

FEDERAL MARITIME COMMISSION

DOCKET NO. 08-03 and DOCKET NO. 07-01

MAHER TERMINALS, LLC

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

INITIAL DECISION¹

I. INTRODUCTION

A. Overview and Summary of Decision

Complainant Maher Terminals, LLC (“Maher”) filed a complaint against respondent The Port Authority of New York and New Jersey (“Port Authority,” “PA,” or “PANYNJ”) alleging violations of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. § 40101 et seq.² Maher alleges that PANYNJ provided an unreasonable preference to non-party APM Terminals North America, Inc. (“APM,” “APMT,” or “Maersk-APM”), or imposed an unreasonable prejudice on Maher. 46 U.S.C. § 41106(2). Maher further alleges that PANYNJ failed to establish, observe, and enforce just and reasonable regulations and practices and that PANYNJ unreasonably refused to deal, in violation of the Shipping Act. 46 U.S.C. §§ 41106(3), 41102(c). Additional issues addressed due to a consolidated proceeding include whether PANYNJ operated contrary to a Federal Maritime Commission (“FMC”) filed agreement.

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

² 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. 109-70, at 2 (2005).

This proceeding involves two leases for land and facilities at Port Elizabeth, New Jersey, for use as marine terminals. Complainant Maher signed Lease EP-249 with PANYNJ dated October 1, 2000, filed with the Commission as FMC Agreement No. 201131 on March 8, 2002. Non-party Maersk-APM signed Lease EP-248 with PANYNJ dated January 6, 2000, filed with the Commission as FMC Agreement No. 201106 on August 2, 2000.

This proceeding involves three entities: the landlord, respondent PANYNJ, and two tenants, complainant Maher and non-party Maersk-APM. PANYNJ, Maher, and Maersk-APM are all marine terminal operators within the meaning of the Shipping Act of 1984 and Maersk-APM is also an ocean common carrier. 46 U.S.C. § 40102(14).

Respondent PANYNJ was created by compact between the states of New York and New Jersey and PANYNJ's twelve-member Board of Commissioners has an equal number of members appointed by the Governors of each state. F. 7, 11.³ PANYNJ owns, operates, and leases marine terminal facilities in the New York/New Jersey area. F. 9-10. PANYNJ is the third largest seaport in North America and the largest maritime cargo center on the East Coast. F. 9.

Complainant Maher has been a tenant of PANYNJ since 1948, when PANYNJ assumed responsibility for the operation of Port Newark. F. 3. Maher has the largest marine terminal in Port Elizabeth with over 445 acres. F. 4. Maher was a closely-held, family company until 2007, when it was purchased by Deutsche Bank. F. 5-6.

Non-party Maersk-APM has been a tenant of PANYNJ for over forty years and has the second largest marine terminal in Port Elizabeth with approximately 350 acres. F. 15. In 1999, Maersk Line, the world's largest ocean carrier, and Sea-Land Service Inc. ("Sea-Land"), the largest ocean carrier in the United States, consolidated their terminal operations. F. 16. Later in 1999, the A.P. Møller-Maersk Group acquired the international container business of Sea-Land. F. 17. It was in part the consolidation of the Sea-Land and Maersk terminals that resulted in the leases at issue, which were signed in 2000. As of January 6, 2000, Maersk-APM was owned and controlled by Maersk, Inc. F. 18. Maersk, Inc., was the exclusive U.S. agent of Aktieselskabet Dampskibsselskabet Svendborg and Dampskibsselskabet af 1912, Aktieselskab (commonly known as "A.P. Møller-Maersk A/S"). F. 20. Maersk, APM, and Sea-Land are referred to collectively as Maersk-APM.

In 2007, Maersk-APM filed the complaint in Docket 07-01 against PANYNJ alleging that Maersk-APM did not receive an additional portion of marine terminal property by the date on which Lease EP-248 required PANYNJ to provide it, that the delay caused harm to Maersk-APM and showed a preference for Maher. PANYNJ filed a third-party complaint against Maher and Maher filed a counter-complaint against PANYNJ. When Maersk-APM and PANYNJ settled, the remaining counter-complaint filed by Maher against PANYNJ was consolidated with this

³ Citations to specific numbered findings of fact in this initial decision are designated by "F."

proceeding. *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Apr. 1, 2009) (Order Denying Exceptions and Petition for Stay).

In 2008, Maher's new owners filed the complaint in Docket 08-03 against PANYNJ alleging that through the lease terms in EP-248 and EP-249 and PANYNJ's actions pursuant to the leases, PANYNJ discriminated against Maher and in favor of Maersk-APM and committed other violations of the Shipping Act. Docket 08-03 has been actively litigated since then.

Maher alleges that Maersk-APM Lease EP-248 and Maher Lease EP-249 differ on several provisions, including the basic annual rental rate, investment requirements, throughput requirements, first point of rest requirement for automobiles, and the security deposit requirement. Maher alleges that these differences discriminate against Maher, a terminal operator, in favor of Maersk-APM, a terminal operator and ocean carrier, in violation of the Shipping Act. Maher also alleges a failure to establish, observe, and enforce just and reasonable practices and an unreasonable refusal to deal. PANYNJ denies violating the Shipping Act and contends that the lease differences are justified.

As discussed more fully below, the evidence does not demonstrate a violation of the Shipping Act. These complex thirty-year maritime leases, both over one hundred pages plus schedules and exhibits, took years of negotiation between sophisticated and established entities. The evidence shows that there are differences in the leases, for example, Maher was required to post a security deposit, while Maersk-APM was not. More significantly, Maersk-APM's initial annual base rent was \$19,000 per acre while Maher's annual base rent started at \$39,750 per acre with a two percent annual escalator. However, PANYNJ negotiated leases with both Maher and Maersk-APM based upon the particular facts and circumstances presented. For example, PANYNJ relied upon an evaluation of relative credit worthiness and corporate guarantees in determining the security deposit requirement. Moreover, the rent discount was required to retain Maersk-APM as an ocean common carrier servicing the port and even Maher, at the time, urged the Governor of New Jersey "to do all that you can to prevent" Maersk-APM from leaving the port. No similar risk was presented by Maher. Given the particular situation facing PANYNJ, the differences in the leases are justified. Complainant has not met its burden to demonstrate Shipping Act violations, as explained below.

Prior to addressing specific findings of fact, analysis, and the Order, a summary of the procedural background, pending motions, and evidence is provided.

B. Procedural Background

1. Docket 07-01

On December 29, 2006, Maersk-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 Maersk-APM pursuant to Lease EP-248. *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Jan. 9, 2007) (Notice of Filing of Complaint and Assignment). Maersk-APM asserted that it did not receive an additional portion of marine terminal property, the Added Premises, by the date

on which Maersk-APM Lease EP-248 required PANYNJ to provide it. Maersk-APM further alleged that the delay caused harm to Maersk-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 Maersk-APM Lease EP-248.

Maher occupied the Added Premises and other PANYNJ property before and at the time PANYNJ and Maersk-APM signed Lease EP-248. PANYNJ and Maher subsequently signed Maher Lease EP-249 pursuant to which Maher continued to occupy the Added Premises, but the lease contained provisions that required Maher to surrender the Added Premises at a future date. This surrender would permit PANYNJ to lease the Added Premises to Maersk-APM pursuant to provisions in Maersk-APM Lease EP-248.

PANYNJ filed a third-party complaint against Maher in Docket 07-01 alleging that Maher failed to surrender the Added Premises to PANYNJ as required by Maher 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 Maher Lease EP-249, and failed to make specified improvements to the other areas of the premises that PANYNJ was required to make before PANYNJ could require Maher to surrender the Added Premises.

Maersk-APM and PANYNJ eventually signed a proposed Settlement Agreement and a Third Supplemental Agreement to Maersk-APM Lease EP-248 resolving their claims in Docket 07-01 and other matters related to Maersk-APM Lease EP-248. In addition to resolving claims between Maersk-APM and PANYNJ, the Settlement Agreement provided that PANYNJ would dismiss its third-party complaint against Maher in Docket 07-01 and a related proceeding against Maher in New Jersey state court. Maher was not involved in the settlement discussions and did not sign the Settlement Agreement.

Maersk-APM and PANYNJ filed a motion with the Commission 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. 46 C.F.R. § 502.227. 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 Docket 07-01 with this proceeding. *Id.*

2. Docket 08-03

On June 3, 2008, before APM and PANYNJ settled their claims in Docket 07-01, Maher filed its complaint in this proceeding. In paragraph IV of its complaint, 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.

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).

Maher alleges it has "sustained and continues to sustain injuries and damages . . . amounting to a sum of millions of dollars." Complaint 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. Complaint at 6.

3. Summary of proceeding

After filing the proceeding, the parties engaged in extensive discovery. On February 28, 2011, PANYNJ filed a motion for summary judgment on the portions of the complaint based on unreasonable discrimination in lease terms, on the ground that all such claims are barred by the Shipping Act's three-year statute of limitations.

On May 16, 2011, an Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-term Discrimination Claims was issued. On June 9, 2011, a Memorandum Regarding Stay Pending Appeal was issued, finding that the

proceeding would not be stayed while the Commission reviewed the May 16, 2011, Summary Judgment Order.

Maher filed its initial brief and proposed findings of fact on October 11, 2011. PANYNJ filed its response on November 11, 2011. Maher filed its reply on December 9, 2011. A memorandum and order on second set of discovery motions, issued January 18, 2012, permitted additional discovery between the parties. A March 8, 2012, order scheduled supplemental briefing. Maher filed its supplemental brief on August 6, 2012. PANYNJ filed its supplemental brief on August 7, 2012. Maher filed its supplemental reply brief on August 21, 2012. PANYNJ filed its supplemental reply brief on August 22, 2012. On October 24, 2012, the proceeding was reassigned to the undersigned Administrative Law Judge.

On January 31, 2013, the Commission issued an Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment which granted PANYNJ's motion for summary judgment, finding that Maher's claim for reparations based on unreasonable discrimination in lease terms for violations of the Shipping Act is barred by the Act's statute of limitations, and denied PANYNJ's motion that Maher's claim for a cease and desist order is barred by any statute of limitations. Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment at 18.

On February 1, 2013, a Scheduling Order was issued for second supplemental briefs regarding the impact of the January 31, 2013, Commission's Order. Maher filed its second supplemental brief on February 22, 2013; PANYNJ filed its response on March 18, 2013; and Maher filed its reply on April 1, 2013.

On February 11, 2013, Maher filed a petition for review of the Commission's January 31, 2013, Order with the U.S. Court of Appeals for the D.C. Circuit. On March 4, 2013, Maher filed with the Commission a petition for reconsideration of the Commission's January 31, 2013, Order. On June 18, 2013, the D.C. Circuit issued an opinion granting the motions to dismiss filed by the Commission and PANYNJ, finding that the Commission's Order was not final and Maher's request for agency reconsideration rendered its petition for review in the D.C. Circuit incurably premature. The D.C. Circuit issued its mandate on August 14, 2013.

On February 11, 2014, the Commission issued a Memorandum Opinion and Order on Petition for Reconsideration rejecting Maher's Petition for Reconsideration. The case is now ripe for decision. Pending motions and evidentiary issues will be addressed prior to the findings of facts and conclusions of law.

C. Pending Motions

The parties filed a large number of pre-trial and discovery motions, in addition to the two motions discussed below. In the event that any other motions are currently pending, they are hereby **DISMISSED AS MOOT**.

1. PANYNJ's Motion to Strike Maher's Reply Brief

On January 10, 2012, PANYNJ filed a motion seeking to strike Maher's reply brief and responses to PANYNJ's proposed findings of fact. PANYNJ contends that the reply brief and responses must be stricken because Maher flagrantly violated the page limitations for the sole purpose of loading its papers with improper and abusive responses to PANYNJ's responses and that if Maher's reply brief and responses are not stricken, PANYNJ should be permitted to file responses to address and refute Maher's abusive and prejudicial submissions. Motion to Strike at 2-8.

On January 24, 2012, Maher filed its reply in opposition to Respondent's motion to strike Maher's filings. Maher asserts that PANYNJ misconstrues the page expansion order; PANYNJ fails to establish any prejudice; and PANYNJ's motion is an unauthorized sur-reply that does not justify the relief sought. Opposition to Motion to Strike at 9-25.

The parties were provided generous page limitations of one hundred twenty pages for findings of facts and one hundred pages for opening briefs. Order Granting in Part and Denying in Part Motion for Expansion of Pages for Proposed Findings of Fact and Brief (Sept. 30, 2011). Pursuant to Commission Rule 221(f), briefs are generally limited to eighty pages.

Maher's responses to PANYNJ's proposed findings of fact were 343 pages, and excluding its recitation of PANYNJ's proposed findings, was approximately 270 pages. Maher's reply brief was one hundred pages. In comparison, PANYNJ's response to Maher's proposed findings of facts was 174 pages and it was not authorized to file a reply brief. Both parties included legal arguments in their proposed findings of fact.

While the filings clearly exceed the page limitations, given the liberal admissibility standards in administrative hearings, at this stage of the proceeding, they will be permitted. In the future, however, failure to abide by page limitations may result in sanctions. Accordingly, PANYNJ's motion to strike Maher's reply brief and responses is hereby **DENIED**.

2. Maher's Motion to Exclude the Opinion of Daniel Fischel

On January 18, 2012, Maher filed a motion seeking to exclude a supplemental report and testimony of PA's expert, Professor Daniel Fischel. Maher contends that the opinions should be excluded because they were offered in violation of the scheduling order and because they are unreliable. Motion to Exclude at 2-17.

On February 1, 2012, PANYNJ filed its opposition to the motion to exclude. PANYNJ asserts that the supplemental report was timely served following and in response to the explanation of Maher's expert, Dr. William Kerr, of his unclear rebuttal exhibit 8; the supplemental report is reliable; and Professor Fischel is qualified. Opposition Motion to Exclude at 9-15.

PANYNJ asserts that the Fischel supplemental report was filed three business days after the deposition of Maher's expert, Dr. Kerr, and was served early in the morning the day before Professor Fischel's testimony was scheduled.

The supplemental report will not be excluded on the basis of when it was filed. It was a one-page report on which Maher had an opportunity to examine the expert witness. In addition, it will not be excluded on the basis of lack of qualification or being unreliable. However, Maher's arguments will be considered in determining the weight to be given to the supplemental exhibit and the related testimony. Accordingly, Maher's motion to exclude Professor Fischel's supplemental report and related opinions is hereby **DENIED**.

D. Evidence

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, testimony, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

The evidentiary record in this proceeding contains thousands of pages and is needlessly long because many of the exhibits were submitted by both parties. Some documents submitted are barely readable, for example, a map of the port at App. 1D-1913. In addition, Maher submitted a supplemental appendix with its reply brief. This fifteen volume supplemental appendix includes three volumes of documents which lack pagination, so that it is impossible to identify the specific page cited. In the future, only one readable, paginated copy of relevant exhibits should be submitted.⁴

⁴ Maher's exhibits were generally labeled App. with a number and letter (i.e.: App. 5A). The Port Authority's exhibits were generally labeled Appx. with a roman numeral (i.e.: Appx. V). The exhibits Maher filed with its reply brief are labeled as S. App. Maher's proposed findings of fact are referred to as MFOF and PANYNJ's proposed findings of fact are referred to as PAFOF.

The parties provided confidential and public versions of their briefs, proposed findings, and responses thereto. Material marked confidential has been considered for confidential treatment pursuant Commission Rule 502.201(j), which permits protection of a trade secret or other confidential research, development, or commercial information. 46 C.F.R. § 502.201(j)(1)(vii). For example, the parties requested confidential protection for portions of the 2008 Empire Report which did not qualify for confidential treatment as they are six-year old records which discuss fourteen-year old leases. *See DNB Exports LLC v. Barsan Global Lojistik Ve Gumruk Musavirligi A.S.*, FMC No. 11-07, Order at 1-5 (ALJ Jan. 24, 2014) (Order on Motions for Confidential Treatment of Merits Briefs and Materials Filed with Merits Briefs) (ordinary business records more than three years old not entitled to protection under Commission Rule 201). Information included in this decision was found not to meet the criteria for confidential treatment under Commission rules and therefore the request for confidential treatment is hereby **DENIED**. The Office of the Secretary will not, however, post this decision on the Commission's website until May 5, 2014.

