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May 14, 2012

VIA FEDEX

Office of the Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573

**Re: Maier Terminals, LLC v. The Port Authority of New York
and New Jersey, FMC Docket No. 12-02
Hardcopies of May 11, 2012 E-Mail Filing of Maier's Reply in
Opposition to PANYNJ's Motion to Dismiss and Stay**

Dear Secretary Gregory:

Enclosed please find the signed original and five (5) copies of Reply in
Opposition of Maier Terminals, LLC to the Port Authority of New York and New
Jersey's April 26, 2012 Motion to Dismiss and Request for a Stay of Litigation, which
Maier previously filed by e-mail on May 11, 2012.

If you have any questions or concerns with this filing, please let me know.

Respectfully submitted,



Brian M. Serafin

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**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

ORIGINAL

**REPLY IN OPPOSITION OF MAHER TERMINALS, LLC
TO THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S APRIL 26, 2012
MOTION TO DISMISS AND REQUEST FOR A STAY OF LITIGATION**

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Maher Terminals, LLC (“Maher”), by and through undersigned counsel, respectfully opposes Respondent Port Authority of New York and New Jersey’s (“PANYNJ” or the “Port Authority”) Motion to Dismiss Maher’s Complaint and Request for a Stay of Litigation Pending the Presiding Officer’s Resolution of the 08-03 Litigation or, at Minimum, Pending Decision on PANYNJ’s Motion to Dismiss.

INTRODUCTION

PANYNJ’s Motion to Dismiss is frivolous. The Motion advances no legitimate legal arguments supporting dismissal on the pleadings of any part of Maher’s Complaint. PANYNJ applies the wrong law in key respects, PANYNJ serially mischaracterizes and ignores the allegations in the Complaint, and the Motion is replete with unsubstantiated assertions of purported fact not found in the Complaint. PANYNJ’s motion is so infused with improper factual assertions¹ that it is not credible to suggest that the motion was filed with the intent to dismiss any part of Maher’s Complaint on the basis of the pleadings.²

PANYNJ feigns concern about the Complaint because purportedly additional “notice of what the claim is and the grounds upon which it rests” is needed before answering or responding to discovery on “broadly and vaguely” alleged claims. Mot. to Dismiss at 2, 17. If PANYNJ had any real need for more insight into Maher’s claims, PANYNJ could have moved pursuant to FMC Rule 71 for a more definite statement—the Commission’s mechanism for dealing with

¹ And all manner of *ad hominem* attacks against the Complainant and counsel, and other sound and fury, that are not facts in the Complaint or otherwise and are not relevant to this or any other motion.

² As a motion to dismiss, the procedural errors alone render the motion dead on arrival. *See, e.g., Rendezvous Int’l v. Chief Cargo Services, Inc. et al.*, 31 S.R.R. 1571, 1576 (Guthridge, A.L.J. 2010) (stating that for a 12(b)(6) motion to dismiss, the Presiding Officer may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” As a “motion is not a pleading”, one is “unable to rely on the facts stated in [a] motion when ruling on [a] motion to dismiss.”) (citations omitted).

allegedly vague or ambiguous pleadings. PANYNJ decision to not seek a more definite statement, but five days later file its wide ranging, baseless motion to dismiss belies PANYNJ's true intent: to improperly delay the adjudication of Maher's well-supported claims and obfuscate the laws and facts alleged in the complaint.

This is not the first time PANYNJ has filed a baseless motion to dismiss to block an FMC complaint and discovery. In response to the complaint and discovery initiating the Docket 07-01 Matter served on January 9, 2007, PANYNJ filed a motion to dismiss arguing that the Commission lacked jurisdiction over PANYNJ's leases. The Presiding Officer rejected the argument as "without merit" and further that PANYNJ's Shipping Act argument "suggests that the Port Authority conducted little, if any, inquiry into [the] Commission's intent." *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 30 S.R.R. 1412, 1418 (A.L.J. 2007). The Presiding Officer also rejected PANYNJ's motion advancing new facts not in the Complaint because the "complaint is the only pleading in the record and the Port Authority presents matter out side this pleading". *Id.* Yet, despite being properly rejected, PANYNJ's baseless motion to dismiss achieved precisely what it really sought – *a de facto seven month stay* of the proceeding and discovery.

PANYNJ's instant motion reprises its Dkt. 07-01 strategy of delay and misdirection. The centerpiece of PANYNJ's motion—alleged failure to meet heightened pleading standards under FRCP Rule 8 and *Iqbal/Twombly*—is premised on the wrong standard that the Commission has *declined to adopt*. Mot. to Dismiss at 14-15. The Commission maintains its long-held liberal pleading standard. Similarly, PANYNJ argues that Maher lacks standing to bring certain claims, premised on a narrow view of standing long rejected by the Commission. PANYNJ actually argues that an allegation of injury is required to plead a violation of the Shipping Act seeking a

cease and desist order. Astonishingly, PANYNJ represents that its “review of governing Commission jurisprudence reveals” its erroneous purported “authority”. Mot. to Dismiss at 24-26. PANYNJ’s propositions flaunt decades of Commission jurisprudence, and like PANYNJ’s Dkt. 07-01 motion to dismiss, “suggests that the Port Authority conducted little, if any, inquiry into [the] Commission’s intent” or application of the Shipping Act.

PANYNJ’s procedural errors and mischaracterizations of the Complaint are legion. Even a cursory review of Maher’s Complaint shows that Maher *pleaded* injuries and damages, Compl. ¶ VI(A)³, yet PANYNJ repeatedly ignores the Complaint and asserts that Maher has not alleged *any* injuries. Mot. to Dismiss at 2, 21-25. New, unsupported assertions of fact and theories not presented anywhere in Maher’s Complaint abound in the motion. *See, e.g.*, Mot. to Dismiss at 19 (alleging dates that Maher was “plainly aware” of the alleged violations and injury), 29 n.11 (introducing additional facts on terminal ownership and purported defenses on the merits with respect to the Global lease).

PANYNJ also plays fast and loose with its own defenses, arguing here that certain allegations fail to state a claim and should be dismissed because differences in lease terms alone are not enough to state a Shipping Act claim. Mot. to Dismiss at 18 (“[A]ll Maher has done is point to alleged ‘differences’ between another tenant’s lease and operation at the port, and its own, and assert, in wholly conclusory fashion, that they amount to unreasonable practices and preferences and refusals to deal.”). Yet, the central argument of PANYNJ’s *last* dispositive motion before the FMC, in Dkt. 08-03, was that *mere knowledge of individual lease differences* was enough for the accrual of a Shipping Act claim. PANYNJ’s Mot. for Summary Judgment of

³ “[I]ncluding but not limited to higher costs and other undue and unreasonable payments, economic considerations, restrictions on transfers and/or changes in ownership or control interests, lost business, foregone business, additional obligations not required of Maersk, APM, PNCT, NYCT, and other marine terminals and other damages.”

Maher's Lease-Term Discrimination Claims, Dkt. 08-03, at 6 (Feb. 25, 2011). PANYNJ's simultaneously conflicting legal positions strains credulity and warrants rejection.

The real purpose of PANYNJ's motion is to delay Shipping Act enforcement and continue unabated PANYNJ's institutional, systemic violations of the Shipping Act. Rather than file a Rule 71 motion, which would have *automatically* deferred PANYNJ's obligation to answer the Complaint pending a decision on the motion, PANYNJ seeks a virtually indefinite stay of this proceeding. Yet, PANYNJ not only fails to meet the burden of demonstrating a proper basis for delay, but misrepresents the appropriate legal standard, omits elements undercutting its position, fails to identify any *pressing need* for a stay or demonstrate a *clear case of hardship* absent a stay, and exaggerates the possible efficiencies resulting from a stay. Mot. to Dismiss at 30-38. PANYNJ has no legitimate basis for requesting a stay that would likely delay the proceeding for years; PANYNJ's real objective is to frustrate the Commission's adjudication of Maher's Shipping Act claims.

PANYNJ's motion to dismiss has failed to present any rational legal arguments and serves only to delay the proceeding and cause yet more injury to Maher. Having failed to meet its burden to show that no relief can be granted under *any set of facts* or that a stay is warranted, PANYNJ's motion accordingly fails and must be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On March 30, 2012, Maher filed a Complaint with the Federal Maritime Commission ("FMC") in this proceeding against PANYNJ ("Complaint") alleging violations of the Shipping Act by PANYNJ injuring Maher. The Complaint and Maher's First Set of Interrogatories and First Set of Document Requests were served on PANYNJ by the Commission on April 6, 2012.

The Complaint alleges PANYNJ violations of the Shipping Act, 46 U.S.C. §§ 41102(c), 41106(2), 41106(3), and 41106(1), Compl. ¶ V(A), resulting in injury and damages to Maher and seeking reparations and an order that PANYNJ cease and desist from violating the Shipping Act. Compl. ¶¶ VI(A), VII(B).

On or before April 21, 2012, PANYNJ could have moved pursuant to FMC Rule 71 for a more definite statement if PANYNJ believed that any part of Maher's Complaint was vague or ambiguous. 46 C.F.R. § 502.71. PANYNJ did not file a Rule 71 motion.

On April 26, 2012, PANYNJ filed its Motion to Dismiss Maher Terminals, LLC's Complaint and Request for a Stay of Litigation Pending the Presiding Officer's Resolution of the 08-03 Litigation or, at Minimum, Pending Decision on the Port Authority's Motion to Dismiss ("Motion to Dismiss").

In its Motion to Dismiss, PANYNJ misstates Maher's Complaint, the Commission's holdings in the 07-01 proceeding, and misrepresents and misapplies Shipping Act authority in arguing: (1) four of Maher's claims do not meet the pleading standards under the standard applied in other forums under FRCP Rule 8 and in *Ashcroft v. Iqbal* and *Bell Atl. Corp. v. Twombly*; (2) two of Maher's claims are allegedly precluded because Maher also raised the issues in objection to the proposed 07-01 Settlement Agreement between PANYNJ and APM; (3) certain of Maher's allegations allegedly should be dismissed for a lack of standing and ripeness; and (4) certain of Maher's claims allegedly are barred by the statute of limitations.

In its motion, PANYNJ asserted that it had prepared responses to Maher's initial discovery requests, and on May 7, 2012, PANYNJ responded to Maher's First Set of Interrogatories and First Set of Requests for Production of Documents, but did not produce documents, and propounded interrogatory and document requests on Maher.

ARGUMENT

I. Maher's Claims Satisfy the Commission's Pleading Standards

PANYNJ's motion applies the wrong standard for motions to dismiss before the Commission. Whereas the Commission continues to apply the liberal pleadings standard of administrative proceedings, consistent with the Commission's Rules, which provide that pleadings are easily amendable and that vague complaints should be addressed through motions for a more definite statement, PANYNJ erroneously argues for application of the inapposite *Twombly* and *Iqbal* decisions and misdirects the Presiding Officer to an inapplicable legal standard.

A. *Standard of Review for a Motion To Dismiss Before the FMC*

In reviewing motions to dismiss a complaint for lack of subject matter jurisdiction or for failure to state a claim upon which relief may be granted, the Commission applies the principles set forth in Federal Rules of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6) as consistent with Commission precedent favoring a more lenient pleading standard.⁴ Such motions should be addressed to the face of the pleadings, not the evidence, and any doubts or questions of fact are to be construed in favor of the non-moving party. Accordingly, a complaint should not be dismissed unless it appears beyond doubt that the complainant can prove no set of facts that would entitle the complainant to the relief requested.⁵

The Commission has long applied a more lenient standard toward pleadings than that which is applied under the Federal Rules of Civil Procedure in federal court, consistent with the

⁴ See, e.g., Memorandum and Order on Respondent's Motion to Dismiss Complaint, Dkt. No. 07-01, at 7 (July 13, 2007); *McKenna Trucking Co., Inc. v. A. P. Moller-Maersk Line*, 27 S.R.R. 1045, 1054 (A.L.J. 1997).

⁵ See, e.g., 27 S.R.R. at 1050 et seq.; *Int'l Freight Forwarders & Custom Brokers Ass'n of New Orleans v. LASSA*, 27 S.R.R. 392, 394-96 (A.L.J. 1995); *NPR, Inc. v. Bd. of Comm'rs*, 28 S.R.R. 1011, 1014-18 (A.L.J. 1999).

Commission's Rules permitting amendment of complaints and the filing of a motion for a more definite statement by respondent. As the Presiding Officer held recently:

The standards for motions to dismiss are well established.

...
When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to plaintiff. Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." Thus, a motion to dismiss under 12(b)(6) should not be granted "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In its review of a 12(b)(6) motion to dismiss, the Court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken."

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., 31 S.R.R. 1369, 1380 (Guthridge, A.L.J. 2010) (quoting *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 335 F. Supp. 2d 275, 279 (D. Conn. 2004)) (internal citations omitted).

The Presiding Officer's application of this standard is consistent with the longstanding and deeply entrenched doctrine applying liberal pleading standards to Shipping Act administrative proceedings. *Interconex, Inc. v. Fed. Mar. Comm'n*, 572 F.2d 27, 30 (2d Cir. 1978) ("[A] liberal attitude toward pleadings has been held specifically appropriate in FMC proceedings."); *Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exch., Inc.*, 28 S.R.R. 1411, 1412 (A.L.J. 2000) ("Initial pleadings in administrative proceedings are designed to give notice and are not considered otherwise to be critical. It is not necessary for complainants to plead their evidence in their initial complaints and it is customary for the facts to be developed, among other ways, by means of discovery rules."); *Tak Consulting Eng'rs v. Bustani*, 28 S.R.R. 584, 589

(A.L.J. 1998) (“Pleadings in administrative proceedings are easily amendable, even more so than in federal courts, and are not considered to be critically important.”); *Pac. Coast European Conference—Limitation on Membership*, 5 F.M.B. 39, 42 n.8 (F.M.B. 1956) (“The most important characteristic of pleadings in the administrative process is their unimportance.”).⁶

The Commission’s liberal attitude towards pleadings is further memorialized in Rule 62, which provides that a complaint need only include information identifying parties and counsel, “a concise statement of the cause shown, and a request for the relief or other affirmative action sought,” and which also permits the amendment of a complaint “If the complaint fails to indicate the sections of the acts alleged to have been violated or clearly to state facts which support the allegations.” 46 C.F.R. § 502.62(a) & (c). Similarly, Rule 70 explicitly provides for amendments or supplements to the pleadings. 46 C.F.R. § 502.70(a). Moreover, where a respondent is confronted with a complaint which “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading,” the Rules provide for the filing of a motion for a more definite statement within fifteen days of the pleading in order to avoid needless delay. 46 C.F.R. § 502.71.

