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FEDERAL MARITIME COMMISSION

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 REPLY  
IN OPPOSITION TO MAHER TERMINALS, LLC'S 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**

Respondent, the Port Authority of New York and New Jersey (the "Port Authority") submits this reply in opposition to Maher Terminals, LLC's ("Maher") Exceptions to the Initial Decision on the Port Authority's Motion for Summary Judgment (the "Initial Decision" with Maher's Exceptions referenced herein as the "Exceptions").

**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 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, which was filed on June 3, 2008, is that its October 1, 2000 lease agreement with the Port Authority, Lease No. EP-249 (the "Maher Lease"), 08PA00001884, attached to the Levine Declaration in Support of the Port Authority's Motion for Summary Judgment ("Levine Decl.") as Ex. A, was unreasonably discriminatory in that, on its face, it provided Maher with less favorable terms in several specified respects than the January 6, 2000 lease agreement between the Port Authority and Maersk Container Service Company, Inc., EP-248 (the "APM Lease"),<sup>1</sup> 08PA00020315, Levine Decl. Ex. B. See Maher's Complaint ("Compl.") at 3, June 3, 2008, Levine Decl. Ex. C. Because Maher commenced this action more than seven and a half years after it signed its lease, the Port Authority moved for summary judgment with respect to all of Maher's "claims of Shipping Act violations based on unreasonable discrimination in lease terms," on the basis that the statute of limitations was a complete defense.<sup>2</sup> See The Port Authority's Motion for Summary Judgment ("Mot. Summ. J.") at 1, Feb. 25, 2011.

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*

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

<sup>2</sup> The Port Authority did not seek summary judgment with respect to non-lease term discrimination claims that the Port Authority violated the Shipping Act by refusing to settle the action *APM Terminals N Am., Inc. v. Port Auth. of N.Y. & N.J.*, Docket No. 07-01 (the "07-01 Litigation"). See Compl. ¶ IV.K. Although the Port Authority believes any such claim is specious, it did not seek dismissal on summary judgment at this time, inasmuch as any such claim appeared to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.*, within the three-year limitations period.



*v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted). To hold that claims based on disparate or unreasonable lease provisions need not be brought within three years of the leases' execution, and that they can instead be brought at any time during the lease term or within three years of any performance thereafter, would render the Shipping Act's statute of limitations meaningless. In the context of the thirty-year leases at issue here, Maher is effectively arguing that it may bring its lease-term discrimination claims as long 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 wrongful acts that had been completed decades earlier—many years after important fact witnesses will likely 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.

The Initial Decision granted the Port Authority's Motion for Summary Judgment on Maher's Lease-Term Discrimination Claims on the ground that they were barred by the Shipping Act's three-year statute of limitations. The Presiding Officer correctly concluded—after diligently initiating and pursuing a painstaking process to ensure that there were no genuine issues of material fact—that Maher knew or should have known all it needed in order to put it on notice as to its potential lease-term discrimination claims far more than three years prior to the filing of its Complaint. Indeed, he observed that it was uncontested that Maher had *actual* knowledge of all of the relevant differences between its lease and the APM Lease that form the basis for its Complaint when it signed its lease in October 2000, nearly eight years before bringing this action, including the rent per acre, financing terms, throughput provisions, first point of rest requirement, and security deposit requirements. Maher was also unquestionably aware of the terms of the port guarantee in the APM Lease, under which APM guarantees that its

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affiliate, Maersk shipping line, will annually deliver a specified number of Maersk's loaded boxes through the Port of New York and New Jersey, and specifies certain rental increases in the event of the failure to do so for two consecutive years. Maher does not suggest that any of the facts identified in the Initial Decision as undisputed are actually subject to dispute. Rather, Maher relies, as is its wont, on a series of misguided, convoluted and baseless arguments.

For example, Maher argues that it did not "discover" its claims until 2008, when it purportedly gained "conclusive information" that the differences between the APM and Maher Leases were "undue." Maher, however, cites no authority that supports the notion that the statute of limitations does not begin until a party, long aware of the facts necessary to put it on notice as to a potential discrimination claim, only then decides to retain a lawyer and purports to learn "conclusively" that the difference in treatment is "undue." This is not surprising, since the law is plain that a party's duty to inquire into its rights arises—and thus the statute of limitations begins to run—once it discovers its injury and its source. As the Initial Decision correctly held, a party is not required to obtain "conclusive information" concerning all aspects of a legal claim as a precondition to the start of the running of the statute of limitations. Acceptance of Maher's novel argument would eviscerate, and indeed make a mockery of, the statute of limitations.

Maher also argues that the parties' continuing to operate under the terms set forth in the lease that governed their relationship was a "continuing violation," such that the statute of limitations could *never* run during the entire operation of the lease. This argument completely misconstrues the case law, which makes plain that the existence of lease terms governing the relationship, including those for payment of rent, that were negotiated and fixed by contract long before the limitations period, does not constitute a continuing violation. To restart the statute of limitations, there must be new affirmative unlawful overt acts by the respondent.

[REDACTED]

Maher has not provided any evidence of any lease-term discrimination conduct following the signing of its lease. Rather, throughout the course of this litigation, Maher has repeatedly asserted, including in sworn interrogatory answers, that its claims are grounded squarely in the original facial terms of the APM and Maher Leases that were signed in 2000, and not upon any fresh unlawful conduct that occurred in the years that followed. *See, e.g.*, Maher's Resp. to Port Authority's First Set of Interrogs. at 10, Aug. 29, 2008, Levine Decl. Ex. H (stating that Maher's damages "are contained in the disparate terms of leases EP-248 and EP-249"); Maher's Reply in Opp'n to Respondent's Mot. to Compel Produc. from Complainant & Mot. for Protective Order at 3, Oct. 9, 2008, Levine Decl. Ex. D (denying that it was seeking "additional" damages beyond those allegedly created by the facial disparities in the lease terms); Complainant's Scheduling Report at 5, July 23, 2008, Levine Decl. Ex. G (admitting that it "is apparent from Maher's complaint and 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").

Maher finally trots out certain supposed "procedural" errors that are little more than *ad hominem* attacks upon the Presiding Officer. This is not the first time that Maher has made baseless accusations of bias against the Presiding Officer, here accusing him of "tak[ing] up the role of advocate for PANYNJ." *See* Exceptions at 49; *see also* Maher's Exceptions to Initial Decision Approving Settlement and Related Dismissals with Prejudice, *APM Terminals N. Am., Inc. v Port Auth. of N.Y. & N.J.*, Docket No. 07-01, at 14, Nov. 17, 2008 (accusing Presiding Officer of having "donned the mantle of settlement advocate"). Maher's accusations are as frivolous now as they were then. The record reflects that the Presiding Officer meticulously determined that there were no material facts relevant to the statute of limitations in dispute, and took pains to ensure that the parties' legal contentions were thoroughly aired and carefully



considered prior to rendering the Initial Decision. Maher's attacks are little more than a desperate attempt to avoid the dismissal of plainly time-barred reparations claims.

**FACTUAL BACKGROUND**

The following facts are uncontested and, indeed, Maher conspicuously fails to assert that any of the facts that the Presiding Officer determined to be undisputed are actually the subject of dispute.<sup>3</sup>

On June 3, 2008, Maher filed a Complaint before the Commission, alleging that the Port Authority had 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 rent per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement." Compl. ¶ IV.B. There is no dispute that Maher was aware of these allegedly "unduly and unreasonably more favorable lease terms" many years before it filed its Complaint. The APM Lease was executed as of January 6, 2000, and publicly filed with the Commission on August 2, 2000, as FMC Agreement No. 201106, as reflected in the Commission's date stamp. *See Maersk Lease*, 08PA00020315, Levine Decl. Ex. B. Maher signed its lease as of October 1, 2000, and has conceded that it knew, at that time, that the terms of its lease differed from those of the APM Lease. *See Maher's Responding Statement to PANYNJ's Statement of Material Facts as to Which PANYNJ Contends There Is No Genuine Dispute* at 5, Apr. 15, 2011.

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<sup>3</sup> 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 defending the summary judgment ruling based on the statute of limitations, that such claims are colorable.

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Maher's factual concessions were firmly grounded in the uncontradicted record evidence. For example, Brian Maher, Chairman and Chief Executive Officer of Maher at the time of the Maher Lease negotiations who negotiated and signed the Maher Lease, admitted that Maher "certainly knew that Maersk had lower rates than we did." Brian Maher Dep. 194:10-195:4, 287:12-19, June 9, 2008, Levine Decl. Ex. I. Randall Mosca, Maher's former Chief Financial Officer, who was also a core member of Maher's lease negotiating team, confirmed that Maher was aware of the APM Lease terms when it negotiated the Maher Lease: "[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 " 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 APM Lease with that of 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.