Part two provides specific findings of fact. Part three provides analysis and conclusions of law which discuss preliminary issues and legal analysis. Part four provides the Order.

II. FINDINGS OF FACT

A. Relevant Entities

1. Maher

1. Complainant Maher is a limited liability company organized under the laws of the State of Delaware. App. 3A-122.
2. Maher is a marine terminal operator with offices at 1210 Corbin Street, Elizabeth, New Jersey, that operates marine container terminal facilities at Elizabeth, NJ. App. 3A-122.
3. Maher has been a tenant of PANYNJ since 1948. App. 1C-1158 (“Maher . . . has maintained an operating presence at Port Newark/Elizabeth since 1948, when PANYNJ assumed responsibility for the operation of Port Newark.”); Appx. I-2387.
4. Maher has the largest marine terminal in the Port Newark/Elizabeth with approximately 445 acres. Appx I-2387 to 2400.
5. In 2000, Maher was a closely-held, family-owned company, with Brian Maher as CEO and his brother Basil Maher as COO. Appx. III-1016; S. App. 2 (Basil Maher at deposition pages 15-16 in 08-03 testimony binder 2 of 2).
6. In 2007, Deutsche Bank purchased Maher. Appx. I-1691 to 1692.

2. PANYNJ

7. Respondent PANYNJ is a body corporate and politic created by compact between the states of New York and New Jersey. App. 3A-58; Appx. II-346.
8. PANYNJ is a marine terminal operator with offices at 225 Park Avenue South, New York, NY. App. 3A-58.
9. PANYNJ owns and operates marine terminal facilities and is engaged in the business of furnishing marine terminals to users of marine terminal services in the New York/New Jersey area, the third largest seaport in North America and the largest maritime cargo center on the East Coast. Appx. I-2336.
10. PANYNJ leases marine terminals at the Port and enters into leases with Port tenants. Appx. I-2374 to 2381; Appx. I-2387 to 2405 (including facility maps and information).
11. PANYNJ has a twelve-member Board of Commissioners, with an equal number of members appointed by the Governors of New York and New Jersey. Appx. I-2497 to 2503; Appx. II-346.
12. From 1988 to 2000, Lillian Borrone was the Director of the Port Commerce Department at PANYNJ and was a primary negotiator of the leases at issue. Appx. II-129, 133. Ms. Borrone subsequently served as Assistant Executive Director of the port and in 2006 joined Maher's Board of Directors. Appx. II-129 to 130.

3. Maersk-APM

13. Non-party APM Terminals North America, Inc., formerly known as Maersk Container Service Company, Inc., and Maersk Sea-Land ("Maersk-APM") is organized under the laws of the State of Delaware. App. 3A-1.
14. Maersk-APM is a marine terminal operator with offices at 6000 Carnegie Boulevard, Charlotte, North Carolina, that operates marine terminal facilities throughout the United States, including at Elizabeth, NJ. App. 3A-1.
15. Maersk-APM has been a tenant of PANYNJ for over forty years and is the second largest marine terminal in Port Newark/Elizabeth with approximately 350 acres. Appx I-2387; Appx, 2389.
16. In 1999, Maersk-APM affiliate Maersk Line, the world's largest ocean carrier, and Sea-Land, the largest ocean carrier in the United States, consolidated their terminal operations. Appx. II-168.

17. Later in 1999, the A.P. Møller-Maersk Group acquired the international container business of Sea-Land Service Inc. Appx. II-113; Appx. II-152; Maher response to PAFOF number 7.2.
18. As of January 6, 2000, Maersk was owned and controlled by Maersk, Inc., a New York corporation with offices at Giralda Farms, Madison Avenue, Madison, NJ. App. 5A-261, 5A-358 to 359.
19. As of January 6, 2000, Maersk, Inc. was an operator of marine container terminals in the United States, including in Elizabeth, NJ. App. 5A-358 to 359; App. 1D-1883.
20. Maersk, Inc. was controlled and majority owned by, and was the exclusive U.S. agent of, Aktieselskabet Dampskibsselskabet Svendborg and Dampskibsselskabet af 1912, Aktieselskab (commonly known as “A.P. Møller-Maersk A/S” and referred to in PANYNJ leases as the “Shipping Companies”). Appx. V-356 to 359; App. 5A-358 to 359.
21. A.P. Møller-Maersk A/S is a worldwide conglomerate operating in 130 countries and employing 108,000 employees. App. 1D-1885.
22. A.P. Møller-Maersk A/S operates a “worldwide waterborne ocean container shipping business” and owns the shipping businesses Maersk Line and Safmarine. App. 5A-346; 5A-358 to 361; App. 1D-1882; App. 1D-1842; App. 2B-422; App. 2B-425; App. 2B-404.
23. As of January 6, 2000, Maersk, Inc. was engaged as the exclusive United States agent for the Shipping Companies. App. 5A-358 to 359; App. 2B-422.
24. Maersk, Inc. does not perform stevedoring operations or marine terminal operations in the Port of New York and New Jersey. App. 2B-422.
25. Maersk-APM provides marine terminal and stevedoring services for Maersk Line as well as other companies. App. 2B-422.
26. Maersk-APM “focuses its primary operations on its own shipping business first, its vessel sharing partners second, and, lastly, third party business.” Appx. I-1614; Appx. I-2895.

B. Relevant Leases

1. PANYNJ'S Current Leases with Maersk-APM and Maher

27. PANYNJ and Maersk-APM are parties to a lease agreement for a 350-acre marine container terminal in Elizabeth, NJ, known as EP-248, filed with the Federal Maritime Commission and designated FMC Agreement No. 201106. App. 5A-257; App. 3A-3.

28. PANYNJ and Maher are parties to a lease agreement, signed on October 1, 2000, for a 445-acre marine container terminal in Elizabeth, NJ, known as EP-249, filed with the FMC and designated FMC Agreement No. 201131. App. 5A-1; App. 3A-125.
29. PANYNJ and Maher are parties to a lease agreement for a marine container terminal office building, located adjacent to its container terminal, at 1210 Corbin Street, Elizabeth, NJ, known as EP-250. App. 5A-431.
30. PANYNJ and Maher are parties to a lease agreement for a 30-acre container chassis storage yard in the vicinity of its container terminal in Elizabeth, NJ, known as EP-251. App. 5B-389.
31. Maher is a party to a sublease of PANYNJ property for a 35-acre off-terminal empty container storage depot. App. 5B-561; App. 1D-1831.
32. Maher is a party to a sublease of a 7-acre overflow storage depot in the vicinity of its container terminal in Elizabeth, NJ. App. 5B-577.

2. PANYNJ'S Prior Leases with Maersk-APM and Maher

a. Maersk-APM

33. Prior to entering into lease EP-248, the predecessors to Maersk-APM and its affiliates and/or successors and assigns, were parties to three container terminal leases with PANYNJ in New Jersey: EP-76 (the Sea-Land terminal lease in Elizabeth, NJ), App. 5C-662; L-NS-850 (the Maersk terminal lease in Port Newark, NJ), App. 5C-844; and L-NS-693 (the Universal terminal lease in Port Newark, NJ), App. 5C-612; App. 2A-117; App. 1D-1913 (map of NJMT showing prior leases).
34. The Universal terminal lease, L-NS-693, dated May 9, 1969, as amended, was to expire on October 31, 1999. L-NS-693 Supp. #11, App. 5C-612; App. 1C-1124.
35. The Maersk terminal lease, L-NS-850, dated July 1, 1974, as amended, was to expire on November 30, 2000. 08PA00036302, App. 5C-844.
36. The Sea-Land Service Inc. ("Sea-Land") terminal lease, EP-76, dated March 8, 1971, as amended, was to expire on February 28, 1999. 08PA00020845, App. 5C-717 (referencing February 28, 1999, termination date); App. 1C-1105; App. 1C-1009; App. 1C-1124.
37. Maersk surrendered the Maersk terminal lease (L-NS-850) prior to the end of its term on or about April 1, 2000. App. 1C-1131; App. 1C-1077; App. 1C-1025; App. 1C-1017.

38. Sea-Land remained in possession of the Sea-Land terminal, Lease EP-76, after the February 1999 lease expiration until the commencement of the Maersk-APM lease, EP-248, on January 6, 2000. App. 1C-1124; App. 1C-1077.
39. In June 2000, the PANYNJ Board authorized extension of the Sea-Land lease applying \$19,000 per acre rental rate retroactively to March 1, 1999. App. 1C-1125; App. 1C-1077; App. 1C-1163; App. 1C-1019.

b. Maher

40. Prior to entering into lease EP-249, Maher was a party to two container terminal leases in Elizabeth, NJ, known as EP-148 (the Fleet Street terminal lease) and EP-78 (the Tripoli Street terminal lease). 08PA00070309, App. 5C-769; 08PA01724866, App. 5C-895; App. 1D-1913 (map of NJMT showing prior leases).
41. The Fleet Street terminal lease, EP-148, was dated February 15, 1984, with a term ending on December 31, 2011, and annual rent of \$47,179 per acre. App. 5C-942; Appx. II-237.
42. EP-148 was replaced as of October 1, 2000, by EP-249. App. 5A-1; App. 1B-942; App. 1C-1077; App. 2B-346 to 347; App. 2B-410.
43. The Tripoli Street terminal lease, EP-78, was dated April 8, 1971, with a term ending on September 30, 2000. EP-78 Supp. # 20, App. 5C-812.
44. The term of EP-78 was extended by PANYNJ on September 30, 2000, to October 31, 2003. App. 5C-824; App. 1C-1148.
45. Supplement 36 to EP-78 provided PANYNJ the right to terminate the lease upon 30-days' notice. App. 5C-824; App. 1C-1155.
46. Supplement 36 to EP-78 increased the rent Maher paid PANYNJ to \$29,430 per acre with a 10% per year rent escalator. App. 1C-1155.
47. PANYNJ sought a further extension of EP-78 in 2003 through September 30, 2006, and a further increase in rent to \$39,171.36 per acre with a 10% per year escalator, which was approved by PANYNJ in Supplement 37 on October 14, 2003, and transmitted to Maher in January 2004. App. 1C-1367; App. 1C-1376; App. 5C-834.
48. Maher continued its tenancy and possession of acreage leased under EP-78 until approximately December 15, 2005. App. 1C-1449; App. 1C-1450; App. 3A-148.

3. Background

a. Lease Negotiations

49. In the 1990s, PANYNJ was a patchwork of terminals of varying sizes and configurations, run by various terminal operators. Maher and Sea-Land occupied terminals at Port Elizabeth, and Maersk Container Services Company, Inc., occupied a terminal at Port Newark. Appx. I-99.
50. Most of PANYNJ's container terminal leases in Elizabeth and Newark, NJ (except for Maher's Fleet Street terminal) were set to expire in 1999 and 2000. Appx. I-258 at 261; Appx. I-199; Appx. II-350.
51. PANYNJ used this opportunity to devise a port modernization plan and to develop a container terminal pricing model that could be used as the starting point for the container terminal lease negotiations. Appx. II-149.
52. PANYNJ planned to negotiate lease agreements with Maher and Hanjin Shipping Company, Ltd. ("Hanjin"), then the world's fifth largest ocean carrier, before going to Maersk and Sea-Land with higher rates. App. 1 B-696 ("The goal was to get Hanjin to agree to rental rates which, while unprecedented by East Coast standards, were acceptable given its recent West Coast lease experience and its desire to be here. The strategy was that once Hanjin agreed, Maher Terminals could be induced to agree to the same rates and then, with more than half of the terminal acreage subscribed, Sea-Land, and ultimately Maersk, could be approached."); App. 2B-568 ("[O]nce we had one steamship company signed up for these new high rates, the others would be forced to sign up as well."); Appx. I-234 to 237; Appx. II-236.
53. In 1995, PANYNJ based its planned pricing model on throughput-based rental rates to ensure that each terminal operator was using its terminal in the most efficient manner. The per-container charge would decrease as a terminal operator's throughput increased. Appx. II-149; Appx. I-73 to 79.
54. On July 22, 1997, PANYNJ provided Maher with a revised outline of proposed terms that included a guaranteed rent of \$16,706,250 for a minimum annual volume of 267,300 units for the Tripoli Street Terminal, which translated to approximately \$68,750 per acre. Appx. I-201 to 204; Appx. II-157; App. I-3013 to 3014.
55. In July 22, 1997, correspondence to Maher, PANYNJ stated:

An issue which we have discussed with both you and with Hanjin, which is not addressed in the attached Outline of Proposed Terms, is the question of a "level playing field." It is our intention to charge the same lease rates to all

terminal operators at the New Jersey Marine Terminal complex, subject to a recognition, as we have discussed, that the new Hanjin terminal is disadvantaged, because of its size and the inability to increase the size, absent an agreement with your organization. This gives Hanjin a very slight reduction in the per unit charge in all tiers. The pricing approach has been discussed at the highest levels of Port Authority management, which is in agreement. Notwithstanding this, the Port Authority cannot represent to Maher that this approach will ultimately be followed, and no language to that effect will be included in a lease.

Appx. I-201.

56. PANYNJ met with Sea-Land on September 4, 1997, to kick off discussions about a new lease and Sea-Land's plans for the future of its operations at the Port. Appx. I-219 to 224.
57. PANYNJ explained that it planned to make substantial investments to upgrade the terminals, but that PANYNJ would need to recapture this investment through "a new commercial structure," a throughput-based lease that would encourage terminal operators to use their terminals more efficiently. Appx. I-219; Appx. I-221; Appx. I-272.
58. Sea-Land asked whether it could forgo any investment in its terminal and just extend its lease for 10 years. Appx. I-219; App. 1A-204.
59. When PANYNJ responded in the negative, Sea-Land stated that it was interested only in a real-estate-based lease, not a throughput-based lease. Appx. I-272 to 273; App. 1A-225.
60. As negotiations continued, PANYNJ learned that Sea-Land was exploring alternative ports, including a site in Rhode Island. Appx. I-272 to 273. Additionally, Sea-Land's Vice President of Labor Relations, David Tolan, made statements to the New York Shippers Association and International Longshoremen's Association that it was prepared to leave unless PANYNJ was willing to revise its proposal. Appx. I-272 to 273.
61. On December 1, 1997, Lillian Borrone met with Brian Maher. Ms. Borrone informed Mr. Maher that Sea-Land did not want a throughput-based rent and that Sea-Land might leave the Port if lease negotiations were not concluded successfully. Appx. I-240; Appx. II-277 to 278.
62. Ms. Borrone also told Brian Maher that "if the Port Authority has to change the format and also the rent levels to maintain Sea-Land and/or Maersk in the Port, they will also have to adjust the Maher lease accordingly." App. 1A-221; Appx. II-277.
63. On March 30, 1998, Sea-Land rejected PANYNJ's March 13 revised proposal, noting that the proposed rates were significantly higher than the rates at all of the competing East Coast

- ports, and adding that although it desired to stay at the Port, if PANYNJ and Sea-Land could not reach agreement on a “much more modest” increase in rent, Sea-Land would “restructure our services to call at one or more alternate East Coast ports.” Appx. I-292 to 297 at 294.
64. On April 30, 1998, Maersk Line and Sea-Land informed PANYNJ that they were issuing a joint request for proposal (“RFP”) to PANYNJ and other East Coast ports that it was considering as alternatives. Appx. I-306 to 307.
 65. On May 13, 1998, Maersk Line and Sea-Land issued their RFP to PANYNJ and six other ports. Appx. I-308; App. 1A-310.
 66. After Maersk issued its RFP, PANYNJ retained Paul Richardson, the former President and CEO of Sea-Land and a port expert, to analyze and assess the benefits to be gained from retaining Maersk and Sea-Land as well as the risk that Maersk and Sea-Land would abandon the Port and the impact on the Port in the event that it did so. Appx. I-373.
 67. Mr. Richardson outlined in detail the impact that the loss of Maersk Line and Sea-Land would have on the Port and the region, as well as the concomitant, equally significant, benefits of retaining them. Appx. I-373 to 411.
 68. Mr. Richardson concluded in his May 26, 1998, report that there was “an extremely high risk of losing all of the Sea-Land/Maersk cargo and up to 55% of the Port of NY & NJ’s (the Port’s) entire containerized cargo base;” the “consequences of such a loss to the competitiveness of the Port and associated regional economic activity would be severe and irrevocable;” and “the potential benefits to be derived from the retention of this business are considerable.” App. I-374.
 69. PANYNJ staff performed their own analyses that estimated a potential 22% to 34% loss of potential container growth over a thirty-year period. App. 1A-433.
 70. PANYNJ “felt very strongly that [it] needed to continue to decrease the cost of operations in the port, particularly the labor costs, and the way to do that was to continue to raise the volume and increase productivity on the cranes and in the way that the terminals were operating in order to generate the largest number of hours possible.” Appx. II-176. Increasing the volume would “bring down the costs per hour or per box and it would put more labor to work.” Appx. II-176.
 71. The senior management of PANYNJ with responsibility for the Port and the negotiations with Maersk, as well as the Board, believed that the threat that Maersk Sea-Land might leave the Port was a real and serious threat. Appx. II-170; Appx. II-397 to 398; Appx. II-358; Appx. II-247.

