

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 08-03**

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**MAHER TERMINALS, LLC**

**COMPLAINANT**

**v.**

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

**RESPONDENT**

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**MAHER TERMINALS, LLC'S  
EXCEPTIONS TO THE INITIAL DECISION OF APRIL 25, 2014**

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**TABLE OF CONTENTS**

INTRODUCTION ..... 1

    I. The I.D. Confirms Maher’s Claims In Key Respects. .... 4

    II. Brief Summary Of Certain Key Exceptions. .... 7

APPLICABLE LEGAL STANDARDS ..... 13

    I. Standard of Review..... 13

    II. Unreasonable Preference or Prejudice. .... 14

    III. Failure to Establish, Observe, and Enforce Just and Reasonable Regulations. .... 16

    IV. Unreasonable Refusal to Deal..... 18

    V. Operating Contrary to FMC Agreement. .... 18

ANALYSIS..... 19

    I. Maher Established The Shipping Act Violations Caused By Status. .... 19

        A. The Purported “Risks And Benefits” Do Not Justify The Lease Disparities. .... 20

        B. The “Risks and Benefits” Justification Is Barred By Judicial Estoppel. .... 23

        C. The I.D. Erroneously Conflated PANYNJ’s Decision To Subsidize Maersk-APM With The Later Decision To Refuse Parity For Maher..... 25

    II. The Port Guarantee Is Not a Valid Transportation Justification..... 26

        B. The I.D. Erroneously Relied Upon Maher’s Failure To Offer. .... 27

        C. PANYNJ Enforces The Port Guarantee As Merely A Rent Increase. .... 28

    III. The I.D. Failed to Consider Maher’s Class Subsidy Claim..... 34

    IV. The I.D. Errs In Other Key Respects Warranting Reversal..... 37

        A. The I.D. Erroneously Invoked Estoppel And Misconstrued Evidence..... 37

        B. “Gives and Takes” Are Not Valid Transportation Purposes. .... 38

        C. The I.D. Erroneously Invoked An “Identical Service” Standard..... 39

        D. The Lease Disparities Are Not Justified. .... 40

    V. PANYNJ Failed to Establish, Observe, and Enforce Reasonable Practices..... 55

    VI. PANYNJ Unreasonably Refused To Deal..... 60

    VII. The I.D. Erroneously Rejected The Dkt. 07-01 Claims..... 64

        A. Maher Established that PANYNJ Failed to Establish, Observe, And Enforce Just And Reasonable Regulations as Required by 46 U.S.C. § 41102(c)..... 65



B. PANYNJ’s Unreasonable Preference/Prejudice ..... 67

C. PANYNJ Unreasonably Refused To Deal..... 68

D. PANYNJ Operated Contrary To FMC Agreement..... 69

E. The I.D. Erroneously Permits PANYNJ To Assert An Affirmative Defense Not  
Pleaded And To Argue Against A Claim It Failed To Deny..... 73

CONCLUSION..... 75

**TABLE OF ABBREVIATIONS FOR MERITS FILINGS**

<b>MERITS FILING</b>	<b>ABBREVIATION</b>
Maher’s Initial Brief Due October 7, 2011 (filed Oct. 7, 2011)	MTIB
Maher’s Reply to Respondent’s Brief Due December 9, 2011 (filed Dec. 9, 2011)	MTRB
Maher’s Proposed Findings of Fact and Supporting Evidence (filed Oct. 7, 2011)	MTFOF
Maher’s Response to PANYNJ’s Proposed Findings of Fact (filed Dec. 9, 2011)	MTR-PAFOF
PANYNJ’s Memorandum of Law in Opposition to Maher’s Initial Brief (filed Nov. 9, 2011)	PARB
PANYNJ’s Proposed Findings of Fact (filed Nov. 9, 2011)	PAFOF
PANYNJ’s Response to Maher’s Proposed Findings of Fact and Supporting Evidence (filed Nov. 9, 2011)	PAR-MTFOF



**TABLE OF AUTHORITIES**

**Supreme Court of the United States**

*Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607 (1966).....4

*Davis v. Wakelee*, 156 U.S. 680 (1895) .....25

*ICC v Delaware Lackawanna & Western R.R. Co.*, 220 U.S. 235 (1911) .....10, 21

*New Hampshire v. Maine*, 532 U.S. 742 (2001).....23, 25

*Pegram v. Herdrich*, 530 U.S. 211 (2000).....23

*Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*,  
390 U.S. 261(1968)..... 2, 14, 17, 55

**Federal Maritime Commission**

“50 Mile Container Rules” Implementation by Ocean Common Carriers  
*Serving U.S. Atl. & Gulf Coasts Ports*, 24 S.R.R. 411 (F.M.C. 1987) .....10, 16, 55

*A/S Ivarans v. Lloyd Brasileiro*, 24 S.R.R. 1029 (F.M.C. 1988) .....74

*APM Terminals v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623 (F.M.C. 2009) .....64

*Ballmill Lumber & Sales Corp. v. Port of N.Y. Auth.*,  
10 S.R.R. 131 (F.M.C. 1968).....16, 20, 34, 68

*Bloomers of Cal., Inc. v. Ariel Maritime Group, Inc.*, 26 S.R.R. 183 (F.M.C. 1992) .....67

*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*,  
25 S.R.R. 400 (A.L.J. 1989) .....4

*Canaveral Port Authority – Possible Violations of Section 10(b)(10)*,  
29 S.R.R. 1436 (F.M.C. 2003)..... passim

*Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (F.M.C. 1981) .....15

*Central Nat’l Corp., et al. v. Port of Houston Auth.*, 22 S.R.R. 521 (A.L.J. 1983).....65

*Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 29 S.R.R. 356 (F.M.C. 2001) ..... passim

*Ceres Marine Terminal v. Md. Port Admin*, 27 S.R.R. 1251 (F.M.C. 1997) ..... passim

*Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*,  
25 S.R.R. 1308 (F.M.C. 1990).....14

*Dep’t of Defense v. Matson Navigation Co.*, 17 S.R.R. 1 (F.M.C. 1977).....10



*Distrib. Servs., Ltd. v. Trans-Pacific Freight Conf. of Japan*,  
24 S.R.R. 714 (F.M.C. 1988)..... passim

*Docking and Lease Agreement By and Between City of Portland, Maine and Scotia Prince  
Cruises Limited*, 30 S.R.R. 377 (F.M.C. 2004) .....18

*Exclusive Tug Arrangements in Port Canaveral, Florida*,  
29 S.R.R. 1199 (F.M.C. 2003).....17, 56, 57

*Freight Forwarder Bids on Government Shipments at U.S. Ports – Possible Violations of the  
Shipping Act, 1916, and General Order 4*, 17 S.R.R. 284 (F.M.C. 1977) .....2, 37

*Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894 (A.L.J. 2002) .....23

*In the Matter of Agreement No. T-1870: Terminal Lease Agreement at Long Beach,  
California*, 9 S.R.R. 390 (F.M.C. 1967) .....11

*In the Matter of Agreements No. T-2108 & T-2108-A Between the City of L.A. & Japan Line,  
Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., & Yamashita-Shinnihon S.S.  
Co.*, 10 S.R.R. 556 (A.L.J. 1968).....21

*Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306 (F.M.C. 2001) .....23, 71

*Int’l Ass’n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675 (A.L.J. 1990).....4

*Investigation of Free Time Practices – Port of San Diego*, 7 S.R.R. 307 (F.M.C. 1966).....9

*Ivarans v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543 (F.M.C. 1986) .....19, 69

*James F. Flanagan Shipping Corp. d/b/a/ James J. Flanagan Stevedores v. Lake Charles  
Harbor & Terminal Dist. & Lake Charles Stevedores, Inc.*,  
27 S.R.R. 1123 (F.M.C. 1997).....10, 15, 17

*Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist.*,  
21 S.R.R. 1072 (F.M.C. 1982).....2, 17

*NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, 28 S.R.R. 1512 (A.L.J. 2000).....17, 57, 58

*Pet. of S.C. State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137 (F.M.C. 1997).....14

*Port Auth. of N.Y. & N.J. v. N.Y. Shipping Ass’n*, 23 S.R.R. 21 (F.M.C. 1985)..... passim

*Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 S.R.R. 826 (A.L.J. 1984) .....23

*Puerto Rico Maritime Shipping Authority – Rates on Government Cargo*,  
18 S.R.R. 830 (F.M.C. 1978).....10

*Rates Which Exclude Certain Classes of Shippers, Circular Letter No 1-85*,  
23 S.R.R. 460 (F.M.C. 1985).....10, 14, 21



*Rose Int’l, Inc. v. Overseas Moving Network Int’l, Ltd.*, 29 S.R.R. 119 (F.M.C. 2001) .....14

*Safmarine Container Lines N.V. v. Garden State Spices, Inc.*, 28 S.R.R. 1619 (A.L.J. 2000).....74

*Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595 (F.M.C. 1987) .....16, 56

*Secretary of the Army v. Port of Seattle*, 24 S.R.R. 1242 (F.M.C. 1988) .....16, 56

*Stevens Shipping and Terminal Co. v. S.C. Ports Auth.*, 22 S.R.R. 1030 (A.L.J. 1984) .....65

*Valley Evaporating Co. v. Grace Line, Inc.*, 11 S.R.R. 873 (F.M.C. 1970) .....34

*Vinmar v. China Ocean Shipping Co.*, 26 S.R.R. 38 (A.L.J. 1991).....70

*West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783 (F.M.C. 1978) .....16, 55, 58

**United States Court of Appeals**

*Burlington Indus. v. Milliken & Co.*, 690 F.2d 380 (4th Cir. 1982) .....70

*Chavez v. Noble Drilling Corp.*, 567 F.2d 287 (5th Cir. 1978) .....20

*Data Gen. Corp. v. Johnson*, 78 F.3d 1556 (Fed. Cir. 1996).....25

*Employers Ins. of Wausau v. U.S.*, 764 F.2d 1572 (Fed. Cir. 1985) .....70

*Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391 (5th Cir. 2003) .....23

*New York Shipping Ass’n v. Fed. Mar. Comm’n*, 854 F.2d 1338 (D.C. Cir. 1988) .....10

*Stephen Marshal Gabarick v. Laurin Maritime (America) Inc., et al.*, No. 13-30739,  
2014 WL 2118621 (5th Cir. May 21, 2014) .....23

*Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571 (D.C. Cir. 2003) .....67

*Varner v. Peterson Farms*, 371 F.3d 1011 (8th Cir.2004).....74

*Waco Int’l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523 (5th Cir. 2002) .....67

**Other Courts**

*Azurak v. Corporate Prop. Investors*, 814 A.2d 600, 601 (N.J. 2003) .....66

*Bd. of Trustees, Sheet Metal Workers' Nat. Pension Fund v. N. Park Heating, Co., Inc.*,  
1:12CV1026 CMH/JFA, 2013 WL 596525 (E.D.Va. Jan. 15, 2013) .....74

*Diaz v. Holdings, LLC*, 2010 WL 2867947 (N.J. Super. Ct. App. Div. July 20, 2010) .....66



*Duchossois Indus., Inc. v. United States*, 07 C 2295,  
2010 WL 1541362 (N.D. Ill. Apr. 14, 2010) .....8

*Muellner v. Mars, Inc.*, 714 F. Supp. 351 (N.D. Ill. 1989) .....25

*Riveredge Assocs. v. Metro. Life Ins. Co.*, 774 F. Supp. 897 (D.N.J. 1991).....67

*Simoes v. Nat’l R.R. Corp.*, 09–3498 (MLC), 2011 WL 2118934 (D.N.J. May 27, 2011) .....66

*Taylor v. Port Auth. of N.Y. and N.J.*, 2008 WL 2572685  
(N.J. Super. Ct. App. Div. July 1, 2008).....66

**United States Code**

5 U.S.C. § 557(c)(3)(A) .....14

46 U.S.C. § 41102(b) .....4, 75

46 U.S.C. § 41102(b)(2).....1, 18, 69

46 U.S.C. § 41102(c) ..... passim

46 U.S.C. § 41106(2) .....1, 14, 19, 34

46 U.S.C. § 41106(3) .....1, 18, 60

46 U.S.C. § 41301(a) .....69

46 U.S.C. § 41301(b) .....70

46 U.S.C. § 41305(b) .....69

**Code of Federal Regulations**

46 C.F.R. § 502.12 .....70

46 C.F.R. § 502.63(a).....69

46 C.F.R. § 502.64(a).....74

46 C.F.R. § 502.64(d) .....70, 74

46 C.F.R. § 502.71 .....70

46 C.F.R. § 502.227(a)(1).....1

46 C.F.R. § 502.153 .....1

46 C.F.R. § 525.2(a)(1).....67



49 Fed. Reg. 44,362-01 .....70

58 Fed. Reg. 27,208-01 .....70

64 Fed. Reg. 9281 .....67



## INTRODUCTION

Pursuant to the April 25, 2014 Initial Decision dismissing Maher’s claims (the “I.D.”) against the Respondent Port Authority of New York and New Jersey (“PANYNJ”) for violations of the Shipping Act and Federal Maritime Commission (“FMC”) Rules 227(a)(1) and 153, 46 C.F.R. §§ 502.227(a)(1) and 502.153, Complainant Maher Terminals, LLC (“Maher”), by and through undersigned counsel, submits these Exceptions.

Notwithstanding the I.D.’s erroneous dismissal, PANYNJ violated and *continues* to violate the Shipping Act by (1) unlawfully preferring Maersk-APM<sup>1</sup> and unlawfully prejudicing Maher, (2) unlawfully failing to establish, observe, and enforce just and reasonable regulations and practices, (3) unreasonably refusing to deal with Maher, and (4) unlawfully operating contrary to an agreement, all in violation of 46 U.S.C. §§ 41106(2), 41102(c), 41106(3), and 41102(b)(2) (Shipping Act §§ 10(d)(4) (formerly §§ 10(b)(11) & (12)), 10(d)(1), 10(d)(3) (applying 10(b)(10) to marine terminal operators) and 10(a)(3)).

PANYNJ violated and *continues* to violate the Shipping Act with respect to FMC Agreements Nos. 201106 (“EP-248”) and 201131 (“EP-249”) and otherwise by unlawfully failing to and *continuing* to fail to fulfill its *absolute statutory duty* to provide Maher preferential lease terms in EP-249 and thereafter, as provided to Maersk-APM in EP-248, and failing to establish, observe, and enforce just and reasonable regulations and practices. These are the same violations adjudged by the Commission in *Ceres Marine Terminal v. Md. Port Admin*, 27 S.R.R. 1251, 1270-77 (F.M.C. 1997) [hereinafter *Ceres I*] and *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 29 S.R.R. 356, 372 (F.M.C. 2001) [hereinafter *Ceres II*] (“once the respondent set forth the criteria upon which it would grant lower rates, it had a statutory duty to apply the criteria in

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<sup>1</sup>“Maersk-APM” collectively refers to Maersk Container Service Company, Inc. (now APM Terminals, North America, Inc.) (“APM”), an entity organized under the laws of the State of Delaware.

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an even-handed manner,” and this duty is “absolute”) [collectively *Ceres*].

PANYNJ violated and *continues* to violate the Shipping Act as reflected in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 280-82 (1968), enforcing 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)), because PANYNJ’s charges levied on Maher are not reasonably related to the service provided. The evidence establishes that PANYNJ overcharges Maher. *Volkswagenwerk*, 390 U.S. at 280-82; *Louis Dreyfus Corp. v. Plaquemines Port, Harbor & Terminal Dist.*, 21 S.R.R. 1072, 1082 (F.M.C. 1982). PANYNJ levied on Maher a class subsidy based on *status* that violates the Shipping Act. *Freight Forwarder Bids on Government Shipments at U.S. Ports – Possible Violations of the Shipping Act, 1916, and General Order 4*, 17 S.R.R. 284, 293-95 (F.M.C. 1977).

PANYNJ also violated and *continues* to violate the Shipping Act by unreasonably refusing to deal or negotiate with Maher. *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448-51 (F.M.C. 2003).

Just as in *Ceres*, although Maher guarantees more cargo and rent than Maersk-APM, PANYNJ unlawfully prefers Maersk-APM because of *status*. PANYNJ unlawfully prefers Maersk-APM because its affiliated ocean carrier, Maersk Line,<sup>2</sup> allegedly controls cargo and threatened to leave the port. PANYNJ unlawfully prejudices Maher, which it regards as a mere captive terminal operator that does not control cargo and presents no risk to leave the port. PANYNJ *continues to violate its absolute duty to make the same preferential volume discount lease terms available to Maher*.

*Maher continues to sustain damages exceeding \$1 million per month. As a practical*

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<sup>2</sup> Maersk Line is A.P. Møller-Maersk’s ocean carrier that is in the business of “transportation of cargo into and out of the United States on ocean-going vessels.” Oppenheimer 07-01 Dep. at 17:8-18:19, 106:10-12; Nicola 07-01 Dep. at 46:10-12; MTFOF ¶ 11; MTIB at 5.

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matter, just during the more than six years that this Dkt. 08-03 proceeding has been before the Commission, Maher has sustained over \$72 million in actual damages.<sup>3</sup> The evidence establishes that as of May 31, 2011, Maher's damages total approximately \$491,363,215 through the 30-year term of the lease. This figure is comprised of actual damages as of that date of \$124,444,650 (\$89,578,815 incurred before 2010) and future damages of \$366,918,465 absent a cease and desist order.<sup>4</sup>

PANYNJ also violated the Shipping Act as alleged in its consolidated original Counter-Complaint from Dkt. 07-01. The Dkt. 07-01 proceeding was filed by Maersk-APM against PANYNJ on December 29, 2006 alleging, among other things, that PANYNJ violated EP-248 by failing to timely provide Maersk-APM certain premises, i.e., 84 acres of land to Maersk-APM, which were previously occupied by Maher's Tripoli Street marine terminal.<sup>5</sup> Maersk-APM alleged that this two-year delay in receiving the premises caused it to incur injury and damages of approximately \$45 million.<sup>6</sup> After its motion to dismiss failed, on August 9, 2007, PANYNJ third-partied Maher into the proceeding alleging among other things that Maher failed to indemnify PANYNJ for the \$45 million in damages allegedly sustained by Maersk-APM.<sup>7</sup>

On September 4, 2007, Maher denied the allegations and filed a counter-complaint for PANYNJ's violations of the Shipping Act, i.e., unduly prejudicing Maher and unduly preferring Maersk-APM with respect to lease terms through the imposition and enforcement of an unlawful indemnity provision, failure to establish observe and enforce just and reasonable regulations and practices, failure to provide proper notice and transfer of improved premises to Maher in a timely

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<sup>3</sup> App. 1D-1621; MTFOF ¶ 299; App. 4-3-4; MTFOF ¶¶ 522-24; MTIB at 13.

<sup>4</sup> App. 4-3-4; MTFOF ¶ 522; App. 4-4; MTFOF ¶¶ 523-24; MTIB at 12-13, 69.

<sup>5</sup> App. 3A-3-8; MTFOF ¶ 41; MTIB at 6.

<sup>6</sup> App. 1D-1620; App. 3A-260; Evans 07-01 Dep. at 160:4-5; MTFOF ¶ 433; MTIB at 6.

<sup>7</sup> App. 3A-56; MTFOF ¶ 47; MTIB at 6.

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manner, failure to operate in accordance with the filed agreement, and unreasonably refusing to deal or negotiate with Maher with respect to these matters.<sup>8</sup> *PANYNJ failed to answer and deny the allegations and did not assert any affirmative defenses, e.g., statute of limitations.*

Maher's actual injury and damages for the two-year delay in receiving improved premises from PANYNJ totals \$56,559,566 in lost profits and increased operating and construction costs, a figure consistent with Maersk-APM's \$45 million claim for like violations in Dkt. 07-01.<sup>9</sup> Maher sustained actual injury and damages in the amount of \$1,354,268.25 for increased operating costs to defend against PANYNJ's unlawful enforcement actions of the indemnity requirement in violation of the filed agreement.<sup>10</sup> Additional amounts not to exceed twice the amount of the actual injury for PANYNJ's violation of 46 U.S.C. § 41102(b) should be awarded.<sup>11</sup> Maher also sustained actual injury from PANYNJ's enforcement of the first point of rest requirement in the amount of at least \$9,382.50.<sup>12</sup> PANYNJ settled Maersk-APM's Dkt. 07-01 claims by providing Maersk-APM further valuable lease concessions exceeding \$23 million in value,<sup>13</sup> but it unreasonably refused to deal with Maher and violated the Shipping Act in additional respects.

### **I. The I.D. Confirms Maher's Claims In Key Respects.**

Despite its errors, in key respects the I.D.—from which PANYNJ has taken no exceptions—establishes PANYNJ's violations. The I.D. reconfirmed that (1) the Commission's governing legal standard applies here as set forth in *Ceres I*, I.D. at 37-38 (previously confirmed

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<sup>8</sup> App. 3A-125-26; MTFOF ¶ 48; MTIB at 6-7.

<sup>9</sup> App. 4-4; MTFOF ¶ 532; MTIB at 13, 96; MTRB at 98.

<sup>10</sup> App. 1D-1924, 2000; App. 1D-1929, 2008; MTFOF ¶ 533; MTIB at 13.

<sup>11</sup> MTIB at 13. *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 400, 432 (A.L.J. 1989); *Int'l Ass'n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675 (A.L.J. 1990); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 622 (1966).

<sup>12</sup> App. 1D-1924; App. 1D-1929, 2009; MTFOF ¶ 533; MTIB at 13.

<sup>13</sup> App. 3A-283-84; Larrabee Dep. at 79:9-81:10; App. 1D-1786; MTFOF ¶ 69; App. 3A-261 & -310; MTFOF ¶ 70; App. 3A-326; MTFOF ¶ 71; App. 3A-261; MTFOF ¶ 72; MTRB at 74.

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by the Commission’s January 31, 2013 Order Granting In Part and Denying In Part Respondent’s Motion for Summary Judgment in this proceeding) (“January 31 Order”), and (2) there is no dispute that Maher carried its burden of establishing the first two key *Ceres* elements for establishing a violation of the Shipping Act with respect to unlawful discrimination. The I.D. concluded correctly that (1) Maher and Maersk-APM are “similarly situated,” I.D. at 39-40, and (2) PANYNJ treated Maher differently from Maersk-APM. I.D. at 40 (“The parties agree that Maher and Maersk-APM are treated differently.”), 47 (for example, “the evidence demonstrates that . . . Maersk-APM received lower rents than Maher.”).

Following PANYNJ’s confession in its initial brief that it discriminated against Maher based on *status*,<sup>14</sup> the I.D. concluded decisively that Maersk-APM’s ocean carrier *status* as contrasted to Maher’s marine terminal operator *status* “*did have a real and tangible impact on PANYNJ’s negotiations with these particular entities.*” I.D. at 40 (emphasis added). That is, *status* caused and continues to cause the ongoing discrimination and violations.

