

Szaferman Lakind

Szaferman, Lakind, Blumstein & Blader, P.C.

Attorneys at Law

2010 AUG 11 PM 5:17

101 Grovers Mill Road, Suite 200, Lawrenceville, New Jersey 08648
Tel: 609.275.0400 Fax: 609.275.4511 www.szaferman.com

FEDERAL MARITIME COMM.

Arnold C. Lakind
Barry D. Szaferman
Jeffrey P. Blumstein
Steven Blader
Lionel J. Frank**
Jeffrey K. Epstein*
Stuart A. Tucker
Brian G. Paul*
Craig J. Hubert ** ***
Michael R. Paglione*
Daniel S. Sweetser*
Robert E. Lytle
Janine G. Bauer****

Paul T. Koenig, Jr.
Counsel

Bruce M. Sattin***
Robert A. Gladstone
Janine Danks Fox*
Ryan A. Marrone
Of Counsel

Robert P. Panzer
Robert G. Stevens, Jr.**
Michael D. Brottman**
Tracey C. Hinson**
Benjamin T. Branche*****
Lindsey Moskowitz Medvin**
Anthony M. Anastasio*
Mark A. Fisher
Robert L. Lakind***
Thomas J. Manzo**

August 8, 2010

Via Fax 202-523-0014 (Brief Only) and Federal Express (Brief and Exhibits)

Federal Maritime Commission

Attn: Office of Secretary

800 North Capitol St. N.W.

Washington, D.C. 20573-0001

Re: American Stevedoring, Inc. v. The Port Authority of New York
And New Jersey

Dear Ms. Gregory:

This firm represents Complainant American Stevedoring, Inc. in the referenced matter. Enclosed please find original and 15 copies of Complainant's Brief in Reply to Port Authority of New York and New Jersey's Motion for Summary Judgment; and an original and 4 copies of the Exhibits to be attached to the Brief.

If you have any questions or concerns, please contact me.

Very truly yours,

**SZAFERMAN, LAKIND,
BLUMSTEIN, & BLADER, P.C.**



JANINE G. BAUER

JGB:scj

Enclosures

c/enc: Weil, Gotshal & Manges LLP – *Via E-mail (Brief Only)*
and Federal Express (Brief and Exhibits)

+Certified by the Supreme Court of
New Jersey as a Matrimonial Attorney
++Certified by the Supreme Court of
New Jersey as a Civil Trial Attorney
+++Certified by the Supreme Court of
New Jersey as a Criminal Trial Attorney
*NJ & PA Bars
**NJ & NY Bars
***NJ, NY & PA Bars
****NJ, NY, PA & FL Bars
*****NJ, PA, MD & DC Bars

cc: ALJ(s)
OS
OGC
Pub

ORIGINAL

RECEIVED
2010 MAR 19 PM 5:17

BEFORE THE

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

Docket No. 10-05

AMERICAN STEVEDORING, INC.

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

AMERICAN STEVEDORING, INC.'S BRIEF IN REPLY TO
PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S
MOTION FOR SUMMARY JUDGMENT

Janine G. Bauer, Esq.
SZAFERMAN, LAKIND, BLUMSTEIN
& BLADER, P.C.
101 Grovers Mill Road, Suite 200
Lawrenceville, NJ 08648
Tel. 609-275-0400
Fax. 609-275-4511
jbauer@szaferman.com
*Attorneys for Complainant,
American Stevedoring, Inc.*

On the Brief
Janine G. Bauer, Esq.
Mark A. Fisher, Esq.

PRELIMINARY STATEMENT

In moving for summary judgment, the Port Authority of New York and New Jersey (“PA”) misinterprets the scope of the release in the Settlement Agreement. (Exhibit A) Relying solely on Paragraph 3, and ignoring every other clause and paragraph in the Agreement, the PA argues that American Stevedoring, Inc. (“ASI”) released the PA from any and all past, present and future claims based on events that occurred before February 9, 2009, the date of the Settlement Agreement. That interpretation is grossly overstated, unsupported by evidence of the parties’ intent, and incorrect.

That interpretation is also irrelevant, because ASI’s 2010 Federal Maritime Commission Complaint (“2010 Complaint”) against the PA is based on events that took place *after* the date of the release in the Settlement Agreement. The PA’s statement that “all of the allegations concern actions allegedly taken by the Port Authority prior to the February 2009 release Date, or are dependent for any legal significance on such pre-Release Date alleged conduct” is totally incorrect.

For instance, the PA now finds its execution of the leases for Piers 8, 9, 10 and Port Newark, three days *after* the release date, to be “ministerial” and without legal significance. PA Brief at p. 6. However, its execution of the leases was the culminating, legally significant act that solidified its refusal to deal and negotiate over the terms of those leases with ASI. The PA drafted the release. If the PA wanted to include the leases for Piers 8, 9, 10 and Port Newark in the release, it should have signed the leases prior to the date of the release.

Similarly, the PA characterizes the PA's post-release instances of refusal to apply for funds to offset the costs of the barge service as an "ongoing violation[,]" PA Brief, p. 9, fn. 2, and claims that because barge funding ended in 2006, that cause of action was released as well. That is not so. See pp. 6-8, *infra*.

STATEMENT OF RELEVANT FACTS

The Settlement Agreement (Exhibit A) is a contract between American Warehousing of New York, Inc. ("American Warehousing") and ASI on one side, and the Port Authority on the other. The Settlement Agreement was executed on February 9, 2009. The Settlement Agreement addressed Pier 7 at the Brooklyn Marine Terminal, settling four different matters. Two of these matters are the 2004 and 2006 eviction actions the PA brought against American Warehousing, the tenant at Pier 7, in the Civil Court of New York, Landlord and Tenant division. These are referred to as the "L and T Proceedings" in the Settlement Agreement. (Exhibit B) The L and T Proceedings do not concern any other pier or leasehold of American Warehousing or the Port Authority; only Pier 7 was at issue.

The other two matters were Complaints that American Warehousing brought against the PA in the Federal Maritime Commission, in 2004 and 2005. These two matters addressed Pier 7.

American Warehousing (denominated "American" in the Settlement Agreement) was the tenant of the PA at Pier 7 for a long time. American occupied Pier 7 under a lease with the PA. (Exhibit C, Pier 7 Lease, BP-302) That lease, BP-302, was dated 1999, but

was actually signed by American in October and by the PA in November, 2002. That Pier 7 lease expired on March 30, 2003.

After the Pier 7 lease expired, the PA refused to renew or extend it. The PA and American's dispute centered upon the PA's refusal to extend a new or renewed lease for Pier 7 to American. Without a lease for Pier 7, American stopped paying rent. The PA sought to evict American and took other actions which hurt American's cocoa import business, which operated from Pier 7.

