred 17:22:02
13 approximately between the Year 2001 and 2005 or 2006, 17:22:06
14 did the delay of the design, planning, and 17:22:14
15 construction of the new ExpressRail cause Maher to 17:22:18
16 have delay in its departure from the 84 acres? 17:22:23
17 MR. BURKE: Objection. 17:22:26
18 A Yes. 17:22:26
19 Q Could you explain that, please? 17:22:27
20 A Well, we -- If I could just take a step 17:22:28
21 back. 17:22:34
22 The delay in completing the ExpressRail 17:22:34

Exhibit 8

BEFORE THE
FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC. :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

Third-Party Complainant :

----- X

(Caption continued on Page Two)

Videotaped Deposition of M. BRIAN MAHER

Newark, New Jersey

Monday, June 9, 2008, 9:37 a.m.

Job No.: 1-129549

Pages 1 through 313

Reported by: Debra A. Whitehead

ORIGINAL

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VIDEOTAPED DEPOSITION OF M. BRIAN MAHER
CONDUCTED ON MONDAY, JUNE 9, 2008

		8
1	P R O C E E D I N G S	09:36:25
2	VIDEO SPECIALIST: Here begins Videotape	09:36:25
3	Number 1 in the deposition of Brian Maher in the	09:36:27
4	matter of APM Terminals North America, Incorporated,	09:36:29
5	complainant, versus Port Authority of New York and New	09:36:34
6	Jersey, respondent, counter-complainant, and	09:36:39
7	third-party complainant, versus Maher Terminals, LLC,	09:36:42
8	third-party respondent and counter-complainant, in the	09:36:48
9	Federal Maritime Commission, Docket Number 07-01.	09:36:53
10	Today's date is June 9, 2008. The time on	09:36:59
11	the video monitor is 9:37 a.m. The video operator	09:37:03
12	today is David Lane. This video deposition is taking	09:37:08
13	place at Winston & Strawn, One Riverfront Plaza,	09:37:11
14	Newark, New Jersey.	09:37:15
15	Counsel, please identify yourselves and	09:37:17
16	state whom you represent.	09:37:19
17	MR. FINK: Marc Fink, with the law firm of	09:37:21
18	Sher & Blackwell, representing APM Terminals.	09:37:23
19	MR. KIERN: Larry Kiern, from the law firm	09:37:27
20	of Winston & Strawn, LLP, representing Maher Terminals	09:37:29
21	and the deponent.	09:37:33
22	MR. BURKE: And Donald Burke, B-U-R-K-E,	09:37:34

Exhibit 9



MAHER TERMINALS INC
Journal Square Plaza Jersey City New Jersey 07306 • (201) 963 2100
Container & Conventional Marine Terminals

February 16, 1999

Mr Robert Boyle
Executive Director
The Port Authority of New York & New Jersey
One World Trade Center
67 West
New York, NY 10048

Dear Bob

In a discussion with Lillian Borrone last week, she asked me three questions on your behalf. As I understand them they are as follows:

First, is Maher prepared to continue to pay the Fleet Street rental rates for the acreage covered by that lease until the end of the lease term regardless of the rates eventually agreed with Sea-Land and Maersk? Second, is Maher willing to pay Fleet Street rates for all of its acreage in a reconfigured terminal regardless of the rate levels determined in the Sea-Land and Maersk negotiations? And last, is Maher willing to accept Bay Avenue land and the land created by demolishing warehouse buildings, "as is," except for demolition and fencing?

In regard to the first question, Maher undertook a twenty-five year lease in 1986 for Fleet Street which provided for substantially higher rents than were in place in the Port at that time. We did so anticipating that the Port would grow over the twenty-five years and that subsequent leases entered into by the Port Authority would be at the same or higher rates. The reality was that during the late 1980s and early 1990s the port did not grow and, in fact, volume declined. These special circumstances led to Maher and the Port Authority renegotiating the terms of the Fleet Street lease in the early 1990s to reflect the actual market conditions at that time. We are just about at the end of the adjusted period and the rates will shortly revert to the original rent schedule agreed to in 1986. Currently, as a result of the efforts of many in the Port community, including Maher and the Port Authority, the market conditions have significantly improved. We are prepared to honor

PORT OF NEW YORK/NEW JERSEY

Tripoli Street Container Terminal

Fleet Street Container Terminal

MT002597



Mr Robert Boyle
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the terms of that lease through its termination regardless of the rent levels eventually concluded with Sea Land and Maersk. It should be noted, however, that an unsuccessful conclusion to the Sea-Land and Maersk negotiations will leave the Port with a 30 - 40 percent over capacity of facilities and bring into question the viability of all the remaining terminal operations.

The second and third questions go to the issue of the renewal of the Tripoli Street lease. Port Authority policy has always been to provide tenants in good standing the ability to renew their leaseholds when they expired at the market terms and conditions prevailing at that time. This policy provides for continuity in Port operations and induces the private sector to make continuing investments in their operation and Port businesses during the full term of the lease. It is clear that Maher has relied on that policy by continuing to make investments in equipment, management, and technology.

As to your second question, in our view it is the Port Authority's responsibility to set rent levels that are competitive with other Ports on the East Coast and which provide a level playing field within the Port itself. Therefore, we would expect that the Port Authority would offer us rates, terms and conditions for our Tripoli Street renewal which are competitive with other Ports on the East Coast and in line with the prevailing terms, conditions and rates being offered to other tenants at this time. You should note that even dedicated steamship marine terminals expect to handle third party business in competition with independent marine terminal operators such as Maher. Port Authority attempts in the past to restrict the purpose clause of dedicated steamship terminal leases failed. Maher Terminals competes with all of the other marine terminals in the Port regardless of whether they are steamship controlled or not, and therefore must have comparable pricing.

With respect to your final question, notwithstanding the Port Authority's policy on renewal of tenant leaseholds, it is clearly not your intention to offer Maher a renewal on its Tripoli Street facility since, most of that facility has already either been offered to Sea-Land and Maersk or dedicated to a new expanded ExpressRail. While we understand the rationale for the reconfiguration and in fact believe that it is the right thing to do, we also recognize that the facilities, which will be offered to us in exchange for large portions of Tripoli Street, are substantially inferior. For instance, the crane rails in the

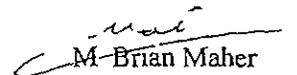


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Page 3

Bay Avenue facility are 50-ft gauge, crane rails in Tripoli Street are 100-ft gauge. The berth depths at the Bay Avenue terminal are designed for 35 ft, the berths at Tripoli are designed for 38 ft. The electrical distribution system at Bay Avenue is antiquated and above ground, the electrical distribution system at Tripoli Street is below ground. Certainly, it is our intention to improve the reconfigured terminal to today's state-of-the-art standards and we expect to pay for those improvements over the term of the lease. However, it is not fair, nor do we believe commercially viable, to expect that Maher will absorb the cost of improving the reconfigured terminal to the level already existing at Tripoli Street. Please keep in mind that Maher paid for the full-amortized cost of these improvements at the Tripoli Street terminal (as an additional component of the rent paid for that terminal) over the life of the lease. Therefore, we should receive a credit for the value of the improvements which we leave behind which could have been utilized by Maher in a renewed lease of Tripoli Street.

The outcome of the negotiations for the renewal of the major leases in Port Elizabeth and Port Newark is of critical importance to Maher just as it is of critical importance to the Port as a whole. A successful conclusion of those leases will result in our company making a substantial new commitment for container cranes, yard equipment, technology and management. Maher has developed the only commercially viable fully-grounded container system in the Port, an operating method which is land efficient but also capital intensive. It is Maher's intention to extend that straddle carrier operation throughout our entire reconfigured terminal. Assuming that Sea Land and Maersk remain in the Port and our new facilities are leased under comparable conditions, our capital budget for the first five years will run between \$75,000,000 and \$100,000,000. In order to justify this intended investment and obtain the financing necessary for such major investments, the Port must be competitive and we must be on a level playing field with our competitors within the Port. We rely on the Port Authority to work out lease arrangements which accomplish those two objectives.

Best regards,


M. Brian Maher
Chairman and CEO

MBM/kj
c Lillian Borrone Port Authority of NY & NJ

MT002599

Exhibit 10

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BEFORE THE

FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC. . . :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

Third-Party Complainant :

----- X

(Caption continued on Page Two)

Videotaped Deposition of RANDALL P. MOSCA

Newark, New Jersey

Wednesday, June 11, 2008

2:03 p.m.

Job No.: 1-131011

Pages 1 through 185

Reported by: Patricia Mulligan Carruthers, CSR

COPY



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VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

	6	
1	THE VIDEOGRAPHER: Here begins Videotape	14:01:27
2	Number 1 in the deposition of Randall P. Mosca in the	14:02:45
3	matter of APM Terminals North America, Incorporated,	14:02:49
4	Complainant, versus Port Authority of New York and New	14:02:53
5	Jersey, respondent, counter-complainant, and	14:02:59
6	third-party complainant; versus Maher Terminals LLC,	14:03:00
7	third-party respondent, counter-complainant, in the	14:03:05
8	Federal Maritime Commission, Docket Number 07-01.	14:03:09
9	Today's date is June 11, 2008. The time on	14:03:14
10	the video monitor is 2:03 p.m. The video operator	14:03:18
11	today is David Lane. This video deposition is taking	14:03:22
12	place at Winston & Strawn, One Riverfront Plaza,	14:03:26
13	Newark, New Jersey.	14:03:30
14	Counsel, would you please identify	14:03:31
15	yourselves and state whom you represent.	14:03:32
16	MR. BURKE: Donald F. Burke, B-U-R-K-E, for	14:03:34
17	the Port Authority of New York and New Jersey.	14:03:38
18	MS. SPRING: Heather Spring with Sher &	14:03:41
19	Blackwell, for APM Terminals North America, Inc.	14:03:42
20	MR. KIERN: Larry Kiern with Winston &	14:03:45
21	Strawn, representing Maher Terminals.	14:03:48
22	THE VIDEOGRAPHER: The court reporter today	14:03:50

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	produced audited financial results which we supplied	15:47:00
2	to the potential buyers.	15:47:03
3	Q What did the results show -- the financial	15:47:06
4	results show about the profitability of Maher?	15:47:09
5	MR. KIERN: Objection, but go ahead.	15:47:12
6	A The financial results showed they had been	15:47:15
7	profitable over a period of time.	15:47:18
8	Q And at what numbers?	15:47:20
9	A I -- I don't recall specifically each year.	15:47:21
10	Q Do you remember at all the areas? I don't	15:47:23
11	mean the -- on a scope of magnitude, how much money	15:47:27
12	was Maher making over the years since the lease was	15:47:33
13	entered into?	15:47:36
14	MR. KIERN: Objection.	15:47:38
15	Q Can you give it roughly to me?	15:47:39
16	A No. I would be guessing.	15:47:41
17	Q Well, was it in the millions of dollars a	15:47:45
18	year?	15:47:49
19	A It was in the millions of dollars a year.	15:47:51
20	Yes.	15:47:54
21	Q What was the most profitable year since the	15:47:55
22	Year 2000?	15:48:03

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	A	From 2000 to when?	15:48:03
2	Q	Present.	15:48:05
3	A	Probably 2000 and -- 2006.	15:48:08
4	Q	And do you know what the profit generally	15:48:15
5		was in an order of magnitude?	15:48:17
6	A	Could I ask my attorney a question?	15:48:24
7	Q	Sure.	15:48:26
8		MR. KIERN: Sure. Go ahead.	15:48:27
9		THE WITNESS: This was a privately-held	15:48:29
10		company where we did not disclose --	15:48:31
11		MR. KIERN: You can go ahead and answer the	15:48:33
12		question, because we have a confidentiality agreement	15:48:35
13		which protects any confidential or trade secret or	15:48:37
14		internal financial information from disclosure. So --	15:48:40
15		you can go ahead. If you remember and you know the	15:48:42
16		information, you can testify.	15:48:45
17	A	It was probably in the upper \$30 million	15:48:48
18		range to the low \$40 million range.	15:48:52
19	Q	On that one year?	15:48:55
20	A	Yeah.	15:48:57
21	Q	Do you have an idea of -- of the other	15:48:57
22		years and the ranges? Did it continue to go up or --	15:49:04

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	A	For the most part it generally went up.	15:49:09
2		There might have been a year in there where -- a year	15:49:11
3		or two where it did not go up; it leveled off.	15:49:12
4	Q	And what year was it 30 or 40 million?	15:49:19
5	A	In 2006.	15:49:22
6	Q	And what's the last year that was -- that	15:49:25
7		you're aware of, 2007?	15:49:29
8	A	Fiscal Year 2007.	15:49:31
9	Q	And do you remember the -- what it was	15:49:33
10		about then? Did it level off or did it go down?	15:49:36
11	A	It really wasn't a fair comparison because	15:49:40
12		the company was sold in July, so you had distorted	15:49:44
13		results. You had nine months of previous comparable	15:49:49
14		results and three months of a time frame that would	15:49:54
15		not be reflective of the current business.	15:50:00
16	Q	Do you remember the number on the 2007?	15:50:04
17	A	I don't.	15:50:07
18	Q	Do you know whether it was higher or lower	15:50:12
19		than the 30 or 40 million in 2006?	15:50:15
20	A	First of all, it was only nine months --	15:50:17
21	Q	Yeah.	15:50:17
22	A	-- and it was lower than the results in	15:50:19

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	2007 for a full-year basis.	15:50:20
2	MR. KIERN: Lower than 2006.	15:50:24
3	THE WITNESS: Lower than 2006. That's	15:50:26
4	correct.	15:50:28
5	MR. KIERN: Because he was asking about --	15:50:28
6	He was asking about 2007.	15:50:29
7	THE WITNESS: Okay.	15:50:32
8	A 2007 was nine months of comparable. Those	15:50:32
9	nine months in 2007 were less than the 12 months in	15:50:39
10	2006.	15:50:43
11	Q What about on a -- What about on an annual	15:50:52
12	basis?	15:51:09
13	A It probably wouldn't be a fair comparison,	15:51:13
14	because typically the last three months of the year	15:51:15
15	are generally our best periods. So to annualize the	15:51:18
16	nine-month results would produce a number less than	15:51:22
17	the 12 months for 2006.	15:51:25
18	Q All right. That's fair enough. Where	15:51:28
19	would we -- Who would we ask for those records?	15:51:30
20	A They were audited financial statements at	15:51:35
21	Maher Terminals.	15:51:37
22	Q What about the due diligence process and	15:51:38

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	analysis?	15:51:42
2	MR. KIERN: Objection.	15:51:45
3	Go ahead.	15:51:46
4	Q Who would we ask for that?	15:51:46
5	A Again, as the seller, we provided records	15:51:52
6	for the buyers to review.	15:51:56
7	Q Right. Now, the buyers are now owning the	15:51:59
8	company. Correct?	15:52:03
9	A One of the buyers is now owning the	15:52:04
10	company.	15:52:05
11	Q Which buyer is that?	15:52:06
12	A It's RREEF, which is a -- infrastructure	15:52:07
13	arm of Deutsche Bank. And I have never seen RREEF's	15:52:13
14	financial package or financial analysis, so I don't.	15:52:19
15	know what that says or who has it or where you would	15:52:23
16	get it.	15:52:26
17	Q But the new senior executives at Maher	15:52:27
18	Terminals would know. Right?	15:52:31
19	A No, because the new senior executives at	15:52:32
20	Maher Terminals are Maher Terminals employees. The	15:52:35
21	purchase was done by Deutsche and RREEF. Where their	15:52:39
22	records are I don't know. I've never seen those	15:52:44

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
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1 records. 15:52:46

2 Q If you wanted to get those records, who 15:52:46

3 would you ask? 15:52:49

4 MR. KIERN: Objection. 15:52:50

5 Go ahead. 15:52:52

6 A I mean, I would -- I could start somewhere, 15:52:53

7 but I don't know if they would provide them. 15:52:56

8 Q Yeah. But where would you start? 15:52:58

9 A I guess the financial people at RREEF for 15:52:59

10 their books and records, and they would have no 15:53:03

11 obligation to provide them to me. 15:53:05

12 Q And who are those people? 15:53:07

13 A They've changed recently, so you can get 15:53:09

14 that from -- 15:53:13

15 Q Well, who are the names you know? 15:53:13

16 A You can get that information from Maher's 15:53:15

17 new CFO. 15:53:18

18 Q Okay. Do you know what the purchase price 15:53:19

19 that was paid by RREEF for Maher Terminals was? 15:53:29

20 A Not entirely. No. 15:53:32

21 Q Was it a million -- a billion and a half or 15:53:33

22 so? 15:53:37

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 MR. KIERN: Objection. 15:53:38
2 Go ahead. 15:53:39
3 A No. 15:53:39
4 Q Do you have an idea? I'm not -- you know, 15:53:40
5 general idea? Was it over a billion dollars? 15:53:43
6 A Yes. 15:53:46
7 Q Do -- Were you -- Were you involved in the 15:53:48
8 negotiation that arrived at that purchase price? 15:54:16
9 A We had various roles as part of the -- the 15:54:23
10 overall team. My -- My role was to produce the 15:54:28
11 financial records to support the results for the last 15:54:32
12 however many years that they wanted to look at, review 15:54:37
13 those documents and discuss any -- and answer any 15:54:40
14 questions they might have had. 15:54:43
15 Q Well, what about the asking price versus 15:54:44
16 the price that was ultimately agreed to; how did that 15:54:47
17 number come about? 15:54:50
18 MR. KIERN: Objection. 15:54:52
19 Go ahead. 15:54:54
20 A We had engaged an investment house, 15:54:54
21 Greenhill, and Brian and Basil and Greenhill discussed 15:55:02
22 the eventual purchase price and negotiated the final. 15:55:13

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 purchase price. 15:55:19

2 Q And who -- Who at Greenhill? Do you know 15:55:20

3 the names of the people who were involved? 15:55:23

4 A Principally John Liu. 15:55:25

5 Q How do you spell that? 15:55:25

6 A L-I-U. 15:55:29

7 Q Do -- Do you know whether or not the asking 15:55:34

8 price was the price that was paid, or was there some 15:55:37

9 back and forth on that? 15:55:41

10 A I don't know specifically. 15:55:42

11 Q Were you involved at all? 15:55:45

12 A I was involved from the documentation side. 15:55:47

13 Q Do you know from any source about how the 15:55:51

14 negotiation that resulted in the purchase price went 15:55:55

15 about? 15:55:58

16 A I was -- I was part of the group, and in 15:56:00

17 the end John and Brian and Basil determined the final 15:56:03

18 price. 15:56:09

19 Q Do you know if it was higher or lower than 15:56:09

20 the initial price that they were looking for? 15:56:11

21 MR. KIERN: Objection. 15:56:14

22 Go ahead. 15:56:17

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	A	I -- I don't know what price they were	15:56:17
2		looking for.	15:56:18
3	Q	Okay. You don't know at all from any	15:56:19
4		source. No one ever said to you, Geez, they're	15:56:20
5		offering us more or less than we wanted, or anything	15:56:25
6		like that?	15:56:27
7	A	It was a bid process, and they evaluated	15:56:28
8		the bid -- We evaluated the bid process.	15:56:30
9	Q	Did you look at the bids?	15:56:35
10	A	I looked at them. Yes.	15:56:38
11	Q	And I take it RREEF's was the highest.	15:56:46
12		MR. KIERN: Objection.	15:56:50
13		Go ahead.	15:56:51
14	A	Not necessarily.	15:56:51
15	Q	Okay. There were higher bids than RREEF's?	15:56:53
16	A	I think it was pretty much a dead heat by	15:56:59
17		the last day.	15:57:01
18	Q	Who was the other competitor?	15:57:02
19	A	Carlisle Group.	15:57:04
20	Q	Where are they?	15:57:08
21	A	New York.	15:57:10
22	Q	Do you know what determined the -- what	15:57:17

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	broke the dead heat?	15:57:20
2	A I believe the general discussion centered	15:57:24
3	around what group would be -- work better from our	15:57:28
4	terminals as it presently existed and what group would	15:57:36
5	be receptive to the Maher Terminals management team.	15:57:40
6	So it was a -- It kind of was a decision that was made	15:57:47
7	at the last minute to see which group we thought would	15:57:53
8	work best.	15:57:56
9	Q So it was more like a qualitative decision	15:57:57
10	because the numbers were the same?	15:58:01
11	A Yeah. I think there were several parties	15:58:02
12	involved on the Carlisle Group, and the concern was	15:58:04
13	with several parties it might be more difficult to	15:58:08
14	deal with a mixed group as opposed to a -- one entity.	15:58:11
15	MR. KIERN: We've been going about an hour.	15:58:33
16	Counsel, you want --	15:58:36
17	Q How are you doing, Mr. Mosca? Whatever you	15:58:36
18	want to do is --	15:58:37
19	A I'm okay.	15:58:37
20	Q You're okay? We'll go on?	15:59:01
21	A I'm okay.	15:59:01
22	(Discussion off the record.)	15:59:01

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
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1 Q All right. What I'm going to do is to ask 15:59:01
2 you a couple of questions on other things. I 15:59:02
3 understand you're the CFO and you had some role, but 15:59:04
4 you were part of a core -- part of the core 15:59:07
5 negotiating team, and you might have an understanding 15:59:10
6 of other things. Like, for instance, was it your 15:59:12
7 understanding that this lease that was ultimately 15:59:16
8 negotiated with Maher that's dated October 1st, 2000, 15:59:19
9 involved a swap of land? 15:59:24
10 A Yes. 15:59:30
11 Q Okay. So what -- Tell me what your 15:59:30
12 understanding is about -- about how that was -- why 15:59:32
13 that was important, what the factors were, and how the 15:59:36
14 negotiations went on that. 15:59:39
15 MR. KIERN: Objection. 15:59:41
16 Go ahead. 15:59:44
17 A My recollection is that we needed to build 15:59:44
18 the new ExpressRail. Once that was completed we 15:59:48
19 needed to vacate the old ExpressRail, but in order for 15:59:52
20 us to utilize the old ExpressRail there were 16:00:00
21 certain -- there were certain improvements the Port 16:00:03
22 Authority had to make specifically to upgrade the 16:00:08

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
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1 paving to a straddle pavement capability. 16:00:11

2 Q Now, was that -- Let's talk about that 16:00:16

3 piece of it. Was that negotiated? 16:00:24

4 A How do you mean "negotiated"? 16:00:26

5 Q Well, in other words, the condition of the 16:00:27

6 property. 16:00:28

7 A Well, it was obvious that if it had -- The 16:00:29

8 current paving would not support a straddle operation. 16:00:32

9 The purpose of the combining the terminals was to 16:00:35

10 eliminate cost over at Tripoli Street and make 16:00:39

11 everything a grounded straddle operation. 16:00:43

12 Q Did you do any financial analysis about how 16:00:46

13 the consolidation of the Tripoli Street and Fleet 16:00:49

14 Street terminals into one would improve the efficiency 16:00:55

15 of Maher and make the operation more profitable? 16:00:58

16 A Make the operation -- 16:01:01

17 Q More profitable. 16:01:03

18 A Yes. We did. We knew that our cost 16:01:04

19 structure at Tripoli Street was considerably higher 16:01:07

20 than at Fleet Street. It was a wheeled operation, 16:01:10

21 which meant you had chassis on the terminal, it was 16:01:12

22 less efficient. 16:01:16

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 MR. KIERN: Which was chassis? Let's get 16:01:16
2 the record clear. Which was chassis? 16:01:16
3 THE WITNESS: Tripoli Street had chassis. 16:01:18
4 Fleet did not. 16:01:21
5 A We had to employ additional labor and other 16:01:23
6 equipment in order to service those accounts. So we 16:01:27
7 knew that the Tripoli Street operation was far more 16:01:32
8 expensive than the Fleet Street operation. 16:01:38
9 Q So the consolidation -- Do you remember the 16:01:39
10 numbers that -- 16:01:42
11 MR. BURKE: Strike that. 16:01:48
12 Q Do you remember what the analysis revealed 16:01:49
13 about how much would be saved by Maher Terminals in -- 16:01:52
14 in the consolidation of its two terminals into one? 16:01:55
15 A I recall that Tripoli Street was somewhere 16:01:59
16 between 15 and \$20 more per box than at Fleet Street. 16:02:03
17 Q What does that mean on a yearly basis? 16:02:08
18 A I guess the volume was somewhere around 16:02:14
19 roughly 250,000 boxes a year. 16:02:20
20 Q Where? 16:02:23
21 A At Tripoli Street. Rough numbers. I mean, 16:02:24
22 I'm not exactly, but that's pretty good guesstimate. 16:02:28

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 So if you use \$200 a box times 250,000 boxes ... 16:02:32

2 Q Five million? 16:02:40

3 A It's 5 million. 16:02:41

4 Q I'm not a number's guy. I have to check 16:02:43

5 with you. 16:02:45

6 Was that a goal of Maher when it set out to 16:02:53

7 negotiate this thing, to consolidate the terminals? 16:02:55

8 Is that one of the things Maher thought would be 16:02:58

9 desirable? 16:03:00

10 A It was so more -- It was so much more 16:03:01

11 costly to operate at Tripoli Street; labor, equipment, 16:03:04

12 servicing the account. That, combined with the fact 16:03:09

13 that the customers that remained at Tripoli Street 16:03:14

14 wanted to go to a grounded operation. 16:03:16

15 Q All right. So let's go back to the -- the 16:03:19

16 straddle carrier improvements for the property that 16:03:26

17 Maher was going to move into, okay, and the 16:03:33

18 negotiations involving that. 16:03:37

19 Was there ever an issue about -- 16:03:43

20 MR. BURKE: Strike that. 16:03:45

21 Q In order to get into that condition, 16:03:45

22 improvements had to be made. Correct? 16:03:47

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 Q That you guys, Maher, had to do. 16:05:18
2 A With the funding from the Port Authority. 16:05:21
3 Q Yes, sir. Well, how about like 16:05:23
4 straddle-grade -- straddle-carrier-grade paving? Why 16:05:26
5 didn't Maher -- 16:05:32
6 MR. BURKE: Well, strike that. 16:05:34
7 Q There was demolition to do. There was the 16:05:34
8 paving at a certain standard. There were the 16:05:38
9 electrical and other things that you mentioned 16:05:40
10 earlier. When the parties were negotiating and knew 16:05:43
11 that that was the quality of the property that was 16:05:47
12 required by Maher, did Maher say to the Port 16:05:51
13 Authority, Let us do it -- 16:05:55
14 MR. KIERN: Objection. 16:05:58
15 Q -- at any time? 16:05:58
16 MR. KIERN: Objection. 16:05:59
17 Go ahead. 16:06:00
18 A We had maintained the Port Authority had to 16:06:00
19 improve the property to -- the acreage to a certain 16:06:04
20 level in order for us to take over that acreage and go 16:06:11
21 forward. 16:06:12
22 Q Tell me about how Maher's position on that 16:06:12

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

104

1 was arrived at. Why was that your negotiating 16:06:15
2 position? 16:06:21
3 A Because the -- The acreage that was being 16:06:21
4 turned over was not at a straddle grade, and we wanted 16:06:25
5 it improved to a straddle-grade capability before we 16:06:31
6 took it over. 16:06:35
7 Q Well, what I'm asking is -- I understand 16:06:35
8 what you needed. My question is, how were the 16:06:37
9 discussions about who was going to do the demolition 16:06:43
10 and improvements? 16:06:47
11 A It was clear in our mind that the Port 16:06:53
12 Authority had to turn over acreage that was at a 16:06:56
13 certain standard. 16:06:59
14 Q Did it ever occur to Maher that Maher 16:07:00
15 should have undertaken those tasks? 16:07:02
16 A Did -- 16:07:05
17 MR. KIERN: Objection. 16:07:05
18 Let me just -- Objection. 16:07:06
19 A Did it ever occur? 16:07:08
20 Q Yes. 16:07:09
21 A I don't know why we would want to do that. 16:07:10
22 I mean, it was a significant cost in improving that 16:07:12

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

105

1 acreage to a -- a standard. And we felt that -- not 16:07:14
2 that we felt; the acreage had to be at a certain level 16:07:21
3 in terms of capability for us to assume responsibility 16:07:27
4 going forward. 16:07:32
5 Q Maher was ultimately going to use that 16:07:32
6 property. Yes? 16:07:34
7 MR. KIERN: Objection, but go ahead. 16:07:37
8 A Yeah. Maher was ultimately going to use 16:07:39
9 that property. 16:07:41
10 Q And I take it Maher wanted to get out of 16:07:41
11 the Tripoli Street terminal in order to save the money 16:07:44
12 we talked about earlier. Correct? 16:07:49
13 A No. Maher did not want to get out of the 16:07:51
14 Tripoli Street facility. Maher wanted to improve the 16:07:55
15 Tripoli Street facility to a level that was 16:07:59
16 somewhere -- 16:08:02
17 Q Okay. Just finish your answer. He's 16:08:04
18 running out of tape. 16:08:05
19 A Maher wanted to improve the Tripoli Street 16:08:06
20 facility to a level that would enable us to go 16:08:09
21 forward, increase capacity, and deal with the 16:08:12
22 increased costs; namely, the lease structure going 16:08:17

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 forward. 16:08:20

2 MR. KIERN: Can we take a break? 16:08:20

3 MR. BURKE: Yes. 16:08:22

4 THE VIDEOGRAPHER: Going off the record. 16:08:22

5 The time is 4:08 p.m. 16:08:23

6 (Whereupon, a recess is taken.) 16:08:26

7 THE VIDEOGRAPHER: Back on the record. 16:20:37

8 Here begins Videotape Number 2, Volume 1, in the 16:20:54

9 deposition of Randall Mosca. The time is 4:21 p.m. 16:20:58

10 Q Mr. Mosca, in -- With regard to the 16:21:02

11 purchase of Maher Terminals by RREEF that we 16:21:04

12 discussed, do you know if Maher Terminals and/or 16:21:08

13 Greenhill prepared a bank book for prospective 16:21:11

14 purchases? 16:21:15

15 A We -- We prepared a -- I'm sorry. What do 16:21:18

16 you mean by "a bank book"? 16:21:23

17 Q Well, is that a -- a term used in the -- in 16:21:25

18 the, you know, financial industry? What I mean is -- 16:21:31

19 I think what I mean is what you discussed before; the 16:21:36

20 financial books and records showing the profitability 16:21:40

21 of the company, and you put it in the form of a bank 16:21:42

22 book that you solicit interested purchasers. If I'm 16:21:45

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1 wrong in that terminology, this is your field, not 16:21:52
2 mine, so -- 16:21:55
3 A I'm just trying to answer your question. 16:21:55
4 Q Yeah, I know. I know. 16:21:55
5 A A bank book has a different connotation to 16:21:57
6 me, but Greenhill prepared a presentation manual to be 16:22:00
7 sent to all the prospective bidders -- 16:22:05
8 Q Okay. 16:22:05
9 A -- which included history of the company 16:22:08
10 and key executives and a little bit about Maher 16:22:10
11 Terminals. 16:22:17
12 Q Profit-and-loss statements based upon the 16:22:17
13 lease terms? 16:22:19
14 ~~A Not necessarily in the -- in this first~~ 16:22:19
15 issue. 16:22:23
16 Q Okay. Do you know if ultimately they did 16:22:24
17 send a package that set forth the profit-and-loss, you 16:22:26
18 know, projections based upon the lease terms? 16:22:30
19 A We created a data room, which the 16:23:42
20 information that the bidders requested was posted to a 16:23:48
21 data room, and if you cleared security you had access 16:23:53
22 to the data room. 16:23:58

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

108

1	Q	Where was that?	16:24:00
2	A	It was a site, I don't know if it was in	16:24:01
3		New York or New Jersey, but the location wasn't as	16:24:03
4		important as the ability to access the information.	16:24:06
5	Q	And that was the actual books and records	16:24:10
6		as opposed to a synopsis?	16:24:12
7	A	That was -- Yes. Whatever the information	16:24:14
8		the bidders were looking for that included much more	16:24:17
9		than the financial records of the company.	16:24:20
10	Q	Okay. Now, do you have an understanding of	16:24:22
11		what the debt was of Maher Terminals prior to the sale	16:24:29
12		to RREEF in July of 2007?	16:24:33
13	A	Yes.	16:24:37
14	Q	How much debt did Maher Terminals have	16:24:38
15		then, prior to the --	16:24:38
16	A	Approximately 125 million.	16:24:42
17	Q	And how much debt did it have after the	16:24:44
18		sale?	16:24:46
19	A	Half of the purchase price.	16:24:46
20	Q	So more than 500 million?	16:24:52
21	A	Yes.	16:24:56
22	Q	Who was the lender on the 500 million?	16:25:06

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

109

1 A There were a group of lenders, but the lead 16:25:08
2 bank was Royal Bank of Canada. 16:25:12
3 Q Do you know the others? 16:25:20
4 A There were many participants in the overall 16:25:21
5 debt package. Deutsche had a piece as well as Royal 16:25:25
6 Bank of Canada, so ... 16:25:31
7 Q Do you know what the 125 million debt 16:25:33
8 consisted of -- 16:25:37
9 A Yes. 16:25:37
10 Q -- prior to the sale? 16:25:38
11 What were those items? 16:25:39
12 A It was loans for equipment and cranes. 16:25:40
13 Q Okay. And so after it was more than 500 16:25:49
14 million above the 125. 16:25:52
15 A After it was the difference between the 16:25:55
16 equity and the debt portion on the -- on the sale of 16:25:57
17 the company. 16:26:01
18 Q And the debt portion was more than half the 16:26:05
19 purchase price? 16:26:07
20 A It was approximately -- It was 16:26:08
21 approximately half the purchase price. 16:26:10
22 Q So that debt was added to the existing 16:26:15

VIDEOTAPED DEPOSITION OF RANDALL P. MOSCA
CONDUCTED ON WEDNESDAY, JUNE 11, 2008

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1	125 --	16:26:18
2	A No.	16:26:19
3	Q -- million debt?	16:26:19
4	No?	16:26:21
5	A No. At -- At close the existing debt had	16:26:22
6	to be paid off.	16:26:24
7	Q Okay. Did Maher have debt to the Port	16:26:26
8	Authority at the time --	16:26:40
9	A Debt wouldn't be the right -- There would	16:26:40
10	be no debt to the Port Authority. We had a lease	16:26:43
11	agreement with the Port Authority. There was no debt.	16:26:45
12	Q What about the improvements that were	16:26:48
13	capitalized?	16:26:51
14	A The improvements. As we borrowed the	16:26:52
15	money, it came back to us in the form of a lease	16:26:55
16	expense.	16:26:58
17	Q Okay. I got you. So you wouldn't call	16:26:59
18	that a debt even though it was infrastructure	16:27:01
19	improvements funded by the Port Authority?	16:27:05
20	A It was strictly a P&L item. It was not a	16:27:07
21	balance sheet item where debt would be recorded.	16:27:10
22	Q Were you involved -- Let's just go back.	16:27:28

Exhibit 11

1
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BEFORE THE

FEDERAL MARITIME COMMISSION

----- X

APM TERMINALS NORTH AMERICA, INC. :

Complainant :

v. : Docket No. 07-01

THE PORT AUTHORITY OF NEW YORK :

AND NEW JERSEY, :

Respondent and :

Third-Party Complainant :

----- X

(Caption continued on Page Two)

COPY

----- Videotaped Deposition of DR. ROGER E. NORTILLO

Newark, New Jersey

Friday, June 13, 2008

9:40 a.m.

Job No.: 1-129552

Pages 1 through 281

Reported by: Debra A. Whitehead



VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

		7	
1	P R O C E E D I N G S		09:37:32
2	(Nortillo Deposition Exhibit 194 marked for		09:37:32
3	identification, to be retained by counsel.)		09:39:29
4	VIDEO SPECIALIST: Here begins Videotape		09:39:29
5	Number 1 in the deposition of Dr. Roger Nortillo in		09:39:31
6	the matter of APM Terminals North America,		09:39:37
7	Incorporated, Complainant, versus Port Authority of		09:39:39
8	New York and New Jersey, Respondent,		09:39:42
9	Counter-Complainant, and Third-Party Complainant,		09:39:45
10	versus Maher Terminals, LLC, Third-Party Respondent,		09:39:48
11	Counter-Complainant, in the Federal Maritime		09:39:52
12	Commission, Docket Number 07-01.		09:39:56
13	Today's date is June 13, 2008. The time on		09:40:00
14	the video monitor is 9:40 a.m. The video operator		09:40:03
15	today is David Lane.		09:40:08
16	This video deposition is taking place at		09:40:09
17	Winston & Strawn, One Riverfront Plaza, Newark, New		09:40:11
18	Jersey.		09:40:17
19	Counsel, please identify yourselves and		09:40:17
20	state whom you represent.		09:40:19
21	MS. SPRING: I'm Heather Spring, with Sher		09:40:20
22	& Blackwell, LLP, for APM North America Terminals,		09:40:20

VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

82

1 redesign. 11:07:19

2 Q Did you have an -- a -- a throughput 11:07:20

3 capacity in mind when you set out to develop this 11:07:33

4 consolidated terminal? 11:07:38

5 A Yes, sir. 11:07:39

6 Q What was that? 11:07:39

7 A It was more than a "that." I think what we 11:07:42

8 were trying to do from a corporate level is, container 11:07:45

9 terminals only really make money if they can move 11:07:49

10 quite a bit of cargo across the dock. 11:07:52

11 For the gate systems, we had targeted 11:07:54

12 something like 12,000 trucks per day. When I left I 11:07:56

13 believe they were doing about 6 or 7,000 trucks per 11:08:02

14 day. We had designed that overall facility for a 11:08:04

15 maximum practical capacity of somewhere around a 11:08:08

16 million eight, up to about 2 million three, I believe. 11:08:11

17 Maximum practical capacity means what's the 11:08:15

18 capacity of a facility that you can -- can run at sort 11:08:18

19 of efficiently. If you get beyond that then it costs 11:08:21

20 you twice as much to run it. If you get below that, 11:08:24

21 it costs you three times more to run it. So maximum 11:08:26

22 practical capacity is sort of an operating range. If 11:08:30

VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

83

1 you would think of your automobile, if it's designed 11:08:33
2 to do 130 miles an hour, and you drive it at 60, 11:08:35
3 you're probably okay. If you drive it at 110, I don't 11:08:38
4 want to be with you. Okay? 11:08:41
5 Q Okay. 11:08:42
6 A That's -- that's the design. 11:08:43
7 Q What -- did -- did you have an 11:08:44
8 understanding of the capacity of the Maher terminals 11:08:57
9 prior to the new reconfigured terminal? 11:09:04
10 A I'm sorry, I don't understand the question. 11:09:08
11 Q You designed this reconfigured terminal for 11:09:10
12 1.8 million or something? 11:09:14
13 A We had -- we had ranges of -- yes, I 11:09:16
14 mentioned 1.8 to 2.3. Something, somewhere like that. 11:09:18
15 We were talking about those ranges. Maybe it was 11:09:23
16 more. At the end I think I heard 3 million at 11:09:25
17 someplace, but we were -- I was trying to design it 11:09:27
18 for capacity in that range. 11:09:30
19 Q Okay. Fine. What was the capacity that 11:09:34
20 you had been dealing with prior to this reconfigured 11:09:37
21 terminal? 11:09:41
22 A I don't know. 11:09:43

VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

200

1 was about when we met or whether or not I gave him any 14:07:43

2 documents, things that are permissible, I would not 14:07:45

3 instruct him not to answer. 14:07:48

4 BY MR. BURKE: 14:07:49

5 Q There came a time when Maher was -- Maher 14:07:50

6 Terminals was seeking a purchaser. 14:07:54

7 A Yes. 14:07:58

8 Q When did that process begin, do you know? 14:07:59

9 A I think you would have to define 14:08:04

10 "purchaser" before I could answer that question. 14:08:05

11 Q An entity to buy the company. 14:08:07

12 A Maher entertained proposals for the 14:08:15

13 purchase of the company from three or four outside 14:08:19

14 people. I don't remember the exact date. I do know 14:08:22

15 when we closed. But it probably was end of 2000 -- I 14:08:24

16 don't know. I would be guessing. I would be 14:08:28

17 guessing. I know when we closed. We closed in May or 14:08:30

18 June of 2008, but I don't know when we started. We 14:08:33

19 probably started eight to ten months before that. 14:08:38

20 MR. KIERN: Did you mean to say 2007, 14:08:41

21 Doctor? 14:08:43

22 THE WITNESS: 2007 is when we started -- 14:08:43

VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

	201	
1	the close was 2007. No, I'm sorry, that's why I don't	14:08:45
2	talk about dates. I don't talk about dates. It's --	14:08:48
3	there's a factual document that says when the close	14:08:51
4	was. That was probably 2007. If you ask me when we	14:08:53
5	started discussions with outside people, it was	14:08:57
6	probably in 2006, '6, '7, yeah, something like that.	14:09:00
7	Q There was a firm known as Greenhill	14:09:07
8	retained --	14:09:10
9	A Yes.	14:09:10
10	Q -- I take it?	14:09:10
11	Were you involved in any of that retaining	14:09:12
12	Green Hill or discussing the proposed sale of the	14:09:15
13	company or any --	14:09:18
14	A Yes.	14:09:20
15	Q What was your role?	14:09:21
16	A The decision -- the -- Maher Terminals is a	14:09:28
17	privately owned company by the Maher family, I	14:09:31
18	suspect. It was their decision to entertain proposals	14:09:35
19	for the sale of the company. They engaged Greenhill.	14:09:37
20	At various times during the discussion with Greenhill	14:09:41
21	they asked me for information or details and stuff	14:09:43
22	like that, and I supplied it. But I was not	14:09:47

VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

	202	
1	controlling the sale of a privately owned company.	14:09:50
2	Q Did you have any ownership interest?	14:09:52
3	A In 1988, I had an option for five percent	14:09:56
4	ownership in the company, which was contingent on a	14:10:00
5	hundred percent of the company being sold -- more than	14:10:06
6	50 percent of the company being sold. I relinquished	14:10:09
7	that ownership right sometime in -- I don't remember.	14:10:12
8	Scott Schley could tell you. I relinquished that	14:10:17
9	ownership right in replacement for a bonus.	14:10:21
10	Q What year?	14:10:24
11	A During the Greenhill discussions.	14:10:25
12	Q What was the bonus?	14:10:26
13	A I'm not sure that, you know, that's	14:10:33
14	something I want to actually tell you, if -- because I	14:10:35
15	don't know what information is out. It's privileged	14:10:38
16	information between me and the Mahers.	14:10:40
17	Q All right. Let me explain what I'm -- why	14:10:42
18	it's -- well, could you give me the date of that?	14:10:46
19	A The date of which?	14:10:50
20	Q When you relinquished in exchange for a	14:10:51
21	bonus. That five percent interest.	14:10:55
22	A Prior to the close. Prior to the close.	14:10:58

VIDEOTAPED DEPOSITION OF DR. ROGER E. NORTILLO
CONDUCTED ON FRIDAY, JUNE 13, 2008

203

1 Q When the purchase price had been set, or 14:10:59
2 before? 14:11:04

3 A To -- to answer your question very 14:11:06
4 specifically, because these are personal questions as 14:11:08
5 opposed to questions related to this particular case. 14:11:11
6 So I am hesitant to discuss my -- 14:11:13

7 Q I know. 14:11:14

8 A -- personal contracts with you. 14:11:16

9 I clearly said to you in 1988 I had an 14:11:17
10 option to buy five percent of the company based on 14:11:19
11 certain contingencies. 14:11:22

12 When the Greenhill people came on board, I 14:11:24
13 worked out with the Maher family converting that 14:11:30

14 ownership position to a bonus. Okay? And that was -- 14:11:32
15 those documents were signed prior to the close, maybe 14:11:38
16 30 days before, maybe 40 days before. 14:11:42

17 But I agreed to convert my ownership 14:11:44
18 position for a bonus. The amount, I don't want to 14:11:47
19 tell you. 14:11:50

20 Q Okay. Do you know what the purchase price 14:11:50
21 for Maher Terminals was when it closed in December of 14:12:11
22 2007? I'm sorry, July 2007? 14:12:18

Exhibit 12

EXHIBIT 12 OMITTED AS REDACTED

Exhibit 13

EXHIBIT 13 OMITTED AS REDACTED

Exhibit 14

VIDEOTAPED DEPOSITION OF MARC E. OPPENHEIMER
CONDUCTED ON TUESDAY, MAY 20, 2008

3 (Pages 9 to 12)

<p>1 PROCEEDINGS 2 VIDEO SPECIALIST: Here begins Videotape 3 Number 1 in the deposition of Marc Oppenheimer in the 4 matter of APM Terminals North America, Incorporated, 5 Complainant, versus Port Authority of New York/New 6 Jersey, Respondent, Counter-Complainant, and 7 Third-Party Complainant, versus Maher Terminals, LLC, 8 Third-Party Respondent and Counter-Complainant, in the 9 Federal Maritime Commission, Docket Number 07-01. 10 Today's date is May 20, 2008. The time on 11 the video monitor is 9:41 a.m. The video operator 12 today is David Lane. This video deposition is taking 13 place at Winston & Strawn, One Riverview -- One 14 Riverfront Plaza, Newark, New Jersey. 15 Counsel, please identify yourselves and 16 state whom you represent. 17 MR. KIERN: Lawrence I. Kiern for Maher 18 Terminals, and I am accompanied by Gerald Morrissey. 19 MR. FINK: Marc Fink of the firm of Sher & 20 Blackwell, representing APM Terminals. 21 MR. BURKE: And Donald Burke, B-U-R-K-E, 22 for the Port Authority of New York and New Jersey.</p>	<p>9</p>	<p>1 A Yes. 2 Q Okay. How many times have you been deposed 3 before? 4 A Four or five. 5 Q Okay. So you're familiar with the 6 procedure. 7 A It was a long time ago, but yes. 8 Q Okay. Good. 9 You understand that you're testifying today 10 under oath just as if you were in a court of law? 11 A Yes. 12 Q I'm going to ask you some questions about 13 this matter which is in litigation before the Federal 14 Maritime Commission. If you do not understand my 15 question, please tell me, and ask me to rephrase the 16 question, and I will do that. 17 Do you understand that? 18 A Yes. 19 Q If you don't have any knowledge about a 20 question, please tell me that you don't have any 21 knowledge, and then we can move on to something else. 22 Do you understand that?</p>	<p>11</p>
<p>1 VIDEO SPECIALIST: The court reporter today 2 is Debbie Whitehead of LAD Reporting. Would the 3 reporter please swear in the witness. 4 MARCE, OPPENHEIMER, 5 having been duly sworn, was examined and 6 testified as follows: 7 VIDEO SPECIALIST: Please begin. 8 MR. KIERN: Thank you. 9 EXAMINATION BY COUNSEL FOR THIRD-PARTY RESPONDENT 10 AND COUNTER-COMPLAINANT 11 BY MR. KIERN: 12 Q Good morning, Mr Oppenheimer. My name is 13 Lawrence Kiern. I'm with the law firm of Winston & 14 Strawn, and I represent Maher Terminals in this 15 proceeding before the Federal Maritime Commission. My 16 colleague Gerald Morrissey is here with me this 17 morning. We're going to ask you some questions that 18 relate to this proceeding. 19 Do you understand that? 20 A Yes. 21 Q Have you ever been deposed before, 22 Mr Oppenheimer?</p>	<p>10</p>	<p>1 A Yes. 2 Q If you answer a question, I'm going to take 3 that to mean that you've heard the question, you've 4 understood it, and you've answered it truthfully. 5 Do you understand that? 6 A Yes. 7 Q If during the testimony or the course of 8 the deposition today you realize that you've made a 9 mistake in your testimony and you want to change your 10 testimony, just bring that to my attention, and you'll 11 have an opportunity to change it on the record. 12 Do you understand that? 13 A Yes. 14 Q Okay. I'm going to ask you to keep your 15 voice up and answer all questions orally, with words. 16 A Even with the videotape? 17 Q It's -- it's confusing for the record 18 sometimes if a witness simply shakes his head or says, 19 uh-huh or unh-unh. 20 Do you understand that? 21 A Yes. 22 Q It's better to say yes or no so the record</p>	<p>12</p>

VIDEOTAPED DEPOSITION OF MARC E. OPPENHEIMER
CONDUCTED ON TUESDAY, MAY 20, 2008

13 (Pages 49 to 52)

49

1 that it's clear what you're referring to.
2 A **A-K-T-I-E-S-E-L-S-K-A-B-E-T.**
3 Q And then following that first word, there
4 are a few other Danish words?
5 A **Up to Svendborg, that's the first company.**
6 Q Okay.
7 A **And then --**
8 Q And then there's another company --
9 A **Right.**
10 Q -- that starts with
11 **D-A-M-P-S-K-I-B-S-S-E-L-S-K-A-B-E-T**; is that right?
12 A **Yes.**
13 Q So it identifies, in Paragraph 46 (a)(2),
14 two Danish entities; is that correct?
15 A **Yes.**
16 Q And if I understand your testimony correct,
17 those two Danish entities are part of the A.P. Moller
18 Group; is that right?
19 MR. FINK: If you know.
20 A **I don't really know how the legal aspect of**
21 **this is.**
22 Q Okay. Do you know what those entities are?

50

1 A **These were the legal names that we were to**
2 **use in contracts, that -- that's the extent.**
3 Q And who told you that?
4 A **That came from our corporate office in**
5 **Copenhagen.**
6 Q Okay. When you say your "corporate office
7 in Copenhagen" --
8 A **When -- back in 19 -- in the Year 1999,**
9 **2000.**
10 Q Okay.
11 A **That was when.**
12 Q All right. When you say your "corporate
13 office in Copenhagen," what -- what corporate office
14 are we talking about?
15 A **The Maersk Line group.**
16 Q Maersk Line group?
17 A **Uh-huh.**
18 Q Okay. Now, the agreement provides a port
19 guaranty. Do you recall that?
20 A **I recall there's a port guaranty.**
21 Q Right. So let me just call your attention
22 to Section 42. And that's on Page 86.

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1 And Section 42 continues on Pages 87 and 88
2 and the top portion of 89; is that correct?
3 A **Yes.**
4 Q Okay. And is that the port guaranty which
5 was negotiated between the Port Authority of New York
6 and New Jersey and APM Terminals as part of this
7 agreement?
8 A **It was negotiated between Maersk, Inc.**
9 Q It was negotiated --
10 A **Well, Maersk Container Service Company, I**
11 **mean.**
12 Q Great. Maersk Container Service Company,
13 which is now APM Terminals?
14 A **Right.**
15 Q All right. Good.
16 And how does APM Terminals satisfy the port
17 guaranty today?
18 A **You -- you've got to step back and --**
19 **Maersk Container Service Company was a company within**
20 **the Maersk, Inc., group.**
21 Q Uh-huh.
22 A **So Maersk, Inc., was the agent for the ship**

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1 owner.
2 Q Okay. Go ahead. I'm sorry, I don't
3 understand. Please explain it.
4 A **Well, the port guaranty is for cargo for**
5 **Maersk -- that Maersk, Inc., represents.**
6 Q Okay. So how does APM Terminals ensure
7 that it satisfies the requirement in Section 42 with
8 respect to a port guaranty?
9 A **APM Terminals, how do they ...**
10 **They have the liability for the guaranties.**
11 **But how they insure it, they do not have control of**
12 **the cargo.**
13 Q Okay. So how -- how do they make sure that
14 Maersk, the ocean carrier, provides the requisite
15 number of containers per year that is provided for in
16 this port guaranty?
17 A **I don't think there is.**
18 Q Okay. So is there a contract?
19 A **Is there a contract with volume commitment**
20 **from ...**
21 **No.**
22 Q Okay.

VIDEOTAPED DEPOSITION OF MARC E. OPPENHEIMER
CONDUCTED ON TUESDAY, MAY 20, 2008

14 (Pages 53 to 56)

53

1 A Excuse me. There's a contract, but there's
2 not a contract for the volume commitment.
3 Q From -- when you say there's a contract --
4 A Maersk, Inc. For Maersk, Inc.
5 Q To -- I just want to get it clear on the
6 record.
7 A To what?
8 Q You said -- I'm reading what the court
9 reporter transcribed. There's a contract, but there's
10 not a contract for the volume commitment.
11 I don't understand that answer. Could you
12 explain it?
13 A We don't -- in the contract there's not a
14 contract -- there's not a volume commitment on behalf
15 of the carrier.
16 Q Okay. So what is the contract that you
17 have --
18 A For --
19 Q That APM has with the carrier, what is that
20 contract?
21 A For terminal services.
22 Q It is a terminal services agreement?

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1 A Yes.
2 Q Okay. Now, under the port guaranty, if
3 Maersk, the ocean carrier, brings a container to the
4 APM terminal, does that container count towards
5 satisfaction of the port guaranty?
6 A Yes.
7 Q Okay.
8 MR. KIERN: We've been going just about an
9 hour. I suggest we take a five-minute break.
10 MR. FINK: Fine.
11 MR. KIERN: Okay.
12 VIDEO SPECIALIST: We're going off the
13 record. The time is 10:27 a.m.
14 (Short recess.)
15 VIDEO SPECIALIST: We're back on the
16 record. The time is 10:46 a.m.
17 MR. KIERN: Thank you very much.
18 BY MR. KIERN:
19 Q Mr. Oppenheimer, we're back on the record.
20 You understand you remain under oath?
21 A Yes.
22 Q Okay. Good.

55

1 Let me just call your attention to Exhibit
2 Number 2, Page 98.
3 A 98?
4 Q Yes, Page 98, Section 46 again.
5 You may recall we were -- I was asking you
6 some questions about those Danish entities. And
7 did -- are there shorthand references to those Danish
8 entities that may be more commonly known?
9 A We -- except in contracts, we rarely refer
10 to it. We refer to A.P. Moller Group or the entity
11 Maersk Line, APM Terminals.
12 Q Okay.
13 A I want to say that I'm not an expert on the
14 corporate structure --
15 Q I understand.
16 A -- and the name -- the exact corporate
17 names that are used. So --
18 Q I understand.
19 A -- you're asking me a lot of technical
20 questions on the -- on the -- what these names exactly
21 and what the legal entity is, and it's -- it's more
22 complicated than I know.

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1 Q Okay. But is the first entity that starts
2 with the word A-K-T-I-E-S-E-L-S-K --
3 A That's --
4 Q -- S-K-A-B-E-T, is the shorthand reference
5 for that Svenborg, S-V-E-N-B-O-R-G?
6 A Yes.
7 Q And for the second entity --
8 A Well, I don't know if it worldwide is known
9 as Svenborg; that's how I refer to it, as Svenborg.
10 Q Okay.
11 A That's correct.
12 Q And the second entity which starts with
13 D-A-M-P-S-K-I-B-S-S-E-L-S-K-A-B-E-T, is that entity --
14 shorthand for that entity, 1912?
15 A That's -- yes, 1912 would be -- is the
16 easiest way for an American to be able to pronounce
17 it.
18 Q Very good. Okay. Great. Thanks.
19 Now, let's go back to 1997. And if you
20 want to put that exhibit back together, I don't think
21 I'm going to ask you questions about that right now.
22 As I recall your earlier testimony, you

Exhibit C

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Respondent, the Port Authority of New York and New Jersey (the "Port Authority"), respectfully submits this Statement of Material Facts as to Which There is No Genuine Dispute, in response to the Presiding Officer's Order to Supplement Record on PANYNJ's Motion for Partial Summary Judgment, served on April 1, 2011. The following are material facts as to which there is no genuine dispute:

I. It Is Undisputed That Maher Was On Notice Of The Terms Of The Maersk Lease And The Differences Between The Maher And Maersk Leases By No Later Than August 2000 When The Maersk Lease Was Publicly Filed With The Commission

1. The lease between the Port Authority and Maersk Container Service Company, Inc., EP-248 (the "Maersk Lease"), was executed as of January 6, 2000. *See* Maersk Lease at 08PA00020315, attached as Exhibit B to the Declaration of Alexander

O. Levine in Support of The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims, Levine Declaration ("Levine Decl.").

2. The Maersk Lease was publicly filed with the Federal Maritime Commission ("FMC") as FMC Agreement No. 201106, date-stamped August 2, 2000. *See id.* at 08PA00020316.

3. The Maersk Lease became publicly available upon its filing with the FMC. *See* Maher Terminals, LLC's ("Maher") Responses to Port Authority's First Set of Interrogatories to Maher at Interrogatory No. 2 (at page 6), August 29, 2008, attached as Exhibit H to Levine Decl. ("[T]he terms of this agreement are publicly available, the subject of media coverage, and therefore, likely are widely known by many persons.").

4. The lease signed between The Port Authority and Maher Terminals, LLC, Lease No. EP-249 (the "Maher Lease"), was signed as of October 1, 2000—two months after the Maersk Lease was publicly filed and available. *See* Maher Lease at 08PA00001884, attached as Exhibit A to Levine Decl.

II. Maher Has Repeatedly Represented that Its Discrimination Claims Stem From, and Are Based On, the Lease Terms

5. Maher's Complaint alleges that the Maersk Lease violated the Shipping Act by "granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement."

Maher's Complaint at § IV.B (at page 3), June 3, 2008, attached as Exhibit C to Levine Decl.

6. In its Interrogatory Responses, Maher has asserted that "[t]he terms of leases EP-248 and EP-249, on their face, show the inequity of treatment as between Maher and APM and these are set forth in the complaint which is incorporated by reference." Maher's Responses to the Port Authority's Second Set of Interrogatories to Maher at Interrogatory No. 1 (at page 4), August 29, 2008, attached as Exhibit K to Levine Decl.

7. In its Scheduling Report, filed on July 23, 2008, Maher has asserted that it "is apparent from Maher's complaint and the plain language of the leases themselves, the lease terms of the two leases are manifestly different to Maher's prejudice and APM's preference." Complainant's Scheduling Report at 5, July 23, 2008, attached as Exhibit G to Levine Decl.

8. In its Interrogatory Responses, Maher has asserted that its damages "are contained in the disparate terms of leases EP-248 and EP-249." Maher's Responses to Port Authority's First Set of Interrogatories at Interrogatory No. 6 (at page 10), Levine Decl. Ex. H.

9. Maher has represented that it is not seeking "additional" damages beyond those allegedly created by the facial disparities in the lease terms. Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3, Oct. 9, 2008, attached as Exhibit D to Levine Decl.

III. It Is Undisputed that Maher Had Actual Knowledge of the Differences in Lease Terms More than 3 Years Before It Filed the Complaint

10. In its Reply in Opposition to the Motion for Summary Judgment, Maher states “Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to July 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.” Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment at 5, March 14, 2011.¹

11. Maher has stated that it “learned of PANYNJ’s preference of APM Terminals North America, Inc. (“APM”) during negotiation of EP-249.” Maher’s Response to Port Authority’s First Set of Interrogatories to Maher at Interrogatory No. 1 (at pages 4-5), Levine Decl. Ex. H.

12. Randall Mosca, Maher’s former Chief Financial Officer, who was part of the core team in the Maher Lease negotiations, has testified that during the Maher Lease negotiations “[w]e were aware of the financial terms in the Maersk lease, which were considerably less than, on a base-rent basis, the Maher proposed lease arrangement.” Deposition of Randall P. Mosca (“Mosca Dep.”) 34:7-35:5, 155:1-16, June 11, 2008, attached as Exhibit F to Levine Decl.

13. Mosca testified further that at that time Maher had performed a financial analysis to compare the base annual rental rate of the Maersk Lease with the Maher Lease. *Id.* at 172:15 – 20, Levine Decl. Ex. F; *see, e.g.*, Memorandum from M. Davis to

¹ Maher’s Opposition is mistakenly dated October 14, 2011.

R.P. Mosca Regarding Maersk Lease at MT005220, Aug. 1, 2001, attached as Exhibit J to Levine Decl. (analysis of Maersk lease rates dated August 1, 2001).

14. Mosca also testified that “Maher knew the differential between the Maersk and the Maher lease. It was considerable.” Mosca Dep. 169:15 – 170:10, Levine Decl. Ex. F.

15. Brian Maher, Chairman and Chief Executive Officer of Maher at the time of the Maher Lease negotiations, has testified that, before signing the Maher Lease, he and Maher “certainly knew that Maersk had lower rates than we did.” Deposition of M. Brian Maher (“Brian Maher Dep.”) 194:10-195:4, 287:12-19, June 9, 2008, attached as Exhibit I to Levine Decl.

16. In August of 2001, an internal Maher memorandum was sent to Brian and Basil Maher and Mr. Mosca, analyzing the differences between the Maher and Maersk Leases. *See* Memorandum from M. Davis to R.P. Mosca Regarding Maersk Lease at MT005220-5224, Levine Decl. Ex. J.