B. *PANYNJ Applies the Wrong Standard of Review for a Motion To Dismiss Before the Commission*

In its Motion to Dismiss, PANYNJ ignores the Commission’s liberal pleading standard, and instead asserts a more restrictive standard pursuant to FRCP 8, which provides that a complainant must plead “only enough facts to state a claim to relief that is plausible on its face” and which has been applied by the federal courts, most notably in the cases of *Ashcroft v. Iqbal*,

⁶ The doctrine extends beyond Commission proceedings to administrative proceedings more generally. *See, e.g., N.Y. State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 104 (2d Cir. 1996) (“In an administrative proceeding . . . pleadings are liberally construed and easily amended . . . the form a pleading takes does not loom large . . .”); *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 585 (D.C. Cir. 1985) (“Administrative pleadings are very liberally construed and very easily amended.”).

556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).⁷ PANYNJ's reliance upon the *Iqbal/Twombly* standard is erroneous.

In *Mitsui*, the Presiding Officer reasoned that FRCP Rule 8 *does not* apply to motions to dismiss before the Commission, because Commission Rule 12 only invokes the FRCP in circumstances “which are not covered by a Commission Rule” and Commission Rule 62 specifically covers the Commission’s pleading requirements. 31 S.R.R. at 1383. Therefore, the more liberal standard of pleading which have always applied before the Commission continue to govern motions to dismiss.⁸ The Commission affirmed the Presiding Officer’s finding in *Mitsui*⁹

⁷ Even if the *Iqbal/Twombly* standard did apply here, PANYNJ overstates the impact, and fails to note that in *Twombly* the Court explained that “Asking for plausible grounds to infer [the facts predicate to a statutory violation] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence [of the violations alleged]” and that “we do not require heightened pleading of specifics.” *Twombly*, 550 U.S. at 556 & 570. See also *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“‘Plausibility’ . . . does not imply that the district court should decide whose version to believe, or which version is more likely than not. . . . As we understand it, the Court is saying instead that the plaintiff must give enough details . . . to present a story that holds together. . . . [C]ould these things have happened, not did they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff’s inferences seem more compelling than the opposing inferences.”); *Aktieselskabet AF 21 November 21 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (“Many courts have disagreed about the import of *Twombly*. We conclude that *Twombly* leaves the longstanding fundamentals of notice pleading intact.”) (emphasis added).

⁸ See also *Rendezvous Int’l*, 31 S.R.R. at 1575-76 (applying the Commission’s liberal standard in another post *Iqbal/Twombly* case); *Tienshan, Inc. v. Tianjin Hua Feng Transp. Agency Co.*, 31 S.R.R. 1309, 1316 (Guthridge, A.L.J. 2010) (same).

⁹ The Commission did not take issue with the Presiding Officer’s analysis from *Twombly* and *Iqbal* nor did it indicate an intent to overturn decades of Commission precedent enforcing the Commission’s liberal pleading standard. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“To be sure, the requirement that an agency provide a reasoned explanation for its action would ordinarily demand that it display awareness that it is changing its position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard its rules that are still on the books.”); *Dillmon v. Nat’l Transp. Safety Bd.*, 588 F.3d 1085, 1089-91 (D.C. Cir. 2009) (finding arbitrary and capricious National Transportation Safety Board’s departure from its precedent deferring to the administrative law judge on credibility determinations without a reasoned explanation).

and declined to adopt a stricter pleading standard.¹⁰ Simply put, PANYNJ's motion applies the incorrect standard to a motion to dismiss before the Commission, and therefore, its argument fails at the outset for want of the proper legal standard.

Further undercutting its argument, PANYNJ is asserting a wholly contradictory position as compared to its position in prior proceedings, in which PANYNJ argued that *mere knowledge of individual lease differences* was sufficient to state a Shipping Act claim. PANYNJ's Mot. for Summary Judgment of Maher's Lease-Term Discrimination Claims, Dkt. 08-03, at 6-7 (Feb. 25, 2011); PANYNJ's Resp. Statement to the New Facts Contained in Maher's Responding Statement (08-03), Apr. 20, 2011, at 2-3 ("Maher had actual knowledge of the differences between the terms of the Maersk and Maher leases and was therefore on inquiry notice that it had a potential claim based upon an 'undue or unreasonable preference.'"); PANYNJ Reply to Maher's Exceptions, Dkt. 08-03, at 4, 7-9, 14-15, 24 (June 29, 2011) (arguing that "[a] terminal operator that knows it is being treated different from a similarly situated operator has every incentive to exercise diligence to investigate and protect its interest . . . the terminal operator can (and must) make inquiry and/or seek relief in a timely manner in order to preserve any rights it may have."). Now, in a blatant reversal of its central argument on summary judgment in Dkt. 08-03, PANYNJ contends in its current motion that "all Maher has done is point to alleged

¹⁰ PANYNJ's assertion of a stricter pleading standard was previously expressly argued by Commissioner Khouri, in dissent in *Mitsui*, wherein he lamented that the Commission's decision *not* to overturn the Presiding Officer's ruling that FMC Rule 62 supplants FRCP 8, that continued adherence to the liberal pleading standard is warranted by the authorities, and express reliance on pre-*Iqbal/Twombly* judicial decisions as governing the standard for a motion to dismiss before the Commission. Notwithstanding his dissent, the *Mitsui* majority declined to adopt the standard that PANYNJ now erroneously asserts. *Wade v. Diamant Boart, Inc.*, 179 F. App'x 352, 358 n.2 (6th Cir. 2006) (majority clearly aware of implicit ruling on an issue where raised by dissent); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (dissent's challenge to majority on an issue demonstrates majority's awareness of the point); *Clark v. Cohen*, 794 F.2d 79, 91 (3d Cir. 1986) ("The fact that this line of argument was noted by the *Green* dissent and not answered by the majority implies that the majority was aware of it, but unpersuaded.").

‘differences’ between another tenant’s lease and operation at the port, and its own, and assert, in wholly conclusory fashion, that they amount to unreasonable practices and preferences and refusal to deal,” and that “such ‘labels and conclusions’ cannot survive a motion to dismiss.” Mot. to Dismiss at 18.

PANYNJ’s fundamental contradiction not only robs its argument of any force, but is contrary to law and cannot be allowed to stand. “[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). Judicial estoppel applies with equal force to “a prior legal proceeding or [to] an earlier phase of the same legal proceeding.” *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003) (citing *Pegram v. Herdrich*, 520 U.S. 211, 227 n.8 (2000)). Moreover, judicial estoppel is not limited to court proceedings and is applicable in administrative proceedings, such as the FMC, as well. See *Muellner v. Mars, Inc.*, 714 F. Supp. 351, 357-58 (N.D. Ill. 1989) (applying judicial estoppel after noting that “[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.”). The Commission has rejected contradictory and inconsistent positions advanced by a party in the past. See, e.g., *Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 903 (A.L.J. 2002) (“Complainants’ present claim . . . blatantly conflicts with their earlier position. . . .”); *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 22 S.R.R. 826, 850 (A.L.J. 1984) (“Prudential’s inconsistent theories of recovery seem to present an insuperable obstacle as a matter of law. . . .”). Having asserted that mere notice of facial differences was sufficient to state a claim for a Shipping Act violation, PANYNJ cannot plausibly argue, as it has now, that “pointing to alleged ‘differences’” and asserting that the differences “amount to unreasonable

practices and preferences and refusal to deal . . . cannot survive a motion to dismiss.” PANYNJ’s attempts to play “fast and loose” with its defenses in order to mislead the Presiding Officer and the Commission should be rejected.

C. *Mahe’s Complaint States Claims for Which Relief Can Be Granted*

PANYNJ moved to dismiss certain of Mahe’s claims alleged in the Complaint on the basis of PANYNJ’s assertion that Mahe failed to plead facts sufficient to state Shipping Act claims. Mot. to Dismiss at 14-16 (unreasonable and preferential treatment with respect to APM); *id.* at 16-18 (unreasonable and preferential treatment concerning PANYNJ’s lease interest transfer consent practices); *id.* at 27-29 (unreasonable and preferential ocean carrier preferences and treatment with respect to PNCT/MSC); *id.* at 29-30 (unreasonable refusal to deal with respect to Global). Applying the facts alleged in the Complaint to the proper elements of the claims, it is clear that Mahe sufficiently pleaded the violations of the Shipping Act under the Commission standard and that PANYNJ failed to avail itself of the Commission’s procedure under Rule 71 for a more definite statement.

PANYNJ nevertheless challenges all of the aforementioned claims on the basis of (i) erroneous elements that are not required, (ii) mischaracterization and/or omission of facts alleged in the Complaint, and (iii) reliance on repeated assertions of purported facts not contained in the Complaint, none of which is a proper basis for a motion to dismiss.¹¹

¹¹ For a 12(b)(6) motion to dismiss, the Presiding Officer may consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” *Rendezvous Int’l*, 31 S.R.R. at 1576. As a motion is not a pleading, the Presiding Officer is unable to rely on additional facts presented in a motion to dismiss. *Id.* (citing *A. Bauer Mech., Inc. v. Joint Arbitration Bd. of Plumbing*, 562 F.3d 784, 790 (7th Cir. 2009)). See also *Cosmas v. Hassett*, 886 F.2d 8, 13 (2d Cir. 1989); *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994) (discussing that the “law addressing the effect of factual allegations in briefs or memoranda suggests such matters may never be considered when deciding a 12(b)(6) motion, and most certainly may not be considered when the facts they contain contradict those alleged in the complaint.”) (internal citations

1. Unreasonable Practices or Procedures; 46 U.S.C. § 41102(c)

Under the Shipping Act, 46 U.S.C. § 41102(c), “[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” A party pleading a violation of 46 U.S.C. § 41102(c) need only plead that the alleged practice or procedure was unreasonable.¹²

(i) *PANYNJ’s Unreasonable Lease Transfer Consent Practices (Count I, Compl. ¶ V(B))*

Maher’s Complaint alleges that PANYNJ’s lease transfer consent practices are unreasonable. Maher has alleged facts detailing that PANYNJ has a practice of requiring financial consideration to obtain consent to transfer lease interests and that the practices are unreasonable. Compl. ¶¶ (A)-(H). Maher alleges that PANYNJ has a published policy not reasonably or uniformly applied, that substantial cash payments and economic consideration are required by PANYNJ, that there is a lack of a reasonable relationship to the relative benefits received by Maher and other marine terminal operators. Compl. ¶¶ V(A)(a), V(B). As a result of the alleged practices, Maher has sustained and continues to sustain injuries and damages. Compl. ¶ VI(A). Therefore, Maher’s Complaint has satisfied the requisite pleading elements for PANYNJ’s unlawful lease transfer consent practices.¹³

omitted).

¹² *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1199, 1222 (F.M.C. 2003).

¹³ PANYNJ’s argument that Maher has “fail[ed] to identify *even one terminal operator* that was not required to pay a fee for an actual change of control” is a misleading attempt by PANYNJ to insert additional elements that are not required to prove a violation. Mot. to Dismiss at 17 (emphasis in original). Maher’s complaint alleges that PANYNJ has not required financial consideration from all terminals. Compl. ¶ IV(D). PANYNJ merely attempts to cast doubt on the allegation by suggesting a fact dispute.

(ii) *PANYNJ's Unreasonable Practice of Favoring Ocean Carriers and Ocean-Carrier-Affiliated Marine Terminals (Count II, Compl. ¶ V(C))*

Maher alleges that PANYNJ has an unreasonable practice of providing preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals, including providing PNCT and MSC with numerous concessions unreasonably preferring MSC, an ocean carrier, and ocean-carrier-affiliated terminals. Compl. ¶¶ IV(I)-(T), V(A)(a), V(C). PANYNJ's failure to establish, observe, and enforce reasonable practices has resulted in injury and damages to Maher. Compl. ¶ VI(A). Maher's Complaint has adequately pleaded violations of 46 U.S.C. § 41102(c).¹⁴

(iii) *PANYNJ's Unreasonable Leasing Practices of Requiring General Releases and Waivers for Potential Shipping Act Violations (Count III, Compl. ¶ V(D))*

Maher has further alleged that PANYNJ has failed to establish, enforce, and observe reasonable leasing practices with respect to demanding unreasonable lease provisions, including requiring agreements to release PANYNJ from Shipping Act claims. Compl. ¶¶ IV(U), V(A)(a), V(D). As a result, Maher "has sustained and continues to sustain injury and damages." Compl. ¶ VI(A). Maher's Complaint meets the pleading standards of 46 U.S.C. § 41102(c).¹⁵

¹⁴ While appearing to simultaneously address Maher's 46 U.S.C. § 41102(c) and 46 U.S.C. § 41106(2) claims arising from PANYNJ's unduly preferential treatment of PNCT, PANYNJ contends that Maher has failed to plead "any facts to demonstrate any Shipping Act violation based on the Port Authority's approval of the PNCT terminal and other concession that it gave PNCT . . ." Mot. to Dismiss at 28 (emphasis in original). However, this yet again ignores the face of the Complaint and impermissibly contradicts Maher's allegations and facts. Furthermore, PANYNJ's argument that Maher failed to plead "facts to support that Maher had the desire or ability to provide the same investment and cargo commitments" as PNCT is not a required element of 46 U.S.C. § 41102(c) and does not constitute a failure to state a claim. *Id.*

¹⁵ Here and for Maher's other claims arising from PANYNJ's unreasonable leasing practices, PANYNJ's assertion that Maher has not alleged any injury from the Port Authority's general leasing practices" is outright contradicted by the allegations in Maher's Complaint and therefore must be ignored. Mot. to Dismiss at 23; *Rendezvous Int'l*, 31 S.R.R. at 1576 (for a 12(b)(6) motion to dismiss, the Presiding Officer may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of

(iv) *PANYNJ's Unreasonable Leasing Practice of Requiring Liquidated Damages Provisions (Count IV, Compl. ¶ V(E))*

Maher alleges that PANYNJ has failed to establish, enforce, and observe reasonable leasing practices with respect to demanding unreasonable lease provisions, including requiring to agree to unreasonable liquidated damages provisions, including provisions designed to trigger if Shipping Act claims are brought against PANYNJ. Compl. ¶¶ IV(U); V(A)(a), V(E). As a result, Maher “has sustained and continues to sustain injury and damages.” Compl. ¶ VI(A). Maher has therefore sufficiently pleaded a Shipping Act claim under 46 U.S.C. § 41102(c).

(v) *PANYNJ's Unreasonable Leasing Practice of Setting Future Lease Rates at Rates Not Reasonably Related to the Cost of Services Provided (Count V, Compl. ¶ V(F))*

Maher alleges that PANYNJ has failed to establish, enforce, and observe reasonable leasing practices with respect to demanding unreasonable lease provisions, including requiring marine terminal operators to agree to future lease rates, in marine terminal operator leases, that are not reasonably related to the cost of services provided. Compl. ¶¶ IV(U), V(A)(a), V(F). As a result, Maher “has sustained and continues to sustain injury and damages.” Compl. ¶ VI(A). Maher has satisfied the pleading elements of 46 U.S.C. § 41102(c).