72. PANYNJ's proposed response to Sea-Land/Maersk's threats to leave were a point of contention. App. 1A-444 to 445; App. 1B-731 to 735; S. App. 2 (Shiftan at deposition pages 218-219 in 08-03 testimony binder 2 of 2).
73. There was a consensus among PANYNJ's senior management and Board that (1) the consequences for the Port and the region would be disastrous if Maersk carried through on its threat to take its business to another port; and (2) PANYNJ could not responsibly take that risk. Appx. I-412 to I-416; Appx. II-244 ("I don't think any of the commissioners or the governor of New York or his staff, or anyone who had an interest in the port generally, doubted for one minute that retaining Maersk in the port was critical to the future of the port and to the economy of the region.").
74. On August 14, 1998, PANYNJ provided its revised and formal response to the RFP. Appx. I-2667 to 2668. PANYNJ proposed a 350-acre terminal encompassing the existing Sea-Land terminal as well as additional adjacent property. Appx. I-2668; *see also* Appx. I-3388.
75. Maersk rejected PANYNJ's August 14 proposal as "unreasonable and non-competitive." Appx. I-972 to 973; Appx. II-181; App. 1A-489.
76. PANYNJ presented a modified proposal to Maersk on September 21, 1998. App. 1B-534; Appx. I-975; App. 1B-731.
77. In December 1998, Maersk selected three finalists in the competition for its business: Baltimore, Halifax, and the Port. Appx. I-1159 to 1161; 1B-731.
78. On February 12, 1999, Lillian Borrone, Chris Ward, and Dennis Lombardi met with Maersk executives. At the meeting, PANYNJ and Maersk discussed what it would take for Maersk to commit to stay in the Port. Appx. I-1064; Appx. I-1069 to 1071; App. 1B-570.
79. Maersk stated that PANYNJ had to reduce Maersk's costs by a total of \$120 million (net present value over 28 years at 9%) in order for Maersk to stay at the Port. Appx. at I-1064. "They clearly told us that if we don't provide a total cost reduction package, the majority of the cargo will go to Baltimore. Some limited select services will continue to call our port through a public stevedore; they would no longer require their own terminal(s)." Appx. I-1064.
80. Based on responses to the RFP, Maersk estimated that it would cost about \$115 to \$120 million more to create a major deepwater port facility at Elizabeth than it would at Baltimore. Appx. I-2679.
81. Ronald Shiftan testified that "it was [his] understanding that unless we found a way to bridge the \$120 million gap, that Maersk would pick up and move to Baltimore." Appx. II-251.

82. Maersk stated that if it was not provided with this \$120 million cost reduction, the majority of its cargo would go to Baltimore. Appx. I-1082 to 1083; Appx. II-183 to 184.
83. In January of 1999, Maersk and Sea-Land sent letters to Governor Whitman and Governor Pataki of New York, informing them that while the Governor of Maryland, members of the Maryland General Assembly, and the Maryland Port Administration supported Maersk's and Sea-Land's needs, PANYNJ was not aggressively working to retain their business. Appx. I-3632 to 3633.
84. Brian Maher, Maher's CEO during the lease negotiations, advocated that everything possible be done to retain Maersk and Sea-Land, in a letter to New Jersey Governor Whitman on January 8, 1999. Appx. I-1043; Appx. II-257.
85. Brian Maher wrote Governor Whitman and acknowledged that "As a result of the bidding process in which they have engaged for the last six months, Sea-Land and Maersk have received proposals from Baltimore and Halifax which would allow them to save hundreds of millions of dollars over the life of the lease." Appx. I-1043.
86. As Brian Maher explained in his letter to Governor Whitman:

You should know that the combined direct payrolls of Sea-Land and Maersk are close to 100 Million Dollars annualized. If they were to leave the Port employment would be reduced by something close to that amount of money. You should also know that they will almost certainly be successful in routing most of their freight through Baltimore or Halifax. Shippers and consignees are port blind assuming that freight costs and transit times are equal. Sea-Land and Maersk are sophisticated, successful steamship operators who have the logistical capability to move cargo through other ports and deliver it in the metropolitan area at the same cost to the shipper and with the same level of service.

If Sea-Land and Maersk do, in fact, move their major operations to Baltimore or some other combination of Baltimore and Halifax, the Port will lose 25-30% of its current volume. Instead of growing at the currently predicted annual rate of 3-5% with the attendant economic benefits to the State and the entire region, the Port will suffer a dramatic decline in volumes which will raise the costs to the remaining business and motivate other major carriers to look for similar alternatives.

Appx. I-1044 to 1055.

87. Brian Maher stated that the “successful conclusion of the leases currently under negotiation for Port Elizabeth will stabilize the Port facilities for the next twenty-five years and thus secure and maximize the significant economic benefits derived from the investments the state and federal government are already making in the channels and the transportation infrastructure.” Appx. I-1045 to 1046.
88. Brian Maher concluded his letter to Governor Whitman by stating that “There is much at stake. To permit two major employers [Maersk and Sea-Land] to leave the state is unthinkable and I urge you to do all that you can to prevent that from occurring.” Appx. I-1046.
89. On May 27, 1999, Lillian Barrone updated the PANYNJ Board on the status of lease negotiations:

In February 1999, at the request of the [PANYNJ] Chairman, staff asked Sea-Land/Maersk what it would take for them to commit to stay. They responded that they would be willing to stay if concessions were made available to them in the net present value (NPV) of \$120 million in rents and free capital. Staff then worked to prepare a refined concept approach that included a reduction in the basic rental from \$36,000 per acre with annual escalation to \$19,000 fixed per acre and \$30 million in free capital. In exchange for these concessions, Port Authority staff developed a set of guarantees which we felt were essential to justify concessions of this magnitude.

App. 1B-731. *See also* section II.B.3.b, *supra*, discussing the Port Guarantee.

90. The PANYNJ staff developed two different proposals to provide the \$120 million NPV concession sought by Sea-Land/Maersk. The first proposal was in February 1999, and offered Sea-Land/Maersk \$90 million in capital funding for improvements to the terminal, as well as the “[e]limination of the escalation component from our basic rent, worth approximately \$26 million”). App. 1B-583; App. 1B-585. The second proposal was later in February 1999, and offered Sea-Land/Maersk \$90 million in rent abatements from PANYNJ’s September 21, 1998, proposal, along with \$30 million in free capital. App. 1B-615; App. 1B-616.
91. Specifically, under PANYNJ’s revised proposal Maersk would receive a fixed base rent of \$19,000 per acre, which constituted approximately \$90 million in savings (calculated at 9% over 30 years). Appx. I-1081. The terminal would be provided “as is,” and Maersk would make a \$200 million capital investment. Appx. I-1081. In addition, Maersk would receive approximately \$30 million in free capital, for a total package of \$120 million. Appx. I-1081. PANYNJ noted as an advantage that it “can argue that the \$19,000 pays for a terminal ‘as is’ and all investment in the terminal is an incremental cost to the tenant.” Appx. I-1081.

92. At the March 12, 1999, meeting between PANYNJ and Sea-Land/Maersk, the “cargo guarantee seemed to be the major issue” which had the potential of being a deal breaker. App. 1B-623.
93. On April 27, 1999, PANYNJ transmitted to Maersk and Sea-Land a draft term sheet reflecting lease terms with the Port “in conjunction with the State of New Jersey’s offer of additional rent credits to be provided on a monthly basis.” Appx. I-2836 to 2837. PANYNJ proposed a \$36,000 per acre base rental that would increase at two percent per year. Appx. I-2840. Under this term sheet, the State of New Jersey would provide rent credits to reduce the rent to \$19,000 per acre. Appx. I-2840 to 2841.
94. Also on April 27, 1999, PANYNJ transmitted a second draft term sheet reflecting lease terms as provided only by PANYNJ, without aid from New Jersey. Appx. I-2847 at I-2848; Appx. II-38. The term sheet proposed a base rent of \$19,000 per acre with no escalation and \$30 million in free capital. Appx. I-2847 at I-2848; Appx. II-38.
95. On or about May 7, 1999, Maersk-APM jointly announced that they had chosen New York based on its September 1998 proposal as enhanced by New Jersey’s offer. Appx. I-1159 to 1162; App. 1B-732; *see also* Appx. I-1156.
96. Around July of 1999, Maersk-APM and Maersk Line abandoned the concept of using PANYNJ as its North East “hub port,” but instead decided that “cargo should continue to be spread over several ports.” App. I-2696 (“During our comprehensive review of the ‘Hub Concept’ (i.e. all volumes in one port), two factors became apparent, which dictated that cargo should continue to spread over several ports. Firstly, a certain level of volume needed to be maintained in New York. The second was the potential for cost savings by combining terminals with SeaLand in New York in any scenario.”); Appx. I-2697 (“while we have not announced a change in our original RFP proposal, our review and analysis has been dedicated to the premise of calling several ports.”). Maersk-APM compared two scenarios: a large combined Maersk-APM terminal in New York or a major combined terminal in Baltimore with a downsized presence in New York. Appx. I-2697.
97. Once Sea-Land and Maersk decided to combine their operations into a single 350-acre terminal located in part on the site of Sea-Land’s Port Elizabeth terminal, there was no room to accommodate both the 445-acre terminal Maher wanted and a separate terminal for Hanjin on the Port Elizabeth peninsula. Appx. I-3688 to 3689.
98. Due to a large volume of inquiries into the availability of the former Maersk/Universal facility, a competitive bidding process was used, and Hanjin was the runner-up to the companies which formed the Port Newark Container Terminal LLC. Appx. I-3688.

99. While the Maersk-APM lease was being finalized, PANYNJ resumed negotiations with Maher and, on May 13, 1999, held a kick-off meeting with Maher to discuss the lease of a reconfigured 445-acre terminal. Appx. I-1145 to 1147.
100. PANYNJ notes from Maher lease negotiations, dated June 2, 1999, indicate that Maher wants to make sure that monies are available for its construction projects; PANYNJ is including an extra 19 acres as the conceptual first point of rest for the major issue of car handling; change of control continues to be one of the most important issues to Maher; and Maher does not want a security deposit and PANYNJ's credit manager is reviewing. Appx. I-1169.

b. Maersk-APM Port Guarantee

101. The port guarantee is a lease provision through which Maersk-APM guaranteed that a certain volume of Maersk-affiliated containers loaded with cargo would go through the Port on an annual basis, regardless of which terminal it comes through. Appx. V-340 to 345; App. 5A-346.
102. The purpose of the port guarantee was to incentivize Maersk Line and Sea-Land to use the Port as a hub and to bring discretionary cargo – cargo that otherwise would have gone to another port – to PANYNJ. Appx. II-139.
103. The Maersk-APM port guarantee requires that a certain number of containers carrying Maersk Line's cargo – not empty containers – be transported to or from the port each year, regardless of the terminal through which they come. Appx. II-139.
104. If the number of loaded Maersk Line and Sea-Land containers fall below the guaranteed levels for any two consecutive years, the base rental rate of \$19,000 per acre increases on a sliding scale. Appx. V-344 to 347.
105. The port guarantee provided for a penalty in the event that Maersk-APM failed to satisfy the guarantee:

In the event that for each of any two consecutive Port Throughput Lease Years the number of [Maersk-affiliated containers] transported to or from the Port shall be less than the number thereof required under the provisions of paragraph (b) of this Section, the basic rental payable by the Lessee under Section 3 hereof shall be increased for the Port Throughput Lease Year next following the second of the aforesaid consecutive Port Throughput Lease Years [in accordance with attached Schedule B].

App. V-346.

106. Robert Boyle, Executive Director of PANYNJ, explained the reason for the port guarantee to the Chairman and Vice-Chairman of PANYNJ in a February 19, 1999 memorandum:

There are two purposes for the guarantee. First, we wish to assure that the carriers do not preclude competition by tying up this terminal for third party business and divert their own business to Baltimore where they may have cheaper labor rates available. Second, we want to assure that we are acquiring cargo they presently ship through other ports on the East Coast in addition to the port's growth cargo.

App. 1B-585; S. App. 1B-654.

107. Ronald Shiftan, the former Deputy Executive Director of PANYNJ, testified that:

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

App. 2B-490.

108. In response to the question, "Why did you have to justify the differences with the port guarantee," Ms. Borrone testified that PANYNJ had two reasons:

When the \$19,000 rate was structured, we had through-put structure below it, which was comparable to the kind of through-put arrangements we were negotiating with Maher, but we had done an assessment of the volume that Maersk was carrying on its vessels -- its own volume and its customers' volumes -- along the East Coast, as well as the West Coast, and we wanted -- truly, if they wanted a hub port, we wanted it to be a hub port.

So we looked at the volume and said that we wanted to assure that we were getting their hub business. We did not want Maersk/Sea-Land bringing containers of those folks who rode on their vessels only, we wanted their own. We didn't want them winding up in Virginia and using that as the hub.

So we said we need a specific guarantee from them to assure that we got a particular percentage of their volume -- and I think it was 70 percent that we were after -- their own boxes that said "Maersk/Sea-Land" on them, not somebody else's.

We felt that was essential to retaining the status as a hub port and also the volume of activity that we needed so that we didn't see a collapse in labor hours, which is – which would have pushed the labor rates up in the port, and that we didn't see a collapse in rates in the other terminals as the new terminal rates were significantly higher than what they would have been in prior years.

So we set that as the first, and then the second was, we acknowledged that we needed to be clear that this guarantee differentiated the terms of the arrangement that we were making with Sea-Land/Maersk in a way that was important to describe.

We said we needed to see this guarantee and we needed parental guarantees that were very clear, as well. So we tied those two things together.

Appx. II-139.

109. Maher could not provide a port guarantee because, as Brian Maher explained, “Maher does not control and did not control cargo and as to what port it would - it would be handled in.” Appx. II-290.

110. Moreover, Brian Maher conceded that it was so obvious that Maher could not provide such a guarantee that it did not even rise to the level of a topic of conversation:

Q. When you discussed with Lillian Borrone the issue of Maersk's port guarantee, did you tell her, in conjunction with those discussions, that you could not commit your customers to any specific volume in the Port of New York?

A. I don't -- I mean, I don't believe we ever had such a conversation. She knew -- she would have known and did know that Maher was not in a position to commit its customers to volume levels in the Port of New York, and so I don't recall such a conversation.

Appx. II-296.

111. Brian Maher was asked about a port guarantee:

Q. Were you ever asked to give a port guarantee?

A. No.

Q. Why not?

...

A. 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.

Appx. II-288 (emphasis added) (objection omitted); Appx. VII-215.