17. The memorandum compared the Maersk lease terms to the Maher lease terms, including the per acre annual charges, the infrastructure financing terms, and the security deposit requirement. *See id.* at MT005220, Levine Decl. Ex. J.

18. The memorandum detailed that while the Maher base rental rate escalated, the APM base rental rate did not. *See id.* at MT005224, Levine Decl. Ex. J.

19. The memorandum also identifies and analyzes the differing investment requirements and differing volume/throughput guarantees. *See id.* at MT005220-5222, Levine Decl. Ex. J.

20. Maher filed the Complaint instituting this action on June 3, 2008, more than seven-and-a-half years after Maher executed its Lease. Maher's Complaint at 1, Levine Decl. Ex. C.

IV. The Remedies For Maersk's Failure To Satisfy Its Port Guarantee Were Set Out in the 2000 Maersk Lease

21. In Maher's Opposition to the Motion for Summary Judgment, Maher alleges that "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... 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's Reply in Opposition to Respondent's Motion for Summary Judgment Ex. A at 3-4.²

22. The Port Guarantee section (Section 42) of the Maersk Lease expressly provided that if the port guaranty were not satisfied in the manner specified under that section "the basic rental payable by the Lessee under Section 3 hereof shall be increased...in accordance with the schedule...marked 'Schedule B.'" Maersk Lease § 42(d) at 08PA00020407, Levine Decl. Ex. B.

23. Maher knew and/or was on notice of the terms of the Port Guaranty, including that APM's failure to meet the throughput requirements of the Port Guaranty would result in increased rent. See Maher's Reply in Opposition to Respondent's Motion

² While Exhibit A to Maher's Opposition is unnumbered, the above quoted language appears at the bottom of the third page and continues on the fourth page.

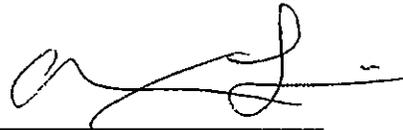
for Summary Judgment at 5 (“Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.”).

V. Conclusion

24. Based on paragraphs 1-23 above, it is undisputed that more than three years prior to the filing of the Complaint, Maher was on notice, and had actual knowledge, of the differences between the terms of the Maersk and Maher leases of which it complains, was on more than ample notice of facts sufficient to put it on a duty of inquiry into whether it had a colorable Shipping Act claim, and failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Dated: April 8, 2011

Respectfully submitted,



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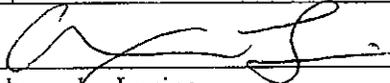
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*Attorneys for The Port Authority of
New York and New Jersey*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

<p><u>Via U.S. Mail and E-mail:</u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at Washington, DC this 8th day of April, 2011</p>
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Alexander Levinc

Exhibit D

Docket 08-03
Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

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 TERMINALS, LLC'S RESPONDING STATEMENT
TO PANYNJ'S STATEMENT OF MATERIAL FACTS AS TO
WHICH PANYNJ CONTENDS THERE IS NO GENUINE
DISPUTE

Complainant, Maher Terminals, LLC ("Maher"), respectfully submits this Responding Statement to the Port Authority of New York and New Jersey's ("PANYNJ's") Statement of Material Facts as to which PANYNJ Contends there is No Genuine Dispute (Maher's "Responding Statement"), in response to PANYNJ's Statement of Material Facts as to which PANYNJ Contends there is No Genuine Dispute, filed on April 8, 2011 ("PANYNJ's Statement"), both pursuant to the Presiding Officer's April 1, 2011 Order to Supplement Record on PANYNJ's Motion for Partial Summary Judgment (the "Order to Supplement").

The Order to Supplement directed that PANYNJ:

serve and file a statement of material facts as to which it contends there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which PANYNJ contends there is no genuine dispute together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. Each paragraph

[REDACTED]

must be limited as nearly as practicable to a single factual proposition. The citation must identify the document and must specify the pages and paragraphs or lines thereof or the specific portions of exhibits on which it relies.

Order to Supplement at 2-3. The Order to Supplement directed that Maher:

serve and file a responding statement either admitting or disputing each of the facts in PANYNJ's statement. All material facts in PANYNJ's statement that are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed with a citation demonstrating the existence of a genuine dispute as to the fact.

Id. at 3. The Order to Supplement provided further that Maher "may also include in its responding statement additional facts that Maher contends are material and as to which there exists a genuine dispute." *Id.* at 3.

Maher's responses to PANYNJ's stated facts as to which PANYNJ contends there is no genuine dispute, with citations demonstrating the existence of a genuine dispute as to the facts disputed, follows:

PANYNJ Statement ¶ 1:¹

The lease between the Port Authority and Maersk Container Service Company, Inc., EP-248 (the "Maersk Lease"), was executed as of January 6, 2000. *See* Maersk Lease at 08PA00020315, attached as Exhibit B to the Declaration of Alexander O. Levine in Support of The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims, Levine Declaration ("Levine Decl.").

Maher Response ¶ 1:

Admitted.

PANYNJ Statement ¶ 2:

The Maersk Lease was publicly filed with the Federal Maritime Commission ("FMC") as FMC Agreement No. 201106, date-stamped August 2, 2000. *See id.* at 08PA00020316.

¹ PANYNJ's Statement contains headings designated by roman numerals I-V. The headings are argumentative statements, not statements of fact, nor do the headings contain any citations in support. Pursuant to the Order to Supplement, the headings have been disregarded.

Maher Response ¶ 2:

Admitted.

PANYNJ Statement ¶ 3:

The Maersk Lease became publicly available upon its filing with the FMC. See *Maher Terminals, LLC's ("Maher") Responses to Port Authority's First Set of Interrogatories to Maher at Interrogatory No. 2* (at page 6), August 29, 2008, attached as Exhibit H to Levine Decl. ("[T]he terms of this agreement are publicly available, the subject of media coverage, and therefore, likely are widely known by many persons.").

Maher Response ¶ 3:

Admitted.

PANYNJ Statement ¶ 4:

The lease signed between The Port Authority and Maher Terminals, LLC, Lease No. EP-249 (the "Maher Lease"), was signed as of October 1, 2000—two months after the Maersk Lease was publicly filed and available. See *Maher Lease at 08PA00001884*, attached as Exhibit A to Levine Decl.

Maher Response ¶ 4:

Admitted.

PANYNJ Statement ¶ 5:

Maher's Complaint alleges that the Maersk Lease violated the Shipping Act by "granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement." Maher's Complaint at §IV.B (at page 3), June 3, 2008, attached as Exhibit C to Levine Decl.

Maher Response ¶ 5:

Maher admits that its Complaint in Docket 08-03 includes the quoted language from Section IV of paragraph B, but denies that Maher's Complaint alleges that the Maersk lease violated the Shipping Act. Maher's Complaint alleges that PANYNJ violated and continues to

██████████

violate the Shipping Act. *See* Maher's Complaint at § IV.A. (June 3, 2008), Exhibit C to Levine Decl.:

Maher seeks a cease and desist order and reparations for injuries cause to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Id. *See also, id.* ¶ IV.B (the paragraph PANYNJ cites is itself non-exclusive (*i.e.*, "including but not limited to")); *id.* ¶ IV.A-M (the paragraph PANYNJ cites is one of thirteen other paragraphs alleging facts pertaining to alleged violations); Maher's Counter-Complaint, at § 40, Dkt. 07-01 (Sept. 4, 2007) (alleging violations of the Shipping Act of 1984, 46 U.S.C. § 40102(b)(2), 41102(c), 41106(3) and 41106(2) because PANYNJ "failed to operate in accordance with the Agreement, failed to establish, observe, and enforce just and reasonable regulations and practices, unreasonably refused to deal or negotiate with Maher, and has imposed unjust and unreasonable prejudice or disadvantage with respect to Maher concerning the turnover of certain premises").

PANYNJ Statement ¶ 6:

In its Interrogatory Responses, Maher has asserted that "[t]he terms of leases EP-248 and EP-249, on their face, show the inequity of treatment as between Maher and APM and these are set forth in the complaint which is incorporated by reference." Maher's Responses to the Port Authority's Second Set of Interrogatories to Maher at Interrogatory No. 1 (at page 4), August 29, 2008, attached as Exhibit K to Levine Decl.

Maher Response ¶ 6:

Maher admits that the quoted language is a textually accurate excerpt from the Interrogatory response, and admits that the terms of the leases show on their face the differences

[REDACTED]

in the lease terms, but denies PANYNJ's attempt to misconstrue one of Maher's interrogatory responses to suggest it was responding to when Maher knew of the differences and that the differences were undue. The interrogatory PANYNJ cites did not. Rather, PANYNJ ignores the interrogatories reflecting when Maher knew of the differences and when Maher knew when they were undue. *See* Maher's Responses to PANYNJ's Second Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit K to Levine Decl.) (The text PANYNJ quotes is three lines of a two-page interrogatory response to responding to PANYNJ's interrogatory requesting "all facts supporting each and every allegation of the Complaint."). In response to PANYNJ's First Set of Interrogatories, No.1, asking "when Maher first became aware of the alleged differences" between the leases, Maher responded that it "learned of PANYNJ's *preference* of [APM] during the negotiation of EP-249," *see* Maher's Responses to PANYNJ's First Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit H to Levine Decl.), but it only began to learn that the APM preference was *unduly or unreasonably* preferential starting "in the summer of 2007" when PANYNJ Deputy General Counsel Christopher Hartwyck sought a release from Maher's General Counsel Scott Schley for a rent disparity claim. *Id.* at No. 4, p.8 (Exhibit H to Levine Decl.).

PANYNJ Statement ¶ 7:

In its Scheduling Report, filed on July 23, 2008, Maher has asserted that it "is apparent from Maher's complaint and the plain language of the leases themselves, the lease terms of the two leases are manifestly different to Maher's prejudice and APM's preference." Complainant's Scheduling Report at 5, July 23, 2008, attached as Exhibit G to Levine Decl.

***Maher Response* ¶ 7:**

Maher admits that the quoted language is a textually accurate excerpt from the cited Scheduling Report, but as with the previous paragraph PANYNJ misconstrues, Maher denies PANYNJ's mischaracterization of the quote. Contrary to PANYNJ's effort to conflate the two elements of a claim—knowledge of the difference and knowledge that the difference is undue—

[REDACTED]

the excerpt sets out both elements *See* Complainant's Scheduling Report at 5 (July 23, 2008) (Exhibit G to Levine Decl.) (explaining in the context of the Shipping Act burden of proof, that the initial burden shift to the Respondent "is apparent from Maher's complaint" and "the plain language of the leases themselves.").

PANYNJ Statement ¶ 8:

In its Interrogatory Responses, Maher has asserted that its damages "are contained in the disparate terms of leases EP-248 and EP-249." Maher's Responses to Port Authority's First Set of Interrogatories at Interrogatory No. 6 (at page 10), Levine Decl. Ex. H.

Maher Response ¶ 8:

Maher admits that the terms of leases EP-248 and EP-249 are disparate. Pursuant to *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1272 (FMC, 1997), where facially disparate lease terms are *unduly* disparate (*i.e.* different *and* wrongful or unjustified) the measure of damages is the difference of the disparate lease terms. *See Ceres Marine Terminal v. Maryland Port Administration*, 29 S.R.R. 356, 372 -73 (FMC 2001) (citing *Valley Evaporating v. Grace Line Inc.*, 11 S.R.R. 873 (1970)). Maher denies PANYNJ's suggestion that an ability to calculate differences if there was a violation constitutes evidence of a violation.

PANYNJ Statement ¶ 9:

Maher has represented that it is not seeking "additional" damages beyond those allegedly created by the facial disparities in the lease terms. Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3, Oct. 9, 2008, attached as Exhibit D to Levine Decl.

Maher Response ¶ 9:

Maher denies that (i) it alleges damages created by facial disparities in the lease terms, and (ii) denies that its Shipping Act claims in this proceeding seek no other damages. Maher alleges that PANYNJ violated and continues to violate the Shipping Act. Maher's claims also

[REDACTED]

allege lost business, lost revenue, increased costs, attorney's fees and interest. *See generally*, Maher's Reply in Opposition to Respondent's Motion for a Protective Order at 11, 31 (Apr. 13, 2011) (citing Maher's complaint and consolidated 07-01 counter-claims and extensive testimony concerning damages). PANYNJ takes the quoted statement out of context. *See* Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3 (Oct. 9, 2008) (Ex. D in Levine Decl.) (the statement was made in response to PANYNJ's Motion to Compel post-lease financial documents in rebuttal of PANYNJ's assertion of a need for discovery of "competitive harm," as a separate and additional element of damages akin to lost profits and or business, and which under *Ceres* is not the applicable measure of damages).

PANYNJ Statement ¶ 10:

In its Reply in Opposition to the Motion for Summary Judgment, Maher states "Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to July 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed." Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 5, March 14, 2011.

Maher Response ¶ 10:

Admitted. As Maher also explained, however, "What is decisive is that Maher did not know nor should it have known that the different lease terms were an *undue* prejudice." Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 4 (March 14, 2011) (emphasis added).

PANYNJ Statement ¶ 11:

Maher has stated that it "learned of PANYNJ's preference of APM Terminals North America, Inc. ("APM") during negotiation of EP-249." Maher's Response to Port Authority's First Set of Interrogatories to Maher at Interrogatory No. 1 (at pages 4-5), Levine Decl. Ex. H.

[REDACTED]

Maher Response ¶ 11:

Maher admits that the quoted language is a textually-accurate excerpt from the Interrogatory response, and that the excerpt itself is accurate, but denies that it conveys knowledge of a preference without knowledge of an undue preference. Compare Maher's Responses to PANYNJ's First Set of Interrogatory Responses, No. 1 at 4-5 (Aug. 29, 2008) (Levine Decl. Ex. II) (responding to PANYNJ's first interrogatory requests by stating, "Maher learned of PANYNJ's *preference* of APMT" at the time of the lease negotiation) *with id.*, No. 4 at 8-9 (responding to PANYNJ's first discovery requests that Maher did not learn that the preferences were "*unduly or unreasonably preferential*" until events in 2007 and 2008.).

PANYNJ Statement ¶ 12:

Randall Mosca, Maher's former Chief Financial Officer, who was part of the core team in the Maher Lease negotiations, has testified that during the Maher Lease negotiations "[w]e were aware of the financial terms in the Maersk lease, which were considerably less than, on a base-rent basis, the Maher proposed lease arrangement." Deposition of Randall P. Mosca ("Mosca Dep.") 34:7-35:5, 155:1-16, June 11, 2008, attached as Exhibit F to Levine Decl.

Maher Response ¶ 12:

Admitted.

PANYNJ Statement ¶ 13:

Mosca testified further that at that time Maher had performed a financial analysis to compare the base annual rental rate of the Maersk Lease with the Maher Lease. *Id.* at 172:15 – 20, Levine Decl. Ex. F; *see, e.g.*, Memorandum from M. Davis to R. P. Mosca Regarding Maersk Lease at MT005220, Aug. 1, 2001, attached as Exhibit J to Levine Decl. (analysis of Maersk lease rates dated August 1, 2001).

Maher Response ¶ 13:

Admitted in part and denied in part. Randy Mosca's testimony concerned a limited financial comparison of Maher's proposed lease terms, *see* R. Mosca Dep., Dkt. 07-01, 172:15-20 (June 11, 2008), which was not "at that time" of the later August 1, 2001 memorandum.

PANYNJ Statement ¶ 14:

[REDACTED]

Mosca also testified that “Maher knew the differential between the Maersk and the Maher lease. It was considerable.” Mosca Dep. 169:15 – 170:10, Levine Decl. Ex. F.

Maher Response ¶ 14:

Admitted.

PANYNJ Statement ¶ 15:

Brian Maher, Chairman and Chief Executive Officer of Maher at the time of the Maher Lease negotiations, has testified that, before signing the Maher Lease, he and Maher “certainly knew that Maersk had lower rates than we did.” Deposition of M. Brian Maher (“Brian Maher Dep.”) 194:10-195:4, 287:12-19, June 9, 2008, attached as Exhibit I to Levine Decl.

Maher Response ¶ 15:

Admitted.

PANYNJ Statement ¶ 16:

In August of 2001, an internal Maher memorandum was sent to Brian and Basil Maher and Mr. Mosca, analyzing the differences between the Maher and Maersk Leases. See Memorandum from M. Davis to R.P. Mosca Regarding Maersk Lease at MT005220-5224, Levine Decl. Ex. J.

Maher Response ¶ 16:

Admitted in part and denied in part. Maher admits that the cited memorandum was prepared and sent, but Maher denies PANYNJ’s characterization of the memorandum as “analyzing the differences between the Maher and Maersk Leases.” The memorandum is described as a “preliminary review of the Maersk” lease. *Id.* at MT005220. Brian Maher testified that the review was requested to quantify the financial differences in the leases, and he testified that the report confirmed the same financial difference that Maher already knew. See B. Maher Dep. 08-03, 16:15-18:25 (April 6, 2011). Maher witnesses testified that the review was not a legal analysis, *see, e.g.*, S. Schley Dep., Dkt 08-03, 76:20-77:8 (March 24, 2011), (no one raised a legal issue with respect to the report); B. Maher Dep. 08-03, 206:11-207:3 (April 6, 2011) (Prior to 2007, it did not cross Maher’s mind to seek counsel); R. Mosca Dep. 08-03, 86:9-86:12 (Mar. 14, 2011) (no discussion of suing the Port Authority).

[REDACTED]

PANYNJ Statement ¶ 17:

The memorandum compared the Maersk lease terms to the Maher lease terms, including the per acre annual charges, the infrastructure financing terms, and the security deposit requirement. *See id.* at MT005220, Levine Decl. Ex. J.

Maher Response ¶ 17:

Admitted.

PANYNJ Statement ¶ 18:

The memorandum detailed that while the Maher base rental rate escalated, the APM base rental rate did not. *See id.* at MT005224, Levine Decl. Ex. J.

Maher Response ¶ 18:

Admitted.

PANYNJ Statement ¶ 19:

The memorandum also identifies and analyzes the differing investment requirements and differing volume/throughput guarantees. *See id.* at MT005220-5222, Levine Decl. Ex. J.

Maher Response ¶ 19:

Admitted in part and denied in part. While Maher admits that the review identifies some “infrastructure work” and guarantees, Maher denies PANYNJ’s characterization of the summary listing of bullets in the review as an analysis or differential comparison. *See id.*

PANYNJ Statement ¶ 20:

Maher filed the Complaint instituting this action on June 3, 2008, more than seven-and-a-half years after Maher executed its Lease. Maher’s Complaint at 1, Levine Decl. Ex. C.

Maher Response ¶ 20:

Admitted.

PANYNJ Statement ¶ 21:

In Maher’s Opposition to the Motion for Summary Judgment, Maher alleges that “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...” [REDACTED]

[REDACTED]

[REDACTED]

Maher Response ¶ 21:

Maher admits that the quoted excerpt is contained in Maher's Reply in Opposition to Respondent's Motion for Summary Judgment. Ex. F at 3-4. PANYNJ's failure to enforce the cargo commitment in APM's Port Guarantee contradicts PANYNJ's sworn and verified responses that the Port Guarantee is a unique justification for charging Maher more than APM. See PANYNJ's Response to Maher's First Set of Interrogatories to PANYNJ, Request No. 18, and No. 1, 10-11 (quoting PANYNJ's interrogatory response, sworn and verified by Port Commerce director Richard Larrabee on August 29, 2008, that "the Maersk lease provided for a Port Guarantee through which APMT (and Maersk, Inc.) *guaranteed that a certain volume of Maersk containers would go through the Port . . . [it] was an important term that neither Maher nor any other port tenant could provide . . . [it] committed the Maersk's shipping lines to continue using the port even if volumes declined in the future. . . . [and] APMT's parent company, Maersk, Inc. executed a guarantee of the entire lease (not just the port guarantee) . . . In short, the APMT lease assured the port authority that . . . Maersk, Inc.'s new mega-ships would continue to come through the port.*") (emphasis added).

PANYNJ Statement ¶ 22:

The Port Guarantee section (Section 42) of the Maersk Lease expressly provided that if the port guaranty were not satisfied in the manner specified under that section "the basic rental payable by the Lessee under Section 3 hereof shall be increased...in accordance with the schedule...marked 'Schedule B.'" Maersk Lease § 42(d) at 08PA00020407, Levine Decl. Ex. B.

Maher Response ¶ 22:

Maher admits that section 42 of lease FP-248 provides *one of many possible* remedies if the port guaranty were not satisfied, and denies that section 42 provides an *exclusive* remedy.

██████████

See EP-248 § 30 at 74 (Levine Decl. Ex. A) (No lease remedies are exclusive: “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”); *id.* § 46(a)(2) at 98-99 (setting forth the requirements that the actual Maersk shipping companies must maintain majority ownership and control of Maersk, Inc. (APM’s U.S. parent, “Maersk”); that Maersk “is engaged as the exclusive United States agent on behalf of [the Maersk shipping companies] . . . in the conduct of a worldwide waterborne ocean container shipping business;” and that: “The Lessee further recognizes and agrees that the aforesaid connection of Maersk with the Shipping Business in conjunction with its holding the Ownership Interest is a major inducement for the Port Authority’s entering into this Agreement, and that it is of great importance to the Port Authority, in order to achieve the business and regional economic goals of this Agreement, that the Lessee be owned by an entity or entities having said connection with the Shipping Business *in order to assure the availability of cargo* to meet the foregoing business and regional economic goals of the Port Authority.”) (emphasis added).

The parent guarantees not just the financial provisions, but all of the lease. See also, *id.*, § 48 at 102 (providing that “[the]Contract of Guaranty shall guarantee the full, faithful, and prompt performance of and compliance with, on the part of the Lessee, all of the terms, provisions, and covenants and conditions of this Agreement...”); *id.*, Parent Contract of Guaranty, Maersk Inc., 08PA0020442 (“The Guarantor hereby absolutely and unconditionally guarantees, promises and agrees that the Lessee will duly and punctually pay all rentals and other monetary obligations which it has or shall have under the Lease, and that the Lessee will

[REDACTED]

faithfully and fully perform, fulfill and observe all the other terms, provisions, covenants and conditions of the Lease on the part of the Lessee to be performed, fulfilled and observed.”)
(emphasis added).

PANYNJ Statement ¶ 23:

Maher knew and/or was on notice of the terms of the Port Guaranty, including that APM’s failure to meet the throughput requirements of the Port Guaranty would result in increased rent. *See* Mahe’s Reply in Opposition to Respondent’s Motion for Summary Judgment at 5 (“Mahe does not contest that Mahe either knew or should have known of the facial differences in the lease terms when they were publicly-filed.”).

Mahe Response ¶ 23:

Admitted in part and denied in part. Mahe admits that it knew or should have known of the facial differences in the leases, but Mahe denies that it knew or was on notice of PANYNJ’s unique Port Guarantee—that PANYNJ asserted was unique to carriers, not marine terminal operators like Mahe—that would only enforce a rent increase penalty. *See* B. Mahe Dep., Dkt. 07-01, 179:14-179:19 (June 9, 2008) (PANYNJ initially promised Mahe rate parity with Maersk/Scaland: “We were told at the very beginning that the Maersk/Sea-Land lease terms and our lease terms would be the same, if not -- similar, if not the same. And we received proposals from the Port Authority, we had discussions with them about that.”); *see also* Port Reinvestment Model, MT005073-74, Dkt. 08-03, Dep. Ex. 55 (Fax date July 22, 1997); *see* L. Borrone Dep., Dkt. 08-03, 67:11-67:18 (Mar. 17, 2011) (PANYNJ ultimately did not offer Mahe the same rates, reasoning that APM had “a port guarantee that we felt was significant and that was a significant difference -- the port guarantee in particular -- between the two leases.”); S. Schley Dep., Dkt. 08-03, 67:10 – 67:19 (Mar. 24, 2011) (In a September 1999 meeting, L. Borrone told Mahe that it would not get the same rates as Maersk, but that the leases were “virtually identical” and overall “within pennies” because: (1) Maersk was said to have higher investment

[REDACTED]

requirements, and that (2) Maersk would have a "Port Guarantee" that Maher could not provide.); *see* Notes of PA Lease Negotiations Meeting of 9/23/99, MT354761-65, Dkt. 08-03, Ex. 144 (Sep. 23, 1999); Mosca Dep., Dkt. 08-03, 88:22-89:15, 139:23-140:5 (Mar. 14, 2011) (L. Borrone conveyed that one of the reasons for Maher's higher rate was because Maersk would provide a Port Guarantee" and was stating that Maersk was "... able to generate a port guarantee for volume, which we were unable to do, and, therefore, the Maersk rates were off the table for us."); B. Maher Dep., Dkt. 08-03, 199:12-199:25 (April 6, 2011) (Borrone alleging that the Port Guarantee and higher investments explained Maher's higher rent);

See L. Barrone Dep., Dkt. 08-03, 97:5-98:21 (Mar. 17, 2011) ("The port guarantee was set up because we really wanted the volume of cargo in the harbor..."); R. Shiftan Dep., Dkt. 08-03, 168:22-196:8 (April 4, 2011) ("PANYNJ's understanding was that only carriers could provide port guarantees because "only shipping companies could guarantee cargo, and that as a consequence, the economics of leases which contained such guarantees could be looked at in one way, and leases that did not contain such guarantees would be looked at in another way."); *see* L. Barrone Dep., Dkt. 08-03, 99:14-99:16 (Mar. 17, 2011) ("Maher would not and could not commit its carriers who it was servicing to a port guarantee."); B. Maher Dep., Dkt. 08-03, 166:2-4 (Apr. 6, 2011) ("My interpretation of a port guarantee is cargo controlled by a -- by an individual entity that they can direct to the port. We were not in a position to do that"); S. Schley Dep., Dkt. 08-03, 69:11 - 69:23 (Mar. 24, 2011) ("and as I believe the Maher people understood it, that this was going to be a requirement, that Maersk bring its cargo to the port. That was the whole issue, that they would bring cargo, that they carried on their own bottoms, their own ships, to that port. Q And Ms. Borrone told you and others at the meeting this information? A Yes.") (emphasis added).

[REDACTED]

PANYNJ Statement ¶ 24:

Based on paragraphs 1-23 above, it is undisputed that more than three years prior to the filing of the Complaint, Maher was on notice, and had actual knowledge, of the differences between the terms of the Maersk and Maher leases of which it complains, was on more than ample notice of facts sufficient to put it on a duty of inquiry into whether it had a colorable Shipping Act claim, and failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher Response ¶ 24:

Denied. Other than knowledge of the facial difference in the leases, which Maher has not contested, Maher denies that it (i) knew or (ii) should have known that it had a case against PANYNJ more than three years before filing the Complaint, and Maher denies that it (iii) failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher did not know of a claim. *See* B. Maher Dep., Dkt. 08-03, 16:7-16:13 (April 6, 2011) (Maher did not know of, or consider, any claim against PANYNJ concerning the leases before 2007); *id.* at 206:18-207:3 (Apr. 6, 2011) (“if I had thought that there was [a] violation of the Shipping Act, I would have raised it then.”); S. Schley Dep., Dkt. 08-03, 75:20-77:8 (Mar. 24, 2011) (no knowledge of any claim concerning rates before 2007); R. Mosca, Dep., Dkt. 08-03, 86:9-17 (March 14, 2011) (no discussion of ever suing PANYNJ on account of the lease differences).

See Maher’s Response to Port Authority’s First Set of Interrogatories to Maher at Interrogatory No. 4 at 8. (Maher did not begin to learn that the lease differences were unduly preferential or prejudicial until “in the summer of 2007 [when] PANYNJ Deputy General Counsel Christopher Hartwyck asked Maher’s General Counsel Scott Schley for a release from Maher’s rent disparity claim which Maher declined to give.”); *see also*, S. Schley Dep., Dkt. 08-03, 75:17-75:19 (Mar. 24, 2011) (up to that point, Maher had “no reason to doubt what the Port

[REDACTED]

Authority had indicated to us back in '99 until 2007" regarding conversations with Lillian Borrone concerning the Port Guarantee justification for the rent difference.).

[REDACTED]

See also M. Oppenheimer Dep., Dkt. 07-01, 52:4-52:21 (May 20, 2008) (Maher learned for the first time on May 20, 2008 that APM *does not control and does not direct* carrier cargo, nor does the guarantor of the Port Guarantee, Maersk, Inc.:

Well, the port guaranty is for cargo for Maersk -- that Maersk, Inc., represents. Q Okay. So how does APM Terminals ensure that it satisfies the requirement in Section 42 with respect to a port guaranty? A APM Terminals, how do they ... They have the liability for the guaranties. But how they insure it, they do not have

[REDACTED]

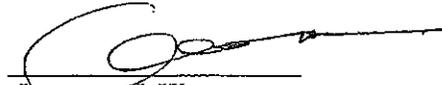
control of the cargo. Q Okay. So how -- how do they make sure that Maersk, the ocean carrier, provides the requisite number of containers per year that is provided for in this port guaranty? A I don't think there is. Q Okay. So is there a contract? A Is there a contract with volume commitment from ... No.).

See, e.g., id. at 53:8-54:1 (The only contract APM has with respect to carrier cargo is a marine terminal services agreement to unload cargo, but unlike Maher's marine terminal services contract with carriers that contain volume guarantees, neither APM nor Maersk, Inc. have any volume commitment for the carriers cargo.). *See also* Shiftan Dep., Dkt. 216:8-216:24 (April 1, 2011) (PANYNJ is plainly treating the Port Guarantee as a special carrier only "rent guarantee" that does not require control, cargo, or delivery of cargo); *see* L. Borrone Dep. 08-03, 99:15-100:21 (Mar. 17, 2011) (originally represented to Maher as justifying the facially-different lease terms, discovery has revealed that PANYNJ applied and continues to apply the "Port Guarantee" to mask *unduly different* terms amounting to a carrier preference not made available to Maher:

"Q. Well, I mean, if the only consequence of not meeting the port guarantee, Ms. Borrone, is that your rent goes up, I don't understand why Maher couldn't pay an increase in rent. A. Because it was structured on the basis of the commitment by Maersk/Sea-Land to bring their own cargo, not somebody else's. Maher didn't have cargo to bring. Maher would not and could not commit its carriers who it was servicing to a port guarantee. Q. But Maher could commit to pay higher rent if it didn't meet the commitment, couldn't it, and that's all APM has done. A. But that wasn't what Maher negotiated with us.").

Dated: April 15, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2011, a copy of the foregoing was served by e-mail and U.S. Mail on the following:

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Holly E. Louiseu
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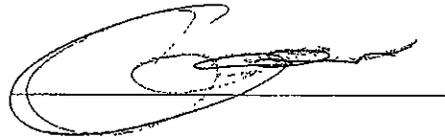
A handwritten signature in black ink, appearing to be 'Richard A. Rothman', written over a horizontal line.

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EXHIBIT 1

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

ALSO PRESENT:

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0003

RYAN McMULLEN
Legal Video Specialist

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0004

M.B. Maher
THE VIDEOGRAPHER: This is the video operator speaking, Ryan McMullen, of Merrill Legal Solutions, 225 Varick Street, New York, New York 10014. Today is Wednesday, April 6th, 2011. The time is 9:30 a.m.
We are at the offices of Essex Equity, 30 South Orange Avenue, Livingston, New Jersey, to take the videotape deposition of Brian Maher, in the matter of Maher Terminals, LLC versus The Port Authority of New York and New Jersey. This is being heard before the Federal Maritime Commission.
Will counsel please introduce themselves for the record.
MR. ISAKOFF: Peter Isakoff and Cheri Veit of Weil Gotshal for The Port Authority.
MR. KIERN: Larry Kiern with Winston & Strawn, LLP, for Maher Terminals, LLC and the deponent.
THE VIDEOGRAPHER: Will the court reporter, Jamie Moskowitz of Merrill Legal Solutions, please swear in the witness.

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M.B. Maher
MICHAEL BRIAN MAHER, after having been first duly sworn, was examined and testified as follows:
* * *
EXAMINATION BY
MR. ISAKOFF:
Q Please state your full name for the record.
A Michael Brian Maher.
Q And have you ever testified in a deposition before?
A Yes.
Q How many times?
A I really can't remember. Six, seven, eight, ten -- I don't really even know -- over the last 40 years or so.
Q Any testimony in a case before the Federal Maritime Commission that you can recall?
A Well, I testified in the -- in a matter that was related to this, I believe, a couple of years ago. I never was before the Federal Maritime Commission, no.
Q Why do you say it's related?
A It was a case between Maher and The

0005

1 M.B. Maher
2 Port Authority.
3 Q All right. Were there any other
4 parties, to your knowledge?
5 A Maersk.
6 Q And are you familiar with the ground
7 rules of depositions?
8 A Yes.
9 Q Okay. Just generally, I'm entitled to
10 your best recollection. If you don't understand a
11 question; please let me know. In terms of
12 consultations with counsel, that's not permitted
13 when a question is pending, except on matters of
14 privilege.
15 If you want to break, just let me
16 know. And when your counsel objects, unless he
17 instructs you not to answer on grounds of privilege,
18 you're still to answer the question. Do you
19 understand all that?
20 A Yes.
21 Q Okay. Are you represented by counsel?
22 A Yes.
23 Q Who?
24 A Mr. Kiern.
25 Q what, if any -- have you ever been a

0006

1 M.B. Maher
2 party to a lawsuit before personally?
3 A I think so. I think my neighbor filed
4 a lawsuit to try to prevent me from creating a minor
5 subdivision.
6 Q Any others?
7 A Not that I can recall.
8 Q Did you file some sort of claim or
9 lawsuit against Lehman in connection with auction
10 rate securities?
11 A Yes, I'm sorry, yes.
12 Q Can you tell me a little bit about
13 what that case was about?
14 A The case has to do with securities
15 that were invested by Lehman that were improper.
16 Q Is that suit still pending?
17 A Yes.
18 Q So, there's been no resolution by
19 return of any funds or anything like that?
20 A No.
21 Q How much are you seeking?
22 A I don't think that's relevant here.
23 Q How much are you seeking?
24 A I don't think it's relevant.
25 MR. ISAKOFF: We'll have to mark the

0007

1 M.B. Maher
2 transcript.
3 BY MR. ISAKOFF:
4 Q Are you refusing to answer the
5 question?
6 A I'm saying, I don't think it's
7 relevant. If I'm ordered to answer the question, I
8 guess I will. But I don't think it's relevant in
9 this case. It's got nothing to do with it.
10 Q what, if anything, have you done to

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18 before, there was an action that The Port Authority
19 brought against Maher, which I think has been
20 dismissed or has been withdrawn.
21 And I'm aware that this action,
22 somehow, came from -- came from that action. And
23 I'm really not sure when this action was actually
24 filed, so I can't -- I guess I can't answer the
25 question.

0015

1 M.B. Maher
2 Q All right.
3 When for the first time did you learn
4 that such an action was contemplated?
5 A When we retained -- when Maher
6 retained counsel in 2007 to defend itself against
7 The Port Authority action, Mr. Kiern was the -- was
8 the counsel that we retained, and I was still there
9 at that time; and at that time he raised the subject
10 that he thought that Maher had a claim against The
11 Port Authority under the Shipping Act.
12 Q what did he tell you?
13 MR. KIERN: I'm going to instruct the
14 witness not to answer. You shouldn't testify
15 about attorney/client privileged
16 communications.
17 BY MR. ISAKOFF:
18 Q All right. Do you recall when that
19 was?
20 A I believe that was in late
21 summer/early fall of 2007.
22 Q Did you have a conversation with your
23 brother, Basil Maher, with respect to that topic?
24 A I really don't recall. I don't
25 recall.

0016

1 M.B. Maher
2 Q Do you recall learning that your
3 brother, Basil Maher, paid a visit on
4 Admiral Larrabee to raise the subject of a possible
5 rent terms discrimination claim?
6 A I don't -- I don't recall.
7 Q Had you ever considered a claim
8 against The Port Authority under the Shipping Act
9 based on lease terms discrimination arising out of
10 your October 1, 2000 lease, prior to the time that
11 Mr. Kiern raised this issue with you?
12 MR. KIERN: Objection. Go ahead.
13 THE WITNESS: I did not, no.
14 BY MR. ISAKOFF:
15 Q Had you ever -- were you aware that
16 anybody at Maher Terminals had ever made a
17 comparison of the Maher Terminals lease and the
18 lease for the property currently run by APM
19 Terminals?
20 A Yes.
21 Q when?
22 A I don't remember exactly, but
23 obviously the discrepancy between the Maher lease
24 and the Maersk lease was something we were aware of,
25 and I'm sure that at some point in time we asked

0017

1 M.B. Maher
2 somebody to quantify it.

040611maher.txt

3 Q what was the reason for doing that?
4 A To understand what the competitive
5 market was.
6 Q what did you conclude?
7 A Well, we concluded what we already
8 knew, which was that the Maersk/APM lease was
9 considerably more favorable to them than the Maher
10 lease was to Maher. But we already knew that.
11 Q when did you first know that?
12 A We knew that before we signed the
13 lease.
14 Q what is it that you knew before you
15 signed the lease?
16 A We knew that Maersk had a more -- had
17 more favorable terms in their lease than we did.
18 Q How did you know that?
19 A Lillian Borrone told us.
20 Q what terms were more favorable, in
21 your view?
22 A Well, the base rent. Their base rent
23 was \$19,000 an acre, and our base rent was I think
24 38 or \$39,000 an acre.
25 Q Anything else?

0018

1 M.B. Maher
2 A I think there were -- I think they had
3 more favorable escalation clauses than we did. I
4 can't remember the other specifics, but, you know,
5 those are pretty big numbers right there.
6 Q what do you mean by "more favorable
7 escalation clauses"?
8 A I think we had -- we had rent
9 escalation clauses, and my recollection is that they
10 had -- that their escalation -- their base rent
11 either didn't escalate or it escalated at a much
12 smaller -- at a much slower rate than ours.
13 Q And when did you learn whatever it was
14 that you did learn about -- on the subject of
15 escalation of the -- I'll call it Maersk rent,
16 because that's the term you're using?
17 A It was some time -- I can't remember
18 the specifics, some time in that time period,
19 2000/2001, somewheres in there.
20 Q Is it before or after you signed your
21 lease?
22 A Oh, I think that would be after. I
23 knew that there were -- I knew that there were rent
24 differences prior to signing the lease. I didn't
25 know all the specifics.

0019

1 M.B. Maher
2 Q Was the Maersk lease available?
3 A Not prior -- no, not prior to our
4 signing the lease, no.
5 Q You didn't know that it had been
6 publicly filed with the Federal Maritime Commission
7 the prior August?
8 MR. KIERN: Objection. Go ahead.
9 THE WITNESS: No.
10 BY MR. ISAKOFF:
11 Q when, if ever, did you learn of the
12 Federal Maritime Commission case in which Ceres
13 Terminals was a party?

24 A I believe there is, yes.
25 Q Now, this document says, "Maher

0165

1 M.B. Maher
2 basically wants the details on the levels and
3 penalties. Brian did note that if only
4 Mearsk/SeaLand get help from the State of NJ, then
5 the guarantee should be very different between the
6 agreements."

7 Did you make such a statement?
8 A I don't know what that sentence means.
9 Q Were you ever asked to give a port
10 guarantee?

11 A No.
12 Q Why not?
13 MR. KIERN: Objection.
14 THE WITNESS: My interpretation of a
15 port guarantee is cargo controlled by a -- by
16 an individual entity that they can direct to
17 the port. We were not in a position to do
18 that.

19 BY MR. ISAKOFF:
20 Q Did you suggest that you could somehow
21 provide a port guarantee equivalent to what was in
22 the Maersk lease?

23 MR. KIERN: Objection. Go ahead.
24 THE WITNESS: Well, I didn't know what
25 the port guarantee was in the Maersk lease.

0166

1 M.B. Maher
2 So, no, I didn't. As it turns out, we could
3 have provided such a guarantee, because it was
4 so low.

5 BY MR. ISAKOFF:
6 Q Which carrier could you have
7 controlled?

8 A We wouldn't have had to control a
9 carrier. We could certainly have guaranteed the
10 350,000 boxes that was in the Maersk lease.

11 Q How many boxes did you guarantee?
12 A I think we guaranteed 600-and-some-odd
13 thousand, and eventually gets up to 900,000.

14 Q And your terminal is larger than the
15 Maersk terminal, correct?

16 A Yes.
17 Q And is there any difference between
18 the boxes under a port guarantee and -- under the
19 port guarantee in the Maersk lease and the terminal
20 guarantee in your lease, so far as you know?

21 MR. KIERN: Objection. Go ahead.
22 THE WITNESS: I don't understand the
23 question. Ask me again.

24 BY MR. ISAKOFF:
25 Q Is there any difference in qualifying

0167

1 M.B. Maher
2 containers under the Maersk port guarantee and the
3 terminal guarantee in your lease, so far as you
4 know?

5 MR. KIERN: Objection. Go ahead.
6 THE WITNESS: Well, I assume, and it's
7 been a long time since I've touched down on
8 this subject, but I assume that the Maersk port

22 same treatment.
23 Q Okay. And when you found out that
24 Maersk was going to be paying \$19,000 per acre, per
25 year, non-escalating, did you specifically ask to
0199

1 M.B. Maher
2 obtain those rates?
3 MR. KIERN: Objection, asked and
4 answered. Go ahead.
5 THE WITNESS: I believe so, yes.
6 BY MR. ISAKOFF:
7 Q And who did you ask?
8 A It would have been Lillian.
9 Q Okay. And did you ask anybody besides
10 Lillian?
11 A No.
12 Q What reason, if any, did she give you
13 for the rates that she agreed to with you?
14 A Her reason was that Maersk provided a
15 port guarantee, and that they -- Maersk was going to
16 make larger investments in their facility than we
17 were.
18 Q And do you know whether they made
19 larger investments on a larger per acre basis than
20 you did?
21 MR. KIERN: Objection. Go ahead.
22 THE WITNESS: I don't have -- I don't
23 really have any proof, but I don't believe they
24 made anything close to the investments that
25 Maher made.

0200

1 M.B. Maher
2 BY MR. ISAKOFF:
3 Q Okay. And in terms of the port
4 guarantee, did you direct that there be any effort
5 made to find out what the terms of that guarantee
6 were?
7 MR. KIERN: Objection. Go ahead.
8 THE WITNESS: I do not believe that we
9 knew the terms of the port guarantee prior to
10 the signing of the lease.
11 BY MR. ISAKOFF:
12 Q Is it your belief that no effort was
13 made to obtain a copy of the Maersk lease after it
14 was publicly filed with the Federal Maritime
15 Commission in August of 2000?
16 MR. KIERN: Objection. Go ahead.
17 Asked and answered.
18 THE WITNESS: I don't recall any
19 effort being made to -- I don't recall that we
20 knew it, that it was filed, and if we knew it,
21 I don't recall any effort being made to obtain
22 it.
23 BY MR. ISAKOFF:
24 Q Okay. Why did you accept the lease
25 that you signed?

0201

1 M.B. Maher
2 MR. KIERN: Objection, asked and
3 answered. He's testified about this in the
4 first deposition --
5 MR. ISAKOFF: Are you done?
6 MR. KIERN: -- Peter. I just want to

040611maher.txt

18 with the evaluation of you as a credit risk as
19 compared with Maersk, backed by the Maersk, Inc.
20 guarantee?

21 MR. KIERN: Objection. Go ahead.
22 THE WITNESS: I have no idea. I have
23 no idea what the -- what the difference was.

24 BY MR. ISAKOFF:
25 Q If you'll turn to the second page of

0204

1 M.B. Maher
2 the exhibit, under the heading Variable Rent, in the
3 last sentence of item 3 under that says, "These
4 volume levels are nearly identical on a per acre
5 basis to the levels in the Maher lease."

6 MR. KIERN: Where is that again,
7 please?

8 MR. ISAKOFF: Under Variable Rent,
9 paragraph 3, last sentence.

10 BY MR. ISAKOFF:

11 Q Was that a surprise to you?

12 MR. KIERN: Objection. Go ahead.
13 THE WITNESS: I don't recall if it was
14 a surprise to me or not.

15 BY MR. ISAKOFF:

16 Q Okay. Do you have any reason to
17 believe that Mr. Davis was wrong in his analysis
18 that the volume levels were nearly identical on a
19 per acre basis?

20 MR. KIERN: Objection.
21 THE WITNESS: I have no reason to
22 believe he was wrong, no.

23 BY MR. ISAKOFF:

24 Q And if you'll look under paragraph 3
25 of Volume Guarantees, after it recites the numbers,

0205

1 M.B. Maher
2 it says, "These guarantee levels are similar on a
3 per acre basis to the volume guarantees in the Maher
4 lease."

5 Do you have any reason to believe that
6 Mr. Davis was inaccurate in reaching that
7 conclusion?

8 MR. KIERN: Objection. Go ahead.
9 THE WITNESS: I have no reason to
10 believe he was inaccurate, no.

11 BY MR. ISAKOFF:

12 Q Do you know why this analysis was
13 performed by Mr. Davis at this time, in August 2001?

14 MR. KIERN: Objection.

15 THE WITNESS: I think that we had --
16 at some point I think we were aware of the fact
17 that the lease had been filed, and we got a
18 copy of it and we did the analysis.

19 BY MR. ISAKOFF:

20 Q Is there anything that you have found
21 out about the Maersk lease and any differences
22 between the Maersk lease and yours between
23 August 1, 2001 and the present?

24 MR. KIERN: Objection.

25 THE WITNESS: I'm sorry, I don't

0206

1 M.B. Maher

2 understand the question. Please ask it again.

3 BY MR. ISAKOFF:
4 Q Is there anything that you have
5 learned about the Maersk lease or the differences
6 between the Maersk lease and the Maher lease since
7 August 1, 2001?
8 MR. KIERN: Objection. Go ahead.
9 THE WITNESS: I don't believe so, no.
10 BY MR. ISAKOFF:
11 Q What reason, if any, did you have for
12 not seeking counsel in and around August 2001, or at
13 any time prior to 2007, to evaluate whether or not
14 you had a viable Shipping Act claim as a consequence
15 of any differences between the Maher lease and the
16 Maersk lease?
17 MR. KIERN: Objection. Go ahead.
18 THE WITNESS: I knew that there were
19 differences in the Maher and Maersk lease
20 before I signed the Maher lease. And if I had
21 thought that there was -- that the lease --
22 that the Maersk lease was in violation of the
23 Shipping Act, I would have raised it then. I
24 had no reason to think that the Maersk lease
25 was in violation of the Shipping Act, so why
0207
1 M.B. Maher
2 would I go -- I mean, I just didn't -- it
3 didn't even cross my mind.
4 (Whereupon, Exhibit Dkt. 08-03 - 209
5 was received and marked for Identification.)
6 BY MR. ISAKOFF:
7 Q We've marked as Exhibit 209 a document
8 Bates stamped 08PA00329438 through 449, which, after
9 the first page or so, is an exchange of letters
10 between Maher and The Port Authority in the fall of
11 2006.
12 Have I accurately characterized the
13 documents?
14 A Yes.
15 Q Were you aware of Basil Maher's letter
16 to Dennis Lombardi on October 12, 2006?
17 A I vaguely -- I vaguely recall that we
18 needed -- yes, we needed to -- we were making some
19 changes in the entity structure and we needed to
20 either inform The Port Authority or get their
21 agreement, I'm not sure which. But yes, I'm aware
22 of it.
23 Q What was the nature of the change in
24 the structure?
25 A I think we -- I think we changed from
0208
1 M.B. Maher
2 a Sub S corporation to an LLC.
3 Q Was there any change in the control of
4 the entity?
5 A No.
6 Q Do you know how much you sold the Port
7 Elizabeth portion of your business for to RREEF?
8 MR. KIERN: Objection. Go ahead.
9 THE WITNESS: About \$2 billion.
10 BY MR. ISAKOFF:
11 Q And do you know what portion of that
12 was attributable to Port Elizabeth versus the Prince
13 Rupert facility?

EXHIBIT 2

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

SCOTT SCHLEY
BEFORE THE
FEDERAL MARITIME COMMISSION

-----x

MAHER TERMINALS, LLC,	:
	:
	:
Complainant,	:
	:
vs. Docket No. 08-03	:
	:
THE PORT AUTHORITY OF NEW YORK	:
AND NEW JERSEY,	:
	:
Respondent.	:

-----x

March 24, 2011

*** CONFIDENTIAL ***

Videotaped deposition of SCOTT H. SCHLEY,
held at the offices of Essex Equity, 70 South Orange
Avenue, Livingston, New Jersey, commencing at 9:40
a.m. before Jamie I. Moskowitz, a Registered
Professional Reporter and Notary Public.

* * *

Page 2	Page 4
<p>1 APPEARANCES</p> <p>2 WINSTON & STRAWN LLP</p> <p>3 BY: LAWRENCE I. KIERN, ESQUIRE</p> <p>4 1700 K Street, N.W.</p> <p>5 Washington, DC 20006-3817</p> <p>6 202.282.5000</p> <p>7 lkiern@winston.com</p> <p>8 Counsel for Claimant</p> <p>9 WEIL, GOTSHAL & MANGES LLP</p> <p>10 BY: HOLLY E. LOISEAU, ESQUIRE</p> <p>11 BY: CONSUELO KENDALL, ESQUIRE</p> <p>12 767 Fifth Avenue</p> <p>13 New York, New York 10153</p> <p>14 212.310.8495</p> <p>15 holly.loiseau@weil.com</p> <p>16 consuelo.kendall@weil.com</p> <p>17 Counsel for Respondent</p> <p>18 ALSO PRESENT:</p> <p>19 RYAN McMULLEN</p> <p>20 Legal Video Specialist</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 S. Schley</p> <p>2 * * *</p> <p>3 SCOTT H. SCHLEY, after having affirmed,</p> <p>4 was examined and testified as follows:</p> <p>5 * * *</p> <p>6 THE WITNESS: I won't swear, but I</p> <p>7 will affirm.</p> <p>8 EXAMINATION BY</p> <p>9 MS. LOISEAU:</p> <p>10 Q Good morning, Mr. Schley.</p> <p>11 A Good morning.</p> <p>12 Q My name is Holly Loiseau, and my</p> <p>13 colleague, Consuelo Kendall and I represent The Port</p> <p>14 Authority of New York and New Jersey in the action</p> <p>15 before the Federal Maritime Commission entitled,</p> <p>16 Maher Terminals, LLC versus The Port Authority of</p> <p>17 New York and New Jersey. And it is Docket Number</p> <p>18 08-03.</p> <p>19 We are here to take your deposition</p> <p>20 today, and we thank you for your time today in</p> <p>21 appearing for the deposition.</p> <p>22 I want to pass to you what has been</p> <p>23 previously marked as Exhibit 120 in the deposition</p> <p>24 of Mr. Joseph Curto. And I would just ask you to</p> <p>25 review it.</p>
Page 3	Page 5
<p>1 S. Schley</p> <p>2 THE VIDEOGRAPHER: This is the video</p> <p>3 operator speaking, Ryan McMullen, of Merrill</p> <p>4 Legal Solutions, 225 Varick Street, New York,</p> <p>5 New York 10014. Today is Thursday,</p> <p>6 March 24th, 2011. The time is 9:34 a.m.</p> <p>7 We're at the offices of Essex Equity,</p> <p>8 70 South Orange Avenue, Livingston, New Jersey,</p> <p>9 to take the videotaped deposition of Scott</p> <p>10 Schley, in the matter of Maher Terminals, LLC</p> <p>11 versus The Port Authority of New York and</p> <p>12 New Jersey. This is being heard before the</p> <p>13 Federal Maritime Commission.</p> <p>14 Will counsel please introduce</p> <p>15 themselves for the record.</p> <p>16 MS. LOISEAU: Holly Loiseau and</p> <p>17 Consuelo Kendall with Weil Gotshal & Manges,</p> <p>18 for The Port Authority of New York and</p> <p>19 New Jersey.</p> <p>20 MR. KIERN: Lawrence Kiern with</p> <p>21 Winston & Strawn, LLP, for Maher Terminals, LLC</p> <p>22 and for the deponent.</p> <p>23 THE VIDEOGRAPHER: And will the court</p> <p>24 reporter, Jamie Moskowitz of Merrill Legal</p> <p>25 Solutions, please swear in the witness</p>	<p>1 S. Schley</p> <p>2 MR. KIERN: Do you have a copy handy I</p> <p>3 could just quickly see?</p> <p>4 MS. LOISEAU: Sure.</p> <p>5 THE WITNESS: Okay, yes.</p> <p>6 BY MS. LOISEAU:</p> <p>7 Q Have you had a chance to review</p> <p>8 Exhibit 120?</p> <p>9 A I have looked at it, yes.</p> <p>10 Q Have you seen this document before?</p> <p>11 A No.</p> <p>12 Q Okay. Can you note on the first page</p> <p>13 that this is a Notice of Deposition and your</p> <p>14 deposition --</p> <p>15 A I'm not listed on this document.</p> <p>16 Q You're not listed on this document.</p> <p>17 Let me hand you a different Notice of Deposition.</p> <p>18 MS. LOISEAU: I will ask that the</p> <p>19 court reporter mark this next exhibit in order,</p> <p>20 and I believe it will be Exhibit Number 130.</p> <p>21 (Whereupon, Exhibit Dkt. 08-03 - 130</p> <p>22 was received and marked for identification.)</p> <p>23 BY MS. LOISEAU:</p> <p>24 Q Mr. Schley, you've been handed what</p> <p>25 has now been marked as Exhibit 130. And could you</p>

Page 6	Page 8
<p>1 S. Schley 2 take a moment to review that document and let me 3 know when you've had a chance to review it? 4 A Okay. 5 Q Have you seen this document before? 6 A I believe I have. 7 Q Okay. And do you see that it's a 8 notice of depositions -- 9 A Yes. 10 Q -- stated on the first page? 11 And do you see that your deposition is 12 noticed for today, March 24th? 13 A Yes. 14 Q Okay. And are you appearing here 15 today pursuant to this notice of deposition? 16 A Yes. 17 Q And attached to the notice of 18 deposition there is a request or there is a request 19 made for documents. 20 Do you have any documents with you 21 today in response to this document request? 22 A No, I do not. 23 Q Thank you. 24 Mr. Schley, are you an attorney? 25 A Yes, I am.</p>	<p>1 S. Schley 2 A I met with Mr. Kiern on I believe two 3 occasions. 4 Q And when did you meet with Mr. Kiern? 5 A Several weeks ago, I don't remember 6 the exact date, and this morning. 7 Q And several weeks ago, how long did 8 you meet with Mr. Kiern? 9 A I want to say two hours, maybe three. 10 I don't remember exactly. 11 Q And today, how long did you meet with 12 Mr. Kiern? 13 A About 40 minutes. 14 Q And during your preparation with 15 Mr. Kiern, did you review any documents? 16 A The first meeting I did not, the 17 meeting today I did. 18 Q Approximately how many documents did 19 you review? 20 A Three or four. I think that was it. 21 Q And other than meeting with Mr. Kiern 22 a few weeks ago and today, have you done anything 23 else to prepare for this deposition? 24 A No. 25 Q And have you reviewed any documents</p>
Page 7	Page 9
<p>1 S. Schley 2 Q Are you licensed to practice in the 3 state of New Jersey? 4 A Yes, I am. 5 Q Are you licensed to practice in any 6 other state? 7 A Yes, I'm licensed to practice in 8 Virginia. That's an inactive or -- I guess it's 9 inactive. So, if I wanted to actually practice in 10 Virginia, I would have to become active. I'm also 11 licensed in Florida and Pennsylvania. 12 Q Thank you. 13 And are you familiar with deposition 14 procedure? 15 A This is the first time I've ever been 16 deposed, but I'm generally familiar. 17 Q Have you ever taken a deposition? 18 A No. 19 Q And are you currently represented by 20 counsel? 21 A Yes, I am. 22 Q And is Mr. Kiern your counsel? 23 A Yes, he is. 24 Q Did you do anything to prepare for 25 this deposition today?</p>	<p>1 S. Schley 2 outside of your discussions with Mr. Kiern? 3 A No. 4 Q Do you know what this lawsuit, and I'm 5 referring to the one filed by Maher Terminals, LLC 6 against The Port Authority of New York and 7 New Jersey, is about? 8 A I have general knowledge of what it's 9 about. 10 Q What's your general knowledge about 11 it? 12 A That it's an action under the Shipping 13 Act by Maher against The Port Authority for 14 violation of the Shipping Act relating to the lease 15 disparity or the amount of rent that Maher is 16 paying. 17 Q And just because you haven't been 18 deposed before and you haven't taken a deposition 19 before, I'm just going to go through a couple of the 20 ground rules and procedure that we'll go through. 21 I will ask you questions, and if 22 you -- and please allow me to finish my question 23 before you answer, which will make it easier for the 24 court reporter to record what we are saying. 25 If my question -- if you do not</p>

Page 66	Page 68
<p>1 S. Schley 2 again. Thank you. 3 BY MS. LOISEAU: 4 Q Were you aware that one of the terms 5 that Maersk had agreed to in its lease was a port 6 guarantee? 7 MR. KIERN: Objection. Time? 8 MS. LOISEAU: I'm sorry. Let me 9 restate that. 10 BY MS. LOISEAU: 11 Q In 2000, prior to Maher signing its 12 lease -- 13 A Yes. 14 Q -- was -- were you aware that Maersk 15 had agreed to a port guarantee in its lease? 16 A Generally, yes. 17 Q And how were you aware that there was 18 a port guarantee agreed to in the Maersk lease? 19 A There was a meeting, a significant 20 meeting with The Port Authority in September of 21 2000 -- September of 1999, where the senior people 22 from Maher met with some of the senior people from 23 The Port Authority about our lease and the -- how it 24 stacked up to the Maersk lease. 25 And, specifically, at that meeting, we</p>	<p>1 S. Schley 2 information regarding the port guarantee; is that 3 correct? 4 A Yeah. The two -- the two rationales 5 that she really gave for that were the fact that 6 they were putting in substantially more improvements 7 and that they were having the port guarantee. 8 Q And this meeting occurred in September 9 of 1999; is that correct? 10 A Correct. 11 Q And what else did Ms. Borrone say 12 about the port guarantee? Did she give -- what else 13 did she say about the port guarantee? 14 A I don't recall that there had been -- 15 I don't recall. As I understood it, and as I 16 believe the Maher people understood it, that this 17 was going to be a requirement, that Maersk bring its 18 cargo to the port. That was the whole issue, that 19 they would bring cargo, that they carried on their 20 own bottoms, their own ships, to that port. 21 Q And Ms. Borrone told you and others at 22 the meeting this information? 23 A Yes. 24 Q And did Ms. Borrone give any details 25 regarding the number of containers that were being</p>
Page 67	Page 69
<p>1 S. Schley 2 were told that our rates were not the same as the 3 Maersk lease. but that there were specific reasons 4 for that. 5 And the two reasons, as I recall, they 6 gave were -- one was the port -- that Maersk was 7 making significantly greater improvements to the 8 facility which would have justified that, and the 9 other reason that they gave was that the port -- 10 that Maersk was giving a port guarantee, something 11 that we could not give to -- and that because of 12 those reasons, the -- our rents would not be exactly 13 the same 14 However, it was represented to us at 15 that meeting that when the leases were taken as a 16 whole over a 30-year term, that the total economic 17 impact of the lease between the Maersk lease and 18 Maher were virtually identical. And I think that 19 Lillian said that they were within pennies. 20 Q So, is it your representation that 21 Lillian Borrone from The Port Authority was telling 22 you this information that you just testified to? 23 A Oh, yes, she was the one that told us, 24 yes. 25 Q And that information included</p>	<p>1 S. Schley 2 considered for the port guarantee? 3 A I don't recall. I don't recall. 4 Q What was the response from Maher to 5 Ms. Borrone's information regarding the differences 6 between the Maersk lease and the Maher lease? 7 A I think we were a little skeptical 8 that, in fact, they were going to be as equal as she 9 was saying. But that was -- that was pretty much 10 our response. I think that we were supposed to get 11 an analysis from The Port Authority. I don't recall 12 if we ever got one or not. 13 Q Did anyone at Maher volunteer that 14 Maher could satisfy a port guarantee? 15 MR. KIERN: Objection. Go ahead. 16 BY MS. LOISEAU: 17 Q At this meeting? 18 MR. KIERN: Objection. Go ahead. 19 THE WITNESS: I don't recall that 20 Maher was asked if we could or could not. I 21 don't think that was ever asked of us at the 22 meeting. 23 BY MS. LOISEAU: 24 Q But my question was, did anyone from 25 Maher volunteer that Maher could meet the port</p>

Page 74	Page 76
<p>1 S. Schley 2 release pretty much that the language had been for 3 P&O. And, quite frankly, that may have been the end 4 of it, except The Port Authority sued us within a 5 couple of weeks of the deal closing. And, of 6 course, when you're sued by someone, one of the 7 things that you look at is, what are the potential 8 counterclaims or cross-claims that you may have in a 9 lawsuit. 10 And so, I started, you know -- I 11 actually really started looking into it -- you know, 12 I don't remember the exact date, but those two 13 events happened within a month, six weeks of each 14 other, and that was really what caused me to realize 15 that there may be an issue. 16 Q And what did you do to try to 17 determine whether there was a justification or not 18 for the differential in rent? 19 A Well, we were sued, so we hired 20 counsel, and it was something that I brought to the 21 attention of counsel. 22 Q And was this the first time that you, 23 personally, realized that there was a differential 24 in rent between the APM -- I'm sorry, the Maersk 25 lease and the Maher lease?</p>	<p>1 S. Schley 2 finance group had done, I don't know. But no one 3 ever, you know, came to me and said, gee, Scott this 4 is a real issue here; is there anything we can do 5 about it. 6 You know, it was never brought to my 7 attention as a lawyer. And I have no idea if other 8 people in the company had done an analysis or not. 9 MS. LOISEAU: I would like to have the 10 court reporter mark the next exhibit in order. 11 Actually, I'm sorry, this has already 12 been -- 13 MR. KIERN: Yes, it's been marked. 14 MS. LOISEAU: -- marked as Exhibit 9. 15 BY MS. LOISEAU: 16 Q Mr. Schley, I have banded you what's 17 previously marked as Exhibit 9. It's a memorandum 18 from M. Davis to R.P. Mosca, dated August 1st, 2001, 19 and it's Bates numbered MTS220 through 5224. 20 A Uh-huh. 21 MR. KIERN: Holly, before you go into 22 the exam, can I just note something on the 23 record from Mr. Mosca's authentication of the 24 exhibit? He testified -- I'll proffer that he 25 testified that the last two pages bear a</p>
Page 75	Page 77
<p>1 S. Schley 2 A I don't know if I would say it was the 3 first time I became aware that there was a 4 differential. I think I had been aware, you know, 5 in the past -- I mean, we did have the lease 6 starting from, like, 2004. But, you know, it had 7 always been -- I always went back to the 8 conversations that we had had with Lillian Borrone 9 back in 2009, where she said -- or 1999, excuse me, 10 where she had indicated that the leases, as a whole, 11 were substantially the same, taken as a whole. 12 And, again, I didn't know what their 13 actual construction commitment was, how much they 14 had put in. It's actually a rather complex, you 15 know, calculation, to determine whether or not they 16 were the same. 17 But I had no reason to doubt what The 18 Port Authority had indicated to us back in '99 until 19 2007. 20 Q And during the period from 2000, when 21 the Maher lease was signed, to this time in 2007 22 that you just testified about, did Maher conduct any 23 analyses of the differences between the Maher 24 terminal lease and the Maersk lease? 25 A Not a legal review. Whether the</p>	<p>1 S. Schley 2 different date in the bottom right-hand corner 3 and were likely not part of the first three 4 pages. But that's all. 5 MS LOISEAU: Understood. Thank you. 6 BY MS. LOISEAU: 7 Q Have you seen this document before? 8 A I don't believe so. 9 Q And do you recognize the person who 10 states it's from, M. Davis? Do you know who that 11 is? 12 A Yes, Michael Davis. 13 Q And where did Mr. Davis work? 14 A He worked for Maher. He was a 15 subordinate to Randall Mosca. 16 Q And is that R.P. Mosca who the 17 memorandum is to? 18 A Yes. 19 Q And Mr. Mosca's title was? 20 A 2001, he was the CFO by then. 21 Q Okay. And the subject line for this 22 memorandum is the Maersk lease; do you see that? 23 A Yes. 24 Q And it states, in the first line: "We 25 have completed a preliminary review of the</p>

EXHIBIT 3

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

20
21
22
23
24
25
0003

1 R. Mosca
2 THE VIDEOGRAPHER: Good morning.
3 We're now on the record. My name is Harris
4 Teran of Merrill Legal Solutions, 225 Varick
5 Street, New York, New York 10014. Today is
6 March 14th, 2011. The time is currently
7 9:37 a.m.
8 We're at the offices of Essex Equity,
9 70 South Orange Avenue, in Livingston,
10 New Jersey, to take the videotaped deposition
11 of Mr. Randy Mosca in the matter of Maher
12 Terminals, LLC v. The Port Authority of
13 New York and New Jersey, before the Federal
14 Maritime Commission, Docket Number 08-03.
15 Will counsel present please identify
16 themselves for the record.
17 MR. ISAKOFF: Peter Isakoff and Alex
18 Levine of Weil Gotshal & Manges, LLP for the
19 Port Authority.
20 MR. KIERN: Lawrence Kiern for Winston
21 & Strawn, LLP for the deponent and Maher
22 Terminals.
23 THE VIDEOGRAPHER: Our court reporter
24 is Jamie Moskowitz.
25 Ms. Court Reporter, would you please

0004

1 R. Mosca
2 swear in the witness.
3 * * *
4 RANDALL P. MOSCA, after having been
5 first duly sworn, was examined and testified as
6 follows:
7 * * *

8 EXAMINATION BY
9 MR. ISAKOFF:
10 Q State your full name for the record.
11 A Randall P. Mosca.
12 Q Have you ever testified at a
13 deposition, other than in the 0701 case before the
14 Federal Maritime Commission?
15 A Yes.
16 Q On how many occasions?
17 A Approximately three or four times.
18 Q Were any of them connected with Maher
19 Terminals?
20 A I believe so, yes.
21 Q All of them or just some?
22 A Probably most of them.
23 Q What type of case have you testified
24 in, that is unrelated to Maher Terminals?
25 A I just don't recall right now.