(vi) *PANYNJ's Unreasonable Practice of Excluding Existing Tenants From Consideration as a Lessee, Operator, or Qualified Transferee of the Marine Terminal that is the Subject of the Global Lease (Count VI, Compl. ¶ V(G))*

Maher has alleged that PANYNJ has an unreasonable practice of excluding Maher and other existing tenants from consideration for the marine terminal that is the subject of the Global Lease, including preventing tenants from qualifying as a Qualified Transferee under the Global Lease. Compl. ¶¶ IV(V)-(W), V(A)(a), V(G). Maher further alleged that PANYNJ's

which judicial notice may be taken.”) (internal citations omitted). Additionally, PANYNJ's argument that a contractual relationship must be present for a 46 U.S.C. § 41102(c) claim applies an incorrect standard and is contravened by Commission jurisprudence. *See infra* section III.

unreasonable actions resulted in harm and injury to Maher. Compl. ¶ VI(A). Thus, Maher meets the Commission's pleading standard for its claim.

(vii) *PANYNJ's Unreasonable Practice of Approving Deferral of APM's Leasehold Construction Obligations (Count VII, Compl. ¶ V(H))*

Maher alleges that PANYNJ has failed to establish, observe, and enforce reasonable practices with respect to the granting of deferrals of marine terminal operator leasehold obligations, such as the deferral PANYNJ granted to APM for its leasehold capital expenditure obligations and the refusal to grant Maher a similar deferral. Compl. ¶¶ IV(X); V(A)(a), (H). PANYNJ's unjustified and unreasonable actions have resulted in injuries and damages to Maher. Compl. ¶ VI(A). Maher has pled sufficient facts to show a violation of 46 U.S.C. § 41102(c) as a result of PANYNJ's unreasonable practices.¹⁶

(viii) *PANYNJ's Unreasonable Practices Regarding Construction Financing (Count VII, Compl. ¶ V(H))*

Maher alleges that PANYNJ has failed to establish, observe, and enforce reasonable practices concerning the use of construction financing allocated for mandatory projects, including facts that PANYNJ approved APM's use of financing allocated to mandatory projects for terminal expansion instead. Compl. ¶¶ IV(Y); V(A)(a), (H). As a result of PANYNJ's unreasonable practices, Maher has incurred injuries and damages. Compl. ¶ VI(A). Therefore, Maher has met the pleading standards for a 46 U.S.C. § 41102(c) claim.

¹⁶ PANYNJ's assertions that Maher "does not allege any facts about how the Port Authority refused to deal" and that it "does not allege that it informed the Port Authority during lease negotiations ... that it believed that the Port Authority was unreasonably refusing to deal" are not elements required under 46 U.S.C. § 41102(c). Furthermore, PANYNJ impermissibly introduces facts outside Maher's Complaint by alleging that "Global itself originally owned 100 acres of the 170-acre terminal, which it transferred to the Port Authority as part of the exchange for a lease of the full 170-acre premises." Mot. to Dismiss at 29 n.11. Thus, PANYNJ has again not shown any pleading deficiency on the part of Maher.

2. Undue or Unreasonable Preferences or Prejudices; 46 U.S.C. § 41106(2)

46 U.S.C. § 41106(2) 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.” To plead an undue or unreasonable preference claim requires the complainant to allege that it was subjected to different treatment by the respondent and was injured as a result.¹⁷

(i) *Lease Transfer Practices (Count VIII, Compl. ¶ V(I))*

Maher has satisfied the requisite pleading standards for its claim that PANYNJ’s lease transfer consent practices resulted in undue prejudice to Maher. Compl. ¶¶ V(A)(b), V(I). Maher has provided detailed allegations concerning PANYNJ’s lease transfer consent practices, including that PANYNJ has not “fairly, uniformly, or reasonably enforced its policy of conducting ‘appropriate due diligence’ or requiring ‘appropriate’ consideration,” and that it unjustifiably imposed on Maher more prejudicial requirements than other marine terminal operators in the port. Compl. ¶¶ IV(A)-(H), V(A)(b), V(I). As a result, Maher alleges that it suffered injury and damages, including unreasonable payments and economic considerations. Compl. ¶ VI(A).¹⁸

(ii) *PANYNJ’s Agreement to Defer APM’s Leasehold Construction Obligations (Count IX, Compl. ¶ V(J))*

Maher’s claim concerning PANYNJ’s agreement to defer APM’s leasehold construction obligations properly pleads the elements required to state a 46 U.S.C. § 41106(2) claim. Maher’s Complaint alleges that PANYNJ agreed to provide APM a valuable deferral of its leasehold

¹⁷ *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251, 1270 (F.M.C. 1997).

¹⁸ PANYNJ’s contention that Maher “fail[ed] to allege *any* facts that [PNCT and NYCT] received a preference” is incorrect on its face. Mot. to Dismiss at 17. The Complaint *alleges* preferences, which is what the pleading standard requires.

capital construction obligations and did not agree to similar concessions for Maher. Compl. ¶¶ IV(X), IV(BB), V(A)(b), V(J). As a result of PANYNJ's unlawful conduct, Maher alleges it was injured and damaged, including the sustaining of higher costs and additional obligations not required of APM. Compl. ¶ VI(A). The allegations on the face of the Complaint are sufficient to state the claim.

(iii) *PANYNJ's Approval of APM's Use of Construction Financing Allocated for Mandatory Projects for Other Projects (Count X, Compl. ¶ V(K))*

Maher alleges that PANYNJ granted and continues to grant APM unduly and unreasonably preferential treatment with respect to approval of APM's use of PANYNJ construction financing, allocated for mandatory projects, for other projects, including an expansion of terminal capacity beyond what was contemplated in its lease with PANYNJ. Compl. ¶¶ IV(Y), V(A)(b), V(K). PANYNJ did not grant Maher similar concessions. Compl. at IV(BB). As a result, Maher suffered and continues to suffer injury and damages from PANYNJ's undue and unreasonable preferences. Compl. ¶ VI(A). Maher has met the pleading standard for a 46 U.S.C. § 41106(2) claim.¹⁹

(iv) *PANYNJ's Undue and Unreasonably Preferential Treatment of PNCT*

Maher has satisfied the elements of 46 U.S.C. § 41106(2) by alleging that PANYNJ provided concessions and opportunities to PNCT, including facilitating terminal capacity expansion, reducing lease costs and extending PNCT's lease so as to accommodate an ocean

¹⁹ PANYNJ erroneously asserts that Maher must plead a request and refusal for non-discriminatory treatment, which is not an element of the claim. Mot. to Dismiss at 16 (asserting that Maher "does not even allege that it sought and was refused permission to use its construction financing for 'other projects'"). PANYNJ ignores the Complaint, asserting Maher failed "to allege *any* facts to support the use of financing for other projects violates the Shipping Act *in any way*," despite the face of the Complaint alleging otherwise. Mot. to Dismiss at 15 (emphasis in original). PANYNJ also asserts that "all Maher has done is point to alleged 'differences,'" but ignores both the alleged injury and the allegation that the violation lacks a valid transportation purpose. Mot. to Dismiss at 18.

carrier, MSC. Compl. ¶¶ IV(I)-(R), V(A)(b). None of these concessions were provided to Maher. Compl. ¶¶ IV(S)-(T). Maher alleges that PANYNJ's unlawful actions have resulted in injuries and damages to Maher, including lost and foregone business. Compl. ¶ VI(A). Thus, Maher has sufficiently stated a claim for which relief can be granted.²⁰

3. Unreasonable Refusal to Deal; 46 U.S.C. § 41106(3)

46 U.S.C. § 41106(3) provides that “[a] marine terminal operator may not unreasonably refuse to deal or negotiate.” The Commission has explained that a refusal to deal claim “requires a two-part inquiry: whether [a party] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.”²¹ Thus, to sufficiently plead a refusal to deal, a complainant must allege that a party refused to deal or negotiate and that such refusal was unreasonable.

- (i) *PANYNJ's Deferral of APM's Leasehold Construction Obligations (Count XI, Compl. ¶ V(L))*

Regarding PANYNJ's refusal to negotiate deferral of Maher's leasehold capital construction obligations, Maher has alleged that it requested parity with APM, PANYNJ unreasonably refused such requests for parity and Maher sustained injuries and damages as a result of PANYNJ's refusal. Compl. ¶¶ IV(BB), V(A)(c), V(L), VI(A). Therefore, Maher has sufficiently stated a Shipping Act claim.²²

²⁰ As discussed *supra* n.15, PANYNJ contends that Maher has failed to plead “any facts to demonstrate any Shipping Act violation based on the Port Authority's approval of the PNCT terminal and other concession that it gave PNCT”, which ignores the face of Maher's Complaint and its clear allegations. Mot. to Dismiss at 28 (emphasis in original). And as before, PANYNJ's argument that Maher failed to plead “facts to support that Maher had the desire or ability to provide the same investment and cargo commitments” as PNCT is not a required element of 46 U.S.C. § 41106(2) and does not constitute a failure to state a claim. *Id.*

²¹ *Canaveral Port Auth. – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448 (F.M.C. 2003).

²² PANYNJ's contention that Maher did not “bother to allege facts concerning the Port Authority's purported unreasonable refusal to deal” again attempts to invoke a heightened pleading standard not present in Commission proceedings. Mot. to Dismiss at 16.

(ii) *Marine Terminal that is the Subject of the Global Lease (Count XII, Compl. ¶ V(M))*

Maher alleges that PANYNJ “unreasonably excluded Maher from consideration as a prospective operator of a marine terminal that is now the subject of the Global Lease” and that as a result, Maher has suffered injury and damages. Compl. ¶¶ IV(V), IV(Z)-(AA), V(A)(c), V(M), VI(A). Thus, the pleading elements for Maher’s refusal to deal claim relating to the premises that is now the subject of the Global Lease have been satisfied.²³

(iii) *Lease Transfer Practices (Count XIII, Compl. ¶ V(N))*

Maher has also satisfied the elements of an unreasonable refusal to deal for its claim concerning PANYNJ’s lease transfer consent practices. Maher’s Complaint alleges facts concerning PANYNJ’s unreasonable requirements of “payments of cash and commitments of other economic considerations to obtain PANYNJ’s consent,” that such payments are “unrelated to, and/or for consideration in excess of, the cost of the service provided” and that PANYNJ’s practice of requiring entities assuming ownership or control of a lease to “pay and/or provide unreasonable economic consideration . . . constitutes an unreasonable refusal to deal by PANYNJ.” Compl. ¶¶ IV(A)-(H), IV(CC), V(A)(c), V(N). Maher alleges that PANYNJ’s practice has resulted in Maher incurring injury and damages, including unreasonable restrictions on transfers and/or changes in ownership or control interests. Compl. ¶ VI(A). PANYNJ’s cursory argument that Maher does not “allege any facts to support its afterthought claim of an unreasonable refusal to deal” is both contradicted by the facts alleged in Maher’s Complaint and

²³ PANYNJ’s assertions that Maher “does not allege any facts about how the Port Authority refused to deal” and that it “does not allege that it informed the Port Authority during lease negotiations . . . that it believed that the Port Authority was unreasonably refusing to deal” are not elements required under 46 U.S.C. § 41106(3). Furthermore, PANYNJ impermissibly introduces facts outside Maher’s Complaint by alleging that “Global itself originally owned 100 acres of the 170-acre terminal, which it transferred to the Port Authority as part of the exchange for a lease of the full 170-acre premises.” Mot. to Dismiss at 29 n.11. Thus, PANYNJ has again not shown any pleading deficiency on the part of Maher.

without merit. Mot. to Dismiss at 18.

4. Agreement with Another Marine Terminal Operator or Common Carrier to Unreasonably Discriminate (Count XIV, Compl. ¶ V(O)); 46 U.S.C. § 41106(1)

46 U.S.C. § 41106(1) provides that a marine terminal operator may not “[a]gree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp.” To sufficiently plead a 46 U.S.C. § 41106(1) claim, a complainant must allege that a marine terminal operator and another marine terminal operator or common carrier agreed to “unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp.”²⁴

PANYNJ does not independently challenge the sufficiency of Maher’s § 41106(1) claim and therefore PANYNJ’s motion does not apply to Maher’s § 41106(1) claim. In an event, Maher’s Complaint alleges detailed facts concerning PANYNJ’s agreements with PNCT, MSC and others, the substantial concessions granted to PNCT, including terminal expansion, lease extension, rent reductions and the refusal to deal similarly with Maher that injure and discriminate against Maher. Compl. ¶¶ IV(I)-(T), V(A)(d), V(O). Maher has also alleged that PANYNJ has not “fairly, uniformly, or reasonably enforced its policy of conducting ‘appropriate due diligence’ or requiring ‘appropriate’ consideration,” and that it unjustifiably imposed on Maher more prejudicial requirements than other marine terminal operators in the port. Compl. ¶¶ IV(A)-(H). The Complaint is sufficient to state the claim and PANYNJ does not move to dismiss Maher’s 46 U.S.C. § 41106(1) claim. Mot. to Dismiss at 27-29.²⁵

²⁴ 46 U.S.C. § 41106(1).

²⁵ PANYNJ does not move to dismiss Count XIV (Comp. ¶ V(O)). PANYNJ cites the allegations in ¶ V(O) only once, but in an argument challenging evidence of discrimination, not the sufficiency of the § 41106(1) pleading. Mot. to Dismiss at 28.

II. Maher Has Standing to Seek a Cease and Desist Order Barring PANYNJ's Unreasonable Leasing Practices

PANYNJ moves to dismiss Maher's claims seeking a cease and desist order from PANYNJ's unlawful leasing practices on the purported bases of lack of standing and ripeness. Mot. to Dismiss at 21, 25-25 (citing Compl. ¶¶ IV(U), VII(B) and Compl. ¶¶ V(B), V(D)-(F) (Counts I, III-IV)). PANYNJ argues that Maher has not been injured by the alleged violations and therefore cannot sustain a complaint seeking a cease and desist order. Mot. to Dismiss at 24-25.²⁶ PANYNJ's motion to dismiss on the basis of lack of standing and ripeness is frivolous. Maher's Complaint alleges injury, PANYNJ's assertion that Maher is not in fact injured is an unsubstantiated factual assertion contradicted by the allegations in the Complaint and, in all events, an allegation of injury is not even required to seek a cease and desist order.

Maher's Complaint seeks, *inter alia*, an order that PANYNJ cease and desist from its actions and failures to act that violated and continue to violate the Shipping Act with respect to PANYNJ's unreasonable marine terminal leasing practices that (i) unreasonably require tenants to provide general releases and/or waivers of claims, including to release PANYNJ from potential violations of the Shipping Act, (ii) require tenants to agree to liquidated damages provisions that are unreasonable, and which are designed to trigger if Shipping Act claims are brought against PANYNJ, and (iii) require lease rate renewal and/or extension provisions that purport to set future lease rates in advance in a manner not reasonably related to the cost of the services provided. The Complaint alleges that "Maher sustained and continues to sustain injury and damages" as a result of the violations. Compl. ¶¶ IV(U), VI(A), VII(B); Compl. ¶¶ V(B),

²⁶ PANYNJ asserts that Maher's Complaint was brought "without regard to whether the Port Authority imposed [the alleged unlawful] practice[s] upon it," that the alleged unlawful practices "do not impact [Maher] in any way" and that the Commission's standard that "any person" seeking a cease and desist remedy may bring a "sworn complaint alleging violations of [the Shipping] Act . . . has never been so broadly applied" to permit Maher's claims.