The I.D. concluded that on April 27, 1999, PANYNJ granted Maersk-APM a “total package” of lease concessions of “\$120 million” (\$90 million rent savings at net present value of nine percent and \$30 million of free construction capital) (\$336 million nominal).<sup>15</sup> I.D. at 20 (F. 94), 44. The I.D. concluded that PANYNJ *did not* provide this “total package of \$120

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<sup>14</sup> PARB at 58-67. PANYNJ conceded that Maersk-APM’s *status* as affiliated with ocean carrier Maersk was a cause of the disparities and the resulting harm. It stipulated to the testimony of its own PANYNJ executives, 30(b)(6) witnesses, and its sworn interrogatory answers verified by its executives. PAR-MTFOF ¶¶ 250, 253-255, 258-260, 262. PANYNJ also conceded that *status* was a cause by arguing affirmatively that the differing “risks” presented by the tenants justify the differences. PAR-MTFOF ¶¶ 223, 253; PAFOF ¶¶ 167, 170. According to PANYNJ, ocean carrier Maersk was a risk to leave the port while marine terminal operator Maher was not. PAFOF ¶¶ 167, 170; MTRB at 24.

<sup>15</sup> Although not addressed by the I.D., it is uncontroverted that the \$120 million net present value lease concession figure equates to \$336 million in nominal dollars over the 30 year term of the lease. App. 1B-565-67; MTFOF ¶ 202; MTIB at 50; MTRB at 27, 73, 87.

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million” net present value (or \$336 million in nominal dollars) in lease concessions to Maher, I.D. at 26 (F. 130-31), and that PANYNJ confirmed that on September 23, 1999, it told Maher “that the Sea-land/Maersk rates were ‘off the table,’” and that “Maher was not going to receive the economic package that Maersk and – and APM received . . . .” I.D. at 26-27 (F. 130-131).

The I.D. concluded that PANYNJ provided the rent concessions to Maersk-APM because it was a “credible risk to leave the Port,” but “Maher did not present the same risk [to leave the Port] as Maersk-APM.” I.D. at 48. According to the I.D., “[t]here is no evidence supporting a finding that if Maher moved to another port, ocean common carriers would follow.” I.D. at 48. But, the I.D. also concluded this “risk” is “because” of *status*. I.D. at 40. Maher is a marine terminal operator, not an ocean carrier. Thus, when it labeled the difference purportedly justifying the discrimination as “risk,” the I.D. unwittingly actually confirmed that PANYNJ refused to provide Maher the same “total package” of lease concessions of \$120 million net present value (\$336 million nominal) and the other unduly preferential terms because of *status*.

The I.D. also confirmed other violations in key respects: (1) the I.D. confirmed that “PANYNJ charged [Maher] the higher finance rate” of which Maher complains, I.D. at 50; (2) the I.D. confirmed that Maher must satisfy *higher* rent and terminal guarantees of which Maher complains, and that in the third guarantee period, i.e., the entire second half of the 30-year lease, Maher must also satisfy a “greater obligation” in the form of the terminal guarantee both total (900,000 versus 390,000 containers for Maersk-APM) and on a per acre basis (2,022 versus 1,114 containers for Maersk-APM), I.D. at 51 (“the rent and terminal guarantees are different,” including more onerous penalties on Maher requiring return of the entire property whereas Maersk-APM would only face return of a portion of its facility); (3) the I.D. confirmed “the security deposit requirement[s] . . . differ[.]” and that “PANYNJ . . . require[d] different security

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deposit requirements from Maher than from Maersk-APM,” I.D. at 52; and (4) the I.D. confirmed that “Maher’s lease requires it maintain a specified berth and ten acres of its terminal as a first point of rest for automobiles . . . [and] [t]he Maersk-APM lease does not require a first point of rest.” I.D. at 52.

The I.D. then concluded that the question “is whether the differences in lease terms are reasonable and based on valid transportation factors.” I.D. at 40. The I.D. observed that “[t]o determine whether the lease differences at issue . . . were based on valid transportation factors, it is necessary to compare the lease provisions.” I.D. at 42. But, of course, having previously determined that *status* caused the disparities, as a practical matter, the I.D. already determined that they are based on an *invalid* transportation factor, *status*, and the violations are proved.

## **II. Brief Summary Of Certain Key Exceptions.**

After admitting—as it had to at a minimum—the governing authority of *Ceres I* as confirmed by the January 31 Order, and accepting the foregoing findings of fact and conclusions established by the uncontroverted evidence, as a practical matter, the I.D. then erroneously departed from the Commission’s authority in *Ceres I* and other decisions at each ultimate decision point and thereby misapplied the governing law. The I.D. further compounded its plain legal errors by: (1) disregarding the mountain of material evidence establishing Maher’s claims; (2) failing to make detailed findings of fact and conclusions of law; (3) entirely ignoring certain of Maher’s claims; and (4) dispensing with others in a wholly conclusory fashion. These errors warrant *de novo* review and an order by the Commission overturning the I.D., approving Maher’s claims establishing PANYNJ’s violations of the Shipping Act, and granting Maher’s prayers for relief.

### **A. Status Caused The Violations Which Are Established.**

Regarding the lease discrimination claims, the I.D.’s express language manifests its plain

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legal error: “The *difference between being a terminal operator and an ocean carrier,*” i.e., *status*, “*impacts the negotiation process because these different entities pose different risks and received different benefits.*” I.D. at 40 (emphasis added). That is, the I.D. confirmed that PANYNJ discriminated against Maher *because* it was a mere marine terminal operator and not an ocean carrier. Having confirmed that *status* was a cause of the discrimination as alleged, the I.D. should have then concluded as a matter of law that PANYNJ violated the Shipping Act. Instead, the I.D. erroneously rescued PANYNJ with arguments that “[t]he differences are not based on status *alone . . .*” I.D. at 40 (emphasis added). This is plain legal error. The Shipping Act is not a *sole fault* statute and Commission authority establishes that the purported existence of other reasons *does not* avoid the proper legal conclusion that PANYNJ violated the Shipping Act. *Port Auth. of N.Y. & N.J. v. N.Y. Shipping Ass’n*, 23 S.R.R. 21, 50 (F.M.C. 1985) (“[T]here is no authority for the proposition that so long as other factors contribute to the [result], the Commission is powerless to act.”).

**B. “Risks And Benefits” Are “Status” And Not A Valid Transportation Purpose.**

Beyond this foundational legal error, the I.D. strained to justify PANYNJ’s unlawful discrimination due to the purportedly “different risks and benefits” of *status*. But, this assertion amounts to nothing more than re-naming “status” by another label, i.e., “different risks and benefits.” “Of course, a rose is a rose by any other name.” *Duchossois Indus., Inc. v. United States*, 07 C 2295, 2010 WL 1541362, \*2 n.2 (N.D. Ill. Apr. 14, 2010) (explaining that the law is concerned with the practical impact not the label). The Shipping Act is concerned with *practical significance*, not labels. *Ceres I*, 27 S.R.R. at 1272-73 (Commission concerned with “practical significance” not “vessel call” guarantee label).

And the I.D.’s reference to “risks and benefits” is unavailing because those reasons were

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rejected by the Commission in *Ceres I* as mere proxies for *status*. Furthermore, the evidence establishes that PANYNJ did not express at the time that “risks and benefits” were the reason for refusing Maher parity, and furthermore, failed to conduct a contemporaneous particularized analysis, as required by Shipping Act authorities.

The I.D. erroneously concluded that “Given the circumstances at the time, the Port’s decision to provide lower rent to Maersk-APM . . . was based upon the particular facts and situation presented.” I.D. at 48. The I.D. misstates both Maher’s claim and the proper legal standard. Maher’s claim did not dispute PANYNJ’s wisdom or lack of wisdom in keeping Maersk-APM in the port with lower rent. PANYNJ violated the Shipping Act by later—after having secured Maersk-APM in the port—refusing to provide Maher parity, i.e., the lower rent. PANYNJ refused Maher parity because of *status* and *commercial convenience*, i.e., PANYNJ’s undue ocean carrier preference and PANYNJ’s determination to collect greater revenue from Maher to pay for the \$120 million net present value (\$336 million nominal) class subsidy provided to Maersk-APM. Thus, the “particular facts and situation presented” referenced by the I.D. are impermissible reasons under the Shipping Act for refusing Maher parity.

*Ceres I* and its underlying authorities provide the proper standard and rejected the I.D.’s approach because the threat to leave a port is *not* a valid transportation purpose. 27 S.R.R. at 1260-61 (rejecting port authority’s defense that Maersk’s departure from the port would be “devastating” and that by contrast *Ceres Marine Terminal* presented no such risk). Ocean carriers that threaten to leave a port, like Maersk in *Ceres I* and Maersk-APM here, may prove *commercially* inconvenient to a port as compared to a captive marine terminal operator that cannot threaten to leave a port. But, *commercial convenience* is *not* a valid transportation purpose. *Id.* at 1274; *Investigation of Free Time Practices – Port of San Diego*, 7 S.R.R. 307,

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323 (F.M.C. 1966). A threat to leave a port (with attendant risk) is simply *not* a valid transportation purpose justifying unreasonable discrimination in lease rates and terms. A valid transportation purpose pertains only to differences in the nature or cost of the services provided. *50 Mile Container Rules*, 24 S.R.R. 411, 464-65 (F.M.C. 1987), *aff'd sub nom, New York Shipping Ass 'n v. Fed. Mar. Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988); *Co-Loading Practices By NVOCCs*, 23 S.R.R. 123, 131-32 (F.M.C. 1985); *Rates Which Exclude Certain Classes of Shippers, Circular Letter No 1-85*, 23 S.R.R. 460, 461 (F.M.C. 1985) (Commission invoked seminal Supreme Court authority for the proposition that rates based on factors other than “differences inhering in the goods or in the cost of the service rendered in transporting them” are unlawful); *Puerto Rico Maritime Shipping Authority – Rates on Government Cargo*, 18 S.R.R. 830, 835-39 (F.M.C. 1978); *Dep't of Defense v. Matson Navigation Co.*, 17 S.R.R. 1, 5 (F.M.C. 1977).<sup>16</sup> And with respect to purported “benefits” received from a service, the port authority must establish that the charges are “reasonably related” to “the benefit from the services at issue.” *James F. Flanagan Shipping Corp. d/b/a/ James J. Flanagan Stevedores v. Lake Charles Harbor & Terminal Dist. & Lake Charles Stevedores, Inc.*, 27 S.R.R. 1123, 1131-32 (F.M.C. 1997) (citing *Volkswagenwerk*, 390 U.S. at 282).

*Ceres I* rejected the purported justifications here as unavailing because they are nothing more than *status proxies*. The Commission rejected these reasons as nothing more than proxies for status because Ceres provided more container volume to the port than Maersk and therefore, the purported justifications were not valid transportation reasons. The Commission concluded the differences were based on the ocean carrier status of Maersk and were unlawful. The

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<sup>16</sup> The principle long pre-dates the definitions in the 1984 Act. *See, e.g., Rates Which Exclude Certain Classes Of Shippers, Circular Letter No. 1-85*, 23 S.R.R. at 461 (citing *ICC v Delaware Lackawanna & Western R.R. Co.*, 220 U.S. 235 (1911)); *Co-loading Practices By NVOCCs*, 23 S.R.R. at 132 n.4 (same).

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Commission’s decisions stand for the proposition that status is not a permissible basis to discriminate, nor are reasons that are proxies for status, i.e., a threat to leave the port or a cargo guarantee lease rate incentive made available to only one class, such as ocean carriers.

Here, the I.D. confirmed that PANYNJ provided preferential lease rate terms to Maersk-APM because of ocean carrier status, but ratified the unlawful discrimination denying Maher parity because of the same reasons rejected by the Commission in *Ceres I*. But Maersk-APM’s threat to leave the port here is *not* a valid transportation purpose, no more than it was in *Ceres I*. Likewise, the purported “port guarantee” that was supposed to be provided by Maersk-APM here is *not* a valid transportation purpose justifying discrimination, no more than Maersk’s “vessel call” guarantee was in *Ceres I*. Following Maersk-APM’s failure to provide the guaranteed container volume during the first two years (2008-09) of the “port guarantee,” in the year 2010 PANYNJ actually implemented and enforced the guarantee for the first time as merely a rent increase.<sup>17</sup> Therefore, it provides no valid justification for discrimination because Maher already provided greater rent and volume guarantees to PANYNJ than Maersk-APM. PANYNJ refused to provide Maher parity, namely the preferential rents and other charges and the opportunity to meet the container volume guarantee levels of the “port guarantee,” subject to a like rent increase. The simplest way for a port authority to avoid running afoul of the Shipping Act when providing differing arrangements is by offering to make those arrangements with other port users. *See In the Matter of Agreement No. T-1870: Terminal Lease Agreement at Long Beach, California*, 9 S.R.R. 390, 390 (F.M.C. 1967). But PANYNJ refused and obstinately *continues* to refuse despite Maher’s repeated requests for parity.

**C. The “Port Guarantee” Is Not A Valid Transportation Purpose.**

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<sup>17</sup> Lombardi Dep. at 209:10-:16, 343:8-12; MTFOF ¶ 409; MTIB at 69-70; MTRB at 32.

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The I.D. confirmed Maher provided PANYNJ greater rent and volume guarantees. I.D. at 47, 51. But, the I.D. failed to analyze the *practical significance* of the greater rent and volume guarantees provided by Maher as mandated by *Ceres I*. 27 S.R.R. at 1272-73. And, it failed to explain how the purported Maersk-APM “port guarantee” provision at issue in this proceeding, which PANYNJ ultimately implemented and enforced in the year 2010 as merely a *rent* increase, constitutes a valid transportation justification when Maher already guarantees more rent and container volume than Maersk-APM.

Importantly, the I.D. completely failed to analyze whether the “port guarantee” *remained and remains today* fit to the aim in view, i.e., proportionate to PANYNJ’s goals. Even if a discriminatory practice is shown to have a valid purpose, it may still be ruled unreasonable if “it goes beyond what is necessary to achieve that purpose.” *Distrib. Servs., Ltd. v. Trans-Pacific Freight Conf. of Japan*, 24 S.R.R. 714, 722 (F.M.C. 1988); *Ceres I*, 27 S.R.R. at 1275.

**D. The I.D. Ignored PANYNJ’s Discrimination Based On Commercial Convenience And Class Subsidy And Invoked An Erroneous “Identical Service” Standard.**

In addition to *status*, PANYNJ discriminated against Maher for its own *commercial convenience*, i.e., to increase PANYNJ revenue from Maher to pay for the unlawful class subsidy provided to Maersk-APM. This is not a valid transportation justification.

The I.D. erroneously invoked an “identical service” standard. I.D. at 40. There is simply no requirement for the complainant to establish that the service was “identical” to establish a violation. PANYNJ provided Maher and Maersk-APM the same service for purposes of the Shipping Act complaint in this proceeding, i.e., “land rental.” *Ceres I*, 27 S.R.R. at 1271. The I.D. made only passing mention of purported differences between the terminal lands at issue, but failed to make any findings of fact that PANYNJ actually expressed at the time that the purported terminal differences were PANYNJ’s reason for refusing Maher parity and that they

actually justified the lease disparities.<sup>18</sup> I.D. at 40.

PANYNJ must satisfy these burdens, but it made no effort to show that it expressed this reason at the time that it denied Maher parity on September 23, 1999, or justified the lease term disparities on the basis of a contemporaneous particularized analysis of differing terminal characteristics, which is the standard. *Ceres I*, 27 S.R.R. at 1273. The silence of both the I.D. and PANYNJ's merits submissions in this respect is decisive. PANYNJ neither expressed purported differing land characteristics at the time as a justification, nor conducted any contemporaneous particularized analysis of land characteristics to justify the land rental disparity.<sup>19</sup> PANYNJ's own contemporaneous evidence conclusively establishes that the Maersk-APM land (of which it got first choice) was more desirable and that differential rent pricing was unwarranted.<sup>20</sup>

### **APPLICABLE LEGAL STANDARDS**

#### **I. Standard of Review.**

A complete *de novo* review is required here because the I.D. failed to consider arguments, ignored material evidence, and made errors on key issues of law and governing standards which incurably infected the subsequent consideration of the facts. *See Ceres I*, 27

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<sup>18</sup> The I.D. mentioned differing terminal acreages (F. 97), Maher's much greater investments (F. 144), and characteristics that do not distinguish the terminals, e.g., depth of channel and intermodal access which are the same (F. 186-88) (referencing a portion of a purchase price allocation (the Empire Report) prepared in 2008). But, it did not explain properly how they actually justify the disparities or otherwise constitute reasonable practices. For example, the I.D. mentioned Maher's "larger terminal" in passing as a "different benefit[]," I.D. at 53, but didn't explain why that justifies the *per acre* rent disparities or the other disparities either.

<sup>19</sup> Yetka Dep. at 324:17-28:7; Borrone Dep. at 64:4-10; App. 3B-608; Shiftan Dep. at 47:11-48:12; MTFOF ¶ 280; MTIB at 27; MTRB at 41.

<sup>20</sup> App. 1A-65; Israel Dep. at 127:3-31:24; MTFOF ¶ 99. The uncontroverted evidence establishes that the Maersk-APM terminal was comprised of the former SeaLand terminal and 84 acres and the best berths from the Tripoli Street terminal previously operated by Maher but required by PANYNJ to be surrendered to Maersk-APM. App. 1A-271; App. 1B-904; MTFOF ¶¶ 148-49, 152; MTRB at 45.

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S.R.R. at 1251, 1270; *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 123-24 (F.M.C. 2001); *Pet. of S.C. State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137, 1158 n.21 (F.M.C. 1997).

The I.D. must provide a reasoned decision “on all the material issues of fact, law, or discretion presented on the record.” 5 U.S.C. § 557(c)(3)(A); FMC Rule 223 (initial decision must “include a statement of findings and conclusions, as well as the reasons or basis therefor, upon *all the material issues presented on the record*”) (emphasis added). Its decision cannot be based on speculation. But the I.D. failed these requirements as well.

## **II. Unreasonable Preference or Prejudice.**

The Shipping Act’s “fundamental purpose” is “the establishment of a nondiscriminatory regulatory transportation process for the common carriage of goods in the U.S. foreign commerce” and the “prevention of economic discrimination.” *Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*, 25 S.R.R. 1308, 1313 (F.M.C. 1990). The I.D. failed to maintain fidelity to this “fundamental purpose” by ratifying economic discrimination contrary to the Commission’s duty to protect the public interest.

Title 46 U.S.C. § 41106(2) (Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12))) prohibits undue or unreasonable preferences or prejudices in lease terms where “[1] the parties were accorded different treatment, . . . [2] the unequal treatment is not justified by differences in transportation factors, and . . . [3] the resulting prejudice or disadvantage is the proximate cause of injury.” *Ceres I*, 27 S.R.R. at 1270. A port authority violates the Shipping Act when it discriminates against marine terminal operators in favor of ocean carriers due to status or discriminates against one port user versus another without a legitimate rationale. *Id.* at 1270-75.

The Supreme Court established the threshold criterion for “unreasonable” preference or disadvantage in *Volkswagenwerk*, 390 U.S. at 278-80 (an unfair advantage). Discrimination can

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exist even though the complainant benefited from the arrangement. *Id.* And with respect to purported “benefits” received from a service, the port authority must establish that the charges are “reasonably related” to “the benefit from the services at issue.” *James J. Flanagan Shipping Corp.*, 27 S.R.R. at 1131-32.

An undue preference or prejudice exists if a port charges a different rate for the same service to different users because of *status*. *Ceres I*. “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 I*, 27 S.R.R. at 1270, n.46 (citing *Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (F.M.C. 1981)) (emphasis added). A port authority must provide a *fact-specific* evaluation of the particular circumstances of the service, facility, or the cargo. *Ceres I*, 27 S.R.R. at 1272. The port cannot rely on *post hoc* rationalizations, but must instead point to reasons that were relied on and given *at the time* the underlying events occurred. *Id.* at 1273. Importantly, even if a discriminatory practice is shown to have a valid purpose, it is unreasonable if “it goes beyond what is necessary to achieve that purpose.” *Distrib. Servs., Ltd.*, 24 S.R.R. at 722; *Ceres I*, 27 S.R.R. at 1275.

A difference in lease rates levied by a port authority cannot be justified based on a lessee’s status. *Ceres I*, 27 S.R.R. at 1273. For a transportation factor to justify a lower rate for a class, the factor must be unique to that class. A class is not “distinct” by virtue of a factor that is shared by entities outside the class. Thus, *Ceres* rejected the port authority’s attempt to justify rate differences with a “vessel call” guarantee because “Maersk is an ocean carrier which owns vessels and controls cargo routings and port calls” while the marine terminal operator did not. *Id.* at 1272. The port authority’s “reliance on this particular guarantee to justify the disparate

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treatment of the lessees is inconsistent with the *practical significance* of the [marine terminal operator’s] cargo commitment and its ability to attract customers.” *Id.* at 1273 (emphasis added).

When a port authority makes a preference available to one tenant, it must make it available to others. *Id.*; *see also Ballmill Lumber & Sales Corp. v. Port of N.Y. Auth.*, 10 S.R.R. 131, 140-41 (F.M.C. 1968). Further, the duty to provide the preference to the other tenants is “absolute” and “continuing.” *Ceres II*, 29 S.R.R. at 372; *see also Ceres I*, 27 S.R.R. at 1277.

The fact that a marine terminal signed a lease with a port authority *does not* prevent the marine terminal from later challenging the terms of the lease under the Shipping Act—and by extension, does not immunize a port authority for its wrongs—since waiver and estoppel are not defenses to Shipping Act claims. *Ceres II*, 29 S.R.R. at 372; January 31 Order at 16.

### **III. Failure to Establish, Observe, and Enforce Just and Reasonable Regulations.**

The basic principle of the foregoing authority—that unfavorable treatment based on class status is inherently unreasonable under the Shipping Act—applies equally to the reasonableness requirement of § 10(d)(1). *50 Mile Container Rules*, 24 S.R.R. at 466-67. “A practice that is unjustly discriminatory or preferential ineluctably will be unreasonable as well.” *Id.* at 466.

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) (Shipping Act § 10(d)(1)). “[A]s applied to terminal practices, we think that ‘just and reasonable practice’ most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) (“WGMA”).

The same “non excessive” and “fit and appropriate to the end in view” standards apply to whether a port’s rate practices violate § 10(d)(1), including in cases where a port imposes different rates on different customers for substantially similar services. *Secretary of the Army v.*

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*Port of Seattle*, 24 S.R.R. 595, 601-02 (F.M.C. 1987); 24 S.R.R. 1242, 1248 (F.M.C. 1988).

Importantly, “[t]he justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination.” *NPR, Inc. v. Bd. of Comm’rs of the Port of N.O.*, 28 S.R.R. 1512, 1531 (A.L.J. 2000). Nor does it depend upon intent. *Volkswagenwerk*, 390 U.S. at 281-82. In the context of monetary payments, the Commission considers “whether the charge levied is reasonably related to the service rendered” by “measur[ing] the *impact on the payer compared to other payers* as well as the relative benefits received.” *NPR*, 28 S.R.R. at 1531-32 (quoting *Volkswagenwerk*, 390 U.S. at 282) (emphasis added). And regarding purported “benefits” received from a service, the port authority must establish that the charges are “reasonably related” to “the benefit from the services at issue.” *James F. Flanagan Shipping Corp.*, 27 S.R.R. 1131-32.

