

S E R V E D  
May 16, 2011  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 08-03**

**MAHER TERMINALS, LLC**

**v.**

**PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

---

**INITIAL DECISION GRANTING IN PART MOTION FOR SUMMARY JUDGMENT  
AND DISMISSING CLAIM FOR A REPARATION AWARD BASED ON  
LEASE-TERM DISCRIMINATION CLAIMS<sup>1</sup>**

---

On June 3, 2008, complainant Maher Terminals, LLC (Maher) commenced this proceeding by filing a Complaint with the Secretary alleging violations of the Shipping Act of 1984 (Shipping Act or Act) by respondent Port Authority of New York and New Jersey (PANYNJ) in the leasing of certain land and facilities at the Elizabeth Port Authority Marine Terminal (Port Elizabeth). On February 28, 2011, PANYNJ filed a motion for summary judgment on the portions of the Complaint “based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act’s three-year statute of limitations.” ([PANYNJ] Motion for Summary Judgment of Maher Terminals, LLC’s Lease-Term Discrimination Claims (PANYNJ MSJ) at 1.)

The material facts as to which there is no genuine dispute establish that Maher’s claim that PANYNJ discriminated against Maher in negotiations leading up to signing the lease and in the lease itself accrued on October 1, 2000, the date Maher signed its lease. On October 1, 2000, Maher knew that it had been injured as alleged in its Complaint and knew that PANYNJ caused the injury. The Shipping Act mandates that a complaint seeking a reparation award be filed within three years of the date the claim accrues. 46 U.S.C. § 41301(a). Maher filed its Complaint more than seven and

---

<sup>1</sup> The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

one-half years after its claim accrued. Therefore, Maher's claim for a reparation award based on alleged discrimination in the negotiations that resulted in the lease and/or the lease itself is barred by the statute of limitations. Maher's claim for a cease and desist order is not subject to the three-year statute of limitations. Therefore, PANYNJ's motion for summary judgment on the cease and desist claim is denied.

## **I. BACKGROUND AND FMC NO. 07-01.**

PANYNJ owns Port Elizabeth. APM Terminals North America, Inc. (APM or APMT), formerly known as Maersk Container Service Company, Inc. (Maersk), occupies certain land and facilities at Port Elizabeth for use as a marine terminal pursuant to Lease EP-248 with PANYNJ dated January 6, 2000, filed with the Commission as FMC Agreement No. 201106 on August 2, 2000. Complainant Maher occupies certain land and facilities at Port Elizabeth for use as a marine terminal pursuant to Lease EP-249 with PANYNJ dated October 1, 2000, filed with the Commission as FMC Agreement No. 201131 on March 8, 2002.<sup>2</sup> Lease EP-248 and Lease EP-249 differ on several provisions, including the basic annual rental rate per acre, investment requirements, throughput requirements, first point of rest requirement for automobiles, and the security deposit requirement. (Complaint at IV.B.)

On December 29, 2006, APM commenced a Commission proceeding when it filed a Complaint alleging that PANYNJ violated the Shipping Act by failing to fulfill certain obligations owed to APM pursuant to Lease EP-248. *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, FMC No. 07-01 (FMC Jan. 9, 2007) (Notice of Filing of Complaint and Assignment). APM alleged that it did not receive an additional portion of marine terminal property (the Added Premises) by the date on which Lease EP-248 required PANYNJ to provide it. APM further alleged that the delay caused harm to APM and that the delay showed a preference for Maher in violation of the Act. PANYNJ filed an Answer to the Complaint denying liability and filed a Counter-Complaint against APM for allegedly failing to perform construction work required by Lease EP-248.

Maher occupied the Added Premises pursuant to Lease EP-249 at and after the time Lease EP-248 required PANYNJ to transfer the Added Premises to APM. PANYNJ filed a third-party complaint against Maher in FMC No. 07-01 alleging that Maher failed to surrender the Added Premises to PANYNJ as required by Lease EP-249. Maher filed an Answer to the third-party complaint denying liability and filed a Counter-Complaint against PANYNJ alleging that PANYNJ failed to provide Maher with reasonably specified dates to vacate the Added Premises as required by Lease EP-249, and failed to make specified improvements PANYNJ was required to make before PANYNJ could require Maher to surrender the Added Premises.

---

<sup>2</sup> I take official notice of the leases pursuant to 46 C.F.R. § 502.226. The leases are available at [http://www2.fmc.gov/agreements/mtos\\_npage.aspx](http://www2.fmc.gov/agreements/mtos_npage.aspx) (last visited April 19, 2010). They are also attached to PANYNJ's motion for summary judgment as Levine Declaration Exhibits A (Lease EP-249) and B (Lease EP-248).

The parties engaged in extensive discovery in FMC No. 07-01. APM and PANYNJ also engaged in settlement discussions and eventually signed a proposed Settlement Agreement and a Third Supplemental Agreement to Lease EP-248 resolving their claims in FMC No. 07-01 and other matters related to Lease EP-248. In addition to resolving claims between APM and PANYNJ, the Settlement Agreement provided that PANYNJ would dismiss its third-party complaint against Maher in FMC No. 07-01 and a related proceeding against Maher in New Jersey state court.

APM and PANYNJ filed a motion seeking approval of the Settlement Agreement. Maher opposed the motion. On October 24, 2008, the Settlement Agreement was approved, *APM Terminals v. PANYNJ*, FMC No. 07-01 (ALJ Oct. 24, 2008) (Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice), and Maher filed exceptions. On April 1, 2009, the Commission denied Maher's exceptions and dismissed the proceeding between APM and PANYNJ. *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Apr. 1, 2009) (Order Denying Exceptions and Petition for Stay). The Commission consolidated Maher's Counter-Complaint against PANYNJ in FMC No. 07-01 with this proceeding. *Id.*

## **II. MAHER'S SHIPPING ACT CLAIMS – FMC NO. 08-03.**

On June 3, 2008, before APM and PANYNJ settled their claims in FMC No. 07-01, Maher filed its Complaint in this proceeding. *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (FMC June 11, 2008) (Notice of Filing of Complaint and Assignment). In Part IV of its Complaint, "Statement of Facts and Matters Complained of," Maher states:

- A. Maher seeks a cease and desist order and reparations for injuries caused to it by PANYNJ's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), because PANYNJ (a) gave and continues to give an undue or unreasonable prejudice or disadvantage with respect to Maher, (b) gave and continues to give an undue or unreasonable preference or advantage with respect to APMT, (c) has and continues unreasonably to refuse to deal or negotiate with Maher, and (d) has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.
- B. PANYNJ's agreement with APMT, EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

(Complaint at 3 (attached to PANYNJ MSJ Levine Declaration, Exhibit C).) Maher alleges it has "sustained and continues to sustain injuries and damages . . . amounting to a sum of millions of dollars." (*Id.* at 5.) As remedies, Maher seeks a cease and desist order and reparations for its actual injury plus interest, costs, and attorneys fees, and any other damages determined. (*Id.* at 6.)

PANYNJ admitted some allegations, denied some allegations, and neither admitted nor denied some allegations. (Answer at 1-6.) PANYNJ also raised several affirmative defenses, including a defense that “Maher’s claims are barred by the applicable statute of limitations.” (*Id.* at 7.) The parties have engaged in extensive discovery.

Maher alleges that PANYNJ violated sections 41106(2), 41106(3) and 41102(c) of the Shipping Act: “A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106. “A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). In a discovery dispute, Maher summarized the legal foundation for its claims in this proceeding, stating:

This case involves a straightforward application of *Ceres Marine Terminal v. Md. Port Admin.*, No. 94-01, 27 S.R.R. 1251, 1270-72 (F.M.C. Oct. 10, 1997). As set forth in Maher’s Complaint, PANYNJ violated the Shipping Act by refusing to provide to Maher preferential lease terms provided to [Maersk/APM]. Even though Maher guaranteed more cargo, PANYNJ unlawfully preferred APM over Maher because PANYNJ viewed Maher as a mere terminal operator presenting no risk to leave the port. By contrast, PANYNJ treated APM as an ocean carrier because its parent ocean carrier, Maersk shipping lines, presented a threat to leave the port. Therefore, PANYNJ unlawfully preferred APM for the same improper reason the FMC rejected in *Ceres Terminal*. . . .

First, whether PANYNJ’s refusal to provide Maher the same terms it provided to APM is lawful turns on PANYNJ meeting its burden of proof that it *expressed* legitimate transportation factors justifying the discrimination *at the time*. PANYNJ’s belated proffer of *post-hoc* rationalizations of alleged transportation factors that did not exist prior to conclusion of the Maher lease in October 2000 is not a legal basis to obtain discovery into wholly unrelated events occurring after PANYNJ imposed disparate terms on Maher. Moreover, to the extent that PANYNJ did express or even rely upon such justifications at the time of the discrimination, any such documents would be found in PANYNJ’s files, not Maher’s. . . .

Second, PANYNJ misconstrues the damages alleged in the Complaint. Maher’s Complaint alleges damages for the difference between terms of its lease that are prejudicial to Maher as compared to the preferential terms in APM’s lease. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. *Id.* at 1271 n.48. Nevertheless, PANYNJ asserts that “In addition to seeking damages for the period from 2000 to date, Maher claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT.” But Maher makes no such “additional” damage claim.

(Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 1-3 (emphasis in original) (attached to PANYNJ MSJ Levine Declaration, Exhibit D). *See also, id.* at 14-15 (similar discussion).)<sup>3</sup>

### **III. PANYNJ'S MOTION FOR SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS.**

#### **A. PANYNJ's Argument.**

The Shipping Act provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part . . . . If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). *See also* 46 U.S.C. § 41305(b) ("If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part . . . .").

PANYNJ moves for summary judgment on Maher's claims that are "based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations." (PANYNJ MSJ at 1.)

This motion does not seek summary judgment with respect to any non-lease term claims asserted by Maher, such as that the Port Authority has "refused to deal" with Maher, inasmuch as any such claim appears to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.*, within the three-year limitations period.

(PANYNJ MSJ at 2 n.2.)

Lease EP-248 between PANYNJ and Maersk was signed January 6, 2000. Lease EP-249 between PANYNJ and Maher was signed October 1, 2000. PANYNJ argues that all of the allegedly discriminatory lease terms were established as of October 1, 2000, and PANYNJ committed any allegedly discriminatory acts in the negotiations that resulted in Lease EP-249 on or before October 1, 2000; therefore, Maher's claim accrued on that date. PANYNJ quotes Maher's response to PANYNJ's first set of interrogatories to support its position.

Maher's damages include the difference between Maher's base rent and APM's base rent that Maher must pay PANYNJ over the 30-year term of Maher's lease. . . . Based on this difference the base rent and escalator differential damages alone

---

<sup>3</sup> The Commission also discussed the elements of a section 10(d)(1) violation with regard to terminal practices. *Ceres Marine Terminals*, 27 S.R.R. at 1274. Maher's Response did not discuss section 10(d)(1). Maher's claim for a reparation award for violations of section 10(d)(1) in the negotiations that resulted in Lease EP-249 and Lease EP-249 itself accrued at the same time as its claims for violations of sections 10(b)(11) and (12).

incurred by Maher since 2000 total approximately \$86 million. According to the disparate lease terms of leases and EP-249, these damages total approximately \$474 million through the 30-year lease period based upon the disparate base rent and escalator.

(Maher's Resp. to Port Authority's First Set of Interrogatories at 10, Aug. 29, 2008 (attached to PANYNJ MSJ, Levine Declaration Ex. H).) PANYNJ also relies on argument Maher made in opposition to PANYNJ's earlier motion to compel production of documents.

Maher's Complaint alleges damages for the difference between terms of its lease [EP-249] that are prejudicial to Maher as compared to the preferential terms in APM's lease [EP-248]. Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. [*Ceres Marine Terminal*, 27 S.R.R. ] at 1271 n.48. Nevertheless, PANYNJ asserts that "In addition to seeking damages for the period from 2000 to date, Maher claims that as a result of certain differences in the terms of these leases, it has suffered and continues to suffer continuing competitive harm and injury relative to APMT." But Maher makes no such "additional" damage claim.

(Maher's Reply in Opposition to Respondent's Motion to Compel Production from Complainant & Motion for Protective Order filed Oct. 9, 2008, at 3 (attached to PANYNJ MSJ, Levine Declaration Ex. D).) PANYNJ argues:

Maher has thus clearly and affirmatively asserted that all of its damages for its lease-term discrimination claims, including those over the entire thirty-year lease period, were fixed by the time Maher entered into its lease in October 2000. Accordingly, that is when its lease-term discrimination claims accrued. . . . Yet, Maher did not file its Complaint until June [3], 2008, over seven-and-a-half years later. Thus, unless some exception applies, Maher's Lease discrimination claims are barred by the Shipping Act's three-year statute of limitations.

(PANYNJ MSJ at 21.)

PANYNJ relies on the Commission decision in *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc. (Inlet Fish)*, 29 S.R.R. 306 (2001), for the proposition that in Commission proceedings, the three-year statute of limitations for a complaint seeking a reparation award begins to run when the complainant discovered that it had a cause of action. (PANYNJ MSJ at 1-2.) See *Inlet Fish*, 29 S.R.R. at 313 ("The Commission has determined to adopt the discovery rule, and to hold that Inlet Fish's cause of action accrued when it knew or should have known that it had a case against MSL."). PANYNJ contends that Maher knew or should have known of all the differences between Lease EP-248 and Lease EP-249 when Maher signed Lease EP-249. (PANYNJ MSJ at 21-22.) PANYNJ argues that because Maher knew or should have known of the lease differences when it signed the lease, the "discovery rule" does not apply to permit Maher's cause of action to accrue at a later date.