112. Under the port guarantee, the required minimum levels vary over the course of the lease as follows: 365,000 Maersk Line containers during the “First Port Guarantee Period,” defined as beginning the first lease year after the Kill Van Kull and Newark Bay were dredged to a depth of forty-five feet below mean low water, which was 2008; 440,000 Maersk containers during the “Second Port Guarantee Period,” defined as beginning the first lease year after the Kill Van Kull and Newark Bay are dredged to a depth of fifty feet below mean low water; and 515,000 Maersk containers during the “Third Port Guarantee Period,” which will begin on January 1, 2015, regardless of whether the fifty-foot channels have been dredged, and will run through the remainder of Maersk-APM’s lease. Appx. V-345; Appx. V-340 to 341; App. 5A-347; Appx. IV-16.

113. The port guarantee can be summarized as follows:

<i>Period</i>	<i>Port guarantee</i>	<i>Port guarantee per acre</i>
1st Guarantee Period	365,000	1043
2nd Guarantee Period	440,000	1257
3rd Guarantee Period	515,000	1471

App. 5A-347; Appx. IV-16.

114. The chart in the Maersk-APM Expert Report of Fredrick A. Flyer (“Flyer Report”) summarizes the increases in Maersk-APM’s rental rate at various volume levels, and demonstrates the variable nature of its base rent. Appx. IV-263 at IV-276.

115. If Maersk-APM fails to meet the guarantee for two consecutive years, its rent will be increased in the following year by \$1,900 per acre for every 10,000 containers below the guarantee in the first guarantee period, and for every 12,500 containers below the guaranteed levels in the second and third guarantee periods. Appx. IV-276.

116. Maersk-APM has already felt the impact of the port guarantee, having missed its requirements for years 2008 to 2010, causing its rent to increase to \$34,200 per acre in 2010, and \$32,300 per acre in 2011. Appx. I-2659; Appx. V-364.
117. If Maersk-APM were to pull its cargo from the Port entirely, Maersk-APM's rent would increase to \$89,300 per acre (or up to \$98,800 per acre were this to occur during the third guarantee period). Flyer Report, Appx. IV-276.
118. In 2008, 2009, and 2010, Maersk-APM failed to meet the port guarantee's minimum levels, leading to increases in its base rent in 2010 to \$34,200 per acre, and in 2011 to \$32,300 per acre. Appx. I-2659; Appx. V-364.
119. Maher's base rent in 2011 was \$48,455 per acre. App. 4-447; App. 4-132.
120. Maersk Inc., which was Maersk-APM's parent, guaranteed all of Maersk-APM's financial obligations, including its obligations under the port guarantee. Appx. V-381 to 382.

C. Lease Term Comparison

1. Basic Annual Rental Rate

121. Maher's initial base rental rate is \$39,750 per acre with a two percent per year escalator. App. 5A-8 to 9; Kerr Report 32, App. 4 to 13; Fischel Report 17, App. 4-306.
122. By the end of the 30-year lease term, Maher's base per acre rental rate will rise to \$70,590 per acre. App. 4-13.
123. Maher's base rental rate averages \$53,753 per acre over the life of the lease. App. 4-14.
124. Brian Maher testified that Lillian Borrone told Maher that Maher was not going to receive the Sea-Land/Maersk rates for two reasons: "Maersk provided a port guarantee, and that they – Maersk was going to make larger investments in their facility than we were." App. 2B-349 to 350.
125. Former Maher General Counsel Scott Schley testified that PANYNJ told Maher at the September 23, 1999, meeting that Maher was not going to receive the Sea-Land/Maersk lease rates for:

two reasons . . . one was the port – that Maersk was making significantly greater improvements to the facility which would have justified that, and the other reason that they gave was that the port – that Maersk was giving a port guarantee, something that we could not give to – and that because of those reasons, the -our rents would not be exactly the same.

App. 2B-458.

126. Former Maher General Counsel Scott Schley further testified that “it was represented to us at that meeting that when the leases were taken as a whole over a 30-year term, that the total economic impact of the lease between the Maersk lease and Maher were virtually identical. And I think that Lillian said that they were within pennies.” App. 2B-458.

127. In a contemporaneous memorandum, former Maher General Counsel Schley wrote:

[T]he rates were not the same but that our total lease cost and the least [sic] cost to Maersk will be approximately the same, possibly within pennies and no more than a few dollars on a volume basis. She indicates that they have looked at both rental rates, as well as investment requirements. According to Borrone, Maersk has to put up approximately two and one-half times our required investment on their facilities.

App. 1B-926.

128. Former Maher CFO Randall Mosca testified that “Ms. Barrone told us that the leases, in their entirety, were similar, and that they were pennies or dollars apart.” App. 2B-393.

129. Former Maher CFO Randall Mosca further testified:

the reason why Maersk had a lower base rental was because they – there were two reasons: One, they had a larger investment in the terminal that they provided, and two, they were able to generate a port guarantee for volume, which we were unable to do, and, therefore, the Maersk rates were off the table for us.

App. 2B-393.

130. Lillian Borrone confirmed that she told Maher at the September 23, 1999, meeting that the Sea-Land/Maersk rates were “off the table.” App. 2A-10.

131. Brian Maher testified that:

Q. Was it important – was it an important thing to compare your lease terms to the Maersk lease terms?

A. What was important to me at that time was that we had been – we had been prepared to enter into a new agreement in 1997, and it was now 2000. And the port’s business was growing very fast, and we didn’t – we needed to

conclude a lease. And we were not – we were told that we were not going to get the terms that Maersk got, even though we had – even though previously we had been told that the playing field would be level throughout the port.

But after the – after the – the enormous political wrangling and the – that went on with the – with the APM lease, we were told – and it was pretty clear to me on a practical basis, that Maher was not going to achieve the economic package that Maersk and – and APM received, and so I accepted the lease that was given to me on the basis that – that the Maersk Sea-Land APM terms were not available to us.

App. 2B-334; App. 2B-339 (“we were basically told that the lease terms were what were being offered to us, and we needed to accept them”); App. 2B-337; App. 2B-346; App. 2B-386 to 387; App. 2B-393 (“the Maersk rates were off the table for us”).

132. Executive Summaries of the Maher and Maersk/APM lease terms prepared by PANYNJ staff for the PANYNJ Board explained that the negotiated Maher rent is greater than that being offered to Maersk and that the Maersk negotiated rent is lower than the container rental in all similar terminals. App. 1C-1107, 1111; App. 2B-526.
133. The Board was aware of Federal Maritime Commission requirements prohibiting discrimination among terminal operators. App. 1A-461 (PANYNJ staff advised the PANYNJ Board that “Under Federal Maritime Law you cannot discriminate against similar tenants”); App. 2A-53 to 54.
134. In comparison, the Maersk-APM Lease is for \$19,000 per acre. App. 5A-263; App. 4-13.
135. In 2008, 2009, and 2010, Maersk-APM failed to meet the port guarantee’s minimum levels, leading to increases in its base rent in 2010 to \$34,200, and in 2011 to \$32,300. Appx. I-2659; Appx. V-364; Maher response to PAFOF 176 at page 178.

2. Investment Requirements

136. Both Maher and Maersk-APM agreed to perform two classes of work, Class A and Class B, and received free capital and financing from PANYNJ to conduct the work. Compare App. 5A-272 to 229 with App. 5A-20 to 38.
137. Maher’s lease requires Maher to make infrastructure improvements to the terminal. App. 5A-20 to 38; App. 4-17; App. 4-310 to 311.
138. Improvements made to the terminal are paid for by Maher, and certain PANYNJ-approved improvements are reimbursed by PANYNJ and then repaid by Maher through a dedicated monthly rental payment to PANYNJ (“Construction Rent”). App. 5A-20 to 22.

139. Maher's lease specifies that up to \$250 million of approved tenant-financed infrastructure improvements may be reimbursed by PANYNJ, comprised of \$46 million that did not have to be repaid and up to \$204 million in reimbursements for improvements that had to be repaid in Construction Rent. App. 5A-21; App. 4-17; App. 4-308 to 309.
140. Maher had the option of performing Class C work for which it could receive funding from PANYNJ under EP-249. App. 5A-20 to 21.
141. The \$46 million in reimbursable tenant improvements that Maher did not have to repay was credit for investments Maher made in its Tripoli Street terminal. App. 1B-928 (Borrone indicated regarding construction funding that "the approach they would like to present would be as a credit for what we give up at Tripoli Street"); App. 2B-462 to 463; App. 2B-344; App. 2B-411.
142. Maher's lease specifies a rate of interest for construction reimbursement financing at 175 basis points above the Revenue Bond Index. App. 5A-16; App. 4-308 to 309.
143. Tenant construction financing is an additional source of revenue for PANYNJ. App. 1B-615 ("The PA can recover some of the cost through the capital financing."); App. 2B-479 to 480 (cash flow to PANYNJ includes "rents and fees paid by other marine terminal operators").
144. Maher invested over \$450 million in improvements to its terminal, including approximately \$100 million on equipment such as cranes and straddle carriers, in addition to the tenant-financed leasehold infrastructure improvements. App. 4-393; App. 1C-1445 (by October 2005, Maher invested an additional \$215 million in equipment for the terminal on top of the \$250 million in financing it received from PANYNJ); App. 1D-1889 ("Maher invested nearly \$400 million over the past five years in infrastructure, equipment acquisition, and technology.").
145. According to the Port Authority, the differing investments in the APM terminal (approximately \$408,000 per acre) and Maher terminal (approximately \$459,000 per acre) were the product of negotiations between the parties based on each tenant's vision for its terminal and the availability of capital to the Port Authority. App. 3B-612; App. 4-17.
146. Maher used approximately \$133 million of its total financing for Class A and B work, and the rest for Class C work. Appx. III-727 to 730.
147. The PANYNJ offered Maher a financing rate of 7.70% (1.75% above the 5.9% 180-day average of the Revenue Bond Index). Appx. IV-184.
148. In comparison, Maersk-APM was provided with \$30 million in "free" capital as a component of the \$120 million concession from the Port Authority. App. 1B-615; App. 1B-565.

149. Maersk-APM’s lease provides up to \$143 million for tenant-financed infrastructure improvements. PANYNJ provided Maersk-APM \$30.4 million which did not have to be repaid and up to \$143.6 million for improvements that had to be repaid. App. 5A-272 to 274; App. 4-17; App. 4-308 to 309; App. 1D-1618.
150. Maersk-APM was provided a total of \$143.6 million funded work reimbursement based on the same index plus 150 basis points. App. 5A-269 to 270.

3. Throughput Requirements

151. PANYNJ’s leases with both Maher and Maersk-APM contain minimum throughput rent guarantees and minimum terminal container volume guarantees. App. 5A-99 to 102; App. 5A-349 to 355; App. 4-114 to 116; App. 4-190 to 192.

a. Rent Guarantee

152. Maher and APM are required to pay rent based on the volume of containers and cargo handled at the terminal, referred to as “throughput rent.” App. 5A-10 to 15; App. 4-14; App. 4-189; Appx. V-344; Appx. V-99.
153. Maher’s throughput rent requirement began in October 2008. App. 5A-11; App. 4-14; App. 4-189.
154. Maher committed to paying rent for a particular number of guaranteed Qualified Containers over the course of the three Terminal Guarantee Periods. The minimum Rent Guarantee Volume Number during the First Terminal Guarantee Period is 650,000 Qualified Containers (1461 containers per acre assuming 445 acres) and 775,000 Qualified Containers for the Second and Third Terminal Guarantee Periods (1742 containers per acre). Appx. V-99 to 99.1; Maher response to PAFOF 192.2 on page 199.
155. Maher’s and Maersk-APM’s rent guarantees per acre are:

<i>Period</i>	<i>Rent Guarantee Volume</i>	<i>Rent Guarantee Volume Per Acre</i>
1st Terminal Guarantee	500,000 (APM)	1,429 (APM)
	650,000 (Maher)	1,461 (Maher)
2nd Terminal Guarantee	600,000 (APM)	1,714 (APM)
	775,000 (Maher)	1,742 (Maher)
3rd Terminal Guarantee	700,000 (APM)	2,000 (APM)
	775,000 (Maher)	1,742 (Maher)

Appx. V-254 to 347; Appx. IV-28 to 135.

b. Terminal guarantee

156. Both the Maher and Maersk-APM leases provide for terminal guarantees in which the respective terminal operators must transport a certain number of containers (loaded or empty) through their terminal on an annual basis, with the terminal guarantee number based upon 800 containers per acre depending on which guarantee period is applicable. Appx. V-347 to 353; Appx. V-99 to 100.
157. Maher also guarantees that it will handle a minimum volume of containers through its terminal at levels that increase during the term of the lease: (1) from January 1, 2008, through the year in which the port channel is deepened to 50 feet, Maher guarantees 340,000 containers per year (764 per acre); (2) from the end of the first period through December 31, 2014, Maher guarantees 420,000 containers per year (944 per acre); and (3) after January 1, 2015, Maher guarantees 900,000 containers per year (2,022 per acre). App. 5A-99 to 100; App. 4-15 to 16; App. 4-191 to 192.
158. The terminal guarantees can be summarized as follows:

<i>Period</i>	<i>Terminal Guarantee Volume</i>	<i>Terminal Guarantee Volume Per Acre</i>
1st Terminal Guarantee	270,000 (APM)	771 (APM)
	340,000 (Maher)	764 (Maher)
2nd Terminal Guarantee	330,000 (APM)	943 (APM)
	420,000 (Maher)	944 (Maher)
3d Terminal Guarantee	390,000 (APM)	1,114 (APM)
	900,000 (Maher)	2,022 (Maher)

Appx. V-348; Appx. V-99.1.

159. Under the two leases, the respective first terminal guarantee period is defined as beginning on the later of the following two dates: Jan. 1, 2008, or the first lease year following the finish of the forty-five-foot channel deepening, and the completion of the fifty-foot channel deepening; the second terminal guarantee period is defined as beginning on or after the completion of the fifty-foot channel deepening and Dec. 31, 2014; and the third terminal guarantee is scheduled to begin on Jan. 1, 2015. Appx. V-348; Appx. V-99.2.
160. The third terminal guarantee in the Maher Lease takes effect January 1, 2015, but only if and when the 50-foot dredging has occurred. Appx. V-1 at 99.1.
161. Maher could be forced to return the entire property to PANYNJ if it fails to meet its terminal guarantee for two consecutive years (prior to 2015) and three consecutive years during the lease's third terminal guarantee period, while Maersk-APM, on the other hand, can only have a portion of its facility reclaimed for a shortfall of two consecutive years and the entire facility only after the shortfall exceeds certain levels for an additional two years. App.

5A-101 to 102; App. 4-15 to 16; App. 4-191 to 192; App. 5A-350 to 353; App. 5A-380; App. 4-185; Maher response to PAFOF 185.1 at page 192.

4. Security Deposit

162. The Maher Lease required a security deposit of \$1.5 million. App. 5A-96 to 97; App. 4-18; App. 4-312.
163. The security deposit requirement was less than two month's rent. Appx. III-1013 to 1016.
164. PANYNJ analyzed both Maher's and Maersk-APM's creditworthiness in setting the security deposit. A primary consideration was whether the lessee historically paid obligations on time. Appx. III-1014 to 1015.
165. Maher had been in arrears on its monthly rent payment for its Fleet Street terminal, which was being repaid during the credit review process. Appx. III-1016.
166. PANYNJ gave Maher a number of ways to satisfy the security deposit requirement, including by posting a letter of credit, providing a surety bond in lieu of a cash deposit, and payment of a reasonable return if a cash deposit was given. Appx. III-385.
167. Maher satisfied the security deposit requirement by using a letter of credit. Appx. II-332; Appx. I-1461.
168. PANYNJ's interrogatory response regarding the security deposit states that "financing terms provided to Maersk were based upon creditworthiness and the negotiations of the parties, and that no formal, written analysis was prepared by PANYNJ with respect to Maersk's assets prior to February 2000." App. 3B-617 to 619; App. 3B-709 to 711; Appx. III-1013.
169. In 2007, when there was a change in ownership, Maher's security deposit was increased. App. 5A-245 to 246 (requiring security deposits of \$14 million by December 31, 2008, \$18 million by December 31, 2009, \$22 million by December 31, 2010, and \$26 million by December 31, 2011, and will be further adjusted on December 31, 2017); App. V-244; App. 4-18.
170. Maher's interest rate financing was a reduction in Maher's financing rate from 250 basis points over the Revenue Bond Index to 175 basis points on the basis of Maher's "improved financial statements" and its "payment record" evidencing the fact that the financing terms provided to Maher were based on its creditworthiness. Appx. IV-183 to 184 (citing Appx. I-152).
171. In comparison, the Maersk-APM Lease did not require a security deposit because Maersk Inc., Maersk-APM's parent corporation at the time, executed a contract of guarantee with

PANYNJ whereby Maersk Inc. guaranteed that Maersk-APM would “duly and punctually pay all rentals and other monetary obligations which it has or shall have under the Lease.” Appx. V-381; App. 5A-362; App. 5A-383 to 385.