0005

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

5 Q How long ago is it that you testified
6 unrelated to Maher Terminals?
7 A I don't recall if there was one, quite
8 honestly, prior to Maher Terminals.
9 Q Okay. And can you tell me the nature
10 of the cases that you testified in connection with
11 Maher Terminals, other than the prior case involving
12 APM Terminals and The Port Authority?
13 A I believe there was one discrimination
14 case going back many years.
15 Q Any others?
16 A None that comes to mind.
17 Q All right. Well, you are here under
18 oath. I'm entitled to your best recollection in
19 response to my questions. If you don't understand a
20 question, please let me know. If you want to take a
21 break, just let us know, and you will, of course, be
22 able to take one.
23 Try to do our best not to speak at the
24 same time so that the court reporter doesn't lose
25 her mind completely. And you may consult with

0006

1 R. Mosca
2 counsel, but if it's -- a question is pending, that
3 consultation can only be on matters of privilege.
4 Do you have any questions?
5 A No.
6 Q Are you represented by counsel here
7 today?
8 A Yes.
9 Q Who?
10 A Larry.
11 Q Now, we're testifying on the premises
12 of Essex Equity.
13 what connection, if any, do you have
14 to Essex Equity?
15 A I'm currently employed by Essex
16 Equity.
17 Q what is your position?
18 A I'm an independent consultant, working
19 for Essex Equity.
20 Q Is that a full-time position?
21 A No.
22 Q what is your deal with Essex Equity?
23 A I work for them on a per-hourly basis
24 on assignments that they deem they need my services
25 for.

0007

1 R. Mosca
2 Q Okay. And what's your hourly rate
3 currently?
4 A That's really personal information, so
5 I don't know why that would -- why I would answer
6 that.
7 Q Well, because I'm putting questions to
8 you and I'm entitled to your answers, and we have a
9 protective order in place, and should there be a
10 need for confidentiality, you and your counsel can
11 designate that portion of the transcript
12 confidential, in which case it can't be disclosed.
13 A I don't feel comfortable answering
14 that question.
15 MR. ISAKOFF: Larry, I'm entitled to

031411rmosca.txt

4 within dollars, or whatever she said at the time.
5 Q Is that something that came up at this
6 meeting at which you and Mr. Davis and one of the
7 Mahers was present?
8 A No.
9 Q Okay. My question to you is, what, if
10 anything, do you recall of the meeting at Maher
11 Terminals in which you, Mr. Davis and at least one
12 of the Maher brothers were present?
13 A We compared the two leases and looked
14 at the financial impact of our lease versus the
15 Maersk lease.
16 Q And what, if any, conclusions did you
17 reach?
18 A That it was not as we were told at
19 some time earlier, where the leases were similar.
20 Q Anything else?
21 A That our lease was significantly
22 higher than the Maersk lease.
23 Q Okay. Do you recall anything else?
24 A No.
25 Q Do you believe that the discussion

0086

1 R. Mosca
2 that you have just referred to took place within a
3 month of receiving Mr. Davis' memo dated
4 August 1, 2001?
5 MR. KIERN: Objection. Go ahead.
6 THE WITNESS: Probably. In all
7 likelihood.
8 BY MR. ISAKOFF:
9 Q Okay. Was there any discussion of
10 suing The Port Authority concerning any differences
11 between your lease and the APM Terminals lease?
12 A No.
13 Q Have you ever been present for any
14 discussion of the subject of suing The Port
15 Authority on account of any differences between the
16 Maher lease and the APM Terminals lease?
17 A No.
18 Q Do you know when the decision -- do
19 you understand that the current lawsuit that you're
20 testifying in is based upon the assertion that there
21 is an unlawful difference between the Maher lease
22 and the APM Terminals lease?
23 MR. KIERN: Objection. Go ahead.
24 THE WITNESS: After the sale of Maher
25 Terminals, there was some discussion about the

0087

1 R. Mosca
2 lease differential, but that's all it was, was
3 discussion. And I wasn't present at anything
4 beyond that.
5 BY MR. ISAKOFF:
6 Q Do you understand that the current
7 lawsuit in which you're testifying concerns claims
8 that the alleged differential between the Maher
9 lease and the APM Terminals lease is unlawful?
10 A Somewhat, yes.
11 Q Okay. Do you know when the decision
12 to bring this lawsuit was made?
13 A No, I don't.
14 Q Do you know whether the Maher brothers

031411rmosca.txt

15 were consulted with respect to --
16 MR. KIERN: Lower your arms so the
17 camera can see you.
18 THE WITNESS: Okay.
19 BY MR. ISAKOFF:
20 Q Do you know whether the Maher brothers
21 were part of any decision to bring this lawsuit?
22 A I don't know.
23 Q Have you ever discussed this lawsuit
24 with anybody?
25 A No. Other than counsel.

0088

1 R. Mosca
2 Q Yup.
3 Can you recall anything else of this
4 discussion in which you and Mr. Davis and one or
5 both of the Maher brothers was present, relating to
6 this August 1, 2001 memorandum, Exhibit 9?
7 MR. KIERN: Objection. Go ahead.
8 THE WITNESS: Could you be a little
9 bit more specific on the question?
10 BY MR. ISAKOFF:
11 Q I'm just trying to find out whether
12 you have any further recollection of the meeting in
13 which you were present, Mr. Davis and one or more of
14 the Maher brothers, concerning this August 1, 2001
15 memorandum that is Exhibit 9?
16 MR. KIERN: Objection. Go ahead.
17 THE WITNESS: I believe it was nothing
18 more than summarizing the two leases and a
19 comparison, and making sure everyone was aware
20 of the differential between the two leases.
21 BY MR. ISAKOFF:
22 Q Mr. Mosca, are you aware that there is
23 a provision for a port guarantee in the APM
24 Terminals lease?
25 A Yes.

0089

1 R. Mosca
2 Q What is your understanding of that
3 provision?
4 A We were told by Ms. Barrone that the
5 reason for the difference between our lease -- one
6 of the reasons for the difference between our lease
7 and the APM lease is the fact that APM had the
8 ability to guarantee volume via a port commitment.
9 Q And do you know what the -- what that
10 commitment is?
11 A Are you asking how much the commitment
12 is?
13 Q No.
14 Do you know -- do you have an idea of
15 how the commitment is structured?
16 A Not specifically.
17 Q Okay. Do you know what the
18 consequence is for any failure to meet that
19 commitment?
20 A Not specifically. I don't recall at
21 this time. I know it's been a while.
22 Q Okay. Does it refresh your
23 recollection for me to suggest to you that APM's
24 rent goes up if it fails to meet the port guarantee
25 figures for two consecutive years?

031411rmosca.txt

12 MR. ISAKOFF: Object to form.
13 BY MR. KIERN:
14 Q Tell us in your own words what they
15 told you.
16 A In discussion with The Port Authority,
17 it was explained to me that all new leases, starting
18 with October 1, 2000, would be required to have a
19 security deposit.
20 Q And did The Port Authority express any
21 explanation to you about its position insisting upon
22 a security deposit from Maher going forward?
23 A Yes.
24 Q And what did they say?
25 A They said because of the size of the

0139

1 R. Mosca
2 lease, they were concerned about the
3 creditworthiness going forward, and that's why they
4 have a security deposit in the lease.
5 Q Now, do you recall testifying earlier
6 today under questioning from Mr. Isakoff with
7 respect to negotiations with The Port Authority over
8 the base rent amount, \$39,750, and other financial
9 terms?
10 A Yes.
11 Q And did that negotiation over \$39,750
12 occur after The Port Authority told you that the
13 Maersk terms were off the table?
14 A That's correct.
15 MR. ISAKOFF: Object to form.

16 BY MR. KIERN:
17 Q Tell us what happened.
18 A We were at a meeting where we
19 discussed our negotiations and what we were trying
20 to attain, and Ms. Barrone told us that the leases,
21 in their entirety, were similar, and that they were
22 pennies or dollars apart.
23 But the reason why Maersk had a lower
24 base rental was because they -- there were two
25 reasons: One, they had a larger investment in the

0140

1 R. Mosca
2 terminal that they provided, and two, they were able
3 to generate a port guarantee for volume, which we
4 were unable to do, and, therefore, the Maersk rates
5 were off the table for us.
6 Q And after that discussion, did
7 negotiations begin in earnest with The Port
8 Authority over what the base rent number would be?
9 MR. ISAKOFF: Object to form.
10 THE WITNESS: Yes.

11 BY MR. KIERN:
12 Q And tell us how that negotiation
13 proceeded?
14 A We were at somewhat higher than 39,000
15 an acre, and I believe the last rental number we
16 received from The Port Authority was -- for the base
17 rent was 44,750 an acre. And in discussion in-house
18 with Brian, Brian said he would see what he could to
19 try to drive the lease amount down, and he was able
20 to reduce it to 39,750, and that was The Port
21 Authority's final position.
22 Q Now, at the time of the lease

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

0141

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

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

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

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

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

0142

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

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

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

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

0143

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

EXHIBIT 4

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

VIDEOTAPED DEPOSITION OF M. BRIAN MAHER
 CONDUCTED ON MONDAY, JUNE 9, 2008

1 (Pages 1 to 4)

<p>1 BEFORE THE 2 FEDERAL MARITIME COMMISSION 3 ----- X 4 APM TERMINALS NORTH AMERICA, INC. : 5 Complainant : 6 v. : Docket No. 07-01 7 THE PORT AUTHORITY OF NEW YORK : 8 AND NEW JERSEY, : 9 Respondent and : 10 Third-Party Complainant : 11 ----- X 12 (Caption continued on Page Two) 13 14 Videotaped Deposition of M. BRIAN MAHER 15 Newark, New Jersey 16 Monday, June 9, 2008, 9:37 a.m. 17 18 Job No.: I-129549 19 Pages 1 through 313 20 Reported by: Debra A. Whitehead 21 22</p>	<p>1 APPEARANCES 3 2 3 ON BEHALF OF COMPLAINANT: 4 MARC J. FINK, ESQUIRE 5 SHER & BLACKWELL LLP 6 1850 M Street, Northwest 7 Suite 900 8 Washington, D.C. 20036 9 (202) 463-2500 10 11 12 ON BEHALF OF RESPONDENT AND THIRD-PARTY 13 COMPLAINANT: 14 DONALD F. BURKE, ESQUIRE 15 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY 16 255 Park Avenue South 17 13th Floor 18 New York, New York 10003 19 (212) 216-6370 20 21 22</p>
<p>1 (Caption continued from Page 1) 2 2 ----- X 3 v. 4 MAHER TERMINALS, LLC 5 Third-Party Respondent and 6 Counter-Complainant 7 ----- X 8 Videotaped Deposition of M. BRIAN MAHER, held 9 at the offices of: 10 11 WINSTON & STRAWN LLP 12 One Riverfront Plaza 13 Newark, New Jersey 07102 14 (973) 621-2230 15 16 17 Pursuant to Notice, before Debra A. Whitehead, an 18 Approved Reporter of the United States District Court 19 and Notary Public of the State of New Jersey. 20 21 22</p>	<p>1 APPEARANCES CONTINUED 4 2 3 ON BEHALF OF THIRD-PARTY RESPONDENT, 4 COUNTER-COMPLAINANT, AND THE WITNESS 5 LAWRENCE I. KIERN, ESQ. 6 WINSTON & STRAWN LLP 7 1700 K Street, Northwest 8 Washington, D.C. 20006-3817 9 (202) 282-5000 10 11 12 ALSO PRESENT: 13 David Lane, Video Specialist 14 15 16 17 18 19 20 21 22</p>

VIDEOTAPED DEPOSITION OF M. BRIAN MAHER
 CONDUCTED ON MONDAY, JUNE 9, 2008

2 (Pages 5 to 8)

<p style="text-align: right; margin-right: 20px;">5</p> <p style="text-align: center;">1 CONTENTS</p> <p>2 EXAMINATION OF M. BRIAN MAHER PAGE</p> <p>3 By Mr. Fink 9</p> <p>4 By Mr. Burke 154</p> <p>5 By Mr. Kiern 288</p> <p>6 By Mr. Fink 302</p> <p>7 By Mr. Burke 305</p> <p>8</p> <p style="text-align: center;">9 EXHIBITS</p> <p>10 (Retained by Counsel)</p> <p>11 MAHER DEPOSITION EXHIBIT PAGE</p> <p>12 162 Business Card of M. Brian Maher 12</p> <p>13 163 Letter dated 2/16/99 from 50</p> <p>14 Mr. Brian Maher to Mr. Boyle</p> <p>15 164 Memorandum dated 5/30/00 from 62</p> <p>16 Mr. Basil Maher and Mr. Mosca to</p> <p>17 Mr. Harrison and Mr. Evans</p> <p>18 165 Memorandum dated 6/22/00 from 67</p> <p>19 Mr. Schley to Mr. Nguyen</p> <p>20 166 Letter dated 8/31/00 from 72</p> <p>21 Dr. Nortillo to Mr. Israel</p> <p>22</p>	<p style="text-align: right; margin-right: 20px;">7</p> <p style="text-align: center;">1 EXHIBITS CONTINUED</p> <p>2 MAHER DEPOSITION EXHIBIT PAGE</p> <p>3 177 Memorandum dated 6/1/00 from 217</p> <p>4 Mr. Basil Maher and Mr. Mosca to</p> <p>5 Mr. Harrison and Mr. Evans</p> <p>6 178 Memorandum dated 12/1/00 from 230</p> <p>7 Dr. Nortillo to Mr. Brian Maher</p> <p>8 179 Letter dated 5/30/01 from 240</p> <p>9 Mr. Brian Maher and Mr. Scioscia</p> <p>10 to Mr. Larrabee</p> <p>11 180 E-mail dated 10/5/01 from 244</p> <p>12 Mr. Luft to Mr. Israel</p> <p>13 181 Minutes of 7/8/02 Meeting 245</p> <p>14 182 Letter dated 9/27/00 from 250</p> <p>15 Mr. Larrabee to Mr. Brian Maher</p> <p>16 183 Letter dated 9/15/00 from 250</p> <p>17 Mr. Brian Maher to Richard Larrabee</p> <p>18 184 E-mail dated 11/16/02 from 259</p> <p>19 Ms. Kochan to Mr. Basil and</p> <p>20 Mr. Brian Maher</p> <p>21 185 E-mail dated 9/16/02 from 265</p> <p>22 Mr. Ragan to Dr. Nortillo</p>
<p style="text-align: right; margin-right: 20px;">6</p> <p style="text-align: center;">1 EXHIBITS CONTINUED</p> <p>2 MAHER DEPOSITION EXHIBIT PAGE</p> <p>3 167 Letter dated 12/21/04 from 102</p> <p>4 Mr. Larrabee to Mr. Brian Maher</p> <p>5 168 Letter dated 5/27/05 from 120</p> <p>6 Mr. Basil Maher to Mr. Larrabee</p> <p>7 169 Document, "Minimum Operational 129</p> <p>8 Requirements for Terminal</p> <p>9 Consolidation"</p> <p>10 170 Letter dated 9/14/05 from 137</p> <p>11 Mr. Basil Maher to Mr. Larrabee</p> <p>12 171 E-mail String 143</p> <p>13 172 Letter dated 9/20/03 from 145</p> <p>14 Mr. Lombardi to Mr. Basil Maher</p> <p>15 173 Letter dated 9/28/05 from 149</p> <p>16 Mr. Basil Maher to Dennis Lombardi</p> <p>17 174 E-mail dated 10/3/05 from 151</p> <p>18 Mr. Evans to Mr. Israel, et al.</p> <p>19 175 Letter dated 10/13/05 from 152</p> <p>20 Mr. Lombardi to Mr. Basil Maher</p> <p>21 176 Letter dated 10/26/05 from 165</p> <p>22 Mr. Brian Maher to Mr. Larrabee</p>	<p style="text-align: right; margin-right: 20px;">8</p> <p style="text-align: center;">1 PROCEEDINGS</p> <p>2 VIDEO SPECIALIST: Here begins Videotape</p> <p>3 Number 1 in the deposition of Brian Maher in the</p> <p>4 matter of APM Terminals North America, Incorporated,</p> <p>5 complainant, versus Port Authority of New York and New</p> <p>6 Jersey, respondent, counter-complainant, and</p> <p>7 third-party complainant, versus Maher Terminals, LLC,</p> <p>8 third-party respondent and counter-complainant, in the</p> <p>9 Federal Maritime Commission, Docket Number 07-01.</p> <p>10 Today's date is June 9, 2008. The time on</p> <p>11 the video monitor is 9:37 a.m. The video operator</p> <p>12 today is David Lane. This video deposition is taking</p> <p>13 place at Winston & Strawn, One Riverfront Plaza,</p> <p>14 Newark, New Jersey.</p> <p>15 Counsel, please identify yourselves and</p> <p>16 state whom you represent.</p> <p>17 MR. FINK: Marc Fink, with the law firm of</p> <p>18 Sher & Blackwell, representing APM Terminals.</p> <p>19 MR. KIERN: Larry Kiern, from the law firm</p> <p>20 of Winston & Strawn, LLP, representing Maher Terminals</p> <p>21 and the deponent.</p> <p>22 MR. BURKE And Donald Burke, B-U-R-K-E,</p>

VIDEOTAPED DEPOSITION OF M. BRIAN MAHER
CONDUCTED ON MONDAY, JUNE 9, 2008

3 (Pages 9 to 12)

<p>1 for the Port Authority of New York and New Jersey. 2 VIDEO SPECIALIST: The court reporter today 3 is Debra Whitehead of LAD Reporting. Would the 4 reporter please swear in the witness. 5 M. BRIAN MAHER, having been duly sworn, was 6 examined and testified as follows: 7 VIDEO SPECIALIST: Please begin. 8 EXAMINATION BY COUNSEL FOR COMPLAINANT 9 BY MR. FINK: 10 Q Mr. Maher, good morning. My name is Marc 11 Fink, and I am here representing APM Terminals in 12 connection with a matter that is pending before the 13 Federal Maritime Commission. And the purpose of the 14 deposition today is to inquire about your knowledge of 15 some of the events and circumstances and facts that 16 pertain to that particular litigation. 17 Before I get into some questioning of you, 18 I've got a number of preliminary matters, really, to 19 go over with you, to make sure we're on the same 20 wavelength, to make this deposition what it should be. 21 First question, sir, is, have you ever had 22 your deposition taken before?</p>	<p>9 11 1 question. 2 I will try and make sure that my questions 3 are clear so that there's no confusion. But if you 4 don't understand the question, please ask me to 5 clarify it, and I will seek to do that. 6 The purpose is not to have a question asked 7 that you don't understand; to the contrary, we want to 8 make sure that the question is clear and we get your 9 testimony. 10 Do you understand that? 11 A Yes. 12 Q I will try and make sure that I don't 13 interrupt your answers. And if you would also be so 14 kind as to let me finish my questions so that we don't 15 speak over each other. That makes it not only more 16 difficult for you and I, but, more importantly, it 17 makes it more difficult for the court reporter to 18 properly transcribe the testimony. Okay? 19 A Uh-huh. 20 Q Also, please try and make sure that your 21 response -- responses are verbal so that it's picked 22 up by the court reporter as well as -- as the</p>
<p>10 1 A Yes. 2 Q And when was that? 3 A I would say a half a dozen times over the 4 course of my career. 5 Q And when was the last time you had a 6 deposition taken? 7 A I really don't remember. 8 Q Okay. 9 A It was some years ago. 10 Q All right. You probably have a general 11 understanding of the process, but let me go over a 12 couple of things with you. 13 I will be asking questions of you. During 14 my questioning or at the end of my questioning, an 15 attorney may raise an objection, Mr. Kiern or perhaps 16 Mr. Burke. If they do so, please let the attorney 17 state the objection. Typically you will then be asked 18 to nonetheless answer the question. 19 If your attorney directs you not to answer, 20 obviously you can comply with -- with those 21 instructions. Otherwise, after the objection has been 22 asserted, please go ahead and -- and answer the</p>	<p>12 1 videographer. So the -- you need to answer in the 2 affirmative or in the negative, rather than nodding 3 your head or -- or some other gesture. Okay? 4 A Okay. 5 Q Let me -- let me start with what has been 6 marked with -- by the court reporter as Exhibit 162, 7 which your counsel handed to me this morning, which is 8 your current business card. 9 (Maher Deposition Exhibit 162 marked for 10 identification, to be retained by counsel.) 11 BY MR. FINK. 12 Q Let me hand you Exhibit 162 and ask you if 13 you can identify that, please. 14 A Yes. 15 Q And what -- what is your occupation today? 16 A I'm -- I'm retired from Maher Terminals, 17 and I am, through Essex Equity Management, I am 18 managing my affairs. 19 Q Okay. Congratulations. 20 A Thank you. 21 Q Prior -- when did that occur? 22 A Well, the -- I retired from Maher</p>

VIDEOTAPED DEPOSITION OF M. BRIAN MAHER
CONDUCTED ON MONDAY, JUNE 9, 2008

45 (Pages 177 to 180)

<p>177</p> <p>1 And in the beginning -- in the beginning, 2 in the early -- in the mid '90s, that consolidated 3 facility was going to consist of most of the Tripoli 4 Street, if not all the Tripoli Street Terminal, and a 5 portion -- and a portion of the Fleet Street Terminal, 6 and the Bay Avenue Terminal. And then Hanjin was 7 going to get a terminal on the western end of the 8 Elizabeth Channel.</p> <p>9 And that all fell apart. And we had a 10 letter of intent in regard to that in 1997. And that 11 all fell apart subsequently, I think because of a 12 challenge to -- well, I don't know why it fell apart, 13 but it fell apart.</p> <p>14 Q What was your understanding -- I mean, 15 what's your --</p> <p>16 A I mean, I realize now that there was 17 another step in there, when Hanjin was -- was going to 18 get the Universal Maersk terminal. But, I mean, I 19 really -- I can't really remember all the details.</p> <p>20 Q I appreciate that. But there were a series 21 of events that -- and an evolving situation, but at 22 some point do you recall the Sea-Land lease being --</p>	<p>179</p> <p>1 Q How did you become aware of that? 2 A I don't remember. I really don't remember. 3 Q Do -- do you recall anything about the 4 Maersk Sea-Land proposal to the Port Authority in the 5 early stages of the negotiations? 6 A I -- I'm not sure what the early stage of 7 the negotiations is. 8 We had -- we had -- we had negotiations 9 ongoing with the Port Authority. We were basically 10 asking for the same terms and conditions as -- as the 11 other terminals on a competitive, on a -- on a fair 12 and competitive playing field. We were very 13 interested in what was happening with the 14 Maersk/Sea-Land negotiations. We were told at the 15 very beginning that the Maersk/Sea-Land lease terms 16 and our lease terms would be the same, if not -- 17 similar, if not the same. And we received proposals 18 from the Port Authority, we had discussions with them 19 about that. 20 And then over time, the -- somehow the 21 Maersk Sea-Land organization decided to go out for 22 bids, which they did. And that changed the whole</p>
<p>178</p> <p>1 coming to an end? 2 A Yes. 3 Q Okay. And what's your understanding about 4 Sea-Land and Maersk and their relationship, sort of, 5 you know -- 6 A My understanding was that Maersk bought the 7 Sea-Land assets. 8 Q Now, before then, though, did you 9 understand that Maersk -- Maersk and Sea-Land were -- 10 A Yes. 11 Q -- jointly negotiating -- 12 A Yes. 13 Q -- with the Port Authority? 14 A Yes. 15 Q And how did -- you know, what did you think 16 about that? 17 MR. FINK: Objection as to form. 18 MR. KIERN: Objection. 19 A I mean, I don't know what I thought about 20 it. It was -- it was -- it was what was. I mean, 21 nobody came and asked my opinion, so it really didn't 22 matter what I thought, but --</p>	<p>180</p> <p>1 tenor of discussions in the -- in the port. It 2 brought the issue of Maersk leaving or staying -- and 3 I don't remember when it became Maersk as opposed to 4 Maersk Sea-Land, but at some point in time it did -- 5 and made it a political issue within the States of New 6 York and New Jersey. And it changed the whole tenor 7 of the -- of the negotiations, and it delayed, 8 significantly delayed, the implementation of any new 9 leases. 10 Q Now, so you were aware when the -- when 11 Maersk went out for proposals. You knew about that? 12 A Yes. It was public knowledge. 13 Q And it was widely disseminated in the -- in 14 the media? 15 A Yes. 16 Q Especially the industry media. 17 A Yes. 18 Q And there was a threat that they would 19 leave the port. 20 A That's correct. 21 Q And you -- you testified earlier that you 22 thought the Port Authority did the right thing to keep</p>

EXHIBIT 5

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

Rec'd 7/1/82

PORT REINVESTMENT MODEL

H. G. Ock

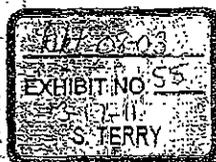
The "model" is actually a plan for a major rehabilitation and upgrade of our container facilities in NJ, recognizing that the terminals are 35 years old, or more. It includes on (container) terminal elements, which are the same for each container terminal (adjusted for acreage), as well as landside access improvements to be made within the NJMT complex, but outside of individual tenants' leaseholds.

The expiration of all but one (Fleet Street) of our container terminal leases affords us a unique opportunity to make the reinvestment at one time, for all the terminals, thus giving each terminal a "level playing field" as far as improvements on terminal are concerned.

It also gives us the opportunity to restructure the leases, to achieve some of our long-held objectives. The most basic of these is to encourage, through the lease structure, a more intensive use of our land. We cannot afford to buy new land -- and there isn't much new land to be purchased, even if we could buy a significant amount of it. Thus, the land we have has to be used more efficiently. *How* an operator achieves greater efficiency, or throughput -- by grounding, by faster cranes, etc., is the operator's decision. Restructuring also indicates that we are willing to forego significant additional revenues if the operator does well, and throughput per acre grows. As volume grows, so does the operator's revenue, by a greater than proportional amount. But by the same token, we expect the operator to not come to us if volume declines. What we don't receive at the higher volumes can't be returned to the operator in the form of rent relief, if volume drops.

The reinvestment plan calls for a standard set of improvements to be made to all the terminals. These include the demolition of buildings near the water, and the provision of the most basic facility infrastructure -- paving, lighting, administration and maintenance buildings, gate complex, deeper berths, etc. We have, or will have, a set of "specs" for each of these. However, if the operator is convinced that there is an alternative, *that achieves the same goals* (e.g., Maher's new "gate complex"), then we are certainly open to using the capital funds for that alternative approach. But we are unwilling to *not* make the investment. We hope that all our tenants will be at the port for 25 years, and more, but we need to plan for the future of the port, which to us means a standard set of generic improvements on each of the terminal facilities, which could be used by another operator if necessary.

By the same token, it means we are unwilling to invest PA funds in gold-plating the terminals. The basic reinvestment concept is that the PA will guide the definition of the terminal elements, and is willing to continue to partially subsidize the investment required to provide these elements. Beyond that, any specialized investment that a tenant feels is necessary, or advantageous relative to other terminals, is at the tenant's cost.



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Planning for the future also means a standard set of rates for each terminal, so that each terminal is equal with all the others, as far as the PA's role is concerned. Then, where terminals will differ is on the level of service, and the prices that each offers, based on factors under the control of each individual operator (whether these are capital decisions, labor force usage decisions, productivity improvements of other types, etc.).

In addition to planning for the future, reinvesting in facilities and encouraging the more intensive use of the terminal properties, and putting all operators on a similar basis to one another, the investment model seeks to return a greater share of PA investment than we have received, in the past. Our lease structures are old, and the rates are, for the most part, out of date significantly. Our great revenue generators of the past, the WTC and the airports, are no longer great generators of funds to cover the cost of the marine terminals. Both businesses - World Trade and Aviation - are in need of significant reinvestment. While the agency, assuming the Board agrees with our approach, will continue to subsidize the port, the level will be lower than before. The appropriate balance between public subsidy and private entities' profit can be debated forever. We are not looking to upset the apple cart, only to shift the balance to less subsidy from the public sector.

We would not do any of this if we believed that to do so would do major harm to the port. We believe the growth opportunity is there, and we believe our port can capture a large share of it. Will we get it all? Perhaps not. But between the options of reinvesting for the future, raising rates and possibly losing a marginal amount, and on the other hand, continuing the status quo, and not making the investment we sincerely believe the port needs, we have chosen the first course. This may not be exactly what a terminal operator wants to hear, but neither we - nor our Board - believe that continuing the status quo is responsible. We believe we understand the elasticity to an extent, and we understand that there is always some cargo which is at the margins, and subject to capture by another port - just as other ports' cargo is subject to capture by us. Many factors are at play in routing decisions, not just the rates which the PA charges.

We believe this will work - and the studies we've seen would indicate that it will. None of us can predict the future, but we know that if we want to be ready for it, we have to take some bold steps.

EXHIBIT 6

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

Exhibit 6 Omitted as

REDACTED

EXHIBIT 7

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey



MAHER TERMINALS, INC.

MEMORANDUM

To: File [initials]
From: Scott H. Schley
Date: September 23, 1999
Subject: PA Lease Negotiations Meeting of 9/23/99

The meeting was held at 8:00 at the PA's office in the WTC. Present for the PA: Lillian Borrone, Ed Harrison, Bob Evans, Rudy Isreal & Clyryl Yeika. Present for Maher: Brian Maher, Basil Maher, Roger Nortillo, Randy Mosca, Scott Schley.

Borrone started the meeting. The format was a review of the items presented in Maher's proposal of 9/21/99.

Terminal Description. Borrone said, the PA agreed with us that Dakar Street would be closed.

Land configuration. [redacted] Borrone indicated that we must mutually agree upon the schedule; however, she reiterated they have specific time requirements, especially with regard to ExpressRail.

Change of Control. Borrone indicated that they have come up with some revision language after receiving input from Ron Shifton. Due to Ron Shifton's absence he has not had an opportunity to review the proposal and as soon as he can do so it will be sent to us for our consideration.

Contract rates. Borrone indicated that our memorandum said that we would accept the rates assuming they were the same as those agreed to with Maersk. She indicated the rates were not the same but that our total lease cost and the least cost to Maersk will be approximately the same, possibly within pennies and no more than a few dollars on a volume basis. She indicates that they have looked at both rental rates, as well as investment requirements. According to Borrone, Maersk has to put up approximately two and one-half times our required investment on

pa\scv\trav\file memo re 9-23 intg 99-9 a

EXHIBIT 144
Deponent: Schley
3-2-14
Date: [initials]
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their facilities. When we asked what they were going to do, they indicated they were going to basically redo the entire facility.

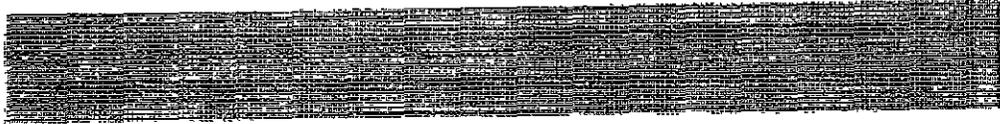
Brian indicated that if that was the case and we would have parity with Maersk that would be okay, but it would be hard for us to see how this would work.

Variable Rates. Borrone indicated that what they have proposed for us is the same as Maersk. The third tier was not included, however, they are willing to look at this as a possible addition to our lease. Borrone indicated that it is important for the Port to obtain a certain return from our lease so they would have sufficient funds to invest in new facilities including land creation. Brian indicated that to get to the desired 3,500 container per acre density they will need substantial investment from the tenants. Furthermore, Brian indicated that if the tenants were able to achieve this density this would reduce the need for the new facility and landfill.

Non-containerized cargo. Borrone indicated that it is the firm position of the PA with regard to Maersk and Maher that their facilities are to be container terminals. She also indicated there should be separate financial arrangements for non-containerized cargo.

Basil indicated there are primarily two types of non-containerized cargo of interest to us. The first is heavy lift ro-ro cargo off of containerships which we see as incidental to the container volume on those ships. ACL and the like have ships which handle both containers and ro-ro and you have to do the ro-ro if the ship is to call at the terminal. The second type of non-containerized cargo is automobiles. Basil indicated our cost just for the land to use for the automobiles is approximately \$1M a year just in rent. He indicated that automobiles were marginally profitable for us and if there were additional wharfage charges we may choose not to do cars. He indicated that his comments with regard to the automobiles was not intended to be a threat and that we would be more than happy to do automobiles but it must be economically feasible for us to do so.

Borrone indicated that the primary issue with regard to non-containerized cargo was control over what the terminals were used for. The rent to be paid was a secondary issue. She indicated they would look into accommodating our heavy lift ro-ro cargo and requested information with regard to the amount of cargo under question.



Construction funding. Borrone indicated that the lease is up in the year 2000.

[REDACTED]

[REDACTED] The PA, however, wants to be pragmatic about this and recognizes its prior policy of lease renewal. She indicated that the approach they would like to present would be as a credit for what we give up at Tripoli Street. The value assigned to these improvements by the PA is similar to the value assigned to them by Maher.

Because Bay Avenue is a facility that has not had significant prior investment the PA recognizes some adjustment must be made.

[REDACTED]

Maher has indicated a total investment of \$169M is necessary. Lillian indicated that the PA is willing to provide \$46M. The PA would agree to reduce Maher's required capital improvement to \$123M. The PA would not be in a position to offer additional capital without reimbursement.

Brian indicated that while the PA would be reducing our required investment, that this does not eliminate the fact that we believe it all must be done so it really doesn't impact our bottom line.

Brian indicated that we are not especially interested in the numbers themselves. He indicated that an increase of \$1M here or a decrease in some other part of the lease of \$1M does not mean that we could put that money in our pocket. What we are concerned about is our costs vs. Maersk and we do not see how they are the same.

Borrone indicated that Maersk, in addition to putting in more investment, had two guarantees. A container volume guarantee, as well as a cargo volume guarantee. This second guarantee was required because they are an anchor tenant steamship line.

Borrone indicated they would work with us as to the timing of our capital investments and also indicated that the cranes are still in the \$123M guarantee.

Container volume guarantee. Borrone is willing to do an adjustment and agrees to maintain the 775K minimum and to eliminate the 900K minimum. In consideration, however, Maher would have an obligation to attempt to achieve

900K volume level and if it was not obtained for three consecutive years after 2015, the PA would have the option to take back part or all of the terminal.

Brian and Borrone agreed that this would only come into effect if others in the Port were achieving the 990K volume level on a pro rata per acre basis.

Environmental, Maintenance, Dredging Adjustment. The language with regard to these three items was sent to Maher on 9/22 and was not discussed in any detail at the meeting. There was limited discussion with regard to the dredging adjustment requirement.

Borrone pointed out the language that was in the draft maintenance provision put an \$80 per cubic yard limit on the amount the PA would have to spend. According to Lillian, the same language is in the Maersk agreement and Maersk has not indicated any problem with the provision. Lillian indicated that the issue to Maersk was the channel depth and their option to terminate if channel depths were not reached.

Brian asked about channel depth maintenance. According to Borrone, channel depth maintenance is currently a federal obligation and the PA does not have to contribute.

Financing. Cheryl Yetka indicated they would have to get back to us with regard to the interest rate and she will be meeting with Randy to discuss this in more detail after she has additional review in-house.

As to the security deposit, they indicated it would be one-month basic rent just on the new facility, not the Fleet Street portion. Basil asked if a surety bond would be okay and Cheryl indicated she would have to check and get back to us. Lillian indicated that this one-month requirement was going to be required basically throughout the Port. She also indicated that Maersk has given the PA "parental" guarantees and in discussion, it appears that Maersk has provided their corporate financial statements for the PA to review.

PA Overhead. It was indicated that the PA would agree that the 5% proposed amount would be reduced to 4%. In addition, they could go lower (but apparently not to below 3%) depending upon the investment level the engineering firms utilized and the construction firms utilized. It was agreed that Rudy Israel and Roger Nortillo would meet to review this issue so that we could do what would be necessary to get a lower overhead charge.

Rental spike. Borrone agreed to smooth out the rental spikes where they occurred and Randy and Cheryl Yetka were to discuss this further.

Rental definitions. With respect to the non-containerized cargo, this had been discussed earlier. With regard to invoicing, generally they thought the language was acceptable but Cheryl will get back to Randy and they will go through the definitions in more detail.

Variable Rent on EP-148. Borrone indicated the PA does not agree with our interpretation. Borrone indicated that while the lease says what we say it says, they see this new lease as the successor to EP-78 and believe that the variable rent at Fleet Street should be continued.

Brian indicated that we are not trying to nitpick. We are concerned about the difference between what Maersk will have to pay and what we will have to pay. Brian indicated he sees this as a major gap and is a major issue. There was some discussion as to whether Maersk's improvements would include structures to handle containers. The PA indicated, however, that while it would include cranes that it did not include structures to handle containers.

Borrone said that they have made an attempt to address the cost to us and to Maersk fairly and again reiterated that, over thirty years the difference between our costs and their costs were almost the same.

Brian indicated again that we believe there is a major difference and that there was a \$300M difference over the term of the lease. He indicated, however, at this point there were really three economic issues: 1) the \$20M construction funding to Bay Avenue, which he indicated was like "a cup of coffee" to the PA; 2) the \$8M variable rent in EP-148; and the issue dealing with non-containerized cargo.

In discussions, it was agreed that we would give them our analysis as to why Maersk's cost is less and they will then review it and give us comments as to why our analysis is incorrect. This was agreed because they could not give us their analysis of Maersk's terms directly.

cc: M. Brian Maher
Basil Maher
Dr. Roger E. Nortillo
Joseph Curto
Randall P. Mosca

EXHIBIT 8

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

Exhibit 8 Omitted as

REDACTED

EXHIBIT 9

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S OBJECTIONS AND
RESPONSES TO COMPLAINANT'S THIRD SET OF INTERROGATORIES**

Pursuant to §§ 502.201 and 502.205 of the Federal Maritime Commission Rules of Practice and Procedure, The Port Authority of New York and New Jersey (the "PANYNJ" or "Port Authority") hereby responds and objects to Complainant's Third Set of Interrogatories Propounded on the Port Authority, as follows:

GENERAL OBJECTIONS

1. The Port Authority objects to each and every one of the definitions, instructions, and interrogatories to the extent that they attempt to impose obligations that exceed the scope of permissible discovery under the Federal Maritime Commission Rules of Practice and Procedure and/or, where applicable, the Federal Rules of Civil Procedure.
2. The Port Authority objects to each and every one of the interrogatories to the extent that they seek information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity. In the event any privileged or otherwise

protected information is disclosed by the Port Authority, its disclosure is inadvertent and does not constitute waiver of any privilege or other immunity.

3. The Port Authority objects to each and every one of the interrogatories to the extent that they seek information that is not relevant to any claim or defense in this action and not reasonably calculated to lead to the discovery of admissible evidence.

4. The Port Authority objects to each and every one of the interrogatories to the extent that they are oppressive, overbroad, and unduly burdensome.

5. The Port Authority objects to each and every one of the interrogatories to the extent that they are vague and ambiguous.

6. The Port Authority objects to each and every one of the interrogatories to the extent that they seek information not within the Port Authority's possession, custody, or control.

7. The Port Authority objects to each and every one of the interrogatories to the extent that they seek information beyond the scope of the Port Authority's knowledge.

8. The Port Authority objects to each and every one of the interrogatories to the extent that they call for legal conclusions or speculation.

9. The Port Authority objects to each and every one of the interrogatories to the extent that they seek documents or information concerning events occurring after June 11, 2008, the date on which the Complaint was served in this action. In responding to the interrogatories, the Port Authority will construe the interrogatories as not calling for production of such documents or materials.

10. The Port Authority objects to each and every one of the interrogatories to the extent that they are duplicative of other discovery requests by Maher.

RESERVATION OF RIGHTS

The Port Authority expressly reserves the right to supplement, clarify, revise, or correct the responses herein at any time. The Port Authority reserves the right to assert additional general and/or specific objections arising from matters discovered in the course of this litigation. By making the following responses, the Port Authority does not waive, and hereby expressly reserves, its right to object to the admissibility of such responses into evidence at the trial of this action, or any other proceedings, on any and all grounds, including, but not limited to, competency, relevancy, materiality, privilege or for any other purpose. Furthermore, the Port Authority makes the responses herein without in any manner implying or admitting that it considers the interrogatories, or the responses thereto, to be relevant or material to the subject matter of this action. Subject to and without waiving the foregoing, the Port Authority responds as follows:

**SPECIFIC OBJECTIONS AND RESPONSES TO
MAHER'S THIRD SET OF INTERROGATORIES**

1. Describe in detail and explain how "The loss of Maersk/Sea Land would have threatened the viability of the port" as stated in PANYNJ's response to Interrogatory 1 of Maher's First Interrogatories.

A.L.J. Guthridge's Memorandum of and Order on Motions to Compel Responses to Discovery dated June 4, 2008 ("June 4th Order") governing discovery in case No. 07-01 requires a party to provide the "principal or material facts" which support an allegation or defense." The Port Authority has already provided the "principal and material facts" in its response to Interrogatory No. 1 of Maher's First Interrogatories, and objects to this interrogatory on the grounds that it seeks information beyond the scope of the June 4th Order. In addition, discovery is cumulative and the requested information can be obtained in a more efficient manner through other methods of discovery, such as documents produced by the Port Authority and depositions of relevant witnesses. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that during the time period, the Port was losing business to its competitors in the cargo trade. The Port was saddled by idle labor costs and needed to devise a way to compete for Far East business. Maersk/Sea Land was, and still is, a major industry leader, and the Port Authority was concerned that if Maersk/Sea Land left the Port others would soon follow. This would drive up container costs and contribute to the downward spiral of the Port.

2. Define the term "viability" as PANYNJ used it in the interrogatory response "The loss of Maersk/Sea Land would have threatened the viability of the port."

A.L.J. Guthridge's Memorandum of and Order on Motions to Compel Responses to Discovery dated June 4, 2008 ("June 4th Order") governing discovery in case No. 07-01 requires a party to provide the "principal or material facts" which support an allegation or defense." The Port Authority has already provided the "principal and material facts" in its response to Interrogatory No. 1 of Maher's First Interrogatories, and objects to this interrogatory on the grounds that it seeks information beyond the scope of the June 4th Order. In addition, discovery is cumulative and the requested information can be obtained in a more efficient manner through other methods of discovery, such as documents produced by the Port Authority and depositions of relevant witnesses. The Port Authority respectfully refers the Complainant to its response to Interrogatory No. 1 for the "principal and material facts" responsive to this request.

3. Describe in detail and explain why "The Port Guarantee was ... [a] term that neither Maher nor any other port tenant could provide" as stated in PANYNJ's response to Interrogatory 1 of Maher's First Interrogatories.

A.L.J. Guthridge's Memorandum of and Order on Motions to Compel Responses to Discovery dated June 4, 2008 ("June 4th Order") governing discovery in case No. 07-01 requires a party to provide the "principal or material facts" which support an allegation or defense." The Port Authority has already provided the "principal and material facts" in its response to Interrogatory No. 1 of Maher's First Interrogatories, and objects to this interrogatory on the grounds that it seeks information beyond the scope of the June 4th Order. In addition, discovery is cumulative and the requested information can be obtained in a more efficient manner through other methods of discovery, such as documents produced by the Port Authority and depositions of relevant witnesses. Subject to and without waiving, but rather expressly preserving, the foregoing objections and its General Objections, the Port Authority responds that the Port Guarantee only applies to companies who are carriers or have a significant ownership interest in one.

5. Identify and describe in detail if, and if so when and how, PANYNJ offered Maher the option to provide a Port Guarantee.

Subject to and without waiving, but rather expressly preserving, its General Objections, the Port Authority responds 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.

EXHIBIT 10

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

Exhibit 10 Omitted as

REDACTED

EXHIBIT 11

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

Exhibit 11 Omitted as

REDACTED

EXHIBIT 12

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

Exhibit 12 Omitted as

REDACTED

EXHIBIT 13

Docket 08-03
Maher Terminals, LLC
v. Port Authority of New York and New Jersey

VIDEOTAPED DEPOSITION OF MARC E. OPPENHEIMER
 CONDUCTED ON TUESDAY, MAY 20, 2008

1 (Pages 1 to 4)

<p>1 BEFORE THE 2 FEDERAL MARITIME COMMISSION 3 ----- X 4 APM TERMINALS NORTH AMERICA, INC. : 5 Complainant : 6 v. : Docket No. 07-01 7 THE PORT AUTHORITY OF NEW YORK : 8 AND NEW JERSEY, : 9 Respondent and : 10 Third-Party Complainant : 11 ----- X 12 (Caption continued on Page Two) 13 Vidcotaped Corporate Deposition of 14 APM TERMINALS NORTH AMERICA, INC., 15 By and through its Corporate Designee, 16 MARC E. OPPENHEIMER 17 Newark, New Jersey 18 Tuesday, May 20, 2008, 9:41 a.m. 19 20 Job No.: 1-128764 21 Pages 1 through 274 22 Reported by: Debra A. Whitehead</p>	<p>1 APPEARANCES 3 2 3 ON BEHALF OF COMPLAINANT: 4 MARC J. FINK, ESQUIRE 5 SHER & BLACKWELL LLP 6 1850 M Street, Northwest 7 Suite 900 8 Washington, D.C. 20036 9 (202) 463-2503 10 11 12 ON BEHALF OF RESPONDENT AND THIRD-PARTY 13 COMPLAINANT: 14 DONALD F. BURKE, ESQUIRE 15 THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY 16 255 Park Avenue South 17 13th Floor 18 New York, New York 10003 19 (212) 435-3442 20 21 22</p>
<p>1 (Caption continued from Page 1) 2 ----- X 3 v. 4 MAHER TERMINALS, LLC 5 Third-Party Respondent and 6 Counter-Complainant 7 ----- X 8 Vidcotaped Deposition of MARC E. OPPENHEIMER, 9 held at the offices of: 10 11 WINSTON & STRAWN LLP 12 One Riverfront Plaza 13 Newark, New Jersey 07102 14 (973) 621-2230 15 16 17 Pursuant to Notice, before Debra A. Whitehead, an 18 Approved Reporter of the United States District Court 19 and Notary Public of the State of New Jersey. 20 21 22</p>	<p>1 APPEARANCES CONTINUED 4 2 3 ON BEHALF OF THIRD-PARTY RESPONDENT AND 4 COUNTER-COMPLAINANT: 5 LAWRENCE I. KIERN, ESQUIRE 6 GERALD A. MORRISSEY, III, ESQUIRE 7 WINSTON & STRAWN LLP 8 1700 K Street, Northwest 9 Washington, D.C. 20006-3817 10 (202) 282-5000 11 12 13 ALSO PRESENT: 14 David Lane, Videographer 15 16 17 18 19 20 21 22</p>

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3 (Pages 9 to 12)

<p>9</p> <p>1 PROCEEDINGS</p> <p>2 VIDEO SPECIALIST: Here begins Videotape</p> <p>3 Number 1 in the deposition of Marc Oppenheimer in the</p> <p>4 matter of APM Terminals North America, Incorporated,</p> <p>5 Complainant, versus Port Authority of New York/New</p> <p>6 Jersey, Respondent, Counter-Complainant, and</p> <p>7 Third-Party Complainant, versus Maher Terminals, LLC,</p> <p>8 Third-Party Respondent and Counter-Complainant, in the</p> <p>9 Federal Maritime Commission, Docket Number 07-01.</p> <p>10 Today's date is May 20, 2008. The time on</p> <p>11 the video monitor is 9:41 a.m. The video operator</p> <p>12 today is David Lane. This video deposition is taking</p> <p>13 place at Winston & Strawn, One Riverview -- One</p> <p>14 Riverfront Plaza, Newark, New Jersey.</p> <p>15 Counsel, please identify yourselves and</p> <p>16 state whom you represent.</p> <p>17 MR. KIERN: Lawrence I. Kiern for Maher</p> <p>18 Terminals, and I am accompanied by Gerald Morrissey.</p> <p>19 MR. FINK: Marc Fink of the firm of Sher &</p> <p>20 Blackwell, representing APM Terminals.</p> <p>21 MR. BURKE: And Donald Burke, B-U-R-K-E,</p> <p>22 for the Port Authority of New York and New Jersey.</p>	<p>11</p> <p>1 A Yes.</p> <p>2 Q Okay. How many times have you been deposed</p> <p>3 before?</p> <p>4 A Four or five.</p> <p>5 Q Okay. So you're familiar with the</p> <p>6 procedure.</p> <p>7 A It was a long time ago, but yes.</p> <p>8 Q Okay. Good.</p> <p>9 You understand that you're testifying today</p> <p>10 under oath just as if you were in a court of law?</p> <p>11 A Yes.</p> <p>12 Q I'm going to ask you some questions about</p> <p>13 this matter which is in litigation before the Federal</p> <p>14 Maritime Commission. If you do not understand my</p> <p>15 question, please tell me, and ask me to rephrase the</p> <p>16 question, and I will do that.</p> <p>17 Do you understand that?</p> <p>18 A Yes.</p> <p>19 Q If you don't have any knowledge about a</p> <p>20 question, please tell me that you don't have any</p> <p>21 knowledge, and then we can move on to something else.</p> <p>22 Do you understand that?</p>
<p>10</p> <p>1 VIDEO SPECIALIST: The court reporter today</p> <p>2 is Debbie Whitehead of LAD Reporting. Would the</p> <p>3 reporter please swear in the witness.</p> <p>4 MARC E OPPENHEIMER,</p> <p>5 having been duly sworn, was examined and</p> <p>6 testified as follows:</p> <p>7 VIDEO SPECIALIST: Please begin</p> <p>8 MR KIERN: Thank you.</p> <p>9 EXAMINATION BY COUNSEL FOR THIRD-PARTY RESPONDENT</p> <p>10 AND COUNTER-COMPLAINANT</p> <p>11 BY MR. KIERN:</p> <p>12 Q Good morning, Mr. Oppenheimer. My name is</p> <p>13 Lawrence Kiern. I'm with the law firm of Winston &</p> <p>14 Strawn, and I represent Maher Terminals in this</p> <p>15 proceeding before the Federal Maritime Commission. My</p> <p>16 colleague Gerald Morrissey is here with me this</p> <p>17 morning. We're going to ask you some questions that</p> <p>18 relate to this proceeding.</p> <p>19 Do you understand that?</p> <p>20 A Yes.</p> <p>21 Q Have you ever been deposed before,</p> <p>22 Mr. Oppenheimer?</p>	<p>12</p> <p>1 A Yes.</p> <p>2 Q If you answer a question, I'm going to take</p> <p>3 that to mean that you've heard the question, you've</p> <p>4 understood it, and you've answered it truthfully.</p> <p>5 Do you understand that?</p> <p>6 A Yes.</p> <p>7 Q If during the testimony or the course of</p> <p>8 the deposition today you realize that you've made a</p> <p>9 mistake in your testimony and you want to change your</p> <p>10 testimony, just bring that to my attention, and you'll</p> <p>11 have an opportunity to change it on the record.</p> <p>12 Do you understand that?</p> <p>13 A Yes.</p> <p>14 Q Okay. I'm going to ask you to keep your</p> <p>15 voice up and answer all questions orally, with words.</p> <p>16 A Even with the videotape?</p> <p>17 Q It's -- it's confusing for the record</p> <p>18 sometimes if a witness simply shakes his head or says,</p> <p>19 uh-huh or unh-unh.</p> <p>20 Do you understand that?</p> <p>21 A Yes.</p> <p>22 Q It's better to say yes or no so the record</p>

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13 (Pages 49 to 52)

<p>49</p> <p>1 that it's clear what you're referring to.</p> <p>2 A A-K-T-I-E-S-E-L-S-K-A-B-E-T.</p> <p>3 Q And then following that first word, there</p> <p>4 are a few other Danish words?</p> <p>5 A Up to Svendborg, that's the first company.</p> <p>6 Q Okay.</p> <p>7 A And then --</p> <p>8 Q And then there's another company --</p> <p>9 A Right.</p> <p>10 Q -- that starts with</p> <p>11 D-A-M-P-S-K-I-B-S-S-E-L-S-K-A-B-E-T; is that right?</p> <p>12 A Yes.</p> <p>13 Q So it identifies, in Paragraph 46 (a)(2),</p> <p>14 two Danish entities; is that correct?</p> <p>15 A Yes.</p> <p>16 Q And if I understand your testimony correct,</p> <p>17 those two Danish entities are part of the A.P. Moller</p> <p>18 Group; is that right?</p> <p>19 MR. FINK: If you know.</p> <p>20 A I don't really know how the legal aspect of</p> <p>21 this is.</p> <p>22 Q Okay. Do you know what those entities are?</p>	<p>51</p> <p>1 And Section 42 continues on Pages 87 and 88</p> <p>2 and the top portion of 89; is that correct?</p> <p>3 A Yes.</p> <p>4 Q Okay. And is that the port guaranty which</p> <p>5 was negotiated between the Port Authority of New York</p> <p>6 and New Jersey and APM Terminals as part of this</p> <p>7 agreement?</p> <p>8 A It was negotiated between Maersk, Inc.</p> <p>9 Q It was negotiated --</p> <p>10 A Well, Maersk Container Service Company, I</p> <p>11 mean.</p> <p>12 Q Great. Maersk Container Service Company,</p> <p>13 which is now APM Terminals?</p> <p>14 A Right.</p> <p>15 Q All right. Good.</p> <p>16 And how does APM Terminals satisfy the port</p> <p>17 guaranty today?</p> <p>18 A You -- you've got to step back and --</p> <p>19 Maersk Container Service Company was a company within</p> <p>20 the Maersk, Inc., group.</p> <p>21 Q Uh-huh.</p> <p>22 A So Maersk, Inc., was the agent for the ship</p>
<p>50</p> <p>1 A These were the legal names that we were to</p> <p>2 use in contracts, that -- that's the extent.</p> <p>3 Q And who told you that?</p> <p>4 A That came from our corporate office in</p> <p>5 Copenhagen.</p> <p>6 Q Okay. When you say your "corporate office</p> <p>7 in Copenhagen" --</p> <p>8 A When -- back in 19 -- in the Year 1999,</p> <p>9 2000.</p> <p>10 Q Okay.</p> <p>11 A That was when.</p> <p>12 Q All right. When you say your "corporate</p> <p>13 office in Copenhagen," what -- what corporate office</p> <p>14 are we talking about?</p> <p>15 A The Maersk Line group.</p> <p>16 Q Maersk Line group?</p> <p>17 A Uh-huh.</p> <p>18 Q Okay. Now, the agreement provides a port</p> <p>19 guaranty. Do you recall that?</p> <p>20 A I recall there's a port guaranty.</p> <p>21 Q Right. So let me just call your attention</p> <p>22 to Section 42. And that's on Page 86.</p>	<p>52</p> <p>1 owner.</p> <p>2 Q Okay. Go ahead. I'm sorry, I don't</p> <p>3 understand. Please explain it.</p> <p>4 A Well, the port guaranty is for cargo for</p> <p>5 Maersk -- that Maersk, Inc., represents.</p> <p>6 Q Okay. So how does APM Terminals ensure</p> <p>7 that it satisfies the requirement in Section 42 with</p> <p>8 respect to a port guaranty?</p> <p>9 A APM Terminals, how do they ...</p> <p>10 They have the liability for the guaranties.</p> <p>11 But how they insure it, they do not have control of</p> <p>12 the cargo.</p> <p>13 Q Okay. So how -- how do they make sure that</p> <p>14 Maersk, the ocean carrier, provides the requisite</p> <p>15 number of containers per year that is provided for in</p> <p>16 this port guaranty?</p> <p>17 A I don't think there is.</p> <p>18 Q Okay. So is there a contract?</p> <p>19 A Is there a contract with volume commitment</p> <p>20 from ...</p> <p>21 No.</p> <p>22 Q Okay.</p>

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14 (Pages 53 to 56)

<p style="text-align: right;">53</p> <p>1 A Excuse me. There's a contract, but there's 2 not a contract for the volume commitment. 3 Q From -- when you say there's a contract -- 4 A Maersk, Inc. For Maersk, Inc. 5 Q To -- I just want to get it clear on the 6 record. 7 A To what? 8 Q You said -- I'm reading what the court 9 reporter transcribed. There's a contract, but there's 10 not a contract for the volume commitment. 11 I don't understand that answer. Could you 12 explain it? 13 A We don't -- in the contract there's not a 14 contract -- there's not a volume commitment on behalf 15 of the carrier. 16 Q Okay. So what is the contract that you 17 have -- 18 A For -- 19 Q That APM has with the carrier, what is that 20 contract? 21 A For terminal services. 22 Q It is a terminal services agreement?</p>	<p style="text-align: right;">55</p> <p>1 Let me just call your attention to Exhibit 2 Number 2, Page 98. 3 A 98? 4 Q Yes, Page 98, Section 46 again. 5 You may recall we were -- I was asking you 6 some questions about those Danish entities. And 7 did -- are there shorthand references to those Danish 8 entities that may be more commonly known? 9 A We -- except in contracts, we rarely refer 10 to it. We refer to A.P. Moller Group or the entity 11 Maersk Line, APM Terminals. 12 Q Okay. 13 A I want to say that I'm not an expert on the 14 corporate structure -- 15 Q I understand 16 A -- and the name -- the exact corporate 17 names that are used. So -- 18 Q I understand 19 A -- you're asking me a lot of technical 20 questions on the -- on the -- what these names exactly 21 and what the legal entity is, and it's -- it's more 22 complicated than I know.</p>
<p style="text-align: right;">54</p> <p>1 A Yes. 2 Q Okay. Now, under the port guaranty, if 3 Maersk, the ocean carrier, brings a container to the 4 APM terminal, does that container count towards 5 satisfaction of the port guaranty? 6 A Yes. 7 Q Okay. 8 MR. KIERN: We've been going just about an 9 hour I suggest we take a five-minute break. 10 MR. FINK: Fine. 11 MR. KIERN: Okay. 12 VIDEO SPECIALIST: We're going off the 13 record. The time is 10:27 a.m. 14 (Short recess.) 15 VIDEO SPECIALIST: We're back on the 16 record. The time is 10:46 a.m. 17 MR. KIERN: Thank you very much. 18 BY MR. KIERN: 19 Q Mr. Oppenheimer, we're back on the record. 20 You understand you remain under oath? 21 A Yes. 22 Q Okay. Good.</p>	<p style="text-align: right;">56</p> <p>1 Q Okay. But is the first entity that starts 2 with the word A-K-T-I-E-S-E-L-S-K -- 3 A That's -- 4 Q -- S-K-A-B-B-T, is the shorthand reference 5 for that Svenborg, S-V-E-N-B-O-R-G? 6 A Yes. 7 Q And for the second entity -- 8 A Well, I don't know if it worldwide is known 9 as Svenborg; that's how I refer to it, as Svenborg. 10 Q Okay. 11 A That's correct. 12 Q And the second entity which starts with 13 D-A-M-P-S-K-I-B-S-S-E-L-S-K-A-B-E-T, is that entity -- 14 shorthand for that entity, 1912? 15 A That's -- yes, 1912 would be -- is the 16 easiest way for an American to be able to pronounce 17 it. 18 Q Very good. Okay. Great. Thanks. 19 Now, let's go back to 1997. And if you 20 want to put that exhibit back together, I don't think 21 I'm going to ask you questions about that right now. 22 As I recall your earlier testimony, you</p>

Exhibit E

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey



**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY'S RESPONDING STATEMENT
TO THE NEW FACTS CONTAINED IN MAHER TERMINALS
LLC'S RESPONDING STATEMENT AND IN FURTHER
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Respondent, the Port Authority of New York and New Jersey (the "Port Authority"), respectfully submits this Responding Statement to the New Facts Contained in Maher Terminals LLC's Responding Statement to the Port Authority's Statement of Material Facts as to Which There is No Genuine Dispute ("Maher's Responding Statement") in support of the Port Authority's Motion for Summary Judgment. As a preliminary matter, Maher's Responding Statement fails to comply with Your Honor's instructions set out in the Order To Supplement Record On PANYNJ's Motion For Partial Summary Judgment ("Order to Supplement"), which required Maher to either (1) admit the Port Authority's facts or dispute the Port Authority's facts by providing a responding citation or (2) state its own facts "in separately numbered paragraphs together with

[REDACTED]

citations to the motion record and must be limited as nearly as practicable to a single factual proposition.” Order To Supplement at 3. Maher frequently ignores this instruction by (1) admitting the facts proffered by the Port Authority and then responding with legal contentions and factual assertions that go beyond and are irrelevant to the factual assertion to which Maher purports to respond, often by providing an amalgamation of facts and arguments in extended responses to the Port Authority’s assertions of undisputed fact; and/or (2) failing to support its contentions with citations limited to the “motion record” as required by the Order To Supplement at 3. Instead, Maher cites to and appends over eighty pages of exhibits from outside the motion record. Maher’s Response did not set forth *any* material facts as to which it believes there exists a genuine dispute “in separately numbered paragraphs together with citations to the motion record and . . . limited as nearly as practicable to a single factual proposition.” Order at 3.