V(D)-(F) (Counts I, III-IV). The allegations in Maher's Complaint—which includes Maher's allegation of injury and damage from the alleged violations—are sufficient on their face to properly plead the claim seeking a cease and desist order.

PANYNJ's new assertions that the unlawful container terminal leasing practices don't in fact affect or injure Maher is contradicted by the injury alleged in the Complaint. Mot. to Dismiss at 24-25; Compl. ¶ VI. The face of Maher's Complaint alleges that PANYNJ's leasing practices violations caused Maher to sustain and continue to sustain injury and damages. Complaint § VI. The Complaint alleges that PANYNJ has a practice of engaging in certain unreasonable marine terminal leasing practices in violation of the Shipping Act and that "Maher sustained and continues to sustain injury and damages" as a result of the violations for which Maher requests, *inter alia*, "that an order be made commanding PANYNJ to cease and desist from the aforementioned violations of the Shipping Act." See Compl. ¶¶ IV(U), V(A), V(D)-(F), VI(A), VII(B).

PANYNJ does not directly dispute or challenge the facial sufficiency of the injury allegation in the Complaint. Mot. to Dismiss at 24.²⁷ Instead, PANYNJ asserts that Maher is not *in fact* injured. PANYNJ asserts that the alleged practices "do not impact [Maher] in any way," Mot. to Dismiss at 24, suggests that Maher is "unconnected to the alleged violation[s]," *id.* at 25, that the alleged practices "would not impact [Maher] in any way," *id.*, and PANYNJ goes as far as likening Maher's claims to "baseless actions by officious interlopers seeking what amounts to

²⁷ PANYNJ concedes that Maher seeks a cease and desist order with respect to its unreasonable leasing practices claims, citing Compl. ¶ VII(B), but skips over the injury allegation in ¶ VI(A) of the Complaint. PANYNJ proceeds to argue that Maher is not injured (and therefore lacks standing) by attacking its own straw man argument that in PANYNJ's view, the Complaint was brought "*without regard to whether the Port Authority imposed that practice upon it.*" Mot. to Dismiss at 24 (emphasis added). Thus, when PANYNJ argues that "The Port Authority submits that such an unprecedented argument must fail," PANYNJ refers to its argument that the Complaint does not allege injury, not ¶ V(A) of the Complaint that alleges that "Maher sustained and continues to sustain injury and damages."

advisory opinions on vague allegations of *practices not yet applied and injuring no one.*" *Id.* (emphasis added).²⁸

In any event, PANYNJ's unsubstantiated assertion that marine terminal leasing practices don't affect marine terminal tenants is simply not credible. PANYNJ does not contest the allegations in the Complaint that PANYNJ and Maher are marine terminal operators and that Maher has a marine terminal lease from PANYNJ. Compl. ¶¶ III(A)-(C). As a motion to dismiss is "intended to evaluate the validity of the pleadings themselves, the factual allegations made outside the complaint, particularly those that contradict the complaint, should not be considered in deciding a motion to dismiss." *Davis v. District of Columbia*, 800 F. Supp. 2d 28, 30 n.2 (D.D.C. 2011). At best PANYNJ only highlights that it seeks to *dispute* the injury alleged in the Complaint, which would warrant discovery and consideration on the merits, not a motion to dismiss.²⁹

In all events, alleging injury is not even required to bring a complaint seeking a cease and desist order. The right to seek, and if warranted obtain, a cease and desist order is wholly independent of alleging injury or direct harm, or seeking a remedy for reparations. A Shipping Act complaint seeking a cease and desist order can be brought by *any person*, including whether

²⁸ PANYNJ raises a host of other purported factual assertions not in the Complaint, including asserting that Maher is "bent on harassment," that Maher seeks to "rummage through leases of other tenants" (and by that presumably implying that Maher does not have leases of other tenants), that Maher's Complaint is "based on the bargained-for provisions in [other] leases," that "actual lessees have not sought to challenge" lease provisions, etc. Mot. to Dismiss at 25.

²⁹ Conversion to summary judgment here is wholly inappropriate where there has been no discovery and the Complaint raises claims for which summary judgment is generally disfavored by the Commission. *See, e.g., APM Terminals*, 30 S.R.R. at 1418; *NPR, Inc.*, 28 S.R.R. 1011 (cited with approval in *In re EuroUSA Shipping, Inc.*, 31 S.R.R. 540, 546 (F.M.C. 2008)). The Commission's standards for considering such motions is to "ensure that doubts are resolved in favor of the nonmoving party, and that decisions are made on records that are as complete as possible." *EuroUSA*, 31 S.R.R. at 546 (citing *NPR, Inc.*, 28 S.R.R. 1011). Summary judgment is "especially inappropriate" in Shipping Act discrimination cases because "questions of discrimination and prejudice or preference are questions of fact. . . ." *In re Denial of Petition for Rule Making, Cargo Diversion*, 14 S.R.R. 236, 238 (F.M.C. 1973).

or not the person has or alleges money damages for injuries or has or alleges direct harm from the violations. *Int'l Freight Forwarders*, 27 S.R.R. at 394-96 (“The principle that any person may file a complaint whether or not seeking money damages for injury caused the complainant has been followed and confirmed many times since the *Isthmian* decision.”); *Cargill v. Waterman S.S. Corp.*, 21 S.R.R. 287, 300 (F.M.C. 1981) (“Cargill clearly has standing to prosecute a complaint under section 22 of the Shipping Act even if it were not alleging injuries to itself.”); *Isthmian S.S. Co. v. United States*, 53 F.2d 251, 253-54 (S.D.N.Y. 1931) (rejecting the argument that a complaint should be dismissed “on the ground that a ‘person’ to be qualified to file a complaint must be one directly affected by the alleged violations of the act. The statute contains no such limitation. . . . Section 16 of the Shipping Act (46 USCA § 815) is drawn in the *broadest terms* and makes it unlawful to ‘give any undue or unreasonable preference or advantage to *any* particular person, locality, or description of traffic *in any respect whatsoever*, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage.”). The authority establishes that “any person” can properly file a verified complaint alleging violations of the Shipping Act, whether or not having or pleading direct injury or direct impact as PANYNJ asserts.

PANYNJ’s attempt to turn the “any person” standard on its head to mean “*not* any person” should be rejected. Mot. to Dismiss 24-25 (PANYNJ claims that its “review of the governing Commission jurisprudence reveals” that the Commission applies the “any person” standard to *exclude* complaints seeking a cease and desist order unless the complainant alleges direct impact or injury). The Commission authority discussed above *resoundingly rejects* PANYNJ’s position. Yet, PANYNJ misdirects the Presiding Officer by reference to four decisions purportedly showing that the “governing Commission jurisprudence” applies its

supposed narrow “any person” standard. Mot. to Dismiss at 25 (citing *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 480 (A.L.J. 1985); *S.A. Chiarella DBA S.A. Chiarella Forwarding Co. v. Pacon Express Inc.*, 29 S.R.R. 335 (F.M.C. 2001); *Sea-Land Dominicana S.A. & Sea-Land of P.R., Inc. v. Sea-Land Serv., Inc.*, 26 S.R.R. 184 (A.L.J. 1992); and *Chilean Nitrate Sales Corp. v. Port of San Diego*, 24 S.R.R. 920 (F.M.C. 1988)). None support PANYNJ’s position and indeed each decision clearly states the broad “any person” standard applied by the Commission that does not require pleading injury to file a cease and desist complaint.

PANYNJ misapplies *Petchem* as a purportedly narrow application of the “any person” standard by suggesting that *Petchem* stands for the proposition that claims for a cease and desist order can only be brought by complainants if denied *their rights*. Mot. to Dismiss at 24-25. However, *Petchem* actually stands for the broad standard that “any person” may “file a sworn complaint alleging a violation of the Act.” 23 S.R.R. at 495. Furthermore, *Petchem* rejected virtually the same standing argument advanced here by PANYNJ.³⁰ The relevant issue in *Petchem* was not whether the alleged violations injured a particular complainant, but “whether or not the *Port* violated the Shipping Acts.” *Id.* at 495 (emphasis added). As in *Petchem*, the relevant issue for Maher’s standing to seek a cease and desist order is whether *PANYNJ violates the Shipping Act* by engaging in unreasonable leasing practices that violate the Shipping Act.

³⁰ In *Petchem*, complainant tug company alleged that respondent port authority violated the Shipping Act concerning commercial tug service contracts at the port. 23 S.R.R. at 480-81. Respondent argued that complainant lacked standing “because it has in no way been injured by the actions of which it complains,” asserting that complainant was contractually barred by a private contract with the Army from performing commercial tug services, and thus could not have been injured by the alleged violations related to commercial tug services. *Id.* at 494. In the Initial Decision, the Presiding Officer dispensed with respondent’s argument that complainant could not be injured and held that “[f]inally, with respect to standing: . . . [the Act] allows ‘any person’ to file a sworn complaint alleging a violation of the Act. Actual harm to the complainant is not a prerequisite to a finding of violation [of the Act]. In such cases, a finding of violation could result in the issuance of a cease and desist order.” *Id.* at 494-95.

PANYNJ also misapplies *Sea-Land Dominicana* as a purportedly narrow application of the “any person” standard, asserting that it permits claims for a cease and desist order if complainant is an affiliate of a contracting party that is “harmed by violations under the contract.” Mot. to Dismiss at 25. *Sea-Land Dominicana* is remarkably inapposite. First, the ALJ *rejected* the standing argument that a complaint was barred unless brought by a contracting party. *Id.* at 185, 186 (“it is irrelevant that such persons are not parties to agreements which have to be filed with the Commission under the Act”). Second, the broad “any person” standard was applied: “As complainants correctly argue, the 1984 Act authorizes any person to file complaints alleging violations of the Act There are many cases establishing these principles.” *Id.* at 186 (internal citations omitted).³¹ The authorities PANYNJ misapplies support Maher’s right to file its Complaint, not PANYNJ’s effort to dismiss it.³²

PANYNJ’s cease and desist standing argument should be summarily denied. The motion as a practical matter is premised on a dispute of fact over whether Maher is injured as a result of

³¹ The Commission applies a broad standard because of the remedial nature of the Shipping Act. *Sea-Land Dominicana*, 26 S.R.R. at 186 (“It should be noted that the 1984 Act, like the 1916 Act, is remedial in nature, that Section 11(a) of the 1984 Act authorizes any ‘person’ to file a complaint alleging a violation of the Act, and that the term ‘person’ is broadly defined in Section 3(20) of the Act.”) (citing *Int’l Ass’n of NVOCCs v. Atl. Container Line*, 25 S.R.R. 734, 744 (F.M.C. 1990); *Tariff Filing Practices of Containerships, Inc.*, 6 S.R.R. 483 (F.M.C. 1965) (remedial legislation “should be liberally interpreted to effect its evident purpose”).

³² PANYNJ cites two other decisions, *S.A. Chiarella* and *Chilean Nitrate*, as narrow applications of the “any person” standard involving agents and principles of contracting parties who were harmed by violations under a contract. Both are inapposite. The standing issues in both concern standing for reparations (where there is no dispute that alleging injury is required), not cease and desist relief, both reject the argument that a contractual relationship is required (*see, e.g., Chilean Nitrate*, 24 S.R.R. at 921 (“A contractual relationship between the parties is not required to support a complaint under Section 11(a) of the 1984 Act.”)) and in all events they reflect, in the reparations context, the broad “any person” standard, not a narrow one. *See, e.g., id.* (“Section 11(a) of the 1984 Act, 46 USC app. §1710, provides that ‘any’ person may file a complaint to allege a violation of the Act and may seek reparation for any injury caused as a result of that violation.”); *S.A. Chiarella*, 29 S.R.R. at 337 (“A showing of injury is necessary only if the complainant seeks reparations.”) (citing *Trane v. S. Africa Marine Corp. (N.Y.)*, 19 F.M.C. 374 (1976)).

the violations alleged, not the sufficiency of the injury allegations in the Complaint. In all events, the authority is well established that the special allegation of injury or harm that PANYNJ asserts is not required for a complaint seeking a cease and desist order.

III. Maher Has Standing to Bring Unreasonable Leasing Practices Claims Seeking Reparations

PANYNJ moves to dismiss Maher's unreasonable leasing practices claims seeking reparations on the basis of lack of standing and lack of ripeness. Mot. to Dismiss at 21-23 (citing Compl. ¶¶ IV(U), V(A), V(D)-(F), VII(B)). PANYNJ argues that "Maher has not alleged any injury from the Port Authority's alleged practice and has no standing to request reparations on these grounds under well-established Commission precedent." Mot. to Dismiss at 23 (citing *Petition for an Investigation of, & for Section 19 Relief from, Italian Subsidies for Carnival Cruise Line Passenger Vessels*, 26 S.R.R. 990, 999 (F.M.C. 1993) (hereinafter *Italian Subsidies*)). PANYNJ asserts further that "because Maher has suffered no injury from the alleged practice, its unreasonable practice claims are not ripe for decision and actually never can be." Mot. to Dismiss at 23-24. PANYNJ's motion to dismiss Maher's reparations claims is frivolous.

A complainant has standing to bring a claim alleging a violation of the Shipping Act and seeking reparations for any injury caused as a result of that violation by alleging injury in the complaint and alleging that the injury was caused by the respondent's alleged violations. See *Chilean Nitrate Sales Corp.*, 24 S.R.R. at 921 ("'any' person may file a complaint to allege a violation of the Act and may seek reparation for any injury caused as a result of that violation For the purpose of standing, it is sufficient for the Complaint to allege injury and charge the respondent with its cause.") (citing *Cargill Inc.*, 21 S.R.R. at 300); 46 U.S.C. § 41301(a) ("the complainant may seek reparations for an injury to the complainant caused by the violation.").

Maher's Complaint properly seeks reparations. The Complaint alleges that PANYNJ's unreasonable leasing practices violate the Shipping Act, Compl. ¶¶ IV(U), V(A), including three specific counts in the Complaint alleging specific practices, Count III, IV and V (Compl. ¶¶ V(D)-(F)). Maher's Complaint alleges that Maher sustained and continues to sustain injuries and damages as a result of the alleged violations. Compl. ¶ VI(A) ("[a]s a result of PANYNJ's aforementioned violations of the Shipping Act, *Maher has sustained and continues to sustain injuries and damages.*") (emphasis added).³³ The face of the Complaint establishes that Maher's unreasonable leasing practices claims seeking reparations for injury caused by PANYNJ's alleged violations are sufficiently pleaded for the purposes of standing. *See Chilean Nitrate*, 24 S.R.R. at 921.

