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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

MAHER'S INITIAL BRIEF DUE OCTOBER 7, 2011



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INTRODUCTION

Pursuant to the Scheduling Order, Complainant Maher Terminals, LLC (“Maher”), by and through undersigned counsel, submits this Initial Brief, accompanied by separate filings of the same date: (1) Proposed Findings of Fact and (2) Supporting Evidence.

PRELIMINARY STATEMENT

The evidence sustains Maher’s complaint and counter-complaint and establishes that the Respondent Port Authority of New York and New Jersey (“PANYNJ”) violated and continues to violate the Shipping Act of 1984, *as amended* (the “Shipping Act”) (46 App. U.S.C. 1701 note (1998), as alleged by Maher. Therefore, the Commission should enter an order sustaining Maher’s complaint and counter-complaint, holding that PANYNJ violated and continues to violate the Shipping Act, ordering an award of reparations with interest, attorneys fees and costs, be paid by PANYNJ to Maher, and entering a cease and desist order to stop PANYNJ’s violations and prohibit such violations in the future.

NATURE AND BACKGROUND OF THE CASE

I. Summary of Maher’s Claims

This proceeding began as a straightforward application of the Commission’s authority in *Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-77 (F.M.C. 1997) and 29 S.R.R. 356, 369-74 (F.M.C. 2001) (hereinafter *Ceres*). In *Ceres*, the Commission held a port authority violates the Shipping Act by charging port users different rates based on status as a marine terminal operator or carrier. *Id.* at 1272. The Commission also explained that where port rates for such services as wharfage, dockage, crane rental, and land rental apply universally and do not vary according to cargo characteristics, a terminal operator need not show that it is similarly situated or in a competitive relationship with another entity in order to challenge disparate treatment. *Id.* 1271; *see also Valley Evaporating Co., v. Grace Line, Inc.* 11

S.R.R. 873, 879 (F.M.C. 1970) (unlawful prejudice violation not dependent on competitive relationship); *Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*, 25 S.R.R. 1308, 1313 (F.M.C. 1990) (“... FMC precedent indicates that it is not necessary to demonstrate a competitive relationship when the preference, e.g. credit terms, bears no relation to the transportation characteristics of a particular commodity.”).

In *Ceres*, the respondent port authority, the Maryland Port Administration (“MPA”), charged complainant marine terminal operator Ceres lease rates that were more than double what it charged Maersk, an ocean carrier, for similar services at Dundalk Marine Terminal in the Port of Baltimore. The port authority unsuccessfully sought to justify the difference in charges on the basis of the lessees’ status as an ocean carrier versus a marine terminal operator. The port authority argued unsuccessfully that ocean carrier Maersk could make a “vessel call” guarantee that a marine terminal operator could not, because “Maersk is an ocean carrier which owns vessels and controls cargo routing and port calls” while marine terminal operator Ceres “has no control over vessel calls and routings, but merely services vessels that already call at the port.” *Id.* at 1272. While the port authority advanced other justifications in the complaint proceeding, the Commission rejected them because the port authority’s “only expressed reason for denying [marine terminal operator] Ceres the Maersk lease terms was Ceres’ status as an MTO,” i.e. a marine terminal operator. *Id.* The Commission rejected the port authority’s *post-hoc* reasons that the marine terminal operator deserved less preferential lease terms than the ocean-carrier based upon an alleged “specific evaluation” and because the marine terminal operator allegedly had less financial capacity than Maersk. *Id.* at 1272-3 n.52 (rejecting these alleged justifications as not expressed at the time the port authority refused to provide the Maersk rates).

The Commission rejected the port authority's justification expressed at the time and concluded that "MPA's accordance of significance only to Maersk's vessel call guarantee, by virtue of its status as a carrier, is *patently unreasonable* in light of Ceres' abilities to fulfill the terms of the Maersk lease, including the vessel calls inherent in its cargo guarantee, its business record and long history at the Port, and its ability to attract carrier customers who do control vessel calls." *Id.* (emphasis added). The FMC soundly rejected the port authority's argument that status, as a marine terminal operator versus an ocean carrier, was a transportation factor justifying disparate rates. The Commission emphasized, "[s]tatus alone is not a sufficient basis by which to distinguish between lessees." *Id.* at 1273.

Moreover, in rejecting the port authority justification for refusing the marine terminal operator parity with the ocean carrier, Maersk, the Commission in *Ceres* underscored that the port authority had a statutory absolute duty to apply its criteria for granting preferential lease terms in a fair and even-handed manner. *Id.* at 1272-4; 29 S.R.R. 370, 372. And the Commission reiterated in *Ceres*, its "decision merely reflects existing precedent that when a port authority establishes criteria for offering incentive rates, it must apply those criteria in a reasonable even-handed manner . . . [and] the violations are *continuing* in nature and the injury is suffered over a period of time." 27 S.R.R. at 1274.

In *Ceres*, the port authority averred that "it feared it was about to lose Maersk," which it described as its "most important ocean carrier service." *Id.* at 1260. The port authority further asserted that "After a decade of suffering financial losses, . . . that the loss of Maersk would have been devastating to the Port." *Id.* at 1260-1. Therefore, according to the port authority, it "entered into negotiations with Maersk with the goal of gaining a long term commitment of regular vessel calls and a return of the service it had lost to the Port of Norfolk." *Id.* at 1261.

The port authority argued that “given the keen competition it faces, it is entitled to make arrangements to expand steamship vessel calls at the Port of Baltimore in furtherance of its statutory responsibility of promoting the economic health of the region.” *Id.* at 1274.

The Commission, however, soundly rejected these port authority pleas for deference based on the “keen competition it faces” from other ports and because the port authority was acting “in furtherance of its statutory responsibility of promoting the economic health of the region.” *Id.* at 1274. The Commission explained that its statutory duty is to “analyze the reasonableness of the practice under the 1984 Act,” and not to simply defer to the port authority’s “business judgment.” *Id.*

Among other things, Maher’s original complaint in Dkt. 08-03 alleged that PANYNJ violated and continues to violate the Shipping Act with respect to FMC Agreements Nos. 201106 (“EP-248) and 201131 (“EP-249”) and otherwise by unlawfully failing to and *continuing* to fail to fulfill its statutory absolute duty to provide Maher preferential lease terms in EP-249 and thereafter, as provided to Maersk Container Service Company, Inc. (now APM Terminals, North America, Inc.) (“APM”) (collectively “Maersk-APM”) in EP-248, and failing to establish, observe and enforce just and reasonable regulations and practices. These are the same violations adjudged by the Commission in *Ceres*. Additionally, Maher’s original complaint in Dkt. 08-03 alleged that PANYNJ violated and continues to violate the Shipping Act by unreasonably refusing to deal or negotiate with Maher. *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448-51 (F.M.C. 2003).

In summary, just as occurred in *Ceres*, although Maher guarantees more cargo and rent to PANYNJ than Maersk-APM, PANYNJ unlawfully prefers Maersk-APM because of status.

PANYNJ prefers Maersk-APM because its affiliated ocean carrier, Maersk Line,¹ allegedly controls cargo and threatened to leave the port. By contrast, PANYNJ unlawfully prejudices Maher which it regards as a mere captive terminal operator which does not control cargo and presents no risk to leave the port. Having given preferential lease terms to Maersk-APM, PANYNJ continues to violate its absolute duty to make the same preferential volume discount lease terms available to Maher.

Maher's complaint alleged that PANYNJ violated and continues to violate the Shipping Act as set forth in *Ceres*, 27 S.R.R. at 1270-77, and *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448-51 (F.M.C. 2003), by (1) unlawfully preferring Maersk-APM and unlawfully prejudicing Maher; (2) unlawfully failing to establish, observe, and enforce just and reasonable regulations and practices, and (3) unreasonably refusing to deal with Maher; all in violation of 46 U.S.C. §§ 41106(2), 41102(c) and 41106(3) (Shipping Act §§ 10(d)(4) (formerly §§ 10(b)(11) & (12)), 10(d)(1) and 10(d)(3) (applying 10(b)(10) to MTOs). The evidence uncovered in discovery has established the foregoing continuing violations of the Shipping Act.

Furthermore, the evidence revealed additional Shipping Act violations by PANYNJ, including continuing violations reflected in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 280-82 (1968), enforcing 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)), because PANYNJ's charges levied on Maher are not reasonably related to the service provided. The newly discovered evidence establishes that PANYNJ overcharges Maher.

¹ Maersk Line is A.P. Møller-Maersk's ocean-carrier that is in the business of "transportation of cargo into and out of the United States on ocean-going vessels." Maersk-APM Director of Terminal Operations Marc Oppenheimer 07-01 Dep. at 17:8-18:19, MPFF ¶ 11, 106:10-12, MPFF ¶ 11 (Maersk Line is A.P. Møller-Maersk's shipping business); former Maersk, Inc. Director of Alliance Management John Nicola 07-01 Dep. at 46:10-12, MPFF ¶ 11 (Maersk Line is "the container ship company").

Volkswagenwerk, 390 U.S. at 280-82 (the question of liability turns upon whether the correlation of the benefit received to the charges imposed is reasonable); *Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist.*, 21 S.R.R. 1072, 1082 (F.M.C. 1982) (violation where other port users obtain equal or greater benefits and have not been shown to have paid their allocable share of port costs).

The proceeding also involves Maher's original counter-complaint from Dkt. 07-01 consolidated in this proceeding. The Dkt. 07-01 proceeding was filed by Maersk-APM against PANYNJ on December 29, 2006 alleging among other things that PANYNJ had violated EP-248 by failing to timely provide Maersk-APM certain premises, *i.e.* 84 acres of land to Maersk-APM, which were previously occupied by Maher's Tripoli Street marine terminal.² Maersk-APM alleged that the two-year delay in receiving the premises caused it to incur injury and damages of approximately \$45 million.³ After its motion to dismiss failed, on August 9, 2007, PANYNJ third-partied Maher into the proceeding alleging among other things that Maher had failed to indemnify PANYNJ for damages sustained by Maersk-APM.⁴ On September 4, 2007, Maher denied the allegations and filed a counter-complaint regarding PANYNJ's multiple violations of the foregoing provisions of the Shipping Act, *e.g.*, unduly prejudicing Maher and unduly preferring Maersk-APM in lease terms by the imposition and enforcement of an unlawful indemnity provision against Maher which PANYNJ neither imposed nor enforced against Maersk-APM, failure to establish observe and enforce just and reasonable regulations and

² Maersk-APM Complaint, Dkt. 07-01, MPFF ¶ 41.

³ APM's Responses to PANYNJ's First Set of Interrogatories, No. 3, MPFF ¶ 433 (estimating damages ranging between \$38.7 million and \$45.2 million); Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Dkt. 07-01, at 3, MPFF ¶ 433 (relinquishing APM's claim for damages, which it calculated to be \$45 million); Evans 07-01 Dep. at 160:4-5, MPFF ¶ 433 ("My understanding is that they put in for damages in excess of \$45 million.").

⁴ PANYNJ Third-Party Complaint, Dkt. 07-01 (Aug. 9, 2007), MPFF ¶ 47.

practices with respect to the unlawful indemnity provision imposed and enforced against Maher but not Maersk-APM, failure to provide notice and transfer of improved premises to Maher in a timely manner, and failure to operate in accordance with the indemnity and force *majeure* provisions of filed FMC Agreement No. 201131 (“EP-249”), and unreasonably refusing to deal or negotiate with Maher with respect to the foregoing matters while dealing and negotiating with Maersk-APM. These PANYNJ violations include continuing and ongoing violations of the foregoing provisions of the Shipping Act and 46 U.S.C. § 41102(b)(2) (Shipping Act § 10(a)(3)) for failing to operate in accordance with the terms of EP-249.

II. PANYNJ’s Ongoing Violations of the Shipping Act In Dkt. 08-03

Notwithstanding Maher’s repeated requests for parity, both before the agreement took effect in October 2000 regarding the terms of EP-249 and more recently in Maher’s counter-complaint in Dkt. 07-01 in September 2007, meetings and correspondence during 2007 and 2008, and its complaint in this proceeding filed on June 3, 2008, PANYNJ unlawfully refused and refuses to provide Maher parity with Maersk-APM with respect to lease terms and fails to fulfill its statutory duties to provide Maher the preferential terms it provides to Maersk-APM, fails to establish, observe, and enforce just and reasonable regulations and practices with respect to its treatment of Maher, and unreasonably refuses to deal or negotiate with Maher.

A. PANYNJ’s Lease Formation Discrimination

The evidence establishes that PANYNJ unlawfully discriminated against Maher and in favor of Maersk-APM with respect to the lease terms provided by PANYNJ in EP-248 for Maersk-APM and EP-249 for Maher. During the PANYNJ-Maher meetings and other communications in the period 1997-2000 that resulted in the lease terms provided by PANYNJ to Maher in EP-249, Maher requested parity with Maersk-APM. PANYNJ informed Maher that PANYNJ would provide a “level playing field” and that Maher would receive materially the

same, or similar, lease terms to those offered to Maersk-APM. Ultimately, however, then PANYNJ Port Commerce Director, Lillian Borrone, told Maher that the Maersk-APM terms were “off the table “and that its terms provided to Maher were its best and final offer, that is, it was a take it or leave it proposal.

The evidence establishes that in September 1999, PANYNJ’s Borrone told Maher that PANYNJ did not provide Maher the Maersk-APM lease rate terms because Maersk was an ocean carrier that could provide a cargo guarantee that Maher could not provide. By May 2008, through discovery in the Dkt. 07-01 proceeding, Maher uncovered conclusive information that this reason provided by PANYNJ to Maher for the disparate lease terms is not a valid transportation reason and the preferences to Maersk-APM and prejudices to Maher were undue.

B. PANYNJ’s Discrimination From 2007 Onward

The evidence establishes that Maher first began to get an inkling of potential Shipping Act claims in the summer of 2007. PANYNJ then filed a Shipping Act third-party complaint against Maher on August 7, 2007 in Dkt. 07-01 to enforce its unlawful indemnity requirement against Maher and discovery ensued. By the end of November 2007, Maher representatives had met twice with PANYNJ leaders, including the new Port Commerce Director Richard Larrabee and his chief deputy Dennis Lombardi about potential Maher lease discrimination claims under *Ceres*, wherein these PANYNJ executives expressly denied that Maher had a *Ceres* claim against PANYNJ regarding disparate treatment in lease terms because “the Maher brothers” had signed EP-249 and there was nothing they could do. Additionally, PANYNJ’s Larrabee categorically refused to discuss the subject of the Dkt. 07-01 proceeding and PANYNJ never altered that position obstinately refusing to discuss it with Maher.

After another effort at outreach by Maher to then PANYNJ Executive Director Anthony Shorris with respect to the potential lease discrimination claims failed in December 2007, on



January 17, 2008, Maher's Chief Executive Officer ("CEO") John Buckley wrote to PANYNJ's Larrabee and explained that Maher understood that PANYNJ "may be in violation of the Shipping Act" and that Maher requested parity with Maersk-APM. By its letter of January 29, 2008, PANYNJ rejected Maher's written proposal.

C. PANYNJ's "Port Guarantee" Justification Debunked

Over the next four months, culminating in the depositions of several key witnesses in Dkt. 07-01, including Maersk-APM's Director of Terminal Operations Marc Oppenheimer (May 20, 2008) and PANYNJ witnesses, including former Port Commerce Department financial services general manager Cheryl Yetka (May 28, 2008), Maher uncovered conclusive information that it had Shipping Act claims against PANYNJ. Maher then filed this action *promptly* on June 3, 2008. On July 22, 2008, Maher also wrote to the Chairman of the PANYNJ Board of Commissioners and expressly requested PANYNJ "to deal meaningfully and fairly with Maher." But, PANYNJ obstinately refused to deal or negotiate with Maher, failed to provide Maher parity with Maersk-APM, and failed to satisfy Maher's complaint and counter-complaint.

Evidence uncovered during discovery in the Dkt. 07-01 proceeding in May 2008, later in this proceeding in document production by PANYNJ in 2009, and in depositions and new evidence disclosed by PANYNJ only in 2011 establishes that Maersk-APM could not enforce the so-called "port guarantee" against the Maersk-APM affiliated ocean carrier, Maersk Line,⁵ to actually require the cargo "guaranteed" to be carried into and out of the port.

⁵ Dep. Ex. 320, MPFF ¶ 406 (Maersk-APM letter of December 23, 2009 identifying the ocean carrier with respect to the port guarantee as A.P. Moller-Maersk A/S trading as "Maersk Line"); Dep. Ex. 16 (EP-248 §§ 42(a)(1), 46(h)), MPFF ¶ 11 (defining "carrier" in the context of the port guarantee as "Maersk, Inc. as agent for its disclosed principals," defined as Aktieselskabet Dampskibsselskabet Svendborg and/or Dampskibsselskabet af 1912, Aktieselskab"); *also see Ceres*, 27 S.R.R. 705 (including lease between the MPA and Maersk Line identifying Maersk Line as "Aktieselskabet Dampskibsselskabet Svendborg and Dampskibsselskabet af 1912, Aktieselskab, trading under the name of MAERSK LINE").

The evidence establishes that the “port guarantee” (the alleged cargo guarantee from Maersk-APM’s affiliated ocean carrier Maersk Line) which PANYNJ told Maher at the time was the cornerstone justification for the different lease rate terms turned out *not* to be the unique cargo guarantee written in the Maersk-APM lease (EP-248), or what PANYNJ stated at the time about why it would not provide Maher the preferential Maersk-APM lease rates, *i.e.* Ms. Borrone’s description of the “port guarantee” as a unique *cargo* guarantee that could only be satisfied by an ocean carrier controlling cargo and which Maher could not provide. Evidence only belatedly disclosed by PANYNJ in January and March 2011, but sought by Maher in this proceeding since 2008, establishes that Maersk-APM has failed to fulfill the “port guarantee” in 2008, 2009, and 2010 and that Maersk-APM has informed PANYNJ that it *will not* be satisfied for several years at a minimum. PANYNJ decided only more recently in the year 2010 *not* to enforce the “port guarantee” requirement against Maersk-APM, its former parent, Maersk, Inc., or their affiliated ocean carrier Maersk Line, to actually require the allegedly “guaranteed” cargo to be provided to the port.

The evidence establishes that according to PANYNJ, the “port guarantee” was not even effective until 2008, and therefore, Maersk-APM’s failure to fulfill it was not established until the year 2010 (after two consecutive years of shortfalls). Maher therefore did not know and could not have known that PANYNJ would *not* implement and enforce the “port guarantee” as an actual cargo guarantee as the new facts show. The alleged cargo “guarantee” of Maersk-APM’s affiliated ocean carrier Maersk Line has turned out to be nothing more than a *simple additional rent payment*. But, the evidence establishes that Maher already pays and guarantees more rent to PANYNJ than Maersk-APM and has far exceeded Maersk-APM’s rent. Therefore, the evidence of PANYNJ’s actions today only recently uncovered in 2008-2011 establishes that

PANYNJ's principal alleged justification for the lease rate differential between Maher and Maersk-APM, the vaunted "port guarantee," is merely an additional rent payment that does not justify the disparate lease terms which unduly prejudice Maher and unduly prefer Maersk-APM. Because the evidence establishes that Maher provides PANYNJ greater cargo volume and guarantees and rent payments and guarantees than Maersk-APM, the Maersk-APM "port guarantee" is not a valid transportation purpose justifying the disparate lease terms which constitute nothing more than discrimination based upon status.

This new evidence established only during depositions and other discovery in recent months has also revealed conclusive information of *additional* continuing violations of the Shipping Act because PANYNJ unreasonably overcharges Maher as compared to Maersk-APM for the same service. *Volkswagenwerk*, 390 U.S. at 280-82 (the question of liability turns upon whether the correlation of the benefit received to the charges imposed is reasonable); *Louis Dreyfus Corp.*, 21 S.R.R. at 1082 (F.M.C. 1982) (violation where other port users obtain equal or greater benefits and have not been shown to have paid their allocable share of port costs). The evidence now establishes that Maher pays *more than twice* what Maersk-APM pays for the *same service* and the PANYNJ's cornerstone justification, the "port guarantee" is simply an additional rent payment, not fit for the end in view, and in all events excessive.

PANYNJ rejected Maher's requests for parity and PANYNJ failed to satisfy Maher's complaint and counter-complaint. Instead, PANYNJ has arrogantly and defiantly denied Maher's allegations and at great expense paid hired-gun experts up to \$1000 per hour to conjure up elaborate *post-hoc* litigation rationalizations straining to justify its violations of the Shipping Act. In these extraordinary circumstances, the PANYNJ's elaborate *post-hoc* litigation rationalizations further evince PANYNJ's ongoing discriminatory conduct and refusal to deal or

negotiate in violation of the Shipping Act. PANYNJ has institutionalized its discrimination against Maher and in favor of ocean-carrier affiliated marine terminal operator Maersk-APM. PANYNJ's Shipping Act violations are demonstrably ongoing.

III. Maher's Reparations Remedy

Maher seeks reparations for actual injury as set forth in the complaint in Dkt. 08-03, Maher's counter-complaint in Dkt. 07-01, and as uncovered in discovery.⁶ The Commission has held that reparations are available when port authorities unreasonably discriminate or fail to establish, observe, and enforce reasonable practices. 46 U.S.C. §§ 41301 and 41305. *Ceres*, 29 S.R.R. 356, 372-74 (F.M.C. 2001) ("the appropriate measure of damages for a violation of sections 10(b)(11) and (12), where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference or prejudice" and "the appropriate measure of damages for a violation of section 10(d)(1) is the . . . difference between the rates charged").

In this particular respect, as of May 31, 2011, the evidence establishes that Maher's damages total approximately \$491,363,215 through the 30 year term of the lease. This figure is comprised of actual damages as of that date of \$124,444,650 (\$89,578,815 incurred before 2010)

⁶ See, Maher 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 (Jun. 7, 2011), MPFF ¶ 85, filed with the Commission. Therein, Maher provides the authority for its reparations claims and explains the errors of the May 16, 2001 Order. Pursuant to 46 U.S.C. § 227(a)(5), "Upon the filing of exceptions to or review of an initial decision, such decision shall become inoperative until the Commission determines the matter."

and future damages of \$366,918,465 absent a cease and desist order. Consequently, Maher sustains over \$1 million per month in these damages on an ongoing basis.⁷

Additionally, the evidence establishes that Maher sustained actual injury as set forth in Maher's counter-complaint in Dkt. 07-01, and as uncovered in discovery because of PANYNJ's violations of the Shipping Act. In this respect, the evidence establishes that Maher's actual injury and damages for the two-year delay in receiving improved premises from PANYNJ total \$56,559,566 in lost profits and increased operating and construction costs. Additionally, Maher sustained actual injury and damages in the form of increased operating costs to defend against PANYNJ's unlawful enforcement actions of the indemnity requirement in violation of the filed agreement in the amount of \$1,354,268.25. In this respect, additional amounts not to exceed twice the amount of the actual injury for PANYNJ's violation of 46 U.S.C. § 41102(b) should be awarded.⁸ Maher also sustained actual injury from the PANYNJ's enforcement of the first point of rest requirement in the amount of at least \$9,382.50.

The foregoing actual injuries and damages incurred by Maher as of May 31, 2011 total \$182,367,866.75 as an initial matter. Therefore, Maher seeks an award of reparations for these actual injuries incurred as of May 31, 2011, additional amounts for operating in violation of the filed agreement, and additional reparations for actual injury incurred thereafter accruing at over \$1 million per month.

⁷ 08PA01442836, Donald Burke's Summary re Maher-APM Terminals (Feb. 21, 2008), MPFF ¶ 299.

⁸ Additional reparations awarded where there is no evidence of good faith on the part of the violating party, and where the acts "arbitrary, unjustly discriminatory and arrogantly deliberate." *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 SRR 400, 432 (A.L.J. 1989); *Int'l Ass'n of NVOCCs v. Atlantic Container Line*, 25 SRR 675 (A.L.J. 1990); *Consolo v. FMC*, 383 U.S. 607, 622 (1966).

IV. Maher's Cease and Desist Order Remedy In Dkt. 08-03

Maher seeks the cease and desist remedy which is an express statutory remedy afforded to complainants like Maher by the Shipping Act, and a specific statutory power provided to the Commission to stop violations.⁹ Section 11(b) of the Shipping Act, codified at 46 U.S.C. § 41301(c), expressly provides that the Commission can, in response to a complaint, issue "an appropriate order," and this includes cease and desist relief. *Western Overseas Trade & Dev. Corp. v. ANERA*, 26 S.R.R. 1066, 1072 (A.L.J. 1993) ("The authority to issue a cease and desist order is found in section 11(b) of the Act, 46 U.S.C. App. § 1710(b).").

The Shipping Act empowers the Commission to issue a cease and desist order directing a regulated entity to stop ongoing or potentially future violations of the Act. *William J. Brewer v. Saeid B. Maralan and World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (F.M.C. 2001). A cease and desist order is a "nonreparation" order. *See id.*; *see also*, 46 U.S.C. §§ 41308 and 41309, making the distinction between "orders" and "reparation orders." Cease and desist orders are designed to ensure future compliance with the law, *Pacific Champion Express Co., Ltd.-Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, 28 S.R.R. 1397, 1405 (F.M.C. 2000) while reparations are awarded to remedy past violations of the Shipping Act, *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 695, 701 (A.L.J. 1996).

Maher seeks a cease and desist order remedy to *halt* PANYNJ's ongoing institutionalized unlawful discrimination and other violations of the Shipping Act. This accords with Shipping Act authority that terminal operators like PANYNJ have a continuing absolute duty to provide volume discount rates in a reasonable, even-handed manner. *Ceres*, 29 S.R.R. at 372-73 (the

⁹ *See*, Maher's Reply In Opposition To Respondent's Exceptions To Initial Decision of May 16, 2011 Denying Respondent's Motion For Summary Judgment And Sustaining Maher's Cease And Desist Order Remedy Based on Lease-Term Discrimination Claims (Jun. 29, 2011), MPFF ¶ 85, filed with the Commission. Therein, Maher provides the authority for its cease and desist order remedy and explains the errors of PANYNJ's exceptions to the May, 16, 2001 Order.

statutory duty is “absolute” to apply criteria for lower rates in an evenhanded manner); *Ceres*, 27 S.R.R. at 1274, 1277 (“This decision merely reflects existing precedent that when a port authority establishes criteria for offering incentive rates, it must apply those criteria in a reasonable even-handed manner,” and “the violations are *continuing* in nature and the injury is suffered over a period of time.”) (emphasis added). Furthermore, as a marine terminal operator, PANYNJ has a “duty to serve the public and treat all persons *alike*.” *Investigation of Free Time Practices – Port of San Diego*, 7 S.R.R. 307, 330 (F.M.C. 1966) (emphasis added). The Commission has repeatedly emphasized that when it comes to marine terminal operators, “[t]he manifest purpose of . . . the Shipping Act is to impose upon ‘persons subject to this Act’ the duty to serve the public *impartially*. In no other area is this requirement of *equality of treatment* between similarly situated persons more important than in the terminal industry.” *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.*, 11 S.R.R. 309, 317 (F.M.C. 1969) (emphasis added). As the Commission has explained, the simplest way for a port authority to avoid running afoul of the Shipping Act when providing differing arrangements is by *offering to make those arrangements with other port users*. See, *In the Matter of Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California*, 9 S.R.R. 390, 398 (F.M.C. 1967). But, PANYNJ has refused to make those arrangements with Maher.