In any event, where Maher does purport to cite new facts, the Port Authority will respond by admitting or disputing such facts (or their materiality) and providing corresponding citations. Because Maher largely attempts to support its denials with legal contentions that are embedded throughout its Responding Statement, the Port Authority will respond to these contentions in the brief preliminary statement below.

PRELIMINARY STATEMENT

In its Responding Statement, Maher clearly concedes facts sufficient to establish, on the undisputed record, that more than three years prior to the filing of the Complaint, Maher had actual knowledge of the differences between the terms of the Maersk and

[REDACTED]

Maher leases and was therefore on inquiry notice that it had a potential claim based upon an “undue or unreasonable preference.” For example, Maher concedes, among other things, that the lease differentials that were known to it at the time of its lease signing in October 2000 were “considerable” (Maher’s Responding Statement ¶ 14), and also that it is apparent from “the plain language of the leases themselves [that] the lease terms of the two leases are manifestly different to Maher’s prejudice and APM’s preference” (*id.* at ¶ 7).

Rather than disputing any of the salient facts set forth in the Port Authority’s Statement, Maher’s Responding Statement repeatedly advances the erroneous legal position that such admissions are not fatal since Maher neglected to conduct a legal analysis or consult with an attorney about the lease differentials until 2007, and also because it did not have “conclusive evidence” that the preferences were “undue” until various supposed discoveries were made in 2007-2008.¹ But Maher’s arguments are of no consequence under the governing legal standard applied by the FMC (and courts throughout the country, including the Supreme Court) for applying the statute of limitations’ discovery rule, which is that the statute of limitations begins to run when “a party knew or *with reasonable diligence should have known that it had a claim.*” *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 311 (FMC 2001) (emphasis added); *see also W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate*

¹ *See, e.g.*, Maher Responding Statement at 15-17 (asserting that Maher learned of facts sufficient to justify its failure to raise this claim within three years of the Maher lease signing, because in 2007 Port Authority counsel asked for a general release, a Port Authority employee, Dennis Lombardi, allegedly called the Maersk lease a “bad deal” and because in 2008 Maher learned that APMT allegedly does not control carrier cargo)

[REDACTED]

Agreement, 26 S.R.R. 651, 660 (ALJ 1992). There is no requirement either that a party have had conclusive evidence of a claim before the statute of limitations could begin to run, see *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002) (in tort action, court held that under the discovery rule a “claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action”), or that a party have done a legal analysis or consulted an attorney and have knowledge of a legal wrong. See *Lee v. United States*, 809 F.2d 1406, 1410 (9th Cir. 1987) (“Statutes of limitation . . . are ‘triggered by [claimants’] knowledge of the transaction that constituted the alleged violation, not by their knowledge of the law.”) (citations omitted) (alteration in original); *United States v. Kubrick*, 444 U.S. 111, 122-123 (1979) (in a tort action, court held that the accrual of a claim does not “await awareness by the plaintiff that his injury was negligently inflicted”); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir.1994) (“a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong.”); *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir.1995) (“A plaintiff's action accrues when he discovers that he has been injured, not when he determines that the injury was unlawful”).

PORT AUTHORITY'S RESPONDING STATEMENT OF FACTS²

PANYNJ Statement ¶ 5:

Maher's Complaint alleges that the Maersk Lease violated the Shipping Act by "granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement." Maher's Complaint at §IV.B (at page 3), June 3, 2008, attached as Exhibit C to Levine Decl.

Maher Response ¶ 5:

Maher admits that its Complaint in Docket 08-03 includes the quoted language from Section IV of paragraph B, but denies Maher's Complaint alleges that the Maersk lease violated the Shipping Act. Maher's Complaint alleges that PANYNJ violated and continues to violate the Shipping Act. See Maher's Complaint at § IV.A. (June 3, 2008), Exhibit C to Levine Decl.:

Maher seeks a cease and desist order and reparations for injuries cause to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Id. See also, id. ¶ IV.B (the paragraph PANYNJ cites is itself non-exclusive (i.e., "including but not limited to")); id. ¶ IV.A-M (the paragraph PANYNJ cites is one of thirteen other paragraphs alleging facts pertaining to alleged violations); Maher's Counter-Complaint, at § 40, Dkt. 07-01 (Sept. 4, 2007) (alleging violations of the Shipping Act of 1984, 46 U.S.C. § 40102(b)(2), 41102(c), 41106(3) and 41106(2) because PANYNJ "failed to operate in accordance with the Agreement, failed to establish, observe, and enforce just and reasonable regulations and practices, unreasonably refused to deal or negotiate with Maher, and has imposed unjust and

² Where Maher has simply admitted the Port Authority's statement of fact, the Port Authority has not provided a response in this Responding Statement.

[REDACTED]

unreasonable prejudice or disadvantage with respect to Maher concerning the turnover of certain premises”).

Port Authority Response ¶ 5:

Admit in part, deny in part. The Port Authority admits that the quoted sections of the Maher Complaint above are quoted accurately, but denies that Maher’s lease term discrimination claims, which appear in paragraphs IV.B-I of the Maher Complaint (pages 3-4), are based on anything other than the terms of the two leases executed more than seven years prior to the Complaint. *See* Maher’s Complaint at §IV.B (at page 3), June 3, 2008, attached as Exhibit C to Levine Decl. (alleging that the Port Authority granted “APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249. . .”); *id.* at IV.C (page 3) (alleging that in the terms of EP-248, the Port Authority “provide[d] APMT a base annual rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher.”); *id.* at IV.D. (page 3) (alleging that the terms of Maher’s lease require it “to pay a base annual rental rate of \$39,750 per acre and additionally required Maher to pay a basic rent escalator of two percent per annum such that by the end of the 30 year term of the lease Maher’s basic rent rises to \$70,590 per acre, or an unreasonable difference of \$51,590 per acre more than the PANYNJ charges APMT.”); *id.* at IV.E. (page 4) (alleging that this “undue prejudice disadvantaging Maher and undue preference advantaging APMT” stemming from the lease term rent differential mentioned above “totals million of dollars.”); *id.* at IV.F. (page 4) (alleging that the investment requirements and financing terms (all of which are found in the two leases) were more favorable for APMT than Maher); *id.* at IV.G. (page 4) (alleging that the container

[REDACTED]

throughput requirement found in the leases were greater for Maher than APMT); *id.* at IV.H. (page 4) (alleging that the first point of rest requirement found in the Maher lease is a further undue preference for APMT); *id.* at IV.I. (alleging that the \$1.5 million security deposit requirement in the Maher lease was a further unlawful preference for APMT).

PANYNJ Statement ¶ 6:

In its Interrogatory Responses, Maher has asserted that “[t]he terms of leases EP-248 and EP-249, on their face, show the inequity of treatment as between Maher and APM and these are set forth in the complaint which is incorporated by reference.” Maher’s Responses to the Port Authority’s Second Set of Interrogatories to Maher at Interrogatory No. 1 (at page 4), August 29, 2008, attached as Exhibit K to Levine Decl.

Maher Response ¶ 6:

*Maher admits that the quoted language is a textually accurate excerpt from the Interrogatory response, and admits that the terms of the leases show on their face the differences in the lease terms, but denies PANYNJ’s attempt to misconstrue one of Maher’s interrogatory responses to suggest it was responding to when Maher knew of the differences and that the differences were undue. The interrogatory PANYNJ cites did not. Rather, PANYNJ ignores the interrogatories reflecting when Maher knew of the differences and when Maher knew when they were undue. See Maher’s Responses to PANYNJ’s Second Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit K to Levine Decl.) (The text PANYNJ quotes is three lines of a two-page interrogatory response to responding to PANYNJ’s interrogatory requesting “all facts supporting each and every allegation of the Complaint.”). In response to PANYNJ’s First Set of Interrogatories, No.1, asking “when Maher first became aware of the alleged differences” between the leases, Maher responded that it “learned of PANYNJ’s preference of [APM] during the negotiation of EP-249,” see Maher’s Responses to PANYNJ’s First Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit H to Levine Decl.), but it only began to learn that the APM preference was unduly or unreasonably preferential starting “in the summer of 2007” when PANYNJ Deputy General Counsel Christopher Hartwyck sought a release from Maher’s General Counsel Scott Schley for a rent disparity claim. *Id.* at No. 4, p.8 (Exhibit H to Levine Decl.).*

Port Authority Response ¶ 6:

The Port Authority admits that the interrogatory is quoted accurately, except that the word “preference” is not emphasized in the original. The Port Authority disputes that Maher first learned the preference was “undue” in 2007 since (1) Maher has failed to

[REDACTED]

allege any *facts* it learned of in 2007 that supposedly rendered the lease term differences of which it was long aware an “undue” preference; and (2) Maher’s contention is irrelevant as a matter of law for the reasons set forth in the Preliminary Statement. The fact that Port Authority counsel may have asked for a general release is irrelevant to whether the lease terms executed seven years earlier created an undue preference and does not excuse Maher’s delay in asserting a Shipping Act claim. Maher itself elsewhere states that the “considerable” lease term differentials were already known to it during the lease signing. Maher’s Responding Statement ¶ 14. The base rental differential, which the Maher Complaint characterizes as an “undue prejudice disadvantaging Maher” (*see* Maher’s Complaint at §IV.E (at page 4), June 3, 2008, attached as Exhibit C to Levine Decl.) was known by Maher by no later than 2001 (*see* Maher’s Responding Statement ¶¶ 17-18). In any event, the dispute regarding Maher’s assertion that it first concluded that any preference was “undue” in 2007 is not material under the governing discovery rule standard for the reasons noted in the Preliminary Statement.

In sum, Maher’s Response fails to present any disputed facts, supported by citations to the record, and accordingly, under the Order to Supplement the facts in this paragraph should be deemed admitted. And, to the extent that a response is required to Maher’s legal argument, the Port Authority notes that such argument is without merit for the reasons stated in the Preliminary Statement.

PANYNJ Statement ¶ 7:

In its Scheduling Report, filed on July 23, 2008, Maher has asserted that it “is apparent from Maher’s complaint and the plain language of the leases themselves, the lease terms of the two leases are manifestly different to Maher’s prejudice and APM’s

preference.” Complainant’s Scheduling Report at 5, July 23, 2008, attached as Exhibit G to Levine Decl.

Maier Response ¶ 7:

Maier admits that the quoted language is a textually accurate excerpt from the cited Scheduling Report, but as with the previous paragraph PANYNJ misconstrues, Maier denies PANYNJ’s mischaracterization of the quote. Contrary to PANYNJ’s effort to conflate the two elements of a claim – knowledge of the difference and knowledge that the difference is undue—the excerpt sets out both elements. See Complainant’s Scheduling Report at 5 (July 23, 2008) (Exhibit G to Levine Decl.) (explaining in the context of the Shipping Act burden of proof, that the initial burden shift to the Respondent “is apparent from Maier’s complaint” and “the plain language of the leases themselves.”).

PANYNJ Response ¶ 7:

Maier’s Response –which concedes that it knew it was “apparent from Maier’s complaint and the plain language of the leases themselves that the lease terms of the two leases are manifestly different to Maier’s prejudice and APM’s preference”– is limited to legal argument for which no response is required. To the extent that a response is required, the Port Authority refutes such argument for the reasons stated in the Preliminary Statement. Moreover, Maier’s Response fails to present any disputed facts, supported by citations to the record, and accordingly, under the Order to Supplement the facts in this paragraph should be deemed admitted.

PANYNJ Statement ¶ 8:

In its Interrogatory Responses, Maier has asserted that its damages “are contained in the disparate terms of leases EP-248 and EP-249.” Maier’s Responses to Port Authority’s First Set of Interrogatories at Interrogatory No. 6 (at page 10), Levine Decl. Ex. H.

Maier Response ¶ 8:

Maier admits that the terms of leases EP-248 and EP-249 are disparate. Pursuant to Ceres Marine Terminal, Inc. v. Maryland Port Administration, 27 S.R.R 1251, 1272 (FMC, 1997), where facially disparate lease terms are unduly disparate (i.e. different and wrongful or unjustified) the measure of damages is the difference of the disparate lease terms. See Ceres Marine Terminal v. Maryland Port Administration, 29 S.R.R. 356,

[REDACTED]

372 -73 (FMC 2001) (citing *Valley Evaporating v. Grace Line Inc.*, 11 S.R.R. 873 (1970), Maher denies PANYNJ's suggestion that an ability to calculate differences if there was a violation constitutes evidence of a violation.

PANYNJ Response ¶ 8:

Maher's Response admits the facts of the Port Authority's statement but also includes legal argument for which no response is required. To the extent that a response is required, the Port Authority notes that such argument is without merit for the reasons stated in the Preliminary Statement.

PANYNJ Statement ¶ 9:

Maher has represented that it is not seeking "additional" damages beyond those allegedly created by the facial disparities in the lease terms. Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3, Oct. 9, 2008, attached as Exhibit D to Levine Decl.

Maher Response ¶ 9:

Maher denies that (i) it alleges damages created by facial disparities in the lease terms, and (ii) denies that its Shipping Act claims in this proceeding seek no other damages. Maher alleges that PANYNJ violated and continues to violate the Shipping Act. Maher's claims also allege lost business, lost revenue, increased costs, attorney's fees and interest. See generally, Maher's Reply in Opposition to Respondent's Motion for a Protective Order at 11, 31 (Apr. 13, 2011) (citing Maher's complaint and consolidated 07-01 counter-claims and extensive testimony concerning damages). PANYNJ takes the quoted statement out of context. See Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3 (Oct. 9, 2008) (Ex. D in Levine Decl.) (the statement was made in response to PANYNJ's Motion to Compel post-lease financial documents in rebuttal of PANYNJ's assertion of a need for discovery of "competitive harm," as a separate and additional element of damages akin to lost profits and or business, and which under Ceres is not the applicable measure of damages).

PANYNJ Response ¶ 9

The Port Authority disputes that Maher is not seeking damages based on the facial disparities of the lease terms, as this representation conflicts with Maher's prior representations, including its Complaint at VII.B. (page 6), its filings (see Maher's Reply

[REDACTED]

in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3, Oct. 9, 2008, attached as Exhibit D to Levine Decl.), as well as its response to paragraph 8 above. In any event, this dispute is not material to the issue of the application of the statute of limitations, including the governing discovery rule as described in the Preliminary Statement.

PANYNJ Statement ¶ 10:

In its Reply in Opposition to the Motion for Summary Judgment, Maher states "Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to July 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed." Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 5, March 14, 2011.

Maher Response ¶ 10:

Admitted. As Maher also explained, however, "What is decisive is that Maher did not know nor should it have known that the different lease terms were an undue prejudice." Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 4 (March 14, 2011) (emphasis added).

PANYNJ Response ¶ 10

Maher's Response admits the facts of the Port Authority's statement but also includes legal argument for which no response is required. Moreover, Maher's Response fails to present any disputed facts, supported by citations to the record, and accordingly, under the Order to Supplement the facts in this paragraph should be deemed admitted. To the extent that a response is required, the Port Authority notes that such argument is without merit for the reasons stated in the Preliminary Statement.

PANYNJ Statement ¶ 11:

Maher has stated that it "learned of PANYNJ's preference of APM Terminals North America, Inc. ("APM") during negotiation of EP-249." Maher's Response to Port

[REDACTED]

Authority's First Set of Interrogatories to Maher at Interrogatory No. 1 (at pages 4-5), Levine Decl. Ex. H.

Maher Response ¶ 11:

Maher admits that the quoted language is a textually-accurate excerpt from the Interrogatory response, and that the excerpt itself is accurate, but denies that it conveys knowledge of a preference without knowledge of an undue preference. Compare Maher's Responses to PANYNJ's First Set of Interrogatory Responses, No. 1 at 4-5 (Aug. 29, 2008) (Levine Decl. Ex. H) (responding to PANYNJ's first interrogatory requests by stating, "Maher learned of PANYNJ's preference of APMT" at the time of the lease negotiation) with id., No. 4 at 8-9 (responding to PANYNJ's first discovery requests that Maher did not learn that the preferences were "unduly or unreasonably preferential" until events in 2007 and 2008.).

PANYNJ Response ¶ 11

Maher's Response admits the facts of the Port Authority's statement but also includes legal argument for which no response is required. Moreover, Maher's Response fails to present any disputed facts, supported by citations to the record, and accordingly, under the Order to Supplement the facts in this paragraph should be deemed admitted. To the extent that a response is required, the Port Authority notes that such argument is without merit for the reasons stated in the Preliminary Statement.

PANYNJ Statement ¶ 13:

Mosca testified further that at that time Maher had performed a financial analysis to compare the base annual rental rate of the Maersk Lease with the Maher Lease. *Id.* at 172:15 – 20, Levine Decl. Ex. F; *see, e.g.*, Memorandum from M. Davis to R. P. Mosca Regarding Maersk Lease at MT005220, Aug. 1, 2001, attached as Exhibit J to Levine Decl. (analysis of Maersk lease rates dated August 1, 2001).

Maher Response ¶ 13:

Admitted in part and denied in part. [REDACTED]

[REDACTED] *see R. Mosca Dep., Dkt. 07-01, 172:15-20 (June 11, 2008), which was not "at that time" of the later August 1, 2001 memorandum.*

PANYNJ Response ¶ 13

[REDACTED]

Admitted in part and denied in part. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

See supra PANYNJ Response

¶ 16.

PANYNJ Statement ¶ 16:

In August of 2001, an internal Maher memorandum was sent to Brian and Basil Maher and Mr. Mosca, analyzing the differences between the Maher and Maersk Leases. *See* Memorandum from M. Davis to R.P. Mosca Regarding Maersk Lease at MT005220-5224, Levine Decl. Ex. J.

Maher Response ¶ 16:

Admitted in part and denied in part. Maher admits that the cited memorandum was prepared and sent, but [REDACTED]

[REDACTED]

Maher witnesses testified that the review was not a legal analysis, see, e.g., S. Schley Dep., Dkt 08-03, 76:20-77:8 (March 24, 2011), (no one raised a legal issue with respect to the report); B. Maher Dep. 08-03, 206:11-207:3 (April 6, 2011) (Prior to 2007, it did not cross Maher's mind to seek counsel); R. Mosca Dep.. 08-03, 86:9-86:12 (Mar. 14, 2011) (no discussion of suing the Port Authority).

PANYNJ Response ¶ 16

Admitted in part and denied in part. The Port Authority admits that the quoted language is contained in the document. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Memorandum

from M. Davis to R.P. Mosca Regarding Maersk Lease at MT005220-5222, Levine Decl. Ex. J. The document speaks for itself and this dispute regarding the characterization of the memorandum is not material.

The remainder of Maher's response includes citations to the testimony of Brian Maher that further undermine Maher's position and to legal argument for which no response is needed. To the extent that a response is required, the Port Authority notes that the fact that the memo was not a "legal analysis" is immaterial, and Maher's argument is without merit for the reasons stated in the Preliminary Statement.

PANYNJ Statement ¶ 21:

In Maher's Opposition to the Motion for Summary Judgment, Maher alleges that "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...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's Reply in Opposition to Respondent's Motion for Summary Judgment Ex. A at 3-4.

Maher Response ¶ 21:

Maher admits that the quoted excerpt is contained in Maher's Reply in Opposition to Respondent's Motion for Summary Judgment. Ex. F at 3-4. PANYNJ's failure to enforce the cargo commitment in APM's Port Guarantee contradicts PANYNJ's sworn and verified responses that the Port Guarantee is a unique justification for charging Maher more than APM. See PANYNJ's Response to Maher's First Set of Interrogatories to PANYNJ, Request No. 18, and No. 1, 10-11 (quoting PANYNJ's interrogatory response, sworn and verified by Port Commerce director Richard Larrabee on August 29, 2008, that "the Maersk lease provided for a Port Guarantee through which APMT (and Maersk, Inc.) guaranteed that a certain volume of Maersk containers would go through the Port . . . [it] was an important term that neither Maher nor any other port tenant could provide . . . [it] committed the Maserk's shipping lines to continue using the port

[REDACTED]

even if volumes declined in the future. . . . [and] APMT's parent company, Maersk, Inc. executed a guarantee of the entire lease (not just the port guarantee) . . . In short, the APMT lease assured the port authority that . . . Maersk, Inc.'s new mega-ships would continue to come through the port.") (emphasis added).

PANYNJ Response ¶ 21:

Maher's Response admits the facts contained in paragraph 21. Furthermore, as even Maher admits, there was no "failure" to enforce the Port Guaranty in accordance with the express term of Maersk's lease that specifically provided the remedy for violation of the Guaranty. The undisputed fact is that the Port Authority did charge APMT for the additional rent due to the failure to meet the guaranty, as Maher admits. See Maher's Reply in Opposition to Respondent's Motion for Summary Judgment Ex. A at 4³ (admitting that the Port Authority has sought a contractual rent increase); see also Email from P. Caffey to R. Evans, 08PA02057413 attached hereto as Exhibit A. Whether there were other remedies available to the Port Authority to enforce the guarantee pursuant to a boilerplate savings clause is a legal issue as to which no response is needed.⁴ To the extent that a response is required, the Port Authority denies

³ Exhibit A to Maher's Opposition is unnumbered. The cited sentence appears in the first paragraph of the fourth page.

⁴ Moreover, Maher's legal argument, which is based on the contention that the Port Authority could have affirmatively sought specific performance of the cargo commitments in the Port Guarantee –whether by seeking a mandatory injunction for such cargo or by suing for specific performance – is baseless since mandatory injunctions are "particularly disfavored" by courts, see *N.D. ex rel. parents acting as guardians ad litem v. Haw. Dept. of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010), and courts do not grant the extraordinary remedy of specific performance where there are adequate compensatory remedies, for instance the increased rent provision found in the Port Guarantee. See, e.g., *INEOS Americas LLC v. Dow Chem. Co.*, 378 F. App'x 74, 77 (2nd Cir. 2010) (in case decided under UCC, court held that specific performance is a remedy that "remains extraordinary in character and is generally available only when other remedies are in some way inadequate"); *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d

[REDACTED]

that its enforcement of the increased rent provision of the Port Guaranty is a material fact since such remedy provision was plainly available and known to, or should have been known to, Maher when the Maersk lease was publicly filed. *See supra* Maher Response ¶ 10.

PANYNJ Statement ¶ 22:

The Port Guarantee section (Section 42) of the Maersk Lease expressly provided that if the Port Guaranty were not satisfied in the manner specified under that section “the basic rental payable by the Lessee under Section 3 hereof shall be increased...in accordance with the schedule...marked ‘Schedule B.’” Maersk Lease § 42(d) at 08PA00020407, Levine Decl. Ex. B.

Maher Response ¶ 22:

Maher admits that section 42 of lease EP-248 provides one of many possible remedies if the port guaranty were not satisfied, and denies that section 42 provides an exclusive remedy. See EP-248 § 30 at 74 (Levine Decl. Ex. A) (No lease remedies are exclusive: “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”); id. § 46(a)(2) at 98-99 (setting forth the requirements that the actual Maersk shipping companies must maintain majority ownership and control of Maersk, Inc. (APM’s U.S. parent, “Maersk”); that Maersk “is engaged as the exclusive United States agent on behalf of [the Maersk shipping companies] . . . in the conduct of a worldwide waterborne ocean container shipping business;” and that: “The Lessee further recognizes and agrees that the aforesaid connection of Maersk with the Shipping Business in conjunction with its holding the Ownership Interest is a major inducement for the Port Authority’s entering into this Agreement, and that it is of great importance to the Port Authority, in order to achieve the business and regional economic goals of this Agreement, that the Lessee be owned by an entity or entities having said connection with the Shipping Business in order to assure the availability of cargo to meet the foregoing business and regional economic goals of the Port Authority.” (emphasis added). The parent guarantees not just the financial provisions, but all of the lease. See also, id., § 48 at 102 (providing that “[the]Contract of Guaranty shall guarantee the full, faithful, and prompt performance of and compliance with, on the part of the Lessee, all of the terms,

265, 279 (7th Cir. 1986) (“specific performance is available only if damages are not an adequate remedy”).

[REDACTED]

provisions, and covenants and conditions of this Agreement..."); id., Parent Contract of Guaranty, Maersk Inc., 08PA0020442 ("The Guarantor hereby absolutely and unconditionally guarantees, promises and agrees that the Lessee will duly and punctually pay all rentals and other monetary obligations which it has or shall have under the Lease, and that the Lessee will faithfully and fully perform, fulfill and observe all the other terms, provisions, covenants and conditions of the Lease on the part of the Lessee to be performed, fulfilled and observed.") (emphasis added)

PANYNJ Response ¶ 22:

The Port Authority denies that the Port Authority has failed to enforce the Port Guaranty. As spelled out clearly in section 42 of the publicly available Maersk Lease, the Port Guaranty expressly provided that Maersk must satisfy certain cargo commitments or its basic rental rate will be increased, which Maher admits in its above response. In 2010, the Port Authority enforced this provision, invoicing APMT for additional rent relating to its failure to meet the levels required by the Port Guaranty, and APMT paid such additional rent. See Email from P. Caffey to R. Evans, 08PA02057413, Exhibit A.

Whether there were might be other, implicit remedies available to the Port Authority to enforce the guarantee is a legal issue as to which no response is needed. To the extent that a response is required, the Port Authority denies that its enforcement of the increased rent provision of the Port Guaranty is a material fact since the express remedy provision that the Port Authority has enforced –and the only express remedy for violation of the Port Guaranty– was plainly available and known to, or should have been known to, Maher when the Maersk lease was publicly filed. See *supra* Maher Response ¶ 10.

PANYNJ Statement ¶ 23:

Maher knew and/or was on notice of the terms of the Port Guaranty, including that APM's failure to meet the throughput requirements of the Port Guaranty would result

in increased rent. See Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 5 ("Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.").

Maher Response ¶ 23:

Admitted in part and denied in part. Maher admits that it knew or should have known of the facial differences in the leases, but Maher denies that it knew or was on notice of PANYNJ's unique Port Guarantee—that PANYNJ asserted was unique to carriers, not marine terminal operators like Maher—that would only enforce a rent increase penalty. See B. Maher Dep., Dkt. 07-01, 179:14-179:19 (June 9, 2008)

; see also Port Reinvestment Model, MT005073-74, Dkt. 08-03, Dep. Ex. 55 (Fax date July 22, 1997); see L. Borrone Dep., Dkt. 08-03, 67:11-67:18 (Mar. 17, 2011)

Schley Dep., Dkt. 08-03, 67:10 – 67:19 (Mar. 24, 2011)

; see Notes of PA Lease Negotiations Meeting of 9/23/99, MT354761-65, Dkt. 08-03, Ex. 144 (Sep. 23, 1999); Mosca Dep., Dkt. 08-03, 88:22-89:15, 139:23-140:5 (Mar. 14, 2011)

; B. Maher Dep., Dkt. 08-03, 199:12-199:25 (April 6, 2011)

See L. Barrone Dep., Dkt. 08-03, 97:5-98:21 (Mar. 17, 2011)

R. Shifan Dep., Dkt. 08-03, 168:22-196:8 (April 4, 2011)

; see L. Barrone Dep., Dkt. 08-03, 99:14-99:16 (Mar. 17, 2011)

; B. Maher Dep., Dkt. 08-03, 166:2-4 (Apr. 6, 2011)

; S. Schley Dep., Dkt. 08-03, 69:11 – 69:23 (Mar. 24, 2011)

[REDACTED]

PANYNJ Response ¶ 23

Maher's response admits that it knew or should have known of the terms of the Maersk lease, including that the Port Guaranty provision was enforceable through its increased rent provision. Given this admission, the remaining "facts" stated by Maher are immaterial and irrelevant in so far as they amount to a complaint that the Port Authority enforced the Port Guaranty in the manner specifically prescribed by the Port Guaranty section of the Maersk lease rather than in some other manner, that was likely not even available, *see supra* note 4, are irrelevant to the statute of limitations motion and are therefore not material.

PANYNJ Statement ¶ 24:

Based on paragraphs 1-23 above, it is undisputed that more than three years prior to the filing of the Complaint, Maher was on notice, and had actual knowledge, of the differences between the terms of the Maersk and Maher leases of which it complains, was on more than ample notice of facts sufficient to put it on a duty of inquiry into whether it had a colorable Shipping Act claim, and failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher Response ¶ 24:

Denied. Other than knowledge of the facial difference in the leases, which Maher has not contested, Maher denies that it (i) knew or (ii) should have known that it had a case against PANYNJ more than three years before filing the Complaint, and Maher denies that it (iii) failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher did not know of a claim. See B. Maher Dep., Dkt. 08-03, 16:7-16:13 (April 6, 2011)

); id. at 206:18-207:3 (Apr. 6, 2011)

S. Schley Dep., Dkt. 08-03, 75:20-77:8 (Mar. 24, 2011)

[REDACTED]
[REDACTED]); R. Mosca, Dep., Dkt. 08-03, 86:9-17 (March 14, 2011) [REDACTED]
[REDACTED]

See Maher's Response to Port Authority's First Set of Interrogatories to Maher at Interrogatory No. 4 at 8. (Maher did not begin to learn that the lease differences were unduly preferential or prejudicial until "in the summer of 2007 [when] PANYNJ Deputy General Counsel Christopher Hartwyck asked Maher's General Counsel Scott Schley for a release from Maher's rent disparity claim which Maher declined to give."); see also, S. Schley Dep., Dkt. 08-03, 75:17-75:19 (Mar. 24, 2011) [REDACTED]
[REDACTED]

See S. Crane Dep., Dkt. 08-03, 24:10-24:18, 38:14-38:20 (March 8, 2011) [REDACTED]
[REDACTED]

See also J. Buckley Dep., Dkt. 08-03, 49:25-50:19, (March 11, 2011); [REDACTED]

see R. Larrabee Dep., Dkt. 08-03, 19:19-21:1, 24:18-24:21, 35:11- 35:15, 26:1-27:2 (Apr. 12, 2011) (rough transcript) [REDACTED]
[REDACTED]

See also M. Oppenheimer Dep., Dkt. 07-01, 52:4-52:21 (May 20, 2008) (Maher learned for the first time on May 20, 2008 that APM does not control and does not direct carrier cargo, nor does the guarantor of the Port Guarantee, Maersk, Inc.):

Well, the port guaranty is for cargo for Maersk -- that Maersk, Inc., represents. Q Okay. So how does APM Terminals ensure that it satisfies the requirement in Section 42 with respect to a port guaranty? A APM Terminals, how do they ... They have the liability for the guaranties. But how they insure it, they do not have control of the cargo. Q Okay. So how -- how do they make sure that Maersk, the ocean carrier, provides the requisite number of containers per year that is provided for in this port guaranty? A I don't think there is. Q Okay. So is there a contract? A Is there a contract with volume commitment from ... No.)

[REDACTED]

See, e.g., id. at 53:8-54:1 (The only contract APM has with respect to carrier cargo is a marine terminal services agreement to unload cargo, but unlike Maher's marine terminal services contract with carriers that contain volume guarantees, neither APM nor Maersk, Inc. have any volume commitment for the carriers cargo.). See also Shiftan Dep., Dkt. 216:8-216:24 (April 1, 2011) [REDACTED]

[REDACTED]; see *L. Borrone Dep. 08-03, 99:15-100:21 (Mar. 17, 2011)*

[REDACTED]

PANYNJ Response ¶ 24

The Port Authority notes that the legal arguments contained in the above paragraphs are without merit for the reasons stated in the Preliminary Statement.

The Port Authority disputes that Maher first learned the preference was "undue" in 2007 since Maher has failed to allege any facts it learned in 2007 that support such alleged unlawfulness. Maher has already conceded that it knew, when it was negotiating its lease that the lease term differential was "considerable" (Maher Responding Statement ¶ 14). The fact that Port Authority counsel would ask for a general release is entirely irrelevant to whether the lease terms created an undue preference and does not shed any additional light on such alleged preference. So too is the allegation that a Port Authority employee allegedly characterized the Maersk lease as a "bad deal," a

[REDACTED]

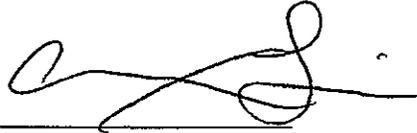
contention which is of no relevance to when Maher should have known about the basis of its lease term discrimination claims. In short, these “facts” are not material.

Moreover, the remaining facts relating to whether the Port Authority or APM was obligated to seek specific performance of the Port Guaranty are similarly not material.⁵ The publicly available Maersk lease includes the Port Guaranty section (Section 42), which expressly provided that if the Port Guaranty was not satisfied in the manner specified under that section “the basic rental payable by the Lessee under Section 3 hereof shall be increased...in accordance with the provisions of the schedule...marked ‘Schedule B.’” Maersk Lease § 42(d) at 08PA00020407, Levine Decl. Ex. B. The fact that the Port Guaranty would be enforced through an increased rent provision was therefore manifestly obvious from the express terms of the Maersk lease, which were available and known to Maher many years before the statute of limitations period.

⁵ See also *supra* note 4.

Dated: April 20, 2011

Respectfully submitted,



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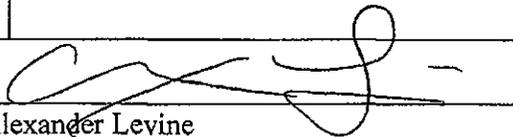
*Attorneys for The Port Authority of
New York and New Jersey*



CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

<p><u><i>Via U.S. Mail and E-mail:</i></u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at Washington, DC this 20th day of April, 2011</p>
--	---


Alexander Levine

The Port Authority of New York and New Jersey's Responding Statement to the New
Facts Contained in Maher Terminals LLC's Responding Statement and in Further
Support of its Motion for Summary Judgment

EXHIBIT A

[REDACTED]

Exhibit F

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

**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 TERMINALS, LLC'S
MOTION TO STRIKE
PANYNJ's "RESPONDING STATEMENT" REPLY AND SUPPLEMENTAL BRIEF**

Complainant, Maher Terminals, LLC ("Maher"), respectfully submits this Motion to Strike the Port Authority of New York and New Jersey's ("PANYNJ's") supplemental reply filing of April 20, 2011, entitled: "[PANYNJ's] Responding Statement to the New Facts Contained in Maher Terminals LLC's Responding Statement and in Further Support of its Motion for Summary Judgment." ("PANYNJ's Reply").

INTRODUCTION

PANYNJ's Reply is an improper "reply to a reply" and should be stricken. PANYNJ's filing violates the April 1, 2011 Order to Supplement Record on PANYNJ's Motion for Partial Summary Judgment (the "Order"), FMC Rule 74(a)(1), prohibiting replies to replies, and FMC Rule 73(e), prohibiting repetitious motions. PANYNJ's Reply *was not* directed or permitted by the Order. Rather, PANYNJ seeks the last word on its motion for summary judgment.

PANYNJ improperly seeks to advance new arguments and authority in support of its motion and improperly attempts to rebut the citations in Maher's Responding Statement demonstrating the existence of genuine disputes of PANYNJ's allegedly undisputed material facts. Because PANYNJ failed to request leave of the Presiding Officer to file its reply to a reply, Maher is compelled to file this motion to strike.

BACKGROUND

PANYNJ filed a partial motion for summary judgment on February 25, 2011, and Maher replied in opposition on March 14, 2011. On April 1, 2011, the Presiding Officer issued the Order directing PANYNJ to Supplement the record on its Motion. The Order explained that "PANYNJ argues that the Act's three-year statute of limitations for reparation claims, 46 U.S.C. § 41301(a)," bars Maher's Shipping Act claims alleging unreasonable discrimination, as to both the claims "seeking a cease and desist order and seeking reparation for alleged injury." Order at 1.

With respect to the cease and desist claims, the Order explained that "Maher argues that its claims seeking a cease and desist are not barred by the Act's statute of limitations. (Maher Opposition at 9-12.)" Order at 1. With respect to the reparations claims, the Order explained that "Maher divides its argument opposing the motion for summary judgment on its claim for reparation into two main sections[:]"

First, it argues that the Shipping Act statute of limitations does not bar claims for reparation for violations of the shipping act within the statutory period – whether new, recurring, or continuing violations. (*Id.* at 13-22.). Second, it argues that under the Commission's "discovery rule," the statute of limitations did not begin to run until it obtained "conclusive information" that it had a claim during discovery in a related proceeding. (*Id.* at 22-25.) Order at 1-2. The Order further explained that PANYNJ contends that its motion should be granted based upon the allegedly undisputed material facts set forth in a "Statement of

Undisputed Facts” in its motion. *Id.* at 2. The statement, however, was presented in narrative form.

In order to “facilitate a decision on the motion for summary judgment,” the Presiding Officer ordered PANYNJ to serve and file a properly-constituted statement of allegedly undisputed facts in support of its motion, and for Maher to respond to those alleged facts. Order at 2-3. Specifically, PANYNJ was ordered to:

serve and file a statement of material facts as to which it contends there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which PANYNJ contends there is no genuine dispute together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. Each paragraph must be limited as nearly as practicable to a single factual proposition. The citation must identify the document and must specify the pages and paragraphs or lines thereof or the specific portions of exhibits on which it relies.

Order at 2-3. (“PANYNJ’s Statement”). The Order directed that Maher:

serve and file a responding statement either admitting or disputing each of the facts in PANYNJ’s statement. All material facts in PANYNJ’s statement that are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed with a citation demonstrating the existence of a genuine dispute as to the fact.

Id. at 3 (Maher’s “Responding Statement”). The Order provided further that Maher “may also include in its responding statement additional facts that Maher contends are material and as to which there exists a genuine dispute” and if so, must provide a statement of material facts in dispute in the form of PANYNJ’s Statement. *Id.* at 3. If Maher elected to file a statement of facts in dispute, PANYNJ was directed to reply to such a statement by April 20, 2011. *Id.*

PANYNJ served and filed its supplemental statement of facts on April 8, 2011, and Maher served and filed its Responding Statement on April 15, 2011. Maher’s Responding Statement responded to PANYNJ’s alleged “facts as to which PANYNJ contends there is no

genuine dispute, with citations demonstrating the existence of a genuine dispute as to the facts disputed.” Responding Statement at 2. Maher’s Responding Statement did not include an optional statement of additional facts in dispute. *Id.*

On April 20, 2011, PANYNJ filed a reply to Maher’s Responding Statement and Supplemental Brief, titled “[PANYNJ’s] Responding Statement to the New Facts Contained in Maher Terminals LLC’s Responding Statement and in Further Support of its Motion for Summary Judgment” (defined above as, “PANYNJ’s Reply”).

ARGUMENT

I. The Order of April 1, 2011.

The Presiding Officer’s April 1, 2011 Order did not direct or permit PANYNJ’s Reply to Maher’s Responding Statement. The Order directed that PANYNJ cure the deficient statement of facts in its summary judgment motion by filing a supplemental statement of facts, in separately numbered paragraphs, with supporting citations to the motion record. Order at 2-3. The Order directed Maher to respond to PANYNJ’s Statement, “either admitting or disputing each of the facts in PANYNJ’s statement” and explaining that “[a]ll material facts in PANYNJ’s statement that are sufficiently supported will be deemed admitted for purposes of the motion only, *unless specifically disputed with a citation demonstrating the existence of a genuine dispute as to the fact.*” Order at 3 (emphasis added). The Order did not provide PANYNJ a right to reply to Maher’s admissions, denials or citations demonstrating the existence of genuine disputes of PANYNJ’s allegedly-undisputed material facts. *Id.*

In addition to disputing PANYNJ’s allegedly undisputed facts with “citation[s] demonstrating the existence of a genuine dispute as to the fact[s],” the Order provided that

“Maher *may also* include in its responding statement additional facts that Maher contends are material and as to which there exists a genuine dispute.” Order at 3 (emphasis added) (outlining Maher’s option to raise additional material facts in dispute with an affirmative statement of such facts). The only PANYNJ reply permitted by the Order was a limited reply if Maher opted to serve and such a statement of additional material facts in dispute. *Id.* (“*If* Maher includes additional facts in its statement, . . . PANYNJ must serve and file a responding statement either admitting or disputing each of the facts in Maher’s statement. . .”). *Id.* (emphasis added). The reply contemplated by the Order, therefore, was (i) only in the event that Maher filed an affirmative statement of facts, and (ii) if Maher filed such a statement, only to respond to the new facts alleged as in dispute, not as a rebuttal to Maher’s citations demonstrating material disputes of PANYNJ’s alleged facts.

II. Other Applicable Law.

Rule 74(a)(1) of the FMC Rules prohibits replies to replies and the Commission has consistently denied requests for leave to file replies to replies. *See Exclusive Tug Franchises — MTOs Serving the Lower Mississippi River*, 30 S.R.R. 278, 282 (FMC 2004). Waiver of Rule 74(a)(1) requires that the party seeking to file the reply show that the reply is necessary to “prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires.” *See Petition of Olympus Growth Fund III, L.P., et al. for a Declaratory Order*, 2009 WL 1766678, 08-07, (FMC June 15, 2009) (citing 46 C.F.R. § 502.10 and granting a motion to strike where the party seeking to file a reply to a reply made no showing of hardship or injustice, or that acceptance of the response would further the expeditious conduct of Commission business).

Replies that advance new argument or authority in an attempt to bolster a party's motion, or are advanced to rebut statements or arguments in a reply to a motion, do not satisfy the standard to overcome FMC Rules 73(e) or 74(a)(1). *See, e.g., Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, 30 S.R.R. 1243, 1245 (FMC 2006) (Commission denial of a request to file a reply to a reply rebutting statements in the reply).

III. PANYNJ's Reply Violates the Order and FMC Rules 73 and 74.

a. *Mahe Properly Responded to PANYNJ's Alleged Undisputed Facts.*

Pursuant to the Order, Maher's Responding Statement denied certain of PANYNJ's alleged facts with citations demonstrating the existence of genuine disputes of fact. *See Responding Statement* at 1-2. Maher properly complied with the Order by "specifically disput[ing] with a citation demonstrating the existence of a genuine dispute as to" PANYNJ's alleged facts, including PANYNJ's alleged facts that Maher discovered its Shipping Act claims more than three years prior to filing the complaint. Maher's citations demonstrating disputes of PANYNJ's facts are not "new facts," but rather, rebuttal citations to PANYNJ's "facts."¹ *See, e.g.,*

¹ PANYNJ's opening argument that Maher's Responding Statement did not comply with the Order because Maher's citations should have been separately numbered mischaracterizes the Order. PANYNJ's Reply at 1-2. Maher's citations rebutted PANYNJ's alleged facts that PANYNJ was required to set out in separately-numbered paragraphs. PANYNJ similarly mischaracterizes the Order by asserting that Maher's citations to record evidence demonstrating disputes of PANYNJ's allegedly undisputed facts improperly cited evidence of record in addition to the motion record. *Id.* at 2. The Presiding Officer permitted PANYNJ to cure its deficient narrative statement of facts, but limited PANYNJ's citations to the evidence that PANYNJ's motion purported to rely upon, *i.e.*, the "motion record." However, in order for Maher to have a full opportunity to respond to PANYNJ's new, properly-constituted statement of facts, Maher's citations demonstrating the existence of disputes of PANYNJ's alleged facts were not limited to only the motion record. *See Order* at 3 (directing citations to the "motion record" for affirmative statements of fact, but Maher's citations demonstrating the existence of disputes of alleged facts were not limited to PANYNJ's motion record.).

PANYNJ's Reply at 2. PANYNJ's limited right to reply to an affirmative statement of new facts in dispute—that Maher had the *option* to file pursuant to the Order, but that Maher *did not* file—provides no basis for PANYNJ's wholesale reply to Maher's Responding Statement.

It was not necessary for Maher to advance affirmative facts in dispute because *PANYNJ affirmatively advanced* as material fact allegedly not in dispute that Maher discovered its Shipping Act claims more than three years prior to filing the complaint. PANYNJ asserted that “it is undisputed” that Maher “was on more than ample notice of facts sufficient to put it on a duty of inquiry into whether it has a colorable Shipping Act claim,” and that Maher “failed to assert its Shipping Act claims until years after the Statute of Limitations had run.” PANYNJ's Statement at ¶ 24. PANYNJ also affirmatively asserted as material fact allegedly not in dispute that Maher knew or should have known that PANYNJ would not enforce the carrier cargo guarantee obligations in EP-248 by any of the other means available in EP-248 (except triggering a rent penalty)—and that Maher knew or should have known that PANYNJ would not enforce the guarantee of the carrier's U.S. cargo agent, Maersk, Inc. *Id.* at ¶¶ 21-23.

Because the Presiding Officer's April 1, 2011 Order did not direct or permit PANYNJ to reply to Maher's Responding Statement, and because Maher did not elect to file an affirmative statement of facts in dispute, the Order provides no basis for PANYNJ's reply or its supplemental brief.

- b. *PANYNJ's Reply Improperly Argues its Motion for Partial Summary Judgment and Advances New Argument and Authority in an Attempt to Bolster its Motion.*

In the first several pages of PANYNJ's Reply, PANYNJ gratuitously and improperly advances new authority and argument in support of its motion for partial summary judgment. *See*

PANYNJ's Reply at 1-4.² PANYNJ's "Preliminary Statement" is plainly a supplemental legal brief on the FMC's discovery rule, albeit comprised chiefly of non-FMC authority misconstruing the rule.³ PANYNJ cites no legitimate basis for attempting to file a supplemental brief to its motion for partial summary judgment. PANYNJ's filing is plainly improper pursuant to the Order, FMC Rules 73 and 74 and it is prejudicial to Maher. It should be struck.

c. PANYNJ's Reply Improperly Seeks to File a Wholesale Rebuttal to Maher's Responding Statement.

The remaining seventeen pages are comprised of PANYNJ's "Responding Statement" to Maher's Responding Statement (*i.e.*, PANYNJ's reply to Maher's Responding Statement to PANYNJ's Statement—a reply to a reply). *Id.* at 5-22. The reply is merely an improper attempt to rebut Maher's Responding Statement. Even if Maher had filed an affirmative statement of new facts in dispute, which it did not, the Order would not have permitted PANYNJ's wholesale rebuttal of Maher's Responding Statement and citations.

PANYNJ attempts to rebut Maher's Responding Statement by various means. For example, based on PANYNJ's pretext that it is replying to "new facts" in dispute asserted by

² In addition to argument, PANYNJ cites *seven* additional cases in alleged further support of its motion: *Gonzalez v. U.S.*, 284 F. 3d 281 (1st Cir. 2002); *Lee v. U.S.*, 809 F. 2d 1406 (9th Cir. 1987); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F. 3d 1380 (3d Cir. 1994); *Thelen v. Marc's Big Boy Corp.*, 64 F. 3d 264 (7th Cir. 1995); *N.D. ex rel. parents acting as guardians ad litem v. Haw. Dept. of Educ.*, 600 F. 3d 1104 (9th Cir. 2010); *INEOS Americas LLC v. Dow Chem. Co.*, 378 F. Appx. 74 (2d Cir. 2010) and *N. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F. 2d 265 (7th Cir. 1986).

³ Without responding to PANYNJ inapposite cases in detail, it suffices to say that the proposition PANYNJ advances conflates the two elements of a Shipping Act discrimination claim relevant here—knowing of a preference and knowing that the preference is undue. In PANYNJ's view, a dispute of fact over whether a complainant knew or should have known that a preference was *undue* is irrelevant once the complainant knew or should have known of a preference. A similar argument was rejected by the Commission in *Inlet Fish*. In any event, PANYNJ is plainly attempting improperly to bolster its motion with legal arguments and new authority.

Maher, PANYNJ attempts to rebut a number of Maher's citations that show disputes of PANYNJ's alleged facts by arguing that Maher's citations should have been advanced as "new facts" in dispute, not as citations disputing PANYNJ's alleged facts.⁴ PANYNJ's rebuttal ignores the obvious: that Maher's citations to facts establish genuine disputes of fact over PANYNJ's allegedly undisputed material facts.⁵ In the face of other plainly disputed facts, PANYNJ also attempts to rebut evidence showing disputes of fact by backtracking and asserting that not all of PANYNJ's allegedly undisputed, material facts are really material after all.⁶ As to other allegedly undisputed facts that Maher disputes with citations, PANYNJ attempts to rebut the weight of the evidence cited.⁷

⁴ See, e.g., *id.* at 7-8, ¶6 (claiming that Maher's citations to record evidence fail to adequately dispute PANYNJ's alleged facts because Maher did not affirmatively "present any disputed facts, supported by citations to the record."); see also, ¶¶ 9 and 11 (asserting that Maher's citations showing disputes of PANYNJ's alleged facts "fails to present any disputed facts, supported by citations to the record, and accordingly, under the Order to Supplement the facts in this paragraph should be deemed admitted."). PANYNJ in effect disagrees that the citations demonstrate the existence of disputes of fact—not by attempting to rebut the substance of the evidence—but by asserting that the citations should have been identified as "new facts." PANYNJ's sophistry obscures the relevant point that the facts are in dispute.

⁵ Having introduced as an allegedly undisputed, material fact that Maher allegedly discovered its Shipping Act claims more than three years before filing a complaint, PANYNJ can't ignore the evidence that demonstrates the existence of a genuine dispute of its allegedly undisputed material fact. The fact is in dispute. How it came to be disputed is academic. *E.g.*, whether the dispute was demonstrated by a citation disputing PANYNJ's alleged fact, which is what occurred, or whether the dispute had been demonstrated as an affirmative new material fact in dispute by Maher (if PANYNJ had not alleged it as an undisputed fact), does not change that the fact is in dispute. PANYNJ is moving for summary judgment, not Maher, and as such the relevant question is whether facts material to the motion for summary judgment as a matter of law are in dispute.

⁶ See, e.g., PANYNJ Reply at 10-11, ¶ 9 (stating with respect to one of its alleged undisputed facts that the "dispute is not material to the issue of the application of the statute of limitations, including the governing discovery rule as described in the preliminary statement."); ¶ 13 (stating that disputed parts of its statement of alleged undisputed facts are "not material"); ¶ 16 (similar).

⁷ *Id.* at ¶ 16 (claiming that cited testimony of Brian Maher that a 2001 "preliminary review of the Maersk" lease only reported on facial differences in the lease terms, not that the differences

And as to PANYNJ's allegedly undisputed material facts that Maher knew or should have known that PANYNJ would not enforce the Maersk cargo guarantee obligations in EP-248 by *any* of the other means available in EP-248, other than triggering a rent penalty, PANYNJ's rebuttal admits that the rent penalty provision *is not an exclusive remedy*. *See id.* at 15. PANYNJ does not contest the lease *obligation* to bring carrier cargo to the port, PANYNJ does not claim that the rent penalty was, or is, an exclusive remedy, and PANYNJ does not contest that other remedies to enforce the Port Guarantee obligation were, and are, available to PANYNJ in the lease. Rather, of the other remedies available to PANYNJ for APM's failure to fulfill its obligation to bring Maersk cargo to the port, PANYNJ merely asserts in rebuttal that *one* of the potential remedies (injunctive action or specific performance) is considered an "extraordinary remedy . . . generally available only when other remedies are in some way inadequate." *See Id.* at 15, n.4 (citation omitted).

Regardless of the applicability of the alleged authority to this proceeding, PANYNJ's admission of other remedies totally eviscerates its assertion that it is undisputed fact that Maher knew or should have known that PANYNJ would not enforce the cargo guarantee except by issuing a rent penalty because the rent penalty was an express remedy in the lease. *See e.g.*, PANYNJ's Statement ¶¶ 21-24. Furthermore, without briefing the cases cited in PANYNJ's Reply, PANYNJ's unsupported legal and factual assertion that "the increased rent provision" is an "adequate compensatory remed[y], *id.* at 15, n.4, only further demonstrates the existence of a

constituted knowledge that Maher knew or should have known that the differences were undue, "further undermin[ed] Maher's position." PANYNJ does not explain how or why the testimony does not show a dispute of PANYNJ's allegedly undisputed material fact that the document allegedly supports knowledge of a claim in 2001. The cited testimony plainly disputes PANYNJ's alleged fact.

dispute of fact (and law) with respect to this issue. None of these rebuttal schemes is permitted by the Order or the Rules.

* * *

In sum, PANYNJ's Reply is a classic "reply to a reply." Neither the reply nor the supplemental briefing were directed or permitted by the Order. PANYNJ seeks, without leave, to advance new authority and argument in support of its motion for summary judgment. Under the guise of responding to a statement of "new facts" in dispute that was not filed, PANYNJ attempts to file a wholesale rebuttal to Maher's Responding Statement. Even if PANYNJ had sought leave to reply or to file a supplemental brief, which it did not, nothing in PANYNJ's Reply suggests that it would meet the burden of showing that the filing is needed to "prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." To the contrary, the expeditious conduct of business applicable here was set out in the supplemental submissions directed and permitted by the Order, which did not include PANYNJ's Reply. FMC Rules 73 and 74 are clear that repetitious papers and replies to replies do not advance the business of the Commission. And the hardship and injustice resulting if PANYNJ is permitted to have the last word on its motion for partial summary judgment would be against Maher, not PANYNJ.

CONCLUSION

PANYNJ's Reply is an improper, repetitive and prejudicial "reply to a reply" and a repetitious motion that violates the Order and is prohibited by FMC Rules 74 and Rule 73(e). For the foregoing reasons, PANYNJ's Reply should be struck. In the event that it is not struck, Maher requests leave to reply in order to have a fair opportunity to fully respond to the new,

allegedly applicable authority and argument advanced in support of PANYNJ's motion and the alleged facts and rebuttals in PANYNJ's Reply.

Dated: April 26, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April 2011, a copy of the foregoing was served by e-mail on the following:

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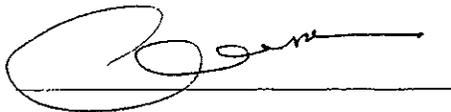
A handwritten signature in black ink, appearing to read "Berezin", is written over a horizontal line.

Exhibit G

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY'S OPPOSITION TO MAHER
TERMINAL, LLC'S MOTION TO STRIKE**

Respondent, the Port Authority of New York and New Jersey (the "Port Authority"), hereby submits its Opposition to Maher Terminals LLC's ("Maher") Motion to Strike PANYNJ's Responding Statement Reply and Supplemental Brief ("Motion to Strike").

Maher's Motion to Strike is a blatant attempt to conceal its own failure to comply with Your Honor's Order to Supplement¹ by baselessly accusing the Port Authority of being the non-complying party, to gain an opportunity to put in a reply to a reply and get the last word, and, yet again, to create a meritless dispute in the this matter. The Order to Supplement clearly stated that "[i]f Maher includes additional facts in its statement, on or before April 20, 2011, PANYNJ must serve and file a responding statement either

¹ Order to Supplement the Record on PANYNJ's Motion for Partial Summary Judgment, filed April 1, 2011.

admitting or disputing each of the facts in Maher's statement." Order to Supplement at 3. Despite this instruction, Maher's Motion to Strike alleges that the Port Authority did not have a right to respond to Maher's Responding Statement,² because Maher did not provide any additional "affirmative facts" in separately numbered paragraphs, *see* Motion to Strike at 7. Notwithstanding Maher's tactic of providing additional facts in response to the Port Authority's facts –rather than in the separately numbered paragraphs required by the Order to Supplement –the Order clearly entitles the Port Authority to respond to such additional facts. Simply because Maher failed to comply with Your Honor's instructions does not entitle it to submit additional facts without affording the Port Authority the opportunity to respond.

