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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 08-03

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S REPLY
TO MAHER TERMINALS, LLC'S EXCEPTIONS TO
THE INITIAL DECISION OF APRIL 25, 2014**

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Respondent, the Port Authority of New York and New Jersey (“Port Authority”) hereby submits its Reply to Maher Terminals, LLC’s (“Maher”) Exceptions to the Initial Decision dated April 25, 2014 (“Exceptions”).

I. PRELIMINARY STATEMENT

Judge Wirth correctly held that the differences between Maher’s and APM/Maersk’s complex and carefully negotiated leases were reasonable and fully justified, and that Maher’s claims lacked merit. Judge Wirth’s well-reasoned Initial Decision should be affirmed.¹

Maher’s Exceptions are founded upon a blatant disregard for the plain language of the Shipping Act and a clear misreading of *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997), as well as the other leading FMC precedents interpreting the Act. From the outset, Maher’s case has been premised entirely on an attempt to force its claims within its misreading of *Ceres* by contending that whenever two different types of entities seeking to negotiate leases at a port – here a terminal affiliated with an ocean carrier and an independent marine terminal operator – present significantly different transportation risks and benefits to the port that would otherwise warrant different lease terms, those differences must be disregarded because they are supposedly always a mere proxy for “status.” Exceptions

¹ The Initial Decision is cited herein as “ID.” Maher’s Initial Brief dated October 7, 2011, Doc. No. 153 is cited as “MTIB,” its Proposed Findings of Fact and Supporting Evidence dated October 7, 2011, Doc. No. 154 are cited as “MTFOF,” its Reply to Respondent’s Brief dated December 9, 2011, Doc. No. 162 is cited as “MTRB,” its Response to the Port Authority’s Proposed Findings of Fact, Doc. No. 163 is cited as “MTR-PAFOF,” and its Reply to the Port Authorities Supplemental Proposed Findings of Fact dated August 21, 2012, Doc. No. 197 is cited as “MTR-PA-SFOF.” The Port Authority’s Memorandum of Law in Opposition to Maher’s Initial Brief dated November 9, 2011, Doc. No. 158 is cited as “PARB,” its Proposed Findings of Fact dated November 9, 2011 are cited as “PAFOF,” its Response to Maher’s Proposed Findings of Fact and Supporting Evidence dated November 9, 2011, Doc. No. 157 is cited as “PAR-MTFOF,” its Supplemental Proposed Findings of Fact dated August 6, 2012, Doc. No. 194 are cited as “PA-SFOF,” and its Response to Maher’s Supplement Brief dated August 21, 2012, Doc. No. 200 is cited as “PAR-MTSB.”

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8-11. And then, having mislabeled all such substantive differences as a matter of “status,” Maher claims that, under *Ceres*, a port authority is “absolutely” required to provide the two entities with identical lease terms, such that if it treats them differently in any way, the port has automatically engaged in unlawful discrimination. *Id.* at 16. Maher’s argument, however, is directly contrary to the plain language of the Shipping Act – which proscribes only “undue” or “unreasonable” preferences and prejudice – and multiple binding precedents, including the *Ceres* decision itself.

As Judge Wirth found, the Port Authority’s decision to agree to the terms of its lease with APM/Maersk,² which forms the basis of Maher’s suit, was clearly justified by compelling reasons that did not apply to Maher. Maher does not contest this key finding in its Exceptions. Indeed, as Maher’s CEO, Brian Maher, testified extensively, there was a very serious risk that had the Port Authority not agreed to enter into a new lease acceptable to APM/Maersk, Maersk Line and Sea-Land Service Inc. (“Sea-Land”) – the largest carriers in the world and in the United States by volume, together accounting for almost a fourth of all of the Port’s³ container cargo traffic – would have abandoned the Port and made Baltimore the hub for their East Coast operations. As Mr. Maher testified and advocated publicly, the consequences of Maersk Line and Sea-Land’s departure would have been disastrous for all of the Port’s constituents – including Maher in particular – as well as for the entire region. Mr. Maher was so concerned that he aggressively lobbied New Jersey Governor Christine Whitman, among others, pleading that everything possible be done to avert Maersk Line and Sea-Land’s departure from the Port. As

² The Port Authority entered into Lease EP-248 with Maersk Container Service Company Inc., which is now known as APM Terminals North America Inc. *See* PAFOF ¶¶ 6, 156; App. V-254. This brief will refer to the Maersk container terminal as “APM/Maersk.”

³ As used herein, the “Port” refers to the Port of New York and New Jersey.

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Mr. Maher told the Governor, “[t]he current status of the negotiations with Sea-Land and Maersk is so dangerous and the risk to the Port and the State of New Jersey so grave” that he felt compelled “to be sure that you understand the situation. . . . There is much at stake. To permit two major employers to leave the state is unthinkable and I urge you to do all that you can to prevent that from occurring.” PAFOF ¶ 106; App. I-1043 at 1043, 1046; *see pp. 15-16 infra*.

Mr. Maher’s views were shared by the senior leadership of the Port Authority, and were fully consistent with the analysis of Paul Richardson, the highly experienced and well-respected port expert retained by the Port Authority to advise it with respect to the Maersk Line and Sea-Land negotiations, and whom Maher later recruited to join its board. *See pp. 14-15 infra*. After Maersk Line and Sea-Land issued their Request For Proposal (“RFP”) soliciting bids from other ports, Richardson warned that: (1) there is “an extremely high risk of losing all of the Sea-Land/Maersk cargo and up to 55% of the Port of NY & NJ’s (the Port’s) entire containerized cargo base”; and (2) “the consequences of such a loss to the competitiveness of the Port and associated regional economic activity would be severe and irrevocable,” including cargo diversion by other carriers, extreme vulnerability to trucking from adjacent ports, and the potential loss of approximately 48,000 jobs worth approximately \$44 billion in wages over thirty years. PAFOF ¶¶ 94; App. I-490 at 491; *see pp. 14-15 infra*. No one, including Mr. Maher, the Port Authority and Governor Whitman, believed that the Port Authority could responsibly risk losing these two market leaders. *See pp. 14-16 infra; see also* MTFOF ¶ 211.

By the same token, it is undisputed that the benefits of retaining Maersk Line and Sea-Land at the Port were as great as the harm associated with their leaving. Mr. Richardson advised that retaining Maersk Line and Sea-Land would increase port volumes by 16% and create at least 23,300 jobs worth nearly \$1 billion in the first year alone. PAFOF ¶ 79; App. I-373 at 396; *see*

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p. 15 *infra*. Here again, Maher's CEO concurred, assuring Governor Whitman that "[t]he successful conclusion" of the Maersk Line and Sea-Land lease negotiations "will stabilize the Port facilities for the next twenty-five years and thus secure and maximize the significant economic benefits derived from the investments the state and federal government are already making in the channels and the transportation infrastructure." App. I-1043 at 1045-46; PAFOF ¶ 83. It was in this context that Mr. Maher implored the Governor and all who would listen "to do all that you can to prevent" Maersk Line and Sea-Land from leaving the Port. PAFOF ¶ 106; App. I-1043 at 1046; *see* p. 41 *infra*. Perhaps most fatal to its case, *Maher does not even attempt to argue in its Exceptions, nor did it make any attempt to prove, that it presented any of the same risks or offered any of the same transportation benefits that caused the Port Authority, with Mr. Maher's ardent support, to agree to the APM/Maersk lease.*

After the Port Authority succeeded in retaining APM/Maersk as the anchor tenant of the Port, Mr. Maher proceeded to negotiate Maher's new lease with Lillian Borrone on behalf of the Port Authority, well aware that Maher would not receive the same terms as APM/Maersk. Rather, those negotiations centered on the particular needs and priorities that *Maher* had at the time, all of which it accomplished. It is undisputed that Maher obtained a reconfigured, consolidated, state-of-the-art terminal that was by far the largest, most efficient, and most valuable in the Port, a 445-acre terminal (30% larger than APM/Maersk's) with a projected capacity of 5.13 million TEUs⁴ by 2015. PAFOF ¶¶ 197, 228, 253; App. V-1 at 16-17; Expert Report of M. John Vickerman ("Vickerman Rep.") ¶¶ 74-75, App. IV-315 at 334; App. I-1569 at 1569-70; *see* p. 24 *infra*.

⁴ A twenty-foot equivalent unit ("TEU") is a unit of measurement that is an approximate measure for container cargo capacity, equal to one standard 20 feet by 8 feet container. Vickerman Rep. ¶ 37, App. IV-315 at IV-323.

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The years following the signing of the APM/Maersk and Maher leases in 2000 confirmed that the Port Authority's business judgment in entering into the APM/Maersk lease in order to retain Maersk Line and Sea-Land at the Port – with Mr. Maher's vociferous support – was not only sound, but prescient. Between 2000 and 2008, the Port's container volume increased by 73%, reversing its market share slide during the 1990s from 29% to 23% of Atlantic Coast U.S. container traffic back to 29% by 2009. PAFOF ¶¶ 158-59; Expert Report of Fredrick A. Flyer ("Flyer Rep."), at ¶ 42, 44-45, App. IV-263 at 282-84.

During this same period, Maher's business exploded. Armed with its new, ideally-configured and enormous terminal and aided by its generous Port Authority financing, between 2000 and 2006, Maher's revenues increased by 49% (from \$258.3 million to \$383.8 million) and its EBITDA increased by 64% (from \$32.6 million to \$53.4 million). PAFOF ¶ 244, 254; Expert Report of Daniel R. Fischel ("Fischel Rep.") ¶ 30, App. IV-175 at 189, 256. And in 2007, the Maher brothers sold their business to Deutsche Bank, through its infrastructure fund RREEF, for \$2.1 billion, of which \$1.86 billion was attributable to its New Jersey terminal alone. PAFOF ¶ 264; App. I-1683 at 1692. Moreover, rather than ever complaining about the terms of its lease, prior to selling the terminal, Maher executed a lease supplement *reaffirming the other terms of its lease, including its rental rate*. ID 33.

Under these circumstances, it is scarcely surprising that Brian Maher – fully aware of the terms of the APM/Maersk lease and the requirements of the Shipping Act – testified that he never believed that Maher had any claim under the Shipping Act. PAFOF ¶ 277; M.B. Maher Dep. 206:18-207:3 (08-03), App. II-256 at 292. To the contrary, he put Lillian Borrone – the Port Authority's lead negotiator of the APM/Maersk and Maher leases, and supposedly the chief villain in counsel's newly-minted version of history – on Maher's Board of Directors after her

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retirement from the Port Authority. PAFOF ¶ 26; Borrone Dep. 23:4-12, 26:10-17, 29:4-14, App. II-126 at 129-30.

Against this record of real-world, undisputed facts, Maher's new owners brought this case in 2008, asserting Shipping Act claims based on the legally groundless, simplistic, and illogical proposition that the Port Authority was "absolutely" required to provide Maher and others with the same lease terms it had agreed upon with APM/Maersk at a cost of hundreds of millions of dollars, even though none of the compelling reasons that justified the APM/Maersk lease applied to Maher or any of the other marine terminal operators at the Port. As Judge Wirth correctly held, nothing in the Shipping Act or the case law decided under it requires a port to engage in such commercial irrationality to the point of economic suicide. Rather, the Shipping Act prohibits only "undue" or "unreasonable" preferences and prejudice, which clearly did not occur here.

In light of (1) the undisputed evidence that there were sound transportation-related reasons supporting the Port Authority's business judgment to enter into the APM/Maersk lease and (2) Maher's abject failure and inability to present proof that it offered the same – or remotely similar – transportation benefits or posed the same risks that caused the Port Authority to enter into the APM/Maersk lease, it is clear that there was no violation of the Shipping Act. Stated more simply, based on the uncontroverted facts in the record – particularly the sworn testimony and other admissions of Maher's principals – the differences between Maher's and APM/Maersk's lease terms were plainly justified, and there is no basis for disturbing the business judgment of the Port Authority in entering into these leases, which produced such extraordinary benefits for the Port, Maher itself, and the entire region.

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As Maher's new management admitted to Empire Valuation Consultants ("Empire") in 2008 on the eve of bringing this lawsuit, "management believed the Company's lease terms were neither materially above nor below market at the Valuation Date." PAFOF ¶ 273; App. I-2136 at 2148; Nortillo Dep. 184:16-185:15 (08-03), App. II-378 at 389-90. Indeed, rather than viewing the difference in base rent between Maher's lease and the one other Port tenant whose base rent was lower – *i.e.*, APM/Maersk – as unjustified and discriminatory, the report prepared by Empire, used by Maher to satisfy both its federal tax and SEC disclosure obligations, certified:

Management and RREEF attributed the differences in basic rental amount (and per acre rental amount) to Maher U.S.'s favorable infrastructure attributes, including: (1) depth of channel; (2) length of berth; (3) size of yard; and (4) intermodal access. Management and RREEF believe that the higher basic rental amount and per acre amount paid and to be paid by Maher U.S. reflects the superior nature of the Maher property, the additional flexibility in yard usage, and its infrastructure. RREEF and management believe that going forward, the maximum capacity constraints placed on the other terminal operators within Port Elizabeth by their infrastructure that are not applicable to Maher U.S. outweigh the marginally higher basic rental amount.

PAFOF ¶ 274; App. I-2136 at 2149-50.

In the face of the enormous record of undisputed evidence, Maher attempts to shoehorn this case into *Ceres* by repeating *ad nauseum* its mantra that the Port Authority's only supposed basis for distinguishing between APM/Maersk and Maher was the "status" of Maersk Line as a carrier and Maher as a marine terminal operator. Exceptions 20, 26; p. 45 *infra*. But Maher's position is groundless, as the record in this case is completely distinguishable from *Ceres* on numerous grounds. First, in *Ceres*, Maersk Line's status as a carrier was the only reason that the Maryland Port Authority ("MPA") even proffered for the preferential rental rate to which *Ceres* objected. And, given the absence of any substantive record supporting the reasonableness of MPA's actions, MPA's sole reliance on "status" was wholly arbitrary and hence unreasonable. In contrast to the record here, there was no evidence in *Ceres* that Maersk Line had rejected

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numerous proposals and credibly threatened to abandon the port if specific demands were not accepted, much less the compelling record present here that the loss of Maersk Line would have been disastrous for the port, other terminal operators such as Maher, and the entire region. Nor was there evidence in *Ceres* that retention of Maersk Line was essential to restoring the vitality of the port, including by preventing the loss of *other carriers*, and to justifying the prospective multi-billion dollar infrastructure investments that were essential to such restoration.

Second, although the MPA in *Ceres* attempted to defend its arbitrary discrimination by noting that Maersk Line had given a vessel call guarantee, *Ceres* had repeatedly and credibly offered to match that purely volume-based guarantee. In addition, the vessel call guarantee lacked any enforcement mechanism, rendering it illusory. By contrast the Port Guarantee in the APM/Maersk lease at issue here is an effective, enforceable guarantee specifically designed to incentivize Maersk Line to direct its *own* cargo traffic to the Port, which could otherwise be lost to the region. Further, in contrast to *Ceres*, where *Ceres* repeatedly offered to provide the same guarantee as Maersk, in this case Brian Maher unequivocally testified that Maher was not capable of providing a guarantee like APM/Maersk's Port Guarantee and did not offer to do so.

Third, there are substantial differences between the Maher and APM/Maersk terminals, not least their significant difference in size, giving Maher a demonstrably more valuable terminal. Indeed, in connection with its sale of the terminal, Maher and its investment advisor, Greenhill, represented to prospective buyers that the superior terminal Maher obtained pursuant to its lease provided it with "competitive advantages" over all other terminals at the Port, which included APM/Maersk. PAFOF ¶ 227; App. I-1573 at 1614-15. In *Ceres*, there was no contention that *Ceres*'s terminal was superior to Maersk's.

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Accordingly, Maher's unreasonable preference or prejudice claim was correctly rejected as lacking in merit. *See pp. 32-64 infra.*

Maher's unreasonable practices claim is equally groundless, because it is founded on the same contentions that underlie its meritless discrimination claim and also because Maher made no showing that its "market" lease is unreasonable. *See pp. 64-67 infra.*

Judge Wirth also correctly rejected Maher's claims that the Port Authority unreasonably refused to deal with Maher during the negotiations for its lease and in 2007 when Maher sought to force the Port Authority to renegotiate the terms of the same lease. There simply was no refusal to deal. The original negotiations were extensive, with many gives and takes. And while the Port Authority met with Maher in 2007 and 2008 when it threatened to sue and demanded that the Port Authority *re*-negotiate the terms of its lease and pay substantial damages – which the Port Authority declined to do because the terms of Maher's lease were wholly consistent with the Shipping Act and also any damages would be time-barred – this was not a refusal to deal. It was simply a refusal to buckle to Maher's threats to pursue litigation that the Port Authority believed, correctly, was groundless. *See pp. 68-69 infra.*

Finally, Maher's arguments concerning its Dkt. 07-01 counterclaims are, if anything, even more baseless. *See pp. 69-74 infra.*

For all of these reasons, Maher's Exceptions should be rejected in their entirety.

II. FACTUAL BACKGROUND

Judge Wirth carefully analyzed the extensive evidentiary record, and set forth the essential facts upon which she based her conclusions. The brief summary that follows

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incorporates the key facts set forth in the Initial Decision, and adds further evidentiary detail from the record for context.⁵

A. THE PORT AUTHORITY'S REVITALIZATION PLAN

The Port of New York and New Jersey has long been the busiest and most highly congested port on the East Coast. PAFOF ¶ 12; App. I-3383 at 3466. But by the 1980's, its infrastructure and performance had declined relative both to West Coast ports as well as other East Coast ports that were competing aggressively for cargo that had previously moved through the Port. PAFOF ¶¶ 16, 24; App. I-1 at 15, 23. The land available for cargo transportation functions in this densely populated region was both scarce and inefficiently encumbered by old and outmoded structures. PAFOF ¶ 12, App. I-3596 at 3599, 3613. What is more, the Port was saddled with labor costs that were as much as three times higher than at competitor ports, which discouraged carriers from using the Port, thereby driving down volumes and increasing the cost per container, a self-reinforcing downward spiral. PAFOF ¶¶ 22-23; Harrison Dep. 92:14-16 (07-01), App. II-14; *id.* at 115:16-23, App. II-199. At the same time, the Port was losing cargo partly because, unlike competing ports, the Port's relatively shallow channels could not accommodate the new generation of larger ships with deeper drafts. PAFOF ¶¶ 18, 24-25; App. I-1 at 21, 23-24; Israel Dep. 17:25-18:9 (08-03), App. II-298-99. Faced with these various deficiencies, the Port Authority began to develop a comprehensive revitalization plan during the 1990's. PAFOF ¶ 33, 39; App. I-1 at 8, 21; App. I-199; Borrone Dep. 150:1-18, 292:10-293:21, App. II-148; M.B. Maher Dep. 29:17-30:4 (08-03), App. II-261-62.

Relying in large part on the analysis performed by Paul Richardson Associates Inc. ("Richardson"), a highly experienced and respected industry consultant,⁶ the Port Authority

⁵ The PAFOF, and the PA-SFOF, set forth the relevant factual background in greater detail.

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formulated a revitalization strategy aimed at deepening the harbor's channels, replacing aging physical infrastructure, modernizing existing facilities, and reconfiguring the terminals' locations and layouts. PAFOF ¶¶ 30, 32, 38-39; Borrone Dep. 475:18-477:11, App. II-178-79; *id.* at 150:1-18, App. II-148; *id.* at 292:10-293:21, App. II-163; App. I-512 at 552; App. I-281 at 290; Ward Dep. 14:2-13; 15:1-17, App. II-395; App. I-258 at 260; App. I-199; M.B. Maher Dep. 29:17-30:4 (08-03), App. II-261-62. In conjunction with a dredging program that was anticipated to cost approximately \$2.8 billion, the Port Authority planned to spend approximately \$2 billion of its own funds to modernize Port terminals and address the deficient infrastructure, including road and rail access. PAFOF ¶ 33; App. I-1 at 12, 21.

As Judge Wirth explained in some detail, most of the Port's terminal leases, including Maher's, were scheduled to expire at the end of the 1990's. ID 14. The Port Authority saw this as an opportunity to design a new series of leases based on throughput that would both incentivize the marine terminal operators to utilize their land efficiently – land being the scarcest resource at the Port – and provide rent sufficient to compensate the Port Authority's costs. ID 14; PAFOF ¶¶ 40-41; App. I-199-200; Borrone Dep. 158:11-160:19, App. II-150.⁷

B. THE PORT AUTHORITY BEGINS NEGOTIATIONS WITH MAHER

When the Port Authority began lease negotiations with Maher in 1995, Maher, a family-owned stevedoring business begun in the 1940's, was the largest in the Port, operating out of two

⁶ Maher later appointed Mr. Richardson to serve on its board of directors. PAFOF ¶ 30; Mosca Dep. 21:11-23 (08-03), App. II-103; M.B. Maher Dep. 13:12-20 (08-03), App. II-258.