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

LEGAL STANDARDS FOR SHIPPING ACT VIOLATIONS

I. Unreasonable Preference or Prejudice

The Commission has explained the underlying reason for and purpose of the application of the Shipping Act here:

One of the fundamental purposes of the Shipping Act of 1984 is the establishment of a nondiscriminatory regulatory transportation process for the common carriage of goods in the U.S. foreign commerce. . . . The Commission . . . recognized this policy in stating that "[t]he prevention of economic discrimination is at the heart of the regulatory scheme established by Congress in the 1984 Act. . . . In furtherance of the Act's declared policy of maintaining a nondiscriminatory transportation system, Section 10 contains various provisions prohibiting certain unjustly discriminatory, preferential or prejudicial practices.

Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V., 25 S.R.R. at 1313 (citing *Motor Vehicle Manufactureres Ass'n of the United States, Inc. – Order Denying Petition*, 25 S.R.R. 849, 853 (1990)). And as the Supreme Court has emphasized, Congress established the Commission as the "specialized government agency . . . entrusted with the duty to protect the public interest" by prohibiting such unlawful practices. *Volkswagenwerk*, 390 U.S. at 271, 274, n.21, & 276.

Title 46 U.S.C. § 41106(2) (Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12)) prohibits undue or unreasonable preference or prejudice with respect to lease terms where:

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

Ceres, 27 S.R.R. at 1270. It is well-established that the Commission will find a violation of the Shipping Act where a port authority discriminates against a marine terminal operator in favor of an ocean carrier because of status or discriminates against one port user versus another without a legitimate justification or rationale. *Id.* at 1270-75.

The threshold criterion for “unreasonable” preference or disadvantage was established by *Volkswagenwerk*. 390 U.S. at 278-80 (discriminatory treatment when third party has enjoyed unfair advantage over the complainant). There, the Supreme Court reversed the Commission’s erroneous decision that there was no discrimination because the complainant benefited from the arrangement. The Commission invoked with approval the explanation of the Supreme Court’s decision as meaning “discriminatory treatment will not be found to exist in the absence of a determination that the third party has enjoyed unfair advantage over the complainant. The favored entity need not have been in direct competition with the complainant. . . .” *New Orleans Stevedoring Co. v. Bd. of Comm’ners of Port of N.O.*, 29 S.R.R. 1066, 1070 (F.M.C. 2002) (quoting ALJ below and citing to *Volkswagenwerk*). And the Commission itself has further emphasized that in circumstances such as those present here, that “the parties need not be similarly situated nor does a competitive relationship need to exist to challenge the alleged unreasonable preferential or prejudicial treatment. . . .” *Id.* at 1070-1 n. 3.

A preference or prejudice is established by showing that a port “charges a different rate to different users for an identical service.” *Lake Charles Harbor & Terminal District v. Port of Beaumont Navigation District*, 10 S.R.R. 1037, 1042 (F.M.C. 1969); *Chr. Salvesen & Co., Ltd. v West Michigan Dock & Market Corp.*, 10 S.R.R. 745, 756 (F.M.C. 1968) (“operators of public terminals must afford all customers seeking the same service fair and reasonable treatment”). In *Ceres*, the port authority conceded that it treated marine terminal operator Ceres differently from ocean carrier Maersk, but irrespective of this concession, the Commission separately emphasized that the port authority’s “rates assessed Ceres for the same services [including land rental] are excessive” in the context of its determination of a violation of Shipping Act § 10(d)(1) for an unreasonable practice. *Ceres*, 27 S.R.R. at 1271, 1272, & 1275.

Mere differences in treatment alone, however, *do not* violate the Shipping Act. *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958, 963 (D.C. Cir. 1988) ("the [Shipping] Act clearly contemplates the existence of *permissible* preferences or prejudices.") (emphasis added). Therefore, only "undue or unreasonable preferences and prejudices would be violative of the Prohibited Acts." *Seacon Terminals v. Port of Seattle*, 26 S.R.R. 886, 900 (F.M.C. 1993).

"The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres*, 27 S.R.R. at 1270, n. 46 (citing *Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (F.M.C. 1981)). Initially, complainant bears the burden to "demonstrate that there are no obvious differences" justifying the disparity. *Cargill*, 21 S.R.R. at 301. Then, because "this evidence is primarily in the possession of the respondent," the respondent has "the burden . . . to demonstrate that there are legitimate transportation differences." *Id.*

Once the existence of a preference or prejudice is established, the question is whether it is "undue or unjust." *Lake Charles Harbor*, 10 S.R.R. at 1042. This will "[n]ormally" be the conclusion when a port charges different users different rates for the same service. However, it may be possible for a port to demonstrate that a rate differential between customers is not "undue or unreasonable." This may be the case, for example, if it is shown that the rate differential is reasonable by virtue of differences in the nature of the services for which the rate is paid or by virtue of differences in the cargo characteristics or cargo volume. *Seacon*, 26 S.R.R. at 900-01.

However, any such demonstration by a port authority that a preference or prejudice is not "undue or unreasonable" requires a *fact-specific* evaluation of the particular circumstances of the service, facility, or the cargo. *Ceres*, 27 S.R.R. 1272 (port authority preference unreasonable

where it ignored the ability of marine terminal operator to fulfill the "vessel call" terms of the Maersk lease with a cargo volume guarantee); *see also, Assembly Time - Port of San Diego*, 11 S.R.R. 8, 18-22 (F.M.C. 1969) (fact specific evaluation of request for tariff provision authorizing additional processing time for bagging certain commercial bulk cargo); *Rates From Jacksonville, Fla. to P.R.*, 9 S.R.R. 175, 183 (F.M.C. 1967) (undue preference or prejudice *not* justified where lack of evidence of cost data of service, etc.). Thus, in *Co-loading Practices By NVOCCs*, 23 S.R.R. 123 (F.M.C. 1985), the Commission rejected the suggestion that NVOCCs constitute a "distinct class" of shippers due to cost savings allegedly inherent in their shipments, stating that "[w]hile cost savings could certainly warrant a difference in rates, *very few specifics are offered* which could be identified solely with NVOCC co-loaded cargo." *Id.* at 132 (emphasis added).

Furthermore, even if a discriminatory practice is shown to have a valid purpose, it may still be ruled unreasonable if "it goes beyond what is necessary to achieve that purpose." *Distrib. Servs., Ltd. v. Trans-Pacific Freight Conf. of Japan*, 24 S.R.R. 714, 722 (F.M.C. 1988); *see also Ceres*, 27 S.R.R. at 1275 (discrimination with valid purpose unreasonable where "the degree of disparity is disproportionate to [port authority's] goals").

Under Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12)), a difference in rates levied by a port authority on its lessees can be justified based on a difference in relevant transportation factors, but not on the lessee's status. "Status alone is not a sufficient basis by which to distinguish between lessees." *Ceres*, 27 S.R.R. at 1273. The Commission's decision in *Ceres* expressly rejecting status as a valid transportation related justification for preference or prejudice reaffirms well-established Commission precedent. *50 Mile Container Rules*, 24 S.R.R. 411, 464-65 (F.M.C. 1987), *aff'd sub nom, New York Shipping Ass 'n v. FMC*, 854 F.2d 1338 (D.C. Cir. 1988); *Co-Loading Practices By NVOCCs*, 23 S.R.R. 123, 131-32 (F.M.C. 1985);

Rates Which Exclude Certain Classes of Shippers, Circular Letter No 1-85, 23 S.R.R. 460, 461 (F.M.C. 1985) (Commission invoked seminal Supreme Court authority for the proposition that rates based on factors other than “differences inhering in the goods or in the cost of the service rendered in transporting them” are unlawful.)¹⁰

For a transportation factor to justify a lower rate for a class as such, it is essential that the factor be unique to that class. A class cannot be rendered "distinct" for ratemaking purposes by virtue of a factor that is shared by entities outside the class. For that reason, the Commission in *Ceres*, rejected the port authority's attempt to justify rate differences with a “vessel call” guarantee because “Maersk is an ocean carrier which owns vessels and controls cargo routings and port calls” which the marine terminal operator did not. 27 S.R.R. 1272. The Commission explained that the port authority's “reliance on this particular guarantee to justify the disparate treatment of the lessees is inconsistent with the *practical significance* of the [marine terminal operator's] cargo commitment and its ability to attract customers.” *Id.* at 1273 (emphasis added). In *Co-loading Practices By NVOCCs*, the Commission had previously explained that, although high volume is a legitimate transportation factor and although that factor may apply generally to a given class (*e.g.*, NVOCCs), that is *not* sufficient to render the class distinct for ratemaking purposes *if* some non-class members also have high volume. In such a situation, a lower rate *can* be granted based on the relevant factor, but it must be made available to both class and non-class members to whom the factor applies (*e.g.*, by applying a volume-based criterion rather than a criterion based on class membership as such). 23 S.R.R. 123, 132 (F.M.C. 1985); also, cited with approval by the Commission in *Ceres*, 27 S.R.R. 1272.

¹⁰ Moreover, the cases make clear that the principle long pre-dates the definitions in the 1984 Act. *See, e.g.*, the citation to *ICC. v Delaware Lackawanna & Western Railroad Co.*, 220 US 235 (1911) in *Rates Which Exclude Certain Classes Of Shippers, Circular Letter No. 1-85*, 23 S.R.R. at 461 and *Co-loading Practices By NVOCCs*, 23 S.R.R. at 132, n 4.

The Commission has also applied the same principles to attempts to *deny* favorable rates based on class status. In *Volume Incentive Program – Possible Violations of the Shipping Act, 1916*, 22 S.R.R. 686 (A.L.J. 1984), the Commission launched an investigation of a volume-based refund program that in relevant respect was available only to shippers who had a proprietary interest in the cargo. In response, the offending carriers amended the program and the Commission's approval of the program was conditioned on elimination of that restriction in order to make the program available to NVOCCs. *Id.* at 702, n 7. Similarly, in *California Shipping Line v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (F.M.C. 1990), the Commission ruled that NVOCCs as a class could not be denied the right to the essential terms of a service contract originally entered into with a proprietary interest shipper. In so ruling, the Commission (1) rejected the claim that NVOCCs as a class could be deemed to lack the "possession, control or likely access to cargo sufficient to meet a service contract's volume requirement," and (2) found that it is instead necessary to make individualized determinations as to whether, on the particular facts of particular cases, a *particular* NVOCC has the ability to fulfill the essential terms of a particular service contract.¹¹ *See also, Status of Shippers Associations Under the 1984 Act*, 22 S.R.R. 1629 1633 (F.M.C. 1985) (shippers' associations may not be restricted to shippers with an ownership interest in the cargo being shipped).

The Commission has applied the same principles in rejecting attempts to justify different treatment of government and commercial shippers based on their class status as such. Distinct

¹¹ 25 S.R.R. at 1221. This ruling was made under § 8(c) of the 1984 Act, which relates specifically to access to service contracts. The Commission did not reach the question of whether the same result would be required by the "undue or unreasonable prejudice" prohibition of § 10(b)(12). There was no "undue or unreasonable" prejudice on the particular facts, since in that instance there were legitimate reasons to believe that the complainant NVOCC did not have the ability to fulfill the essential terms of the service contracts it sought. In *Ceres*, the Commission distinguished the result by explaining that the port authority did not express any concern at the time about the marine terminal operator's financial condition. 27 S.R.R. at 1273.

rates for government cargo can be justified based on distinctive characteristics of the cargo itself or on distinctive service which the cargo may be provided. *Puerto Rico Maritime Shipping Authority - Rates on Government Cargo*, 18 S.R.R. 830, 835-39 (F.M.C. 1978); *Department of Defense v. Matson Navigation Co.*, 17 S.R.R. 1, 5 (F.M.C. 1977).

However, in the absence of such cargo or service distinctions, the differing status of government and commercial shippers cannot, in itself, justify different treatment. *Puerto Rico Maritime Shipping Authority - Rates on Government Cargo*, 18 S.R.R. 1265, 1267 (F.M.C. 1978) (failure to give same rate to commercial cargo with same characteristics unlawful); *Freight Forwarder Bids on Government Shipments at U.S. Ports – Possible Violations of the Shipping Act, 1916, and General Order 4*, 17 S.R.R. 285, 292-94 (F.M.C. 1977) (higher forwarding fees for commercial than government shipments unlawful); *Non-Assessment of Fuel Surcharges on Military Sealift Command Rates*, 12 S.R.R. 851, 857 (F.M.C. 1972) (imposition of fuel surcharge on commercial but not military shipments unlawful). Likewise, in *Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595, 601-2, 1248 (F.M.C. 1987) the Commission held unlawful the port's practice of charging the government a higher rate for military cargo than provided for commercial cargo because the "large rate differential was disproportionate given the similarity of the service provided and thus violated the 'reasonable relationship' requirement" of the Shipping Act.

In *Ceres*, the Commission reaffirmed the principle that when a port authority makes a preference available to one tenant it must make it available to others. 27 S.R.R. at 1273. *See, e.g. Ballmill Lumber & Sales Corp. v. Port of New York Auth.*, 10 S.R.R. 131, 140-1 (F.M.C. 1968) (port users entitled to similar treatment in respect to whether a discount based on volume of lumber is to be granted); *Valley Evaporating Co., v. Grace Line, Inc.* 11 S.R.R. 873, 880

(F.M.C. 1970) (once the volume criterion established, the Shipping Act imposed a duty on it to apply that criterion "in a totally fair and impartial manner"); *Co-Loading Practices By NVOCCs*, 23 S.R.R. 123 (F.M.C. 1985) (NVOCCs can be granted favorable rates based on a volume criterion provided the criterion is applied evenhandedly to entities other than NVOCCs).

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

The basic principle of the foregoing authorities—that unfavorable treatment based on an entity's class status is inherently unreasonable under the Shipping Act—applies not only to the undue preference and prejudice prohibitions of § 10(d)(4) (formerly §§ 10(b)(11) & (12)), but also to the reasonableness requirement of § 10(d)(1). *50 Mile Container Rules*, 24 S.R.R. at 466-67. As the Commission explained, “a practice that is unjustly discriminatory or preferential ineluctably will be unreasonable as well.” *Id.* at 466.

Title 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)) provides that a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” “[A]s applied to terminal practices, we think that ‘just and reasonable practice’ most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) (“*WGMA*”); *NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, 28 S.R.R. 1512, 1531 (A.L.J. 2000) (quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. at 329).

The same “non excessive” and “fit and appropriate to the end in view” standards apply to a determination of whether a port’s rate practices violate § 10(d)(1) - including in cases in which a port imposes different rates on different customers for substantially similar services. Thus, in *Secretary of the Army*, 24 S.R.R. 595, a port charged the Defense Department a rate for a certain

service that was much higher than the rate in its commercial tariff for a basically similar service. The Commission held that the large rate differential was excessive given the similarity of the services provided, and hence violated the "reasonable relationship" requirement of section 10(d)(1) of the 1984 Act. *Id.* at 601-02; 24 S.R.R. at 1248.

Importantly, "[t]he justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination." *NPR*, 28 S.R.R. at 1531. Nor does it depend upon intent. *Volkswagenwerk*, 390 U.S. at 281-2. In the context of monetary payments, the Commission considers "whether the charge levied is reasonably related to the service rendered" by "measur[ing] the impact on the payer compared to other payers as well as the relative benefits received." *NPR*, 28 S.R.R. at 1531-32 (quoting *Volkswagenwerk*, 390 U.S. at 282).

"[Complainant] has the burden of persuading the Commission that [the Port]'s practice . . . [i]s unreasonable," and "[i]f [Complainant] succeeds in that regard, the burden of proving justification shifts to [the Port]." *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1199, 1222 (F.M.C. 2003). A prima facie violation of §10(d)(1) exists if a port structures a charge in a such a way that the amounts paid by different customers "do not bear a reasonable relationship" to the relative benefits they receive. *Louis Dreyfus Corp.*, 21 S.R.R. at 1082 (violation where other port users obtain equal or greater benefits and have not been shown to have paid their allocable share of port costs). *See also Volkswagenwerk*, 390 U.S. at 281-82 (charge assessed customer would violate the Shipping Act even though customer received substantial benefits, when charge levied is not reasonably related to the service rendered).

In its determination of a violation of Shipping Act § 10(d)(1) by the port authority in *Ceres*, the Commission concluded that the port authority's "rates assessed [marine terminal

operator] Ceres for the same services [including land rental] are excessive”. *Ceres*, 27 S.R.R. at 1271, 1272, & 1275. The Commission explained that “[t]he evidence reveals that the rates assessed [the marine terminal operator] Ceres were much higher than those assessed [ocean carrier] Maersk across the board.” *Id.* at 1275. The Commission further explained that while the port authority’s “vessel call” justification “could be reasonably related to its stated end of securing vessel calls to the Port, the degree of disparity in this case is disproportionate to [the port authority’s] goals” because “Maersk’s vessel call guarantee” . . . “does not guarantee anything more than [the marine terminal operator] could have guaranteed . . . particularly where the difference so greatly disfavors the party committed to moving substantially higher volumes of cargo,” *i.e.*, the marine terminal operator Ceres. *Id.* at 1275.

III. Unreasonable Refusal to Deal

Title 46 U.S.C. § 41106(3) (Shipping Act §§ 10(b)(10) and 10(d)(3)) provides that a “marine terminal operator may not unreasonably refuse to deal or negotiate.” “This requires a two part inquiry: whether [the port authority] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth.*, 29 S.R.R. at 1448. The Commission has held that a port authority’s refusal to consider a proposal constitutes a refusal to deal or negotiate. *Id.* The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking and Lease Agreement By and Between City of Portland, Maine and Scotia Prince Cruises Limited*, 30 S.R.R. 377, 379 (F.M.C. 2004). And in doing so, the Commission has held that with respect to a port authority, “in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration of an entity’s efforts at negotiation.” *Canaveral Port Auth.*, 29 S.R.R. at 1450.

IV. Operating Contrary to FMC Agreement

Title 46 U.S.C. § 41102(b)(2) (Shipping Act § 10(a)(3)) provides that “A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . the operation is not in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.” Here, the prohibition requires proof that (1) the agreement was required to be filed under § 40302 which establishes the filing requirement for marine terminal operator agreements, and (2) that the operation was not in accordance with the terms of the agreement. As relevant here, a marine terminal operator agreement is “an agreement between or among marine terminal operators . . . to . . . “fix or regulate rates or other conditions of service.” § 40301. It is well-established that parties to agreements must operate within the authority of those agreements. *See, e.g., Ivarans v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1566-67 n. 11 (F.M.C. 1986) (“Parties . . . are specifically required to adhere to the terms of their filed agreements.”). In this proceeding, it has previously been expressly held that materially the same alleged violation of 46 U.S.C. § 41102(b)(2) by PANYNJ was cognizable for operating contrary to a marine terminal operator agreement required to be filed under § 40302. *APM Terminals N. Am., Inc. v. PANYNJ*, 30 S.R.R. 1412, 1418 (A.L.J. 2007).

ANALYSIS

I. Unreasonable Preference or Prejudice Violation of 46 U.S.C. § 41106(2)

A. PANYNJ Subjected Maher to Different Treatment By Failing To Provide Maher Parity With Maersk-APM And Injured Maher As A Result

This proceeding concerns PANYNJ’s ongoing failure to provide the same preferential lease terms to Maher that it provided to Maersk-APM and imposing prejudicial lease terms on Maher not required of Maersk-APM. PANYNJ, having previously granted Maersk-APM the preferential terms in FMC Agreement No. 201106, (“EP-248”), refused to grant those terms to

Maher in FMC Agreement No. 201131 (“EP-249”) despite its repeated requests for parity. The evidence establishes that PANYNJ violated and continues to violate 46 U.S.C. § 41106(2) by providing Maersk-APM an undue or unreasonable preference and Maher an undue or unreasonable prejudice with respect to lease terms in EP-248 and 249. PANYNJ's actions and failures to act with respect to Maher violated the foregoing provisions of the Shipping Act by failing to provide to Maher in EP-249 and thereafter the unduly and unreasonably more favorable lease terms that PANYNJ provided to Maersk-APM in EP-248, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, no first point of rest requirement for automobiles for Maersk-APM, and no the security deposit requirement for Maersk-APM.

PANYNJ's failure to provide Maher the preferential terms provided to Maersk-APM subjected Maher to different treatment causing Maher injury and damages. The evidence establishes that there is no obvious valid transportation purpose justifying the foregoing differences which are undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging Maersk-APM. Moreover, PANYNJ failed to perform a fact-specific evaluation of the particular circumstances of the service required by the Shipping Act to justify the disparate treatment.¹² Indeed, PANYNJ's position was that it did not need to

¹² Yetka 30(b)(6) Dep. at 324:17-28:7, MPFF ¶ 280 (PANYNJ never put “pen to paper” to analyze different characteristics of terminals); Borrone 30(b)(6) Dep. at 64:4-10, MPFF ¶ 280 (“Q: So did The Port Authority ever sit down and put a pen-to-paper and produce a justification for why Maher should pay hundreds of millions of dollars more in base rent than the tenant paid under EP-248? A: Saying that directly, I would say no, we never put pen-to-paper in an explicit statement that said, “This is why Maher should pay a difference.”); “[N]o formal, written analyses were created prior to November 2000 showing that differences in per acre rental rates and escalation terms are fully justified by the differences in the terminals. . . .” PANYNJ confessed that it only “considered various differences between the terminal properties. . . .” PANYNJ Response to Maher's Third Set of Interrogatories No. 33 at 37, MPFF ¶ 280.

justify the disparate treatment.¹³ As Maher expert Dr. Kerr explained, “I found no . . . differences in the physical or economic value of the properties that explain the differences in the leases. I also sought to determine whether valid transportation purposes were identified to explain the differences in the lease. I was able to find none.”¹⁴

1. Basic Rent Difference

PANYNJ has conceded that the Maersk-APM and Maher lease terms are different and favor Maersk-APM. The official contemporaneous PANYNJ documents highlight the different basic rent terms. The Executive Summary prepared for the PANYNJ Board to approve the lease terms on June 2, 2000 evinced that the lease rates to be provided by PANYNJ were dramatically different, *i.e.* “\$19,000 per with no escalation for the term of the lease” for Maersk-APM” and “\$39,750 per acre with escalation [at 2% per year] for the term of the lease” for Maher.¹⁵ The Executive Summary admitted in a “Comparison to Market Rent” of the Maersk-APM rates that “The negotiated rent is lower than the container rental in all similar terminals.” And, with respect to the “Comparison to Market Rent” provided to Maher it conceded “The negotiated rent is greater than that being offered to Maersk.”¹⁶

Notably, during the PANYNJ-Maersk-APM lease negotiations, Sealand/Maersk (Maersk-APM’s predecessor entities) viewed the lease as preferential such that on October 18, 1999, PANYNJ’s Port Commerce Director Lillian Borrone wrote to PANYNJ’s Ed Harrison, reporting that SeaLand/Maeresk wanted a legal opinion that PANYNJ could enter the agreement, even

¹³ Shiftan Dep. at 47:11-48:12, MPFF ¶ 280 (no recall of any report analyzing different characteristics of the terminals used to justify differences in the lease terms because PANYNJ did not feel it had an obligation to justify anything).

¹⁴ Kerr Expert Report ¶ 80, MPFF ¶ 508.

¹⁵ Dep. Ex. 183 at 08PA00410000 and 0004, MPFF ¶ 212.

¹⁶ *Id.* at 08PA00410001 and 0005, MPFF ¶ 212.

though it was a preferential agreement.¹⁷ Likewise, the testimony of PANYNJ witnesses confirms their view that the Maersk-APM lease was preferential.¹⁸

On August 21, 2001, PANYNJ Port Commerce Department financial services manager Cheryl Yetka reported to PANYNJ's CFO that Maher paid "more than twice as much on a per acre basis" as Maersk.¹⁹ Internal PANYNJ correspondence from PANYNJ Director of Port Commerce Richard Larrabee to PANYNJ Chief Operating Officer Ernesto Butcher in February 2002 candidly described Maersk-APM's \$19,000 base rent as "extremely beneficial," and noted that it has caused other tenants to ask for "similar rental deals."²⁰

The rents required of Maher and Maersk-APMT under the leases are materially different with PANYNJ levying higher rents on Maher. In November 2003, PANYNJ estimated that during the terms of their respective leases, Maher would pay total rent (net of free capital and PANYNJ investments), with a present value of \$847,367 per acre, while Maersk-APMT would pay only \$435,916 per acre.²¹ Additionally, on January 29, 2008, communications among key senior PANYNJ officials involved in developing PANYNJ's settlement strategy with respect to

¹⁷ Dep. Ex. 90, MPFF ¶ 276.

¹⁸ Borrone 30(b)(6) Dep. at 634:11-640:14, MPFF ¶ 276 (Borrone did not dispute characterization of SeaLand/Maersk lease as "preferential"); former PANYNJ Port Commerce Department property manager E.Harrison at 192:14-196:23, MPFF ¶ 277 (rent negotiated with SeaLand/Maersk (Maersk-APM's predecessor entities) lower than container rent in all similar terminals), 300:16-301:22, MPFF ¶ 276 (SeaLand/Maersk requested a PANYNJ legal opinion that preferential agreement was legally permissible); former PANYNJ Port Commerce director of financial services C.Yetka 30(b)(6) Dep. at 302:3-16, MPFF ¶ 277 (SeaLand/Maersk had the most favorable rates in the port); PANYNJ Port Commerce leasing manager R.Evans at 206:5-209:21, MPFF ¶ 291 (Evans had discussion with PANYNJ attorney Ralph Verrill about Maersk requesting a legal opinion confirming that PANYNJ could enter a preferential lease agreement with Maersk).

¹⁹ Dep. Ex. 164, MPFF ¶ 293-94; Yetka 30(b)(6) Dep. at 313:17-314:20, MPFF ¶ 293-94.

²⁰ Dep. Ex. 255, MPFF ¶ 278, & 303, MPFF ¶ 278.

²¹ C.Yetka email of November 23, 2003, Dep. Ex. 165 (08PA00328580-85), MPFF ¶ 279; C.Yetka 30(b)(6) Dep. at 318:3-22:15, MPFF ¶ 279 (Maher is paying a much greater amount on a per acre basis than Maersk, based on this analysis).

Maersk-APM in the Dkt. 07-01 proceeding confirmed PANYNJ's position that the Maher and Maersk-APM lease terms are "very different," including: "Base rate different"; "financing terms different" and "Redevelopment funds. . . ." ²² In the same context, PANYNJ's counsel also reported that PANYNJ counsel and staff "discussed the fact that a \$50 million investment benefiting the Port Authority serves to equalize the *disparity* in the rates paid by Maher in comparison to those paid by APMT, at least in part, and waiving this investment exacerbates the *disparity*." ²³ (Emphasis added.)