“[Complainant] has the burden of persuading the Commission that [the Port]’s practice . . . [i]s unreasonable,” and “[i]f [Complainant] succeeds in that regard, *the burden of proving justification shifts to [the Port].*” *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1199, 1222 (F.M.C. 2003) (emphasis added). A prima facie violation of §10(d)(1) exists if a port structures a charge so that amounts paid by different customers “do not bear a reasonable relationship” to the relative benefits they receive. *Louis Dreyfus Corp.*, 21 S.R.R. at 1082. *See also Volkswagenwerk*, 390 U.S. at 281-82.

In *Ceres I*, the Commission concluded that the port authority’s “rates assessed [marine terminal operator] Ceres for the same services [including land rental] are excessive.” 27 S.R.R. at 1271-72 & 1275. The Commission explained that “[t]he evidence reveals that the rates assessed [the marine terminal operator] Ceres were much higher than those assessed [ocean carrier] Maersk across the board.” *Id.* at 1275. The Commission further explained that while the

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port authority’s “vessel call” justification “could be reasonably related to its stated end of securing vessel calls to the Port, the degree of disparity in this case is disproportionate to [the port authority’s] goals” because “Maersk’s vessel call guarantee . . . does not guarantee anything more than [the marine terminal operator] could have guaranteed . . . particularly where the difference so greatly disfavors the party committed to moving substantially higher volumes of cargo,” i.e., the marine terminal operator Ceres. *Id.*

**IV. Unreasonable Refusal to Deal.**

Title 46 U.S.C. § 41106(3) (Shipping Act §§ 10(b)(10) and 10(d)(3)) provides that a “marine terminal operator may not unreasonably refuse to deal or negotiate.” “This requires a two part inquiry: whether [the port authority] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448 (F.M.C. 2003). A port authority’s refusal to consider a proposal constitutes a refusal to deal or negotiate. *Id.* The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking and Lease Agreement By and Between City of Portland, Maine and Scotia Prince Cruises Limited*, 30 S.R.R. 377, 379 (F.M.C. 2004). “[I]n 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.

**V. Operating Contrary to FMC Agreement.**

Title 46 U.S.C. § 41102(b)(2) (Shipping Act § 10(a)(3)) provides that “A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . the operation is not in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.” Here, the prohibition requires proof that (1) the agreement was required to be filed under § 40302, which establishes the filing requirement for marine

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terminal operator agreements, and (2) that the operation was not in accordance with the terms of the agreement. Parties to agreements must operate within the authority of those agreements. *See, e.g., Ivarans v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543, 1566-67 n.11 (F.M.C. 1986).

## ANALYSIS

### **I. Maher Established The Shipping Act Violations Caused By Status.**

The I.D. admitted that “status did have real and tangible impact on PANYNJ’s negotiations with [Maher and Maersk-APM].” I.D. at 39-40. The I.D. was compelled to reach this conclusion because PANYNJ admitted it.<sup>21</sup> This finding establishes that, as a matter of law, PANYNJ violated and continues to violate the Shipping Act.

Instead, the I.D. erroneously concluded that “[t]he differences are not based on status *alone*.” I.D. at 40 (emphasis added). PANYNJ, according to the I.D., had other purported reasons for the discrimination too, i.e., differing “risks” and “benefits” and the “port guarantee” that exonerate it. This is plain error. This is not a sole-fault statute, so it is irrelevant whether status “alone” was a reason for the discrimination. For violations of 46 U.S.C. § 41102(c) (Shipping Act § 10(d)(1)), the standard is merely “but for” causation. *Distrib. Servs. Ltd.*, 24 S.R.R. at 725. And for violations of 46 U.S.C. § 41106(2) (Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12))), the standard is that the resulting prejudice or disadvantage is the proximate cause of injury. *Ceres I*, 27 S.R.R. at 1270.

The I.D.’s conclusion that status is a “real and tangible” cause of the lease disparities means that Maher proved the violations. I.D. at 40. “‘Proximate cause’ is not the same as ‘sole cause.’ While there must be sufficient evidence to show that [it] is the cause in fact of the [result], there is no authority for the proposition that so long as other factors contribute to the

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<sup>21</sup> MTRB at 23-24.

[result], the Commission is powerless to act.” *Port Auth. of N.Y. & N.J.*, 23 S.R.R. at 50. Status is the proximate or but for cause of the applicable violation where it was a “substantial factor” in bringing about the disparate treatment which is the injury. *Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 289 (5th Cir. 1978).

## **II. The I.D.’s Other Purported Justifications Are Unavailing.**

The I.D. asserted that the “differences are based upon different risks presented and benefits received by each entity,” I.D. at 53, but it really only addressed substantively through findings of fact and conclusions the differing nature of the purported threat and benefit posed by ocean carrier Maersk-APM to PANYNJ. The I.D. made no meaningful effort to show that the disparity is justified by “benefits” provided to Maher. Its only comments about purported benefits to Maher were merely in passing and in all events *did not* distinguish Maher from Maersk-APM, which received the same benefits. I.D. at 53.

The I.D. also failed to conduct a proper legal analysis as required by *Ceres I* and other Commission authorities to determine whether the justifications expressed at the time are valid transportation factors, actually justify the disparity, and are fit for the end in view.

### **A. The Purported “Risks And Benefits” Do Not Justify The Lease Disparities.**

In *Ceres I*, the port authority *unsuccessfully* advanced the same “risks” and “important benefits” justifications relied upon here. 27 S.R.R. at 1260-61. And furthermore, promoting one region’s economy over another is not a valid transportation factor justifying undue discrimination. *Id.* at 1274. And this makes perfect sense. Since status is not a valid transportation factor justifying the disparities in the first instance, the purported “risk” of leaving and “benefit” of staying posed to a port authority by ocean carrier *status* cannot be valid transportation reasons. The I.D. merely re-labeled *status* as “risk.”

Preferential treatment is not justified to keep one entity from leaving a port. *Ballmill*, 10



S.R.R. at 138; *In the Matter of Agreements No. T-2108 & T-2108-A Between the City of L.A. & Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., & Yamashita-Shinnihon S.S. Co.*, 10 S.R.R. 556, 564 (A.L.J. 1968)

Differing “risks” and “benefits” of *status* do not lawfully justify the discrimination. *See, e.g., Ceres I*, 27 S.R.R. at 1272-74; *Rates Which Exclude Certain Classes of Shippers, Circular Letter No 1-85*, 23 S.R.R. at 461 (rates based on factors other than “differences inhering in the goods or in the cost of the service rendered in transporting them” are unlawful).<sup>22</sup> For a transportation factor to justify a lower rate for a class, it is essential that the factor be unique to that class. *Ceres I*, 27 S.R.R. at 1272-73; *Co-Loading Practices by NVOCCs*, 23 S.R.R. at 132. Importantly, even if a discriminatory practice is has a valid purpose, it is unreasonable if “it goes beyond what is necessary to achieve that purpose.” *Distrib. Servs., Ltd.*, 24 S.R.R. at 722.

The I.D.’s justifications of disparities for differing “risks and benefits” match the arguments rejected by the Commission in *Ceres*. MPA’s unavailing *Ceres I* arguments alongside the I.D.’s erroneous conclusions illustrate the Commission previously rejected the I.D.’s justifications:

<b><i>Rejected MPA Arguments in Ceres</i></b>	<b><i>Corresponding Dkt. 08-03 I.D. Conclusions</i></b>
“The undisputed evidence shows that MPA negotiated at great length with Maersk and with Ceres and that the terms of their respective leases were tailored through that process to reflect MPA’s assessment of the different benefits and circumstances that each brought to the Port.” MPA Exceptions at 51.	“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.” I.D. at 40. “[T]he rates assessed Maher correspond with the benefit received and the risks presented.” I.D. at 54.
“[W]hile Ceres may be valuable to the Port, the significant differences in transportation	“Maher did not present the same risk as Maersk-APM. . . . There is no evidence

<sup>22</sup> Moreover, the cases make clear that the principle long pre-dates the definitions in the 1984 Act. *See, e.g., Rates Which Exclude Certain Classes Of Shippers, Circular Letter No. 1-85*, 23 S.R.R. at 461 (citing *ICC v Delaware Lackawanna & Western R.R. Co.*, 220 U.S. 235 (1911)); *Co-loading Practices By NVOCCs*, 23 S.R.R. at 132 n.4 (same).



<p>circumstances between itself and Maersk involve important attributes of Maersk – and benefits to the Port – that Ceres cannot duplicate.” MPA Exceptions at 42.</p>	<p>supporting a finding that if Maher moved to another port, ocean common carriers would follow.” I.D. at 48.</p>
<p>“At this critical juncture, MPA was threatened with the loss of all business from Maersk. . . . If that had happened, it would have dealt a devastating blow by sending a signal to the entire shipping industry that Baltimore’s days as a major ocean port were numbered.” MPA Exceptions at 12.</p>	<p>“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. . . . [A] departure of Maersk-APM would have had a negative impact on the region, the Port, and other port tenants, including Maher.” I.D. at 48.</p>
<p>“MPA asserts that its lease with Maersk brings important benefits to the Port, accomplishing its goals and resulting in a long-term relationship with Maersk.” <i>Ceres I</i> at 1261.</p>	<p>“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.” I.D. at 53.</p>
<p>“At the time of its negotiations with Maersk, MPA asserts that it feared it was about to lose Maersk, described as its ‘most important ocean carrier service.’ After a decade of suffering financial losses, MPA explains that the loss of Maersk would have been devastating to the Port.” <i>Ceres I</i> at 1260-61.</p>	<p>“Moreover, during these negotiations, PANYNJ was faced with a credible threat that Maersk-APM would leave the port for a competing offer in Baltimore.” I.D. at 53.  “[A] departure of Maersk-APM would have had a negative impact on the region, the Port, and other port tenants, including Maher.” I.D. at 48.</p>
<p>“The Port of Baltimore is in a fight for its life with other ports to attract and retain the business of ocean carriers and MPA accordingly offered incentive rates to Maersk and other carriers in return for a long-term commitment of vessel calls at the Port.” MPA Exceptions at 5.</p>	<p>“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.” I.D. at 48.</p>
<p>“MPA concluded that these dire circumstances required a creative competitive response MPA decided to offer incentives, in the form of discounts from the standard tariff rates, to ocean carriers that would make a long-term commitment to make vessel calls on the Port.” MPA Exceptions at 32.</p>	<p>“Given the circumstances at the time, the Port’s decision to provide lower rent to Maersk-APM . . . in order to keep Maersk-APM in the port, was based upon the particular facts and situation presented.” I.D. at 48.</p>
<p>“MPA notes that the ALJ recognized that the Port was acting in the interests of itself and the State of Maryland in good faith for competitive reasons, so as to foster the Port’s competitive position on the east coast, but then failed to accord any deference to its business judgment of prevailing competitive circumstances.” <i>Ceres I</i> at 1266.</p>	<p>“Economic realities justify PANYNJ not offering the same terms to Maher, which received different benefits (such as a larger terminal) and posed different risks.” I.D. at 53.</p>
<p>“MPA believed that Baltimore’s position as a</p>	<p>“Weighing Maersk Line’s and Sea-Land’s</p>



<p>major ocean port was in jeopardy, and decided it must forge strong, long-term relationships with major global carriers – including the Port’s long-time and most important ‘anchor’ tenant, Maersk Line.” MPA Exceptions at 11.</p>	<p>request for a \$120 million [net present value \$336 million nominal] 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.” I.D. at 44.</p>
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**B. The “Risks and Benefits” Justification Is Barred By Judicial Estoppel.**

Judicial estoppel bars PANYNJ’s argument on the merits that differing “risks and benefits” justify the lease disparities after PANYNJ reversed its position. “Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000). It seeks to “protect the integrity of the judicial process” by “prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). Judicial estoppel prevents litigants from playing “fast and loose with the courts.” *Stephen Marshal Gabarick v. Laurin Maritime (America) Inc., et al.*, No. 13-30739, 2014 WL 2118621 (5th Cir. May 21, 2014); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003). Commission authority is in accord.<sup>23</sup>

PANYNJ successfully argued in its summary judgment motion and in its Reply to Maher’s Exceptions that Maher knew or should have known of its claim because of the differences in the lease terms.<sup>24</sup> But, on the merits, PANYNJ reversed itself and argued Brian

<sup>23</sup> See, e.g., *Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 903 (A.L.J. 2002) (“Complainants’ present claim . . . blatantly conflicts with their earlier position . . . .”); *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 315 n.5 (F.M.C. 2001) (“These are not legal arguments in the alternative. Rather, they are conflicting factual assertions.”); *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 S.R.R. 826, 850 (A.L.J. 1984) (“Prudential’s inconsistent theories of recovery seem to present an insuperable obstacle as a matter of law. . . .”).

<sup>24</sup> Initial Decision Granting In Part Motion for Summary Judgment and Dismissing Claim for Reparation Award Based on Lease-Term Discrimination Claims of May 16, 2011 at 29. According to the May 16 Order Maher’s “lease discrimination” claims accrued upon knowledge of a difference in lease terms. *Id.* (“On October 1, 2000, Maher knew (‘discovered’) that it had been injured by the differences between Lease EP-248 and Lease 249 and knew that PANYNJ



Maher, was “well aware of the differences,” but “never believed that he had been the victim of unlawful discrimination,” because of differing “risks and benefits.”<sup>25</sup> But, judicial estoppel bars PANYNJ’s contradictory argument. PANYNJ’s contradictory positions are manifest and contrary to law. They strike at the integrity of the Commission’s process because PANYNJ continues to affirmatively mislead and deceive the Commission as set forth below:

<b>PANYNJ Motion for Summary Judgment/Exceptions Position that Maher Knew/Should Have Known</b>	<b>Contradictory, November 9, 2011 PANYNJ Position that Maher <i>Did Not</i> Know/Should Not Have Known</b>
<p>“Maher not only had reason to know, but had actual knowledge of, any potential lease term discrimination claims . . . the day it signed its lease . . . .” PANYNJ’s Reply in Opp’n to Maher’s Exceptions to Initial Decision of May 16, 2011 Granting in Part Mot. for Summ. J. and Dismissing Claim for a Reparation Award Based on Lease-Term Discrimination Claims at 15-16.</p>	<p>“APM/Maersk and Maher fundamentally differed with respect to risks and benefits they presented. . . . Maher bargained for and received several benefits . . . that APM/Maersk did not. . . . Accordingly, Maher . . . never believed that [it] had been the victim of unlawful discrimination. . . .” PARB at 32.</p>
<p>“Maher’s own internal documents prove that it knew the basis of its lease-term discrimination claims more than three years prior to the commencement of this proceeding.” PANYNJ’s Mot. for Summ. J. of Maher’s Lease-Term Discrimination Claims at 7.</p>	<p>“[I]n the context of all the gives and takes . . . and having received the benefits and superior terminal he sought, [Brian Maher] . . . knew that there had been no unlawful discrimination notwithstanding the marginal difference in rental rates.” PARB at 35.</p>
<p>“Maher had actual knowledge of the differences between the terms of the Maersk and Maher leases and was therefore on inquiry notice that it had a potential claim based upon an ‘undue or unreasonable preference.’” PANYNJ’s Responding Statement to the New Facts Contained in Maher’s Responding Statement and in Further Supp. of its Mot. for Summ. J. at 2-3.</p>	<p>“After signing its lease, Maher like the rest of the Port benefited greatly. . . . Maher obtained the very benefits it had hoped for . . . a supremely optimized terminal. These terminal improvements . . . provide additional confirmation that Maher recognized in 2000 and for the seven years thereafter that . . . the PA in no way discriminated against Maher.” PARB at 48.</p>
<p>“[N]ot only did Maher have reason to know the facts upon which it bases its lease discrimination claims before signing its lease, but it had <i>actual</i> knowledge of such facts.” PANYNJ’s Reply Br. Pursuant to the Order to File Supplemental Brs. at 6.</p>	<p>“Maher believed . . . the differences between the APM/Maersk and Maher lease terms did not pose any violation of the Shipping Act.” PARB at 62-63.  “[T]he benefits conferred by Maher’s lease . . . [are why] Maher believed [it] has no</p>

caused the injury.”); MTRB at 47-50. *See also* Comm’n Jan. 31, 2013 Order at 14 (Maher knew or should have known the remedy for failure to satisfy the port guarantee was increased rent.).

<sup>25</sup> PARB at 4-5, 32, 49, 60, 73; PAFOF ¶¶ 277, 279; MTRB at 47.



	legitimate basis for claiming that the rates it paid under its lease are in any way discriminatory.” PARB at 64.
“Maher not only had reason to know, but had actual knowledge, of the allegedly unlawful differences between the APM and Maher leases well before the limitations period.” PANYNJ’s Reply Br. Pursuant to the Order to File Supplemental Brs. at 2.	“Maher . . . never believed that Maher had any claim under the Shipping Act. PAFOF ¶ 277.” PARB at 5. “Maher . . . never believed . . . that [its] terms violated the Shipping Act.” PARB at 49. “Maher never believed it had cause to sue . . . .” PARB at 73.

“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . .” *New Hampshire*, 532 U.S. at 749 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). *See also Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996).<sup>26</sup> Having argued in its motion for summary judgment and Reply to Maher’s Exceptions that Maher *knew or should have known* of the discriminatory lease differences in 2000, PANYNJ improperly reversed itself on the merits and argued that Maher *never knew nor could have known* that it was being discriminated against in violation of the Shipping Act because differing “risks and benefits” justified the differences. Furthermore, if as the I.D. concluded, “risks and benefits” known to Maher at the time justified the differences, then Maher neither knew nor should have known that the differences were *not* justified by a valid transportation factor. The I.D. flatly contradicted the Commission’s January 31 Order.

**C. The I.D. Erroneously Conflated PANYNJ’s Decision To Subsidize Maersk-APM With The Later Decision To Refuse Parity For Maher.**

Maher does not contest the wisdom or lack of wisdom of PANYNJ’s decision to subsidize Maersk-APM to not relocate to Baltimore. Maher alleges violations for PANYNJ’s

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<sup>26</sup> Judicial estoppel is applied in administrative proceedings, such as before the Commission. *See Muellner v. Mars, Inc.*, 714 F. Supp. 351, 357-58 (N.D. Ill. 1989) (applying judicial estoppel after noting that “[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.”).

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*later* refusals to provide Maher parity as required by *Ceres* and the Commission’s “existing precedent” and other related violations. *Ceres I*, 27 S.R.R. at 1272-74; *Ceres II*, 29 S.R.R. at 370, 372. The I.D. erroneously conflated PANYNJ’s decision to give Maersk-APM concessions to retain it in the port with PANYNJ’s *later* decision refusing Maher parity.

PANYNJ refused to provide Maher the Maersk-APM lease rates long *after* securing Maersk-APM in the port. I.D. at 20 (F. 94 – On April 27, 1999, PANYNJ offered Maersk-APM the \$120 million net present value (\$336 million nominal) package), (F. 95 – On May 7, 1999, Maersk-APM announced its decision to remain in the port), 26 (F. 130 – PANYNJ told Maher on September 23, 1999 (*over four months later*) that the Maersk-APM rates were “off the table”). Just as in *Ceres I*, where the port authority secured Maersk in the Port of Baltimore in November 1991 and later refused parity in May 1992, here, PANYNJ had already secured Maersk-APM’s commitment to remain in the port on May 7, 1999, over four months *before* it refused to provide Maher the Maersk-APM lease rates *later* on September 23, 1999.<sup>27</sup>

And, when PANYNJ informed Maher that it refused to provide Maher the Maersk-APM lease rates on September 23, 1999, PANYNJ *did not* justify its refusal to provide Maher the preferential Maersk-APM rates with its previous decision to induce Maersk-APM to remain. Thus, just as in *Ceres*, where the Commission found MPA’s proffered evidence of the potential economic damage caused by Maersk-APM leaving the port completely irrelevant, the evidence relied on by the I.D. of the purported risks posed to the port and region if Maersk-APM would have left, is simply irrelevant to a proper Shipping Act analysis. *Ceres I*, 27 S.R.R. at 1272-74.

## **II. The Port Guarantee Is Not a Valid Transportation Justification.**

The “port guarantee” is not a valid transportation justification. It is a mere proxy for

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<sup>27</sup> App. 1B-696; App. 1B-732; App. 1B-689; App. 1B-690-92; App. 1B-763; Harrison Dep. at 208:5-209:2; Oppenheimer 07-01 Dep. at 180:4-:8; MTFOF ¶ 190; Schley Dep. at 66:25-67:13; App. 1B-926-27; MTFOF ¶ 243.

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status. PANYNJ defined it so that Maher could not offer to provide it. And in all events, in 2010, PANYNJ implemented and enforced it *only* as a rent increase.

**A. The Port Guarantee Is A Proxy for Ocean Carrier Status.**

PANYNJ devised and defined the “port guarantee” as a unique Maersk-affiliated ocean carrier guarantee.<sup>28</sup> So, it was a proxy for Maersk-APM’s ocean carrier status. The I.D. acknowledged that the “port guarantee,” as defined in the Maersk-APM lease, could only be satisfied with “Maersk-affiliated containers loaded with cargo . . . .” I.D. at 45. This means that *by definition*, the “port guarantee” could *only* be provided by a Maersk-affiliated ocean carrier.

Thereby, the I.D. unwittingly made findings establishing that the “port guarantee” is a mere proxy for ocean carrier *status*. The uncontroverted evidence accords.<sup>29</sup> Together, they demolish the I.D.’s erroneous conclusion that the “port guarantee” is a valid transportation justification for the discrimination. The “port guarantee” is a mere proxy for *status*, which is *not* a valid transportation purpose. *Ceres I*, 27 S.R.R. at 1272-74.

**B. The I.D. Erroneously Relied Upon Maher’s Failure To Offer.**

The I.D. asserted that “Maher did not offer to provide a port guarantee,” and cited deposition testimony by former Maher Chief Executive Officer, Brian Maher, in support of the assertion. I.D. at 46. But that is irrelevant. The *absolute continuing* duty to provide Maher the same volume incentive terms is PANYNJ’s duty, not Maher’s. PANYNJ must “make [volume-type discounts] available to all users who meet the criteria.” *Ceres I*, 27 S.R.R. at 1273, 1277

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<sup>28</sup> Borrone Dep. at 84:4-:13; MTFOF ¶ 250; PAR-MTFOF ¶ 250; MTIB at 69; MTRB at 28-29.

<sup>29</sup> PANYNJ stipulated to Borrone’s testimony that “the port guarantee was unique for carriers, terminal operators who were carriers.” PAR-MTFOF ¶ 250; *see also* PAR-MTFOF ¶ 251. And PANYNJ stipulated that it answered in sworn interrogatory responses that “[T]he port guarantee only applies to companies who are carriers or have a significant ownership interest in one.” PAR-MTFOF ¶ 253. PANYNJ also stipulated that it “answered in sworn interrogatory responses that PANYNJ ‘did not offer Maher the option to provide a Port Guarantee because it was not a carrier and did not have a significant ownership interest in a carrier.’” PAR-MTFOF ¶ 254; PAR-MTFOF ¶¶ 258-260; MTRB at 28.