American Stevedoring, Inc. ("American Stevedoring" or "ASI") is a separate corporation from American, with a separate purpose. American Warehousing is not owned by ASI. ASI is a stevedoring company, not a warehousing company. ASI was not a party to Lease BP-302 for Pier 7. ASI was not named by the Port Authority in the L and T Proceedings, either as a party defendant, tenant, affiliate, or in any other manner.

In 2004, after the Port Authority filed the first L and T Proceeding, American Warehousing filed a Complaint in the Federal Maritime Commission ("FMC" or "Commission") against the PA. American Warehousing sought relief and reparations for the PA's violations of the Shipping Act. These Shipping Act violations occurred in that time frame, 1999-2004, and involved the lease for Pier 7, and acts by the PA concerning American's cocoa business at Pier 7. See Complaint, American Warehousing etc. v. Port Authority, etc., Index No. 04-09. (Exhibit D)

ASI was not a party to the FMC Proceeding, Index No. 04-09.

A second Complaint was filed by American Warehousing against the Port Authority in 2005, for the PA's then-current conduct involving the Pier 7 leasehold, including a ship boycott. See Complaint, Index No. 05-03. (Exhibit E) These 2004 and

2005 Complaints, together referred to as the “FMC Proceedings” in the Settlement Agreement, were tried in November 2005, and were proceeding to final decision by the Commission when the parties decided to settle their impasse and litigation.

Like the 2004 Complaint, ASI was not a party to the 2005 FMC Complaint filed by American Warehousing. ASI did not participate in the FMC Proceedings. American Warehousing was the sole complainant in the FMC Proceedings, all of which concerned the Pier 7 dispute.¹

ARGUMENT

I. ASI’s 2010 Complaint Alleges Claims Against the Port Authority That Arise from Acts Occurring After the February 9, 2009 Settlement Agreement.

ASI’s 2010 Complaint alleges current violations of the Shipping Act against the PA. Therefore, the PA is incorrect in arguing that the 2010 Complaint is barred by the release. ASI’s suit is based on post-release actions by the PA that constitute Shipping Act violations, and is well-grounded. In any event, this is not the place to try ASI’s case. The PA did not even take the preliminary step of moving for a more definite statement of facts, if it was confused about the post-release nature of the causes of action in Counts I and II of the 2010 Complaint. As the PA decided to prematurely submit a motion for summary judgment, based solely on the release in Paragraph 3 of the Settlement Agreement, that release, and its context in the overall Settlement Agreement, is the only issue before the Commission. However, for clarity and in case there is any doubt about the propriety of the 2010 Complaint, the PA’s post-release acts underlying the new causes of action are identified below, with relevant corresponding paragraphs in the 2010 Complaint,.

¹ In the Settlement Agreement, American Warehousing of New York, Inc. is denominated “American” and American Stevedoring, Inc. is denominated “ASI.”

A. The PA's Disruption of ASI's Anticipated Contracts Occurred During the Summer and Fall of 2009

The PA took certain actions, and refused to take other actions, which together interfered with ASI's anticipated business for stevedoring goods in the summer and fall of 2009. Essentially, ASI anticipated entering into agreements with the shipping lines Turkon and ACL, which together would have netted ASI about \$11 million over a five year period. Then, in March 2010, the PA interfered with another operating agreement ASI was about to enter into, with an entity called Hornbeck, for Pier 8. That PA-disrupted agreement was also very valuable.

ASI was negotiating for the business from the shipping lines ACL and Turkon in the summer and fall of 2009. The agreements were set to start in the fall of 2009 or the beginning of 2010. (Exhibit M) The PA's summer/fall 2009 disruption of these anticipated agreements post-dates the release cut-off date of February 9, 2009. See Complaint, Index No. 10-05, Paras. 97-98.

B. The PA's Refusal To Apply for Barge Funding Opportunities That Occurred After February 9, 2009

ASI relies on a barge service provided by the PA between Brooklyn and Newark. The PA funded the barge service, by itself and with some federal and other grants which the PA applied for, since at least 1993. The PA then decided to end its funding of the barge service, in 2006, thrusting the cost of the barge on ASI.

The PA has had opportunities to apply for funding to support the barge service and relieve some of the expense from ASI, *after* the release cut off date. For instance, the federal government made funds available as part of the American Recovery and Reinvestment Act ("ARRA"); indeed, this was probably the largest concentrated infusion

of funds since the Great Depression. ARRA was enacted on February 17, 2009. At 23 U.S.C. §601, ARRA provided substantial monies for rail freight and port infrastructure projects. According to the U.S. Federal Highway Administration website, <http://www.fhwa.dot.gov/economicrecovery/summary.htm>, ARRA provided for \$1.5 billion in discretionary grants for projects, including rail freight and port projects.

Another new law that provides substantial funds for short sea (within ports) transportation routes is described in Para. 27 of the 2010 Complaint. Paragraphs 26-36 of ASI's 2010 Complaint describe a sample of the post-release funding opportunities which the PA has refused to apply for, leaving ASI to fund the cost of the PA's barge service by itself, at approximately \$450,000 monthly.

Paragraph 86 of the 2010 Complaint states that the PA discriminates against ASI "by continually refusing to . . . fund, deal and negotiate over the terms of the cross-Harbor barge obligation." *Id.* Because the PA passed up opportunities to apply for funds to support its barge service, on which ASI relies, *after* the release, ASI has alleged new facts to support a new cause of action.

Even under the PA's view, Paragraph 3 of the Settlement Agreement did not address, or release, PA violations that occur, anew, after February 9, 2009. *Cf. Centex Corp. v U.S.*, 48 Fed. Claims 625, 629 (2001) (finding new suit to be preserved despite release in termination agreement, despite release, because law changed); *Dalton v Cessna Aircraft Co.*, 98 F. 3d 1298, 1305 (Fed. Cir. 1996) ("We read the language of a particular contractual provision in the context of the entire agreement and construe the contract so as not to render portions of it meaningless.").

The PA characterizes its refusal to apply for barge funding now as an “ongoing violation” and cites Varner v. Peterson Farms, 371 F. 3d 1011, 1019 (8th Cir. 2004). The plaintiffs had missed the statute of limitations of various laws, including the Clayton Act, and were barred by that; release was not at issue. In the antitrust context, however, the Court of Appeals in Varner did cite to several cases, however, holding that continuing violations to be actionable. See, e.g., Pace Indus., Inc. v Three Phoenix Co., 813 F. 3d 234, 237 (9th Cir. 1987) (a continuing antitrust violation is one in which the plaintiff’s interests are repeatedly invaded); Barnosky Oils, Inc. v. Union Oil Co. of California, 665 F. 2d 74, 81 (9th Cir. 1981) (when a continuing violation of an antitrust violation is alleged, a cause of action accrues each time a plaintiff is injured by an act of the defendants).