The basic rental rates that PANYNJ provided to Maersk-APM and Maher are materially different with PANYNJ charging Maher higher rates. Maher's starting basic rent rate is more than twice the rate PANYNJ provided to Maersk-APM. In EP-248, PANYNJ provided and continues to provide Maersk-APM a basic annual lease rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher. ²⁴ By contrast, in EP-249, PANYNJ required and continues to require Maher to pay a higher basic annual rental rate which started at \$39,750 per acre.

Maher's per acre basic rental also escalates by 2% per year, while Maersk-APM's does not. Therefore, by the end of the 30 year term of the lease Maher's basic rent rises to \$70,590 per

²² 08PA00381994, PANYNJ email from General Manager Kenneth Spahn to Port Commerce Director Larrabee, Deputy Director Lombardi, leasing manager Evans, and attorneys Donald Burke (PANYNJ's New Jersey Solicitor) and First Deputy General Counsel Christopher Hartwyk (Jan. 29, 2008), MPFF ¶ 298.

²³ 08PA01442836, Donald Burke's Summary re Maher-APM Terminals (Feb. 21, 2008), MPFF ¶ 301.

²⁴ Among other remedies, the Maersk-APM lease also provides a rent penalty for Maersk-APM's failure to fulfill its "port guarantee" cargo "guarantee" obligation. In 2010, PANYNJ assessed this penalty because Maersk-APM failed to fulfill the cargo "guarantee" obligation in 2008 and 2009 and therefore, Maersk-APM is currently paying a base rent of \$19,000 per acre per year plus a "port guarantee" penalty amount of \$13,300 per acre per year. Fischel Expert Report at ¶ 27, MPFF ¶ 407 (APM currently pays \$32,300 per acre). If Maersk-APM satisfies the "port guarantee" requirement in any year, this "port guarantee" rent penalty ends.

acre, or a difference of \$51,590 per acre more than the PANYNJ's basic rent lease term of \$19,000 per acre provided to Maersk-APMT. At that point, Maher's basic rental rate is 3.7 times the basic rental rate PANYNJ provided to Maersk/APM.²⁵

Over the 30 year term of the leases, the terms called for Maher to pay \$703 million in basic rental, while Maersk/APMT would pay only \$193 million (both in nominal dollars). Maher's basic rental for its facility is almost four times Maersk-APM's rent over the life of the lease. On a per acre basis, Maher will pay almost three times the amount that is called for in Maersk-APM's lease. On average, Maher pays \$53,753 per acre per year, almost three times Maersk-APM's average basic rental rate of \$19,000.²⁶ Over the term of the leases, this difference in the basic rent lease rate terms totals \$459,716,899. As of May 31, 2011, Maher has sustained injury and damages due to this basic rent difference in the amount of \$108,121,870, not including prejudgment interest of \$12,209,989. Also, as a result of the basic rent difference Maher continues to sustain ongoing injury and damages and these future damages after May 31, 2011 total \$351,595,029.²⁷

2. Investment Difference

The leases are also materially different with respect to investments required by PANYNJ of Maersk-APM and Maher. PANYNJ unlawfully preferred and continues to prefer Maersk-APM over Maher with respect to the investment requirements in the PANYNJ property that is the subject of the leases. PANYNJ required and continues to require Maher to invest greater sums than it required Maersk-APM to invest and PANYNJ provided and continues to provide Maersk-APM more favorable financing terms than it provided Maher, requiring Maher to repay the investments at a higher rate than PANYNJ provided APM.

²⁵ Kerr Expert Report" at Ex. 1, MPFF Comparison of EP-249 and EP-248 Lease Differences.

²⁶ *Id.*, MPFF ¶ 510, Comparison of EP-249 and EP-248 Lease Differences.

²⁷ Kerr Report ¶ 7, Ex. 3, MPFF ¶ 512.

The leases require both Maher and Maersk/APMT to invest in significant improvements to their facilities. The leases describe certain improvements that were required and subject to PANYNJ approval, but do not specify the amount of investment required for those projects. For the specified improvements, Maersk-APM was provided \$30 million which did not have to be repaid (referred to as “free capital”), and up to \$143 million in financing from PANYNJ. This \$30 million in “free capital” provided to Maersk-APM was part of the additional \$120 million concession that PANYNJ provided to Maersk-APM to prevent Maersk-APM from moving to the Port of Baltimore. PANYNJ provided Maher \$46 million which did not have to be repaid, but that \$46 million compensated Maher for investments in Maher’s terminals which Maher was required to relinquish to PANYNJ to satisfy Maersk-APM’s demands for a new and larger 350 acre terminal and intermodal rail.²⁸ PANYNJ also agreed to provide Maher up to \$204 million in financing. Based on the funding provided that did not require repayment and financing made available by PANYNJ, on a per acre basis, PANYNJ expected Maher to spend more on its leasehold improvements than Maersk-APMT. In its responses to Maher’s Interrogatories, PANYNJ admitted that it expected Maher to make greater investments in its terminal than Maersk-APM terminal both in gross and per acre terms: Maher invested \$459,000 per acre (\$204 million divided by 450 acres) versus Maersk-APM which invested \$408,000 per acre (\$143 million divided by 350 acres). Including the sums that did not have to be repaid, the total amount per acre for Maher was \$561,798 (\$250 million divided by 445 acres) and the total for Maersk-APMT was \$494,286 (\$173 million divided by 350 acres).²⁹

²⁸ Kerr Rebuttal ¶ 33, MPFF ¶ 317-18; Dep. Ex. 144, MPFF ¶ 318 (PANYNJ’s Port Commerce Director Borrone explained that regarding construction funding “the approach they would like to present would be as a credit for what we give up at Tripoli Street”).

²⁹ Kerr Report ¶ 49, MPFF Comparison of EP-249 and EP-248 Lease Differences; PANYNJ’s Responses to Maher’s Third Interrogatories, No. 37, MPFF ¶ Comparison of EP-249 and EP-248

In addition to being required to invest more in total terms, under both methods of per acre calculation, Maher's terminal investment requirements were greater than Maersk-APM on a per acre basis. Furthermore, internally, in developing their settlement strategy with Maersk-APM for the Dkt. 07-01 proceeding, PANYNJ officials communicated among themselves that one of the obvious differences between EP-248 and EP-249 was that "APM provided less \$ per acre" in redevelopment funds.³⁰ Indeed, PANYNJ officials knew that Maersk-APM actively sought during the settlement negotiations to defer its terminal investment requirements until at least 2020 expressly to maintain its "competitive advantage."³¹ As Maersk-APM explained in its confidential settlement memorandum presented to PANYNJ officials during the negotiations in the 2007 – 2008 timeframe:

The commitments made by APM Terminals therefore will allow more cargo to move through the port and give the shipping lines the incentives to move business through the port. In order to successfully accomplish this APM Terminals do seek PANYNJ's assistance in delaying the Class 'A' work until commercially required. If this doesn't happen APM Terminals in Elizabeth will bear cost for which there will be no revenue and therefore the competitive advantage diminishes.³²

This evidence further underscores the practical significance of the disparate investment requirements. Maersk-APM explained expressly that the requirement for greater terminal investments increases its costs and diminishes its competitive advantage.

Beyond the disparate lease requirements on Maher, the evidence establishes that Maher actually invested much more in its terminal than Maersk-APM. Maher alone invested over \$450

Lease Differences. The PANYNJ numbers differ from Dr. Kerr's numbers because his calculation of per acre investment includes the sums that did not have to be repaid while PANYNJ's numbers do not.

³⁰ 08PA00381994, MPFF ¶ 298 (General Manager Kenneth Spahn email to PANYNJ officials R.Larrabee, D. Lombardi, C.Hartwyk, *et al.* re Discussion points and APM terminal deal meeting (Jan. 29, 2008)).

³¹ Dep. Ex. 272 at 08PA01436060, MPFF ¶ 437.

³² *Id.*, MPFF ¶ 437.

million in improvements to its terminal and approximately \$100 million on equipment such as cranes and straddle carriers in addition to the leasehold improvements.³³ In 2007, PANYNJ also imposed on Maher an additional consent fee payment requirement of \$22 million and an additional \$114 million terminal investment requirement on Maher not imposed on APM.³⁴

By contrast the evidence establishes that Maersk-APM invested much less in its terminal and has sought to postpone its investments. In May 2008, Maersk-APM executive Marc Oppenheimer testified that Maersk-APM only committed to \$100 million in terminal improvements.³⁵ As a result of a subsequent agreement between PANYNJ and Maersk-APM which became effective on April 1, 2009, PANYNJ also agreed to postpone Maersk-APM's completion date for approximately half (estimated \$50 million) of Maersk-APM's terminal investment improvements required by EP-248 from the year 2006 until 2017.³⁶ PANYNJ estimated the value to Maersk-APM of postponing the work at approximately \$23 million.³⁷ Maersk-APM sought the postponement of its terminal investment obligations because it would

³³ Kerr Rebuttal Report ¶ 12, MPFF ¶ 322.

³⁴ Dep. Ex. 362, MPFF ¶ 329 (as a result of the purchase of Maher by RREEF, "the Port Authority received a lump sum consent fee of \$22 million and future capital commitments of \$114 million").

³⁵ Oppenheimer Dep. at 191:14-192:4, MPFF ¶ 374.

³⁶ Larrabee Dep., 79:9-81:10, MPFF ¶ 69; EP-248 Supp. # 3 § 3, MPFF ¶ 69 (extending the deadline for APM to complete the Class A work – referred to in Settlement Agreement, Dkt. 07-01); Joint Motion for Approval of Settlement Agreement and Dismissal With Prejudice, Dkt. 07-01 at 8, MPFF ¶ 68-69 ("PANYNJ has determined that so long as the remaining Class A work is completed by 2017, as the Settlement Agreement requires APMT to do, it will not be substantially damaged. PANYNJ is not in any way relieving APMT of its obligations to perform the Class A work at APMT's expense."); PANYNJ and APM's Reply to Maher's Exceptions to the Initial Decision, Dkt. 07-01 at 6, MPFF ¶ 436 ("[B]ecause the Port Authority determined that there is no need to have APMT's remaining Class A work completed now . . . , the Port Authority's concession was truly insignificant from its perspective."); Dep. Ex. 248, MPFF ¶ 69 (PANYNJ notes on settlement).

³⁷ PANYNJ Submission Seeking Approval of Settlement at 4, MPFF ¶ 72 (APM must post a \$73 million letter of credit if it does not complete the work by either the expansion of the Panama Canal or December 31, 2017, to allow PANYNJ to complete the work at APM's expense).

lower Maersk-APM's costs and make it more competitive as compared to other marine terminals.³⁸ As a result of the greater investment requirements imposed on Maher as compared to Maersk-APM, Maher is injured and continues to be prejudiced by PANYNJ, which prefers Maersk-APM by providing it a lower cost structure as compared to Maher for terminal investments.

In addition to requiring more investments from Maher, PANYNJ also provided different financing terms for the foregoing terminal improvements at a rate 0.25% higher to Maher than Maersk-APMT. This resulted in significantly higher costs to Maher than to Maersk-APMT and Maher sustained injury and damages in the amount of \$3,164,170 as of May 31, 2011 and future damages in the amount of \$10,629,179.³⁹

3. Container Throughput Difference

PANYNJ also imposed disparate container throughput requirements and penalties. PANYNJ required and continues to require Maher to provide greater gross throughput guarantees and suffer more severe penalties than it required and continues to require of Maersk-APM. Section 43 of Maersk-APM's lease EP-248 provides for a minimum rent guarantee volume number of 220,000 Qualified Containers during the First Terminal Guarantee Period, a minimum of 320,000 Qualified Containers during the Second Terminal Guarantee Period, and a minimum of 420,000 Qualified Containers during the Third Terminal Guarantee Period. In contrast, the throughput numbers required of Maher in EP-249 Section 42 are significantly higher: a minimum of 650,000 Qualified Containers during the First Terminal Guarantee Period, a minimum of 775,000 Qualified Containers during the Second Terminal Guarantee Period, and a minimum of 775,000 Qualified containers during the Third Terminal Guarantee Period.

³⁸ Dep. Ex. 272 at at 08PA01436060, MPFF ¶ 437.

³⁹ Kerr Expert Report at ¶¶ 6-7, MPFF ¶ 515-16, and ¶ 50, MPFF ¶ 514.

Additionally, EP-248 imposed Terminal Guarantee Numbers of 270,000; 330,000; and 390,000 Qualified Containers whereas EP-249 required Maher to meet 340,000; 420,000; and 900,000 Qualified Containers. Consequently, Maher guarantees PANYNJ both more throughput rent and terminal throughput volume. *See*, Kerr Expert Report ¶ 39 and Kerr Report Ex. 2 (explaining and applying the exempt amounts for comparison).

The Maher and Maersk-APM Terminal Guarantees also discriminate against Maher on a per acre basis. In the third period, *i.e.* for the second half of the lease term, on a per acre basis, Maher guarantees to PANYNJ almost twice the throughput as Maersk-APM, 2,022 containers per acre guaranteed by Maher and only 1,114 containers per acre by Maersk/APMT. *See* Kerr Expert Report ¶ 43 and Kerr Exhibit 2.

Additionally, under the terms of its lease, Maher could be forced to return the entire marine container terminal to PANYNJ if it fails to meet its Terminal Guarantee for two consecutive years (prior to 2015), and three consecutive years during the lease's third Terminal Guarantee period after 2015, when Maher's terminal guarantee per acre is nearly twice that of Maersk-APM. For Maersk-APM, if the Terminal Guarantee is not met for two years, PANYNJ can reclaim only a portion of the terminal (150 acres of the 350 acre terminal) for an initial shortfall and can only reclaim the entire facility after a shortfall exceeds even lower levels after an additional two years. Therefore, as a practical matter, the penalty for Maersk-APM's failure to satisfy its two-stages of terminal guarantee minimums means that it does not risk losing the entire terminal for four years.⁴⁰

⁴⁰ Dep. Ex. 131 (EP-249) § 42(d)-(e), MPFF ¶ 314 (Maher's Terminal Guarantee); Dep. Ex. 16 (EP-248) § 43(c)-(d), MPFF ¶ 354 (APM's Terminal Guarantee); Kerr Report ¶ 43, MPFF ¶ 314 & 354.

4. Security Deposit Difference

The security deposit terms of the leases are also different. PANYNJ also unlawfully preferred and continues to prefer Maersk-APM over Maher with respect to the security deposit requirement by requiring Maher to provide a deposit not required of Maersk-APM. Originally set at \$1.5 million, in 2007 PANYNJ required a significant increase to Maher's security deposit. Currently the security deposit requirement Maher must satisfy is \$22 million. By comparison, Maersk-APMT was not required to post a security deposit. Instead, PANYNJ allowed Maersk-APM to provide a corporate guarantee from a "parental" entity which is no longer a parent following a consent provided by PANYNJ Maersk-APM to reorganize in 2008. The difference between a security deposit and a corporate guarantee is cost. Providing a security deposit ties up capital that could be put to other uses. In contrast, a guarantee requires no resources to be devoted to the agreement. So the economic effect of the different requirements faced by Maher and Maersk-APM is higher cost for Maher. Maher sustains injury and damages from the security deposit requirement of \$5,642,878.⁴¹

5. First Point Of Rest Difference

The leases are also materially different with respect to the requirement for a first point of rest for the loading and offloading of automobiles. PANYNJ unlawfully preferred and continues to prefer Maersk-APM over Maher with respect to the first point of rest requirement imposed on Maher, but not required of Maersk-APM. PANYNJ did not require Maersk-APM to provide a first point of rest for the loading and unloading of automobiles, but PANYNJ imposed this requirement on Maher.⁴² The first point of rest requirement mandated that Maher set aside a

⁴¹ Kerr Expert Report ¶¶ 6-7, MPFF ¶ 521, and ¶ 52, MPFF ¶ 518.

⁴² PANYNJ Responses to Complainant's First and Second Sets of Interrogatories at 17, MPFF ¶ 375 (Aug. 29, 2008) (verified by Richard Larrabee, Director of the Port Commerce Department, PANYNJ).

berth and ten acres of its terminal for use by automobile processors for the loading and unloading of automobiles available on 48 hours notice.⁴³ As a practical matter, this imposed additional prejudice on Maher as compared to Maersk-APM because Maher could not use acreage devoted to the first point of rest for container yard storage.⁴⁴ Maher did not need the requirement imposed by PANYNJ for a first point of rest in order to operate a container terminal, or to service automobile processors in the loading or unloading of automobiles.⁴⁵

The first point of rest requirement prejudiced Maher with an unnecessary restriction on the flexible use of its terminal and according to PANYNJ also prohibited Maher from charging automobile processors its costs for maintaining the first point of rest acreage available for the loading and unloading of automobiles.⁴⁶ Compounding the discrimination, in March 2008, PANYNJ unreasonably enforced the first point of rest requirement against Maher and threatened

⁴³ Dep. Ex. 131, EP-249 § 48 “First Point of Rest”, MPFF ¶ 330-31 (requiring Maher to “make available a ship berth and upland area for the purpose of receiving and loading automobiles and other motor vehicles . . . [u]pon 48 hours advance notice” consisting of “berth 52 . . . and the open area upland of Berth 52 of approximately ten (10) acres. . . .”)

⁴⁴ Kerr Expert Report ¶ 51, MPFF ¶ 333; Dep. Ex. 131 (EP-249) § 48(a), MPFF ¶ 330; former Maher President J. Curto Dep. at 230:20-233:2, MPFF ¶ 333 (Maher opposed to the first point of rest requirement as unnecessary to stevedore cars and because Maher didn’t want to have to dedicate the area to one purpose); former Maher General Counsel S. Schley Dep. at 297:4-16, MPFF ¶ 333 (Maher opposed to first point of rest requirement because it was a “double-whammy” requiring Maher to keep the facility available for a less productive purpose); former Maher CEO Brian Maher Dep. at 195:4-196:5, MPFF ¶ 333 (Maher opposed to first point of rest requirement because it was a “big issue” to have to keep ten acres vacant); Kerr Rebuttal Report at ¶ 75, MPFF ¶ 333 (“Because of this provision, under the lease . . . berth space would not have been available for containers.”); former Maher President Basil Maher Dep. at 89:21-4, MPFF ¶ 333 (PANYNJ required Maher to stevedore cars that it did not want to stevedore).

⁴⁵ *Id.*, MPFF ¶ 333 & 340; Basil Maher Dep. at 85:24 – 86:9, MPFF ¶ 340 (“we still objected to the fact that it was a requirement in our lease . . . there was no reason for it to be required in the lease.”)

⁴⁶ *Id.* at 83:23 – 85:2, MPFF ¶ 337 (Maher not compensated for use of the first point of rest land area of ten acres); PANYNJ letter from First Deputy General Counsel Christopher Hartwyk to Maher (Mar. 24, 2008), MPFF ¶ 337 (PANYNJ asserts that Maher “has no right” to impose charges for preparing the berth to accept autos and asserting that Maher can only require “commercially reasonable insurance and prompt payment of wharfage and dockage charges”).

Maher with repossession of the acreage and berth.⁴⁷ Maher sustained injury and damages from the first point of rest requirement and the PANYNJ's unreasonable implementation and enforcement of the unlawful requirement. The existence of the first point of rest requirement effectively reduced the acreage Maher had available for its container terminal operations and reduced Maher's operating flexibility while charging Maher higher rents than Maersk-APM for the acreage, including throughput rents.⁴⁸ The first point of rest area has not been used pursuant to EP-248 § 48 since March 2007 and despite Maher's request for a meeting to discuss the matter and Maher's complaint in this proceeding, PANYNJ has not met with Maher, and has failed to acknowledge that § 48's requirements on Maher have lapsed, and has failed to abandon its threats of termination of the letting of the berth and acreage.

B. PANYNJ Unlawfully Treated Maher Differently Because of Status

The evidence establishes that PANYNJ provided Maersk-APM preferential terms with respect to the foregoing lease terms, failed and continues to fail to provide the Maersk-APM lease terms to Maher, and refused and continues to refuse to provide those terms to Maher. PANYNJ refused despite Maher's requests because Maersk-APM was affiliated with an ocean carrier, Maersk Line, and Maher was not. However, "[s]tatus alone is not a sufficient basis by which to distinguish between lessees." *Ceres*, 27 S.R.R. at 1273. Simply put, PANYNJ

⁴⁷ PANYNJ General Manager Kenneth Spahn letter to Maher (Mar. 14, 2008), MPFF ¶ 344 (Notice of Non-compliance with EP-249 § 48 and assertion of right to terminate the letting of the first point of rest 10 acre area and berth); PANYNJ letter from First Deputy General Counsel Christopher Hartwyk to Maher (Mar. 24, 2008), MPFF ¶ 344 (PANYNJ notice to Maher alleging breach of EP-249 and the obligation of good faith and fair dealing and threatening enforcement of the lease provision providing for termination of the letting); Maher General Counsel J.Ruble letter to PANYNJ (Apr. 2, 2008), MPFF ¶ 344 (rejected PANYNJ's assertion of breach, objecting to PANYNJ's manipulation of the provision with one vessel call, explaining the circumstances, and requesting a meeting to resolve the dispute).

⁴⁸ Dep. Ex. 131 (EP-249) § 48(a), MPFF ¶ 333; Curto Dep. at 230:20-231:11, MPFF ¶ 333; Schley Dep. at 297:4-16, MPFF ¶ 333; Brian Maher Dep. at 195:4-196:5, MPFF ¶ 333; Kerr Expert Report ¶ 51, MPFF ¶ 333; Kerr Rebuttal Report at ¶ 75, MPFF ¶ 333 ("Because of this provision, under the lease . . . berth space would not have been available for containers.").

discriminated against Maher for an unlawful purpose. And, furthermore, PANYNJ failed to ensure that its differentiation between Maher and Maersk-APM was based on the particular facts and circumstances of the lessees. *Id.* To the contrary, Maher provided PANYNJ both a larger cargo guarantee and a larger rent guarantee. Once “a port determines to offer volume-type discounts, it must make them available to all users who meet the criteria.” *Id.* Therefore, PANYNJ has violated and continues to violate the Shipping Act.

The testimony of key PANYNJ witnesses establishes that PANYNJ unlawfully discriminated against Maher and in favor of Maersk-APM because of status. Former PANYNJ Deputy Executive Director Ronald Shiftan who was directly involved in the negotiations and decision-making testified about what he described as the “existential” differences between Maersk-APM and Maher:

Maersk and Maher were completely different animals . . . Maersk . . . being a *carrier* was able to direct traffic into the harbor. . . . Maher on the other hand, as a *terminal operator* . . . did not present the same flight risk because Maher wasn't going anywhere, because Maher didn't have ships and its didn't have control over the cargo to the degree that Maersk did, and, therefore, it didn't present the same risks. . . . And as a consequence, it was The Port Authority's view , and it is my view today, that one can't really compare the two.⁴⁹

He also testified that PANYNJ did not provide Maher the basic rent lease rate term that it provided to Maersk-APM in the June 2, 2000 Board action because of *status*. According to Mr. Shiftan:

. . . The Port Authority, commissioners viewed the Maersk lease as critical and essential to the region. They also viewed the Maersk terminal as unique. Maersk is a *shipping company* which brings ships in and the containers those ships carry into port. And, as a consequence, the terms of the lease with Maersk not only included the basic rent for the land, but also included additional amounts, in terms of thruptut on a per container basis and guarantees by Maersk as to the number of containers that they would bring into their terminal and the number of containers that they would bring into the port generally. Maher, as a *stevedore, a terminal*

⁴⁹ Shiftan Dep. 262:16-264:7, MPFF ¶ 260 (emphasis added).

operator, without a shipping line, is not in a position to make those sorts of guarantees with respect to volume."⁵⁰

Likewise, current PANYNJ Executive Director Christopher Ward who participated directly in the Maersk-APM lease negotiations and the Board presentations and deliberations with respect to the leases⁵¹ testified that Maersk-APM was "qualitatively" different from Maher because Maersk Line was an ocean carrier and not a mere marine terminal operator. When asked "Having secured Maersk in the port at the rate of \$19,000 an acre, why didn't The Port Authority extend that rate to the other marine container terminal operators," he testified: "Because The Port Authority's need to secure Maersk and all of that which they bring was qualitatively different than the other terminal operators and their market position going forward."⁵² And when asked to explain that qualitative difference, Mr. Ward testified, "That the Maersk port guarantee requires it to be Maersk containers versus any containers." And when asked why that constitutes a qualitative difference, Mr. Ward testified: "Due to the nature of the way ships are loaded and the amount of market force that a *carrier* has, with Maersk bringing a lion's share of their own cargo has a draw of pulling other cargo into the harbor, besides direct Maersk cargo. So, it has a multiplier effect of bringing even additional cargo into the facility."⁵³

Then PANYNJ Director of Port Commerce Lillian Borrone, who led the PANYNJ negotiations with respect to the Maersk-APM and Maher leases, also confirmed the PANYNJ discrimination on the basis of status in sworn 30(b)(6) testimony on behalf of PANYNJ. When asked, what would "justify charging more -- hundreds of millions of dollars more in base rent,"

⁵⁰ Shiftan Dep. at 42:21-43:20, MPFF ¶ 259 (emphasis added).

⁵¹ Ward Dep. at 11:14-24, MPFF ¶ 255; 25:15-26:21, MPFF ¶ 255. (Ward served as Director of Port Development and the PANYNJ's Chief of Strategic Planning and External Affairs from 1997 – 2002 when he oversaw the comprehensive port improvement plan. He initially worked directly for PANYNJ Port Commerce Director Lillian Borrone for about a year and then in about May 1998 started working directly for Executive Director Robert Boyle).

⁵² Ward Dep. at 162:6-13, MPFF ¶ 262.

⁵³ *Id.* at 166:1-7:6, MPFF ¶ 262 (emphasis added).

Ms. Borrone testified: “. . . Maher Terminal is not a *carrier* and it couldn't commit to assuring that particular *carrier's* cargoes could come to the harbor as part of their negotiation with us.”⁵⁴

According to PANYNJ consultant Pat Ragan of consulting firm Paul F. Richardson Associates, Inc., Port Commerce Director Lillian Borrone directed revisions to a report being prepared for PANYNJ regarding the Maersk-APM lease negotiations in August 1998 which set forth Ms. Borrone's revisions in bold explaining her view that PANYNJ should levy different lease rates for a “carrier/operator, such as Sea-Land & Maersk” versus a “pure, captive terminal operator with no cargo of its own:”

It is important that the distinction be drawn between a “market rate” for a carrier/operator, such as Sea-Land & Maersk, and that of a pure, captive terminal operator with no cargo of its own. This distinction has a profound impact on what lease levels should be offered. There are two leases in the Port which contain base rent levels similar to those proposed for Sea-Land & Maersk. However, these two leases are with independent terminal operators who do not have an option, they cannot readily move to another port. Sea-Land & Maersk, on the other hand, are carriers who have several viable options to moving cargo through the Port.