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(where port did not provide evenhanded access to lease rates, “the violations are continuing in nature and the injury is suffered over a period of time”); *Ceres II*, 29 S.R.R. at 372 (“once the respondent set forth the criteria upon which it would grant lower rates, it had a statutory duty to apply the criteria in an even-handed manner,” and this duty is “absolute”).

And PANYNJ devised and defined the “port guarantee” to be an ocean carrier specific condition that Maher *could not* offer. PANYNJ’s sworn interrogatory responses confirmed that it restricted the “port guarantee” to marine terminal operators affiliated with ocean carriers that, in PANYNJ’s view, controlled cargo.<sup>30</sup> PANYNJ conceded that “the port guarantee only applies to companies who are carriers or have a significant ownership interest in one,” thus proving that the “port guarantee” is just a proxy for *status*.<sup>31</sup> PANYNJ also admitted that it “did not offer Maher the option to provide a Port Guarantee because it was not a carrier and did not have a significant ownership interest in a carrier,” a fact which the I.D. recognized in its citation to Brian Maher’s testimony that Maher was never “asked to give a port guarantee.”<sup>32</sup> I.D. at 46-47. PANYNJ’s 30(b)(6) witness, PANYNJ’s then-Port Commerce Director, Lillian Borrone, testified—to which PANYNJ stipulated—that as defined by PANYNJ, “the port guarantee was unique for carriers, terminal operators who were carriers. Maher Terminal is not a carrier and it couldn’t commit to assuring that particular carrier’s cargoes could come to the harbor as part of their negotiation with us.”<sup>33</sup>

### **C. PANYNJ Enforces The Port Guarantee As Merely A Rent Increase.**

However, the “port guarantee” as implemented and enforced by PANYNJ in the year 2010 is *not* what PANYNJ represented it to be to Brian Maher during the lease negotiations, not

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<sup>30</sup> PAR-MTFOF ¶ 253; PAR-MTFOF ¶ 254; PAR-MTFOF ¶¶ 258-260; MTRB at 28.

<sup>31</sup> App. 3B-577; MTFOF ¶ 253; *see also* Borrone Dep. at 84:4-:13; MTFOF ¶ 250; MTIB at 75; MTRB at 91.

<sup>32</sup> App. 3B-579; MTFOF ¶ 253; MTIB at 75; MTRB at 28, 91-92.

<sup>33</sup> Borrone Dep. at 84:4-:13; MTFOF ¶ 250; PAR-MTFOF ¶ 250; MTIB at 69; MTRB at 28-29.

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what the Maersk-APM lease, EP-248, states it is, and *not* the unique cargo guarantee that the I.D. erroneously concluded is a “basis” for lease term differences. I.D. at 45-47. Rather, it is merely a rent increase that does not justify the disparate lease terms because Maher guarantees more rent and more container volume.

The I.D. ignored uncontroverted evidence to reach its erroneous conclusions that the “evidence shows that the port guarantee is a basis for the different lease terms provided to Maersk-APM as opposed to Maher,” and that the “port guarantee” was something “which Maher could not provide.” I.D. at 45-47. *Neither* of these I.D. assertions is true.

The “port guarantee” did not start until 2008, and Maersk-APM’s failure to fulfill it was not established until 2010 (after two consecutive years of shortfalls).<sup>34</sup> PANYNJ belatedly disclosed in January 2011 that Maersk-APM consistently failed and will likely continue to fail to fulfill the “port guarantee.”<sup>35</sup> On April 8, 2011, PANYNJ disclosed that Maersk-APM also failed to meet the “port guarantee” in 2010.<sup>36</sup> PANYNJ decided in 2010 *not* to enforce the “port guarantee” cargo requirement against Maersk-APM, its former corporate parent, Maersk, Inc., or their affiliated ocean carrier, Maersk Line, to actually require the allegedly guaranteed cargo to be provided to the port.<sup>37</sup> What the I.D. characterized as a *unique* cargo guarantee of Maersk-APM has been implemented and enforced as nothing more than an additional rent payment.

As ultimately implemented by PANYNJ in the year 2010, Maher *could* provide what turned out in practice to be just a volume guarantee subject *only* to a rent increase.<sup>38</sup> Maher is

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<sup>34</sup> App. 5A-347; App. 1D-1840; App. 4-313-14; MTFOF ¶¶ 356, 405, 407; MTIB at 68.

<sup>35</sup> App. 1D-1842; App. 1D-1857; App. 1D-1856; Larrabee Dep. at 324:6-:16, 331:4-:9; MTFOF ¶ 406; MTIB at 69-70.

<sup>36</sup> App. 1D-1864 (produced by PANYNJ on April 8, 2011); MTFOF ¶ 408; MTIB at 70.

<sup>37</sup> Lombardi Dep. at 209:10-:16; Larrabee Dep. at 342:20-343:12; MTFOF ¶ 409; MTIB at 70; MTRB at 32.

<sup>38</sup> Borrone Dep. at 100:1-:21; App. 4-16-17; MTR-PAFOF ¶ 170.3; MTRB at 29-32.

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already subject to much higher rental charges. PANYNJ's own internal comparison of the respective lease payments and investments, following the Commission's August 15, 2001 decision in *Ceres II* eliminating the waiver/estoppel defense, showed that PANYNJ subjected Maher to payments three times more than Maersk-APM.<sup>39</sup> At the time PANYNJ's First Deputy General Counsel, Hugh Welsh, described the "major problem" as a "\$400 million . . . disaster."<sup>40</sup> And its internal comparison of the rents alone showed that PANYNJ subjected Maher to rates much greater than that of Maersk-APM.<sup>41</sup> Over the 30 year term of the leases, the unduly prejudicial terms require Maher to pay \$703 million in basic rental, while Maersk/APMT would pay only \$193 million (both in nominal dollars) at the preferential rates.<sup>42</sup> Maher's total required basic rental is almost four times the preferential Maersk-APM's rent over the life of the lease. On a per acre basis, Maher will pay almost three times the preferential rental amount provided for in Maersk-APM's lease. On average, Maher pays \$53,753 per acre per year in base rent, almost three times Maersk-APM's preferential basic rental rate of \$19,000.<sup>43</sup> Maher's rent guarantees average \$93,366 annually and peak at \$144,232 per acre by the end of Maher's lease.<sup>44</sup> Over the term of the leases, this difference in the lease rate terms totals \$459,716,899.<sup>45</sup> The lesser hypothetical \$89,300 Maersk-APM rent figure referenced by the I.D. is speculation because it would result only "if Maersk Line were to pull its cargo from the Port entirely . . . ." I.D. at 47.

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<sup>39</sup> Yetka Dep. at 315:3-12; MTFOF ¶ 292; App. 1C-1174; App. 1C-1196; Yetka Dep. at 313:17-314:20; MTFOF ¶ 293; MTIB at 29.

<sup>40</sup> App. 1C-1209; MTFOF ¶ 296; MTRB at 89.

<sup>41</sup> App. 1C-1370; Yetka Dep. at 318:3-22:15; MTFOF ¶ 279; MTIB at 29.

<sup>42</sup> App. 4-14; App. 4-134; MTFOF ¶ 510; MTIB at 31.

<sup>43</sup> App. 4-14; App 4-134; App. 1C-1370; App. 1C-1171; MTFOF ¶ 510; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 31.

<sup>44</sup> App. 4-134; MTFOF, Comparison of EP-249 and EP-248 Lease Differences.

<sup>45</sup> App. 4-136; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; App. 4-136; MTFOF ¶ 510; MTRB at 31, 86.

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In August 1999 during the lease negotiations, Maher had contracts for 600,000 container moves per year, many with long-standing customers of 20 years or more, and thereby already provided more cargo volume to the port than Maersk-APM.<sup>46</sup> Comparing the container volume throughput guarantee provisions the lessees have in common, i.e., the rent and terminal guarantee provisions of the leases, Maher provides higher container volume throughput guarantee levels in each period and therefore, also must pay higher gross throughput rent.<sup>47</sup> Maher's rent guarantee to PANYNJ exceeds the Maersk-APM guarantee in each period by a minimum of (1) 75,000 containers in the third period, (2) 150,000 containers in the first period, and (3) a maximum of 175,000 containers in the second period.<sup>48</sup> Likewise, Maher's terminal container volume throughput guarantee requirements are much higher than those of Maersk-APM. During the third period, which is half of the lease term (15 years), Maher guarantees annually 510,000 more containers than Maersk-APM.<sup>49</sup> And during the first two periods, Maher also guarantees more containers annually than Maersk-APM: (1) 70,000 more in the first period, and (2) 90,000 more in the second period.<sup>50</sup> On a per-acre basis, Maher guarantees almost twice as many containers for half of the lease term, which is 68% of the period during which throughput guarantees are in effect, 2008-2030.<sup>51</sup> Therefore, Maher guarantees both more

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<sup>46</sup> App. 1B-904; App. 1B-907; App. 4-418; App. 4-135; MTFOF ¶ 257; MTIB at 68; MTRB at 29-30, 42.

<sup>47</sup> App. 4-134; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 59; MTRB at 30.

<sup>48</sup> App. 5A-99-100; App. 5A-349-50; App. 4-135; App. 4-184 & -191; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 59; MTRB at 30.

<sup>49</sup> App. 5A-99-100; App. 5A-349-50; App. 4-135; App. 4-185 & -192; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 59; MTRB at 30.

<sup>50</sup> *Id.*

<sup>51</sup> App. 5A-99-100; App. 5A-349-50; App. 4-15-16, 135; App. 4-184-85 & -191-92; MTR-PAFOF ¶ 186; MTIB at 59; MTRB at 30.

[REDACTED]

throughput rent and terminal throughput volume than Maersk-APM.<sup>52</sup>

Maher also exceeded the loaded container volume requirements of the Maersk-APM “port guarantee.” From 2008 to date, the I.D. conceded that the Maersk-APM port guarantee required Maersk to handle at least 365,000 loaded Maersk containers, i.e., “qualified containers,” through the port annually and that it failed to do so in 2008, 2009, and 2010.<sup>53</sup> I.D. at 45. During the same years, however, Maher exceeded that 365,000 number of loaded containers by a wide margin. In 2008, Maher handled 824,846 loaded containers, in 2009 it handled 642,011, and in 2010 it handled 784,975.<sup>54</sup> Applying the “port guarantee” “qualified container” number used by PANYNJ for Maersk-APM of 1043 per acre would yield an equivalent port guarantee threshold for Maher of 464,135 vice 365,000 for Maersk-APM.<sup>55</sup> Maher exceeded that volume.

Therefore, had PANYNJ provided parity, i.e., the opportunity for Maher to satisfy a similar loaded container “port guarantee” volume requirement to qualify for the preferential lower lease rate terms, Maher easily qualified during the same period in which Maersk-APM has repeatedly failed, and Maher’s base rent would still be \$19,000 per acre.<sup>56</sup> The I.D. failed to consider, much less dispute, these uncontroverted facts, and it thereby wholly failed to consider the *practical significance* of Maher’s own volume guarantees as mandated by *Ceres I*.

By referencing Maersk-APM’s hypothetical rent if it completely fails to meet the “port guarantee,” as well as its rent of “\$34,200 per acre in 2010, and \$32,300 per acre in 2011”

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<sup>52</sup> App. 4-135; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 59-60; MTRB at 30.

<sup>53</sup> App. 5A-347; App. 4-16; PAR-MTFOF ¶ 362; App. 1D-1842-48; App. 1D-1857; App. 1D-1856; Larrabee Dep. at 324:6-:16, 331:4-:9; App. 4-313-14; App. 1D-1862-76; PAR-MTFOF ¶¶ 406-408; MTIB at 70; MTRB at 31.

<sup>54</sup> App. 4-443; App. 4-441; MTR-PAFOF ¶ 176; MTRB at 31.

<sup>55</sup> App. 4-443; MTR-PAFOF ¶ 176; MTRB at 31.

<sup>56</sup> App. 4-135; App. 4-15-17; App. 4-396; App. 4-441-43; App. 5A-99-100; App. 4-186; App. 4-307; MTFOF ¶ 313; MTR-PAFOF ¶ 176; MTRB at 31.

[REDACTED]

because of its failure to meet the “port guarantee,” the I.D. erroneously concluded that *Maersk-APM’s failure* to meet its port guarantee requirement justifies PANYNJ’s refusal to provide *Maher* with a similar guarantee. I.D. at 46. This is a *non sequitur*. Maersk-APM’s failure to perform does not justify denying *Maher* the opportunity to satisfy comparable volume discount terms. If provided that opportunity, by definition *Maher* would likewise risk a rent penalty in exchange for the \$19,000 per acre base rent rate. This is *parity* and *Maher* consistently sought this parity. PANYNJ’s refusal to provide parity violates the Shipping Act. The I.D. compared the wrong lease rent rates. *Ceres II*, 29 S.R.R. at 372-74 (“the appropriate measure of damages . . . where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged”).

The I.D.’s conclusion that *Maersk-APM’s failure* to meet its port guarantee requirement justifies PANYNJ’s refusal to provide *Maher* with a similar guarantee, I.D. at 46, flatly contradicts the January 31 Order wherein the Commission concluded that the *Ceres* Element 3 (undue preference/prejudice) was met because *Maher* knew or should have known the remedy for failure to satisfy the port guarantee was increased rent.<sup>57</sup> Yet, according to the I.D., the rent increase was a reason to believe the differences were *justified*. I.D. at 46. This contradiction cannot stand. As set forth above regarding the “risks and benefits” justification, the doctrine of judicial estoppel bars PANYNJ’s contradictory argument that the “port guarantee” rent increase justifies the disparity since the Commission decided just the opposite.

Just as in *Ceres*, in these circumstances the Shipping Act mandated PANYNJ to consider “the practical significance of . . . [*Maher’s*] cargo commitment and . . . [*Maher’s*] ability to attract customers,” which PANYNJ failed to do. *Ceres I*, 27 S.R.R. at 1273. And, just as in

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<sup>57</sup> Comm’n Jan. 31, 2013 Order at 14.

[REDACTED]

*Ceres*, after PANYNJ “determine[d] to offer volume-type discounts” to Maersk-APM, it had a continuing, absolute duty under the Shipping Act to “make them available to all users who meet the criteria,” which, for the reasons stated above, include Maher. *Id.*; *see also Co-Loading Practices by NVOCCs*, 23 S.R.R. at 132; *Valley Evaporating Co., v. Grace Line, Inc.*, 11 S.R.R. 873, 880 (F.M.C. 1970); *Ballmill*, 10 S.R.R. at 140-41. PANYNJ failed and *continues to fail to fulfill this absolute duty in violation of the Shipping Act and Maher sustains injury as a result.*

### **III. The I.D. Failed to Consider Maher’s Class Subsidy Claim.**

The I.D. failed to consider Maher’s “Class Subsidy” claim, pursuant to 46 U.S.C. § 41106(2) (Shipping Act § 10(d)(4)), based on the \$120 million net present value (\$336 million nominal) unlawful class subsidy that PANYNJ provides to Maersk-APM which was not the subject of the Commission’s January 31 Order.

PANYNJ’s Board directed the Port Commerce Department to recoup the rent concession to Maersk-APM from Maher and other tenants, which PANYNJ ultimately did, using revenue from derived from Maher’s lease.<sup>58</sup> On July 30, 1998, PANYNJ Commissioner Charles Gargano, Chairman of the PANYNJ Board’s Committee on Operations and Vice Chairman of the Board, told the PANYNJ staff “to find a way to recoup the subsidy even if it is through other tenants.”<sup>59</sup> Former PANYNJ Deputy Executive Director, Ron Shiftan, testified that the Maersk-APM deal was supported by other PANYNJ “sources of revenue,” including “rents and fees paid by other marine terminal operators.”<sup>60</sup> Likewise, PANYNJ Executive Director, Chris Ward, testified to the same effect that increasing the PANYNJ’s revenues from other tenants, e.g.,

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<sup>58</sup> App. 1A-444; MTFOF ¶¶ 220-22; App. 1C-1006; McClafferty Dep. at 199:17-205:21; MTFOF ¶ 270; MTIB at 52-57.

<sup>59</sup> App. 1A-444; MTFOF ¶ 222; MTIB at 52.

<sup>60</sup> Shiftan Dep. at 40:1-41:9; MTFOF ¶ 274; MTIB at 56.

[REDACTED]

Maher, reduced its deficit.<sup>61</sup>

In April 1999, PANYNJ granted concessions totaling \$120 million net present value (\$336 million nominal)<sup>62</sup> to avert Maersk-APM's threatened relocation to the Port of Baltimore. PANYNJ then recouped the \$120 million (\$336 million nominal) concession from Maher and other marine terminal operators. Ms. Borrone explained to the PANYNJ Board that where the "proposal [to Maersk-APM] does not provide parity to all New Jersey lease holders" the result is "additional revenue to the Port Authority."<sup>63</sup> In response to PANYNJ Board Chairman Lewis Eisenberg's question about net present value internal accounting loss to the Port Authority in the September 1998 proposal to Sea-Land/Maersk, Ms. Borrone explained that the proposal "did not assume concessions for existing tenants," but only for "three of which are up for renewal in the near future," including "Maher Tripoli Street."<sup>64</sup> Thus, it was apparent that PANYNJ could raise its revenues and reduce its net present value internal accounting deficit by *not* providing parity. PANYNJ confirmed that it understood one way to reduce the PANYNJ's net present value internal accounting deficit would be *not* to extend the Maersk-APM terms to other port tenants.<sup>65</sup> PANYNJ Commissioner Gargano "asked if the [PANYNJ] subsidy would be higher if all tenants were to receive the same rental rates as those being proposed" for Maersk-APM.<sup>66</sup> When told "yes" by Ms. Lillian Borrone, Gargano "stated that SeaLand/Maersk should be the anchor tenant and everyone else does not need to get the same deal."<sup>67</sup> As the PANYNJ Commissioners and Ms. Borrone continued their discussion of the subsidy and the need to reduce it, Gargano

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<sup>61</sup> Ward Dep. at 38:23-39:11; MTFOF ¶ 273; MTIB at 56.

<sup>62</sup> App. 1B-565-67; MTFOF ¶ 202; MTIB at 50; MTRB at 27, 73, 87.

<sup>63</sup> App. 1B-732; MTFOF ¶ 231; MTIB at 51.

<sup>64</sup> App. 1B-732; MTFOF ¶ 228; MTIB at 51-52.

<sup>65</sup> Borrone Dep. at 577:19-78:3; MTFOF ¶ 232; MTIB at 52.

<sup>66</sup> App. 1A-444; Gargano Dep. at 9:24-10:1; MTFOF ¶ 220; MTIB at 52.

<sup>67</sup> App. 1A-444; App. 1A-438; Borrone Dep. at 429:6-30:14, 444:18-45:16; MTFOF ¶ 221; MTIB at 52.

[REDACTED]

“reemphasized that staff needs to find a way to recoup the subsidy even if it is through other tenants.” Then, “he advised staff to . . . find a way to recoup the deficit through other tenants.”<sup>68</sup>

This is precisely what PANYNJ did. PANYNJ refused Maher the Maersk-APM preferential lease rate terms for its *commercial convenience* to increase its revenue to reduce its internal accounting deficit. When asked “was the Sea-Land/Maersk better deal made up by higher rents from other tenants such as Maher,” PANYNJ 30(b)(6) witness, Lillian Borrone, testified “it was a combination of . . . rate structures negotiated . . . with other tenants.”<sup>69</sup>

On September 23, 1999, Ms. Borrone informed Maher that PANYNJ was *not* providing Maher the Maersk-APM lease rate terms. Ms. Borrone told Maher that among other things,<sup>70</sup> Maher was not getting the Maersk-APM lease rates because “Maersk was guaranteeing to bring their cargo into the port.”<sup>71</sup> And, by October 27, 1999, the PANYNJ had secured Maher’s agreement to a base rent lease rate of \$39,750 per acre per year with a two percent escalator, which was the term embodied in EP-249. PANYNJ Chief Financial Officer, Charles McClafferty, then updated the PANYNJ Commissioners regarding the revenue increase and reduction of PANYNJ’s net present value loss accounting deficit. He described “[h]igher revenue projections as a result of the rates included in the lease currently under negotiation with Maher Terminals. It is assumed that these rates which are higher than the rates for Sea-Land and Maersk will also be achievable in the Port Newark Container Terminal.”<sup>72</sup> The deficit projection was smaller than previously projected when PANYNJ assumed that Maher’s lease rates would

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<sup>68</sup> App. 1A-444; MTFOF ¶ 222; MTIB at 52.

<sup>69</sup> Borrone Dep. at 461:7-62:7; MTFOF ¶ 272; MTIB at 52-53.

<sup>70</sup> The only two reasons given by PANYNJ at the time it refused Maher parity, i.e., on September 23, 1999, were the “port guarantee” and PANYNJ’s representation that Maersk-APM would make greater investments in its facility than Maher. Brian Maher Dep. at 199:12-:17; MTFOF ¶ 242; Schley Dep. at 66:25-67:13; MTFOF ¶ 243; MTIB at 43-44; MTRB at 27, 54, 60-61.

<sup>71</sup> Schley Dep. at 266:22- 67:14; MTFOF ¶ 252; MTRB at 27.

<sup>72</sup> App. 1C-1005-06; MTFOF ¶ 270; MTIB at 55-56.

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be the same as those of Maersk-APM—principally because of the increase in PANYNJ revenue due to the \$118.5 million net present value increase from Maher’s being higher than previously projected.<sup>73</sup> As McClafferty testified, “if Maher Terminals paid higher rents, then the subsidy for the Port Commerce Department would have been smaller.”<sup>74</sup>

PANYNJ charges Maher higher lease rates for commercial convenience to increase revenue for its subsidy to Maersk-APM in violation of the Shipping Act. *Freight Forwarder Bids*, 17 S.R.R. at 293-95 (class subsidy paid for by another class unlawful).

#### **IV. The I.D. Erred In Other Key Respects Warranting Reversal.**

##### **A. The I.D. Erroneously Invoked Estoppel And Misconstrued Evidence.**

In support of its “risks and benefits” label for status, the I.D. erroneously relied on a notion that because Maher’s former Chief Executive Officer asked the Governor of New Jersey to do “everything possible” to keep Maersk-APM in the port, Maher is effectively estopped from claiming that PANYNJ’s undue preference of Maersk-APM violates the Shipping Act. I.D. at 44, 48, 53. But, “waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission’s jurisdiction from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act.” *Ceres II*, 29 S.R.R. at 372; January 31 Order at 16.