PANYNJ's unsupported assertion that "Maher has not alleged any injury from the Port Authority's alleged practice," Mot. to Dismiss at 23, is squarely contradicted by the injury alleged in the Complaint, Compl. ¶ V(A) ("PANYNJ violated and continues to violate the Shipping Act").³⁴ When considering a Rule 12(b)(6) motion to dismiss, the court "accepts as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to plaintiff." *Mitsui O.S.K. Lines Ltd.*, 31 S.R.R. at 1380 (quoting *Bridgeport & Port Jefferson Steamboat Co.*, 335 F. Supp. 2d at 279). PANYNJ's assertion of

³³ "[I]ncluding but not limited to higher costs and other undue and unreasonable payments, economic considerations, restrictions on transfers and/or changes in ownership or control interests, lost business, forgone business, and additional obligations not required of . . . marine terminals, and other damages amounting to a sum of millions of dollars to be determined more precisely at hearing." Compl. ¶ VI(B).

³⁴ Compl. ¶¶ V(A), VI(A), VII(B) (seeking "that an order be made commanding PANYNJ to cease and desist from the aforementioned violations of the Shipping Act . . . [and] that an order be made commanding PANYNJ to pay Maher reparations for violations of the Shipping Act, including the amount of the actual injury, plus interest, costs and attorneys fees . . .").

purported fact that “Maher has suffered no injury from the alleged practices” is not contained in the Complaint and is an improper basis for a motion to dismiss.³⁵

PANYNJ also advances a heightened standard for pleading injury: according to PANYNJ, to properly seek reparations for injuries caused by unreasonable leasing practices in violation of the Shipping Act, a complainant must plead injury resulting from unreasonable provisions in its existing lease.³⁶ But, neither the Shipping Act nor the Commission’s authority applying it stand for that proposition. It is broadly applied to permit “any person” filing a complaint alleging a violation of the Act to “seek reparation for *any injury* caused as a result of that violation.” *Chilean Nitrate*, 24 S.R.R. at 921. Section 41301(a) does not require a heightened or particularized injury pleading as PANYNJ suggests. *See* 46 U.S.C. § 41301(a). Nor does the Commission’s liberal pleading standard require that Maher allege all its evidence at the start of the proceeding. *Kawasaki Kisen Kaisha*, 28 S.R.R. at 1412 (“It is not necessary for complainants to plead their evidence in their initial complaints and it is customary for the facts to be developed, among other ways, by means of discovery rules.”).

PANYNJ provides no explanation for why § 41301(a) should, or could, be read as excluding “any” kind of injury caused by alleged unreasonable leasing practices with respect to “marine terminal operator leases, lease extensions and/or amendments and modifications thereto” in violation of the Act. The Act permits complaints seeking reparations to allege “any injury” caused by the alleged violation, not just “one injury.” For example, unlawful demands

³⁵ *Davis v. District of Columbia*, 800 F. Supp. 2d at 30 n.2 (“factual allegations made outside the complaint, particularly those that contradict the complaint, should not be considered in deciding a motion to dismiss.”) (internal citations omitted); *Rendezvous Int’l*, 31 S.R.R. at 1576 (“A motion is not a pleading. Therefore, [the Presiding Officer is] unable to reply on facts stated in [a] motion when ruling on [a] motion to dismiss.”) (internal citations omitted).

³⁶ Mot. to Dismiss at 23. PANYNJ asserts that because “Maher does not allege that its lease includes any [resulting unreasonable] provisions . . . [a]s a result, Maher has not alleged any injury from the Port Authority’s alleged practice and has no standing to request reparations.”

for unreasonable terms may cause injury in the form of unreasonable lease provisions in a new or extended or amended lease, or in the absence of a new or extended or amended lease. PANYNJ provides no authority supporting the proposition why any manner of injury or damage should be barred from a reparations remedy in a Shipping Act claim.³⁷

In addition to impermissible assertions of purported fact contradicted by the injuries expressly alleged in Maher's Complaint, PANYNJ's contrived heightened pleading standard for injury is erroneous. PANYNJ's argument therefore must be rejected.

IV. Maher's Claims Pertaining to PANYNJ's Agreement to Defer Construction Obligations and Lease Transfer Consent Practices Are Not Barred by the Doctrine of Collateral Estoppel/Issue Preclusion

PANYNJ asserts that "Maher makes two claims that it previously raised as objections to the 07-01 settlement, both of which were expressly litigated, considered, and rejected on the merits, by the Presiding Officer and by the Commission on appeal." Mot. to Dismiss at 8. The two claims identified by PANYNJ are (1) Maher's claims with respect to PANYNJ's agreement to the deferral of APM's leasehold capital expenditure requirements and (2) Maher's claims with respect to PANYNJ's lease transfer consent practices. *Id.* at 8-9 (citing Compl. ¶¶ IV(A)-(H),

³⁷ The three Commission authorities PANYNJ cites merely stand for the unexceptional proposition that injury is a required element of a reparations claim, which is not in dispute. Mot. to Dismiss at 22-23 (citing *Italian Subsidies*, 26 S.R.R. at 999; *Gov't of the Territory of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 1509, 1563 (A.L.J. 2003) and *Tradecheck, LLC v. Sea-Land Serv. Inc.*, 27 S.R.R. 334, 334-35 (Informal Dkt., 1995)). None of the authorities stand for PANYNJ's proposition that a complainant alleging unreasonable leasing practices claims has standing to seek reparations only for injuries resulting from the unreasonable provisions in its own lease. None are even apposite on the standard for pleading injury seeking reparations for Shipping Act violations in a motion to dismiss.

Italian Subsidies was dismissed on the basis of lack of jurisdiction, not lack of standing. *Territory of Guam* did not address standing requirements for pleading reparations: it was a decision on the *merits* that found that complainants ultimately failed to *prove their damages* after an initial decision, a remand, after extensive discovery, expert damages testimony, after a denied motion for summary judgment that raised standing, and a hearing and briefs. *Tradecheck* involved an informal docket proceeding dismissing without prejudice a complaint seeking reparations of \$6,893 for alleged shipment overcharges where the *facts* established that the complainant did not suffer the injury it alleged.

IV(X)-(Y), IV(BB)-(CC), V(B), V(H)-(L), V(N)). PANYNJ argues further that having litigated the “very same” two 07-01 settlement objections on the merits, decided on the merits in the Initial Decision and upheld on exceptions by the Commission, Maher is “collaterally estopped from relitigating” the same claims in the instant Complaint. *Id.* at 13. PANYNJ’s collateral estoppel argument is frivolous.

At the outset, it is important to highlight that PANYNJ is now doing precisely what Maher warned that it would do, *i.e.* foist the 07-01 settlement approval on Maher to defeat Maher’s subsequent claims of Shipping Act violations. Maher’s Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 47 (Nov. 17, 2008) (“[I]f the Commission were to affirm the I.D. in this case [finding that the proposed settlement *would not* violate the Shipping Act], it would cause plain legal prejudice to Maher’s ability to pursue those claims. From the start, PANYNJ-APM signaled that they would foist the settlement on Maher in a later proceeding brought by Maher alleging that the settlement violated the Shipping Act.”).³⁸

PANYNJ *knows* full well that the Commission *did not decide the merits* of the violations that Maher argued would result from approval of the proposed settlement in 07-01—they were *not* “actually and necessarily” decided on the merits. To the contrary, the Commission expressly ruled that the standard for approval of a settlement—that it “does not *appear* to violate the Shipping Act”—was met without reaching the merits of Maher’s objections that approval of the settlement between PANYNJ and APM would enshrine further violations of the Shipping Act harming Maher. *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (F.M.C. 2009) (“When determining whether to approve a settlement agreement it is not

³⁸ The Presiding Officer may take judicial notice in a motion to dismiss of prior proceedings and submissions for their *existence*, not to establish facts to challenge the allegations in the complaint. *See infra* n.49.

necessary to make final determinations of violations or lack of violations since to do so might discourage parties from even attempting to propose settlement in the first place.”); (“[A]pproving a settlement does not entail a final adjudication of the merits and does not mandate either party to admit liability. . . . [T]he ALJ applied the correct standard of review in finding that the Settlement Agreement does not appear to violate any law or policy.”). PANYNJ itself argued the very same point in its Reply to Maher’s Exceptions—the “determination [that the settlement did not *appear* to violate the Act] is obviously not a final adjudication of the merits of any legal issue or claim.” PANYNJ’s & APM’s Reply to Maher’s Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 12 n.10 (Dec. 9, 2008). PANYNJ’s flagrant misrepresentation of these 07-01 decisions and improper assertion of contradictory positions manifests the extraordinary lengths to which PANYNJ will strain to mislead the Commission.³⁹

Equally damaging to PANYNJ’s argument is the obvious fact that the issues in 07-01 are not “identical” for preclusion purposes as the issues in the Complaint. PANYNJ contorts the generalization that the two claims “retread familiar ground” from the 07-01 proceeding, Mot. to Dismiss at 8, into a wholly unsupportable assertion that minor factual similarities constitute identity between two otherwise separate issues. PANYNJ is wrong and its arguments do not remotely satisfy its burden to prove issue preclusion.

³⁹ See *supra* Section I.B for a discussion of PANYNJ’s egregiously inconsistent positions taken in this and the 08-03 proceedings.

A. *The Commission Did Not Decide the Merits of the Violations of the Shipping Act that Maher Argued Would Result from Approval of the Proposed Settlement in the 07-01 Proceeding*

PANYNJ concedes, as it must, that issue preclusion⁴⁰ only applies to bar the litigation of an issue if “the first proceeding ended with a final judgment on the merits.” Mot. to Dismiss at 9 (citing *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006)).⁴¹ In its approval of the 07-01 Settlement Agreement, the Commission *explicitly* stated that “approving a settlement does not entail a final adjudication of the merits,” and that the Presiding Officer’s Initial Decision approving the settlement was also not a ruling on the merits of Maher’s arguments against the settlement, but rather only satisfied a “limited role” to find “that the Settlement Agreement *does not appear* to violate any law or policy.” *APM Terminals*, 31 S.R.R. at 626 (emphasis added).

PANYNJ devotes most of its Motion to Dismiss to obsequiously recounting the Initial Decision approving the Settlement. Mot. to Dismiss at 10-13. According to PANYNJ, the Initial Decision purportedly proves that the “Presiding Officer . . . adjudicated and rejected Maher’s objection[s]” to the Settlement Agreement and that “the Presiding Officer’s ‘approval of the settlement constituted a final judgment on the merits,’ which was then affirmed by the full Commission.” Mot. to Dismiss at 10.⁴² PANYNJ blatantly misrepresents the Commission’s

⁴⁰ Courts, as well as the Commission, use the terms “issue preclusion” and “collateral estoppel” interchangeably. See *Galín Ataei v. Barber Blue Sea Line, et al.*, 24 S.R.R. 647, 653 n.7 (A.L.J. 1987).

⁴¹ PANYNJ also cites *Reyn’s Pasta Bella* later in its Motion in support of its erroneous argument that the Commission’s approval of the 07-01 Settlement Agreement was a final judgment on the merits. Mot. to Dismiss at 10. Other than setting forth a correct formulation of the standard for issue preclusion, cited here, PANYNJ’s later reliance on it is misplaced because PANYNJ fails to meet its standard for issue preclusion.

⁴² PANYNJ’s cut-and-paste quotation implies that the Commission made the statement that “approval of the settlement constituted a final judgment on the merits.” However, this statement appears *nowhere* in the Commission’s Order, but rather is a quotation taken from the inapposite case *Reyn’s Pasta Bella*, 442 F.3d at 746. Mot. to Dismiss at 10.

Order, and contradicts the arguments *made by PANYNJ itself* to the Commission in response to Maher's Exceptions to the Initial Decision.

In Maher's Exceptions to the Initial Decision, Maher explained that the I.D. suggested that it was ruling on the merits of Maher's objections to the settlement, which would prejudice Maher in future proceedings. Maher's Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 46 (Nov. 17, 2008) (Maher specifically highlighted this concern, noting that "[b]ecause Maher sustains plain legal prejudice if the settlement is approved *as set forth in the I.D.*, the Commission should reverse the I.D. and disapprove the settlement.") (emphasis added). Maher further argued that "if the Commission were to affirm the I.D. in this case, it would cause plain legal prejudice to Maher's ability to pursue those claims" that the Settlement Agreement contains violations of the Shipping Act, and that "PANYNJ must not be allowed to misuse the Commission's settlement process to immunize itself against Commission proceedings based on the discrimination embodied in the settlement itself." *Id.* at 47-48.

In rebuttal to Maher's concerns, PANYNJ argued that the Presiding Officer and Commission's role in upholding a settlement is *not* to rule on the merits, saying, "the Presiding Officer's task on a motion to approve a settlement is to satisfy himself that the settlement does not appear to violate any law. As a consequence, any such determination is obviously not a final adjudication of the merits of any legal issue or claim." PANYNJ's & APM's Reply to Maher's Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 12 n.10 (Dec. 9, 2008) (emphasis in original) (also arguing that "That is the standard that the Presiding Officer applied when he approved the PANYNJ-APMT settlement.") & 31-32. PANYNJ argued exactly the *opposite* of what it now argues in its Motion to Dismiss.

In approving the Settlement Agreement, the Commission agreed with PANYNJ's repeated assertions in its Reply to Maher's Exceptions that the Initial Decision was *not* an adjudication on the merits and found that the Presiding Officer "applied the correct standard of review in finding that the Settlement Agreement does not appear to violate any law or policy." *APM Terminals*, 31 S.R.R. at 626 ("[A]pproving a settlement does not entail a final adjudication of the merits and does not mandate either party to admit liability."). The Commission expressly resolved Maher's concern that the Initial Decision would prejudice Maher's ability to bring claims arising out of the Settlement Agreement in a future action, noting, "Maher will not be prejudiced by a dismissal of these proceedings Neither are Maher's own claims against the Port Authority foreclosed by approval of this settlement agreement and termination of this proceeding." *Id.*⁴³ The Commission *explicitly* held, responding to Maher's concerns and PANYNJ's own arguments, that no aspect of the Initial Decision in the 07-01 constituted a determination on the merits of Maher's objections to the Settlement Agreement. PANYNJ's misrepresentation of the Commission's Order underscores the frivolous nature of its Motion to Dismiss.

B. The Construction Deferral Approval and Lease Transfer Consent Issues Raised as Objections in 07-01 Were Not Actually and Necessarily Determined by the Commission in the 07-01 Proceeding

Maher's claims in the Complaint regarding PANYNJ's agreement to the deferral of

⁴³ In its Motion to Dismiss, PANYNJ tries to create a false dichotomy in the 07-01 FMC Order between the Commission's findings on the settled claims and the findings regarding the lawfulness of the Settlement Agreement itself. Mot. to Dismiss at 13 n.6. However, nothing in the Commission's Order even hints that such a distinction exists in its and the Presiding Officer's approval of the Settlement Agreement. The Commission broadly states that it was *not the case* that "in approving a settlement, the ALJ and Commission must necessarily find that the Shipping Act has not been violated." *APM Terminals*, 31 S.R.R. at 626. The standard "that the Settlement Agreement *does not appear* to violate any law or policy," is not an actual and final determination that no terms violate or could violate the Shipping Act. *Id.* (emphasis added).