...

Given this development as well as other potential options, the competitive lease rate must be measured, not by what captive operators in the Port are paying, but by the lease rate levels which exist, or potentially exist, in competing ports.⁵⁵

In response to questions about her forgoing revisions to the Richardson Report recommended by Mr. Ragan, Ms. Borrone testified that she did not recall the revisions, and did not agree with the first sentence of the revisions, but she did agree with the remainder of the revisions. She testified that “I would say that I believe it is important to understand the *distinction* between the circumstances of a carrier operator like Sea-Land and Maersk and a

⁵⁴ Borrone 30(b)(6) Dep. 84:4-13, MPFF ¶ 250 (emphasis added).

⁵⁵ Ex. 72, Richardson Report with Borrone Comments In Bold (Aug. 26, 1998), at MT004615, MPFF ¶ 167; also see Ex. 95 Richardson Report with Borrone Comments incorporated (Aug. 27, 1998) (08PA00001471-79), MPFF ¶ 167; Borrone 30(b)(6) Dep. at 670:10-70:21, MPFF ¶ 167 (bold comment incorporated into Aug. 27, 1998 version of Richardson Report).

terminal operator with no cargo of its own.”⁵⁶ Likewise, in response to Maher’s interrogatories asking why PANYNJ provided disparate lease terms to Maersk-APM and Maher, PANYNJ answered under oath that Maher “*was not a carrier and did not have a significant ownership interest in a carrier.*”⁵⁷

The official contemporaneous PANYNJ documents also establish that PANYNJ unduly preferred Maersk-APM and discriminated against Maher because of Maersk-APM’s status as affiliated with an ocean carrier. The Executive Summary explained with respect to “Comparison to Market Rent” that PANYNJ provided Maersk-APM that “The negotiated rent is lower than the container rental in all similar terminals.”⁵⁸ According to the Executive Summary the decision to approve the Maersk-APM lease terms was because: “Development of a 350-acre container facility in Elizabeth for Maersk will anchor its *major steamship lines* in the Port of New York and New Jersey. . . . Not entering into this agreement may lead Maersk to leave the Port. . . .”⁵⁹ (Emphasis added.)

The testimony from the Maher witnesses who participated in the EP-249 negotiations corroborates the foregoing PANYNJ witnesses testimony and contemporaneous documents supplied by PANYNJ establishing that although Maher expressly requested the Maersk-APM terms, PANYNJ refused because of status. Former CEO of Maher, Brian Maher who led the Maher negotiating team, explained that “the port guarantee . . . was the cornerstone of the reason

⁵⁶ Borrone 30(b)(6) Dep. at 490:9-13, MPFF ¶ 168 (emphasis added).

⁵⁷ PANYNJ’s Responses to Complainant’s Third Set of Interrogatories at 6 & 8 (Oct. 8, 2008), MPFF ¶ 253 (verified by Dennis Lombardi, Deputy Director of the Port Commerce Department, PANYNJ) (PANYNJ prefers “companies who are carriers or have a significant ownership interest in one”); *see also*, PANYNJ Responses to Complainant’s First and Second Sets of Interrogatories at 10 (Aug. 29, 2008), MPFF ¶ 253 (verified by Richard Larrabee, Director of the Port Commerce Department, PANYNJ) (explaining PANYNJ’s preference for “Maersk shipping lines”) (emphasis added).

⁵⁸ Dep. Ex. 183 at 08PA00410001, MPFF ¶ 277.

⁵⁹ *Id.* at 08PA00409999, MPFF ¶ 213.

why The Port Authority -- why The Port Authority gave Maersk more favorable terms than Maher. . . .⁶⁰ Likewise, former Maher General Counsel Scott Schley testified:

. . . specifically, at that meeting [on September 23, 1999], we were told that our rates were not the same as the Maersk lease, but that there were specific reasons for that. And the two reasons, as I recall, they gave were -- one was the port -- that Maersk was making significantly greater improvements to the facility which would have justified that, and the other reason that they gave was that the port -- that Maersk was giving a port guarantee, something that we could not give to -- and that because of those reasons, the -- our rents would not be exactly the same.⁶¹

And, Maher's former Chief Financial Officer ("CFO") who also negotiated Maher's lease terms with PANYNJ testified, "[w]e were told by Ms. Borrone that the reason for the difference between our lease -- one of the reasons for the difference between our lease and the APM lease is the fact that APM had the ability to guarantee volume via a port commitment."⁶²

PANYNJ considered Maher as a mere captive marine terminal operator that presented no risk to leave the port and could not guarantee carrier cargo like Maersk which provided a "port guarantee." Randall Mosca, explained that PANYNJ refused to provide Maher the Maersk-APM lease rate terms because of status:

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

A The -- The Port Authority -- I don't know if anyone specifically said that, but there was discussion many times about Maher being a terminal operator that was

⁶⁰ Brian Maher Dep. at 20:22-21:3, MPFF ¶ 251; 198:17-199:17, MPFF ¶ 242 (Q: What reason, if any, did she [Lillian Borrone] give you for the rates that she agreed to with you? A: Her reason was that Maersk provided a port guarantee, and that they -- Maersk was going to make larger investments in their facility than we were.).

⁶¹ Schley Dep. at 66:25-67:13, MPFF ¶ 243; 266:22-267:14, MPFF ¶ 252 (PANYNJ did not provide Maher the opportunity to provide a cargo guarantee provided to Maersk-APM).

⁶² Mosca Dep. at 89:4-89:8, MPFF ¶ 244; 139:18-140:5, MPFF ¶ 244 ("We were at a meeting where we discussed our negotiations and what we were trying to attain, and Ms. Borrone told us . . . the reason why Maersk had a lower base rental was because they -- there were two reasons: One, they had a larger investment in the terminal that they provided, and two, they were able to generate a port guarantee for volume, which we were unable to do, and, therefore, the Maersk rates were off the table for us.").

only in the Port of New York and we really had no place to go other than conduct our business in the Port of New York.

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

A Yes.

Q Tell us what happened.

A We 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. And we had asked to replace the Maher lease rate with the Maersk lease rate, and we were told that the Maersk lease rates were off the table, it was not something the Port Authority was willing to negotiate.

Q Who told you that?

A Lillian Borrone.

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

A We reached the point in the lease negotiation where that was -- the Port Authority said it was their final offer. So we had to decide if we wanted to accept the lease terms.

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

A We understood very clearly that the -- this was the final offer for the Port Authority and that they were not going to negotiate any further.⁶³

Maher's then CEO Brian Maher also testified further about PANYNJ's refusal to provide Maher the Maersk-APM lease rate terms during negotiations with PANYNJ, and Maher's acceptance of the terms in order to stay in business in the port:

[W]e were not -- we were told that we were not going to get the terms that Maersk got, even though we had -- even though previously we had been told that the playing field would be level throughout the port.

[W]e were told -- and it was pretty clear to me on a practical basis, that Maher was not going to achieve the economic package that Maersk and -- and APM received, and so I accepted the lease that was given to me on the basis that -- that the Maersk Sea-Land APM terms were not available to us.⁶⁴

Throughout the lease negotiations, Maher requested parity with Maersk-Sealand and PANYNJ had communicated to Maher that it would provide a level playing field. Therefore, when PANYNJ negotiators asked Mr. Maher in February 1999—after receiving the ultimatum

⁶³ Mosca 07-01 Dep. at 154:3-156:10, MPFF ¶ 249.

⁶⁴ Brian M. Maher 07-01 Dep. at 274:18-275:9, MPFF ¶ 249.

from Maersk-APM for the \$120 million concession (net present value)(\$336 million nominal)—if he would be willing to accept rent terms irrespective of what rent levels were ultimately agreed between PANYNJ and Maersk-APM, Mr. Maher responded consistent with his longstanding position:

[I]n our view it is the Port Authority's responsibility to set rent levels that are competitive with other Ports on the East Coast and which produce a level playing field with within the Port itself. Therefore, we would expect that the Port Authority would offer us rates, terms, and conditions for our Tripoli Street renewal which are competitive with other Ports on the East Coast and in line with the prevailing terms, conditions and rates being offered to other tenants at this time.⁶⁵

But, despite Maher's repeated requests for parity and the same lease terms provided by PANYNJ to Maersk-APM, PANYNJ provided preferential terms to Maersk-APM because of its status as affiliated with an ocean carrier, Maersk Line, and refused to provide the same lease rate terms to Maher because it was merely a captive marine terminal operator.

C. PANYNJ Treated Maher Differently To Increase Revenue

The evidence also establishes that PANYNJ took a decision to charge Maher higher rates as compared to Maersk-APM to increase revenue for commercial convenience. However, such commercial convenience is not a sufficient basis upon which to distinguish between lessees. As the Commission has explained, "[c]ommercial convenience cannot justify a practice which is otherwise unreasonable." *Investigation of Free Time Practices-Port of S.D.*, 7 S.R.R. at 323; *see also Perry's Crane Serv. v. Port of Houston*, 16 S.R.R. 1459, 1480, 1492 (A.L.J. 1976), *partially adopted by the Commission* 19 F.M.C. 548 (justifications for discrimination based on self-serving commercial grounds rejected). As an initial matter, "operators of public terminals must afford all customers seeking the same service fair and reasonable treatment." *Chr. Salvesen &*

⁶⁵ Dep. Ex. 198, Letter from Brian Maher to Robert Boyle, Executive Director of PANYNJ, MT002597-8 (Feb. 16, 1999), MPFF ¶ 153.

Co. v W. Mi. Dock & Mkt. Corp., 10 S.R.R. 745, 756 (F.M.C. 1968). And, a preference or prejudice is established by showing that a port "charges a different rate to different users for an identical service." *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation Dist.*, 10 S.R.R. 1037, 1042 (F.M.C. 1969); In *Ceres*, the Commission emphasized that the port authority's "rates assessed Ceres for the same services [including land rental] are excessive" in the context of its determination of a violation of Shipping Act § 10(d)(1) for an unreasonable practice. *Ceres*, 27 S.R.R. at 1271, 1272, and 1275. Consistent with established authority, the Commission did not accept the port authority's purpose of increasing revenues as a valid justification for an unreasonable practice. *Id.* at 1255 (Ceres asserted that port authority "denied it parity with Maersk first in order to generate higher revenue from the higher rates").

1. PANYNJ Sought To Increase Revenue

PANYNJ witnesses testified uniformly that PANYNJ sought to increase its revenue, particularly with respect to the Port Commerce Department and the redevelopment of the port. PANYNJ testified through its 30(b)(6) witness Ms. Yetka that PANYNJ's port reinvestment model sought "to return a greater share of P[ort] A[uthority] investment than we have received, in the past," to result in "a substantial increase in rent to the Port Authority."⁶⁶ And PANYNJ also testified through its 30(b)(6) witness former Port Commerce Director Borrone that a significant purpose of PANYNJ's plan was to increase PANYNJ revenues.⁶⁷ Former PANYNJ CFO McClafferty has explained in sworn testimony that PANYNJ sought to reduce the operating deficit of the Port Commerce Department to a break-even level. According to Mr. McClafferty,

⁶⁶ Dep. Ex. 55, MPFF ¶ 104; Yetka 30(b)(6) Dep. at 62:18-21, MPFF ¶ 104.

⁶⁷ Borrone 30(b)(6) Dep. at 272:8-11, MPFF ¶ 104 & 110 ("Q: So is it fair to say that a significant factor in this port reinvestment model was to increase Port Authority revenues? A: Yes.").

“the Port Commerce Department was a money loser for the Port Authority.”⁶⁸ When asked why it was important to develop a container pricing model in 1996 with respect to the upcoming renewal of marine container terminal leases in the port, he testified:

A My recollection is that the Port Commerce Department was a deficit operation that was subsidized by other Port Authority facilities.

Q And so, the fact that it was a deficit operation, how did that lead you to develop a container pricing model?

A We were looking to develop a model that would have the Port Commerce Department, you know, break even.⁶⁹

And, in response to additional questions about the PANYNJ's objective of reducing its deficit with respect to marine container terminal pricing, he explained that PANYNJ also aimed to achieve an internal rate of return or “hurdle rate” of eight and a quarter percent:⁷⁰

Q And isn't it also true, Mr. McClafferty, that, as you've testified earlier this morning, that one of the principal purposes was to achieve a break-even financial return for the Port Commerce Department with respect to these terminals?

A Yes.

Q And, additionally, wasn't part of the purpose to increase The Port Authority's revenues?

A The purpose was to reduce the deficit to the -- that The Port Authority was subsidizing for the Port Commerce Department.

Q And that would involve an increase in The Port Authority's revenue; isn't that correct, Mr. McClafferty?

A Yes.

Q Indeed, wasn't one of the other purposes of the container pricing model to clear The Port Authority's hurdle rate?

A Yes.

Q What was The Port Authority's hurdle rate at the time, Mr. McClafferty?

A Eight and a quarter percent.⁷¹

PANYNJ 30(b)(6) witness Borrone testified to the same effect, explaining that the port investment model, which she had approved, aimed to increase PANYNJ revenues to reduce the

⁶⁸ McClafferty Dep. at 208:15-19, MPFF ¶ 228.

⁶⁹ McClafferty Dep. at 24:16-24, MPFF ¶ 92.

⁷⁰ Dep. Ex. 45 at 08PA00202378, MPFF ¶ 92 (PANYNJ internal rate of return (“IRR”) port-wide for the container pricing model varies from 6.5 – 9.7%, but 8.25% can be achieved by adjusting expenditures, etc.).

⁷¹ *Id.* at 26:24 – 27:22, MPFF ¶ 92.

level of subsidy.⁷² According to Ms. Borrone, this objective to increase revenues and decrease the subsidy was directed by PANYNJ senior management.⁷³

Although during July and August 1998 PANYNJ Board Commissioners stated that lease rate terms provided to Maersk-APM need not be provided to other PANYNJ tenants, PANYNJ's internal staff position was that Maersk-APM would be charged the same rates as Maher.⁷⁴ Then PANYNJ Executive Director Robert Boyle explained to the PANYNJ Commissioners on July 30, 1998 that "if we give in to SeaLand/Maersk we would likely have to drop all of the tenant rates. The Federal Maritime Commission will look at the rate schedule and terms of the agreements to see if firms have been given an advantage or disadvantage."⁷⁵ As expressly stated in Ms. Borrone's August 5, 1998 memorandum to the Board's Committee on Operations with respect to the rate structure: "A basic assumption is that all container terminal rents would be maintained at parity during the next generation of container terminal leases."⁷⁶ And at another meeting on August 10, 1998, the staff informed the Commissioners that "under Federal Maritime Law you cannot discriminate against similar tenants," and further that "[i]f we were to give SeaLand/Maersk a better deal and try to make up the difference with a tenant(s) such as Maher,

⁷² Borrone 30(b)(6) Dep. at 268:2- 273:3, MPFF ¶ 104; Dep. Ex. 55, MPFF ¶ 102-08 (Port Reinvestment Model transmitted on July 22, 1997 to Maher and approved by Ms. Borrone reflecting her position at the time).

⁷³ *Id.*, MPFF ¶ 104.

⁷⁴ Dep. Ex. 68 at 08PA00236538, MPFF ¶ 156, 159-60 (PANYNJ CFO McClafferty July 28, 1998 Memorandum to the PANYNJ Board Committee on Operations "[b]ased upon an assumption that all container terminal rents would be maintained at parity"); Dep. Ex. 69 at 08PA01723130, MPFF ¶ 158 (July 30, 1998 presentation to the Committee on Operations).

⁷⁵ Dep. Ex. 69 at 08PA01723133, MPFF ¶ 223.

⁷⁶ Dep. Ex. 70 at 08PA00082143, MPFF ¶ 163.

then they would file suit and win, unless we could prove there were significant distinctions between the leases, such as more or less desirable property.”⁷⁷

2. PANYNJ Provided An Additional \$120 Million (NPV) Concession To Maersk-APM To Avert Relocation to the Port of Baltimore

As set forth above, PANYNJ discriminated against Maher because of status in violation of the Shipping Act. In 1999, PANYNJ acceded to Maersk-APM’s demand for additional concessions totaling \$120 million net present value (\$336 million nominal)⁷⁸ to avert Maersk-APM’s threatened relocation to the Port of Baltimore. In response to the question, “Was any other subsidy offered, provided, or in any other way credited to Maersk,” Ms. Yetka, the PANYNJ’s then Port Commerce financial services manager testified: “As I recall, the total value of the lease proposal was approximately \$120 million and included a combination of reduced rentals and capital investments in the terminal.”⁷⁹ The \$120 million net present value (\$336 million nominal) concession that PANYNJ provided to Maersk-APM was comprised of approximately \$118 million in rent reduction and “free capital.” The remaining approximately \$2 million represented PANYNJ’s forgiveness of a balloon payment due from Maersk-APM.⁸⁰

But, according to PANYNJ’s own contemporaneous financial analysis the lease rate concessions that PANYNJ ultimately provided to Maersk-APM if also provided to Maher and other marine terminal operators would cause PANYNJ’s internal accounting deficit to balloon by \$200 million (net present value), i.e. approximately \$560 million in nominal dollars over the 30 year lease terms:

⁷⁷ Dep. Ex. 71 at 08PA1770792, MPFF ¶ 226; Borrone 30(b)(6) Dep. at 454:2-5, MPFF ¶ 226 (most likely said by either then PANYNJ General Counsel Jeff Green or current PANYNJ Executive Director Chris Ward).

⁷⁸ Dep. Ex. 159 at 3, MPFF ¶ 202 (\$305.6 million in rent concessions and \$30.4 million in free capital = \$336 million in nominal dollars over the lease term).

⁷⁹ Declaration of PANYNJ’s C.Yetka at 1 (June 17, 2008), MPFF ¶ 201.

⁸⁰ Dep. Ex. 81, MPFF ¶ 201 (PANYNJ identifying forgiveness of the balloon payment of \$2.14 million due on February 28, 1999 as part of the \$120 million in concessions to Maersk-APM).

This [net present value] NPV deficit . . . would grow to over \$600 million if the \$120 million Sea-Land/Maersk concession were to be provided to all new terminal leases because of FMC considerations.

. . . if the \$120 million Sea-Land/Maersk concession has to be made available to other operators because of FMC considerations, the financial results could be well over \$200 million worse than what could be expected if Sea-Land and Maersk were to leave.⁸¹

PANYNJ's Borrone confirmed under oath that this analysis accurately reflected the PANYNJ staff's assessment at the time, including that of Executive Director Robert Boyle, of the impact of providing other marine container terminal operators the Maersk-APM concessions.⁸² Ms. Borrone presented materially the same analysis to the PANYNJ Board at a meeting on May 27, 1999.⁸³ She explained that the PANYNJ's proposed reduction in Maersk-APM's basic rent from \$36,000 per acre to \$19,000 per acre and PANYNJ also providing Maersk-APM \$30 million in free capital yielded a \$628 million net present value internal accounting loss to the Port Authority, if the same concessions provided to Maersk-APM were also provided to Maher and other marine container terminal operators.⁸⁴

Furthermore, at this meeting Ms. Borrone expressly explained to the PANYNJ Board that where the "proposal does not provide parity to all New Jersey lease holders" the result is "additional revenue to the Port Authority."⁸⁵ In response to PANYNJ Board Chairman Lewis Eisenberg's question about net present value internal accounting loss to the Port Authority in the September 1998 proposal to Sea-Land/Maersk, Ms. Borrone explained that the proposal "did not assume concessions for existing tenants," but only for "three of which are up for renewal in the

⁸¹ Dep. Ex. 84, MPFF ¶ 227 (Memorandum from Robert E. Boyle, Director PANYNJ, to All Commissioners, PANYNJ, 08PA01625998, 08PA01626000-1 (May 19, 1999)).

⁸² Borrone 30(b)(6) Dep. at 556:13-580:15, MPFF ¶ 227.

⁸³ *Id.* at 589:8-590:14, MPFF ¶ 227.

⁸⁴ Dep. Ex. 86 at 08PA01770559-60, MPFF ¶ 230 ("Lillian advised that the conceptual proposal [\$19,000/acre and \$30 million free capital] translated into a NPV loss to the Port Authority on the New Jersey Marine Terminal complex of \$628 million. . . . Lillian detailed the single lease concept [i.e. no New Jersey state funding] that results in a revised NPV deficit of \$628 million.")

⁸⁵ *Id.* at 08PA017705560, MPFF ¶ 231.

near future,” including “Maher Tripoli Street.”⁸⁶ Thus, it was apparent that PANYNJ could raise its revenues and reduce its net present value internal accounting deficit by limiting the marine container terminals to which it provided parity with Maersk-APM. Under oath, PANYNJ confirmed through its 30(b)(6) witness Ms. Borrone that it understood one way to reduce the PANYNJ’s net present value internal accounting deficit would be *not* to extend the Maersk-APM terms to other port tenants.⁸⁷ Indeed, this discriminatory approach to reducing PANYNJ’s deficit had been proposed by PANYNJ Commissioner Charles Gargano, who also served as Chairman of the Board’s Committee on Operations and Vice Chairman of the PANYNJ Board, as early as July 30, 1998. Commissioner Gargano “asked if the [PANYNJ] subsidy would be higher if all tenants were to receive the same rental rates as those being proposed” for Maersk-APM.⁸⁸ When told “yes” by Ms. Borrone, Chairman Gargano “stated that SeaLand/Maersk should be the anchor tenant and everyone else does not need to get the same deal.”⁸⁹ As the PANYNJ Commissioners and Ms. Borrone continued their discussion of the subsidy and the need to reduce it, Chairman Gargano “reemphasized that staff needs to find a way to recoup the subsidy even if it is through other tenants.” Then, “he advised staff to . . . find a way to recoup the deficit through other tenants.”⁹⁰

3. PANYNJ Recoups Maersk-APM Concession With Maher Revenue

And in the end, this is precisely what PANYNJ did. PANYNJ failed to provide Maher the Maersk-APM preferential lease rate terms for its commercial convenience to increase its revenue, thereby reducing its internal accounting deficit. When asked “was the SeaLand/Maersk better deal made up by higher rents from other tenants such as Maher,” PANYNJ

⁸⁶ *Id.*, MPFF ¶ 228.

⁸⁷ Borrone 30(b)(6) Dep. at 577:19-578:3, MPFF ¶ 232.

⁸⁸ Dep. Ex. 378 at 08PA01784123, MPFF ¶ 220.

⁸⁹ *Id.*, MPFF ¶ 221.

⁹⁰ *Id.* at 08PA01784123, MPFF ¶ 222.

30(b)(6) witness Ms. Borrone testified “it was a combination of . . . rate structures negotiated . . . with other tenants.”⁹¹

The evidence establishes that at the May 27, 1999 PANYNJ Board meeting, where Ms. Borrone gave a presentation on the status of negotiations and the impact on net present value internal accounting loss, PANYNJ had not yet decided on lease rates for Maersk-APM and Maher.⁹² Previously, on May 19, 1999, Ms. Borrone had requested rates for both Maersk-APM and Maher from Executive Director Boyle.⁹³ Ms. Borrone confirmed in sworn testimony that at that point “we had not agreed on any rate structure at this point” and “I needed rates, yes.”⁹⁴ But, rates were not forthcoming by the May 27, 1999 PANYNJ Board meeting.⁹⁵ And while Ms. Borrone testified that she did not remember when she got rates, the evidence is that the PANYNJ Board determined the rates provided to Maersk-APM on July 29, 1999.⁹⁶

On June 2, 1999, Ms. Borrone previously told Maher that while “we are not able to discuss rates with Maher yet,” but she “suggested that Maher work on a worst case scenario first, i.e. the September 36,000 per acre proposal to Sea-Land Maersk.”⁹⁷ At a meeting on September 1, 1999, PANYNJ provided Maher lease rate terms of \$36,000 per acre with a two percent

⁹¹ Borrone 30(b)(6) Dep. at 461:7-462:7, MPFF ¶ 272.

⁹² Dep. Ex. 86 at 08PA01770559-63, MPFF ¶ 192.

⁹³ Dep. Ex. 85, MPFF ¶ 234 (Ms. Borrone proposed alternative rate tracks for Maersk-APM, i.e. \$36,000 and \$19,000 per acre, and explaining that “I have made it clear with Maher . . . that we cannot speak with them about rates until the direction on Sea-Land and Maersk is resolved”).

⁹⁴ Borrone 30(b)(6) Dep. at 583:2-18, MPFF ¶ 234.

⁹⁵ Dep. Ex. 86 at 08PA01770559-63, MPFF ¶ 192.

⁹⁶ Dep. Ex. 375, MPFF ¶ 201 (08PA01792380) (PANYNJ Board item dated July 29, 1999 authorizing the Executive Director to “proceed with full negotiation”); 07-01 Dep. Ex. 14, Updates on the North East Deepwater Port Analysis, at APM03270, MPFF ¶ 201 (“We were informed on July 29, 1999 by Port Authority of NY/NJ officials that they have received instruction from their Board of Commissioners to proceed with a lease for Maersk. This lease (usd 19,000 per acre, etc) will incorporate the favorable economics previously offered. . . .”).

⁹⁷ Dep. Ex. 114 at 08PA00017191-2, MPFF ¶ 235.

annual escalator.⁹⁸ At the next PANYNJ-Maher lease negotiation meeting on September 14, 1999, Maher CEO Brian Maher “explained that he assumes that the basic financial terms are not negotiable . . . since he believes they are similar to that offered to Maersk/Sealand.”⁹⁹ In response, Ms. Borrone said that the “rates are different but similar to Maersk/Sealand.”¹⁰⁰

On September 21, 1999, Maher responded to PANYNJ’s September 1 proposal of \$36,000 per acre per year basic rent with the two percent annual escalator “on the basis that they are the same as those agreed to with SeaLand and Maersk.”¹⁰¹ And at the next PANYNJ-Maher lease negotiation meeting on September 23, 1999, Ms. Borrone informed Maher that PANYNJ was *not* providing Maher the Maersk-APM lease rate terms. Ms. Borrone told Maher that, among other things,¹⁰² Maher was not getting the Maersk-APM lease rates because “Maersk was guaranteeing to bring their cargo into the port.”¹⁰³

In October 5, 1999 comments on the PANYNJ proposed terms, Maher stated that the rates are agreed “subject to review by PANYNJ analysis showing Maersk/Maher

⁹⁸ Dep Ex. 92, MPFF ¶ 238.

⁹⁹ Dep. Ex. 93 at 08PA01788578, MPFF ¶ 240; Dep Ex. 94, MPFF ¶ 240 (Brian Maher “assumes rent levels are non-nego[tiable]”).

¹⁰⁰ Dep Ex. 94, MPFF ¶ 241.

¹⁰¹ Dep. Ex. 203, Maher Response to PANYNJ (Sept. 21, 1999), MPFF ¶ 239.