PANYNJ also contends that if it is assumed that imposition of disparate lease terms on Maher violates the Act, PANYNJ did not commit any overt acts of lease discrimination after Lease EP-249 was signed.

Maher relies exclusively upon the differing provisions of the allegedly discriminatory leases themselves, which were fixed in October 2000. To the extent that the Port Authority received payments or other benefits under Maher's lease during the limitations period, such payments and benefits were simply the "unabated inertial consequences" of pre-limitations actions. Indeed, Maher's interrogatory responses with respect to damages made clear that all thirty years' worth of its alleged damages – such as they are – were fixed as of the signing of its lease.

(PANYNJ MSJ at 23.) "In short, Maher's lease discrimination claims accrued in October 2000 when it signed its lease, over seven-and-a-half years before Maher filed its Complaint, well outside the applicable three-year statute of limitations period. Accordingly, reparations for all of its lease-term discrimination claims are time-barred." (*Id.* at 26.)

PANYNJ also argues that since the claim for a reparation award is barred by the statute of limitations, a cease and desist order is also barred.

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

(*Id.* (emphasis in original).)

#### **B. Maher's Opposition.**

Maher alleges that PANYNJ discriminated against it and in favor of Maersk/APM through the imposition of several lease provisions.

PANYNJ's agreement with APMT, EP-248, violated the foregoing provisions of the Shipping Act by granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

(Complaint at 3 (Part IV.B); *see also id.* at 3-4 (IV.C through IV.J).) Maher concedes that it knew of the allegedly discriminatory differences between Maersk/APM Lease EP-248 and Maher Lease EP-249 on October 1, 2000, when it signed the lease.

Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to [June] 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.

(Maher's Reply in Opposition to Respondent's Motion for Summary Judgment at 5, March 14, 2011.)

Maher focuses on the Commission's statement in *Inlet Fish* that "[i]t would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place." *Inlet Fish*, 29 S.R.R. at 313. Maher argues that "[w]hat is decisive is that Maher did not know nor should it have known that *the different lease terms were an undue prejudice violating the Shipping Act until it possessed conclusive information in May 2008.*" (Maher Opp. to MSJ at 4 (emphasis added).) Maher contends that during discovery in FMC No. 07-01, it first learned that PANYNJ did not have non-discriminatory reasons for imposing the differences between Lease EP-248 and Lease EP-249 and argues that the statute of limitations did not begin to run until it had this information.

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

(Maher Opp. to MSJ at 25 (emphasis in original).)

## DISCUSSION

### I. STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings and the record demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment may support its motion by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting former Fed. R. Civ. P. 56(c)). The administrative law judge must view the facts in the light most favorable to the nonmoving party, giving the nonmoving party the benefit of all justifiable inferences derived from

the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A motion for summary judgment should be granted only when genuine disputes of material fact do not exist. *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1052 (1997).

A party opposing a motion for summary judgment cannot rest on the allegations of his complaint but must come forward and designate specific facts, by affidavit or otherwise, showing that a genuine issue of material fact exists that can only be resolved by the trier of fact. *Celotex*, 477 U.S. at 324; *Nissan Fire & Marine Ins. Co., v. Fritz Companies Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary judgment because current Rule 56(a) requires “that there be no genuine [dispute] of *material fact*.” *Anderson*, 477 U.S. at 247-248 (emphasis added). Material facts are those which could actually affect the outcome of the lawsuit. *Webb v. Lawrence Cnty.*, 144 F.3d 1131, 1135 (8th Cir. 1998).

In evaluating the evidence at the summary judgment stage, the court considers only those facts which are supported by admissible evidence. “[A] successful summary judgment defense requires more than argument or reallegation; [the opposing party] must demonstrate that at trial it may be able to put on admissible evidence proving its allegations.” *JRT, Inc. v. TCBY Sys., Inc.*, 52 F.3d 734, 737 (8th Cir. 1995). *See also Walker v. Wayne Cnty., Iowa*, 850 F.2d 433, 434 (8th Cir. 1988) (holding that courts considering a summary judgment motion “may consider only the portion of the submitted materials that is admissible or usable at trial”), *cert. denied*, 488 U.S. 1008 (1989). The court is not required “to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), *quoting Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). The court “may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

At summary judgment it is insufficient for the nonmoving party merely to reassert ultimate facts without providing any support for the contentions. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion, *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003), but conclusory allegations as to ultimate facts are not adequate to defeat summary judgment. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). “‘Ultimate facts’ are defined . . . as ‘those which the law makes the occasion for imposing its sanctions.’” *Laughlin v. United States*, 344 F.2d 187, 191 (D.C. Cir. 1965), citing *Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). “[T]he mere fact that the [nonmoving party] vigorously dispute[s] the *legal conclusions* to be drawn from the facts presented by the [moving party is] no bar to the grant of summary judgment.” *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 728 n.13 (5th Cir. 1976) (emphasis added). “It is axiomatic that where questions of law alone are involved in a case, summary judgment is appropriate.” *Int’l Ass’n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977). Where

the relevant facts are not in dispute and only one conclusion can be drawn from those facts, entry of summary judgment may be appropriate. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 719 (7th Cir. 1994) (affirming summary judgment on statute of limitations ground against party that claimed benefit of discovery rule).

## II. THE COMMISSION'S HOLDING IN *CERES MARINE TERMINAL v. MARYLAND PORT ADMINISTRATION*.

Maher bases its discrimination claims on the Commission's decision in *Ceres Marine Terminal v. Maryland Port Admin.*, 27 S.R.R. 1251 (FMC 1997), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Comm'n*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table). *See also Ceres Marine Terminal v. Maryland Port Admin.*, 30 S.R.R. 358, 358-359 (FMC 2004) (discussing history). (*See* Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 1-3 (attached to PANYNJ MSJ, Levine Declaration Ex. D).) Ceres Marine Terminal leased property at Dundalk Marine Terminal from the Maryland Port Administration (MPA) for use as a marine terminal. MPA leased other property at Dundalk to Maersk Line, Universal Maritime Services Corporation, and Hale Intermodal Marine Company for use as a marine terminal. Ceres Marine Terminal filed a complaint against Maryland Port Administration (MPA) alleging the MPA violated sections 10(b)(11), 10(b)(12), and 10(d)(1) of the Shipping Act by refusing to grant Ceres the same lease terms that it had granted to Maersk.<sup>4</sup>

At the time the Commission decided *Ceres Marine Terminal*, section 10 of the Act provided:

(b) Common Carriers. – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may – \* \* \* (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever; (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; \* \* \* (d) Common Carriers, Ocean Freight Forwarders and Marine Terminal Operators. – (1) No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations

---

<sup>4</sup> Ceres Marine Terminal and MPA signed the lease in November 1991. *Ceres Marine Terminal*, 27 S.R.R. at 1253. The Secretary received Ceres Marine Terminal's complaint on December 30, 1993, well within the Act's three-year statute of limitations. FMC Docket Activity Log, *Ceres Marine Terminal v. Maryland Port Admin.*, FMC No. 94-01, available at [http://www.fmc.gov/electronic\\_reading\\_room/proceeding\\_or\\_inquiry\\_log\\_search.aspx?F\\_DocketNumber=&F\\_DocketType=1&F\\_Title=&F\\_DocketDateLBound=&F\\_DocketDateUBound=&F\\_IsClosed=&F\\_SortBy=DocketDate&F\\_SortOrder=DESC&F\\_Pg=4&DocketId=324](http://www.fmc.gov/electronic_reading_room/proceeding_or_inquiry_log_search.aspx?F_DocketNumber=&F_DocketType=1&F_Title=&F_DocketDateLBound=&F_DocketDateUBound=&F_IsClosed=&F_SortBy=DocketDate&F_SortOrder=DESC&F_Pg=4&DocketId=324) (last visited May 13, 2011). Therefore, Ceres Marine Terminal's claim for reparations was timely.

and practices relating to or connected with receiving, handling, storing, or delivering property. \* \* \* (3) The prohibitions in subsection (b)(11), (12), and (16) of this section apply to marine terminal operators.

*Ceres Marine Terminal*, 27 S.R.R. at 1252 n.3. On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Sections 10(b)(11) and 10(b)(12) of the Act are now codified at 46 U.S.C. §§ 41106(2) and (3), the provisions of the Act that Maher alleges PANYNJ violated by imposing different and less favorable provisions in Lease EP-249 than Lease EP-248.

In *Ceres Marine Terminal*, the Commission articulated the elements of proving a violation of section 10(b)(11) and 10(b)(12) as follows:

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

*Ceres Marine Terminal*, 27 S.R.R. at 1270-1271.

In addressing the merits, the Commission found that:

MPA's only expressed reason for denying Ceres the Maersk lease terms was Ceres' status as an MTO. At oral argument, MPA's counsel reasoned that as an MTO, Ceres had no control over vessels and could not back up a guarantee to bring vessels to the Port. Counsel further argued that Ceres' offer to pay a penalty for failure to meet a vessel call guarantee really was "something different from a guarantee" like that offered by Maersk. Thus, the issue remains whether status is a legitimate transportation factor on which a port may base differences in lease terms for its facilities.

We find that MPA unreasonably prejudiced Ceres and unduly preferred Maersk when it refused to grant Ceres parity with Maersk. MPA's refusal, based on the shaky premise that Maersk can guarantee vessel calls and Ceres, without the backing of an ocean carrier, cannot, does not withstand scrutiny. Maersk's vessel call guarantee does not guarantee to MPA any more than Ceres could have guaranteed had it been allowed. MPA's 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. The reasonableness of MPA's decision is belied by its either having ignored these factors or its inability to explain why these factors are insignificant. Additionally, the vessel call guarantee upon which MPA so heavily relies is not supported by a shortfall penalty or a liquidated damages provision; in the event that Maersk fails to meet its minimum requirement, MPA would have to seek traditional breach of contract relief in an appropriate state court. Ceres was willing and able to provide the same sort of guarantee to MPA.

*Ceres Marine Terminal*, 27 S.R.R. at 1272 (citations to record and footnotes omitted). Maher alleges that PANYNJ discriminated against it and in favor of Maersk/APM for substantially the same reasons as MPA discriminated against Ceres Marine Terminal and in favor of Maersk.

### **III. THE DISCOVERY RULE GOVERNS WHEN A CLAIM ACCRUES UNDER THE SHIPPING ACT.**

As the parties recognize, the Commission has adopted what is called the "discovery rule" to determine when a cause of action accrues under the Shipping Act. "The Commission has determined to adopt the discovery rule, and to hold that [a complainant's] cause of action accrue[s] when it [knows or should know] that it [has] a case against [a respondent]." *Inlet Fish*, 29 S.R.R. at 313.

There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations – such adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action. This is, of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.

*Id.*

[I]mplementing the rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeals. In *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991), the court held that unless Congress has provided a directive that a cause of action accrues when an injury occurs, the discovery rule

should apply. Explaining the practical application of the rule, the court in *Connors* held:

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

*Id.* (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)). The court also noted that this rule has been adopted by “[a]t least eight federal courts of appeals.” *Id.*

*Id.* at 314.

#### **IV. FACTS NOT IN DISPUTE MATERIAL TO THE QUESTION OF WHETHER MAHER KNEW OR SHOULD HAVE KNOWN IT HAD A CLAIM AGAINST PANYNJ ON OCTOBER 1, 2000.**

The critical inquiry for this motion for summary judgment is whether the material facts as to which there is no genuine dispute establish that Maher’s claim that PANYNJ discriminated against it in Lease EP-249 as compared to Maersk/APM in Lease EP-248 accrued October 1, 2000; that is, what did Maher know on October 1, 2000, and based on what it knew did Maher know or should it have known that it had a claim against PANYNJ for alleged discrimination in the negotiations that resulted in Lease EP-249 and Lease EP-249 itself? “A ‘genuine’ [dispute] is one that could be resolved in favor of either party, and a ‘material fact’ is one that has the potential of affecting the outcome of the case.” *Calero-Cerezo v. U.S. Dep’t of Justice*, 355 F.3d 6, 19 (1st Cir. 2004), citing *Anderson v. Liberty Lobby*, 477 U.S. at 248-250.

On April 1, 2011, I required the parties to supplement the record by filing statements of material fact as to which there is no genuine dispute. *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Apr. 1, 2011) (Order to Supplement Record on PANYNJ’S Motion for Partial Summary Judgment).

This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which [the party] contends there is no genuine dispute together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. Each paragraph must be limited as nearly as practicable to a single factual proposition.

*Id.* at 2-3. On April 8, 2011, PANYNJ served and filed the statement required by the April 1, 2011, Order. I have determined that not all the statements proffered by PANYNJ are material to the question of whether Maher’s claim accrued on October 1, 2000. Statements 13, 16, 17, 18, 19, and

21 set forth facts regarding events occurring after October 1, 2000, or otherwise are not material to this motion; therefore, they have been stricken. *See Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London*, 637 F.3d 53, 2011 WL 834072, at \*3 (1st Cir. 2011) (when considering motion for summary judgment, not error for district court to ignore submitted facts that are not material or are argumentation). Statement 24 sets forth mixed questions of fact and law and argument; therefore, it has been stricken. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 382 n.2 (7th Cir. 2008) (not error to strike purported statements of material fact as to which there is no genuine dispute that contain improper legal argument).

On April 15, 2011, Maher served its response to PANYNJ's statement. The response admits to many of PANYNJ's statements of material facts. I have determined that some of Maher's responses set forth facts regarding events occurring after October 1, 2000, thus were not known by Maher on that date, otherwise are not material to this motion, and/or are argumentative and have stricken those portions.

