

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 12-02**

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**MAHER TERMINALS, LLC**

**COMPLAINANT**

**v.**

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

**RESPONDENT**

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**MAHER TERMINALS, LLC'S  
EXCEPTIONS TO AND APPEAL OF  
INITIAL DECISION OF JANUARY 30, 2015  
GRANTING MOTION TO DISMISS**

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## **EXCEPTIONS TO AND APPEAL OF INITIAL DECISION**

Complainant Maher Terminals, LLC (“Maher”), by and through undersigned counsel, hereby appeals the Initial Decision Granting Motion to Dismiss of January 30, 2015 in this proceeding (the “I.D.”) pursuant to Federal Maritime Commission (“FMC” or “Commission”) Rule 227, 46 C.F.R. § 502.227. As set forth in the exceptions and bases for appeal herein, the I.D. improperly dismissed the Complaint with prejudice. The Commission should reverse the I.D. and reinstate the Complaint, providing for its amendment if necessary, so that this long-delayed proceeding may advance for a decision on the merits.

### **Brief Overview Of Maher’s Claims**

The 57-paragraph, 14-page Complaint details Maher’s claims arising from the Port Authority of New York and New Jersey’s (“PANYNJ”) economic discrimination in the Port of New York and New Jersey. As set forth more fully in the Complaint, Maher alleges a series of specific practices and events whereby PANYNJ imposes unfair, unreasonable, and discriminatory requirements on marine terminal operators (“MTOs”) in the port in violation of the Shipping Act. PANYNJ’s practices, as alleged, strike at the heart of the Shipping Act.

The Complaint alleges facts establishing PANYNJ’s brazen leasing practices requiring port MTO tenants—as preconditions to doing business in the port—to waive the Federal statutory protections of the Shipping Act against economic discrimination, to agree to lease rate renewal provisions for future lease renewals and/or lease extensions at rates set by PANYNJ in advance in a manner not reasonably related to the costs of the services provided, and to agree to liquidated damages provisions designed to trigger if an MTO even tries to bring a Shipping Act claim against PANYNJ to challenge such economic discrimination. The Complaint alleges, as a condition for doing business in the port, PANYNJ’s “change of control” policy and practice of requiring payments and other economic consideration in order to obtain PANYNJ’s consent to

changes in MTO ownership interests and/or control—exacting in excess of \$200 million from some MTOs including Maher, but nothing from other MTOs—is not fairly, uniformly, or reasonably enforced or observed. Maher further alleges that such charges are not related to the cost of services provided by PANYNJ for such consents, that MTOs pay far more than the benefits received for such consents, and that PANYNJ’s “change of control” policy results in economic discrimination against MTOs, including Maher.

Other PANYNJ practices exclude MTOs and classes of MTOs from doing certain business in the port at all. As alleged in the Complaint, PANYNJ specifically refused to deal with Maher and unreasonably excluded Maher from consideration as a prospective operator of the Global marine terminal and then *categorically excluded* any existing container terminal operator in the port, including Maher, from qualifying as a future Qualified Transferee under the Global Lease. And the Complaint alleges repeated instances of PANYNJ’s preferences to ocean-carrier-affiliated terminals—including modifications of existing ocean-carrier-affiliated MTO leases that provide preferences and concessions—that were not made available to Maher, not because they guarantee more cargo or revenue to the port than does Maher, but because of status.

Furthermore, the Complaint specifically alleges that PANYNJ’s agreement with Port Newark Container Terminal (“PNCT”), an ocean-carrier-affiliated MTO, and ocean-carrier Mediterranean Shipping Company (“MSC”) discriminates unlawfully in the provision of terminal services to common carriers, including those that call at Maher’s terminal.

The Complaint alleges serious violations of the Shipping Act and the allegations in the Complaint are plainly sufficient to put PANYNJ on notice of the claims, which target specific PANYNJ leasing practices, specific provisions in PANYNJ’s own leases, and specific PANYNJ conduct to which PANYNJ is well-acquainted.

## Summary Of The Appeal

### *The Dismissal With Prejudice Is An Abuse Of Discretion*

The I.D. improperly concluded that “amendment of the pleadings would be futile and therefore the complaint is dismissed with prejudice.” I.D. at 33. However, dismissal with prejudice is disfavored and “warranted only when a trial court *determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.*” *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (internal quotation marks and citations omitted) (emphasis added). Furthermore, in these circumstances the FMC’s own specific rules expressly provide for amendment of the Complaint: “If the complaint fails to . . . state facts which support the allegations, the Commission may . . . require the complaint to be amended.” 46 C.F.R. §§ 502.62(a), (c) (2012); 46 C.F.R. § 502.62(a)(3)(v) (2013).

The I.D. did not make a determination that other facts consistent with the Complaint could not possibly cure the purported deficiencies. Quite to the contrary, the I.D. repeatedly identified specific additional facts that purportedly *should* have been pleaded and thereby identified the kind of additional facts that *could* have been pleaded, given the opportunity. There is nothing in the I.D. or the Complaint to support a determination that Maher could not possibly allege additional specific facts—regardless of whether such additional facts are even necessary under the Commission’s pleading standards. And the assertion that “it appears in this proceeding, amendment of the pleadings would be futile,” I.D. at 33, is neither a substitute for a determination nor a sufficient explanation of reasons that the courts require for refusing to grant leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1018, 1020 (D.C. Cir. 1981) (reversing district court’s denial of leave to amend, and remanding to the district court either to grant plaintiff leave to amend or provide sufficient reasons for its denial). The I.D.’s denial of an opportunity to amend is an abuse of discretion

warranting reversal.

***Maheer's Complaint Satisfied The Iqbal/Twombly Standard As Applied By The Commission***

The I.D. misapplied the pleading standard. The well-established pleading standard of the Commission is based on the Commission's rules and jurisprudence, amply set forth by Chief Judge Guthridge and upheld by the Commission in *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1369, 1379-80 (A.L.J. 2010), *aff'd in part and remanded*, *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136-37, 155 (F.M.C. 2011). In *Mitsui*, the Commission applied *Iqbal/Twombly* consistent with the Commission's rules, longstanding administrative law, and the continued adherence to notice pleading—preserved by the Commission and other Federal agencies in the wake of *Iqbal/Twombly*—over the express objections of the *Mitsui* dissent. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (“*Iqbal/Twombly*”).

Contrary to the position taken in the I.D., the Commission's citation to *Iqbal/Twombly* in considering motions to dismiss before the Commission is not an adoption of the heightened pleading standards inferred by *some* federal courts, nor is it a rejection of the notice pleading principles long applied by the Commission. Nor is there any basis to infer that the Commission jettisoned its rules and precedent *sub silentio* to adopt a heightened *Iqbal/Twombly* plausibility pleading standard in *Cornell v. Princess Cruise Lines, Ltd., Carnival PLC, & Carnival Corp.*, 33 S.R.R. 614, 620 (F.M.C. 2014).

The Commission's fair notice pleading standard accords with *Iqbal/Twombly*, which neither rejects the standards of notice pleading, nor requires heightened pleading of specifics. In *Twombly*, the Supreme Court explained that “[a]sking 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 fact pleading of specifics.” 550 U.S. at 556, 570 (emphasis added). Contrary to the I.D.’s application, “*Twombly leaves the longstanding fundamentals of notice pleading intact.*” *Aktieselskabet AF 21 November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (emphasis added). Longstanding fundamentals of notice pleading require the Commission to construe the factual allegations of the Complaint in the light most favorable to Maher and to grant Maher the benefit of all inferences that can be derived from the facts as alleged in the Complaint. *See Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir 2004).

The I.D.’s application of *Iqbal/Twombly*—importing concepts of heightened pleading, including pleading specific details of legal theories, pleading facts beyond the elements of the alleged violations, pleading facts bearing on plausibility of hypothetical defenses, and pleading facts pertaining to matters outside of the Complaint—is not the applicable standard for proceedings before the Commission. The facts alleged in the Complaint are sufficiently pleaded under the *Iqbal/Twombly* standard as applied in the Commission’s rules and precedent, both in effect when the Complaint was filed in March 2012 and now in effect. 46 C.F.R. §§ 502.62(a), (c) (2012); 46 C.F.R. §§ 502.62(a)(3)(v), 502.66, 502.67(2013).

***The I.D. Failed To Construe Factual Allegations In The Light Most Favorable To Maher And To Grant Maher The Benefit Of All Inferences***

Regardless of the nuances of *Iqbal/Twombly*, the law required the I.D. to accept as true all factual allegations in the Complaint and draw inferences from these allegations in the light most favorable to plaintiff. *Mitsui O.S.K. Lines*, 31 S.R.R. 1369, 1380, *aff’d in part and remanded*, 32 S.R.R. at 136-37, 155. Instead, in each instance of an alleged violation, the I.D. inferred that PANYNJ might have had a legitimate business reason for its actions and inactions which,

according to the I.D., was enough to defeat all of the allegations of the Complaint. The analysis applied by the I.D. turns the legal requirement for drawing inferences in favor of the complainant on its head. Rather than drawing all inferences from the factual allegations in the Complaint in Maher's favor, the I.D. speculated on hypothetical facts outside the Complaint, the supposed absence of additional, more detailed allegations of fact and legal theory that could have been alleged, and supposedly missing facts pertaining to PANYNJ's hypothetical defenses that it may have had legitimate "business reasons" for the alleged violations. But the absence of allegations of fact concerning possible defenses is no basis to dismiss a complaint, and the absence of allegations of fact *affirmatively disproving* possible defenses is certainly no basis to dismiss a complaint, let alone dismiss with prejudice. *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980); *Vance v. Terrazas*, 444 U.S. 252, 270 n.11 (1980); *Flying Food Grp., Inc. v. N.L.R.B.*, 471 F.3d 178, 183 (D.C. Cir. 2006) (potential defenses lie outside the burden of pleading); *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003) (complaints need not anticipate or attempt to defuse potential defenses).