C. The PA’s Issuance of a Request for Expressions of Interest in August 2009

In August 2009, the PA issued a Request for Expressions of Interest (“RFEI”) to other marine terminal operators to operate ASI’s piers, in Red Hook and in Port Newark, without any notice to ASI that it would take that action. (Exhibit M) August 2009 is *after* the cut-off date of the release, February 9, 2009.

ASI found out about this destabilizing attack on its stevedoring business from other MTOs, who placed calls to ASI to find out what was happening. The RFEI was designed to drive away ASI’s customers, and embarrass it. These customers are served from Piers 8, 9A, B and 10 at Red Hook Terminal (Brooklyn) with a satellite receiving berth and facility in Port Newark. This August 2009 RFEI had nothing to do with the prior dispute, or Pier 7, which ASI no longer leases.

The PA's issuance of the post-release RFEI and the effects it had were described in Paragraphs 68-76 of the 2010 Complaint.

D. The PA's Refusal to Negotiate the Leases for Piers 8, 9, 10 and Port Newark

On February 12, 2009, the PA executed the leases with ASI, the terms of which ASI protests, for Piers 8, 9 and 10, and Port Newark. February 12, 2009 is *after* the release cut off date of February 9, 2009. (Exhibit I.) The Settlement Agreement's release in Para. 3 relates only to claims—even under the PA's overstated interpretation—that occur “from the beginning of the world to the date of this settlement Agreement.” Exhibit A, Para. 3.

Paragraphs 93-96 of Count I of the 2010 Complaint describe the unilateral nature of the leases for Piers 8, 9, 10 and Port Newark, which the PA imposed on ASI. The PA refused to negotiate with ASI. Then ASI had to endure ten month lease “limbo” created by the PA when it refused to sign the leases it had imposed on ASI. This hurt ASI's business and advantaged other MTOs, that enjoyed stable, negotiated, long term leases. The PA finally signed the unilateral set of leases for Piers 8, 9, 10 and Port Newark leases, on February 12, 2009.² The PA's execution of the leases is a legally significant act, which finalized the PA's refusal to negotiate with ASI on the Pier 8, 9, 10 and Port Newark lease terms, *after* the release cut off date.

E. The Prayers for Relief I Counts I and II

The relief requested in the prayers at the conclusion of Counts I and II of the 2010 Complaint also make clear that ASI is suing on the new disputes, relating to post-release

² The date of February 10, 2009, in the Complaint, and repeated in the PA's Brief, is in error.

actions (ASI requested relief terminating the PA evictions action filed in August 2009; requiring the PA to negotiate the new leases, which the PA signed on Feb. 12, 2009; ending disruption of ASI's economic relationships with its customers and potential customers, which occurred in summer and fall of 2009, etc.). (2010 Complaint, Exhibit L)

Given the above-recited paragraphs of the 2010 Complaint, which allege violations of the Shipping Act that post-date the release, and the fact that the relief requested in Counts I and II are based on those post-release acts, the PA's characterization of the 2010 Complaint as relating only to pre-release acts, because historical facts are employed for color and context, is plain wrong.

II. The FMC's Order Approving the Settlement Agreement Confirms the Limited Scope of the Releases and Is Binding on The PA

The FMC entered an Order Approving the Settlement Agreement on April 1, 2009. Specifically, the FMC's "Order Approving Settlement Agreement" states that:

The Settlement Agreement provides that the parties release each other from any and all claims with respect to the matters covered by the FMC proceedings, as well as the landlord tenant proceedings (L and T Proceedings) for eviction presently being heard in the New York courts.

[Order Approving Settlement Agreement, Exhibit F)

There was no confusion on the part of the Federal Maritime Commission as to the specific purpose and intent of the Settlement Agreement, *and the releases* contained in Paragraphs 2 and 3. The FMC specifically stated that "the parties release each other from any and all claims with respect to matters covered by the FMC Proceedings, as well as the landlord tenant proceedings (L and T Proceedings) for eviction presently being

heard in the New York courts.” (Emphasis added.) That language was not simply a characterization of the overall Settlement Agreement purpose, but specifically addressed the parties’ *releases*—that is, the release by ASI in Para. 3, and the release by the PA in Para. 2. They related to the Pier 7 proceedings.

In NPR, Inc. v Board of Commissioners of the Port of New Orleans, Docket No. 98-23 (March 16, 2000), the Federal Maritime Commission observed that “the Commission does not rubber stamp proffered settlements but examines them to ensure that they do ‘not contravene any law or public policy.’ (Id.)” There, NPR was attacking a lease cancellation agreement (like a settlement agreement, the purpose of which was to avoid future litigation), which was later alleged to be discriminatory with respect to other lessees.

The Commission wrote, “Of course the Cancellation Agreement did not work as intended, as seen from the court case and the instant complaint, but even if it had been designed to settle the *instant* dispute, *it would have to comply with the applicable Shipping Act substantive provisions prohibiting unreasonable and undue practices and prejudices, etc.*” (Emphasis added.)

If the release given by ASI in Para. 3 was *not* limited to the L and T Proceedings and FMC Proceedings, as stated by the FMC in its Order Approving Settlement Agreement, then the FMC was required to determine whether the release in Paragraph 3 was fair regarding claims that were not before it, i.e., the leases related to Piers 8, 9, 10 and Port Newark, as well as other acts that had not occurred yet. The FMC did not determine the fairness, or compliance with the Shipping Act, of the ASI release

respecting claims it had no knowledge of, and which were not part of the FMC proceedings.

Further, if Paragraph 3's release covered non-Pier 7 claims, assuming *arguendo* they were even extant on February 9, 2009, the PA should have objected to the Order Approving Settlement Agreement, and sought to clarify it. The PA did not object to the Commission's characterization of the releases as limited to the FMC and L and T Proceedings. The PA did not even raise the release defense in its Answer to this 2010 Complaint, in June 2010. The PA's *post hoc* interpretation of Para. 3 is a convenient result of its decision to ignore the overall purpose, context and language of the Settlement Agreement, the limited purpose for which ASI was inserted into the release in Paragraph 3, and the exclusion of admiralty claims in ASI's release.

Essentially, the PA tries to rewrite history by taking the Paragraph 3 release out of the context in which it was given to the PA, claiming Para. 3 applies to the instant, post-release dispute between ASI and the PA. The PA's attempt to expand the Settlement Agreement which only concerned the Pier 7 dispute to cover the instant dispute proves too much.

The PA must be bound by the scope and the approval given to the releases by the FMC in its Order, which was clearly stated. In deciding this motion, the Commission should also look to the clear, and consistent, *evidence* of the parties' intent as to the scope of the releases, at the time they formulated those releases, in addition to its own Order. Those prior proceedings, and the dispute, did not concern the PA's post-release actions with respect to the terms of the leases at Piers 8, 9, 10 and Port Newark, or the barge

service, or acts that had not occurred yet, such as the PA's interference with ASI's business agreements, and the PA's issuance of the RFEI.