APM's Class A investment requirements and PANYNJ's unlawful lease transfer consent practices are also not barred by the issue preclusion doctrine because the issue of their validity under the Shipping Act was not actually and necessarily determined by the Commission in the 07-01 proceeding. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (issue preclusion "bars successive litigation of an issue of fact or law actually litigated *and resolved* in a valid court determination *essential* to the prior judgment") (internal quotations removed) (emphasis added); *Lans v. Adduci Mastriani & Schaumberg LLP*, 786 F. Supp. 2d 240, 302-03 (D.D.C. 2011); *Galini Ataei*, 24 S.R.R. at 653 (issue preclusion applies "as to matters that were necessarily litigated and determined").

PANYNJ incorrectly argues in its Motion to Dismiss that the Commission's approval of the settlement "'necessarily had to adjudicate the objections [Maher] raised' that the Settlement Agreement itself allegedly violated the Shipping Act, including" on the grounds that APM Class A deferral and PANYNJ's transfer fee concessions proposed in the settlement would violate the Shipping Act. Mot. to Dismiss at 12. As discussed above, PANYNJ misrepresents the Commission's decision in 07-01 and contradicts its own arguments to the Commission that Maher's objections to the Settlement Agreement were not actually decided as Shipping Act claims on the merits. *See supra*, Part IV; *see also Port Auth. of N.Y. & N.J. v. N.Y. Shipping Ass'n*, 22 S.R.R. 1329, 1341-42 (A.L.J. 1984), *upheld in relevant part*, 23 S.R.R. 21 (F.M.C. 1985) ("The Commission itself indicated quite clearly that its approval of the [prior] assessment formulas . . . was an approval of settlement agreements, not determinations under Section 15 of the merits of the agreement formulas"); *In re PCH Assoc.*, 949 F.2d 585, 593 (2d Cir. 1991) (rejecting an issue preclusion argument, noting that in the first action, the court "went to great lengths to make clear that [it was] not deciding that issue. To hold that [its] intentional decision

not to resolve this issue amounts to a final adjudication on the issue would be to misapply the settled law regarding issue preclusion.”).⁴⁴

The Commission also ruled that it was *not* necessary for the approval of the Settlement Agreement to make a final determination on the merits as to whether its terms would violate the Shipping Act. The Commission explained that “FMC case law is clear in that settlements are presumed fair and the presiding officer has ‘a relatively limited role to perform when scrutinizing them.’” *APM Terminals*, 31 S.R.R. at 626 (Order approving the Settlement Agreement). The Presiding Officer’s role in evaluating proposed settlement agreements is not to “make final determinations of legal issues,” but only to determine whether the settlement agreement “*appear[s]* to violate any law or policy.” *Id.* (emphasis added). The Commission affirmed the Initial Decision’s approval of the Settlement Agreement consistent with that standard. *Id.* According to the Commission, it was neither necessary, nor proper, for the Presiding Officer to decide the merits of Maher’s objections that the proposed settlement would result in violations of the Shipping Act.

⁴⁴ The three cases PANYNJ cites in support of its argument that these issues were actually decided by the Commission, none of which are FMC authority, are entirely inapposite for the proposition PANYNJ advances. Mot. to Dismiss at 10. *Reyn’s Pasta Bella* and *Weber* involved claims that the parties were attempting to bring that had been *expressly released* by settlement agreements in prior actions, and in both cases the complainants were actually parties to the settlement itself. *Reyn’s Pasta Bella*, 442 F.3d at 745; *Weber v. Henderson*, 33 F. App’x 610, 611 (3d Cir. 2002). Conversely, in the 07-01 proceeding, as discussed above, the Commission *explicitly* stated that the approval of the Settlement Agreement was *not* a determination on the merits of Maher’s arguments and Maher was not *party* to the proposed settlement, but rather Maher *objected* to it. *Ret. Chicago Police Ass’n v. City of Chicago* is similarly inapposite because (1) it deals with *claim* preclusion, not *issue* preclusion, and (2) the third party in the case challenged the settlement agreement itself in the second action, rather than the validity of practices following the settlement agreement. 7 F.3d 584 (7th Cir. 1993); Mot. to Dismiss at 10. In contrast, Maher did not argue that PANYNJ and APM could not enter into a private settlement agreement (indeed PANYNJ and APM vigorously argued that they could sign the APM lease amendment regardless of the approval of the settlement), but rather objected that the settlement should not be approved because it would result in violations of the Act that have now occurred, and with respect to the deferral approval, are now the subject of a claim.

Even without the Commission's crystal clear language explaining that its approval of the 07-01 Settlement Agreement was *not* an actual and necessary judgment on the merits of Maher's objections to the settlement, the nature of the settlement approval proceeding itself shows that the Commission did not make such a judgment. Under the Shipping Act, private party proceedings are "commenced by the filing of a complaint." 46 C.F.R. § 502.61. The FMC "shall provide an opportunity for a hearing before issuing an order relating to a violation of this part or a regulation prescribed under this part," in which each party has the right to present its case, submit evidence, and conduct necessary cross-examination. 46 U.S.C. § 41304(a); 46 C.F.R. § 502.154. In the Commission's approval of the 07-01 Settlement Agreement, no complaint was filed with respect to Maher's obligations and Maher had no opportunity to present its case on the merits or evidence at a hearing. Without following these procedures, the Commission could not have rendered a ruling on the merits concerning the arguments made by Maher against the Settlement Agreement.

Likewise, Maher did not have a "full and fair opportunity to litigate the issue[s] in question" regarding the Settlement Agreement because it was not able to obtain relevant discovery from PANYNJ or APM. *Sprecher v. Graber*, 716 F.2d 968, 972 (2d Cir. 1983). If the party against whom issue preclusion is being asserted did not prevail in the first action where it was not able to take discovery, courts have held that that party is not precluded from litigating those issues in the second action. *See id.* (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)); *Svarzbein v. Sidel*, 1999 WL 729260, *10 (E.D. Pa. Sept. 10, 1999). The stay granted to PANYNJ and APM in July 2008 "effectively cut off Maher's ability to obtain discovery" regarding any of the issues surrounding the Settlement Agreement, including those dealing with PANYNJ's deferral of APM's Class A requirements and APM's change of control

consent. Maher's Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 17 (Nov. 17, 2008).

C. *Maher's Claims Regarding PANYNJ's Lease Transfer Consent Practices Are Not the Same as Maher's Arguments in Opposition to 07-01 Settlement Agreement*

Throughout its Motion to Dismiss, PANYNJ conflates the arguments Maher made in opposition to the 07-01 Settlement Agreement with Maher's new Complaint. Maher raised objections to the settlement observing that PANYNJ's granting to APM of a concession in the form of a consent to a change of ownership without allocating any value to the consent would result in an unlawful preference because PANYNJ's policy was to obtain financial concessions in exchange for consents, which PANYNJ has done with other tenants, including Maher. Maher's Reply in Opp. to Joint Mot. to Approve Settlement, Dkt. 07-01, at 15-17 (Aug. 29, 2008) (noting that PANYNJ has a policy of requiring consent fees from terminals, but did not comply with this policy with regards to APM). But here, Maher's Complaint alleges that PANYNJ's lease transfer consent practices—the practices themselves—constitute a failure to establish, observe, and enforce just and reasonable regulations and practices. PANYNJ's unlawful practice is unreasonable and has and continues to discriminate against Maher as compared to other marine terminal operators, not just APM, and constitutes an unreasonable refusal to deal with respect to its requiring unreasonable concessions to obtain consent. Maher's Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 26 (Nov. 17, 2008); Compl. ¶¶ IV(A)-(H), V(B), V(I), V(N). PANYNJ has the burden of proving that the issues in the two proceedings are identical, and its egregious misrepresentation of Maher's allegations in the Complaint fails to meet this burden.⁴⁵

⁴⁵ PANYNJ tries to meet its burden of proving that the issues are identical by misstating Maher's allegations in the Complaint as well as advancing assertions of purported fact not found

The issues raised in the two proceedings are plainly not identical, as required for issue preclusion, and PANYNJ's arguments to the contrary misrepresent the plain language of the Complaint. *See Orff v. United States*, 358 F.3d 1137, 1143 (9th Cir. 2004); Mot. to Dismiss at 9, 11-12 (conflating Maher's objections to the 07-01 Settlement Agreement with its allegations in the Complaint).

D. *The Different Burdens Applicable in the Proceedings Render Issues Not Identical in All Events*

Furthermore, issue preclusion would not apply here because neither the issues relating to PANYNJ's agreement to the deferral of APM's leasehold construction obligations nor the APM change of control issue are "identical" to the claims in the Complaint for the purpose of preclusion because the burdens of proof in the two proceedings are starkly different.

Issue preclusion only applies when the "issues litigated [are] not . . . 'merely similar,' but [are] 'identical.'" *Orff*, 358 F.3d at 1143. In circumstances where issues are fully litigated on the merits, which did not occur here, courts conclude that issues are not "identical" for the purposes of issue preclusion where:

The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his

anywhere in the Complaint. PANYNJ misconstrues Maher's Complaint regarding PANYNJ's change of control practices as only concerning the April 1, 2009 approval of APM's change of control. Mot. to Dismiss at 9 (PANYNJ cites the preference Count in ¶ V(I) of the Complaint, which identifies "Maersk, APM, PNCT, NYCT, and other marine terminal operators," but refers only to Maersk and APM) & 11 (falsely summarizing Maher's lease transfer consent practices claims as based only on the requirement that PNCT, NYCT, and Maher provide PANYNJ consideration in exchange for consent to changes of control while not imposing a similar requirement on APM, thereby completely *ignoring* the bulk of Maher's Complaint (e.g., Compl. ¶¶ IV(A)-(B), IV(D)-(H), V(B), and V(N)), including unduly preferential and prejudicial consent fees required of NYCT and PNCT, as well as the entirety of PANYNJ's lease transfer consent practices claims). PANYNJ desperately misrepresents the scope of Maher's Complaint so that it is purportedly identical to Maher's objection in opposition to the 07-01 Settlement Agreement. This flagrant misrepresentation of the facts and Maher's Complaint is not nearly enough to satisfy PANYNJ's burden of proof and must fail.

adversary; or the adversary has a significantly heavier burden than he had in the first action

Restatement (Second) of Judgments § 28(4); *see Cobb v. Pozzi*, 363 F.3d 89, 113-14 (2d Cir. 2004) (“Courts and commentators alike have recognized that a shift or change in the burden of proof can render the issues in two different proceedings non-identical, and thereby make collateral estoppel inappropriate [T]he same principle is applicable where presumptions or standards of proof vary between two civil actions.”); *Purdy v. Zeldes*, 337 F.3d 253, 259 (2d Cir. 2003) (“[A] litigant’s failure to meet a higher burden of proof on an issue in a prior proceeding does not bar him from raising the same issue in a subsequent proceeding in which his burden will be lighter.”); *Whelan v. Abell*, 953 F.2d 663, 668-69 (D.C. Cir. 1992); Restatement (Second) of Judgments § 28 cmt. f (“[s]ince the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied.”).

In approving the Settlement Agreement in the 07-01 proceeding, the Commission noted that “[t]here is no burden on the settling parties to prove that the settlement involves concessions of equal value on both sides,” and that “Maher has the burden of demonstrating that the ALJ erred in making a finding of fairness and reasonableness in the settlement.” *APM Terminals*, 31 S.R.R. at 626. The Commission also noted, “The Commission has a strong and consistent policy of ‘encourag[ing] settlements and engag[ing] in every *presumption* which favors a finding that they are fair, correct, and valid.’” *Id.* at 625 (emphasis added). It later repeats this principle, stating, “FMC case law is clear in that settlements are presumed fair and the presiding officer has ‘a relatively limited role to perform when scrutinizing them.’” *Id.* at 626; *see also* PANYNJ’s and APM’s Reply to Maher’s Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 15, 17 (Dec. 9, 2008). Maher’s burden therefore, was to overcome every presumption that the proposed settlement did not violate the Act, a burden

applied after having been denied any discovery on the settlement. *Id.*; Maher's Exceptions to Init. Dec. Approving Settlement and Related Dismissals with Prejudice, Dkt. 07-01, at 17 (Nov. 17, 2008) (noting that Presiding Officer's grant of a stay after APM and PANYNJ announced that they had the Settlement Agreement "effectively cut off Maher's ability to obtain discovery" about the Agreement).

PANYNJ's violations of the Shipping Act alleged in Maher's 12-02 Complaint are not protected by the same Commission policies favoring settlement approval applied in the 07-01 settlement. Indeed, PANYNJ's argument that the 07-01 settlement approval immunizes PANYNJ from alleged violations of the Shipping Act seeks to shield PANYNJ from its burdens under the Shipping Act to respond to discovery and to produce evidence justifying, if possible, its discrimination, unreasonable practices, and refusals to deal. For example, it is well-established that Maher only has the initial burden of showing for its reparations claims in this proceeding "that it was subjected to different treatment and was injured as a result," while PANYNJ "has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres*, 27 S.R.R. at 1270-71 (citing *Cargill, Inc.*, 21 S.R.R. 287). For unreasonable practice claims, Maher only has the burden to prove that the practice or procedure is unreasonable, but the burden of justification rests on PANYNJ. *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. at 1222. And for Maher's refusal to deal claims, all Maher has to show is that PANYNJ refused to deal with Maher and offer evidence that the refusal was unreasonable, at which point PANYNJ will have to explain its reasons for the refusal. *Canaveral Port Auth. – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. at 1446, 1448-50. Maher also has a right of discovery which it was not afforded in the settlement approval proceeding. *Carolina Marine Handling v. S.C. State Ports*

Auth., 30 S.R.R. 1243, 1245 (F.M.C. 2006). Here, unlike the settlement approval context in 07-01, Maher does not have to proceed without discovery and in the face of a Commission policy overwhelmingly favoring its opponent to such an extent that as a practical matter PANYNJ had no burden as movant. *APM Terminals*, 31 S.R.R. at 626 (“There is no burden on the settling parties to prove that the settlement involves concessions of equal value on both sides.”); *id.* (“Maher has the burden of demonstrating that the ALJ erred in making a finding of fairness and reasonableness in the settlement.”).

V. Maher’s Lease Transfer Consent and Construction Financing Claims Seeking Reparations are not Barred by a Statute of Limitations

PANYNJ moves to dismiss Maher’s claims seeking reparations for (1) PANYNJ’s agreement to the defer APM’s leasehold construction obligations, (2) PANYNJ’s unreasonable and preferential construction financing practices (citing Compl. ¶¶ IV(X)-(Y))⁴⁶; and (3) Maher’s claims seeking reparations for PANYNJ’s unlawful lease transfer consent practices (citing Compl. ¶¶ IV(A)-(H)).⁴⁷ Mot. to Dismiss 18-21.