⁷ Rents and other revenues from the Port did not compensate the Port Authority for its Port costs, which were, in effect, being subsidized by the Port Authority's other operations, including bridges, tunnels and airports. PAFOF ¶¶ 41, 152; App. I-199 at 200; PAR-MTFOF ¶ 222. Although the Port Authority sought to achieve self-sustaining terminal lease rents with the new round of leases, rents at all of the terminals continued to fall short of the Port Authority's costs. PAR-MTFOF ¶ 110, App. I-2136 at 2157.

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separate, though nearby, terminals. ID 13; PAFOF ¶¶ 42, 49; App. I-99; Nortillo Dep. 58:17-59:15, App. II-381; M.B. Maher Dep. 23:20-24:22 (08-03), App. II-260. Maher had a number of key objectives in the negotiations, all of which it eventually achieved:

- avoiding competitive bidding for its new terminal, which could have led to Maher being out of business;⁸
- consolidating its two terminals into one so as to avoid redundancies and inefficiencies;⁹
- obtaining as much land as possible to maximize future capacity growth;¹⁰
- retaining contiguous access to, and the right to manage, the on-dock ExpressRail;¹¹
- being able to transfer ownership of this closely-held company to family members;¹² and
- being permitted to continue to stevedore automobiles.¹³

The Port Authority first proposed that Maher pay a base rent of approximately \$78,000 per acre for Maher's Tripoli Street Terminal, and later approximately \$68,750 per acre. ID 14; PAFOF ¶¶ 56, 59; Nortillo Dep. 58:17-59:15, App. II-381; M.B. Maher Dep. 23:20-24:22 (08-03), App. II-260. The Port Authority made the same rental rate proposals to Hanjin Shipping

⁸ PAFOF ¶ 50; M.B. Maher Dep. 34:23-35:13 (08-03), App. II-263.

⁹ PAFOF ¶ 49; M.B. Maher Dep. 23:20-24:22; 27:12-29:4 (08-03), App. II-260-62; Mosca Dep. 14:16-16:11 (08-03), App. II-102.

¹⁰ PAFOF ¶ 133; M.B. Maher Dep. 34:3-5 (08-03), App. II-263. Brian Maher, Maher's CEO, testified that he would have been "unhappy" if offered only 350 acres, the size of the APM/Maersk terminal. PAFOF ¶ 133; M.B. Maher Dep. 69:12-19 (08-03), App. II-271.

¹¹ PAFOF ¶¶ 52-53; M.B. Maher Dep. 30:16-18, 31:7-16; 31:24-32:3 (08-03), App. II-262. Brian Maher was "violently opposed" to any public bidding for the ExpressRail management function, because he viewed Maher's management of it to be a prime competitive advantage. PAFOF ¶ 53; M.B. Maher Dep. 30:17-20, 31:24-32:3, App. II-262.

¹² PAFOF ¶ 51; App. I-169; M.B. Maher Dep. 104:5-20 (08-03), App. II-276; App. I-159.

¹³ PAFOF ¶ 55; App. I-170.

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Company. Ltd. (“Hanjin”), an ocean carrier that wanted its own 106-acre terminal. ID 14-15; PAFOF ¶ 47; App. I-234 at 236-37; Yetka Dep. 186:3-22 (08-03), App. II-236; App. I-102; App. I-3636. These proposals were contingent upon negotiations for new terminal leases with Sea-Land and Maersk Line, given their central role in the Port Authority’s modernization plan. ID 43; *see e.g.*, PAFOF ¶ 83; App. I-1043 at 1045.

C. NEGOTIATIONS WITH MAERSK AND SEA-LAND

As detailed in the Initial Decision, the Port Authority’s negotiations with Maersk and Sea-Land were exceedingly difficult and protracted. ID 15-21.

1. The Impasse

From September 1997 until April 1998, when the negotiations reached an impasse, the Port Authority made a number of different proposals to Sea-Land that were met with the carrier’s outright rejections and credible threats to abandon the Port if the Port Authority did not meet its demands. ID 15-19; *see also* PAFOF ¶¶ 61-69; MTFOF ¶¶ 134-135, 142; App. I-240, 272-73, 292-97; App. II-169, 399; M.B. Maher Dep. 116:9-117:19 (08-03), App. II-277-78. On May 13, 1998, Sea-Land and Maersk issued a joint request for proposal (“RFP”) for a marine terminal lease to the Port Authority as well as six competing ports. ID 16; PAFOF ¶ 71; App. I-306 at 307; MTFOF ¶ 145.¹⁴ Sea-Land and Maersk explicitly warned both the Port Authority and the New Jersey Governor that they would move their cargo to Baltimore if their demands were not met. ID 15-18; ¶¶ PAFOF 108-116; App. I-2669, 2670 at 2675.

¹⁴ As explained in greater detail in the Initial Decision, Maersk Line and Sea-Land consolidated their terminal operations in 1999 and, thereafter, A.P. Moller-Maersk Group, of which AMP/Maersk is a business unit, acquired Sea-Land’s international container business. ID 10-11; PAFOF ¶ 7; Borrone Dep. 310:7-311:4 (08-03), App. II-168; *id.* at 204:5-12, 285:12-16, App. II-152; Mosca Dep. 67:25-68:3 (08-03), App. II-113; App. II-152.

2. The Stakes

As Judge Wirth found, everyone with an interest in the Port, from senior management at the Port Authority and its consultants, to Brian Maher and the Governor of New Jersey, fully appreciated that the risk that Sea-Land and Maersk Line would leave the Port was real and that, were that to occur, the consequences to the Port, all the Port constituents – including Maher – and the entire region would be disastrous. ID 16-17; PAFOF ¶ 103-07; App. I-412 at 416; Shiftan Dep. 38:16-21, 39:4-13 (08-03), App. II-244; M.B. Maher Dep. 181:2-7 (07-01), App. II-57; App. I-1043-46; MTFOF ¶ 211. Retaining Maersk Line and Sea-Land was essential to the overall future health of the Port's cargo transportation function, as well as the region's economic vitality, with many thousands of cargo transportation related jobs at stake. PAFOF ¶¶ 74-94; App. I-373; App. I-376; Borrone Dep. 310:7-12, 382:10-16 (08-03), 568:15-569:1, App. II-168, 176, 186; Shiftan Dep. 105:5-14 (08-03), App. II-249; Ward Dep. 123:14-24 (08-03), App. II-401. Together, Sea-Land and Maersk Line controlled approximately 23% of the Port's container traffic, and their retention was essential both to ensure the vitality and competitiveness of the Port, and to garner the prospective infrastructure investments by both governmental and private parties. PAFOF ¶¶ 75, 82-83; App. I-373 at 394; Shiftan Dep. 265:23-266:5 (08-03), App. II-255; App. I-1043 at 1045.

The Port Authority asked Paul Richardson to analyze the risk that the Port would lose Sea-Land and Maersk Line, as well as the effect of such a loss and the benefits to be gained by retaining them. PAFOF ¶ 74; App. I-373. Richardson concluded that there was a high likelihood that Maersk Line and Sea-Land would, in fact, leave the Port, and that their departure would have a crushing impact on the Port and the region. ID 16, 43; PAFOF ¶¶ 86-94; App. I-373 at I-374. The Port Authority risked losing up to 55% of its entire containerized cargo base, because without Sea-Land's and Maersk Line's container volumes and the associated New York

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Shipping Association assessment revenues (the per container charge for shippers that included labor costs), the cost per container would rise, leading *other* port users to route their cargo through less expensive ports. ID 16, 43; PAFOF ¶¶ 81, 87, 90; App. I-80; I-373 at 392, 396; I-445 at 446; I-476 at 481. Richardson concluded that approximately 48,000 cargo transportation and other jobs would be lost, as well as \$44 *billion* in transportation-related wages over a thirty-year period. PAFOF ¶ 94; App. I-490 at 491. At the same time, Richardson reported that the benefits of retaining Maersk Line and Sea-Land were commensurate with the losses associated with their leaving. Retaining Maersk Line and Sea-Land would bring increased cargo volume to the Port, increase transportation-related jobs and wages, reduce the cost per container, and ensure that the needed public and private investment in the Port would take place. PAFOF ¶¶ 75-85; App. I-373 at 376, 391, 395-96; I-463 at 464.¹⁵

As Judge Wirth noted, Brian Maher, a man with decades of experience running a major terminal at the Port, fully recognized that the departure of Maersk and Sea-Land would be disastrous for the Port, the Port's constituents, including Maher Terminals, and the region as a whole because their volumes were critical both to justifying the Port's infrastructure investments and to reduce per container labor costs, and that if those carriers left, others would follow. ID 42-45, 48, 53.¹⁶ Mr. Maher's ardent pleas to anyone who would listen – that everything possible

¹⁵ Richardson concluded that the carriers' continued presence in the Port would lead to an increase in port volumes by 16% and an additional 23,300 jobs worth nearly \$1 billion in the first year alone. PAFOF ¶ 79; App. I-373 at 396.

¹⁶ As Mr. Maher explained, losing Maersk Line's and Sea-Land's volume would have led to excess marine terminal capacity, drastically-reduced rates for marine terminal services, a significant reduction in available cargo to cover labor assessments, and an increase in the Port's cost per container, which would in turn cause other carriers to flee the port, while retaining the carriers would stabilize the Port and secure significant economic benefits from the state and federal investments in the channels and transportation infrastructure. ID 18-19; PAFOF ¶ 95, M.B. Maher Dep. 57:23-58:8 (08-03), App. II-269; PAFOF ¶ 97, M.B. Maher Dep. 58:10-17

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should be done to retain Maersk and Sea-Land – are captured well in the Initial Decision’s quotations from Mr. Maher’s letter to New Jersey’s Governor. ID 18-19, 44; App. I-1043 at I-1045-46; PAFOF ¶¶ 104-107.¹⁷

3. The Resolution

With all of the Port Authority’s proposals to date having been flatly rejected, and faced with Maersk and Sea-Land’s credible threat to move their hub to Baltimore, on February 12, 1999, representatives of the Port Authority met with representatives of Maersk and Sea-Land to ask what it would take to reach agreement. ID 17; PAFOF ¶¶ 108-117; App. I-1064, I-1069 at 1070-71. Maersk and Sea-Land advised that the Port Authority needed to provide \$120 million in concessions in order to match what was available to them in Baltimore. PAFOF ¶ 117; App. I-1064, MTFOF ¶ 176. The Port Authority then offered a fixed base rent of \$19,000 per acre per year (equal to about \$90 million in savings), plus about \$30 million in free construction capital. ID 19, 44.

Negotiations did not end there, however. In order to ensure that the Port Authority would get what it bargained for in terms of the carriers’ cargo business, the APM/Maersk lease (EP-248) contains a Port Guarantee, which tied APM/Maersk’s rental rate to the carriers’ commitment to route their own cargo through the Port. ID 44; PAFOF ¶ 123; App. I-1159 at I-

(08-03), App. II-269; PAFOF ¶ 101, M.B. Maher Dep. 127:2-9 (08-03), App. VII-206. PAFOF ¶ 101, M.B. Maher Dep. 127:2-9, 157:14-158:11 (08-03), App. II-280, 286.

¹⁷ Because Maher did not view APM/Maersk as a true competitor, it had no reservations concerning its continued presence even as Maher’s immediate marine terminal neighbor. PAFOF ¶ 223; App. IV-263 at 288. If Maersk Line and Sea-Land left the Port, however, there was a risk that another terminal operator that was more likely to compete directly with Maher or even one of Maher’s customers would move in and occupy the adjoining space. PAFOF ¶¶ 98, 223; M.B. Maher Dep. 58:23-25, 59:12-20 (08-03), App. VII-269; Curto Dep. 137:23-138:12 (08-03), App. VII-328-29; Mosca Dep. 162:2-163:1 (07-01), App. II-90; M.B. Maher Dep. 181:8-183:11 (07-01), App. VII-332.

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1161; PAFOF ¶¶ 149-150; App. I-1299 at 1302-04. The purpose of the Port Guarantee is to incentivize the carriers to maintain the guaranteed volumes, and it is enforceable through significant rental increases that take effect in the event of noncompliance.¹⁸ Because APM/Maersk failed to meet the Port Guarantee thresholds in 2008-2010, its annual base rent increased from \$19,000 per acre to \$34,200 per acre for 2010 and \$32,300 per acre for 2011. ID 25, 46; PAFOF ¶ 176; App. I-2659; App. V-254 at 364; Flyer Rep., App. IV-263 at 276.

D. THE PORT AUTHORITY COMPLETES NEGOTIATIONS WITH MAHER

The Port Authority and Maher resumed negotiations and executed a new lease (EP-249) on October 1, 2000, PAFOF ¶ 157, in which Maher not only achieved all of its key objectives – without a public bidding process – but also achieved significantly better rental rates than it had originally been offered. PAFOF ¶ 46, App. I-39-40; *id.* at I-74, 76, 78; App. II-234; *see* p. 12 *supra*.¹⁹ Hanjin was not as fortunate. Once Maersk and Sea-Land joined forces and negotiated for a 350-acre terminal, and the Port Authority then accommodated Maher’s desire for a terminal of 445 acres (the largest in the Port), there was no room, given land scarcity, for a separate Hanjin terminal. App. I-3686 at 3689; App. II-111.

E. COMPARISON OF THE MAHER AND APM/MAERSK LEASES

The Maher and APM/Maersk leases differed in numerous respects due to differences in their key objectives as well as in the risks they posed and benefits they received. ID 40. Maher bargained for and received several significant benefits and concessions that APM/Maersk did

¹⁸ If the Port Guarantee commitments are missed for two consecutive years, APM/Maersk’s rent increases significantly in the following year. If APM/Maersk were to cease shipping its containers through the Port all together, APM/Maersk’s rent would increase to \$98,000 per acre per year. ID 21-25, 45-46; PAFOF ¶ 174; App. V-254 at 346; *see also* Dep. Ex. 397, Flyer Rep., Table 4, App. IV-263 at IV-276.

¹⁹ *See also* PAFOF ¶¶ 50, 143, 152, 164, 234, 197, 134, 247, 248, 213-14; App. V-254 at 261.

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not, which allowed Maher to capitalize on the many benefits of retaining Maersk and Sea-Land in the Port. *See* pp. 24-26 *infra*; *see generally* PAFOF ¶¶ 218-38.

Maher willingly entered into its lease with its eyes wide open. By the time Maher signed its lease, the APM/Maersk lease had been publicly filed, with Maher fully aware of its terms. PAFOF ¶¶ 130-132; Mosca Dep. 155:1-16, 170:1-6 (07-01), App. II-88, 92; Maher's Reply in Opp'n to Resp'ts Mot. Summ. J., Oct. 14, 2011 at 4, Doc No. 87. Brian Maher, a highly experienced and sophisticated marine terminal operator, testified in 2011 that he never believed that Maher had been the victim of unlawful discrimination, and was "surprised to learn that Maher's [new owner's] counsel thought" there was a Shipping Act violation here. PAFOF ¶ 279; M.B. Maher Dep. 220:15-22 (08-03), App. II-295; *see* PAFOF ¶ 277; M.B. Maher Dep. 206:18-207:3 (08-03), App. II-292; App. VII-256, VII-229.²⁰ Maher enjoyed great success and profitability in the seven years between signing its new lease in 2000 and selling the terminal in 2007 for the astronomical sum of \$1.86 *billion*, at which time it reaffirmed all of its rental rate provisions. *See* ID 33; pp. 26-30 *infra*. In marketing its terminal to potential buyers, Maher openly boasted of its immense value and unique benefits in comparison with other terminals in the Port, including APM/Maersk's, and afterward admitted that its lease – despite the lower base rental rate at one neighboring terminal – was at "market." *See* pp. 26-30 *infra*.

1. Base Rent

While APM/Maersk's base rent is \$19,000 per acre per year, it is subject to significant increases if it fails to satisfy the Port Guarantee, which, as Judge Wirth noted, have already occurred. ID 47; EP-248 § 3, 42, App. V-254 at V-261; *see* pp. 16-17 *supra*. Maher's base rent

²⁰ Brian Maher never believed that the Port Authority's chief negotiator Lilian Borrone treated Maher unfairly or took advantage of Maher, and later placed her on Maher's Board. PAFOF ¶ 26; Borrone Dep. 26:10-17, 29:4-14, App. II-130; M.B. Maher Dep. 12:3-12, App. II-257.

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is set at \$39,750²¹ with a 2% annual escalator, but is not subject to a Port Guarantee. ID 25; EP-249 § 3, App. V-1 at 8-9. As Judge Wirth found, Maher was unwilling and unable to provide a comparable Port Guarantee, a fact that Brian Maher testified was so obvious that it did not even rise to the level of a topic of conversation during the lease negotiations. ID 23 (quoting M.B. Maher Dep. 221:19-222:5 (08-03), App. VII-229-30). The difference between Maher's and APM/Maersk's rent was immaterial in the context of Maher's overall operating expenses and revenues, amounting, for example, to approximately 3.6% of Maher's \$248 million operating expenses for 2001.²² PA- SFOF ¶ 19; Appx. I-1463; Kerr Dep. 90:6-22, 91:16-92:23, Appx. VII.

2. Construction Requirements and Cheap Port Authority Financing

Maher and APM/Maersk agreed in their respective leases to perform differing amounts of construction and installation work, known as Class A and Class B work, and they both received differing amounts of "free capital" and cheap financing from the Port Authority with which to do so. ID 27, 49; PAFOF ¶ 195; App. V-254 at 270; App. V-1 at 20. As Judge Wirth noted, Maher, but *not* APM/Maersk, was also given the right to use the Port Authority financing for optional

²¹ This rental rate was lower than the \$47,179 per acre rate Maher was paying under its Fleet Street lease while negotiating the terms of EP-249. ID 13, 47; PAFOF ¶ 152; App. I-159 at 161; Yetka Dep. 196:24-197:1 (08:03), App. II-237. Maher's base rent was also significantly lower than that of Port Newark Container Terminal's ("PNCT"), situated just across the channel. Board Resolution re: PNCT Lease Agreement, Sep. 28, 2000, App. I-3502 at 3507; *see also* Dep. Ex. 258, Comparison of Container Terminal Rates, Feb. 7, 2008, App. I-2247 at 2248 (showing Maher's 2007 lease rental rate was \$45,660.26 per acre while PNCT's 2007 rental rate was \$79,488 per acre).

²² PAFOF ¶ 243; PA-SFOF ¶ 19; App. I-1463; Kerr Dep. 90:6-22, 91:16-92:23, App. II-415; *see also* Shayne Dep. 50:6-51:18; S. App. II-209 (testimony from the author of the Empire Report, as follows: "Q. And is that because although the terms may have differed, they did not differ materially in your view? A. Yes. . . . Q. And is that because any differences in the rent rates between the leases were minor in comparison with the overall size and scope of the revenues and expenditures of the Maher business?... A. Yes, probably.").

[REDACTED]

projects, labeled Class C work, as Maher in fact did. ID 28, 49; PAFOF ¶ 195; App. V-20-21. APM/Maersk spent considerably more than Maher on a per acre basis to perform the required Class A and Class B work. *See* PAFOF ¶ 196; App. III-727 at 729-30 (APM/Maersk spent \$496,000 per acre as compared with Maher’s expenditures of \$295,555 per acre); PAR-MTFOF ¶ 323.

Maher received proportionately more cheap Port Authority financing than APM/Maersk. ID 49. Although Maher’s terminal is about 30% larger than APM/Maersk’s, its lease provided it with access to \$250 million in Port Authority financing, which was approximately 44% more than the \$174 million that the Port Authority provided to APM/Maersk. PAFOF ¶ 197. Of this, Maher received \$46 million in “free” capital, which was approximately 51% more than the \$30.4 million in “free” capital under APM/Maersk’s lease. PAFOF ¶ 197; App. V-1 at 16-17.²³

The Port Authority financing rate made available to Maher – the Revenue Bond Index²⁴ plus 175 basis points – was considerably less than what was available to Maher in the commercial market. ID 28; PAFOF ¶ 204; Fischel Rep. ¶ 22, App. IV-175 at 184.²⁵ Although the rate for the financing in the APM/Maersk lease was the Revenue Bond Index plus 150 basis points, *see* ID 29; PAFOF ¶ 199; App. V-252 at 267, the difference in rate reflected a disparity in

²³ As noted above, Maher was permitted to use its \$250 million in financing to perform certain optional Class C work, while APM/Maersk was not. ID 28. Maher used approximately \$133 million of the \$195 million it had drawn for Class A and B work and \$62 million for optional Class C work. ID 28; PAFOF ¶¶ 195-96; App. III-727 at III-730.