Furthermore, factual allegations in a complaint that do bear on potential defenses are of course still assumed true and afforded all favorable inferences in favor of the Complainant. *Sherley v. Sebelius*, 610 F.3d 69, 71 (D.C. Cir. 2010) ("we accept[ ] as true all of the factual allegations contained in the complaint and draw[ ] all inferences in favor of the nonmoving party.") (internal citations and quotations omitted). Yet the I.D.'s repeated conclusory assertion that "there is nothing to suggest that PANYNJ did not have a legitimate business reason" for its actions and inactions, fails to account for (i) the law that the Shipping Act has no intent requirement—the mere doing of an unlawful act, whether part of a seemingly legitimate business decision or otherwise, constitutes a violation, *Volkswagenwerk Aktiengesellschaft v. Federal*

*Maritime Comm'n*, 390 U.S. 261, 281 (1968), and (ii) the numerous factual allegations in the 57-paragraph Complaint that, when properly read in the light most favorable to Maher and accorded all reasonable inferences in favor of Maher, at a minimum suggest that the facts alleged—e.g., requiring tenants to waive Shipping Act protections, setting future lease renewal and lease extension rates without regard to the cost of services provided, exacting over \$200 million from some MTOs but not others for lease consents, etc.—and warrant the inference that the acts on their face are *not* legitimate, not the opposite inference that PANYNJ might later advance a defense, let alone prove one.

## **DISCUSSION**

### **I. Legal Standards**

#### **A. Commission Rule Of Practice And Procedure 227**

Commission Rule 227 provides that any party may file an appeal or exceptions within 22 days. The Commission reviews an initial decision *de novo*. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 33 S.R.R. 543, 553 (F.M.C. 2014) (quoting 46 C.F.R. § 502.227(a)(6)); *see also Dep't. of Defense v. Matson Navigation Co.*, 17 S.R.R. 671, 674 (F.M.C. 1977) (reviewing a dismissal *de novo*). This means “looking at the case anew, the same as if it had not been heard before, and as if no decision previously had been rendered, and giving *no deference* to the [ALJ’s] determinations.” *McComish v. Bennett*, 611 F.3d 510, 519-20 (9th Cir. 2010) (internal quotation marks omitted) (emphasis added), *rev'd on other grounds*, 131 S.Ct. 2806 (2011).

#### **B. Dismissal For Failure To State A Claim**

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) in conjunction with and as applied by Commission precedent. *See, e.g.*, Memorandum and Order on

Respondent's Motion to Dismiss Complaint, F.M.C. 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). Such motions should be addressed on the face of the pleadings, not purported "facts" or hypothetical defenses imported into the Complaint, 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. *See, e.g., McKenna Trucking Co.*, 27 S.R.R. at 1054-55; *Int'l Freight Forwarders & Custom Brokers Ass'n of New Orleans v. Latin Am. Shippers Serv. Ass'n.*, 27 S.R.R. 392, 394 (A.L.J. 1995); *NPR, Inc. v. Bd. of Comm'rs*, 28 S.R.R. 1011, 1014-18 (A.L.J. 1999).

Consonant with other Federal agencies and independent commissions, the Commission has long applied an administrative law standard for pleadings that is not identical to the varying standards applied under the FRCP in federal courts. Consistent with the Commission's Rules permitting amendment of complaints and the filing of motions for a more definite statement by respondents, the Commission applies a fair notice pleading standard congruent with *Iqbal/Twombly*. As Chief Administrative Law Judge recently explained:

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*, 31 S.R.R. at 1379-80 (quoting *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 335 F. Supp. 2d 275, 279 (D. Conn. 2004)) (internal citations omitted), *aff'd in part and remanded*, 32 S.R.R. at 136-37, 155 (expressly reaffirming the fair notice pleading standard in consonance with *Iqbal/Twombly* with Commissioner Khouri in dissent expressly objecting to continued application of the fair notice standard and arguing for a heightened plausibility pleading standard under *Iqbal/Twombly*).

Chief Judge Guthridge’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.”). 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.”).

As pertinent to this proceeding, the Commission’s notice pleading standard was further memorialized in its Rule 62, which, in its version in effect at the time of the filing of the Complaint in March 2012, provided that a complaint must be verified, but 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 permitted the amendment of a complaint “[i]f 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) (2012). Similarly, Rule 70, then in effect, explicitly provided for amendments or supplements to the pleadings. 46 C.F.R. § 502.70(a)(2012). Moreover, pursuant to Rule 71, then in effect, 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,” it may file 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 (2012).<sup>1</sup>

After the March 30, 2012 filing of the Complaint in this proceeding and after briefing on the motion to dismiss was completed on May 11, 2012, the Commission on October 10, 2012, revised certain of its rules of practice and procedure by rulemaking. Commission’s Rules of Prac. and Proc., 77 Fed. Reg. 61,519-61,535 (Oct. 10, 2012). As pertinent here, in that rulemaking, the Commission preserved the Shipping Act’s longstanding fair notice pleading standard. The new Rule 62 provides with respect to the “Content of the Complaint” that:

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<sup>1</sup> PANYNJ did not file such a motion here.

The complaint must be verified and must contain the following:

(ii) A clear and concise factual statement *sufficient to inform each respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law*, and a statement showing the complainant is entitled to relief.

46 C.F.R. § 502.62(a)(3)(ii) (2013) (emphasis added). Likewise, the new version of the rules preserved Commission authority to require amendment of a complaint when warranted to provide more detail. 46 C.F.R. §§ 502.62(a)(3)(v), 502.66, 502.67 (2013). The previous Rule 71 now appears in the new Rule 67, but still permits a more definite statement if the complaint “is so vague or ambiguous that a party cannot reasonably prepare a response.” 46 C.F.R. § 502.67 (2013). The Commission’s new rules *do not* invoke a heightened *Iqbal/Twombly* plausibility pleading standard as has been interpreted to apply in some federal courts, but rather expressly invoke a “sufficient to inform” standard, i.e., fair notice. Therefore, under the rules in effect both at the time of filing the Complaint and now, the Commission’s rules provide for a fair notice standard for pleading violations of the Shipping Act.

As recently as November 6, 2014, Chief Judge Guthridge confirmed the enduring application of the fair notice standard. *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, 33 S.R.R. 710, 724-25 (A.L.J. 2014) (upholding multiple claims and declining to dismiss them, holding in three instances that “these allegations [in the complaint] are detailed and informative enough to enable [the opposing party] to respond.”).

Applying *Iqbal/Twombly* consistent with this fair notice pleading standard accords with current administrative practice across the Federal Government. As current commentators note, “Pleading requirements in administrative proceedings are traditionally more informal than judicial proceedings and are not held to the technical standards required in courts of law.” 2 Am. Jur. 2d Administrative Law § 285 (2015); *see also* 2 Admin. L. & Prac. § 5:33 (3d ed. 2015)

(noting that in administrative proceedings, “[t]he general principle applied is ‘notice pleading,’ which requires that a complaint provide sufficient notice of the charges.”). And other Federal agencies, applying this enduring principal of administrative law, have held that *Iqbal/Twombly* does not alter the preexisting liberal notice pleading standard in agency proceedings. *In re LabMD, Inc.*, Dkt. No. 9357, 2013 WL 6327988, at \*9 (F.T.C. Nov. 22, 2013) (Federal Trade Commission stating that “[t]he pleading standard articulated in [*Twombly*] and [*Iqbal*], is inapplicable to complaints filed before the Federal Trade Commission’s Office of the Administrative Law Judges,” as 16 C.F.R. § 3.11(b)(2) only requires complaints to contain “[a] clear and concise factual statement *sufficient to inform* each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law”) (emphasis added); *see also Darrah v. Knowles, et al.*, CFTC No. 05-R042, 2013 WL 7155089, at \*1 (C.F.T.C. Dec. 16, 2013) (Commodity Futures Trading Commission holding that “so long as a complaint provides a simple statement of the facts and a claim for relief, it is sufficient under Commission rules.”); *Sec’y of Labor Mine Safety and Health v. New NGC Inc.*, Dkt. No. CENT 2013-538-M, 2013 WL 8505723, at \*1 (F.M.S.H.R.C. Sept. 6, 2013) (Federal Mine Safety and Health Review Commission holding that “administrative pleadings are to be liberally construed and easily amended.”); *U.S. v. Mar-Jac Poultry, Inc.*, OCAHO Case No. 11B00111, 2012 WL 2950407, at \*7 (E.O.I.R. Mar. 15, 2012) (Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, regarding *Iqbal/Twombly*, questioning “why any administrative agency should be required to adopt such a controversial pleading standard” and declining to do so).

## **C. The Shipping Act Violations Alleged In The Complaint**

### **1. The Violations For Failure To Establish, Observe, And Enforce Just And Reasonable Regulations**

Title 46 U.S.C. § 41103(c) (Shipping Act § 10(d)(1)) provides that a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” “[A]s applied to terminal practices, we think that ‘just and reasonable practice’ most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *NPR, Inc. v. Bd. of Comm’rs*, 28 S.R.R. 1512, 1531 (A.L.J. 2000) (quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. 307, 329 (F.M.C. 1966)); *West Gulf Maritime Ass’n v. Port of Houston*, 18 S.R.R. 783, 790 (F.M.C. 1978). “The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination.” *NPR*, 28 S.R.R. at 1531. In the context of monetary payments, the Commission considers “whether the charge levied is reasonably related to the service rendered” by “measur[ing] the impact on the payer compared to other payers as well as the relative benefits received.” *Id.* at 1531-32 (quoting *Volkswagenwerk*, 390 U.S. at 282). “[Complainant] has the burden of persuading the Commission that [the Port]’s practice . . . [i]s unreasonable,” and “[i]f [Complainant] succeeds in that regard, the burden of proving justification shifts to [the Port].” *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. 1199, 1222 (F.M.C. 2003).

### **2. The Undue Prejudice Or Preference Violations**

Title 46 U.S.C. § 41106(2) (Shipping Act §§ 10(b)(10), (11)) prohibits undue or unreasonable preference or prejudice with respect to lease terms where:

the parties were accorded different treatment, . . . the unequal treatment is not justified by differences in transportation factors, and . . . the resulting prejudice or

disadvantage is the proximate cause of injury.

*Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1270 (F.M.C. 1997) (“*Ceres I*”). The threshold criterion for unreasonable preference or disadvantage was established by *Volkswagenwerk*. 390 U.S. at 278-80 (discriminatory treatment when third party has enjoyed unfair advantage over the complainant). In *Ceres*, the Commission reaffirmed that when a port authority makes a preference available to one tenant it must make it available to others. 27 S.R.R. at 1272-74; *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 29 S.R.R. 370, 372 (F.M.C. 2001) (“*Ceres II*”) (duty to apply its criteria for granting preferential lease terms in a fair and even-handed manner).<sup>2</sup> For example, as pertinent here, the relevant inquiry is not about the wisdom or lack of wisdom in according the many preferences to the ocean-carrier-affiliated marine terminal operators, PNCT and APM, or other marine terminal operators, e.g., Global and NYCT, but rather PANYNJ’s unreasonable failure to provide comparable preferences to Maher because of impermissible reasons, i.e., it is not an ocean-carrier-affiliated marine terminal or because of its identity.

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<sup>2</sup> The I.D. cites *dicta* from the Commission’s recent decision in *Maher Terminals, LLC v. The Port Authority of N.Y. and N.J.*, F.M.C. Dkt. 08-03, (F.M.C. Dec. 17, 2014) for the unremarkable proposition that “neither *Ceres I* nor *II* states that a port has an absolute continuing duty to provide all lessees with identical lease terms” and uses it to argue that “Maher cites no authority for the proposition that the Shipping Act requires a port authority to reevaluate lease provisions during the life of the lease to make sure they serve their intended purpose.” I.D. at 2. The I.D. cites no language in the Complaint that Maher seeks “identical lease terms” nor that PANYNJ must “reevaluate lease provisions during the life of the lease to make sure they serve their intended purpose.” Rather consistent with longstanding precedent predating *Ceres I* and *II* along with those decisions, Maher simply seeks proper application of the Shipping Act’s protections from economic discrimination by comparable treatment in a fair and evenhanded manner. See, e.g., *Co-Loading Practices By NVOCCs*, 23 S.R.R. 123 (F.M.C. 1985) (NVOCCs can be granted favorable rates based on a volume criterion provided the criterion is applied evenhandedly to entities other than NVOCCs); *Valley Evaporating Co., v. Grace Line, Inc.* 11 S.R.R. 873, 880 (F.M.C. 1970) (once the volume criterion established, the Shipping Act imposed a duty on it to apply that criterion “in a totally fair and impartial manner”); *Ballmill Lumber & Sales Corp. v. Port of N.Y. Auth.*, 10 S.R.R. 131, 140-41 (F.M.C. 1968) (port users entitled to similar treatment in respect to whether a discount based on volume of lumber is to be granted).

Furthermore, even if a discriminatory practice is shown to have a valid purpose, it may still be ruled unreasonable if “it goes beyond what is necessary to achieve that purpose.” *Distrib. Servs. Ltd. v. Trans-Pacific Freight Conference of Japan & its Member Lines*, 24 S.R.R. 714, 722 (F.M.C. 1988); *Ceres I*, 27 S.R.R. at 1275 (discrimination with valid purpose unreasonable where “the degree of disparity is disproportionate to [port authority’s] goals”).

### **3. The Unreasonable Refusal To Deal Violations**

Title 46 U.S.C. § 41103(c) (Shipping Act § 10(b)(10)) provides that a “marine terminal operator may not unreasonably refuse to deal or negotiate.” “This requires a two part inquiry: whether [the Port] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth.—Possible Violation of Section 10(b)(10)*, 29 S.R.R. 1436, 1448 (F.M.C. 2003). The Commission “must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect.” *Docking and Lease Agreement By and Between City of Portland, Maine & Scotia Prince Cruises Ltd.*, 30 S.R.R. 377, 379 (F.M.C. 2004).

### **4. The Violations For Agreement To Unreasonably Discriminate**

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) violation, 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.”

## II. Substantive Errors And Exceptions

### A. Dismissal With Prejudice Was Improper

The I.D. improperly concluded that “amendment of the pleadings would be futile and therefore the complaint is dismissed with prejudice.” I.D. at 33.<sup>3</sup> Even assuming, *arguendo*, that heightened plausibility pleading requirements apply here, which they do not, Maher should have been allowed to amend its Complaint. As the D.C. Circuit has warned, dismissals with prejudice under Rule 12(b)(6), such as the I.D. here, are disfavored and “warranted only when a trial court *determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.*” *Firestone*, 76 F.3d at 1209 (internal quotation marks and citations omitted) (emphasis added).

There is no basis to conclude that Maher cannot allege additional facts to cure the asserted deficiency, nor has the I.D. identified any such basis. Nor does the I.D. explain the basis for the conclusory assertion that “it appears in this proceeding, amendment of the pleadings would be futile.” I.D. at 33. Indeed, to the contrary, the I.D. itself repeatedly identifies purported deficiencies of missing factual details that the I.D. asserts should have been pleaded, and therefore, that could have been pleaded absent dismissal with prejudice. I.D. at 2-5, 11, 12, 13, 14, 15, 17, 18, 19, 21, 22, 24, 25, 26, 28, 29, 30, 31, 33. For example, the I.D. highlighted as pleading deficiencies allegedly missing additional specific detailed facts:

- (1) to “identify the entities, dates, or amounts that Maher thinks violate the Shipping Act” with respect to lease transfer practices, I.D. at 12, 23, 31;
- (2) that “Maher requested comparable concessions or lease terms” complained of, I.D. at 14;

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<sup>3</sup> This followed the I.D.’s erroneous conclusions that Maher fails to plead sufficient facts to make a Shipping Act violation plausible under a heightened *Iqbal/Twombly* plausibility pleading standard as interpreted in some federal courts. I.D. at 2-5, 11, 13, 14, 15, 17, 18, 19, 21, 22, 24, 25, 26, 28, 29, 30, 31, 33.

(3) “that Maher . . . is subject to these [release or waiver] provisions . . . whether the provisions have been utilized, or which leases contain the provisions.” I.D. at 15;

(4) that “Maher . . . is subject to liquidated damages, what would trigger the liquidated damages provisions, the content of the provisions, whether the provisions have been utilized, or which leases contain the provisions.” I.D. at 16;

(5) to identify “which capital expenditures or projects it objects to and who received deferrals of marine terminal operator leasehold obligations other than APM-Maersk.” I.D. at 21;

(6) to show there is “no valid transportation purpose” and if so that “the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose” regarding the discrimination and unreasonable practices claims, I.D. at 22;

(7) that “PANYNJ had an obligation to renegotiate its thirty-year lease with Maher based on agreements it made with other port tenants” with respect to PANYNJ’s failure to provide Maher comparable construction financing, I.D. at 26; and

(8) that “Maher . . . bid or requested consideration for the other marine terminal” with respect to the refusal to deal regarding the terminal which is the subject to the Global Lease, I.D. at 28.

But, required or not, the I.D. does not *determine* that the identified facts would be *impossible* for Maher to plead. Under any pleading standard, Maher should have been afforded the opportunity to amend its Complaint to make additional allegations.

Furthermore, the I.D.’s failure to provide reasons for refusing to grant leave to amend is reversible error. In *Foman v. Davis*, the Supreme Court explained that while in the judicial context the decision to grant or deny leave to amend is within the trial court’s discretion, “outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely *abuse of that discretion* and inconsistent with the spirit of the Federal Rules.” 371 U.S. at 182 (emphasis added). Likewise, the D.C. Circuit has emphasized that a proper exercise of discretion requires providing reasons. *See Parker*, 652 F.2d at 1018, 1020 (reversing denial of leave to amend and remanding to either grant plaintiff leave to

amend or provide sufficient reasons for its denial).<sup>4</sup>

The two authorities cited in the I.D. do not absolve the failure to make a proper futility determination. I.D. at 33. In *Birdette v. Saxon Mortgage*, *pro se* plaintiffs repeatedly failed to comply with the court's order specifically directing them how to amend the complaint. 502 F. App'x 839, 840 (11th Cir. 2012). The court dismissed with prejudice under FRCP 41(b) because plaintiffs repeatedly failed to comply with the courts' order. *Id.* at 841. In *Holmes v. Grubman*, the court merely denied plaintiffs' request for leave to amend the complaint to enlarge its scope to include earlier claims, applying FRCP 16(b)(4) because plaintiffs had not established good cause for why their proposed amendment was untimely given the scheduling order. 568 F.3d 329, 334-35 (2d Cir. 2009) *certified question answered*, 286 Ga. 636 (2010). Neither decision cited remotely supports the decision to dismiss with prejudice here.

Furthermore, Maher should have been allowed to amend even if a new heightened plausibility pleading standard had been adopted after the Complaint was filed. Courts have freely allowed amendments to complaints brought before, but decided after *Iqbal/Twombly*. *Coal. for a Level Playing Field, L.L.C. v. AutoZone, Inc.*, 737 F. Supp. 2d 194, 206 (S.D.N.Y. 2010) (offering "the opportunity to move to add curative amendments"); *Kasten v. Ford Motor Co.*, No. 09-11754, 2009 WL 3628012, at \*6 (E.D. Mich. Oct. 30, 2009) ("equity justifies allowing Plaintiffs to amend their Complaint"); *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp. 2d 381, 391 (S.D.N.Y. 2007) ("grant[ing] leave to amend . . . complaint"). The I.D.'s failure to provide Maher an opportunity to amend is an abuse of discretion warranting reversal.

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<sup>4</sup> Moreover, here, as compared to a "trial court" standard referenced by the Court of Appeals in *Firestone*, the Commission's own specific pleading rules permit amendment: (1) allowing a party to "state facts which support the allegations," 46 C.F.R. §§ 502.62(a), (c) (2012); (2) allowing a party to "state its case more fully and in detail," 46 C.F.R. § 502.66 (2013); and (3) when the pleading is "so vague or ambiguous that a party cannot reasonably prepare a response . . ." 46 C.F.R. § 502.71 (2012); 46 C.F.R. § 502.66 (2013).