On April 20, 2011, PANYNJ filed [PANYNJ's] Responding Statement to the New Facts Contained in Maher Terminals LLC's Responding Statement and in Further Support of its Motion for Summary Judgment. PANYNJ responded to Maher's argumentation in Maher's statement. Just as argumentation in Maher's response to PANYNJ's statement is improper, argumentation in reply to Maher's argumentation is improper and is stricken.

The material facts are set forth below. For the convenience of the Commission and the parties, the stricken statements and responses and the reasons for striking are included in an appendix to this decision. PANYNJ's reply to Maher's response is not set forth in the appendix.

PANYNJ Statement 1:

The lease between the Port Authority and Maersk Container Service Company, Inc., EP-248 (the "Maersk Lease"), was executed as of January 6, 2000. *See* Maersk Lease at 08PA00020315, attached as Exhibit B to the Declaration of Alexander O. Levine in Support of The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims, Levine Declaration ("Levine Decl.").

Maher Response 1:

Admitted.

PANYNJ Statement 2:

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

Maher Response 2:

Admitted.

PANYNJ Statement 3:

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

Maher Response 3:

Admitted.

PANYNJ Statement 4:

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

Maher Response 4:

Admitted.

PANYNJ Statement 5:

Maher's Complaint alleges that the Maersk Lease violated the Shipping Act by "granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the basic annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement." Maher's Complaint at § IV.B (at page 3), June 3, 2008, attached as Exhibit C to Levine Decl.

Maher Response 5:

Maher admits that its Complaint in Docket 08-03 includes the quoted language from Section IV of paragraph B, but denies that Maher's Complaint alleges that the Maersk lease violated the Shipping Act. Maher's Complaint alleges that PANYNJ violated and continues to violate the Shipping Act. *See* Maher's Complaint at § IV.A. (June 3, 2008), Exhibit C to Levine Decl.

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

*Id. See also, id.* IV.B (the paragraph PANYNJ cites is itself non-exclusive (*i.e.*, "including but not limited to")); *id.* IV.A-M (the paragraph PANYNJ cites is one of thirteen other paragraphs alleging facts pertaining to alleged violations); Maier's Counter-Complaint, at § 40, Dkt. 07-01 (Sept. 4, 2007) (alleging violations of the Shipping Act of 1984, 46 U.S.C. § 40102(b)(2), 41102(c), 41106(3) and 41106(2) because PANYNJ "failed to operate in accordance with the Agreement, failed to establish, observe, and enforce just and reasonable regulations and practices, unreasonably refused to deal or negotiate with Maier, and has imposed unjust and unreasonable prejudice or disadvantage with respect to Maier concerning the turnover of certain premises").

PANYNJ Statement 6:

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

Maier Response 6:

Maier admits that the quoted language is a textually accurate excerpt from the Interrogatory response, and admits that the terms of the leases show on their face the differences in the lease terms. [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 7:

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

Maher Response 7:

Maher admits that the quoted language is a textually accurate excerpt from the cited Scheduling Report . . . . [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 8:

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

Maher Response 8:

Maher admits that the terms of leases EP-248 and EP-249 are disparate. [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 9:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 10:

In its Reply in Opposition to the Motion for Summary Judgment, Maher states “Maher has not contested in this proceeding, and does not contest, that Maher knew or should have known of the facial differences in the lease terms prior to July 3, 2005. Indeed, Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.” Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment at 5, March 14, 2011.

Maher Response 10:

Admitted. [REMAINDER OF RESPONSE STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 11:

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

Maher Response 11:

Maher admits that the quoted language is a textually-accurate excerpt from the Interrogatory response, and that the excerpt itself is accurate . . . . [REMAINDER OF RESPONSE STRICKEN AS ARGUMENTATIVE AND/OR NOT MATERIAL.]

PANYNJ Statement 12:

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

Maher Response 12:

Admitted.

PANYNJ Statement 13:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 14:

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

Maher Response 14:

Admitted.

PANYNJ Statement 15:

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

Maher Response 15:

Admitted.

PANYNJ Statement 16:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 17:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 18:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 19:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 20:

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

Maher Response 20:

Admitted.

PANYNJ Statement 21:

[STRICKEN AS NOT MATERIAL.]

PANYNJ Statement 22:

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

Maher Response 22:

Maher admits that section 42 of lease EP-248 provides *one of many possible* remedies if the port guaranty were not satisfied, and denies that section 42 provides an *exclusive* remedy. See EP-248 § 30 at 74 (Levine Decl. Ex. A) (No lease remedies are exclusive: "All remedies provided in this Agreement shall be deemed cumulative and

additional and not in lieu of or exclusive of each other or of any other remedy available to the Port Authority at law or in equity, and neither the exercise of any remedy, nor any provision in this Agreement for a remedy or an indemnity shall prevent the exercise of any other remedy”); *id.* § 46(a)(2) at 98-99 (setting forth the requirements that the actual Maersk shipping companies must maintain majority ownership and control of Maersk, Inc. (APM’s U.S. parent, “Maersk”); that Maersk “is engaged as the exclusive United States agent on behalf of [the Maersk shipping companies] . . . in the conduct of a worldwide waterborne ocean container shipping business;” and that: “The Lessee further recognizes and agrees that the aforesaid connection of Maersk with the Shipping Business in conjunction with its holding the Ownership Interest is a major inducement for the Port Authority’s entering into this Agreement, and that it is of great importance to the Port Authority, in order to achieve the business and regional economic goals of this Agreement, that the Lessee be owned by an entity or entities having said connection with the Shipping Business *in order to assure the availability of cargo* to meet the foregoing business and regional economic goals of the Port Authority.”) (emphasis added).

The parent guarantees not just the financial provisions, but all of the lease. *See also, id.*, § 48 at 102 (providing that “[the] Contract of Guaranty shall guarantee the full, faithful, and prompt performance of and compliance with, on the part of the Lessee, all of the terms, provisions, and covenants and conditions of this Agreement...”); *id.*, Parent Contract of Guaranty, Maersk Inc., 08PA0020442 (“The Guarantor hereby absolutely and unconditionally guarantees, promises and agrees that the Lessee will duly and punctually pay all rentals and other monetary obligations which it has or shall have under the Lease, *and that the Lessee will faithfully and fully perform, fulfill and observe all the other terms, provisions, covenants and conditions of the Lease on the part of the Lessee to be performed, fulfilled and observed.*”) (emphasis added).

#### PANYNJ Statement 23:

Maher knew and/or was on notice of the terms of the Port Guaranty, including that APM’s failure to meet the throughput requirements of the Port Guaranty would result in increased rent. *See* Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment at 5 (“Maher does not contest that Maher either knew or should have known of the facial differences in the lease terms when they were publicly-filed.”).

#### Maher Response 23:

Admitted in part and denied in part. Maher admits that it knew or should have known of the facial differences in the leases, but Maher denies that it knew or was on notice of PANYNJ’s unique Port Guarantee – that PANYNJ asserted was unique to carriers, not marine terminal operators like Maher – that would only enforce a rent increase penalty. *See* B. Maher Dep., Dkt. 07-01, 179:14 to 179:19 (June 9, 2008) (PANYNJ initially promised Maher rate parity with Maersk/Sealand: “We were told at the very beginning that the Maersk/Sea-Land lease terms and our lease terms would be the same, if not – similar, if not

the same. And we received proposals from the Port Authority, we had discussions with them about that.”); *see also* Port Reinvestment Model, MT005073-74, Dkt. 08-03, Dep. Ex. 55 (Fax date July 22, 1997); *see* L. Borrone Dep., Dkt. 08-03, 67:11 to 67:18 (Mar. 17, 2011) (PANYNJ ultimately did not offer Maher the same rates, reasoning that APM had “a port guarantee that we felt was significant and that was a significant difference – the port guarantee in particular – between the two leases.”); S. Schley Dep., Dkt. 08-03, 67:10 to 67:19 (Mar. 24, 2011) (In a September 1999 meeting, L. Borrone told Maher that it would not get the same rates as Maersk, but that the leases were “virtually identical” and overall “within pennies” because: (1) Maersk was said to have higher investment requirements, and that (2) Maersk would have a “Port Guarantee” that Maher could not provide.); *see* Notes of PA Lease Negotiations Meeting of 9/23/99, MT354761-65, Dkt. 08-03, Ex. 144 (Sep. 23, 1999); Mosca Dep., Dkt. 08-03, 88:22 to 89:15, 139:23 to 140:5 (Mar. 14, 2011) (L. Borrone conveyed that one of the reasons for Maher’s higher rate was because Maersk would provide a Port Guarantee” and was stating that Maersk was “. . . able to generate a port guarantee for volume, which we were unable to do, and, therefore, the Maersk rates were off the table for us.”); B. Maher Dep., Dkt. 08-03, 199:12 to 199:25 (April 6, 2011) (Borrone alleging that the Port Guarantee and higher investments explained Maher’s higher rent);

*See* L. Borrone Dep., Dkt. 08-03, 97:5 to 98:21 (Mar. 17, 2011) (“The port guarantee was set up because we really wanted the volume of cargo in the harbor . . .”); R. Shiftan Dep., Dkt. 08-03, 168:22 to 169:8 (April 4, 2011) (“PANYNJ’s understanding was that only carriers could provide port guarantees because “only shipping companies could guarantee cargo, and that as a consequence, the economics of leases which contained such guarantees could be looked at in one way, and leases that did not contain such guarantees would be looked at in another way.”); *see* L. Borrone Dep., Dkt. 08-03, 99:14 to 99:16 (Mar. 17, 2011) (“Maher would not and could not commit its carriers who it was servicing to a port guarantee.”); B. Maher Dep., Dkt. 08-03, 166:2 to 166:4 (Apr. 6, 2011) (“My interpretation of a port guarantee is cargo controlled by a – by an individual entity that they can direct to the port. We were not in a position to do that”); S. Schley Dep., Dkt. 08-03, 69:11 to 69:23 (Mar. 24, 2011) (“and as I believe the Maher people understood it, that this was going to be a requirement, that Maersk bring its cargo to the port. That was the whole issue, that they would bring cargo, that they carried on their own bottoms, their own ships, to that port. Q And Ms. Borrone told you and others at the meeting this information? A Yes.”) (emphasis added).

PANYNJ Statement 24:

[STRICKEN FOR CONTAINING MIXED QUESTIONS OF FACT AND LAW AND ARGUMENT.]

**V. MAHER'S CLAIM FOR A REPARATION AWARD ACCRUED ON THE DAY IT SIGNED LEASE EP-249 AND THE STATUTE OF LIMITATIONS BEGAN TO RUN ON THAT DATE.**

PANYNJ moves for summary judgment on the affirmative defense that the statute of limitations bars Maher's claims "based on supposed unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations." (PANYNJ MSJ at 1.) A claim that an action is barred by the statute of limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1), made applicable to this proceeding by 46 C.F.R. § 502.12. A party moving for summary judgment on an affirmative defense must establish all of the essential elements of the defense to warrant judgment in its favor. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 54-55 (1st Cir. 2002); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1264 (11th Cir. 2001).

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

*United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

It should not be forgotten that time-limitations provisions [promote] important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

*Delaware State College v. Ricks*, 449 U.S. 250, 259-260 (1980), *quoting Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

As set forth above, the Commission established the elements that Maher must plead and prove in this proceeding in *Ceres Marine Terminal*:

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and

the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

*Ceres Marine Terminal*, 27 S.R.R. at 1270-1271. The material facts as to which there is no genuine dispute establish that when it signed Lease EP-249 on October 1, 2000, Maher knew all of the contents of and more importantly the differences between Lease EP-249 and Lease EP-248.

The material facts as to which there is no genuine dispute set forth above establish that when Maher signed Lease EP-249 on October 1, 2000, Maher knew the contents of Lease EP-248 and the allegedly more favorable treatment of Maersk/APM. That is, Maher: (1) knew that Lease EP-249 required Maher to pay \$39,750 per acre per month while Maersk/APM paid \$19,000 per acre per month; (2) knew that Lease EP-249 increased Maher's rent at the rate of two percent per annum such that by the end of the 30-year term of the lease Maher's basic rent rises to \$70,590 while Maersk/APM's rent would remain at \$19,000; (3) knew that Lease EP-249 required Maher to invest greater sums than it required Maersk/APM to invest and PANYNJ provided Maersk/APM more favorable financing terms than it provided Maher, requiring Maher to repay the investment at a higher rate than required of Maersk/APM; (4) knew that Lease EP-249 required Maher to provide greater throughput guarantees and risk greater consequences than it required of Maersk/APM; (5) knew that Lease EP-249 imposed a first point of rest requirement on Maher not required of Maersk/APM; and (6) knew that Lease EP-249 imposed a \$1.5 million security deposit requirement on Maher not required of Maersk/APM.

On October 1, 2000, Maher had information that would permit it to plead (and prove) each element of its prima facie case as established in *Ceres Marine Terminals*:

*Ceres* Element 1: Two parties are similarly situated or in a competitive relationship.

Lease EP-248 and Lease EP-249 establish that Maher knew that Maher and Maersk/APM were similarly situated or in a competitive relationship in Port Elizabeth.

*Ceres* Element 2: The parties were accorded different treatment.

Lease EP-248 and Lease EP-249 establish that Maher knew that Maher and Maersk/APM were accorded different treatment by Lease EP-248 and Lease EP-249.

*Ceres* Element 4: The resulting prejudice or disadvantage is the proximate cause of injury.