²⁴ The Revenue Bond Index, published by the “Bond Buyer,” a daily financial newspaper, is based on the average yield for 25 separate 30-year yield revenue bond offerings, and is commonly referenced in the public financing of construction projects by municipalities. Borrelli Decl. ¶ 9, App. III-1013 at 1015.

²⁵ The financing rate offered to Maher was 7.70% (1.75% above the 5.95% 180-day average of the Revenue Bond Index), compared with Maher’s July 2001 private placement of \$32 million in Senior Secured Notes at 8.47%. PAFOF ¶ 204; Fischel Rep. ¶ 22, App. IV-175 at 184.

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Maher's and APM/Maersk's creditworthiness. ID 50; PAFOF ¶ 201; *see* Borrelli Dec. ¶¶ 4, 7, 9-10, 13, App. III-1013 at 1014-16. Maher had run up a two-year arrearage for its Fleet Street terminal prior to the 2000 lease negotiations. ID 50.²⁶

3. Minimum Throughput Rent and Terminal Guarantees

APM/Maersk's and Maher's leases contain two separate throughput-based components: (1) a minimum throughput rent obligation and (2) a terminal throughput guarantee that is set at low levels, which, if not met in consecutive years, would give rise to a right of termination. ID 29-30, 50-51; PAFOF ¶¶ 184, 192; App. V-254 at 347-53; App. V-1 at 99-100.

| Period | Rent Guarantee Volume | Rent Guarantee Volume Per Acre | Terminal Guarantee Volume | Terminal Guarantee Volume Per Acre |
|--------|---|-------------------------------------|---|-------------------------------------|
| 1st | 500,000 (APM/Maersk) 650,000 (Maher) | 1,429 (APM/Maersk) 1,461 (Maher) | 270,000 (APM/Maersk) 340,000 (Maher) | 771 (APM/Maersk) 764 (Maher) |
| 2nd | 600,000 (APM/Maersk) 775,000 (Maher) | 1,714 (APM/Maersk) 1,742 (Maher) | 330,000 (APM/Maersk) 420,000 (Maher) | 943 (APM/Maersk) 944 (Maher) |
| 3rd | 700,000 (APM/Maersk) 775,000 (Maher) | 2,000 (APM/Maersk) 1,742 (Maher) | 390,000 (APM/Maersk) 900,000 (Maher) | 1,114 (APM/Maersk) 2,022 (Maher) |

ID 51; PAFOF ¶¶ 187, 193; App. IV-28 at 135; App. V-254 at 347; App. V-348; App. V-99.1.

Because the Guarantee Periods are defined differently in the two leases, and because the triggers and consequences for failure to meet the terminal guarantee also differ in the two leases, it is difficult to determine which, if either, is more burdensome than the other. ID 51.

²⁶ Maher's suggestion that APM/Maersk's credit was no better is not supported by the record. Maher cites a March 6, 2000 Port Authority memorandum, which shows only that after Maersk took over the Sea-Land terminal lease in December 1999, the Port Authority did not immediately update its records to invoice Maersk instead of Sea-Land and that payments in the amount of \$3.3 million were temporarily outstanding. Exceptions 43-44, n. 100; S. App. 1D-1619. Maher also cites a draft letter dated July 2000 with respect to three months' rent in the amount of \$1,263,500 that appears to have been outstanding under APM/Maersk's lease. Exceptions 43-44, n. 100; S. App. 1D-1712. The record contains no evidence, however, as to whether this draft letter was sent to APM/Maersk, and no witness testified regarding this document or the underlying circumstances. In any event, any such arrearages would have been far less significant than the long-standing two-year arrearage on which Maher was continuing to make payments up until the commencement of its 2000 lease. PAFOF ¶ 202; Mosca Dep. 44:4-45:17 (08-03), App. II-109; App. I-100; Exceptions 44 n. 100.

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The minimum throughput rent obligation in both leases is virtually the same on a per acre basis for the first two guarantee periods, though in the third, *APM/Maersk's* is the more onerous. And, while the per acre volume requirements of the terminal guarantees are nearly the same for the first and second periods, Maher appears to have the greater obligation under its terminal guarantee in the third period, at least at first glance. ID 30-31, 51; App. V-348; App. V-99.1. But the third terminal guarantee period is defined differently in the two leases. APM/Maersk's third period begins unconditionally on January 1, 2015, whereas Maher's third period does not begin at that time unless the Kill Van Kull and Newark Bay have been dredged to fifty feet.²⁷ Also, the Port Authority's right of termination in APM/Maersk's lease is triggered during the Third Terminal Guarantee Period if APM/Maersk fails to meet its required throughput level in any *two* consecutive years, whereas the Maher lease's right of termination is triggered in that period only if Maher misses the required level for *three* consecutive years. PAFOF ¶ 188; *see* EP-248 § 43(c)(1), App. V-254 at 348-49; EP-249 § 42(e), App. V-1 at 99.2.²⁸

²⁷ Since such dredging would allow the Port to accommodate larger "Post-Panamax" ships, it would make the third terminal guarantee period threshold easier to meet, an advantage APM/Maersk would not have if the dredging has not occurred by January 1, 2015. PAFOF ¶ 189; EP-248 § 43(a)(7), App. V-254 at 348; EP-249 § 42(a)(7), App. V-1 at 99.1. Also, because Maher's throughput was already more than one million containers in 2010 despite a global recession, *see* Vickerman Rep. ¶ 60, App. IV-315 at 328, Maher should have no difficulty exceeding the 900,000-container threshold of its Third Terminal Guarantee Period once it begins. PAFOF ¶ 190; App. I-3532 at 3566; *see* Vickerman Rep. ¶ 60, App. IV-315 at 328 (Maher's terminal capacity expected to reach approximately 5.13 million TEUs by 2015).

²⁸ There are also some differences in the nature of the Port Authority's right of termination when it arises. In Maher's case, the Port Authority's right to terminate applies to the entire leasehold, whereas in APM/Maersk's case there are two different levels of triggers and two different consequences. One right of termination for failure of APM/Maersk applies to the 84 acres adjacent to the ExpressRail facility, the most valuable piece of the APM/Maersk terminal, but a second right of termination applies if APM/Maersk fails to meet even lower levels in which case the Port Authority can terminate the entire leasehold. PAFOF ¶ 185; App. V-254 at 348-53. Contrary to Maher's assertion, upon which ALJ Wirth mistakenly relied, ID 30-31, APM/Maersk's lease provides that the Port Authority can terminate APM/Maersk's entire tenancy upon one year's written notice if APM/Maersk fails to meet the specified lower

[REDACTED]

4. **Security Deposit**

Maher's lease required it to post a security deposit of \$1.5 million (or about one month's rent),²⁹ while Maersk Inc. guaranteed all of APM/Maersk's financial obligations in lieu of a security deposit. ID 31-32, 52; PAFOF ¶¶ 208-210; App. V-254 at 381. That guarantee provided more security than Maher's small security deposit. PAFOF ¶ 210; App. V-254 at 381. Maher had no affiliate to provide a comparable guarantee. ID 52. And there was a disparity in Maher's and APM's resulting creditworthiness. *See* pp. 20-21 *supra*.³⁰

5. **First Point of Rest**

Maher's lease provided that it would maintain a specified ten-acre area of its terminal as a first point of rest for automobiles, a provision that would not have been germane in the APM/Maersk lease as APM/Maersk did not intend to stevedore automobiles. ID 32; PAFOF ¶¶ 212-13; Harrison Dep. 68:2-7 (08-03), App. II-195; App. V-1 at 111-12. By contrast, Maher had specifically requested that its use of premises clause allow it to continue to stevedore automobiles and other noncontainerized cargo. PAFOF ¶ 213; App. I-227 at 228. The first point

thresholds (171,430; 205,715; and 240,000 in the First, Second, and Third Terminal Guarantee Periods, respectively) in "any two consecutive Terminal Lease Years." PAFOF ¶ 185; EP-248 §§ 42(c)(3), (d)(3), (e)(3), App. V-254 at 347-53. It need not have first missed the higher thresholds for two consecutive years. At all events, the terminal guarantee thresholds in both leases are set at relatively low levels, making any violation unlikely, and in both leases the consequence of termination would be onerous.

²⁹Maher had the option to use cash or bonds, which would earn interest, or a letter of credit. ID 31; Dep. Ex. 131, EP-249 § 40, App. V-1 at 96-98. Maher chose the latter at a cost of approximately \$18,750 per year, an immaterial 0.00756% of Maher's 2001 operating expenses. ID 31; PAFOF ¶ 208; Davis Dep. 26:17-27:8 (08-03), App. II-332.

³⁰Maher's security deposit was later increased by agreement in connection with the Port Authority's consent to Maher's 2007 change of control to Deutsche Bank for \$2.1 billion. ID 31; PAFOF ¶ 208; Borrelli Dec. ¶ 12, App. III-1013. As ALJ Wirth noted, Maher's 2008 Complaint did not plead any violation of the Shipping Act in connection with this security deposit increase. ID 52. And unlike Maher, APM/Maersk never underwent a change in control. PAFOF ¶¶ 208, 285; Borrelli Dec. ¶¶ 5, 12, App. III-1013.

[REDACTED]

of rest resulted from a three-way negotiation among the Port Authority, Maher and Maher's customer, Nissan. ID 32; PAFOF ¶ 214; Harrison Dep. 57:6-25, 62:11-20 (08-03), App. II-193-194. Maher ignored the requirements of the first point of rest without consequence by relocating the first point of rest at its convenience and later constructing a building on the designated site. ID 32, 53; PAFOF ¶ 217; Basil Maher Dep. 143:9-20, 153:7-21 (08-03), App. II-282, 376; Mosca Dep. 42:16-22 (08-03), App. II-109.

F. MAHER REAPS SPECTACULAR BENEFITS FROM ITS LEASE

As Judge Wirth explained, not only did the negotiations and resulting lease terms take account of the unique benefits and risks presented by APM/Maersk – but not Maher – but they also related to properties that differed in “size, depth, berthing options, buildings, and access to transportation and infrastructure.” ID 40. Accordingly, “variation in rental terms is to be expected.” *Id.* Maher’s terminal is the largest in this land-scarce and highly congested Port, and indeed is one of the largest terminals in North America, some 30% larger than APM/Maersk’s. PAFOF ¶ 228, 232; Vickerman Rep. ¶ 62, 74-75, App. IV-315 at 328-29, 334; App. I-1569 at 1570.³¹ By consolidating its operations into a single contiguous 445-acre terminal, Maher was able to remove redundancies and enjoy the enormous benefits of its huge, supremely optimized, ideally configured terminal. *See generally* PAFOF ¶¶ 227-32; Vickerman Rep. ¶¶ 8-9, App. IV-315 at 317-18.³² Its capacity far exceeds that of other terminals, including APM/Maersk. PAFOF ¶¶ 228-29; Vickerman Rep. ¶¶ 9-10, App. IV-315 at 317-18.

³¹ Brian Maher would have been “unhappy” had the Port Authority offered only 350 acres for Maher’s new terminal. M.B. Maher Dep. 69:12-19 (08-03), App. VII-191; *see* p. 12 n. 10 *supra*.

³² As explained below, the 2005 Greenhill Offering Memorandum and the 2008 Empire Report specifically highlighted the superior nature of Maher’s terminal in comparison to other terminals, including APM/Maersk’s, and the competitive advantage Maher enjoyed as a result of the many benefits it received. *See* pp. 26-30 *infra*. Likewise, John Vickerman, an expert in marine terminal logistics with more than 35 years of experience, detailed the myriad ways that the

The Port's rejuvenation effort, anchored by its retention of Maersk and Sca-Land in 2000, was successful and completely restored its prior decline in market share. *See p. 5 supra.* Maher, perfectly poised to participate in that rejuvenation as the Port's largest and best situated and configured terminal, realized its full share of the Port's increased business and more, posting gains of 42% in container volumes, 49% in revenues, and 64% in EBITDA between 2000 and 2006. PAFOF ¶ 254; Fischel Rep. ¶ 30, App. IV-175 at IV-189, 256.

**Maher Terminals Financial Performance
2000 - 2006**

| | 2000 | 2001 | Fiscal Year Ending October 1 | | 2004 | 2005 | 2006 | CAGR 00-06 | % Δ 00-06 |
|-----------------------------|---------|---------|------------------------------|-----------|-----------|-----------|-----------|---------------|--------------|
| | | | 2002 | 2003 | | | | | |
| Total Container Volume | 852,762 | 885,813 | 958,967 | 1,035,276 | 1,071,825 | 1,183,300 | 1,211,874 | 6.0% | 42% |
| <i>Growth Rates</i> | | 3.9% | 8.3% | 8.0% | 3.5% | 10.4% | 2.4% | | |
| Net Revenues | 258.3 | 267.3 | 276.6 | 309.7 | 319.1 | 383.7 | 383.8 | 6.8% | 49% |
| <i>Growth Rates</i> | | 3.5% | 3.5% | 12.0% | 3.0% | 20.2% | 0.0% | | |
| Cost of Services | 199.6 | 212.1 | 209.9 | 245.3 | 251.4 | 304.6 | 296.3 | | |
| Gross Profit | 58.7 | 55.1 | 66.7 | 64.4 | 67.6 | 79.1 | 87.6 | 6.9% | 49% |
| <i>Gross Margin</i> | 22.7% | 20.6% | 24.1% | 20.8% | 21.2% | 20.6% | 22.8% | | |
| General & Administrative | 26.1 | 25.1 | 27.5 | 32.6 | 35.9 | 34.3 | 34.1 | | |
| EBITDA | 32.6 | 30.1 | 39.2 | 31.9 | 31.8 | 44.7 | 53.4 | 8.6% | 64% |
| <i>EBITDA Margin</i> | 12.6% | 11.3% | 14.3% | 10.3% | 10.0% | 11.7% | 13.9% | | |
| Depreciation & Amortization | 8.8 | 10.9 | 11.8 | 13.5 | 16.8 | 19.0 | 19.7 | | |
| EBIT | 23.8 | 19.2 | 27.4 | 18.3 | 15.0 | 25.8 | 33.7 | 6.0% | 42% |
| <i>EBIT Margin</i> | 9.3% | 7.2% | 9.9% | 5.9% | 4.7% | 6.7% | 8.8% | | |
| Interest Expense | -3.3 | -4.7 | -4.5 | -3.5 | -5.2 | -5.1 | -5.3 | | |
| Interest Income | 1.6 | 1.8 | 1.2 | 1.1 | 0.7 | 1.1 | 1.8 | | |
| Pretax Profit | 22.0 | 16.2 | 24.1 | 15.9 | 10.5 | 21.8 | 30.2 | 5.4% | 37% |

Source: Maher Terminals, Inc. Audited Financial Statements 2001 - 2006. Container volumes come from Confidential Information Memorandum, January 2008.

Maher terminal is superior to APM/Maersk's. Vickerman Rep., Appx IV-315. Maher's terminal has more than 10,000 feet of linear berth space, which is 68% more than APM/Maersk's 6,000 feet, and 8,388 feet of crane rail, which is 47% more than APM/Maersk's 5708 feet, both considerably more than the 30% difference in terminal acreage. PAFOF ¶ 228; Vickerman Rep. ¶ 10, App. IV-315 at 318. The geometry and aspect ratio of Maher's terminal yields an 80% higher berth capacity than the geometry of APM/Maersk's terminal, which gives Maher greater flexibility in the use of gantry cranes and other equipment. Vickerman Rep. ¶ 10, App. IV-315 at 318. As a result of the superior characteristics and infrastructure, Maher's terminal's capacity exploded, and is projected to reach approximately 5.13 million TEUs by 2015. *See p. 22 n. 7 supra.*

The Vickerman Report is unrefuted. Although Maher's damages expert, William Kerr, stated that he found no differences in the properties that could explain the differences in the leases, *see* Kerr Rep. ¶ 80, App. IV-1 at 27, Dr. Kerr was not qualified to opine on the subject, given his complete lack of expertise in logistics and his mere passing contact with the marine terminal industry. Kerr Dep. 31:24-33:16, 37:12-38:12, App. VII-277 at 278-80.

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Fischel Rep. Ex. H, App. IV-175 at IV-256 (based upon Maher's Audited Financial Statements and the RREEF Confidential Information Memorandum dated January 2008, DB0001593-681, App. I-2034). This is obviously why Brian Maher, despite knowing that his lease terms differed from APM/Maersk's, never believed that the terms violated the Shipping Act, and also why Maher reaffirmed the rental terms of its lease in 2007 without questioning them.

G. MAHER SELLS ITS TERMINAL TO DEUTSCHE BANK FOR AN ASTOUNDING \$1.8 BILLION

While in the midst of these years of growth and profitability, Brian Maher and his brother and co-owner, Basil Maher, explored opportunities to sell the company. ID 33; PAFOF ¶¶ 255-258; Maher Dep. 92:10-13 (08-03), App. II-256 at II-273; Mosca Dep. 88:3-7, 88:17-20, 90:1-5 (07-01), App. II-63 at 74, 75; App. I-1573 at I-1632-34; Fischel Rep. ¶ 34, App. IV-175 at 191, 256. In 2005, the Greenhill Offering Memorandum was prepared for and provided to potential buyers with Maher's participation and approval. PAFOF ¶¶ 258-59; App. I-1573 at I-1574; Mosca Dep. 94:20-95:1 (07-01), App. II-63 at 76; Schley Dep. 150:18-151:9, 185:22-186:9 (08-03), App. II-224 at 226, 227-28. The Greenhill Memorandum identified Maher as the "single largest terminal operator, accounting for almost half of all [Port] volume" with "an advantageous location in terms of rail and highway access relative to most other operators" and "facilities [that] are approximately 50% larger than those of its closest direct competitor." PAFOF ¶¶ 260-61; App. I-1573 at I-1577. The Greenhill Memorandum explained that Maher had a "competitive advantage" because, unlike APM/Maersk, its focus was not limited to a particular steamship line. PAFOF ¶ 262; App. I-1573 at 1584. Additional benefits touted in the Memorandum include Maher's "state of the art gate complex," "the world's largest" straddle carrier fleet, and "ultra post-panamax" cranes, all made possible by the lease it had negotiated with the Port Authority. PAFOF ¶ 263; App. I-1573 at 1578.

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In 2007, Maher sold its Port Elizabeth terminal to Deutsche Bank through its infrastructure fund, RREEF, for \$1.86 billion, which represented at least a three-fold increase in enterprise value since 2000. PAFOF ¶¶ 257, 264; Fischel Rep. ¶ 34, App. IV-175 at 191 (citing App. I-2034 at 2041); App. I-1683 at 1692.³³ RREEF's acquisition team singled out Maher as "the only terminal operator [in the Port] not constrained by its berth," and that Maher had "a significant advantage in that [only Maher] can increase capacity significantly without altering the footprint of the facility." PA-SFOF ¶ 25; DeWitte Dep. 34:22-35:5, 65:23-66:4, S-App. II-137 at 146, 153-54. RREEF determined that Maher's resulting terminal capacity was far higher than that of other port tenants, including APM/Maersk. App. I-53 at 57-58; DeWitte Dep. 60:2-61:12, 63:15-64:19, 65:1-66:4, S-App. II-152 at 154.³⁴ RREEF concluded that Maher was thereby "well-positioned to capture" an "above average proportion" of projected growth in port-wide container traffic and revenues, and to increase its already significant market share. DeWitte Dep. 62:5-64:19, S-App. 11-136 at 153.

After the sale, Maher engaged Empire to assist Maher and RREEF in allocating the purchase price to various tangible and intangible asset categories for financial and tax reporting purposes. ID 33; PA-SFOF ¶¶ 1, 34; Shayne Dep. 43:16-44:14, S-App. II-195 at 207; Soos Dep. 16:15-17:1-23:10-13, S-App. II-81 at 86, 88.³⁵ The final January 29, 2008 report ("Empire

³³ The new owner saddled the Maher business with enormous debt, having leveraged the deal with debt equal to about 50 percent of the \$2.1 billion purchase price. PAFOF ¶ 264; Mosca Dep. 95:11-17 (08-03), App. II-118.

³⁴ PB Consultants, which was engaged by RREEF and Deutsche Bank in connection with the acquisition, concurred that, by contrast with Maher, the APM/Maersk terminal was constrained by lower berth and yard capacities. DeWitte Dep. 39:10-19, App. II-147; PA-SFOF ¶ 26; Mosca Dep. 95:11-17 (08-03), App. II-100 at II-118.