## **B. The I.D. Misapplied The *Iqbal/Twombly* Standard As Applied By The Commission's Rules And Administrative Law Doctrine**

The *Iqbal/Twombly* standard as applied in the courts is controversial and not nearly as unequivocally draconian as the I.D. interprets it. In *Twombly*, the Court explained that “[a]sking 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.” 550 U.S. at 556, 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* 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 [FRCP] 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.”); *Fame Jeans Inc.*, 525 F.3d at 15 (“*Many courts have disagreed about the import of Twombly. We conclude that Twombly leaves the longstanding fundamentals of notice pleading intact.*”) (emphasis added). Here, these longstanding fundamentals of notice pleading before administrative agencies and the Commission’s rules and precedent dictate that the factual allegations of the Complaint be construed in the light most favorable to Maher and that Maher be granted the benefit of all inferences that can be derived from the facts as alleged in the Complaint. See *Barr*, 370 F.3d at 1199.

Furthermore, the I.D.’s strict interpretation of *Iqbal/Twombly* in accord with the most

unforgiving of Federal courts is at odds with the Commission's rules, longstanding commission precedent, and the enduring administrative doctrine favoring lenient notice pleading, as discussed *supra* Section I.B. In this administrative context where the Commission's own specific pleading regulations apply, the practical significance of *Iqbal/Twombly* is to preserve “the longstanding fundamentals of notice pleading intact.” *Fame Jeans Inc.*, 525 F.3d at 15 (emphasis added); *Mitsui O.S.K. Lines*, 31 S.R.R. at 1379-80, *aff'd in part and remanded*, 32 S.R.R. at 136-37, 155 (expressly reaffirming the “fair notice” pleading standard with Commission Khouri in dissent objecting to its continued interpretation under the Commission's longstanding administrative rules).

Thus, Chief Judge Guthridge reaffirmed the vitality of notice pleading before the Commission under *Iqbal/Twombly* in the most recent decision of the Commission, issued after *Cornell. Edaf Antillas*, , 33 S.R.R. at 724-25 (holding in three instances “these allegations [in the complaint] are detailed and informative enough to enable [the opposing party] to respond.”); 46 C.F.R. § 502.227(a)(3) (decision of Presiding Officer becomes the decision of the Commission thirty days after service thereof unless exceptions are made or the Commission determines to make review on its own initiative); *Mitsui O.S.K. Lines*, 31 S.R.R. at 1380 (quoting *Bridgeport*, 335 F. Supp. 2d at 279) (internal citations omitted). The I.D.'s erroneous assertion that the Commission adopted a heightened *Iqbal/Twombly* plausibility pleading standard in *Mitsui O.S.K. Lines* misconstrues the decision. While referencing *Iqbal/Twombly*, the Commission expressly preserved notice pleading—over the express objections in the dissenting opinion. *Mitsui O.S.K. Lines*, 32 S.R.R. at 136-37, 155. Similarly, the Commission did not adopt a heightened Federal court interpretation of *Iqbal/Twombly* plausibility pleading standard in *Cornell*, which merely held in accordance with well-established pre-*Iqbal/Twombly* authority that where on the face of

the complaint the facts establish the practice complained of is reasonable, the complaint can be dismissed. *Cornell*, 33 S.R.R. at 620-24.

### **1. The I.D. Erroneously Required Inapplicable Heightened Pleading With Particularity**

The I.D. found the Complaint deficient in the absence of Maher pleading facts “showing how” the alleged facts violated the Shipping Act. I.D. at 12, 14, 15, 16, 18, 19, 21, 23, 25, 29, 30, 31, 33. The I.D. also required that Maher plead particular and specific additional facts with respect to the allegations about PANYNJ’s practices requiring release and waiver of the Shipping Act as a condition for operating in the port and the imposition of liquidated damages provisions to enforce the releases and waivers. I.D. at 15, 16. According to the I.D., the Complaint was deficient for failing to specifically plead (1) “what would trigger the provisions,” (2) “the content of the provisions,” (3) “whether the provisions have been utilized,” and (4) which leases contain the provisions. *Id.* As a practical matter, these pleading requirements impose heightened pleading under FRCP Rule 9(b), which does not apply here.

Rule 9(b) requires the complaint plead “the who, what, when, where, and how” of the events at issue. *U.S. ex rel. Elms v. Accenture LLP*, 341 F. App’x 869, 873 (4th Cir. 2009); *U.S. ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601, 605 (7th Cir. 2005); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002) (internal quotations omitted); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999) (Under Rule 9(b), plaintiffs asserting fraud claims must explain “the who, what, when, where, and how: the first paragraph of any newspaper story.”), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), *as recognized in Institutional Investors Grp. v. Avaya, Inc.*, 564 F.3d 242, 276 (3d Cir. 2009). And Rule 9(b) does not govern this proceeding. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (declining to extend the particularity pleading

requirements of Rule 9(b)); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (same). The I.D.’s requirement that Maher plead additional specific facts and theories—such as “how” the facts alleged constituted violations—is far more than required by the Commission’s rules and as a practical matter imposes an unwarranted and wholly inapplicable heightened pleading requirement mandated by FRCP 9(b).

## **2. The I.D. Erroneously Required Pleading Of Legal Theories**

The I.D. found the Complaint deficient for not pleading facts “suggesting how” and “showing how” the facts alleged violated the Shipping Act, in effect improperly requiring Maher to plead legal theories. I.D. at 12, 14, 15, 16, 18, 19, 21, 23, 25, 29, 30, 31, 33. But, it is beyond cavil that not even the heightened *Iqbal/Twombly* plausibility pleading standard imposed by some Federal courts requires a “theory of the pleadings.” *Johnson v. City of Shelby*, 135 S. Ct. 346, 346-47 (2014). As the Supreme Court has explained,

Federal pleading rules call for “a short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. . . .

Our decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), are not in point, for they concern the factual allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners’ complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim. See Fed. Rules Civ. Proc. 8(a)(2) and (3), (d)(1), (e). For clarification and to ward off further insistence on a punctiliously stated “theory of the pleadings,” petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983. See 5 Wright & Miller, *supra*, § 1219, at 277–278 (“The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff’s claim for relief.” (footnotes omitted)); Fed. Rules Civ. Proc. 15(a)(2) (“The court should freely give leave [to amend a pleading] when justice so requires.”).

*Id.*

Further applying this well-established principle and echoing the Supreme Court’s recent decision *City of Shelby*, the court in *WiAV Solutions LLC v. Skyworks Solutions, Inc.*, expressly rejected the contention that complainants were required to state “how” the facts alleged constituted a claim. Applying *City of Shelby*, the court explained the complaint:

puts defendants on notice of the claims against them. *See Johnson v. City of Shelby*, — U.S. —, —, 135 S.Ct. 346, 347, —L.Ed.2d —, — (2014) (“Having informed [defendant] of the factual basis for their complaint, [plaintiffs] were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim .”).

No. 13 CIV. 6683 PAC, 2015 WL 57670, at \*3-4 (S.D.N.Y. Jan. 5, 2015). In this proceeding, the I.D. itself establishes that Maher pleaded facts that put defendants on notice of the claims against them. Requiring more—that Maher explain “how” those facts constituted violations—constitutes reversible error in violation of the Supreme Court’s admonition in *City of Shelby*.

### **3. The I.D. Erroneously Required Pleading Of Facts Beyond Elements Of Violations**

The I.D. found the Complaint deficient in the absence of Maher pleading additional facts beyond the elements of the violations. I.D. at 14, 15, 16, 18, 19, 21, 23, 25, 29, 30, 31, 33. For example, the I.D. found deficient the absence of wholly unnecessary facts that: (1) “Maher requested comparable concessions on lease terms,” I.D. at 14; (2) PANYNJ’s concessions to PNCT-MSA were unreasonable, I.D. at 14; (3) Maher was “subject to” the release, waiver and liquidated damages provisions enforcing them, I.D. at 15-16; (4) PANYNJ’s deferral of \$50 million of APM’s capital expenditure obligation was unreasonable, I.D. at 25; and (5) Maher “bid or requested consideration for the other marine terminal,” I.D. at 28. None of these I.D.-mandated additional pleading requirements are elements of the violations and the I.D. cites no authority for requiring them to be pleaded in the Complaint.

First, it is not an element of any of the Shipping Act violations at issue that a complainant must allege that it first “requested comparable concessions on lease terms” or that it “bid or requested consideration” before filing the complaint. I.D. at 14, 28. The Shipping Act expressly imposes affirmative duties on PANYNJ to: (1) “not fail to establish, observe, and enforce, just and reasonable regulations and practices,” 46 U.S.C. § 41102(c); (2) “not give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person,” 46 U.S.C. § 41106(2); (3) “not unreasonably refuse to deal or negotiate,” 46 U.S.C. § 41106(3); and (4) “not agree with another marine terminal operator or with a common carrier to . . . unreasonably discriminate in the provision of terminal services to, a common carrier . . . .” 46 U.S.C. § 41106(1).

The Shipping Act expressly permits any person to file a sworn complaint alleging a violation of the Act for failure to perform the foregoing affirmative duties. 46 U.S.C. § 41301(a). Furthermore, the Act expressly provides that “the person [named in the complaint] *shall* satisfy the complaint or answer it in writing” and if not satisfied then “the Commission *shall* investigate the complaint . . . and make an appropriate order.” 46 U.S.C. §§ 41301(b), (c) (emphasis added). The I.D.’s improper imposition of additional pre-filing requirements as preconditions to the filing of the Complaint lacks any basis in the statute or Commission authority and the I.D. cites none.

The Complaint repeatedly alleges facts that PANYNJ unreasonably failed to provide comparable terms in a fair and even-handed manner to Maher of the preferences that PANYNJ provided to other marine terminal operators and failed to establish, observe, and enforce just and reasonable regulations. Compl. ¶ IV. The I.D. does not indicate that PANYNJ satisfied the Complaint. Moreover, the Complaint alleges facts that establish that Maher sought parity, that

Maher requested to be considered for the Global Lease, that PANYNJ unreasonably refused to deal or negotiate with Maher, and that Maher made repeated efforts at alternative dispute resolution without success before filing the Complaint. Compl. ¶¶ IV(AA), IV(BB), VII(A).