Additionally, in August of 2001, almost seven years prior to the filing of Maher's Complaint, an internal Maher memorandum—which was sent to Maher's top management, including Brian Maher and his brother and co-owner, Basil Maher, as well as to Mr. Mosca—analyzed and spelled-out the differences between the Maher and APM Leases in detail. *See* Mem. from M. Davis to R. P. Mosca Regarding Maersk Lease, Aug. 1, 2001, MT005220-5224, Levine Decl. Ex. J. The memorandum specifically compared the APM 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 identified and

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analyzed other terms that figure in Maher's current claims, *i.e.*, the differing investment requirements and the throughput provisions. *See id.* at MT005220-5222.

Despite being well aware of these differences, the Maher brothers never filed a Complaint. Rather, after signing Maher's Lease, the Maher brothers continued to operate the business for another six-and-a-half years thereafter, until they sold the business to RREEF Infrastructure ("RREEF") in mid-2007. *See* Brian Maher Dep. 12:21-13:16, June 9, 2008, Levine Decl. Ex. I; Mosca Dep. 108:10-13, June 11, 2008, Levine Decl. Ex. F. Nevertheless, Maher's new owner, [REDACTED] filed the Complaint instituting this action about a year later, but more than seven-and-a-half years after Maher executed its lease.

Maher thereafter repeatedly admitted that its claims were based entirely upon a facial comparison of the leases, *see* Maher's Resp. to Port Authority's First Set of Interrogs. at 10, Aug. 29, 2008, Levine Decl. Ex. H (stating that Maher's damages "*are contained in the disparate terms of leases EP-248 and EP-249*") (emphasis added); Maher's Resp. to Second Set of Interrogs. at 4, Aug. 29, 2008, Levine Decl. Ex. K (admitting 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") (emphasis added),<sup>4</sup> including specifically that its claim for reparations was fully fixed at the time its lease was signed. *See* Maher's Resp. to Port Authority's First Set of Interrogs. at 10, Aug. 29, 2008, Levine Decl. Ex. H (claiming damages based on the disparities in the lease terms for the entire

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<sup>4</sup> *See also* Complainant's Scheduling Report, at 5, July 23, 2008, Levine Decl. Ex. G (admitting that it "is apparent from Maher's complaint and 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").

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period of the lease, calculated to be “approximately \$474 million through the 30 year lease period”). Indeed, Maher specifically asserted that it was not seeking any “additional” damages beyond those allegedly created by the facial disparities in the lease terms. Maher’s Reply in Opp’n to Respondent’s Mot. to Compel Produc. from Complainant & Mot. for Protective Order, at 3, Oct. 9, 2008, Levine Decl. Ex. D. Moreover, Maher’s Complaint does not allege that the Port Authority undertook any new or independent acts with respect to allegedly discriminatory lease terms at any time after 2000, *i.e.*, during the more than seven-and-a-half years prior to the filing of this action.

In the Exceptions, Maher contends that it “discovered” following 2008 that the Port Authority would fail to enforce a guarantee in the APM Lease regarding the shipment of containers by one of APM’s affiliates. *See* Exceptions at 8-9. Under its lease, APM guaranteed that, beginning in 2008, a certain number of containers carrying cargo and shipped by Maersk shipping line (an affiliate of APM) would be sent to or from the port each year. As specified in the APM Lease, the consequence of a failure to meet this guarantee for two consecutive years was that APM’s base rent would be increased in the following year pursuant to a formula based upon the extent of the shortfall. *See* APM Lease at 08PA00020406-07, 08PA00020425, Levine Decl. Ex. B. Maher now claims that it did not know until 2008 that the Port Authority would respond to a failure to meet this guarantee by raising APM’s rent, in accordance with that specific provision, rather than by seeking somehow to compel delivery of the containers. Exceptions at 37-38. Nevertheless, it does not dispute that the port guarantee provisions are contained on the face of the APM Lease, which had been publicly filed in August 2000, before Maher signed its lease in October 2000.



Finally, the Exceptions allege, in wholly conclusory terms, that the Port Authority engaged in continuing violations in “failing to establish, observe, and enforce just and reasonable regulations and practices,” and also by unreasonably refusing to deal with Maher. *See* Exceptions at 10. But, as its interrogatory responses asserted, all of Maher’s claims, save for the claim that the Port Authority refused to deal with Maher in 2007 and 2008 to settle the 07-01 Litigation, *see supra* n. 2 & *infra* pp. 14-15, arise from and are based upon the differences between the facial terms of the APM and Maher Leases.

### LEGAL STANDARD

Because the Commission’s rules do not specifically address summary judgment, “the Commission considers motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and relevant case law,” including seminal United States Supreme Court cases such as *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp v Catrett*. *EuroUSA Shipping, Inc., Tober Grp. Inc., & Container Innovations, Inc.—Possible Violations of Section 10 of the Shipping Act of 1984 & the Commission’s Regulations at 46 C.F.R. § 515.27*, 31 S.R.R. 540, 548-49 (FMC 2008). Therefore, 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)<sup>5</sup>; *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.*,

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<sup>5</sup> 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.” Fed. R. Civ. P. 56 Advisory Committee Note to 2010 Amendments.

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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).

Contrary to Maher's contention that summary judgment is "generally disfavored" by the Commission, Exceptions at 11, and thus, by implication, inappropriate in this action, decisions under the Shipping Act forthrightly accept summary judgment as the appropriate way to resolve actions when no genuine issues of material fact remain for trial:

[T]he Supreme Court has encouraged the use of summary judgment as a means to eliminate unnecessary trials and to decrease litigation costs. . . . The Commission follows the federal rules of civil procedure absent a specific Commission rule and 'to the extent that they are consistent with sound administrative practice.' 46 C.F.R. 502.12. Therefore, the Supreme Court's endorsement of summary judgment is very pertinent to Commission proceedings. . . . *Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.*

*Universal Logistic Forwarding Co., Ltd.—Possible Violations of Sections 10(a)(1) & 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 325, 327 (ALJ 2001) (quoting Fed. R. Civ. P. 1; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)) (emphasis added).<sup>6</sup>

Moreover, Maher's argument, *see* Exceptions at 12, that summary judgment is *per se* inappropriate on discrimination claims is groundless, particularly where the summary judgment

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<sup>6</sup> *See also Kin Bridge Express Inc. & Kin Bridge Express (U.S.A.) Inc.—Possible Violations of Sections 8, 10(a)(1), 10(b)(1) & 23 of the Shipping Act of 1984*, 28 S.R.R. 604, 605 (ALJ 1998) ("There is no doubt that the summary-judgment procedure is an extremely valuable tool to eliminate useless trials and cut litigation costs."); *see also DSR Shipping Co., Inc. v. Great White Fleet, Ltd. d/b/a Chiquita Brands, Inc.*, 26 S.R.R. 627, 628, 631-32 (FMC 1992) (affirming the ALJ's dismissal of seven claims, including a Section 10(b)(12) claim for "unjust or unreasonable prejudice or disadvantage," on motion for partial summary judgment); *Harrington & Co., Inc. and Palmetto Shipping & Stevedoring Co., Inc. v. Ga. Ports Auth.*, 23 S.R.R. 1276, 1277-78, 1286 (FMC 1986) (affirming the ALJ's rulings on motions for summary judgment in action claiming "undue and unreasonable prejudice or disadvantage" and "unreasonable practices" in violation of Sections 10(b)(11) and 10(b)(12) of the Shipping Act).

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motion is founded not upon whether there was or was not unreasonable or undue discrimination, but upon a more objective issue such as a statute of limitations defense. While questions of whether certain differences are “undue” or “unreasonable” may present nuanced factual issues that are perhaps less susceptible to resolution by way of summary judgment, a motion seeking summary judgment based on a statute of limitations presents “an appropriate means for disposing of an action” unless “there is a genuine issue of fact as to when the limitations period began or expired and that fact is material to the question of whether the statute has run.” *Giordano v. Market Am., Inc.*, 599 F.3d 87, 93 (2d Cir. 2010).<sup>7</sup>

Accordingly, “[w]here, as in this case, summary judgment was granted on statute-of-limitations grounds,” the Commission’s task is neither more nor less than to “determine whether (1) the statute of limitations has run and (2) whether there exists a genuine issue of material fact as to when the plaintiff’s cause of action accrued.” *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001); *see also Fries v. Chi. & Nw. Transp., Co.*, 909 F.2d 1092, 1094 (7th Cir. 1990). “Because the statute of limitations is an affirmative defense, the burden is on the defendant to show that the statute of limitations has run”; if the defendant meets that burden, then “the burden shifts to the plaintiff to establish an exception to the statute of limitations.” *Campbell*, 238 F.2d at 775 (citing *Drazan v. United States*, 762 F.2d 56, 60 (7th Cir. 1985)).

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<sup>7</sup> Maher misleadingly describes *NPR, Inc. v. Bd. of Comm’rs of the Port of New Orleans*, 28 S.R.R 1011, 1016 (ALJ 1999), as “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 inappropriate.’” Exceptions at 12. But Maher’s quotations from the case were in no way connected with any statute of limitations issue.