5. First Point of Rest for Automobiles

172. The Maher Lease required that a berth and a 10-acre area of the Maher facility be reserved as a first point of rest for use off-loading automobiles. App. 5A-113 to 114.
173. The Maher Lease states that the “Lessee acknowledges and agrees, as a special inducement to the Port Authority to enter into this Agreement, that the Lessee shall make available a ship berth and upland area for the purpose of receiving and loading automobiles and other motor vehicles carried as waterborne cargo.” App. 5A-113.
174. The Maher Lease requires Maher to provide the first point of rest on 48 hours’ notice, unless the first point of rest was not used for a period of more than one year. App. 5A-113.
175. The first point of rest provision provides a berthing and land use preference for the use and benefit of any motor vehicle processor operating a motor vehicle processing facility located at the Elizabeth-Port Authority Marine Terminal. App. 5A-113.
176. Harrison testified that PANYNJ imposed the first point of rest requirement on Maher to benefit PANYNJ and Distribution Auto Services (“DAS”) (formerly a subsidiary of Nissan) “to raise DAS’s comfort level, that their automobile business wouldn’t be displaced by more profitable commodities in the future, because the forecast was very robust of containers coming into the harbor” and that the “Port Authority wanted to assure that DAS’s automobiles would be properly handled and stevedored at a competitive rate.” S. App. 2 (Harrison deposition page 60 in 08-03 testimony binder 1 of 2).
177. Maher constructed a maintenance building on the area designated as the first point of rest after the execution of the lease. Appx. II-376; S. App. 2 (Evans deposition page 285 to 288, in 08-03 testimony binder 1 of 2).
178. PANYNJ approved the location for Maher’s maintenance and repair building and required an adjustment of the first point of rest boundary to maintain the 10-acre requirements adjacent to berth 52/54. S. App. 1F-2716; S. App. 1F-2724.
179. In March 2008, PANYNJ sought to enforce the first point of rest termination provisions against Maher and threatened Maher with loss of the acreage. App. 1D-1639; App. 1D-1640 to 1641; App. 1D-1642 to 1644.
180. The parties dispute whether the first point of rest requirements have lapsed. App. 1D-1837 to 1838; App. 1D-1652.

181. In contrast, the Maersk-APM Lease does not require a first point of rest for automobiles. App. 4-18; App. 2A-218; App. 3A-433 and 3B-479.

D. Post-Contract Developments

182. After the signing of Maher's lease in 2000, Maher was generally profitable until it sold its business to Deutsche Bank Americas Holding Corp. ("Deutsche Bank") in 2007. Appx. II-273; Appx. II-74 to 75; App. I-1687; Appx. I-1692.
183. On June 29, 2007, PANYNJ consented to the transfer of ownership and control of Maher to Deutsche Bank and increased Maher's investment requirement by \$114 million, increased its security deposit to \$26 million, and required an additional \$22 million to be used for future capital projects. Appx. V-239 to 253; Appx. I-1681; App. 1D-1614.
184. These additional requirements were also imposed upon other tenants who requested a change of control in or after 2007 when the policy was implemented. Appx. I-2247 to 2248; Appx. II-340.
185. On July 3, 2007 in a Supplemental Lease Agreement, Maher reaffirmed all of the other terms of its lease with PANYNJ, including the rental rate. Appx. V-239 to 253.
186. Between July 2007 and January 2008, following Deutsche Bank's acquisition of Maher, Deutsche Bank and Maher retained Empire Valuation Consultants ("Empire") to "allocate the purchase price paid for the Company to the fixed assets, identifiable intangible assets and goodwill . . . of the company." Appx. I-2026 to 2029.
187. According to the Empire Report, the purpose was to assist Maher and RREEF, a subsidiary of Deutsche Bank, "in allocating the purchase price paid for the identifiable intangible assets and goodwill of Maher" and to "meet financial reporting requirements under Statement of Financial Accounting Standard No. 141." Appx. I-2136.
188. The Empire Report states:

Above or below market lease arrangements were not included as an identifiable intangible asset for purposes of this analysis because: (1) [new] management believed the Company's lease terms were neither materially above nor below market at the Valuation Date; (2) RREEF believed the Company's lease terms were neither materially above nor below market at the Valuation Date; and (3) available comparable information indicated that the terms of the U.S. Lease Agreement were neither materially above nor below market at the Valuation Date.

Management believed that the terms of the U.S. lease Agreement were on comparable terms to other terminal operators located within Port Elizabeth, with one exception (due to negotiating power and timing). . . . Further, the terms of the U.S. Lease Agreement were agreed to as a result of an arms length negotiated transaction with an independent third party, the Port Authority, as were the terms of the lease agreements for the other Port Elizabeth terminal operators.

. . .

As compared with publicly available agreements for other terminal operators in Port Elizabeth, the container and cargo rental and on-container throughput charges were similar in terms of charge per unit; however, volume requirements differed. Empire attributes this differential to differences in size and capacity of the terminals. Regarding the additional rent, this represents the unamortized costs of specific improvements made to the leased facility for the benefit of Maher U.S. and is a company specific rental obligation. As compared with the financing arrangement for capital improvements, the deals were structured similarly; however, the applicable margins were different, which is believed by Empire to be attributable to differences in size of the lessee and perceived risk of default of the lessee.

. . . . The notable difference between the terms of the U.S. Lease Agreement and the publicly available agreements relate to the basic annual rent amount. Management and RREEF attributed the differences in basic rental amount (and per acre rental amount) to Maher U.S.'s favorable infrastructure attributes, including: (1) depth of channel; (3) length of berth; (3) size of yard; and (4) intermodal access. Management and RREEF believe that the higher basic rental amount and per acre amount paid and to be paid by Maher U.S. reflects the superior nature of the Maher property, the additional flexibility in yard usage, and its infrastructure. RREEF and management believe that going forward, the maximum capacity constraints placed on the other terminal operators within Port Elizabeth by their infrastructure that are not applicable to Maher U.S. outweigh the marginally higher basic rental amount.

Appx. I - 2148 to 2150.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a “person may file with the . . . Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000). The parties have not contested either personal or subject matter jurisdiction.

2. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-19 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. When the evidence is evenly balanced, the party with the burden of persuasion must lose. *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Legal Analysis

1. Unreasonable Preference or Prejudice

a. Arguments of the parties

Maher contends that PANYNJ continues to deny the same preferential lease terms to Maher that it provided to Maersk-APM and that PANYNJ imposes prejudicial lease terms on Maher not required of Maersk-APM. Maher asserts that PANYNJ subjected Maher to different treatment by failing to provide Maher parity with Maersk-APM and injured Maher as a result. Maher Initial Brief at 26-37. Maher further claims that PANYNJ unlawfully treated Maher differently because of status and it treated Maher differently to increase revenue. Maher Initial Brief at 39-57.

PANYNJ asserts that the Shipping Act does not prohibit different lease terms for fundamentally different terminal operators, arguing that Maher cannot establish an undue or unreasonable preference or prejudice in violation of the Shipping Act and that Maher cannot avoid rejection of its claims by falsely painting this action as a mere replication of *Ceres*.⁵ PANYNJ Opposition at 55-86.

Maher, in its reply brief, argues that PANYNJ concedes Maher's prima facie case and fails to carry its burden. Maher Reply Brief at 26-83. The parties both address the four *Ceres* elements, discussing the five sections of the lease that are at issue: basic annual rental rate, investment requirements, throughput requirements, security deposit requirement, and first point of rest requirement. Each disputed lease provision will be addressed in turn after discussing the legal framework.

b. Legal Framework

Pursuant to section 41106(2) of the Shipping Act, a marine terminal operator may not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2) (formerly Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12))).

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

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

Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V., 25 S.R.R. 1308, 1313 (FMC 1990) (citing *Motor Vehicle Manufactureres Ass'n of the United States, Inc.*, 25 S.R.R. 849, 853 (FMC 1990) (Order Denying Petition)). The Supreme Court has stated that Congress established the Commission as the government agency "entrusted with the duty to protect the public interest" by prohibiting such unlawful practices. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime*

⁵ All *Ceres* cites, unless otherwise indicated, are to *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 Commission*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table).

Commission, 390 U.S. 261, 274 n.21 (1968) (quoting *Isbrandtsen v. United States*, 211 F.2d 51, 57 (D.C. Cir. 1954)).

In the leading case regarding port leases, Ceres Marine Terminal (“Ceres”) alleged that the Maryland Port Administration (“MPA”) provided more favorable lease terms to other entities, including Maersk Line (“Maersk”). *Ceres*, 27 S.R.R. at 1252. In *Ceres*, the Commission found violations of section 10(b)(11), 10(b)(12), and 10(d)(1), where the “only expressed reason for denying Ceres the Maersk lease terms was Ceres’ status.” *Ceres*, 27 S.R.R. at 1272. Upon appeal, the Fourth Circuit remanded for consideration of the claim that Ceres was estopped from challenging the terms of its lease. *Maryland Port Admin. v. Federal Maritime Commission*, 164 F.3d 624 (4th Cir. 1998).

On remand of *Ceres*, the Commission stated:

The Shipping Act permits, and indeed encourages, parties to enter into agreements tailored to their individual needs. What the Shipping Act prohibits is differentiation based on unreasonable or unjustly discriminatory factors. The Commission’s role is not to ensure that all interested parties get the same deal or make a certain profit. Rather, the Commission’s role is to ensure that parties are not precluded from obtaining preferential treatment due to unreasonable or unjustly discriminatory reasons. In this case, the Commission concluded, based on the evidence of record, that MPA’s denial of the preferential lease terms to Ceres was based on Ceres’ status as an MTO, and further that such denial was patently unreasonable given the container throughputs to which the parties agreed. The Commission explained that its decision was neither designed nor intended to constrain the ability of ports to consider many relevant factors when negotiating a lease. Rather, the Commission emphasized that its decision leaves to ports a vast amount of discretion to structure deals as they see fit, within the limits of the Shipping Act.

Ceres Marine Terminals, Inc. v. Maryland Port Admin., 29 S.R.R. 356, 369-70 (FMC 2001) (citations omitted). Ultimately, the case was dismissed after a finding that the Maryland Port Authority was entitled to Eleventh Amendment sovereign immunity. *Ceres Marine Terminals v. Maryland Port Admin.*, 30 S.R.R. 358, 358-59 (FMC 2004).

In *Ceres*, the Commission established four elements of an unreasonable preference or advantage or unreasonable prejudice or disadvantage claim:

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.

Ceres, 27 S.R.R. at 1270 (footnote omitted) (citing *Distribution Services, Ltd. v. Trans-Pacific Freight Conf. of Japan*, 24 S.R.R. 714, 720 (FMC 1988)). In this proceeding, the Commission has confirmed that the *Ceres* case is the “substantive law regarding unreasonable prejudice or preferences in maritime terminal leasing.” Commission’s Order Granting in Part and Denying in Part Respondent’s Motion for Summary Judgment at 10.

c. Burden of Proof for *Ceres* Elements

The parties disagree about the burden of proof applicable to the *Ceres* analysis. In its reply brief, Maher argues that PANYNJ failed to carry its burden to show that the disparate treatment of Maher was justified by a valid transportation purpose, *see, e.g.*, Maher Reply Brief at 1, 18-19, 67, while PANYNJ contends that Maher cannot establish an undue or unreasonable preference or prejudice in violation of the Shipping Act, *see* PANYNJ Opposition at 56.

The decision in *Ceres* states that the “complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.” *Ceres*, 27 S.R.R. at 1270-71 (citing *Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (FMC 1981)). The decision in *Cargill* states:

the complainant is not obligated to prove that the transportation circumstances . . . are identical. This evidence is primarily in the possession of the respondent. It is sufficient that the complainant demonstrate that there are no obvious differences between the trades. At that point, the burden is upon the respondent to demonstrate that there are legitimate transportation differences.

Cargill, 21 S.R.R. at 301. In this case, the Commission has confirmed that all four *Ceres* elements are part of the cause of action and that the third element is not an affirmative defense. Commission’s Order Granting in Part and Denying in Part Respondent’s Motion for Summary Judgment at 12.

It appears that the burden of persuasion stays with the complainant throughout, although the burden of moving forward with the evidence shifts. This is consistent with the APA’s requirement that except “as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d).

In this proceeding, even if the burden of persuasion shifted to PANYNJ for any of the elements, PANYNJ met that burden as the voluminous record supports a finding that PANYNJ acted reasonably by a preponderance of the evidence. Each of the *Ceres* elements will be discussed, in turn, below.

d. Analysis of *Ceres* Elements

i. Relationship of Parties

The first element of a claim of unreasonable preference or prejudice is that two entities are similarly situated or in a competitive relationship. As the Supreme Court described, the Commission has “applied the ‘competitive relationship’ doctrine which it has developed in cases concerning rates for carriage of goods by sea. But the Commission, in cases not involving freight rates and the particularized economics that result from a vessel’s finite cargo capacity, has often found § 16 violations even in the absence of a ‘competitive relationship.’” *Volkswagenwerk*, 390 S. Ct. at 279-80 (footnotes and citations omitted); *New Orleans Stevedoring Co. v. Bd. of Comm’ners of Port of N.O.*, 29 S.R.R. 1066, 1070 (FMC 2002) (quoting ALJ below and citing to *Volkswagenwerk*).

“Traditionally, it was also necessary for the complainant to prove that the parties were similarly situated to prove undue preference or prejudice.” *Ceres*, 27 S.R.R. at 1271 (footnote omitted). However, more recently, “the Commission reaffirmed that a competitive relationship is not always necessary to prove an undue preference or prejudice.” *Ceres*, 27 S.R.R. at 1271; *Credit Practices of Sea-Land Service*, 25 S.R.R. at 1308.

In *Ceres*, the Commission stated:

We find that the disparate rates assessed *Ceres* vis-a-vis other port users, in particular Maersk, are more akin to the practices found prejudicial in *Valley Evaporating and Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*, and not to a situation where a competitive relationship would be necessary to challenge disparate commodity rates, and thus find that the parties in this case need not be similarly situated, or in a competitive relationship, to challenge terminal lease rates. The rates in question -- wharfage, dockage, crane rental and land rental -- apply universally and do not vary according to cargo characteristics. Rather, the level of the rate varies according to amount of cargo handled, or with crane service, according to hours of usage.

Ceres, 27 S.R.R. at 1271 (footnote omitted).

The parties in this proceeding agree that, as defined by the Shipping Act, PANYNJ is a marine terminal operator, Maher is a marine terminal operator, and Maersk-APM is an ocean common carrier and marine terminal operator. Maher and Maersk-APM compete to lease and utilize facilities at the port. The evidence demonstrates that Maher and Maersk-APM are in a competitive relationship to the extent required for section 41106(2) to apply. Accordingly, the first *Ceres* element of similarly situated entities is met.

Although the parties do not focus their attention on this element, it becomes more important later, in determining the reasonableness of different treatment. While both Maher and Maersk-APM

are competing for terminal space, one is solely a terminal operator while the other is a terminal operator and an ocean carrier. The difference between being a terminal operator and an ocean carrier impacts the lease negotiation process because these different entities pose different risks and received different benefits. The differences are not based on status alone, but, as will be discussed later, status did have real and tangible impact on PANYNJ's negotiations with these particular entities. The next *Ceres* element is whether there is different treatment.

ii. Different Treatment

Maher insists that it was treated differently in violation of the Shipping Act. Maher Initial Brief at 18. PANYNJ acknowledges that the Maher Lease was different from the Maersk-APM Lease; however, PANYNJ contests whether there was an unlawful preference or advantage. PANYNJ Opposition at 44-52.