The I.D. repeatedly referenced a January 8, 1999 letter from former Maher Chief Executive Officer, Brian Maher, to the then-Governor of New Jersey, Christine Todd Whitman,<sup>75</sup> which in part urges that “everything possible be done to retain Maersk and Sea-Land” for the proposition that PANYNJ was justified in providing disparate lease terms to Maersk-APM and Maher based on the “risk” of Maersk-APM leaving the port. I.D. at 44 (F. 84-

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<sup>73</sup> App. 1C-1006; McClafferty Dep. at 199:17-205:21, MTFOF ¶ 270; MTIB at 56.

<sup>74</sup> McClafferty Dep. at 168:13-:15; MTFOF ¶ 271; MTIB at 56.

<sup>75</sup> PA Appx. I-1043.

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88) (averring that “Maher advocated that everything possible be done to retain Maersk and Sea-Land,” and citing to the letter), 48, 53. But, that is *irrelevant* to a proper *Ceres* analysis and certainly cannot justify the PANYNJ’s later decision communicated to Maher on September 23, 1999 to refuse parity to Maher then, or *continuing to refuse now*.

The I.D. misconstrued the letter and ignored the uncontroverted evidence that in this letter, Mr. Maher also expected PANYNJ to provide Maher parity with Maersk/Sea-Land, saying, “if successfully concluded, the Sea-Land and Maersk lease terms and conditions will most certainly set a standard and pattern for the rest of the Port.”<sup>76</sup> Maher’s expectation at that point was that PANYNJ was going to provide a “‘fairly level playing field’ of rates at New Jersey facilities.”<sup>77</sup> After all, it was not until September 23, 1999 that PANYNJ told Maher that the Maersk-APM rates were “off the table.”

**B. “Gives and Takes” Are Not Valid Transportation Purposes.**

The I.D. erroneously parroted PANYNJ’s argument that the disparities “should be evaluated in the context of all of the ‘gives and takes.’” I.D. at 47. But, in *Ceres I*, the Commission rejected MPA’s “gives and takes” argument. 27 S.R.R. at 1263, 1273 (port authority argued that “each party made several proposals . . . and concessions . . . to reach an agreement,” and ruled instead that the “port authority must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of the lessees”). PANYNJ conceded that it performed no particularized analysis at the time of the lease negotiations that comprehensively compared all of the Maher and Maersk-APM lease terms.<sup>78</sup>

The “gives and takes” justification is nothing but another *post hoc* rationalization that

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<sup>76</sup> PA Appx. I-1043; MTR-PAFOF ¶ 105.1.

<sup>77</sup> App. 1A-276; App. 1B-574; Brian Maher Dep. at 235:10-:20; Borrone Dep. at 207:13-08:5; Harrison Dep. at 69:7-:20; MTFOF ¶ 153.

<sup>78</sup> App. 3B-608; Yetka Dep. at 324:17-28:7; MTFOF ¶ 280; MTIB at 27; MTRB at 41.

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cannot be a legally proper justification. *See id.* at 1272. The uncontroverted evidence establishes that the only two reasons PANYNJ gave at the time it refused Maher parity, i.e., on September 23, 1999, were the “port guarantee” and PANYNJ’s representation that Maersk-APM would make greater investments in its facility than Maher.<sup>79</sup>

**C. The I.D. Erroneously Invoked An “Identical Service” Standard.**

The I.D. erroneously asserted that “Maher and Maersk-APM are not provided an ‘identical service’ because the leased property is significantly different.” I.D. at 40. This is the incorrect standard. There is no requirement to establish that the service was *identical* to establish a violation of the Shipping Act. *Ceres I*, 27 S.R.R. at 1275. PANYNJ provided both parties the *same service* for purposes of the Shipping Act violation, i.e., “land rental.” *Id.* at 1271.

The I.D. made only passing mention to purported differences between the terminal lands at issue, but failed to make any findings of fact that any of the purported terminal differences were actually expressed at the time as the justification for the disparities or that they actually justify the lease disparities. I.D. at 40. These are PANYNJ’s burdens, but it made no effort to show that it expressed this reason at the time that it denied Maher parity on September 23, 1999, or justified the lease term disparities on the basis of a contemporaneous particularized analysis of differing terminal characteristics, which is the standard.<sup>80</sup> The evidence establishes that PANYNJ neither expressed purported differences in the land at the time as a justification, nor conducted any contemporaneous particularized analysis of land characteristics to justify the land

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<sup>79</sup> Brian Maher Dep. at 20:22-21:3; MTFOF ¶ 251; Brian Maher Dep. at 199:12-:17; MTFOF ¶ 242; Schley Dep. at 66:25-67:13; MTFOF ¶ 243; Schley Dep. at 266:22-67:14; MTFOF ¶ 252; MTIB at 43-44; MTRB at 27.

<sup>80</sup> *Ceres I*, 27 S.R.R. at 1273 (“[P]ort must ensure that any such differentiation is reasonable, based on the particular facts and circumstances of potential lessees.”); Yetka Dep. at 324:17-28:7; Borrone Dep. at 64:4-:10; App. 3B-608; Shiftan Dep. at 47:11-48:12; MTFOF ¶ 280; MTIB at 27; MTRB at 41.

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rental disparity.<sup>81</sup> PANYNJ’s own contemporaneous evidence establishes that the land that PANYNJ provided to Maersk-APM, which had *first* choice of the land in all events, was more desirable and that differential rent pricing was *unwarranted*.<sup>82</sup>

**D. The Lease Disparities Are Not Justified.**

**1. The I.D. Erroneously Concluded Differences Between the Rental Rates for EP-248 and EP-249 Are Justified Because of “Status.”**

The I.D. concluded that differences exist between the basic rental rates for Maher’s lease and Maersk-APM’s lease—namely that “Maher’s initial base rental of \$39,750 per acre is higher than Maersk-APM’s base rental of \$19,000 per acre,” and by the end of the lease term, “will escalate to \$70,590 per acre.” I.D. at 47-48. However, it ultimately concluded that because of *status*, i.e., the “threat made by Maersk-APM [to leave the port],” the evidentiary record “does not support a finding that the rent provisions of the leases were unjustified.” *Id.* As shown above, this is plain legal error and the violation is proved.

The I.D. also erroneously obscured and diminished the enormous disparity between the basic rental rates, observing that “it is impossible to conduct an exact, apples-to-apples comparison because of the multiple factors impacting rent.” I.D. at 47. This is irrelevant. The uncontroverted evidence establishes that over the term of the leases, the disparities in the lease rate rents exceed \$1 million a month.<sup>83</sup> Whether an “apples-to-apples” comparison can be made is irrelevant, as the Commission’s governing authorities establish that PANYNJ has an absolute and continuing duty to provide Maher the preferential terms afforded to Maersk-APM.

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<sup>81</sup> Yetka Dep. at 324:17-28:7; Borrone Dep. at 64:4-:10; App. 3B-608; Shiftan Dep. at 47:11-48:12; MTFOF ¶ 280; MTIB at 27; MTRB at 41.

<sup>82</sup> App. 1A-65; MTFOF ¶ 99. The uncontroverted evidence establishes that the Maersk-APM terminal was comprised of the former SeaLand terminal and 84 acres and the best berths from the Tripoli Street terminal previously operated by Maher but required by PANYNJ to be surrendered to Maersk-APM. App. 1A-271; App. 1B-904; MTFOF ¶ 152; MTRB at 45.

<sup>83</sup> App. 1D-1621; MTFOF ¶ 299; MTIB at 13.

[REDACTED]

PANYNJ concluded that the rents were materially different, estimating that Maher would pay a total rent with a net present value of \$847,367 per acre, while Maersk-APM would pay only \$435,916 per acre.<sup>84</sup> PANYNJ's Executive Summary of the lease terms determined that "[t]he negotiated [Maersk-APM] rent is lower than the container rental in all similar terminals," and that Maher's "negotiated rent is greater than that being offered to Maersk."<sup>85</sup>

The I.D.'s comparison of Maher's initial base rental of \$39,750 to what it previously paid under its Fleet Street lease is irrelevant. I.D. at 47. So is its observation that "Maersk-APM's rent may increase if it fails to meet the requirements of the port guarantee . . . if Maersk Line were to pull its cargo from the Port entirely, Maersk-APM's rent would increase to \$89,300 per acre." I.D. at 47. Neither reason for the disparity was expressed at the time of the lease negotiations, and are *post hoc* litigation justifications. Speculation about an extreme hypothetical of what Maersk-APM's basic rent *might* be if Maersk-APM failed to bring *any* cargo to the port provides no justification because Maher requested parity, which would have necessarily included a like rent increase provision.

The correct Shipping Act comparison is between prejudicial terms provided to Maher and the preferential terms provided to Maersk-APM and refused to Maher. The I.D. erroneously compared Maher's rent rates to the preferential terms provided to Maersk-APM, which Maersk-APM *might* fail to satisfy. Maersk-APM's failures to satisfy its "port guarantee" volume commitments and the resulting rent increases required by PANYNJ are *irrelevant*.

Maher's starting basic rent rate is more than twice the rate PANYNJ provided to Maersk-APM: \$39,750 per acre versus \$19,000 per acre retroactive to 1999 and fixed for the

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<sup>84</sup> App. 1C-1370; Yetka Dep. at 318:3-22:15; MTFOF ¶ 279; MTIB at 29, 58.

<sup>85</sup> App. 1C-1107 & -1111; Ward Dep. at 156:5-:22; MTFOF ¶¶ 212, 277; MTIB at 28, 43.

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approximately thirty year term of the agreement.<sup>86</sup> Maher's per acre basic rental also escalates by 2% per year, while Maersk-APM's does not.<sup>87</sup> By the end of the 30 year term Maher's basic rent rises to \$70,590 per acre, or \$51,590 more per acre than the basic rent lease term of \$19,000 per acre provided to Maersk-APM.<sup>88</sup> At that point, Maher's basic rental rate is 3.7 times the basic rental rate PANYNJ provided to Maersk-APM.<sup>89</sup>

Over the thirty year leases, the terms call for Maher to pay \$703 million in basic rental, while Maersk-APM would pay only \$193 million (both in nominal dollars).<sup>90</sup> Maher's basic rental for its facility is almost four times Maersk-APM's rent over the life of the lease. On a per acre basis, Maher will pay almost three times the amount that is called for in Maersk-APM's lease. On average, Maher pays \$53,753 per acre per year, almost three times Maersk-APM's average preferential basic rental rate of \$19,000.<sup>91</sup> Over the term of the leases, this difference in the basic rent lease rate terms totals \$459,716,899.<sup>92</sup> As of May 31, 2011, Maher sustained injury and damages due to this basic rent difference in the amount of \$108,121,870, not including prejudgment interest of \$12,209,989.<sup>93</sup> Future damages measured after May 31, 2011 total \$351,595,029.<sup>94</sup>

## **2. The I.D. Erroneously Concluded "Creditworthiness" Justified Disparate Financing And Security Deposit Terms.**

The I.D. agreed that PANYNJ provided Maher and Maersk-APM different financing

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<sup>86</sup> App. 5A-8-9; App. 4-13; MTFOF ¶ 305; App. 4-13; MTFOF ¶ 306; MTIB at 30.

<sup>87</sup> App. 5A-8-9; App. 4-13; MTFOF ¶ 305; App. 5A-263; MTFOF ¶ 349; MTIB at 30.

<sup>88</sup> App. 4-13; App. 1-134; MTFOF ¶ 306; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 30-31.

<sup>89</sup> App. 4-13; App. 4-134; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 30-31; MTRB at 32.

<sup>90</sup> App. 4-14; App. 4-134; MTFOF ¶ 510; MTIB at 31.

<sup>91</sup> App. 4-14; App. 4-134; App. 1C-1371; App. 1C-1171; MTFOF ¶ 510; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 31.

<sup>92</sup> App. 4-14; App. 4-134; App. 4-136; MTFOF ¶ 510; MTIB at 31.

<sup>93</sup> App. 4-4; App. 4-136; App. 4-170; MTFOF ¶ 511; MTIB at 31.

<sup>94</sup> App. 4-4; App. 4-136; MTFOF ¶ 512; MTIB at 31.

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terms for improvements, which resulted in Maher paying an additional twenty-five basis points. I.D. at 49. As a result, Maher sustained damages in the amount of \$3,164,170 as of May 31, 2011 and will incur future damages in the amount of \$10,629,179.<sup>95</sup> The I.D. also accepted that PANYNJ requires Maher to provide a security deposit not required of Maersk-APM. I.D. at 52. Originally set at \$1.5 million, PANYNJ further imposed an enormous increase to Maher's security deposit in 2007 in connection with providing PANYNJ consent to a change of control of Maher.<sup>96</sup> As of December 31, 2011, the security deposit requirement Maher provides is \$26 million.<sup>97</sup> Maher sustains injury and damages from the ongoing security deposit requirement in the amount of \$5,642,878.<sup>98</sup> By comparison, and as acknowledged by the I.D., Maersk-APM is not required to post a security deposit. PANYNJ permits Maersk-APM to provide a corporate guarantee from a "parental" entity which is not even a parent.<sup>99</sup>

The I.D. erroneously justified these disparities because purportedly: "Maher's Fleet Street rent was in arrears;" "Maersk-APM's lease was supported by a "parental" corporate guarantee while Maher was unable to present such a guarantee;" and that "PANYNJ charged the higher finance rate because it found Maher was a greater credit risk than Maersk-APM." I.D. at 50. None of these *post hoc* rationalizations justifies the disparities.

First, Maher was *not* a greater credit risk and PANYNJ conducted no contemporaneous creditworthiness comparison. The I.D. ignored Maersk-APM's contemporaneous arrearage in rent payments on its leases of \$3.3 million during 2000, as compared to Maher's Fleet Street

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<sup>95</sup> App. 4-4; App. 4-17; App. 4-140-41; App. 4-170; 5A-16; 5A-269-70; MTFOF ¶¶ 514-16; MTIB at 35.

<sup>96</sup> App. 5A-245-246; App. 4-18; MTFOF ¶ 328; MTIB at 37.

<sup>97</sup> I.D. Findings of Fact ¶ 169.

<sup>98</sup> App. 4-3-4; App. 4-145-46; App. 4-170; MTFOF ¶ 521; MTIB at 37.

<sup>99</sup> App. 3A-276-77; MTFOF ¶ 430; App. 5A-362 & 383-85; MTFOF ¶¶ 376-77; App. 1D-1659-60; MTFOF ¶ 427; Hartwyk Dep. at 116:13-17:21; MTFOF ¶ 431; MTIB at 64; MTRB at 62.

[REDACTED]

arrearage.<sup>100</sup> Thus, Maher’s arrearage cannot justify disparate treatment.

Second, the evidence debunks the *post hoc* rationalization that the disparities were justified by the purported “parental” corporate guarantee of Maersk, Inc. The I.D. erroneously failed to conduct a particularized analysis of the disparate financial guarantees at issue to determine if the differences are reasonable. Given the disparity, the burden shifted to PANYNJ to justify the disparate treatment and it failed to carry that burden. The evidence establishes that Maher already provided a corporate guarantee.<sup>101</sup> And, PANYNJ’s own expert’s report opined that Maher had substantial assets at the time it entered into the lease agreement far exceeding the amount of the security deposit as originally imposed (\$1.5 million) or as later increased in 2007 and subsequent years to \$26 million today.<sup>102</sup>

The “parental” guarantee of Maersk, Inc., *which is no longer Maersk-APM’s parent*, cannot justify the disparity. The so-called “parental” nature of the guarantee in practice proved to be a chimera because PANYNJ later disclosed that it was always subject to Maersk-APM’s unilateral decision to reorganize, i.e., Maersk-APM’s unilateral decision to end the “parental” nature of the guarantee.<sup>103</sup> And, Maersk, Inc. was not the “shipping giant” erroneously alleged

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<sup>100</sup> S. App. 1D-1619; S. App. 1D-1712; MTR-PAFOF ¶ 201.3. Maher’s arrearage amount was \$3,057,735, less than half the basic rent for 1990, \$6,410,000. PA Appx. I-100; App. 5C-947; PA Appx. I-152; MTR-PAFOF ¶ 202; MTRB at 64-66.

<sup>101</sup> As a practical matter, Maher already provides a corporate guarantee of lease performance. App. 5A-80 & 81-84; MTFOF ¶ 324; MTIB at 62; MTRB at 62.

<sup>102</sup> According to PANYNJ’s own expert, in 2000 Maher held approximately \$17.8 million in cash, cash equivalents, and government securities and had an enterprise value of \$547.7 million. App. 4-312-13 & 316; MTFOF ¶ 326; MTIB at 63; MTRB at 62-63. And, PANYNJ’s expert opined that in 2007 when PANYNJ increased the security deposit requirement Maher’s enterprise value was approximately \$1.8 billion. App. 4-182; MTRB at 62-63. In 2007, PANYNJ increased Maher’s security deposit requirement and this greater requirement injures Maher. App. 4-3-4; App. 4-18 & 4-145-146; MTFOF ¶¶ 518, 521; MTRB at 63.

<sup>103</sup> App. 1D-1577; MTFOF ¶ 428; App. 1D-1621; MTFOF ¶ 429; App. 3C-923; MTR-PAFOF ¶ 51; MTIB at 64.

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by PANYNJ,<sup>104</sup> and it is no longer a parent of Maersk-APM.<sup>105</sup> PANYNJ was “materially *worse off* with only the guarantee from Maersk, Inc.”<sup>106</sup>

Third, the I.D. erroneously adopted PANYNJ’s *post hoc* “creditworthiness” justification—based upon the unsubstantiated Borrelli Declaration (“Borrelli Decl.”) foisted upon Maher in PANYNJ’s Reply Brief, six months after fact deposition discovery had closed.

**a. The I.D. Erred According Weight to the Unsubstantiated and Untimely Borrelli Declaration.**

The declaration sought to plug a gaping evidentiary hole created by PANYNJ’s own sworn interrogatory answers and the testimony of its 30(b)(6) witnesses. It failed because it lacks foundation, is unreliable, and is not probative. The declarant did not profess *personal* knowledge of the events<sup>107</sup> and did not personally perform any creditworthiness analysis with respect to the allegations.<sup>108</sup> It averred that a deceased PANYNJ employee “performed a credit analysis or review of both APM and Maher,”<sup>109</sup> but did not state it was even written, what the purported “analysis or review” showed, or how it was performed. It did not state that declarant ever *saw* or *verified* the purported “credit analysis or review;” nor did it state that he knows how Maersk-APM and Maher *compared* in terms of creditworthiness and on the measure of what criteria the disparate treatment was based, which is, after all, the essential point.<sup>110</sup> It confessed that PANYNJ charged Maher a “higher interest rate” of “25 basis points,” but failed to explain

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<sup>104</sup> App. 3A-433; MTFOF ¶ 379; App. 3B-479; MTFOF ¶ 379; MTIB at 63; MTRB at 62.

<sup>105</sup> App. 3A-276-77; MTFOF ¶ 430; App. 5A-362 & 383-85; MTFOF ¶¶ 376-77; App. 1D-1659-60; MTFOF ¶ 427; Hartwyk Dep. at 116:13-17:21; MTFOF ¶ 431; MTIB at 64; MTRB at 62.

<sup>106</sup> S. App. 1C-1448 (emphasis added); MTR-PAFOF ¶ 210; MTRB at 64. Mr. Harrison’s memorandum to Ms. Borrone shows no comparative creditworthiness analysis was performed because Maher and Maersk-APM were being treated disparately because of *status*.

<sup>107</sup> PA Appx. III-1013-17; MTR-PAFOF ¶ 201.2; MTRB at 63.

<sup>108</sup> PA Appx. III-1013-17; MTR-PAFOF ¶ 201.2; MTRB at 63.

<sup>109</sup> PA Appx. III-1014; MTR-PAFOF ¶ 201.2; MTRB at 63.

<sup>110</sup> PA Appx. III-1013-17; MTR-PAFOF ¶ 201.2; MTRB at 64.

why.<sup>111</sup>

It stated that one of the “primary considerations” is “whether the Lessee has historically paid its obligations on time,”<sup>112</sup> but failed to explain how that justified the disparate treatment here, especially in light of Maersk-APM’s contemporaneous arrearage in rent payments of over \$3 million during 2000, before the Maher lease was concluded in October 2000.<sup>113</sup>

It erroneously averred that “Maher had been in arrears for *two* years on its monthly rent payment for one of its two terminals, and in fact was still making arrearage payments during the credit review process.”<sup>114</sup> The arrearage only pertained to less than one-half the 1990 basic rent, not *two* years’ worth of basic rent.<sup>115</sup> It omitted Maher’s successful repayment and PANYNJ’s subsequent admission that the Maher Fleet Street rates PANYNJ imposed on Maher were commercially unsustainable.<sup>116</sup> Therefore, Maher’s Fleet Street lease arrearage referenced by the Borrelli Decl. was *not* the result of lesser creditworthiness, but instead, PANYNJ’s unrealistic volume predictions. Contrary to the Borrelli Decl.’s suggestion, the facts evince Maher’s creditworthiness, not a purported lack of creditworthiness.

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<sup>111</sup> PA Appx. III-1014; MTR-PAFOF ¶ 201.2; MTRB at 64.

<sup>112</sup> PA Appx. III-1015; PAFOF ¶ 201; MTRB at 64.

<sup>113</sup> S. App. 1D-1619; S. App. 1D-1712; MTR-PAFOF ¶ 201.3; MTRB at 64.

<sup>114</sup> PA Appx. III-1016; PAFOF ¶ 202; MTRB at 65.

<sup>115</sup> PA Appx. I-152; MTR-PAFOF ¶ 202; MTRB at 65. The arrearage amount was \$3,057,735, less than half the basic rent for 1990, \$6,410,000. PA Appx. I-100; App. 5C-947; PA Appx. I-152; MTR-PAFOF ¶ 202; MTRB at 65-66.

<sup>116</sup> Maher’s arrearage pertained only to the Fleet Street Terminal rent, which was by far the highest rent in the port, and resulted from the port’s failure to increase container volume during the late 1980s and early 1990s. Maher entered into the 1986 Fleet Street lease agreement “based on the assumption that volume was going to continue to grow as it had, and volume did not continue to grow. In fact, volume – volume significantly reduced over the next few years.” Brian Maher Dep. at 101:23-02:4. “These special circumstances led to Maher and the Port Authority renegotiating the terms of the Fleet Street lease in the early 1990s to reflect the actual market conditions at that time.” App. 1B-572; Brian Maher Dep. at 228:7-29:2. In 1991, PANYNJ cut the Maher Fleet Street basic rental rate in half and also agreed to a repayment plan for the arrearage which Maher satisfied in full with interest. *Compare* App. 5C-947 with S. App. 1K-4377-78; MTR-PAFOF ¶ 202; MTRB at 66.

[REDACTED]

The declaration glaringly failed to address PANYNJ's previous false assertion in its interrogatory answers that Maersk-APM's parental guarantee was a "vastly greater source of security" because it was provided by "APMT's parent, shipping giant, Maersk, Inc."<sup>117</sup> Maersk, Inc. was not a "shipping giant." Maersk Line, the real "shipping giant," *did not* provide the "parental" corporate guarantee.<sup>118</sup> The declarant also failed to disclose his view that PANYNJ was "materially *worse off* with only the guarantee from Maersk, Inc.,"<sup>119</sup> and that PANYNJ admitted that it failed to perform any formal analysis with respect to Maersk, Inc. or Maersk Line's assets prior to the signing of EP-248.<sup>120</sup> The declaration's errors and failures to disclose demolish its veracity, reliability, and probative value.