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## ARGUMENT

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). Statutes of limitations serve 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 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 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 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).

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 Commission, 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.*

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*Shipping Auth.*, 18 S.R.R. 1079, 1081 (ALJ 1979); *see also W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 874, 885 (FMC 1993) (following *Seatrains*'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). As the Commission has observed, 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)).

**I. MAHER'S CLAIMS ACCRUED, AT THE LATEST, IN OCTOBER 2000**

It is clear from Maher's own statements in the course of this litigation that its purported injury—if any—occurred, and therefore its lease term discrimination claims accrued, at the time it signed its lease in October 2000. As the Initial Decision recognized. *see* Initial Decision at 41-42, that each of Maher's lease term claims accrued more than seven-and-a-half years before Maher filed its Complaint is entirely consistent with Maher's own sworn response to the interrogatory requiring Maher to identify all 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.

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Maher's Resp. to Port Authority's First Set of Interrogs. at 9-10, Aug. 29, 2008, Levine Decl. Ex.

H. Indeed, Maher expressly confirmed that all of its lease term discrimination damages stem from the entry into its lease with the Port Authority in October 2000 and disavowed that such damages flowed from 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. 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 APM.' *But Maher makes no such 'additional' damage claim.*

Maher's Reply in Opp'n to Respondent's Mot. to Compel Produc. from Complainant & Mot. for Protective Order at 3, Oct. 9, 2008. Levine Decl. Ex. D (internal citation omitted) (emphasis added). Maher has thus clearly and affirmatively asserted that all of its damages relating to its lease discrimination claims, including those over the entire thirty-year lease period, were fixed at the time Maher entered into its lease in October 2000. Accordingly, that is when all of its claims arising from purported lease disparities necessarily accrued.

**A. Application of the Discovery Rule Confirms that Maher's Claims Are Time-Barred**

To be sure, the Commission follows the "discovery rule," pursuant to which the statute of limitations period will not begin to run until "a party knew *or with reasonable diligence should have known that it had a claim.*" *Inlet Fish*, 29 S.R.R. at 311, 314 (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991)) (emphasis added); *see also W. Overseas Trade & Dev. Corp.*, 26 S.R.R. at 660. But on the undisputed facts of this case, Maher not only had reason to know, but had actual knowledge of, any potential lease term discrimination claims

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at the same time as the purported injury, the day it signed its lease more than seven and a half years prior to filing its complaint.

First, it is well settled that 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. *See W. 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 violated 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 filings occurred because the [independent action rates] are filed in publicly available tariffs.” *Id.*<sup>8</sup>

The Initial Decision correctly concluded that “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-24[8] and Lease EP-249 itself began to run on October 1, 2000.” Initial Decision at 26. Specifically, it was uncontested that:

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<sup>8</sup> On appeal, the Commission 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 in that case, 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 APM Lease itself may not have caused injury to Maher, it did put Maher on notice of the lease provisions contained therein. Accordingly, Maher’s Shipping Act claims accrued in October 2000, when Maher executed its own lease several months after the APM Lease had been publicly filed.

[REDACTED]

Maher knew the contents of Lease EP-248 and the allegedly more favorable treatment of Maersk/APM. That is, Mahe: (1) knew that Lease EP-249 required Mahe to pay \$39,750 per acre per month [sic: "year"] while Maersk/APM paid \$19,000 per acre per month [sic: "year"]; (2) knew that Lease EP-249 increased Mahe's rent at the rate of two percent per annum such that by the end of the 30-year term of the lease Mahe's basic rent rises to \$70,590 while Maersk/APM's rent would remain at \$19,000; (3) knew that Lease EP-249 required Mahe to invest greater sums than it required Maersk/APM to invest and PANYNJ provided Maersk/APM more favorable financing terms than it provided Mahe, requiring Mahe to repay the investment at a higher rate than required of Maersk/APM; (4) knew that Lease EP-249 required Mahe 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 Mahe not required of Maersk/APM; and (6) knew that Lease EP-249 imposed a \$1.5 million security deposit requirement on Mahe not required of Maersk/APM.

*Id.* at 23. As the Initial Decision also recognized:

When Mahe paid its rent on October 1, 2000, Mahe knew that it was paying \$20,750 more per acre per month [sic: "year"] than it would pay if its lease had the same rent as Lease EP-248; therefore, Mahe knew that its profit margin for October 2000 would be injured by being \$20,750 per acre less than it would have been if Mahe paid rent at the Maersk/APM rate. Mahe 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 Mahe contends is the measure of its damages. . . . Mahe knew that the two leases had different investment requirements. Mahe knew that the two leases had different throughput requirements. Mahe knew that the two leases had different first point of rest requirements for automobiles. Mahe knew that the two leases had different security deposit requirements.

*Id.* at 23-24. Accordingly, all of the specific differences in the lease terms identified in Mahe's Complaint, *see* Compl. ¶ IV.B, were known to Mahe as of October 1, 2000.

Mahe argues that the Initial Decision erred in concluding that Mahe's lease-term claims accrued when it entered its lease because Mahe purportedly lacked "conclusive information" of the merits of its claim at that time. *See, e.g.*, Exceptions at 45-46. Specifically, Mahe claims that it did not "discover" "conclusive information" that the differences between the Mahe and

[REDACTED]

APM Leases were “undue” until 2008, during discovery in the 07-01 Litigation. *See id.* at 45. But Maher does not dispute that it was aware of all relevant differences between the leases in October 2000—including the very differences that support Maher’s claim of injury. Instead, Maher argues that, despite having actual knowledge of all relevant lease-term differences, it failed to gain “conclusive information” as to whether it had a legal claim against the Port Authority until much later. *See id.* Maher’s position, however, flies in the face of the law and is based on a complete misreading of *Inlet Fish*.

Maher claims that, under *Inlet Fish*, a statute of limitations does not begin to run until a party obtains “conclusive information” of the merits of its claim. *See id.* at 38, 45. *Inlet Fish* reached no such holding. Rather, *Inlet Fish* plainly stated that a cause of action accrues when the complainant “knew or had reason to know that it had a claim” against the respondent. *Inlet Fish*, 29 S.R.R. at 314. In elaborating further on the discovery rule, the Commission used a party’s knowledge of whether it had suffered an *injury* as the key point in time in determining when the statute of limitations begins to run:

[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 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 *Connors*, 935 F.2d at 342).

The issue in *Inlet Fish* was when Inlet Fish learned, as a factual matter, that it had suffered an injury due to freight rate discrimination, *not* when it obtained conclusive information that it had a meritorious legal cause of action. In *Inlet Fish*, the respondent had transported Inlet Fish’s seafood products from Alaska to foreign destinations, and included the weight of

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packaging and wrapping (the “tare weight”) in the freight charges to the complainant. 26 S.R.R. at 307-08. The shipments at issue took place from June through August 1996. *Id.* At the same time, when respondent transported similar products for similarly situated shippers, those shippers, unlike Inlet Fish, were permitted to subtract the tare weight of their cargo in calculating the freight charges, in effect charging them lower freight rates than those charged to Inlet Fish. *Id.* at 308. Based on this difference in the calculation of the freight charges, Inlet Fish filed its complaint on January 21, 2000, some three and a half years after the shipments involved, alleging discrimination in violation of the Shipping Act of 1984. *Id.*

The respondent moved to dismiss, citing the Act’s three-year statute of limitations and arguing that Inlet Fish’s cause of action had accrued “upon the occurrence of an act that causes injury” (*i.e.*, in 1996 when the shipments occurred). *Id.* at 308. Inlet Fish responded that it “did not and could not have learned” of the alleged violations (*i.e.*, the difference in treatment between Inlet Fish and its competitors) until May 1998, and that a cause of action does not accrue until a complainant “discovers that he was injured.” *Id.* The respondent asserted that Inlet Fish had obtained bills of lading in 1996 that demonstrated the disparate treatment and that its principal had claimed, at a meeting in 1997, that the respondent “had permitted Inlet Fish’s competitors to subtract the tare weight in calculating rates,” thus demonstrating that Inlet Fish was aware of the differential treatment in 1996, more than three years prior to the complaint. *Id.* Inlet Fish, in response, argued that this 1997 statement had been based purely on rumors, and that it had “no meaningful evidence” until May 1998, when Inlet Fish’s principal spoke with a former employee of the respondent. *See id.* at 308-09.

In affirming the ALJ’s denial of respondent’s motion to dismiss, the Commission decided to apply the “discovery rule in this case,” noting that it would be “overly restrictive” to find that

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Inlet Fish's cause of action accrued in 1996, when the shipments in question occurred, because at that time Inlet Fish had no "conclusive information" of the violation. *See id.* at 313. In context, however, it is clear that the Commission was simply stating that Inlet Fish neither knew nor should have known of the differential treatment more than three years prior to the complaint. *See id.* at 313-14 ("Having decided that Inlet Fish's claim accrued when it knew or had reason to know . . ."). Prior to 1998, Inlet Fish merely had heard rumors from its customers and obtained bills of lading that were described as a "needle in a haystack." *Id.* at 308-09.