As Judge Posner eloquently pointed out in Foufas v. Dru, 319 F.3d 284 (7th Cir. 2003), taking a general release out of the context in which it appears is disfavored. In that case, one party, Dru, sought to read the release in isolation from the rest of the settlement agreement, as the PA does here, and apply it to a new dispute. Dru's view that the general release language covered the new dispute between the parties rather than what had actually been released related to the prior dispute—notwithstanding the general release language—was forcefully put down:

In holding that a consent decree is to be interpreted essentially as a contract, the Supreme Court was explicit that “the circumstances surrounding the formation of the consent order [=contract]” were among the aids to interpretation on which the court could rely. United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975). (The analysis applies with equal force to a settlement agreement.) If those circumstances are known to the judge at first hand, his interpretation comes to the reviewing court with added weight. But the rationale for deferential review fails when as in this case the judge's decision does not turn on his interpretation of the agreement that he approved.

No matter; it is an easy case. Dru wants us to look only at the language of the release itself, and not at the “whereas” clause that introduce it. We decline the invitation. To read language acontextually is an almost certain route to error. AM Int'l, Inc. v. Graphic Management Associates, Inc., 44 F.3d 572, 575, 577 (7th Cir.1995); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1013 (7th Cir.1984) (en banc). Especially when the context is supplied by the very document that is being interpreted. The “whereas” clauses indicate that the context of the release is the parties' settlement of the second part of their dispute, the part concerning the Sycuan tribe's casino. ***

Dru misunderstands the architecture of a release. The releasing language must be very broad so that a party cannot, by merely refileing his claim or recasting it in other legal terms or embellishing it with new facts, escape the force of the release. The breadth of the release language in this case is not uncharacteristic, at least in release governed like this one by California law. See, e.g., Vahle v. Barwick, 93 Cal.App.4th 1323, 113 Cal.Rptr.2d 793, 794-95 (2001); Wilshire-Doheny Associates, Ltd. v. Shapiro, 83 Cal.App.4th 1380, 100 Cal.Rptr.2d 478, 482 (2000); Parsons v. Tickner, 31 Cal.App.4th 1513, 37 Cal.Rptr.2d 810, 820 (1995). But then there has to be

something, supplied by other language in the agreement or sometimes by extrinsic evidence of context, to tie the language to the circumstances out of which the parties' dispute arose. See Neverkovec v. Fredericks, 74 Cal.App.4th 337, 87 Cal.Rptr.2d 856, 865-67 (1999); Winet v. Price, 4 Cal.App.4th 1159, 6 Cal.Rptr.2d 554, 557 (1992); Atalla v. Abdul-Baki, 976 F.2d 189, 193 (4th Cir.1992). That something was supplied by the "whereas" clauses, which made clear that the release concerned the disputes that had arisen out of the management contract for the Sycuan tribe's casino.

Any other interpretation would produce absurd results, which is a good reason for declining an invitation to read contractual (or statutory, or constitutional) language literally, as we had occasion to note recently in FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 284-85 (7th Cir.2002). At argument we asked Dru's lawyer whether the release would prevent Foufas from suing Dru for battery if Dru punched Foufas in the eye, and to our surprise the lawyer said that it would. We can imagine the parties rising from the settlement table and Dru telling Foufas, "Now that you've signed the release, I can do with impunity (and immunity) what I've been wanting to do for a long time-and that is punch you in the face." And (according to Dru's lawyer) Foufas couldn't sue. Enough said. AFFIRMED.

[Foufas v. Dru, 319 F. 3d at 286-287.]

The Commission, in evaluating the PA's motion, and current characterization of the breadth and coverage of the release, should also consider the effect of the PA's position on the Commission's policy favoring settlement. The PA's position does violence to that policy, by calling into question the extent of a release, even where the agreement itself makes clear, within its four corners, that the release relates to and disposes of the prior proceedings for a particular dispute. Inquiry into the scope of the release years later will make it more difficult to settle cases. Of course, the Commission should also give weight to its own statement as to the purpose of the releases.

III. The Scope of the Releases in the Settlement Agreement is Clearly Limited to "the Matters Covered By the FMC Proceedings and the L and T Proceedings."

It is a "cardinal principle of contract construction [] that a document should be read to give effect to all its provisions and to render them consistent with each other."

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995). Even “[i]n a situation of potential contract ambiguity, an interpretation that gives a reasonable and effective meaning to all terms of a contract is preferable to one that leaves a portion of the writing useless or inexplicable.” Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 558 (2d. Cir 2000).

It is also “a fundamental rule of contract construction that ‘specific terms and exact terms are given greater weight than general language.’” Aramony v. United Way of America, 254 F.3d 403, 413 (2d Cir. 2001)(quoting Restatement (Second) of Contracts § 203(c)).

Even where there is no “true conflict” between two provisions, “*specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate.*”

Id. at 413-414 (quoting Williston on Contracts § 32:10 at 449 (4th ed.1999))(italics added).

Here, interpreting the Settlement Agreement in its entirety leaves little doubt about its purpose, or about the scope of the releases.

A. The “Whereas” Clauses Show That the Specific Intent of the Parties to the Agreement Was to Resolve the Claims Related to the L and T Proceedings and FMC Proceedings

Every single “Whereas Clause” in the Settlement Agreement references the Pier 7 proceedings, whether the FMC Proceedings, or the L and T proceedings. The Whereas Clauses evidence the context and intent of the parties to a settlement agreement.

Nothing about the Whereas Clauses to this Settlement Agreement suggests that any other claims relating to any other leases for any other piers; or to the PA barge

service; or to contracts that ASI lost but which had not even been anticipated yet; or to a PA Request for Expressions of Interest that had not been issued yet, and was months off in the future, were contemplated to be released by ASI.

For instance, the first and second “Whereas” clauses in the Settlement Agreement describe the nature of the L and T Proceedings and FMC Proceedings, as dealing with Pier 7. (Exhibit A)

The third “Whereas” clause explains that “the Parties have decided to amicably resolve the disputes by dismissing the L and T Proceedings, and the FMC Proceedings, between American and the Port Authority,” and provides the specific procedures for securing dismissals with prejudice in those actions. (Exhibit A)

The fourth “Whereas” clause is particularly instructive, providing:

Whereas, the Parties desire to release each other for any and all claims they have against each other with respect to the matters covered by the FMC Proceedings and the L and T Proceedings...and now in consideration of the premises of covenants as set forth herein the Parties agree as follows...[(emphases added)].

This fourth Clause is a clear statement that the parties’ mutual intent under the Settlement Agreement was to release each other only from those claims covered by the L and T Proceedings and FMC Proceedings.