For the first time in the belated declaration, PANYNJ identified Mr. Borrelli as a knowledgeable person with respect to the disparities regarding the financing rate and the security deposit. PANYNJ failed to supplement its responses to Maher's discovery requests as required by FMC Rule 201(j) and improperly used the declaration as new evidence not disclosed in its answers to Maher's interrogatories or in the answers of its 30(b)(6) witnesses at deposition, and it should have been excluded from consideration against Maher.<sup>121</sup>

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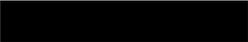
<sup>117</sup> App. 3A-433; App. 3B-479; MTFOF ¶ 379; MTRB at 63.

<sup>118</sup> Oppenheimer 07-01 Dep. at 17:8-18:19, 106:10-:12; Nicola 07-01 Dep. at 46:10-:12; App. 1D-1882; App 1D-1842; MTFOF ¶ 11; App. 5A-362; App. 4-18; App. 4-185-86; App. 4-312; MTFOF ¶ 376; MTIB at 62-63; MTRB at 63-64.

<sup>119</sup> S. App. 1C-1448 (emphasis added); MTR-PAFOF ¶ 210; MTRB at 64. Mr. Harrison's memorandum to Ms. Borrone shows no comparative creditworthiness analysis was performed because Maher and Maersk-APM were being treated disparately because of *status*.

<sup>120</sup> App. 3B-617-19; MTIB at 62; MTRB at 61.

<sup>121</sup> Pursuant to Maher's 30(b)(6) deposition notices, PANYNJ designated 30(b)(6) representatives regarding the financial aspects of EP 248 and 249 and provisions of agreements EP-248 and EP-249 pertaining to investment requirements and security deposit requirements. However, neither of these PANYNJ 30(b)(6) witnesses, Cheryl Yetka and Lillian Borrone, provided the information PANYNJ belatedly offers for the first time long after the close of fact discovery in the Borrelli Decl. Additionally, during Ms. Borrone's deposition, she testified that as it relates to the differences in their lease terms, she said PANYNJ "never put pen-to-paper in



**b. PANYNJ Failed to Engage in Any Comparative  
“Creditworthiness” Analysis And Imposed Disparate  
Financing Terms Due To Status And Business Convenience.**

Maher had substantial financial resources at the time of the lease negotiations and at the conclusion of the agreement on or about October 1, 2000.<sup>122</sup> Yet, PANYNJ failed to produce any evidence showing a contemporaneous *comparative* financial analysis establishing that Maersk-APM could provide a corporate guarantee and Maher could not.<sup>123</sup> PANYNJ asserted in this litigation that it never offered Maher the opportunity to provide a corporate guarantee in lieu of a security deposit “because it did not have the financial wherewithal required by the Port Authority,” which it describes as “the support of a parent entity whose total assets exceeded the Port Authority’s projected total revenue stream from EP-249.”<sup>124</sup> PANYNJ produced no evidence showing that Maersk, Inc. actually satisfied that standard at the time with respect to EP-248. And in all events, that is not what PANYNJ expressed at the time and it is discriminatory on its face because the underlying discriminatory lease rate terms to be guaranteed were \$500 million higher for Maher than for Maersk-APM. The I.D. ignored all of this evidence and failed to conduct a proper analysis according to the governing authorities.

Maersk, Inc. is not Maersk-APM’s parent. PANYNJ consented to corporate ownership changes that divested Maersk-APM from ownership by Maersk, Inc.<sup>125</sup> The purported “parental” quality of the Maersk, Inc. guarantee proved illusory. PANYNJ revealed for the first time in 2008 that it was, and remains, subject to Maersk-APM’s unilateral discretion to

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an explicit statement that said, “This is why Maher should pay a difference.” Borrone Dep. at 64:8-:10; MTR-PAFOF ¶ 201.2; MTRB at 68-69.

<sup>122</sup> According to PANYNJ’s own expert, at that time, Maher held approximately \$18.8 million in cash, cash equivalents, and government securities and had an enterprise value of \$547.7 million. App. 4-312-13, -316; MTFOF ¶ 326; MTIB at 63; MTRB at 62.

<sup>123</sup> App. 3B-617-18; App. 3B-709; MTFOF ¶ 327; MTIB at 63; MTRB at 61.

<sup>124</sup> App. 3B-619; App. 3B-710-11; MTFOF ¶ 327; MTIB at 63-64.

<sup>125</sup> App. 3A-276-77; MTFOF ¶ 430; Hartwyk Dep. at 116:13-17:21; MTFOF ¶ 431; MTIB at 61-62; MTRB at 67.

[REDACTED]

reorganize.<sup>126</sup> Consequently, Maersk, Inc. no longer owns Maersk-APM or the other APM Terminals North American assets that it apparently did at the time the agreements were concluded.<sup>127</sup> This evidence and the subsequent Maersk-APM ownership changes render the justification invalid. *Ceres II*, 29 S.R.R. at 369-74; *Ceres I*, 27 S.R.R. at 1270-77. PANYNJ also provided no evidence comparing the current Maersk, Inc. “guarantee” to the security deposit PANYNJ requires of Maher or Maher’s corporate guarantee. PANYNJ erroneously asserted that Maersk-APM’s parental guarantee was a “vastly greater source of security” because it was provided by “APMT’s parent, shipping giant, Maersk, Inc.”<sup>128</sup> But, Maersk, Inc. was not, and is not, a “shipping giant.” It is merely an agent for the “shipping giant,” Maersk Line.<sup>129</sup> Maersk Line, the real “shipping giant,” *did not* provide the “parental” corporate guarantee.

**3. The I.D. Erroneously Approved The Disparate Investment Requirements PANYNJ Imposed on Maher.**

PANYNJ imposed a more onerous investment requirement on Maher and provided less favorable financing in violation of the Shipping Act.

**a. More PANYNJ Financing And Differing Visions Do Not Justify the Disparity.**

PANYNJ required Maher to invest much more in its terminal than it required Maersk-APM to invest. “According to the Port Authority, [there were] differing investments in the APM terminal (approximately \$408,000 per acre) and Maher terminal (Approximately \$459,000 per acre) . . . .” I.D. at 28 (F. 145).<sup>130</sup> The I.D. failed to determine that the disparity is justified by a

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<sup>126</sup> App. 1D-1577; MTFOF ¶ 428; App. 1D-1621; MTFOF ¶ 429; App. 3C-923; MTR-PAFOF ¶ 51; MTIB at 64; MTRB at 62.

<sup>127</sup> App. 5A-362 & 383-385; MTFOF ¶¶ 376-377; App. 1D-1659-60; MTFOF ¶ 427; MTIB at 64; MTRB at 62.

<sup>128</sup> App. 3A-433; App. 3B-479; MTFOF ¶ 379; MTIB at 62-63; MTRB at 63.

<sup>129</sup> Oppenheimer 07-01 Dep. at 17:8-18:19, 106:10-:12; Nicola 07-01 Dep. at 46:10-:12; App. 5A-346 & -361; MTFOF ¶¶ 9 & 11; MTIB at 63.

<sup>130</sup> The I.D. also understated the magnitude of the disparity. The I.D. ignored the evidence that

[REDACTED]

valid transportation purpose. It ignored the reasons expressed by PANYNJ. And PANYNJ failed to establish that the *post hoc* rationalizations (“more financing” and “vision”) are valid transportation reasons and that they actually justify the disparity.

PANYNJ imposes on Maher a greater investment requirement and charges a higher (25 basis point) financing rate.<sup>131</sup> Maher sustained injury and damages in the amount of \$3,164,170 as of May 31, 2011 and future damages in the amount of \$10,629,179.<sup>132</sup>

When PANYNJ refused to provide Maher parity on September 23, 1999 and stated that the Maersk-APM terms were “off the table,” one of the two reasons it expressed justifying preferential rates was Maersk-APM’s purportedly greater investment requirement, which later turned out to be untrue (the other express reason, of course, was the “port guarantee.”).<sup>133</sup> According to the reason expressed by PANYNJ at the time, Maher’s greater investment requirement imposed by PANYNJ in the end should have justified *lower* rents and financing charges for Maher as compared to Maersk-APM, not *higher* ones. PANYNJ’s own documents established that “APM provided less \$ per acre” in redevelopment funds<sup>134</sup> and that reducing Maersk-APM’s investment requirement “*exacerbates the disparity.*”<sup>135</sup> The disparity is not justified by a valid transportation purpose.

That PANYNJ discriminated against Maher due to *status* and *commercial convenience* is

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considering the differing “free capital” amounts granted to Maersk-APM and Maher that did not have to be repaid to PANYNJ and the reason for that, i.e., unlawful discrimination, that the total amount per acre of required investment for Maher increases to \$561,798 (\$250 million divided by 445 acres), and the total for Maersk-APM is only \$494,286 (\$173 million divided by 350 acres). App. 4-17; App. 4-308-09; App. 5A-21; App. 5A-272-74; App. 3B-612; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 32; MTRB at 71-72.

<sup>131</sup> PAR-MTFOF ¶ 319; PAR-MTFOF ¶ 373; MTIB at 35.

<sup>132</sup> App. 4-4; App. 4-140-41; MTFOF ¶ 517; MTIB at 35.

<sup>133</sup> App. 1B-926; App. 1B-922; Mosca Dep. at 139:18-40:5; MTFOF ¶ 244; MTIB at 10, 54, 72.

<sup>134</sup> App. 1D-1613; MTFOF ¶ 298; MTIB at 33.

<sup>135</sup> App. 1D-1621 (emphasis added); MTFOF ¶ 301; MTIB at 30.

[REDACTED]

further supported by Maersk-APM’s request for deferral of its investment requirement, as explained in its confidential settlement memorandum presented to PANYNJ officials during the negotiations in the 2007–2008 timeframe:

[REDACTED]

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This underscores the *practical significance* of the disparate investment requirements. *Ceres I*, 27 S.R.R. at 1271-73. The requirement for greater investments increases costs and diminishes competitive advantage. PANYNJ imposed and *continues* to impose greater investment requirements on Maher because of the impermissible reasons of *status* and *commercial convenience* and Maher sustains injury as a result.

**b. Maher’s “Free Capital” Differs From Maersk-APM’s.**

The I.D. admitted the \$30.4 million in free capital provided to Maersk-APM is *different* from the \$46 million provided to Maher, but it disregarded the significance of the difference and erroneously treated the amounts as equivalent. I.D. at 49. In Maersk-APM’s case, the \$30 million “free capital” was part of PANYNJ’s concession because of *status*.<sup>137</sup> I.D. at 28 (F. 148). By contrast, Maher’s \$46 million “free capital” compensated it for improvements to the Tripoli Street terminal PANYNJ required Maher to surrender to Maersk-APM.<sup>138</sup> I.D. at 28 (F. 141).

**c. Maher’s Investment Requirements Are Not More Flexible than Maersk-APM’s.**

The I.D. mischaracterized Maher’s Class C work as “optional,” giving Maher “greater

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<sup>136</sup> App. 1D-1629; MTFOF ¶ 437; MTIB at 33.

<sup>137</sup> See Section III, *supra*; App. 1B-565-67; MTFOF ¶ 202; MTIB at 50; MTRB at 73.

<sup>138</sup> App. 4-400; App. 1B-928; Schley Dep. at 259:22-65:18; Brian Maher Dep. at 173:20-74:8; Nortillo Dep. at 98:2-100:1; MTFOF ¶ 318; MTRB at 73.

[REDACTED]

flexibility.” I.D. at 49. It elevated form over substance, contrary to the Commission’s admonition that it will consider the *practical significance* and not just formalistic labels. *Ceres I*, 27 S.R.R. at 1273. The Class C work was not practically different from Maersk-APM’s investments, which Maersk-APM did not perform anyway. Class C work was comprised of the same work that made up Maersk-APM’s Class A and B work which, as discussed above, Maersk-APM *did not* perform.<sup>139</sup> The only difference identified in the Class A, B, and C categories is the option for Maher to purchase cranes, which it did not do.<sup>140</sup> Therefore, it lacks practical significance.

**4. The I.D. Erroneously Concluded The Throughput Disparities Are Justified.**

PANYNJ refused parity and imposed on Maher more demanding throughput requirements and more onerous penalties for failing to meet those requirements, which are not justified by a valid transportation purpose. Maher’s throughput rent guarantee exceeds Maersk-APM’s by a minimum of (1) 75,000 containers in the third period, (2) 150,000 containers in the first period, and (3) a maximum of 175,000 container in the second period.<sup>141</sup> Maher’s terminal guarantee requirements are much higher as well. During the third period, which is half the lease term (15 years), Maher guarantees annually 510,000 more containers than Maersk-APM (900,000 versus 390,000).<sup>142</sup> And during the first two terminal guarantee periods, Maher guarantees more containers annually than Maersk-APM: 70,000 more in the first period and

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<sup>139</sup> Compare App. 5A-20-21 with App. 5A-272; MTR-PAFOF ¶ 195.2; MTRB at 73-74.

<sup>140</sup> App. 5A-20-21; App. 1C-1445; MTR-PAFOF ¶ 195.2; MTRB at 74.

<sup>141</sup> App. 5A-99-100; App. 5A-349-50; App. 4-135; App. 4-184 & -191; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; PARB at 39-40; PAR-MTFOF ¶¶ 312, 352; MTIB at 59; MTRB at 76.

<sup>142</sup> App. 5A-99-100; App. 5A-349-50; App. 4-135; App. 4-185 & -192; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; PARB at 40; PAR-MTFOF ¶¶ 313, 353; MTIB at 59; MTRB at 76.

[REDACTED]

90,000 more in the second period.<sup>143</sup> Maher guarantees almost twice as many containers on a per acre basis for half the lease term, i.e., the third period of the terminal guarantee: 2,022 versus 1,114.<sup>144</sup> Maher guarantees both more throughput rent and terminal throughput volume.<sup>145</sup>

PANYNJ could force Maher to return the entire terminal if it fails to meet its Terminal Guarantee for two consecutive years (prior to 2015), and three consecutive years during the lease's third Terminal Guarantee period after 2015, when Maher's terminal guarantee per acre is nearly twice that of Maersk-APM. I.D. at 51. For Maersk-APM, if the Terminal Guarantee is not met for two years, PANYNJ can reclaim only a portion of the terminal (150 acres of the 350 acre terminal) for an initial shortfall and can only reclaim the entire facility after a shortfall exceeds even lower levels after an additional two years. I.D. at 51. Maersk-APM's lesser penalty means that it does not risk losing the entire terminal for four years.<sup>146</sup>

The I.D. erroneously concluded that differing guarantee start and "trigger" dates distinguish the differing container throughput requirements. I.D. at 51. But, as a *practical* matter, they are *the same*. From the start, PANYNJ committed to completion of the 50 foot dredging before 2015, and the completion of the 50 foot dredging is still scheduled before

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<sup>143</sup> *Id.*

<sup>144</sup> App. 5A-99-100; App. 5A-349-50; App. 4-135; App. 4-185 & -192; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; PARB at 40; PAR-MTFOF ¶¶ 313, 353; MTIB at 59-60; MTRB at 76-77.

<sup>145</sup> App. 4-135; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 59-60; MTRB at 76-77. PARB at 38-42. Maher's gross throughput rent guarantee exceeds Maersk-APM's guarantee in the third period by 75,000 containers even though Maersk-APM's per acre rent guarantee is greater on a per acre basis. Maher's gross rent guarantee remains much higher than Maersk-APM's during the same period, so the per acre number is of no *practical significance*. App. 5A-99-100; App. 5A-349-50; App. 4-135; App. 4-184 & -191; MTFOF, Comparison of EP-249 and EP-248 Lease Differences; MTIB at 59; MTRB at 30.

<sup>146</sup> App. 5A-101-02; App. 5A-350-53, -380; App. 4-15-16; App. 4-185, -191-92; MTFOF ¶¶ 314 & 354; MTIB at 60; MTRB at 78.

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2015.<sup>147</sup> There is no “longer time period” to trigger for Maher.<sup>148</sup>

### **5. The First Point of Rest Disparity Is Unjustified.**

The I.D. conceded that the Maher and Maersk-APM leases differ with respect to the requirement for a first point of rest for the loading and offloading of automobiles, as “Maher’s lease requires that it maintain a specified berth and ten acres of its terminal as a first point of rest for automobiles,” while the “Maersk-APM lease does not require a first point of rest.” I.D. at 52.

PANYNJ mandated that Maher set aside a berth and ten acres of its terminal for use by automobile processors for the loading/unloading of automobiles upon 48 hours’ notice.<sup>149</sup> This prejudiced Maher by imposing an unnecessary restriction on the flexible use of its terminal, as it could not use the first point of rest berth and acreage for container yard operations and storage and required Maher to stevedore automobiles that it did not want to stevedore.<sup>150</sup> Maher did not need and opposed the costly requirement.<sup>151</sup>

PANYNJ imposed the requirement for its customer, Nissan.<sup>152</sup> I.D. at 53. But PANYNJ’s commercial convenience is *not* a valid transportation purpose.

The I.D. failed to address Maher’s evidence and argument showing that in March 2008,

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<sup>147</sup> S. App. 1G-3304; S. App. 1I-4330; MTR-PAFOF ¶ 189; MTRB at 77.

<sup>148</sup> The I.D. also omitted other preferential aspects of this provision, i.e., that Maersk-APM could terminate its lease with one year’s notice and obtain compensation from PANYNJ for investments if the 50 foot deepening was not completed by December 31, 2009. App. 5A-342-46; App. 5A-272; MTR-PAFOF ¶ 189. As a practical matter, the lease provisions concerning the 50 foot channel deepening completion date provided a greater “flexibility” and benefit to Maersk-APM than they did to Maher, although this particular preference is not the subject of a claim by Maher.

<sup>149</sup> App. 5A-113; App. 4-18; MTFOF ¶¶ 330-31; MTIB at 65; MTRB at 79-80.

<sup>150</sup> App. 4-18; Schley Dep. at 297:4-:16; Brian Maher Dep. at 195:4-96:5; App. 4-415; Basil Maher Dep. at 89:21-:24; MTFOF ¶ 333; MTIB at 65-66; MTRB at 79-80.

<sup>151</sup> Curto Dep. at 230:20-33:2; Basil Maher Dep. at 85:24-86:9; MTFOF ¶¶ 333, 340; MTIB at 65-66; MTRB at 79-80.

<sup>152</sup> Harrison Dep. at 57:6-:20; PAFOF ¶ 214; MTRB at 81. The operation was actually closer to the Maersk-APM terminal than the Maher terminal. Harrison Dep. at 51:7-54:24; MTR-PAFOF ¶ 213.2; MTRB at 81. PARB at 44.

[REDACTED]

PANYNJ enforced the first point of rest requirement against Maher and expressly threatened Maher with *termination* of the letting of the berth and ten acres.<sup>153</sup> Maher sustained injury and damages from the first point of rest provision and PANYNJ's enforcement of the unduly prejudicial requirement.<sup>154</sup>

**V. PANYNJ Failed to Establish, Observe, and Enforce Reasonable Practices.**

The I.D. erroneously failed to address meaningfully Maher's § 10(d)(1) unreasonable practices claims. I.D. at 54-55. They have independent bases and support apart from the unjust discrimination claims. Furthermore, "[a] practice that is unjustly discriminatory or preferential ineluctably will be unreasonable as well," such that for all the foregoing reasons establishing the I.D.'s errors and establishing Maher's undue preference or prejudice claims, Maher's unreasonable practices claims are likewise proved. *50 Mile Container Rules*, 24 S.R.R. at 466.

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). Independent evaluation under the proper legal framework is required:

[C]omplainants made a prima facie case . . . where they showed that the charges assessed did not bear a reasonable relationship to the comparative benefit obtained from the port services by the assessed parties. . . . [C]omplainants did not receive benefits proportionate to the costs allocated to them, and moreover, other users of the port received equal or greater benefits, but did not pay their share of the port's costs.

*Ceres I*, 27 S.R.R. at 1274-75. The authority provides "that 'just and reasonable practice' most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view." *WGMA*, 18 S.R.R. at 790. "The appropriate inquiry under Section 10(d)(1) . . . [is] the *Volkswagenwerk* standard of 'whether the charge levied is

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<sup>153</sup> App. 1D-1639; App. 1D-1642-43; MTFOF ¶ 344; MTIB at 66; MTRB at 81.

<sup>154</sup> *Id.*

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reasonably related to the services rendered.” *Secretary of the Army*, 24 S.R.R. at 602 (quoting *Volkswagenwerk*, 390 U.S. at 282).

The I.D. failed to apply correctly the standard. It neither analyzed the large rate differential for the same service nor determined whether the practice, even if otherwise lawful, is “not excessive and . . . is fit and appropriate to the end in view.” Under a proper legal analysis, the facts on their face—a large rate differential for similar services—constitute a *prima facie* violation of the “reasonable relationship” requirement of 10(d)(1). *See Ceres I*, 27 S.R.R. at 1257. Thus, “the burden of proving justification shift[ed] to [the Port].” *Exclusive Tug Arrangements*, 29 S.R.R. at 1222.

PANYNJ provided no evidence correlating the charge to the benefit of the service. Yet, the I.D. concluded erroneously that “the rates assessed Maher correspond with the benefit received and risks presented” for two reasons: (1) Maher received “a large property convenient to express rail and other services,” and (2) “the property was not competitively bid.” I.D. at 54.

These observations about purported benefits that Maher received in isolation cannot, as a matter of law, support the I.D.’s 10(d)(1) conclusion. Applying the proper legal framework, the two reasons given by the I.D. *do not* support the conclusion that the higher rents and other charges that PANYNJ levied on Maher are “reasonably related” to the service provided, but in fact, show the opposite *because Maersk-APM received the same service yet pays far less. Maersk-APM also* received a large property equally convenient to ExpressRail and other services,<sup>155</sup> and Maersk-APM’s properties *also* were not competitively bid.<sup>156</sup> Further, while the I.D. implied that the lease terms were reasonable since “Maher *negotiated* a long-term lease,” I.D. at 54 (emphasis added), this neither distinguishes Maher from Maersk-APM nor immunizes

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<sup>155</sup> App. 5A-265; S. App. 1F-2653; App. 1B-907; MTR-PAFOF ¶ 52; MTRB at 41.

<sup>156</sup> App. 1A-200-203; MTFOF ¶ 133; App. 1A-398; MTFOF ¶ 156.

unlawful practices.

There is no reasonable relationship between the higher rents and other charges that PANYNJ levied on Maher for the same service rendered. In determining reasonableness of monetary charges, the Commission considers “whether the charge levied is reasonably related to the service rendered” as measured by “the impact on the payer compared to other payers as well as the relative benefits received.” *NPR*, 28 S.R.R. at 1531-32. And, if the charges are unreasonable, then “the burden of proving justification shifts” to PANYNJ. *Exclusive Tug Arrangements*, 29 S.R.R. at 1222. PANYNJ failed to carry its burden.