The instant situation could not be more different. It is beyond dispute, and indeed is uncontested, that Maher was fully aware at the time it entered into its lease of the differences between the terms of its and APM's leases. *See* Initial Decision at 32 ("Unlike Inlet Fish, Maher *knew* that it was being treated differently from the moment it signed its lease.") (emphasis added). Indeed, Maher has admitted as much, and conceded that these very differences formed the basis for its purported injury. *See supra* pp. 16-17. Maher's failure to inquire into, and pursue whatever legal rights it might have with respect to, such lease differences did not prevent the statute of limitations from beginning to run. A party cannot avoid a statute of limitations by sitting on its legal rights:

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 Freundenfeld Assoc., Inc. v McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) (citations omitted); *Erickson v Upjohn Co.*, No. 95-35207, 1996 WL 95249, at \*2 (9th Cir. Mar. 5, 1996) (unpublished opinion) ("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

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be time-barred”); *see also Plat Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1057 (9th Cir. 2008) (where plaintiff “suspects a factual basis” for a cause of action, he must “seek to learn the facts necessary to bring the cause of action in the first place—he cannot wait for them to find him and sit on his rights”) (internal quotation marks and citation omitted).

There is no requirement that a party “discover” every aspect of a claim for relief. It is enough that it learn of the fact of its injury and that the defendant caused it. *See Inlet Fish, 29 S.R.R.* at 314; *Kubrick*, 444 U.S. at 119-20. *Kubrick* illustrates this point. There, the plaintiff filed a medical malpractice action for negligence for treatment that occurred outside the statute of limitations period. *See* 444 U.S. at 113-15. The Supreme Court held that the discovery rule applied and the statute of limitations barred the claim even though the plaintiff did not learn that the treatment was negligent until within the limitations period. *See id.* at 123. The Court held that since the plaintiff knew prior to the limitations period that he was injured by the defendant doctor, the statute of limitations began to run even though he did not learn that the treatment was negligent until later. *See id.* By the same token, a complainant’s knowledge of disparate lease terms is sufficient to start the running of the Shipping Act’s statute of limitations, irrespective of whether it has also discovered that the disparity is “unreasonable” or “undue.” And that is so whether or not the fact that the disparity is unreasonable or undue is deemed to be an element of the cause of action or an affirmative defense. In either case, the knowledge of injury and its source constitutes inquiry notice and starts the running of the statute of limitations.<sup>9</sup>

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<sup>9</sup> Maher spends several pages arguing, without citing any authority, that case law distinguishing between “actual injury” and “legal injury” is inapplicable to Shipping Act cases. *See* Exceptions at 38-42. Maher’s failure to cite relevant authority is not surprising, since, as the Initial Decision discusses at 28-33, it is now well established that a party cannot avoid dismissal on statute of limitations grounds by claiming that it was unaware that it had suffered a “legal injury.” Contrary to Maher’s Exceptions, this generally applicable principle is in no way confined to Title



Maher argues without merit that the Presiding Officer erred by “eliminat[ing] the undue disparity element from its accrual analysis” by describing it as the Port Authority’s affirmative defense, rather than part of Maher’s claim. *See* Exceptions at 32-33.<sup>10</sup> But Maher does not cite any authority holding that a complainant’s claim does not accrue until it “discovers” that well-known differences in lease terms, which are the very source of complainant’s purported injury, are “undue.” Rather, Maher once again completely misrepresents case law when it describes the Commission’s opinion in *Inlet Fish*, as having “emphasized repeatedly that the case was about when Inlet Fish learned that its competitors had received *unduly* preferential treatment, not just *different* treatment.” Exceptions at 43 (emphasis in original) The decision does not contain even so much as a hint that the statute of limitations did not begin to run until Inlet Fish concluded that the differences were “undue.” Rather, as discussed *supra* p. 18, the issue was when Inlet Fish first learned, as a factual matter, that it had been treated differently in the calculation of freight costs than similarly situated competitors. *See* Initial Decision at 32 (“*Inlet*

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VII and Federal Tort Claims Act actions. *See, e.g., Forbes v. Eagleson*, 228 F.3d 471, 485 (3d Cir. 2000) (invoking the general rule that “a claim accrues in a federal cause of action upon awareness of the actual injury, not upon awareness that this injury constitutes a legal wrong,” and applying that rule to claims under the Racketeer Influenced and Corrupt Organizations Act (“RICO”)); *Elliott, Reihner, Siedzikowski & Egan, P C v. Pa. Emps Benefit Trust Fund*, 161 F.Supp.2d 413, 421 (E.D. Pa. 2001) (applying the same actual injury rule in determining accrual of First and Fourteenth Amendment claims and finding them time-barred); *see also Lukovsky v. City & Cnty. of San Francisco*, 535 F.3d 1044, 1048-50 (9th Cir. 2008) (invoking the general rule that “a claim accrues in a federal cause of action upon awareness of the actual injury, not upon awareness that this injury constitutes a legal wrong,” and applying that rule to claims under 42 U.S.C. §§ 1981, 1983, 1985 and 1986); *Wastak v Lehigh Valley Health Network*, 342 F.3d 281, 287 (3d Cir. 2003) (applying the distinction between “actual injury” and “legal wrong” to claims pursuant to the Age Discrimination in Employment Act (“ADEA”)).

<sup>10</sup> Whether the “undue” or “unreasonable” aspect of a Shipping Act violation is deemed an affirmative defense or an element of the claim, the law is plain that a complainant’s obligation to exercise diligence to inquire arises, at the latest, when it learns of its injury. Maher was unquestionably aware of its injury when it entered into its lease.

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*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”). Thus, Maher’s assertion that “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,” is nothing short of a fabrication.

Maher also cannot avoid the statute of limitations by arguing that it was not injured until it allegedly “discovered” “new facts” in 2008 “demonstrating” that the port guarantee was not a “unique cargo guarantee,” but rather would be enforced against APM by raising its base rent. *See* Exceptions at 8-9. The facts concerning the port guarantee were all right there for Maher to see on the face of the APM Lease that was publicly filed back in August 2000 *before* Maher signed its lease.<sup>11</sup>

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<sup>11</sup> To the extent that it is Maher’s position that the Port Authority, notwithstanding the contractually specified remedy of increasing APM’s base rent for failure to meet the port guarantee, was somehow required to seek a mandatory injunction or sue for specific performance of APM’s cargo commitments in the port guarantee, we note first that, in general, any such remedy is disfavored by courts. *See N.D. ex rel. Parents Acting as Guardians Ad Litem v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010); *INEOS Ams LLC v. Dow Chem. Co.*, 378 F. App’x 74, 77 (2d Cir. 2010) (in case decided under the Uniform Commercial Code, 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 Cnty. Coal Co.*, 799 F.2d 265, 279 (7th Cir. 1986) (“specific performance is available only if damages are not an adequate remedy”). Moreover, any such remedy would be particularly impractical in the context of trying to enforce an annual volume guarantee, the breach of which can only be determined through a retrospective annual look-back.

[REDACTED]

**B. Maher's Position, if Accepted, Would Lead to Absurd Results**

Maher lastly argues that “the I.D.’s approach to claim accrual under the Shipping Act is wholly impractical” because it would require “port users [to] 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.” Exceptions at 46. According to Maher, this would only “benefit[] violators of the Shipping Act who would have every incentive to conceal the undue nature of their discriminatory conduct . . .” *Id.* Maher’s argument is legally baseless, and is indeed preposterous. A terminal operator that knows that it is being treated differently from a similarly situated operator has every incentive to exercise diligence to investigate and protect its interests. If the different treatment is causing injury, the terminal operator can (and must) make inquiry and/or seek relief in a timely manner in order to preserve any rights it may have. That is the exact purpose and effect of a statute of limitations. Maher’s position, if accepted, would lead to the absurd result whereby a complainant with full knowledge of its injury could, in a case like this one involving a thirty-year lease, wait thirty-three years, until after all of the respondent’s witnesses are deceased, and only then claim that it did not discover that the differences that had been well-known to it were “undue.” Requiring a terminal operator to bring its request for reparations within three years of learning of its injury is plainly not, as Maher contends, “the outcome the Commission sought to prevent in *Inlet Fish* . . .” Exceptions at 46: *see supra* pp. 18-20. Rather, it is entirely consistent with the entire weight of United States Supreme Court and Commission case law on statutes of limitations. Any other approach would deprive the statute of limitations of any meaning and would do nothing to prevent the unfairness and burden of having to litigate genuinely stale claims.