Second, it is not *necessary* for Maher to allege facts that the concessions PANYNJ provided to PNCT or PANYNJ's deferral of \$50 million of APM's capital expenditure obligation were unreasonable in isolation; an individual concession need not be unreasonable for PANYNJ's failure to provide comparable terms to Maher in a fair and even-handed manner to violate the Shipping Act. As explained, Maher alleged facts that PANYNJ provided unreasonable *preferences* to PNCT and APM because they were ocean-carrier-affiliated MTOs and unreasonably failed to provide comparable *preferences* to Maher in an even-handed manner and overcharged Maher, which is not an ocean-carrier-affiliated MTO. Compl. ¶ IV. The well-established "non-excessive" and "fit and appropriate to the end in view" standards apply to a determination of whether a port's rate practices violate § 10(d)(1)—including in cases in which a port imposes different rates on different customers for substantially similar services. Thus, in *Sec'y of the Army v. Port of Seattle*, a port charged the Department of Defense because of its identity a rate for a certain service that was much higher than the rate in its commercial tariff for a basically similar service. 24 S.R.R. 595, 596 (F.M.C. 1987). The Commission held that the large rate differential was excessive given the similarity of the services provided, and hence violated the "reasonable relationship" requirement of section 10(d)(1) of the 1984 Act. *Id.* at 601-02; *Sec'y of the Army v. Port of Seattle*, 24 S.R.R. 1242, 1248 (F.M.C. 1998) (reaffirming decision). In the context of monetary payments, the Commission considers "whether the charge levied is reasonably related to the service rendered" by "measur[ing] the impact on the payer compared to other payers as well as the *relative* benefits received." *NPR*, 28 S.R.R. at 1531-32

(quoting *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. at 329 and *Volkswagenwerk*, 390 U.S. at 282) (emphasis added); *Ceres I*, 27 S.R.R. at 1274-75 (“charges assessed did not bear a reasonable relationship to the comparative benefit obtained . . . by the assessed parties”).

Third, it is not *necessary* for Maher to allege facts that it was “subject to” the release, waiver, and liquidated damages provisions enforcing them to state a claim. In *Ceres II*, the Commission explained that “The Shipping Act provides that “any person” may file a complaint, and this right is independent of the terms and conditions set forth in the agreement.” 29 S.R.R. at 371. Maher alleged that PANYNJ’s practices are unreasonable and that “Maher sustained and continues to sustain injury and damages” as a result of the violations. Compl. ¶¶ IV(U), V(B), V(D)-(F), VI(A), VII(B). The allegations in Maher’s Complaint—which includes Maher’s allegation of injury and damage from the alleged violations—are more than sufficient on their face to properly plead the claim. Alleging injury is not even required to bring a complaint under the Shipping Act. *Int’l Freight Forwarders*, 27 S.R.R. at 399 (“it is obvious that ‘any person’ may file a complaint with the Commission whether or not the person seeks reparation for injury”); *Cargill v. Waterman S.S. Corp.*, 21 S.R.R. 287, 300 (F.M.C. 1981); *Isthmian S.S. Co. v. U.S.*, 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 authorities establish that “any person” can properly file a verified complaint alleging violations of the Shipping Act, whether or not it is “subject to” the unreasonable leasing practices at issue. 46 U.S.C. § 41301 (a person may file . . . a complaint alleging a violation).

#### **4. The I.D. Erroneously Required Maher To Defeat Hypothetical Defenses**

The I.D. repeatedly asserts that the Complaint is deficient absent specific allegations “that PANYNJ did not have a legitimate business reason” for the actions and inactions which are the subject of the Complaint. I.D. at 12, 14, 15, 16, 18, 19, 21, 23, 25, 26, 29, 30, 31, 33. But, this is not an element of the violations and there is no requirement that Maher have pleaded facts to debunk hypothetical PANYNJ “business reasons” whatever they might be.

To the contrary, as the Commission explained in *Ceres I*, this proceeding decides the threshold question under the Shipping Act, whether PANYNJ’s refusals to deal, denials of parity, agreements to discriminate, failures to establish just and reasonable practices, etc., are reasonable or not. Whether or not PANYNJ might have had “business reasons” for violating the Shipping Act, e.g., it preferred to collect additional revenue from Maher and deny comparable terms because it profited PANYNJ, is irrelevant, particularly at the pleading stage. As the Commission explained in *Ceres I* when presented with an appeal for deference to a port authority’s business decisions, in a proceeding on the *merits*:

Before granting deference in any case, the Commission must first assess the reasonableness of the practice involved and then evaluate the grounds articulated to justify the disparate treatment. If it is determined that a port’s actions are not unreasonable, then the Commission could grant deference to the port’s business decision, rather than substitute its own judgment . . . .

It would appear in this case, however, that [the port authority] wants the Commission simply to defer to its decision of granting preferential lease terms to carriers but not to MTOs, without analyzing the reasonableness of that practice under the 1984 Act. That is not an appropriate use of the concept of deference.

*Ceres I*, 27 S.R.R. at 1274.

Drawing from the port authorities’ playbook, the I.D.’s invocation of hypothetical and undisclosed “legitimate business reasons” to dismiss the complaint is no different as a practical matter from the “shibboleth of deference” that port authorities argue to avoid compliance with

the Shipping Act. *Flanagan Shipping Corp. v. Lake Charles Harbor & Term. Dist.*, 27 S.R.R. 1123, 1130 (F.M.C. 1997). However, the Commission has emphasized that it will not “turn a blind eye to the Port’s activities under the shibboleth of deference,” but instead will “review the Port’s determinations, in order to ensure that the provisions of the [Shipping] Act are not violated.” *Id.* This is because as the Commission has emphasized, “[p]ort authorities are regulated entities under the Shipping Act, and their conduct is governed by the prohibited acts provisions set forth therein.” *Ceres II*, 29 S.R.R. 371-72.

Furthermore, it is well-established that a complainant need not plead facts that would defeat a hypothetical defense like “legitimate business reasons” that a respondent might subsequently assert in an answer. *Gomez*, 446 U.S. at 639-40; *Vance*, 444 U.S. at 270 n.11; *Flying Food Grp.*, 471 F.3d at 183 (potential defenses lie outside the burden of pleading); *U.S. Gypsum Co.*, 350 F.3d at 626 (complaints need not anticipate or attempt to defuse potential defenses).

##### **5. The I.D. Erroneously Invokes Purported Facts Outside The Complaint**

The I.D. repeatedly invokes purported facts outside the Complaint to dismiss it. I.D. at 12, 18, 19, 21, 28, 29. For example, the I.D. asserts that there were “different risks and benefits presented” by different marine terminal operators and that these might explain why “payments are not uniform,” when none of this was alleged in the Complaint. I.D. at 12, 23. The I.D. erroneously asserts that Maher’s pleaded enforcement of the Shipping Act “would create uncertainty for both ports and tenants” when none of this was alleged in the Complaint. I.D. at 18. The I.D. erroneously asserts that “there was evidence that the Maher lease with PANYNJ was also not competitively bid,” when “competitive” bidding of the Maher Lease or Global lease was not alleged in the Complaint. I.D. at 19. The I.D. erroneously asserts that in the Docket 08-

03 proceeding Maher failed to prove that APM-Maersk received preferential financing and investment terms, when none of this was alleged in the Complaint. I.D. at 21. The I.D. erroneously asserts that in the Docket 08-03 proceeding that the Commission determined that “as a policy matter it would be unduly burdensome for a port authority to have to renegotiate its leases on demand,” when none of this was alleged in the Complaint. I.D. at 28. The I.D. asserts that enforcing the Shipping Act’s refusal to deal prohibition means “ports would constantly be renegotiating every lease agreement and there would be no certainty provided to any parties in the lease,” when none of this was alleged in the Complaint, and indeed, like in many of the foregoing examples, the purported factual assertions of the I.D. misconstrue both the nature of the facts and violations alleged in the Complaint and the Docket 08-03 decision. I.D. at 29.

It is well-established that reliance on factual assertions outside the Complaint is improper and should be rejected. *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 687-688 (D.C. Cir. 1994) (presenting matters outside of a complaint improper for motion to dismiss on the pleadings); *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 30 S.R.R. 1412, 1418 (A.L.J. 2007) (same).

**C. The I.D. Erroneously Fails To Construe Factual Allegations In The Light Most Favorable To Maher And To Grant Maher The Benefit Of All Inferences**

The I.D. erroneously failed to accept as true all factual allegations in the Complaint and draw inferences from these allegations in the light most favorable to plaintiff as required by law. *Mitsui O.S.K. Lines*, 31 S.R.R. at 1380, *aff’d in part and remanded*, 32 S.R.R. at 136-37, 155. *See also Sherley*, 610 F.3d at 71 (“In reviewing *de novo* the district court’s decision to dismiss this suit . . . we ‘accept[ ] as true all of the factual allegations contained in the complaint and draw[ ] all inferences in favor of the nonmoving party.’”) (internal citations omitted); *City of Harper Woods Employees’ Ret. Sys. v. Olver*, 589 F.3d 1292, 1298 (D.C. Cir. 2009). Instead of

drawing favorable inferences from the facts alleged, from the outset of each finding, the I.D. repeatedly searched elsewhere for inferences from what was *not* alleged. As explained above in detail, the I.D. strained to require Maher to allege a multitude of additional detailed facts not required to allege the violations. *Supra* Section II.B.3. Next, the I.D. erroneously imposed the heightened pleading requirements of FRCP 9(b), requiring Maher to explain “how” the facts established each violation and to alleged additional detailed facts showing a “theory of the pleadings” contrary to well established precedent. *City of Shelby*, 135 S.Ct. at 346-347; *supra* Section II.B.2. And furthermore, the I.D. mandated that Maher allege facts in anticipation of a hypothetical PANYNJ defense that it might have had a legitimate business reason for its refusals to deal, discrimination, and unreasonable practices. *Supra* Section II.B.4.