The higher rents and other charges PANYNJ levies on Maher bear no relationship to any higher costs to provide the service to Maher as contrasted to Maersk-APM. At the time of the lease negotiations, PANYNJ never “put pen-to-paper” to try and calculate the relative economic values and costs of the two terminals and did not otherwise prepare written analyses “showing that differences in per acre rental rates and escalation terms are fully justified by the differences in the terminals.”<sup>157</sup> PANYNJ’s only contemporaneous analysis established that Maersk-APM got the superior terminal and that differential pricing was unwarranted.<sup>158</sup> As shown above, PANYNJ *continues* to levy much higher rents and other charges and imposes more onerous lease terms on Maher without a valid transportation justification for the same service.

The I.D. did not invoke the “port guarantee” here, but did reference it as a purported justification for the disparities in its consideration of the undue preference/prejudice claims. So, if the Commission considers the “port guarantee” in this respect, the evidence establishes that the

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<sup>157</sup> Yetka Dep. at 324:17-28:7; App. 3B-608; MTFOF ¶ 280; MTRB at 41, 45.

<sup>158</sup> The HDR report, which was the only evaluation of comparative terminal value contemporaneous with the lease negotiations, found that the two most valuable spaces in Port Elizabeth were the areas which ultimately formed Maersk-APM’s new terminal, a point with which PANYNJ’s Manager for Port Redevelopment at the time agreed. App. 1A-65; App. 1A-43; MTFOF ¶ 96; App. 1A-65; Israel Dep. at 127:3-31:24; MTFOF ¶ 99; MTRB at 45.

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“port guarantee” *does not* provide a reasonable basis for the practice because it is not “fit and appropriate to the end in view.” *NPR*, 28 S.R.R. at 1531; *WGMA*, 18 S.R.R. at 790. The I.D.’s discussion of the governing legal standard pertaining to an unreasonable practice claim ignored this requirement that the practice be “fit and appropriate to the end in view.”

In addition to the foregoing discussion, the evidence—including PANYNJ’s internal memoranda, Board minutes and notes prepared at the time, and PANYNJ testimony—establishes that PANYNJ conceived the “port guarantee” as a device to avoid scrutiny by the Commission.<sup>159</sup> PANYNJ used it to appear to be a “significant distinction[] between the leases.”<sup>160</sup> PANYNJ admitted through its 30(b)(6) representative, Ms. Borrone, that “we acknowledged that we needed to be clear that this guarantee differentiated the terms of the arrangement that we were making with Sealand/Maersk in a way that was important to describe. We said we needed to see this guarantee and we needed the parental guarantees that were very clear as well.” I.D. at 23 (F. 108). However, the “port guarantee” did not “justify [Maersk-APM] concessions of this magnitude” because it was materially lower than the guarantee levels, both in container volume and investment in the facility, that were essential—according to PANYNJ—and ultimately it enforced in 2010 as only a rent increase.<sup>161</sup>

PANYNJ sought 80% of Maersk’s North Atlantic cargo, which Maersk-APM refused.<sup>162</sup> PANYNJ then demanded 550,000 containers and PANYNJ “*d[id]n’t expect that the guarantee*

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<sup>159</sup> App. 1B-698; Yetka Dep. at 273:9-74:20; App. 1A-461; MTR-PAFOF ¶ 175.1; MTRB at 87-89.

<sup>160</sup> App. 1A-461; MTFOF ¶ 226; MTRB at 88-89.

<sup>161</sup> App. 1B-731; Borrone Dep. at 593:17-94:5; MTFOF ¶ 193; App. 1B-731; Borrone Dep. at 593:17-96:14; MTFOF ¶ 194; App. 1B-746; MTFOF ¶ 198; App. 5A-346-349; MTFOF ¶ 205; Borrone Dep. at 593:17-97:22; MTFOF ¶ 206; App. 1B-774; MTFOF ¶ 207.

<sup>162</sup> App. 1B-703; MTFOF ¶ 191; App. 1B-746; MTFOF ¶ 198; App. 1B-746; App. 5A-346-349; MTFOF ¶ 369.

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would be viewed as a way to recoup what we are giving up on the basic rent.”<sup>163</sup> PANYNJ dropped its demand again and again, first to 425,000 containers and ultimately to 365,000 containers per year.<sup>164</sup> But, the “port guarantee” failed to increase Maersk-APM’s cargo.

Before Maersk-APM signed its lease, it abandoned the idea of using the port as a “hub port” and determined to spread its cargo out over several east coast ports, notwithstanding PANYNJ’s purported purpose of the “port guarantee” provision to direct discretionary cargo into the port.<sup>165</sup> When PANYNJ approved the “port guarantee” it was already less than portrayed and less than financial concessions granted to Maersk-APM.<sup>166</sup>

Maersk-APM directed its cargo elsewhere, building a container port in Virginia in 2004, which PANYNJ considered a direct threat to discretionary rail cargo volume in the port.<sup>167</sup> So, the “port guarantee” failed to achieve its purported purpose of securing Maersk-APM cargo in the port. In 2010, when PANYNJ decided to enforce the “port guarantee” as merely a rent increase, Maersk-APM brought only approximately 295,000 containers to the port, a 15% *decrease* from the approximately 349,000 containers in 1999 when the guarantee was negotiated and far less than required.<sup>168</sup> The “port guarantee” failed its purported purpose to require Maersk-APM transport more cargo into the port at specified levels. Instead, Maersk-APM used

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<sup>163</sup> App. 1B-581 (emphasis added); MTFOF ¶ 183.

<sup>164</sup> App. 1B-746; MTFOF ¶ 198; App. 5A-347; MTFOF ¶ 205; Borrone Dep. at 593:17-97:22; MTFOF ¶ 206.

<sup>165</sup> App. 1B-771; MTFOF ¶ 389.

<sup>166</sup> PANYNJ did not consult with Hugh Welsh, who was PANYNJ’s deputy general counsel at the time of the lease negotiations and was PANYNJ’s “expert in the Shipping Act,” regarding the Port Guarantee or the lease negotiations, however Mr. Welsh subsequently recognized that “[t]here is a tendency for landlord ports to incorrectly assume that ocean carriers of their marine terminal subsidiaries will be in a position to redirect cargo through their port.” App. 1C-1432; Welsh Dep. at 201:7-02:7; MTFOF ¶ 297. *See also* Green Dep. at 171:2-16; Welsh Dep. at 85:9-16; MTFOF ¶ 286; Welsh Dep. at 21:22-:24, 124:3-:10; MTFOF ¶¶ 287, 290.

<sup>167</sup> App. 1C-1384; MTFOF ¶ 393; App. 1C-1394; App. 1C-1420; MTFOF ¶ 394.

<sup>168</sup> App. 5A-347; App. 4-135; App. 4-307; App. 4-441; App. 1D-1864; MTFOF ¶ 356; App. 4-441; App. 1D-1864; MTFOF ¶ 398; App. 1D-1864; MTFOF ¶ 408; MTIB at 67, 70.

its lower Maher-subsidized lease rates to poach business from Maher.<sup>169</sup>

PANYNJ “d[id]n’t expect that the guarantee would be viewed as a way to recoup what we are giving up on the basic rent,”<sup>170</sup> and it is neither “fit” nor “appropriate” to its purported goal of attracting Maersk-APM cargo. Thus, it is not a reasonable basis for the disparities.

#### **VI. PANYNJ Unreasonably Refused To Deal.**

The I.D.’s dismissal of Maher’s 46 U.S.C. § 41106(3) refusal to deal claim erred by superficially treating the claim without required findings of fact, including numerous refusals of Maher’s requests for parity from the year 2007 onward and continuing today. It failed to apply the clear legal authority and erroneously asserted that “once PANYNJ signed the lease with Maher, it was not required to continually renegotiate the lease with Maher.” I.D. at 55.

“[I]n 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. Merely meeting with a party with no intention of actually engaging in substantive discussions does not satisfy a port authority’s obligations under 46 U.S.C. § 41106(3). *Id.* And a port authority has a continuing *absolute* duty to offer lease terms in a fair and even-handed manner. *Ceres II*, 29 S.R.R. at 369-74; *Ceres I*, 27 S.R.R. at 1270-77.

PANYNJ repeatedly *refused* to even consider Maher’s requests for parity based on status and commercial convenience. Lillian Borrone informed Maher that the SeaLand/Maersk terms were “off the table” for Maher and PANYNJ presented Maher with a “take it or leave it” offer.<sup>171</sup>

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<sup>169</sup> App. 1D-1864; App. 4-441; MTFOF ¶ 398. In the same period that the amount of Maersk cargo in the port dropped 15%, the amount of third-party, non-Maersk cargo handled at the Maersk-APM terminal increased 192%, further highlighting how the lower lease rents provided by the “port guarantee” incentivized Maersk-APM to poach business from other terminals in the port instead of increasing the amount of Maersk cargo it brought to the port. App. 4-441; MTFOF ¶ 399; App. 1C-1255; MTFOF ¶ 392; App. 4-202; MTFOF ¶ 402.

<sup>170</sup> App. 1B-581; MTFOF ¶ 183.

<sup>171</sup> Borrone Dep. at 86:6-:14; MTFOF ¶ 248; Mosca Dep. at 51:3-:12, 53:18-55:25, 139:23-40:5;

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Beginning in the year 2007 and onward, PANYNJ refused and *continues* to refuse to deal with Maher's requests for parity because of an additional unreasonable basis. PANYNJ refused actual consideration of Maher's efforts at negotiation because "the Maher brothers" signed the lease.<sup>172</sup> The I.D. erroneously observed a port authority is "not required to continually renegotiate the lease," as "it would impede the port's ability to function effectively." I.D. at 55.

Citing neither authority nor evidence and advancing an argument not even advanced by PANYNJ, as a practical matter, the I.D. invoked contractual theories of waiver and estoppel and deference to the business decisions of a port authority to trump its continuing and absolute statutory duties to deal reasonably with Maher. This misapplied the governing authority. *Canaveral Port Auth.*, 29 S.R.R. at 1450 (meeting with no intention to engage in substantive discussion does not satisfy Shipping Act obligations); *Ceres II*, 29 S.R.R. at 372 (contractual doctrines of waiver and estoppel *do not* immunize a violation of the Shipping Act).

Following PANYNJ's filing of a Shipping Act complaint against Maher on August 7, 2007 in Dkt. 07-01,<sup>173</sup> Maher representatives met twice in November 2007 with PANYNJ leaders, including Port Commerce Director, Richard Larrabee, and his chief deputy, Dennis Lombardi, about the potential discrimination claims based on PANYNJ's disparate treatment of Maher as compared to Maersk-APM.<sup>174</sup> These PANYNJ executives denied that Maher had a *Ceres* claim against PANYNJ regarding disparate treatment in lease terms because "the Maher brothers" had signed EP-249 and there was nothing they could do.<sup>175</sup> At the first meeting on or

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MTFOF ¶ 244; Brian Maher Dep. at 52:3-:12, 187:13-188:4; Mosca 07-01 Dep. at 154:3-56:10; Brian Maher 07-01 Dep. at 274:18-75:9; MTFOF ¶ 249; MTIB at 44-45, 55, 72.

<sup>172</sup> Buckley Dep. at 72:14-:17, MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90.

<sup>173</sup> App. 3A-56-63; MTFOF ¶ 47; MTIB at 81.

<sup>174</sup> Crane Dep. at 20:11-23:3, 32:23-35:10; Basil Maher Dep. at 17:18-21:9; MTFOF ¶ 483; MTIB at 73-74; MTRB at 89-90.

<sup>175</sup> Buckley Dep. at 72:14-:17, MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90. PANYNJ's

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about November 6, 2007,<sup>176</sup> Mr. Larrabee told Basil Maher, “Basil, you and Brian knowingly signed this lease and there’s nothing we can do about it -- or nothing we can do for you about this, or there's nothing -- no remedy we can take . . . .”<sup>177</sup> And at the second meeting on or about November 28, 2007, Mr. Larrabee repeated the same PANYNJ position to Maher Chief Executive Officer, John Buckley, that “They signed it, there's nothing we can do, they knew about it . . . .”<sup>178</sup> For his part, Mr. Larrabee testified that he did not recall the foregoing account of Messrs. Crane and Buckley, but he did not dispute it.<sup>179</sup> Mr. Buckley testified to the same effect, referring to Port Commerce Director Larrabee and Deputy Director Lombardi: “All they were saying was the Maher Brothers have signed the lease. Game over. Nothing we can do about it. That's what they were telling us.”<sup>180</sup> Mr. Buckley also testified specifically that Mr. Lombardi said “that the Maher brothers have signed the -- have signed the lease and there's nothing the Port Authority can do about it.”<sup>181</sup> When asked about his recollection of the meeting, Mr. Buckley explained, “The Port Authority really -- you know, what -- what I took from . . . the interaction from the Port Authority is that they were putting us on the long finger. . . . When you put someone on the long finger, means you have no intention of doing anything about the problem that’s being discussed.”<sup>182</sup> PANYNJ did not and has not given actual consideration to Maher’s efforts at negotiation from 2007 onward because as Messrs. Larrabee

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

<sup>176</sup> App. 1D-1576; MTFOF ¶ 483; MTIB at 73-74; MTRB at 89-90.

<sup>177</sup> Crane Dep. at 24:13-:18; MTFOF ¶ 484; MTIB at 73-74; MTRB at 89-90.

<sup>178</sup> Crane Dep. at 38:6-:20; MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90.

<sup>179</sup> Larrabee Dep. at 23:1-:16, 25:21-26:2; MTFOF ¶¶ 484, 489; MTIB at 73-74; MTRB at 89-90.

<sup>180</sup> Buckley Dep. at 72:14-:17; MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90.

<sup>181</sup> Buckley Dep. at 50:9-:19; MTFOF ¶ 490; MTIB at 73-74; MTRB at 89-90.

<sup>182</sup> Buckley Dep. at 57:5-58:3; MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90.

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and Lombardi stated at the time, “the Maher brothers” signed the lease.<sup>183</sup> But, doctrines of waiver and estoppel *do not* immunize a violation. *Ceres II*, 29 S.R.R. at 372.

After another effort at outreach by Maher to PANYNJ with respect to these potential claims failed in December 2007,<sup>184</sup> and after Mr. Larrabee told Maher that another meeting would not be fruitful,<sup>185</sup> on January 17, 2008, Maher’s Chief Executive Officer, John Buckley, wrote to PANYNJ’s Larrabee and explained that Maher understood that PANYNJ “may be in violation of the Shipping Act” and that Maher requested parity with Maersk-APM.<sup>186</sup> On January 29 2008, Larrabee rejected Maher’s proposal by letter writing that “The Port Authority does not agree to your proposed rental adjustments.”<sup>187</sup> Furthermore, PANYNJ continued by emphasizing that it expected Maher to continue to abide by the terms of the lease agreement.<sup>188</sup> In his letter, Larrabee did not provide any justification for rejecting Maher’s proposal.<sup>189</sup> Therefore, PANYNJ’s written response to Maher on January 29, 2008 remained the same as its position in the previous meetings during November 2007 when PANYNJ’s Larrabee and Lombardi said “the Maher brothers” had signed the lease and there was nothing PANYNJ could do.<sup>190</sup>

Following Larrabee’s letter of January 29, 2008, on February 7, 2008, Messrs. Crane and Buckley met with PANYNJ’s Larrabee one more time and sought to negotiate with respect to the claims in this proceeding.<sup>191</sup> However, at this meeting PANYNJ introduced a new prerequisite

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<sup>183</sup> Buckley Dep. at 72:14-:17; MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90.

<sup>184</sup> App. 1D-1579; Larrabee Dep. at 51:25-53:1; MTFOF ¶ 493; MTIB at 75-76.

<sup>185</sup> App. 1D-1587; Larrabee Dep. at 58:7-:19; MTFOF ¶ 494; MTIB at 75-76.

<sup>186</sup> App. 1D-1587-88; App. 1D-1621; MTFOF ¶ 495; MTIB at 76.

<sup>187</sup> App. 1D-1607; Larrabee Dep. at 91:21-96:11; MTFOF ¶ 496; MTIB at 76.

<sup>188</sup> App. 1D-1607; MTFOF ¶ 496; MTIB at 76.

<sup>189</sup> App. 1D-1607; Larrabee Dep. at 97:16-98:19; MTFOF ¶ 497; MTIB at 76.

<sup>190</sup> Buckley Dep. at 72:14-:17, MTFOF ¶ 489; MTIB at 73-74; MTRB at 89-90.

<sup>191</sup> Crane Dep. at 65:4-66:11; App. 1D-1617; Larrabee Dep. at 99:22-100:25; MTFOF ¶ 500;

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and insisted that the parties first conclude a confidentiality agreement.<sup>192</sup> On April 22, 2008, Maher Chief Executive Officer Buckley signed a Settlement Communications Confidentiality Agreement provided by PANYNJ.<sup>193</sup> PANYNJ's Larrabee apparently signed the document on April 30, 2008, but PANYNJ did not transmit it to Maher and Maher did not receive the Larrabee-signed copy back from PANYNJ at the time.<sup>194</sup>

Instead, on May 6, 2008, PANYNJ's Larrabee called Maher's Crane and stated that Maher must agree to a stay of the Dkt. No. 07-01 proceeding *before* PANYNJ would agree to any discussion of Maher's claims.<sup>195</sup> Then, on May 8, 2008, PANYNJ filed a *second* enforcement action against Maher, this time an action in New Jersey state court to enforce the unlawful indemnity provisions imposed on Maher.<sup>196</sup> In sharp contrast, during the same time period, PANYNJ continued its negotiations with Maersk-APM.<sup>197</sup> Therefore, contrary to the I.D.'s mistaken conclusion, Maher has established that PANYNJ has violated and continues to violate Section 10(d)(3) of the Shipping Act for unreasonably refusing to deal with Maher.

## **VII. The I.D. Erroneously Rejected The Dkt. 07-01 Claims.**

The I.D. formally acknowledged—as it had to—that the Commission decision approving

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MTIB at 77.

<sup>192</sup> Larrabee Dep. at 100:17-:25; Crane Dep. at 55:24-57:6; MTFOF ¶ 500; MTIB at 77.

<sup>193</sup> App. 1D-1653-55; MTFOF ¶ 502; MTIB at 77.

<sup>194</sup> Buckley Dep. 75:5-76:3; Larrabee Dep. at 104:25-09:12; MTIB at 77-78.

<sup>195</sup> App. 1D-1656; Larrabee Dep. at 115:24-19:9; Crane Dep. at 59:7-:10; MTFOF ¶ 503; MTIB at 78; MTRB at 91.

<sup>196</sup> App. 3A-160; Larrabee Dep. at 117:5-18:13; MTFOF ¶ 504; MTIB at 78. PANYNJ's complaint against Maher in the Union County Superior Court, Chancery Division, sought declaratory judgment construing EP-249 to require Maher to indemnify PANYNJ against the claims brought against PANYNJ by Maersk-APM and against any losses stemming from PANYNJ's settlement with Maersk-APM, based both on Maher's alleged duty to indemnify PANYNJ per EP-249 and Maher's alleged breach of the lease, and PANYNJ also sought damages. The PANYNJ complaint also averred that Maher was negligent, and PANYNJ sought damages under a common law indemnification theory. It also sought a declaration that the PANYNJ-APM settlement was reasonable and barring Maher from challenging the settlement's reasonableness.

<sup>197</sup> Larrabee Dep. at 123:17-24:16; App. 1D-1625; App. 1D-1581; MTFOF ¶ 505; MTIB at 79.

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the PANYNJ and Maersk-APM settlement *did not* resolve Maher’s Counter-Complaint and represented that “[e]ach allegation argued by Maher in its initial brief will be discussed.” I.D. at 57; *APM Terminals v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (F.M.C. 2009). But, it then failed to actually do that in a proper and meaningful way per the governing authorities.

**A. Maher Established that PANYNJ Failed to Establish, Observe, And Enforce Just And Reasonable Regulations as Required by 46 U.S.C. § 41102(c).**

Commission authority establishes that agreements that exculpate a party from its own responsibility without conferring some offsetting benefit are unreasonable and violate the Shipping Act. *Central Nat’l Corp., et al. v. Port of Houston Auth.*, 22 S.R.R. 521, 523 (A.L.J. 1983), *approved by Comm’n*, 22 S.R.R. 795 (F.M.C. 1984); *Stevens Shipping and Terminal Co. v. S.C. Ports Auth.*, 22 S.R.R. 1030, 1033-34 (A.L.J. 1984).

Maher established both the unlawful nature of the indemnity provision enforced against Maher and the resulting injury.<sup>198</sup> PANYNJ enforced an *unlawful* indemnity requirement for Maher to indemnify PANYNJ for its own failures without offsetting benefit. PANYNJ averred that Maher was liable to PANYNJ for “all claims and demands” against PANYNJ “arising out of the use or occupancy of the premises” of certain premises, i.e., the 84 acres, that were not delivered to PANYNJ in a “timely manner” irrespective of fault.<sup>199</sup> But, PANYNJ itself was responsible for the two-year delay. PANYNJ confessed in its sworn answer to a Maersk-APM’s interrogatory that it delivered the 84 acres two years late due to “[m]any unforeseen and unforeseeable challenges [that] delayed the initial and anticipated schedule for completion.”<sup>200</sup> PANYNJ’s process for planning, approving, and contracting for the new ExpressRail facility

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<sup>198</sup> App. 1D-1924; App. 1D-1929; MTFOF ¶ 533; MTIB at 13.

<sup>199</sup> App. 3A-56-63; MTFOF ¶ 47; MTIB at 81.

<sup>200</sup> App. 3A-235; Yetka 07-01 Dep. at 28:3-:8; Israel Dep. at 288:6-:25, 292:11-:24, 293:13-:23, 295:16-96:11; MTFOF ¶ 463; Israel Dep. at 315:5-17:8; MTFOF ¶ 475; MTIB at 81-84.

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caused a delay of over two years.<sup>201</sup> PANYNJ did not complete the new ExpressRail facility until October 4, 2004, more than nine months past the December 31, 2003 deadline.<sup>202</sup> And, PANYNJ took another *year* to satisfy key prerequisites of the Maher lease.<sup>203</sup>

Maher did not receive any “offsetting benefit” in return for the indemnity requirement, because it never agreed to indemnify PANYNJ for PANYNJ’s own failures.<sup>204</sup> PANYNJ’s purported “offsetting benefit” to Maher of an “an incentive through its lease with Maher Terminals, LLC to compel Maher Terminals, LLC to move from the added premises expeditiously” is false. Maher already had ample incentive to move from the 84 acres expeditiously—among other things, it was costly.<sup>205</sup> And when PANYNJ finally provided Maher notice to vacate the area, Maher timely vacated the area anyway.<sup>206</sup>

PANYNJ’s indemnity requirement, as interpreted and enforced against Maher, fails to comply with the governing law of EP-249.<sup>207</sup> New Jersey law requires “explicit contractual language” referencing “the negligence or fault of the indemnitee.”<sup>208</sup> The indemnity requirement also constitutes an unreasonable practice because it defies the policy reason

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<sup>201</sup> Israel Dep. at 314:12-15:3; MTFOF ¶ 477; Israel Dep. at 281:23-82:7, 286:5-87:21, MTFOF ¶ 476; Israel Dep. at 286:5-87:21; 316:14-:16, 317:19-19:12; MTFOF ¶ 478; MTIB at 83-84. Boyle Dep. at 262:15-63:2; Shifan Dep. at 69:18-70:2; Gargano Dep. at 50:6-:18; MTFOF ¶ 475; MTIB at 81-84.