[REDACTED]

**II. MAHER HAS FAILED TO DEMONSTRATE THAT THE PARTIES' PERFORMANCE OF MAHER'S LEASE CONSTITUTES A PERPETUALLY RENEWING VIOLATION OF THE SHIPPING ACT THAT CONTINUOUSLY RE-STARTS THE STATUTE OF LIMITATIONS**

As the Initial Decision recognized, the mere fact that the parties continued to operate under the lease which governed their relationship, the terms of which were fixed at the time of the lease signing, does not serve either to toll or restart the running of the statute of limitations on its lease term discrimination claims. Absent proof of new independent overt acts of discrimination by the Port Authority during the limitations period, *i.e.*, after June 2, 2005, Maher's lease term discrimination claims are time-barred. To the extent that the Port Authority received payments or other benefits under the Maher Lease during the limitations period (just as Maher received the benefits of its lease), such payments and benefits were simply the "unabated inertial consequences" of pre-limitations period 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. *See supra* pp. 8-9, 14.

The case law fully confirms these points. In *Zenith Radio Corp.*, cited by the Commission with approval in *Seatrain*, 18 S.R.R. at 1081 (construing the Shipping Act statute of limitations), the United States Supreme Court set out the basic rule. 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 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. The key point is whether and when the defendant affirmatively committed a new illegal act. In other words, as the Initial Decision recognized, *see* Initial Decision at 34, where a respondent has engaged in a discrete set

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of illegal acts outside the limitations period that may have continuing effects within it, relief is barred by the statute of limitations. But where a respondent engages in a continuing course of conduct that began outside the statute of limitations but continued within it, the statute of limitations is not a complete bar. The determining factor is whether the respondent has committed fresh overt acts in violation of the law during the statute of limitations period. *See id.* at 34.

*Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004), illustrates the point. In that case, the plaintiff claimed that performance and enforcement during the limitations period of an allegedly illegal contract—which 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. 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

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limitations period typically is not tolled by the requirements placed on the parties under the agreement.” *Id.*<sup>12</sup>

The Initial Decision thus correctly concluded that “current operation under the terms of Lease EP-249” is not “a continuing violation of the Act” and that “passive receipt of [rental payments] . . . is not an overt act of enforcement which will restart the statute of limitations.” Initial Decision at 41, 42. In reaching this conclusion, the Initial Decision recognized that “[t]he 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,” and “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.” *Id.* at 34.

The Exceptions assert that the Initial Decision “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

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<sup>12</sup> 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 a 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”); *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.”); *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1052-53 (5th Cir. 1982); *Hamilton Cnty Bd. of Cnty. Comm’rs v. National Football League*, 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); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F.Supp.2d 188, 229 (E.D.N.Y. 2003).

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claim.” Exceptions at 15. These assertions are plainly incorrect, and indeed Maher distorts the authorities it discusses beyond recognition.<sup>13</sup>

**A. Maher Fails in Its Attempts to Distinguish Applicable Case Law Relied upon in the Initial Decision**

Maheer attempts to sidestep the well-developed body of case law discussed in the Initial Decision by claiming that it consists of “inapposite” antitrust and employment law cases. See Exceptions at 15. Maher, however, cites no authority suggesting that these cases, which directly address statute of limitations issues in the context of alleged discriminatory conduct and the ongoing operation of allegedly unlawful contracts, are somehow “inapposite” in the Shipping Act context. Indeed, as discussed below, the cases upon which Maher relies in fact *support* the Initial Decision’s reasoning.

Maheer argues that *Varner*, as well as similar cases, are inapplicable because they are based on the “specialized requirements” of antitrust “tying-contract cases.” *Id.* at 24. Maher argues further that *Varner*’s (and similar cases’) holding that “mere payments under an

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<sup>13</sup> Maher first misconstrues FMC Rule 63(b) in arguing that a continuing violation exists so long as Maher simply alleges as much. Exceptions at 16 (“To the contrary, all that is required is that ‘complainant alleges that the matters complained of, if continued in the future, will constitute violations. . . .’”). Obviously a complainant cannot manufacture a genuine issue of material fact on the issue of whether the respondent has continued to violate the Shipping Act for purposes of a summary judgment motion that is founded upon the statute of limitations. Rule 63(b) does not purport to do anything more than validate the sufficiency of a pleading. It is well settled that for purposes of opposing a summary judgment motion, however, the non-movant may not rely on mere pleadings to establish the existence of a genuine issue of material fact. Rather, it is well settled that at that stage of the proceedings, a non-movant must come forward with evidence to support its factual position. *McKenna Trucking Co., Inv. v. A.P. Moller-Maersk Line & Maersk Inc.*, 27 S.R.R. 1045, 1051 (ALJ 1997) (“[P]laintiffs seeking to overcome defendants’ motion for summary judgment must proffer something more than merely the allegations in their complaints.”); see also Fed. R. Civ. P. 56; *Celotex*, 477 U.S. at 325. Maher has come forward with no evidence of discriminatory acts during the limitations period, and thus has failed to demonstrate a continuing violation for purposes of avoiding summary judgment.

[REDACTED]

anticompetitive agreement during a limitations period do not constitute a continuing violation” simply “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.” *Id.* at 30. But there is nothing about tying contracts or their performance that makes them any different for statute of limitations purposes than other contracts that are asserted to be illegal from their inception. Nothing in *Varner* or in the other cases referenced by Maher attempts to suggest any such limitation. Nor does Maher cite a single case or commentator that has so suggested.

Maher nevertheless argues that, “even in tying-contract cases, the actual rule is that tying-contract continuing violations *can* be established by continued operation of an unlawful contract.” Exceptions at 30. But the cases that Maher cites do not support any such proposition, but rather support the Initial Decision. For example, Maher cites *Aurora Enterprises, Inc. v. Nat’l Broad. Co.*, 688 F.2d 689, 694 (9th Cir. 1982), which involved a claim that syndication rights had been “tied” to network exhibition rights. *See* Exceptions at 30. The Ninth Circuit, while recognizing that “active enforcement of an illegal contract may, under certain circumstances, cause renewal of an injury and restart the statute of limitations,” made plain that mere receipt of a financial benefit under a contract during the limitations period does not constitute a continuing injury sufficient to restart the statute of limitations:

Since 1966, NBC has been entitled to receive syndication profits as a result of its contract with Xanadu. In 1973, defendant NTA purchased the assets of NBC’s syndication subsidiaries and took over syndication of NBC’s programs. NBC now receives syndication profits, if there are any, from NTA. Defendant NTA is entitled to a share of syndication profits under its contract with NBC. *However, the mere fact that a defendant receives a benefit today as a result of a contract executed in 1966 in which Xanadu was purportedly coerced to part with syndication rights, is not enough to restart the statute of limitations. Any other holding would destroy the function of the statute, since parties may continue*

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*indefinitely to receive some benefit as a result of an illegal act performed in the distant past.*

*Aurora Enterprises, Inc.*, 688 F.2d at 694. As in *Aurora*, the Port Authority is merely receiving “a benefit today as a result of a contract executed in [2000]” (*id.*), as to which Maher’s claims are clearly time-barred.<sup>14</sup>

Maher’s argument, unsupported by any authority, that *Varner* and other cases discussed above at pages 28-29 are inconsistent with the Commission’s holding in *Seatrain*, is specious. See Initial Decision at 36 (“*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.”). *Seatrain* was not a lease term discrimination claim. Rather, the claim there was based on allegedly improper refusals to allow use of a berth. In that case, *Seatrain* lost the ability to use its pre-existing berth, and sought permission to use a separate berth on several occasions, including during the limitations period. *Seatrain*, 18 S.R.R. at 1080-82. The respondent refused to permit such use on multiple occasions, again including during the limitations period. *Id.*

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<sup>14</sup> *Twin City Sportservice, Inc. v. Charles O. Findley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975); *Airweld Inc. v. Airco, Inc.*, 742 F.2d 1184, 1190 (9th Cir. 1984), and *Nat’l Souvenir Ctr., Inc. v. Historic Figures, Inc.*, 728 F.2d 503, 509-10 (D.C. Cir. 1984), also cited by Maher on page 30 of the Exceptions, likewise do not support Maher’s position that a continuing violation exists merely because the parties’ relationship continues to be governed by a purportedly unlawful agreement. For example, in *Twin City Sportservice*, the defendant was actually monopolizing a market by enforcing an exclusive concession contract through litigation in the limitations period. See *Twin City Sportservice*, 512 F.2d at 1269-70. The Ninth Circuit in *Airweld* upheld the district court’s conclusion that “no overt acts” had occurred during the relevant limitations period. See *Airweld*, 742 F.2d at 1189-90. Finally, the D.C. Circuit in *National Souvenir* agreed with the district court in noting that mere receipt of payments under an agreement, without further anticompetitive harm does not constitute a continuing violation because the statute of limitations would otherwise “have little force whenever a contract allegedly executed in violation of the antitrust laws provided for long term payments: there would be no repose until four years after the last installment payment.” *Nat’l Souvenir*, 728 F.2d at 512.