¹⁰² Dep. Ex. 144, Maher-PANYNJ Meeting Notes (Sept. 23, 1999) at MT354761-63, MPFF ¶ 241; Mosca Dep. at 84:24-85:4, MPFF ¶ 241 (Borrone told Maher that the leases were within pennies or within dollars of each other overall), 139:20-140:5, MPFF ¶ 241, 244 (Borrone told Maher that Maher and SeaLand/Maersk leases were within pennies or dollars overall and that SeaLand/Maersk had a lower basic rent because (1) it was required to provide larger investment in terminal; (2) it had a port guarantee, which Maher could not guarantee); Schley Dep. at 250:11-51:9, MPFF ¶ 241 (Borrone told Maher that leases were within pennies or dollars); Brian Maher Dep. at 17:6-19, MPFF ¶ 249 (Borrone told Maher SeaLand/Maersk terms were more favorable than Maher terms), 178:12-24, MPFF ¶ 241 (Borrone told Maher leases were so close over life of lease that difference was insignificant).

¹⁰³ Schley Dep. at 266:22- 267:7, MPFF ¶ 252.

discrepancy.”¹⁰⁴ On October 6, 1999, Maher noted that the rates are agreed “subject to the rates being Port Authority’s final offer.”¹⁰⁵ By this time Ms. Borrone had informed Maher that the SeaLand/Maersk terms were “off the table” for Maher.¹⁰⁶ Maher was presented with a “take it or leave it” offer from PANYNJ.¹⁰⁷ Maher concluded that it could not achieve better terms and because Maher feared that PANYNJ would put its terminal out for bid if Maher did not agree.¹⁰⁸ Nevertheless, on October 8, 1999, PANYNJ then proposed a further increase in Maher’s basic rent term from \$36,000 and a two percent escalator to \$41,000 and a two percent escalator and on October 12, 1999, Maher objected to the proposed \$22.5 million increase.¹⁰⁹

By October 27, 1999, the PANYNJ had secured Maher’s agreement to a base rent lease rate of \$39,750 per acre per year with a two percent escalator which was the term embodied in EP-249. PANYNJ CFO Charles McClafferty then updated the PANYNJ Commissioners regarding the revenue increase and reduction of PANYNJ’s net present value loss accounting deficit. He described “[h]igher revenue projections as a result of the rates included in the lease

¹⁰⁴ Dep. Ex. 24, Maher Comments on Proposed Terms (10/5/99), MPFF ¶ 264; Dep. Ex. 204, Maher Comments on Proposed Terms (10/6/99), MPFF ¶ 264; Schley at 69:4-12, MPFF ¶ 264 (PANYNJ was supposed to perform an analysis to show that the leases were equivalent).

¹⁰⁵ Dep. Ex. 205, Maher Comments on Proposed Terms (10/6/99), MPFF ¶ 264.

¹⁰⁶ Borrone 30(b)(6) Dep. at 86:6-14, MPFF ¶ 248 (Borrone admits making statement that SeaLand/Maersk terms were off the table around time of Sept. 23, 1999 meeting with Maher); Mosca Dep. at 51:3-12, MPFF ¶ 249 (during negotiations Maher was told that it could not get APM rates), 53:18-55:25, MPFF ¶ 244 (Borrone told Maher that she could not negotiate APM terms for Maher); Brian Maher Dep. at 52:3-12, MPFF ¶ 249 (Borrone told Maher that terms were non-negotiable and Maher needed to accept them), 187:13-188:4, MPFF ¶ 249.

¹⁰⁷ Mosca 07-01 Dep. at 154:3-56:10, MPFF ¶ 249.

¹⁰⁸ Brian Maher Dep. at 200:24-01:20, MPFF ¶ 265 (Maher accepted lease terms because believed PANYNJ was not going to give any more favorable terms and was concerned that PANYNJ would put Tripoli Street terminal out for bid); Basil Maher at 54:2-10, MPFF ¶ 265 (agreed to terms of lease because thought it had the best terms Maher could get at the time).

¹⁰⁹ Dep. Ex. 129, MPFF ¶ 266-67 (Brian Maher letter to Lillian Borrone objecting to the \$41,000 figure and proposing \$39,000 instead.); MT005167, MPFF ¶ 266-67 (Comparison of PANYNJ Base Rent Proposals of September 21 and October 8, 1999).

currently under negotiation with Maher Terminals. It is assumed that these rates which are higher than the rates for Sea-Land and Maersk will also be achievable in the Port Newark Container Terminal.”¹¹⁰ Essentially, the deficit projected was smaller than previously projected when PANYNJ assumed that Maher’s lease rates would be the same as those of Maersk-APM, principally because of increase in PANYNJ revenue due to the \$118.5 million net present value increase from Maher’s higher rent than previously projected.¹¹¹ As McClafferty testified, “if Maher Terminals paid higher rents, then the subsidy for the Port Commerce Department would have been smaller.”¹¹² In the same vein, former PANYNJ Deputy Executive Director Ron Shiftan testified that the Maersk deal was supported by other PANYNJ “sources of revenue,” including “rents and fees paid by other marine terminal operators.”¹¹³ Likewise, PANYNJ Executive Director Chris Ward testified to the same effect that increasing the PANYNJ’s revenues from other tenants, e.g. Maher, reduced its deficit:

Q If revenues did go up for other tenants, wouldn't that reduce the size of the deficit?

A Yes.

Q And isn't that what happened?

A **To the extent that any of The Port Authority's revenues increased reduced the deficit, correct.**

Q And so, that would include increased rents charged to other marine container terminals, too, wouldn't it?

A **It's a matter of math, yes.**

Q It's a matter of fact?

A **Fact.**¹¹⁴

Therefore, the evidence establishes that PANYNJ reduced its net present value accounting loss resulting from the preferential lease terms provided to Maersk-APM by *not*

¹¹⁰ Dep. Exhibit 233 (McClafferty Memorandum “New Jersey Marine Terminal” to the PANYNJ Board of Commissioners, Oct. 27, 1999), 08PA00265136-7, MPFF ¶ 270.

¹¹¹ Dep. Ex. 233, MPFF ¶ 270; McClafferty Dep. at 199:17-205:10, MPFF ¶ 270.

¹¹² McClafferty Dep. at 168:13-168:15, MPFF ¶ 271.

¹¹³ Shiftan Dep. at 40:1-41:9, MPFF ¶ 274.

¹¹⁴ Ward Dep. at 38:23-39:11, MPFF ¶ 273.

providing the same terms to Maher and by requiring higher lease rate terms of Maher than it provided to Maersk-APM. This action by PANYNJ accorded with senior management's objective to increase revenue to reduce the purported accounting deficit of the Port Commerce Department and the instructions to the staff by senior management and Commissioner Gargano in July and August 1998 to reduce the subsidy by charging other tenants higher rent.

PANYNJ's action to charge Maher higher lease rates than Maersk-APM for commercial convenience—to increase its revenue and reduce its accounting deficit—supported PANYNJ's subsidy to Maersk-APM. But, such a subsidy based on status violates the Shipping Act. *Freight Forwarder Bids on Government Shipments at U.S. Ports – Possible Violations of the Shipping Act, 1916, and General Order 4*, 17 S.R.R. at 293-95 (class subsidy paid for by other class unlawful). And, commercial convenience is not a sufficient basis upon which to distinguish between lessees. As the Commission has explained, “[c]ommercial convenience cannot justify a practice which is otherwise unreasonable.” *Investigation of Free Time Practices-Port of S.D.*, 7 S.R.R. at 323 & 330 (“terminal charges . . . should be . . . dependent upon efficiency, economy, and soundness of operation, . . . not in our view . . . conditioned on promotional inducements which dissipate essential revenues”); *see also Perry's Crane Serv.*, 16 S.R.R. 1459, 1480, 1492 (A.L.J. 1976), *partially adopted by the Commission* 19 F.M.C. 548 (justifications for discrimination based on self-serving commercial grounds rejected).

II. Failure to Establish, Observe, and Enforce Just and Reasonable Regulations And Practices In Violation of 46 U.S.C. § 41102(c)

A. PANYNJ Assessed Maher Lease Rates And Other Requirements Much Higher Than Maersk-APM For The Same Services

In its determination of a violation of Shipping Act § 10(d)(1) by the port authority in *Ceres*, the Commission concluded that the port authority's “rates assessed [marine terminal operator] *Ceres* for the same services [including land rental] are excessive”. *Ceres*, 27 S.R.R. at

1271, 1272, & 1275. The Commission explained that “[t]he evidence reveals that the rates assessed [the marine terminal operator] Ceres were much higher than those assessed [ocean carrier] Maersk across the board.” *Id.* at 1275. Here, the evidence also establishes that PANYNJ overcharged Maher as compared to Maersk-APM. *Volkswagenwerk*, 390 U.S. at 280-82 (the question of liability turns upon whether the correlation of the benefit received to the charges imposed is reasonable); *Louis Dreyfus Corp.* 21 S.R.R. 1082 (violation where other port users obtain equal or greater benefits and have not been shown to have paid their allocable share of port costs).

1. Much Higher Basic Rent

Likewise, here the evidence establishes that PANYNJ assessed marine terminal operator Maher much higher rates than ocean-carrier affiliated Maersk-APM. PANYNJ itself estimated that during the terms of their respective leases, Maher would pay total rent with a present value of \$847,367 per acre, while Maersk-APM would pay \$435,916 per acre on the same basis.¹¹⁵

As set forth above, Maher’s starting basic rent rate is more than double the Maersk-APM rate and escalates 2% annually, unlike Maersk-APM. By the end of the 30 year term of the lease Maher’s basic rent is 3.7 times the basic rental rate provided by PANYNJ to Maersk-APM.¹¹⁶ In these circumstances, PANYNJ levied on Maher rates even *more* excessive than the Commission found violative of Shipping Act 10(d)(1) in *Ceres*. *Id.* (Commission determines rates port authority levied on terminal operator more than double Maersk rates “excessive” and unlawful.)

2. Much Higher Throughput Rent

The evidence also establishes that Maher must pay much higher throughput rent than

¹¹⁵ C. Yetka email of November 23, 2003, Dep. Ex. 165, MPFF ¶ 279 (08PA00328580-85) (net of free capital and PANYNJ investments); Yetka 30(b)(6) Dep. at 318:3-22:15, MPFF ¶ 279 (Maher is paying a much greater amount on a per acre basis than Maersk, based on this analysis).

¹¹⁶ Kerr Expert Report at Exhibit 1, MPFF Comparison of EP-249 and EP-248 Lease Differences.

Maersk-APM. In addition to the disparate basic rent terms, Maher and Maersk-APMT pay additional rent based on the volume of containers and cargo handled by their respective terminals. These payments are referred to as “throughput rent” in the leases. With respect to the container guarantee provisions the lessees’ have in common, *i.e.* the rent and terminal guarantee provisions of the leases, Maher provides higher guarantee levels in each period and therefore, must pay higher gross throughput rent.¹¹⁷ The per-container throughput rental rates in the Maher agreement are similar to those in the Maersk-APM agreement.¹¹⁸ However, with respect to the rent guarantee, the Maher guarantee exceeds the Maersk-APM guarantee in each period by a minimum of (1) 75,000 containers in the third period, (2) 150,000 containers in the first period, and (3) a maximum of 175,000 container in the second period. Likewise, Maher’s terminal guarantee requirements are much higher than those of Maersk-APM. During the third period, which is half the lease term (15 years), Maher guarantees annually 540,000 more containers than Maersk-APM. And during the first two periods, Maher also guarantees more containers annually than Maersk-APM: 70,000 more in the first period and 90,000 more in the second period. On a per acre basis, Maher guarantees almost twice as many containers for half the lease term, *i.e.* for the fifteen-year third period of the terminal guarantee: 2,022 containers for Maher and only 1,114 containers for Maersk-APM when on a per acre basis. Consequently, Maher guarantees PANYNJ both more throughput rent and terminal throughput volume than Maersk-APM. *See*, Kerr Expert Report ¶ 39 and Kerr Expert Report Ex. 2 (explaining and applying the exempt

¹¹⁷ Kerr Expert Report at Exhibit 1, MPFF Comparison of EP-249 and EP-248 Lease Differences.

¹¹⁸ The Tier 2 rate in the Maher lease in the second year of throughput rent is \$9.25 per container, while in the Maersk-APMT lease it is \$9.50 per container. This difference is immaterial as Maher’s far greater container guarantee number (175,000 more containers during that year) eclipses any impact by this \$.25 per container difference. All other per container throughput rates are the same for Maersk-APM and Maher.

amounts for comparison).

3. Discriminatory Terminal Guarantee Enforcement

Beyond the greater container volume and rent requirements of Maher's terminal guarantee, PANYNJ also imposed a more onerous terminal guarantee enforcement provision with respect to the threat of termination on Maher than it did on Maersk-APM. Unlike the Maersk-APM provision, PANYNJ can terminate the lease, demand all rents and force Maher to return the *entire* terminal, including Maher's greater terminal investments, if Maher fails to meet its Terminal Guarantee for two consecutive years (prior to 2015), and three consecutive years during the lease's third terminal guarantee period (i.e. through the end of the lease when Maher's terminal guarantee per acre is nearly twice that of Maersk-APM).

For Maersk-APM, if the terminal guarantee is not met for two consecutive years, PANYNJ can reclaim only a *portion* of the terminal (150 acres of the 350 acre terminal) for an initial shortfall and can only reclaim the entire facility only after the shortfall exceeds even lower levels after an additional two consecutive years of shortfall. Therefore, as a practical matter, the penalty for Maersk-APM's failure to satisfy its two stages of terminal guarantee minimums means that it does not risk losing the entire terminal for four consecutive years while Maher faces the stark risk of termination of its entire terminal for shortfalls for shorter time periods, i.e. two and three consecutive year periods. This is particularly threatening during the third period which represents half the 30 year term of the agreement when Maher must satisfy much higher required terminal guarantee volumes than Maersk-APM.¹¹⁹

¹¹⁹ Dep. Ex. 131, EP-249 § 42(a)(4), MPFF ¶ 313 (Maher guaranteeing 2,022 containers per acre in the third period); Dep. Ex. 16, EP-248 § 43(a)(4), MPFF ¶ 353, MPFF Comparison of EP-249 and EP-248 Lease Differences. (Maersk guaranteeing 1,114 containers per acre); Kerr Report ¶ 43, MPFF ¶ 313, 353, MPFF Comparison of EP-249 and EP-248 Lease Differences. ("In the third period, Maher guarantees 2,022 containers per acre while Maersk/APMT only guarantees 1,114 per acre").

4. Security Deposit Requirement Imposed On Maher But Not Maersk-APM

PANYNJ also imposed a security deposit requirement on Maher not imposed on Maersk-APM at all. Additionally, in 2007 PANYNJ required an enormous increase to Maher's security deposit in connection with providing PANYNJ consent to a change of control of Maher. Although PANYNJ consented to Maersk-APM's change of control in 2008, which both eliminated Maersk, Inc.'s corporate parental relationship and devalued Maersk, Inc. by spinning off APM Terminals North America assets, PANYNJ again did not require a security deposit requirement from Maersk-APM.¹²⁰ PANYNJ provided this consent absent a security deposit requirement notwithstanding devaluation of the Maersk, Inc. "parental" guarantee.¹²¹ And at the same time, PANYNJ demanded that Maher increase its security deposit requirement to a level now at \$22 million. PANYNJ allowed Maersk-APM to provide a "corporate guarantee" from a parental entity that ceased to be a parent entity following PANYNJ's consent to corporate ownership changes made by Maersk-APM in 2007.¹²²

¹²⁰ Joint Motion in Support of Settlement, Dkt. 07-01, Ex. A, ¶ 3 (Aug. 14, 2008), MPFF ¶ 432; Hartwyk Dep. 116:13-117:21, MPFF ¶ 432 (PANYNJ ratified Maersk-APM corporate changes); 08PA01795649, Letter from Maersk-APM's President Eric Sisco to Larrabee (Dec. 3, 2007), MPFF ¶ 432 (explaining Maersk-APM reorganization); 08PA01795031, Email from Maersk-APM's Raeburn to Evans (June 2, 2008), MPFF ¶ 427 (Maersk-APM corporate structure organization charts); 08PA01442836, Donald Burke Memo re Maher-APM Terminals (Feb. 21, 2008), MPFF ¶ 427 ("APMT recently notified the PA of a reorganization of its corporate structure in an effort to isolate the terminal operating side of APM from its other operations.").

¹²¹ PANYNJ's Larrabee wrote Maersk-APM that the proposed transfer of ownership would breach EP-248 and devalue the Maersk, Inc. parent guarantee. 08PA01900190 (Nov. 16, 2007), MPFF ¶ 428; 08PA01795028 (PANYNJ credit department recommended determination of financial capacity on Maersk, Inc.), MPFF ¶ 428.

¹²² Joint Motion in Support of Settlement, Dkt. 07-01, Ex. A, ¶ 3 (Aug. 14, 2008), MPFF ¶ 430 (PANYNJ consenting "to the transfer of Maersk Inc.'s interest in APMT to any affiliate of Maersk Inc."); Dep. Ex. 16, EP-248, Contract of Guaranty, MPFF ¶ 376-77 (financial and monetary obligations guaranteed by Maersk, Inc.); 08PA01795031, Email from Raeburn to Evans (June 2, 2008), MPFF ¶ 427 (containing organizational charts where Maersk, Inc. is no longer a parent entity of APM Terminals); Hartwyk Dep. at 116:13-117:21, MPFF ¶ 431

Maher opposed the security deposit requirement imposed by PANYNJ. PANYNJ did not provide Maher the opportunity of providing a comparable guarantee in lieu of the security deposit. PANYNJ's position is that Maher could not provide such a guarantee because it did not have a qualifying corporate parent.¹²³ But, this ignores the fact that as a practical matter Maher already provided a corporate guarantee of the lease performance.¹²⁴

PANYNJ mandated Maher to provide a security deposit not required of Maersk-APM without any particularized analysis of *comparative* financial capacity.¹²⁵ PANYNJ's *post hoc* interrogatory answers merely stand for the unremarkable proposition that PANYNJ considered Maersk, Inc.'s corporate guarantee acceptable, not that it had any factual basis to reach a different conclusion with respect to Maher.¹²⁶ Furthermore, in its sworn interrogatory answer PANYNJ erroneously asserted that Maersk-APM's parental guarantee was a "vastly greater

(PANYNJ agreed to change of APM-Maersk, Inc. affiliation without analysis of effect on APM's "parental" guarantee).

¹²³ PANYNJ's Response to Maher's First Set of Interrogatories, No. 1, MPFF ¶ 379 ("Maher did not have or provide any other collateral or source of financial guarantee. By contrast, APMT's parent, shipping giant, Maersk, Inc., provided a full guarantee of the entire APMT lease"); PANYNJ's Response to Maher's Second Set of Interrogatories, No. 1, MPFF ¶ 379 (same).

¹²⁴ Dep. Ex. 131, EP-249 §§ 25(a)(10)-(11) & (d), 28(a) & (b), MPFF ¶ 324 (PANYNJ reserves all remedies at law and equity to enforce lease and Maher obligated to fulfill lease terms and notwithstanding termination Maher's lease obligations continue until the end of the lease term).

¹²⁵ PANYNJ's Response to Maher's Third Set of Interrogatories, No. 42-43, MPFF ¶ 327 (PANYNJ answered with respect to the security deposit that ". . . financing terms provided to Maersk were based upon creditworthiness and the negotiations of the parties, and that no formal, written analysis was prepared by the Port Authority with respect to Maersk's assets prior to February 2000.") and PANYNJ's Response to Maher's Sixth Set of Interrogatories, No. 26, MPFF ¶ 327 (PANYNJ answered with respect to the security deposit that "any formal written analysis performed in consideration of Maersk's creditworthiness prior to November 2000 would have been destroyed [in 9/11]. The Port Authority's credit and collection department reviewed the assets of Maersk to make a determination that Maersk's parental guarantee would support the value of the lease and had the wherewithal to meet any other lease obligations. . . .").

¹²⁶ *Id.*, MPFF ¶ 327.

source of security” because it was provided by “APMT’s parent, shipping giant, Maersk, Inc.”¹²⁷ But, Maersk, Inc. was not, and is not, a “shipping giant.” It is merely an agent for the “shipping giant,” Maersk Line.¹²⁸ Maersk Line, the real “shipping giant,” *did not* provide the “parental” corporate guarantee. Therefore, PANYNJ’s interrogatory answer is false and its *post hoc* justification perforce unreasonable.

Instead, the evidence establishes that PANYNJ discriminated against Maher based on the impermissible basis of status. The documents and PANYNJ expert’s recent evidence shows that Maher had substantial financial resources at the time of the lease negotiations and conclusion of the agreement on or about October 1, 2000.¹²⁹ Yet, PANYNJ failed to produce any evidence showing a contemporaneous *comparative* financial analysis showing that Maersk-APM could provide a corporate guarantee and Maher could not.¹³⁰ To the contrary, PANYNJ concedes it

¹²⁷ PANYNJ’s Response to Maher’s First Set of Interrogatories, No. 1, MPFF ¶ 379 (“ . . . APMT’s parent, shipping giant, Maersk, Inc., provided a full guarantee of the entire APMT lease, a vastly greater source of security for the Port Authority than Maher’s half month’s rent”); PANYNJ’s Response to Maher’s Second Set of Interrogatories, No. 1, MPFF ¶ 379 (same).

¹²⁸ Maersk Line is A.P. Møller-Maersk’s ocean-carrier that is in the business of “transportation of cargo into and out of the United States on ocean-going vessels.” Maersk-APM’s Oppenheimer 07-01 Dep. at 17:8-18:19, 106:10-12, MPFF ¶ 11 (Maersk Line is A.P. Møller-Maersk’s shipping business); Maersk, Inc.’s Nicola 07-01 Dep. at 46:10-12, MPFF ¶ 11 (Maersk Line is “the container ship company in the U.S. on the terminal side”); EP-248 §§ 42(a)(1), 46(h), MPFF ¶ 9 & 11 (defining “carrier” in the context of the port guarantee as “Maersk, Inc. as agent for its disclosed principals,” defined as Aktieselskabet Dampskibsselskabet Svendborg and/or Dampskibsselskabet af 1912, Aktieselskab”); *see also Ceres*, 27 S.R.R. 705 (including lease between the Maryland Port Administration and Maersk Line identifying Maersk Line as “Aktieselskabet Dampskibsselskabet Svendborg and Dampskibsselskabet af 1912, Aktieselskab, trading under the name of MAERSK LINE”).

¹²⁹

PANYNJ’s Response to Maher’s Third Set of Interrogatories, No. 42-43, MPFF ¶ 327 (PANYNJ answered with respect to the security deposit that “. . . financing terms provided to Maersk were based upon creditworthiness and the negotiations of the parties, and that no formal, written analysis was prepared by the Port Authority with respect to Maersk’s assets prior to February 2000.”) and PANYNJ’s Response to Maher’s Sixth Set of Interrogatories, No. 26,

never offered Maher the opportunity to provide a corporate guarantee in lieu of a security deposit allegedly “because it did not have the financial wherewithal required by the Port Authority,” which it describes as “the support of a parent whose total assets exceeded the Port Authority’s projected total revenue stream from EP-249.”¹³¹ Nor, did PANYNJ produce any evidence showing that Maersk, Inc. actually satisfied that standard at the time with respect to EP-248. And in all events, that is not what PANYNJ expressed at the time and it is discriminatory on its face because the underlying discriminatory lease rate terms to be guaranteed were more than \$500 million higher for Maher than for Maersk-APM.

Moreover, Maersk, Inc. is not Maersk-APM’s parent. PANYNJ consented to corporate ownership changes that divested Maersk-APM from ownership by Maersk, Inc.¹³² The purported “parental” quality of the Maersk, Inc. guarantee proved illusory. PANYNJ revealed for the first time in 2008 that it was, and remains, subject to Maersk-APM’s discretion to reorganize. Consequently, Maersk, Inc. no longer owns Maersk-APM or the other APM Terminals North American assets that it apparently did at the time the agreements were concluded. Therefore, the financial capacity of Maersk, Inc. to satisfy the corporate guarantee that it provided for Maersk-APM in 1999 has changed as has its previous status as a corporate parent of Maersk-APM. PANYNJ has provided no evidence comparing the current Maersk, Inc.

MPFF ¶ 327 (PANYNJ answered with respect to the security deposit that “any formal written analysis performed in consideration of Maersk’s creditworthiness prior to November 2000 would have been destroyed . . . [t]he Port Authority’s credit and collection department reviewed the assets of Maersk to make a determination that Maersk’s parental guarantee would support the value of the lease and had the wherewithal to meet any other lease obligations . . .”).

¹³¹ PANYNJ’s Response to Maher’s Third Interrogatories, No. 44, MPFF ¶ 327; PANYNJ’s Response to Maher’s Sixth Interrogatories, Nos. 27 and 28, MPFF ¶ 327.

¹³² Joint Motion in Support of Settlement, Dkt. 07-01, Ex. A, ¶ 3 (Aug. 14, 2008), MPFF ¶ 430 (PANYNJ consenting “to the transfer of Maersk Inc.’s interest in APMT to any affiliate of Maersk Inc.”); Hartwyk Dep. at 116:13-117:21, MPFF ¶ 431 (PANYNJ agreed to change of APM-Maersk, Inc. affiliation without analysis of effect on APM’s “parental” guarantee).

“guarantee” to the security deposit PANYNJ requires of Maher or Maher’s corporate guarantee. In these circumstances, PANYNJ has failed to establish, observe, and enforce just and reasonable regulations and practices in violation of the Shipping Act.

The difference between a security deposit and a corporate guarantee is cost. Providing a security deposit ties up capital that could be put to other uses. A guarantee requires no resources to be devoted to the agreement. The requirement imposes higher costs for Maher not required of Maersk-APM. Maher sustains injury and damages from the security deposit requirement of \$5,642,878.¹³³ As a result, PANYNJ unlawfully assessed an excessive security deposit requirement on Maher not required of Maersk-APM costing Maher to incur higher costs than Maersk-APM causing injury and damages to Maher.

5. First Point Of Rest Requirement Imposed on Maher But Not Maersk-APM

As set forth above, the leases are also materially different with respect to the requirement for a first point of rest for the loading and offloading of automobiles. PANYNJ unlawfully preferred and continues to prefer Maersk-APM over Maher with respect to the first point of rest requirement imposed on Maher, but not required of Maersk-APM. Also as set forth above, PANYNJ did not require Maersk-APM to provide a first point of rest for the loading and unloading of automobiles, but PANYNJ imposed this requirement on Maher. The first point of rest requirement mandated that Maher set aside a berth and ten acres of its terminal for use by automobile processors for the loading and unloading of automobiles upon 48 hours notice.¹³⁴ As a practical matter, this disparate requirement imposed on Maher as compared to Maersk-APM

¹³³ Kerr Expert Report at ¶¶ 6-7, 52, MPFF ¶ 521.