The enumerated Paragraphs of the Settlement Agreement also reference the Pier 7 proceedings. Paragraph 1 states, in relevant part, that “The L and T Proceedings and the FMC Proceedings shall be dismissed forthwith with prejudice without fees or costs as against either party.”

Paragraph 2 begins, “With regard to Lease BP 302 between the Port Authority and American” Lease BP-302 was the “old” Pier 7 lease. The PA reserves its claim

for rent in this paragraph, stating later, at the end of Paragraph 2, that “Nothing herein release ASI from rent owed or other claims arising out of BP 309, effective May 1, 2008. Further, ASI will move with dispatch and in good faith to remove the pallets being stored upland of Pier 7.” Lease BP-309 was the new Pier 7 lease, between ASI and the PA.

Paragraph 3 through 6 and Paragraph 8 are essentially “boilerplate” release and standard contract provisions. However, in Paragraph 3, ASI does not release the PA from its claims in admiralty. To that extent, the general release boilerplate in Paragraph 2 (the PA’s release of American and ASI) and that in Paragraph 3 (ASI’s and American’s release of the PA), are not mutual.

Paragraph 7 states that, “It is understood that this stipulation shall permit discussions by and among ASI, the Port Authority and Phoenix Beverage with respect to possible future leases between the Port Authority and Phoenix Beverage during the term of BP-309 for lease of Pier 7. Notwithstanding the foregoing, nothing in this Paragraph shall be construed to modify the parties’ proposed lease agreement annexed hereto as Exhibit C or obligate any party to engage in such discussions.”

As such, every single Whereas Clause references Pier 7, and every single substantive aspect of the enumerated paragraphs reference Pier 7. The boilerplate provisions (Paragraphs 3-6 and 8) do not reference Pier 7, but they reference nothing else either. Reading the Settlement Agreement within its four corners, one cannot help but understand that it is only about Pier 7, meaning the Pier 7 leases, and the Civil Court and Commission proceedings dealing with Pier 7. There is literally nothing else in the Settlement Agreement that gives evidence of, or solace to, the PA’s new view of it as

having captured other subjects, claims or potential claims, except as relates to Pier 7, through to February 9, 2009.

B. The Release Provisions Do Not Address Leases for Piers 8, 9, 10 and Port Newark, Barge Funding Opportunities, or Post-Release Conduct

Paragraph 3 contains a release by American Warehousing and ASI in favor of the Port Authority. That paragraph provides, in its entirety:

3. American and ASI, their agents, successors, and assigns (collectively American releasors) hereby release and discharge the Port Authority, its agents, employees, officers, commissioners, successors, and assigns (collectively Port Authority releasees) from any and all actions, causes of actions, suits, debts, dues, sums of money, account, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, damages, summary judgments, executions, claims and demands whatsoever in law or equity against the Port Authority releasees which the American releasors have, or have ever had, or will in the future have upon reason of any matter or thing with respect to the Port Authority releasees, from the beginning of the world to the date of this Settlement Agreement. This release shall have no effect upon defenses and causes of actions in the defense of unrelated third party claims. *Id.*, Exhibit A.

Para. 3 was not a limit on liability—past, present and future—for all matters that could possibly arise between ASI and the PA, unrelated to Pier 7, as the Port Authority now contends. Rather, the reference point for the Port Authority’s release in Paragraph 2 and American Warehousing and ASI’s release in Paragraph 3 was the same – “matters covered by the FMC Proceedings and L and T Proceedings.” Exhibit A, Fourth Whereas Clause; Exhibit G, Order Approving Settlement Agreement, p. 3.

For the release in Paragraph 3 to extend beyond “matters [not] covered by the FMC Proceedings and L and T Proceedings” would require specific language, terms, and

references, such as those included in Paragraph 2, dealing with rent, pallets, etc. The PA did not include such specific terms in Paragraph 3.

Federal appellate courts have found that the interpretation the PA attempts to give to Para. 3 is wrong, especially in light of the intent and context describing only Pier 7-related FMC and L and T Proceedings, and the Pier 7 Lease. See Foufas v. Dru, *supra*, 319 F. 3d, 286-87.

C. Only Pre-May 1, 2008 and Post-May 1, 2008 Pier 7 Claims Were Released

In reviewing the Settlement Agreement and its Order, the Commission may ask why ASI was included in the Paragraph 3 release, since it was not a party to the FMC Proceedings, and was not a party to the L and T Proceedings. The reason is simple. ASI was included in Para. 3 because ASI had become the new tenant at Pier 7, in the interim, while the FMC Proceedings and the L and T Proceedings were pending. American Warehousing was no longer the tenant at Pier 7 after May 1, 2008. ASI replaced American as the tenant in the new lease, BP-309. (Exhibit G)

Without ASI, there would be a distinction between “old” Pier 7 claims, those arising prior to May 1, 2008, based on the prior lease between the PA and American Warehousing, Lease BP-302 (Exhibit C), and those that could arise under the “new” May 1, 2008 Pier 7 lease, BP-309 (Exhibit G), between the PA and ASI.

In other words, since the entire Settlement Agreement was about Pier 7 claims, the PA needed to add ASI to Paragraph 3 to capture any Pier 7 claims ASI might have had, from the new lease’s inception date, May 1, 2008, to the release cut off date, February 9, 2009. That is why the new lease, between ASI and the PA, was attached to the Settlement Agreement proffered to the FMC, to evidence that the Pier 7 dispute had

been resolved. That is also clearly why the release was changed from a limited release based on the FMC Proceedings and the L and T Proceedings, into a more general release (by the striking of the limiting language)—because ASI was not a party to any of the L and T, or FMC Proceedings. Para. 3’s inclusion of ASI thus avoided any confusion as to claims being cut off on February 9, 2009 “with respect to matters covered by the FMC Proceedings and L and T Proceedings[,]” since ASI was *not* a party to those proceedings. Similarly, Paragraph 3 could not logically be limited to only the FMC Proceedings and L and T Proceedings, if ASI were included in the release, because ASI was not releasing any claim it had in those proceedings. ASI was only releasing the claims it could have, related to Pier 7, from the date of the inception of its tenancy at Pier 7, i.e, May 1, 2009.

C. The PA’s Position Is Not Supported by Evidence or Logic

The scope of the release contemplated in Paragraph 3 is informed by the overall context of the Settlement Agreement, including the “Whereas” clauses, the non-mutual language in the releases, the FMC’s approval of the Settlement Agreement and the Order stating that “the parties release each other from any and all claims with respect to the matters covered by the FMC proceedings, as well as the landlord tenant proceedings (L and T Proceedings) for eviction presently being heard in the New York courts.”