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Respondent's motion to dismiss Seatrain's complaint based on the statute of limitations was denied because the complaint alleged numerous refusals to permit Seatrain permission to use the berth, including some during the limitations period. *Id.* at 1082. Relying on *Zenith*, the ALJ held that while the statute of limitations would have barred the claim if it had been based on 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." *Id.* at 1082.

Unlike this case, *Seatrain* did not concern two parties who simply continued to operate in accordance with the written terms of a lease that had been fixed by agreement prior to the statute of limitations period. Indeed, *Seatrain* is both factually distinguishable from cases like *Varner* and the instant case, and entirely consistent with *Varner* in requiring a new and independent wrongful act within the limitations period in order to avoid a complete statute of limitations bar. *See* Initial Decision at 37 ("*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 reparations award for the unabated inertial consequences of the allegedly discriminatory terms of Lease EP-249.>").

Similarly, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) and *Baker v. F & F Inv. Co.*, 489 F.2d 829 (7th Cir. 1973), which Maher complains was "ignored" by the Initial Decision. Exceptions at 27, likewise support the Initial Decision. In *Hanover Shoe*, the defendant refused to sell shoe manufacturing machinery to plaintiff, insisting instead that plaintiff lease this equipment from defendant. *See Hanover Shoe*, 392 U.S. at 483. The holding in *Hanover* was premised on new and independent refusals to sell during the limitations period constituting a fresh continuing violation, as these refusals to sell remained "an instrument of [defendant's continued] monopolization" of plaintiff's market, including during the limitations

[REDACTED]

period. *See id.* at 483-84, *see also Hanover Shoe, Inc. v. United Shoe Mach Corp.*, 245 F.Supp. 258, 296 (M.D. Pa. 1965) (“The injury and claimed damage flows from a continuing violation of [plaintiff’s] right to deal in a few market.”), 297 (“[A]s long as [defendant] continued to monopolize the shoe machinery market [plaintiff] could bring an action for the continued monopolization within the [applicable limitations] period . . .”). It was on this basis that the court held the claim not to be completely time-barred.<sup>15</sup>

Maher’s attempts to distinguish the United States Supreme Court’s decision in *Ledbetter* by arguing that it is limited to the unique characteristics of Title VII disparate treatment claims similarly lack merit. In *Ledbetter*, the Supreme Court applied the general rule that a discriminatory act must take place within the limitations period in the specific context of an employment discrimination case. *See* 550 U.S. 618, 625 (2007). *Ledbetter* alleged that a history of discriminatory poor performance evaluations given outside the limitations period led to lower pay during the limitations period. *Id.* The Supreme Court rejected that argument, holding that *Ledbetter*’s paychecks were merely the “current effects” of “prior, uncharged discrimination,” which was barred by the statute of limitations. *Id.* at 628. The *Ledbetter* holding has been applied in a variety of non-Title VII cases.<sup>16</sup> While Maher notes that Congress has since

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<sup>15</sup> Similarly, in *Baker*, cited in Maher’s Exceptions at page 28, the court reasoned that where there was a conspiracy between the defendants and new and different harm was inflicted on plaintiffs during the limitations period, the applicable statute of limitations began to run from the last overt act in furtherance of that conspiracy. *See Baker v. F & F Inv. Co.*, 420 F.2d 1191, 1200 (7th Cir. 1970) (“As in *Hazeltine Research Inc. v. Zenith Radio Corporation* . . . the limitations periods commence to run from the last overt act of the conspiracy. . .”).

<sup>16</sup> *See Garcia v. Brockway*, 526 F.3d 456, 462-63 (9th Cir. 2008) (dismissing a claim for violations of the Fair Housing Act’s design/construction requirements as time-barred because, under *Ledbetter*, “current effects alone cannot breathe life into prior, uncharged discrimination”); *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1207 (10th Cir. 2007) (applying *Ledbetter* in analysis on timeliness of Americans with Disabilities Act (“ADA”) claims); *Randle v. Local 28*

[REDACTED]

abrogated *Ledbetter*, it is clear that the Lilly Ledbetter Fair Pay Act of 2009 merely created a special rule applicable solely to paycheck employment discrimination and did not purport to alter the principles applied by the courts in construing statutes of limitations more generally. *See* Pub. Law 111-2, 123 Stat. 5-7 (Jan. 29, 2009) (observing that the *Ledbetter* decision “ignore[d] the reality of *wage discrimination*” and amending civil rights statutes “with respect to discrimination in compensation”) (emphasis added).

**B. Maher’s Reliance On Various Precedents As Supporting the Notion that Mere Performance During the Limitations Period of Lease Terms Entered Prior to the Limitations Period Constitutes a Continuing Violation Is Utterly Misplaced**

Citing a number of Commission and court decisions, such as *Ceres Marine Terminal v. Md. Port Admin.*, 27 S.R.R. 1251 (FMC 1997); *Ballmill Lumber & Sales Corp. v. Port Auth. of New York and New Jersey*, 10 S.R.R. 131 (FMC 1968); and *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), Exceptions at 19-22. Maher argues that “continuation of unlawful provisions of an agreement constitutes a continuing violation of the Shipping Act.” Exceptions at 19-22. But none of the

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*Int’l Longshoremens Ass’n/AFL-CIO*, 255 F.App’x 842, 845-47 (5th Cir. 2007) (applying *Ledbetter* in concluding that claims under the Labor-Management Reporting and Disclosure Act were time-barred); *Shea v. Rice*, 587 F.Supp.2d 166, 169 (D.D.C. 2008) (applying *Ledbetter* to Equal Protection Clause claims in finding them time-barred); *Coghlan v Peters*, 555 F.Supp.2d 187, 195-98 (D.D.C. 2008) (applying *Ledbetter* to ADEA claims in finding them time-barred); *Webb v. Deluxe Fin. Servs., Inc.*, No. 05-2137-CM, 2008 WL 3850679, at \*4-5 (D. Kan. Aug. 15, 2008) (applying *Ledbetter* to § 1981 claims in finding them time-barred). Moreover, *United Air Lines, Inc. v. Evans*, cited in the Initial Decision, has likewise been relied upon by federal courts in dismissing non-Title VII claims as time-barred where the discriminatory practice took place outside the limitations period. *See* 431 U.S. 553 (1977). *See also* *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1225-27 (10th Cir. 2006) (applying *Evans* in finding that ADEA and ADA claims were time-barred); *Cox v. City of Memphis*, 230 F.3d 199, 202-05 (6th Cir. 2000) (applying *Evans* in finding that § 1983 claims were time-barred); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1434 (11th Cir. 1998) (applying *Evans* in finding that ADEA claims were time-barred).

[REDACTED]

cases that Maher cites actually supports that proposition. Rather, the cases Maher cites either did not address the issue at all, or, as the Initial Decision correctly pointed out, merely referenced the issue in an offhand manner and unsupported *dicta*.

For example, Maher cites *Ceres* for the purported holding that the alleged lease term discrimination at issue in that case was “continuing in nature,” as if to suggest that had any bearing on the statute of limitations issue in this case. Exceptions at 19. But the statute of limitations was not at issue in *Ceres*. In *Ceres*, the lease term discrimination complaint was brought well within the three year limitations period. *See Ceres*, 27 S.R.R. at 1253. The respondent attempted to defend on the basis that *Ceres*, by signing its lease and then waiting eighteen months to file its complaint, was estopped from asserting a Shipping Act claim based on discriminatory lease terms. *Id.* at 1263. The Commission rejected this estoppel defense, reasoning 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.” *See Ceres Marine Terminal v. Md. Port Admin.*, 29 S.R.R. 356, 372 (FMC 2001) (emphasis added). This statement—particularly its reference to the “*full* statutory period of limitation”—reflects the Commission’s view that the Shipping Act’s statute of limitations in a case arising out of disparate lease terms begins to run at the time the complainant enters into its lease and does not begin anew with each act of implementation thereunder. The Commission’s use of the words “*full*” would have made literally no sense if the Commission believed that *none* of the three-year limitation period had actually yet elapsed when the complaint was filed eighteen months after lease execution. To the contrary, it is clear that the Commission believed that the complainant’s

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cause of action in *Ceres* accrued upon the lease signing and that the “full” three-year limitation period would expire three years thereafter.<sup>17</sup>

Similarly, *Ballmill*, which Maher cites as a case “successfully challeng[ing] a provision in lease with port more than six years after agreement was entered into,” Exceptions at 19, did not address the statute of limitations at all, much less whether any limitations-period conduct in that case constituted a “continuing violation” such as would restart the statute of limitations. And indeed, following a hearing before the ALJ, reparations were denied because the complainant was unable to demonstrate injury sufficient to justify an award. *See Ballmill*, 10 S.R.R. at 144.