¹³⁴ Dep. Ex. 131 (EP-249) § 48(a), MPFF ¶ 330-47 (requiring Maher to “make available a ship berth and upland area for the purpose of receiving and loading automobiles and other motor vehicles . . . [u]pon 48 hours advance notice” consisting of “berth 52 . . . and the open area upland of Berth 52 of approximately ten (10) acres. . .”).

prejudiced Maher because Maher could not use the first point of rest berth and acreage for container yard operations and storage, burdened Maher with an unnecessary restriction on the flexible use of its terminal, and PANYNJ required Maher to stevedore automobiles that it did not want to stevedore.¹³⁵ Maher did not need the requirement imposed by PANYNJ for a first point of rest in order to service automobile processors in the loading or unloading of automobiles.¹³⁶ And, as set forth above PANYNJ requires Maher to pay much higher rents than Maersk-APM on the area while prohibiting Maher from charging automobile processors for maintaining the first point of rest acreage available for the loading and unloading of automobiles.¹³⁷

Compounding its unlawful action imposing the requirement on Maher, in March 2008 PANYNJ enforced the first point of rest requirement against Maher and expressly threatened Maher with termination of the letting. Maher sustained injury and damages from the first point of rest requirement and PANYNJ's enforcement of the unduly prejudicial requirement.¹³⁸

¹³⁵ Kerr Expert Report ¶ 51, MPFF ¶ 333; Dep. Ex. 131 (EP-249) § 48(a), MPFF ¶ 330-33; former Maher General Counsel Schley Dep. at 297:4-16, MPFF ¶ 333 (Maher opposed to first point of rest requirement because it was a "double-whammy" requiring Maher to keep the facility available for a less productive purpose); Brian Maher Dep. at 195:4-196:5, MPFF ¶ 333 (Maher opposed to first point of rest requirement because it was a "big issue" to have to keep ten acres vacant); Kerr Rebuttal Report at ¶ 75, MPFF ¶ 333 ("Because of this provision, under the lease . . . berth space would not have been available for containers."). Basil Maher Dep. at 89:21-24, MPFF ¶ 333 (PANYNJ required Maher to stevedore cars that it did not want to stevedore).

¹³⁶ Former Maher President Curto Dep. at 230:20-233:2, MPFF ¶ 333 (Maher opposed to the first point of rest requirement as unnecessary to stevedore cars and because Maher didn't want to have to dedicate the area to one purpose);

¹³⁷ PANYNJ letter from First Deputy General Counsel Christopher Hartwyk to Maher (Mar. 24, 2008), MPFF ¶ 344 (PANYNJ notice to Maher alleging breach of EP-249 and the obligation of good faith and fair dealing and threatening enforcement of the lease provision providing for termination of the letting and asserting that Maher could only charge dockage and wharfage for use of the first point of rest berth and acreage); Maher letter from General Counsel J.Ruble to PANYNJ, MPFF ¶ 344 (Apr. 2, 2008) (rejected PANYNJ's assertion of breach, objecting to PANYNJ's manipulation of the provision with one vessel call, and explaining the circumstances, and requesting a meeting to resolve the dispute).

¹³⁸ PANYNJ letter from General Manager Kenneth Spahn to Maher (Mar. 14, 2008), MPFF ¶ 344 (Notice of Non-compliance with EP-249 § 48 and assertion of right to terminate the letting

B. PANYNJ's Lease Terms Levied On Maher Do Not Correspond With The Level Of The Benefit Received

The evidence establishes that there is no obvious valid transportation purpose justifying the foregoing differences which are undue or unreasonable prejudices against Maher and undue or unreasonable preferences favoring Maersk-APM. In *Ceres*, the Commission explained that while the port authority's "vessel call" justification for the discounted lease rates provided to the ocean carrier lessee "could be reasonably related to its stated end of securing vessel calls to the Port, the degree of disparity in this case is disproportionate to [the port authority's] goals" because "Maersk's vessel call guarantee . . . does not guarantee anything more than [the marine terminal operator] could have guaranteed . . . particularly where the difference so greatly disfavors the party committed to moving substantially higher volumes of cargo," i.e., the marine terminal operator *Ceres*. *Id.* at 1275.

The same is true here. As an initial matter, the "port guarantee" manifests discrimination based on status and perforce is not a valid transportation purpose. Additionally, it is not "fit and appropriate to the end in view." *West Gulf Maritime Ass'n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) ("*WGMA*"); *NPR, Inc. v. Bd. of Comm'rs of the Port of N.O.*, 28 S.R.R. 1512, 1531 (A.L.J. 2000) (quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. at 329). As established above, the "port guarantee" as implemented and enforced by PANYNJ is merely an additional rent payment not an actual cargo guarantee. Additionally, Maersk-APM has consistently failed to meet the "port guarantee" and informed PANYNJ that it is not likely to meet it at a minimum for several years.¹³⁹ Between 1999 and 2010, cargo that would qualify for

of the first point of rest 10 acre area and berth); PANYNJ letter from First Deputy General Counsel Christopher Hartwyk to Maher at 2 (Mar. 24, 2008), MPFF ¶ 344 (PANYNJ notice to Maher alleging breach of EP-249).

¹³⁹ Dep. Ex. 320 at 08PA01819853, MPFF ¶406 (Maersk-APM requesting PANYNJ not to increase rent for not meeting the port guarantee in 2008 and 2009 and explaining that it "does not

the port guarantee decreased over 25%, from 349,470 to 259,085 containers.¹⁴⁰ The evidence establishes that the “port guarantee” does not achieve its purported aim.¹⁴¹

However, assuming *arguendo* that it was “fit for the aim in view” of attracting cargo to the port, the degree of disparity is disproportionate to PANYNJ’s aim because it “does not guarantee anything more than [the marine terminal operator] could have guaranteed . . . particularly where the difference so greatly disfavors the party committed to moving substantially higher volumes of cargo,” i.e., in this instance the marine terminal operator Maher. *Id.* at 1275. In August 1999, PANYNJ acknowledged that Maher already had “contracts for 600,000 container moves per year and many are long-standing customers of 20 years or more.”¹⁴² And, as Maher’s expert Dr. Kerr has explained, “Maher guaranteed more volume and clearly could have satisfied a functionally equivalent guarantee, with rent penalties had it been given the opportunity to do so.”¹⁴³

First, according to PANYNJ, the “port guarantee” did not begin until the year 2008 with no consequence to Maersk-APM for two years, i.e. the beginning of year 2010 at the earliest. That is, Maersk-APM provided no Maersk Line cargo guarantee during the period before 2010. Consequently, the Maersk-APM port guarantee does not guarantee anything more than Maher guaranteed during that ten year period. The Maersk-APM “port guarantee” cannot justify the

anticipate being able to satisfy the volume requirements of the port guarantee for several years, at a minimum”); Dep. Exhibit 322 at 08PA01819664, MPFF ¶ 406 (PANYNJ’s Larrabee Jul. 13, 2010 email reporting that “APM failed to meet the port throughput requirement of the lease and delayed the transfer of the information. . . .”); Larrabee Dep. at 324:6-16, MPFF ¶ 406 (PANYNJ “ultimately concluded” Maersk did not satisfy its port guarantee), 331:4-9, MPFF ¶ 406 (Larrabee recalls Maersk-APM telling him that it “does not anticipate being able to satisfy the volume requirements of the port guarantee for several years, as a minimum”).

¹⁴⁰ Kerr Rebuttal Report at Exhibit 2, MPFF ¶ 356, 398, 408.

¹⁴¹ See MPFF ¶¶ 380-432.

¹⁴² Dep. Ex. 115, PANYNJ-Maher Lease Negotiation Meeting Notes (Aug. 6, 1999), MPFF ¶ 257.

¹⁴³ Kerr Rebuttal Report at ¶83, MPFF ¶ 257; Kerr Expert Report at Exhibit 2, MPFF ¶ 257.

lease differences from 2000 to 2010 when it was not in effect. As explained above, the lease rate difference during this period totals \$89,578,815 more paid by Maher than it would have paid if it had been provided the Maersk-APM lease rate terms. Moreover, Maher provided both greater rent and container volume guarantees to PANYNJ during that same ten year period. Therefore, as in *Ceres*, the lease rate term is not justified during that decade “where the difference so greatly disfavors the party committed to moving substantially higher volumes of cargo,” *e.g.* the marine terminal operator Maher. *Id.* at 1275.

Second, the “port guarantee” as implemented and enforced by PANYNJ is not a *cargo* guarantee. As implemented and enforced by PANYNJ in 2010, it only results in an additional *rent* payment. The evidence establishes that Maersk-APM executive Marc Oppenheimer revealed for the first time in May 2008 that Maersk-APM could not enforce the so-called “port guarantee” against the Maersk-APM affiliated ocean carrier, Maersk Line.¹⁴⁴ Neither Maersk-APM nor Maersk, Inc. controlled Maersk Line cargo and could not actually require Maersk Line cargo to be carried into and out of the port. Thus, the vaunted “port guarantee” that PANYNJ extolled as the cornerstone justification for the different lease rate terms turned out *not* to be the unique cargo guarantee that the Maersk-APM lease (EP-248) states or that PANYNJ stated at the time it refused to provide Maher the preferential Maersk-APM lease rates.¹⁴⁵

The evidence discovered during belated disclosures by PANYNJ in January 2011,

¹⁴⁴ Oppenheimer 07-01 Dep. at 51:4-54:1, MPFF ¶ 57 (Maersk-APM has no rights or abilities to control or commit the ocean carrier cargo to the port).

¹⁴⁵ PANYNJ Responses to Complainant’s First and Second Sets of Interrogatories at 10 (Aug. 29, 2008), MPFF ¶ 253 (“Port Guarantee was an important term that neither Maher nor any other port tenant could provide”); Borrone 30(b)(6) Dep. at 84:4-13, MPFF ¶ 250 (“The port guarantee was unique for carriers, for terminal operators who were carriers. . . .”); Shiftan Dep. at 42:21 – 43:20, MPFF ¶ 259 (port guarantee described as a unique *cargo* guarantee that could only be satisfied by ocean carriers that controlled cargo).

establishes that Maersk-APM has consistently failed to fulfill the “port guarantee.”¹⁴⁶ Indeed, most recently on April 8, 2011, PANYNJ disclosed that Maersk-APM also failed to meet the “port guarantee” in 2010.¹⁴⁷ Yet, PANYNJ decided in the year 2010 *not* to enforce the “port guarantee” requirement against Maersk-APM, its former corporate parent, Maersk, Inc., or their affiliated ocean carrier, Maersk Line, to actually require the allegedly guaranteed cargo to be provided to the port.¹⁴⁸ Consequently, what PANYNJ represented and continues to represent in this proceeding as a *unique cargo guarantee* of Maersk-APM’s affiliated ocean carrier, Maersk Line, has turned out to be nothing more than a simple additional rent payment, i.e. a rent payment in addition to the basic rental rate of \$19,000 per acre per year.

But, as set forth above, Maher guarantees both more rent and container volume to PANYNJ than Maersk-APM and thus has far exceeded the Maersk-APM supplemental rent paid for failing to meet the “port guarantee” requirement. Therefore, the evidence of PANYNJ’s actions today only recently uncovered in the period 2008-2011 establishes that the cornerstone justification for the lease rate discrimination between Maher and Maersk-APM, the vaunted “port guarantee,” is merely a rent payment that does not justify the disparate lease terms. As in *Ceres*, the lease rate term is not justified “where the difference so greatly disfavors the party

¹⁴⁶ Dep. Ex. 320 at 08PA01819853, MPFF ¶ 406 (Maersk-APM requesting PANYNJ not to increase rent for not meeting the port guarantee in 2008 and 2009 and explaining that it “does not anticipate being able to satisfy the volume requirements of the port guarantee for several years, at a minimum”); Dep. Exhibit 322 at 08PA01819664, MPFF ¶ 406 (PANYNJ’s Larrabee Jul. 13, 2010 email reporting that “APM failed to meet the port throughput requirement of the lease and delayed the transfer of the information. . . .”); Larrabee Dep. at 324:6-16, MPFF ¶ 406 (PANYNJ “ultimately concluded” Maersk did not satisfy its port guarantee), 331:4-9, MPFF ¶ 406 (Larrabee recalls Maersk-APM telling him that it “does not anticipate being able to satisfy the volume requirements of the port guarantee for several years, as a minimum”).

¹⁴⁷ 08PA02181816-30, MPFF ¶ 408, Maersk-APM email and letter of March 3, 2011 to PANYNJ with container summary showing that Maersk-APM only moved 295,085 loaded containers through the port in 2010, not the required 365,000 per the “port guarantee.”

¹⁴⁸ Larrabee Dep. at 342:20 – 343:12, MPFF ¶ 409 (PANYNJ only billed Maersk-APM for higher rent as only remedy and did not enforce any obligation to bring the cargo to the port).

committed to moving substantially higher volumes of cargo,” e.g., the marine terminal operator Maher. *Id.* at 1275.

III. Unreasonable Refusal To Deal In Violation of 46 U.S.C. § 41106(3)

Determining this Shipping Act violation “requires a two part inquiry: whether [the Port] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth.*, 29 S.R.R. at 1448. The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking & Lease Agreement By & Between City of Portland, Me. and Scotia Prince Cruises Ltd.*, 30 S.R.R. 377, 379 (F.M.C. 2004). And, the Commission has held that with respect to a port authority, “in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration of an entity’s efforts at negotiation.” *Canaveral Port Auth.*, 29 S.R.R. at 1450.

A. PANYNJ Refused And Refuses To Deal Or Negotiate With Maher

The evidence establishes that PANYNJ refused to deal and continues to refuse to deal with Maher with respect to Maher’s repeated requests for parity with Maersk-APM and that PANYNJ’s refusal was and is unreasonable. As set forth above, the evidence establishes that PANYNJ refused to deal with Maher with respect to the Maersk-APM lease terms during the original lease negotiations which concluded before October 2000 because of unlawful bases: (1) status and (2) commercial convenience. Additionally, beginning in the year 2007, continuing into the year 2008 and ongoing as of this date, PANYNJ refused and continues to refuse to deal with Maher’s request for parity with the Maersk-APM lease rate terms because of an additional unreasonable basis. That is, PANYNJ has not given actual consideration to Maher’s efforts at negotiation because of unlawful reasons because “the Maher brothers” signed the lease.

As set forth above, Maher requested parity: prior to October 2000 regarding its lease terms; more recently in Maher's counter-complaint in Dkt. 07-01 in September 2007; in meetings and letters during 2007 and 2008; and in its complaint in this proceeding filed in June 2008. However, in response to Maher's requests for parity, PANYNJ unreasonably refused to deal or negotiate with Maher to provide parity with Maersk-APM and continues to fail to fulfill its statutory duties to provide Maher the preferential terms it provides to Maersk-APM and thereby, continues to unreasonably refuse to deal or negotiate with Maher.

During the PANYNJ-Maher negotiations in the period 1997-2000 that resulted in the lease terms provided by PANYNJ to Maher in EP-249, Maher requested parity with Maersk-APM. PANYNJ informed Maher that PANYNJ would provide a "level playing field" and that Maher would receive materially the same, or similar, lease terms to those offered to APM. But, in the end, PANYNJ's Borrone, told Maher that the Maersk-APM terms were "off the table" and that its terms provided to Maher were its best and final offer, that is, it was take it or leave it.

B. PANYNJ's Refusals Are Unreasonable

1. The Pre-November 2000 Refusals Are Unreasonable

The evidence establishes that on September 23, 1999, PANYNJ's Lillian Borrone told Maher that PANYNJ did not provide Maher the Maersk-APM lease rate terms because Maersk-APM was an ocean carrier that could provide a port guarantee that Maher could not provide. The evidence also establishes that PANYNJ increased revenue by levying higher lease rates on Maher. In the particular circumstances here, these justifications for PANYNJ's refusal to deal or negotiate with Maher with respect to parity with Maersk-APM were unreasonable. Status and commercial convenience are not valid transportation purposes and therefore, are not reasonable bases to refuse to deal or negotiate.

2. The Post-November 2000 Refusals Are Unreasonable

PANYNJ filed a Shipping Act third-party complaint against Maher on August 7, 2007 in Dkt. 07-01 to enforce its unlawful indemnity requirement against Maher and discovery ensued. By the end of November 2007, Maher representatives asked for meetings with PANYNJ and actually met twice with PANYNJ leaders, including Port Commerce Director Larrabee and his chief deputy Dennis Lombardi about the potential discrimination claims based on PANYNJ's disparate treatment of Maher as compared to Maersk-APM.¹⁴⁹ At these meetings, these PANYNJ executives denied that Maher had a *Ceres* claim against PANYNJ regarding disparate treatment in lease terms because "the Maher brothers" had signed EP-249 and there was nothing they could do.¹⁵⁰ According to the sworn testimony of former Maher vice president Sam Crane, at the first meeting on or about November 6, 2007,¹⁵¹ Mr. Larrabee told Basil Maher, "Basil, you and Brian knowingly signed this lease and there's nothing we can do about it -- or nothing we can do for you about this, or there's nothing -- no remedy we can take. . . ."¹⁵² And at the second meeting on or about November 28, 2007, Mr. Crane testified that Mr. Larrabee repeated the same PANYNJ position to Maher CEO John Buckley, "They signed it, there's nothing we can do they knew about it. . . ."¹⁵³ Mr. Buckley testified to the same effect referring to Port Commerce Director Larrabee and Deputy Director Lombardi that, "All they were saying was the Maher

¹⁴⁹ Crane Dep. at 21:24-23:3, 32:23- 35:10, MPFF ¶ 483 & 489 (Basil Maher, Sam Crane, and John Buckley outlined Maher's potential claim against PANYNJ because of the competitive disadvantage with Maersk-APM); Basil Maher Dep. at 17:18 – 21:9 (Maher met with PANYNJ to discuss lease disparities of financial terms of Maher and Maersk-APM leases), MPFF ¶ 483.

¹⁵⁰ PANYNJ's Larrabee categorically refused to discuss with Maher the subject of the Dkt. 07-01 proceeding and PANYNJ never altered that position obstinately and unreasonably refusing to discuss those matters with Maher. This refusal to deal is the subject of Maher's Dkt 07-01 claims addressed below.

¹⁵¹ 08PA01428664, MPFF ¶ 483 (PANYNJ Meeting calendar entry of R.Evans for Maher-PANYNJ meeting).

¹⁵² Crane Dep. at 24:13-18, MPFF ¶ 484.

¹⁵³ *Id.* at 38:6-20, MPFF ¶ 489.

Brothers have signed the lease. Game over. Nothing we can do about it. That's what they were telling us."¹⁵⁴ Mr. Buckley also testified specifically that Mr. Lombardi said "that the Maher brothers have signed the -- have signed the lease and there's nothing the Port Authority can do about it."¹⁵⁵ When asked about his recollection of the meeting, Mr. Buckley explained, "The Port Authority really -- you know, what -- what I took from . . . the interaction from the Port Authority is that they were putting us on the long finger. . . . When you put someone on the long finger, means you have no intention of doing anything about the problem that's being discussed."¹⁵⁶ For his part, Mr. Larrabee testified that he did not recall the foregoing account of Messrs. Crane and Buckley, but he did not dispute it.¹⁵⁷

In these circumstances, PANYNJ did not and has not given actual consideration to Maher's efforts at negotiation from 2007 onward because as Messrs. Larrabee and Lombardi stated at the time, "the Maher brothers" signed the lease. But, the fact that Maher signed the lease is not a valid reason to refuse to deal or negotiate with a lessee. Contractual doctrines of waiver and estoppel *do not* immunize a violation of the Shipping Act. *Ceres*, 29 S.R.R. at 372. Notwithstanding this well-established authority, PANYNJ Port Commerce Director Rick Larrabee categorically refused to deal or negotiate with Maher in November 2007 relying on the inapplicable doctrines of "waiver" or "estoppel," by stating emphatically that "the Maher brothers" had signed the lease and there was nothing PANYNJ could do.

Subsequent to the meetings between Maher and PANYNJ's Larrabee in November 2007, PANYNJ explained under oath in this proceeding, including in interrogatory answers verified by

¹⁵⁴ Buckley Dep. at 72:14-17, MPFF ¶ 489.

¹⁵⁵ *Id.* at 50:9-19, MPFF ¶ 490.

¹⁵⁶ *Id.* at 58:8-16, MPFF ¶ 489.

¹⁵⁷ Larrabee Dep. at 23:1-16, 25:21-26:2, MPFF ¶ 484, 489 (Larrabee repeatedly denying any recollection but not disputing the testimony of Messrs. Crane and Buckley).

Messrs. Larrabee and Lombardi that the differences in Maher and Maersk-APM lease rate basic rent terms are justified by Maersk-APM's status because it is affiliated with an ocean carrier that can satisfy a "port guarantee" which Maher cannot satisfy. PANYNJ answered under oath that the "Port Guarantee was an important term that neither Maher nor any other port tenant could provide. The Port Guarantee committed Maersk shipping lines to continue using the Port even if volumes declined in the future."¹⁵⁸ And when asked why that is the case, PANYNJ answered under oath that "the Port Guarantee *only* applies to companies who are carriers or have a significant ownership interest in one."¹⁵⁹ Moreover, when asked if PANYNJ offered Maher the option to provide a Port Guarantee, PANYNJ answered under oath "that it did not offer Maher the option to provide a Port Guarantee *because it was not a carrier and did not have a significant ownership interest in a carrier.*"¹⁶⁰ (Emphasis added.) This evidence establishes that PANYNJ's ongoing refusal to deal is because of status.¹⁶¹

After another effort at outreach by Maher to PANYNJ with respect to these potential claims failed in December 2007,¹⁶² and after Mr. Larrabee told Maher that another meeting

¹⁵⁸ PANYNJ Responses to Complainant's First and Second Sets of Interrogatories at 10 (Aug. 29, 2008), MPFF ¶ 253 (verified by Richard Larrabee, Director of the Port Commerce Department, PANYNJ).

¹⁵⁹ PANYNJ's Responses to Complainant's Third Set of Interrogatories at 6 (Oct. 8, 2008), MPFF ¶ 253 (verified by Dennis Lombardi, Deputy Director of the Port Commerce Department, PANYNJ) (emphasis added).

¹⁶⁰ *Id.* at 8, MPFF ¶ 254.

¹⁶¹ PANYNJ Responses to Complainant's First and Second Sets of Interrogatories at 10 (Aug. 29, 2008), MPFF ¶ 253 (verified by Richard Larrabee, Director of the Port Commerce Department, PANYNJ).

¹⁶² Dep. Ex. 6, MPFF ¶ 493-95; Larrabee Dep. at 52:1-53:1, MPFF ¶ 493 (Maher communicated unsuccessfully with PANYNJ Executive Director Shorris on or about December 11, 2007 and was referred back to Mr. Larrabee); 08PA00727764, A.Shorris calendar entry (Dec. 10, 2007), MPFF ¶ 493.

would not be fruitful,¹⁶³ on January 17, 2008, Maher's CEO John Buckley wrote to PANYNJ's Larrabee and explained that Maher understood that PANYNJ "may be in violation of the Shipping Act" and that Maher requested parity with Maersk-APM.¹⁶⁴ On January 29, 2008, Larrabee rejected Maher's proposal by letter writing that "The Port Authority does not agree to your proposed rental adjustments."¹⁶⁵ Furthermore, PANYNJ continued by emphasizing that it expected Maher to continue to abide by the terms of the lease agreement.¹⁶⁶ In his letter, Larrabee did not provide any justification for rejecting Maher's proposal.¹⁶⁷ Therefore, PANYNJ's written response to Maher on January 29, 2008 remained the same as its position in the previous meetings during November 2007 when PANYNJ's Larrabee and Lombardi said "the Maher brothers" had signed the lease and there was nothing PANYNJ could do.

However, in a reversal from his previous position that a meeting would *not* be fruitful when he insisted on a written proposal from Maher, Larrabee's January 29, 2008 letter expressed a "willingness to meet to engage in a more detailed dialogue."¹⁶⁸ Larrabee's letter was disingenuous. PANYNJ had no intention of actually addressing Maher's proposal seriously. On January 30, 2008, Larrabee wrote an internal memorandum to PANYNJ Executive Director Shorris conveying his actual position—contradicting his position communicated to Maher—that "continued discussions in the directions [Maher] outlined would not be fruitful."¹⁶⁹ This internal

¹⁶³ Dep. Ex. 6, MPFF ¶ 494 (Larrabee "indicated that a meeting would not be fruitful and instead requested that Maher present a written proposal regarding Maher's lease terms . . ." which Maher presented on January 17, 2008).

¹⁶⁴ Dep. Ex. 6, MPFF ¶ 495.

¹⁶⁵ Dep. Ex. 245, MPFF ¶ 496.

¹⁶⁶ *Id.*, MPFF ¶ 496.

¹⁶⁷ *Id.*, MPFF ¶ 497.

¹⁶⁸ Dep. Ex. 6, MPFF ¶ 496 (Larrabee "indicated that a meeting would not be fruitful and instead requested that Maher present a written proposal regarding Maher's lease terms . . ." which Maher presented on January 17, 2008).

¹⁶⁹ Dep. Ex. 362, Memorandum from R. Larrabee to A. Shorris (Jan. 30, 2008), MPFF ¶ 498.

expression of his real sentiment to his boss, Executive Director Shorris, is further corroborated by contemporaneous handwritten notes from Deputy Port Commerce Director Lombardi taken during the “APM Deal Meeting” conducted by PANYNJ on January 29, 2008. The notes reveal PANYNJ’s actual plan was to “Press [Maher] for info + Don’t ask for mtg.”¹⁷⁰ PANYNJ’s misdirection confirms the foregoing evidence that PANYNJ did not give actual consideration to Maher’s efforts at negotiation as required by the Shipping Act. *Canaveral Port Auth.*, 29 S.R.R. at 1450. PANYNJ’s internal communications and subsequent actions confirm John Buckley’s conclusion that PANYNJ had put Maher on the “long finger,” meaning that PANYNJ had “no intention of doing anything about the problem that’s being discussed.”¹⁷¹

Following Larrabee’s letter of January 29, 2008, on February 7, 2008, Messrs. Crane and Buckley met with PANYNJ’s Larrabee one more time and sought to negotiate with respect to the claims in this proceeding (08-03).¹⁷² However, at this meeting PANYNJ introduced a new prerequisite and insisted that the parties first conclude a confidentiality agreement.¹⁷³ On April 22, 2008, Maher CEO Buckley signed a Settlement Communications Confidentiality Agreement provided by PANYNJ.¹⁷⁴ PANYNJ’s Larrabee apparently signed the document on April 30,

¹⁷⁰ 08PA00329334, MPFF ¶ 499 (Lombardi handwritten notes of meeting discussing APM settlement and Maher); 08PA00381994, MPFF ¶ 499 (PANYNJ K.Spahn email to R.Larrabee, D.Lombardi, *et al.* regarding “DISCUSSION POINTS – 3:00 [p.m.] APM TERMINALS DEAL MEETING).

¹⁷¹ Buckley Dep at 58:8-16, MPFF ¶ 489.

¹⁷² Crane Dep. at 47:19-24, 65:4-66:11, MPFF ¶ 500 (Crane clarified that the meeting occurred in early February vice January 2008).