When Maher paid its rent on October 1, 2000, Maher knew that it was paying \$20,750 more per acre per month than it would pay if its lease had the same rent as Lease EP-248; therefore, Maher knew that its profit margin for October 2000 would be injured by being \$20,750 per acre less than it would have been if Maher paid rent at the Maersk/APM rate. Maher knew that every month thereafter, it would pay more per acre in rent, and that the difference would increase over the thirty-year term of Lease EP-249, injuring its profit margin every month of that thirty years, a difference

that Maher contends is the measure of its damages. (See Maher Terminals, LLC's Reply in Opposition to Respondent's Motion to Compel Production from Complainant and Motion for Protective Order at 3 (attached to PANYNJ MSJ, Levine Declaration Ex. D) ("Indeed, as explained in *Ceres Terminal*, the legal measure of damages in this proceeding is the financial difference between the two leases. [*Ceres Marine Terminal*, 27 S.R.R. ] at 1271 n.48.") Maher knew that the two leases had different investment requirements. Maher knew that the two leases had different throughput requirements. Maher knew that the two leases had different first point of rest requirement for automobiles. Maher knew that the two leases had different security deposit requirements.

The Complaint that Maher filed in this proceeding in 2008 includes the following factual allegations:

- C. In EP-248, PANYNJ provided and continues to provide APMT a base annual rental rate of \$19,000 per acre retroactive to 1999 and fixed for the approximately 30 year term of the agreement which it did not provide to Maher.
- D. By contrast, in EP-249, PANYNJ required and continues to require Maher to pay a base annual rental rate of \$39,750 per acre and additionally required Maher to pay a basic rent escalator of two percent per annum such that by the end of the 30 year term of the lease Maher's basic rent rises to \$70,590 per acre, or an unreasonable difference of \$51,590 per acre more than the PANYNJ charges APMT.
- E. Over the approximately 30 year term of the agreements, this undue prejudice disadvantaging Maher and undue preference advantaging APMT totals million [*sic*] of dollars.
- F. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the investment requirements in the PANYNJ property that is the subject of the leases. PANYNJ required and continues to require Maher to invest greater sums than it required APMT to invest and PANYNJ provided and continues to provide APMT more favorable financing terms than it provided Maher, requiring Maher to repay the investment at a higher rate than PANYNJ provided APMT.
- G. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the container throughput requirements and consequences thereof that are the subject of the leases. PANYNJ required and continues to require Maher to provide greater throughput guarantees and risk greater consequences than it required and continues to require of APMT.

- H. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the first point of rest requirement imposed on Maher, but not required of APMT.
- I. PANYNJ also unlawfully preferred and continues to prefer APMT over Maher with respect to the security deposit requirement by requiring Maher to provide a \$1.5 million deposit not required of APMT.
- J. Despite Maher's request to the PANYNJ to be treated equally with APMT, the PANYNJ refused to deal with Maher and continues to refuse to deal with Maher and has required the foregoing undue and unreasonable preferences favoring APMT and prejudices disadvantaging Maher.

(Complaint at 3-4.)

On October 1, 2000, Maher knew all of the facts necessary to draft a complaint alleging the facts set forth in Part IV.C through IV.J of its Complaint exactly as it stated them nearly eight years later when it commenced this proceeding. Not only did Maher have sufficient information to draft its Complaint, Maher had sufficient evidence in 2000 to prove all three elements that *Ceres Marine Terminal* indicates constitute its prima facie case. The burden would have then shifted to PANYNJ to establish Ceres Element 3: “[T]he respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.” *Ceres Marine Terminal*, 27 S.R.R. at 1270-1271.

Addressing the other factual allegations in Part IV of Maher's Complaint, Maher included two paragraphs that address *Ceres* Element 3:

- L. There is no valid transportation purpose for the foregoing undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging APMT or for the PANYNJ's refusal to deal with Maher.
- M. If there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose.

(Complaint at 5.) As the Commission established in *Ceres Marine Terminal*, *Ceres* Element 3 is not part of Maher's prima facie case, but an affirmative defense for PANYNJ. *Ceres Marine Terminal*, 27 S.R.R. at 1270-1271. As the District of Columbia Circuit stated in *Connors*, the case upon which the Commission relied for the discovery rule, *see Inlet Fish*, 29 S.R.R. at 314:

The Trustees were not obliged to anticipate this [affirmative] defense in their complaint. *See* C. WRIGHT & A. MILLER, 5 FEDERAL PRACTICE & PROCEDURE § 1276 (1990) (“On occasion, a plaintiff's complaint will contain allegations that seek to avoid or defeat a potential affirmative defense; technically

this is improper pleading because these allegations are not an integral part of plaintiff's claim. . . . [T]he court should treat plaintiff's references to the defense as surplusage.").

*Connors v. Hallmark & Son Coal Co.*, 935 F.2d at 177. Maher's knowledge or lack thereof of PANYNJ's reasons for including different lease terms in Lease EP-248 and Lease EP-249 is not material to the accrual of its cause of action or part of its prima facie case.

The Complaint also alleges that PANYNJ committed some discriminatory acts in 2008:

K. With respect to EP-248, during the year 2008 the PANYNJ negotiated with APMT to address APMT's claim that the PANYNJ violated the Shipping Act by failing to provide certain premises in a timely fashion, but at the same time the PANYNJ refused to negotiate with Maher concerning its claim that the PANYNJ violated the Shipping Act with respect to EP-249 by failing to provide certain premises to Maher in a timely fashion.

(Complaint at 5.) This paragraph raises claims regarding events that occurred in 2008 and obviously could not have been included in a complaint filed in 2000. PANYNJ states:

This motion does not seek summary judgment with respect to any non-lease term claims asserted by Maher, such as that the Port Authority has "refused to deal" with Maher, inasmuch as any such claim appears to be based upon alleged actions by the Port Authority during 2007 and 2008, *i.e.*, within the three-year limitations period.

(PANYNJ MSJ at 2 n.2.) Therefore, Maher's claim for a reparation award for discriminatory acts alleged in Part IV.K of its Complaint survives this decision.

The Act provides that "[i]f the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). Although Maher may disagree with the conclusion of law to be drawn, Maher concedes the material facts that establish that its claim accrued and the Act's three-year statute of limitations for a complaint seeking a reparation award for discrimination in the negotiations resulting in Lease EP-249 and Lease EP-249 itself began to run on October 1, 2000. Maher filed its Complaint on June 3, 2008, more than seven and one-half years later. (PANYNJ Statement 20 and Maher Response.) Maher did not file its Complaint within three years after its claim accrued. Therefore, the Act's statute of limitations bars Maher's claim for a reparation award for injuries caused by the alleged violations in the negotiations leading to Lease EP-249 or the terms of Lease EP-249 itself.

## VI. THE DISCOVERY RULE DOES NOT SAVE MAHER'S CLAIM FOR A REPARATION AWARD.

Maher argues that the statute of limitations did not begin to run until it discovered the allegedly discriminatory reasons that PANYNJ gave more favorable lease terms to Maersk/APM. The discovery rule is an exception to the time-bar provision. Since Maher is seeking the protection of the rule, it has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence it could not have known of the purported injury. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d at 717.

Maher sets forth the facts it claims led to its discovery of PANYNJ's allegedly discriminatory motive in Exhibit A attached to its opposition to PANYNJ's motion for summary judgment. For the purposes of this motion, I assume that there is no genuine dispute about these facts and the facts are true. The facts are not material to the issues raised by PANYNJ's motion, however, since they do not affect the outcome of this decision on when Maher's cause of action accrued. *Webb v. Lawrence Cnty.*, 144 F.3d at 1135.

I first note that there may be a question regarding the continued vitality of the discovery rule. In *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), the Supreme Court rejected the application of the discovery rule for "improper disclosure" claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. The Court stated:

The Court of Appeals rested its decision on the premise that all federal statutes of limitations, regardless of context, incorporate a general discovery rule "unless Congress has expressly legislated otherwise." [*Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000)]. To the extent such a presumption exists, a matter this case does not oblige us to decide, the Ninth Circuit conspicuously overstated its scope and force.

The Appeals Court principally relied on our decision in *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946). See 225 F.3d, at 1067. In that case, we instructed with particularity that "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Holmberg*, 327 U.S., at 397, 66 S. Ct. 582 (internal quotation marks omitted). *Holmberg* thus stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption applicable across all contexts. The only other cases in which we have recognized a prevailing discovery rule, moreover, were decided in two contexts, latent disease and medical malpractice, "where the cry for [such a] rule is loudest," *Rotella v. Wood*, 528 U.S. 549, 555, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). See *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979); *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).

We have also observed that lower federal courts “generally apply a discovery accrual rule when a statute is silent on the issue.” *Rotella*, 528 U.S., at 555, 120 S. Ct. 1075; *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (C.A.D.C. 1991), for the proposition that “federal courts generally apply [a] discovery accrual rule when [the] statute does not call for a different rule”). But we have not adopted that position as our own.

*TRW Inc. v. Andrews*, 534 U.S. at 27.

In the wake of [*TRW Inc. v. Andrews*], a smattering of judges and commentators have questioned the continued vitality of the discovery rule in copyright infringement cases. *See, e.g., Auscape Int’l v. Nat’l Geo. Soc’y*, 409 F. Supp. 2d 235, 242-48 (S.D.N.Y. 2004); 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05[B][2][b], at 12-150.4 to 150.8 (2007).

*Warren Freedensfeld Assoc., Inc. v. McTigue*, 531 F.3d 38, 46 n.3 (1st Cir. 2008).

I also note that in adopting the discovery rule, although the Commission stated that a claim accrues when a party “knew or should have known” that it had a claim, the Commission used language that arguably differs from the rule articulated by the courts of appeals. The Commission stated: “It would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it *had no conclusive information* about such a dispute for several years after the shipments took place.” *Inlet Fish*, 29 S.R.R. at 313 (emphasis added). This is the language on which Maher relies. A holding that the statute of limitations does not run while a party has “no conclusive information” about the dispute could be interpreted to eliminate the “should have known” language from the discovery rule.

I assume the continued vitality of the discovery rule as articulated and adopted by the courts and the Commission (including the “knew or should have known” language) and apply it in this proceeding.

In their discussions of the discovery rule, the Supreme Court and the courts of appeals have drawn a clear distinction between discovery of an *actual* injury, which is subject to the discovery rule, and the discovery that the injury is also a *legal* injury for which the party may seek relief, which is not subject to the discovery rule. In *United States v. Kubrick*, one of the cases cited in *TRW*, a veteran filed suit against the United States alleging that he had been injured by negligent treatment at a VA hospital. The facts showed that he had learned of a possible connection between treatment that he received and the injury more than two years (the limitations period) prior to filing suit. The district court denied a statute of limitations defense because it found that the plaintiff had exercised reasonable diligence and had no reasonable suspicion that the treatment was negligent. The district court did “not believe it reasonable to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached.” *United States v. Kubrick*, 444 U.S. at 116 (quoting the district court). The court of appeals affirmed, ruling that

even though a plaintiff is aware of his injury and of the defendant's responsibility for it, the statute of limitations does not run where the plaintiff shows that "in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper."

*Id.*

The Supreme Court rejected the reasoning of the district court and the court of appeals and reversed.

We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.

*Id.* at 122. On October 1, 2000, Maher knew ("discovered") that it had been injured by the differences between Lease EP-248 and Lease EP-249 and knew that PANYNJ caused the injury. Maher was no longer at the mercy of PANYNJ. The fact that it may not have realized it had a legal injury is not material to the issue of whether its claim accrued on October 1, 2000.

The courts of appeals have reached similar conclusions for other statutes. In *Podobnik v. U.S. Postal Service*, 409 F.3d 584 (3d Cir. 2005), on January 25, 2001, Podobnik filed a complaint in district court alleging that USPS discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act (ADEA) when it reduced his mail delivery route in 1993 and again when it notified him in March 1998 that it intended to terminate his employment. The district court entered summary judgment for the USPS on statute of limitations grounds. The court of appeals understood Podobnik to be claiming that both his 1993 route reduction and his 1998 retirement were instances of age discrimination. The court held that:

"As a general rule, the statute of limitations begins to run when the plaintiff's cause of action accrues . . . the accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff discovers that he or she has been injured." [*Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 (3d Cir.1994)] (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)) (emphasis in original). *That is not to say that the accrual date is when a plaintiff learns he has been the victim of a legal wrong. Rather, a claim accrues as soon as a potential plaintiff either is aware, or should be aware after a sufficient degree of diligence, of the existence and source of an actual injury. Keystone*

*Insurance Co. v. Houghton*, 863 F.2d 1125, 1127 (3d Cir. 1988); *see also Cada*, 920 F.2d at 450. The discovery rule delays the initial running of the statute of limitations, but only until the plaintiff has discovered: (1) that he or she has been injured; and (2) that this injury has been caused by another party's conduct. *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1124 (3d Cir. 1997). Thus, the question is when did Appellant suffer an actual injury.

While we understand Appellant to be citing both his 1993 route reduction and his 1998 retirement as instances of age discrimination, we shall dispense with both concurrently. Appellant had actual knowledge of his route reduction immediately, since he participated in and agreed to the reduction. Furthermore, he had actual knowledge of USPS's intent to terminate him on March 10, 1998. Appellant contends that USPS's 1993 route reduction and 1998 intent to terminate or retire him was on account of his age, that this was not apparent to him until October 11, 2000 (the day he met with his attorney), and therefore the limitations period did not begin to run until then. Specifically, he contends that he "did not know he had a possible injury until then." Brief of Appellant at 38. *We read this as meaning that Appellant did not know he had a possible legal injury resulting from the 1993 or 1998 actions until after meeting with his attorney. However, the discovery rule is concerned with knowledge of actual injury, not legal injury.*

Appellant does not claim he was unaware that USPS reduced his route in 1993, or that it served him with a Notice of Proposed Removal on March 10, 1998. These are the only dates when any alleged injury occurred. Therefore, the latest date on which Appellant's claim could have possibly accrued was March 31, 1998, his last day of employment. The discovery rule does not excuse his failure to file his Intent To Sue Letter more than two years after the 180-day limitations period had expired. Were we to extend the reach of the discovery rule to delay accrual until a plaintiff learned that a legal injury had occurred, as Appellant requests, a statute of limitations would become effectively meaningless, as a plaintiff could, through ignorance or fraud, bring an age discrimination claim at any point in his lifetime, regardless of how long ago the underlying acts had occurred. We decline this invitation, and conclude that the discovery rule does not save Appellant's untimely ADEA claim.