In considering these other provisions, the fact that Paragraph 3 is not a ‘global’ release of any claim ASI ever had against the Port Authority to the date of the Settlement Agreement is apparent, and makes sense – which is something the PA’s *post hoc* rationalization does not do. As discussed above, these provisions consistently establish a much more defined and circumscribed objective: To resolve the parties’ claims “with

respect to matters covered by the FMC Proceedings and L and T Proceedings[.]” Exhibits A and G.

The PA pushes for a broad and liberal reading of this provision, but such a reading cannot be reconciled with the clear and specific Pier 7 purpose of the Settlement Agreement in every other respect. The specific intent expressed in the Agreement, and stated by the FMC at the time of approval, controls.

Other factors are important in understanding Paragraph 3. First, there was no reason for ASI to release the PA from ASI’s potential claims related to the new as yet unexecuted (by the PA) leases for Piers 8, 9, 10 and Port Newark. There had been no *quid pro quo*. No compromise had been reached on those claims, if they were even understood to be extant claims at that point. Query whether such claims had ripened. No negotiations had occurred. The only lease the PA actually negotiated was ASI’s new lease for Pier 7. Once the Pier 7 new lease was negotiated fairly, and the PA agreed to issue a new lease for Pier 7, ASI released the PA from past and then-present (“to the date of this Settlement Agreement”) claims, *relating to Pier 7 proceedings*.

Evidencing this, the negotiated-and-released claim attending the Pier 7 lease was specifically referred to in the third Whereas Clause of the Settlement Agreement, to wit, “Attached as Exhibit C, is a new lease which has been executed by ASI and *will be executed by the Port Authority upon the execution of this Settlement Agreement by both parties*, of the for certain areas of Pier 7, the terms of which are set forth in the lease agreement. Exhibits A, B and C are incorporated herein by reference herein and form a part of this Settlement Agreement[.]” (Emphasis added.) The new Pier 7 lease between the PA and ASI was attached, and it was the only lease forwarded to the FMC.

The leases for Piers 8, 9 and 10 and Port Newark, which are the subject of the current ASI 2010 Complaint, were *not* referenced in the Settlement Agreement, in any Whereas Clause, in any enumerated paragraph, in the Para. 3 release, or anywhere else, and they were not attached as exhibits, or forwarded to the FMC.

Further, the PA did not even think to allege that the Shipping Act claims in the instant 2010 Complaint were barred by the release in Paragraph 3 when the PA filed its initial Answer to the Complaint in June 2010. Now, two months later, the PA has realized what it simultaneously contends was obvious all along, and contemplated by the parties, i.e., that ASI released all such Shipping Act claims against the PA back on February 9, 2009. The PA's realization of this "clear" bar to the Complaint actually came so late that it has been forced to move to *add* release as a defense to its Answer to the Shipping Act claims, while it simultaneously moves for summary judgment on that release defense. This is not simply procedurally improper, it gives the lie to the PA's recent interpretation of Paragraph 3.

IV. Admiralty Claims Were Specifically Excluded From ASI's Release

A final flaw in the PA's approach to Paragraph 3 is its failure to even mention that ASI excluded admiralty claims from the type of claim being released in the otherwise standard language.

Paragraph 3 provides, in relevant part, that American Warehousing and ASI

"hereby release and discharge the Port Authority, its agents, employees, officers, commissioners, successors, and assigns (collectively Port Authority releasees) from any and all actions, causes of actions, suits, debts, dues, sums of money, account, reckoning, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, damages, summary judgments, executions, claims and demands whatsoever in law or equity against the Port Authority releasees which the American releasors have, or have ever had, or will in the

future have upon reason of any matter or thing with respect to the Port Authority releasees, from the beginning of the world to the date of this Settlement Agreement...This release shall have no effect upon defenses and causes of actions in the defense of unrelated third party claims.”

[Exhibit A, Para. 3, Settlement Agreement.]

In Paragraph 2, the Port Authority released American Warehousing and ASI from all claims at law, equity *and admiralty*. However, in Paragraph 3, ASI did not release the Port Authority from any admiralty claims, past, present or future. It only released claims at law³ and equity. That difference—the exclusion of admiralty claims from the release— allows ASI to bring this action against the Port Authority in the Federal Maritime Commission seeking an Order for relief, and reparations, for the Port Authority’s violations of the Shipping Act.

A. ASI Included Acts Pre-Dating the Release in the Complaint Only For Context, Color and Comparison, Not as Actionable Claims

ASI’s 2010 Complaint alleges Shipping Act claims based on post-release acts of the PA. Specifically, ASI complains that the Port Authority currently favors and gives undue preference to other marine terminal operators in terms of investments and subsidies, compared to ASI; that the PA interfered with contracts ASI anticipated would be obtained and served at those piers, during the summer and fall of 2009; that the PA issued a request for Expressions of Interest to other marine terminal operators to operate ASI’s piers in August 2009; that the PA refused to deal and negotiate over the terms and conditions of Leases for Piers 8, 9 and 10 and Port Newark, which the PA signed after the

³ “[C]laims and demands ... in law” means civil actions, or which address the Court’s “civil side” seeking damages, as opposed to a Court’s jurisdiction to hear equity claims. In this context, “law” and admiralty are distinct types of claims. The FMC does not have “law” jurisdiction. The FMC has admiralty jurisdiction, originally, which a District Court does not have, except pursuant to federal question or diversity jurisdiction. Even an Order directing reparations must be docketed in the District Court, at law.

release cutoff date; and that the PA *continues* to refuse to fund the bi-state barge operation between Brooklyn and Newark, to the present day, or even to make application to fund these barges.

The acts and omissions for which ASI seeks relief and reparations deal solely with operations at and from Piers 8, 9 and 10, and Port Newark— which: 1) were not part of the dismissed FMC Proceedings; 2) were not part of the L and T Proceedings; 3) were not any part of Paragraph 3's release; and 4) are based on acts that took place after February 9, 2009. The argument that inclusion of any pre-release subsidies, investments and support for other marine terminal operators in the Complaint, as examples of the PA's undue preference and advantage to others, compared to ASI, is a red herring.

Mr. Lombardi's Affidavit may have clarified that some of the examples of investment, support and subsidies the PA has made for the benefit of other marine terminal operators, cited in ASI's 2010 Complaint, *began* at a time before the release date. However, these substantial investments are continuing. Exhibit H, pp. 15, 19. The relevance of the date such subsidies to other MTOs began is not entirely clear, unless the investments and its benefits are entirely in the *past*.⁴ From that, the PA nevertheless leaps to the conclusion that ASI is barred from asserting a claim for its post-Feb. 9, 2009 refusal to fund the bi-state barge operation.⁵

⁴ ASI does not accept or credit those dates for the purposes of this litigation otherwise, without discovery, and without supporting documentation. No such documentation was provided by the PA, and no discovery has been exchanged.