¹⁷³ Crane Dep. at 55:24-57:6, MPFF ¶ 500 (PANYNJ was to send Maher a confidentiality agreement).

¹⁷⁴ Dep. Ex. 1, MPFF ¶ 502.

2008, but PANYNJ did not transmit it to Maher and Maher did not receive the Larrabee-signed copy back from PANYNJ at the time.¹⁷⁵

Instead, on May 6, 2008, PANYNJ's Larrabee called Maher's Crane and stated that Maher must agree to a stay of the Dkt. No. 07-01 proceeding *before* PANYNJ would agree to any discussion of Maher's claims.¹⁷⁶ Then, on May 8, 2008, PANYNJ filed a *second* enforcement action against Maher, this time an action in New Jersey state court to enforce the unlawful indemnity provisions imposed on Maher.¹⁷⁷ During 2008, PANYNJ "put Maher on the long finger" by requiring Maher to enter into a confidentiality agreement which PANYNJ did not return to Maher, demanding that Maher to agree to a stay in order to engage in negotiations, and

¹⁷⁵ Buckley Dep. at 75:7-9, MPFF ¶ 502 (Q. . . . "Was a confidentiality agreement ever entered into? A. We signed it, we returned it to the Port Authority, but as yet we haven't received it back."), 75:5-76:3, MPFF ¶ 502 ("We never received a signed copy of the agreement back from the Port Authority to my - to my knowledge."). Larrabee Dep. at 104:25-109:12, MPFF ¶ 502 (Larrabee testified that he has "no basis" for disputing the fact that Maher never received a signed copy of the confidentiality agreement back from the Port Authority).

¹⁷⁶ Dep. Ex. 7, MPFF ¶ 503 (Letter from Larrabee to Buckley, dated May 14, 2008, stating "In furtherance of my conversation with Sam Crane last week, I reiterate my offer to engage in settlement discussions with Maher Terminals ... [a]s a condition of engaging in these negotiations, however, the Port Authority requires a stay of all litigation."); Larrabee Dep. at 115:24-119:9, MPFF ¶ 503; Crane Dep. at 59:7-10, MPFF ¶ 503 (confirming phone call by Larrabee to Maher in May 2008).

¹⁷⁷ PANYNJ Verified Complaint for Declaratory Judgment and Injunctive Relief and Jury Demand, Union County Superior Court, Docket No. UNN-L-1760-08 (May 8, 2008), MPFF ¶ 504. PANYNJ's complaint against Maher in the Union County Superior Court, Chancery Division, sought declaratory judgment construing EP-249 to require Maher to indemnify PANYNJ against the claims brought against PANYNJ by Maersk-APM and against any losses stemming from PANYNJ's settlement with Maersk-APM, based both on Maher's alleged duty to indemnify PANYNJ per EP-249 and Maher's alleged breach of the lease, and PANYNJ also sought damages. The PANYNJ complaint also averred that Maher was negligent, and PANYNJ sought damages under a common law indemnification theory. It also sought a declaration that the PANYNJ-APM settlement was reasonable and barring Maher from challenging the settlement's reasonableness. *See also*, Dep Ex. 7, MPFF ¶ 506 (referring to PANYNJ's litigation filed against Maher in state court May 8, 2008); Larrabee Dep. at 110:19 - 122:10, MPFF ¶ 506 (Larrabee confirming PANYNJ's lawsuit against Maher filed in state court the week before his May 14, 2008 letter).

then filing a second unlawful enforcement action against Maher in state court. In sharp contrast, during the same time period PANYNJ continued its negotiations with Maersk-APM.¹⁷⁸

In May 2008, PANYNJ continued to refuse to negotiate with Maher unless Maher agreed to a stay in Dkt. No. 07-01.¹⁷⁹ On May 14, 2008, PANYNJ's Larrabee sent a letter to Maher CEO Buckley indicating that PANYNJ would engage in settlement discussions regarding Dkt. 07-01 and any other issues in dispute, but *only* if Maher agreed to a stay of *all* litigation.¹⁸⁰ On July 22, 2008, John Buckley transmitted a letter to Anthony Coscia, the Chairman of the PANYNJ Board of Directors requesting the Board's intervention in PANYNJ's continuing refusal to deal with Maher.¹⁸¹ On July 24, 2008, PANYNJ concluded a deal which provided Maersk-APM additional preferences of "substantial value."¹⁸² PANYNJ did not alter its position and continued to refuse to deal or negotiate with Maher and has failed to satisfy Maher's complaint in this proceeding and thereby, has violated and continues to violate the Shipping Act.

¹⁷⁸ Larrabee Dep. at 123:17-124:16, MPFF ¶ 505 (PANYNJ was actively negotiating a settlement with APM Terminals while telling Maher it must agree to a stay of litigation in order to enter negotiations); Declaration of Joe Nicklaus Nielsen, CFO for APM Terminals Americas (Sep. 15, 2008), MPFF ¶ 505 ("the parties negotiated for several months and ultimately were able to agree upon a mutual exchange of concessions").

¹⁷⁹ Dep. Ex. 7, MPFF ¶ 506; Dep. Ex. 8, MPFF ¶ 506.

¹⁸⁰ Dep. Ex. 7, PANYNJ letter from Larrabee to Buckley (May 14, 2008), MPFF ¶ 506.

¹⁸¹ Maher Letter from J. Buckley to PANYNJ Board Chairman A. Coscia (July 22, 2008), MPFF ¶ 507.

¹⁸² 07-01 Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Ex. A, MPFF ¶ 70 (settlement agreement between PANYNJ and APM entered into on July 24, 2008); 07-01 Maher's Reply in Opposition to Joint Motion for Settlement (Aug. 29, 2008), MPFF ¶ 71, 75 (the settlement agreement provides Maersk-APM with additional preferences in the form of forgiving APM's failure to make terminal investments of \$50-73 million required by EP-248, granting APM until 2017 to make certain improvements, providing a consent to a change in ownership without any consent fee that PANYNJ required from other Maher and other marine terminal operators, etc. PANYNJ and Maersk APM conceded that "[t]he mutual releases and concessions are of *substantial value to both parties.*") (quoting 07-01 Joint Motion for Approval of Settlement at 4) (emphasis added).

IV. Dkt. 07-01 Violations Of The Shipping Act

A. Failure To Establish, Observe, And Enforce Just And Reasonable Regulations In Violation Of 46 U.S.C. § 41102(c)

In what began as the Dkt. 07-01 proceeding concerning the two-year delay in PANYNJ's delivery of 84 acres to Maersk-APM,¹⁸³ the evidence establishes with respect to Maher's counter-complaint that PANYNJ failed and continues to fail to establish, observe, and enforce just and reasonable regulations and practices with respect to Maher and the transfer of certain premises, i.e. the 84 acres, to PANYNJ and ultimately destined for Maersk-APM. In this respect, PANYNJ enforced an *unlawful* indemnity requirement for Maher to indemnify PANYNJ for PANYNJ's own failures, and which provided Maher no offsetting benefit. PANYNJ enforced the unlawful indemnity in two legal proceedings, one before the Commission in 2007 – 2009 (the Dkt. 07-01 proceeding) and the second in New Jersey state court in May 2008 – 2009 (Union County Superior Court, Docket No. UNN-L-1760-08.).¹⁸⁴

Commission authority establishes that agreements that exculpate a party from its own responsibility without conferring some offsetting benefit are unreasonable and violate the Shipping Act. *Central Nat'l Corp., et al. v. Port of Houston Auth.*, 22 S.R.R. 521, 523 (A.L.J. 1983) approved by the Commission 22 S.R.R. 795 (F.M.C. 1984) (“An indemnification clause

¹⁸³ See APMT Dkt. 07-01 Complaint against PANYNJ, PANYNJ Third-Party Complaint against Maher, and Maher Countercomplaint against PANYNJ, MPFF ¶ 41-49 (describing PANYNJ's two year delay in delivering 84 acres to Maersk-APM, PANYNJ's indemnification claim against Maher, and Maher's countercomplaint for Shipping Act violations).

¹⁸⁴ PANYNJ's complaint against Maher in the Union County Superior Court, Chancery Division, seeking declaratory judgment construing EP-249 to require Maher to indemnify PANYNJ against the claims brought against PANYNJ by Maersk-APM and against any losses stemming from PANYNJ's settlement with Maersk-APM, based both on Maher's alleged duty to indemnify PANYNJ per EP-249 and Maher's alleged breach of the lease, and PANYNJ also seeking damages from Maher. The PANYNJ complaint also averred that Maher was negligent, and PANYNJ sought damages under a common law indemnification theory. It also sought a declaration that the PANYNJ-APM settlement was reasonable and barring Maher from challenging the settlement's reasonableness, MPFF ¶ 54, 504.

which would relieve respondent [port authority] of all liability in situations where it was even partly responsible is unlawful under [Shipping Act] Section 17.”); *Stevens Shipping and Terminal Co. v. S.C. Ports Auth.*, 22 S.R.R. 1030, 1033-4 (A.L.J. 1984) (“marine terminal tariffs, regulations or practices that would exculpate the terminal from liability for its own negligence without conferring some offsetting benefit or would impose liability without regard to fault are unreasonable under Section 17 of the 1916 Act.”); *Stevens Shipping and Terminal Co. v. S.C. Ports Auth.*, 23 S.R.R. 267, 272 (F.M.C. 1985) adopted by the Commission, 23 S.R.R. 684, 687-9 (1985) (affirming the initial decision) (port authority exculpatory tariff provisions unlawful).

1. PANYNJ Enforced An Indemnity Obligation For PANYNJ’s Own Fault

In its third-party complaint filed against Maher and verified by PANYNJ Port Commerce Deputy Director Lombardi, PANYNJ averred that Maher was liable to PANYNJ for “all claims and demands” against PANYNJ “arising out of the use or occupancy of the premises” if certain premises, i.e. the 84 acres, were not delivered to PANYNJ in a “timely manner” irrespective of fault.¹⁸⁵ PANYNJ’s enforced two indemnity provisions of EP-249 which PANYNJ represented under oath as requiring Maher to indemnify PANYNJ irrespective of fault.¹⁸⁶ In sworn interrogatory answers verified by Deputy Director Lombardi, PANYNJ confessed repeatedly that it imposed on Maher indemnity requirements irrespective of fault. PANYNJ testified:

Maher Terminals, LLC agreed in its lease with the Port Authority to vacate the premises in a timely manner and to hold the Port Authority harmless against any damages or loss resulting from any failure arising out of the Port Authority - Maersk (APMT) lease.¹⁸⁷

¹⁸⁵ Dkt. 07-01 PANYNJ Verified Complaint ¶¶11 – 18, MPFF ¶ 47.

¹⁸⁶ *Id.*, MPFF ¶ 47.

¹⁸⁷ PANYNJ Supp. Answer to APM Interrogatory No. 6, MPFF ¶ 442, and PANYNJ’s Supp. Answer to Maher Interrogatory No. 7 (June 20, 2008), MPFF ¶ 442. Also see, PANYNJ’s Supp. Answer to Maher Interrogatory No. 4, MPFF ¶ 442 (“Maher undertook the obligation to hold the Port Authority harmless from ‘damages of loss to the Port Authority’ that may arise out of the

However, the Shipping Act bars the PANYNJ indemnity requirement enforced against Maher because it was imposed on Maher for PANYNJ's fault and PANYNJ provided Maher no offsetting benefit. Therefore, PANYNJ's enforcement actions of these indemnity requirements of EP-248 prosecuted against Maher violate the Shipping Act.

The evidence establishes that PANYNJ was responsible for the two-year delay in delivering the 84 acres to Maersk-APM, i.e. in December 2005 vice December 2003. As PANYNJ confessed in its sworn answer to Maersk-APM's interrogatory asking *why* PANYNJ delivered the 84 acres two years late:

The Port Authority undertook the task of the redevelopment of the Elizabeth Peninsula along with its tenants Maersk and Maher Terminals, LLC and undertook various demolition construction projects that were complicated. Many unforeseen and unforeseeable challenges delayed the initial and anticipated schedule for completion. These include unforeseen asbestos within the construction sites being demolished, unforeseen challenges with regard to underground facilities and conditions, weather delays, challenges regarding the design of the ExpressRail and attempting to obtain the consent and operating information of all affected parties including Maersk (now APMT), Maher Terminals, LLC, CSX Norfolk Southern and ConRail. These problems, among others that may be revealed through future discovery delayed the transition of the added premises to APMT.¹⁸⁸

Other PANYNJ failures caused the two-year delay in delivery of the 84 acres to Maersk-APM. At the outset, PANYNJ's first delay resulted from PANYNJ's Board of Commissioners' protracted delay of many months to approve the Maersk-APM lease.¹⁸⁹ Additionally, the design,

Port Authority – Maersk lease including damages or losses that may arise out of any delay in transferring the 84 acres”).

¹⁸⁸ PANYNJ Supp. Answer to APM Interrogatory No. 5 (June 20, 2008), MPFF ¶ 463.

¹⁸⁹ R.Israel 30(b)(6) Dep. at 315:5-317:8, MPFF ¶ 475 (“no one anticipated the leases would be held up for almost two years” by the PANYNJ Board); Boyle Dep. at 262:15–263:2, MPFF ¶ 475 (PANYNJ Board delayed for 18 months certainly causing some delay in redevelopment project); Shiftan Dep. at 38:22-24, MPFF ¶ 475 (“the approval of the lease was delayed for a protracted period”), 69:24–70:2, MPFF ¶ 475 (“certainly during that period of time when the board didn’t meet, anything that would have required the board’s approval didn’t get done”).

planning, and building of the new ExpressRail facility was the responsibility of PANYNJ.¹⁹⁰ But PANYNJ's process for planning, approving, and contracting for the new ExpressRail facility caused a delay of over two years.¹⁹¹ PANYNJ did not even issue a solicitation for bids for the construction of the ExpressRail facility, which was a prerequisite to the transfer of the 84 acres, until September 2002.¹⁹² This took over two years, from June 2000 – September 2002 because of PANYNJ's "process."¹⁹³ As PANYNJ's 30(b)(6) witness Rudy Israel testified:

Well, the fact that you are getting started late after the [PANYNJ Board] authorization or you couldn't put contracts out until the board authorized the project obviously delayed the start-up of completion of award of contracts, et cetera.

Q. And why did it take over two years, Mr. Israel, to issue the solicitations for bid for the new ExpressRail?

THE WITNESS. There's a process. The board approves, and if you read the item, you could not authorize contracts for consultants, et cetera, until the board approved. So, it took time to get consultants to the board and sign contracts with them, and also do the design.

Q And who was responsible for managing that, Mr. Israel?

THE WITNESS: The Port Authority.

Q. . . . So, Maher was not responsible for managing that, was it?

A. No.¹⁹⁴

The evidence establishes that PANYNJ's design and planning stage for the facility alone lasted into at least mid-May 2003 which as a practical matter prevented completion of the project before December 31, 2003.¹⁹⁵ PANYNJ's Rudy Israel who was in charge of the terminal

¹⁹⁰ E.Harrison 07-01 Dep. at 122:10–123:12, MPFF ¶ 463 (it was PANYNJ's responsibility to design, plan, and build the new ExpressRail facility, Maher was not responsible for the new ExpressRail construction); Maher's Senior Vice President for Operations A.Ray 07-01 Dep. at 37:7-10, MPFF ¶ 463 (PANYNJ led the design on the new ExpressRail facility and Rudy Israel was in charge).

¹⁹¹ Israel 30(b)(6) Dep. at 314:24-315:3, MPFF ¶ 477 ("It is a long process . . . of the Port Authority).

¹⁹² Israel 30(b)(6) Dep. at 281:23-82:7, MPFF ¶ 476 & 286:5–287:17, MPFF ¶ 476.

¹⁹³ Israel 30(b)(6) Dep. at 286:5-287:17, MPFF ¶ 476.

¹⁹⁴ Israel Dep. at 286:150-287:21, MPFF ¶ 475.

¹⁹⁵ MT003068, Letter from F. van Riemsdyk to R. Israel, January 14, 2003, MPFF ¶ 458 (indicating that PANYNJ was still in the design/planning stage of new ExpressRail facility in

redevelopment project, including the new ExpressRail project, admitted under oath that the completion date of December 31, 2003 should have been changed to reflect a new completion date, but PANYNJ did not change the date.¹⁹⁶

In the end, the new ExpressRail facility was not completed and opened for use until October 4, 2004, more than nine months past the December 31, 2003 deadline for PANYNJ's required delivery of the 84 acres to Maersk-APM.¹⁹⁷ And, PANYNJ consumed another *year* just to complete the additional work necessary to satisfy the prerequisites of the Maher lease, i.e. demolition and improvement of the old express rail premises to straddle grade condition, which would allow PANYNJ to provide reasonable notice pursuant to the lease to Maher for it to be required to relinquish the 84 acres to PANYNJ in a timely manner.¹⁹⁸ Therefore, the evidence establishes that the PANYNJ is responsible for the two-year delay.

January 2003), MT000063, E-Mail from A. Hubler to D. Olesky, May 18, 2003, MPFF ¶ 458 (indicating that design of new ExpressRail facility still was not complete in May 2003); Curto 07-01 Dep. at 61:14-62:22 & 111:1-5, MPFF ¶ 463 (“My sense is that because there were design questions and what to build and where to build it, my sense is that some of those issues delayed the project.”).

¹⁹⁶ Israel 30(b)(6) Dep. at 316:14-16, MPFF ¶ 478 (“So, I’m saying, in retrospect, perhaps the date – the lease should have been amended to reflect a different completion date.”); 317:19-319:12, MPFF ¶ 478 (PANYNJ opinion that December 2003 date was reasonable turned out to be wrong).

¹⁹⁷ 07-01 Dep. Ex. 192, Millennium Marine Rail, Notice to All Expressrail Terminal Users, MPFF ¶ 459 (notifying customers that the new ExpressRail facility is operational starting October 4, 2004); 08-03 Dep. Ex. 386, Letter from Brian Maher to R. Larrabee, October 26, 2005, MPFF ¶ 459 (referencing new ExpressRail facility opening on October 4, 2004); Maher’s Supplemental Responses to PANYNJ’s Interrogatories, 07-01, 08-03 Dep. Ex. 224, No. 3, MPFF ¶ 459 (“And the PANYNJ’s mismanagement of the design, planning and construction of the New Express Rail or Millennium Marine Rail project was delayed for years such that this new rail facility did not even begin operating until October 4, 2004”); Crotty 07-01 Dep. at 93:15-18, MPFF ¶ 459.

¹⁹⁸ Israel 30(b)(6) Dep. at 228:1-5, MPFF ¶ 460 (about a year after new ExpressRail completed before old ExpressRail demolished); Dep. Ex. 264, MPFF ¶ 449, 460 (Letter from R. Israel to D. Olesky re “Elizabeth – Port Authority Marine Terminals – EP-384.059 – Removals and Paving & Utilities of Former Expressrail,” October 4, 2005 notifying Maher that old express rail demolition and improvement completed); Olesky Dep. at 47:2-14, MPFF ¶ 460 (following

PANYNJ's own belated admission in response to interrogatories ordered by the Presiding Officer, confirms PANYNJ's knowledge and understanding that Maher had no fault for the delay.¹⁹⁹ Moreover, the evidence establishes that Maher's construction projects did not delay the transfer of the 84 acres.²⁰⁰ Indeed, PANYNJ ultimately abandoned its unlawful indemnity enforcement actions against Maher with prejudice in conjunction with its settlement with Maersk-APM in the Dkt. 07-01 proceeding²⁰¹ and as a practical matter has confessed the unlawful enforcement actions were meritless and perforce unreasonable. PANYNJ's submissions with respect to dismissal with prejudice of the unlawful indemnity enforcement actions against Maher failed to make a showing that the actions were proper. Instead, they resorted to misdirection arguing only that Maher was benefiting from the settlement because it would be relieved of the unlawful indemnity obligation foisted upon it by PANYNJ.²⁰²

2. There Was No Offsetting Benefit To Maher

According to PANYNJ, "the Port Authority provided an incentive through its lease with Maher Terminals, LLC to compel Maher Terminals, LLC to move from the added premises expeditiously. . . ." This is false. However, even if this were true, the purported "incentive . . . to move from the added premises expeditiously" is *not* an "offsetting benefit" to Maher. PANYNJ failed to produce any evidence of any offsetting benefit provided to Maher in return

PANYNJ's completion of old ExpressRail in October Maher vacated the 84 acres by December 15, 2005).

¹⁹⁹ PANYNJ Supp. Answer to APM Interrogatory No. 6 and PANYNJ's Supp. Answer to Maher Interrogatory No. 7, *supra.*, MPFF ¶ 442, 448, 463; Brian Maher 07-01 Dep. at 239:2-8, MPFF ¶ 463 (Maher not responsible for PANYNJ engineering department, design of ExpressRail, hiring contractors, or putting out bids for paving and demolition for PANYNJ projects).

²⁰⁰ Olesky Dep. at 119:1-5, MPFF ¶ 463 (no delays to Maher construction projects during the period 2000 – 2005), 128:22 – 129:14, MPFF ¶ 463 (" . . . everything as far as I was concerned went on schedule with our Maher projects. And we couldn't go any faster than the Port Authority gave [land] it to us . . .").

²⁰¹ Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Dkt. 07-01 (Aug. 14, 2008), MPFF ¶ 69.

²⁰² *Id.* at 12, MPFF ¶ 74.

for the purported “incentive.” To the contrary, the evidence establishes that Maher never sought nor did it receive any “offsetting benefit” in return for the indemnity requirement enforced by PANYNJ, because it never agreed to indemnify PANYNJ for PANYNJ’s own failures in the first instance.²⁰³ As Maher’s General Counsel Scott Schley explained to PANYNJ in rejecting the demand to defend, “Maher is not responsible for the fact that the Port Authority failed to meet its obligations to APMT, nor is Maher obligated to defend the Port Authority . . . or to indemnify the Port Authority. . . .”²⁰⁴

Moreover, as enforced, PANYNJ’s alleged “offsetting benefit” to Maher of an “incentive” to vacate the 84 acres expeditiously is unreasonable. The evidence establishes that Maher already had ample incentive to move from the 84 acres expeditiously because it was costly.²⁰⁵ Since PANYNJ was responsible for the port redevelopment project, Maher was at PANYNJ’s mercy with respect to completion of key elements of the project, e.g. completion of new ExpressRail and demolition and improvement of old ExpressRail, which were prerequisites to Maher’s obligation to vacate the 84 acres. PANYNJ caused the two-year delay by its failures to timely approve the Maersk-APM agreement, approve the design and plan for the ExpressRail project, solicit bids for the ExpressRail project, and ultimately complete this project and others,

²⁰³ Brian Maher 07-01 Dep. at 206:11-15, MPFF ¶ 444 (Referring to the indemnity provision, “it was only upon Maher’s failure to deliver in a timely manner and at dates reasonably specified by the Port Authority, that that clause would come into effect.”).

²⁰⁴ Dep. Ex. 402, S.Schley Letter to PANYNJ at 5 (May 2, 2007), MPFF ¶ 445; Ex. B of PANYNJ Dkt. 07-01 Verified Complaint, MPFF ¶ 439.

²⁰⁵ Olesky Dep. at 129:8-22, MPFF ¶ 530 (Maher wanted to vacate the property “because we were losing money . . . it was a costly piece of property that we needed to get out of. It was costing us money”); 08PA00021061, Supplement 36 to EP-78, MPFF ¶ 38, increased the rent PANYNJ levied on Maher “approximately 22% higher than the existing rate” to \$29,430 per acre with a 10% per year rent escalator, etc., e.g. by Oct 1, 2005 the per acre rent increased to \$47,397.35; Kerr Expert Report ¶¶ 66-77, 81-82, MPFF ¶ 532 (Maher sustained damages of \$56.6 million caused by PANYNJ delay providing premises due to higher operating costs, lost profits, and increased construction costs).

e.g. the old ExpressRail demolition and improvement, that were prerequisites to Maher's surrender of the 84 acres. Maher simply had no obligation to vacate the 84 acres during the period of PANYNJ's two-year delay. Therefore, Maher did not require an "incentive," to vacate the 84 acres before PANYNJ completed the work that it was required to complete before it could even provide notice to Maher to vacate the area in a timely manner. Moreover, the evidence establishes that when PANYNJ finally provided Maher a notice to vacate the area, even though that notice was defective, Maher timely vacated the area anyway.²⁰⁶ Pursuant to the terms of EP-249, Maher agreed to indemnify PANYNJ for damages caused by Maher if Maher failed to timely provide premises following reasonable notice from PANYNJ, but Maher did not agree to indemnify PANYNJ for PANYNJ failures. PANYNJ's enforcement of the indemnity provisions of EP-249 to require Maher to indemnify PANYNJ for PANYNJ's own failures is patently unreasonable and violates the Shipping Act.

As a matter of law, PANYNJ's indemnity requirement, as interpreted and enforced against Maher, fails to comply with the governing law of EP-249.²⁰⁷ New Jersey law requires "explicit contractual language" referencing "the negligence or fault of the indemnitee." *Taylor v. Port Auth. of N.Y. and N.J.*, 2008 WL 2572685 (N.J. Super.A.D.) (citing *Azurak v. Corporate Prop. Investors*, 175 N.J. 110, 112-13 (2003)); *Diaz v. Holdings, LLC*, 2010 WL 2867947, at *8-

²⁰⁶ Dep. Ex. 265, MPFF ¶ 447 (PANYNJ's 30 day notice to vacate issued to Maher on September 20, 2005, two weeks before the old ExpressRail work was actually completed on October 4, 2005); Dep. Ex. 264, MPFF ¶ 449, 460 (Letter from R. Israel to D. Olesky re "Elizabeth – Port Authority Marine Terminals – EP-384.059 – Removals and Paving & Utilities of Former Expressrail," October 4, 2005 notifying Maher that old express rail demolition and improvement completed); Dep. Ex. 173, MPFF ¶ 461 (Maher letter to PANYNJ of September 28, 2005 explaining that PANYNJ's notice was unreasonable and setting forth a reasonable process to turn over 84 acres and cooperate); Maher's Responses to PANYNJ's First Set of Interrogatories, Dkt. 07-01, No. 3, MPFF ¶ 459 (explaining phased turnover of 84 acres to PANYNJ complete on December 15, 2005).

²⁰⁷ Dep. Ex. 131, EP-249 §34(v), MPFF ¶ 18 ("This agreement shall be governed in accordance with the laws of the State of New Jersey").

10, (N.J.Super.A.D. 2010) (indemnification clause did not specifically express that tenant will indemnify the landlord for its negligence and therefore the lease falls under *Azurak*). *See also Simoes v. Nat'l R.R. Corp.*, 2011 WL 2118934, at *7 (D.N.J. 2011).