³⁵ The Empire Report's valuation figures were relied upon by Maher in its financial and tax statements, including (i) the company's opening balance sheet, which was presented to the fund's auditors at year's end; (ii) Maher's affiliates' consolidated financial statements in 2008,

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Report”) was the result of nearly six months of analysis and numerous interviews with Maher’s management, and was specifically reviewed by Maher and Maher’s auditors before it was issued.³⁶ It memorialized Maher and RREEF’s significant admissions, highly relevant to this case, regarding the superior attributes of Maher’s terminal in comparison with other terminals at the Port, as well as regarding Maher’s lease. Using information and resources provided by Maher and RREEF, the Empire Report concurred with Maher and RREEF’s view that “the terms of the U.S. Lease Agreement [EP-249] were neither materially above nor below market,” noting also that the terms “were agreed to as a result of an arms-length negotiated transaction with an independent third party, the Port Authority, as were the terms of the lease agreements for the other Port Elizabeth terminal operators.” PAFOF ¶ 273; Empire Report, App. I-2136 at 2148; Nortillo Dep. 184:16-185:15 (08-03), App. II-378 at II-389-90; *see also* ID 33-34.

The Empire Report specifically observed that the terms of Maher’s lease were comparable to the terms of other terminal operators’ leases at the Port, except for one whose lease was different “due to negotiating power and timing,” which can only be read as referring to the APM/Maersk lease.³⁷ The Report expressly stated that the “notable difference between the

2009 and 2010, including its parent’s SEC filings; and (iii) tax preparation for both RREEF and Maher. PA-SFOF ¶ 34; DeWitte Dep. 16:19-25, 111:7-14, 119:9-16, 120:6-19, S-App. II-141, 165, 167; Soos Dep. 16:4-7, 23:14-19, 101:12-15, 128:2-130:19; 131:15-20, S-App. II-86, 88, 107, 114-15; Mosca Dep. 159:5-11; 167:15-168:1, 171:7-25; 173:9-13, 174:3-7; 174:25-175:6, 176:4-8, 177:17-20, S-App. II-121, 123-25.

³⁶ *See* PA-SFOF ¶ 32; Mosca Dep. 170:12-14, 178:13-15, 184:20-23, 188:16-23, 191:5-192:5, S-App. II-118 at 123, 125, 127-29; Shayne Dep. 113:14-22, S-App. II-195 at 224; DeWitte Dep. 14:11-15:12, S-App. II-136 at 141; Soos Dep. 42:4-6, 71:9-72:9, 75:11-20, 80:10-21, 93:23-94:17, S-App. II-81 at 93, 100-02, 105-06.

³⁷ Indeed, Empire looked for third-party confirmation in other tenant leases and specifically sought information regarding “what APM pays for their lease.” PA-SFOF ¶ 7; Shayne Dep. 50:14-17, 101:25-103:11, S-App. II-209, 221-22. Maher’s controller, Lorraine Soos, instructed Empire on how to obtain the APM lease from public sources. PA-SFOF ¶ 8; Shayne Dep. 103:12-104:11, S-App. II-222; S-App. I-76 (directing Empire to the Commission’s website to

terms of the U.S. Lease Agreement and the publicly available agreements relate to the basic annual rent amount.” PAFOF ¶ 273; Empire Report, App. I-2136 at 2148-49. And as for that difference, the Empire Report expressly set forth the admissions of Maher and RREEF’s management that the difference in “basic rental amount” is attributable to the “superior nature of the Maher property,” as follows:

Management and RREEF attributed the differences in basic rental amount (and per acre rental amount) to Maher U.S.’s favorable infrastructure attributes, including: (1) depth of channel; (2) length of berth; (3) size of yard; and (4) intermodal access. Management and RREEF believe that the higher basic rental amount and per acre amount paid and to be paid by Maher U.S. reflects the superior nature of the Maher property, the additional flexibility in yard usage, and its infrastructure. RREEF and management believe that going forward, the maximum capacity constraints placed on the other terminal operators within Port Elizabeth by their infrastructure that are not applicable to Maher U.S. outweigh the marginally higher basic rental amount.

ID 34; PAFOF ¶ 274; Empire Report, App. I-2136 at 2148.³⁸

Maher thus fully realized the benefits for which it bargained in its lease: a market-rate lease for the largest terminal in the Port, a premier terminal set apart by its superior infrastructure and easily-expanded capacity, with the ability to capture the largest share of port-wide container cargo with the potential to reap an even greater share in years to come. And, none of that would

obtain the “Maersk, Port Newark Container and Maher leases”). Mark Shayne, the senior author of the Empire Report, testified that Empire specifically compared the Maher and APM leases. PA-SFOF ¶¶ 7, 9, 16; Shayne Dep. 20:8-12, 21:2-22:16, 35:8-15, 48:7-49:1, 49:21-51:10, 101:25-104:11, S-App. II-201-02, 205, 208-09, 221-22.

³⁸ As Mark Shayne, senior author of the Empire Report, attested, the Maher terminal’s superior infrastructure attributes identified in the Empire Report were what Maher and RREEF “believe[d] warrant[ed] these differences in basic rental amounts.” PA-SFOF ¶¶ 21-22; Shayne Dep. 68:4-8, S-App. II-213; *see also* Shayne Dep. 71:3-10, S-App. II-214; DeWitte Dep. 24:16-22, S-App. II-143 (explaining that RREEF “distinguished” Maher from other terminal operators based on “[i]ts infrastructure” and having “fewer capacity constraints”); PA-SFOF ¶ 24. Shayne also testified that the marginal rental rate difference was immaterial in the context of Maher’s operating costs. *See* p. 19 n. 22 *supra*.

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have come about had the Port Authority not succeeded in retaining Maersk and Sea-Land and required them to commit their cargo to the Port, as the Port Authority and other terminal stakeholders would then have been exceedingly unlikely to make the investments and undertake the extensive capital improvements of which Maher's new terminal was a part. *See generally* PAFOF ¶¶ 158-165. As Brian Maher testified, had Maersk and Sea-Land left the Port and Port volumes then plummeted as anticipated, Mr. Maher believed that the private sector "would have been crazy" to make the required infrastructure investments³⁹ and that those investments would not have been made.⁴⁰

III. PROCEDURAL BACKGROUND

A. DOCKET 07-01

On December 29, 2006, APM/Maersk filed a Complaint against the Port Authority for its failure to deliver a certain 84-acre land parcel (the "84 Acres") by December 31, 2003. The Port Authority filed a third-party complaint against Maher and Maher filed an answer and a counter-complaint against the Port Authority. ID 3-4. APM/Maersk and the Port Authority reached a settlement, which the Presiding Officer approved over Maher's objections. Init. Dec. Granting Joint Mot. for Approval of Settlement (07-01), at 44-45, Oct. 24, 2008, Doc. No. 123. As part of the settlement, the Port Authority dismissed its third party complaint against Maher with prejudice. Maher nevertheless filed Exceptions challenging the decision to approve the settlement, *see* Exceptions to Initial Dec. Approving Settlement (07-01), Nov. 17, 2008, Doc. No. 124, which the Commission rejected, *see* FMC Notice (07-01), Jul. 2, 2009, Doc. No. 141,

³⁹ PAFOF ¶ 100, M.B. Maher Dep. 154:11-155:12 (08-03), App. II-285.

⁴⁰ M.B. Maher Dep. 150:15-151:7 (08-03), App. II-284.

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and ordered that any of Maher's remaining counterclaims be consolidated with the Dkt. 08-03 litigation.

B. DOCKET 08-03

On June 3, 2008, eight years after Maher signed its lease and a year after Maher had reaffirmed its lease terms, *see* pp. 17-18 *supra*, Maher's new owner filed its complaint in this action challenging those same terms. *See* Compl. at 1 (08-03), June 3, 2008, Doc. No. 1. The complaint alleged principally that the Port Authority had violated 46 U.S.C. §§ 41106(2) and (3) and 41102(c) by "granting and continuing to grant to APMT unduly and unreasonably more favorable lease terms than provided to Maher...." *Id.* at ¶¶ IV.A-B. Maher sought a cease and desist order as well as reparations. *Id.* at ¶ VII.B.

As the Commission is aware, the Port Authority moved for summary judgment as to Maher's lease term discrimination claims as time-barred. Judge Guthridge granted the Port Authority's motion with respect to Maher's claim for reparations, and the Commission affirmed. *Init. Dec. Granting in Part Mot. for Summ. J.*, May 16, 2011, Doc. No. 120; *Order Granting in Part and Denying in Part Resp's Mot. for Summ. J.*, Jan. 31, 2013, Doc. No. 203 ("Jan. 31, 2013 Order").⁴¹ Throughout the discovery process Maher fomented numerous disputes, including waging a prolonged scorched-earth battle to thwart discovery regarding the Empire Report while

⁴¹ Maher filed a petition for review of the Commission's decision in the United States Court of Appeals for the District of Columbia and also a motion for reconsideration before the Commission. The former was dismissed for lack of jurisdiction and the latter denied as meritless. *Maher v. FMC & USA*, No. 13-1028 (D.C. Cir.), Order, Aug. 14, 2013; *Mem. Op. and Order of Pet. for Recons. (FMC)*, Feb. 11, 2014, Doc. No. 218 (Feb. 11, 2014 *Recons. Order*). Maher then appealed to the D.C. Circuit from the Commission's denial of the motion for reconsideration, which was likewise dismissed. *Maher Terminals, LLC v. FMC & USA*, No. 14-1051 (D.C. Cir.), Order, July 14, 2014, Doc. No. 1502423.

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misrepresenting the purpose and significance of the critical admissions of Maher and RREEF contained therein, as quoted by Judge Wirth and above. ID 33-34; *see* p. 29 *supra*.⁴²

On April 25, 2014, Judge Wirth issued the Initial Decision rejecting all of Maher's claims on the merits. Maher filed its Exceptions on June 9, 2014.

IV. ARGUMENT

A. JUDGE WIRTH CORRECTLY REJECTED MAHER'S CLAIMS OF UNREASONABLE PREFERENCE OR PREJUDICE BASED ON LEASE TERMS

Maher's case rests on the twin nonexistent pillars of "status proxies" and "absolute duty," both of which disregard the plain language of the Shipping Act and neither of which is supported by *Ceres Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251 (F.M.C. 1997) ("*Ceres I*"), 29 S.R.R. 356 (F.M.C. 2001) ("*Ceres II*"), a decision on which Maher entirely, but mistakenly, relies. Maher first submits that the "practical significance" of *any* difference

⁴² Maher's counsel, also representing Empire and RREEF, filed *nine separate motions* in the effort to evade discovery regarding the Empire Report, all of which were denied except with respect to a handful of document requests. *See* Empire's Mot. to Quash Subpoena Issued by PA, Apr. 14, 2011, Doc. No. 96; RREEF's Mot. to Quash Subpoena Issued by PA, Apr. 21, 2011, Doc. No. 102; Empire's Mot. for Leave to Reply & Reply to PA's Opp'n to Mot. to Quash Subpoena, Apr. 26, 2011, Doc. No. 106; Maher's Mot. for Leave to Reply & Reply to PA's Opp'n to Mot. to Quash Subpoena, Apr. 26, 2011, Doc. No. 107; Shayne, Eidman, & Brace Mot. to Quash Subpoenas Issued by PA, May 12, 2011, Doc. No. 119; RREEF's Mot. for Leave to Reply & Reply to PA's Opp'n to Mot. to Quash Subpoena, May 9, 2011, Doc. No. 116; Soos Mot. to Quash Subpoena Issued by PA, May 16, 2011, Doc. No. 121; RREEF's Mot. for Leave to File Reply & Reply to PA's Joint Opp'n to RREEF's Mot. for Leave to Reply & Reply to PA's Opp'n to Mot. to Quash Subpoena & to Strike Maher's Opp'n to Respt's Mot. to Extend Fact Discovery, May 26, 2011, Doc. No. 128; Soos Mot. for Leave to Reply & Reply to PA's Opp'n to Soos Mot. to Quash Subpoena Issued by PA, June 9, 2011, Doc. No. 135; *see* Mem. & Order on Second Set of Disc. Mots., Jan. 18, 2012, Doc. No. 172; Decision & Order, July 11, 2012 (W.D.N.Y.), Doc. 17 (enforcing the January 18, 2012 Order as to David Eidman). After consistently misrepresenting in these discovery motions, merits briefing and proposed findings of fact that Empire did *not even consider* the APM/Maersk lease when drafting the Empire Report, *see, e.g.*, Maher's Reply in Opp'n to PA's Mot to Compel the Prod. Of Docs and Depositions, May 9, 2011, at 24-25, Doc No. 115, Maher was compelled to abandon this blatant falsehood in the supplemental briefing following the ordered discovery. MTR-PA-SFOF ¶ 6; PAR-MTSB 4-7.

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between the circumstances presented by a terminal operator that is affiliated with a carrier and one that is not, no matter how significant, is mere “status” that cannot justify a difference in lease terms. Exceptions 8. Second, having thereby swept aside as meaningless all substantive differences between two such terminal operators by mislabeling them as mere “status proxies,” Maher then contends that a port authority has an “absolute duty” to give any terms provided to one terminal operator to every other terminal operator. *Id.* at 2. Thus, rather than respecting and applying the express language of the Shipping Act – which proscribes only “undue” or “unreasonable” preferences or prejudices – Maher would read the pivotal statutory language out of the Act and prohibit *any* differences in terms, even where entirely reasonable in light of the kinds of compelling justifications that were incontestably present in this case.

Maher’s utilizes its forcible misreading of *Ceres* to try to sidestep the numerous compelling reasons why the Port Authority granted certain concessions to APM/Maersk, including the undisputed dire consequences to the Port if Maersk and Sea-Land abandoned the Port, and the corollary benefits if they remained. Indeed, Maher concedes that it “does not contest the wisdom” of the Port Authority’s actions in retaining Maersk and Sea-Land. Exceptions 25; *accord id.* at 9. Equally important, Maher does not contest, and therefore concedes, that it did not present the same risks and benefits. *Id.*

As *Ceres* demonstrates, the “practical significance” of these real-world considerations is not mere status, as Maher attempts to mislabel them. *Id.* at 8. Indeed, the shoe is on the other foot. Consistent with the plain language of the Shipping Act and the pre-*Ceres* precedents applying it, *Ceres* expressly states that a port may distinguish between a terminal operator that is affiliated with a carrier and one that is not so long as its decision rests on differences beyond mere label that render any different treatment reasonable. 27 S.R.R. at 1273. *Ceres* likewise

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debunks Maher’s “absolute duty” argument by emphasizing the Shipping Act’s express contemplation of permissible preferences in lease term differences as between different port users. Part IV(A)(1) *infra*. In so holding, *Ceres* is fully in line with both the Shipping Act’s language and binding Commission precedents, and forecloses Maher’s claims.

1. The Shipping Act And The Commission’s Precedents

At the outset, the Shipping Act’s plain language squarely defeats Maher’s foundational but flawed theory that if a port grants a preferential term to one port user, it must automatically grant the same term to every other port user. Exceptions 1-2. The Shipping Act provides that “[a] marine terminal operator may not . . . give any *undue* or *unreasonable* preference or advantage or impose any *undue* or *unreasonable* prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106(2) (emphasis added). Maher’s proposed “absolute duty to make the same preferential” terms available to all tenants regardless of circumstances, Exceptions 2, would read the words “undue” and “unreasonable” right out of the statute.

Not surprisingly, Maher’s theory of what constitutes an unlawful preference (*i.e.*, any preference) stands at odds with Commission and federal court precedents interpreting the Shipping Act. *Petchem*, for example, after highlighting the statute’s use of the key terms “unreasonable” and “undue,” concluded that “[t]he Act clearly contemplates the existence of *permissible* preferences or prejudices,” adding that the Act affords a considerable degree of “flexibility in applying the antidiscrimination provisions in light of the particular circumstances existing at a given port.” *Petchem, Inc. v. Canaveral Port Auth.*, 853 F.2d 958, 963 (D.C. Cir. 1988) (emphasis added). The Commission made this same point in *Petchem*, noting that the Shipping Act “do[es] not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable.” *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 988 (F.M.C. 1986).

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The Commission's decision in *Seacon* is in accord, emphasizing that "[o]nly *undue* or *unreasonable* preferences and prejudices would be violative of the Prohibited Acts." *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (F.M.C. 1993) (emphasis in original). Indeed, the Shipping Act carefully preserves the "public port authorities[]" discretion in making managerial decisions which affect port operations so long as the Port Authority has not acted unreasonably." *Agreement No. T-2880*, 19 F.M.C. 687, 700 (1976). As *Seacon* explained, the statute safeguards the "appropriate deference" to be granted a port authority as an entity "familiar with business circumstances . . . and entitled to a presumption that it is concerned with public and not private interest." *Seacon*, 26 S.R.R. at 899. Thus, the Port Authority is "the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance," and the Commission's function is *not* to "gainsay [those] day-to-day economic decisions." *Agreement No. T-2598*, 17 F.M.C. 286, 297 (1974).

Ceres is on all fours with these precedents, roundly rejecting Maher's central contention that it was automatically entitled to whatever deal was negotiated with APM/Maersk, and upholding the determinative role of the reasonableness inquiry in the context of lease term differences. As Judge Wirth noted, *Ceres II* confirmed that "[t]he Shipping Act permits, and indeed encourages, parties to enter into agreements tailored to their individual needs," and also that "[t]he Commission's role is *not to ensure that all interested parties get the same deal or make a certain profit.*" 29 S.R.R. at 369 (emphasis added); ID 37. Instead, its "role is to ensure that parties are not precluded from obtaining preferential treatment due to *unreasonable or unjustly* discriminatory reasons." 29 S.R.R. at 369 (emphasis added); ID 37. To be sure, *Ceres* concluded that differentiation in making a favorable lease term available to terminal operators on the sole basis that one is a carrier and the other is not, without regard to each tenant's actual

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abilities relevant to the terms in question, *i.e.*, mere “status,” would be arbitrary and unreasonable, and hence unlawful. 27 S.R.R. at 1273. At the same time, however, *Ceres* explicitly acknowledged a port’s discretion to “differentiate between port users” based on “the particular facts and circumstances” of each, consistent with Shipping Act jurisprudence. *Id.*

Ceres was a terminal operator that challenged its lease with the Maryland Port Administration (“MPA”) as unreasonably prejudicial because it contained higher rates than did ocean carrier Maersk’s lease. *Ceres I*, 27 S.R.R. at 1253. *Ceres* complained that the MPA refused to give it the Maersk rates “based on a generic class distinction between terminal operators and vessel operators without any attempt by MPA to evaluate *Ceres*’ particular circumstances and ability.” *Id.* at 1255. Unlike in the instant case, however, the MPA never even attempted to provide any evidentiary support for any rationale apart from mere label or “status,” and indeed openly “maintain[ed] that its incentive rates were only available to ocean carriers who made long term vessel call commitments to the port and *Ceres*’ offers to match Maersk’s guarantees were not backed by an ocean carrier.” *Id.* at 1272.

The record in *Ceres* showed, however, that Maersk’s vessel call guarantee⁴³ was no different from what *Ceres* itself not only could provide, but indeed had consistently *offered* to provide, along with “every [other] commitment in the Maersk lease.” 27 S.R.R. at 1255, 1272. *Ceres* had offered even to “double the vessel calls guaranteed by Maersk,” *id.*, and actually “had provided more vessel calls than Maersk,” *id.* at 1257 (emphasis added). But the MPA “adamantly and persistently refused to allow *Ceres* to match the Maersk guarantees.” *Id.* at 1255.

⁴³ Maersk agreed to “make a minimum 52 direct vessel calls (excluding barges) at DMT [Dundalk Marine Terminal] in each year of the lease.” *Ceres I*, 27 S.R.R. at 1253.

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The Commission concluded that the MPA's refusal to grant the Maersk lease terms to Ceres was unreasonable because its "only" basis was "Ceres' status as an MTO," as Judge Wirth noted. 27 S.R.R. at 1272; ID 37. This status-based distinction did "not withstand scrutiny" for two reasons. *Id.*; ID 41. First, "Ceres was willing and able to provide the same sort of guarantee to MPA," such that the MPA's refusal to recognize a Ceres guarantee was arbitrary and "patently unreasonable." *Id.*; ID 41. Second, Maersk's vessel call guarantee was "not supported by a shortfall penalty or a liquidated damages provision; in the event that Maersk fails to meet its minimum requirement, MPA would have to seek traditional breach of contract relief in an appropriate state court." *Id.*; ID 41. Thus, Maersk's vessel call guarantee was ineffective to distinguish between the terminal operators because it "did not provide to MPA any more security or assurances than Ceres could have provided if it had been allowed to match the Maersk lease terms." *Id.* at 1273; ID 41.

Ceres cautioned, however, that "[i]n reaching this conclusion, the Commission does not suggest that MPA, and other ports, must apply the same rate to all customers, but if a port determines to offer volume-type discounts, it must make them available to all users who meet the criteria." 27 S.R.R. at 1273; ID 42. Thus, "[i]f there were a realistic indication that *Ceres* would have been unable to fulfill those requirements, MPA could have legitimately denied *Ceres* the more favorable lease terms." *Id.* at 1273; ID 42 (emphasis added). Indeed, the Commission unequivocally preserved a port's ability to "differentiate between port users" "based on the particular facts and circumstances of potential lessees," *id.*, including legitimate factors like "market conditions, available locations and facilities, and the nature and character of potential lessees." *Id.* at 1274. Thus, *Ceres* upheld the Commission's consistent interpretation of the Shipping Act, in line with *Seacon* and *Petchem*, as intended to preserve appropriate "deference to

the port's business decision[s],” as well as the port's “ability to negotiate leases on a case-by-case basis.” 27 S.R.R. at 1274.