Maher’s description of *River Plate* as containing the position that an “agreement provision was a continuing violation of the Shipping Act even though complainant agreed to it and operated under it for six years,” Exceptions at 19, is not even close. The action in *River Plate* was brought by an association of common carriers that had a freight agreement with the defendant obligating it to use the plaintiffs for particular shipments. The plaintiffs filed their complaint on October 6, 1953 alleging that the defendant breached this agreement on September 30, 1953. *River Plate*, 124 F.Supp. at 89. In response, the defendant asserted—and the district court agreed—that the agreement was unlawful because the Federal Maritime Board had not approved it. *Id.* at 93. The district court’s decision in favor of the defendant never mentioned either the statute of limitations or whether the conduct at issue constituted a continuing violation.

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<sup>17</sup> *See also Ceres Marine Terminals, Inc. v. Md. 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”) (emphasis added); *Md. 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”) (emphasis added).



Maher cites *NPR, Inc. v. Board of Comm'rs of the Port of New Orleans*, 28 S.R.R. 1011 (ALJ 1999) as rejecting the proposition 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.”

Exceptions at 21. Again, Maher’s description of the holding in that case is totally misleading. In *NPR*, the complainant challenged a cancellation agreement that required it to continue making payments under a cancelled lease. See *NPR*, 28 S.R.R. at 1012. The complaint was brought in November 1998, which was more than two years, but less than three years, after the cancellation agreement had been executed. *Id.* at 1011; 2000 WL 259985 (Order dated Mar. 16, 2000) (stating date of complaint). The respondent moved to dismiss for summary judgment, asserting that the Commission lacked subject matter jurisdiction over the cancellation agreement and the parties because the respondent was not a “common carrier operating in foreign commerce.” *Id.* at 1013. The ALJ denied the respondent’s motion, because “it would be error to dismiss the instant complaint or to decide the jurisdictional issue or to issue summary judgment on the basis of the presently incompletely developed record.” *Id.* at 1017. The ALJ also stated in *dicta*, and without citing to any authority or even mentioning the notion of a continuing violation or injury, that the complaint would have been timely under either the two-year statute of limitations found in the 1916 Shipping Act, or the three year statute of limitations in the 1984 Shipping Act, because “the Board’s practice in demanding payments over the life of the canceled lease constitutes ongoing conduct. . . .” *Id.* at 1014. As correctly noted in the Initial Decision, “the issue of whether the continuing violation rule would permit a reparations award in the absence of

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an overt act of discrimination within the limitations period was not relevant and this statement is *obiter dictum*.” Initial Decision at 39.<sup>18</sup>

Maheer cites *Seacon* as “recogniz[ing] 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.” Exceptions at 20. Maheer, however, once again relies on offhand *dicta* and otherwise totally mischaracterizes the decision. In that case, unlike other similarly situated terminal operators at the port, *Seacon* had been provided with cranes powered by diesel fuel that were more expensive to operate than the electric cranes provided to other similarly situated terminal operators. *See Seacon*, 26 S.R.R. at 271-72. *Seacon*’s lease contained a most favored nations (“MFN”) clause providing that it would not pay more for its premises than other operators. *See id.* at 252. *Seacon* argued that this clause also applied to equipment, such as cranes, and that the MFN clause was violated because of the higher costs it incurred to operate its cranes as compared with those operated by the similarly situated terminal operators. *See id.* at 271. The ALJ rejected this argument, concluding that the MFN clause “related only to land and premises, and did not relate to cranes and equipment.” *See id.* at 277. The ALJ nevertheless stated, in *dicta*, that if *Seacon*’s crane terms had “provided that it had to pay the diesel fuel rates, or rates higher than electricity rates, to operate its two diesel Starporter cranes, *Seacon* appears probably to have suffered rate discrimination. . . .” *Id.* Then, without citing to any authority, and in a statement entirely unnecessary to the decision, the ALJ went on to write that “[t]o the extent that the disparity in fuel costs continued after [the

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<sup>18</sup> As the Initial Decision also correctly noted, *id.* at 39, *NPR* cited no authority for the notion that demanding payments over the life of a canceled lease constitutes ongoing conduct, and is inconsistent with the holdings of the many cases in which the issue was squarely presented.

[REDACTED]

limitations period began], these costs would not be barred.” *Id.* The Initial Decision correctly noted that the ALJ’s decision in *Seacon* was based on the holding that the MFN clause did not apply to cranes, thus rendering the ALJ’s statements on statute of limitations “quite clearly” *dicta*. Initial Decision at 38 (“This discussion is quite clearly unnecessary to the decision in the case that the clause did not apply to cranes and is *obiter dictum*.”).<sup>19</sup>

Maher claims that *Odyssea Stevedoring of Puerto Rico, Inc. v. PRPA*, 30 S.R.R. 484, 503 (ALJ 2004), “held that the allegations of continuing failure to provide preferential lease terms, among others, constituted continuing violations.” Exceptions at 22 n.4. Once again, however, *Odyssea* did not address the statute of limitations at all, much less whether the conduct at issue constituted a continuing violation sufficient to restart the statute of limitations. Rather, the respondent sought summary judgment because the complainant had allegedly failed to “provide competent evidence of damages incurred by the alleged wrongdoing of Respondent.” *Odyssea*, 30 S.R.R. at 495. The decision merely held that the complainant had proffered sufficient

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<sup>19</sup> Maher further misconstrues *Seacon* by arguing that the Initial Decision mistook a “claim for diesel fuel rate discrimination . . . with a separate discrimination claim concerning use of cranes.” Exceptions at 20 n.2. But there was no separate “claim for diesel fuel rate discrimination” in *Seacon*. Rather, *Seacon* argued that its crane pricing was discriminatory because it paid higher costs for using a diesel powered crane rather than one powered by electricity. See 26 S.R.R. at 271-72 (discussing “crane cost discrimination” claim); see also *id.* at 271 (listing *Seacon*’s allegations of unfavorable lease terms as relating to renewal option, “land rentals,” and “crane rentals” only: “[t]hus, it is alleged that the Port violated the ‘most favored nation’ clause in *Seacon*’s lease”); *id.* at 252 (“complainant seeks damages (a) . . . for being put out of business . . . (b) . . . for land rental discrimination . . . (c) for crane rental discrimination . . . [and] interest and attorney’s fees” exclusively); *cf.* Initial Decision at 38 (“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.”) (emphasis in original); *id.* (“Therefore, to the extent that [*Seacon*] would lead to a conclusion that Maher may seek a reparation award in the absence of an overt discriminatory act within the limitations period . . . I respectfully disagree.”).

[REDACTED]

evidence of injury to survive a motion for summary judgment. *See id.* at 503. As the Initial Decision correctly noted, “[t]he effect of the statute of limitations on a claim was neither raised nor discussed” in the decision denying the motion. *See* Initial Decision at 41.

Finally, Maher argues that *Int’l Shipping Agency, Inc. v. The Puerto Rico Ports Auth.* (“*Intership*”), 30 S.R.R. 407, 425-26 (ALJ 2004) applied the “FMC’s continuing violation rule because ‘the complainant clearly includes allegations of continuing offenses and seeks reparations in connection with those violations.’” Exceptions at 21. At least *Intership* did involve the statute of limitations. But it is clearly distinguishable from this case on its facts. In *Intership*, the ALJ rejected the statute of limitations defense because the respondent allegedly committed several affirmative unlawful actions during the limitations period, including (i) failing to deliver land it was contractually obligated to deliver, (ii) refusing to provide facilities comparable to those it failed to deliver, (iii) ignoring requests to lease other facilities on a temporary basis, (iv) failing to repair certain piers, and (iv) pretextually denying certain berths. *See Intership*, 30 S.R.R. at 426 n.51-52. The Initial Decision thus correctly noted that the respondent’s liability in *Intership* arose from repeated conduct that continued into the limitations period and not, as here, from the mere existence of contractual obligations governing the parties’ relationship that had been fixed well outside the limitations period. *See* Initial Decision at 39-40.

Accordingly, none of the cases that Maher cites support its position that continued operation of the terms of the Maher Lease constitutes a continuing violation of the Shipping Act.

**C. Maher’s Attempt to Manufacture a Continuing Violation by Labeling Its Lease Term Discrimination Claims as a Refusal to Deal Is Meritless**

Unable to demonstrate that new and independent conduct is not required to amount to a continuing violation, or that mere performance of lease terms fixed outside the limitations period

constitutes a continuing violation, Maher attempts to recast its claims in a manner that it never pleaded—that the Port Authority has been under an absolute affirmative obligation every day since October 2000 to offer Maher the terms contained in Maersk’s Lease, and the Port Authority’s “failure to fulfill its absolute duty” constitutes a continuing refusal to deal. *See* Exceptions at 18. To make this argument, Maher must make several wild leaps. It first argues that the Port Authority, under *Ceres*, has a “continuing absolute duty” to “provide volume discount terms in a reasonable, even-handed manner.” *Id.* at 17-18. Maher then argues that 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 these arrangements with other port users.*” *Id.* at 18 (emphasis in original). Finally, Maher asserts that a port authority “may not unreasonably refuse to deal with port users like Maher, and a refusal to deal constitutes a continuing violation.” *Id.* Attempting to string these points together, Maher contends that the Port Authority was under an affirmative duty to offer Maher the terms contained in the APM Lease, that this duty continued even after Maher signed its lease, and that each day it failed to perform this duty amounted to a “refusal to deal” as to which the statute of limitations began to run anew.