Additional evidence further demonstrates that the indemnity requirement PANYNJ enforced against Maher constitutes an unreasonable practice in violation of the Shipping Act because it defies the underlying policy reason prohibiting such provisions in the PANYNJ tariff. 46 C.F.R. § 525.2(a)(1), 64 Fed. Reg. 9281 (1999) (mandating that "terminal schedules cannot contain provisions that exculpate or relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence."). The unreasonable nature of such a provision in a port authority tariff is equally applicable here because it aims to prevent a party in a powerful bargaining position, e.g. PANYNJ, from requiring such indemnity provisions from others like Maher in a weaker bargaining position.

3. Maher Incurred Actual Injury Opposing PANYNJ's Enforcement

Maher sustained injury and damages to defend itself from PANYNJ's unlawful enforcement actions. And in these circumstances, the Shipping Act provides for "payment of reparations to the complainant for actual injury . . . caused by a violation of this Act. . . ." ²⁰⁸ The Commission recognizes that attorney's fees incurred defending against a suit filed in violation of the Shipping Act may be awarded as the measure of a complainant's reparations damages. *Bloomers of Cal., Inc. v. Ariel Maritime Group, Inc.*, 26 S.R.R. 183, 183 (FMC 1992). There, the respondent brought an earlier lawsuit against complainant to collect an unlawful charge. *Id.* The Commission agreed that complainant "is entitled to recover its legal fees [from the earlier suit], not as attorney's fees as such, but as damages flowing from the unlawful practice of

²⁰⁸ 46 U.S.C. § 41305 (Shipping Act §11(g)).

Respondents, which was in part to demand the payment of unjustly discriminatory charges by means of a lawsuit to collect such charges.” *Id.* The Commission noted that “[i]n general, actual injury will not have been incurred where a complainant has not paid the unlawful charges,” but that “where, however, as here, the demand itself, in the form of a lawsuit, is part of the unlawful practice, the payment of legal fees incurred in defending that lawsuit constitutes actual injury for which reparations may be granted.” *Id.*

Other authorities confirm the Commission’s authority that when a party subjects another to an unlawful or improper legal proceeding causing injury that a measure of damages is the attorney’s fees spent defending the earlier legal proceeding. *See, e.g., Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 572, 576-77 (D.C. Cir. 2003) (in Federal Tort Claims Act suit alleging Government wrongfully and abusively investigated and sued plaintiff, plaintiff could recover “damages in the form of attorney’s fees already expended in defending itself against the underlying” unlawful suit since those fees qualify as “injury or loss of property”); *Waco Int’l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523, 535 (5th Cir. 2002) (in counterclaim under Lanham Act where opposing party instituted a wrongful *ex parte* seizure of goods proceeding, “attorney fees are to be considered part of actual damage” and are allowed even when there are no other damages such as “lost profits and/or loss of good will”); *Riveredge Assocs. v. Metro. Life Ins. Co.*, 774 F. Supp 897, 901-02 (D.N.J. 1991) (“attorneys fees are a proper element of damages when the right violated is the right to be free from suit”; these fees are not barred as damages under the “American Rule”); *Tech. Comp. Servs., Inc. v. Buckley*, 844 P.2d 1249, 1256 (Colo. App. 1992) (party who brought a counterclaim to wrongful litigation “could recover attorney fees attributable to his defense against [opposing sides]’s wrongful litigation” as damages).

B. Unreasonable Preference or Prejudice Violation of 46 U.S.C. § 41106(2)

PANYNJ imposed and enforced an *unlawful* indemnity requirement for Maher to indemnify PANYNJ for PANYNJ's failures, and which provided Maher no offsetting benefit. PANYNJ averred that it imposed this unduly prejudicial unlawful indemnity lease term on Maher requiring Maher to indemnify PANYNJ for PANYNJ's actions that it did not require of Maersk-APM. Also, PANYNJ unlawfully preferred Maersk-APM and prejudiced Maher by imposing and enforcing the indemnity requirement on Maher and not Maersk-APM. PANYNJ's requirement that Maher indemnify PANYNJ for PANYNJ's own failures was not imposed on Maersk-APM. PANYNJ's enforcement of this unlawful indemnity lease term against Maher caused Maher injury and damages and violated the Shipping Act.

PANYNJ, having already granted Maersk-APM preferential terms in EP-248 wherein according to PANYNJ Maersk-APM was not required to indemnify PANYNJ for PANYNJ's actions causing the delay in the transfer of the 84 acres, PANYNJ refused to grant those terms to Maher EP-249 despite its repeated requests for the same terms.²⁰⁹ The evidence establishes that PANYNJ violated and continued to violate 46 U.S.C. § 41106(2) by providing Maersk-APM an undue or unreasonable preference and Maher an undue or unreasonable prejudice with respect to lease terms in this respect. PANYNJ required Maher to indemnify PANYNJ for PANYNJ failures to transfer the 84 acres by December 31, 2003, but PANYNJ did not require Maersk-APM to indemnify PANYNJ for PANYNJ's failures in this same respect.

²⁰⁹ See discussion *supra*. at 7-9, 39-46 and the evidence establishing that PANYNJ unlawfully discriminated against Maher and in favor of Maersk-APM with respect to the lease terms provided by PANYNJ in EP-248 for Maersk-APM and EP-249 for Maher. During the PANYNJ-Maher negotiations that resulted in the lease terms provided by PANYNJ to Maher in EP-249, Maher requested parity with Maersk-APM. PANYNJ informed Maher that PANYNJ would provide a "level playing field" and that Maher would receive materially the same, or similar, lease terms to those offered to APM. But, ultimately PANYNJ Port Commerce Director, Lillian Borrone, told Maher that the Maersk-APM terms were "off the table" and that its terms provided to Maher were its best and final offer, that is, it was a take it or leave it proposal.

C. Unreasonable Refusal To Deal In Violation of 46 U.S.C. § 41106(3)

The Shipping Act provides that a “marine terminal operator may not . . . unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106(3). The FMC has held that “[r]efusals to deal are factually driven and determined on a case-by-case basis.” *Canaveral Port Auth. - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. at 1449. To determine reasonableness, the FMC will “look to whether a marine terminal operator gave actual consideration to an entity’s efforts at negotiation.” *Id.* at 1450. A refusal to even consider proposals to negotiate, where the port authority cannot point to any evidence that the unique aspects of the applicant’s proposal were individually considered, have been found to constitute an unlawful refusal to deal. *Id.* at 1449-50.

PANYNJ unlawfully refused to deal or negotiate with Maher categorically with respect to the issues presented in Dkt. 07-01 while actively negotiating with Maersk-APM and providing Maersk-APM undue and unreasonable preferences which prejudice Maher.²¹⁰ PANYNJ’s position that Maher must satisfy and failed to satisfy PANYNJ’s precondition of presenting PANYNJ “concrete settlement offers or proposals” before PANYNJ would consent to negotiate²¹¹ is untrue. As set forth above, PANYNJ had not imposed the requirement as a precondition to negotiations with Maersk-APM. And, at PANYNJ’s insistence, Maher had previously provided a written settlement proposal on January 17, 2008 requesting parity with Maersk-APM.²¹² Indeed, on January 29, 2008, PANYNJ expressly rejected Maher’s written

²¹⁰ Crane Dep. at 68:22–69:2, MPFF ¶ 487 (“The Port Authority refused to talk . . . They said, we can’t talk about this, because it was an active legal action”); Larrabee Dep. at 24:9–16, MPFF ¶ 487 (Larrabee did not recall refusing to deal with Maher, but did not deny it); 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.*, No. 07-01 at 19-49 (November 17, 2008).

²¹¹ PANYNJ-APM Joint Motion for Settlement Approval at 12 n.9, MPFF ¶ 491.

²¹² Dep. Ex. 6, MPFF ¶ 494-95.

proposal, stating plainly “The Port Authority does not agree to your proposed rental adjustments.”²¹³ PANYNJ's subsequent demand that Maher satisfy a purported precondition that Maher had previously satisfied manifests PANYNJ's unreasonable refusal to deal or negotiate. PANYNJ also improperly demanded that Maher agree to stay the Dkt. 07-01 proceeding as a precondition to discuss Maher's claims.²¹⁴ PANYNJ imposed neither precondition on Maersk-APM with which PANYNJ negotiated *without a stay* for several months while refusing to deal or negotiate with Maher.²¹⁵ In mid-2008, PANYNJ asserted for the first time that it categorically refused to deal or negotiate with Maher with respect to Maher's Dkt. 07-01 claims because it ultimately decided to dismiss its claims against Maher with prejudice.²¹⁶ Assuming *arguendo* that PANYNJ knew this in November 2007 when it first categorically refused to deal or negotiate with respect to its unlawful indemnity action, then PANYNJ should have dismissed its third-party complaint against Maher then. Moreover, this is not what PANYNJ said at the time. Instead, PANYNJ prosecuted its third-party action against Maher, obstructed Maher's discovery, and brought a second enforcement action against Maher in May 2008 in New Jersey state court, causing Maher to incur injury and damages to defend and ultimately defeat these actions. Moreover, this *post hoc* rationalization provides no reason for PANYNJ's refusal to deal or negotiate with Maher with respect to Maher's claims against PANYNJ in Dkt. 07-01.

PANYNJ's refusal to deal or negotiate with Maher stands in stark contrast to PANYNJ's willingness over several months during 2007 – 2008 to discuss with Maersk-APM that lessee's

²¹³ Dep. Ex. 245, MPFF ¶ 496-97.

²¹⁴ Dep. Ex. 7, PANYNJ Larrabee's letter to Maher of May 14, 2008, MPFF ¶ 506 (requiring Maher stay all proceedings as a precondition to dealing or negotiating with Maher).

²¹⁵ Declaration of J. Nielsen, ¶¶ 2 & 3, January 10, 2008, MPFF ¶ 505.

²¹⁶ PANYNJ-APM Joint Motion for Settlement Approval at 12 n.9, MPFF ¶ 491 (“ . . . since PANYNJ will dismiss . . . there is no need for settlement negotiations with Maher”).

"long term business relationship"²¹⁷ and in the process to award it new valuable preferences over Maher that preserve Maersk-APM's "competitive advantage."²¹⁸ PANYNJ and Maersk-APM admitted that their negotiation was not limited to the issues in the Dkt. 07-01 proceeding, but also concerned their "long-term business relationship." As PANYNJ's counsel Mr. Burke explained to the Presiding Officer, "I mean there are a lot of pieces to the settlement that it makes it somewhat complicated. Its not just this case. It's a broader moving forward type of settlement that includes this case."²¹⁹ Thus, since PANYNJ negotiated with Maersk-APM about both its Dkt. 07-01 claims and its long term business relationship, and ultimately granted Maersk-APM concessions preserving Maersk-APM's "competitive advantage," PANYNJ should similarly have dealt with Maher regarding its Dkt. 07-01 claims and not categorically refused to deal or negotiate. *See Canaveral Port*, 29 S.R.R. at 1450 (a refusal to even consider proposals to negotiation constitutes an unlawful refusal to deal).

In the Dkt. 07-01 proceeding, PANYNJ granted Maersk-APM new undue preferences further prejudicing Maher. For example, PANYNJ granted Maersk-APM undue preferences in

²¹⁷ Transcript of pre-hearing conference, Dkt. 07-01, June 17, 2008 at 33:10-14, MPFF ¶ 505 (PANYNJ's counsel stated with respect to negotiations with Maersk-APM that "[i]ts not just this case. It's a broader moving forward type of settlement that includes this case"); Memorandum and Order on Joint Motion to Stay Proceedings at 5 (Jan. 30, 2008), MPFF ¶ 52 ("According to the representations of counsel for APM and PANYNJ, those discussions go beyond this controversy and related to the long term relationship between APM and PANYNJ"); Declaration of Lawrence I. Kiern in Support of Maher's Opposition to the Joint Motion to Stay (Dec. 20, 2007), MPFF ¶ 505 (memorializing PANYNJ's statement to the Presiding Officer on Dec. 11, 2007 that "the discussions between APM and PANYNJ went beyond the issues in the FMC proceeding and related to their long term business relationship").

²¹⁸ PANYNJ-APM Joint Motion for Settlement Approval at 4 & 11, MPFF ¶ 71-72 (PANYNJ provided consent to change of ownership of Maersk-APM which it described as "substantial" and that it provided Maersk-APM a \$23 million benefit by allowing it to defer \$50 million terminal investments from 2017); Dep. Ex. 272 at 08PA01436060, MPFF ¶ 437 (Maersk-APM confidential settlement memorandum to PANYNJ seeking to preserve its competitive advantage).

²¹⁹ Transcript of pre-hearing conference, Dkt. 07-01, June 17, 2008 at 33:10-14, MPFF ¶ 505.

the forms of (1) a financial benefit of approximately \$23 million by granting Maersk-APM deferral of terminal improvement obligations under Lease EP-248 and (2) a valuable consent to change in ownership that permitted Maersk-APM's parent company, Maersk, Inc., to transfer its one hundred percent interest in Maersk-APM while unduly prejudicing Maher by requiring \$136 million in cash and improvements for a like consent.²²⁰ Therefore, where PANYNJ categorically refused to deal or negotiate with Maher and simultaneously provided additional preferences in favor of Maersk-APM, PANYNJ's refusal to deal or negotiate with Maher with respect to Dkt. 07-01 manifests an unreasonable refusal to deal or negotiate violating the Shipping Act.

D. Operating Contrary To FMC Agreement In Violation Of 46 U.S.C. § 41102(b)(2) With Respect To The Transfer of Premises

Additionally, with respect to the foregoing PANYNJ unlawful enforcement of an indemnity requirement not lawfully provided for in the agreement, PANYNJ's failure to operate consistent with the agreement's *force majeure* provision, and PANYNJ's failure to reasonably transfer improved premises to Maher as provided by EP-249, PANYNJ violated its filed agreement in multiple respects that were arbitrary, unjustly discriminatory, and arrogantly deliberate in circumstances where the law is clear and established.

²²⁰ 07-01 Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice, Ex. A, MPFF ¶ 71-72, 430-32 (settlement agreement between PANYNJ and APM entered into on July 24, 2008); 07-01 Maher's Reply in Opposition to Joint Motion for Settlement (Aug. 29, 2008), MPFF ¶ 70-71, 75 (the settlement agreement provides Maersk-APM with additional preferences in the form of forgiving APM's failure to make terminal investments of \$50 million required by EP-248 by December 2006, granting APM until 2017 to make certain improvements, providing a consent to a change in ownership without any consent fee that PANYNJ required from other Maher and other marine terminal operators, etc. PANYNJ and Maersk APM conceded that "[t]he mutual releases and concessions are of *substantial value to both parties.*") (quoting 07-01 Joint Motion for Approval of Settlement at 4) (emphasis added).

1. PANYNJ's Operation Contrary To The Agreement's Indemnity And Force Majeure Provisions

First, as the evidence establishes above, PANYNJ operated contrary to EP-249 which did not as a matter of law require Maher to indemnify PANYNJ for PANYNJ's failures with respect to PANYNJ's delayed delivery of the 84 acres. EP-249 does not require Maher to indemnify PANYNJ for its own failures as PANYNJ averred in its enforcement actions against Maher. EP-249 simply provided that Maher was required to provide certain premises to PANYNJ in a timely manner following delivery of certain improved premises to Maher and reasonable notice from PANYNJ. Maher's indemnification obligation to PANYNJ pursuant to the agreement only occurred in the event Maher failed to deliver the premises in such a timely manner following delivery of premises by PANYNJ and reasonable notice from PANYNJ. Therefore, PANYNJ's enforcement actions requiring Maher to indemnify PANYNJ irrespective of PANYNJ's fault violate the Shipping Act because PANYNJ operated contrary to the agreement.

Likewise, PANYNJ's enforcement actions also violated the Shipping Act because they were contrary to the agreement because they failed to observe and enforce the *force majeure* provision of EP-249, which exempted Maher from liability for circumstances outside its control, particularly where PANYNJ was responsible for the redevelopment project and caused the delay in transferring improved premises to Maher and the 84 acres, etc. in the first instance. EP-249 provides that Maher shall not be liable "for any failure, delay or interruption in performing its obligations hereunder due to causes or conditions beyond its control . . . whether affecting the Port Authority or its contractors or subcontractors" and additionally that any Maher liability under the lease would depend upon a "failure to use reasonable care to prevent or reasonable

efforts to cure. . . .²²¹ Therefore, PANYNJ's enforcement actions which failed to allege a failure of reasonable care to prevent or reasonable efforts to cure" plainly violate the agreement.

2. PANYNJ's Operation Contrary To The Agreement's Provisions Requiring PANYNJ To Provide Maher Improved Premises And Governing The Land Swap Provided By The Agreement

As set forth above, PANYNJ failed to provide the certain premises required by EP-249 and the companion reasonable notifications for the mandated land swaps before December 31, 2003, the required deadline which PANYNJ asserted in its 2007 and 2008 enforcement actions against Maher, failed to improve premises before providing Maher dates reasonably specified to vacate the 84 acres before December 31, 2003, and failed to make and to provide Maher improvements before December 31, 2003, including the old express rail premises improved to straddle grade condition. PANYNJ's two-year delay beyond December 31, 2003 violated all of the provisions of the agreement. The foregoing violations caused actual injury and damages to Maher because of the two-year delay totaling \$56,559,566.²²²

EP-249 required PANYNJ to provide to Maher certain improved premises to Maher. Following receipt of these new improved premises and reasonable notice from PANYNJ, Maher was to timely surrender certain portions of Maher's former Tripoli Street terminal referred to as the "Old Premises," including the 84 acres at issue.²²³ The evidence establishes that PANYNJ represented under oath and testified repeatedly that EP-249 required PANYNJ to provide the required improved premises to Maher in such a manner that upon reasonable notice, Maher could

²²¹ Dep. Ex. 131 (EP-249 § 36 "Force Majeure"), MPFF ¶ 444.

²²² Kerr Expert Report ¶ 8, MPFF ¶ 532.

²²³ As relevant to this proceeding, EP-249 § 1 entitled "Letting" describes PANYNJ's letting of the premises of Maher's marine terminal. It provides that the terminal is to be comprised of "Initial Premises" plus "Added Premises" accrued through a series of land swaps. PANYNJ is to provide certain "Added Premises" improved to straddle grade condition and in return following reasonable notice Maher is to timely surrender portions of the "Old Premises," including the 84 acres which is the last swap, MPFF ¶ 440.

timely deliver the 84 acres to PANYNJ before December 31, 2003 so that PANYNJ could satisfy its obligation to Maersk-APM under EP-248.²²⁴ PANYNJ testified in its sworn interrogatory answer verified by Deputy Port Commerce Director Dennis Lombardi that:

The Complaint filed . . . by APM Terminals North America (APMT) against the Port Authority of New York and New Jersey alleges that the Port Authority violated the Shipping Act and breached its lease obligations to APMT by failing to timely deliver 84 acres . . . to APMT. The Port Authority was unable to deliver the [84 acres] because Maher failed to vacate in a timely manner as required by lease EP-249.²²⁵

Likewise, PANYNJ New Jersey Solicitor Donald F. Burke wrote to Maher terminals on April 18, 2007 and set forth PANYNJ's position, "Section 1 of Lease EP-249 required Maher Terminals to turn over the Added Premises [i.e., the 84 acres] to the Port Authority so that it could deliver them to APMT, and Maher Terminals failed to do so."²²⁶

PANYNJ again testified in its supplemental sworn interrogatory answer verified by Deputy Port Commerce Director Dennis Lombardi that:

Further, the Port Authority provided an incentive through its lease with Maher Terminals, LLC to compel Maher Terminals, LLC to move from the added premises expeditiously. For instance, through the lease terms, Maher Terminals, LLC was fully aware of the obligation of [the] Port Authority to transfer the Added Premises [i.e., the 84 acres] to Maersk (now APMT) on or before December 31, 2003 by virtue of the reference to the Maersk (now APMT) lease in the Port Authority - Maher Terminals, LLC lease. Maher Terminals, LLC agreed in its lease with the Port Authority to vacate the premises in a timely manner and to hold the Port Authority harmless against any damages or loss resulting from any failure arising out of the Port Authority - Maersk (APMT) lease.²²⁷

²²⁴ PANYNJ Third-Party Complaint, Dkt. 07-01 (Aug. 9, 2007), MPFF ¶ 47, 448 (verified by Port Commerce Department Deputy Director Dennis Lombardi).

²²⁵ PANYNJ'S Responses to Maher's First Set of Interrogatories, Answer to Interrogatory Number 1 (Oct. 24, 2007), MPFF ¶ 448.

²²⁶ PANYNJ letter from D.Burke to Maher's General Counsel S.Schley, Apr. 18, 2007 at 1, Ex. B to PANYNJ Third-Party Complaint, Dkt. 07-01, MPFF ¶ 439.

²²⁷ PANYNJ Supplemental Responses to Complainant's First Set of Interrogatories As Required By Memorandum And Order Dated June 4, 2008 (Jun. 20, 2008), MPFF ¶ 442, 448 (Answer to APM Interrogatory Number 6) (verified by Port Commerce Department Deputy Executive Director Dennis Lombardi).

Likewise, referring to Maersk-APM's complaint in the Dkt. 07-01 proceeding which referred to Maersk-APM as "APMT" and the 84 acres as the "Added Premises," PANYNJ's verified third-party complaint against Maher stated with respect to Maher and the 84 acres:

2. . . . The Port Authority was unable to provide the [84 acres] to APMT because Maher Terminals failed to vacate in a timely manner as required by EP-249. . . .

3. . . . Lease EP-249 specifically required Maher to turn over the [84 acres] to the Port Authority so that it could deliver them to APMT, and Maher failed to do so.

9. . . . While the [APMT] Complaint contends that the Port Authority has violated various provisions of the Shipping Act, each of those alleged violations would disappear if the [84 acres] had been given to APMT on or before December 31, 200[3], and the [84 acres] would have been given to APMT if Maher had timely vacated those 84 acres.

10. Any fair reading of [l]eases EP-248 and EP-249 which were negotiated and entered into almost simultaneously reveals that the parties well knew that the [84 acres], then occupied by Maher might not be handed over to APMT by December 31, 200[3].²²⁸

PANYNJ Port Commerce Deputy Executive Director Dennis Lombardi testified to the same effect under oath:

Q. And was there a deadline -- by that I mean a date -- when Maher was required to turn over the 84 acres to the Port Authority?

A. I don't believe that's a yes/no question for -- for me, because I'm not sure I could answer it in that way, but I would think that all parties involved had their leases executed at the time, and they were, to some degree, interrelated, that -- the tendering of the property from Maher to the Port Authority, and the Port Authority to APM. So I would think everyone was aware of the dates.

Q. Okay. Well, what were the dates?

A. There was the date we discussed this morning. . . . The December 31st, 2003, date.

Q Okay. And what had to occur on that date?

A That's the day by which the Port Authority is required to tender the 84 acres to APM.

Q. And so what was the date that Maher was required to turn over the 84 acres to the Port Authority?

²²⁸ *Id.*, MPFF ¶ 442, 448 (the PANYNJ third-part complaint against Maher has many typographical errors including the year 2007 vice 2003 which is the obvious intent per the complaint which alleged that PANYNJ had failed to provide the 84 acres by December 31, 2003 per EP -248). *See*, APMT Complaint, Dkt. 07-01, ¶ H, MPFF ¶ 41. 433, "Despite the terms of the Agreement [EP-248] and the knowledge of prospective harm to APMT, PANYNJ failed to provide any portion of the [84 acres] on or before December 31, 2003."

A. As -- as I'm sitting here, I would say that it would be any time between the beginning of the --of the Maher lease, once it started, and that date -- December 31st, 2003.²²⁹

Having established PANYNJ's position that Maher was required to tender the 84 acres to PANYNJ before December 31, 2003, PANYNJ also confessed that it *did not* provide the premises to Maher that EP-249 required PANYNJ to provide Maher in advance of that date.²³⁰ To the contrary, the evidence establishes that PANYNJ did not provide the old express rail premises improved to straddle grade condition as required by EP-249 until October 4, 2005.²³¹ Therefore, PANYNJ operated contrary to the provisions of EP-249 with respect to the transfer of premises to Maher.

The evidence establishes that PANYNJ caused the two year delay and that PANYNJ failed to provide Maher the required improved old express rail premises such that upon reasonable notice Maher could have timely surrendered the 84 acres before December 31, 2003, the required deadline which PANYNJ asserted in its 2007 and 2008 enforcement actions against Maher. Consequently, PANYNJ caused Maher injury and damages as set forth above.

CONCLUSION

For the foregoing reasons, Maher's complaints should be granted as set forth above, with an award of reparations for actual injuries incurred as of May 31, 2011 of \$182,367,866.75, additional actual injury incurred thereafter, additional amounts not to exceed twice the amount of

²²⁹ Lombardi 07-01 Dep. at 138:2 – 139:10 (Jun. 5, 2008), MPFF ¶ 448.

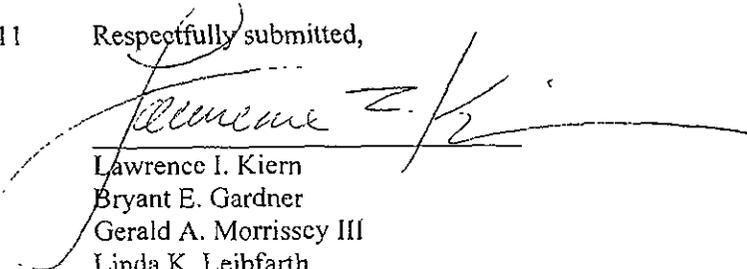
²³⁰ Larrabee Dep. at 251:4 – 9, MPFF ¶ 456 (PANYNJ's Larrabee confirms that PANYNJ was required to demolish and improve to straddle grade condition the old express rail property prior to Maher tendering the 84 acres to PANYNJ.); EP-249 § 1(d)(iv), MPFF ¶ 455 (84 acres to be surrendered by Maher "subsequent to the time the Lessee is provided with the remainder of the Added Premises which is not then part of the Premises (principally the "old Expressrail facility) improved in a manner consistent herewith.

²³¹ Letter from R. Israel to D. Olesky re "Elizabeth – Port Authority Marine Terminals – EP-384.059 – Removals and Paving & Utilities of Former Expressrail," October 4, 2005, 08-03 Dep. Ex. 264, MPFF ¶ 460; Ray 07-01 Dep. at 130:13-20, MPFF ¶ 460; Curto 07-01 Dep. at 106:20-08:9, MPFF ¶ 460.

the actual injury for PANYNJ's violation of 46 U.S.C. § 41102(b), attorneys fees, costs, and interest, and the Commission should issue an order *prohibiting* PANYNJ from requiring of Maher (1) a base rent lease rate of Maher in excess of \$19,000 per acre, (2) a financing rate greater than that provided to Maersk-APM in EP-248, (3) a security deposit requirement in lieu of its existing corporate guarantee in EP-249; (4) a terminal guarantee more onerous than that provided by Maersk-APM in EP-248; and (5) indemnification to PANYNJ for PANYNJ's own actions or inactions.

Dated: October 7, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 7th day of October, 2011, served the foregoing
via federal express and e-mail on the following:

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A handwritten signature in cursive script, appearing to read "Richard Rothman", is written over a horizontal line.