*Podobnik v. U.S. Postal Service*, 409 F.3d at 590-591 (emphasis added).

Maher concedes that it was aware of the differing lease terms on October 1, 2000. This is the date on which the alleged injury occurred and Maher knew that it was caused by PANYNJ. When Maher learned that it might have had a legal injury (or as it puts it, "discovered" that the differences were an "undue preference") is irrelevant to the accrual of its cause of action.

In *Merrill v. Southern Methodist University*, 806 F.2d 600 (5th Cir. 1986), a plaintiff alleging discrimination because of sex in violation of Title VII of the Civil Rights Act argued "that in

determining whether a particular claim is time-barred, a court should focus on the date the victim first perceives that a discriminatory motive caused the act, rather than the actual date of the act itself.” *Merrill v. Southern Methodist University*, 806 F.2d at 605. The court rejected this rule.

The leading case on this subject is *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). It emphasizes that the limitations period starts running on the date the discriminatory *act* occurs. 101 S. Ct. at 504. This Circuit has also consistently focused on the date that plaintiff knew of the discriminatory *act*. For example, in *Cervantes v. Imco Halliburton Services*, 724 F.2d 511 (5th Cir.1984), we said, “Under established federal law, the 180-day limitations period for Title VII claims . . . begin[s] to accrue ‘when the plaintiff knows or reasonably should know that the discriminatory act has occurred.’” *Id.* at 513 (quoting *McWilliams v. Escambia County School Board*, 658 F.2d 326, 330 (5th Cir. 1981)). These holdings cannot be reconciled with Merrill’s proposed rule. *It might be years before a person apprehends that unpleasant events in the past were caused by illegal discrimination.* In the meantime, under Merrill’s theory, the employer would remain vulnerable to suits based on these old acts. Merrill’s proposal is inconsistent with the Supreme Court’s language in *Ricks* that the Title VII limitations period is partially designed to “protect employers from the burden of defending claims arising from employment decisions that are long past,” 101 S. Ct. at 503, and its comment in [*United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977)] that employers are entitled to treat past acts as lawful when the employee does not file a charge of discrimination within the statutory time. [431 U.S. at 558].

*Merrill v. Southern Methodist University*, 806 F.2d at 605 (emphasis added).

Maher contends that its claim did not accrue on October 1, 2000, because it did not discover that the “unpleasant events” visited upon it by the differences between Lease EP-248 and Lease EP-249 “were caused by illegal discrimination” until May 2008. The Fifth Circuit rejected a similar argument in *Merrill*.

Other courts have rejected arguments that a claim does not accrue until a plaintiff knows it has a legal injury in addition to an actual injury. *See, e.g., Thelen v. Marc’s Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995) (“A plaintiff’s action [under the ADEA] accrues when he discovers that he has been injured, not when he determines that the injury was unlawful. . . . [Appellant’s] injury was his termination.”); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994) (“a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong”); *id.* at 1390-1391 (“With regard to Oshiver’s claim of discriminatory discharge, we have no difficulty in concluding that for purposes of the discovery rule, Oshiver ‘discovered’ the injury on April 10, 1990, the very date defendant law firm informed her of her discharge. Simply put, at the moment the law firm conveyed her dismissal to her, Oshiver became aware (1) that she had been injured, *i.e.*, discharged, and (2) that this injury had been caused by another party’s conduct. That Oshiver may have been deceived regarding the underlying motive behind her discharge is irrelevant for purposes of the discovery rule.”); *Bohus v. Beloff*, 950 F.2d

919, 924-925 (3d Cir. 1991) (construing Pennsylvania law and applying the discovery rule in connection with a medical malpractice cause of action; in order for a claim to accrue, “[t]he plaintiff need not know the exact medical cause of the injury; that the injury is due to another’s negligent conduct; or that he [or she] has a cause of action.”) (citations omitted).

In contrast, the only authority on which Maher relies for its argument that its claim did not accrue until May 2008 when it claims it first acquired conclusive information that discrimination caused the differences between Lease EP-248 and Lease EP-249 of which it was long aware is the Commission’s statement in *Inlet Fish* that “[i]t would not be appropriate for Inlet Fish to lose its right to seek Commission adjudication of its dispute when it had no conclusive information about such a dispute for several years after the shipments took place.” *Inlet Fish*, 29 S.R.R. at 313. Maher contends that the *Inlet Fish* discovery rule “looks to knowledge of the difference *and that the difference is an undue preference.*” (Maher Opp. to MSJ at 22 n.20 (emphasis added).)

*Inlet Fish* did not involve a question of when a party learned that “the difference is an undue preference” (*i.e.*, that it had a *legal* injury as described by the courts), however, but when it learned that it had an *actual* injury. Inlet Fish alleged that the respondent included the tare weight when calculating Inlet Fish’s freight charges, but did not include tare weight in its competitors’ charges. Inlet Fish stated that it learned this fact in May 1998 in a conversation with an employee of the respondent. The respondent argued that Inlet Fish had in its possession a few documents from which it could have learned of the different treatment and had heard rumors of the different treatment long before May 1998. The Commission found that:

The fact that a few bills of lading were, apparently incidentally, among the documents relating to Inlet Fish’s purchase of salmon does not trigger Inlet Fish’s knowledge of the claim. It appears that Inlet Fish was not aware of its cause of action until Goddard’s conversation with the MSL employee in May, 1998. We therefore find that Inlet Fish was not aware, and could not reasonably have been aware, that it had a cause of action against MSL until May, 1998.

*Id.* at 315. *Inlet Fish* concerned a complainant learning that it had been treated differently than its competitors (that there was an “actual injury”), not learning that there was a discriminatory reason for different treatment of which it was already aware. Unlike Inlet Fish, Maher knew that it was being treated differently from the moment it signed its lease.

The Commission noted that cases in which a party discovers information demonstrating that it had been injured at a point after the injury occurs should, “of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.” *Id.* at 313. Maher was aware (or should have been aware) that it had a cause of action on October 1, 2000. Maher failed to act on that knowledge for nearly eight years. It is also significant that the Commission stated that “[i]f Inlet Fish were merely contending that it did not file a complaint because MSL had indicated that it had done nothing wrong, the complaint would likely be barred.” *Id.* n.6. This statement is consistent with the rulings of the courts of appeals, *see, e.g., Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d at 1391 (“That Oshiver may have been deceived

regarding the underlying motive behind her discharge is irrelevant for purposes of the discovery rule.”), and suggests that even if PANYNJ falsely told Maher that it had legitimate reasons for the differences in treatment, Maher’s claim accrued when Maher signed its lease.

Maheer does not cite any authority – court or agency – supporting its contention that the statute of limitations does not begin to run until a plaintiff or complainant knows that it suffered a legal injury as opposed to an actual injury. It argues for a rule pursuant to which “[w]hat is decisive is that Maher did not know nor should it have known that the different lease terms were an undue prejudice violating the Shipping Act until it possessed conclusive information in May 2008.” (Maheer Opp. to MSJ at 4.) Maheer’s articulation of its version of the discovery rule is essentially identical to the rule articulated by the district court, but rejected by the Supreme Court, in *Kubrick*: “[W]e do not believe it reasonable to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached.” *United States v. Kubrick*, 444 U.S. at 116 (quoting the rule applied by the district court); at 122 (rejecting the district court’s rule).

Maheer does not cite any case (Commission or other forum) holding that the statute of limitations does not run for a plaintiff or complainant with actual knowledge of its injury and knowledge that the injury was caused by the conduct of another person because the plaintiff or complainant does not appreciate that it has a legal injury. The burden is on it to establish that it is protected by the rule. Therefore, the discovery rule does not save Maheer’s claim for a reparation award for alleged discrimination in negotiations resulting in Lease EP-249 and by allegedly discriminatory differences between Lease EP-248 and EP-249 as the material facts as to which there is no dispute establish Maheer “discovered” its injury on October 1, 2000.

## **VII. THE DIFFERENCES BETWEEN THE LEASES DO NOT ESTABLISH A CONTINUING VIOLATION FOR STATUTE OF LIMITATIONS PURPOSES.**

Maheer argues that the “continuing violation” rule permits it to seek a reparation award for any violations that occurred in the period beginning three years prior to the date it filed its Complaint.

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

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

*Seatrains* rejected respondent’s argument and held that (i) each act in violation of the Shipping Act is a new act for the purpose of the statute of limitations, and that

(ii) each day of a continuing violation is a new act for the purpose of the statute of limitations:

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

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

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

The continuing violation rule is infused in Commission precedent.

(Maher Opp. to MSJ at 13-14 (footnotes omitted) (emphasis in original).)

It appears that Maher contends that the statute of limitations does not bar a reparation award based solely on the allegedly discriminatory differences between Lease EP-248 and Lease EP-249, including, but not limited to, the rental rate, investment requirements, throughput requirements, the first point of rest requirement for automobiles, and the security deposit requirement. To the extent Maher is claiming a right to seek a reparation award in the absence of an overt discriminatory act by PANYNJ within the limitations period, Maher is incorrect.

The case law makes it abundantly clear that a defendant/respondent must commit an overt act of discrimination within the limitations period for a plaintiff/complainant to receive damages. In *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Supreme Court stated:

[Ledbetter] argues that the pay-checks were unlawful because they would have been larger if she had been evaluated in a nondiscriminatory manner prior to the EEOC charging period. Similarly, she maintains that the decision was unlawful because it “carried forward” the effects of prior, uncharged discrimination decisions. In

essence, she suggests that it is sufficient that discriminatory acts that occurred prior to the charging period had continuing effects during that period. This argument is squarely foreclosed by our precedents.

*Id.* at 624-625. *See also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) (“[I]n the case of a ‘continuing violation,’ . . . each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again . . . . But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.”) (citations, quotations omitted)); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (“A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.”).

In *Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir. 2004), the plaintiffs commenced an action in 2002 contending that contracts signed in 1996 were illegal under the Sherman Antitrust Act and the Packers and Stockyard Act as “tying contracts.” They argued that the contracts were not subject to the applicable four-year statute of limitations under the continuing violation rule. The Eighth Circuit rejected this argument, stating that the continuing violation rule

“permits a cause of action to accrue whenever the wrongdoer commits an overt act in furtherance of an antitrust conspiracy or, in the absence thereof, commits an act that by its very nature is a continuing antitrust violation.” *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982). A continuing antitrust violation is one in which the plaintiff’s interests are repeatedly invaded. *Id.* at 849 (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987)). “When a continuing antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants.” *Barnosky Oils, Inc. v. Union Oil Co. of California*, 665 F.2d 74, 81 (6th Cir. 1981). However, “even when a plaintiff alleges a continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act.” *Peck v. General Motors Corp.*, 894 F.2d 844, 849 (6th Cir. 1990) (quoting *Pace Indus.*, 813 F.2d at 237). “For statute of limitations purposes, . . . the focus is on the timing of the causes of injury, *i.e.*, the defendant’s overt acts, as opposed to the effects of the overt acts.” *DXS, Inc. v. Siemens Medical Systems, Inc.*, 100 F.3d 462, 467 (6th Cir. 1996) (citing *Peck*, 894 F.2d at 849).

An overt act has two elements: (1) it must be a new and independent act that is not merely a reaffirmation of a previous act, and (2) it must inflict new and accumulating injury on the plaintiff. *Pace Industries, Inc.*, 813 F.2d at 238. Acts that are merely “unabated inertial consequences” of a single act do not restart the statute of limitations.

\*

\*

\*

Performance of the alleged anticompetitive contracts during the limitations period is not sufficient to restart the period. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 160 (9th Cir. 1989) (mere fact that plaintiff made payments to defendant since signing of contract did not establish defendant's ability to enforce the tie absent voluntary cooperation by plaintiff); *Aurora Enter. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982) (“[T]hat defendants receive a benefit today as a result of a contract executed in 1966 . . . is not enough to restart the statute of limitations.”). In addition, when a complaining party was fully aware of the terms of an agreement when it entered into the agreement, an injury occurs only when the agreement is initially imposed; thus, the limitations period typically is not tolled by the requirements placed on the parties under the agreement. See *Information Exchange Systems, Inc. v. First Bank Nat. Ass’n*, 994 F.2d 478, 484 (8th Cir. 1993) (plaintiff knew terms of alleged tying agreement for continued credit when it entered into credit agreement, and claim for fraudulent concealment therefore could not survive). Here, the Varners failed to allege any new overt acts, other than enforcement of the initial contracts, that would toll the four-year statutes of limitations under either Act.

*Varner v. Peterson Farms*, 371 F.3d at 1019-1020 (footnote omitted). See also *Midwestern Machinery Co., Inc. v. Northwest Airlines, Inc.*, 392 F.3d 265, 272 (8th Cir. 2004) (“[W]here the plaintiff had actual knowledge of the initial violation and suffered sufficient injury, courts generally do not toll the statute of limitations based on a continuing violation theory. 2 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 320c1 at 210-11 (2d ed. 2000).”); *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) (“A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.”) (citing *Collins v. United Air Lines, Inc.*, 514 F.2d 594, 596 (9th Cir. 1975)).

Maher cites four decisions by Commission administrative law judges as support for its argument that the terms of Lease EP-249 constitute a “continuing violation” of the Shipping Act for which it may seek a reparation award despite the absence of an overt discriminatory act within the limitations period. (Maher Opp, to MSJ at 13-22.) None of the cases supports Maher’s argument.