Indeed, in this last respect, in each instance of an alleged violation, the only thing that the I.D. appears to infer from the facts accepted as true is that PANYNJ might have had a legitimate business reason for its actions and inactions, which according to the I.D., was enough to defeat all of the allegations of the Complaint. As a practical matter the I.D. turned the legal requirement for drawing inferences in favor of the complainant completely on its head. Rather than drawing all inferences in Maher’s favor, it drew upon hypothetical facts outside the Complaint to conjure up inferences favoring PANYNJ and to defeat the factual allegations and reasonable inferences within the Complaint.

### **1. Inferences Regarding Consent Fee Allegations**

Maher’s Complaint alleges facts in support of the allegations that PANYNJ’s lease transfer consent practices are unreasonable and discriminatory, and that PANYNJ has refused to deal with Maher with respect to such practices as they apply to Maher. Compl. ¶¶ IV(A)-(H). Maher has specifically alleged facts detailing that PANYNJ has a published policy of requiring economic consideration in exchange for its consent, and under this policy, has required

approximately \$237 million in such consideration from PNCT, NYCT, and Maher. Compl. ¶¶ IV(B)-(C). In other instances, PANYNJ has not uniformly enforced its policy and consented to changes in ownership without requiring cash payments or commitments of other economic considerations from MTOs. Compl. ¶¶ IV(D)-(E). Maher alleges that PANYNJ unjustly overcharged Maher and that there is a lack of a reasonable relationship between the consideration extracted and the benefits received by Maher or the services provided by PANYNJ. Compl. ¶¶ IV(F)-(H). In light of the foregoing, Maher further alleges that there is no valid transportation purpose for the foregoing unreasonable practices, preferences, and prejudices. Compl. ¶¶ V(P), V(Q). Accordingly, PANYNJ's establishment, observation, and enforcement of its practices governing the transfer and/or change of ownership and/or control interests constitute an unreasonable practice, unreasonable preference, and an unreasonable refusal to deal under the Shipping Act. Compl. ¶¶ V(A)(a), V(B). As a result, Maher has sustained and continues to sustain injuries and damages. Compl. ¶¶ IV(CC), V(A)(b), V(A)(c), V(I), V(N), VI(A).

The reasonable inference in favor of Maher is that PANYNJ's decisions to consent for less in some instances and to exact huge sums in other instances, are not determinations of "appropriate" consideration in accord with the policy, or the Shipping Act. The I.D.'s felicitous surmise that PANYNJ might have a business purpose for widely disparate impositions on MTOs for the materially same consent service is not only pure speculation of a hypothetical defense, it is also just as likely that such a business purpose reflects "commercial convenience" or "business purpose"—i.e., making money by exercising monopoly power over port tenants—which of course would not constitute a valid transportation purpose and highlights further why the I.D. inferences improperly failed to favor the complainant. *Volkswagenwerk*, 390 U.S. at 273-74 (Commission scrutiny is required because of antitrust implications) (citing *Isbrandtsen Co. v.*

*U.S.*, 211 F.2d 51, 57 (D.C. Cir. 1954) (scrutiny under the Shipping Act must ensure that conduct “does not invade the prohibitions of the anti-trust laws any more than is necessary”); *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. at 323 (“Commercial convenience cannot justify a practice which is otherwise unreasonable”); *Ballmill Lumber*, 10 S.R.R. at 137-38.

Instead, the I.D. reaches beyond the Complaint for facts not pleaded and concludes that “Given the risks and benefits presented it is not surprising that the payments are not uniform. . . . There is nothing to suggest that PANYNJ did not have a legitimate business reason for the decisions.” I.D. at 12, 23, 31. With respect to the allegation that the economic consideration requirement was applied in a manner that discriminated against Maher, the I.D. further imagines that “The lack of uniformity in payments may be due to the different risks and benefits associated with each lease.” But, different “risks and benefits” were not presented in the Complaint, and “that the payments are not uniform” hardly captures the scope of the allegations in the Complaint. I.D. at 23. This unbridled speculation by the I.D.—that there might be some business reason (not in the Complaint, but maybe elsewhere) is an impermissible inference by the I.D. against the Complainant, not in favor of the Complainant, and manifests reversible error.

## **2. Inferences Regarding Ocean-Carrier Status Allegations**

Maher alleges that PANYNJ has an unreasonable practice of providing undue preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals not provided to Maher causing Maher undue prejudice, including providing PNCT and MSC, an ocean-carrier-affiliated terminal and ocean carrier, with specific lease term concessions that unreasonably prefer PNCT and MSC, and unreasonably prejudice Maher by failing to provide comparable terms in an even-handed manner. Compl. ¶¶ IV(I)-(T), V(A)(a), V(C). Maher specifically alleges that prior to October 1, 2009, MSC was Maher’s largest customer and that

PNCT had unsuccessfully sought to negotiate an agreement with PANYNJ to expand its terminal. Compl. ¶¶ IV(J)-(K). Maher alleges that on or about October 1, 2009, MSC relocated to PNCT, even though PANYNJ was aware that PNCT lacked sufficient capacity to adequately handle MSC's cargo without expansion of PNCT's terminal. Compl. ¶¶ IV(L)-(N). Maher alleges facts that following MSC's relocation to PNCT and obtainment of an ownership interest in PNCT, which required PANYNJ's consent, PANYNJ provided unduly preferential terms to PNCT-MSC—as a carrier-affiliated-terminal—including preferential lease rates, doubling the size of the terminal, preferential chassis storage terms, and a 20-year lease extension. Compl. ¶¶ IV(O)-(R). Maher alleged facts that PANYNJ failed to provide comparable preferential terms to Maher in an even-handed manner. Compl. ¶¶ IV(S)-(T). PANYNJ's failure to establish, observe, and enforce just and reasonable practices has resulted in injury and damages to Maher. Compl. ¶ VI(A).

Maher's Complaint further alleges that PANYNJ agreed to provide ocean-carrier-affiliated APM a valuable deferral until 2017 of its leasehold capital construction obligations of \$50 million and failed to provide comparable concessions for Maher in an even-handed manner. Compl. ¶¶ IV(X), IV(BB), V(A)(b), V(J). Maher also 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 PANYNJ's mandatory projects, for other projects preferred by APM, including an expansion of terminal capacity beyond what was contemplated in its lease with PANYNJ. Compl. ¶¶ IV(Y), V(A)(b), V(K). PANYNJ failed to provide Maher comparable preferences in an even-handed manner. Compl. ¶ IV(BB). Maher further alleges that there is no valid transportation purpose for the foregoing unreasonable practices, preferences and prejudices, and that PANYNJ unreasonably refused to deal with

Maher's request for comparable treatment. Compl. ¶¶ IV(X), IV(BB), V(A)(c), V(L), V(P), V(Q). 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 logical inference to draw from the factual allegations of the Complaint that PANYNJ failed to establish, observe, and enforce unreasonable practices by failing to provide comparable terms to Maher in an even-handed manner and overcharges Maher millions of dollars as compared to ocean-carrier-affiliated marine terminal operators, and that the overcharges levied on Maher are greater than the cost of providing the service and the benefits received by Maher, is that PANYNJ did so because Maher is not an ocean-carrier-affiliated MTO and that PANYNJ wanted to collect more revenue from Maher, i.e., for PANYNJ's own business convenience. And business convenience is neither a valid transportation purpose nor does not it mean that the PANYNJ established, observed and enforced just and reasonable regulations. *Investigation of Free Time Practices-Port of San Diego*, 7 S.R.R. at 323 ("Commercial convenience cannot justify a practice which is otherwise unreasonable"); *Ballmill Lumber*, 10 S.R.R. at 137-38.

Yet according to the I.D. even though Maher alleged well-pleaded facts specifying that it was discriminated against unreasonably because of its status as a marine terminal operator not affiliated with an ocean carrier, unlike PNCT and APM, that there was no valid transportation purpose for the discrimination, and that Maher was injured by the discrimination and sustained damages totaling millions of dollars, the I.D. failed to draw the obvious inference of a violation and instead invoked speculation from outside the Complaint that PANYNJ generally might have a legitimate business reason for its discrimination, I.D. at 14, 21, 29, and additional pleading requirements that the Complaint was deficient because "there is nothing to suggest that PANYNJ

did not have a legitimate business reason for providing concessions or to plausibly claim that PANYNJ's agreements with PNCT and MSC were unreasonable." I.D. at 14. Yet, the I.D. does not grapple with the allegations, which must be adopted in the I.D. as true for the purpose of the motion, that certainly infer that PANYNJ's decision to grant PNCT preferential terminal expansion, rate reductions, and other concessions, only after ocean carrier MSC affiliated with PNCT in 2009, was because of PNCT's change in status from an unaffiliated MTO to an ocean-carrier-affiliated MTO. Moreover, the I.D. further infers improperly that this case might be similar to the carrier-preference decision in Dkt. 08-03, which was decided against the Complainant based on different facts, different parties, different times, different practices, and different occurrences. *Id.*

Addressing the allegation of unreasonable refusal to deal, the I.D. drew the remarkable inference that absent more specific detailed allegations about why PANYNJ unreasonably refused to deal with Maher, other than the obvious facts that Maher is not an ocean-carrier-affiliated marine terminal operator and the reasonable inference that PANYNJ preferred to keep the value of Maher's capital improvements for its business convenience, that Maher's claim means that "ports would constantly be renegotiating every lease agreement and there would be no certainty provided to any parties to the lease." I.D. at 29. These striking manifestations of hyperbole in the I.D. invoked to protect PANYNJ highlight the remarkable lengths to which the I.D. strained to import purported facts and inferences from outside the Complaint to dismiss it.