⁵ The barge-as-legitimate-transportation-factor issue will not be litigated on this summary judgment motion. It is important to note, however, that no evidence was adduced on the barge service or cost at trial of the 2004 and 2005 FMC Proceedings. Rather, the ALJ seized on barge costs to excuse the PA's disparate treatment of American Warehousing, compared to other MTOs. The barge cost was a Judge-invented *defense* to American Warehousing's refusal to deal and preference claims, not the basis of any *claims* by American in the prior FMC Proceedings. And no such Shipping Act claim was released by ASI.

The PA's investments in dredging, rail links, highway ramps, and others' terminal operations, and infrastructure, past or present, do not form the *basis* of ASI's undue preference claim. They merely provide a *comparison* of the PA's *current* treatment of ASI with respect to the preference for others and discrimination against ASI. Historical examples and trends also provide a rich context for ASI's present, post-release claims, particularly where the favoritism shown to other MTOs is long-standing, and continuing. ASI could have limited its preference examples to post-Feb. 9, 2009 acts of operating and capital investments that compare unfavorably with the lack of investment in ASI's leasehold, and its operation. Such examples abound.

For instance, the 2010 PA Budget Schedule (Exhibit H, p. 19) for "Operating and Maintenance" expenses show planned expenditures at Port Newark of \$84.7 million; at Port Elizabeth of \$32 million; at Brooklyn of \$11.7 million; at Staten Island (Howland Hook) of \$12 million, while Red Hook Marine Terminal is "maintained" at \$2.7 million. (Every port commerce facility lost revenue for the PA, save one. Thus, the disinvestment at Red Hook cannot be excused by any profit/loss ratio.)

Capital spending investments projected for the PA's 2010 Budget tell the same story: \$50 million for Port Newark, \$44 million for Port Elizabeth; \$8 million for Brooklyn; \$31 million for Staten Island (Howland Hook), \$57 million for the new barge venture, NY NJ Rail, LLC, a bi-state barge and rail operation running from Brooklyn to Jersey City; and \$400,000 for Red Hook Marine Terminal (ASI's main leasehold). See Exhibit H, p. 15.

B. Para. 3 is Too Vague to Constitute a Global Release for Future Claims With Respect to Piers 8, 9, 10 and Port Newark, and Barge Funding

Even if Paragraph 3 could be read in isolation, it is unclear, despite the Port Authority's contrary assertion that "[t]he inescapable meaning [of Paragraph 3] is obvious: ASI cannot bring a Complaint asserting causes of action based on alleged Port Authority actions that occurred prior to February 9, 2009."

If it really was as simple as the Port Authority—the drafter of the Settlement Agreement—now suggests by way of paraphrase, then the Port Authority could have, and should have, used certain, clear language in the first place. The PA should have referenced the other leases, for Piers 8, 9, 10 and Port Newark, since they were also drafted, and dated by the PA, May 1, 2008 (although they remained unexecuted). The PA should have attached those leases to the settlement Agreement proffered to the FMC, as it did with the Pier 7 new, negotiated, lease. The PA certainly should have insisted on mutuality in the release language as to admiralty claims. After all, "any uncertainty in a writing is construed most strongly against the party who caused the uncertainty to exist." Insurance Co. of North America v. NNR Aircargo Service (USA), Inc., 201 F.3d 1111, 1114 (9th Cir 2000).

V. ASI's Undue Preference Claims Are Not Barred by the Release

A. Unfair Advantage to Other MTOs

A new cause of action has arisen regarding the barge service, in addition to the PA's refusal to apply for new, post release funding sources for the barge service. The PA is investing in another barge service between Brooklyn and New Jersey. The PA purchased the assets of NY and NJ Rail, LLC, an entity operating a bi-state barge service

carrying rail freight and containers, between South Brooklyn and Jersey City, New Jersey. The PA is now assembling land in Jersey City, and has moved forward with an environmental impact statement analysis of this option and alternatives. See Port Authority website, "Cross Harbor Freight Program" (<http://www.panynj.gov/about/cross-harbor.html>) (Exhibit J); Environmental Impact Statement, Dept. of Transportation, Federal Highway Administration ("FHWA") and PANYNJ, Fed. Reg. Vol. 75, No. 92, pp. 27053-27056 (May 13, 2010) (Exhibit K). The Federal Register Notice of the Port Authority's and FHWA's NEPA statement for the PA's anticipated bi-state barge operation from Brooklyn to Jersey City is specifically studying capital investment and "operations and maintenance cost estimation for each proposed alternative[.]" Id. at p. 27055.

In its 2010 Budget, the Port Authority set aside \$57 million for the new bi-state barge freight operation. See Exhibit H, pp. 15 and 19. The PA has allocated little or no funding to pay for the barge service which ASI uses. ASI picks up the cost of maintenance, labor, rental, service, certification, etc. of the PA's barges.

Yet, except for the type of cargo, the bi-state barge operation of NY and NJ Rail, basically mirrors the barge operation, also owned by the PA, on which ASI relies. As such, the PA appears to be investing in *more* barge service, not treating barge service as an anathema that justifies discriminatory treatment of a stevedore that requires its use.⁶

⁶ The PA decided to settle the 2004 and 2005 American Warehousing cases before the Commission ruled on the Exceptions to the Initial Decision, by dismissing its L and T Proceedings, and offering a new lease for Pier 7 to ASI, *despite* ASI's well-known need for a barge. Thus, the barge-as-factor initial "finding" was *de facto* overruled by the PA's own contrary actions in settling those cases. The settlement occurred after American Warehousing moved to strike the PA's improper additions to the record after trial of matters intended to justify its refusal to deal and discriminatory treatment.

Given the geography of the New York Harbor, with ports on both sides, a freight-carrying barge is a necessity. This is a fact the PA recognized early on, in its application for federal funds to support the barge service in 1993, see Exhibit N, and which the PA has apparently recognized, again.

VI. Alternatively, Summary Judgment Must be Denied to the PA Because ASI Needs Discovery as to The Meaning of Para. 3's "Release" in the Settlement Agreement

A. Discovery Is Necessary

The PA's summary judgment motion is premature. "Summary judgment ordinarily is proper only after the plaintiff has been given adequate time for discovery." Chappell-Johnson v. Powell, 440 F.3d 484, 488 (C.A.D.C. 2006) (quoting Americable Int'l, Inc. v. Dep't of Navy, 129 F.3d 1271, 1274 (D.C.Cir.1997)). A claimant cannot be expected to respond to the precise components of an affirmative defense "[b]efore discovery has unearthed relevant facts and evidence[.] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002).

Here, the parties have only propounded initial interrogatories and document requests. No responses have been made. Moreover, ASI did not request any documents or propound any interrogatories on the subject of the release, or Settlement Agreement, because that defense was not even raised by the PA in its Answer. Thus, the Port Authority seeks summary judgment on a defense that is not even part of the case yet.