A preference or prejudice is established by showing that a port "charges a different rate to different users for an identical service." *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation Dist.*, 10 S.R.R. 1037, 1042 (FMC 1969); *Chr. Salvesen & Co., Ltd. v. West Michigan Dock & Market Corp.*, 10 S.R.R. 745, 756 (FMC 1968) ("operators of public terminals must afford all customers seeking the same service fair and reasonable treatment").

Mere differences in treatment alone, however, do not violate the Shipping Act. *Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 958, 963 (D.C. Cir. 1988) ("The Act clearly contemplates the existence of permissible preferences or prejudices."). Therefore, only "undue or unreasonable preferences and prejudices would be violative of the Prohibited Acts." *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993) (emphasis in original). "Indeed it would be impossible for the Port to insure that all of its tenants are identically situated, since each parcel and each operator has geographical and commercial idiosyncracies." *Seacon*, 26 S.R.R. at 900 (footnote omitted). "The Commission is not required to tally and compare exactly what benefits were received by the relevant parties." *Seacon*, 26 S.R.R. at 900.

The parties agree that Maher and Maersk-APM are treated differently. Maher and Maersk-APM have different lease terms and pay different rates. However, Maher and Maersk-APM are not provided an "identical service" because the leased property is significantly different. Not surprisingly for a maritime lease, the leased properties differ in size, depth, berthing options, buildings, and access to transportation and infrastructure. Maritime leases are rarely for identical property and some variation in rental terms is to be expected. The question here is whether the differences in lease terms are reasonable and based on valid transportation factors. Five specific lease provisions are at issue: basic annual rental rate, investment requirements, throughput requirements, security deposit requirement, and first point of rest requirement.

iii. Justification

Maher contends that PANYNJ unlawfully treated it differently because of status, pointing to the testimony of PANYNJ witnesses that: “Maersk and Maher were completely different animals” and that Maersk:

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

Maher Initial Brief at 18-19; F. 107. Maher also contends that PANYNJ unlawfully treated Maher differently to increase its revenue; PANYNJ provided an additional \$120 million concession to Maersk-APM to avert relocation to the Port of Baltimore; and PANYNJ recoups Maersk-APM concession with Maher revenue. Maher Initial Brief at 46-57.

PANYNJ asserts that Maersk-APM's lower base rental rate is entirely reasonable based on the qualitatively different port-wide economic benefits and risks presented by Maersk-APM and Maher, coupled with the very different lease-term priorities and concessions that each entity offered to the Port and that the absence of discrimination is further confirmed by the fact that Maher was not harmed and, to the contrary, benefitted from the retention of Maersk-APM pursuant to its lease. PANYNJ Opposition at 58-67.

In *Ceres*, the Commission found that “Ceres committed to bringing more than twice the cargo to the Port than Maersk, but was charged more than double what Maersk was charged.” *Ceres*, 27 S.R.R. at 1273. Ceres had argued that “it was prepared, and offered, to meet every commitment in the Maersk lease.” *Ceres*, 27 S.R.R. at 1255 (footnote omitted). The Commission also noted that “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*, 27 S.R.R. at 1272 (footnote omitted).

In *Ceres*, the Commission found:

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.

Ceres, 27 S.R.R. at 1272.

“In reaching this conclusion, the Commission does not suggest that MPA, and other ports, must apply the same rate to all customers, but if a port determines to offer volume-type discounts, it must make them available to all users who meet the criteria.” *Ceres*, 27 S.R.R. at 1273. The Commission explicitly explained that a:

vessel call guarantee may still be a valid transportation factor by which ports can distinguish between lessees when offering favorable lease terms. In order to differentiate between port users and offer favorable lease terms to some users and not others, however, the port must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees.

Ceres, 27 S.R.R. at 1273.

If there were a realistic indication that *Ceres* would have been unable to fulfill those requirements, MPA could have legitimately denied *Ceres* the more favorable lease terms. In *California Shipping Line*, the Commission ruled that Yangming did not violate section 10(b)(12) by refusing to grant complainant access to terms of service contracts with other shippers, finding that the difference in treatment was based on valid transportation factors, namely Yangming’s legitimate concerns about California Shipping’s ability to fulfill the essential terms of each contract. Specifically, the Commission found reasonable Yangming’s concern about complainant’s ability to pay liquidated damages, that it may have “developed a reputation in the trade for contracts that were not fulfilled and other problems with carriers.”

Ceres, 27 S.R.R. at 1273 (quoting *California Shipping Line v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1228 (FMC 1990)).

To determine whether the lease differences at issue in this proceeding were based on valid transportation factors, it is necessary to compare the lease provisions. Maher alleged five areas of alleged violations: basic annual rental rate, investment requirements, throughput requirements, first point of rest requirement, and the security deposit requirement. Each area will be discussed in turn, after background is provided regarding the lease negotiation process.

a. Lease Negotiation

As of 1995, Maher operated two separate terminals on the Port Elizabeth peninsula, which it shared with Sea-Land’s terminal. F. 40. Maersk occupied a terminal across the channel at Port Newark. F. 33. Because most of the Port’s leases, except for Maher’s “Fleet Street” terminal, were scheduled to expire by 2000, PANYNJ used this opportunity to devise a port modernization plan. F. 50-51.

PANYNJ began negotiations with Maher in 1995, initially using a container terminal pricing model that would have charged terminal operators based on the number of containers passing through their terminals (i.e., a throughput-based model). F. 52-54. This approach was designed to ensure a guaranteed minimum rental amount from each terminal, allowing PANYNJ to make and recover necessary investments that would raise each terminal to a minimum standard and further allow it to recover a portion of the Port's operating costs and maintenance expenses. PANYNJ Opposition Brief at 18-19. PANYNJ planned to charge all of the terminal operators the same rate to create a level playing field. F. 55.

In 1997, the Port entered into a non-binding "outline of proposed terms" with both Hanjin and Maher. F. 54-55. Because PANYNJ was planning a comprehensive port-wide modernization that was dependent upon reaching a satisfactory set of arrangements with others, the PANYNJ's negotiations with Maher and Hanjin remained contingent upon pending negotiations for new terminal leases with Sea-Land and Maersk. PANYNJ Opposition Brief at 21. However, because Sea-Land and Maersk decided to combine their operations into a single 350-acre terminal located in part on the site of Sea-Land's Port Elizabeth terminal, ultimately there was no room to accommodate both the 445-acre terminal Maher wanted and a separate terminal for Hanjin on the Port Elizabeth peninsula. F. 97.

At the PANYNJ's kick-off meeting with Sea-Land in September 1997, however, Sea-Land rejected the notion of a throughput-based lease, and also made clear that it would agree to only a very minimal increase in its per acre rental rate. F. 56-59. Sea-Land also stated that it was prepared to leave the Port if its demands were not accommodated. F. 60. Sea-Land likewise rejected PANYNJ's subsequent proposals, stating that the proposed rental rates were still significantly higher than rental rates available to it at competing East Coast ports. F. 61. Negotiations continued without an agreement. F. 62-63.

On April 30, 1998, Maersk and Sea-Land informed PANYNJ that they were issuing a joint request for proposal ("RFP") to PANYNJ and other East Coast ports, threatening to redirect their cargo away from the region if they and PANYNJ did not come to terms. F. 64. On May 13, 1998, Maersk and Sea-Land issued their RFP to PANYNJ and six other competing ports. F. 65.

Following the issuance of the Maersk and Sea-Land RFP, PANYNJ asked Paul Richardson, a port expert, to analyze the risk and the effect of losing Maersk and Sea-Land. F. 66. Richardson's analysis indicated that there was a high likelihood that Maersk and Sea-Land would leave the Port, and if they did the result would be severe and irrevocable. F. 67-68. Richardson outlined in detail the impact that the loss of Maersk and Sea-Land would have on the Port and the region, as well as the concomitant, equally significant, benefits of retaining them. F. 68. PANYNJ staff performed their own analyses that estimated a potential twenty-two percent to thirty-four percent loss of potential container growth over a thirty-year period if Maersk and Sea-Land left the port. F. 69.

In August and September of 1998, PANYNJ negotiated with Maersk Line and Sea-Land in response to the RFP. F. 74-76. Maersk-APM, however, continued to reject PANYNJ's proposed

rates as unreasonable and non-competitive, and indicated that they would leave the Port unless PANYNJ significantly improved its offer. F. 75, 77. Maersk and Sea-Land sent letters to Governor Whitman and Governor Pataki of New York, informing them that while the Governor of Maryland, members of the Maryland General Assembly, and the Maryland Port Administration supported Maersk's and Sea-Land's needs, PANYNJ was not aggressively working to retain their business. F. 83.

Maier advocated that everything possible be done to retain Maersk and Sea-Land. In a letter from Maier's CEO, Brian Maier, to New Jersey Governor Whitman on January 8, 1999, Maier stated that "As a result of the bidding process in which they have engaged for the last six months, Sea-Land and Maersk have received proposals from Baltimore and Halifax which would allow them to save hundreds of millions of dollars over the life of the lease." F. 85-86. Mr. Maier stated that the "successful conclusion of the leases currently under negotiation for Port Elizabeth will stabilize the Port facilities for the next twenty-five years and thus secure and maximize the significant economic benefits derived from the investments the state and federal government are already making in the channels and the transportation infrastructure." F. 87. Mr. Maier concluded that "There is much at stake. To permit two major employers [Maersk and Sea-Land] to leave the state is unthinkable and I urge you to do all that you can to prevent that from occurring." F. 88.

In February 1999, PANYNJ and Maersk discussed what it would take to retain Maersk and Sea-Land at the Port. F. 89. Maersk responded that they needed \$120 million in rent and free capital lease concessions in their terminal lease in order to remain at the Port. F. 89. This represented the difference between the costs to create a deepwater port facility in New Jersey and in Baltimore. F. 80. If they did not receive the concession, they would transfer the majority of their cargo to Baltimore. F. 89.

Weighing Maersk Line's and Sea-Land's request for a \$120 million concession against the economic harm to the region and to the economic viability of the Port's cargo transportation function, PANYNJ tailored a response to their demand. Specifically, PANYNJ agreed to provide Maersk-APM with a fixed base rent of \$19,000 per acre, which constituted an approximately \$90 million savings (net present value at nine percent), as well as approximately \$30 million in free construction capital, for a total package of \$120 million. F. 91. PANYNJ obtained concessions in return. Specifically, PANYNJ negotiated a port guarantee in the Maersk-APM lease that tied the reduced rental rate to the Port's receipt of certain levels of Maersk Line's business on an ongoing basis. F. 101-106.

While the Maersk-APM lease was being finalized, PANYNJ resumed negotiations with Maier and, on May 13, 1999, held a kick-off meeting with Maier to discuss the lease of a reconfigured 445-acre terminal. F. 99. PANYNJ notes from Maier lease negotiations, dated June 2, 1999, indicate that Maier wants to make sure that monies are available for its construction projects; PANYNJ is including an extra 19 acres as the conceptual first point of rest for the major issue of car handling; change of control continues to be one of the most important issues to Maier; and Maier

does not want a security deposit and PANYNJ’s credit manager is reviewing. F. 100. After extensive negotiations, Maher signed its lease with PANYNJ on October 1, 2000. F. 28.

At the time of the lease negotiations, the evidence shows that Maher supported doing “all that they could” to keep Maersk-APM in the Port. Maher likely hoped it would benefit from subsidization of the port and that it would receive similar concessions. Nonetheless, the contemporaneous documents demonstrate Maher’s support for the PANYNJ’s decision to do what was needed to keep Maersk-APM in the port. These lease negotiations directly impacted the final lease agreements. Indeed, PANYNJ’s desire to retain Maersk and Sea-Land businesses resulted in the Maersk-APM lease having a port guarantee, a provision which is not present in Maher’s lease and which Maher could not provide.

b. Maersk-APM Port Guarantee

The port guarantee is a lease provision through which Maersk-APM guaranteed that a certain volume of Maersk-affiliated containers loaded with cargo would go through the Port on an annual basis, regardless of which terminal it comes through. F. 101. The purpose of the port guarantee was to incentivize Maersk Line and Sea-Land to use the Port as a hub and to bring discretionary cargo – cargo that otherwise would have gone to another port – to PANYNJ. F. 102. The Maersk-APM port guarantee requires that a certain number of containers carrying Maersk Line’s cargo – not empty containers – be transported to or from the port each year, regardless of the terminal through which they come. F. 103.

The annual required minimum levels of the port guarantee vary over the course of the lease as follows: 365,000 Maersk Line containers during the “First Port Guarantee Period,” defined as beginning the first lease year after the Kill Van Kull and Newark Bay were dredged to a depth of forty-five feet below mean low water, which was 2008; 440,000 Maersk Line containers during the “Second Port Guarantee Period,” defined as beginning the first lease year after the Kill Van Kull and Newark Bay are dredged to a depth of fifty feet below mean low water, which has not yet been completed; and 515,000 Maersk Line containers during the “Third Port Guarantee Period,” which will begin on January 1, 2015, regardless of whether the fifty-foot channels have been dredged, and will run through the remainder of Maersk-APM’s lease. F. 112.

The port guarantee can be summarized as follows:

<i>Period</i>	<i>Port guarantee</i>	<i>Port guarantee per acre</i>
1st Guarantee Period	365,000	1043
2nd Guarantee Period	440,000	1257
3rd Guarantee Period	515,000	1471

F. 113. Maersk-APM's port guarantee per acre is higher than its terminal guarantee per acre and is lower than its rent guarantee per acre, as discussed more fully below.

The port guarantee imposed financial penalties if Maersk-APM failed to meet its commitments. Specifically, if Maersk-APM fails to meet the guarantee for two consecutive years, its rent will be increased in the following year by \$1,900 per acre for every 10,000 containers below the guarantee in the first guarantee period, and for every 12,500 containers below the guaranteed levels in the second and third guarantee periods. F. 104. The chart in the PANYNJ Expert Report of Fredrick A. Flyer summarizes the increases in Maersk-APM's rental rate at various volume levels, and demonstrates the variable nature of its base rent. Indeed, Maersk-APM has already felt the impact of the port guarantee, having missed its requirements for 2008-2010, causing its rent to increase to \$34,200 per acre in 2010, and \$32,300 per acre in 2011. F. 116. If Maersk Line were to pull its cargo from the Port entirely, Maersk-APM's rent would increase to \$89,300 per acre (or up to \$98,800 per acre were this to occur during the third guarantee period). F. 117. Maersk Inc., which was Maersk-APM's parent, guaranteed all of Maersk-APM's financial obligations, including its obligations under the port guarantee. F. 120.

Maher did not offer to provide a port guarantee. Brian Maher testified that Maher could not have provided a port guarantee similar to Maersk-APM:

Q. Were you ever asked to give a port guarantee?

A. No.

Q. Why not?

A. 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.

F. 111.

Maher could not provide a port guarantee because, as Brian Maher explained, "Maher does not control and did not control cargo and as to what port it would - it would be handled in." F. 109. Moreover, Brian Maher indicated that it was so obvious that Maher could not provide such a guarantee that it did not even rise to the level of a topic of conversation:

Q. When you discussed with Lillian Borrone the issue of Maersk's port guarantee, did you tell her, in conjunction with those discussions, that you could not commit your customers to any specific volume in the Port of New York?

- A. I don't - I mean, I don't believe we ever had such a conversation. She knew - she would have known and did know that Maher was not in a position to commit its customers to volume levels in the Port of New York, and so I don't recall such a conversation.

F. 110. The evidence shows that the port guarantee is a basis for the different lease terms provided to Maersk-APM as opposed to Maher. This can be seen when the disputed lease terms are compared.

c. Lease comparison

(i) Base Annual Rental Rate

Maersk-APM's lease establishes an annual base rent of \$19,000 per acre, subject to increase if it fails to meet the port guarantee in its lease. F. 112-117. Maher's lease establishes a starting annual base rent of \$39,750 per acre with a two percent annual escalator. F. 121. Contemporaneous documents confirm that PANYNJ knew that Maersk-APM's negotiated rent was lower than the container rental in all similar terminals and that Maher's negotiated rent was greater than that being offered to Maersk. F. 132.