Maher's “absolute duty” theory flies directly in the face of these precedents, and would impose an absurd and irrational obligation on ports to provide identical terms to every port user without regard to (i) the different transportation risks and benefits presented by terminal operators, (ii) the differing needs of tenants occupying different properties with different characteristics,⁴⁴ and (iii) the original terms that the port tailored to each tenant's needs, since each new lease, according to Maher, *see* Exceptions 16, would require the amendment of every other existing lease at the port on a continuing basis. The Shipping Act's plain language, case law and common sense all confirm that Maher's “absolute duty” theory of the Shipping Act is baseless.⁴⁵

⁴⁴ *Ceres* did not reject the notion that different lease terms may be the reasonable result of different concessions and benefits, or “gives and takes,” within each tenant's lease. Exceptions 38. The *Ceres* language on which Maher relies to suggest otherwise simply summarized the MPA's waiver argument before the ALJ that *Ceres*'s claims were barred by its “own conduct” because the MPA and *Ceres* each “made several proposals and counter-proposals and each made concessions” “to reach agreement,” and its negotiator “had a full understanding of the lease's costs, benefits and risks when he signed it.” *Ceres I*, 27 S.R.R. at 1263. The Commission's analysis did not address this argument. *Id.* at 1270-74. In any event, the MPA's waiver argument is not comparable to the Port Authority's very different point here that any differences in lease terms were balanced by different negotiated concessions and benefits, or gives and takes, between APM/Maersk's and Maher's leases and terminal properties. *See* ID 47-48; Part I(A)(2)(c) *infra*.

⁴⁵ Maher conjures up its “absolute duty” by misleadingly lifting the words “absolute” in *Ceres II* and “continuing” in *Ceres I* from their contexts. Exceptions 16; *id.* at 1-2, 27-28, 34, 40. The reference to an “absolute” duty in *Ceres II*, which cited *Valley Evaporating Co. v. Grace Line*, 14 F.M.C. 16, 21 (1970), relates solely to a discussion of the measure of damages in cases where the Commission has held that a competitive relationship is not required in proving an undue preference. *Ceres II*, 29 S.R.R. at 372. The Commission used the word “absolute” to distinguish such cases from those where a showing of competition is required. *Id.*; *Valley*, 14 F.M.C. at 21 (“an effective competitive relationship . . . is not required where the carrier's obligation to render a particular service is ‘absolute’ and not dependent upon such factors or differences” as “differing characteristics in commodities”); *see also Free Time Practices -- Port of San Diego*, 7 S.R.R. 307, 329 (F.M.C. 1966). This usage of “absolute duty” has no bearing on the element of

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2. **The Factual Record Here Is Clearly Distinguishable From *Ceres***

Once Maher's flawed "absolute duty" theory is seen for the fiction it is, its undue preference and prejudice claims cannot survive because, as discussed herein, the record establishes a host of material differences between this case and *Ceres* that fully support Judge Wirth's decision here, including: (1) the exigent need to retain Maersk and Sea-Land, including at the urging of Maher's CEO, and the concomitant Port-wide benefits of their retention, together with the obvious and uncontested fact that Maher did not present the same considerations; (2) an enforceable Port Guarantee provided by APM/Maersk that directly tied the APM/Maersk rental rate about which Maher complains to Maersk's fulfillment of its commitment, one that Brian Maher testified Maher never offered and could not provide; and (3) Maher's successful negotiation for a larger, superior terminal, with a unique potential for increased capacity, along with other key concessions not received by APM/Maersk.

a. **Unlike In *Ceres*, The Port Authority Proved That APM/Maersk Presented Port-Critical Risks And Benefits That Maher Did Not**

The record is laden with detailed, undisputed evidence, proving the exigent need faced by the Port Authority to retain APM/Maersk and its market-leader affiliates at the Port or face dire consequences, as Judge Wirth found. ID 16-19, 43-45, 48. Maher admits that it "does not contest the wisdom" of the Port Authority's decision to make the necessary concessions to secure APM/Maersk at the Port. Exceptions 25; *id.* at 9. Nor could it on this record. The Port Authority's reliance on the unique risks and similarly well-documented benefits presented by APM/Maersk was no mere abstract assertion amounting to a pure status-based distinction, as in

a Shipping Act preference violation that any preference be shown to be "undue" or "unreasonable." Maher's occasional elaboration that its "absolute" duty is also "continuing," Exceptions 16, again lifts a single word out of context from *Ceres*'s damages analysis, which held that a remand for damages proceedings was warranted because "the violations are continuing in nature and the injury is suffered over a period of time." 27 S.R.R. at 1277.

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Ceres. To the contrary, it rested on abundant contemporaneous evidence of the real-world urgency that drove the Port Authority to enter the APM/Maersk deal at Brian Maher’s vociferous urging – including Richardson’s expert analysis – which Maher does not dispute.

As explained above, during re-negotiation of the Port leases, Sea-Land, the largest carrier in the United States, had flatly rejected the Port Authority’s repeated proposals as non-competitive and told the Port Authority in no uncertain terms that “it was prepared to leave the Port if its demands were not accommodated.” ID 43; PAFOF ¶ 7; App. II-168; p. 13 *supra*. When the Port Authority failed to do so, Maersk and Sea-Land, by then working in tandem, issued an RFP, placing directly at risk approximately 23% of the Port’s container volume and indirectly placing at risk a great deal more. ID 16; pp. 13-14 *supra*.

Everyone involved understood this to be a “credible threat,” as Judge Wirth likewise concluded. ID 16, 43-44, 48; p. 14 *supra*. Everyone also understood that the consequences for the Port – and for Maher and other marine terminal operators that served the Port – would be “disastrous.” ID 17; pp. 14-16 *supra*. Port expert Paul Richardson, who contemporaneously analyzed the consequences of APM/Maersk departing – or staying – concluded that more than 50% of the Port’s volume, tens of thousands of transportation-related jobs, and approximately \$44 billion in wages hung in the balance, particularly since other ocean carriers would very likely follow market leaders Maersk and Sea-Land to other ports as volumes fell and costs per container thereby increased. ID 16; pp. 14-15 *supra*. This would have endangered the entire Port modernization project. ID 43-44; p.14-16 *supra*. The consequences to the Port of a Maersk and Sea-Land departure “would [have] be[en] severe and irrevocable.” ID 16; pp. 3 *supra*.

Brian Maher ardently concurred, warning in his letter to Governor Whitman that, if Sea-Land and Maersk relocated to another Port, “they will almost certainly be successful in routing

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most of their freight through Baltimore or Halifax.” ID 18. Mr. Maher predicted that the Port stood to lose at least “25-30% of its current volume” and “close to 100 Million Dollars annualized” in transportation jobs if the threatened exodus took place. *Id.* He warned that this “dramatic decline in volumes” at the Port “will raise the costs to the remaining business and motivate other major carriers to look for similar alternatives.” *Id.* Mr. Maher loudly sounded the alarm when he beseeched Governor Whitman to pay attention: “There is much at stake. To permit two major employers to leave the state is unthinkable and I urge you to do all that you can to prevent that from occurring.” *Id.* at 19; *see also id.* at 44.⁴⁶

Enhancing the stakes were the “concomitant, equally significant benefits” to be gained from retaining APM/Maersk at the Port. ID 16. Paul Richardson and the Port Authority’s management anticipated – correctly, as subsequent events confirmed – that retaining Maersk would “generate tremendous immediate and long term economic benefits to the Port.” PAFOF ¶ 79; App. I-373 at 396. Richardson concluded that the “Hub Port envisioned by Sea-Land and Maersk in their RFP would increase Port volume by 16% in the first year” alone, a significant expansion from Maersk and Sea-Land’s then current activity at the Port. PAFOF ¶ 75; App. I-373 at 376. The Port Authority expected that securing Maersk and Sea-Land’s cargo would have a “multiplier effect,” by influencing other carriers to increase their Port volumes as well. PAFOF ¶ 77; Ward Dep. 166:25-167:6 (08-03), App. II-402. Richardson and Port Authority management predicted that this increased cargo volume would, in turn, significantly reduce assessments and costs. ID 16; PAFOF ¶¶ 80-81; App. I-373 at 396. Richardson additionally

⁴⁶ Maher cannot escape these and other key admissions by Brian Maher through its utterly false contention that Judge Wirth held that Brian Maher’s statements “estopped” Maher’s claims. Exceptions 37-38. Judge Wirth never remotely held that Maher’s claims were estopped in any way. She simply and rightfully noted that Brian Maher’s recognition of the risks and benefits presented by APM/Maersk that were not presented by Maher was compelling evidence of the reasonableness of their different lease terms. ID 18-19, 44, 48.

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concluded that retaining Maersk and Sea-Land would create 23,300 transportation-related jobs worth \$1 billion in the first year alone, with subsequent years seeing even larger employment growth. PAFOF ¶ 79; App. I-373 at 396. Brian Maher completely agreed, telling Governor Whitman that the “successful conclusion” of the APM/Maersk lease negotiations would “stabilize the Port facilities for the next twenty-five years,” and would “secure and maximize the significant economic benefits derived from the investments the state and federal government are already making in the channels and the transportation infrastructure.” ID 19; p. 3 *supra*.

The Port Authority’s decision to accommodate APM/Maersk’s demand for \$120 million in concessions was thus not only reasonable but necessary to avoid untold billions of dollars in harm from the crippling loss of critical market-leading businesses and to secure the predicted Port-wide growth if Maersk and Sea-Land were retained.⁴⁷ And this was not simply an unadorned “give” on the Port Authority’s part. In return, it negotiated for a key concession from APM/Maersk in the Port Guarantee, which “tied the reduced rental rate” to the Port’s actual receipt of discretionary Maersk business that would have otherwise been lost to the Port. ID 44; p. 16 *supra*. There is no question – and, indeed, Maher raises no question – regarding the reasonableness of the Port Authority’s actions to retain Maersk Line’s presence and ensure the continued economic vitality of the Port.⁴⁸ See Exceptions 25.

⁴⁷ This concession did not “go[] beyond what [was] necessary to achieve th[e] purpose” of retaining APM/Maersk and Sea-Land at the Port. *Ceres I*, 27 S.R.R. at 1275. APM/Maersk’s \$120 million demand represented the difference between the Port Authority’s prior proposal and a competing proposal that Maersk and Sea-Land were prepared to accept from Baltimore, another finalist port in connection with the RFP. Nicola Dep. 75:8-76:12 (07-01), App. II-29.

⁴⁸ *Petchem*, 23 S.R.R. at 990, 992-93 (ruling that the port’s interest in promoting “reliable and continuous service at the Port” was reasonable, and justified the port’s entry into an exclusive tug operation contract in order to ensure that an experienced provider remained at the port, even while denying the complainant the right to compete); *Agreement No. T-2598*, 17 F.M.C. at 297.

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Maher's acknowledgment of the wisdom of retaining APM/Maersk, to avoid the crushing devastation of its departure and reap the crucial benefits of its continued presence, is utterly fatal to Maher's case because Maher makes *no* effort, nor could it, to show that the reasons that warranted the APM/Maersk terms applied to it as well. Exceptions 2. Because Maher did not present those same Port-critical considerations, it did not merit the same terms, as Judge Wirth explained. ID 53. Judge Wirth did not "conflate" the concession to APM/Maersk with the decision not to offer Maher the same terms, *see* Exceptions 9, 20, 25-26, but rather found that "Maher did not present the same risk as Maersk-APM," and could not provide the same benefits. ID 48; *id.* at 45; p. 33 *supra*. As Judge Wirth reasoned:

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

ID 48. Thus, Judge Wirth did *not* "determine[] that *status* caused the disparities," Exceptions 7; *see id.* at 8, 19-20, as Maher flagrantly misrepresents, but rather premised her decision on the very different benefits and risks posed by the two terminal operators, among other considerations.⁴⁹ As discussed above, Part IV(A)(1) *supra*, nothing in the Shipping Act,

⁴⁹ In further support of this distortion, Maher misleadingly extracts a single sentence fragment from the Initial Decision's discussion of *Ceres* element 1 out of context. Exceptions 5; ID 40. The Presiding Officer actually stated in full the following: "The difference between being a terminal operator and an ocean carrier impacts the lease negotiation process because these different entities *pose different risks and received different benefits*. The differences *are not based on status alone*, but, as will be discussed, later, status did have real and tangible impact on PANYNJ's negotiations with these particular entities." ID 40 (emphasis added). This holding is perfectly consistent with *Ceres*, which held that a port authority *can* distinguish between terminal operators and carriers as long as they actually present different circumstances, beyond a mere distinction in label. *Ceres I*, 27 S.R.R. at 1273; Part IV(A)(1) *supra*.

Maher attempts to dismiss all of the other compelling reasons discussed by the Presiding Officer by urging that the Shipping Act is "not a sole-fault statute, so it is irrelevant whether status

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Commission jurisprudence, or plain common sense required the Port Authority to provide the APM/Maersk concessions to Maher when Maher did not present the same compelling circumstances.

Maher's ill-conceived theory that *Ceres I* nonetheless dismissed out of hand as "status proxies" the different risks and benefits presented by terminal operators, including a threat to leave the port, misconstrues the Commission's decision. Exceptions 8-11, 20-23. *Ceres* never even referenced these topics in its resolution of the unreasonable prejudice claims. 27 S.R.R. at 1270-74. And *Ceres* certainly did not dismiss these very legitimate considerations as mere "status proxies." On the contrary, *Ceres* held that a port authority may legitimately distinguish between terminal operators and carriers as long as they actually present different circumstances, beyond a mere title distinction. *Ceres I*, 27 S.R.R. at 1273. As support for its distortion of *Ceres*, Maher repeatedly cites instead to the MPA's Exceptions or *Ceres I*'s description of the MPA's Exceptions. *Id.* at 1252-70. These passages do not contain the Commission's rulings, much less any rejection of these considerations, as Maher falsely states. Exceptions 21-23. To be sure, the MPA, among its many arguments, did assert, apparently without evidentiary support, that "it feared it was about to lose Maersk" and that "Maersk brings important benefits to the

'alone' was a reason for the discrimination." Exceptions 19. But this has it exactly backward. In *Ceres*, it was precisely because the MPA distinguished between tenants based upon "status alone" that it was held to violate the Shipping Act. 27 S.R.R. at 1273. *Ceres*'s standard for causation, relied on by Maher for its "sole fault" contention, relates to *Ceres* element 4 regarding causation of injury, and is irrelevant to *Ceres*'s "status alone" standard for *Ceres* element 3 regarding justification. Exceptions 7-8, 19-20; see *Ceres I*, 27 S.R.R. at 1270. The other cases Maher cites regarding causation likewise have nothing to do with justification for different lease terms based on reasons other than status alone. *Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 289 (5th Cir. 1978) (discussing causation for personal injury tort action under Louisiana law); *Distrib. Servs., Ltd. v. Trans-Pacific Freight Conf. of Japan*, 24 S.R.R. 714 (F.M.C. 1988) (discussing the causation standard to prove injury for unreasonable practices claim); *Port Auth. of N.Y. & N.J. v. N.Y. Shipping Ass'n*, 23 S.R.R. 21, 50 (F.M.C. 1985) (discussing causation in proving injury for claims under 1980 Maritime Labor Agreements Act).

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Port.” 27 S.R.R. at 1260-61. But the MPA did not adduce proof that these considerations drove its decisions, much less the kind of concrete proof that is replete in the record of this case, such as (i) a credible threat like the RFP here, (ii) the port’s contemporaneous analysis of the devastating consequences of a departure, and (iii) the *complainant’s* wholehearted agreement that these critical factors *justified* the lease terms in question. *See* pp. 13-17 *supra*. On the contrary, as explained in detail, *see* pp. 36-38, 44 *supra*, the MPA openly acknowledged that it had made a pure status-based distinction. *Ceres I*, 27 S.R.R. at 1272. Indeed, *Ceres* had offered to provide all the same benefits that Maersk offered, *see id.*, which is not the case here. *See* pp. 19 *supra*; Part IV(A)(2)(b) *infra*. Thus, *Ceres* in no way rejected a port’s consideration of the kinds of differences in real-world benefits and risks proven in this case.⁵⁰

b. Unlike In *Ceres*, The Port Guarantee Was An Effective, Enforceable Guarantee That Secured Benefits Maher Could Not And Did Not Offer To Match

The Port Guarantee was one component of the APM/Maersk lease among many complex, interrelated terms and considerations that, taken together, justified APM/Maersk’s lease rates. Unlike in *Ceres*, where the MPA’s defense revolved around an ineffectual and illusory vessel call guarantee, *see* 27 S.R.R. at 1272, the record in this case shows that the Port Guarantee was reasonably designed to incentivize Maersk Line to continue to ship its own cargo through the Port and thereby eliminate the grave risk that, if Maersk left, others would follow. ID 44-45; pp. 16-17 *supra*. Thus, Maher’s jab at the Port Guarantee as a “mere proxy for status” is well wide of the mark. Exceptions 26-27.

⁵⁰ Nor did *Ceres* reject the port’s need to “promot[e] [the] region’s economy” as a legitimate consideration, as Maher contends. Exceptions 20. Indeed, such an incredible holding would be contrary to the port’s duty to do just that. *Petchem*, 23 S.R.R. at 990. *Ceres* simply held that, in promoting the region’s economy, a port cannot establish criteria for reduced rates and then arbitrarily refuse to give those rates to others who meet the criteria. *Ceres I*, 27 S.R.R. at 1274.

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The Port Guarantee secured a qualitatively different, far more critical, benefit to the Port than did the *Ceres* vessel call guarantee. Under the *Ceres* guarantee, Maersk agreed to “make a minimum of 52 direct vessel calls” at the port in each year of the lease. 27 S.R.R. at 1253. This was a promise simply of volume that could be satisfied with any sort of cargo from any source. There was no promise, for example, that the vessels would be carrying Maersk’s own cargo as distinguished from that of other carriers. Accordingly, this pure volume-based type of guarantee was one that *Ceres* could match, and indeed repeatedly did offer to match, given its longstanding relationships with a variety of carrier customers. *Id.* at 1257, 1272. In contrast, the Port Guarantee requires that a certain number of fully loaded containers carrying Maersk Line’s *own* cargo be transported to and from the Port each year, regardless of terminal. ID 21. Thus, the Port Guarantee ensures that Maersk will continue to direct its own discretionary cargo into the Port instead of sending it elsewhere, a requirement that cannot be satisfied by making vessel calls with other carriers’ cargo that would have been destined for the New Jersey/New York region anyway. Because Maersk was the industry leader and anchor, this commitment to continue routing its own cargo through the Port – which could otherwise have gone to competing ports – was a real, non-illusory benefit. *See pp. 14-17 supra.*

The Port Guarantee also easily passes the two determinative tests that the *Ceres* vessel call guarantee failed. First, unlike in *Ceres*, where the complainant repeatedly offered and proved its ability to provide the same guarantee, 27 S.R.R. at 1255, 1257, 1272, Maher expressly acknowledged that it could not and would not offer to provide a similar port guarantee. ID 45-47; pp. 19 *supra*. Maher’s protest, that its “failure to offer” is “irrelevant,” Exceptions 27, is inexplicable, given the Commission’s emphasis on *Ceres*’s repeated offers to match the vessel call guarantee. 27 S.R.R. at 1255, 1257, 1272. Indeed, *Ceres* expressly held that *Ceres*’s

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willingness and ability to offer the same terms was not only relevant but *determinative*. *Id.* at 1272 (MPA’s reliance on “Maersk’s vessel call guarantee, by virtue of its status as a carrier, is patently unreasonable in light of Ceres’ abilities to fulfill the terms of the Maersk lease”). As the Commission expressly stated, “[i]f there were a realistic indication that Ceres would have been unable to fulfill those requirements [of the vessel call guarantee], MPA could have legitimately denied Ceres the more favorable least terms.” *Id.* at 1273. Here, however, there was not just a “realistic indication,” but an indisputable unwillingness and inability to provide the Port Guarantee, as attested to under oath by Maher’s CEO. That Maher has the temerity to argue that its “failure to offer” is “irrelevant” is perhaps as good an illustration as any of the complete lack of merit in Maher’s entire case.