ASI believes the Para. 3 release is clear on its face, and within its four corners, that it relates only to prior Pier 7 lease and Pier 7 proceedings in the FMC and L and T court. Ironically, the PA has essentially raised fact issues as to the *meaning* and

interpretation of the release, even though it has moved for summary judgment, claiming that the release is clear and bars the 2010 Complaint.

An example of the PA's flawed reasoning is that ASI could not have released the Port Authority from its claim for undue preference and reparation for interference with anticipated contracts, due to the PA's issuance of the Request for Expressions of Interest in operating ASI's piers, and other bad acts, because those actions did not take place until the summer and fall of 2009. Those actions could not have been raised in the prior proceedings, they were not contemplated by the release, nor were they released.

However, if the PA's argument is deemed to have any merit at all, then discovery is necessary to understand what the PA thought it was receiving in the way of a release from ASI, in Paragraph 3, why it believed that, and what evidence there (prior drafts, emails, letters, etc.) is to support the PA view that it negotiated a general release of future claims that ASI had, or might have, respecting other piers, other leases, and other future acts disrupting ASI's business, undue preference, refusal to negotiate, etc., especially in light of the exclusion of admiralty claims from the release.

If there are fact issues surrounding the scope of the release, the motion must both be denied, and discovery should proceed on the release and Settlement Agreement, and the facts as they were known at that time, and the basis for claims then allegedly released.

ASI's position is that the release in the Settlement Agreement is unambiguously intended to relate only to those claims related to the Pier 7 leases, and the L and T Proceedings and FMC Proceedings. However, even if the PA's interpretation is accepted, that will not defeat ASI's contention that the post-release undue preference and refusal to deal claims on which Counts I and II are based should proceed to discovery and

hearing. In other words, on this summary judgment motion, the Complaint cannot be dismissed in its entirety. The 2010 Complaint would merely have to be modified to eliminate any factual allegations supporting the new causes of action which the Commission deems to have been compromised, and released. Because the PA does not identify which those are (other than in Dennis Lombardi's affidavit discussing the comparison examples, not the PA's Shipping Act violations), this would require parsing the Complaint through discovery.

B. The Commission Must Construe Inferences as to the Meaning of Paragraph 3 in the Light Most Favorable to ASI

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering such a motion, the court construes the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *See Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 714 (7th Cir.1999). "Summary judgment should be denied if the dispute is 'genuine': 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1095 (7th Cir.1998) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The court will enter summary judgment against a party who does not "come forward with evidence that would reasonably permit the finder of fact to find in [its] favor on a material question." *McGrath v. Gillis*, 44 F.3d 567, 569 (7th Cir.1995).

In its moving papers, the PA does not construe any inferences as to the meaning and purpose of ASI' inclusion in Paragraph 3 favorably to ASI; in fact, it does the opposite. The PA assumes there is no alternative legal or factual interpretation of the release that excludes admiralty claims, and does not reference any other piers, or leases, disrupted business agreements, unfounded requests for expressions of interest, or passed-over funding opportunities for the barge service, other than the interpretation the PA has now adopted, one and a half years later.

The Commission should reject this approach on summary judgment, and deny the motion. Either the PA is wrong as a matter of law, or there is a genuine issue of material fact raised by ASI in this Reply Brief.

CONCLUSION

ASI's 2010 Complaint is based on post-release violations of the Shipping Act. This fact alone merits denial of the summary judgment motion, as a matter of law.

No release of Shipping Act claims relating to past or future acts of the Port Authority ("to the date of the Settlement Agreement") respecting Piers 8, 9 and 10 and the Port Newark piers was contemplated by the release within Para. 3, nor was any negotiated. No such intention was expressed anywhere. Admiralty claims were specifically excluded by ASI from the release. Plainly, any claims arising from the leases for the other piers were not included within the scope of any part of the Settlement Agreement, including Para. 3. Those other leases were not attached or forwarded to the Commission, with the Settlement Agreement.

ASI also could not have released the Port Authority from its claim for reparation for interference with anticipated contracts, due to the PA's issuance of the Request for Expressions of Interest in operating ASI's piers, and other bad acts, because those Shipping Act violations had not occurred yet, and did not occur until the summer and fall of 2009.

The motion should be denied.

Respectfully submitted,



Janine G. Bauer, Esq.

SZAFERMAN, LAKIND,
BLUMSTEIN & BLADER, P.C.
Attorneys for American Stevedoring, Inc.
101 Grovers Mill Road, Ste. 200
Lawrenceville, N.J. 08648
Tel. (609) 275-0400

Dated: August 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons listed below in the manner indicated, with a copy to each such person:

1. Via Fax 202-523-0014 (Brief Only) and Via Federal Express (Brief and Exhibits) to

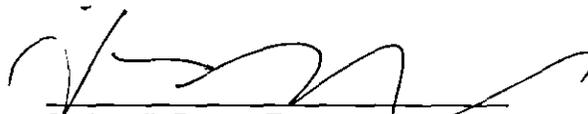
Federal Maritime Commission
Attn: Office of Secretary
800 North Capitol St. N.W.
Washington, D.C. 20573-0001

2. Via E-mail (Brief Only) and Via Federal Express (Brief and Exhibits)

Richard A. Rothman
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153

Peter D. Isakoff, Esq.
Alexander O. Levine, Esq.
Weil, Gotshal & Manges LLP
1300 Eye Street, NW
Suite 900
Washington, DC 20005

Dated at Lawrenceville, New Jersey
This 9th day of August, 2010



Janine G. Bauer, Esq.

APPENDIX

TABLE OF CONTENTS

Exhibit A	Settlement Agreement
Exhibit B	2004 and 2006 Port Authority (PA) "L and T" Petitions
Exhibit C	Pier 7 Lease, BP-302, between PA and American Warehousing
Exhibit D	2004 American Warehousing FMC complaint against PA
Exhibit E	2005 American Warehousing FMC complaint against PA
Exhibit F	FMC Order Approving Settlement Agreement
Exhibit G	Pier 7 Lease, BP-309, between PA and ASI
Exhibit H	2010 PA Budget Schedules
Exhibit I	Leases for Other Piers LPN 281 (Port Newark) BP 308 (Pier 8, Red Hook Terminal) BP 307 (Piers 9A, 9B and 10, Red Hook Terminal)
Exhibit J	PA Website, Cross Harbor Freight Program and News Article
Exhibit K	Federal Register Notice of NEPA environmental Analysis
Exhibit L	2010 American Stevedoring, Inc.'s (ASI) FMC Complaint against PA ("2010 Complaint")
Exhibit M	PA Request for Expressions of Interest for ASI Piers, Aug. 2009
Exhibit N	1993 PA Application for Barge Funding