(1) PANYNJ argues that Maher’s claims with respect to PANYNJ’s agreements to provide preferential construction financing to APM but not Maher are barred by the statute of limitations because, PANYNJ asserts, Maher pleaded that the claims accrued on July 24, 2008, outside the three year limitations period. Mot. to Dismiss at 19 (asserting with respect to the allegations in both paragraphs X and Y of section IV, that “Maher alleges that the Port Authority’s approval of APM’s deferral of its capital expenditure obligations and use of allocated financing for other work was given ‘[o]n July 24, 2008’ nearly four years before

⁴⁶ PANYNJ addresses its statute of limitations argument to the construction financing allegations in the Complaint in ¶¶ IV(X)-(Y) , but *does not* move to dismiss ¶¶ V(H), V(J)-(L) on the basis of the statute of limitations. Mot. to Dismiss at 19, 21.

⁴⁷ PANYNJ addresses its statute of limitations argument to the lease transfer consent allegations in the Complaint in ¶¶ IV(E)-(H) and ¶¶ V(B), V(I), V(N). Mot. to Dismiss at 21.

Maier filed this Complaint on March 30, 2012 . . . clearly outside the Shipping Act's three-year limitations period.").

PANYNJ's motion to dismiss fails because PANYNJ materially misquotes the allegations in Maier's Complaint. Contrary to PANYNJ's assertion, paragraph X of section IV alleges that PANYNJ's unreasonable grant of preferences to APM was "effective as of April 1, 2009," which is *within* three years of the March 30, 2012 Complaint. Compl. ¶ IV(X). PANYNJ selectively quoted the date of the *proposed* settlement, but omitted the date it became *effective*. Mot. to Dismiss at 19; Compl. ¶¶ IV(X), V(H), V(J), V(L).

PANYNJ makes the same July 24, 2008 date argument with respect to the allegations in paragraph Y of section IV of the Complaint—concerning PANYNJ's unreasonable and preferential treatment of APM over Maier with respect to use of PANYNJ financing for construction not contemplated in the leases. Mot. to Dismiss at 19. However, the language in paragraph Y of section IV does not include that date at all, which as a threshold matter precludes PANYNJ's effort to misapply it to paragraph Y. PANYNJ in effect makes no limitations argument with respect to Maier's allegations in paragraph Y of section IV (and in any event makes no limitation motion at all as to Count X, Compl. ¶ V(K)).

(2) PANYNJ argues that Maier's lease transfer consent practices claims are barred by the statute of limitations because, PANYNJ asserts, "Maier has been aware" that PANYNJ adopted a change of control policy in 2007 and purported to apply that policy to Maier and others in 2007. Mot. to Dismiss 19-20 ("Because Maier plainly has been aware of all of these events for over three years, its claims that the Port Authority has not uniformly applied its change of control policy; that the policy requires payment in excess of the cost of the service provided and is otherwise an unreasonable practice; that Maier was 'unjustly

overcharged' for the benefit received as compared to other terminal operators; and [unreasonable refusal to deal] are all barred by the statute of limitations.”). PANYNJ’s motion fails for multiple reasons.

First, PANYNJ concedes that the facts alleged on the face of the Complaint do not establish a statute of limitations defense, and therefore PANYNJ fails to meet the applicable standard to dismiss. Mot. to Dismiss at 19 (conceding that the allegations in ¶¶ IV(A)-(H) do not on their face place the allegations beyond 3 years). It is well established that the affirmative defense of statute of limitations permissible can be brought in a Rule 12(b)(6) motion to dismiss only when the facts that give rise to the defense are clear from the face of the complaint. *DePippo v. Chertoff*, 453 F. Supp. 2d 30, 33 (D.D.C. 2006) (citing *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)) (a pre-discovery motion to dismiss on statute of limitations grounds permissible “only if the complaint on its face is conclusively time-barred.”); *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981) (explaining the “inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense” where a complaint does not disclose defects on its face).⁴⁸ Because there is no dispute that the facts alleged on the face of the Complaint do not “conclusively establish” PANYNJ’s statute of limitations defense, PANYNJ’s motion should be denied.

Second, PANYNJ improperly narrows the entirety of Maher’s preferential and unreasonable lease interest transfer consent practices claims alleged in the Complaint down

⁴⁸ *Id.* at 73, n.13. (“We do no more than add to an overwhelming line of authority. *See, e.g., Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 235, 79 S.Ct. 760, 763, 3 L.Ed.2d 770 (1959) (question of plaintiff’s diligence ‘cannot be decided at this stage of the proceedings,’ on a motion to dismiss); *Jones v. Rogers Memorial Hospital*, 442 F.2d 773, 775 (D.C. Cir. 1971) (statute of limitations defense cannot be decided on a motion to dismiss ‘unless it appears beyond doubt’ that plaintiff can prove no facts to entitle him to relief); *Houlihan v. Anderson-Stokes, Inc.*, 434 F. Supp. 1319, 1324 (D.D.C. 1977) (issue of due diligence requires a finding of fact and thus is not suitable for determination on motion for judgment on the pleadings).”).

to three issues, each of which PANYNJ conveniently asserts occurred more than three years prior to the Complaint. Mot. to Dismiss at 20. PANYNJ invites the Presiding Officer to take “judicial notice” of *PANYNJ’s own proposed findings of fact* in Docket 08-03 as evidence that:

- PANYNJ’s *policy* authorization published in 2007 is the “*practice*” alleged in the Complaint. Mot. to Dismiss at 19-20 (citing PANYNJ’s Proposed Findings of Fact, Dkt. 08-03, ¶ 266 (Nov. 9, 2011));
- The “payments” in connection with Maher’s 2007 acquisition are “the cause of the alleged injuries to Maher.” Mot. to Dismiss at 20 (citing PANYNJ’s Proposed Findings of Fact, Dkt. 08-03, ¶ 266 (Nov. 9, 2011) and various pleadings); and
- Maher’s objection to the approval of the 07-01 settlement consenting to a lease interest transfer for APM without valuing the consent in the settlement. Mot. to Dismiss at 20.

While there is an appropriate place for judicial notice of prior proceedings, for example to establish that a litigation occurred, PANYNJ is plainly not permitted to rely on assertions in another proceeding not contained in Maher’s Complaint. *See, e.g., Howard v. Gutierrez*, 474 F. Supp. 2d 41, 52 n.5 (D.D.C. 2007) (“On a motion to dismiss, this Court cannot accept as true allegations pled by [a party] in a prior proceeding”) (citing *Global Network Commc’ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (“A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings”)); *Brody v. Hankin*, 145 F. App’x 768, 772 (3d Cir. 2005) (“on a motion to dismiss, we may take judicial notice of another court’s opinion—not for the truth of the matter asserted, but for the

existence of the opinion.”).⁴⁹ Reliance on PANYNJ’s factual assertions outside the Complaint is improper and should be rejected. *APM Terminals*, 30 S.R.R. at 1418 (presenting matters outside of a complaint improper for motion to dismiss on the pleadings); *Henthorn*, 29 F.3d at 688 (same).

Third, PANYNJ uses the assertions not in the Complaint to argue that Maher’s transfer consent practices claims accrued more than three years before the Complaint was filed. Mot. to Dismiss at 18, 20 (“identifying the time of accrual” beyond three years before the Complaint “[b]ecause Maher has been aware” of the events that, in PANYNJ view, characterize Maher’s claims). However, claim accrual is a fundamentally fact-based inquiry inappropriate for a motion to dismiss—even if PANYNJ’s argument was premised on actual allegations in the Complaint, which here it is not. *Askanase v. Fatjo*, 828 F. Supp. 465, 469 (S.D. Tex. 1993) (In ruling on a motion to dismiss under Rule 12(b)(6), “[w]here the issue of limitations requires a determination of when a claim begins to accrue, the complaint should be dismissed only if the evidence is so clear that there is no genuine factual issue and the determination can be made as a matter of law.”); *Seibu Corp. v. KPMG LLP*, 2001 WL 1167317, *5 (N.D. Tex. Oct. 2, 2001) (dismissal not appropriate if determining whether the

⁴⁹ Judicial notice may be appropriate to *establish the existence* of a proceeding or filing, but judicial notice is not appropriate to *establish the truth* of the matter asserted in a proceeding. *Brody*, 145 F. App’x at 772. PANYNJ cites no authority to the contrary providing a legal basis to using judicial notice of PANYNJ’s 08-03 proposed facts as facts in its motion to dismiss. Mot. to Dismiss at 19 n.9 (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 (3d Cir. 1988) (judicial notice for the purpose of *res judicata*, a permissible use to establish the existence of the prior proceedings); *World Line Shipping Inc. & Saeid B. Maralan (aka Sam Bustani) Order to Show Cause*, 29 S.R.R. 384, 392 n.18 (A.L.J. 2001) (judicial notice of prior proceedings for existence of prior offenses); *Merswin v. Williams Cos., Inc.*, 364 F. App’x 438 (10th Cir. 2010) (“When entertaining a motion to dismiss on the ground of *res judicata*, a court may take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact.”)).

limitations period has lapsed requires a factual determination of when the claims began to accrue).⁵⁰

VI. PANYNJ Fails to Meet Its Burden Of Showing a Stay Is Warranted

PANYNJ's motion to stay this Proceeding must fail because PANYNJ has not met its burden of demonstrating why the Presiding Officer should set aside his paramount obligation to exercise the Commission's jurisdiction timely. First, PANYNJ misstates the standard for a stay by setting forth only those elements of the standard purportedly favoring its position. Second, PANYNJ fails to identify any *pressing need* for the stay or to demonstrate it will sustain a *clear case of hardship or inequity* absent a stay. Third, PANYNJ fails to demonstrate that there is *not even a fair possibility* of hardship to Maher from a stay. Fourth, PANYNJ overstates the potential efficiencies for litigants and the Commission that might be achieved by the entry of a stay, and fails to recognize the additional burdens and costs from a stay which may outweigh any savings.

A. PANYNJ Misstates the Standard for a Stay

PANYNJ argues that the standard for a stay here finds its roots in *Landis v. North American Co.*, but fails to set forth how the standard is to be applied and the elements that it must show as movant to properly warrant a stay. As the party seeking the stay, PANYNJ bears the burden of showing the stay is warranted. *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 250, 252 (Guthridge, A.L.J. 2008) (quoting *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). To meet its burden, PANYNJ must show that there is "a pressing need for a stay" and

⁵⁰ *Richards*, 662 F.2d at 73 ("There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense. The filing of an answer, raising the statute of limitations, allows both parties to make a record adequate to measure the applicability of such a defense, to the benefit of both the trial court and any reviewing tribunal.").

must make out a “clear case of hardship or inequity” in being required to go forward. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *Kawasaki Kisen Kaisha, Ltd.*, 28 S.R.R. at 1413 (citing *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413 (Fed. Cir. 1997)). Moreover, PANYNJ must demonstrate that there is not “even a fair possibility” that the stay will work damage to Maher. *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. 1020, 1021 (F.M.C. 2002) (quoting *Landis*, 299 U.S. at 255).

When considering whether PANYNJ has met its burden, the law mandates balancing the interests favoring a stay against the interests frustrated by a stay, ever mindful that it is the Presiding Officer’s “paramount obligation to exercise [his] jurisdiction timely in cases properly before [him].” *Carolina Marine Handling, Inc. v. S.C. State Ports Auth.*, 28 S.R.R. 1595, 1598 (A.L.J. 2000); *Kawasaki Kisen Kaisha*, 28 S.R.R. at 1413. *See also* FMC Rule 1, 46 C.F.R. § 502.1 (requiring that the Rules be interpreted to secure “speedy” determination of every proceeding); *Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exchange, Inc.*, FMC Dkt. No. 00-01, 2001 WL 633643, *1 (A.L.J. May 2, 2001) (recognizing the duty of judges to eliminate undue delay and move cases along).

The *Landis* decision, which PANYNJ invokes as the standard, admonished that “[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at 255. In keeping with the Commission’s emphasis on swift justice, Commission administrative law judges have required that the proceeding not stayed resolve *all* of the claims in the stayed proceeding before finding a stay appropriate. For example, in *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, Judge Kline held that judges should not

stay or dismiss a proceeding before them when there [i]s pending a prior parallel proceeding before another court if the second court had “any

substantial doubt” that the first court proceeding would be “an adequate vehicle for the *complete and prompt* resolution of the issues between the parties.” Indeed, the Supreme Court stated that it would be a “serious abuse of discretion” for the second court to stay or dismiss the case before it under such circumstances.

28 S.R.R. 1004, 1005 (A.L.J. 1999) (emphasis added) (declining to stay proceeding pending resolution of purported parallel court litigation between the same parties unless the court “indicates that it intends to rule upon *all* of the issues that *could* give NPR substantially the same relief”). *See also Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. at 1021 (finding stay inappropriate where the cases involve some distinct issues and are not as intertwined as movant represents); *A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 24 S.R.R. 1468, 1478 (F.M.C. 1988) (denial of stay where causes of action in complaint before the Commission included matters other than those at issue in the alternative tribunal proceeding between the same parties).

B. *PANYNJ Fails to Demonstrate a Clear Case of Hardship or Inequity Creating a Pressing Need for the Stay*

Faced with its burden to demonstrate a “clear case of hardship or inequity” to PANYNJ if it does not obtain a stay, PANYNJ does nothing more than bemoan the potential costs of complying with its discovery obligations. First, PANYNJ has repeatedly requested stays without identifying any burden beyond what it characterizes as unnecessary litigation costs, and in each instance the Presiding Officer found the argument unconvincing. *See, e.g., Maher v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. 80, 83 (Guthridge, A.L.J. 2011) (litigation costs pending appeal); Order Denying PANYNJ Motion for Extension of Deadlines, Dkt. 08-03, at 2 (Sept. 30, 2011) (additional round of briefing). “[B]eing required to defend a suit, without more, does not constitute a ‘clear case of hardship or inequity’ within the meaning of *Landis*.” *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005); *In re Beebe*, 56 F.3d 1384, 1995 WL

337666, *4 (5th Cir. May 15, 1995) (per curiam table decision) (where discovery not yet complete, risk to plaintiff's claim of lost or stale evidence resulting from stay where several years have already passed outweighs potential burden of responding to discovery since "every defendant in a lawsuit faces this 'inequity'"); *McCurdy v. Novartis Pharma. Corp.*, 2012 WL 1551344, *7 (E.D. Cal. May 1, 2012) ("Being required to defend a suit, without more, does not constitute a clear case of hardship or inequity within the meaning of *Landis*.") (brackets and quotation marks omitted, quoting *Lockyer*, 398 F.3d at 1112)); *Prati v. United States*, 82 Fed. Cl. 373, 378 (2008) ("[T]he desire to avoid duplicative litigation and conserve judicial resources [is] insufficient, by itself, to warrant a stay.") (quoting *Cherokee Nation*, 124 F.3d at 1416); *Teague v. Alt. Energy Holdings, Inc.*, 2011 WL 6337611 (D. Idaho Dec. 19, 2011) ("[D]uplicative discovery—standing alone—is not enough to show a 'clear case' of hardship or inequity").