*Seatrain, supra*, the primary case on which Maher relies, is consistent with the continuing violation rule as articulated by the courts in the cases cited above. The administrative law judge denied the respondent’s motion to dismiss on statute of limitations grounds.

The Ports Authority contends that *Seatrain*’s cause of action accrued on or before January 1976 [apparently when *Seatrain* resumed service in the Puerto Rican trade] and in any event, *Seatrain*’s effort to obtain “legal action in concert with the FMC” based on the denial of access to the PRMSA cranes in April 1976 was the latest when the cause of action accrued. And, they argue, that April 1976 being more than two years prior to the filing of the instant complaint, the Commission is without jurisdiction to entertain the complaint.

Such contention would have validity if there were a single refusal for a single utilization of Isla Grande. But the facts, as alleged, do not support such a conclusion. It is complained that Seatrain has “been attempting to obtain . . . use of . . . Isla Grande . . . since about September, 1975 . . . [and such] attempts have been unsuccessful [to date].” The complaint alleges numerous requests (some prior to July 29, 1976) and numerous refusals (some prior to July 29, 1976) and continuing requests (on and after July 29, 1976) and continuing refusals (on and after July 29, 1976) with continuing use of alternative facilities (subsequent to July 29, 1976) resulting in alleged continuing and accumulative injury.

As alleged, each and every berthing barred is a new act giving rise to alleged injury. Damages for unlawful acts prior to July 29, 1976, are, of course, barred by the statute of limitations. Any unlawful act, however, which continues becomes not one act but a series of individual acts each time it is enforced, and the statute of limitations is to be measured against each act giving rise to an alleged new injury.

*Seatrain*, 18 S.R.R. at 1081-1082. The Ports Authority contended since the first refusal to permit berthing occurred more than two years before Seatrain filed its complaint, the statute of limitations barred a reparation award for refusals less than two years before Seatrain filed its complaint. The judge found that the statute of limitations did not bar a claim for a reparation award for the overt acts of discrimination (*i.e.*, refusals to permit Seatrain to berth where requested) occurring within two years of the date Seatrain filed the complaint.

Maher contends that *Seatrain* stands for the proposition that “claims accruing *outside* of the limitations period *do not bar complaints* seeking reparations for claims of continuing violations *inside* the limitations period.” (Maher Opp. to MSJ at 14 (footnote omitted) (emphasis in original).) This contention is not precisely correct. *Seatrain* stands for the proposition that claims accruing outside of the limitations period do not bar complaints seeking reparations for claims of similar *overt discriminatory acts* inside the limitations period. Each refusal to permit Seatrain to berth, some of which occurred within the limitations period, was a separate overt act of discrimination, not the unabated inertial consequence of a discriminatory act outside the limitations period. Seatrain could seek a reparation award for the refusals to berth within the limitations period. *Seatrain* does not support Maher’s argument that without an overt act of discrimination by PANYNJ within the limitations period, Maher is entitled to a reparation award for the unabated inertial consequences of the allegedly discriminatory terms of Lease EP-249.

Maher also relies on *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 248 (ALJ 1992). The administrative law judge found that “Seacon’s most-favored-nation clause in its lease . . . related only to land and premises, and did not relate to cranes and equipment” and awarded no reparations to Seacon. 26 S.R.R. at 426 (ultimate conclusion and finding number 7). In the decision, the judge observed:

The crane terms agreements of the various tenants at the Port of Seattle had differing rates at different levels of usage. These different terms could favor Seacon, or could favor other tenants, all depending on the volume of usages of the cranes.

To the extent that Seacon's crane terms provided that it had to pay diesel fuel rates, or rates higher than electricity rates, to operate its two diesel Starporter cranes, Seacon appears probably to have suffered rate discrimination, but these fuel charges (rates) were established by the Port in its tariffs, which became effective on Oct. 1, 1982, and which remained unchanged until July 1, 1990. Thus, Seacon's cause of action as to a disparity in fuel costs began to accrue over seven years before its complaint was filed in May 1990, and, of course, the Port was obliged to charge the fuel costs specified in its tariff, unless its lease agreements were amended in this respect. To the extent that the disparity in fuel costs continued after May 30, 1987, these costs would not be barred. Seacon [ceased] operation in July 1988, so that the unbarred fuel disparity was for a relatively short period, and perhaps was offset by payments or lack of payments by Seacon for acres less than suitable for container yard operations.

*Id.* at 277.

This discussion is quite clearly unnecessary to the decision in the case that the clause did not apply to cranes and is *obiter dictum*. See Black's Law Dictionary 1177 (9th ed. 2009). Nevertheless, Maher argues that in this decision, "the Presiding Officer recognized the legal vitality of the alleged Shipping Act discrimination claims for a Port Authority's alleged ongoing violation of the Shipping Act in charges that *began to accrue over seven years prior* to the complaint." (Maher Opp. to MSJ at 15 (footnote omitted) (emphasis in original).) Perhaps because of the conditional nature of the judge's discussion (*e.g.*, "Seacon *appears probably* to have suffered rate discrimination") and the fact that the resolution of the question did not affect the outcome of the case, the judge did not cite to any cases discussing the elements of a continuing violation. Therefore, to the extent that the *Seacon Terminals* opinion would lead to a conclusion that Maher may seek a reparation award in the absence of an overt discriminatory act within the limitations period, given the decisions by the Supreme Court and courts of appeals cited above, I respectfully disagree.

Maher also relies on *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1011 (ALJ 1999). NPR, an ocean carrier, took over the operations of another ocean carrier that provided shipping services between New Orleans and Puerto Rico. NPR decided to discontinue serving the Port of New Orleans directly, but had assumed a lease with the Port that ran until the year 2003. In order to leave the Port, NPR and the Board negotiated a Cancellation Agreement, signed September 17, 1996, by which NPR would make certain payments to the Board in lieu of the former rental. After making some payments under the Cancellation Agreement, on November 25, 1998, NPR filed a complaint with the Commission that the Agreement violated the Shipping Act of 1984.

NPR filed its complaint more than two years and less than three years after it signed the Agreement. The Board argued that the Agreement had been approved under the Shipping Act, 1916, which had a two-year statute of limitations, and belonged before the Surface Transportation Board. The administrative law judge rejected this argument, *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. at 1017 n.5, and the case was ultimately decided pursuant to the Shipping Act of 1984. *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1512, 1536 (ALJ 2000).

In the language on which Maher relies, the administrative law judge stated:

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

*NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. at 1014. Since the two-year statute of limitations of the 1916 Act was inapplicable, the case was decided under the 1984 Act, and NPR filed its complaint with the 1984 Act's three-year statute of limitations, the issue of whether the continuing violation rule would permit a reparation award in the absence of an overt act of discrimination within the limitations period was not relevant and this statement is *obiter dictum*. Furthermore, the judge did not cite any authority supporting the statement that practice of demanding payments over the life of the canceled lease constituted ongoing conduct. Therefore, to the extent that the *NPR* opinion would lead to a conclusion that Maher may seek a reparation award in the absence of an overt discriminatory act within the limitations period, given the decisions by the Supreme Court and courts of appeals cited above, I respectfully disagree.

In *Int'l Shipping Agency, Inc. v. Puerto Rico Ports Auth.*, 30 S.R.R. 407 (ALJ 2004),<sup>5</sup> the administrative law judge rejected the respondent's argument that the claims were barred by the statute of limitations. The judge recognized that:

The Commission has determined that a cause of action "accrues" when the complainant knew or had reason to know of the harm alleged. Likewise, if the alleged harm continues for an extended period of time, the limitation period begins to run when the complainant first *knew or should have known* of the harm. There is no competent evidence or rule of law that the Complaint should be dismissed because some of the harm occurred before December 29, 2000 and Intership knew or should have known about the harm.

---

<sup>5</sup> The Commission did not review this decision. The complaint was eventually dismissed on sovereign immunity grounds. See *Puerto Rico Ports Auth. v. Federal Maritime Comm'n*, 531 F.3d 868 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

*Id.* at 425.

The judge took note of the allegations of the complaint:

Complaint, Part V, C (“PRPA . . . continues to refuse to provide comparable marine terminal areas at Puerto Nuevo to Intership”); D (“PRPA . . . continues to ignore many requests from Intership for the temporary lease of several available Puerto Nuevo lots”); G (“PRPA . . . continues to fail to repair Pier [½] N & O, despite charging rent to Intership for their use”); M (“Since Sept. 2001, the PRPA has used the construction of the Royal Caribbean Cruise Line terminal as a pretext for denying berths to Intership”); DD (PRPA advised Intership that the repair work to Piers ½ N & O “would commence in 2002”); HH (“the PRPA has failed to repair Piers [½] N & O as of this date”).

*Id.* at 426 n.51. She found that:

PRPA’s attempt to invoke the section 11(g) statute of limitations ignores the nature of the Complaint. The Complaint was initiated due to PRPA’s ongoing failure to operate in accordance with requirements of the Shipping Act.

Although PRPA’s unacceptable activities may have begun more than three years ago, its liability for violations under the Shipping Act *does not arise from a single discrete act that occurred in the past and is now complete*. Rather, PRPA’s liability arises from continued violations of obligations that continue to exist under the Agreement.

*Id.* at 425-426 (emphasis added). In contrast, Maher’s claim for a reparation award for the negotiations that resulted in Lease EP-249 and Lease EP-249 itself arises from acts “that occurred in the past and [are] now complete.”

Maher also contends that:

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

(Maher Opp. to MSJ at 17 n.12.) In *Odyssea*, PRPA sought “summary judgment and dismissal of the Complaint because *Odyssea* has not shown damages. PRPA argue[d] that ‘Complainant fails to provide competent evidence of damages incurred by the alleged wrongdoing of Respondent. Therefore, Complainant cannot prove any of its claims and summary judgment must be granted in favor of Respondent.’” *Odyssea Stevedoring v. PRPA*, 30 S.R.R. at 502. The administrative law judge denied the motion for summary judgment, finding that “[t]he Complaint clearly includes

allegations of continuing offenses and seeks reparations in connection with those violations.” *Id.* at 503. The effect of the statute of limitations on a claim was neither raised nor discussed in *Odysea*. *Odysea* provides no support for Maher’s argument that it may seek a reparation award for a continuing violation in the absence of an overt discriminatory act within the limitations period.

The material facts as to which there is no genuine dispute establish that Maher was fully aware of the terms of and the differences between Lease EP-248 and Lease EP-249 when it entered into Lease EP-249. Any overt discriminatory act by PANYNJ that resulted in Lease EP-249 was necessarily committed on or before October 1, 2000. Maher’s injury occurred “only when the agreement [was] initially imposed; thus, the limitations period . . . is not tolled by the requirements placed on the parties under the agreement.” *Varner v. Peterson Farms*, 371 F.3d at 1019-1020. With no overt discriminatory act by PANYNJ within the limitations period, the cases cited above foreclose a reparation award for differences between Lease EP-248 and Lease EP-249 in rent, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement. Maher has not cited any contrary controlling authority that would support a holding that current operation under the terms of Lease EP-249 is a continuing violation of the Act. Therefore, the continuing violation rule does not support Maher’s claim for a reparation award for alleged discrimination in negotiations leading up to signing Lease EP-249 and the terms of Lease EP-249 itself.

#### **VIII. CLAIMS FOR A REPARATION AWARD BARRED.**

PANYNJ served the following interrogatory on Maher:

Interrogatory No. 6: Identify and describe any damages claimed by Maher in the Complaint, including, but not limited to, stating: (i) the factual basis for such damages; (ii) the legal theory under which such damages are recoverable; (iii) the amount of such damages; and, (iv) the methodology used to calculate such damages.

Response: Maher objects to this request to the extent it calls for a legal conclusion. The information requested is also premature because the discovery order in this proceeding does not require expert disclosures for many months and Maher will designate an expert on damages. Subject to the foregoing and general objections, Maher’s damages include the additional costs it incurred to APM because of PANYNJ’s preferential treatment of APM. These damages are contained in the disparate terms of leases EP-248 and EP-249.

First, Maher’s damages include the difference between Maher’s base rent and APM’s base rent that Maher must pay PANYNJ over the 30-year term of Maher’s lease. This includes the difference between Maher’s initial base rent of \$39,750 per acre and APM’s base rent of \$19,000, plus difference owing to the 2% annual rent escalator paid by Maher and not paid by APM. For example, Maher’s 2008 rent is \$45,660 per acre, while APM’s base rent remains unchanged at \$19,000. Thus, in 2008 alone Maher must pay PANYNJ \$26,660 more per acre in base rent than APM

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

(Maher's Resp. to Port Authority's First Set of Interrogatories (Maher's Int. Resp.) at 9-10, Aug. 29, 2008 (attached to PANYNJ MSJ, Levine Declaration Ex. H).)

The higher rent and the rental increases imposed by Lease EP-249 are the "unabated inertial consequences" of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the differences in rent between Lease EP-248 and Lease EP-249 are not justified by a valid transportation purpose, the difference in rent and the yearly increase in Maher's rent are not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit "a new and independent act that is not merely a reaffirmation of a previous act" and PANYNJ did not "inflict [a] new and accumulating injury" on Maher. *Pace Industries, Inc.*, 813 F.2d at 238.