And indeed, it is readily apparent that Maher's Responding Statement did provide additional facts. For example, paragraph 22 of the Port Authority's Statement of Undisputed Facts³ stated that the Port Guaranty section of the Maersk lease includes a certain quote regarding a rental increase remedy. In response to this fact, Maher admitted that this quote appears in the lease section but then asserted that the lease contains numerous other remedies in a lengthy two page response. Maher's Responding Statement at 11-13. This latter statement was clearly neither an admission nor a rebuttal to the Port Authority's statement that the lease contains the quoted language and was instead the assertion of a new fact. Maher's Responding Statement is replete with similar examples, including Maher's assertion that it did not learn of the supposedly undue preferences in the Maersk Lease until 2007-2008, an assertion that appears in response to

² Maher's Responding Statement to the Port Authority's Statement of Material Facts as to Which There is No Genuine Dispute ("Maher's Responding Statement"), filed April 15, 2011.

³ The Port Authority's Statement of Material Facts as to Which There is No Genuine Dispute ("Statement of Undisputed Facts") at 6, filed April 8, 2011.

paragraphs 6, 7, 8, 10, 11, 13, and 24 of the Port Authority's Statement of Undisputed Facts. Such assertion was plainly neither a specific admission nor a specific denial of the discrete facts contained in the Port Authority's paragraphs, but was instead an attempt to advance an additional contention.⁴

The filing of its Motion to Strike reveals Maher's calculated strategy to defy the Order to Supplement with the aim of depriving the Port Authority of the opportunity conferred by the Order to respond to Maher's assertion of additional factual allegations. Such attempt should not be countenanced, and instead Your Honor's instruction that the Port Authority was entitled –indeed, obligated– to respond to such additional facts should be followed.

Nor should Maher be granted the opportunity to file a further reply, since such a reply to a reply would be exactly the type of redundant rehashing of Maher's legal arguments that FMC Rule 74(a) specifically prohibits. Moreover, such a reply to a reply is unnecessary because the Port Authority's Responding Statement did not assert any new facts, instead limiting itself to a simple response to the new facts contained in Maher's Responding Statement. Finally, Maher has already used its Motion to Strike to respond to the Port Authority's Responding Statement, despite not having any leave from Your Honor to do so.⁵

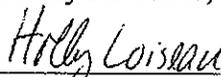
⁴ Moreover, Maher's Responding Statement includes not only additional facts, but also additional legal arguments, supported in places with case citations and authority, designed not to admit or deny the discrete facts set forth in the paragraph, but rather to re-argue Maher's legal positions. The Port Authority limited its response to such legal arguments to the Introductory Paragraph.

⁵ For instance, Maher spends an entire page of its Motion to Strike rehashing its allegation that the Port Guaranty rental increase provision was not an exclusive remedy. *See* Motion to Strike at 10.

For the foregoing reasons, Maher's Motion to Strike should be denied.

Dated: April 28, 2011

Respectfully submitted,



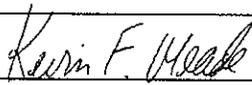
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

<p><u>Via U.S. Mail and E-mail:</u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at New York, NY this 28th day of April, 2011</p>
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Kevin F. Meade

Exhibit H

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

S E R V E D
May 16, 2011
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 08-03

MAHER TERMINALS, LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

**INITIAL DECISION GRANTING IN PART MOTION FOR SUMMARY JUDGMENT
AND DISMISSING CLAIM FOR A REPARATION AWARD BASED ON
LEASE-TERM DISCRIMINATION CLAIMS¹**

On June 3, 2008, complainant Maher Terminals, LLC (Maher) commenced this proceeding by filing a Complaint with the Secretary alleging violations of the Shipping Act of 1984 (Shipping Act or Act) by respondent Port Authority of New York and New Jersey (PANYNJ) in the leasing of certain land and facilities at the Elizabeth Port Authority Marine Terminal (Port Elizabeth). On February 28, 2011, PANYNJ filed a motion for summary judgment on the portions of the Complaint "based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations." ([PANYNJ] Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims (PANYNJ MSJ) at 1.)

The material facts as to which there is no genuine dispute establish that Maher's claim that PANYNJ discriminated against Maher in negotiations leading up to signing the lease and in the lease itself accrued on October 1, 2000, the date Maher signed its lease. On October 1, 2000, Maher knew that it had been injured as alleged in its Complaint and knew that PANYNJ caused the injury. The Shipping Act mandates that a complaint seeking a reparation award be filed within three years of the date the claim accrues. 46 U.S.C. § 41301(a). Maher filed its Complaint more than seven and

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

one-half years after its claim accrued. Therefore, Maher's claim for a reparation award based on alleged discrimination in the negotiations that resulted in the lease and/or the lease itself is barred by the statute of limitations. Maher's claim for a cease and desist order is not subject to the three-year statute of limitations. Therefore, PANYNJ's motion for summary judgment on the cease and desist claim is denied.

I. BACKGROUND AND FMC NO. 07-01.

PANYNJ owns Port Elizabeth. APM Terminals North America, Inc. (APM or APMT), formerly known as Maersk Container Service Company, Inc. (Maersk), occupies certain land and facilities at Port Elizabeth for use as a marine terminal pursuant to Lease EP-248 with PANYNJ dated January 6, 2000, filed with the Commission as FMC Agreement No. 201106 on August 2, 2000. Complainant Maher occupies certain land and facilities at Port Elizabeth for use as a marine terminal pursuant to Lease EP-249 with PANYNJ dated October 1, 2000, filed with the Commission as FMC Agreement No. 201131 on March 8, 2002.² Lease EP-248 and Lease EP-249 differ on several provisions, including the basic annual rental rate per acre, investment requirements, throughput requirements, first point of rest requirement for automobiles, and the security deposit requirement. (Complaint at IV.B.)

On December 29, 2006, APM commenced a Commission proceeding when it filed a Complaint alleging that PANYNJ violated the Shipping Act by failing to fulfill certain obligations owed to APM pursuant to Lease EP-248. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (FMC Jan. 9, 2007) (Notice of Filing of Complaint and Assignment). APM alleged that it did not receive an additional portion of marine terminal property (the Added Premises) by the date on which Lease EP-248 required PANYNJ to provide it. APM further alleged that the delay caused harm to APM and that the delay showed a preference for Maher in violation of the Act. PANYNJ filed an Answer to the Complaint denying liability and filed a Counter-Complaint against APM for allegedly failing to perform construction work required by Lease EP-248.

Maher occupied the Added Premises pursuant to Lease EP-249 at and after the time Lease EP-248 required PANYNJ to transfer the Added Premises to APM. PANYNJ filed a third-party complaint against Maher in FMC No. 07-01 alleging that Maher failed to surrender the Added Premises to PANYNJ as required by Lease EP-249. Maher filed an Answer to the third-party complaint denying liability and filed a Counter-Complaint against PANYNJ alleging that PANYNJ failed to provide Maher with reasonably specified dates to vacate the Added Premises as required by Lease EP-249, and failed to make specified improvements PANYNJ was required to make before PANYNJ could require Maher to surrender the Added Premises.

² I take official notice of the leases pursuant to 46 C.F.R. § 502.226. The leases are available at http://www2.fmc.gov/agreements/mtos_npage.aspx (last visited April 19, 2010). They are also attached to PANYNJ's motion for summary judgment as Levine Declaration Exhibits A (Lease EP-249) and B (Lease EP-248).

The parties engaged in extensive discovery in FMC No. 07-01. APM and PANYNJ also engaged in settlement discussions and eventually signed a proposed Settlement Agreement and a Third Supplemental Agreement to Lease EP-248 resolving their claims in FMC No. 07-01 and other matters related to Lease EP-248. In addition to resolving claims between APM and PANYNJ, the Settlement Agreement provided that PANYNJ would dismiss its third-party complaint against Maher in FMC No. 07-01 and a related proceeding against Maher in New Jersey state court.

APM and PANYNJ filed a motion seeking approval of the Settlement Agreement. Maher opposed the motion. On October 24, 2008, the Settlement Agreement was approved, *APM Terminals v. PANYNJ*, FMC No. 07-01 (ALJ Oct. 24, 2008) (Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice), and Maher filed exceptions. On April 1, 2009, the Commission denied Maher's exceptions and dismissed the proceeding between APM and PANYNJ. *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Apr. 1, 2009) (Order Denying Exceptions and Petition for Stay). The Commission consolidated Maher's Counter-Complaint against PANYNJ in FMC No. 07-01 with this proceeding. *Id.*

II. MAHER'S SHIPPING ACT CLAIMS -- FMC NO. 08-03.

On June 3, 2008, before APM and PANYNJ settled their claims in FMC No. 07-01, Maher filed its Complaint in this proceeding. *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (FMC June 11, 2008) (Notice of Filing of Complaint and Assignment). In Part IV of its Complaint, "Statement of Facts and Matters Complained of," Maher states:

- A. Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.
- B. PANYNJ's agreement with APMT, EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

(Complaint at 3 (attached to PANYNJ MSJ Levine Declaration, Exhibit C).) Maher alleges it has "sustained and continues to sustain injuries and damages . . . amounting to a sum of millions of dollars." (*Id.* at 5.) As remedies, Maher seeks a cease and desist order and reparations for its actual injury plus interest, costs, and attorneys fees, and any other damages determined. (*Id.* at 6.)

PANYNJ admitted some allegations, denied some allegations, and neither admitted nor denied some allegations. (Answer at 1-6.) PANYNJ also raised several affirmative defenses, including a defense that “Maher’s claims are barred by the applicable statute of limitations.” (*Id.* at 7.) The parties have engaged in extensive discovery.

Maher alleges that PANYNJ violated sections 41106(2), 41106(3) and 41102(c) of the Shipping Act: “A marine terminal operator may not – . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106. “A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). In a discovery dispute, Maher summarized the legal foundation for its claims in this proceeding, stating:

This case involves a straightforward application of *Ceres Marine Terminal v. Md. Port Admin.*, No. 94-01, 27 S.R.R. 1251, 1270-72 (F.M.C. Oct. 10, 1997). As set forth in Maher’s Complaint, PANYNJ violated the Shipping Act by refusing to provide to Maher preferential lease terms provided to [Maersk/APM]. Even though Maher guaranteed more cargo, PANYNJ unlawfully preferred APM over Maher because PANYNJ viewed Maher as a mere terminal operator presenting no risk to leave the port. By contrast, PANYNJ treated APM as an ocean carrier because its parent ocean carrier, Maersk shipping lines, presented a threat to leave the port. Therefore, PANYNJ unlawfully preferred APM for the same improper reason the FMC rejected in *Ceres Terminal*. . . .

First, whether PANYNJ’s refusal to provide Maher the same terms it provided to APM is lawful turns on PANYNJ meeting its burden of proof that it *expressed* legitimate transportation factors justifying the discrimination *at the time*. PANYNJ’s belated proffer of *post-hoc* rationalizations of alleged transportation factors that did not exist prior to conclusion of the Maher lease in October 2000 is not a legal basis to obtain discovery into wholly unrelated events occurring after PANYNJ imposed disparate terms on Maher. Moreover, to the extent that PANYNJ did express or even rely upon such justifications at the time of the discrimination, any such documents would be found in PANYNJ’s files, not Maher’s. . . .

Second, PANYNJ misconstrues the damages alleged in the Complaint. Maher’s Complaint alleges damages for the difference between terms of its lease that are prejudicial to Maher as compared to the preferential terms in APM’s lease. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. *Id.* at 1271 n.48. Nevertheless, PANYNJ asserts that “In addition to seeking damages for the period from 2000 to date, Maher claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT.” But Maher makes no such “additional” damage claim.

(Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 1-3 (emphasis in original) (attached to PANYNJ MSJ Levine Declaration, Exhibit D). *See also, id.* at 14-15 (similar discussion).)³

III. PANYNJ'S MOTION FOR SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS.

A. PANYNJ's Argument.

The Shipping Act provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part 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). *See also* 46 U.S.C. § 41305(b) ("If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part . . .").

PANYNJ moves for summary judgment on Maher's claims that are "based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations." (PANYNJ MSJ at 1.)

This motion does not seek summary judgment with respect to any non-lease term claims asserted by Maher, such as that the Port Authority has "refused to deal" with Maher, inasmuch as any such claim appears to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.*, within the three-year limitations period.

(PANYNJ MSJ at 2 n.2.)

Lease EP-248 between PANYNJ and Maersk was signed January 6, 2000. Lease EP-249 between PANYNJ and Maher was signed October 1, 2000. PANYNJ argues that all of the allegedly discriminatory lease terms were established as of October 1, 2000, and PANYNJ committed any allegedly discriminatory acts in the negotiations that resulted in Lease EP-249 on or before October 1, 2000; therefore, Maher's claim accrued on that date. PANYNJ quotes Maher's response to PANYNJ's first set of interrogatories to support its position.

Maher's damages include the difference between Maher's base rent and APM's base rent that Maher must pay PANYNJ over the 30-year term of Maher's lease. . . . Based on this difference the base rent and escalator differential damages alone

³ The Commission also discussed the elements of a section 10(d)(1) violation with regard to terminal practices. *Ceres Marine Terminals*, 27 S.R.R. at 1274. Maher's Response did not discuss section 10(d)(1). Maher's claim for a reparation award for violations of section 10(d)(1) in the negotiations that resulted in Lease EP-249 and Lease EP-249 itself accrued at the same time as its claims for violations of sections 10(b)(11) and (12).

incurred by Maher since 2000 total approximately \$86 million. According to the disparate lease terms of leases and EP-249, these damages total approximately \$474 million through the 30-year lease period based upon the disparate base rent and escalator.

(Maher's Resp. to Port Authority's First Set of Interrogatories at 10, Aug. 29, 2008 (attached to PANYNJ MSJ, Levine Declaration Ex. H).) PANYNJ also relies on argument Maher made in opposition to PANYNJ's earlier motion to compel production of documents.

Maher's Complaint alleges damages for the difference between terms of its lease [EP-249] that are prejudicial to Maher as compared to the preferential terms in APM's lease [EP-248]. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. [*Ceres Marine Terminal*, 27 S.R.R.] at 1271 n.48. Nevertheless, PANYNJ asserts that "In addition to seeking damages for the period from 2000 to date, Maher claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT." But Maher makes no such "additional" damage claim.

(Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant & Motion for Protective Order filed Oct. 9, 2008, at 3 (attached to PANYNJ MSJ, Levine Declaration Ex. D).) PANYNJ argues:

Maher has thus clearly and affirmatively asserted that all of its damages for its lease-term discrimination claims, including those over the entire thirty-year lease period, were fixed by the time Maher entered into its lease in October 2000. Accordingly, that is when its lease-term discrimination claims accrued. . . . Yet, Maher did not file its Complaint until June [3], 2008, over seven-and-a-half years later. Thus, unless some exception applies, Maher's Lease discrimination claims are barred by the Shipping Act's three-year statute of limitations.

(PANYNJ MSJ at 21.)

PANYNJ relies on the Commission decision in *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc. (Inlet Fish)*, 29 S.R.R. 306 (2001), for the proposition that in Commission proceedings, the three-year statute of limitations for a complaint seeking a reparation award begins to run when the complainant discovered that it had a cause of action. (PANYNJ MSJ at 1-2.) See *Inlet Fish*, 29 S.R.R. at 313 ("The Commission has determined to adopt the discovery rule, and to hold that Inlet Fish's cause of action accrued when it knew or should have known that it had a case against MSL."). PANYNJ contends that Maher knew or should have known of all the differences between Lease EP-248 and Lease EP-249 when Maher signed Lease EP-249. (PANYNJ MSJ at 21-22.) PANYNJ argues that because Maher knew or should have known of the lease differences when it signed the lease, the "discovery rule" does not apply to permit Maher's cause of action to accrue at a later date.

PANYNJ also contends that if it is assumed that imposition of disparate lease terms on Maher violates the Act, PANYNJ did not commit any overt acts of lease discrimination after Lease EP-249 was signed.

Maher relies exclusively upon the differing provisions of the allegedly discriminatory leases themselves, which were fixed in October 2000. To the extent that the Port Authority received payments or other benefits under Maher's lease during the limitations period, such payments and benefits were simply the "unabated inertial consequences" of pre-limitations actions. Indeed, Maher's interrogatory responses with respect to damages made clear that all thirty years' worth of its alleged damages – such as they are – were fixed as of the signing of its lease.

(PANYNJ MSJ at 23.) "In short, Maher's lease discrimination claims accrued in October 2000 when it signed its lease, over seven-and-a-half years before Maher filed its Complaint, well outside the applicable three-year statute of limitations period. Accordingly, reparations for all of its lease-term discrimination claims are time-barred." (*Id.* at 26.)

PANYNJ also argues that since the claim for a reparation award is barred by the statute of limitations, a cease and desist order is also barred.

While the FMC has held that its authority to enter a cease and desist order is not subject to the Shipping Act's statute of limitations, Maher cannot validly invoke such authority as the basis for seeking relief on its lease-term discrimination claims. As discussed above, there are no allegations of any overt acts of discrimination within the limitations period. All of the acts of which Maher complains occurred more than eight years ago. In other words, there is no ongoing *conduct* with respect to the alleged lease-term discrimination from which the Port Authority can be ordered to cease and desist.

(*Id.* (emphasis in original).)

B. Maher's Opposition.

Maher alleges that PANYNJ discriminated against it and in favor of Maersk/APM through the imposition of several lease provisions.

PANYNJ's agreement with APMT, EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

(Complaint at 3 (Part IV.B); *see also id.* at 3-4 (IV.C through IV.J).) Maher concedes that it knew of the allegedly discriminatory differences between Maersk/APM Lease EP-248 and Maher Lease EP-249 on October 1, 2000, when it signed the lease.

Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to [June] 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.

(Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 5, March 14, 2011.)

Maher focuses on the Commission's statement in *Inlet Fish* that "[i]t would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place." *Inlet Fish*, 29 S.R.R. at 313. Maher argues that "[w]hat is decisive is that Maher did not know nor should it have known that *the different lease terms were an undue prejudice violating the Shipping Act until it possessed conclusive information in May 2008.*" (Maher Opp. to MSJ at 4 (emphasis added).) Maher contends that during discovery in FMC No. 07-01, it first learned that PANYNJ did not have non-discriminatory reasons for imposing the differences between Lease EP-248 and Lease EP-249 and argues that the statute of limitations did not begin to run until it had this information.

Maher only uncovered "conclusive information," as outlined in Maher's attached Exhibit A, that it had Shipping Act claims against PANYNJ following the depositions of several key witnesses in Dkt. 07-01, including APM Terminals' witness Marc Oppenheimer (May 20, 2008) and Port Authority witnesses, including Cheryl Yetka (May 28, 2008), and then Maher filed this action *promptly* on June 3, 2008.

(Maher Opp. to MSJ at 25 (emphasis in original).)

DISCUSSION

I. STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment may support its motion by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting former Fed. R. Civ. P. 56(c)). The administrative law judge must view the facts in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all justifiable inferences derived from

the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A motion for summary judgment should be granted only when genuine disputes of material fact do not exist. *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1052 (1997).

A party opposing a motion for summary judgment cannot rest on the allegations of his complaint but must come forward and designate specific facts, by affidavit or otherwise, showing that a genuine issue of material fact exists that can only be resolved by the trier of fact. *Celotex*, 477 U.S. at 324; *Nissan Fire & Marine Ins. Co., v. Fritz Companies Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary judgment because current Rule 56(a) requires “that there be no genuine [dispute] of *material fact*.” *Anderson*, 477 U.S. at 247-248 (emphasis added). Material facts are those which could actually affect the outcome of the lawsuit. *Webb v. Lawrence Cnty.*, 144 F.3d 1131, 1135 (8th Cir. 1998).

In evaluating the evidence at the summary judgment stage, the court considers only those facts which are supported by admissible evidence. “[A] successful summary judgment defense requires more than argument or reallegation; [the opposing party] must demonstrate that at trial it may be able to put on admissible evidence proving its allegations.” *JRT, Inc. v. TCBY Sys., Inc.*, 52 F.3d 734, 737 (8th Cir. 1995). See also *Walker v. Wayne Cnty., Iowa*, 850 F.2d 433, 434 (8th Cir. 1988) (holding that courts considering a summary judgment motion “may consider only the portion of the submitted materials that is admissible or usable at trial”), *cert. denied*, 488 U.S. 1008 (1989). The court is not required “to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). The court “may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

At summary judgment it is insufficient for the nonmoving party merely to reassert ultimate facts without providing any support for the contentions. 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 (2003), but conclusory allegations as to ultimate facts are not adequate to defeat summary judgment. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). “‘Ultimate facts’ are defined . . . as ‘those which the law makes the occasion for imposing its sanctions.’” *Laughlin v. United States*, 344 F.2d 187, 191 (D.C. Cir. 1965), citing *Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). “[T]he mere fact that the [nonmoving party] vigorously dispute[s] the *legal conclusions* to be drawn from the facts presented by the [moving party is] no bar to the grant of summary judgment.” *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 728 n.13 (5th Cir. 1976) (emphasis added). “It is axiomatic that where questions of law alone are involved in a case, summary judgment is appropriate.” *Int’l Ass’n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977). Where

the relevant facts are not in dispute and only one conclusion can be drawn from those facts, entry of summary judgment may be appropriate. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 719 (7th Cir. 1994) (affirming summary judgment on statute of limitations ground against party that claimed benefit of discovery rule).

II. THE COMMISSION'S HOLDING IN *CERES MARINE TERMINAL v. MARYLAND PORT ADMINISTRATION*.

Maher bases its discrimination claims on the Commission's decision in *Ceres Marine Terminal v. Maryland Port Admin.*, 27 S.R.R. 1251 (FMC 1997), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table). *See also Ceres Marine Terminal v. Maryland Port Admin.*, 30 S.R.R. 358, 358-359 (FMC 2004) (discussing history). (*See* Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 1-3 (attached to PANYNJ MSJ, Levine Declaration Ex. D).) Ceres Marine Terminal leased property at Dundalk Marine Terminal from the Maryland Port Administration (MPA) for use as a marine terminal. MPA leased other property at Dundalk to Maersk Line, Universal Maritime Services Corporation, and Hale Intermodal Marine Company for use as a marine terminal. Ceres Marine Terminal filed a complaint against Maryland Port Administration (MPA) alleging the MPA violated sections 10(b)(11), 10(b)(12), and 10(d)(1) of the Shipping Act by refusing to grant Ceres the same lease terms that it had granted to Maersk.⁴

At the time the Commission decided *Ceres Marine Terminal*, section 10 of the Act provided:

(b) Common Carriers. – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may – * * * (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever; (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; * * * (d) Common Carriers, Ocean Freight Forwarders and Marine Terminal Operators. – (1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations

⁴ Ceres Marine Terminal and MPA signed the lease in November 1991. *Ceres Marine Terminal*, 27 S.R.R. at 1253. The Secretary received Ceres Marine Terminal's complaint on December 30, 1993, well within the Act's three-year statute of limitations. FMC Docket Activity Log, *Ceres Marine Terminal v. Maryland Port Admin.*, FMC No. 94-01, available at http://www.fmc.gov/electronic_reading_room/proceeding_or_inquiry_log_search.aspx?F_DocketNumber=&F_DocketType=1&F_Title=&F_DocketDateLBound=&F_DocketDateUBound=&F_IsClosed=&F_SortBy=DocketDate&F_SortOrder=DESC&F_Pg=4&DocketId=324 (last visited May 13, 2011). Therefore, Ceres Marine Terminal's claim for reparations was timely.

and practices relating to or connected with receiving, handling, storing, or delivering property. * * * (3) The prohibitions in subsection (b)(11), (12), and (16) of this section apply to marine terminal operators.

Ceres Marine Terminal, 27 S.R.R. at 1252 n.3. On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Sections 10(b)(11) and 10(b)(12) of the Act are now codified at 46 U.S.C. §§ 41106(2) and (3), the provisions of the Act that Maher alleges PANYNJ violated by imposing different and less favorable provisions in Lease EP-249 than Lease EP-248.

In *Ceres Marine Terminal*, the Commission articulated the elements of proving a violation of section 10(b)(11) and 10(b)(12) as follows:

In order to establish an allegation of an 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 injury. 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 Marine Terminal, 27 S.R.R. at 1270-1271.

In addressing the merits, the Commission found that:

MPA's only expressed reason for denying Ceres the Maersk lease terms was Ceres' status as an MTO. At oral argument, MPA's counsel reasoned that as an MTO, Ceres had no control over vessels and could not back up a guarantee to bring vessels to the Port. Counsel further argued that Ceres' offer to pay a penalty for failure to meet a vessel call guarantee really was "something different from a guarantee" like that offered by Maersk. Thus, the issue remains whether status is a legitimate transportation factor on which a port may base differences in lease terms for its facilities.

We find that MPA unreasonably prejudiced Ceres and unduly preferred Maersk when it refused to grant Ceres parity with Maersk. MPA's refusal, based on the shaky premise that Maersk can guarantee vessel calls and Ceres, without the backing of an ocean carrier, cannot, does not withstand scrutiny. Maersk's vessel call guarantee does not guarantee to MPA any more than Ceres could have guaranteed had it been allowed. MPA's accord of significance only to Maersk's vessel call guarantee, by virtue of its status as a carrier, is patently unreasonable in light of Ceres' abilities to fulfill the terms of the Maersk lease, including the vessel

calls inherent in its cargo guarantee, its business record and long history at the Port, and its ability to attract carrier customers who do control vessel calls. The reasonableness of MPA's decision is belied by its either having ignored these factors or its inability to explain why these factors are insignificant. Additionally, the vessel call guarantee upon which MPA so heavily relies is not supported by a shortfall penalty or a liquidated damages provision; in the event that Maersk fails to meet its minimum requirement, MPA would have to seek traditional breach of contract relief in an appropriate state court. Ceres was willing and able to provide the same sort of guarantee to MPA.

Ceres Marine Terminal, 27 S.R.R. at 1272 (citations to record and footnotes omitted). Maher alleges that PANYNJ discriminated against it and in favor of Maersk/APM for substantially the same reasons as MPA discriminated against Ceres Marine Terminal and in favor of Maersk.

III. THE DISCOVERY RULE GOVERNS WHEN A CLAIM ACCRUES UNDER THE SHIPPING ACT.

As the parties recognize, the Commission has adopted what is called the "discovery rule" to determine when a cause of action accrues under the Shipping Act. "The Commission has determined to adopt the discovery rule, and to hold that [a complainant's] cause of action accrue[s] when it [knows or should know] that it [has] a case against [a respondent]." *Inlet Fish*, 29 S.R.R. at 313.

There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations – such adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, 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. This is, of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.

Id.

[I]mplementing the 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 appeals. In *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991), the court held that unless Congress has provided a directive that a cause of action accrues when an injury occurs, the discovery rule

should apply. Explaining the practical application of the rule, the court in *Connors* held:

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

Id. (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)). The court also noted that this rule has been adopted by “[a]t least eight federal courts of appeals.” *Id.*

Id. at 314.

IV. FACTS NOT IN DISPUTE MATERIAL TO THE QUESTION OF WHETHER MAHER KNEW OR SHOULD HAVE KNOWN IT HAD A CLAIM AGAINST PANYNJ ON OCTOBER 1, 2000.

The critical inquiry for this motion for summary judgment is whether the material facts as to which there is no genuine dispute establish that Maher’s claim that PANYNJ discriminated against it in Lease EP-249 as compared to Maersk/APM in Lease EP-248 accrued October 1, 2000; that is, what did Maher know on October 1, 2000, and based on what it knew did Maher know or should it have known that it had a claim against PANYNJ for alleged discrimination in the negotiations that resulted in Lease EP-249 and Lease EP-249 itself? “A ‘genuine’ [dispute] is one that could be resolved in favor of either party, and a ‘material fact’ is one that has the potential of affecting the outcome of the case.” *Calero-Cerezo v. U.S. Dep’t of Justice*, 355 F.3d 6, 19 (1st Cir. 2004), citing *Anderson v. Liberty Lobby*, 477 U.S. at 248-250.

On April 1, 2011, I required the parties to supplement the record by filing statements of material fact as to which there is no genuine dispute. *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Apr. 1, 2011) (Order to Supplement Record on PANYNJ’S Motion for Partial Summary Judgment).

This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which [the party] contends there is no genuine dispute together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. Each paragraph must be limited as nearly as practicable to a single factual proposition.

Id. at 2-3. On April 8, 2011, PANYNJ served and filed the statement required by the April 1, 2011, Order. I have determined that not all the statements proffered by PANYNJ are material to the question of whether Maher’s claim accrued on October 1, 2000. Statements 13, 16, 17, 18, 19, and

21 set forth facts regarding events occurring after October 1, 2000, or otherwise are not material to this motion; therefore, they have been stricken. *See Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London*, 637 F.3d 53, 2011 WL 834072, at *3 (1st Cir. 2011) (when considering motion for summary judgment, not error for district court to ignore submitted facts that are not material or are argumentation). Statement 24 sets forth mixed questions of fact and law and argument; therefore, it has been stricken. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 382 n.2 (7th Cir. 2008) (not error to strike purported statements of material fact as to which there is no genuine dispute that contain improper legal argument).

On April 15, 2011, Maher served its response to PANYNJ's statement. The response admits to many of PANYNJ's statements of material facts. I have determined that some of Maher's responses 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 are argumentative and have stricken those portions.

On April 20, 2011, PANYNJ filed [PANYNJ's] Responding Statement to the New Facts Contained in Maher Terminals LLC's Responding Statement and in Further Support of its Motion for Summary Judgment. PANYNJ responded to Maher's argumentation in Maher's statement. Just as argumentation in Maher's response to PANYNJ's statement is improper, argumentation in reply to Maher's argumentation is improper and is stricken.

The material facts are set forth below. For the convenience of the Commission and the parties, the stricken statements and responses and the reasons for striking are included in an appendix to this decision. PANYNJ's reply to Maher's response is not set forth in the appendix.

PANYNJ Statement 1:

The lease between the Port Authority and Maersk Container Service Company, Inc., EP-248 (the "Maersk Lease"), was executed as of January 6, 2000. *See Maersk Lease at 08PA00020315*, attached as Exhibit B to the Declaration of Alexander O. Levine in Support of The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims, Levine Declaration ("Levine Decl.").

Maher Response 1:

Admitted.

PANYNJ Statement 2:

The Maersk Lease was publicly filed with the Federal Maritime Commission ("FMC") as FMC Agreement No. 201106, date-stamped August 2, 2000. *See id.* at 08PA00020316.

Maher Response 2:

Admitted.

PANYNJ Statement 3:

The Maersk Lease became publicly available upon its filing with the FMC. *See* Maher Terminals, LLC's ("Maher") Responses to Port Authority's First Set of Interrogatories to Maher at Interrogatory No. 2 (at page 6), August 29, 2008, attached as Exhibit H to Levine Decl. ("[T]he terms of this agreement are publicly available, the subject of media coverage, and therefore, likely are widely known by many persons.").

Maher Response 3:

Admitted.

PANYNJ Statement 4:

The lease signed between The Port Authority and Maher Terminals, LLC, Lease No. EP-249 (the "Maher Lease"), was signed as of October 1, 2000 – two months after the Maersk Lease was publicly filed and available. *See* Maher Lease at 08PA00001884, attached as Exhibit A to Levine Decl.

Maher Response 4:

Admitted.

PANYNJ Statement 5:

Maher's Complaint alleges that the Maersk Lease violated the Shipping Act by "granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement." Maher's Complaint at § IV.B (at page 3), June 3, 2008, attached as Exhibit C to Levine Decl.

Maher Response 5:

Maher admits that its Complaint in Docket 08-03 includes the quoted language from Section IV of paragraph B, but denies that Maher's Complaint alleges that the Maersk lease violated the Shipping Act. Maher's Complaint alleges that PANYNJ violated and continues to violate the Shipping Act. *See* Maher's Complaint at § IV.A. (June 3, 2008), Exhibit C to Levine Decl.

Maher seeks a cease and desist order and reparations for injuries cause to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Id. See also, id. IV.B (the paragraph PANYNJ cites is itself non-exclusive (*i.e.*, "including but not limited to")); *id.* IV.A-M (the paragraph PANYNJ cites is one of thirteen other paragraphs alleging facts pertaining to alleged violations); Maher's Counter-Complaint, at § 40, Dkt. 07-01 (Sept. 4, 2007) (alleging violations of the Shipping Act of 1984, 46 U.S.C. § 40102(b)(2), 41102(c), 41106(3) and 41106(2) because PANYNJ "failed to operate in accordance with the Agreement, failed to establish, observe, and enforce just and reasonable regulations and practices, unreasonably refused to deal or negotiate with Maher, and has imposed unjust and unreasonable prejudice or disadvantage with respect to Maher concerning the turnover of certain premises").

PANYNJ Statement 6:

In its Interrogatory Responses, Maher has asserted that "[t]he terms of leases EP-248 and EP-249, on their face, show the inequity of treatment as between Maher and APM and these are set forth in the complaint which is incorporated by reference." Maher's Responses to the Port Authority's Second Set of Interrogatories to Maher at Interrogatory No. 1 (at page 4), August 29, 2008, attached as Exhibit K to Levine Decl.

Maher Response 6:

Maher admits that the quoted language is a textually accurate excerpt from the Interrogatory response, and admits that the terms of the leases show on their face the differences in the lease terms. [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 7:

In its Scheduling Report, filed on July 23, 2008, Maher has asserted that it "is apparent from Maher's complaint and the plain language of the leases themselves, the lease terms of the two leases are manifestly different to Maher's prejudice and APM's preference." Complainant's Scheduling Report at 5, July 23, 2008, attached as Exhibit G to Levine Decl.

Maher Response 7:

Maher admits that the quoted language is a textually accurate excerpt from the cited Scheduling Report [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 8:

In its Interrogatory Responses, Maher has asserted that its damages “are contained in the disparate terms of leases EP-248 and EP-249.” Maher’s Responses to Port Authority’s First Set of Interrogatories at Interrogatory No. 6 (at page 10), Levine Decl. Ex. H.

Maher Response 8:

Maher admits that the terms of leases EP-248 and EP-249 are disparate. [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 9:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 10:

In its Reply in Opposition to the Motion for Summary Judgment, Maher states “Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to July 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.” Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment at 5, March 14, 2011.

Maher Response 10:

Admitted. [REMAINDER OF RESPONSE STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 11:

Maher has stated that it “learned of PANYNJ’s preference of APM Terminals North America, Inc. (“APM”) during negotiation of EP-249.” Maher’s Response to Port Authority’s First Set of Interrogatories to Maher at Interrogatory No. 1 (at pages 4-5), Levine Decl. Ex. H.

Maher Response 11:

Maher admits that the quoted language is a textually-accurate excerpt from the Interrogatory response, and that the excerpt itself is accurate [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 12:

Randall Mosca, Maher's former Chief Financial Officer, who was part of the core team in the Maher Lease negotiations, has testified that during the Maher Lease negotiations "[w]e were aware of the financial terms in the Maersk lease, which were considerably less than, on a base-rent basis, the Maher proposed lease arrangement." Deposition of Randall P. Mosca ("Mosca Dep.") 34:7 to 35:5, 155:1 to 155:16, June 11, 2008, attached as Exhibit F to Levine Decl.

Maher Response 12:

Admitted.

PANYNJ Statement 13:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 14:

Mosca also testified that "Maher knew the differential between the Maersk and the Maher lease. It was considerable." Mosca Dep. 169:15 to 170:10, Levine Decl. Ex. F.

Maher Response 14:

Admitted.

PANYNJ Statement 15:

Brian Maher, Chairman and Chief Executive Officer of Maher at the time of the Maher Lease negotiations, has testified that, before signing the Maher Lease, he and Maher "certainly knew that Maersk had lower rates than we did." Deposition of M. Brian Maher ("Brian Maher Dep.") 194:10 to 195:4, 287:12 to 287:19, June 9, 2008, attached as Exhibit I to Levine Decl.

Maher Response 15:

Admitted.

PANYNJ Statement 16:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 17:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 18:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 19:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 20:

Maher filed the Complaint instituting this action on June 3, 2008, more than seven-and-a-half years after Maher executed its Lease. Maher's Complaint at 1, Levine Decl. Ex. C.

Maher Response 20:

Admitted.

PANYNJ Statement 21:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 22:

The Port Guarantee section (Section 42) of the Maersk Lease expressly provided that if the port guaranty were not satisfied in the manner specified under that section "the basic rental payable by the Lessee under Section 3 hereof shall be increased . . . in accordance with the schedule . . . marked 'Schedule B.'" Maersk Lease § 42(d) at 08PA00020407, Levine Decl. Ex. B.

Maher Response 22:

Maher admits that section 42 of lease EP-248 provides *one of many possible* remedies if the port guaranty were not satisfied, and denies that section 42 provides an *exclusive* remedy. *See* EP-248 § 30 at 74 (Levine Decl. Ex. A) (No lease remedies are exclusive: "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”); *id.* § 46(a)(2) at 98-99 (setting forth the requirements that the actual Maersk shipping companies must maintain majority ownership and control of Maersk, Inc. (APM’s U.S. parent, “Maersk”); that Maersk “is engaged as the exclusive United States agent on behalf of [the Maersk shipping companies] . . . in the conduct of a worldwide waterborne ocean container shipping business;” and that: “The Lessee further recognizes and agrees that the aforesaid connection of Maersk with the Shipping Business in conjunction with its holding the Ownership Interest is a major inducement for the Port Authority’s entering into this Agreement, and that it is of great importance to the Port Authority, in order to achieve the business and regional economic goals of this Agreement, that the Lessee be owned by an entity or entities having said connection with the Shipping Business *in order to assure the availability of cargo* to meet the foregoing business and regional economic goals of the Port Authority.”) (emphasis added).

The parent guarantees not just the financial provisions, but all of the lease. *See also, id.*, § 48 at 102 (providing that “[the] Contract of Guaranty shall guarantee the full, faithful, and prompt performance of and compliance with, on the part of the Lessee, all of the terms, provisions, and covenants and conditions of this Agreement...”); *id.*, Parent Contract of Guaranty, Maersk Inc., 08PA0020442 (“The Guarantor hereby absolutely and unconditionally guarantees, promises and agrees that the Lessee will duly and punctually pay all rentals and other monetary obligations which it has or shall have under the Lease, *and that the Lessee will faithfully and fully perform, fulfill and observe all the other terms, provisions, covenants and conditions of the Lease on the part of the Lessee to be performed, fulfilled and observed.*”) (emphasis added).

PANYNJ Statement 23:

Maher knew and/or was on notice of the terms of the Port Guaranty, including that APM’s failure to meet the throughput requirements of the Port Guaranty would result in increased rent. *See* Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment at 5 (“Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.”).

Maher Response 23:

Admitted in part and denied in part. Maher admits that it knew or should have known of the facial differences in the leases, but Maher denies that it knew or was on notice of PANYNJ’s unique Port Guarantee – that PANYNJ asserted was unique to carriers, not marine terminal operators like Maher – that would only enforce a rent increase penalty. *See* B. Maher Dep., Dkt. 07-01, 179:14 to 179:19 (June 9, 2008) (PANYNJ initially promised Maher rate parity with Maersk/Sealand: “We were told at the very beginning that the Maersk/Sea-Land lease terms and our lease terms would be the same, if not – similar, if not

the same. And we received proposals from the Port Authority, we had discussions with them about that.”); *see also* Port Reinvestment Model, MT005073-74, Dkt. 08-03, Dep. Ex. 55 (Fax date July 22, 1997); *see* L. Borrone Dep., Dkt. 08-03, 67:11 to 67:18 (Mar. 17, 2011) (PANYNJ ultimately did not offer Maher the same rates, reasoning that APM had “a port guarantee that we felt was significant and that was a significant difference – the port guarantee in particular – between the two leases.”); S. Schley Dep., Dkt. 08-03, 67:10 to 67:19 (Mar. 24, 2011) (In a September 1999 meeting, L. Borrone told Maher that it would not get the same rates as Maersk, but that the leases were “virtually identical” and overall “within pennies” because: (1) Maersk was said to have higher investment requirements, and that (2) Maersk would have a “Port Guarantee” that Maher could not provide.); *see* Notes of PA Lease Negotiations Meeting of 9/23/99, MT354761-65, Dkt. 08-03, Ex. 144 (Sep. 23, 1999); Mosca Dep., Dkt. 08-03, 88:22 to 89:15, 139:23 to 140:5 (Mar. 14, 2011) (L. Borrone conveyed that one of the reasons for Maher’s higher rate was because Maersk would provide a Port Guarantee” and was stating that Maersk was “. . . able to generate a port guarantee for volume, which we were unable to do, and, therefore, the Maersk rates were off the table for us.”); B. Maher Dep., Dkt. 08-03, 199:12 to 199:25 (April 6, 2011) (Borrone alleging that the Port Guarantee and higher investments explained Maher’s higher rent);

See L. Barrone Dep., Dkt. 08-03, 97:5 to 98:21 (Mar. 17, 2011) (“The port guarantee was set up because we really wanted the volume of cargo in the harbor . . .”); R. Shiftan Dep., Dkt. 08-03, 168:22 to 169:8 (April 4, 2011) (“PANYNJ’s understanding was that only carriers could provide port guarantees because “only shipping companies could guarantee cargo, and that as a consequence, the economics of leases which contained such guarantees could be looked at in one way, and leases that did not contain such guarantees would be looked at in another way.”); *see* L. Barrone Dep., Dkt. 08-03, 99:14 to 99:16 (Mar. 17, 2011) (“Maher would not and could not commit its carriers who it was servicing to a port guarantee.”); B. Maher Dep., Dkt. 08-03, 166:2 to 166:4 (Apr. 6, 2011) (“My interpretation of a port guarantee is cargo controlled by a – by an individual entity that they can direct to the port. We were not in a position to do that”); S. Schley Dep., Dkt. 08-03, 69:11 to 69:23 (Mar. 24, 2011) (“and as I believe the Maher people understood it, that this was going to be a requirement, that Maersk bring its cargo to the port. That was the whole issue, that they would bring cargo, that they carried on their own bottoms, their own ships, to that port. Q And Ms. Borrone told you and others at the meeting this information? A Yes.”) (emphasis added).

PANYNJ Statement 24:

[STRICKEN FOR CONTAINING MIXED QUESTIONS OF FACT AND LAW AND ARGUMENT.]

V. MAHER'S CLAIM FOR A REPARATION AWARD ACCRUED ON THE DAY IT SIGNED LEASE EP-249 AND THE STATUTE OF LIMITATIONS BEGAN TO RUN ON THAT DATE.

PANYNJ moves for summary judgment on the affirmative defense that the statute of limitations bars Maher's claims "based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations." (PANYNJ MSJ at 1.) A claim that an action is barred by the statute of limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1), made applicable to this proceeding by 46 C.F.R. § 502.12. 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. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 54-55 (1st Cir. 2002); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1264 (11th Cir. 2001).

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (citations omitted).

It should not be forgotten that time-limitations provisions [promote] important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Delaware State College v. Ricks, 449 U.S. 250, 259-260 (1980), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

As set forth above, the Commission established the elements that Maher must plead and prove in this proceeding in *Ceres Marine Terminal*:

In order to establish an allegation of an 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 injury. 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 Marine Terminal, 27 S.R.R. at 1270-1271. The material facts as to which there is no genuine dispute establish that when it signed Lease EP-249 on October 1, 2000, Maher knew all of the contents of and more importantly the differences between Lease EP-249 and Lease EP-248.

The material facts as to which there is no genuine dispute set forth above establish that when Maher signed Lease EP-249 on October 1, 2000, Maher knew the contents of Lease EP-248 and the allegedly more favorable treatment of Maersk/APM. That is, Maher: (1) knew that Lease EP-249 required Maher to pay \$39,750 per acre per month while Maersk/APM paid \$19,000 per acre per month; (2) knew that Lease EP-249 increased Maher's rent at the rate of two percent per annum such that by the end of the 30-year term of the lease Maher's basic rent rises to \$70,590 while Maersk/APM's rent would remain at \$19,000; (3) knew that Lease EP-249 required Maher to invest greater sums than it required Maersk/APM to invest and PANYNJ provided Maersk/APM more favorable financing terms than it provided Maher, requiring Maher to repay the investment at a higher rate than required of Maersk/APM; (4) knew that Lease EP-249 required Maher to provide greater throughput guarantees and risk greater consequences than it required of Maersk/APM; (5) knew that Lease EP-249 imposed a first point of rest requirement on Maher not required of Maersk/APM; and (6) knew that Lease EP-249 imposed a \$1.5 million security deposit requirement on Maher not required of Maersk/APM.

On October 1, 2000, Maher had information that would permit it to plead (and prove) each element of its prima facie case as established in *Ceres Marine Terminals*:

Ceres Element 1: Two parties are similarly situated or in a competitive relationship.

Lease EP-248 and Lease EP-249 establish that Maher knew that Maher and Maersk/APM were similarly situated or in a competitive relationship in Port Elizabeth.

Ceres Element 2: The parties were accorded different treatment.

Lease EP-248 and Lease EP-249 establish that Maher knew that Maher and Maersk/APM were accorded different treatment by Lease EP-248 and Lease EP-249.

Ceres Element 4: The resulting prejudice or disadvantage is the proximate cause of injury.

When Maher paid its rent on October 1, 2000, Maher knew that it was paying \$20,750 more per acre per month than it would pay if its lease had the same rent as Lease EP-248; therefore, Maher knew that its profit margin for October 2000 would be injured by being \$20,750 per acre less than it would have been if Maher paid rent at the Maersk/APM rate. Maher knew that every month thereafter, it would pay more per acre in rent, and that the difference would increase over the thirty-year term of Lease EP-249, injuring its profit margin every month of that thirty years, a difference

that Maher contends is the measure of its damages. (See Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3 (attached to PANYNJ MSJ, Levine Declaration Ex. D) ("Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. [*Ceres Marine Terminal*, 27 S.R.R.] at 1271 n.48.") Maher knew that the two leases had different investment requirements. Maher knew that the two leases had different throughput requirements. Maher knew that the two leases had different first point of rest requirement for automobiles. Maher knew that the two leases had different security deposit requirements.

The Complaint that Maher filed in this proceeding in 2008 includes the following factual allegations:

- C. In EP-248, PANYNJ provided and continues to provide APMT a base annual rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher.
- D. By contrast, in EP-249, PANYNJ required and continues to require Maher to pay a base annual rental rate of \$39,750 per acre and additionally required Maher to pay a basic rent escalator of two percent per annum such that by the end of the 30 year term of the lease Maher's basic rent rises to \$70,590 per acre, or an unreasonable difference of \$51,590 per acre more than the PANYNJ charges APMT.
- E. Over the approximately 30 year term of the agreements, this undue prejudice disadvantaging Maher and undue preference advantaging APMT totals million [*sic*] of dollars.
- F. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the investment requirements in the PANYNJ property that is the subject of the leases. PANYNJ required and continues to require Maher to invest greater sums than it required APMT to invest and PANYNJ provided and continues to provide APMT more favorable financing terms than it provided Maher, requiring Maher to repay the investment at a higher rate than PANYNJ provided APMT.
- G. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the container throughput requirements and consequences thereof that are the subject of the leases. PANYNJ required and continues to require Maher to provide greater throughput guarantees and risk greater consequences than it required and continues to require of APMT.

- H. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the first point of rest requirement imposed on Maher, but not required of APMT.
- I. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the security deposit requirement by requiring Maher to provide a \$1.5 million deposit not required of APMT.
- J. Despite Maher's request to the PANYNJ to be treated equally with APMT, the PANYNJ refused to deal with Maher and continues to refuse to deal with Maher and has required the foregoing undue and unreasonable preferences favoring APMT and prejudices disadvantaging Maher.

(Complaint at 3-4.)

On October 1, 2000, Maher knew all of the facts necessary to draft a complaint alleging the facts set forth in Part IV.C through IV.J of its Complaint exactly as it stated them nearly eight years later when it commenced this proceeding. Not only did Maher have sufficient information to draft its Complaint, Maher had sufficient evidence in 2000 to prove all three elements that *Ceres Marine Terminal* indicates constitute its prima facie case. The burden would have then shifted to PANYNJ to establish Ceres Element 3: "[T]he respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres Marine Terminal*, 27 S.R.R. at 1270-1271.

Addressing the other factual allegations in Part IV of Maher's Complaint, Maher included two paragraphs that address Ceres Element 3:

- L. There is no valid transportation purpose for the foregoing undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging APMT or for the PANYNJ's refusal to deal with Maher.
- M. If there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose.

(Complaint at 5.) As the Commission established in *Ceres Marine Terminal*, Ceres Element 3 is not part of Maher's prima facie case, but an affirmative defense for PANYNJ. *Ceres Marine Terminal*, 27 S.R.R. at 1270-1271. As the District of Columbia Circuit stated in *Connors*, the case upon which the Commission relied for the discovery rule, see *Inlet Fish*, 29 S.R.R. at 314:

The Trustees were not obliged to anticipate this [affirmative] defense in their complaint. See C. WRIGHT & A. MILLER, 5 FEDERAL PRACTICE & PROCEDURE § 1276 (1990) ("On occasion, a plaintiff's complaint will contain allegations that seek to avoid or defeat a potential affirmative defense; technically

this is improper pleading because these allegations are not an integral part of plaintiff's claim. . . . [T]he court should treat plaintiff's references to the defense as surplusage.”).

Connors v. Hallmark & Son Coal Co., 935 F.2d at 177. Maher's knowledge or lack thereof of PANYNJ's reasons for including different lease terms in Lease EP-248 and Lease EP-249 is not material to the accrual of its cause of action or part of its prima facie case.

The Complaint also alleges that PANYNJ committed some discriminatory acts in 2008:

- K. With respect to EP-248, during the year 2008 the PANYNJ negotiated with APMT to address APMT's claim that the PANYNJ violated the Shipping Act by failing to provide certain premises in a timely fashion, but at the same time the PANYNJ refused to negotiate with Maher concerning its claim that the PANYNJ violated the Shipping Act with respect to EP-249 by failing to provide certain premises to Maher in a timely fashion.

(Complaint at 5.) This paragraph raises claims regarding events that occurred in 2008 and obviously could not have been included in a complaint filed in 2000. PANYNJ states:

This motion does not seek summary judgment with respect to any non-lease term claims asserted by Maher, such as that the Port Authority has “refused to deal” with Maher, inasmuch as any such claim appears to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.*, within the three-year limitations period.

(PANYNJ MSJ at 2 n.2.) Therefore, Maher's claim for a reparation award for discriminatory acts alleged in Part IV.K of its Complaint survives this decision.

The Act provides that “[i]f 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). Although Maher may disagree with the conclusion of law to be drawn, Maher concedes the material facts that establish that its claim accrued and the Act's three-year statute of limitations for a complaint seeking a reparation award for discrimination in the negotiations resulting in Lease EP-248 and Lease EP-249 itself began to run on October 1, 2000. Maher filed its Complaint on June 3, 2008, more than seven and one-half years later. (PANYNJ Statement 20 and Maher Response.) Maher did not file its Complaint within three years after its claim accrued. Therefore, the Act's statute of limitations bars Maher's claim for a reparation award for injuries caused by the alleged violations in the negotiations leading to Lease EP-248 or the terms of Lease EP-249 itself.

VI. THE DISCOVERY RULE DOES NOT SAVE MAHER'S CLAIM FOR A REPARATION AWARD.

Maher argues that the statute of limitations did not begin to run until it discovered the allegedly discriminatory reasons that PANYNJ gave more favorable lease terms to Maersk/APM. The discovery rule is an exception to the time-bar provision. Since Maher is seeking the protection of the rule, it 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. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d at 717.

Maher sets forth the facts it claims led to its discovery of PANYNJ's allegedly discriminatory motive in Exhibit A attached to its opposition to PANYNJ's motion for summary judgment. For the purposes of this motion, I assume that there is no genuine dispute about these facts and the facts are true. The facts are not material to the issues raised by PANYNJ's motion, however, since they do not affect the outcome of this decision on when Maher's cause of action accrued. *Webb v. Lawrence Cnty.*, 144 F.3d at 1135.

I first note that there may be a question regarding the continued vitality of the discovery rule. In *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), the Supreme Court rejected the application of the discovery rule for "improper disclosure" claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. The Court stated:

The Court of Appeals rested its decision on the premise that all federal statutes of limitations, regardless of context, incorporate a general discovery rule "unless Congress has expressly legislated otherwise." [*Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000)]. To the extent such a presumption exists, a matter this case does not oblige us to decide, the Ninth Circuit conspicuously overstated its scope and force.

The Appeals Court principally relied on our decision in *Holmberg v. Armbrrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946). See 225 F.3d, at 1067. In that case, we instructed with particularity that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Holmberg*, 327 U.S., at 397, 66 S. Ct. 582 (internal quotation marks omitted). *Holmberg* thus stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption applicable across all contexts. The only other cases in which we have recognized a prevailing discovery rule, moreover, were decided in two contexts, latent disease and medical malpractice, "where the cry for [such a] rule is loudest," *Rotella v. Wood*, 528 U.S. 549, 555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). See *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979); *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).

We have also observed that lower federal courts “generally apply a discovery accrual rule when a statute is silent on the issue.” *Rotella*, 528 U.S., at 555, 120 S. Ct. 1075; *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (*citing Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (C.A.D.C. 1991), for the proposition that “federal courts generally apply [a] discovery accrual rule when [the] statute does not call for a different rule”). But we have not adopted that position as our own.

TRW Inc. v. Andrews, 534 U.S. at 27.

In the wake of [*TRW Inc. v. Andrews*], a smattering of judges and commentators have questioned the continued vitality of the discovery rule in copyright infringement cases. *See, e.g., Auscape Int’l v. Nat’l Geo. Soc’y*, 409 F. Supp. 2d 235, 242-48 (S.D.N.Y. 2004); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05[B][2][b], at 12-150.4 to 150.8 (2007).

Warren Freedensfeld Assoc., Inc. v. McTigue, 531 F.3d 38, 46 n.3 (1st Cir. 2008).

I also note that in adopting the discovery rule, although the Commission stated that a claim accrues when a party “knew or should have known” that it had a claim, the Commission used language that arguably differs from the rule articulated by the courts of appeals. The Commission stated: “It would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it *had no conclusive information* about such a dispute for several years after the shipments took place.” *Inlet Fish*, 29 S.R.R. at 313 (emphasis added). This is the language on which Maher relies. A holding that the statute of limitations does not run while a party has “no conclusive information” about the dispute could be interpreted to eliminate the “should have known” language from the discovery rule.

I assume the continued vitality of the discovery rule as articulated and adopted by the courts and the Commission (including the “knew or should have known” language) and apply it in this proceeding.

In their discussions of the discovery rule, the Supreme Court and the courts of appeals have drawn a clear distinction between discovery of an *actual* injury, which is subject to the discovery rule, and the discovery that the injury is also a *legal* injury for which the party may seek relief, which is not subject to the discovery rule. In *United States v. Kubrick*, one of the cases cited in *TRW*, a veteran filed suit against the United States alleging that he had been injured by negligent treatment at a VA hospital. The facts showed that he had learned of a possible connection between treatment that he received and the injury more than two years (the limitations period) prior to filing suit. The district court denied a statute of limitations defense because it found that the plaintiff had exercised reasonable diligence and had no reasonable suspicion that the treatment was negligent. The district court did “not believe it reasonable to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached.” *United States v. Kubrick*, 444 U.S. at 116 (quoting the district court). The court of appeals affirmed, ruling that

even though a plaintiff is aware of his injury and of the defendant's responsibility for it, the statute of limitations does not run where the plaintiff shows that "in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper."

Id.

The Supreme Court rejected the reasoning of the district court and the court of appeals and reversed.

We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.

Id. at 122. 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. Maher was no longer at the mercy of PANYNJ. The fact that it may not have realized it had a legal injury is not material to the issue of whether its claim accrued on October 1, 2000.

The courts of appeals have reached similar conclusions for other statutes. In *Podobnik v. U.S. Postal Service*, 409 F.3d 584 (3d Cir. 2005), on January 25, 2001, Podobnik filed a complaint in district court alleging that USPS discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act (ADEA) when it reduced his mail delivery route in 1993 and again when it notified him in March 1998 that it intended to terminate his employment. The district court entered summary judgment for the USPS on statute of limitations grounds. The court of appeals understood Podobnik to be claiming that both his 1993 route reduction and his 1998 retirement were instances of age discrimination. The court held that:

"As a general rule, the statute of limitations begins to run when the plaintiff's cause of action accrues . . . the accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff discovers that he or she has been injured." [*Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir.1994)] (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)) (emphasis in original). *That is not to say that the accrual date is when a plaintiff learns he has been the victim of a legal wrong. Rather, a claim accrues as soon as a potential plaintiff either is aware, or should be aware after a sufficient degree of diligence, of the existence and source of an actual injury. Keystone*

Insurance Co. v. Houghton, 863 F.2d 1125, 1127 (3d Cir. 1988); *see also Cada*, 920 F.2d at 450. The discovery rule delays the initial running of the statute of limitations, but only until the plaintiff has discovered: (1) that he or she has been injured; and (2) that this injury has been caused by another party's conduct. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1124 (3d Cir. 1997). Thus, the question is when did Appellant suffer an actual injury.

While we understand Appellant to be citing both his 1993 route reduction and his 1998 retirement as instances of age discrimination, we shall dispense with both concurrently. Appellant had actual knowledge of his route reduction immediately, since he participated in and agreed to the reduction. Furthermore, he had actual knowledge of USPS's intent to terminate him on March 10, 1998. Appellant contends that USPS's 1993 route reduction and 1998 intent to terminate or retire him was on account of his age, that this was not apparent to him until October 11, 2000 (the day he met with his attorney), and therefore the limitations period did not begin to run until then. Specifically, he contends that he "did not know he had a possible injury until then." Brief of Appellant at 38. *We read this as meaning that Appellant did not know he had a possible legal injury resulting from the 1993 or 1998 actions until after meeting with his attorney. However, the discovery rule is concerned with knowledge of actual injury, not legal injury.*

Appellant does not claim he was unaware that USPS reduced his route in 1993, or that it served him with a Notice of Proposed Removal on March 10, 1998. These are the only dates when any alleged injury occurred. Therefore, the latest date on which Appellant's claim could have possibly accrued was March 31, 1998, his last day of employment. The discovery rule does not excuse his failure to file his Intent To Sue Letter more than two years after the 180-day limitations period had expired. Were we to extend the reach of the discovery rule to delay accrual until a plaintiff learned that a legal injury had occurred, as Appellant requests, a statute of limitations would become effectively meaningless, as a plaintiff could, through ignorance or fraud, bring an age discrimination claim at any point in his lifetime, regardless of how long ago the underlying acts had occurred. We decline this invitation, and conclude that the discovery rule does not save Appellant's untimely ADEA claim.

Podobnik v. U.S. Postal Service, 409 F.3d at 590-591 (emphasis added).

Maher concedes that it was aware of the differing lease terms on October 1, 2000. This is the date on which the alleged injury occurred and Maher knew that it was caused by PANYNJ. When Maher learned that it might have had a legal injury (or as it puts it, "discovered" that the differences were an "undue preference") is irrelevant to the accrual of its cause of action.

In *Merrill v. Southern Methodist University*, 806 F.2d 600 (5th Cir. 1986), a plaintiff alleging discrimination because of sex in violation of Title VII of the Civil Rights Act argued "that in

determining whether a particular claim is time-barred, a court should focus on the date the victim first perceives that a discriminatory motive caused the act, rather than the actual date of the act itself.” *Merrill v. Southern Methodist University*, 806 F.2d at 605. The court rejected this rule.