### **3. Inferences About Forced Waivers Of Shipping Act Protection**

Turning to Maher's allegations that PANYNJ requires its MTO tenants to waive the protections of the Shipping Act as a precondition to doing business in the port by demanding contractual waivers of Shipping Act liability in new and amended port leases and under threat of liquidated damages provisions triggering if Shipping Act claims are even brought against

PANYNJ, the I.D. does not infer facts in favor of Complainant that PANYNJ did so for its own business convenience. Compl. ¶¶ IV(U), V(A)(a), V(D), V(E). The Complaint reasonably infers that PANYNJ exculpates itself from Shipping Act scrutiny and chills the statutory right to challenge unlawful PANYNJ practices (including, e.g., PANYNJ's efforts to impose advance rate provisions in future lease renewals, etc., without regard to the costs of services provided) for its own business convenience. Instead the I.D. again infers that "[t]here is nothing to suggest that PANYNJ did not have a legitimate business reason for these provisions." I.D. at 15-16. Yet, there is nothing suggesting that there is or could be any legitimate business reason for a regulated port authority to strip its tenants of the Act's protections. *Ceres II*, 29 S.R.R. at 372 ("waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act."). Moreover, the I.D. infers that Maher has not been subject to these provisions, when the inference in favor of Maher, based upon its allegation that PANYNJ has a practice of requiring such waivers of MTOs and Maher has sustained injury from this practice, is that Maher has indeed been subjected to the unlawful practice. Compl. ¶ VI(A).

#### **4. Inferences Regarding Exclusion Of Maher From The Global Terminal Opportunity Outside the Bayonne Bridge**

Maher's Complaint alleges that PANYNJ categorically barred, because of status, existing marine terminal operators in the port from consideration for operation of the marine terminal known as the Global Terminal on the seaward side of the Bayonne Bridge, even though Maher asked to be considered. Compl. ¶¶ IV(V)-(W), IV(Z)-(AA), V(A)(a), V(G), V(M). Maher further alleges that it has been injured as a result of this misconduct, for which there is no valid transportation purpose. Compl. ¶¶ V(P), V(Q), VI(A).

The allegation on the face of the Complaint alleges a categorical exclusion on the sole basis of the status of a prospective marine terminal operator as either an existing marine terminal operator in the port or not an existing marine terminal operator in the port. The proper inference to be drawn—consistent with the allegations that PANYNJ also specifically refused to deal with Maher’s request to be considered to operate the Global terminal before PANYNJ leased it with the offending categorical exclusion provision—is that PANYNJ sought to improperly exclude a class of port users on the basis of status of the port user as an existing port MTO versus not an existing port MTO, which is the kind of categorical refusal to deal and class-based unreasonable and discriminatory practice that alleges *prima facie* violations of the Shipping Act.

Again, the I.D. flipped the proper legal standard on its head and inferred that PANYNJ might have had a business reason for its discrimination and further inferred that Maher did not allege additional facts that PANYNJ did not have a valid transportation purpose justifying the policy. I.D. at 19, 30. Maher did allege an impermissible reason, status, and a lack of a valid transportation purpose, and is not required to allege facts in its Complaint defeating a hypothetical defense, and the I.D. errs insofar as it imposes this additional pleading requirement instead of drawing the logical factual inference in favor of Complainant that Maher was discriminated against because of status as an existing terminal operator. Moreover, the I.D. improperly reaches outside of the Complaint for alleged facts from the Docket 08-03 proceeding purporting to show that Maher’s terminal was not competitively bid and infers that such facts might justify the refusal to deal with Maher and exclusion of Maher with respect to the Global opportunity. This is reversible error.

##### **5. Inferences Regarding Allegations Of Unreasonable Lease Renewal And Extension Practices Setting Unreasonable Future Rates**

With respect to Maher’s allegations that Maher was injured by PANYNJ’s unreasonable

practice of requiring agreement in advance to future rates for lease renewal and extension based on factors not reasonably related to the cost of the services provided or the benefits received, the I.D. drew the extraordinary inference that Maher's Complaint means that "ports could never enter into leases as rates could not be set for the future due to uncertainty about the costs of services provided. . . . [and ] [t]his would create uncertainty in both ports and tenants." Id. at 18; Compl. ¶¶ IV(A), IV(U), V(A)(a), V(F). Of course, this rank speculation imported from outside the Complaint improperly favors Respondent and improperly infers that the excessive charges alleged in the Complaint might be justified by PANYNJ's business convenience.

Indeed, the inference of "uncertainty" to be drawn from the facts alleged is that PANYNJ's practice of setting rates for lease renewals/extensions without regard to the lawful requirements, e.g., relation of rates to costs of services provided, creates uncertainty over PANYNJ's Shipping Act *compliance*. When coupled with PANYNJ leasing practices requiring waivers of PANYNJ Shipping Act violations, and the logical inference that the liquidated damages provisions designed to trigger if a Shipping Act claim is even brought before the Commission is to chill parties from even trying to challenge unlawful conduct under the Shipping Act, the reasonable inference is that PANYNJ's leasing practices are structured to set rates in violation of the Shipping Act *and* avoid Commission scrutiny through mandatory waivers and intimidating liquidated damages provisions.

The I.D. reprises its repeated improper inference that "There is nothing to suggest that PANYNJ did not have a legitimate business reason for setting future lease rates." I.D. at 18. But, as explained, the Commission's pleading standards do not require Maher to anticipate and defeat potential defenses that PANYNJ might attempt to advance and the logical inference is that PANYNJ's purpose is unlawful.

## **6. Inferences With Respect To Allegation Of Agreeing With Another MTO Or Common Carrier To Unreasonably Discriminate**

Maheer's Complaint alleges detailed facts identifying PANYNJ's agreements with PNCT, MSC and others, the substantial concessions granted to PNCT and APM, including terminal expansion, lease extension, rent reductions, deferral of capital investment obligations, and PANYNJ's failures to deal comparably with Maheer, thereby discriminating against Maheer and the common carriers operating at Maheer. Compl. ¶¶ IV(I)-(T), IV(X)-IV(Y), V(A)(d), V(O), V(P), V(Q), VI(A). Based upon these allegations, which include the foregoing unreasonable practices and preferences in favor of the other MTOs, and prejudices against Maheer and common carriers operating at Maheer's terminal, the logical inference in Maheer's favor is that PANYNJ has no valid transportation reason for its conduct which injures Maheer and common carriers operating at Maheer's terminal, and therefore, it violates 46 U.S.C. § 41106(1).

Yet, the I.D. improperly jumps to the conclusion that Maheer's allegations are merely that "PANYNJ included lease concessions in leases with other terminal tenants," which Maheer has not shown do not have a legitimate business or transportation purpose justifying them. I.D. at 32. The I.D.'s speculation that Maheer's detailed factual allegations of discriminatory agreements are justified by the possibility of unspecified PANYNJ "business reasons" not pleaded in the Complaint fails to draw all inferences in Maheer's favor, and should be reversed. *Id.*

### **D. The I.D. Erred By Not Concluding The Complaint Satisfied The *Iqbal/Twombly* Standard As Informed By The Commission's Rules And Longstanding Administrative Precedent**

The I.D. dismissed with prejudice all of the violations alleged in the Complaint purportedly because Maheer failed to plead facts sufficient to state Shipping Act claims under the heightened *Iqbal/Twombly* plausibility pleading requirements. I.D. at 33. Applying the facts alleged in the Complaint to the proper elements of the violations, however, Maheer plainly

pleaded the violations of the Shipping Act sufficiently under the *Iqbal/Twombly* standard as informed by the Commission's specific pleading rules both in effect when the Complaint was filed in March 2012 and now currently in effect. 46 C.F.R. § 502.62(a), (c) (2012); 46 C.F.R. §§ 502.62(a)(3)(v), 502.66, 502.67 (2013). And even if, *arguendo*, the Commission has departed *sub silentio* from its own rules and precedents requiring only notice pleading, Maher's complaint nevertheless satisfies the heightened *Iqbal/Twombly* plausibility standard applied by some Federal courts. If not, Maher should be permitted leave to amend.

**1. PANYNJ's Failure To Establish Just And Reasonable Practices; 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. *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 S.R.R. at 1222.

**a. 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. ¶¶ IV(A)-(H). Maher has specifically alleged facts detailing that PANYNJ has a published policy of requiring economic consideration in exchange for its consent, and under this policy, has required approximately \$237 million in such consideration from PNCT, NYCT, and Maher. Compl. ¶¶ IV(B)-(C). In other instances, PANYNJ has not uniformly enforced its policy and consented to changes in ownership without requiring cash

payments or commitments of other economic considerations from MTOs. Compl. ¶¶ IV(D)-(E). Maher alleges that PANYNJ unjustly overcharged Maher and that there is a lack of a reasonable relationship between the consideration extracted and the benefits received by Maher or the services provided by PANYNJ. Compl. ¶¶ IV(F)-(H). Accordingly, PANYNJ's establishment, observation, and enforcement of its practices with respect to the transfer and/or change of ownership and/or control interests constitute an unreasonable practice under the Shipping Act. Compl. ¶¶ V(A)(a), V(B). As a result of these 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.

**b. 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 unduly preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals not provided to Maher causing Maher undue prejudice, including providing PNCT and MSC, an ocean-carrier-affiliated terminal and ocean carrier, with specific lease term concessions that unreasonably prefer PNCT and MSC, and unreasonably prejudicing Maher for failing to provide comparable terms in an even-handed manner because of PNCT's ocean carrier status. Compl. ¶¶ IV(I)-(T), V(A)(a), V(C). Maher specifically alleges that prior to October 1, 2009, MSC was Maher's largest customer and that PNCT had unsuccessfully sought to negotiate an agreement with PANYNJ to expand its terminal. Compl. ¶¶ IV(J)-(K). Maher alleges that on or about October 1, 2009, MSC relocated to PNCT, even though PANYNJ was aware that PNCT lacked sufficient capacity to adequately handle MSC's cargo without expansion of PNCT's terminal. Compl. ¶¶ IV(L)-(N). Maher alleges facts that following MSC's relocation to PNCT and obtainment of an ownership interest in PNCT, which required PANYNJ's consent, PANYNJ

provided unduly preferential terms to PNCT-MSC—as a carrier-affiliated-terminal—including preferential lease rates, doubling in size of the terminal, preferential chassis storage terms, and a 20-year lease extension. Compl. ¶¶ IV(O)-(R). Maher alleged facts that PANYNJ failed to provide comparable preferential terms to Maher in an even-handed manner. Compl. ¶¶ IV(S)-(T). PANYNJ’s failure to establish, observe, and enforce just and 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).