In *Eichman v. Fotomat Corp.*, 880 F.2d 149 (9th Cir. 1989), Eichman had signed a lease agreement with Fotomat in 1968. In an action commenced in 1982, Eichman claimed that the lease agreement was an unlawful tying agreement in violation of the antitrust laws. The district court held that this claim was barred by the Clayton Act's four year statute of limitations. On appeal, Eichman argued that "the lease tying agreement was a continuing violation of the antitrust laws which is not barred by the statute of limitations. Eichman contends that each payment under the lease was a new injury for purposes of the statute of limitations." *Eichman v. Fotomat Corp.*, 880 F.2d at 160. The court of appeals held:

When a plaintiff alleges a continuing violation of the law, an overt act is required to restart the statute of limitations and the statute of limitations runs from the last overt act. Under certain circumstances the active enforcement of an illegal contract may constitute an overt act which will restart the statute of limitations. However, the passive receipt of profits from an illegal contract by an antitrust defendant is not an overt act of enforcement which will restart the statute of limitations.

To restart the statute of limitations in a tying situation, Eichman must show that Fotomat "had the ability [to] and actually did enforce the tie" during the limitations period. The mere fact that Eichman has made lease payments to Fotomat since 1968 does not establish Fotomat's ability to enforce the tie absent voluntary cooperation by Eichman.

*Id.* (citations omitted). PANYNJ's "passive receipt of [rental payments] . . . is not an overt act of enforcement which will restart the statute of limitations." Therefore, a reparation award for the difference in rent between Lease EP-248 and Lease EP-249 paid subsequent to June 3, 2005, is barred by the statute of limitations.

Maher's response continues:

Second, Maher's damages include the additional burdens and risks imposed on Maher and not imposed on APM because Maher's lease requires it to guarantee a higher container throughput per acre than APM. If Maher fails to satisfy the throughput requirements, PANYNJ may terminate the lease. By contrast, APM is not subject to termination for failing to meet its lower throughput requirements.

(Maher's Int. Resp. at 10.)

Maher's response does not set forth any actual injury that it had suffered by the time of its response and does not contend that it will suffer monetary damages if it fails to satisfy the throughput requirements. Maher contends that failure to satisfy the throughput requirement could result in the termination of its lease. To the extent that Maher may claim monetary damages resulting from the different provisions, those damages are the "unabated inertial consequences" of the negotiations and the lease itself and barred by the statute of limitations. Assuming the Maher could establish that this provision violates the Shipping Act, I express no opinion on the question of whether enforcement of this provision would be an overt act by PANYNJ.

Maher's response continues:

Third, Maher's damages include the additional twenty-five basis point finance fee that it must pay relative to APM for infrastructure improvements (175 basis points over the Revenue Bond Index versus APM's 150 basis points over the Revenue Bond Index). Calculation of the present value of this additional cost to Maher remains ongoing and will be subject to actual activity. APM's access to cheaper financing from PANYNJ constitutes ongoing disparate treatment and competitive advantage.

(Maher's Int. Resp. at 10-11.)

Maher does not state that PANYNJ has actually imposed any higher investment requirements on Maher. The higher investment requirements imposed by Lease EP-249 would be the "unabated inertial consequences" of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the higher investment requirements in Lease EP-249 are not justified by a valid transportation purpose, the higher investment requirements are not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit "a new and independent act that is not merely a reaffirmation of a previous act" and PANYNJ did not "inflict [a] new and accumulating injury" on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Therefore, a reparation award for the higher investment requirements is barred by the statute of limitations.

Maher's response continues: "Fourth, Maher's damages are equal to the cost of the additional security deposit requirements that PANYNJ requires of Maher, but not of APM."  
(Maher's Int. Resp. at 11.)

Lease EP-249 required Maher to tender its security deposit when it signed the lease and delivered it to PANYNJ. (Lease EP-249, Section 40.) This occurred on or about October 1, 2000. I first note that since the lease requires PANYNJ to return the security deposit (minus any unpaid claims or damages) when the lease terminates and Maher “may collect or receive any interest or income earned on bonds [used for the security deposit] and interest paid on cash deposited in interest-bearing bank accounts” (*id.*) while PANYNJ holds the security deposit, it is not clear that paying a higher security deposit is an actual injury within the meaning of the Act. Even if it is assumed it is an injury and that PANYNJ discriminated against Maher in the negotiations and the additional security deposit requirements in Lease EP-249 are not justified by a valid transportation purpose, the additional security deposit is not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit “a new and independent act that is not merely a reaffirmation of a previous act” and PANYNJ did not “inflict [a] new and accumulating injury” on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Therefore, a reparation award for the additional security deposit is barred by the statute of limitations.

Maher’s response continues: “Additionally, Maher faces a potential loss of profit because of the cost advantages PANYNJ has wrongfully bestowed on APM. APM has been actively soliciting Maher’s customers to expand its third-party business to the detriment of Maher.” (Maher’s Int. Resp. at 11.)

Maher does not identify an actual injury or damages that it has suffered as a result of the cost disadvantages. The cost disadvantages imposed by Lease EP-249 are the “unabated inertial consequences” of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the cost disadvantages in Lease EP-249 are not justified by a valid transportation purpose, the cost disadvantages are not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit “a new and independent act that is not merely a reaffirmation of a previous act” and PANYNJ did not “inflict [a] new and accumulating injury” on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Solicitation by APM is not an overt act by PANYNJ. Therefore, a reparation award for the cost disadvantages is barred by the statute of limitations.

Maher does not identify an actual injury or damages that it has suffered as a result of the different first point of rest requirement for automobiles imposed by Lease EP-249. Any injury allegedly imposed by the different first point of rest requirement for automobiles by Lease EP-249 is the “unabated inertial consequence[.]” of the negotiations and the lease itself. Even if it is assumed that PANYNJ discriminated against Maher in the negotiations and the cost disadvantages in Lease EP-249 are not justified by a valid transportation purpose, the different first point of rest requirement for automobiles is not the result of an overt act by PANYNJ subsequent to October 1, 2000; that is, PANYNJ did not commit “a new and independent act that is not merely a reaffirmation of a previous act” and PANYNJ did not “inflict [a] new and accumulating injury” on Maher. *Pace Industries, Inc.*, 813 F.2d at 238. Therefore, a reparation award for the first point of rest requirement for automobiles is barred by the statute of limitations.

**IX. THE STATUTE OF LIMITATIONS IS NOT APPLICABLE TO A CEASE AND DESIST ORDER.**

PANYNJ argues that the Commission cannot grant Maher’s prayer for a cease and desist order. It contends:

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

\* \* \*

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

(PANYNJ MSJ at 26-28 (footnotes omitted).)

The Act’s statute of limitations states that “[a] person may file with the . . . Commission a sworn complaint alleging a violation of this part . . . . If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. § 41301(a). It does not state that *all* complaints must be filed within three years after the claim accrues. It does not state that a complaint seeking a cease and desist order must be filed within three years. It does not state that if a complaint seeking reparations and other relief is filed more than three years after the claim accrues, the claim for other relief must be dismissed with the untimely claim for reparations.

The Commission has clearly held that “[t]he 3 year statute of limitations . . . applies only to requests for reparations. It would not prevent the Commission from issuing a cease and desist order in a case brought over three years after the cause of action accrued.” *Western Overseas Trade and Development Corp. v. ANERA*, 26 S.R.R. 874, 885 n.17 (FMC 1993). See also *A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1550 (ALJ 1986) (“If there is no claim for reparations, however, there is no time limit to the filing of the claim. In fact, under the Commission’s and court interpretations of Section 22, any person could file a complaint alleging a violation of the 1916 Act even if the person had not alleged injury.”), Report and Order Adopting Initial Decision with Clarifications, 24 S.R.R. 1468, *rev’d on other grounds sub nom. A/S Ivarans Rederi v. United States*, 895 F.2d 1441 (D.C. Cir. 1990).

A complaint seeking a reparation award must be filed within three years of the date the claim accrued; therefore, the Commission cannot grant a reparation award for alleged injuries resulting from violations that occurred more than three years before Maher filed its Complaint. A complaint seeking a cease and desist order need not be filed within three years of the date the claim accrued. If the Commission determines that terms in Lease EP-249 violate the Shipping Act by granting an undue preference, the Commission may issue a cease and desist order requiring PANYNJ eliminate the preference. See *Ballmill Lumber & Sales Corp. v. Port of New York Auth.*, 10 S.R.R. 524, 526 (FMC 1968) (stating that “[t]he Port Authority could choose to remove the privilege from [its recipient] and thereby remove the preference” or it could choose to give the privilege to the complainant). Therefore, PANYNJ’s motion for summary judgment on the claim for a cease and desist order is denied.

## **X. APPEAL AND POSSIBLE STAY.**

This decision dismisses Maher’s claim for a reparation award for alleged Shipping Act violations during the negotiations that resulted in Lease EP-249 and in Lease EP-249 itself. Commission Rule 227 provides “[i]f an administrative law judge has granted a motion for dismissal of the proceeding in whole or in part, any party desiring to appeal must file such appeal no later than twenty-two (22) days after service of the ruling on the motion in question.” 46 C.F.R. § 502.227(b)(1). Therefore, as a matter of course, Maher may seek review of this decision. Pursuant to Rule 227, any exceptions to this decision must be filed with the Commission within twenty-two days of the date of the decision and a reply is due twenty-two days after the exceptions are filed. 46 C.F.R. § 502.227(a).

Even if this decision did not fit within Rule 227, the Commission has also held that it is appropriate to look to the procedures established for the district courts for guidance in determining whether an interlocutory appeal is appropriate. See *Amzone International, Inc. v. Hyundai Merchant Marine Co.*, 27 S.R.R. 386, 389 (1995) (“[I]nterlocutory appeals are permissible if a district judge certifies that an otherwise unappealable order ‘ . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . .’ 28 U.S.C. § 1292(b).”). Under its discovery rule argument, Maher is seeking a reparation award for the difference between the rent it paid and the rent it would have paid if given the same rental rate as Maersk/APM. In its

discovery response, Maher stated that the difference as of August 29, 2008, totaled approximately \$86 million. (Maher's Resp. to Port Authority's First Set of Interrogatories at 10, Aug. 29, 2008 (attached to PANYNJ MSJ, Levine Declaration Ex. H).) Subsequent payments have likely taken this figure well above \$100 million. Pursuant to this decision, Maher would not receive any reparation award on the discriminatory rent claim.

The parties engaged in settlement discussions that apparently came close to resolving their differences. On October 15, 2010, the parties stated that "[f]ollowing extensive discussions and negotiations, the parties have now reached a full agreement in principle to resolve the entire matter in controversy." See *Maher v. PANYNJ*, FMC No. 08-03, Order at 2 (ALJ Jan. 11, 2011) (January 11, 2011 Scheduling Order). Based on this representation, the date to file a joint motion for approval of the settlement was extended. *Id.* On December 17, 2010, the parties filed another joint motion asking for another extension. The parties stated: "The parties have continued to negotiate the terms and progressed in preparing final documentation for the settlement, but have not been able to complete the process. Therefore, the parties need additional time to conclude the documents and secure approvals." *Id.* at 3. The date to submit a joint motion to approve a settlement agreement was again extended. *Id.* On January 5 and 6, 2011, the parties submitted joint proposed litigation schedules, thereby signaling that they had not reached the settlement they anticipated. *Id.* at 4-5.

Given the difference between what Maher seeks and what it would receive, the Commission's resolution of the issue of when Maher's claim accrued could enable the parties to reassess their interests and resolve their differences by settlement. While I have some question as to how substantial Maher's arguments may be, the grounds for difference of opinion are not insubstantial. Therefore, if it is determined that this decision may not be reviewed pursuant to Rule 227, I have determined that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Since Maher's claim for a cease and desist order was not dismissed, that portion of this ruling would not be reviewed at this time pursuant to Rule 227. Commission Rule 153 provides that a presiding officer may allow an interlocutory appeal if he or she finds it necessary "to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.153(a). The Commission has recognized that it is an "extraordinary step" to grant leave to petition the Commission "to overturn the ALJ's jurisdictional ruling denying [a] motion to dismiss." *Inlet Fish*, 29 S.R.R. at 315.

PANYNJ's contention that the three-year statute of limitations bars entry of a cease and desist order is based on the Act's statute of limitations that the Commission will already have under review. I have determined that it is in the public interest to permit PANYNJ to seek review of its contention at this time. Therefore, I *sua sponte* grant leave for PANYNJ to appeal the denial of summary judgment based on its argument that a cease and desist order is barred by the statute of limitations. If PANYNJ chooses to appeal, its brief on the effect of the statute of limitations on the prayer for a cease and desist order is due twenty-two days after this decision and Maher's response is due twenty-two days after PANYNJ files its brief.

Commission Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted. I will defer ruling on a stay pending receipt of memoranda from the parties stating their positions on staying this proceeding pending the Commission's review of this decision. On or before May 20, 2011, the parties are ordered to file memoranda addressing the presiding officer's authority to stay this proceeding pursuant to Rule 153 or any other ground pending the Commission's review of this decision, and the propriety of staying the proceeding pending Commission review. If the parties choose, they may file a joint memorandum.

**ORDER**

Upon consideration of The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that The Port Authority of New York and New Jersey's Motion for Summary Judgment of Maher Terminals, LLC's Lease-Term Discrimination Claims be **GRANTED IN PART** and **DENIED IN PART**. Maher's claim that PANYNJ discriminated against Maher in the negotiations that resulted in Lease EP-249 and in the terms of Lease EP-249 itself accrued when Maher signed the lease October 1, 2000. Maher filed its Complaint more than three years after its claim accrued. Accordingly, Maher's claim for a reparation award based on alleged discrimination against Maher in the negotiations that resulted in Lease EP-249 and in the terms of Lease EP-249 itself must be dismissed. PANYNJ's motion to dismiss the claim seeking a cease and desist order based on alleged discrimination against Maher in the negotiations that resulted in Lease EP-249 and in the terms of Lease EP-249 itself is **DENIED**. It is

**FURTHER ORDERED** that on or before May 20, 2011, the parties file memoranda addressing the presiding officer's authority to stay this proceeding pursuant to Rule 153 or any other ground pending the Commission's review of this decision, and the propriety of staying the proceeding.