This argument lacks any merit whatsoever. In the first place, Maher has never pled such a refusal to deal claim. Rather, the only “refusal to deal” alleged in the complaint is based on the Port Authority’s purported refusal to pay hundreds of millions of dollars to settle Maher’s lease discrimination claim – which the Port Authority believed to be groundless – when it settled APM’s very different claim in the 07-01 Litigation for zero dollars. *See* Compl. at 4; *supra* n.2. Maher’s attempt to re-cast its lease term discrimination claims as an ongoing refusal to deal is merely a transparent exercise in conclusory re-labeling in an effort to evade the well-settled line



of cases relied upon in the Initial Decision showing that its claims are time-barred.

\* \* \* \* \*

In sum, Maher’s lease term discrimination claims are based entirely on a facial comparison of the terms of leases that were executed well outside the limitations period, and the only conduct that has occurred during the limitations period consists of the “unabated inertial consequences” of those lease terms. Accordingly, Maher’s request for reparations is barred by the statute of limitations.

**III. MAHER HAS NOT ESTABLISHED ANY PROCEDURAL ERRORS**

Maher claims that certain purported “procedural errors” “decisively tilt[ed] the playing field against Maher.” Exceptions at 46. Maher first argues that the Initial Decision erred by “categorically excluding facts relating to events that occurred after October 2000 pertaining to discovery of Maher’s claims and other relevant issues.” Exceptions at 47. Maher claims that the “facts” that were purportedly “excluded” demonstrate that Maher “discovered” in 2008 and afterward that the lease disparities between the Maher and APM Leases were “undue.” *Id.* at 9-10. As explained above, Maher’s position that its claims did not accrue until it made this “discovery” is baseless as it was plainly aware of its injury at the time it signed its lease. *See supra* pp. 9-10. Therefore, excluding these “facts” was appropriate and did not prejudice Maher in any way.

Maher next argues that the Presiding Officer erred by granting summary judgment with respect to Maher’s “unreasonable practices” claim on the grounds that the Port Authority did not move for summary judgment with respect to that claim, and also by advancing arguments that were not raised by the Port Authority. *See* Exceptions at 48-49. In doing so, Maher claims that “[t]his is not the first time the Presiding Officer has taken up the role of advocate for PANYNJ

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by introducing *sua sponte* new arguments not raised by PANYNJ.” *Id.* at 49. This is nonsense. But it is also not the first time that Maher has resorted to making baseless *ad hominem* attacks against the Presiding Officer, and the Commission should summarily reject them now, just as it correctly did the last time.<sup>20</sup>

In any event, Maher is just playing with words. All of Maher’s “unreasonable practices” allegations – in fact, all of its claims other than the “refusal to deal” claims arising from a purported refusal to negotiate a settlement of the 07-01 Litigation in 2007-2008, *see supra* n.2 – are based on the injury it purportedly suffered by reason of the facial differences between the terms of its and APM’s leases of which Maher was fully aware when it signed its lease in 2000. *See* Compl. at 3-5 (alleging that the Port Authority violated “the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c)” and that its “agreement with APMT, EP-248, violated the

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<sup>20</sup> In opposing the settlement between APM and the Port Authority in the 07-01 Litigation, Maher accused the ALJ of “*sua sponte* [seeking] to develop evidence in support of his theory to justify the settlement, one not advanced by movants and then [shifting] the burden to Maher to show the settlement should not be approved. . . . The Presiding Officer improperly assumed the position of advocate for the settlement. . . . The Presiding Officer should judge impartially and not assume the mantle of advocate for the settlement, especially in a proceeding where one of the parties has objected to the settlement as prejudicing its interests.” Maher’s Exceptions to Initial Decision Approving Settlement and Related Dismissals With Prejudice, at 14-17. The Commission, of course, approved the settlement, obviously rejecting Maher’s outlandish claim of bias.

Here, in addition to accusing the Presiding Officer of acting as the Port Authority’s advocate, Exceptions at 49. Maher’s Exceptions are replete with specious and unwarranted attacks on him, including that he and the Initial Decision allegedly (i) “fail[ed] to comprehend” the Port Authority’s alleged obligations, *id.* at 17, (ii) “strain[ed] to distinguish” certain case law, *id.* at 21, (iii) reflected a “fundamental failure to appreciate” purported obligations, *id.* at 21, (iv) “misconstrue[d]” Commission decisions, *id.* at 31, (v) “mischaracterize[d]” Maher’s arguments, *id.* at 38, (vi) took “extraordinary lengths to dismiss Maher’s reparations remedy,” *id.* at 47, (vii) engaged in “result oriented” analysis, *id.*, and (ix) engaged in a “repeated practice of springing new arguments on Maher *sua sponte* to benefit PANYNJ,” *id.* at 50. In fact, to the contrary, the Presiding Officer engaged in a meticulous process to ensure that no disputed issues of material fact existed and that all arguments were thoroughly aired and fairly considered.

[REDACTED]

foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably *more favorable terms* than provided to Maher in EP-249”) (emphasis added); Maher’s Resp. to Port Authority’s First Set of Interrogs. at 10 (identifying Maher’s alleged damages as “the additional costs it incurred relevant 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.*”) (emphasis added); *see also id.* at 10-11 (listing damages as a result of specific, disparate lease terms). And it is clear that the Port Authority’s summary judgment motion sought relief as to “claims of Shipping Act violations based on supposed unreasonable discrimination in lease terms,” Motion for Summary Judgment at 1, which plainly encompassed all of the pleaded “unreasonable practices’ claims.”<sup>21</sup>

\* \* \* \* \*

In sum, there is no reason for the Commission to deviate from a straightforward application of the statute of limitations in this case. To the contrary, there is every reason to enforce the statute of limitations here. Maher deliberately chose to enter into its lease with its eyes wide open to the differences between the terms of its own lease and the APM 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, a private equity investor.

[REDACTED] that Maher suddenly decided to challenge the lease terms that had been fixed—and had been well-

<sup>21</sup> Maher argues that it should “[be provided] a right of reply” because of the “Presiding Officer’s repeated practice of springing new arguments on Maher *sua sponte* to benefit PANYNJ. . . .” Exceptions at 50. As noted above, the Presiding Officer has not sprung any “new arguments” on Maher, and has acted in an even-handed manner at all times. Maher should not be rewarded for impugning the impartiality of the Presiding Officer, and its request for a “right of reply” should be rejected out of hand.

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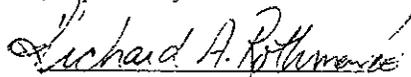
known to Maher—many years earlier. But nothing had changed. It is perfectly obvious that Maher's lease-term claims are based squarely and entirely upon the original terms of these same leases. And there is no reason to reward Maher's new owners by distorting the Shipping Act's three-year statute of limitations beyond recognition. Inasmuch as it is well settled that where, as here, there were no new acts of lease discrimination 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, all claims founded upon disparate lease terms are clearly time-barred.

CONCLUSION

For all the foregoing reasons, Maher's Exceptions should be denied in their entirety.

Dated: June 29, 2011

Respectfully submitted,



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

Peter D. Isakoff  
Holly E. Loiseau  
Alexander O. Levine  
WEIL, GOTSHAL & MANGES LLP  
1300 Eye Street, NW  
Suite 900  
Washington, DC 20005

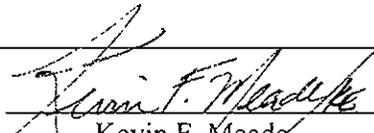
*Attorneys for The Port Authority of  
New York and New Jersey*



**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><b><u>Via Email and Federal Express</u></b> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Winston &amp; Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at New York, NY this 29th day of June, 2011</p>
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Kevin F. Meade

1300 Eye Street, NW Suite 900  
Washington, DC 20005  
tel: +1 202 682 7000  
fax +1 202 857 0940

**Weil, Gotshal & Manges LLP**

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OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMMISSION

Consuelo A. Kendall  
+1 202 682 7156  
Consuelo.kendall@weil.com

August 12, 2011

BY HAND

Office of the Secretary  
Federal Maritime Commission  
800 North Capitol Street  
Washington, DC 20573

Re: Mahe Terminals, LLC v. The Port Authority of  
New York and New Jersey LLC 08-03 (FMC)

Dear Ms. Gregory:

Pursuant to paragraph 5(c) of the Protective Order, enclosed please find the original, five copies, and an additional copy on disk, of the Agreed-Upon Redacted Copies of *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*, dated June 7, 2011, and *The Port Authority of New York and New Jersey's Reply in Opposition to Maher Terminals, LLC's 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*, dated June 29, 2011.

If you have any questions with respect to the foregoing, please do not hesitate to call me.

Respectfully submitted,



Consuelo A. Kendall