The leading case on this subject is *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). It emphasizes that the limitations period starts running on the date the discriminatory act occurs. 101 S. Ct. at 504. This Circuit has also consistently focused on the date that plaintiff knew of the discriminatory act. For example, in *Cervantes v. Imco Halliburton Services*, 724 F.2d 511 (5th Cir.1984), we said, “Under established federal law, the 180-day limitations period for Title VII claims . . . begin[s] to accrue ‘when the plaintiff knows or reasonably should know that the discriminatory act has occurred.’” *Id.* at 513 (quoting *McWilliams v. Escambia County School Board*, 658 F.2d 326, 330 (5th Cir. 1981)). These holdings cannot be reconciled with Merrill’s proposed rule. *It might be years before a person apprehends that unpleasant events in the past were caused by illegal discrimination.* In the meantime, under Merrill’s theory, the employer would remain vulnerable to suits based on these old acts. Merrill’s proposal is inconsistent with the Supreme Court’s language in *Ricks* that the Title VII limitations period is partially designed to “protect employers from the burden of defending claims arising from employment decisions that are long past,” 101 S. Ct. at 503, and its comment in [*United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977)] that employers are entitled to treat past acts as lawful when the employee does not file a charge of discrimination within the statutory time. [431 U.S. at 558].

Merrill v. Southern Methodist University, 806 F.2d at 605 (emphasis added).

Maher contends that its claim did not accrue on October 1, 2000, because it did not discover that the “unpleasant events” visited upon it by the differences between Lease EP-248 and Lease EP-249 “were caused by illegal discrimination” until May 2008. The Fifth Circuit rejected a similar argument in *Merrill*.

Other courts have rejected arguments that a claim does not accrue until a plaintiff knows it has a legal injury in addition to an actual injury. *See, e.g., Thelen v. Marc’s Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995) (“A plaintiff’s action [under the ADEA] accrues when he discovers that he has been injured, not when he determines that the injury was unlawful. . . . [Appellant’s] injury was his termination.”); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (“a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong”); *id.* at 1390-1391 (“With regard to Oshiver’s claim of discriminatory discharge, we have no difficulty in concluding that for purposes of the discovery rule, Oshiver ‘discovered’ the injury on April 10, 1990, the very date defendant law firm informed her of her discharge. Simply put, at the moment the law firm conveyed her dismissal to her, Oshiver became aware (1) that she had been injured, *i.e.*, discharged, and (2) that this injury had been caused by another party’s conduct. That Oshiver may have been deceived regarding the underlying motive behind her discharge is irrelevant for purposes of the discovery rule.”); *Bohus v. Beloff*, 950 F.2d

919, 924-925 (3d Cir. 1991) (construing Pennsylvania law and applying the discovery rule in connection with a medical malpractice cause of action; in order for a claim to accrue, “[t]he plaintiff need not know the exact medical cause of the injury; that the injury is due to another’s negligent conduct; or that he [or she] has a cause of action.”) (citations omitted).

In contrast, the only authority on which Maher relies for its argument that its claim did not accrue until May 2008 when it claims it first acquired conclusive information that discrimination caused the differences between Lease EP-248 and Lease EP-249 of which it was long aware is the Commission’s statement in *Inlet Fish* that “[i]t would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place.” *Inlet Fish*, 29 S.R.R. at 313. Maher contends that the *Inlet Fish* discovery rule “looks to knowledge of the difference *and that the difference is an undue preference.*” (Maher Opp. to MSJ at 22 n.20 (emphasis added).)

Inlet Fish did not involve a question of when a party learned that “the difference is an undue preference” (*i.e.*, that it had a *legal* injury as described by the courts), however, but when it learned that it had an *actual* injury. *Inlet Fish* alleged that the respondent included the tare weight when calculating Inlet Fish’s freight charges, but did not include tare weight in its competitors’ charges. *Inlet Fish* stated that it learned this fact in May 1998 in a conversation with an employee of the respondent. The respondent argued that *Inlet Fish* had in its possession a few documents from which it could have learned of the different treatment and had heard rumors of the different treatment long before May 1998. The Commission found that:

The fact that a few bills of lading were, apparently incidentally, among the documents relating to *Inlet Fish*’s purchase of salmon does not trigger *Inlet Fish*’s knowledge of the claim. It appears that *Inlet Fish* was not aware of its cause of action until Goddard’s conversation with the MSL employee in May, 1998. We therefore find that *Inlet Fish* was not aware, and could not reasonably have been aware, that it had a cause of action against MSL until May, 1998.

Id. at 315. *Inlet Fish* concerned a complainant learning that it had been treated differently than its competitors (that there was an “actual injury”), not learning that there was a discriminatory reason for different treatment of which it was already aware. Unlike *Inlet Fish*, Maher knew that it was being treated differently from the moment it signed its lease.

The Commission noted that cases in which a party discovers information demonstrating that it had been injured at a point after the injury occurs should, “of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.” *Id.* at 313. Maher was aware (or should have been aware) that it had a cause of action on October 1, 2000. Maher failed to act on that knowledge for nearly eight years. It is also significant that the Commission stated that “[i]f *Inlet Fish* were merely contending that it did not file a complaint because MSL had indicated that it had done nothing wrong, the complaint would likely be barred.” *Id.* n.6. This statement is consistent with the rulings of the courts of appeals, *see, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d at 1391 (“That Oshiver may have been deceived

regarding the underlying motive behind her discharge is irrelevant for purposes of the discovery rule.”), and suggests that even if PANYNJ falsely told Maher that it had legitimate reasons for the differences in treatment, Maher’s claim accrued when Maher signed its lease.

Maheer does not cite any authority – court or agency – supporting its contention that the statute of limitations does not begin to run until a plaintiff or complainant knows that it suffered a legal injury as opposed to an actual injury. It argues for a rule pursuant to which “[w]hat is decisive is that Maher did not know nor should it have known that the different lease terms were an undue prejudice violating the Shipping Act until it possessed conclusive information in May 2008.” (Maheer Opp. to MSJ at 4.) Maheer’s articulation of its version of the discovery rule is essentially identical to the rule articulated by the district court, but rejected by the Supreme Court, in *Kubrick*: “[W]e do not believe it reasonable to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached.” *United States v. Kubrick*, 444 U.S. at 116 (quoting the rule applied by the district court); at 122 (rejecting the district court’s rule).

Maheer does not cite any case (Commission or other forum) holding that the statute of limitations does not run for a plaintiff or complainant with actual knowledge of its injury and knowledge that the injury was caused by the conduct of another person because the plaintiff or complainant does not appreciate that it has a legal injury. The burden is on it to establish that it is protected by the rule. Therefore, the discovery rule does not save Maheer’s claim for a reparation award for alleged discrimination in negotiations resulting in Lease EP-249 and by allegedly discriminatory differences between Lease EP-248 and EP-249 as the material facts as to which there is no dispute establish Maheer “discovered” its injury on October 1, 2000.

VII. THE DIFFERENCES BETWEEN THE LEASES DO NOT ESTABLISH A CONTINUING VIOLATION FOR STATUTE OF LIMITATIONS PURPOSES.

Maheer argues 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 Shipping Act plainly permits Maheer to bring a complaint for reparations, and recover reparations, for violations of the Shipping Act by PANYNJ within the three-year limitations period, in this case after June 3, 2005. *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079 (ALJ 1979).

In *Seatrain*, the complainant sought reparations for a port authority’s refusal to provide access to certain port facilities. The respondent port authority sought dismissal of the reparations complaint on the basis of its argument that the cause of action accrued at the time of the first refusal – outside the statutory period – barred the reparations claims for the subsequent violations inside the statutory period.

Seatrain rejected respondent’s argument and held that (i) each act in violation of the Shipping Act is a new act for the purpose of the statute of limitations, and that

(ii) each day of a continuing violation is a new act for the purpose of the statute of limitations:

As alleged, *each and every berthing barred is a new act giving rise to alleged injury*. Damages for unlawful acts prior to July 29, 1979, are of course, barred by the statute of limitations. *Any unlawful act, however, which continues becomes not one act but a series of individual actions each time it is enforced and the statute of limitations is to be measured against each act giving rise to an alleged new injury*. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 (1968); see also *Baker v. F & F Investment Co.*, 489 F.2d 829 (7th Cir. 1973).

As regards the requirement pursuant to Section 22 of the Act and Rule 63 that the Commission has jurisdiction to order payment of reparation only if the complaint is filed within two years after the cause of action has accrued, it is determined that the complaint is timely filed and the Commission has jurisdiction to determine whether payment of reparation should be directed.

Id. 1082 (emphasis added). As *Seatrain* explains, claims accruing *outside* of the limitations period *do not bar complaints* seeking reparations for claims of continuing violations *inside* the limitations period. Rather, the statute of limitations *bars the damages* recoverable from accrued claims outside the limitations period.

The continuing violation rule is infused in Commission precedent.

(Maher Opp. to MSJ at 13-14 (footnotes omitted) (emphasis in original).)

It appears that Maher contends that the statute of limitations does not bar a reparation award based solely on the allegedly discriminatory differences between Lease EP-248 and Lease EP-249, including, but not limited to, the rental rate, investment requirements, throughput requirements, the first point of rest requirement for automobiles, and the security deposit requirement. 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.

The case law makes it abundantly clear that a defendant/respondent must commit an overt act of discrimination within the limitations period for a plaintiff/complainant to receive damages. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Supreme Court stated:

[Ledbetter] argues that the pay-checks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period. Similarly, she maintains that the decision was unlawful because it “carried forward” the effects of prior, uncharged discrimination decisions. In

essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. This argument is squarely foreclosed by our precedents.

Id. at 624-625. *See also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (“[I]n the case of a ‘continuing violation,’ . . . each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.”) (citations, quotations omitted); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (“A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.”).

In *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004), the plaintiffs commenced an action in 2002 contending that contracts signed in 1996 were illegal under the Sherman Antitrust Act and the Packers and Stockyard Act as “tying contracts.” They argued that the contracts were not subject to the applicable four-year statute of limitations under the continuing violation rule. The Eighth Circuit rejected this argument, stating that the continuing violation rule

“permits a cause of action to accrue whenever the wrongdoer commits an overt act in furtherance of an antitrust conspiracy or, in the absence thereof, commits an act that by its very nature is a continuing antitrust violation.” *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982). A continuing antitrust violation is one in which the plaintiff’s interests are repeatedly invaded. *Id.* at 849 (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987)). “When a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants.” *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74, 81 (6th Cir. 1981). However, “even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.” *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (quoting *Pace Indus.*, 813 F.2d at 237). “For statute of limitations purposes, . . . the focus is on the timing of the causes of injury, *i.e.*, the defendant’s overt acts, as opposed to the effects of the overt acts.” *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (citing *Peck*, 894 F.2d at 849).

An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff. *Pace Industries, Inc.*, 813 F.2d at 238. Acts that are merely “unabated inertial consequences” of a single act do not restart the statute of limitations.

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Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) (mere fact that plaintiff made payments to defendant since signing of contract did not establish defendant's ability to enforce the tie absent voluntary cooperation by plaintiff); *Aurora Enter. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982) (“[T]hat defendants receive a benefit today as a result of a contract executed in 1966 . . . is not enough to restart the statute of limitations.”). In addition, when a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed; thus, the limitations period typically is not tolled by the requirements placed on the parties under the agreement. *See Information Exchange Systems, Inc. v. First Bank Nat. Ass’n*, 994 F.2d 478, 484 (8th Cir. 1993) (plaintiff knew terms of alleged tying agreement for continued credit when it entered into credit agreement, and claim for fraudulent concealment therefore could not survive). Here, the Varners failed to allege any new overt acts, other than enforcement of the initial contracts, that would toll the four-year statutes of limitations under either Act.

Varner v. Peterson Farms, 371 F.3d at 1019-1020 (footnote omitted). *See also* *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265, 272 (8th Cir. 2004) (“[W]here the plaintiff had actual knowledge of the initial violation and suffered sufficient injury, courts generally do not toll the statute of limitations based on a continuing violation theory. 2 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 320c1 at 210-11 (2d ed. 2000).”); *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (“A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.”) (*citing* *Collins v. United Air Lines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975)).

Maher cites four decisions by Commission administrative law judges as support for its argument that the terms of Lease EP-249 constitute a “continuing violation” of the Shipping Act for which it may seek a reparation award despite the absence of an overt discriminatory act within the limitations period. (Maher Opp, to MSJ at 13-22.) None of the cases supports Maher’s argument.

Seatrain, supra, the primary case on which Maher relies, is consistent with the continuing violation rule as articulated by the courts in the cases cited above. The administrative law judge denied the respondent’s motion to dismiss on statute of limitations grounds.

The Ports Authority contends that *Seatrain*’s cause of action accrued on or before January 1976 [apparently when *Seatrain* resumed service in the Puerto Rican trade] and in any event, *Seatrain*’s effort to obtain “legal action in concert with the FMC” based on the denial of access to the PRMSA cranes in April 1976 was the latest when the cause of action accrued. And, they argue, that April 1976 being more than two years prior to the filing of the instant complaint, the Commission is without jurisdiction to entertain the complaint.

Such contention would have validity if there were a single refusal for a single utilization of Isla Grande. But the facts, as alleged, do not support such a conclusion. It is complained that Seatrain has "been attempting to obtain . . . use of . . . Isla Grande . . . since about September, 1975 . . . [and such] attempts have been unsuccessful [to date]." The complaint alleges numerous requests (some prior to July 29, 1976) and numerous refusals (some prior to July 29, 1976) and continuing requests (on and after July 29, 1976) and continuing refusals (on and after July 29, 1976) with continuing use of alternative facilities (subsequent to July 29, 1976) resulting in alleged continuing and accumulative injury.

As alleged, each and every berthing barred is a new act giving rise to alleged injury. Damages for unlawful acts prior to July 29, 1976, are, of course, barred by the statute of limitations. Any unlawful act, however, which continues becomes not one act but a series of individual acts each time it is enforced, and the statute of limitations is to be measured against each act giving rise to an alleged new injury.

Seatrain, 18 S.R.R. at 1081-1082. The Ports Authority contended since the first refusal to permit berthing occurred more than two years before Seatrain filed its complaint, the statute of limitations barred a reparation award for refusals less than two years before Seatrain filed its complaint. The judge found that the statute of limitations did not bar a claim for a reparation award for the overt acts of discrimination (*i.e.*, refusals to permit Seatrain to berth where requested) occurring within two years of the date Seatrain filed the complaint.

Maher contends that *Seatrain* stands for the proposition that "claims accruing *outside* of the limitations period *do not bar complaints* seeking reparations for claims of continuing violations *inside* the limitations period." (Maher Opp. to MSJ at 14 (footnote omitted) (emphasis in original).) This contention is not precisely correct. *Seatrain* stands for the proposition that claims accruing outside of the limitations period do not bar complaints seeking reparations for claims of similar *overt discriminatory acts* inside the limitations period. Each refusal to permit Seatrain to berth, some of which occurred within the limitations period, was a separate overt act of discrimination, not the unabated inertial consequence of a discriminatory act outside the limitations period. Seatrain could seek a reparation award for the refusals to berth within the limitations period. *Seatrain* does not support Maher's argument that without an overt act of discrimination by PANYNJ within the limitations period, Maher is entitled to a reparation award for the unabated inertial consequences of the allegedly discriminatory terms of Lease EP-249.

Maher also relies on *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 248 (ALJ 1992). The administrative law judge found that "Seacon's most-favored-nation clause in its lease . . . related only to land and premises, and did not relate to cranes and equipment" and awarded no reparations to Seacon. 26 S.R.R. at 426 (ultimate conclusion and finding number 7). In the decision, the judge observed:

The crane terms agreements of the various tenants at the Port of Seattle had differing rates at different levels of usage. These different terms could favor Seacon, or could favor other tenants, all depending on the volume of usages of the cranes.

To the extent that Seacon's crane terms provided that it had to pay diesel fuel rates, or rates higher than electricity rates, to operate its two diesel Starporter cranes, Seacon appears probably to have suffered rate discrimination, but these fuel charges (rates) were established by the Port in its tariffs, which became effective on Oct. 1, 1982, and which remained unchanged until July 1, 1990. Thus, Seacon's cause of action as to a disparity in fuel costs began to accrue over seven years before its complaint was filed in May 1990, and, of course, the Port was obliged to charge the fuel costs specified in its tariff, unless its lease agreements were amended in this respect. To the extent that the disparity in fuel costs continued after May 30, 1987, these costs would not be barred. Seacon [ceased] operation in July 1988, so that the unbarred fuel disparity was for a relatively short period, and perhaps was offset by payments or lack of payments by Seacon for acres less than suitable for containeryard operations.

Id. at 277.

This discussion is quite clearly unnecessary to the decision in the case that the clause did not apply to cranes and is *obiter dictum*. See Black's Law Dictionary 1177 (9th ed. 2009). Nevertheless, Maher argues that in this decision, "the Presiding Officer recognized the legal vitality of the alleged Shipping Act discrimination claims for a Port Authority's alleged ongoing violation of the Shipping Act in charges that *began to accrue over seven years prior* to the complaint." (Maher Opp. to MSJ at 15 (footnote omitted) (emphasis in original).) Perhaps because of the conditional nature of the judge's discussion (*e.g.*, "Seacon *appears probably* to have suffered rate discrimination") and the fact that the resolution of the question did not affect the outcome of the case, the judge did not cite to any cases discussing the elements of a continuing violation. Therefore, to the extent that the *Seacon Terminals* opinion would lead to a conclusion that Maher may seek a reparation award in the absence of an overt discriminatory act within the limitations period, given the decisions by the Supreme Court and courts of appeals cited above, I respectfully disagree.

Maher also relies on *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1011 (ALJ 1999). NPR, an ocean carrier, took over the operations of another ocean carrier that provided shipping services between New Orleans and Puerto Rico. NPR decided to discontinue serving the Port of New Orleans directly, but had assumed a lease with the Port that ran until the year 2003. In order to leave the Port, NPR and the Board negotiated a Cancellation Agreement, signed September 17, 1996, by which NPR would make certain payments to the Board in lieu of the former rental. After making some payments under the Cancellation Agreement, on November 25, 1998, NPR filed a complaint with the Commission that the Agreement violated the Shipping Act of 1984.

NPR filed its complaint more than two years and less than three years after it signed the Agreement. The Board argued that the Agreement had been approved under the Shipping Act, 1916, which had a two-year statute of limitations, and belonged before the Surface Transportation Board. The administrative law judge rejected this argument, *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. at 1017 n.5, and the case was ultimately decided pursuant to the Shipping Act of 1984. *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1512, 1536 (ALJ 2000).

In the language on which Maher relies, the administrative law judge stated:

NPR argues, correctly in my opinion, that the Board's practice in demanding payments over the life of the canceled lease constitutes ongoing conduct and that its complaint is therefore not time-barred even by the two-year statute of limitations set forth in section 22 of the 1916 Act, which is inapplicable, nor by the three-year statute of limitations set forth in section 11 of the 1984 Act, which is applicable.

NPR, Inc. v. Board of Commissioners of the Port of New Orleans, 28 S.R.R. at 1014. Since the two-year statute of limitations of the 1916 Act was inapplicable, the case was decided under the 1984 Act, and NPR filed its complaint with the 1984 Act's three-year statute of limitations, the issue of whether the continuing violation rule would permit a reparation award in the absence of an overt act of discrimination within the limitations period was not relevant and this statement is *obiter dictum*. Furthermore, the judge did not cite any authority supporting the statement that practice of demanding payments over the life of the canceled lease constituted ongoing conduct. Therefore, to the extent that the *NPR* opinion would lead to a conclusion that Maher may seek a reparation award in the absence of an overt discriminatory act within the limitations period, given the decisions by the Supreme Court and courts of appeals cited above, I respectfully disagree.

In *Int'l Shipping Agency, Inc. v. Puerto Rico Ports Auth.*, 30 S.R.R. 407 (ALJ 2004),⁵ the administrative law judge rejected the respondent's argument that the claims were barred by the statute of limitations. The judge recognized that:

The Commission has determined that a cause of action "accrues" when the complainant knew or had reason to know of the harm alleged. Likewise, if the alleged harm continues for an extended period of time, the limitation period begins to run when the complainant first *knew or should have known* of the harm. There is no competent evidence or rule of law that the Complaint should be dismissed because some of the harm occurred before December 29, 2000 and Intership knew or should have known about the harm.

⁵ The Commission did not review this decision. The complaint was eventually dismissed on sovereign immunity grounds. See *Puerto Rico Ports Auth. v. Federal Maritime Comm'n*, 531 F.3d 868 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

Id. at 425.

The judge took note of the allegations of the complaint:

Complaint, Part V, C (“PRPA . . . continues to refuse to provide comparable marine terminal areas at Puerto Nuevo to Intership”); D (“PRPA . . . continues to ignore many requests from Intership for the temporary lease of several available Puerto Nuevo lots”); G (“PRPA . . . continues to fail to repair Pier [½] N & O, despite charging rent to Intership for their use”); M (“Since Sept. 2001, the PRPA has used the construction of the Royal Caribbean Cruise Line terminal as a pretext for denying berths to Intership”); DD (PRPA advised Intership that the repair work to Piers ½ N & O “would commence in 2002”); HH (“the PRPA has failed to repair Piers [½] N & O as of this date”).

Id. at 426 n.51. She found that:

PRPA’s attempt to invoke the section 11(g) statute of limitations ignores the nature of the Complaint. The Complaint was initiated due to PRPA’s ongoing failure to operate in accordance with requirements of the Shipping Act.

Although PRPA’s unacceptable activities may have begun more than three years ago, its liability for violations under the Shipping Act *does not arise from a single discrete act that occurred in the past and is now complete*. Rather, PRPA’s liability arises from continued violations of obligations that continue to exist under the Agreement.

Id. at 425-426 (emphasis added). In contrast, Maher’s claim for a reparation award for the negotiations that resulted in Lease EP-249 and Lease EP-249 itself arises from acts “that occurred in the past and [are] now complete.”

Maher also contends that:

The [continuing violation] rule was similarly applied in *Odyssea Stevedoring of Puerto Rico, Inc. v. PRPA*, 30 S.R.R. 484 (Nov. 9, 2004) (Trudelle, ALJ). In *Odyssea*, the complaint alleged continuing violations of the lease, alleged that enforcement of the lease itself was a continuing violation and that the respondent’s conduct was a continuing violation. *Id.* at 503.

(Maher Opp. to MSJ at 17 n.12.) In *Odyssea*, PRPA sought “summary judgment and dismissal of the Complaint because *Odyssea* has not shown damages. PRPA argue[d] that ‘Complainant fails to provide competent evidence of damages incurred by the alleged wrongdoing of Respondent. Therefore, Complainant cannot prove any of its claims and summary judgment must be granted in favor of Respondent.’” *Odyssea Stevedoring v. PRPA*, 30 S.R.R. at 502. The administrative law judge denied the motion for summary judgment, finding that “[t]he Complaint clearly includes

allegations of continuing offenses and seeks reparations in connection with those violations.” *Id.* at 503. The effect of the statute of limitations on a claim was neither raised nor discussed in *Odyssea*. *Odyssea* provides no support for Maher’s argument that it may seek a reparation award for a continuing violation in the absence of an overt discriminatory act within the limitations period.

The material facts as to which there is no genuine dispute establish that Maher was fully aware of the terms of and the differences between Lease EP-248 and Lease EP-249 when it entered into Lease EP-249. Any overt discriminatory act by PANYNJ that resulted in Lease EP-249 was necessarily committed on or before October 1, 2000. Maher’s injury occurred “only when the agreement [was] initially imposed; thus, the limitations period . . . is not tolled by the requirements placed on the parties under the agreement.” *Varner v. Peterson Farms*, 371 F.3d at 1019-1020. With no overt discriminatory act by PANYNJ within the limitations period, the cases cited above foreclose a reparation award for differences between Lease EP-248 and Lease EP-249 in rent, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement. Maher has not cited any contrary controlling authority that would support a holding that current operation under the terms of Lease EP-249 is a continuing violation of the Act. Therefore, the continuing violation rule does not support Maher’s claim for a reparation award for alleged discrimination in negotiations leading up to signing Lease EP-249 and the terms of Lease EP-249 itself.

VIII. CLAIMS FOR A REPARATION AWARD BARRED.

PANYNJ served the following interrogatory on Maher:

Interrogatory No. 6: Identify and describe any damages claimed by Maher in the Complaint, including, but not limited to, stating: (i) the factual basis for such damages; (ii) the legal theory under which such damages are recoverable; (iii) the amount of such damages; and, (iv) the methodology used to calculate such damages.

Response: Maher objects to this request to the extent it calls for a legal conclusion. The information requested is also premature because the discovery order in this proceeding does not require expert disclosures for many months and Maher will designate an expert on damages. Subject to the foregoing and general objections, Maher’s damages include the additional costs it incurred to APM because of PANYNJ’s preferential treatment of APM. These damages are contained in the disparate terms of leases EP-248 and EP-249.

First, Maher’s damages include the difference between Maher’s base rent and APM’s base rent that Maher must pay PANYNJ over the 30-year term of Maher’s lease. This includes the difference between Maher’s initial base rent of \$39,750 per acre and APM’s base rent of \$19,000, plus difference owing to the 2% annual rent escalator paid by Maher and not paid by APM. For example, Maher’s 2008 rent is \$45,660 per acre, while APM’s base rent remains unchanged at \$19,000. Thus, in 2008 alone Maher must pay PANYNJ \$26,660 more per acre in base rent than APM

pays PANYNJ. Based on this difference the base rent and escalator differential damages alone incurred by Maher since 2000 total approximately \$86 million. According to the disparate lease terms of leases EP-248 and EP-249, these damages total approximately \$474 million through the 30-year lease period based upon the disparate base rent and escalator.

(Maher's Resp. to Port Authority's First Set of Interrogatories (Maher's Int. Resp.) at 9-10, Aug. 29, 2008 (attached to PANYNJ MSJ, Levine Declaration Ex. H).)

The higher rent and the rental increases imposed by Lease EP-249 are the "unabated inertial consequences" of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the differences in rent between Lease EP-248 and Lease EP-249 are not justified by a valid transportation purpose, the difference in rent and the yearly increase in Maher's rent are not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit "a new and independent act that is not merely a reaffirmation of a previous act" and PANYNJ did not "inflict [a] new and accumulating injury" on Maher. *Pace Industries, Inc.*, 813 F.2d at 238.

In *Eichman v. Fotomat Corp.*, 880 F.2d 149 (9th Cir. 1989), Eichman had signed a lease agreement with Fotomat in 1968. In an action commenced in 1982, Eichman claimed that the lease agreement was an unlawful tying agreement in violation of the antitrust laws. The district court held that this claim was barred by the Clayton Act's four year statute of limitations. On appeal, Eichman argued that "the lease tying agreement was a continuing violation of the antitrust laws which is not barred by the statute of limitations. Eichman contends that each payment under the lease was a new injury for purposes of the statute of limitations." *Eichman v. Fotomat Corp.*, 880 F.2d at 160. The court of appeals held:

When a plaintiff alleges a continuing violation of the law, an overt act is required to restart the statute of limitations and the statute of limitations runs from the last overt act. Under certain circumstances the active enforcement of an illegal contract may constitute an overt act which will restart the statute of limitations. However, the passive receipt of profits from an illegal contract by an antitrust defendant is not an overt act of enforcement which will restart the statute of limitations.

To restart the statute of limitations in a tying situation, Eichman must show that Fotomat "had the ability [to] and actually did enforce the tie" during the limitations period. The mere fact that Eichman has made lease payments to Fotomat since 1968 does not establish Fotomat's ability to enforce the tie absent voluntary cooperation by Eichman.

Id. (citations omitted). PANYNJ's "passive receipt of [rental payments] . . . is not an overt act of enforcement which will restart the statute of limitations." Therefore, a reparation award for the difference in rent between Lease EP-248 and Lease EP-249 paid subsequent to June 3, 2005, is barred by the statute of limitations.

Maher's response continues:

Second, Maher's damages include the additional burdens and risks imposed on Maher and not imposed on APM because Maher's lease requires it to guarantee a higher container throughput per acre than APM. If Maher fails to satisfy the throughput requirements, PANYNJ may terminate the lease. By contrast, APM is not subject to termination for failing to meet its lower throughput requirements.

(Maher's Int. Resp. at 10.)

Maher's response does not set forth any actual injury that it had suffered by the time of its response and does not contend that it will suffer monetary damages if it fails to satisfy the throughput requirements. Maher contends that failure to satisfy the throughput requirement could result in the termination of its lease. To the extent that Maher may claim monetary damages resulting from the different provisions, those damages are the "unabated inertial consequences" of the negotiations and the lease itself and barred by the statute of limitations. Assuming the Maher could establish that this provision violates the Shipping Act, I express no opinion on the question of whether enforcement of this provision would be an overt act by PANYNJ.

Maher's response continues:

Third, Maher's damages include the additional twenty-five basis point finance fee that it must pay relative to APM for infrastructure improvements (175 basis points over the Revenue Bond Index versus APM's 150 basis points over the Revenue Bond Index). Calculation of the present value of this additional cost to Maher remains ongoing and will be subject to actual activity. APM's access to cheaper financing from PANYNJ constitutes ongoing disparate treatment and competitive advantage.

(Maher's Int. Resp. at 10-11.)

Maher does not state that PANYNJ has actually imposed any higher investment requirements on Maher. The higher investment requirements imposed by Lease EP-249 would be the "unabated inertial consequences" of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the higher investment requirements in Lease EP-249 are not justified by a valid transportation purpose, the higher investment requirements are not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit "a new and independent act that is not merely a reaffirmation of a previous act" and PANYNJ did not "inflict [a] new and accumulating injury" on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Therefore, a reparation award for the higher investment requirements is barred by the statute of limitations.

Maher's response continues: "Fourth, Maher's damages are equal to the cost of the additional security deposit requirements that PANYNJ requires of Maher, but not of APM."
(Maher's Int. Resp. at 11.)

Lease EP-249 required Maher to tender its security deposit when it signed the lease and delivered it to PANYNJ. (Lease EP-249, Section 40.) This occurred on or about October 1, 2000. I first note that since the lease requires PANYNJ to return the security deposit (minus any unpaid claims or damages) when the lease terminates and Maher “may collect or receive any interest or income earned on bonds [used for the security deposit] and interest paid on cash deposited in interest-bearing bank accounts” (*id.*) while PANYNJ holds the security deposit, it is not clear that paying a higher security deposit is an actual injury within the meaning of the Act. Even if it is assumed it is an injury and that PANYNJ discriminated against Maher in the negotiations and the additional security deposit requirements in Lease EP-249 are not justified by a valid transportation purpose, the additional security deposit is not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit “a new and independent act that is not merely a reaffirmation of a previous act” and PANYNJ did not “inflict [a] new and accumulating injury” on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Therefore, a reparation award for the additional security deposit is barred by the statute of limitations.

Maher’s response continues: “Additionally, Maher faces a potential loss of profit because of the cost advantages PANYNJ has wrongfully bestowed on APM. APM has been actively soliciting Maher’s customers to expand its third-party business to the detriment of Maher.” (Maher’s Int. Resp. at 11.)

Maher does not identify an actual injury or damages that it has suffered as a result of the cost disadvantages. The cost disadvantages imposed by Lease EP-249 are the “unabated inertial consequences” of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the cost disadvantages in Lease EP-249 are not justified by a valid transportation purpose, the cost disadvantages are not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit “a new and independent act that is not merely a reaffirmation of a previous act” and PANYNJ did not “inflict [a] new and accumulating injury” on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Solicitation by APM is not an overt act by PANYNJ. Therefore, a reparation award for the cost disadvantages is barred by the statute of limitations.

Maher does not identify an actual injury or damages that it has suffered as a result of the different first point of rest requirement for automobiles imposed by Lease EP-249. Any injury allegedly imposed by the different first point of rest requirement for automobiles by Lease EP-249 is the “unabated inertial consequence[.]” of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the cost disadvantages in Lease EP-249 are not justified by a valid transportation purpose, the different first point of rest requirement for automobiles is not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit “a new and independent act that is not merely a reaffirmation of a previous act” and PANYNJ did not “inflict [a] new and accumulating injury” on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Therefore, a reparation award for the first point of rest requirement for automobiles is barred by the statute of limitations.

IX. THE STATUTE OF LIMITATIONS IS NOT APPLICABLE TO A CEASE AND DESIST ORDER.

PANYNJ argues that the Commission cannot grant Maher's prayer for a cease and desist order. It contends:

While the FMC has held that its authority to enter a cease and desist order is not subject to the Shipping Act's statute of limitations, Maher cannot validly invoke such authority as the basis for seeking relief on its lease-term discrimination claims. As discussed above, there are no allegations of any overt acts of discrimination within the limitations period. All of the acts of which Maher complains occurred more than eight years ago. In other words, there is no ongoing conduct with respect to the alleged lease-term discrimination from which the Port Authority can be ordered to cease and desist.

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Moreover, any attempt by Maher to invoke the FMC cease and desist authority to rewrite its lease on a prospective basis would be nothing more than an attempt to obtain indirectly the reparations that it cannot obtain directly. As noted above, . . . Maher has already claimed that it could compute its damages based upon a comparison of the facial differential between the APM and Maher leases over their entire thirty-year term. Assuming that the Commission agrees that Maher's reparations claims are barred by the Shipping Act's three-year statute of limitations, the only effect of issuing the "cease and desist order" Maher has requested – which would rewrite Maher's lease on a prospective basis so as to match the APM terms – would be to award Maher reparations for however many years of Maher's lease remain as of the date the Commission issues its decision in this case. Permitting such an end-run around the statute of limitations would be an inappropriate exercise of the Commission's cease and desist authority as a matter of law. Accordingly, if summary judgment is granted on Maher's reparations claims, summary judgment should be granted on its claim for a cease and desist order as well.

(PANYNJ MSJ at 26-28 (footnotes omitted).)

The Act's statute of limitations states that "[a] person may file with the . . . Commission a sworn complaint alleging a violation of this part 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). It does not state that *all* complaints must be filed within three years after the claim accrues. It does not state that a complaint seeking a cease and desist order must be filed within three years. It does not state that if a complaint seeking reparations and other relief is filed more than three years after the claim accrues, the claim for other relief must be dismissed with the untimely claim for reparations.

The Commission has clearly held that “[t]he 3 year statute of limitations . . . applies only to requests for reparations. It would not prevent the Commission from issuing a cease and desist order in a case brought over three years after the cause of action accrued.” *Western Overseas Trade and Development Corp. v. ANERA*, 26 S.R.R. 874, 885 n.17 (FMC 1993). See also *A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1550 (ALJ 1986) (“If there is no claim for reparations, however, there is no time limit to the filing of the claim. In fact, under the Commission’s and court interpretations of Section 22, any person could file a complaint alleging a violation of the 1916 Act even if the person had not alleged injury.”), Report and Order Adopting Initial Decision with Clarifications, 24 S.R.R. 1468, *rev’d on other grounds sub nom. A/S Ivarans Rederi v. United States*, 895 F.2d 1441 (D.C. Cir. 1990).

A complaint seeking a reparation award must be filed within three years of the date the claim accrued; therefore, the Commission cannot grant a reparation award for alleged injuries resulting from violations that occurred more than three years before Maher filed its Complaint. A complaint seeking a cease and desist order need not be filed within three years of the date the claim accrued. If the Commission determines that terms in Lease EP-249 violate the Shipping Act by granting an undue preference, the Commission may issue a cease and desist order requiring PANYNJ eliminate the preference. See *Ballmill Lumber & Sales Corp. v. Port of New York Auth.*, 10 S.R.R. 524, 526 (FMC 1968) (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 the complainant). Therefore, PANYNJ’s motion for summary judgment on the claim for a cease and desist order is denied.

X. APPEAL AND POSSIBLE STAY.

This decision dismisses Maher’s claim for a reparation award for alleged Shipping Act violations during the negotiations that resulted in Lease EP-249 and in Lease EP-249 itself. Commission Rule 227 provides “[i]f an administrative law judge has granted a motion for dismissal of the proceeding in whole or in part, any party desiring to appeal must file such appeal no later than twenty-two (22) days after service of the ruling on the motion in question.” 46 C.F.R. § 502.227(b)(1). Therefore, as a matter of course, Maher may seek review of this decision. Pursuant to Rule 227, any exceptions to this decision must be filed with the Commission within twenty-two days of the date of the decision and a reply is due twenty-two days after the exceptions are filed. 46 C.F.R. § 502.227(a).

Even if this decision did not fit within Rule 227, the Commission has also held that it is appropriate to look to the procedures established for the district courts for guidance in determining whether an interlocutory appeal is appropriate. See *Amzone International, Inc. v. Hyundai Merchant Marine Co.*, 27 S.R.R. 386, 389 (1995) (“[I]nterlocutory appeals are permissible if a district judge certifies that an otherwise unappealable order ‘ . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation’ 28 U.S.C. § 1292(b).”). Under its discovery rule argument, Maher is seeking a reparation award for the difference between the rent it paid and the rent it would have paid if given the same rental rate as Maersk/APM. In its

discovery response, Maher stated that the difference as of August 29, 2008, totaled approximately \$86 million. (Maher's Resp. to Port Authority's First Set of Interrogatories at 10, Aug. 29, 2008 (attached to PANYNJ MSJ, Levine Declaration Ex. H).) Subsequent payments have likely taken this figure well above \$100 million. Pursuant to this decision, Maher would not receive any reparation award on the discriminatory rent claim.

The parties engaged in settlement discussions that apparently came close to resolving their differences. On October 15, 2010, the parties stated that "[f]ollowing extensive discussions and negotiations, the parties have now reached a full agreement in principle to resolve the entire matter in controversy." See *Maher v. PANYNJ*, FMC No. 08-03, Order at 2 (ALJ Jan. 11, 2011) (January 11, 2011 Scheduling Order). Based on this representation, the date to file a joint motion for approval of the settlement was extended. *Id.* On December 17, 2010, the parties filed another joint motion asking for another extension. The parties stated: "The parties have continued to negotiate the terms and progressed in preparing final documentation for the settlement, but have not been able to complete the process. Therefore, the parties need additional time to conclude the documents and secure approvals." *Id.* at 3. The date to submit a joint motion to approve a settlement agreement was again extended. *Id.* On January 5 and 6, 2011, the parties submitted joint proposed litigation schedules, thereby signaling that they had not reached the settlement they anticipated. *Id.* at 4-5.

Given the difference between what Maher seeks and what it would receive, the Commission's resolution of the issue of when Maher's claim accrued could enable the parties to reassess their interests and resolve their differences by settlement. While I have some question as to how substantial Maher's arguments may be, the grounds for difference of opinion are not insubstantial. Therefore, if it is determined that this decision may not be reviewed pursuant to Rule 227, I have determined that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Since Maher's claim for a cease and desist order was not dismissed, that portion of this ruling would not be reviewed at this time pursuant to Rule 227. Commission Rule 153 provides that a presiding officer may allow an interlocutory appeal if he or she finds it necessary "to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.153(a). The Commission has recognized that it is an "extraordinary step" to grant leave to petition the Commission "to overturn the ALJ's jurisdictional ruling denying [a] motion to dismiss." *Inlet Fish*, 29 S.R.R. at 315.

PANYNJ's contention that the three-year statute of limitations bars entry of a cease and desist order is based on the Act's statute of limitations that the Commission will already have under review. I have determined that it is in the public interest to permit PANYNJ to seek review of its contention at this time. Therefore, I *sua sponte* grant leave for PANYNJ to appeal the denial of summary judgment based on its argument that a cease and desist order is barred by the statute of limitations. If PANYNJ chooses to appeal, its brief on the effect of the statute of limitations on the prayer for a cease and desist order is due twenty-two days after this decision and Maher's response is due twenty-two days after PANYNJ files its brief.

Commission Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted. I will defer ruling on a stay pending receipt of memoranda from the parties stating their positions on staying this proceeding pending the Commission's review of this decision. On or before May 20, 2011, the parties are ordered to file memoranda addressing the presiding officer's authority to stay this proceeding pursuant to Rule 153 or any other ground pending the Commission's review of this decision, and the propriety of staying the proceeding pending Commission review. If the parties choose, they may file a joint memorandum.

ORDER

Upon consideration of The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

ORDERED that The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims be **GRANTED IN PART** and **DENIED IN PART**. Maher's claim that PANYNJ discriminated against Maher in the negotiations that resulted in Lease EP-249 and in the terms of Lease EP-249 itself accrued when Maher signed the lease October 1, 2000. Maher filed its Complaint more than three years after its claim accrued. Accordingly, Maher's claim for a reparation award based on alleged discrimination against Maher in the negotiations that resulted in Lease EP-249 and in the terms of Lease EP-249 itself must be dismissed. PANYNJ's motion to dismiss the claim seeking a cease and desist order based on alleged discrimination against Maher in the negotiations that resulted in Lease EP-249 and in the terms of Lease EP-249 itself is **DENIED**. It is

FURTHER ORDERED that on or before May 20, 2011, the parties file memoranda addressing the presiding officer's authority to stay this proceeding pursuant to Rule 153 or any other ground pending the Commission's review of this decision, and the propriety of staying the proceeding.


Clay G. Guthridge
Administrative Law Judge

DOCKET NO. 08-03

MAHER TERMINALS, LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

**INITIAL DECISION GRANTING IN PART MOTION FOR SUMMARY JUDGMENT
AND DISMISSING CLAIM FOR A REPARATION AWARD BASED ON
LEASE-TERM DISCRIMINATION CLAIMS**

APPENDIX

Statements Stricken from Material Facts as to Which There is no Genuine Dispute

Maher Response 6: REASON FOR STRIKING RESPONSE: Argumentative and the additional facts relate to Maher's argument that its claim did not accrue until it learned that it was the victim of a legal wrong.

. . . but [Maher] denies PANYNJ's attempt to misconstrue one of Maher's interrogatory responses to suggest it was responding to when Maher knew of the differences and that the differences were undue. The interrogatory PANYNJ cites did not. Rather, PANYNJ ignores the interrogatories reflecting when Maher knew of the differences and when Maher knew when they were undue. See Maher's Responses to PANYNJ's Second Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit K to Levine Decl.) (The text PANYNJ quotes is three lines of a two-page interrogatory response to responding to PANYNJ's interrogatory requesting "all facts supporting each and every allegation of the Complaint."). In response to PANYNJ's First Set of Interrogatories, No.1, asking "when Maher first became aware of the alleged differences" between the leases, Maher responded that it "learned of PANYNJ's preference of [APM] during the negotiation of EP-249," see Maher's Responses to PANYNJ's First Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit H to Levine Decl.), but it only began to learn that the APM preference was *unduly or unreasonably* preferential starting "in the summer of 2007" when PANYNJ Deputy General Counsel Christopher Hartwyck sought a release from Maher's General Counsel Scott Schley for a rent disparity claim. *Id.* at No. 4, p.8 (Exhibit H to Levine Decl.).

Maher Response 7: REASON FOR STRIKING RESPONSE: The response is argumentative.

. . . but as with the previous paragraph PANYNJ misconstrues, Maher denies PANYNJ's mischaracterization of the quote. Contrary to PANYNJ's effort to conflate the two elements of a claim-knowledge of the difference and knowledge that the difference is undue – the excerpt sets out both elements. See Complainant's Scheduling Report at 5 (July 23, 2008)

(Exhibit G to Levine Decl.) (explaining in the context of the Shipping Act burden of proof, that the initial burden shift to the Respondent “is apparent from Maher’s complaint” and “the plain language of the leases themselves.”).

Maher Response 8: REASON FOR STRIKING RESPONSE: The response is argumentative.

Pursuant to *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1272 (FMC, 1997), where facially disparate lease terms are unduly disparate (*i.e.* different and wrongful or unjustified) the measure of damages is the difference of the disparate lease terms. See *Ceres Marine Terminal v. Maryland Port Administration*, 29 S.R.R. 356, 372 -73 (FMC 2001) (citing *Valley Evaporating v. Grace Line Inc.*, 11 S.R.R. 873 (1970). Maher denies PANYNJ’s suggestion that an ability to calculate differences if there was a violation constitutes evidence of a violation.

PANYNJ Statement 9: REASON FOR STRIKING STATEMENT: Maher knew it suffered an actual injury on October 1, 2000. The extent of that injury is not material to the accrual of its claim.

Maher has represented that it is not seeking “additional” damages beyond those allegedly created by the facial disparities in the lease terms. Maher’s Reply in Opposition to Respondent’s Motion to Compel Production from Complainant and Motion for Protective Order at 3, Oct. 9, 2008, attached as Exhibit D to Levine Decl.

Maher Response 9:

Maher denies that (i) it alleges damages created by facial disparities in the lease terms, and (ii) denies that its Shipping Act claims in this proceeding seek no other damages. Maher alleges that PANYNJ violated and continues to violate the Shipping Act. Maher’s claims also allege lost business, lost revenue, increased costs, attorney’s fees and interest. See generally, Maher’s Reply in Opposition to Respondent’s Motion for a Protective Order at 11, 31 (Apr. 13, 2011) (citing Maher’s complaint and consolidated 07-01 counter-claims and extensive testimony concerning damages). PANYNJ takes the quoted statement out of context. See Maher’s Reply in Opposition to Respondent’s Motion to Compel Production from Complainant and Motion for Protective Order at 3 (Oct. 9, 2008) (Ex. D in Levine Decl.) (the statement was made in response to PANYNJ’s Motion to Compel post-lease financial documents in rebuttal of PANYNJ’s assertion of a need for discovery of “competitive harm,” as a separate and additional element of damages akin to lost profits and or business, and which under *Ceres* is not the applicable measure of damages).

Maher Response 10: REASON FOR STRIKING RESPONSE: The response is argumentative.

As Maher also explained, however, “What is decisive is that Maher did not know nor should it have known that the different lease terms were an *undue* prejudice.” Maher’s Reply in

Opposition to Respondent's Motion for Summary Judgment at 4 (March 14, 2011) (emphasis added).

Maher Response 11: REASON FOR STRIKING RESPONSE: The response is argumentative.

. . . but denies that it conveys knowledge of a preference without knowledge of an undue preference. Compare Maher's Responses to PANYNJ's First Set of Interrogatory Responses, No. 1 at 4-5 (Aug. 29, 2008) (Levine Decl. Ex. H) (responding to PANYNJ's first interrogatory requests by stating, "Maher learned of PANYNJ's *preference* of APMT" at the time of the lease negotiation) *with id.*, No. 4 at 8-9 (responding to PANYNJ's first discovery requests that Maher did not learn that the preferences were "*unduly or unreasonably preferential*" until events in 2007 and 2008.).

PANYNJ Statement 13: REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

Mosca testified further that at that time Maher had performed a financial analysis to compare the base annual rental rate of the Maersk Lease with the Maher Lease. *Id.* at 172:15 - 20, Levine Decl. Ex. F; *see, e.g.*, Memorandum from M. Davis to R. P. Mosca Regarding Maersk Lease at MT005220, Aug. 1, 2001, attached as Exhibit J to Levine Decl. (analysis of Maersk lease rates dated August 1, 2001).

Maher Response 13:

Admitted in part and denied in part. Randy Mosca's testimony concerned a limited financial comparison of Maher's proposed lease terms, *see* R. Mosca Dep., Dkt. 07-01, 172:15-20 (June 11, 2008), which was not "at that time" of the later August 1, 2001 memorandum.

In August of 2001, an internal Maher memorandum was sent to Brian and Basil Maher and Mr. Mosca, analyzing the differences between the Maher and Maersk Leases. *See* Memorandum from M. Davis to R.P. Mosca Regarding Maersk Lease at MT005220-5224, Levine Decl. Ex. J.

PANYNJ Statement 16: REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

In August of 2001, an internal Maher memorandum was sent to Brian and Basil Maher and Mr. Mosca, analyzing the differences between the Maher and Maersk Leases. *See* Memorandum from M. Davis to R.P. Mosca Regarding Maersk Lease at MT005220-5224, Levine Decl. Ex. J.

Maher Response 16:

Admitted in part and denied in part. Maher admits that the cited memorandum was prepared and sent, but Maher denies PANYNJ's characterization of the memorandum as "analyzing the differences between the Maher and Maersk Leases." The memorandum is described as a "preliminary review of the Maersk" lease. *Id.* at MT005220. Brian Maher testified that the review was requested to quantify the financial differences in the leases, and he testified that the report confirmed the same financial difference that Maher already knew. *See* B. Maher Dep. 08-03, 16:15-18:25 (April 6, 2011). Maher witnesses testified that the review was not a legal analysis, *see, e.g.*, S. Schley Dep., Dkt 08-03, 76:20-77:8 (March 24, 2011), (no one raised a legal issue with respect to the report); B. Maher Dep. 08-03, 206:11-207:3 (April 6, 2011) (Prior to 2007, it did not cross Maher's mind to seek counsel); R. Mosca Dep. 08-03, 86:9-86:12 (Mar. 14, 2011) (no discussion of suing the Port Authority).

PANYNJ Statement 17: **REASON FOR STRIKING STATEMENT:** Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

The memorandum compared the Maersk lease terms to the Maher lease terms, including the per acre annual charges, the infrastructure financing terms, and the security deposit requirement. *See id.* at MT005220, Levine Decl. Ex. J.

Maher Response 17:

Admitted.

PANYNJ Statement 18: **REASON FOR STRIKING STATEMENT:** Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

The memorandum detailed that while the Maher base rental rate escalated, the APM base rental rate did not. *See id.* at MT005224, Levine Decl. Ex. J.

Maher Response 18:

Admitted.

PANYNJ Statement 19: REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

The memorandum also identifies and analyzes the differing investment requirements and differing volume/throughput guarantees. *See id.* at MT005220-5222, Levine Decl. Ex. J.

Maher Response 19:

Admitted in part and denied in part. While Maher admits that the review identifies some “infrastructure work” and guarantees, Maher denies PANYNJ’s characterization of the summary listing of bullets in the review as an analysis or differential comparison. *See id.*

PANYNJ Statement 21: REASON FOR STRIKING STATEMENT: On October 1, 2000, Maher did not have knowledge of PANYNJ’s enforcement or non-enforcement of lease clauses against APM.

In Maher’s Opposition to the Motion for Summary Judgment, Maher alleges that “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... [PORTION REDACTED BY THE PARTIES AS CONFIDENTIAL]

Maher Response 21:

Maher admits that the quoted excerpt is contained in Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment. Ex. F at 3-4. PANYNJ’s failure to enforce the cargo commitment in APM’s Port Guarantee contradicts PANYNJ’s sworn and verified responses that the Port Guarantee is a unique justification for charging Maher more than APM. *See* PANYNJ’s Response to Maher’s First Set of Interrogatories to PANYNJ, Request No. 18, and No. 1, 10-11 (quoting PANYNJ’s interrogatory response, sworn and verified by Port Commerce director Richard Larrabee on August 29, 2008, that “the Maersk lease provided for a Port Guarantee through which APMT (and Maersk, Inc.) *guaranteed that a certain volume of Maersk containers would go through the Port . . . [it] was an important term that neither Maher nor any other port tenant could provide . . . [it] committed the Maserk’s shipping lines to continue using the port even if volumes declined in the future. . . . [and] APMT’s parent company, Maersk, Inc. executed a guarantee of the entire lease (not just the port guarantee) . . . In short, the APMT lease assured the port authority that . . . Maersk, Inc.’s new mega-ships would continue to come through the port.”*) (emphasis added).

PANYNJ Statement 24: [STRICKEN FOR CONTAINING MIXED QUESTIONS OF FACT AND LAW AND ARGUMENT.]

Based on paragraphs 1-23 above, it is undisputed that more than three years prior to the filing of the Complaint, Maher was on notice, and had actual knowledge, of the differences between the terms of the Maersk and Maher leases of which it complains, was on more than ample notice of facts sufficient to put it on a duty of inquiry into whether it had a colorable Shipping Act claim, and failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher Response 24:

Denied. Other than knowledge of the facial difference in the leases, which Maher has not contested, Maher denies that it (i) knew or (ii) should have known that it had a case against PANYNJ more than three years before filing the Complaint, and Maher denies that it (iii) failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher did not know of a claim. *See* B. Maher Dep., Dkt. 08-03, 16:7-16:13 (April 6, 2011) (Maher did not know of, or consider, any claim against PANYNJ concerning the leases before 2007); *id.* at 206:18-207:3 (Apr. 6, 2011) (“if I had thought that there was [a] violation of the Shipping Act, I would have raised it then.”); S. Schley Dep., Dkt. 08-03, 75:20-77:8 (Mar. 24, 2011) (no knowledge of any claim concerning rates before 2007); R. Mosca, Dep., Dkt. 08-03, 86:9-17 (March 14, 2011) (no discussion of ever suing PANYNJ on account of the lease differences).

See Maher’s Response to Port Authority’s First Set of Interrogatories to Maher at Interrogatory No. 4 at 8. (Maher did not begin to learn that the lease differences were unduly preferential or prejudicial until “in the summer of 2007 [when] PANYNJ Deputy General Counsel Christopher Hartwyck asked Maher’s General Counsel Scott Schley for a release from Maher’s rent disparity claim which Maher declined to give.”); *see also*, S. Schley Dep., Dkt. 08-03, 75:17-75:19 (Mar. 24, 2011) (up to that point, Maher had “no reason to doubt what the Port Authority had indicated to us back in ‘99 until 2007” regarding conversations with Lillian Borrone concerning the Port Guarantee justification for the rent difference.).

[PORTION REDACTED BY THE PARTIES AS CONFIDENTIAL]

See also M. Oppenheimer Dep., Dkt. 07-01, 52:4-52:21 (May 20, 2008) (Maher learned for the first time on May 20, 2008 that APM *does not control and does not direct* carrier cargo, nor does the guarantor of the Port Guarantee, Maersk, Inc.:

Well, the port guaranty is for cargo for Maersk -- that Maersk, Inc., represents. Q Okay. So how does APM Terminals ensure that it satisfies the

requirement in Section 42 with respect to a port guaranty? A APM Terminals, how do they . . . They have the liability for the guaranties. But how they insure it, they do not have control of the cargo. Q Okay. So how -- how do they make sure that Maersk, the ocean carrier, provides the requisite number of containers per year that is provided for in this port guaranty? A I don't think there is. Q Okay. So is there a contract? A Is there a contract with volume commitment from ... No.).

See, e.g., id. at 53:8-54:1 (The only contract APM has with respect to carrier cargo is a marine terminal services agreement to unload cargo, but unlike Maher's marine terminal services contract with carriers that contain volume guarantees, neither APM nor Maersk, Inc. have any volume commitment for the carriers cargo.). *See also* Shiftan Dep., Dkt. 216:8-216:24 (April 1, 2011) (PANYNJ is plainly treating the Port Guarantee as a special carrier only "rent guarantee" that does not require control, cargo, or delivery of cargo); *see* L. Borrone Dep. 08-03, 99:15-100:21 (Mar. 17, 2011) (originally represented to Maher as justifying the facially-different lease terms, discovery has revealed that PANYNJ applied and continues to apply the "Port Guarantee" to mask *unduly different* terms amounting to a carrier preference not made available to Maher:

"Q. Well, I mean, if the only consequence of not meeting the port guarantee, Ms. Borrone, is that your rent goes up, I don't understand why Maher couldn't pay an increase in rent. A. Because it was structured on the basis of the commitment by Maersk/Sea-Land to bring their own cargo, not somebody else's. Maher didn't have cargo to bring. Maher would not and could not commit its carriers who it was servicing to a port guarantee. Q. But Maher could commit to pay higher rent if it didn't meet the commitment, couldn't it, and that's all APM has done. A. But that wasn't what Maher negotiated with us.").

Exhibit I

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

[REDACTED]

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY'S EXCEPTIONS TO THE INITIAL
DECISION GRANTING IN PART MOTION FOR SUMMARY
JUDGMENT AND DISMISSING CLAIM FOR A REPARATIONS
AWARD BASED ON LEASE-TERM DISCRIMINATION CLAIMS**

Respondent, the Port Authority of New York and New Jersey ("Port Authority") hereby submits its Exceptions to the Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims (the "Initial Decision"), dated May 16, 2011.

PRELIMINARY STATEMENT

The Initial Decision correctly concluded that Maher Terminals, LLC's ("Maher") claim for reparations based on the facial differences between its lease and APM Terminals North America, Inc.'s ("APM") lease—in particular the base rental rate—was time-barred because Maher knew or should have known of these differences nearly eight years before filing its Complaint. The Initial Decision nonetheless permitted Maher's



request for a cease and desist order based on those exact same facial lease differences to remain in the case. Although, as the Initial Decision noted, the relevant statute of limitations does not on its face apply to cease and desist relief, Maher's Complaint does not seek true cease and desist relief, which, as the Commission has noted, is designed to prevent ongoing or future illegal conduct and injury—a fundamental predicate for such relief. Indeed, the Initial Decision correctly noted, based on a solid record of undisputed facts, that there is no ongoing allegedly unlawful lease-term discrimination that is continuing in nature. Rather, Maher's lease-term discrimination claim arises from a discrete set of facts that concluded, at the latest, over ten years ago in October 2000. Maher's request for cease and desist relief seeks to obtain exactly, and no more than, what it attempted to obtain through its time-barred request for reparations, *i.e.*, monetary relief from its contractual obligations to the Port Authority.

In essence, and due to financial decisions they evidently now regret, Maher's new owners are attempting, through the use of the cease and desist label, to evade the long-standing obligations of Maher's lease with the Port Authority, notwithstanding the time-bar of the statute of limitations. Maher, however, cannot obtain through the back door what it cannot obtain through the front door simply by changing rubric. Where a party has sat on its rights for many years and suffers the predictable dismissal of its reparations claim through the straightforward application of the statute of limitations, there is no reason to permit it to obtain the precisely equivalent relief on a prospective basis through invocation of the Commission's cease and desist powers. The same reasons that render statutes of limitations so important to the proper functioning of our legal system and that require dismissal of Maher's request for reparations here, apply equally to Maher's

[REDACTED]

remaining request for relief. Thus, for example, Maher's request for a cease and desist order and the time-barred reparations request depend on exactly the same testimony—from witnesses whose memories have inevitably faded in the more than a decade since the operative events in this case occurred.

Accordingly, and as more fully set forth below, the Port Authority respectfully files these Exceptions to the Initial Decision insofar as it permitted Maher's request for a cease and desist order to proceed with respect to its assertions of lease-term discrimination.

FACTUAL BACKGROUND

This action involves two leases between the Port Authority and marine terminal operators located at Port Elizabeth in New Jersey. On January 6, 2000, the Port Authority entered into a lease with Maersk Container Service Company, Inc. ("Maersk"), now known as APM, which was publicly filed with the Commission as FMC Agreement No. 20116, date-stamped August 2, 2000 (the "Maersk Lease"). *See* Maersk Lease at 08PA00020316, Jan. 6, 2000, attached as Exhibit ("Ex.") A to Declaration of Kevin F. Meade ("Meade Dec."). On October 1, 2000, the Port Authority entered into a lease with Maher (the "Maher Lease"). *See* Maher Lease at 08PA00001884, Oct. 1, 2000, Meade Dec. Ex. B.

The Maher Lease was negotiated by Brian and Basil Maher, among others, and signed by Brian Maher, who ran Maher's business for nearly thirty years prior to the lease's execution. *See* Maher Lease at 08PA00001998, Meade Dec. Ex. B (signed by Brian Maher); Brian Maher Dep. 12:22-14:5, 27:11-17, June 9, 2008, Meade Dec. Ex. C. Mr. Maher continued to operate the business for nearly six-and-a-half years thereafter,

[REDACTED]

until mid-July 2007, at which time the Maher brothers sold the Maher business to

RREEF, [REDACTED]

[REDACTED] p. See Mosca Dep. 108:10-110:11, June 11, 2008, Meade Dec. Ex. D.

On June 3, 2008, nearly eight years after Maher entered into its lease with the Port Authority, Maher's new owners filed the Complaint in this proceeding, alleging that the Maher Lease improperly provided for differing rental and financing terms and differing investment, throughput, first point of rest for automobiles, and security deposit requirements as compared with the Maersk Lease. See Compl. ¶ IV.B, June 11, 2008. Based solely upon these differing terms, Maher alleged violations of the Shipping Act—specifically, 46 U.S.C. §§ 41106(2), (3), and 41102(c)—and claimed to have “sustained and continued to sustain injuries and damages . . . amounting to a sum of millions of dollars.” Compl. ¶ VI.A. Maher sought both reparations and a cease and desist order.¹

Maher's new owners thereafter repeatedly and expressly underscored—including in briefs filed with the Commission and its Interrogatory Responses—that Maher's lease-term discrimination claim is based squarely, and solely, on the facial terms of the two leases agreed upon more than seven-and-a-half years previously; that its damages were not based on anything other than the facial differences between the leases; and that its claims for thirty years' worth of reparations arising from its lease-term discrimination

¹ The Port Authority moved for summary judgment with respect to Maher's lease-term discrimination claim (including Maher's request both for reparations and cease and desist relief). It did not move for summary judgment with respect to Maher's refusal to deal allegations, which allegedly occurred in 2007 and 2008. Although the Port Authority believes such allegations are without merit, they are not at issue in these Exceptions.