Maher asserts that it pays significantly higher rent than Maersk-APM. Maher contends that because of the rent escalator, by the end of the thirty-year term of the lease, Maher's basic rental rate will be \$70,590 per acre, 3.7 times the basic rental rate PANYNJ provided to Maersk-APM. Maher Initial Brief at 12.

PANYNJ contends that the cost differential between the leases amounts to only a small percent of Maher's overall operating budget; the Maersk-APM lease may increase due to the port guarantee; and that the lease should be evaluated in the context of all of the "gives and takes." PANYNJ Opposition at 32-35.

The facts demonstrate that Maher's initial base rental of \$39,750 per acre is higher than Maersk-APM's base rental of \$19,000 per acre. F. 112-117, 121. However, Maher's rental rate is lower than the \$47,179 per acre rate Maher was paying under its Fleet Street lease which was in effect prior to Lease EP-249. F. 41. Maher's lease has a rent escalator clause while Maersk-APM's rent may increase if it fails to meet the requirements of the port guarantee. So, for example, if Maersk Line were to pull its cargo from the Port entirely, Maersk-APM's rent would increase to \$89,300 per acre. F. 117. Indeed, Maersk-APM's rent has increased due to the port guarantee. F. 135. Maher's base rent will escalate to \$70,590 per acre by the end of its lease. F. 122. Although it is impossible to conduct an exact, apples-to-apples comparison because of the multiple factors impacting rent, the evidence demonstrates that reviewing the leases as a whole, Maersk-APM received lower rental rates than Maher. However, the inquiry does not stop there. The next question is whether the difference is reasonable.

As discussed above, Maersk-APM made a credible threat to leave the Port. Maersk-APM sought and obtained viable offers from other ports which were competing for their business. The evidence shows that a departure of Maersk-APM would have had a negative impact on the region, the Port, and other port tenants, including Maher. If Maersk-APM left the port, the containers it carried would have been diverted to another port. As Brian Maher explained in his January 8, 1999, letter to Governor Whitman:

You should know that the combined direct payrolls of Sea-Land and Maersk are close to 100 Million Dollars annualized. If they were to leave the Port employment would be reduced by something close to that amount of money. You should also know that they will almost certainly be successful in routing most of their freight through Baltimore or Halifax. Shippers and consignees are port blind assuming that freight costs and transit times are equal. Sea-Land and Maersk are sophisticated, successful steamship operators who have the logistical capability to move cargo through other ports and deliver it in the metropolitan area at the same cost to the shipper and with the same level of service.

If Sea-Land and Maersk do, in fact, move their major operations to Baltimore or some other combination of Baltimore and Halifax, the Port will lose 25-30% of its current volume. Instead of growing at the currently predicted annual rate of 3-5% with the attendant economic benefits to the State and the entire region, the Port will suffer a dramatic decline in volumes which will raise the costs to the remaining business and motivate other major carriers to look for similar alternatives.

F. 86.

Maher did not present the same risk as Maersk-APM. There is no suggestion that Maher threatened to leave the region. Even if Maher had threatened to leave, it is likely that the freight carried by Maher would have been handled by another terminal operator in the port and would not have had the same overall economic impact on the port as the threatened departure of Maersk-APM. There is no evidence supporting a finding that if Maher moved to another port, ocean common carriers would follow.

Because of the credible threat made by Maersk-APM, PANYNJ provided the rent concessions necessary to retain Maersk-APM in the port. The rent concessions are balanced against the port guarantee and the commitment to stay in the port. Given the circumstances at the time, the Port's decision to provide lower rent to Maersk-APM, a decision supported by Maher, in order to keep Maersk-APM in the port, was based upon the particular facts and situation presented. Accordingly, the evidence does not support a finding that the rent provisions of the leases were unjustified.

(ii) Investment Requirement

Both Maher and Maersk-APM were required to invest in their terminals by performing certain construction and installation work, known as Class A and Class B work, and they received free capital and low-cost financing from PANYNJ to conduct this work. F. 136. Maher received \$250 million in PANYNJ financing including \$46 million in “free” capital. F. 139. Maher was permitted to use its financing to perform optional Class C work. F. 140. Maersk-APM’s lease provides up to \$143 million for tenant-financed infrastructure improvements while PANYNJ provided Maersk-APM \$30.4 million which did not have to be repaid and up to \$143.6 million for improvements that had to be repaid. F. 148-150.

The finance rate under the Maersk-APM lease was based on an index of revenue bonds as reported in the “Bond Buyer” plus an additional 150 basis points. F. 150. Under the Maher Lease, the finance rate was based on the same index, plus an additional 175 basis points. F. 142.

Maher alleges that PANYNJ required Maher to invest greater sums than it required Maersk-APM to invest and that PANYNJ provided Maersk-APM with more favorable financing terms. Maher Initial Brief at 31. Maher argues that PANYNJ knew that Maersk-APM actively sought during the lease negotiations to defer its terminal investment requirements until at least 2020 expressly to maintain its competitive advantage. Maher Initial Brief at 13. Maher contends that its increased capital expenditures and increased financing rate have caused financial injury and competitive harm. Maher Initial Brief at 14-15, 33.

Maher asserts that the higher finance rate charged resulted in significantly higher costs for Maher. Maher Initial Brief at 35. In its reply, Maher contends that PANYNJ did not express to Maher on September 23, 1999, when it refused Maher the Maersk-APM terms, that the refusal was based on creditworthiness. Maher Reply at 61.

PANYNJ, discussing construction and financing, argues that a comparison should only be made between the money utilized by Maher for Class A and Class B work, or \$133 million of the \$195 million it has drawn. PANYNJ Opposition at 37. PANYNJ contends that the difference in finance rates was based on the disparity in creditworthiness and was better than Maher obtained in contemporaneous non-related loan transactions. PANYNJ Opposition at 38. PANYNJ contends that the disparity in finance rate was the result of Maher’s and Maersk-APM’s disparity in creditworthiness. F. 147.

The evidence shows that Maher received more financing and more free financing than Maersk-APM. In addition, Maher also received greater flexibility and ability to fund class C work. Maher has used only approximately \$133 million of the \$195 million it has drawn in total for Class A and B work, and the rest for class C work. F. 146. Maher objects that this placed a greater obligation on it to perform improvements while PANYNJ asserts that Maher obtained more low-cost

financing and more free capital that it did not have to pay back. It is not clear whether either Maher or Maersk-APM received more favorable financing or a more onerous investment requirement and this factor does not weigh in favor of either entity.

Regarding the finance rate, during lease negotiations, Maher's Fleet Street rent was in arrears and being repaid pursuant to a payment plan. F. 165. Maersk-APM's lease was supported by a corporate guarantee while Maher was unable to present such a guarantee. F. 120, 171. PANYNJ charged the higher finance rate because it found that Maher was a greater credit risk than Maersk-APM. The evidence does not show that PANYNJ's decision to charge a higher finance rate to Maher based on the increased risk presented by Maher was unjustified.

(iii) Throughput Requirements

Throughput requirements include the rent guarantee and the terminal guarantee. Both the Maher and Maersk-APM leases have a minimum throughput rent obligation and a minimum terminal guarantee. F. 151. The minimum rent guarantee requires Maher and Maersk-APM to pay throughput rent on specified minimum number of qualified containers. F. 152. The terminal guarantee requires Maher and Maersk-APM to handle a smaller specified number of containers at their terminals or risk termination of all or a portion of their leaseholds. F. 156. Both the rent guarantee and the terminal guarantee are set differently for three separate lease periods and the consequences for violation differ. There are a number of variables that impact both guarantees which make them challenging to compare.

Maher argues that for the second half of the lease term, on a per acre basis, Maher guarantees almost twice the throughput of Maersk-APM and that Maher could be forced to return the entire marine container terminal to PANYNJ if it fails to meet its terminal guarantee clause for two consecutive years prior to 2015 and three consecutive years after 2015. Maher Initial Brief at 15.

PANYNJ points out that the requirements are fairly similar for the first two periods while Maersk-APM has a higher rent guarantee per acre for the third period and Maher has a higher terminal guarantee for the third period. PANYNJ Opposition at 39-40.

The requirements can be generally summarized as follows, although the guarantee periods are not the same for Maher and Maersk-APM.

<i>Period</i>	<i>Rent guarantee</i>	<i>Rent guarantee per acre</i>	<i>Terminal guarantee</i>	<i>Terminal guarantee per acre</i>
1st	650,000 (Maher) 500,000 (M-APM)	1,461 (Maher) 1,429 (M-APM)	340,000 (Maher) 270,000 (M-APM)	764 (Maher) 771 (M-APM)
2nd	775,000 (Maher) 600,000 (M-APM)	1,742 (Maher) 1,714 (M-APM)	420,000 (Maher) 330,000 (M-APM)	944 (Maher) 943 (M-APM)
3rd	775,000 (Maher) 700,000 (M-APM)	1,742 (Maher) 2,000 (M-APM)	900,000 (Maher) 390,000 (M-APM)	2,022 (Maher) 1,114 (M-APM)

F. 155, 158. Maersk-APM's numbers include rent guarantee amounts plus Maersk-APM's exemption number to afford compatibility with Maher's terms, which allow for a reduction by exemption amount. Maher Response to PAFOF 193 n. 7 at page 201.

The evidence shows that the rent guarantees and terminal guarantees differ in timing, amount required, and penalties. As shown by the chart above, while Maher's and Maersk-APM's rent guarantees per acre are essentially identical for the first two periods, it is Maersk-APM's rent guarantee in the third period that is higher per acre than Maher's. Maher's and Maersk-APM's terminal guarantees are essentially identical on a per acre basis for the first two guarantee periods, though in the case of the third period, it is Maher which has the greater obligation.

The third terminal guarantee period for Maersk-APM occurs at fifteen years while the third guarantee period for Maher does not start until the Kill Van Kull and Newark Bay are dredged to fifty feet to accommodate larger post-Panamax ships. F. 160. Maher could be forced to return the entire property to PANYNJ if it fails to meet its terminal guarantee for two consecutive years (prior to 2015) and three consecutive years during the lease's third terminal guarantee period, while Maersk-APM, on the other hand, can only have a portion of its facility reclaimed for a shortfall of two consecutive years and the entire facility only after the shortfall exceeds certain levels for an additional two years. F. 161.

It is difficult to compare the throughput requirements with each other because of the different time periods, penalties, and details. For example, the noticeably higher third period terminal guarantee for Maher may be justified based upon the timing, the longer time period to trigger it, and because this requirement does not begin until dredging is complete and post-Panamax ships can be accommodated. These thirty-year leases are complex and attempt to account for a wide variety of circumstances. While the rent guarantee and terminal guarantees are different, the evidence does not compel a finding that those differences are unreasonable or undue. Rather, given the similarities in the requirements, the sophistication of the parties to the leases, and the extensive negotiations between the parties, the throughput requirements appear justified.

(iv) Security Deposit Requirement

Maher's lease obligated it to post a security deposit of \$1.5 million. F. 162. Maher obtained a letter of credit to cover the security deposit. F. 167. In 2007, PANYNJ increased Maher's security deposit to \$22 million. F. 169. Maersk-APM was not required to post a security deposit, instead, Maersk, Inc. executed a contract of guarantee on Maersk-APM's full performance of its lease terms. F. 171.

Maher contends that PANYNJ also unlawfully preferred and continues to prefer Maersk-APM over Maher with respect to the security deposit requirement by requiring Maher to provide a deposit not required of Maersk-APM. Maher Initial Brief at 37. Maher asserts that providing a security deposit ties up capital that could be put to other uses and that the economic cost of the security deposit is \$5,642,878. Maher Initial Brief at 37.

PANYNJ contends that Maher presented a greater credit risk and had been in arrears, whereas Maersk-APM's obligations were guaranteed in full, an obligation potentially far more costly than Maher's security deposit. PANYNJ Opposition at 42. PANYNJ contends that the security deposit increase in 2007 was required because of the transfer of ownership and control from Maher to RREEF, a policy which has been applied to other tenants, and that this issue was not pled in the complaint and therefore is not an issue in this proceeding. PANYNJ Opposition at 42-43.

The evidence shows that the security deposit requirement in the Maher Lease EP-249 differs from the Maersk-APM Lease EP-248. The Commission said in *Ceres*, that if "there were a realistic indication that Ceres would have been unable to fulfill those requirements, MPA would have legitimately denied Ceres the more favorable lease terms." *Ceres*, 27 S.R.R. at 1273. Maher paid a security deposit while Maersk-APM provided a guarantee from its parent corporation. Because Maher was a closely held corporation, it could not have provided the same type of guarantee. While operating under its prior lease with PANYNJ, Maher was in arrears on its monthly rental payment and was making repayment payments through the credit review process. Maersk-APM's obligations, by contrast, were guaranteed in full by its affiliate. The 2007 security deposit increase is not alleged as a violation in the complaint but also does not appear unreasonable. PANYNJ had a legitimate reason to require different security deposit requirements from Maher than from Maersk-APM and the evidence demonstrates that the different treatment was justified.

(v) First Point of Rest Requirement

Maher's lease requires that it maintain a specified berth and ten acres of its terminal as a first point of rest for automobiles. F. 172. The Maersk-APM lease does not require a first point of rest. F. 181.

Maher alleges that the first point of rest requirement was an unnecessary restriction on the flexible use of its terminal and that the requirement was unreasonably enforced in 2008 with the threat of repossession of the acreage and berth. Maher Initial Brief at 37-39.

PANYNJ maintains that at the time of lease negotiations, Maher intended to continue stevedoring automobiles and that Maher's customer, Nissan, wanted the term and it was negotiated between Maher, PANYNJ, and Nissan. PANYNJ Opposition at 43-44. PANYNJ contends that the reason for the first point of rest requirement is non-discriminatory. The Port states that Maher "insisted that its lease's use of premises clause permit it. Maersk-APM, by contrast, had no intention of stevedoring autos at it terminal." PANYNJ Opposition at 44.

In its reply, Maher contends that PANYNJ conceded that Maersk-APM does not have a similar requirement; Maher opposed the requirement; PANYNJ approved the construction of the building on the designated site; PANYNJ enforced the requirement in threatening letters in 2008; and the change in location did not eliminate the requirement. Maher Reply at 79-82.

The evidence demonstrates that the first point of rest requirement was not a central issue in the negotiation of either the Maersk-APM Lease or the Maher Lease, although it may have benefitted other entities, such as Nissan. In fact, Maher has changed the location of the first point of rest, having built a building on the location identified in the initial contract, and that change was approved by PANYNJ. F. 177-178. While there has been some dispute between the parties about the current status of the requirement, the evidence does not suggest that first point of rest for automobiles provisions were not justified under the Shipping Act.

d. Conclusion

Accordingly, Complainant has not established a violation of the third element of *Ceres*, that the unequal treatment is not justified by differences in transportation factors. Even if the burden is on PANYNJ, PANYNJ met that burden. As discussed above, the evidence does not demonstrate that PANYNJ gave any undue or unreasonable preference or advantage to Maersk-APM nor does the evidence demonstrate that PANYNJ imposed any undue or unreasonable prejudice or disadvantage on Maher. While there are differences in the leases that PANYNJ negotiated with Maersk-APM and Maher, those differences are based upon different risks presented and benefits received by each entity. Moreover, during these negotiations, PANYNJ was faced with a credible threat that Maersk-APM would leave the port for a competing offer in Baltimore. Brian Maher, himself, in contemporaneous documents, supported doing "all that you can" to retain Maersk-APM in the port. Even though Maersk-APM's approach to hub ports, and even the global financial economy, changed after the leases were negotiated, at the time, the decisions made by PANYNJ were reasonable. Economic realities justify PANYNJ not offering the same terms to Maher, which received different benefits (such as a larger terminal) and posed different risks. Given the set of circumstances presented, PANYNJ's leasing decisions were justified and based upon an analysis of the facts. The evidence does not support finding a violation of the Shipping Act based on section 41106(2). 46 U.S.C. § 41106(2).