The second determinative factor noted by *Ceres* for rejecting the vessel call guarantee as a legitimate distinguishing factor was that the vessel call guarantee was not backed by any “shortfall penalty or a liquidated damages provision,” and hence was toothless. 27 S.R.R. at 1272. As a result, even if Maersk had failed to meet its vessel call guarantee, it would still receive the concessions under its lease. *See id.* By contrast, the Port Guarantee includes substantial shortfall penalties that make the rental rate directly dependent on APM/Maersk’s fulfillment of its commitments. ID 46; pp. 16-17 *supra*. If Maersk brings in insufficient cargo, APM/Maersk loses the benefit of its base rental rate under a sliding scale formula, as has already occurred. ID 46; p. 17 *supra*. If it fails to bring *any* cargo through the Port, APM/Maersk’s rental rate would skyrocket, and would be higher than Maher’s. ID 45-46; p. 17 n. 18 *supra*. While Maher dismisses this “hypothetical rent” as beside the point, Exceptions 32-33, it is *exactly* the point. The Port Guarantee makes APM/Maersk’s rental rate directly dependent upon

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the continuation of the unique benefit that APM/Maersk provides, the continued flow of Maersk Line cargo traffic through the Port.⁵¹

Maher claims that the Port Authority “decided in 2010 *not* to enforce the ‘port guarantee’ cargo requirement.” Exceptions 29. Not only is this patently untrue, but in its January 31, 2013 summary judgment ruling, the Commission rejected this very same meritless contention. According to Maher, the only legitimate manner by which to enforce the Port Guarantee would be to “actually require the allegedly guaranteed cargo to be provided to the port,” *id.*, presumably by seeking a mandatory injunction or specific performance order, rather than the remedy provided in the lease. As the Commission held, however, “Maher’s argument that the port guarantee was otherwise enforceable, *e.g.* by specific performance, is not persuasive.”⁵² Jan. 31,

⁵¹ Maher makes the bizarre contention that: “[t]he 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, ID at 46, flatly contradicts the January 31, 2013 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.” Exceptions 33 (emphasis in original). Maher’s argument sets a new high-water-mark for the intertwining of mischaracterizations with *non sequiturs*. The Port Authority did not refuse to provide Maher with a port guarantee, but rather Maher could not and did not offer to provide it. ID 46-47. The Presiding Officer did not “conclude” otherwise. *Id.* The remedy for failure to meet the Port Guarantee was expressly set forth in the APM/Maersk lease that was publicly filed before Maher signed its lease and of which Maher was fully aware. See Jan. 31, 2013 Order at 14. And what the Commission held in its January 31, 2013 Order was that the statute began to run on Maher’s unreasonable preference claim when it knew of the differences in lease terms, and was thereby on notice sufficient to require it to determine whether it wished to bring a claim within the three-year statute of limitations. *Id.* And the Commission most definitely did *not* conclude that *Ceres* element 3 “was met.”

⁵² Of course, mandatory injunctions are disfavored, since courts are not designed to run a business, and specific performance is inappropriate where the contract includes an adequate monetary remedy. See *Park Village Apt. Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008); *D.D. ex rel. V.D. v. N.Y. City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006); *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004); see also *Ceres*, 27 S.R.R. at 1272 (ruling that a shortfall penalty or liquidated damages provision is preferable to ordinary breach of contract remedies); *INEOS Ams. LLC v. Dow Chem. Co.*, 378 F. App’x 74, 77 (2d Cir. 2010); *Pritzker v. Yari*, 42 F.3d 53, 72 (1st Cir. 1994); *N. Ind. Pub. Serv. Co. v. Carbon Cnty.*

[REDACTED]

2013 Order at 14; *accord* Feb. 11, 2014 Recons. Order at 8; PARB 79-80. As the Commission ruled, “the remedy available to PANYNJ” was the rent penalty, and that is the remedy the Port Authority has rightly employed. Jan. 31, 2013 Order at 14; *see also* Feb. 11, 2014 Recons. Order at 8.⁵³

Equally meritless is Maher’s suggestion that the Port Guarantee is ineffective simply because Maersk has fallen short of the requisite volume thresholds. Exceptions 29. Even though the global recession that began in 2008 reduced shipping volumes industry-wide, Maersk continued to direct its crucial at-risk cargo to the Port.⁵⁴ *See* PARB 80-81. And of course, when Maersk’s volume fell below the thresholds, APM/Maersk’s rent increased substantially. ID 46; pp. 17 *supra*.⁵⁵

Coal. Co., 799 F.2d 265, 279 (7th Cir. 1986). Moreover, because compliance with the Port Guarantee is determined retrospectively on an annual basis, a forward-looking mandatory injunction would be particularly impracticable.

⁵³ Maher’s accusation that the Port Authority “defined” the Port Guarantee “so that Maher could not offer to provide it,” Exceptions 27-28, is not supported by any evidence, and is utterly false. The record conclusively shows that when APM/Maersk demanded a \$120 million concession as the price for keeping Maersk in the Port, the Port Authority responded by negotiating for a set of commitments in return that included the Port Guarantee. ID 21-22, 44-46, 48; PAFOF ¶¶ 122-124; App. I-1159 at 1161; pp. 16-17 *supra*.

⁵⁴ As APM/Maersk and Maersk Line stated in a joint letter in 2009, “notwithstanding [the prevailing] general economic conditions, in 2009 Maersk Line has engaged in initiatives to increase volumes at the Port . . . Without these initiatives, the volumes declines [sic] in the Port could well have been worse.” App. I-2482 at 2483, 2487-88.

⁵⁵ Maher’s complaint that the Port Guarantee “did not start until 2008” is equally unavailing. Exceptions 29. Maher was well aware when it signed its own lease that the APM/Maersk Port Guarantee start date was expressly tied to completion of the dredging project. Maher’s minimum throughput rent guarantee likewise did not start until 2008 for similar reasons. PARB 81-82 & n.81; PAFOF ¶¶ 173, 187; App. V-1 at 99.1-99.2; App. V-254 at 340-41, 345, 348; *see* p. 22 *supra*.

[REDACTED]

c. Unlike In *Ceres*, Maher Received A Superior Terminal Along With Other Benefits It Sought That APM/Maersk Did Not Receive

The record provides abundant proof that Maher's lease reflects its successful negotiation for a number of key benefits – including the largest, premier terminal at the Port – that APM/Maersk did not receive under its lease. *See pp. 24-26 supra*. This proof includes Maher's and RREEF's own damning admissions that Maher's superior terminal explained its marginally higher rental base rate and provided Maher with a competitive advantage over other terminals at the Port, including APM/Maersk. *See pp. 27-29 supra*. This proof of Maher's superior terminal further distinguishes this case from *Ceres*, where, if anything, *Ceres*'s terminal was “demonstrably inferior” to Maersk's terminal. 27 S.R.R. at 1258; ID 33-34, 40.

As Judge Wirth found, “Maher and Maersk-APM are not provided an ‘identical service’ because the leased property is significantly different” as to “size, depth, berthing options, buildings, and access to transportation and infrastructure.”⁵⁶ ID 40; pp. 24-26 *supra*. These differences unequivocally favored Maher. First, Maher's terminal was the largest in this land-scarce port, some 30% larger than APM/Maersk's terminal, with proportionately even greater linear berth and crane rail. ID 9-10; App. I-2387 at 2389, 2391; pp. 24-26 *supra*. Maher's new terminal consolidated its operations from the two properties it held under earlier leases into a single terminal. ID 9, 13. As the Vickerman Report explained, Maher's new terminal not only removed major redundancies, *see pp. 24 supra*, but was ideally configured, in terms of geometry, aspect ratio, linear berth space and crane rail, to maximize throughput capacity. *See p. 25 supra*.

⁵⁶ Maher contends that the Presiding Officer applied the “incorrect standard” of “‘identical service’” rather than the purportedly correct standard of “‘same service.’” Exceptions 12, 39. Maher does not explain how these two standards differ, since the words “identical” and “same” have the same, identical meaning.

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As a result, Maher's capacity exploded, positioning it to capitalize on the rejuvenation of the Port in the wake of the retention of the Maersk Line cargo.⁵⁷ *See p. 25 supra.*

Moreover, the record is replete with Maher's and RREEF's own admissions confirming the superiority of Maher's terminal in multiple respects and the immense benefits it reaped under its lease. *See pp. 26-30 supra.* The 2005 Greenhill Memorandum that Maher provided to potential buyers hailed the Maher terminal as "the single largest terminal operator, accounting for almost half of all volume," with facilities 50% larger than its competitors and "an advantageous location in terms of rail and highway access," indeed, the "undisputed preferred commercial location" at the Port; touted the significant infrastructure improvements made to Maher's terminal under EP-249 as a result of the Port Authority's substantial investment; and emphasized that Maher, as a pure terminal operator, possessed a significant advantage over APM/Maersk, whose affiliation with Maersk Line deterred other carriers from calling at its terminal. PAFOF ¶¶ 260-63; App. I-1573 at 1577, 1581. When the Maher brothers successfully sold their terminal to Deutsche Bank through its infrastructure fund, RREEF, for the astounding sum of \$1.86 billion in 2007, RREEF echoed these sentiments, lauding Maher's terminal as the only one at the Port not constrained by its berth and capable of readily increasing its capacity. *See pp. 27, 29 n. 38 supra.*

The Empire Report, which Judge Wirth quoted at length, contained additional damning admissions by Maher and RREEF to the same effect, including that the Maher lease was at "market," and that the difference between the base rent in its lease and lower base rent of one of

⁵⁷ Maher obtained a number of additional concessions from the Port Authority that enhanced its terminal's superior function and profitability, including huge sums of low-cost financing and free capital, continued adjacent access to and right to manage the ExpressRail, the flexibility to stevedore non-container cargo like automobiles, and the relief it sought regarding future changes of control, all through direct negotiation without the risks of competitive bidding. *See pp. 12, 17, 19-21 supra.*

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its neighbors (which could refer to no terminal other than APM/Maersk) was justified by the advantages in the Maher terminal's physical characteristics. ID 33-34, 40; p. 29 *supra*. Perhaps nothing better demonstrates the significance of the Empire Report and the damning nature of the admissions contained within it than the extraordinary lengths to which Maher went to try to prevent the Empire Report from seeing the light of day, to obstruct the discovery about it that Judge Guthridge fortunately ordered, and to deny and evade its obvious import. *See* ID 34; pp. 31-32 n. 42 *supra*. For years, Maher, RREEF and its consultant Empire (all represented by Maher's counsel) conducted a coordinated campaign to bury the Empire admissions, and then fought desperately to avoid any discovery into their admissions, including by refusing to produce its authors for deposition without compulsion orders. *See In re Subpoena of David Eidman* (W.D.N.Y. Feb. 21, 2012), Mem. in Support of PA's Motion to Enforce FMC Subpoena at 1-2, 8-9; *see* pp. 31-32 n. 42 *supra*.

The testimony of the Empire Report's authors, once finally obtained, ultimately revealed why Maher had expended so much time, money, and effort to keep them silent. For years, Maher had dismissed the importance of the Empire Report by claiming that Empire had not even *considered* APM/Maersk's lease, the effect of which, if true, would have been to undermine the Maher and RREEF admissions that Maher's lease was at "market" and attributing "the differences in basic rental amount and per acre rental amount" between Maher and the one unnamed neighbor whose rent was lower "due to negotiating power and timing" – APM/Maersk – to the "superior nature of the Maher property, the additional flexibility in its yard usage, and its infrastructure." PA-SFOF ¶ 6; Empire Report at 13, App. I-2136 at 2148. The Empire testimony, however, confirmed this was a direct falsehood, and that Empire, with Maher's knowledge and assistance, obtained the APM lease and included it in the analysis of other leases

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to verify that Maher's lease was neither above nor below market. *See* pp 28-29 *supra*.⁵⁸ The testimony also confirmed that the Empire Report was not some casual document, but was carefully reviewed by Maher and its auditors before it was issued, and was then used in its SEC and tax reporting. *See* pp. 27-28, n. 35 *supra*.

The record in *Ceres* did not contain any comparable evidence to the effect that Ceres's terminal was superior. Indeed, the only contention was that Ceres's terminal was "demonstrably inferior" to Maersk's terminal. *Ceres I*, 27 S.R.R. at 1258. Here, in contrast, the Maher terminal's proven *superior* size and characteristics confirm that, as Brian Maher recognized, the Port Authority had in no way discriminated against Maher or otherwise violated the Shipping Act.⁵⁹ *See* ID 40 ("variation in rental terms is to be expected" where, as here, the terminal operators' properties are significantly different); *id.* at 53 "[e]conomic realities justify PANYNJ not offering the same terms to Maher, which received different benefits (such as a larger terminal) and posed different risks"); *Seacon*, 26 S.R.R. at 900 ("it would be impossible for the Port to insure that all of its tenants are identically situated, since each parcel and each operator has geographical and commercial idiosyncrasies").

⁵⁸ Maher's and RREEF's repeated contemporaneous admissions recognizing the clear superiority of the terminal Maher received under EP-249 entirely defeat Maher's disingenuous comment that APM/Maersk's terminal was "more desirable." Exceptions 40 & n.82. The draft analysis from 1997 and a Maher-authored memorandum from 1998 that Maher cites did not compare the terminals as redeveloped and reconfigured under the 2000 leases, in contrast to the 2005 Greenhill and 2008 Empire analyses. PAR-MTFOF ¶¶ 96-97, 99; App. 1A-60-64, App. 1A-270-71.

⁵⁹ PAFOF ¶ 277; M.B. Maher Dep. 206:18-207:3 (08-03) App. II-292 ("I knew that there were differences in the Maher and Maersk lease before I signed the Maher lease. And if I had thought that . . . the Maersk lease was in violation of the Shipping Act, I would have raised it then. I had no reason to think that the Maersk lease was in violation of the Shipping Act . . . it didn't even cross my mind."); *see also* PAFOF ¶ 279; M.B. Maher Dep. 14:10-16:13 (08-03), App. II-258; *id.* at 220:18-22, App. II-295 ("I was surprised to learn that Maher's [new owner's] counsel thought that there was a Shipping Act violation in connection with the Maersk/Sea-Land lease, whenever that was, which I think was the summer/early fall of 2007.").

[REDACTED]

3. **Maher Cannot Avoid Rejection Of Its Claims By Relying on Non-Existent Legal Constraints**

a. **The “Expressed At the Time” Fallacy**

Maher’s Exceptions are littered with references to Judge Wirth’s purported failure to find that the Port Authority had “expressed” various reasons for different lease terms “at the time” or that the Port Authority made a “contemporaneous particularized analysis,” as if those were requirements of the Shipping Act. *See, e.g.*, Exceptions 9, 12-13, 15, 20, 39, 41, 48. But there are no such requirements. The Shipping Act requires only that any preference be reasonable, *see* 46 U.S.C. § 41106(2), and, as *Ceres I* explained, that determination that is made “based on the particular facts and circumstances of potential lessees,” not on whether all of the facts that go into reasonableness were the subject of contemporaneous communications or written analyses. 27 S.R.R. at 1273. Accordingly, there is no basis for simply ignoring, as Maher urges, (i) the very different risks and benefits posed by the two different terminal operators, Exceptions 9; (ii) the differences between the two terminals, *id.* at 12-13; (iii) the different needs of and concessions made by the different terminal operators, *id.* at 38-39; (iv) APM/Maersk’s port guarantee, *id.* at 41; (v) the respective creditworthiness of Maher and APM/Maersk, *id.* at 48; and (vi) Maersk Inc.’s corporate guarantee, *id.*

Maher’s “expressed at the time” premise is founded on a single phrase contained in *Ceres I*, that Maher distorts and takes out of context. *Ceres I* held that the MPA’s only reason for discrimination was status, and rejected as pretextual the justification that the MPA “expressed” for the first time *at oral argument before the Commission*. 27 S.R.R. at 1273 n.52. There is no rule that unless a port specifically and contemporaneously communicates to a tenant each individual factor underlying its lease terms, or reduces an analysis to writing, the port is precluded from relying on those factors to show the reasonableness of lease terms if there is a

[REDACTED]

later challenge. Such a rule would lead to absurd and unjust results, particularly where, as here, the facts were already well known to the negotiating parties. Indeed, parties to negotiations frequently reach agreement for reasons that do not need to be verbalized. For example, as Maher's CEO explained, it was so obvious that Maher could not provide a port guarantee that it did not even rise to the level of a topic of conversation in the negotiations. PAFOF ¶ 139; M.B. Maher Dep. 221:19-222:5 (08-03), App. VII-229-30; ID 47.

b. APM/Maersk's Credible Threat To Leave The Port

Maher attempts to dismiss as a supposedly illegitimate consideration Maersk and Sea-Land's credible threats to leave the Port, threats which were of such concern to Brian Maher that he vigorously lobbied all who would listen to do whatever was necessary to retain APM/Maersk at the Port. *See* pp. 15-16 *supra*. Maher protests that "[a] threat to leave the port (with attendant risk)" is not a legitimate consideration, because "[a] valid transportation purpose pertains only to differences in the nature or cost of the services provided." Exceptions 10. No such illogical principle can be found in any of the cases Maher cites. Moreover, none of those cases even involved alleged lease-term discrimination, much less said anything about a port's consideration of *either* the proven devastating consequences – for the vitality of the port and its MTOs and other constituents – of a credible threat of a critical tenant to leave the port, *or* the countervailing benefits of retention. They merely stand for the sound principle, consistent with *Ceres*, that an arbitrary reliance on status alone cannot justify rate differences.⁶⁰

⁶⁰ *See* "50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coasts Ports, 24 S.R.R. 411, 464-65 (F.M.C. 1987) (tariff provisions regarding stripping and stuffing improperly made distinctions between port users "solely on the basis of their identity" and not "on the basis of any Shipping Act transportation circumstances"); *Co-Loading Practices of NVOCCs*, 23 S.R.R. 123, 131-32 (F.M.C. 1985) (rejecting a proposed Commission rule regarding "special co-loading tariff rates" for the "exclusive use" of "NVOCCs" because "the identity of a shipper is not a legitimate transportation factor"); *Rates Which Exclude Certain Classes of Shippers*, Circular Letter No. 1-85, 23 S.R.R. 460, 461 (F.M.C. 1985) (invoking

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Indeed, the Commission clearly held in *Petchem* that the risk of loss of an entity granted a preference *can* support a finding that the preference is reasonable. *Petchem* held that the port's grant of an exclusive franchise for commercial tug services to Hvide, while denying a franchise to Petchem, was reasonable based on port circumstances and "the particular identity and circumstances of the companies running those tugs." 23 S.R.R. at 994; *see id.* at 990-95. The Commission noted that "the Port Authority cannot regard as mere bluff Hvide's statements that *it will consider withdrawing from Port Canaveral* if it must share commercial business with Petchem," adding that, "[i]f that happened, the record indicates that Petchem would have its hands full with its military work and would not be able to provide adequate commercial service." *Id.* at 994 (emphasis added). The Commission therefore concluded that it "does not believe that Petchem has met its burden of proving the Port Authority was or is unreasonable in refusing to allow it to compete with Hvide." *Id.* *Petchem* thus clearly supports that a credible threat to leave the port can be a justification for preferences, just as Judge Wirth held.⁶¹ ID 48, 53.

Supreme Court decision that a carrier was not permitted to "discriminate in fixing the charge for carriage [of cargo], not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods"); *Puerto Rico Maritime Shipping Academy – Rates of Government Cargo*, 18 S.R.R. 830, 835-39 (F.M.C. 1978) (carrier's tariff rates and commodity classifications for "Government Cargo" must be "based upon legitimate transportation factors and not solely upon the identity of the shipper"); *Dep't of Defense v. Matson Navigation Co.*, 17 S.R.R. 1, 5 (F.M.C. 1977) ("rates for the carriage of government cargoes [must] be established on the same basis as commercial rates").