  
Clay G. Guthridge  
Administrative Law Judge

DOCKET NO. 08-03

MAHER TERMINALS, LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

---

INITIAL DECISION GRANTING IN PART MOTION FOR SUMMARY JUDGMENT  
AND DISMISSING CLAIM FOR A REPARATION AWARD BASED ON  
LEASE-TERM DISCRIMINATION CLAIMS

APPENDIX

Statements Stricken from Material Facts as to Which There is no Genuine Dispute

Maher Response 6: REASON FOR STRIKING RESPONSE: Argumentative and the additional facts relate to Maher's argument that its claim did not accrue until it learned that it was the victim of a legal wrong.

. . . but [Maher] denies PANYNJ's attempt to misconstrue one of Maher's interrogatory responses to suggest it was responding to when Maher knew of the differences and that the differences were undue. The interrogatory PANYNJ cites did not. Rather, PANYNJ ignores the interrogatories reflecting when Maher knew of the differences and when Maher knew when they were undue. *See* Maher's Responses to PANYNJ's Second Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit K to Levine Decl.) (The text PANYNJ quotes is three lines of a two-page interrogatory response to responding to PANYNJ's interrogatory requesting "all facts supporting each and every allegation of the Complaint."). In response to PANYNJ's First Set of Interrogatories, No.1, asking "when Maher first became aware of the alleged differences" between the leases, Maher responded that it "learned of PANYNJ's preference of [APM] during the negotiation of EP-249," *see* Maher's Responses to PANYNJ's First Set of Interrogatories, No. 1, p.4-5 (August 29, 2008) (Exhibit H to Levine Decl.), but it only began to learn that the APM preference was *unduly or unreasonably* preferential starting "in the summer of 2007" when PANYNJ Deputy General Counsel Christopher Hartwyck sought a release from Maher's General Counsel Scott Schley for a rent disparity claim. *Id.* at No. 4, p.8 (Exhibit H to Levine Decl.).

Maher Response 7: REASON FOR STRIKING RESPONSE: The response is argumentative.

. . . but as with the previous paragraph PANYNJ misconstrues, Maher denies PANYNJ's mischaracterization of the quote. Contrary to PANYNJ's effort to conflate the two elements of a claim-knowledge of the difference and knowledge that the difference is undue – the excerpt sets out both elements. *See* Complainant's Scheduling Report at 5 (July 23, 2008)

(Exhibit G to Levine Decl.) (explaining in the context of the Shipping Act burden of proof, that the initial burden shift to the Respondent “is apparent from Maher’s complaint” and “the plain language of the leases themselves.”).

Maher Response 8: REASON FOR STRIKING RESPONSE: The response is argumentative.

Pursuant to *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R 1251, 1272 (FMC, 1997), where facially disparate lease terms are unduly disparate (*i.e.* different *and* wrongful or unjustified) the measure of damages is the difference of the disparate lease terms. *See Ceres Marine Terminal v. Maryland Port Administration*, 29 S.R.R. 356, 372 -73 (FMC 2001) (citing *Valley Evaporating v. Grace Line Inc.*, 11 S.R.R. 873 (1970)). Maher denies PANYNJ’s suggestion that an ability to calculate differences if there was a violation constitutes evidence of a violation.

PANYNJ Statement 9: REASON FOR STRIKING STATEMENT: Maher knew it suffered an actual injury on October 1, 2000. The extent of that injury is not material to the accrual of its claim.

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

Maher Response 9:

Maher denies that (i) it alleges damages created by facial disparities in the lease terms, and (ii) denies that its Shipping Act claims in this proceeding seek no other damages. Maher alleges that PANYNJ violated and continues to violate the Shipping Act. Maher’s claims also allege lost business, lost revenue, increased costs, attorney’s fees and interest. *See generally*, Maher’s Reply in Opposition to Respondent’s Motion for a Protective Order at 11, 31 (Apr. 13, 2011) (citing Maher’s complaint and consolidated 07-01 counter-claims and extensive testimony concerning damages). PANYNJ takes the quoted statement out of context. *See* Maher’s Reply in Opposition to Respondent’s Motion to Compel Production from Complainant and Motion for Protective Order at 3 (Oct. 9, 2008) (Ex. D in Levine Decl.) (the statement was made in response to PANYNJ’s Motion to Compel post-lease financial documents in rebuttal of PANYNJ’s assertion of a need for discovery of “competitive harm,” as a separate and additional element of damages akin to lost profits and or business, and which under *Ceres* is not the applicable measure of damages).

Maher Response 10: REASON FOR STRIKING RESPONSE: The response is argumentative.

As Maher also explained, however, “What is decisive is that Maher did not know nor should it have known that the different lease terms were an *undue* prejudice.” Maher’s Reply in

Opposition to Respondent's Motion for Summary Judgment at 4 (March 14, 2011) (emphasis added).

Maher Response 11: REASON FOR STRIKING RESPONSE: The response is argumentative.

. . . but denies that it conveys knowledge of a preference without knowledge of an undue preference. Compare Maher's Responses to PANYNJ's First Set of Interrogatory Responses, No. 1 at 4-5 (Aug. 29, 2008) (Levine Decl. Ex. H) (responding to PANYNJ's first interrogatory requests by stating, "Maher learned of PANYNJ's preference of APMT" at the time of the lease negotiation) with *id.*, No. 4 at 8-9 (responding to PANYNJ's first discovery requests that Maher did not learn that the preferences were "unduly or unreasonably preferential" until events in 2007 and 2008.).

PANYNJ Statement 13: REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

Mosca testified further that at that time Maher had performed a financial analysis to compare the base annual rental rate of the Maersk Lease with the Maher Lease. *Id.* at 172:15 - 20, Levine Decl. Ex. F; see, e.g., Memorandum from M. Davis to R. P. Mosca Regarding Maersk Lease at MT005220, Aug. 1, 2001, attached as Exhibit J to Levine Decl. (analysis of Maersk lease rates dated August 1, 2001).

Maher Response 13:

Admitted in part and denied in part. Randy Mosca's testimony concerned a limited financial comparison of Maher's proposed lease terms, see R. Mosca Dep., Dkt. 07-01, 172:15-20 (June 11, 2008), which was not "at that time" of the later August 1, 2001 memorandum.

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

PANYNJ Statement 16: REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

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

**Maher Response 16:**

Admitted in part and denied in part. Maher admits that the cited memorandum was prepared and sent, but Maher denies PANYNJ's characterization of the memorandum as "analyzing the differences between the Maher and Maersk Leases." The memorandum is described as a "preliminary review of the Maersk" lease. *Id.* at MT005220. Brian Maher testified that the review was requested to quantify the financial differences in the leases, and he testified that the report confirmed the same financial difference that Maher already knew. *See* B. Maher Dep. 08-03, 16:15-18:25 (April 6, 2011). Maher witnesses testified that the review was not a legal analysis, *see, e.g.*, S. Schley Dep., Dkt 08-03, 76:20-77:8 (March 24, 2011), (no one raised a legal issue with respect to the report); B. Maher Dep. 08-03, 206:11-207:3 (April 6, 2011) (Prior to 2007, it did not cross Maher's mind to seek counsel); R. Mosca Dep. 08-03, 86:9-86:12 (Mar. 14, 2011) (no discussion of suing the Port Authority).

**PANYNJ Statement 17:** REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

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

**Maher Response 17:**

Admitted.

**PANYNJ Statement 18:** REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

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

**Maher Response 18:**

Admitted.

PANYNJ Statement 19: REASON FOR STRIKING STATEMENT: Although Maher had sufficient information to perform the analysis on October 1, 2000, it did not perform the analysis on that date. The fact that it performed the analysis after October 1, 2000, and the results of the analysis are not material to the accrual of its claim.

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

Maher Response 19:

Admitted in part and denied in part. While Maher admits that the review identifies some “infrastructure work” and guarantees, Maher denies PANYNJ’s characterization of the summary listing of bullets in the review as an analysis or differential comparison. *See id.*

PANYNJ Statement 21: REASON FOR STRIKING STATEMENT: On October 1, 2000, Maher did not have knowledge of PANYNJ’s enforcement or non-enforcement of lease clauses against APM.

In Maher’s Opposition to the Motion for Summary Judgment, Maher alleges that “The Port Guarantee did not in fact ‘commit[] the Maersk shipping lines to continue using the Port even if volumes declined in the future’ as PANYNJ claimed... [PORTION REDACTED BY THE PARTIES AS CONFIDENTIAL]

Maher Response 21:

Maher admits that the quoted excerpt is contained in Maher’s Reply in Opposition to Respondent’s Motion for Summary Judgment. Ex. F at 3-4. PANYNJ’s failure to enforce the cargo commitment in APM’s Port Guarantee contradicts PANYNJ’s sworn and verified responses that the Port Guarantee is a unique justification for charging Maher more than APM. *See* PANYNJ’s Response to Maher’s First Set of Interrogatories to PANYNJ, Request No. 18, and No. 1, 10-11 (quoting PANYNJ’s interrogatory response, sworn and verified by Port Commerce director Richard Larrabee on August 29, 2008, that “the Maersk lease provided for a Port Guarantee through which APMT (and Maersk, Inc.) *guaranteed that a certain volume of Maersk containers would go through the Port . . . [it] was an important term that neither Maher nor any other port tenant could provide . . . [it] committed the Maserk’s shipping lines to continue using the port even if volumes declined in the future. . . . [and] APMT’s parent company, Maersk, Inc. executed a guarantee of the entire lease (not just the port guarantee) . . . In short, the APMT lease assured the port authority that . . . Maersk, Inc.’s new mega-ships would continue to come through the port.”*) (emphasis added).

PANYNJ Statement 24: [STRICKEN FOR CONTAINING MIXED QUESTIONS OF FACT AND LAW AND ARGUMENT.]

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

Maher Response 24:

Denied. Other than knowledge of the facial difference in the leases, which Maher has not contested, Maher denies that it (i) knew or (ii) should have known that it had a case against PANYNJ more than three years before filing the Complaint, and Maher denies that it (iii) failed to assert its Shipping Act claims until years after the Statute of Limitations had run.

Maher did not know of a claim. *See* B. Maher Dep., Dkt. 08-03, 16:7-16:13 (April 6, 2011) (Maher did not know of, or consider, any claim against PANYNJ concerning the leases before 2007); *id.* at 206:18-207:3 (Apr. 6, 2011) (“if I had thought that there was [a] violation of the Shipping Act, I would have raised it then.”); S. Schley Dep., Dkt. 08-03, 75:20-77:8 (Mar. 24, 2011) (no knowledge of any claim concerning rates before 2007); R. Mosca, Dep., Dkt. 08-03, 86:9-17 (March 14, 2011) (no discussion of ever suing PANYNJ on account of the lease differences).

*See* Maher’s Response to Port Authority’s First Set of Interrogatories to Maher at Interrogatory No. 4 at 8. (Maher did not begin to learn that the lease differences were unduly preferential or prejudicial until “in the summer of 2007 [when] PANYNJ Deputy General Counsel Christopher Hartwyck asked Maher’s General Counsel Scott Schley for a release from Maher’s rent disparity claim which Maher declined to give.”); *see also*, S. Schley Dep., Dkt. 08-03, 75:17-75:19 (Mar. 24, 2011) (up to that point, Maher had “no reason to doubt what the Port Authority had indicated to us back in ‘99 until 2007” regarding conversations with Lillian Borrone concerning the Port Guarantee justification for the rent difference.).

[PORTION REDACTED BY THE PARTIES AS CONFIDENTIAL]

*See also* M. Oppenheimer Dep., Dkt. 07-01, 52:4-52:21 (May 20, 2008) (Maher learned for the first time on May 20, 2008 that APM *does not control and does not direct* carrier cargo, nor does the guarantor of the Port Guarantee, Maersk, Inc.:

Well, the port guaranty is for cargo for Maersk -- that Maersk, Inc., represents. Q Okay. So how does APM Terminals ensure that it satisfies the

requirement in Section 42 with respect to a port guaranty? A APM Terminals, how do they . . . They have the liability for the guaranties. But how they insure it, they do not have control of the cargo. Q Okay. So how -- how do they make sure that Maersk, the ocean carrier, provides the requisite number of containers per year that is provided for in this port guaranty? A I don't think there is. Q Okay. So is there a contract? A Is there a contract with volume commitment from ... No.).

*See, e.g., id.* at 53:8-54:1 (The only contract APM has with respect to carrier cargo is a marine terminal services agreement to unload cargo, but unlike Maher's marine terminal services contract with carriers that contain volume guarantees, neither APM nor Maersk, Inc. have any volume commitment for the carriers cargo.). *See also* Shiftan Dep., Dkt. 216:8-216:24 (April 1, 2011) (PANYNJ is plainly treating the Port Guarantee as a special carrier only "rent guarantee" that does not require control, cargo, or delivery of cargo); *see* L. Borrone Dep. 08-03, 99:15-100:21 (Mar. 17, 2011) (originally represented to Maher as justifying the facially-different lease terms, discovery has revealed that PANYNJ applied and continues to apply the "Port Guarantee" to mask *unduly different* terms amounting to a carrier preference not made available to Maher:

"Q. Well, I mean, if the only consequence of not meeting the port guarantee, Ms. Borrone, is that your rent goes up, I don't understand why Maher couldn't pay an increase in rent. A. Because it was structured on the basis of the commitment by Maersk/Sea-Land to bring their own cargo, not somebody else's. Maher didn't have cargo to bring. Maher would not and could not commit its carriers who it was servicing to a port guarantee. Q. But Maher could commit to pay higher rent if it didn't meet the commitment, couldn't it, and that's all APM has done. A. But that wasn't what Maher negotiated with us.").