Given this conclusion, it is not necessary to consider the fourth *Ceres* element, whether the resulting prejudice or disadvantage is the proximate cause of injury. However, Maher alleges other violations of the Shipping Act which must also be considered.

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

Maher contends that PANYNJ assessed Maher lease rates and other requirements much higher than Maersk-APM for the same services, including for basic rent, throughput rent, terminal guarantee enforcement, security deposit, and first point of rest requirement, and that PANYNJ lease terms levied on Maher do not correspond with the level of the benefit received. Maher Initial Brief at 57-71. PANYNJ asserts that Maher fails to demonstrate that PANYNJ engaged in unreasonable regulations and practices. PANYNJ Opposition at 87-88.

Section 41102(c), general prohibitions, of the Shipping Act states: “Practices in Handling Property.—A common carrier, marine terminal operator, or ocean transportation intermediary 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) (formerly Shipping Act § 10(d)(1)).

“The appropriate inquiry under Section 10(d)(1) . . . [is] the *Volkswagenwerk* standard of ‘whether the charge levied is reasonably related to the services rendered.’” *Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595, 602 (FMC 1987) (quoting *Volkswagenwerk*, 390 U.S. at 282). In *Secretary of the Army*, the Commission held that a large rate differential was excessive given the similarity of the services provided, and hence violated the “reasonable relationship” requirement of section 10(d)(1) of the 1984 Act. *Secretary of the Army*, 24 S.R.R. at 601-602, reaffirmed on reconsideration, 24 S.R.R. 1242, 1248 (FMC 1988).

“The concept of an unreasonable practice is broader than that relating to discrimination, prejudice, and the like.” *NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, 28 S.R.R. 1512, 1531 (ALJ 2000). In *NPR*, under the *Volkswagenwerk* test, it was “necessary to measure the benefits received by NPR as compared to the cost burdens that it was required to bear.” *NPR*, 28 S.R.R. at 1532. A *prima facie* violation of section 10(d)(1) exists if a port structures a charge in such a way that the amounts paid by different customers “do not bear a reasonable relationship” to the relative benefits they receive. *Louis Dreyfus Corp. v. Plaquemines Port Harbor & Terminal Dist.*, 21 S.R.R. 1072, 1082 (FMC 1982). In finding a section 10(d)(1) Shipping Act violation by the port authority in *Ceres*, the Commission concluded that “we find that the rates assessed Ceres do not correspond with the level of the benefit received, and thus constitute a violation.” *Ceres*, 27 S.R.R. at 1275.

In the proceeding *sub judice*, the rates assessed Maher correspond with the benefit received and risks presented. Maher negotiated a long-term lease of a large property convenient to express rail and other services. The benefits to Maher, including that the property was not competitively bid, must be considered. (*See, e.g.* F. 98, where Hanjin lost a competitive bidding situation in the Port.) The evidence shows that Maher’s lease terms are reasonably related to the benefits that Maher received. Accordingly, Maher has not established that PANYNJ failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving,

handling, storing, or delivering property, and therefore has not established a violation of section 41102(c).

3. Unreasonable Refusal to Deal

Maher asserts that PANYNJ refused and refuses to deal or negotiate with Maher with respect to Maher's repeated requests for parity with Maersk-APM and that the Port's refusals to deal are unreasonable. Maher Initial Brief at 71-80. PANYNJ contends that Maher fails to demonstrate that PANYNJ unreasonably refused to negotiate with Maher. PANYNJ Opposition at 88-91.

Section 41106(3) of the Shipping Act states that a marine terminal operator may not "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3) (Shipping Act §§ 10(b)(10) and 10(d)(3)). "This requires a two-part inquiry: whether [the port authority] refused to deal or negotiate, and, if so, whether its refusal was unreasonable." *Canaveral Port Auth. – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448 (FMC 2003). The Commission has held that a port authority's refusal to consider a proposal constitutes a refusal to deal or negotiate. *Canaveral Port Auth.*, 29 S.R.R. at 1448. With respect to a port authority, "in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration of an entity's efforts at negotiation." *Canaveral Port Auth.*, 29 S.R.R. at 1450.

The evidence shows that PANYNJ did not refuse to deal in the negotiations that resulted in Maher Lease EP-249. In fact, extensive negotiations spanned a five-year time frame. It does appear that negotiations stalled while PANYNJ negotiated its lease with Maersk-APM. However, this delay did not signal a refusal to deal but rather reflected the market realities facing PANYNJ. The evidence shows that while Maher's requests may not have been granted, that they were given due consideration. In fact, PANYNJ negotiated exclusively with Maher. Moreover, once PANYNJ signed the lease with Maher, it was not required to continually renegotiate the lease with Maher. If a port authority were required to continually renegotiate every lease every time a different lease provision was offered, it would impede the port's ability to function effectively. As has been discussed previously, the Shipping Act does not require "that all interested parties get the same deal." *Ceres*, 29 S.R.R. at 370. If there was a refusal to negotiate, the evidence does not demonstrate that such a refusal was unreasonable.

4. 07-01

a. Procedural History

Docket 07-01 began on December 29, 2006, when APM filed a complaint alleging that respondent PANYNJ violated the Shipping Act of 1984. The complaint alleges that APM did not receive an additional portion of marine terminal property, the Added Premises, by the date on which Maersk-APM Lease EP-248 required PANYNJ to provide it, that the delay caused harm to Maersk-APM, and that the delay showed a preference for Maher, which occupied the Added Premises pursuant to leases with PANYNJ before and during the delay of the transfer. 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 Maersk-APM Lease EP-248. APM answered the counter-complaint denying liability.

PANYNJ also filed a third-party complaint against Maher based on PANYNJ's claim that Maher failed to surrender the Added Premises as required by Maher Lease EP-249, the lease pursuant to which Maher occupied the Added Premises on the date on that Maersk-APM Lease EP-248 required PANYNJ to provide the Added Premises to Maersk-APM. 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 Maher Lease EP-249, and failed to make specified improvements PANYNJ was required to make before PANYNJ could require Maher to surrender the Added Premises.

Maersk-APM and PANYNJ entered into a Settlement Agreement and a Third Supplemental Agreement to Lease EP-248 resolving their claims in Docket 07-01 and other matters related to Lease EP-248 and filed a motion seeking approval of the Settlement Agreement. Maher opposed the motion. An Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice was issued on October 24, 2008. Maher filed exceptions to the Initial Decision. On April 1, 2009, the Commission denied Maher's exceptions and transferred and consolidated Maher's counter-complaint with the proceedings in Docket 08-03. *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Apr. 1, 2009) (Order Denying Exceptions and Petition for Stay).

b. Arguments of the parties

Maher alleges that PANYNJ failed to establish, observe, and enforce just and reasonable regulations; provided an unreasonable preference or prejudice; unreasonably refused to deal; and operated contrary to an FMC agreement with respect to the transfer of premises. Maher Initial Brief at 80-99.

PANYNJ claims that the Docket 07-01 litigation is now moot and that the Commission only consolidated the remaining issues between Maher and the PANYNJ. PANYNJ Opposition at 52. PANYNJ asserts that the then Presiding Officer rejected many of Maher's current arguments in approving the settlement between Maersk-APM and PANYNJ. PANYNJ Opposition at 52-53 (citing *APM Terminals v. PANYNJ*, FMC No. 07-01 at 36 (ALJ Oct. 24, 2008) (Initial Decision Granting Joint Motion for Approval of Settlement Agreement and Dismissal with Prejudice (citations omitted) (emphasis in original))). PANYNJ contends that "there are very few issues relevant to Maher's counter-complaint that 'remain' following the Settlement Agreement." PAFOF at 114 (finding 286).

c. Legal Framework

Shipping Act section 41102(b), general prohibitions, states that a "person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . the operation

is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission.” 46 U.S.C. § 41102(b)(2) (formerly Shipping Act § 10(a)(3)).

Title 46 U.S.C. § 41102(b)(2) provides that “A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . the operation is not in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.” Here, the prohibition requires proof that (1) the agreement was required to be filed under § 40302 which establishes the filing requirement for marine terminal operator agreements, and (2) that the operation was not in accordance with the terms of the agreement. As relevant here, a marine terminal operator agreement is an agreement between or among marine terminal operators to fix or regulate rates or other conditions of service. 46 U.S.C. § 40301. It is well-established that parties to agreements must operate within the authority of those agreements. *See, e.g., Ivarans v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1566 n.11 (ALJ 1986) (“Parties . . . are specifically required to adhere to the terms of their filed agreements.”).

d. Discussion

PANYNJ questions how much of the 07-01 issues were remaining and therefore transferred after the Commission’s decision. The 07-01 Commission Decision did not find that Maher raised issues warranting disapproval of the settlement agreement; however, it also did not explicitly resolve the issues raised in Maher’s counter-complaint. The Commission indicated that it would consolidate the “remaining issues” between Maher and PANYNJ into Docket 08-03. *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Apr. 1, 2009) (Order Denying Exceptions and Petition for Stay) at 6. The question is what issues are remaining. Each allegation argued by Maher in its initial brief will be discussed in turn.

i. Indemnity Provision

Maher contends:

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

Maher Initial Brief at 80 (footnotes omitted).

PANYNJ claims that this new damages claim was first asserted and disclosed in an expert report filed on May 27, 2011. PAFOF at 114 (finding 287). PANYNJ argues that this delayed damages claim was never properly pled in either the 07-01 or 08-03 litigations; that any such claim for reparations is time-barred by the three-year statute of limitations; that PANYNJ is not liable for any alleged delayed damages because there is no provision in Maher's lease, EP-249, that required PANYNJ to provide Maher with the premises at issue by any specified date; and Maher was also responsible for the delays in transferring and improving the land subject to the land swaps contemplated in the lease. PAFOF at 114-115 (findings 288-291).

PANYNJ's claims against Maher in both the 07-01 proceeding and the companion New Jersey state court litigation were resolved with the approval of the PANYNJ-APM settlement agreement. The issue of fault regarding the delay in delivering the 84 acres to Maersk-APM was not resolved in the settlement and is no longer necessary to determine. PANYNJ resolved the issues with APM in Docket 07-01, thereby relieving Maher of potential liability for these issues. As the Commission stated in approving the settlement agreement, "the approval of the Settlement Agreement would extinguish PANYNJ's claim against Maher, thereby releasing Maher of potential liability were this proceeding to continue." *APM Terminals v. PANYNJ*, FMC No. 07-01 (FMC Apr. 1, 2009) (Order Denying Exceptions and Petition for Stay) at 6. Accordingly, the evidence does not support a finding that the indemnity provision violates the Shipping Act.

ii. Unreasonable Preference

Maher asserts that:

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

Maher Initial Brief at 90.

As discussed more fully above, there is no requirement that leases for different properties contain identical provisions nor that this particular provision shows an unreasonable preference or undue preference. The evidence does not support a finding that there is a failure to establish, observe, and enforce just and reasonable regulations by the inclusion in Maher Lease EP-249 of an indemnity provision or by filing a claim in Docket 07-01 against Maher based on that claim.

iii. Refusal to Deal

Maher claims that “PANYNJ unlawfully refused to deal or negotiate with Maher categorically with respect to the issues presented in Dkt. 07-01 while actively negotiating with Maersk-APM and providing Maersk-APM undue and unreasonable preferences which prejudice Maher.” Maher Initial Brief at 91 (footnote omitted).

Maher cites no authority holding that when a port authority renegotiates specific lease provisions in one lease for marine terminal property with one of its marine terminal operator tenants, the Shipping Act requires it to renegotiate with all of its other marine terminal operator tenants about whatever provisions in their leases they want to renegotiate. It would paralyze a port authority’s ability to renegotiate leases as may be required by changed conditions for fear of being inundated with demands from other marine terminal operators seeking unrelated changes to their leases. To the extent that Maher’s claim is based upon a duty to negotiate issues in litigation, they have presented no legal authority demonstrating such a requirement and no facts supporting such a finding. The evidence does not support a finding of an unreasonable refusal to deal.

iv. Operating Contrary to Agreement

Maher asserts:

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

Maher Initial Brief at 94.

Specifically, Maher states that “PANYNJ operated contrary to EP-249 which did not as a matter of law require Maher to indemnify PANYNJ for PANYNJ’s failures with respect to PANYNJ’s delayed delivery of the 84 acres” and “PANYNJ’s enforcement actions also violated the Shipping Act because they were contrary to the agreement because they failed to observe and enforce the *force majeure* provision of EP-249, which exempted Maher from liability for circumstances outside its control.” Maher Initial Brief at 95. In addition, Maher states that PANYNJ caused the two year delay and that PANYNJ failed to provide Maher the required improved old express rail premises such that upon reasonable notice Maher could have timely surrendered the 84 acres before December 31, 2003, the required deadline which PANYNJ asserted in its 2007 and 2008 enforcement actions against Maher. Maher Initial Brief at 99.

PANYNJ responds that:

Maier has now invented a new claim, under which the PA purportedly had a contractual obligation to Maier to complete a land swap with Maier by December 31, 2003, and is liable to Maier for \$56 million for failing to comply with that purported obligation. Initial Br. 13, 96-99. As discussed in further detail at pp. 91-94 infra, however, (1) Maier never pleaded any such claim, which is thus not properly part of this proceeding; (2) in any event, any claim based on purported delays would have arisen on December 31, 2003, and thus would be barred by the Shipping Act's three-year statute of limitations, see 46 U.S.C. § 41301(a) (a complainant must seek reparations "within 3 years after the claim accrues"); (3) there is plainly no legal or factual basis for such a claim, inasmuch as the PA had no lease obligation to Maier to complete the land swap by any date certain, let alone by December 31, 2003; and (4) Maier's assertion that the PA "delayed" development or failed to act diligently is baseless.

PANYNJ Opposition at 53-54 (footnotes omitted).

The evidence does not support a finding that PANYNJ operated contrary to a filed agreement. The indemnity issue is moot as the claims between PANYNJ and Maier have been resolved. Even if the inclusion of this indemnity provision violated the Shipping Act, Maier has not established any actual injury. Any damages would have occurred at the latest as the time of the land swap, and would be barred by the three year statute of limitation. See Initial Decision Granting Joint Mot. for Approval of Settlement Agreement and Dismissal With Prejudice at 33-34, 37-40 (07-01), Oct. 24, 2008.

v. Reply Brief Arguments

In its reply brief, Maier contends that PANYNJ did not file and serve a verified answer to Maier's counter-complaint, and therefore it has defaulted on Maier's counter-complaint and is barred from asserting defenses to it. Reply Brief at 97. Barring PANYNJ's defense is an extreme sanction that is disfavored, particularly where there is no contumacious conduct and lesser sanctions could have resolved the issue had it been raised earlier. See *Betty K. Agencies, LTD v. M/V Monada*, 432 F.3d 1333, 1337-38 (11th Cir. 2005). This issue was not raised in Maier's initial brief and PANYNJ has not had an opportunity to respond to it. It has been clear throughout these protracted proceedings, however, that PANYNJ intends to contest the allegations in the counter-complaint. Particularly in this context, where the parties have actively litigated a series of cases before this administrative forum, it would not be appropriate at this point to limit PANYNJ's defense. In addition, based on the findings herein, it is not necessary to reach the issue of whether counter-complaints are subject to the same statute of limitations as complaints, as long as the counter-complaint was not already time-barred. Reply Brief at 95-96. As discussed above, the evidence does not establish a violation of the Shipping Act based upon the counter-claims raised in Docket 07-01.

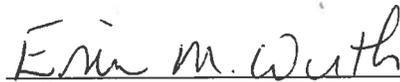
IV. ORDER

Upon consideration of the findings and conclusions set forth above, and the determination that Maher Terminals did not violate the Shipping Act, it is hereby

ORDERED that the claims herein be **DENIED**. It is

FURTHER ORDERED that the complaint in Docket 08-03 and the counter-complaint in Docket 07-01 be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.



Erin M. Wirth
Administrative Law Judge