⁶¹ Contrary to Maher, the Commission's decisions in *Matter of Agreements* and *Ballmill* did not hold otherwise. Exceptions 20-21. *Matter of Agreements* did not even involve an MTO's challenge to a port decision based, in part, on a market leader's threat to leave the port, but instead concerned another port's (unsuccessful) claim that defendant port's practices were "monopolistic." *In the Matter of Agreements No. T-2108 & T-2108-A Between the City of Los Angeles & Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd. & Yamashita-Shinnihon Steamship Co., Ltd.*, 10 S.R.R. 556, 559 (A.L.J. 1968). Likewise, *Ballmill* does not say that a port's decisions cannot be justified by, among other factors, a market leader's threat to leave the port and proven devastating consequences. *Ballmill Lumber & Sale Corp. v. Port of N.Y. Auth.*, 10 S.R.R. 131, 138-39 (F.M.C. 1968). Instead, *Ballmill* found an

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4. Any Differences In Lease Terms Were Reasonable

As discussed above, APM/Maersk and Maher negotiated complex thirty-year leases of two very different terminals reflecting a variety of disparate considerations. APM/Maersk obtained certain concessions that Maher did not based on the grave risk it posed to the Port, with proven consequences, and the corollary benefits it offered. Meanwhile, Maher pursued – and received – an entirely different set of benefits and concessions that APM/Maersk did not. Maher’s attempt to conduct a blindered term-by-term comparison, devoid of context, has been roundly rejected by the Commission, which held that it “is not required to tally and compare exactly what benefits were received by the relevant parties.” *Seacon*, 26 S.R.R. at 900. Viewed in the entire context, Maher’s lease terms were not prejudicial as compared to APM/Maersk’s – and certainly not unreasonably prejudicial, *see* ID 47-53, as unequivocally confirmed by, *inter alia*, (i) the testimony of Maher’s long-time CEO; (ii) Maher’s enormous success and profitability under its lease; (iii) its 2007 sale of its terminal for \$1.8 billion; (iv) its reaffirmation of its lease terms at that time; and (v) the binding admissions contained in the Greenhill Memorandum and Empire Report before and after the lucrative terminal sale. *See* pp. 18, 24-30 *supra*.

a. Base Rental Rate

As Judge Wirth explained, “it is impossible to conduct an exact, apples-to-apples comparison” of two terminals’ base rents “because of the multiple factors impacting rent.” ID

unreasonable preference where the port permitted a longstanding tenant to unload its own lumber – a right not afforded complainant – based on the preferred tenant’s history with the port, “heavy investment” in the port, and “long-established equities which had accrued to [it].” *Id.* at 133, 138-39. While the port conclusorily “pointed out” that the preferred tenant also “was ready to leave” the port, *id.* at 138, this comment was not addressed in the Commission’s decision.

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47.⁶² While APM/Maersk's base rent of \$19,000 per acre per year appears on the surface to be lower than Maher's base rent of \$39,750 with a 2% annual escalator, *see* pp. 18-19 *supra*, the dollar differential is mitigated by the Port Guarantee and otherwise explained by the surrounding circumstances.

As events have confirmed, APM/Maersk's rent is highly variable due to the Port Guarantee, which Maher could not and did not offer to provide, and which makes it impossible to conduct a purely facial comparison between the base rents. ID 47; pp. 16, 18-19 *supra*. The Port Guarantee reflects the enforceable promise of a critical ocean carrier, which had credibly threatened to pull its business from the Port, not only to maintain but to increase its business at the Port. ID 47-48; pp. 14-17 *supra*. The Port Guarantee's penalty provisions ensure that if APM/Maersk falls short of its guaranteed levels, its rent will substantially increase, as it already has. ID 47; pp. 16-17 *supra*. Moreover, the dollar value of the base rent differential is miniscule in the context of Maher's total operating expenses.⁶³ And in any event, Maher and APM/Maersk presented entirely unique benefits and risks and pursued very different needs and concessions, and, as a result, received very different leases for very different properties and infrastructure. ID 40, 47-48. Indeed, Maher's long-time CEO, having received the benefits and superior terminal he sought, knew that there was no unlawful discrimination or other violation of the Shipping Act notwithstanding the marginal difference in rental rates.⁶⁴

⁶² Brian Maher said the same thing. *See* PAFOF ¶ 240; M.B. Maher Dep. 99:9-101:2 (08-03), App. VII-199 ("impossible to make exact comparisons between any two leases").

⁶³ *See* p. 19 *supra*.

⁶⁴ *See* 18 *supra*.

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b. Minimum Throughput Rent And Terminal Guarantees

Maher likewise has failed to demonstrate any preference for APM/Maersk, much less an unreasonable preference, based on the differences between its and APM/Maersk's minimum throughput rent guarantee and terminal guarantees, which Maher grossly mischaracterizes. Exceptions 29-34. As Judge Wirth correctly observed, Maher's and APM/Maersk's guarantees per acre are "essentially identical" during the first and second Terminal Guarantee Periods. ID 51; *see pp. 21-22 supra*. Only during the third period does any apparent difference arise and, in the case of the rent guarantee, it is *APM/Maersk* that has the greater obligation. ID 51.

Although Maher's terminal guarantee in the third period is greater than APM/Maersk's, this is offset by the facts favorable to Maher that (1) APM/Maersk has the more onerous, date-certain, trigger for this final period, instead of its being conditioned on the prior completion of the fifty-foot dredging as is Maher's third guarantee period;⁶⁵ (2) Maher must meet its third period target only once every three years, whereas APM/Maersk must meet its target every two years; and (3) Maher's third period target level, while the higher of the two, is only a small fraction of Maher's anticipated throughput capacity and is not realistically burdensome.⁶⁶ *See pp. 21-22 supra*. Maher has thus not shown that the various, counterbalancing differences as between its and APM/Maersk's minimum throughput rent and terminal guarantees were even prejudicial, much less unreasonably so. ID 51.

⁶⁵ Even if Maher's prediction is correct that the dredging project will be completed by APM/Maersk's January 1, 2015 trigger date – and that remains to be seen – that would not undercut Maher's successful negotiation back in 2000 for a more favorable trigger linked to the dredging project's completion. Exceptions 53-54.

⁶⁶ The differences between the termination rights in the two leases are also insignificant, because there is only a minimal likelihood that either terminal operator will trigger the termination right, given the terminal guarantee's low levels. *See p. 22 n. 27 supra*.

[REDACTED]

c. Construction Requirements and Financing

Similarly, Maher's construction and financing terms were not prejudicial, much less unreasonable, as compared with APM/Maersk's. ID 50. On the contrary, APM/Maersk had to perform more Class A and B construction per acre, while receiving proportionately less cheap financing and free financing from the Port Authority than Maher. ID 49; pp. 19-20 *supra*. At the same time, Maher had greater flexibility to use its financing to perform optional Class C work – a benefit not given to APM/Maersk and of which Maher has taken full advantage. ID 49; p. 20 n. 23 *supra*. Although Maher's financing rate was a little higher than APM/Maersk's, by 25 basis points, this simply reflected the terminal operators' respective creditworthiness.⁶⁷ ID 50; pp. 20-21 *supra*. Specifically, Maher's financing rate was attributable to its history of arrearages that it continued to repay right through its lease negotiation,⁶⁸ and was actually lower than both its earlier financing rate with the Port Authority and the rates available from other lenders. ID 50; pp. 20-21 *supra*. Meanwhile, APM/Maersk's lease obligations were fully secured by an affiliate's guarantee, while Maher's were not. ID 50.

⁶⁷ Maher's challenge to Mr. Borrelli's Declaration, explaining this disparity in creditworthiness, is unpersuasive. Exceptions 45-47. First, the Commission held on summary judgment, unlike trial courts governed by the Federal Rules of Evidence, Commission adjudications are "governed by liberal evidentiary rules" that admit all evidence that is not immaterial, unreliable, or unduly repetitious – and presume the admissibility of "challenged evidence." Jan. 31, 2013 Order at 8-9. Second, there was nothing improper about Mr. Borrelli's account of events, which was based on his role as manager of the Port Authority credit department that conducted all creditworthiness assessments during the relevant time period. Borrelli Decl. ¶ 2, App. III-1013 at 1014. In that role, he implemented the Port Authority's policies for determining security deposits and financing rates, and directly supervised the creditworthiness assessments for Maher and APM. *Id.* at ¶¶ 2, 4, App. III-1013 at 1014. Third, Maher has demonstrated no prejudice from its receipt of the Borrelli Declaration as part of the Port Authority's opposition briefing, *see* Exceptions 47, particularly since the Port Authority's interrogatory responses, filed three years earlier, had likewise noted the difference in creditworthiness as the reason for the differences in financing rates and security requirements. *See* App. III-338 at 383-84; App. III-443 at 474.

⁶⁸ Maher's attempt to dismiss its history of arrearages based on "Maersk-APM's contemporaneous arrearage" misrepresents the record. *See* p. 21 n. 26 *supra*.

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d. Security Deposit

Maheer's modest security deposit (approximately one month's rent) at trivial cost was not prejudicial. APM/Maersk simply provided an entirely different form of security, a corporate guarantee that secured not merely one month's rent but *all* of APM/Maersk's financial obligations including the Port Guarantee. *See* pp. 23 *supra*. Maheer could not provide a similar guarantee.⁶⁹ Thus, the modest security deposit was reasonable, particularly given Maheer's history of arrearages. *See* pp. 20-21 *supra*. As for the 2007 increase – which Maheer never pleaded as a violation, ID 52 – this was part of the consideration for the Port Authority's consent to Maheer's change of control in the sale of the terminal for \$1.86 billion to Deutsche Bank. ID 31; p. 26 n. 30 *supra*. APM/Maersk never underwent a comparable change in control.

e. First Point of Rest

Maheer's first point of rest was the direct product of its insistence that it continue to be permitted to stevedore automobiles. *See* pp. 23-24 *supra*. Since APM/Maersk never intended to stevedore automobiles, which Maheer does not dispute, a first point of rest was simply irrelevant to APM/Maersk. *Id.* The first point of rest was neither prejudicial – indeed, Maheer has virtually ignored its strictures – nor unreasonable. ID 53; pp. 23-24 *supra*.⁷⁰

5. Maheer's So-Called Class Subsidy Claim

There is no "Class Subsidy" claim in this case. *See* Exceptions 2, 9, 12, 35-37. To be sure, Maheer argued in its initial brief on the merits, as part of its argument that APM/Maersk had received a preference, that Maheer's terminal subsidized the lower APM/Maersk rent in some

⁶⁹ While Maheer oddly asserts that it "provided a corporate guarantee," Exceptions 44, Maheer merely agreed to perform under its lease; it had no affiliate that could provide a guarantee. PAR-MTFOF ¶ 324; Borrelli Dec. ¶ 10, App. III-1013 at 1016.

⁷⁰ Brian Maheer testified that he did not view the first point of rest to be a "terribl[y] important issue." PAFOF ¶ 216, M.B. Maheer Dep. 121:22-25, App. VII-174 at 204.

[REDACTED]

respect. *See* MTIB 26, 46-57. But Maher never pleaded or otherwise presented any such “subsidy” as an independent claim until it filed its second supplemental brief on February 22, 2013, some thirteen years after signing its lease, five years after this case was filed, and long after the completion of discovery. *Compare* Compl. ¶¶ IV(A), V; MTIB 26, 46-57; MTRB 53, *with* Maher’s 2d Supp. Br. at 11 (Feb. 22, 2013), Doc. No. 205. That is why Judge Wirth did not consider any such separate “class subsidy” claim, *see* Exceptions 12, 34, but instead properly noted (and rejected) the subsidy contention in the course of ruling on Maher’s unreasonable preference claim. ID 41.

In any event, Maher’s “class subsidy” allegations are meritless not least because Maher’s lease did not subsidize APM/Maersk’s lease.⁷¹ Maher’s rent does not fully compensate the Port Authority even for Maher’s *own* leasehold. PAFOF ¶¶ 41, 152; App. I-199 at 200; App. I-170 at I-170-71. Rather, the Port Authority loses money on all of its terminal leases and subsidizes all of them, including both APM/Maersk’s and Maher’s leases, with funds from other operations.⁷² PAFOF ¶ 41; PAR-MTFOF ¶ 272; Borrone Dep. 461:7-462:14, App. VII-117.⁷³

⁷¹ Maher’s class subsidy claim also finds no support in the law. There is no independent statutory basis for it, and the only case Maher cites for the concept simply held that a preference was undue where respondent failed to “provide any explanation,” and considered the question of subsidy only in connection with injury. *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, 294 (F.M.C. 1977).

⁷² The innocuous testimony that Maher cites to the effect that an increase in rates would increase Port revenues and decrease subsidization of the Port, simply sets forth self-evident arithmetic propositions. Exceptions 34-35 (citing Ward Dep. 38:23-39:11; MTFOF ¶ 273; MTIB 56); *id.* at 34 (citing Shiftan Dep. at 40:1-41:9; MTFOF ¶ 274; MTIB 56); *id.* at 34, 36-37 (citing McClafferty Dep. 168:13-15, 199:17-205:21; MTFOF ¶¶ 270-71; MTIB 52-57); *id.* at 35 (citing MTFOF ¶¶ 220-21, 228, 231-32; MTIB at 51-52). This cited testimony does not say that Maher’s lease subsidized APM/Maersk’s lease. If it did, it would be wrong, since Maher’s lease was not fully compensatory of even the Port Authority’s costs. *See* p. 11, n. 7 *supra*.

⁷³ Even if the subsidy issue could give rise to a separate claim and also had merit, it would be time-barred under the Commission’s summary judgment ruling. Jan. 31, 2013 Order at 12-15.

[REDACTED]

6. In Sum, Maher's Discrimination Claims Are Patently Meritless

In conclusion, the record resoundingly establishes that Maher's unreasonable preference claims lack any merit. Maher has clearly failed to satisfy the burden of persuasion on its allegations that it was subjected to prejudicial lease terms and that any such prejudice was unreasonable. *See* ID 38. While it is true that APM/Maersk and Maher had different lease terms, Maher did not meet its burden of proving that those differences provided a preference to APM/Maersk under *Ceres* element 2. Given all of the interrelated and counterbalancing differences between the two leases and the leaseholds themselves, and the obvious benefits Maher obtained, the Port Authority respectfully submits that Maher has not shown that the different lease terms either preferred APM/Maersk or prejudiced Maher, which, on the contrary, benefited enormously from the retention of Maersk and its own huge, reconfigured terminal made possible by the 2000 APM/Maersk and Maher leases. As Judge Wirth explained, the two entities "pose[d] different risks and received different benefits," including leased terminals and properties that were "significantly different" as to "size, depth, berthing options, buildings, and access to transportation and infrastructure." ID 40. Thus, "some variation in rental terms is to be expected." *Id.*

In any event, to the extent that the Commission believes that APM/Maersk's lease was preferential in some respect, Maher has failed to carry its burden of proving that there was any *unreasonable* preference or prejudice under the Shipping Act. ID 32, 53. And, even if the Port Authority were held to bear the burden of proof on reasonableness, it fully met that burden, as Judge Wirth correctly noted. ID 38.

Any "subsidy" was embraced in APM/Maersk's lease terms and any "recoupment" was embodied in Maher's lease terms, both of which were known to Maher by October 2000, far more than three years before Maher raised this issue or brought suit. *Id.* at 13.

[REDACTED]

Thus, Judge Wirth properly concluded that Maher entirely failed to show any violation of the Shipping Act in terms of unreasonable preference or prejudice.⁷⁴

B. JUDGE WIRTH CORRECTLY REJECTED MAHER'S CLAIMS THAT THE PORT AUTHORITY'S PRACTICES WERE UNREASONABLE

Maher's unreasonable practices claim is based squarely upon the very same differences in lease terms that underlie its unreasonable preference or prejudice claim and, for the same reasons set forth above, is meritless. As explained in greater detail in the Port Authority's Response to Maher's Second Supplemental Brief (filed on March 15, 2013), Maher's own complaint and sworn interrogatory responses clearly confirm that, with the exception of the refusal to deal allegations in the 2007 to 2008 timeframe, all of Maher's 08-03 claims were based entirely on the facial differences in the terms of its lease and APM/Maersk's lease, and Maher has never asserted otherwise. PA 2d Supp. Br. at 7-10, Doc No. 211. The same evidence that supports the Initial Decision's dismissal of Maher's unreasonable discrimination claim makes clear that the Port Authority did not engage in unreasonable practices. And a review of the law governing unreasonable practice claims not surprisingly compels the same conclusion.

As set forth in the Initial Decision, the *Volkswagenwerk* standard of "whether the charge levied is reasonably related to the services rendered" governs a claim under Section 10(d)(1). ID 54 (quoting *Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595, 602 (FMC 1987) (quoting

⁷⁴ Maher's judicial estoppel argument, that the Port Authority somehow conceded Maher's claim had merit by arguing that it accrued for statute of limitations purposes when it signed its lease, Exceptions 23-25, is both frivolous and barred by law of the case. The Commission considered and rejected the identical argument supported by an almost identical chart, *see* Maher's Pet. for Rec. of FMC's Jan. 31, 2013 Order at 20-23, Mar. 4, 2013, Doc. No. 206, in its February 11, 2014 decision denying Maher's motion for reconsideration. Feb. 11, 2014 Rec. Order at 8. There, as here, Maher presented the legally groundless contention that the Port Authority's argument on the merits, that the lease-term differences were justified, is inconsistent with its statute of limitations argument that Maher should have known the facts underlying its claims as of 2000. As the Commission has already ruled, there is nothing contradictory about arguing that a claim is *both* meritless *and* time-barred.

[REDACTED]

Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 282 (1968)). A practice is reasonable if it is “otherwise lawful, not excessive and reasonably related, fit and appropriate to the ends in view.” *W. Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978) (“*WGMA*”); accord *Ceres*, 27 S.R.R. at 1274. More specifically, practices must be “reasonably related to an actual service performed or a benefit conferred on the person charged.” *WGMA*, 18 S.R.R. at 790 n.14 (citing *Volkswagenwerk*, 390 U.S. at 282). Where there are multiple users of marine terminals, the Commission applies the reasonableness test by “measur[ing] the impact on the payer compared to other payers as well as the relative benefits received.” *NPR Inc. v. Bd. of Comm’r of Port of New Orleans*, 28 S.R.R. 1512, 1532 (F.M.C. 2000). The reasonableness inquiry for a Section 10(d)(1) claim is fact-specific and “requires a flexible interpretation” of the statute. *50 Mile Container Rules*, 24 S.R.R. at 466; see also *Distrib. Servs.*, 24 S.R.R. at 721. Finally, “the burden of establishing the unreasonableness of the practice is squarely upon [the complainant].” *WGMA*, 18 S.R.R. at 791.

1. The Benefits Maher Received Are Reasonably Related To Its Lease Terms

Judge Wirth correctly concluded that the rates to which Maher agreed under its lease corresponded with the benefits and risks that Maher presented, and properly foreclosed Maher’s attempts to obtain the benefit of the same rental rates as the APM/Maersk lease, given Maher’s far larger and superior terminal, and that Maher did not provide the benefits or guarantees or pose the same risks that led to the lease with APM/Maersk. ID 52-54. Contrary to Maher’s assertion,⁷⁵ the Initial Decision properly explained that “Maher and Maersk-APM are not provided an ‘identical service’ because the leased property is significantly different” and “the leased properties differ in size, depth, berthing options, buildings, and access to transportation

⁷⁵ Exceptions 56 (asserting that APM/Maersk pays less for the same services).

[REDACTED]

and infrastructure.” ID 40. The terms in Maher’s lease are reasonably related to the services and benefits Maher received for three principal reasons, *see pp. 24-26 supra*, all of which are wholly consistent with Judge Wirth’s analysis, in which she noted, among other things, that Maher obtained “a large property convenient to express rail and other services” and that Maher’s “property was not competitively bid,” ID 54.⁷⁶

- Maher received a premier, reconfigured and consolidated, state-of-the-art terminal that was by far the largest, most efficient and most valuable in the Port – 30% larger than APM/Maersk’s – with superior infrastructure and the unique ability to expand capacity, enabling Maher to capture the largest share of port-wide container cargo and positioning it to reap an even greater share in years to come.⁷⁷
- Retaining Maersk Line not only was critical to the Port Authority’s objectives to protect and secure the vitality of the Port, but also directly benefited Maher enormously, as Brian Maher expected, whereas Maher was not able to provide any equivalent value that could have warranted receiving APM/Maersk’s terms. *See pp. 14-16 supra*.
- APM/Maersk’s lease contained a Port Guarantee that incentivized Maersk Line to retain cargo that otherwise would have left the Port, avoided the attendant risk of losing other carriers and cargo if Maersk Line redirected its cargo to other ports, and obliged APM/Maersk to commit additional cargo to the Port in an effort to satisfy the requirement, which Brian Maher admitted Maher could not and would

⁷⁶ *See also* ID 42-45, 48 (discussing the importance of retaining Maersk in the Port), 45, 47 (discussing the Port Guarantee as a basis for the different lease terms).

⁷⁷ *See pp. 24-26 supra*; ID 40, 54. Maher also received cheap financing to develop its terminal into the dominant terminal it then became, as well as certain unquantifiable benefits, including negotiating exclusively with the Port Authority instead of competing with other terminals in a public bidding process; eliminating the inefficiencies and redundancies of operating two separate terminals; and the flexibility it sought regarding future changes in control. *See pp. 12, 17, 20 supra*; *see NPR Inc.*, 28 S.R.R. at 1532-33 (explaining that the Commission cannot ignore unquantifiable benefits such as achieving efficiencies and reducing costs when weighing the benefits and cost burdens). While it is true that APM/Maersk’s property also was not competitively bid, *see Exceptions 56-57*, this concession impacted Maher and APM/Maersk differently. Maher risked going out of business and the loss of the terminal it was later able to sell for \$1.8 billion, while Maersk/APM could simply relocate its operations to another port. PAFOF ¶ 50; M.B. Maher Dep 34:23-35:13 (08-03), App. II-256 at 263.