Second, PANYNJ's exposure to purportedly "unnecessary" discovery costs, should the Presiding Officer rule in its favor, will be limited to the period of time required to rule on the motion to dismiss. Considering that PANYNJ has stated in its motion that it has already prepared its responses to Maher's initial discovery requests, its purported exposure to unnecessary discovery costs has already been incurred by its own admission. *See* Mot. to Dismiss at 35. Third, discovery provided in Dockets 07-01 and 08-03 may be used in this Docket. August 1, 2008 Discovery Order, Dkt. 08-03, at 6 (Aug. 1, 2008). Thus, to the extent that PANYNJ contends in its motion there is similarity between this proceeding and previous proceedings and PANYNJ has fulfilled its discovery obligations in those proceedings, then it should have already substantially complied with its obligations. In these circumstances, PANYNJ has failed to demonstrate any clear case of hardship or inequity that creates a pressing need for a stay.

C. *PANYNJ Fails to Prove that There Is Not Even a Fair Possibility that Maher Will Be Harmed by the Stay*

PANYNJ's motion asserts without support that there is "no possibility" of harm to Maher. To meet its burden, PANYNJ claims that (a) the stay will be of short duration; (b) Maher did not immediately file its claims following the events in question; and (c) Maher has not waited long enough for other claims such that they are not ripe.

Contrary to PANYNJ's representations, the stay PANYNJ requests is not of a definite period—it is indefinite—and will likely delay this proceeding for years, causing Maher severe hardship. PANYNJ requests a stay until the 08-03 proceeding reaches final judgment. Given the serious violations of the Shipping Act at issue in the 08-03 proceeding and the resulting likelihood that the parties will appeal an adverse ruling, a final judgment is not likely for years. And even if the stay is limited to the time it will take the Presiding Officer to decide the motion to dismiss, this will likely also be a substantial delay which weighs against the stay. For example, in Docket 07-01, a similar meritless motion to dismiss six months and in the 08-03 proceeding, motions have required ten to twenty months.⁵¹ Requiring Maher to wait many months presents at least a "fair possibility" of hardship to Maher caused by the stay. *See, e.g., Beebe*, 56 F.3d 1384, 1995 WL 337666 at **4-5 (risk of stay to plaintiff of stale evidence where discovery not yet completed outweighs risk that defendants "could incur unnecessary litigation expenses" since "every defendant in a lawsuit faces this 'inequity'" and "[w]e also believe that Respondents overstate the extent of judicial resources to be saved" because "discovery does not

⁵¹ *See* Motion to Dismiss Complaint, Dkt. 07-01 (Jan. 29, 2007); *APM Terminals*, 30 S.R.R. 1412 (deciding motion to dismiss on July 13, 2007); Maher's Motion to Compel Production from PANYNJ, Dkt. 08-03 (Sept. 24, 2008) (first filed discovery motion decided as part of July 23, 2010 order); Memorandum and Order on Discovery Motions, Dkt. 08-03 (July 23, 2010) (deciding first set of discovery motions); PANYNJ's Motion for a Protective Order, Dkt. 08-03 (March 29, 2011) (first filed discovery motion decided as part of January 18, 2012 order); Memorandum and Order on Second Set of Discovery Motions, Dkt. 08-03 (Jan. 18, 2012) (deciding second set of discovery motions).

conserve significant judicial resources; typically it is the parties, not the district court, who are the active participants in that pre-trial stage of the litigation process.”); *McCurdy*, 2012 WL 1551344 at *7 (risk of prejudice to plaintiff under *Landis* outweighs potential harm to defendant from proceeding where only risk is being required to defend suit, and with regard to judicial resources factor “[d]elaying a case without sufficient cause places additional burden on the Court’s already overburdened docket as it delays resolution of the case.”); *Purvis v. Blitz, U.S.A., Inc.*, 2012 WL 645884, *2 (M.D. Ga. Feb. 28, 2012) (need for plaintiff’s allegations to be addressed in a timely fashion outweighs burden on defendant of proceeding litigation); *Davis v. Four Seasons Hotel Ltd.*, 2012 WL 518058, *2 (D. Haw. Feb. 14, 2012) (under *Landis* analysis, risk of stay to plaintiffs of lost evidence from delay outweighs risk to defendants that they may have to expend resources litigating the case which may be needless *if* they ultimately prevail); *Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 2011 WL 4005396, *1-2 (N.D. Ohio Sept. 8, 2011) (risk to plaintiff of prejudice from lost evidence and faded memories outweighs burden on defendant of proceeding with litigation under *Landis*); *Cartmill v. Sea World, Inc.*, 2010 WL 4569922, *2 (S.D. Cal. Nov. 5, 2010) (stay pending another action which will not be resolved for “many months” presents increased possibility of damage to Plaintiff and weighs against its imposition); January 11, 2011 Scheduling Order, Dkt. 08-03, at 4 (Jan. 11, 2011) (denying joint request for extension of stay since discussion between parties “cannot be allowed to delay the proceeding further”).

PANYNJ also alleges that there will be “no possibility” of harm to Maher because its claims were not filed *immediately* after events giving rise to the claim. The Presiding Officer has previously rejected this PANYNJ argument, holding that the delay in filing a complaint does not preclude arguing against a stay. *Maher v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. at 83 (Guthridge,

A.L.J. June 9, 2011). PANYNJ also cites no authority for such a novel position. Nor does PANYNJ explain how the filing of a Complaint, other than immediately, erases the possibility of harm to Maher from further delays. To the contrary, it is well established that delay presents an increased risk of harm to a complainant like Maher and risks prejudice to its claims. *Clinton*, 520 U.S. at 707-08 (delay of proceedings unwarranted because of “danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party”).

Finally, PANYNJ argues erroneously that based on its assertion that certain of Maher’s claims are not yet ripe, Maher sustains no harm from a stay. The claim to which PANYNJ apparently refers, the unreasonable leasing practices claim, is only one of many. Moreover, PANYNJ’s ripeness theory is itself infirm, as set forth *supra*, and offers no basis to stay this claim let alone the entire complaint. PANYNJ fails to meet its burden to show that the stay has no fair possibility of causing any harm to Maher.

The substantial delays from the stay PANYNJ requests present a very real and significant possibility of harm to Maher, particularly with respect to the cease and desist relief that Maher seeks. *Lockyer*, 398 F.3d at 1112 (finding more than “fair possibility” of harm under *Landis* when the stay would delay injunctive relief and not just past damages). As the Presiding Officer has recognized, for those claims which do not have a reparations component or for which PANYNJ argues reparations should be found time-barred, Maher will sustain irreparable harm for each day of delay in getting to a cease and desist order. Order Denying PANYNJ Motion for Extension of Deadlines, Dkt. 08-03, at 2 (Sept. 30, 2011); *Maher*, 32 S.R.R. at 83. *See also* Mot. to Dismiss at 18-21 (alleging time bar as to certain reparations claims).

D. *PANYNJ Overstates the Potential Efficiencies a Stay Could Create for the Litigants and the Commission*

Notwithstanding its burden, PANYNJ does not even attempt to claim that 08-03 will resolve all or even most of the issues in 12-02. *See NPR*, 28 S.R.R. at 1005 (stay is inappropriate if there is “any substantial doubt that the first court proceeding would be an adequate vehicle for the *complete* and prompt resolution of the issues between the parties”) (emphasis added, quotation marks omitted); *Exclusive Tug Arrangements*, 29 S.R.R. at 1021; *A/S Ivarans*, 24 S.R.R. at 1478. The only overlap in issues that PANYNJ asserts is that 08-03 and this case touch upon “the deferral of APM’s capital expenditure obligations and the purported exemption of APM from change of control fees.” Mot. to Dismiss at 34 & n.13. As set forth above, Part IV, the claims related to these two issues are distinct from those raised in 08-03, so the decision in 08-03 will not resolve these claims despite some alleged partial factual similarity.

More importantly, however, this case addresses new Shipping Act violations by PANYNJ that are unconnected to PANYNJ’s Shipping Act violations at issue in 08-03, including: PANYNJ’s unreasonable and preferential treatment of ocean carrier MSC and ocean-carrier-affiliated marine terminal PNCT, Compl. ¶ V(C); PANYNJ’s leasing practices involving general releases and waivers of Shipping Act claims, *id.* ¶ V(D); PANYNJ’s leasing practices involving unreasonable liquidated damages provisions, *id.* ¶ V(E); PANYNJ’s leasing practices involving lease rate renewal or extension provisions that set future lease rates in advance in a manner not reasonably related to the cost of the services provided, *id.* ¶ V(F); PANYNJ’s unreasonable exclusion of Maher and other existing tenants for consideration as lessees concerning the premises that are the subject of the Global Lease, *id.* ¶ V(G), PANYNJ’s practice of approving for other terminals to use financing allotted for mandatory projects for terminal capacity expansion projects, *id.* ¶ V(H); PANYNJ’s approval of APM’s use of construction

financing allocated for mandatory projects for capacity expansion and other projects while not allowing Maher to do the same, *id.* at ¶ V(K); and PANYNJ's unreasonable refusal to deal or negotiate with respect to leasing and operating the Global terminal, *id.* at ¶ V(M). Resolution of 08-03 will not determine these claims and they will continue regardless of the outcome in 08-03.

PANYNJ next asserts that 08-03 will be the “*very first* major decision in ten years on what constitutes an unreasonable preference or practice under the Shipping Act” and that it will be the first “in eight years on what constitutes an unreasonable refusal to deal.” Mot. to Dismiss at 33-34. First, PANYNJ is wrong—there have been numerous more recent cases on these Shipping Act violations. *See, e.g., Bishma Int’l v. Chief Cargo Servs., Inc.*, 32 S.R.R. 353 (Guthridge, A.L.J. 2011); *DSW Int’l, Inc. v. Commonwealth Shipping, Inc.*, 31 S.R.R. 1850 (Guthridge, A.L.J. 2011); *La Torre’s Enter. v. Natural Freight Ltd.*, 31 S.R.R. 1767 (A.L.J. 2011); *Tienshan, Inc. v. Tianjin Hua Feng Transp. Agency*, 31 S.R.R. 1831 (Guthridge, A.L.J. 2011); *R.O. White & Co. v. Port of Miami Terminal Operating Co.*, 31 S.R.R. 783 (A.L.J. 2009); *Am. Warehousing of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, 30 S.R.R. 1046 (A.L.J. 2006). Second, even if it were true that there has been no new authority in recent years, that has no bearing on the Presiding Officer’s *Landis* analysis. As the Presiding Officer has explained and PANYNJ has previously agreed, with regard to Maher’s 08-03 claims, the law applicable to PANYNJ’s violations in that proceeding is well-settled and fairly straightforward. Order Granting in Part and Denying in Part Motion for Extension of Pages for Proposed Findings of Fact and Brief, Dkt. 08-03, at 2 (Sept. 30, 2011) (“Unlike *Ceres* in *Ceres Marine*, Maher apparently does not have to establish new law, but apply established law to its fact situation.”); PANYNJ’s Response to Maher’s Rule 61 Statement, Dkt. 08-03, at 4 (Jan. 9, 2012) (recognizing that 08-03 is governed by “basic, well-established legal standards that the Port Authority has

never disputed”). PANYNJ’s stark reversal of its previous position in order to portray a prospective 08-03 decision as ground-breaking only serves to further eviscerate its credibility, such as it is. Mot. to Dismiss at 35. PANYNJ has failed to demonstrate this is one of those “rare circumstances” in which litigants in one case should “be compelled to stand aside” while “another settles the rule of law that will define the rights of both.” *Landis*, 299 U.S. at 255.

Finally, PANYNJ purports to seek delay to conserve “Commission resources” and to “ease this undue burden on the Presiding Officer,” and even suggests that because the Presiding Officer has another case pending, he cannot handle a second case. Mot. to Dismiss at 34-35. However, the Presiding Officer has a “paramount obligation to exercise [his] jurisdiction timely in cases before [him].” *Carolina Marine Handling*, 28 S.R.R. at 1598. In any event, it is frivolous to suggest that the Federal Maritime Commission can only handle one case at a time and in bringing yet another frivolous motion to dismiss⁵² it is PANYNJ, not Maher, which needlessly adds to the burden upon the Presiding Officer and the Parties, and needlessly adds cost and delay to Maher’s statutory right of relief.⁵³

PANYNJ’s arguments ignore the additional costs and burdens on Maher associated with delays, which the Commission has previously concluded outweigh the cost of proceeding with discovery in conducting a *Landis* analysis. In *Exclusive Tug Arrangements*, the respondent port

⁵² *APM Terminals*, 30 S.R.R. at 1416, 1418 (denying PANYNJ motion to dismiss in FMC 07-01 as “clearly not justified,” “without merit,” and “suggest[ive] that the Port Authority conducted little, if any, inquiry into Commission’s intent” regarding the Shipping Act).

⁵³ PANYNJ again recounts its baseless *ad hominem* attacks regarding discovery abuse and what it constantly characterizes as “scorched earth” tactics by Maher. As the Presiding Officer well knows, PANYNJ has spread far and wide its overbroad discovery requests, litigating against numerous third parties in addition to Maher. PANYNJ’s fishing expedition into matters unrelated to Maher’s 08-03 claims resulted in the production of approximately 1.7 million pages of documents to PANYNJ and over 80 pages of interrogatory responses to 62 interrogatories, or 81 with subparts, as well as 99 document requests, or 109 with subparts. PANYNJ can hardly be heard to complain about comparable discovery flowing the other direction, particularly since the claims concern violations of the Shipping Act by PANYNJ, not those of Maher.

authority moved for a stay of discovery pending the Commission's decision in another case. 29 S.R.R. at 1020. The port authority argued that without the stay of discovery, the port authority as well as third parties "would be unnecessarily burdened, particularly if the Commission ultimately issues a decision in Docket No. 02-02 which 'dramatically alters the scope and nature of discovery in this case.'" *Id.* Conducting its *Landis* balancing analysis, the Commission put little stock in the port authority's concerns, reasoning: "[W]e are concerned that granting a stay of discovery may be harmful to [Complainant] because the costs of participating in this proceeding are considerable and increase each time a deadline is extended. As a result of this potential harm to [Complainant], [Respondent] has an ever greater burden to justify the granting of this extraordinary remedy." *Id.* at 1022. Here, as in *Exclusive Tug Arrangements*, the grant of a stay presents a fair possibility of harm to Complainant in the form of increased costs. This in turn increases PANYNJ's burden of justifying the extraordinary remedy it seeks, and PANYNJ fails to satisfy this burden.

CONCLUSION

For the foregoing reasons Maher respectfully requests that the Port Authority's motion for dismissal and motions for stays should be denied.

Dated: May 11, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May 2012, a copy of the foregoing was served by e-mail on the following:

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