[REDACTED]

allegations were fixed at the time that its thirty-year lease was signed.² Based on these undisputed facts, the Port Authority moved for summary judgment on February 25, 2011 based upon the Shipping Act's three-year statute of limitations. *See* 46 U.S.C. § 41301(a).

Following the submission of the Port Authority's motion and Maher's reply, the ALJ meticulously took additional steps to identify the undisputed facts, and to ensure that there were no facts material to summary judgment that were subject to any genuine dispute. Thus, the ALJ directed the Port Authority to submit a statement of undisputed material facts—along with citations to the record supporting its position “establishing the fact or demonstrating that it is uncontroverted.” *See* Order to Supplement R. on PANYNJ's Mot. for Partial Summ. J., at 2-3 (ALJ Apr. 1, 2011). Maher was then directed to submit a counter-statement to the extent that it believed that any of the facts set forth in the Port Authority's statement could be disputed. *See id.* at 3. The parties submitted these statements on April 8, 2011, and April 15, 2011. *See* Initial Decision at 13-14. As reflected in the Initial Decision, this cautious process initiated by the ALJ served to crystallize and confirm the absence of any material factual disputes. For example, among other admissions, Maher admitted that it “certainly knew that Maersk had lower rates than [Maher] did” while negotiating the Maher Lease, and had “learned

² *See* Maher's Reply in Opp'n to Respondent's Mot. to Compel Produc. from Complainant & Mot. for Protective Order, at 3, Oct. 9, 2008 (denying that it was seeking “additional” damages beyond those allegedly created by the facial disparities in the lease terms); Compl. ¶ VLA (alleging that Maher is entitled to “millions of dollars” due to “higher rents, costs, and other undue and unreasonable payments and obligations to [the Port Authority] not required of APMT”); Maher's Resps. to Port Authority's First Set of Interrogs., at 10, Aug. 29, 2008, Meade Dec. Ex. E (claiming damages based on the disparities in the lease terms for the entire period of the lease, calculated to be “approximately \$474 million through the 30 year lease period”).

[REDACTED]

of PANYNJ's preference of [APM]" during that same time. *See id.* at 17-18. Therefore, Maher admitted that it "knew or should have known of the facial differences in the lease terms" by the time it signed its lease in 2000. *See id.* at 17.

The Port Authority thus demonstrated in its motion and subsequent statement of undisputed facts, on the undisputed facts and as a matter of law, that Maher not only should have known but *actually knew* all the facts necessary to bring its lease-term discrimination claim by the time it entered into its lease in October 2000, and that therefore Maher's request for reparations was barred by the Shipping Act's three-year statute of limitations. *See* Port Authority's Mot. for Summ. J. of Maher's Lease-Term Discrimination Claims, at 6-7, 21-23, Feb. 25, 2011. Additionally, the Port Authority demonstrated that, as a matter of law, no "continuing violation" exists because Maher did not allege or otherwise show any "overt acts" with respect to lease-term discrimination during the limitations period. *See id.* at 23. Rather, Maher alleged a single discrete set of acts culminating in the signing of the Maher Lease in October 2000, with only the "unabated inertial consequences" of those acts continuing into the limitations period. *See* Initial Decision at 42.

Since the entirety of Maher's lease-term discrimination claim, however styled, arose from this single set of acts resulting in the Maher Lease, and because no ongoing or potential future violations of the Shipping Act pertaining to lease-term discrimination were alleged or shown, Maher's request for cease and desist relief is nothing more than an attempt to obtain some of the monetary relief that is otherwise barred by the statute of limitations simply through use of a different label. Accordingly, the Port Authority asserted that Maher's request for a cease and desist order should be dismissed as well.

[REDACTED]

In Maher's opposition brief and counter-statement of facts, Maher conceded that it was fully aware of the differences between its lease and the Maersk Lease by the time it entered into its lease in October 2000, but argued that it did not have "conclusive information" that there had been a Shipping Act violation until later, in 2007. *See, e.g.,* Maher's Reply in Opp'n to Respondent's Mot. for Summ. J., at 22-25, Oct. 14, 2011. The Initial Decision properly rejected this contention as without any legal significance, noting the firmly established rule that the statute of limitation begins to run when a complainant knew or should have known that it was actually injured, and not when that party chooses to retain a lawyer or otherwise discovers that it suffered a "legal injury" giving rise to a claim. *See, e.g.,* Initial Decision at 33 ("Maher does not cite any authority—court or agency—supporting its contention that the statute of limitations does not begin to run until a plaintiff or complainant knows that it suffered a legal injury as opposed to an actual injury.").³

Maher also argued that its claim was not time-barred because a new and independent claim arose each time that it made a payment under its lease. *See* Maher's Reply in Opp'n to Respondent's Mot. for Summ. J., at 14 ("Any unlawful act, however, which continues becomes not one act but a series of individual actions each time it is enforced and the statute of limitations is to be measured against each act giving rise to an alleged new injury.") (citation omitted). The Initial Decision correctly rejected this argument as well, concluding, after a comprehensive review of relevant case law, that the

³ The Initial Decision concluded that the undisputed material facts "establish that when Maher signed Lease EP-249 on October 1, 2000, Maher knew the contents of Lease EP-248 and the allegedly more favorable treatment of Maersk/APM," including that Maher paid a higher rent under its lease than did APM. Initial Decision at 23.



mere performance of the lease during the limitations period did not amount to new overt acts giving rise to a Shipping Act violation during the limitations period. *See* Initial Decision at 34 (“The case law makes it abundantly clear that a defendant/respondent must commit an overt act of discrimination within the limitations period for a plaintiff/complainant to receive damages.”); *id.* at 36 (“Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period.”) (quoting *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004)). The Initial Decision thus concluded that Maher’s request for reparations was barred by the statute of limitations. *See* Initial Decision at 34 (“To the extent Maher is claiming a right to seek a reparations award in the absence of an overt discriminatory act by PANYNJ within the limitations period, Maher is incorrect.”).

The Initial Decision, however, declined to dismiss Maher’s self-styled cease and desist claim, on the basis that 46 U.S.C. § 41301(a) “does not state that if a complaint seeking reparations and other relief is filed more than three years after the claim accrues, the claim for other relief must be dismissed with the untimely claim for reparations.” Initial Decision at 45. The Initial Decision stated that the statute of limitations “would not prevent the Commission from issuing a cease and desist order in a case brought over three years after the cause of action accrued,” and “[i]f the Commission determines that terms in Lease EP-249 violate the Shipping Act by granting an undue preference, the Commission may issue a cease and desist order requiring PANYNJ eliminate the preference.” *Id.* at 46. The Initial Decision, however, did not address the Port Authority’s core argument—that Maher’s cease and desist claim does not seek *bona fide* cease and desist relief and is, in actuality, nothing more than a re-labeled request for

[REDACTED]

monetary relief subject to the Shipping Act's three-year statute of limitations and, accordingly is, in the particular circumstances here, properly dismissed. Despite denying this aspect of the Port Authority's motion, the Initial Decision determined that "it is in the public interest to permit PANYNJ to seek review of its contention at this time," and thus the Port Authority was granted leave to appeal. *Id.* at 47. The Port Authority therefore files these Exceptions to the Initial Decision.

ARGUMENT

I. MAHER'S THINLY-DISGUISED CLAIM FOR DAMAGES SHOULD BE DISMISSED AS TIME-BARRED

The Initial Decision declined to dismiss Maher's request for a cease and desist order on the basis that the statute does not apply to cease and desist relief. The Port Authority does not dispute that the statute on its face does not bar requests for true cease and desist relief.⁴ In the circumstances of this case, however, this general proposition does not apply. Maher's Complaint does not present a request for genuine cease and desist relief. Maher failed to present any evidence to show that there is any ongoing unlawful conduct with respect to lease-term discrimination for which a cease and desist order would be warranted. Indeed, the undisputed facts established and the Initial Decision correctly concluded that there is no continuing unlawful lease-term discrimination and that, to the extent that any occurred, such conduct was completed by

⁴ The Commission has noted that it has the power to issue a cease and desist order even if a party's request for reparations is time-barred. See *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 313 (FMC 2001); *Western Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 874, 885 n.17 (FMC 1993). As noted below, however, the Port Authority's research has not uncovered any Commission decision holding that after dismissal of a time-barred claim for monetary relief, a party could then obtain the equivalent relief merely by labeling its claim as one for cease and desist relief.

[REDACTED]

the time Maher signed its lease more than ten years ago. *See* Initial Decision at 33, 41. Therefore, rather than seeking a legitimate cease and desist order to prevent ongoing statutory violations, Maher is plainly seeking the same exact monetary relief on a prospective basis in the form of reduced rent that it sought through its indisputably time-barred request for reparations. Moreover, the purported cease and desist claim—and the Port Authority’s defense of it—depends on exactly the same stale evidence as Maher’s time-barred reparations claim.

A. Maher’s Cease and Desist Claim Is Substantively Identical to Its Time-Barred Claim for Reparations

Maher is transparently doing nothing more through its purported cease and desist claim than trying to obtain a portion of its time-barred reparations claim through the back door. Form, however, does not rule over substance, and courts have consistently held, in numerous contexts, that artful pleading cannot be used to evade a statute of limitations. *See, e.g., Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 284-85 (1983) (plaintiff could not “avoid the [Quiet Title Act’s] statute of limitations . . . by the device of an officer’s suit,” as “[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading”).⁵ The United States Court of Appeals for the First

⁵ *See also Minehan v. U.S.*, 75 Fed. Cl. 249, 259-60 (2007) (plaintiff could “not rescue an untimely [tax] refund request simply by recharacterizing it as a tort claim,” which the court recognized as “artful pleading . . . in an attempt to avoid the statute of limitations”); *Shawnee Trail Conservancy v. U.S. Dep’t of Agric.*, 222 F.3d 383, 388 (7th Cir. 2000) (“To allow claimants to avoid the [Quiet Title Act] by characterizing their complaint as a challenge to the federal government’s regulatory authority would be to allow parties to seek a legal determination of disputed title without being subject to the limitations placed on such challenges.”); *Hall v. Dow Corning Corp.*, 114 F.3d 73, 78 (5th Cir. 1997) (plaintiff could not circumvent the statute of limitations barring her claim under a state medical malpractice statute by “recast[ing] [it] as fraud”); *Raymond v. Mobil Oil Corp.*, 7 F.3d 184, 186 (10th Cir. 1993) (plaintiff’s

[REDACTED]

Circuit relied on this principle in rejecting an attempt to avoid dismissal of a time-barred damages claim by styling it as a claim for a declaratory judgment:

[Plaintiffs] contend that the statute of limitations is inapplicable to an action cast in the declaratory judgment mold. The argument is meritless. To prevent plaintiffs from making a mockery of the statute of limitations by the simple expedient of creative labeling—styling an action as one for declaratory relief rather than damages—courts must necessarily focus upon the substance of an asserted claim rather than its form. It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy. . . .

We refuse to subvert the real[i]ties of the case before us simply to suit a party's convenience. . . . [Plaintiffs] have been barred from bringing a claim for damages since three years after the denial of their permit applications. Draping their claim in the raiment of the Declaratory Judgment Act, some five years after the window of opportunity framed by the statute of limitations has closed, cannot elude this time bar.

Gilbert v. City of Cambridge, 932 F.2d 51, 57-58 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1991).

Maher's Complaint fundamentally seeks one thing—a reduction in the amount of rent paid to the Port Authority. Indeed, Maher's interrogatory responses recite its contention that it is entitled to \$474 million based on thirty years of rent differential between Maher's Lease and Maersk's Lease. *See* Maher's Resps. to Port Authority's First Set of Interrogs., at 10 (claiming damages based on the disparities in the lease terms for the entire period of the lease, calculated to be "approximately \$474 million through the 30 year lease period").

recharacterization of an otherwise untimely ADEA claim was "merely an exercise in semantics" and likewise time-barred).

[REDACTED]

Moreover, any possible doubt that Maher's claim for cease and desist relief is nothing more than an effort to obtain the same monetary relief to the extent available on a prospective basis was erased and graphically illustrated by Maher's own recent submission to the ALJ in seeking to oppose a stay pending the appeal of the instant ruling on the Port Authority's summary judgment motion. Specifically, Maher's principal argument against a stay was that any delay in the proceedings would postpone the ultimate day of judgment, with the result that Maher's "losses" would "grow every day until a cease and desist [order] is finally entered in this proceeding." *See* Maher's Mem. Regarding the Authority and the Propriety of a Stay Pursuant to the Order of May 16, 2011, at 7, May 20, 2011 ("The losses total approximately \$100 million and grow every day until a cease and desist order is finally entered in this proceeding, which may be some years from now."). Accordingly, it is beyond reasonable dispute that Maher's request for a cease and desist order, which does not seek to bar any ongoing illegal lease-term discrimination conduct, is nothing more nor less than an attempt to recover a portion of its time-barred reparations.

A cease and desist order, however, ordinarily presumes that some unlawful conduct is ongoing.⁶ Cease and desist relief, as a rule, is intended to prevent future violations, not to punish past conduct. *See World Line Shipping, Inc. & Saeid B. Maralan (aka Sam Bustani) Order to Show Cause*, No. 00-05, 2001 WL 865697, at *1,

⁶ *Alex Parsinia d/b/a Pac. Int'l Shipping & Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997) ("a cease 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"); *see also 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").

[REDACTED]

*12-13 (FMC 2001) (concluding, in refusing to permit double recovery for violations of the Shipping Act and of a cease and desist order, that “[t]he purpose of a cease and desist order is not to magnify legal liability for past violations but to restrain recalcitrant parties from committing future violations”).⁷ Maher has not presented a request for true cease and desist relief. Any allegedly unlawful lease-term discrimination occurred more than ten years ago. A cease and desist order in this case would merely punish the Port Authority for past conduct allegedly committed long ago, rather than restrain ongoing or future violations, all while effectively providing Maher with monetary relief that is clearly barred by the Shipping Act’s three-year statute of limitations. The Port Authority’s research has not uncovered—and Maher has not cited—any decision of the Commission supporting the view that a complainant may enter into a lease, perform under it for nearly eight years with full knowledge of the allegedly discriminatory terms, have its reparations relief dismissed as time-barred, and yet nevertheless be able to obtain the identical relief through invocation of the Commission’s cease and desist authority.⁸

⁷ See also *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 806 (1948) (“the effect of the [Federal Trade Commission’s (“FTC”) cease and desist] order is not to punish or fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress”); *Doyle v. Fed. Trade Comm’n*, 356 F.2d 381, 383 (5th Cir. 1966) (FTC cease and desist orders “are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future”) (quoting *Fed. Trade Comm’n v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)); cf. *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm’n*, 620 F.2d 900, 912 (1st Cir. 1980) (“A cease and desist order is justified when the party who commits statutory transgressions is likely to persist in the contumacy in the future, unless restrained.”).

⁸ Maher’s cases involved instances where a reparations claim was either not asserted or was not time-barred. See *Inlet Fish Producers, Inc.*, 29 S.R.R. at 307, 313, 316 (finding that plaintiffs timely brought a reparations claim and did not seek—or had abandoned—cease and desist relief); *Portman Square*, 28 S.R.R. at 86-87 (issuing a cease and desist order as to unlawful conduct likely to recur, where no reparations were sought, and where no statute of limitations issue arose); *Alex Parsinia*, 27 S.R.R. at 1342 (issuing a cease and desist order as to unlawful conduct likely to recur, where no reparations were sought, and where no statute of limitations issue arose); *Western*

[REDACTED]

Moreover, dismissal of the cease and desist claim here would be consistent with the analogous line of authority pursuant to which federal courts consistently hold that, where the legal remedy sought in a cause of action is barred by the statute of limitations, “any equitable relief that might otherwise be available . . . in connection with [that] cause[] of action” is also barred. *Williams v. Walsh*, 558 F.2d 667, 671 (2d Cir. 1977); *see also Cope v. Anderson*, 331 U.S. 461, 463-64 (1947) (where a court’s equitable jurisdiction is invoked “to enforce the legal obligation here asserted,” “equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy”); *Russell v. Todd*, 309 U.S. 280, 289 (1940) (“when the jurisdiction of the federal court is concurrent with that of law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations”); *Algrant v. Evergreen Valley Nurseries Ltd. P’Ship*, 126 F.3d 178, 181-85 (3d Cir. 1997) (joining the Courts of Appeals for the First, Sixth, Ninth, and Tenth Circuits in holding that, “when plaintiffs’ claims are barred by a statute of limitations applicable to a concurrent legal remedy, then a court will withhold declaratory

Overseas, 26 S.R.R. at 885 (dismissing complaint seeking reparations for breach of contract as appropriately brought in court under section 8(c) of the Shipping Act and not reaching the issue of whether that reparations claim was barred by the statute of limitations under section 11(g)); *see also A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasilerio*, 23 S.R.R. 1543, 1550 (ALJ 1986) (determining that “[a]bsent an allegation anywhere in the complaint that [plaintiff] has paid any money at all under the arbitral decision,” the ALJ could “[]not find that this complaint, at this time, is one seeking reparations”); *Balmill Lumber & Sales Corp. v. Port of N.Y. Auth.*, 10 S.R.R. 131, 146-47 (FMC 1968) (ordering that defendants cease and desist from unlawful conduct where plaintiff’s reparations claim was timely but unsubstantiated). Even the Commission’s decision in *Ceres Marine Terminal v. Maryland Port Administration* with respect to non-waiver of claims was based on its conclusion that complainant’s reparations claim was “well within the three-year statute of limitations,” and thus “finding a waiver on the basis of that delay would render the statute of limitations a nullity by penalizing a party for waiting the full statutory period before bringing a claim.” *See* 29 S.R.R. 356, 357, 372 & n.16 (FMC 2001). Here, Maher took nearly three times the full statutory period.

[REDACTED]

judgment relief in an independent suit *essentially predicated upon the same cause of action*") (emphasis added).

B. All of the Policy Justifications that Underlie the Shipping Act's Statute of Limitations for Reparations Claims Apply Equally to Maher's Self-Styled Cease and Desist Claim

The same important policy reasons that underpin the dismissal of Maher's reparations claim on statute of limitations grounds apply equally here to Maher's purported cease and desist claim. Statutes of limitations "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted). They also protect broader systemic goals, such as facilitating the administration of claims and promoting judicial efficiency, *see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008), and "are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). On the contrary, conscientious adherence to statutes of limitations is "the best guarantee of evenhanded administration of the law." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Statutes of limitations exist for sound policy reasons. As time passes, witnesses become unavailable or memories fade, and records and evidence are lost, thus prejudicing a party's ability to defend itself from claims that should have been brought in a timely manner. *See W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 651, 659 (ALJ 1992) ("The objective of statutes of limitations is to prevent stale claims of which the defendant had no prior notice and the facts and merits

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of which become less susceptible of determination due to the fading of memories and loss of records and evidence.”). In the typical case involving a request for a cease and desist order, the challenged conduct is either currently ongoing, or occurred recently and is likely to recur. See *World Line Shipping*, 2001 WL 865697, at *1, *12-13; *Portman Square*, 28 S.R.R. at 86; *Alex Parsinia*, 27 S.R.R. at 1342; see also *Coro, Inc. v. Fed. Trade Comm’n*, 338 F.2d 149, 153 (1st Cir. 1964) (the FTC may issue a cease and desist order “only to put a stop to present unlawful practices and to prevent their recurrence in the future”). Witnesses are therefore available, recollections are still fresh, and information necessary to defend against the claim is available. In this case, by contrast, the lease negotiations at issue in Maher’s lease-discrimination claim concluded more than ten years ago. Inevitably, memories (to the extent witnesses are still available) have faded, and information relevant to the Port Authority’s defense has been lost. Accordingly, to permit Maher’s claim to proceed under the cease and desist rubric would subject the Port Authority to the exact sort of prejudice that statutes of limitations are designed to prevent. Maher should not be permitted to sit on its rights while enjoying the benefits of its lease, and then, after eight years, bring an action seeking relief amounting to a time-barred damages claim while avoiding dismissal through mere artful pleading.



CONCLUSION

For the foregoing reasons, the Port Authority's Exceptions should be granted, and the Initial Decision should be overruled to the extent that it failed to grant the Port Authority's motion for summary judgment in its entirety.

Dated: June 7, 2011

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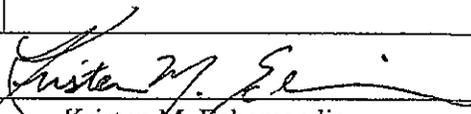
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the person listed below in the matter indicated, a copy to each such person.

<p><u>Via Email and FedEx</u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at New York, NY this 7th day of June, 2011</p>
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Kristen M. Echemendia

Exhibit J

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**EXCEPTIONS TO INITIAL DECISION OF MAY 16, 2011 GRANTING IN PART
MOTION FOR SUMMARY JUDGMENT AND DISMISSING CLAIM FOR A
REPARATION AWARD BASED ON LEASE-TERM DISCRIMINATION CLAIMS**

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EXCEPTIONS TO INITIAL DECISION

Pursuant to the May 16, 2011 Initial Decision Granting In Part Motion for Summary Judgment and Dismissing Claim for Reparation Award Based on Lease-Term Discrimination Claims (the "I.D.") and Federal Maritime Commission ("FMC") Rules 227(a)(1) and 153, 46 C.F.R. §§ 502.227(a)(1) and 502.153, Complainant Maher Terminals, LLC ("Maher"), by and through undersigned counsel, submits these Exceptions.

Continuing Violation Exception

The I.D. erroneously concluded that Maher has no reparation remedy for the alleged "lease-term discrimination" continuing violations of the Shipping Act of 1984, *as amended* (the "Shipping Act"), totaling approximately \$100 million over a 10-year period and occurring now. The I.D. erroneously concluded that even though Maher filed its complaint in this proceeding over three years ago, on June 3, 2008, and Respondent Port Authority of New York and New Jersey ("PANYNJ") failed to remedy its Shipping Act violations in the interim, reparations are not available because PANYNJ committed no new "*overt discriminatory act.*" Maher's complaint properly alleges continuing violations pursuant to FMC Rule 63(b). According to the I.D., Maher has no remedy for these continuing violations and damages growing every day until a cease and desist order is finally entered in this proceeding, which may be years from now. Maher takes exception to this error. I.D. at 33-45.

Claim Accrual & Discovery Rule Exceptions

The I.D. also erroneously barred Maher's reparations remedy by misconstruing Commission authority governing application of the discovery rule to claim accrual and by eliminating from the determination of claim accrual for "lease-discrimination" claims the central element of the violation, *i.e.*, when Maher had conclusive information that the differences in the

leases were *undue*. The I.D. accomplished this by erroneously finding the central element of the violation an “affirmative defense.” Maher takes exception to this error. I.D. at 22-33.

The I.D. also erroneously barred Maher’s reparations remedy for its allegations that PANYNJ violated 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)) (failure to establish observe and enforce just and reasonable regulations and practices). I.D. at 5 n.3. Although the I.D. opines that Maher’s “claim for a reparation award for violation of section 10(d)(1) . . . itself accrued at the same time as its claims for violations of sections 10(b)(11) and (12),” it provides no basis for this erroneous conclusion. Maher takes exception to this error. *Id.*

To the extent that the I.D. might be construed to bar Maher’s claims under 46 U.S.C. § 41106(3) (Shipping Act § 10(b)(10)) for PANYNJ’s unreasonable refusal to deal with respect to the “lease discrimination” claims, Maher also takes exception to this as error because the I.D. provides no basis for such a conclusion. I.D. at 5 n.3.

Procedural Exceptions

The I.D. erroneously excluded from consideration Maher’s material evidence. Maher properly submitted evidence showing that Maher neither knew nor should have known that it had a Shipping Act case against PANYNJ until, at the earliest, during the year 2008 when “conclusive information” was finally disclosed during fact depositions in the Docket No. 07-01 proceeding (“Dkt. 07-01”), following which Maher promptly filed its complaint in this proceeding on June 3, 2008. However, the I.D. excluded this evidence of events occurring after October 1, 2000, even though the discovery rule and claim accrual by their nature concern events after the initiation of the lease. I.D. at 13-21. Maher takes exception to summary judgment on the basis of excluded material evidence.

Maher also takes exception to the new argument advanced for the first time in the I.D.

that the central element of the violation, *i.e.*, when Maher had conclusive information that the differences in the leases were *undue*, was an “affirmative defense.” PANYNJ never offered the argument advanced in the I.D. Therefore, Maher had neither notice nor an opportunity to be heard on the pivotal argument advanced for the first time by the I.D. Maher takes exception to the I.D. for this error. I.D. at 22-24.

Likewise, Maher takes exception to the I.D.’s *sua sponte* arguments never advanced by PANYNJ that Maher’s response did not show injuries. I.D. at 42-44. Maher had neither notice nor an opportunity to be heard on these *sua sponte* arguments.

BACKGROUND

Summary of Maher’s Claims

This proceeding began as a straightforward application of the Commission’s authority in *Ceres Marine Terminal v. Md. Port Admin*, 27 S.R.R. 1251, 1270-77 (F.M.C. 1997) (hereinafter *Ceres*). Among other things, Maher alleged that PANYNJ violated the Shipping Act by failing to and *continuing* to fail to fulfill its statutory absolute duty to provide Maher preferential lease terms provided to Macrsk Container Service Company, Inc. (now APM Terminals, North America, Inc.) (“APM”) (collectively “Macrsk-APM”). Although Maher guarantees more cargo and rent, PANYNJ unlawfully prefers Maersk-APM because PANYNJ views Maher as a mere captive terminal operator presenting no risk to leave the port. By contrast, PANYNJ prefers Maersk-APM as an ocean carrier because its affiliated ocean carrier threatened to leave the port. Having given preferential lease terms to APM, PANYNJ violates its absolute duty to make the same preferential volume discount lease rate terms available to Maher.

Maher’s complaint alleged that PANYNJ (1) violated and continued to violate the Shipping Act as set forth in *Ceres*, 27 S.R.R. at 1270-77, and *Canaveral Port Auth. – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448-51 (F.M.C. 2003), by (1) unlawfully

preferring Maersk-APM and unlawfully prejudicing Maher; (2) unlawfully refusing to deal with Maher; and (3) unlawfully failing to establish, observe, and enforce just and reasonable regulations and practices, all in violation of 46 U.S.C. §§ 41106(2) and (3) and 41102(c) (Shipping Act §§ 10(b)(11), 10(b)(12), 10(b)(10) and 10(d)(1)). Evidence uncovered in discovery established the foregoing continuing violations and revealed additional Shipping Act violations by PANYNJ, including continuing violations reflected in *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 280-82 (1968), enforcing 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)), because PANYNJ's charges on Maher are not reasonably related to the service provided. The newly discovered evidence establishes that PANYNJ overcharges Maher to subsidize Maersk-APM and fails to credit Maher with additional payment and investment commitments of \$136 million provided to PANYNJ in 2007.

The proceeding also involves Maher's original counter-complaint from Dkt. 07-01 consolidated in this proceeding, regarding PANYNJ's multiple violations of the Shipping Act with respect to its violations of filed FMC Agreement No. 201131 ("EP-249"), e.g., failure to provide notice and transfer improved premises to Maher and discrimination prejudicing Maher and preferring Maersk-APM in lease terms by the imposition and enforcement of an unlawful indemnity provision against Maher in 2007, which PANYNJ did not require of Maersk-APM. These PANYNJ violations include continuing violations of the foregoing provisions of the Shipping Act and 46 U.S.C. § 41102(b)(2) (Shipping Act § 10(a)(3)) for failing to operate in accordance with the terms of EP-249.

Maher's Reparations Remedy

Maher seeks reparations for actual injury as set forth in the complaint in Dkt. 08-03, Maher's counter-complaint in Dkt. 07-01, and as uncovered in discovery. Maher's reparations claims are cognizable because (1) the claims arise from continuing violations of the Shipping

Act; (2) the “discovery rule” establishes that the claims did not accrue before May 2008; and (3) other claims arose more recently within the statutory period. The Commission has held that reparations are available when port authorities discriminate or fail to establish, observe, and enforce reasonable practices, including in the *Ceres* proceeding. 46 U.S.C. §§ 41301 and 41305. *Ceres*, 29 S.R.R. 356, 372-74 (F.M.C. 2001) (“the appropriate measure of damages for a violation of sections 10(b)(11) and (12), where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference or prejudice” and “the appropriate measure of damages for a violation of section 10(d)(1) is the . . . difference between the rates charged”).

Maher’s “Lease-Discrimination” Continuing Violations Claims

Commission authority provides Maher reparations for continuing violations for those acts and failures to act by PANYNJ in violation of the Shipping Act. *Ceres*, 27 S.R.R. at 1277 (“the violations are *continuing* in nature and the injury is suffered over a period of time”) (emphasis added). At a minimum, regarding the “lease-discrimination” claims at issue, Commission authority provides Maher reparations for the period after June 3, 2005 (three years prior to filing its complaint). *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 248, 277 (Morgan, ALJ 1992) (Complainant could recover discriminatory rate charges commencing *seven* years before its complaint was filed, but only for the three-year limitations period preceding filing of the complaint). Likewise, in *NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, Chief Judge Kline rejected the port authority’s contention that claims were time-barred, agreeing with complainant NPR that “the Board’s practice in demanding payments over the life of the cancelled lease constitutes ongoing conduct and that its complaint is therefore not time-barred” 28 S.R.R.

1011, 1014 (Kline, ALJ 1999). More recently, in *International Shipping Agency, Inc. v. Puerto Rico Ports Authority (Intership)*, the ALJ applied Commission decisions, FMC Rule 63(b), and the Shipping Act to hold that even though respondent port authority's alleged violations predated the complaint by *more than* three years, the claim for reparations was *not* barred because complainant had alleged an ongoing failure by respondent to operate in accordance with the Shipping Act, which constituted a continuing violation. 30 S.R.R. 407, 425-26 (Trudelle, ALJ 2004) ("Complaint was initiated due to . . . ongoing failure to operate in accordance with the requirements of the Shipping Act." And alleged "liability arises from continued violations of obligations that continue to exist under the Agreement.").

Maher's Discovery of "Lease-Discrimination" Claims In 2008-2011

The Commission applies the "discovery rule," not the "time of violation rule" or the "time of injury rule" (collectively the "time of violation/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).

The Commission adopted the discovery rule favoring "a flexible approach to the accrual of a cause of action" because "a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct," whereas a "stricter rule would exonerate certain respondents even if their conduct was unlawful, simply because a potential complainant was unable to identify the existence of its cause of action." *Id.* at 313. The Commission explained that it is not enough that the complainant had "some suspicion" of the disparity and even possessed documents showing the disparity, or in that case even *both* suspicion and documents showing the disparity. To the contrary, under the Shipping Act, the complainant must have

“conclusive information” that a third party received *unduly* preferential treatment in violation of the Shipping Act. *Id.*

Maher only discovered the “conclusive information” that it has a case after PANYNJ filed a Shipping Act third-party complaint against Maher in Dkt. 07-01 and discovery ensued. In November 2007, Maher representatives met twice with PANYNJ leaders, including Port Commerce Director Rick Larrabee and his chief deputy Dennis Lombardi about the potential “lease-discrimination” claims, wherein these PANYNJ executives both vigorously and expressly denied that Maher had a *Ceres* claim against PANYNJ regarding disparate treatment in lease terms because “the Maher brothers” had signed EP-249 and there was nothing they could do. *See Exhibit B*, Maher’s Reply, App. A, p. 2-3 (Crane and Buckley Test.); *Exhibit D*, Maher’s Responding Stmt., at ¶ 24 (Crane, Buckley, Larrabee Test.).

After another effort at outreach to PANYNJ failed, on January 17, 2008, Maher’s CEO John Buckley wrote to PANYNJ’s Larrabee and explained that Maher understood that PANYNJ “may be in violation of the Shipping Act,” Maher requested parity with Maersk-APM, but PANYNJ rejected Maher’s proposal. *See id.* Over the next four months, culminating in the depositions of several key witnesses in Dkt. 07-01, including Maersk-APM’s witness Marc Oppenheimer (May 20, 2008) and PANYNJ witnesses, including Cheryl Yetka (May 28, 2008), Maher uncovered “conclusive information” that it had Shipping Act claims against PANYNJ. *See Exhibit B*, Maher’s Reply, App. A, p. 3-9 (Oppenheimer and Yetka Test. and exhibits to App. A); *Exhibit D*, Maher’s Responding Stmt., at ¶ 24, p. 16-17 (Oppenheimer Test.). Maher then filed this action *promptly* on June 3, 2008.

Depositions in recent months have revealed conclusive information of *additional* continuing violations of the Shipping Act because PANYNJ overcharges Maher to subsidize

Maersk-APM. *Volkswagenwerk*, 390 U.S. at 280-82 (the question of liability turns upon whether the correlation of the benefit received to the charges imposed is reasonable); *Plaquemines Port, Harbor & Terminal Dist.*, 21 S.R.R. 1072 (F.M.C. 1982) (violation where complainants did not receive benefits proportionate to the costs allocated to them).

The Commission's discovery rule affords Maher reparations from the start of the lease in October 2000 because "conclusive information" of the violations only came to Maher's attention during discovery in the Dkt. 07-01 proceeding in May 2008, later in this proceeding in 2009, and most recently in depositions and new evidence finally disclosed by PANYNJ in discovery during 2011. For example, depositions of Maersk-APM and PANYNJ witnesses that occurred in May 2008 revealed that Maersk-APM could not enforce the so-called "port guarantee" against the Maersk-APM affiliated ocean carrier to actually require the cargo guaranteed to be carried into and out of the port. See Exhibit B, Maher's Reply, App. A, p. 3 (Oppenheimer Test.) (Maersk-APM has no rights or abilities to control or commit the ocean carrier cargo to the port); Exhibit D, Maher's Responding Stmt., at ¶ 24, p. 16-17 (Oppenheimer Test.).

That is, the vaunted "port guarantee" (the alleged cargo guarantee from Maersk-APM's affiliated ocean carrier) which PANYNJ extolled as the key justification for the different lease rate terms turned out *not* to be the unique cargo guarantee that the Maersk-APM lease (EP-248) states, see Exhibit D, Maher's Responding Stmt., at ¶¶ 21-22, p. 11-12, or what PANYNJ stated about why it would not provide Maher the preferential Maersk-APM lease rates, *id.* at ¶¶ 21, 23 (port guarantee described as a unique *cargo* guarantee that could only be satisfied by ocean carriers that controlled cargo). Recently, the evidence discovered during belated disclosures by PANYNJ sought for years by Maher establishes that Maersk-APM has consistently failed to fulfill the "port guarantee." See Exhibit B, Maher's Reply, App. A, p. 4. PANYNJ decided in

the year 2010 not to enforce the “port guarantee” requirement against Maersk-APM, its parent, Maersk, Inc., or their affiliated ocean carrier, to actually require the allegedly guaranteed cargo to be provided to the port. See Exhibit C, PANYNJ’s Fact Stmt. at ¶¶ 21-23; Exhibit E, PANYNJ’s Responding Stmt. at ¶¶ 21-23. The port guarantee was not effective until 2008. Maher therefore did not know and could not have known that PANYNJ would implement and not enforce the port guarantee as the newly discovered facts show. The alleged cargo guarantee of Maersk-APM’s affiliated ocean carrier has turned out to be nothing more than a simple rent guarantee. But Maher guarantees more rent to PANYNJ than Maersk-APM and thus has far exceeded Maersk-APM’s rent guarantee. Therefore, the contemporary evidence of PANYNJ’s actions today only recently uncovered in 2008-2011 establishes that the principal alleged justification for the lease rate differential between Maher and Maersk-APM, the vaunted “port guarantee,” is merely a rent guarantee that does not justify the disparate lease terms which unduly prejudice Maher and unduly prefer Maersk-APM.

Maher also has alleged violations of the Shipping Act against PANYNJ in Dkt. 07-01 caused by discrimination with respect to the lease terms, which the I.D. does not address. Maher’s counter-complaint in Dkt. 07-01 expressly alleged PANYNJ’s violation of the Shipping Act with respect to undue prejudice/preference in lease terms because PANYNJ imposed and enforced an *unlawful* indemnity requirement upon Maher to indemnify PANYNJ for PANYNJ’s own failures, and which provided Maher no offsetting benefit. *Stevens Shipping & Terminal Co. v. S.C. Ports Auth.*, 23 S.R.R. 267, 272 (F.M.C. 1985). Like Maher’s discovery of “conclusive information” with respect to the “lease discrimination” claims in 2008 and later years during discovery in this proceeding, Maher only discovered this violation in 2008 after PANYNJ filed actions against Maher to enforce the unlawful indemnity provision. See Dkt. 07-01, Third Party

Complaint (Aug. 9, 2007); PANYNJ v. Maher Terminals, LLC, Verified Complaint for Declaratory Judgment and Injunctive Relief, Superior Court of N.J. (May 8, 2008). Before then, Maher had no “conclusive information” that PANYNJ would construe and enforce the indemnity provision against Maher to indemnify PANYNJ for its own failures.

Additionally, apart from the I.D.’s granting of partial summary judgment regarding Maher’s “lease-term discrimination” reparation remedy, Maher has alleged additional violations of a continuing nature of the Shipping Act by PANYNJ for its acts or failures to act and for which Maher seeks reparations. PANYNJ failed to and continues to fail to establish, observe, and enforce just and reasonable regulations and practices, including with respect to the setting of lease terms and other practices applicable to Maher. PANYNJ also unreasonably refused to deal with Maher with respect to its lease terms and continues to unreasonably refuse to deal with Maher. As a result of the foregoing violations of the Shipping Act, Maher has sustained and continues to sustain injury compensable by reparations. The I.D. did not grant summary judgment with respect to Maher’s reparation claims pertaining to “any non-lease term claims asserted by Maher, such that the Port Authority refused to deal with Maher, inasmuch as any such claim appears to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.* within the three-year limitations period.” I.D. at 5. Additionally, Maher alleged and maintains reparations remedies pursuant to 46 U.S.C. §§ 41106(3) (refusal to deal), 41102(c) (failure to establish, observe, and enforce just and reasonable regulations and practices), and 41102(b)(2) (failure to operate in accordance with a filed agreement) pertaining to the disparate lease terms before the 2007 and 2008 additional violations referenced by PANYNJ.

As described above, PANYNJ also unreasonably refused to deal or negotiate with Maher repeatedly during the period 2007 and thereafter, both with respect to the claims at issue in Dkt.

07-01 and Maher's potential *Ceres* claims, even though Maher repeatedly sought negotiations. The evidence establishes that PANYNJ failed to treat Maher's requests seriously.

DISCUSSION

I. Legal Standards

A. Rule of Practice and Procedure 227(a)(1) and 153

Commission Rule 227(a)(1) provides that "any party may file a memorandum [together with a brief in support] excepting to . . . such decision." 46 C.F.R. § 502.227(a)(1); I.D. at 46. The I.D. also granted Maher leave to appeal per Rule 153. *Id.* at § 502.153. I.D. at 47.

The Commission reviews an ALJ order granting summary judgment *de novo*. *See EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc.—Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (F.M.C. 2008)*. This means that the FMC "look[s] at the case anew, the same as if it had not been heard before, and as if no decision previously had been rendered, and giving *no deference* to the [ALJ's] determinations." *McComish v. Bennett*, 611 F.3d 510, 519-20 (9th Cir. 2010) (internal quotation marks omitted) (emphasis added).

B. Summary Judgment

The I.D. grants partial summary judgment regarding certain of Maher's "lease-discrimination" claims seeking reparations. However, it sustains Maher's underlying "lease-discrimination" claims for a determination of the cease and desist order remedy.

As an initial matter, summary judgment is generally disfavored by the Commission. *See, e.g., NPR*, 28 S.R.R. at 1011 (cited with approval in *EuroUSA*, 31 S.R.R. at 546). The Commission's standard for considering such motions is to "ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible." *Id.* For that reason, summary judgment motions before the Commission "should be

rarely granted in complex cases requiring more fully developed records or cases involving novel statutes or question [sic] of motive or intent.” *Id.* (citing *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk, Inc.*, 27 S.R.R. 1045 (ALJ 1997)).

Summary judgment is “especially inappropriate” in discrimination cases such as this proceeding because, as the Commission stated almost four decades ago, “[c]itations to precedents of the Commission and its predecessors could be almost endlessly multiplied to show that questions of discrimination and prejudice or preference are questions of fact. . . .” *In re Denial of Petition for Rule Making, Cargo Diversion*, 14 S.R.R. 236, 238 (F.M.C. 1973); *see also NPR*, 28 S.R.R. at 1016 (quoting *In re Denial of Petition for Rule Making* and denying motion for summary judgment of lease discrimination claims for statute of limitations, stating that “questions of prejudice, preference and discrimination” in lease discrimination claims, “are questions of fact, making summary judgment especially inappropriate.”).

Summary judgment is also inappropriate here because it saves the Commission no resources. The continued vitality of Maher’s cease-and-desist order remedy necessitates a trial involving fundamental “questions of fact” about the underlying Shipping Act violations. Courts deny summary judgment where “the issues raised in the motion are closely meshed with issues to be tried and summary disposition of these issues would not materially expedite the proceedings.” *State of N.Y. v. Amfar Asphalt Corp.*, 1986 WL 27582, *2 (E.D.N.Y. Nov. 20, 1986); *see also Taylor v. Rederi A/S Volo*, 374 F.2d 545, 549 (3d Cir. 1967); *Dunham-Bush, Inc. v. Mills*, 72 F.R.D. 42, 46 (S.D.N.Y. 1976).

Where summary judgment is sought based on an affirmative defense, such as the statute of limitations for reparations at issue here, the *movant* bears the burden of proof establishing facts supporting the affirmative defense. *Tech 7 Systems, Inc. v. Vacation Acquisition, LLC*, 594

F. Supp. 2d 76, 80 (D.D.C. 2009). The Commission recently reiterated that “[a]t the summary judgment stage, the burden . . . on the nonmoving party is ‘. . . not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.’” *EuroUSA*, 31 S.R.R. at 545 (quoting 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2727, p. 490 (3d ed. 1998)). “Materials offered in opposition to summary judgment are not offered to establish the truth of the matter asserted. They are offered to establish a genuine issue of material fact for trial. At 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.” *Id.* (internal citations and quotations omitted). The non-moving party, therefore, “receives the benefit of all reasonable doubts and inferences to be drawn from the facts.” *Id.* at 546.

C. The Shipping Act Violations

1. Maher’s “Lease-Discrimination” Claims

Title 46 U.S.C. § 41106(2) (Shipping Act §§ 10(b)(10) & (11)) prohibits undue or unreasonable preference or prejudice with respect to lease terms where:

the parties were accorded different treatment, . . . the unequal treatment is not justified by differences in transportation factors, and . . . the resulting prejudice or disadvantage is the proximate cause of injury.

Ceres, 27 S.R.R. at 1270. The threshold criterion for unreasonable preference or disadvantage was established by *Volkswagenwerk*. 390 U.S. at 278-80 (discriminatory treatment when third party has enjoyed unfair advantage over the complainant). In *Ceres*, the Commission reaffirmed that when a port authority makes a preference available to one tenant it must make it available to others. 27 S.R.R. at 1273.

Mere differences in treatment alone, however, *do not* violate the Shipping Act. *Petchem, Inc. v. Fed. Mar. Comm’n*, 853 F.2d 958, 963 (D.C. Cir. 1988) (the Shipping Act contemplates

the existence of *permissible* preferences and prejudices). Therefore, only “undue or unreasonable preferences and prejudices would be violative of the Prohibited Acts.” *Seacon*, 26 S.R.R. at 900. Further, even if a discriminatory practice is shown to have a valid purpose, it may still be ruled unreasonable if “it goes beyond what is necessary to achieve that purpose.” *Distribution Services, Ltd. v. Trans-Pacific Freight Conference of Japan and its Member Lines*, 24 S.R.R. 714, 722 (1988); *Ceres*, 27 S.R.R. at 1275 (discrimination with valid purpose unreasonable where “the degree of disparity is disproportionate to [port authority’s] goals”).

2. Failure to Establish Observe and Enforce Just and Reasonable Regulations

Title 46 U.S.C. § 41103(c) (Shipping Act § 10(d)(1)) provides that a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” “[A]s 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.” *NPR*, 28 S.R.R. at 1531 (A.L.J. 2000) (quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. 307, 329 (1966)); *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) (“WGMA”). “The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination.” *NPR*, 28 S.R.R. at 1531. In the context of monetary payments, the Commission considers “whether the charge levied is reasonably related to the service rendered” by “measur[ing] the impact on the payer compared to other payers as well as the relative benefits received.” *Id.* at 1531-32 (quoting *Volkswagenwerk*, 390 U.S. at 282). “[Complainant] has the burden of persuading the Commission that [the Port]’s practice . . . [i]s unreasonable,” and “[i]f [Complainant] succeeds in that regard, the burden of proving justification shifts to [the Port].”

Exclusive Tug Arrangements in Port Canaveral, Florida, 29 S.R.R. 1199, 1222 (F.M.C. 2003).

3. Unreasonable Refusal to Deal

Title 46 U.S.C. § 41103(c) (Shipping Act § 10(b)(10)) provides that a “marine terminal operator may not unreasonably refuse to deal or negotiate.” “This requires a two part inquiry: whether [the Port] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth.*, 29 S.R.R. at 1448. The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking and Lease Agreement By and Between City of Portland, Maine and Scotia Prince Cruises Limited*, 30 S.R.R. 377, 379 (F.M.C. 2004).

II. Substantive Errors and Exceptions

A. The Initial Decision Erroneously Determined No Continuing Violation

The Commission’s regulation expressly addressing allegations of continuing violations for purposes of reparations, FMC Rule 63(b), plainly permits complainants to recover reparations for continuing violations. Commission authority establishes that the violations at issue here constitute continuing violations. *Ceres*, 27 S.R.R. at 1277 (“the violations are *continuing* in nature and the injury is suffered over a period of time”) (emphasis added). At a minimum, the Commission authority permits Maher to recover reparations for the period after June 3, 2005 (three years prior to filing its complaint). *See, e.g., Seacon*, 26 S.R.R. at 277 (Complainant could challenge discriminatory rate charges commencing seven years before its complaint was filed, but recover reparations only for the three-year limitations period prior to filing the complaint).

The I.D. erroneously ignores FMC Rule 63(b) and Commission continuing violation authority, including *Ceres*. Instead, the I.D. misconstrues Commission authority recognizing continuing violations and invokes inapposite employment discrimination and antitrust case law to impose a requirement for new “overt discriminatory acts” to dismiss Maher’s claims.

PANYNJ's continuing failure to comply with its absolute duty to provide Maher volume discount terms provided to Maersk-APM by its very nature alleges a current, and future, violation of the Shipping Act and therefore constitutes a continuing violation. Contrary to the I.D., the continuing violations as alleged are sufficient for the purposes of the statute of limitations. No additional new "overt discriminatory acts" are required.

1. Commission Authority Recognizes The Continuing Violations

Commission authority plainly permits reparations for continuing violations alleged by Maher. FMC Rule 63(b) provides:

The Commission will consider as in substantial compliance with a statute of limitations a complaint in which complainant alleges that the matters complained of, if continued in the future, will constitute violations of the shipping acts in the particulars and to the extent indicated and in which complainant prays for reparation accordingly for injuries which may be sustained as a result of such violations.

Rule 63(b), 46 C.F.R. § 502.63(b). Nowhere in this governing rule do the words "new overt discriminatory act" appear. To the contrary, all that is required is that "complainant alleges that the matters complained of, if continued in the future, will constitute violations. . . ." *Id.* Maher complied with the rule and expressly alleged that the matters complained of constitute *continuing violations* for which Maher seeks reparations. *See, e.g.,* Maher Complaint, Dkt. 08-03, IV.A.¹ Moreover, *Ceres* held that allegations of undue discrimination and unreasonable practices in failing to extend preferential lease terms fairly---materially the same "lease discrimination"

¹ *E.g.,* Maher Complaint, 08-03, IV.A. "Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property."

violations here—constitute *continuing violations* of the Shipping Act. *Ceres*, 27 S.R.R. at 1277. The I.D.’s complete failure to address these express Commission authorities precisely on point, and instead resort to non-Shipping Act authorities, is stunning.

Maher properly alleged continuing violations, the substance of which was not challenged in the motion nor decided by the I.D. The I.D. does not conclude that the continuing violations fail to show actual violations of the Shipping Act, nor would there be any factual basis to reach such a conclusion. PANYNJ’s motion did not advance any allegedly-undisputed material facts that the “lease-discrimination” claims do not constitute continuing violations. To the contrary, PANYNJ’s motion relied entirely on a legal argument requiring a “new overt act” for a continuing violation, and the I.D. simply agreed. I.D. at 34. Indeed, the I.D. admits that PANYNJ’s future “lease discrimination” may violate the Shipping Act and warrant a cease and desist order. I.D. at 46. Therefore, dismissal of the reparations claims for the continuing violations was plain error.

2. The I.D. Erroneously Required a New Overt Discriminatory Act

The I.D. argues that “the discriminatory differences between Lease EP-248 and EP-249” do not constitute continuing violations of the Shipping Act because of “an absence of an overt discriminatory act by PANYNJ within the limitations period.” I.D. at 34. Because PANYNJ and Maher negotiated and signed the lease before October 1, 2000, the I.D. concludes that those are “acts ‘that occurred in the past and [are] now complete.’” I.D. at 40 (alterations in original). But, a continuing violation of the Shipping Act does not also require new “overt discriminatory acts” as mandated by the I.D.

a. PANYNJ’s Failure to Fulfill Its Shipping Act Absolute Duty Constitutes A Continuing Violation

The I.D. fails to comprehend that PANYNJ has a continuing absolute duty to provide

volume discount terms in a reasonable, even-handed manner. *Ceres*, 29 S.R.R. at 372-73 (the statutory duty is “absolute” to apply criteria for lower rates in an evenhanded manner); *Ceres*, 27 S.R.R. at 1251 (“This decision merely reflects existing precedent that when a port authority 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.”) (emphasis added). As the Commission has explained, the simplest way for a port authority to avoid running afoul of the Shipping Act when providing differing arrangements is by *offering to make those arrangements with other port users*. *In the Matter of Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California*, 9 S.R.R. 390, 398 (F.M.C. 1967) (emphasis added).

Likewise, port authorities may not unreasonably refuse to deal with port users like Maher, and a refusal to deal constitutes a continuing violation. *Canaveral Port Auth.*, 29 S.R.R. at 1451 (violation continued for a period of almost two years from when it initially refused to consider port user’s application from June 13, 2000–May 20, 2002 when it invited new applications); *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079, 1082 (adopted by F.M.C. 1979) (port authority’s refusal to provide berthing access for over two years, commencing outside the limitations period, constituted a continuing violation).

Maher did not allege a one-off violation of the Shipping Act that was complete before October 2000. Rather, Maher’s complaint alleges PANYNJ’s *continuing* violations. PANYNJ’s failure to fulfill its *absolute duty* to make the same volume discount terms available to Maher violated and *continues to violate* the Shipping Act *every day* that PANYNJ fails to offer Maher the same volume discount lease terms. *Seatrain*, 18 S.R.R. at 1082 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 (1968) (recognizing continuing violations for

conduct begun decades earlier that continues to violate law in limitations period) and *Baker v. F & F Inv., Co.*, 489 F.2d 829, 836 (7th Cir. 1973) (for conduct in violation of law that continues into a limitations period, a new period began to run each day as to each day's damage)).

b. Private Agreements Do Not Immunize Failures to Fulfill Statutory Duties

Commission authority establishes that the continuation of unlawful provisions of an agreement constitutes a continuing violation of the Shipping Act. *See Ceres*, 27 S.R.R. at 1277 (finding that the violations resulting from differences in the leases "are continuing in nature and the injury is suffered over a period of time.") (emphasis added); *Ballmill Lumber & Sales Corp. v. The Port of New York and New Jersey*, 10 S.R.R. 131 (F.M.C. 1968) (complainant lessee successfully challenged a provision in lease with port more than six years after agreement was entered into); *River Plate & Brazil Conferences v. Pressed Steel Car Co.*, 124 F. Supp. 88 (S.D.N.Y. 1954), *aff'd*, 227 F.2d 60 (2d Cir. 1955) (agreement provision was a continuing violation of the Shipping Act even though complainant agreed to it and operated under it for six years). The Commission is obligated to enforce violations of the Shipping Act, not immunize them. *See Ceres*, 29 S.R.R. at 371 (affirming that "the Commission's statutory duty with respect to agreements should not be thwarted by the inconsistent actions of the parties to the agreement."). The I.D. erroneously shuns this foundational Commission authority and rejects other FMC lease discrimination authorities involving continuing violations.

In *Seacon*, complainant's reparations claims for discriminatory rate charges pursuant to a lease initiated seven years before the complaint were not barred. 26 S.R.R. at 277. Damages were limited to the three year period prior to the complaint. *Id.* The rule was clearly presented in the initial decision:

The original complaint herein was filed at the Office of the Secretary of the Commission on May 30, 1990, served on June 5, 1990, and the amended

complaint was served on April 9, 1991. Section 11(g) of the Shipping Act of 1984 (the 84 Act) provides for payment of reparations limited to certain conditions, including that complaints be filed within three years after the cause of action accrued. Under this rule reparations for the period prior to May 30, 1987, are barred.

Id. at 251. And the presiding officer applied the rule with similar clarity:

[the disputed] fuel charges (rates) were established by the Port in its tariffs, which became effective on October 1, 1982, and which remained unchanged until July 1, 1990. Thus, *Seacon's* cause of action as to a disparity in fuel costs began to accrue over seven years before its complaint was filed in May 1990, and, of course, the Port was obliged to charge the fuel costs specified in its tariff, unless its lease agreements were amended in this respect. To the extent that the disparity in fuel costs continued after May 30, 1987, these costs would not be barred.

. . . . *Seacon* ceased operation at T-25 in July 1988, so that the *unbarred fuel disparity* was for a relatively short period, and perhaps was offset by payments or lack of payments by *Seacon* for acres less than suitable for container yard operations.

Id. at 277 (emphasis added). *Seacon* recognized the legal vitality of the alleged Shipping Act discrimination claims for a port authority's ongoing violation of the Shipping Act in charges that *began to accrue over seven years prior* to the complaint.²

In *NPR*, Chief Judge Kline rejected the port authority's contention that claims were time-barred, agreeing with complainant *NPR* that "the Board's practice in demanding payments over the life of the cancelled lease constitutes ongoing conduct and that its complaint is therefore not time-barred. . . ." 28 S.R.R. at 1014. His expression of the rule was clear:

NPR argues, correctly in my opinion, that the Board's practice in demanding payments over the life of the canceled lease constitutes ongoing conduct and that

² The I.D. incorrectly reads the holding in *Seacon* as *obiter dictum* by mistaking the claim for diesel fuel rate discrimination (the claim discussed above) with a separate discrimination claim concerning use of cranes. The most favored nation clause did not apply to the diesel fuel rate discrimination claim. Nor is the criticism that reparations were not ultimately awarded on the merits availing. Importantly, both the I.D. and *PANYNJ* ignore the fact that the Commission's ultimate dismissal on the merits does not suggest that the Commission disagreed with the Presiding Officer's application of the continuing violation rule, which was clearly described and applied, and required no further analysis. The criticism in the I.D. that the decision did not cite cases discussing the elements of a continuing violation provides no support for the I.D.'s reliance on inapposite cases.

its complaint is therefore not time-barred even by the two-year statute of limitations set forth in section 22 of the 1916 Act, which is inapplicable, nor by the three-year statute of limitations set forth in section 11 of the 1984 Act, which is applicable.

Id. at 1014.³ Pursuant to the continuing violation rule, he rejected the port authority's argument that an agreement to pay cancellation fees executed outside an allegedly applicable limitations period would immunize the port authority's allegedly wrongful conduct in demanding excessive payments over the life of the cancelled lease. *Id.*

In *Intership*, the respondent port authority moved to dismiss complainant's reparations claims arising out of a lease executed over *seven years prior* to the complaint. 30 S.R.R. at 425-26. The ALJ denied the motion, expressly applying the FMC's continuing violation rule because "the complainant clearly includes allegations of continuing offenses and seeks reparations in connection with those violations." *Id.* at 425. She also explained Commission authority on continuing violations: "[t]here is no competent evidence or rule of law that [a] complaint should be dismissed because some of the harm occurred before the [limitations period] and [complainant] knew or should have known of the harm." *Id.*

The I.D. erroneously strains to distinguish *Intership* by asserting that Maher's "lease discrimination" alleges only "acts that occurred in the past and are now complete." That is not correct. Maher alleged that PANYNJ violated and continues to violate the Shipping Act. Maher's complaint is similar in this respect to the determinative finding in *Intership*, "the Complaint was initiated due to PRPA's ongoing failure to operate in accordance with the requirements of the Shipping Act." *Id.* at 425-26 n.51. The position taken in the I.D. reflects its fundamental failure to appreciate PANYNJ's absolute continuing duty to make available to

³ The I.D. also disregards *NPR* as *obiter dicta* and indicates it "respectfully disagree[s]" because of the inapposite authority the I.D. invokes requiring a new "overt act of discrimination."

Maher the same preferential lease terms provided to Maersk-APM.⁴

c. The I.D. Erroneously Invokes Inapposite Employment Cases

Relying principally on Title VII⁵ cases, the I.D. rules that respondent “must commit an overt act of discrimination within the limitations period.” I.D. at 34-35 (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624-25 (2007) (receipt of paychecks insufficient to constitute new overt acts because the acts within the statute period were not themselves violations of the applicable statute) and *United Air Lines Inc. v. Evans*, 431 U.S. 553, 558 (1977)). However, the *Ledbetter/United* line of authority is inapposite to the Shipping Act and has never been relied upon by the Commission. As an initial matter, when reading outside Shipping Act jurisprudence, the Commission has underscored the essential analytical step “to illustrate why the particular cases . . . cite[d] are consistent with or relevant to the Shipping Act.” *Inlet Fish*, 29 S.R.R. at 313. The I.D. did not do this.

⁴ For its part, PANYNJ’s assertion that *Intership* “would offer Maher no support [because in *Intership*], the complainant alleged that the respondents were in violation of continuing contractual obligations under its agreement . . . during the limitations period,” as opposed to challenging that the lease itself violates the Shipping Act (MSJ at 18 n.12), is neither accurate, nor relevant, and ignores the crux of the holding that the “continuing violations” are the port authority’s failures to comply with its obligations under the Shipping Act, some of which began accruing prior to the limitations period.

Additionally, the rule from *Intership* was similarly applied in *Odyssea Stevedoring of Puerto Rico, Inc. v. PRPA*, 30 S.R.R. 484, 503 (Trudelle, ALJ 2004). In *Odyssea*, the complaint alleged continuing violations of the lease, alleged that enforcement of the lease itself was a continuing violation, and that the respondent’s conduct was a continuing violation. *Id.* The I.D. discounts these express conclusions, arguing that the *Odyssea* decision did not “discuss the effect of the statute of limitations on a claim. . . .” I.D. at 41. But, the I.D. misses the point. The decision held that the allegations of continuing failure to provide preferential lease terms, among others, constituted continuing violations. Moreover, in light of *Ceres*’ express ruling that the lease discrimination there constituted continuing violations, there was no need for the ALJ to engage in the discussion suggested by the I.D. 27 S.R.R. at 1277.

⁵ The I.D. principally invokes Title VII disparate treatment and related cases to find a way to foreclose Maher’s reparations. Other employment statutes mentioned generally look to Title VII jurisprudence. Therefore, this section refers generally to the set of statutes and employment law cases cited in the Order as “Title VII” law.

The consideration of new overt acts in *Ledbetter* applied uniquely to continuing violations of Title VII disparate treatment claims. As the Supreme Court firmly emphasized in rejecting Ms. Ledbetter's argument that the court should consider jurisprudence applying a related employment discrimination statute, the Equal Pay Act of 1963 ("EPA"), "[t]he simple answer to this argument is that the EPA and Title VII *are not the same.*" *Ledbetter*, 550 U.S. at 640 (emphasis added). Unlike other employment law violations, a Title VII disparate treatment claim requires joining two distinct elements, (1) "employment practice" and (2) "discriminatory intent," to fully form a cause of action. *Id.* at 631. The court emphasized that the discriminatory intent requirement is the "defining" or "central element" of the disparate treatment claim at issue and therefore, the primary reason for the strict interpretation of the 180-day limitations period. *Id.* at 624 & 629. The court also underscored (1) "Title VII's integrated, multistep enforcement procedure," which it feared would be distorted by Ms. Ledbetter's continuing violation theory, and (2) that it interprets Title VII mindful of "the legislative compromises that preceded the enactment of Title VII" and "respectful of the legislative process that crafted this scheme." *Id.* at 629-30.