<sup>202</sup> S. App. 3A-50; Crotty 07-01 Dep. at 93:15-:18; App. 1C-1446; MTFOF ¶ 459; MTIB at 84.

<sup>203</sup> Israel Dep. at 228:1-:5; App. 1C-1443; Olesky 07-01 Dep. at 48:2-:14; Ray 07-01 Dep. at 130:13-:20; Curto 07-01 Dep. at 106:20-08:9; App. 1C-1450; MTFOF ¶¶ 449, 460; MTIB at 84.

<sup>204</sup> Brian Maher 07-01 Dep. at 206:11-:15, 237:1-:21; MTFOF ¶ 444; MTIB at 85-86.

<sup>205</sup> Olesky 07-01 Dep. at 129:8-:22; MTFOF ¶ 530; App. 1C-1157; MTFOF ¶ 38; MTIB at 86.

<sup>206</sup> App. 1C-1437; Brian Maher 07-01 Dep. at 145:19-46:13; MTFOF ¶ 447; App. 1C-1443; App. 1C-1450; MTFOF ¶¶ 449, 460; Ray 07-01 Dep. at 85:16-86:8; Curto 07-01 Dep. at 68:2-:4; App. 1C-1442; MTFOF ¶ 461; S. App. 3A-50-51; MTFOF ¶ 459; MTIB at 86-87.

<sup>207</sup> App. 5A-91; MTFOF ¶ 18; MTIB at 87-88.

<sup>208</sup> *Taylor v. Port Auth. of N.Y. and N.J.*, 2008, WL 2572685, \*4 (N.J. Super. Ct. App. Div. July 1, 2008) (citing *Azurak v. Corporate Prop. Investors*, 814 A.2d 600, 601 (N.J. 2003)); *Diaz v. Holdings, LLC*, 2010 WL 2867947, \*8-10, (N.J. Super. Ct. App. Div. July 20, 2010). *See also Simoes v. Nat’l R.R. Corp.*, 09-3498 (MLC), 2011 WL 2118934, \*7 (D.N.J. May 27, 2011).

prohibiting such tariff provisions. 46 C.F.R. § 525.2(a)(1); 64 Fed. Reg. 9281 (1999).

Maher has established that it sustained injury and damages as a result of defending itself from PANYNJ's unlawful enforcement actions.<sup>209</sup> *Bloomers of Cal., Inc. v. Ariel Maritime Group, Inc.*, 26 S.R.R. 183, 183 (F.M.C. 1992); *see also Tri-State Hosp. Supply Corp. v. United States*, 341 F.3d 571, 572, 576-77 (D.C. Cir. 2003); *Waco Int'l, Inc. v. KHK Scaffolding Houston, Inc.*, 278 F.3d 523, 535 (5th Cir. 2002); *Riveredge Assocs. v. Metro. Life Ins. Co.*, 774 F. Supp. 897, 901-02 (D.N.J. 1991). The I.D. failed to consider Maher's increased operating costs in the amount of \$1,354,268.25 incurred as a result of PANYNJ's wrongful enforcement of the unlawful indemnity provision<sup>210</sup> and incorrectly inferred that because PANYNJ's settlement "reliev[ed] Maher of potential liability," Maher suffered no harm. I.D. at 58.

**B. PANYNJ's Unreasonable Preference/Prejudice.**

The I.D. failed to conduct any particularized analysis of Maher's Dkt. 07-01 unreasonable preference claim, simply asserting that "there is no requirement that leases for different properties contain identical provisions" and that "[t]he evidence does not support a finding" that a Shipping Act violation has occurred. I.D. at 58. The I.D. is conclusory and unsupported—Maher established that PANYNJ unlawfully preferred Maersk-APM and prejudiced Maher by imposing and enforcing the indemnity requirement on Maher and not Maersk-APM. Having already granted Maersk-APM preferential terms in EP-248, wherein Maersk-APM was not required to indemnify PANYNJ for PANYNJ's own actions causing the delay in the transfer of the 84 acres, PANYNJ refused to grant those terms to Maher despite Maher's repeated requests for the same terms.<sup>211</sup> All PANYNJ had to do was make the same

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<sup>209</sup> App. 1D-1924; App. 1D-1929; MTFOF ¶ 533; MTIB at 13.

<sup>210</sup> App. 1D-1924; App. 1D-1929; MTFOF ¶ 533; MTIB at 13.

<sup>211</sup> *See generally* discussion *supra* and the evidence establishing that PANYNJ unlawfully discriminated against Maher and in favor of Maersk-APM with respect to the lease terms

terms available to Maher, which it did not.<sup>212</sup>

**C. PANYNJ Unreasonably Refused To Deal.**

A refusal to even consider proposals to negotiate, where the port authority cannot point to any evidence that the unique aspects of the applicant's proposal were individually considered, have been found to constitute an unlawful refusal to deal. *Canaveral Port Auth.*, 29 S.R.R. at 1449-50. And furthermore, a port authority has an absolute continuing duty to offer lease terms in a fair and even-handed manner. *Ceres II*, 29 S.R.R. at 369-74; *Ceres I*, 27 S.R.R. at 1270-77.

Doctrines of waiver and estoppel *do not* immunize a violation of the Shipping Act from scrutiny. *Ceres II*, 29 S.R.R. at 372; January 31 Order. Entering into an agreement does *not* result in a party being “estopped from challenging its agreement” or conduct relating to that agreement. *Id.* Contrary to governing authority and without any factual basis, the I.D. erroneously asserted that 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.” I.D. at 59 (emphasis added).

PANYNJ unlawfully refused to deal or negotiate with Maher with respect to the issues presented in Dkt. 07-01 while actively negotiating with Maersk-APM and providing Maersk-APM unreasonable preferences that prejudice Maher.<sup>213</sup> PANYNJ imposed a precondition of

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provided by PANYNJ in EP-248 for Maersk-APM and EP-249 for Maher. During the negotiations that resulted in the lease terms provided by PANYNJ to Maher in EP-249, Maher requested parity with Maersk-APM. PANYNJ informed Maher that PANYNJ would provide a “level playing field” and that Maher would receive materially the same, or similar, lease terms to those offered to APM. But, ultimately PANYNJ Port Commerce Director, Lillian Borrone, told Maher that the Maersk-APM terms were “off the table” and that its terms provided to Maher were its best and final offer, that is, it was a take it or leave it proposal.

<sup>212</sup> *Chr. Salvesen & Co. v. W. Mi. Dock & Mkt. Corp.*, 10 S.R.R. 745, 756 (F.M.C. 1968) (“[O]perators of public terminals must afford all customers seeking the same service fair and reasonable treatment.”); Borrone Dep. at 86:6-:14; MTFOF ¶ 248; MTIB at 44-45, 55, 72.

<sup>213</sup> Crane Dep. at 68:22-69:2; Larrabee Dep. at 24:9-:16; MTFOF ¶ 487; 3B-742-72; MTIB at 91.

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presenting PANYNJ “concrete, written settlement offers or proposals”<sup>214</sup> before PANYNJ would consent to negotiate, which Maher met, and improperly demanded Maher agree to stay the Dkt. 07-01 proceeding.<sup>215</sup> PANYNJ imposed neither precondition on Maersk-APM with which PANYNJ negotiated *without a stay* for several months to discuss that lessee’s “long term business relationship” while refusing to deal or negotiate with Maher.<sup>216</sup>

**D. PANYNJ Operated Contrary To FMC Agreement.**

PANYNJ also failed to operate consistent with the *force majeure* provision in EP-249, and failed to transfer improved premises to Maher as provided by EP-249, violating 46 U.S.C. § 41102(b)(2). *See, e.g., Ivarans*, 23 S.R.R. at 1566-67 n.11.

Maher established actual injury in the form of legal fees in the amount of \$1,354,268.25 to defend against PANYNJ’s unlawful enforcement of the indemnity requirement and damages totaling \$56,559,566 resulting from PANYNJ’s Dkt. 07-01 delays for operating contrary to the agreement.<sup>217</sup> Maher’s delay claim is no different than Maersk-APM’s \$45 million delay claim which the previous Presiding Officer upheld as a valid claim to prosecute when he rejected PANYNJ’s motion to dismiss it.<sup>218</sup>

The I.D. erroneously concluded that Maher’s claim is barred by the three year statute of limitations. I.D. at 60. But, the three year statute of limitations for reparations applies *only* to a “complaint,” not a responsive pleading. 46 U.S.C. § 41301(a); *see also* 46 U.S.C. § 41305(b) (limiting the award of reparations *only* with respect to a “complaint”). Rule 63 confirms the Commission’s understanding that the three-year statute of limitations provision applies *only* to a “Complaint seeking reparation.” 46 C.F.R. § 502.63(a). Regarding a “counter-complaint,” the

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<sup>214</sup> App. 3A-269-70; MTFOF ¶ 491; MTIB at 91-92.

<sup>215</sup> App. 1D-1656; MTFOF ¶ 506; MTIB at 91-92.

<sup>216</sup> App. 1D-1581; App. 1D-1758; MTFOF ¶ 505; MTIB at 92.

<sup>217</sup> App. 4-4; MTFOF ¶ 532; App. 1D-1924; App. 1D-1929; MTFOF ¶ 533; MTIB at 13, 96.

<sup>218</sup> App. 3A-32, MTFOF ¶ 45; MTIB at 6.

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Commission expressly permits the filing in “addition to filing an answer,” provided that this is accomplished “within 20 days after service of the complaint by the Commission.”<sup>219</sup> Therefore, Maher’s Counter-Complaint is filed pursuant to Rule 64. 46 C.F.R. § 502.64(d). *See also* 46 C.F.R. § 502.71 (confirming that a “counter-complaint [is] filed pursuant to . . . § 502.64”). Accordingly, Maher’s Counter-Complaint is not subject to the three-year statute of limitations for a “complaint.”

Even if a statute of limitations period applied to bar Maher’s Counter-Complaint, which it does not, the filing of the original complaint in the Dkt. 07-01 proceeding tolled it. *Employers Ins. of Wausau v. U.S.*, 764 F.2d 1572, 1576 (Fed. Cir. 1985); *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982); *see also* 46 C.F.R. § 502.12; FRCP 13(a). The Commission’s adoption of the FRCP means that the general federal rule requiring tolling of the statute of limitations as to a compulsory counterclaim applies with equal force to counter-complaints filed by respondents before the Commission.

Additionally, the Commission applies the “discovery rule,” not the “time of violation

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<sup>219</sup> Through its development of the FMC Rules, the Commission applied the Shipping Act provision that a respondent’s responsive pleading shall be filed within “a reasonable time specified by the Commission.” 46 U.S.C. § 41301(b). FMC Rules 12, 63, and 64, permit the assertion of any answer within twenty days of service of the Complaint, consistent with the Federal Rules of Civil Procedure (“FRCP”). Rule 12; Rule 64(c); Final Rules in Subchapter A; General and Administrative Provisions, 49 Fed. Reg. 44,362-01 (Nov. 6, 1984). Subsequent to the original enactment of the FMC Rules in 1984, the Commission amended Rule 64 to include within the ambit of the Rule “counter complaints” and explicitly provided for the application of the Federal Rules of Civil Procedure, reasoning that the changes merely codified longstanding Commission policy. Miscellaneous Amendments to the Rules of Practice and Procedure, 58 Fed. Reg. 27,208-01 (May 7, 1993) (“The Commission has consistently endorsed the policy of following the Federal Rules of Civil Procedure in situations not covered by a specific Commission rule and where there is no conflict with administrative law or another FMC rule. This policy is well established. . . . The Commission currently has no rule permitting or governing the filing of counter-complaints in complaint proceedings, even though in practice they have been allowed.”); *A/S Ivarans v. Lloyd Brasileiro*, 24 S.R.R. 1029, 1032 n.7 (F.M.C. 1988) (permitting counter-complaint prior to rule change; *Vinmar v. China Ocean Shipping Co.*, 26 S.R.R. 38 (A.L.J. 1991) (same).

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rule” or the “time of injury rule” erroneously suggested by the I.D. I.D. at 60. A limitations period begins to run only when the complainant possesses “conclusive information about such a dispute.” *Inlet Fish Prod., Inc.*, 29 S.R.R. at 313. In these circumstances, Maher’s Counter-Complaint *did not* accrue until PANYNJ confessed “conclusive information” in 2007–2008 that it was required by the filed FMC agreement to provide Maher certain premises in advance of December 31, 2003 so that Maher could transfer the 84 acres before that date, and Maher’s Counter-Complaint was timely filed September 4, 2007.<sup>220</sup> The I.D. erroneously concluded that the claim was barred by the statute of limitations. I.D. at 60. Maher’s Counter-Complaint sought damages incurred within a properly determined limitations period which the I.D. failed to determine. The limitations period was tolled by the filing of the original complaint in the Dkt. 07-01 proceeding. And Maher sustained damages during 2004 and 2005, including after the land swap, and all within a properly determined limitations period.<sup>221</sup>

**1. PANYNJ Operated Contrary To The Agreement’s Indemnity And Force Majeure Provisions.**

PANYNJ operated contrary to EP-249, which did not as a matter of law require Maher to indemnify PANYNJ for PANYNJ’s own failures with respect to its delayed delivery of the 84 acres. Maher’s indemnification obligation to PANYNJ only occurred in the event that Maher failed to deliver the premises in a timely manner following delivery of premises by PANYNJ and reasonable notice from PANYNJ.<sup>222</sup> Therefore, PANYNJ’s enforcement actions requiring Maher to indemnify PANYNJ, irrespective of PANYNJ’s fault, violate the Shipping Act because PANYNJ operated contrary to the agreement. Likewise, PANYNJ’s enforcement actions also violated the Shipping Act because they were contrary to the agreement insofar as they failed to

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<sup>220</sup> App. 3A-56; MTFOF ¶ 47; App. 3A-56; App. 3A-133-35; App. 3A-335-36; Lombardi 07-01 Dep. at 138:15-39:13; MTFOF ¶¶ 442, 448; MTRB at 98-99.

<sup>221</sup> App. 4-26; App. 4-168; MTFOF ¶ 527; MTIB at 13, 96; MTRB at 98

<sup>222</sup> App. 5A-6-8; Brian Maher 07-01 Dep. at 39:11-:15; MTFOF ¶ 456; MTIB at 95.

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observe and enforce the *force majeure* provision of EP-249. EP-249 provides that Maher shall not be liable “for any failure, delay or interruption in performing its obligations hereunder due to causes or conditions beyond its control . . . whether affecting the Port Authority or its contractors, or subcontractors,” and additionally, that any Maher liability under the lease would depend upon a failure “to use reasonable care to prevent or reasonable efforts to cure . . . .”<sup>223</sup>

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

PANYNJ failed to provide the certain premises required by EP-249 before December 31, 2003, failed to improve premises before providing Maher dates reasonably specified to vacate the 84 acres before December 31, 2003, and failed to make and to provide Maher improvements before December 31, 2003. EP-249 required PANYNJ to provide to Maher certain improved premises to Maher.<sup>224</sup> Following receipt of these new improved premises and reasonable notice from PANYNJ, Maher was to timely surrender certain portions of Maher’s former Tripoli Street terminal, referred to as the “Old Premises,” including the 84 acres at issue.<sup>225</sup> PANYNJ represented under oath and testified repeatedly that EP-249 required PANYNJ to provide the required improved premises to Maher in such a manner that upon reasonable notice, Maher could timely deliver the 84 acres to PANYNJ before December 31, 2003 so that PANYNJ could satisfy its obligation to Maersk-APM under EP-248.<sup>226</sup> Having established PANYNJ’s position that Maher was required to tender the 84 acres to PANYNJ before December 31, 2003, PANYNJ

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<sup>223</sup> App. 5A-93; MTFOF ¶ 444; MTIB at 95-96.

<sup>224</sup> App. 5A-6-8; MTFOF ¶¶ 456, 457; MTIB at 95-97.

<sup>225</sup> Under EP-249 § 1 entitled “Letting,” PANYNJ is to provide certain “Added Premises” improved to straddle grade condition and in return following reasonable notice Maher is to timely surrender portions of the “Old Premises,” including the 84 acres which is the last swap. App. 5A-5-8; MTFOF ¶ 440; MTIB at 96.

<sup>226</sup> App. 3A-56; MTFOF ¶ 47; App. 3A-56; App. 3A-133-35; App. 3A-335-36; Lombardi 07-01 Dep. at 138:15-39:13; MTFOF ¶¶ 442, 448; MTIB at 96-97.

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also confessed that it *did not* provide the premises to Maher that EP-249 required PANYNJ to provide in advance of that date.<sup>227</sup> To the contrary, the evidence establishes that PANYNJ did not provide the old ExpressRail premises improved to straddle grade condition, as required by EP-249, until October 4, 2005.<sup>228</sup> Therefore, PANYNJ's two-year delay beyond December 31, 2003 violated the provisions as set forth in EP-249. The foregoing violations caused actual injury and damages to Maher totaling \$56,559,566.<sup>229</sup>

**E. The I.D. Erroneously Permitted PANYNJ To Assert An Affirmative Defense Not Pleaded And To Argue Against A Claim It Failed To Deny.**

The I.D. erroneously excused PANYNJ's failure to plead and its default. I.D. at 60. It misstated what occurred. In *reply* to a statute of limitations argument that PANYNJ *did not plead* and advanced by PANYNJ for the first time in its November 7, 2011 opposition brief, Maher argued in its following reply brief that the affirmative defense, which PANYNJ *had not pleaded* but asserted only in its opposition brief, was barred by Commission authority.

PANYNJ took no steps to address either the matter of its failure to plead the affirmative defense or its failure to answer and deny the allegations in its January 9, 2012 sur-reply and motion filings.<sup>230</sup> Among other merits arguments re-argued, PANYNJ's January 9, 2012 Response to Maher's Rule 61 Statement expressly reargued its *statute of limitations* argument from its November 7, 2011 opposition brief, citing new authorities, but it remained *silent* about its failure to plead the affirmative defense and its default. PANYNJ's inaction effectively conceded that its affirmative defense was barred by its failure to answer Maher's Counter-Complaint and plead the affirmative defense, and it also effectively conceded waiver of any

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<sup>227</sup> Larrabee Dep. at 251:4-9; MTFOF ¶ 457; App. 5A-7-8; MTFOF ¶ 455; MTIB at 96-99.

<sup>228</sup> App. 1C-1443; Ray 07-01 Dep. at 130:13-20; Curto 07-01 Dep. at 106:20-08:9; MTFOF ¶ 460; MTIB at 99.

<sup>229</sup> App. 4-4; MTFOF ¶ 532; MTIB at 13, 96.

<sup>230</sup> On January 9, PANYNJ filed its Motion to Strike Maher's Reply Brief and Response to the Port Authority's Proposed Findings of Fact and its Response to Maher's Rule 61 Statement.

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argument that Maher should have highlighted PANYNJ's default earlier and that PANYNJ did not default. The I.D. erroneously ignored PANYNJ's supplemental filings and enforced remarkable solicitude for PANYNJ to Maher's prejudice for properly relying on PANYNJ's lack of a verified answer denying the allegations and its failure to plead the affirmative defense.

The I.D. cited an inapposite case from the Eleventh Circuit involving a court's *sua sponte* dismissal with prejudice of an entire complaint as a result of plaintiff's failure to respond to defendant's counterclaims. I.D. at 60. But, barring *affirmative defenses* as a result of a party's failure to file an answer is *not* a drastic remedy and courts do not hesitate to impose it. *See, e.g., Varner v. Peterson Farms*, 371 F.3d 1011, 1017 (8th Cir. 2004) ("In order to avail itself of [a statute of limitations] defense, the party must specifically plead the defense in its answer."); *Bd. of Trustees, Sheet Metal Workers' Nat. Pension Fund v. N. Park Heating, Co., Inc.*, 1:12CV1026 CMH/JFA, 2013 WL 596525, \*5 (E.D. Va. Jan. 15, 2013). The I.D. also erroneously disregarded Commission authority that "failure of a respondent or defendant to answer the well-pleaded allegations of a complainant can result in issuance of a default judgment." *Safmarine Container Lines N.V. v. Garden State Spices, Inc.*, 28 S.R.R. 1619, 1620 (A.L.J. 2000).

The I.D. cited no authority for the proposition that Maher must have argued in its initial brief that PANYNJ defaulted on the claim. To the contrary, the Commission's own Rules provide that the failure to answer and deny *deems* the allegations admitted.<sup>231</sup> Since PANYNJ had ample opportunity on the merits to respond to these issues and failed to respond and because this proceeding is now before the Commission on Maher's Exceptions to the I.D. and subject to *de novo* review, there is no prejudice to PANYNJ, especially where it filed a sur-reply on January

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<sup>231</sup> FMC Rule 64 governing the failure to answer a "counter-complaint" provides that such failure means that the "[r]ecitals of material and relevant facts . . . shall be admitted as true." 46 C.F.R. § 502.64(a) & (d).

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9, 2012 *not* addressing its failures, and in all events, it will have a right of reply to address the matter of its failure to deny the allegations of Maher's Counter-Complaint. In these circumstances, PANYNJ has admitted the allegations and as a practical matter defaulted.

**CONCLUSION**

For the foregoing reasons, the I.D. should be overturned and the Commission should conduct a complete *de novo* review of this proceeding, following which it should issue an order granting Maher's Complaint and Counter-Complaint, as set forth above, with an award of reparations for actual injuries as of May 31, 2011 of \$182,367,866.75, additional actual injury incurred thereafter, additional amounts not to exceed twice the amount of the actual injury for PANYNJ's violation of 46 U.S.C. § 41102(b), attorneys' fees, costs, and interest, and the Commission should issue an order *prohibiting* PANYNJ from requiring of Maher (1) a base rent lease rate of Maher in excess of \$19,000 per acre; (2) a financing rate greater than that provided to Maersk-APM in EP-248; (3) a security deposit requirement in lieu of its existing corporate guarantee in EP-249; (4) a terminal guarantee more onerous than that provided in EP-248; and (5) indemnification to PANYNJ for its own actions or inactions.

In these *de novo* review circumstances as set forth above, and because of the importance of the issues presented in this proceeding, Maher also requests oral argument.

Dated: June 9, 2014

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

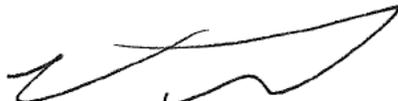
I hereby certify that on this 9th day of June, 2014, a copy of the foregoing was served by

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