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not provide. *See* pp. 16-17 *supra*; PAFOF ¶¶ 179; Nicola Dep. 63:11-19 (07-01), App. II-8 at 26; App. I-2833 at 2833.⁷⁸

Maher admitted that its lease was at “market” and boasted about the numerous benefits, including the competitive advantage it received under its lease. *See* pp. 26-30 *supra*. Maher’s base rent was substantially less than the \$65,100 per acre per year with a 2.5% escalator paid by PNCT just across the channel and also less than it had been paying for its Fleet Street lease. *See* p. 19 n. 21 *supra*; ID 47.

The many benefits Maher received lie at the core of the Commission’s reasonable practices analysis and, taken as a whole, demonstrate that the charges in EP-249 were reasonably related to the services and benefits Maher received. *See Volkswagenwerk*, 390 U.S. at 282. In short, Maher has made no showing that its lease was unreasonable.⁷⁹

⁷⁸ Maher’s attempts to undermine the significance of the Port Guarantee, *see* Exceptions 57-60, are unavailing. Maher relies on testimony from Lillian Borrone and Executive Session Notes from May 1999 that reflect the Port’s initial belief that certain guarantee levels were necessary. Lillian Borrone testified, however, that the levels of the Port Guarantee were “a course of a [sic] very significant and frequent set of conversations and assessments.” Borrone Dep. at 595:1-3, Maher App 2-A 76. Also, the language Maher attributes to Port Authority lawyer, Hugh Welsh, purportedly regarding the Port Guarantee is excerpted from a paper that Mr. Welsh prepared for an American Association of Port Authorities seminar and that “refers to port authorities in general, not to the Port Authority of New York and New Jersey.” Welsh Dep. at 201:10-12; 204:6-8, Maher App. 2-B 548. Furthermore, whether or not Maersk sent some of its cargo through other ports, as Maher asserts, Exceptions 59, is immaterial because, as explained above, the Port Guarantee secured essential cargo that otherwise would not pass through the Port. *See* pp. 16-17 *supra*. The former CFO of Universal Maritime and later APM/Maersk director testified that at the time of lease negotiations, “the combined Maersk and Sea-Land volume was somewhat under the throughput guarantee, which would get you to the minimum cost of \$19,000 per acre, and . . . Maersk would have to move additional cargo through the Port of New York to achieve that.” Nicola Dep. 63:14-19 (07-01), App. II-18 at 26.

⁷⁹ To the extent that Maher claims that its rental terms put it at a competitive disadvantage vis-à-vis APM/Maersk, the undisputed record is (1) that Maher did not view APM/Maersk as a true competitor, *see* PAFOF ¶¶ 98, 223; Flyer Rep. ¶¶ 51-52, App. IV-263 at 288; PAR-MTFOF ¶ 380; App. I-1573 at 1614; (2) Maher did not lose *any* third party carrier business to APM/Maersk between 2000 and 2007, *see* M.B. Maher Dep. 47:6-48:5 (08-03), App. VII-174 at 186; PAR-MTFOF ¶ 380; and (3) the only third-party business Maher lost was to PNCT, not APM/Maersk,

[REDACTED]

C. THERE WAS NO REFUSAL TO DEAL WITH MAHER

Judge Wirth correctly concluded that the Port Authority did not refuse to deal with Maher, much less unreasonably refuse to deal, either when the parties negotiated the terms of EP-249 or when Maher later attempted to renegotiate the terms of EP-249. ID 55. The burden is on Maher to prove that the Port Authority refused to deal or negotiate with Maher concerning its requests *and* that any such refusal was “unreasonable.” *Canaveral Port Auth. – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1448 (F.M.C. 2003). A refusal to accede to demands is not a “refusal to deal.” *Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1226-27 (F.M.C. 1990).

Maher’s argument that the Port Authority refused to consider its requests for APM/Maersk’s lease terms during negotiations, based on “status and commercial convenience,” fails because the undisputed facts are that the Port Authority engaged in extensive and exclusive negotiations with Maher for over a period of five years, and “while Maher’s requests may not have been granted, . . . they were given due consideration.” ID 55; Exceptions 60; p. 11-13, 17 *supra*.

Maher’s arguments regarding the Port Authority’s alleged refusal to deal since 2007 are equally meritless. Exceptions 61-64. The Port Authority met with Maher and considered Maher’s demand to renegotiate the terms of EP-249, which the Port Authority believed, with ample reason, was both valid and lawful. Other than the passage of time and the fact of new ownership, nothing had changed when Maher approached the Port Authority in 2007. The notion that the Port Authority was compelled, at the threat of litigation, to accede to Maher’s demand that it *re*-negotiate an extensively negotiated and ongoing lease that the parties had been

and PNCT’s base rent, as noted above at p. 19 n. 21, was *higher* than Maher’s, PAR-MTFOF ¶ 380.

[REDACTED]

performing for seven years, and which the Port Authority correctly believed did not violate the Shipping Act, is specious and finds no basis in law, logic or equity.⁸⁰ The Shipping Act obviously does not require that a port authority accede to any and all of a terminal operator's demands merely because the port reached an agreement with another party under different circumstances and based on reasons that are inapplicable to the complainant. Again, a refusal to agree is not a refusal to deal, much less an unreasonable refusal to deal.

D. JUDGE WIRTH CORRECTLY REJECTED MAHER'S MERITLESS DOCKET 07-01 CLAIMS

Maher's Exceptions concerning the 07-01 litigation fall into three categories: (1) the Port Authority's enforcement of the indemnity provisions in Maher's lease; (2) the Port Authority's alleged refusal to deal; and (3) Maher's unpleaded land swap delay claim, *i.e.*, that the Port Authority purportedly breached a nonexistent duty to complete a land swap with Maher by December 31, 2003. All of Maher's arguments were properly rejected by Judge Wirth.

1. The Indemnity Related Claims

Judge Wirth properly rejected Maher's claims concerning the Port Authority's enforcement of the indemnity provisions in Maher's lease. ID 58. First, the Port Authority did not "unreasonably prefer" APM/Maersk over Maher "by imposing and enforcing an indemnity requirement on Maher and not Maersk-APM." Exceptions 58. There is no comparable obligation in the APM/Maersk lease to which a comparable indemnity obligation could apply

⁸⁰ Maher argues that "*as a practical matter*, the Initial Decision invoked contractual theories of waiver and estoppel," Exceptions 61 (emphasis added), but the Initial Decision does no such thing. Instead, Judge Wirth correctly explained that requiring a port authority "to continually renegotiate every lease every time a different lease provision was offered . . . would impede the port's ability to function effectively." ID 55. There was no discussion of or reliance upon any theory of estoppel.

[REDACTED]

because APM/Maersk, unlike Maher, had not contracted to deliver any land to the Port Authority.

Second, Maher argues that by seeking to enforce the indemnity provisions in EP-249, the Port Authority sought to “exculpate” itself “from its own responsibility” in violation of New Jersey and maritime laws. Exceptions 65. But the Port Authority sought indemnification for *Maher’s share* of responsibility for the delay in delivering the eighty-four acres to APM/Maersk, not the Port Authority’s or anyone else’s.⁸¹ Accordingly, *Central Nat’l Corp. v. Port of Houston Auth.*, 22 S.R.R. 795, 797 (F.M.C. 1984), cited by Maher, *see* Exceptions 65, where a port authority sought to indemnify itself “without regard to its own possible negligence or non-liability,” is inapposite. The entire litigation between Maher and the Port Authority in 07-01, while it lasted, concerned whether it was Maher, the Port Authority, or some combination that was at fault for the Port Authority’s failure to deliver the eighty-four acres to APM/Maersk by the date set forth in the APM/Maersk lease.⁸² *Id.*

⁸¹ *See, e.g.*, PAFOF ¶ 291 (demonstrating that discovery concerned the Port Authority and Maher’s respective shares of fault); PAR-MTFOF ¶ 442 (same); n. 82 *supra*. For the same reasons, Maher’s attempt to claim that the Port Authority operated contrary to the *force majeure* provisions in EP-249 because the Port Authority allegedly attempted to hold Maher liable for forces “beyond [Maher’s] control” is without foundation. *See* Exceptions at 72.

⁸² The record evidence that had been developed prior to the Port Authority’s voluntary dismissal of the indemnification claim established that Maher was at least partially at fault. The Port Authority could not begin construction on the new ExpressRail until Maher surrendered area 4000, a 50-acre area that occupied part of the footprint of the new ExpressRail; Maher’s delay in surrendering this area caused the Port Authority to have to alter the ExpressRail design and reschedule construction to work around Maher’s partial, delayed turnover by breaking the project into three phases; Maher compounded these design and planning delays by demanding additional changes to the new ExpressRail; and Maher’s delay in transferring area 4000 delayed the demolition of the old rail system, which, in turn, prevented the Port Authority from delivering the property to Maher as required by EP-249. PAR-MTFOF ¶¶ 47, 49, 433; Israel Dep. 228:1-10, 239:18-241:9, 244:18-23, 283:6-284:7 (08-03), App. VII-301-04; *see also* PAFOF ¶ 291 (detailing Maher’s repeated delays in transferring certain property and the effect on the Port Authority’s ability to complete the new ExpressRail); App. I-1548-49; App. I-2865-66.

[REDACTED]

Accordingly, there is no basis for Maher’s claim that the Port Authority illegally sought to enforce an indemnification obligation – a claim that the Port Authority voluntarily dismissed as part of its settlement of Dkt. 07-01, and hence is also largely, if not completely, moot.

2. Maher’s Docket 07-01 Refusal to Deal Claims

Although Maher asserts that the Port Authority “unlawfully refused to deal with Maher with respect to the issues presented in Dkt. 07-01,” Exceptions 68, there was no such refusal, as Judge Wirth correctly found. ID 59. Instead, Maher’s claim is based upon Maher’s insistence in that the Port Authority was required to cave in 2007 and 2008 to Maher’s litigation threats, to rewrite Maher’s lease so as to mirror APM/Maersk’s, and to pay time-barred reparations, simply because the Port Authority had agreed to settle its wholly different dispute with APM/Maersk for zero dollars. *See* Exceptions 68-69; p. 68 *supra*.⁸³

3. Maher’s Unpleaded, Meritless and Untimely “Land Swap Delay” Claims

Judge Wirth properly rejected Maher’s unpleaded claim – that the Port Authority was liable for its failure to transfer certain land to Maher as part of the reconfiguration of Maher’s two terminals by no later than December 31, 2003 – as baseless and time-barred. ID 59-60. Maher first suggested the existence of such a claim for damages (supposedly worth over \$56 million) in the report of its damages expert, William Kerr, filed in June 2011⁸⁴ and in its Initial

⁸³ Maher’s statement that the Port Authority “imposed a precondition of presenting PANYNJ with concrete, written settlement offers or proposals” and demanded a stay before it would negotiate with Maher, Exceptions 69, is likewise inaccurate and, in any event, meritless. Maher and the Port Authority met twice before the Port Authority requested a written proposal to determine whether future meetings would be fruitful. PAR-MTFOF ¶¶ 492; Maher App. 1D-1580 at 1581. To be sure, the Port Authority later requested that Maher agree to a stay of litigation at some point, *see* PAR-MTFOF ¶ 503; Dep. Ex. 7, Maher App. 1D-1656, but such a request violates no law.

⁸⁴ Kerr Rep. ¶ 8 (08-03), App. IV-1 at 4.

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Brief filed in November 2011,⁸⁵ many years after the pleadings had closed in both Dkt. No. 07-01 and Dkt. No. 08-03. Accordingly, the Port Authority had had no previous occasion to respond to any such claim, whether by interposing the statute of limitations as a defense or otherwise.

In any event, any such claim was obviously meritless, as there was no contractual obligation to Maher to achieve the land swap by any date certain, much less by December 31, 2003. Rather, it was only in EP-248, the Port Authority's lease with *APM/Maersk*, that the Port Authority was required to do anything by December 31, 2003.⁸⁶ No comparable date appears in EP-249, because in negotiations, Maher had expressly rejected the inclusion of any date certain for the land swap. Indeed, Maher's General Counsel, Scott Schley, declined the Port Authority's demand for indemnification in the 07-01 litigation precisely because, among other things, the Maher lease imposed *no* date by which Maher was required to abandon the eighty-four acres.⁸⁷

⁸⁵ MTIB 13, 86 n.205, 96. Maher's Counter-Complaint purported to allege only violations of "the Shipping Act of 1984, 46 U.S.C. §§ 40102(b)(2), 41102(c), 41106(3) and 41106(2)" – *not* § 41102(b)(2), the provision on which Maher's alleged "land swap delay" claim is purportedly based. Ans. to 3d Party Compl. & Counter-Compl. (07-01) ¶ 40, Sept. 9, 2007, Doc. No. 17; Exceptions 69.

⁸⁶ *E.g.* EP-248 §1(d), App. V-254 at 260.

⁸⁷ *See* App. I-1853 at 1854 (rejecting tender of defense and arguing that "there was no matching fixed obligation on the part of Maher to vacate the space in question by [December 31, 2003] so that the space could be tendered by the Port Authority to APMT"); *id.* at 1854-55 (arguing that while the Port Authority had wanted "specific dates and time parameters" for Maher to vacate the premises, Maher did not, and therefore no such provisions were included); *see also* PAFOF ¶ 290; Lease EP-249 § (1)(d)(iv), App. V-1 at 7-8 (requiring Maher to vacate the 84 acres after the Port Authority provides it with improved premises, but not setting a date for either event).

Maher claims that the Port Authority "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." Exceptions 72. But the Port Authority never asserted that it had a contractual obligation to provide Maher with any replacement property by a date certain, let alone December 31, 2003. A condition (*e.g.*, receipt of improved premises from the Port

[REDACTED]

Thus, there plainly is no contractual basis on which to premise this claim of breach.⁸⁸

Moreover, even if the Port Authority did have an obligation to deliver property to Maher by December 31, 2003, which it did not, any reparations claim would clearly be time-barred.⁸⁹

Maher seeks to circumvent the three-year statute of limitations by arguing (i) there is no statute of limitations applicable to counterclaims; (ii) the filing of APM's claim against the Port Authority tolled the statute of limitations for this claim by Maher; and (iii) Maher did not "discover" its claim until depositions took place in the 07-01 litigation. Exceptions 69-71. First, Maher's citation to Commission rules concerning the time of service for answers and counterclaims both makes no sense and does not address the statute of limitations questions.⁹⁰

Authority) to be fulfilled before Maher has an obligation (e.g., to tender the 84 acres to the Port Authority) is totally distinct from a lease term by which the parties agree that the Port Authority must perform a certain act by a date certain (which can be found nowhere in Maher's lease). Indeed, Maher admitted that EP-249 did not impose specific deadlines for the transfer of land, but rather that the parties agreed to a "flexible swapping mechanism." PAR-MTFOF ¶ 526; App. I-1853 at 1855-57.

⁸⁸ Indeed, Maher never contemporaneously complained that it had been injured by any purported "delay" in receiving replacement property, or that the Port Authority had been dilatory in providing such property. On the contrary, Maher specifically acknowledged its close working relationship with the Port Authority, and expressed appreciation for all the work that the Port Authority had performed in conjunction with Maher in reconfiguring the peninsula, and the phenomenal benefits that Maher received in return. App. I-1569 at 1572. The parties worked diligently together to renovate the Maher terminal, and any delays were caused as much by Maher as by the Port Authority. See PAR-MTFOF ¶ 433; App. I-2867 at 2867, 2868; App. I-2829 at 2829, 2831; App. I-1548 at 1550; App. I-1853 at 1855.

⁸⁹ See 46 U.S.C. § 41301(a) (complainant must seek reparations "within 3 years after the claim accrues").

⁹⁰ Under Maher's interpretation, Maher would be permitted to file time-barred claims with impunity in the form of counterclaims and cross-claims so long as its answer was served within 20 days of receiving a complaint. That is not the law. See, e.g., *Hurst v. U.S. Dep't of Educ.*, 901 F.2d 836, 837 (10th Cir. 1990) (dismissing time-barred compulsory counterclaim); *Wells v. Rockefeller*, 728 F.2d 209, 214 (3d Cir. 1984) (same); see also 46 C.F.R. § 502.62(b)(4) (counter-complaints "are governed by the rules and requirements of this section [which includes the applicable three-year statute of limitations] for the filing of complaints and answers").

[REDACTED]

Second, Maher's counter-complaint was filed in response to the Port Authority's third-party complaint, not APM's original complaint; it was time-barred by August 9, 2007, the date on which the Port Authority filed its third-party complaint; it could not have been a compulsory counterclaim to APM's complaint, which was not filed against Maher; and even compulsory counterclaims for affirmative relief can be time-barred.⁹¹ Third, it is undisputed that Maher knew that if the Maher lease had required the land swap between the Port Authority and Maher to be completed by December 31, 2003 – which, of course, it did not – Maher would have known of any breach of that provision no later than December 31, 2003, more than three years before it or the Port Authority filed any pleading in Dkt. 07-01.⁹²

⁹¹ See Moore's Fed. Prac. § 13.93 ("Even if compulsory, counterclaims for affirmative relief will be time barred."); A. Wright, A. Miller & R. Kane, Fed. Prac. & Proc. § 1419 ("[I]f defendant's claim already is barred when plaintiff brings suit, the notion of tolling the statute is inapplicable and the fact that the tardily asserted claim is a compulsory counterclaim does not serve to renew defendant's right to assert it.").

⁹² Maher argued for the first time in its Reply Brief that the Port Authority should be precluded from arguing that Maher's unpleaded "land swap delay" claim is time-barred, and that Maher should receive a default judgment on its 07-01 claims, because the Port Authority had failed to file an answer to Maher's counterclaim. ID 60-61. Judge Wirth properly rejected Maher's argument and considered the Port Authority's statute of limitations defense, because "it has been clear [all along]... that the PANYNJ intends to contest the allegations in the counter-complaint." ID 60. Although Maher misleadingly implies that Judge Wirth was *required* under Commission rules to issue a default judgment, *see* Exceptions 74, Commission rules merely state that the presiding officer *may* issue a default upon reviewing the record. 46 C.F.R. § 502.65; *see also Betty K Agencies, Ltd. v. M/V Moneta*, 432 F.3d 1333 (11th Cir. 2005). For over three years Maher aggressively litigated its 07-01 claims through the use of burdensome document requests, motions, interrogatories and depositions, and the Port Authority incurred millions of dollars defending itself in response. Under such circumstances, courts have declined to issue a default judgment or prohibit a party from asserting defenses. *See, e.g., Betty K Agencies, Ltd.*, 432 F.3d at 1336 (overruling trial court's issuance of a default judgment: "[t]he parties continued to litigate their claims before the district court even after the date on which Betty K's Answer was due, and no motion to compel an answer or dismissal was ever filed by any party"); *Boazman v. Econ. Lab., Inc.*, 537 F.2d 210, 213-13 (5th Cir. 1976) (overturning dismissal with prejudice for failure to answer where there was no evidence of willful misconduct). Particularly since this "land swap delay" claim was never pleaded, Maher never sought or obtained an entry of default, and the Port Authority never had the opportunity to explain or excuse any default and raised its

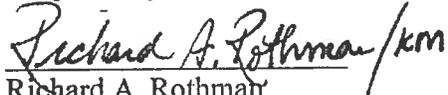
Accordingly, Maher has failed to demonstrate that its unpleaded "land swap delay" claim has any merit or is not time-barred.

V. CONCLUSION

For the foregoing reasons, Maher's Exceptions should be denied in their entirety,⁹³ and its complaint in the Docket 08-03 proceeding, as well as its counter-complaint in the Docket 07-01 proceeding, should be dismissed.

Dated: July 23, 2014

Respectfully submitted,



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defenses including the statute of limitations once it appeared that Maher was pressing such a claim, Judge Wirth was well within her discretion to consider the Port Authority's defenses.

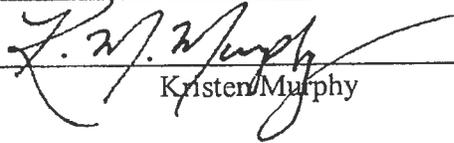
⁹³ Accordingly, there is no need for the Commission to address the statute of limitations regarding claims that the Commission has not already ruled upon or the requirements for cease and desist relief. *See* PARB 91-98 (explaining why Maher's claims for reparations are time-barred and why any cease and desist relief would be inappropriate); PA Mot. for Summ. J. of Maher's Lease-Term Discr. Claims at 26-28, Feb. 25, 2011, Doc. No. 84. If Maher's Exceptions are not rejected in their entirety, there should be a remand for consideration of any such issues.



CERTIFICATE OF SERVICE

I hereby certify that I have this day served the corrected version of the foregoing document upon the persons listed below in the matter indicated, a copy to each such person.

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| <p><u>Via Federal Express and E-mail:</u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Rand Brothers Winston & Strawn LLP 1700 K Street, NW Washington, DC 20006</p> | <p>Dated at Washington, DC this 24th day of July, 2014</p> |
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Kristen Murphy