These unique statutory purposes do not apply to the Shipping Act. *Ledbetter*, turning as it does on such unique reasons, is wholly irrelevant to the Shipping Act and this proceeding. *See Volkswagenwerk*, 390 U.S. at 271, 274 n.21, 276 (the purpose of the Shipping Act was to "subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry." Because the Shipping Act permits some conduct that would otherwise be barred by antitrust law, "[t]he condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement[s]"). The Supreme Court expressly acknowledged that the *Ledbetter* rule *did not* apply to another

employment statute that does not require specific intent to discriminate. *Ledbetter*, 550 U.S. at 641 (Fair Labor Standard (FLSA) Act does not require specific intent to discriminate and it is "well established that the statute of limitations . . . runs anew with each paycheck."). The Shipping Act, like FLSA, does not require specific intent to discriminate. *Volkswagenwerk*, 390 U.S. at 280-82 (intent to discriminate is irrelevant for Shipping Act claims). The express acknowledgment of *Ledbetter*'s inapplicability to the FLSA applies equally to the Shipping Act. *Ledbetter* is wholly inapposite.⁶

d. The I.D. Erroneously Invokes Inapposite Antitrust Cases

The I.D. also invokes a discrete subset of inapposite antitrust "tying-contract" cases to require new "overt discriminatory acts" in addition to the continuing violations alleged. The I.D. principally relies on *Varner v. Peterson Farms*, and cases cited therein, applying "overt acts" in this peculiar context. 371 F.3d 1011, 1019-20 (8th Cir. 2004) (quoting *Pace Indus. Inc. v. Three Phoenix Co.*, 813 F.3d 234, 237 (9th Cir. 1987)) ("[a]n overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff."). But, like *Ledbetter*, *Varner*'s specialized requirements do not govern the Shipping Act, and the Commission has never relied upon the tying-contract standard in *Varner* to determine a continuing violation under the Shipping Act.

Contrary to *Varner*, the Shipping Act recognizes that reaffirmations of previous acts

⁶ Moreover, Congress expressly overruled *Ledbetter* with regard to pay discrimination claims. See Lilly Ledbetter Fair Pay Act of 2009, Pub. Law 111-2 (Jan. 29, 2009) ("Congress finds . . . *Ledbetter* . . . significantly impairs statutory protections against discrimination in compensation [] that have been bedrock principles of American law for decades . . . by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices"); see also *Diaz v. Jiten Hotel Mgmt., Inc.*, 2011 WL 181777, at *7 (D. Mass. Jan 20, 2011) (citing *Ledbetter* Act and holding that "a claim accrues with each paycheck that stems from a discriminatory decision irrespective of when the decision was made"). The *Ledbetter* continuing violation rule invoked by the I.D. no longer applies even to Title VII discrimination cases, much less the Shipping Act.

constitute continuing violations that satisfy the statute of limitations. *See Seatrain*, 18 S.R.R. at 1079 (port authority's continuing refusal to provide berthing access constituted a continuing violation—even though refusal was initiated outside the limitations period—and recognizing the right to reparations for the damages arising from the effects of the refusal inside the limitations period); *see also Inlet Fish*, 29 S.R.R. at 314 (explaining that the continuing violation recognized in *Seatrain* was not barred by complainant's knowledge of its claim or its identical injury that began outside of the limitations period). Thus, a Shipping Act continuing violation initiated outside a limitations period *does not* immunize reparations for reaffirmations of the violation *inside* a statutory period. *See Seatrain*, 18 S.R.R. at 1082.

In *Seatrain*, the complainant sought reparations for a port authority's refusal to provide access to certain port facilities. *Id.* at 1081. The port authority claimed that the complaint was barred by the statute of limitations, arguing that the claim accrued when the port authority first refused to provide access, which began outside the limitations period. Subsequent refusals, the port authority argued, did not restart accrual. *Id.*⁷ *Seatrain* rejected the port authority's argument because the complaint alleged the violations *continued*. Unlike a circumstance involving "a single refusal for a single utilization," *Seatrain* explained that the complainant's attempt to obtain access before the limitations period, and the port authority's initial refusal and *continuing failure to provide access to date*, alleged a continuing violation. *Id.*

With respect to specific acts, *Seatrain* held that each refusal is a new act for the purpose of the Shipping Act statute of limitations. *Id.* at 1082 ("As alleged, each and every berthing barred is a new act giving rise to alleged injury."). Importantly, with respect to the continuing refusal, *Seatrain* expressly held that the continuing refusal to provide access is not one act, but is

⁷ Section 22 of the 1916 Act was at issue in *Seatrain*. Other than its shorter two-year period, section 22 is materially similar on this issue to section 11(g) in 1984 Act.

treated for the purposes of the statute of limitations as a series of individual acts whenever Seatrain used alternative berths. *Id.* at 1082 (“Any unlawful act, however, which continues becomes not one act but a series of individual actions each time it is enforced.”) & 1081 (because of the port authority’s continuing refusal, Seatrain used alternative facilities after the port authority’s specific refusals in August 1979). The I.D. erroneously ignores this holding in *Seatrain*, apparently because it defies *Varner/Ledbetter*.

Nevertheless, the I.D. labels *Seatrain*’s continuing violations as new “overt acts” in an attempt to conform to *Varner/Ledbetter*. See I.D. at 36 (asserting that *Seatrain* is “consistent with the [*Ledbetter/Varner*] continuing violation rule”). The I.D. erroneously argued that “*Seatrain* stands for the proposition that claims accruing outside of the limitations period do not bar complaints seeking reparations for claims of *similar overt discriminatory acts* inside the limitations period,” and that “[e]ach refusal to permit Seatrain to berth, some of which occurred within the limitations period, was a separate overt act of discrimination, not the unabated inertial consequence of a discriminatory act outside the limitations period.”). I.D. at 36, 37 (emphasis added). The I.D.’s reading, and rewriting, of *Seatrain* is erroneous.

Seatrain does not contain the “similar overt discriminatory acts” language read into it by the I.D. Nor does *Seatrain* support such an interpretation. Rather, *Seatrain* explains that the continuing violation was the continuing refusal to provide access—initiated outside the limitations period—not that “each refusal” constituted “a separate overt act of discrimination”:

The event giving rise to Seatrain’s efforts for relief and the gravamen of its complaint was *the refusal* of PRPA and PRMSA to make Isla Grande available to Seatrain after the closure of the Pan Am facility in San Juan. [] the cause of action relating to *this refusal* by PRPA and PRMSA accrued within two years of the instant complaint for damages.

Seatrain, 18 S.R.R. at 1081 (emphasis added). The focus in *Seatrain* is on the initial refusal and

its continuation, which forms the basis of the continuing violation. Nor is *Seatrain's* recognition of the right of reparations limited only to specific requests or refusals, as the I.D. seems to suggest, but rather “continuing refusals . . . with continuing use of alternative facilities . . . result[ed] in alleged continuing and accumulative injury.”⁸

Finally, the I.D.’s argument that *Seatrain's* reaffirmation of a refusal policy qualifies as an “overt act” under *Varner* is directly contradicted by “tying-contract” cases. *Pace Indus. Inc. v. Three Phoenix Co.*, which *Varner* relies upon as authority for its definition of overt acts, holds that subsequent refusals to act *do not* constitute separate “overt acts.” 813 F.3d at 237-38 (quoted in *Varner*). See also I.D. at 35-36. Under the *Varner* authority, subsequent refusals *do not* constitute continuing violations or reset the statute of limitations. *Id.* at 238. The approach in *Varner* is plainly *not* consistent with *Seatrain*.

e. The I.D. Erroneously Ignored Authority Cited in *Seatrain*

Seatrain held that the port authority’s refusal to provide berthing access outside a limitations period constituted a continuing violation where the port authority continued to refuse to provide access into the limitations period. 18 S.R.R. at 1079. In so ruling, *Seatrain* cited two cases: (1) *Hanover Shoe*, 392 U.S. at 502 and (2) *Baker*, 489 F.2d at 836. The I.D. ignores these cases, which provide clear illumination of *Seatrain's* holding without resorting to inapposite tying-contract or employment law cases. The alleged failure to act in a manner required by the Shipping Act alleges an act that by its very nature constitutes a continuing violation because it alleges that a violation of the Shipping Act has or will occur in the statutory period.

In *Hanover*, a non-conspiracy Sherman Act case, the Supreme Court held that the plaintiff could recover damages for Sherman Act violations, stemming from defendant’s practice

⁸ The facts in *Seatrain* included specific requests and refusals as well as “continuing requests . . . and continuing refusals . . . with continuing use of alternative facilities.” *Id.* at 1081-82.

of leasing and continuing refusal to sell its machinery that had begun beyond the limitations period. The defendant argued that because it first refused to sell in 1912, the action was barred by the statute of limitations. The Supreme Court held that although the violation was first initiated outside the limitations period, damages could be had for continuing violations within the statutory period. Continuation of the policy was by its nature a continuing antitrust violation:

We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

392 U.S. at 502 n.15. As the Third Circuit explained, and the Supreme Court upheld, the continued collection of lease payments, and entering into new leases, constituted continuing violations. *Id.* at 502. *Seatrain* expressly cited and relied upon *Hanover* for the proposition that a single act or failure to act in violation of the Shipping Act that continues (*i.e.*, the berthing refusal in *Seatrain* and the refusal to sell in *Hanover*) is treated for the purpose of the reparations statute of limitations as a new act each day the violation continues. 18 S.R.R. at 1082.

Along with *Hanover*, *Seatrain* cited *Baker*, which the I.D. also ignored. 489 F.2d at 836. In *Baker*, the court of appeals held that antitrust and civil rights claims based on installment sale contracts and loans based on false and excessive appraisals were *not* time barred because defendants' wrongful conduct continued after the contracts were signed, injury to plaintiffs continued to accrue, and "had defendants at any time ceased their wrongful conduct, further injury to plaintiffs could have been avoided." *Id.* "[A] new injury was inflicted in plaintiffs each day until the federal defendants abandoned their discriminatory policies or the respective installment contracts were completely performed, whichever occurred first. Consequently, a new limitations period began to run each day as to that day's damage. . . ." *Id.*

The I.D. lacks any basis or reason for failing to address the cases expressly cited in *Seatrain*. In contrast to *Seatrain's* reliance on *Hanover* and *Baker*, the Commission does not rely upon the *Varner* "tying-contract" sub-set of antitrust cases that the I.D. reads into *Seatrain*. The I.D.'s silence is particularly perplexing because *Hanover* is a foundational authority on continuing violations and Maher raised and discussed *Hanover* and *Baker* in its Reply in Opposition to PANYNJ's Motion, etc. See Exhibit B at 19-20. To the extent consideration of antitrust authorities is needed to understand *Seatrain*, the I.D. should have started with the authority that *Seatrain* actually cited.

f. *Varner* Does Not Apply To The Shipping Act

Varner is inapplicable here for good reason: the *Varner* tying-contract cases apply to the unique requirements of an antitrust tying violation, requirements not present in all antitrust cases, e.g., *Hanover*, where the alleged continuing violation by its nature alleges actual violations of the relevant statute, much less in Shipping Act cases.

Antitrust violations generally accrue when an act first causes antitrust injury, but two exceptions apply to "allow an antitrust suit to be brought more than four years after the events that initially created a cause of action." See, e.g., *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982) ("These grounds are derived from *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, (1971) and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)");

the continuing conspiracy or continuing violation exception [] permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy or, in the absence of an antitrust conspiracy, commits an act that by its very nature is a continuing antitrust violation

Kaiser, 677 F.2d at 1051 (emphasis added) (citing *Hanover Shoe* and *Zenith*).

Whether an act is "by its very nature . . . a continuing antitrust violation" depends on the

particular antitrust provision that is alleged to continue into the limitations period. *See, e.g., Nat'l Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 509-10 (D.C. Cir. 1984) (discussing continuing violation exception and the particular "overt acts" required to establish a continuing tying violation vs. other violations). To show a tying-contract violation, a plaintiff must show that the defendant (i) could enforce a tie, and (ii) actual enforcement caused "antitrust injury" during the limitations period. *Airweld Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th Cir. 1984). The elements required to show an antitrust tying violation are simply not required to show a violation of the Shipping Act.

Thus, the I.D.'s reliance on the tying-contract discussion in *Eichman v. Fotomat Corp.* (as quoted in *Varner*) for the proposition that mere payments under an anticompetitive agreement during a limitation period do not constitute a continuing violation is inapposite. I.D. at 35-36, 41-42. The *Eichman* proposition invoked by the I.D. stands for the entirely unremarkable point that, with respect to tying-contract antitrust violations, plaintiff failed to show that the defendant "actually did enforce the tie" during the limitations period. 880 F.2d 149, 160 (9th Cir. 1989).

Nevertheless, the I.D. erroneously asserts that the holding in *Eichman* states a rule of law applicable to the Shipping Act, concluding that "PANYNJ's passive receipt of [rental payments] . . . is not an overt act of enforcement which will restart the statute of limitations." I.D. at 42. The I.D. is incorrect. But, even in tying-contract cases, the actual rule is that tying-contract continuing violations *can* be established by continued operation of an unlawful contract. *See, e.g., Twin City Sportservice, Inc. v. Charles O. Findley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975); *Aurora Enterprises v. Nat'l Broad Co.*, 688 F.2d 689, 694 (9th Cir. 1982); *Airweld*, 742 F.2d at 1190; *Nat'l Souvenir Ctr.*, 728 F.2d at 510.

B. The Initial Decision Erroneously Determined Claim Accrual

The I.D. erroneously determined that “Maher’s claim for a reparation award accrued on the day it signed lease EP-249 and the statute of limitations began to run on that date.” I.D. at 22. It reached this result by committing two fundamental errors. First, the I.D. *eliminated* from its claim accrual analysis consideration of the central element of the violation: “the unequal treatment is not justified by differences in transportation factors.” I.D. at 25. The I.D. argued for elimination by styling the central element of the violation as an “affirmative defense” and therefore, not part of Maher’s “prima facie case.” I.D. at 25. Second, the I.D. erroneously applied the “time of violation/injury rule” for claim accrual instead of the Commission’s “discovery rule.” And further compounding its error, the I.D. invoked inapposite case law interpreting other statutes, principally Title VII employment law decisions, based on statutory provisions and purposes different from the Shipping Act.

1. The I.D. Erroneously Eliminated the “Undue” Element from Claim Accrual Analysis

The Commission’s decision in *Inlet Fish*, 29 S.R.R. at 313, explains that accrual of a “cause of action” for a violation of the Shipping Act does not occur until complainant “knew or should have know that it had a case.” According to the Commission, “It would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had *no conclusive information* about such a dispute for several years after the shipments took place.” *Id.* (emphasis added). However, the I.D. misconstrues the Commission’s decision by arguing *sua sponte* that accrual occurs when complainant only knew or should have known that it had part of a *prima facie* case. I.D. at 23, 25. (“ . . . Maher had information that would permit it to plead (and prove) each element of its prima facie case . . . ,” and “[n]ot only did Maher have sufficient information to draft its Complaint, Maher had sufficient evidence in 2000 to prove all

three elements that . . . constitute a prima facie case.”) But, that is neither what PANYNJ argued in its motion, nor what the Commission ruled in *Inlet Fish*, and it required elimination of the central element of the violation.

To the contrary, the Commission expressly ruled that accrual only commenced when a complainant knew or should have know that it “had a case,” not *part* of a case. That is why, throughout *Inlet Fish*, the Commission refers expressly to complainant’s “cause of action” and not to complainant’s *prima facie* case. These are two distinctly different legal concepts: (1) a “cause of action” constitutes “a factual situation that entitles one person to obtain a remedy in court from another person,” *i.e.*, a *complete* case, while (2) a “*prima facie* case” merely constitutes “the establishment of a legally required rebuttable presumption,” *i.e.*, merely *part* of a case. *Black’s Law Dictionary*, 251 & 1310 (9th Ed. 2009).

Likewise, the Supreme Court has emphasized that: (1) a “cause of action” is “the unlawful violation . . . which the facts show,” not just a *part* of it. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 722-24 (1966) (quoting *Hurn v. Oursler*, 289 U.S. 238 (1933) and *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). And (2) a *prima facie* case is merely “an evidentiary standard not a pleading requirement,” as the I.D. erroneously argued. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510 (2007). Therefore, if the Commission had meant to trigger claim accrual on the basis of a *prima facie* case only, it would have so ruled expressly. But it did not because the statute says “cause of action,” not “*prima facie* case.”

Nevertheless, the I.D. eliminated the undue disparity element from its accrual analysis, arguing erroneously that because the element was an “affirmative defense” it was *not* part of Maher’s *prima facie* case. As an initial matter, the I.D. erroneously stated that “the Commission established in *Ceres Marine Terminal, Ceres Element 3* is not part of Maher’s *prima facie* case,

but an affirmative defense.” I.D. at 25. But nowhere in that decision did the Commission style the undue disparity element of the violation as an “affirmative defense.”

The I.D. errs by misconstruing a sentence and accompanying citation in *Ceres* as support for the erroneous proposition. The sentence and citation follow: “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. *Cargill, Inc. v. Waterman Steamship Corp.*, 24 F.M.C. 442, 461-62 [21 S.R.R. 287] (1981).” This passage *does not* rule that the undue element is an affirmative defense. It simply identifies the undue element as subject to a burden-shifting procedure. The Commission explained how it works in *Cargill*. Initially, complainant bears the burden to “demonstrate that there are no obvious differences.” 21 S.R.R. at 301. Then, because “this evidence is primarily in the possession of the respondent,” the respondent has “the burden . . . to demonstrate that there are legitimate transportation differences.” *Id.* Here, upon a showing by Maher that there are no obvious differences justifying the disparity, the burden of rebutting that showing shifts to respondent, *i.e.*, PANYNJ. *See id.*

In administrative law, a burden shifting procedure merely transfers from one party to another the burden of rebutting evidence. *Black's Law Dictionary* 223, 1502-03 (9th Ed. 2009) (“Burden shifting is most commonly applied in discrimination cases. If the plaintiff presents sufficient evidence of discrimination, the burden shifts to the defendant to show a legitimate, nondiscriminatory basis for its actions. The precise components of the analysis vary depending on the context of the claim.” “Shifting the burden of proof – In litigation, the transference of the duty to prove a fact from one party to the other; passing of the duty to produce evidence in a case from one side to another as the case progresses, when one side has made a prima facie showing

defense.” “An affirmative defense is defined as ‘[a] defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.’” *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (citing *Black’s Law Dictionary* 430 (7th ed. 1999)); see also *In re Sterten*, 546 F.3d 278, 284 n.9 (3d Cir. 2008) (defining an affirmative defense as “a matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it. A response to a plaintiff’s claim which attacks the plaintiff’s legal right to bring an action, as opposed to attacking the truth of the claim.”) (brackets omitted, emphasis in original). On the other hand, “if the defense involved is one that merely negates an element of the plaintiff’s *prima facie* case it is not truly an affirmative defense.” *Sanden v. Mayo Clinic*, 495 F.2d 221, 224 (8th Cir. 1974) (ellipses omitted). “In other words, assuming a plaintiff’s factual allegations make out a cause of action, an affirmative defense bars it.” *Sterten v. Option One Mort. Corp.*, 479 F. Supp. 2d 479, 483 (E.D. Penn. 2007). For example, if complainant proved a Shipping Act violation, but respondent established the affirmative defense of sovereign immunity, the affirmative defense would bar the cause of action that was proven. *Ceres Marine Terminal*, 30 S.R.R. 358, 370 (F.M.C. 2004).

The Commission’s burden shifting procedure with respect to the undue preference or prejudice violation, 46 U.S.C. § 41106(2), *i.e.*, requiring the respondent to prove that the differences in lease rates are based on valid transportation factors, directly addresses an element of the violation which remains complainant’s ultimate burden to prove. Therefore, by definition it is not an affirmative defense.

Likewise, the I.D.’s erroneous accrual argument does not apply to violations of Shipping Act §§ 10(d)(1) (failure to establish, observe, and enforce just and reasonable regulations and practices, etc.) and 10(b)(10) (unreasonable refusal to deal). The Commission has ruled with

respect to these violations that complainant bears the burden of proving that the relevant practice or refusal to deal is *unreasonable* and this is also an element of the *prima facie* case of each violation. *Ceres*, 27 S.R.R. at 1274-75 (“complainants made a *prima facie* case where they showed that the charges assessed did not bear a reasonable relationship to the comparative benefit obtained”); *Canaveral Port Auth.*, 29 S.R.R. at 1448 (“This requires a two-part inquiry: whether [the port authority] refused to deal or negotiate, and if so, whether its refusal was unreasonable. . . . A refusal to deal or negotiate is not on its own a violation of the Shipping Act. We must also determine whether that refusal was unreasonable.”)

Furthermore, according to the Commission, a § 10(d)(1) violation can exist even when there is no preference, prejudice or discrimination, *i.e.*, without a difference in lease terms: “The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination which is unnecessary to the case. It may cause none of these, but still be unreasonable.” *Ceres*, 27 S.R.R. at 1274-75 (quoting *Distribution Services*, 24 S.R.R. at 721). Therefore, the mere existence or nonexistence of a difference does not satisfy the requirements of even a *prima facie* case for violations of § 10(d)(1). That is also the case for a violation of § 10(b)(10). As the Commission’s analysis in *Canaveral Port Authority* illustrates, neither the violation nor the *prima facie* case turned on the port authority’s decision to grant the tug franchise to Petchem, but rather on the port authority’s unreasonable refusal to deal with complainant. 29 S.R.R. at 1450 (the port authority’s failure to consider complainant’s application is unreasonable and its justifications insufficient and inadequate). Therefore, to carry its burden of proof of a violation of these provisions Maher must prove that PANYNJ’s practice of failing to provide to Maher the lower lease rate terms provided Maersk-APM was unreasonable and that element of the violations cannot be stripped away for purposes of

accelerating claim accrual.

2. The I.D. Erroneously Applied The Time of Violation/Injury Rule

The I.D.'s errors transform the test of claim accrual from the "discovery rule" to the "time of violation/injury" rule expressly rejected by the Commission. *Inlet Fish*, 29 S.R.R. at 313. According to the I.D., Maher's "lease-discrimination" claims accrued upon knowledge of a difference in lease terms. I.D. at 29 ("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 I.D. reached this conclusion by first excluding as "not material" Maher's evidence submitted in opposition to the PANYNJ motion showing that Maher only learned that the different lease terms were *undue* starting in the year 2008. I.D. at 27. This decision to exclude Maher's evidence as "not material" followed from the foregoing error excluding the *undue* element from the accrual analysis.

The I.D. erroneously argued that Maher's discovery that the differences were *undue* (which it accepts as "true") is nothing more than the discovery "of PANYNJ's discriminatory motive." I.D. at 27. Then, the I.D. erroneously equates that with the discovery of a "legal injury" which it rejects as an improper basis for accrual. I.D. at 30 ("When Maher learned that it might have had a legal injury (or as it puts it "discovered" that the differences were an "undue preference") is irrelevant to the accrual of its cause of action.").

To the contrary, Maher did not discover PANYNJ's "discriminatory motive" in 2008, Maher discovered *new facts* beginning in 2008 that the differences were unduly discriminatory. Maher discovered that the principal justification provided to Maher for the lease rate differences, the port guarantee of ocean carrier cargo, which only took effect in 2008, was not implemented as PANYNJ represented to Maher or as expressly provided by the Maersk/APM lease. The "port guarantee" proved to be merely a rent guarantee, not a cargo volume guarantee. See Exhibit D,

Maher's Responding Stmt., at ¶¶ 21-24. Under the terms of the lease, the port guarantee did not even commence until 2008, so Maher did not know until after 2008 that PANYNJ's implementation and non-enforcement of the port guarantee revealed the undue discrimination. Indeed, it was not until 2010 that PANYNJ determined how to apply the port guarantee for the first time against Maersk-APM. See Exhibit B, Maher's Reply, App. A., p. 4. And even then, the port guarantee data was not provided publically by PANYNJ. In fact, PANYNJ failed to disclose the relevant evidence about the port guarantee until its belated supplemental production to Maher in February 2011 in this proceeding.

PANYNJ's representations to Maher, and the Maersk-APM lease on its face, *require* a cargo volume guarantee from Maersk-APM's ocean carrier affiliate and provides PANYNJ the power to compel Maersk-APM's parent to provide the cargo. See Exhibit D, Maher's Responding Stmt., at ¶¶ 21, 22, 23. The new facts that only occurred in 2010 establish that the "port guarantee" as implemented by PANYNJ constitutes merely a rent guarantee, not the ocean carrier affiliate cargo volume guarantee. See Exhibit B, Maher's Reply, App. A; Exhibit D, Maher's Responding Stmt., at ¶ 24, p. 17 (Oppenheimer, Shiftan, Borrone Test.).

Maher did not know, and could not have known, facts that *did not exist* in the year 2000 when the leases were concluded. The new facts Maher discovered beginning in 2008 showing that the lease differences were unjustified and are *undue* is not the discovery of a "legal injury" as mischaracterized by the I.D., but rather the discovery of "conclusive information" that Maher had a "cause of action." *Inlet Fish*, 29 S.R.R. at 316 ("The Commission finds that Inlet Fish's cause of action . . . accrued when Inlet Fish learned that it had such a cause of action.")

3. The I.D. Misapplies and Misconstrues Discovery Rule Authority

Once again, the I.D. erroneously relies upon inapposite employment law decisions and one Federal Tort Claims Act (FTCA) case concluding that Maher's discovery of new facts in

discovery in 2008 and thereafter merely constituted Maher's discovery of "legal injury." But the distinction drawn by the I.D. between "actual injury" and "legal injury" from those cases derives from the particular statutes involved and does not apply to the Shipping Act, and in any event, although inapposite, the FTCA decision is consistent with Maher's position.

The Commission has underscored the essential analytical step "to illustrate why the particular cases . . . cite[d] are consistent with or relevant to the Shipping Act." *Inlet Fish*, 29 S.R.R. at 313. Likewise, the FTCA case cited by the I.D. confirms this essential step in a proper analysis. I.D. at 28-29. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (emphasizing the unique aspects of the FTCA and the particular balance struck in its limitations period, when deciding whether to extend limitations period).

But, the I.D. ignored the admonitions of both the Commission and the Supreme Court. The distinction between "actual injury" and "legal injury" in a Title VII disparate treatment claim comports with the text of *that* statute (and related law), but contravenes the plain language of the Shipping Act. Compare 42 U.S.C. § 2000c-5(e) (Title VII limitation period begins "after the alleged unlawful employment *practice occurred*") with 46 U.S.C. § 41301 (limitations period for reparations claim begins "after the *cause of action* accrued") (emphasis added). Unlike Title VII and other statutes, the Shipping Act's plain language defines accrual as the date on which a *cause of action* arises, not merely the date when a *practice occurred*.

Additionally, the *purposes* underlying a limitations provision informs its interpretation. And the Commission has explained the key purposes pertinent to the analysis here: "[b]ased upon this understanding of the Act a flexible rule . . . would allow the Commission to pass on the legality of the allegedly injurious conduct," whereas a "stricter rule would exonerate certain respondents even if their conduct was unlawful, simply because a potential complainant was

unable to identify the existence of its cause of action . . . [and] [t]he Shipping Act itself suggests this result.” *Inlet Fish*, 29 S.R.R. at 313. *See* 46 U.S.C. § 40101 (purposes of the Shipping Act include “to establish a nondiscriminatory regulatory process”; *Volkswagenwerk*, 390 U.S. at 271, 274 n.21, 276 (purpose is “to subject to the scrutiny of a specialized government agency the myriad of restrictive agreements in the maritime industry,” and because the Shipping Act permits some conduct that would otherwise be barred by antitrust law, “[t]he condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement[s]”).

By contrast to the Commission’s *flexible* approach to accrual, Title VII *strictly* construes accrual in disparate treatment claims – the particular subset of employment claims cited. I.D. at 29-31. These claims accrue when the employee learns of the adverse personnel action, such as termination. These strict accrual and limitations provisions manifest Congress’ intent that “aggrieved persons [should] have their cases processed promptly.” *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). And it furthered Title VII’s mandate that an employer and employee engage in conciliation efforts during the EEOC’s administrative phase, in an effort to obviate the need for a court. *See Ledbetter*, 550 U.S. at 619; *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 78 (1984). Title VII’s animating purposes – quickly promoting conciliation and a *mutually agreeable resolution* between an employer and employee – differ dramatically from the Shipping Act’s purpose to avoid exonerating violators “because a potential complainant was unable to identify the existence of a cause of action.” *Inlet Fish*, 29 S.R.R. at 313.

The I.D.’s reliance on *Kubrick* is inapposite because the FTCA provides a limited waiver of sovereign immunity not present here which is *strictly*, not flexibly, construed consistent with the Commission’s conclusion in *Inlet Fish*. Nevertheless, *Kubrick*’s application of the discovery

employment discrimination claim, plaintiffs are afforded a more *flexible* limitations analysis – one in which each use of a discriminatory *practice* within the limitations period, regardless of intent, gives rise to a cognizable and timely claim.

[*Evans* and a line of cases following it], we are told, stand for the proposition that present effects of prior actions cannot lead to Title VII liability.

We disagree. As relevant here, those cases establish only that a Title VII plaintiff must show a “present violation” within the limitations period. *What that requires depends on the claim asserted.* For disparate-treatment claims – and others for which discriminatory intent is required – that means the plaintiff must demonstrate deliberate discrimination within the limitations period. *But for claims that do not require discriminatory intent, no such demonstration is needed.* Our opinions, it is true, described the harms of which the unsuccessful plaintiffs in those cases complained as “present effect[s]” of past discrimination. But the reason they could not be the present effects of present discrimination was that the charged discrimination required proof of discriminatory intent, which had not even been alleged. *That reasoning has no application when, as here, the charge is disparate impact, which does not require discriminatory intent.*

Lewis v. Chicago, 130 S. Ct. 2191, 2199 (2010) (emphasis added, internal citations omitted).

Thus, as employment law itself makes clear, questions of accrual and how to apply the discovery rule can only be determined by looking to the particular statute, and indeed the particular claim, at issue. The I.D.’s reliance on inapposite cases renders the analysis fatally flawed from the start.

4. The I.D. Misconstrues the Commission’s Reasoning in *Inlet Fish*

The I.D. also misconstrued *Inlet Fish*, arguing that the decision “did not involve a question of when a party learned that ‘the difference is an undue preference’” and thus only involved the question of when *Inlet Fish* learned that it had an “actual injury.” I.D. at 32. According to the I.D., “*Inlet Fish* concerned a complainant learning that it had been treated differently than its competitors (that there was an actual injury), not learning that there was a discriminatory reason for different treatment of which it was already aware. Unlike *Inlet Fish*, Maher knew that it was being treated differently from the moment it signed the lease.” *Id.*

As explained above, contrary to the I.D.’s assertion, mere knowledge of different

treatment *does not* constitute knowledge of the Shipping Act cause of action. To achieve its result, the I.D. *reads out* of the decision the Commission's express language that emphasized repeatedly that the case was about when Inlet Fish learned that its competitors had received *unduly* preferential treatment, not just *different* treatment. So, what the I.D. labels merely as knowledge of the "actual injury" that Inlet Fish learned of in May 1998 was actually that its competitors had received *unduly* preferential treatment, not just *different* treatment. Yet, according to the I.D., the Commission's decision had nothing to do with when Inlet Fish learned of the undue preference. The plain language of the Commission's decision in *Inlet Fish* highlights the I.D.'s error.

The Commission posed the issue it was to decide as follows: "The issue presented in this appeal is whether the ALJ was correct in ruling that the statute of limitations accrued upon Inlet Fish learning that its competitors had allegedly received *unduly* preferential treatment, or when the shipments in question took place." *Inlet Fish*, 29 S.R.R. at 311 (emphasis added). According to the Commission, the ALJ had ruled that "the cause of action necessarily did not accrue until [Inlet Fish] learned that its competitors had received *unduly* preferential treatment. . . ." *Id.* (emphasis added). The *Inlet Fish* ALJ's ruling is not surprising because Inlet Fish had "argued that [Inlet Fish's] Goddard's earlier statements to MSL attorneys at the meeting were based on rumor and that at that time Inlet Fish had no meaningful evidence of *wrongdoing*." *Inlet Fish*, 29 S.R.R. at 308-09 (emphasis added). Additionally, Inlet Fish's "Goddard stated that he only obtained actual evidence of *wrongdoing* by MSL in May, 1998, when he spoke to a former MSL employee, and was not aware before that time of MSL's alleged violations of the Shipping Act." *Id.* at 309 (emphasis added). And in rendering its decision, the Commission "determined to uphold the ALJ's decision" and ruled "that Inlet Fish's cause of action against MSL accrued in

“after the cause of action accrued”).

5. The I.D. Failed to Apply the Proper *Inlet Fish* Discovery Rule

The question of whether Maher knew or should have known that the lease disparity was *undue* in violation of the Shipping Act, *i.e.*, whether Maher had an injury, is a question of fact. *See, e.g., In RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co.*, 58 F. Supp. 2d 503, 544-45 (D.N.J. 1999) (citing *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976)) (disputes concerning discovery of an injury for the purpose of accrual are issues of material fact). Maher submitted ample uncontested evidence showing that when it entered into the agreement with PANYNJ (EP-249) that Maher did not know that it had a Shipping Act case against PANYNJ. Exhibit D, Maher’s Responding Stmt., at ¶¶ 21-23, ¶ 24 (Maher, Schley, Mosca Test.). Maher also submitted ample uncontested evidence that explaining when it first obtained “conclusive information” that it had a Shipping Act case against PANYNJ, *i.e.*, in May 2008 at the earliest. Maher only uncovered “conclusive information,” as outlined in Maher’s attached Exhibit B, App. A and Exhibit D, ¶¶ 21-24, that it had Shipping Act claims against PANYNJ following the depositions of several key witnesses in Dkt. 07-01, including APM Terminals’ witness Marc Oppenheimer (May 20, 2008) and Port Authority witnesses, including Cheryl Yetka (May 28, 2008), and then Maher filed this action *promptly* on June 3, 2008.

By contrast, PANYNJ made *no effort* to satisfy its burden to show the absence of any material fact in dispute. PANYNJ rested its motion entirely on its legal position that the discovery rule requires nothing more than Maher’s knowledge of lease differences. Exhibit A, PANYNJ’s Motion for Summary Judgment at 23 (asserting that Maher’s evidence of its knowledge that the lease was *undue*, “Even if true, [is] entirely irrelevant.”). In these circumstances, PANYNJ’s motion should have been denied because the evidence showed that Maher did not have “conclusive information” that the preference/prejudice was *undue* until the

year 2008 at the earliest.

C. The I.D. Is Wholly Impractical for the Industry and the Commission

Besides being legally erroneous, the I.D.'s approach to claim accrual under the Shipping Act is wholly impractical. If, as the I.D. suggests, a Shipping Act claim accrues upon the knowledge of mere differences in lease terms, port users must file complaints with the Commission when they learn of differences to require port authorities to justify the differences and to prove that the valid purpose is not unreasonable "because it goes beyond what is necessary to achieve that purpose." *Distribution Services, Ltd.*, 24 S.R.R. at 722. In a regulated industry where the Shipping Act contemplates the existence of permissible preferences and prejudices, triggering accrual of claims on the basis of mere lease differences, whether or not the differences are undue, only benefits violators of the Shipping Act who would have every incentive to conceal the undue nature of their discriminatory conduct just as PANYNJ has in this instance and then foist the statute of limitations on the unwary port user which was unaware of the undue nature of the discrimination for years. This is precisely the outcome the Commission sought to prevent in *Inlet Fish* and contradicts the Supreme Court's admonition that the Commission must scrutinize such agreements with monopoly port authorities.

III. Procedural Errors and Exceptions.

Two procedural errors decisively tilt the playing field against Maher. First, the I.D. categorically excludes evidence concerning events that occurred after October 1, 2000, which as a practical matter excludes evidence showing that Maher discovered that it had a case in 2008 and other facts pertaining to discovery and PANYNJ's violations. Second, the I.D. grants summary judgment *sua sponte* on Maher's unreasonable practice claim, and similarly advances new arguments that were not raised in PANYNJ's motion. Summary judgment on the basis of a

statute of limitations that categorically excludes critical facts and grants summary judgment on claims not raised by PANYNJ's motion is plain error.

A. The Initial Decision Errs By Excluding Facts Post-2000

The I.D. took extraordinary lengths to dismiss Maher's reparations remedy by categorically excluding facts relating to events that occurred after October 2000 pertaining to discovery of Maher's claims and other relevant issues. The I.D. determined that "not all the statements proffered by PANYNJ are material to the question of whether Maher's claim accrued on October 1, 2000," and similarly that "Maher's responses set forth facts regarding events occurring after October 1, 2000 [that were] not known by Maher on that date." Accordingly, the I.D. struck and did not consider facts "regarding events occurring after October 1, 2000." I.D. at 13-14.⁹ The I.D. misapprehends that the discovery rule and claim accrual which by their very nature contemplate events that occurred and were discovered *after* initiation of the lease.

The I.D.'s exclusion of post-lease facts preordains the result. The relevant questions regarding the statute of limitations at the summary judgment stage are when Maher's claim accrued and when Maher discovered it had a case. But the "critical inquiry" of the I.D. was purely result oriented: "whether the material facts as to which there is no dispute establish that Maher's claim . . . accrued on October 1, 2000; that is, what did Maher know on October 1, 2000[?]." I.D. at 13. Rather than consider whether post-October 2000 facts raise genuine disputes of material fact, the I.D. selects a sub-set of PANYNJ's allegedly material facts and takes *excerpts* from Maher's responses. The I.D. simply excludes facts that contradict that

⁹ The I.D. strikes PANYNJ's alleged material facts ¶¶ 13, 16, 17, 18, 19, 21 and 24, including the entirety of Maher's responses thereto, and portions of Maher's Responses ¶¶ 6, 7, 8, 10 and 11. I.D. at 13-21 and Appendix.

Maheer's claim "accrued on October 1, 2000."¹⁰

Thereby, the I.D. failed to "take[] into consideration . . . all of the evidence" and to "ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible." *EuroUSA*, 31 S.R.R. at 546 (citing *NPR*, 28 S.R.R. 1011). The Commission has explained that "summary judgment at the Commission has been denied even when the nonmovant has not submitted any evidence, as well as when evidence has been deemed incomplete." *Id.* But here, the I.D. took the opposite approach, preventing Maheer from showing evidence that PANYNJ's violations were continuing and that Maheer only discovered "conclusive information" that it had a "cause of action" in 2008 and thereafter. *Inlet Fish*, 29 S.R.R. at 313.¹¹

B. The Initial Decision Errs By *Sua Sponte* Dismissing a Claim Not Raised in PANYNJ's Motion and Raising New Arguments Not Advanced by PANYNJ.

The I.D. granted summary judgment on Maheer's unreasonable practice claim (referred to

¹⁰ For example, the I.D. at 18 strikes the following part of Maheer's response No. 11 "as "argumentative and /or not material":

" . . . but [Maheer] denies that it conveys knowledge of a preference without knowledge of an undue preference. Compare Maheer's Responses to PANYNJ's First Set of Interrogatory Responses, No. 1 at 4-5 (Aug. 29, 1008) (Levine Decl. Ex. H) (responding to PANYNJ's first interrogatory requests by stating, "Maheer learned of PANYNJ's preference of APMT" at the time of the lease negotiation) with *id.*, No. 4 at 8-9 (responding to PANYNJ's first discovery requests that Maheer did not learn that the preferences were "unduly or unreasonably preferential" until events in 2007 and 2008.)."

¹¹ The I.D. argues that it struck certain responses as "argumentative" citing *Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London*, 637 F.3d 53 (1st Cir. 2011). *Tropigas* does not support the I.D.'s exclusion of Maheer responses and citation to evidence showing disputes of material fact or Maheer's responses to PANYNJ's mischaracterization of alleged facts. For example, PANYNJ Statement ¶ 6 selectively quotes out of context a Maheer interrogatory concerning knowledge of lease differences and passes it off as an alleged "fact" concerning knowledge that the differences were undue. Order at 16; see also PANYNJ Statements ¶¶ 7, 10, 11. Proffering facts in response to the moving party's statement of facts to place them in proper context is *not* improper argumentation. See *In re Fedex Ground Package Sys., Inc. Emp. Prac. Litig.*, 2010 WL 1737848, *3 (N.D. Ind. Apr. 28, 2010) (clarifying responses are appropriate).

in the I.D. as the “10(d)(1)” claim:

The Commission also discussed the elements of a section 10(d)(1) violation with regard to terminal practices. *Ceres Marine Terminals*, 27 S.R.R. at 1274. Maher's Response did not discuss section 10(d)(1). Maher's claim for a reparation award for violations of section 10(d)(1) in the negotiations that resulted in Lease EP-249 and Lease EP-249 itself accrued at the same time as its claims for violations of sections 10(b)(11) and (12).

I.D. at 5 n.3.¹² However, PANYNJ's motion sought partial summary judgment only with respect to Maher's “unreasonable discrimination in lease terms” claims. Exhibit C at 1. Although the I.D. observes that “Maher's Response did not discuss section 10(d)(1),” the I.D. fails to acknowledge that PANYNJ did not discuss section 10(d)(1) either, and thus PANYNJ did not seek summary judgment on the claim. The I.D. erroneously grants summary judgment on the claim *sua sponte*.

The I.D. also decided PANYNJ's motion on arguments never advanced by PANYNJ and only raised by the I.D. *sua sponte*. The I.D.'s determination that the central element of a Shipping Act violation need not be considered in determining accrual was never advanced by PANYNJ. Therefore, Maher never had a chance to address the decisive argument that *Ceres* Element 3 is an affirmative defense. The I.D. also erroneously ruled *sua sponte* that Maher had no injury when PANYNJ never advanced that argument. I.D. 42-44. This is not the first time the Presiding Officer has taken up the role of advocate for PANYNJ by introducing *sua sponte* new arguments not raised by PANYNJ. This repeated practice prejudices Maher by denying it notice and an opportunity to be heard. A grant of summary judgment *sua sponte* should only be done “with great caution” and where “the party against whom judgment will be entered is given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment

¹² The I.D. also references Maher's refusal to deal claim (in the I.D. as a “10(b)(12)” claim), although it is not clear if the I.D. is ruling on that claim in light of PANYNJ's statement that it seeks summary judgment on Maher's refusal to deal claims related to the terms of the lease.

should not be granted.” 27A Fed. Proc. L. Ed. § 62:677. Maher had no such opportunity because it only learned of the argument when it read the I.D. Both the Commission and the federal courts view *sua sponte* adjudication without sufficient notice as creating procedural prejudice and fairness concerns. *Martyn Merritt, AMG Services, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1)*, 27 S.R.R. 142, 147 (F.M.C. 1995) (reversing a *sua sponte* determination of damages as the “lack of notice raises a fairness question”); *Baltodano v. Merck, Sharp & Dohme (I.A.) Corp.*, 637 F.3d 38, 43 (1st Cir. 2011) (vacating summary judgment where claim was not briefed or raised in movant’s motion for summary judgment).

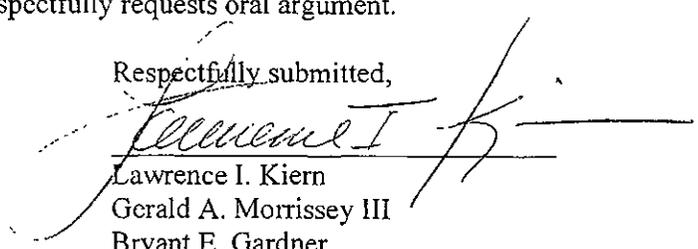
The net result is that Maher must now take exception to the I.D. just to get a right of reply. It also effectively gives PANYNJ the last word on its own motion for summary judgment. In these circumstances, the Commission should take notice of the practical impact of its rule disfavoring replies and provide Maher a right of reply to PANYNJ’s reply to Maher’s Exceptions. Otherwise, the Presiding Officer’s repeated practice of springing new arguments on Maher *sua sponte* to benefit PANYNJ will only be rewarded, making a mockery of the Commission’s rules.

CONCLUSION

For the foregoing reasons the I.D. should be reversed and Maher’s “lease-discrimination” claims reinstated. Additionally, Maher should be provided a right of reply to PANYNJ’s reply to Maher’s exceptions. Maher also respectfully requests oral argument.

Dated: June 7, 2011

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I hereby certify that I have on this 7th day of June, 2011, served the foregoing via e-mail on the following:

Holly E. Loiseau
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Linda L. Isakoff

Exhibit K

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

BEFORE THE
FEDERAL MARITIME COMMISSION



Docket No. 08-____

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

COMPLAINT

Complainant, Maher Terminals, LLC ("Maher") by and through the undersigned hereby files this Complaint against The Port Authority of New York and New Jersey ("PANYNJ") alleging violations of the Shipping Act of 1984, *as amended* (46 U.S.C. § 40101 et seq.) (the Shipping Act").

I. Complainant

A. Complainant Maher is a limited liability company ("LLC") registered in the State of Delaware.

B. Maher's corporate offices are located at 1210 Corbin St., Elizabeth, New Jersey and Maher has facilities located at Elizabeth, New Jersey.

II. Respondent

A. PANYNJ is a body corporate and politic created by Compact between the States of New York and New Jersey and with the consent of the Congress and having offices at 225 Park Avenue South, New York, New York.

B. PANYNJ owns marine terminal facilities in the New York New Jersey area, including in Elizabeth, New Jersey.

III. Jurisdiction

A. PANYNJ is a marine terminal operator within the meaning of the Shipping Act, 46 U.S.C. § 40102(14).

B. The PANYNJ and Maher are parties to agreement EP-249 filed with the Federal Maritime Commission ("Commission") and designated FMC Agreement No. 201131.

C. The PANYNJ and APM Terminals North America, Inc., formerly known as Maersk Container Service Company, Inc. ("APMT") are parties to agreement EP-248 filed with the Commission and designated FMC Agreement No. 201106.

D. The Commission has jurisdiction over this Complaint which is filed pursuant to the Shipping Act, 46 U.S.C. § 41301.

E. The Commission has jurisdiction over this Complaint because the PANYNJ is a marine terminal operator within the meaning of the Shipping Act, 46 U.S.C. § 40102(14) and the actions of the PANYNJ which are the subject of this Complaint are violations of the Shipping Act.

IV. Statement of Facts and Matters Complained of

A. Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

B. PANYNJ's agreement with APMT, EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

C. In EP-248, PANYNJ provided and continues to provide APMT a base annual rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher.

D. By contrast, in EP-249, PANYNJ required and continues to require Maher to pay a base annual rental rate of \$39,750 per acre and additionally required Maher to pay a basic rent escalator of two percent per annum such that by the end of the 30 year term of the lease Maher's basic rent rises to \$70,590 per acre, or an unreasonable difference of \$51,590 per acre more than the PANYNJ charges APMT.

E. Over the approximately 30 year term of the agreements, this undue prejudice disadvantaging Maher and undue preference advantaging APMT totals million of dollars.

F. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the investment requirements in the PANYNJ property that is the subject of the leases. PANYNJ required and continues to require Maher to invest greater sums than it required APMT to invest and PANYNJ provided and continues to provide APMT more favorable financing terms than it provided Maher, requiring Maher to repay the investments at a higher rate than PANYNJ provided APMT.

G. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the container throughput requirements and the consequences thereof that are the subject of the leases. PANYNJ required and continues to require Maher to provide greater throughput guarantees and risk greater consequences than it required and continues to require of APMT.

H. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the first point of rest requirement imposed on Maher, but not required of APMT.

I. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the security deposit requirement by requiring Maher to provide a \$1.5 million deposit not required of APMT.

J. Despite Maher's request to the PANYNJ to be treated equally with APMT, the PANYNJ refused to deal with Maher and continues to refuse to deal with Maher and has required the foregoing undue and unreasonable preferences favoring APMT and prejudices disadvantaging Maher.

K. With respect to EP-248, during the year 2008 the PANYNJ negotiated with APMT to address APMT's claim that the PANYNJ violated the Shipping Act by failing to provide certain premises in a timely fashion, but at the same time the PANYNJ refused to negotiate with Maher concerning its claim that the PANYNJ violated the Shipping Act with respect to EP-249 by failing to provide certain premises to Maher in a timely fashion.

L. There is no valid transportation purpose for the foregoing undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging APMT or for the PANYNJ's refusal to deal with Maher.

M. If there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose.

V. Violations of the Shipping Act

A. As a result of the foregoing, PANYNJ violated the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c).

VI. Injury to Maher

A. As a result of PANYNJ's aforementioned violations of the Shipping Act, Maher has sustained and continues to sustain injuries and damages, including but not limited to higher rents, costs, and other undue and unreasonable payments and obligations to PANYNJ not required of APMT amounting to a sum of millions of dollars to be determined more precisely at hearing.

VII. Prayer for Relief

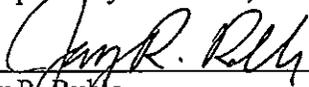
A. Statement regarding alternative dispute resolution procedures. Maher has met directly with the PANYNJ's leadership in an attempt to resolve this dispute, but the PANYNJ has

rebuffed Maher's requests. Therefore, Maher does not believe that alternative dispute resolution procedures would be productive and Maher has not consulted with the Commission's dispute resolution specialist.

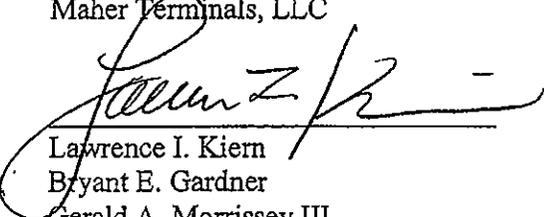
B. WHEREFORE, Complainant Maher prays that Respondent PANYNJ be required to answer the charges in this Complaint; that after investigation and due hearing in Washington, D.C.; that an order be made commanding PANYNJ to cease and desist from the aforementioned violations of the Shipping Act, providing to Maher the preferences provided to APMT, putting in force such practices as the Commission determines to be lawful and reasonable; and that an order be made commanding PANYNJ to pay Maher reparations for violations of the Shipping Act, including the amount of the actual injury, plus interest, costs and attorneys fees, and any other damages to be determined; and that the Commission order any such other relief as it determines appropriate.

Date: June 2, 2008

Respectfully submitted,



Jay R. Ruble
Director of Legal Affairs
Maher Terminals, LLC



Lawrence I. Kiern
Bryant E. Gardner
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VERIFICATION

I, Jay R. Ruble, Director of Legal Affairs of Complainant Maher Terminals, LLC, declare under penalty of perjury that the statements set forth in the foregoing are true and correct.

Date: June 2, 2008



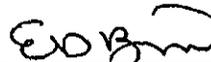
Jay R. Ruble
Director of Legal Affairs
Maher Terminals LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the forgoing document upon the persons listed below in the matter indicated, a copy to each such person.

Via Federal Express
Donald F. Burke, New Jersey Solicitor
The Port Authority of New York
and New Jersey
225 Park Avenue, South, 13th Floor
New York, NY 10003

Dated at Washington, DC, this 3rd day of
June 2008.



Ellen Berndtson

Exhibit L

Docket 08-03

Maher Terminals, LLC

v.

The Port Authority of New York and New Jersey

S E R V E D
June 9, 2011
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 08-03

MAHER TERMINALS, LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

MEMORANDUM REGARDING STAY PENDING APPEAL

I. BACKGROUND.

On May 16, 2011, I issued a Memorandum and Order on the motion for summary judgment filed by the Port Authority of New York and New Jersey (PANYNJ). *Maier Terminals, LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (ALJ May 16, 2011) (Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-term Discrimination Claims) (May 16 Decision). I noted that the Decision would be reviewed by the Commission. *Id.* at 46-48. I stated that:

Commission Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted. I will defer ruling on a stay pending receipt of memoranda from the parties stating their positions on staying this proceeding pending the Commission's review of this decision. On or before May 20, 2011, the parties are ordered to file memoranda addressing the presiding officer's authority to stay this proceeding pursuant to Rule 153 or any other ground pending the Commission's review of this decision, and the propriety of staying the proceeding pending Commission review. If the parties choose, they may file a joint memorandum.

Id. at 48.

On May 20, 2011, Maier filed Maier Terminals, LLC's Memorandum Regarding the Authority and the Propriety of a Stay Pursuant to the Order of May 16, 2011 (Maier Memorandum).

Maher argues that a stay should not be entered. The Secretary received [PANYNJ's] Memorandum in Support of a Stay Pending the Commission's Review of the Initial Decision Dated May 16, 2011 Granting in Part the Port Authority's Motion for Summary Judgment (PANYNJ Memorandum) on May 23, 2011. PANYNJ argues that the proceeding should be stayed while the Commission reviews the May 16 Decision.

II. CONTROLLING LAW.

Commission Rule 153 states "[u]nless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer." 46 C.F.R. § 502.153(d). The May 16 Decision states that "Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted." *Maher v. PANYNJ*, FMC No. 08-03, Memorandum at 48 (ALJ May 16, 2011) (Initial Decision).

In its memorandum in response to the May 16 Decision, Maher states that "[t]he May 16th [Decision] cites no authority for the proposition." (Maher Memorandum at 2.) *Crowley Liner Services*, the case on which Maher bases its argument, recognizes that Rule 153 permits the presiding officer to stay the proceeding when an appeal is allowed. *Crowley Liner Services, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 452, 453 (ALJ 2001) (editor's note discussing September 26, 2001 Notices; complete version of Notice available at 2001 WL 1632547). In its opposition to PANYNJ's motion for summary judgment, Maher relied extensively on the Commission's decision in *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc. (Inlet Fish)*, 29 S.R.R. 306 (FMC 2001). (Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 4-5, 23, 23-26.) The Commission described the administrative law judge's actions as follows:

The ALJ first issued an order holding in abeyance MSL's request to appeal the denial of its motion to dismiss, on September 27, 2000. The motion was to be held in abeyance pending the taking of discovery to ascertain jurisdictional facts. However, MSL, in a letter sent to the ALJ, reiterated its request that its appeal go to the Commission and that no discovery take place until the Commission had ruled. *Inlet Fish* then sent a letter in reply, MSL replied to *Inlet Fish*'s letter, and *Inlet Fish* replied to MSL's letter. On October 12, 2000, the ALJ altered his position, granted MSL's motion for leave to appeal to the Commission, and stayed the proceeding, and all discovery, pending the outcome of that appeal.

Inlet Fish, 29 S.R.R. at 310. Therefore, it is well established that Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted.

The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-674 (D.C. Cir. 1985), citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The consideration of the factors on a motion for stay is left to the sound discretion of the administrative law judge. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977). The applicant for a stay has the burden of demonstrating that a stay should be imposed. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1985). See *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 30 S.R.R. 1324, 1328-1334 (2007).

In a proceeding in which a party sought a stay of a Commission Order pending review by the court of appeals, the Commission articulated the test for a stay as follows:

[I]t is necessary to look to case law for guidance. In [*Virginia Petroleum Jobbers*] the Court of Appeals for the District of Columbia Circuit set out four standards to be applied in determining whether a stay should be granted. The four standards are as follows: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? [*Virginia Petroleum Jobbers*, 259 F.2d at 925.]

Although *Virginia Petroleum Jobbers* involved a petition for judicial stay pending review on the merits, the "irreparable harm" and "public interest" factors can be considered to have application where an administrative agency is being petitioned to stay one of its own orders pending an appeal.

Western Overseas Trade and Dev. Corp. v. Asia North America Eastbound Rate Agreement, 26 S.R.R. 1382, 1383-1384 (FMC 1994).

III. DISCUSSION.

The undersigned raised the issue of a stay *sua sponte* in the May 16 Decision. In response, PANYNJ argues that a stay should be entered, while Maher opposes entry of a stay. Although strictly speaking, the issue of a stay is not before me on PANYNJ's motion, as the party arguing for a stay, PANYNJ has the burden of demonstrating that a stay should be imposed.

(1) PANYNJ has not made a strong showing that it is likely to prevail on the merits of its appeal.

PANYNJ states that it intends to appeal the denial of its motion for summary judgment with respect to Maher's cease and desist claims, (PANYNJ Memorandum at 4), and I take official notice that on June 8, 2011, the Secretary received PANYNJ's exceptions. PANYNJ does not make a

strong showing in its Memorandum that it is likely to prevail on the merits of its appeal. Even if it made such a showing, PANYNJ recognizes that if it were to prevail, barring a settlement, this proceeding would continue on Maher's claims not subject to the May 16 Order. (PANYNJ Memorandum at 11.) PANYNJ has not demonstrated that this standard favors entry of a stay.

(2) PANYNJ has not shown that without such relief, it will be irreparably injured.

PANYNJ contends that it will be burdened with this litigation if a stay is not entered, but does not argue that it will be irreparably harmed. PANYNJ has not demonstrated that this standard favors entry of a stay.

(3) Issuance of a stay would substantially harm other parties interested in the proceedings.

PANYNJ contends that Maher would not be injured by a stay and would benefit from a stay because it would avoid unnecessary costs incurred prior to the Commission's decision on the appeal. (PANYNJ Memorandum at 11.)

Maher argues that under the May 16 Decision, it incurs higher costs under Lease EP-249 that cannot be recovered and will continue unless and until it obtains a cease and desist order.

A stay while the Commission reviews the May 16 Decision could substantially harm Maher's interest by delaying entry of a cease and desist order. PANYNJ has not demonstrated that this standard favors entry of a stay.

(4) The public interest does not support entry of a stay.

The public has an interest in efficient use of Commission resources as PANYNJ contends. However, there is a competing public interest in the resolution of complaints. PANYNJ has not demonstrated that this standard favors entry of a stay.

PANYNJ contends that Maher delayed seven and one-half year between the date it signed Lease EP-249 and the date it commenced this proceeding, Maher's discovery practices have resulted in delay while discovery motions are pending, and Maher has proposed and/or accepted stay of this proceeding for a total of twenty-six months of the thirty-six months since it filed its Complaint. (PANYNJ Memorandum, *passim*.) See also *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Oct. 9, 2008) (Order Staying Depositions Pending a Decision on Pending Discovery Motions) (staying discovery pursuant in part to Maher's Emergency Consent Motion to Stay Depositions Pending Resolution of Maher's Motion for Protective Order); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ July 23, 2010) (Memorandum and Order on Discovery Motions); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Aug. 5, 2010) (Order on Joint Motion for 45-Day Extension of Discovery Order Deadlines and for a Teleconference); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Aug. 27, 2010) (Order on Joint Statement of Status of Settlement Discussion and Motion for 40-Day Extension of Deadlines); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Oct. 18, 2010) (Order Granting Joint Motion for 60-Day Stay of Deadlines); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Dec. 17, 2010) (Order Granting in Part

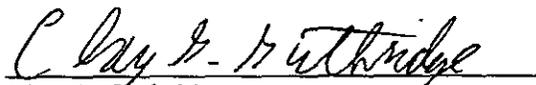
and Denying in Part Joint Motion for Extension of Deadlines). PANYNJ suggests that based on this record, Maher has no right to ask for a stay. The delay in filing the Complaint and the acquiescence to earlier stays do not preclude arguing against a stay pending appeal.

PANYNJ has not demonstrated that this proceeding should be stayed while the Commission reviews the May 16, 2011, Order. Therefore, no stay will be entered.

IV. PENDING DISCOVERY MOTIONS.

PANYNJ contends that if a stay is not entered, its pending discovery motion regarding what it describes as "Empire-related documents" should be decided. (PANYNJ Memorandum at 12-13.) Since the litigation schedule resumed in January 2011, *see Maher v. PANYNJ*, FMC No. 08-03 (ALJ Jan. 11, 2011) (January 11, 2011 Scheduling Order), the parties and subpoenaed deponents have filed fourteen (by my count) motions related to discovery up to and including "RREEF America L.L.C.'s Motion for Leave to File Reply and Reply to The Port Authority of New York and New Jersey's Joint Opposition to RREEF America L.L.C.'s Motion for Leave to Reply and Reply to The Port Authority of New York and New Jersey's Opposition to the Motion to Quash its Subpoena and Motion to Strike Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Extend Fact Discovery," oppositions to the motions, and exhibits for the motions and oppositions. Most of the motions and oppositions have been filed in both confidential and public versions. The papers currently stack up more than twenty-four inches high.

PANYNJ is correct that its pending discovery motion should be decided, and it appears that all of the pending discovery motions must be addressed. On or before June 15, 2011, the parties are ordered to file a joint statement indicating which, if any, of the issues raised by the motions have been resolved or are moot.


Clay G. Guthridge
Administrative Law Judge