**c. 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 unreasonably requiring marine terminal operators to release PANYNJ from potential Shipping Act violations to do business in the port. Compl. ¶¶ IV(U), V(A)(a), V(D). More specifically, Maher alleges that PANYNJ forces its MTO tenants to agree to waive the protections of the Shipping Act and Commission scrutiny, as a precondition to doing business in the port. Compl. ¶¶ IV(U). 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).

**d. PANYNJ’s Unreasonable Leasing Practice Of Requiring Liquidated Damages Provisions (Count IV, Compl. ¶ V(E))**

Maher alleges that PANYNJ has failed to establish, observe, and enforce just and reasonable leasing practices with respect to demanding unreasonable lease provisions, including as set forth above requiring that tenants in the port waive their statutory protections under the Shipping Act—and that PANYNJ imposes liquidated damages provisions that trigger against any tenant that seeks Commission protection. 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).

**e. 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, observe, and enforce just and 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 or benefits received. 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).

**f. 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 categorically excluding Maher and other existing MTOs from consideration to operate a marine terminal on the outside of the Bayonne Bridge unencumbered by air draft restrictions, the Global Terminal, 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 unreasonable discrimination and practices on the basis of status resulted in harm and injury to Maher. Compl. ¶ VI(A). Thus, Maher satisfies the Commission’s pleading standard.

**g. 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 just and

reasonable practices with respect to the granting of deferrals of marine terminal operator leasehold obligations, such as the deferral until 2017 PANYNJ granted to ocean-carrier-affiliated APM for its leasehold capital expenditure obligations of approximately \$50 million and the failure to provide Maher a comparable deferral in an evenhanded manner. Compl. ¶¶ IV(X), V(A)(a), V(H). PANYNJ's unjustified and unreasonable actions have resulted in injuries and damages to Maher. Compl. ¶ VI(A). Maher has pleaded sufficient facts to show a violation of 46 U.S.C. § 41102(c) as a result of PANYNJ's unreasonable practices.

**h. 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 ocean-carrier-affiliated APM's use of financing allocated to PANYNJ's mandatory projects for terminal expansion preferred by APM. Compl. ¶¶ IV(Y), V(A)(a), V(H). Maher alleged facts that PANYNJ failed to provide comparable preferential terms to Maher in an even-handed manner. 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.

**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. *Ceres I*, 27 S.R.R. 1270.

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

Maier has satisfied the requisite pleading standards for its claim that PANYNJ's lease transfer consent practices resulted in undue prejudice to Maier. Compl. ¶¶ V(A)(b), V(I). Maier has specifically alleged facts detailing that PANYNJ has a published policy of requiring economic consideration in exchange for its consent, and under this policy, has required approximately \$237 million in consideration from PNCT, NYCT, and Maier. Compl. ¶¶ IV(B)-(C). In other instances, PANYNJ has not uniformly enforced its policy and consented to changes in ownership without requiring cash payments or other economic considerations from MTOs. Compl. ¶¶ IV(D)-(E). Maier alleges that PANYNJ unjustly overcharged Maier and that there is a lack of a reasonable relationship between the consideration extracted and the benefits received by Maier or the services provided by PANYNJ. Compl. ¶¶ IV(F)-(H). Maier further alleges that there is no valid transportation purpose for the foregoing unreasonable preferences. Compl. ¶¶ V(P), V(Q). Maier has suffered injury and damages as a result of the unreasonable preferences, including being required to provide unreasonable economic consideration and restrictions on changes of control or ownership. Compl. ¶¶ V(A)(b), V(I), VI(A).

**b. PANYNJ's Agreement To Defer APM's Leasehold Construction Obligations (Count IX, Compl. ¶ V(J))**

Maier'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. Maier's Complaint alleges that PANYNJ agreed to provide APM a valuable deferral until 2017 of its leasehold capital construction obligations of \$50 million and failed to provide comparable concessions for Maier in an even-handed manner. Compl. ¶¶ IV(X), IV(BB), V(A)(b), V(J). Maier further alleges that there is no valid transportation purpose for the foregoing unreasonable preferences and prejudices. Compl. ¶¶ V(P), V(Q). 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.

**c. 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 PANYNJ's mandatory projects, for other projects preferred by APM, including an expansion of terminal capacity beyond what was contemplated in its lease with PANYNJ. Compl. ¶¶ IV(Y), V(A)(b), V(K). PANYNJ failed to provide Maher similar preferences in an even-handed manner. Compl. ¶ IV(BB). Maher further alleges that there is no valid transportation purpose for the foregoing unreasonable preferences and prejudices. Compl. ¶¶ V(P), V(Q). 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.

**d. 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 undue preferences to PNCT-MSA, including reducing the lease rates, facilitating terminal capacity expansion, and extending PNCT's lease for 20 years because of its ocean-carrier-affiliated status. Compl. ¶¶ IV(I)-(R), V(A)(b). Maher specifically alleges that prior to October 1, 2009, MSA was Maher's largest customer and that PNCT had unsuccessfully sought to negotiate an agreement with PANYNJ to expand its terminal. Compl. ¶¶ IV(J)-(K). Maher alleges that on or about October 1, 2009, MSA relocated to PNCT, even though PANYNJ was

aware that PNCT lacked sufficient capacity to adequately handle MSC's cargo without expansion of PNCT's terminal. Compl. ¶¶ IV(L)-(N). Maher alleges facts that following MSC's relocation to PNCT and obtainment of an ownership interest in PNCT, which required PANYNJ's consent, PANYNJ provided unduly preferential terms to PNCT-MS—as a carrier-affiliated-terminal—including a preferential lease rates, doubling in size of the terminal, preferential chassis storage terms, and a 20-year lease extension. Compl. ¶¶ IV(O)-(R). None of these valuable preferences were provided to Maher in an even-handed manner and there is no valid transportation purpose for the foregoing unreasonable preferences and prejudices. Compl. ¶¶ IV(S)-(T), V(P), V(Q). Maher alleges that PANYNJ's unlawful actions have resulted in injuries and damages to Maher, including the lost and foregone MSC business. Compl. ¶ VI(A). Thus, Maher has sufficiently stated a claim for which relief can be granted.

### **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.” *Canaveral Port Auth.*, 29 S.R.R. at 1448. Thus, to sufficiently plead a refusal to deal, a complainant must allege facts that a party refused to deal or negotiate and that such refusal was unreasonable. Since all of the factual allegations of the Complaint were referenced as the bases for the pleading that the refusal was unreasonable, e.g., status, overcharges in excess of the costs of the service or benefits received, and the lack of a valid transportation purpose, etc., the Complaint sufficiently stated a claim.

#### **a. 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 ocean-carrier-affiliated marine terminal operator APM, which was granted a deferral of its leasehold capital construction obligations until 2017, that there is no valid transportation purpose for the foregoing unreasonable preferences and prejudices, that PANYNJ unreasonably refused such requests for parity, and that Maher sustained injuries and damages as a result of PANYNJ's refusal. Compl. ¶¶ IV(X), IV(BB), V(A)(c), V(L), V(P), V(Q), VI(A). Therefore, Maher has sufficiently stated a Shipping Act claim.

**b. Marine Terminal 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,” even though Maher requested the opportunity to be considered for the opportunity to operate this terminal on the seaward side of the Bayonne Bridge and unrestricted by air draft limitations, because of Maher's status as an existing MTO in the port 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.

**c. 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 has specifically alleged facts detailing that PANYNJ has a published policy of requiring economic consideration in exchange for its consent, and under this policy, has required approximately \$237 million in such consideration from PNCT, NYCT, and Maher. Compl. ¶¶ IV(B)-(C). In other instances, PANYNJ has not uniformly enforced its policy and consented to changes in ownership without

requiring cash payments or commitments of other economic considerations from MTOs. Compl. ¶¶ IV(D)-(E). Maher alleges that PANYNJ unjustly overcharged Maher and that there is a lack of a reasonable relationship between the consideration extracted and the benefits received by Maher or the services provided by PANYNJ. Compl. ¶¶ IV(F)-(H). Maher additionally alleges that PANYNJ's practices unreasonably discriminate against Maher without a valid transportation purpose, 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(CC), V(A)(c), V(N), V(P), V(Q). Maher alleges that PANYNJ's lease 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).

**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."

Maher's Complaint alleges facts detailing PANYNJ's agreements with PNCT-MSA and others, the substantial undue preferences granted to PNCT-MSA and APM, including terminal expansion, lease extension, rent reductions, deferral of capital investment obligations, and the failures to deal comparably with Maher in an even-handed manner that injure and discriminate against Maher and common carriers operating at Maher's terminal. Compl. ¶¶ IV(I)-(T), IV(X)-

IV(Y), V(A)(d), V(O)-(Q), VI(A). Maher 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 MTOs, causing Maher and common carriers operating at Maher’s terminal injury and damages. Compl. ¶¶ IV(A)-(H), V(A)(d), V(O)-(Q), VI(A).<sup>5</sup>

### CONCLUSION

For the foregoing reasons the I.D. should be reversed and Maher’s Complaint reinstated. If the Commission concludes that additional facts should be alleged, then it should specify with particularity which additional facts it deems necessary and Maher should be provided leave to amend the Complaint. Maher also respectfully requests oral argument, and considering the fact that this Complaint has been pending before the Commission for almost three years without any progress, Maher respectfully requests expedited consideration.

Dated: February 23, 2015

Respectfully submitted,



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<sup>5</sup> PANYNJ did not move to dismiss Count XIV (Comp. ¶ V(O)). PANYNJ cited 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. Nevertheless, the I.D. dismissed the count *sua sponte*, even though PANYNJ provided no reasons for it to be dismissed.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of February, 2015, a copy of the foregoing was served by Federal Express and electronic mail on the following:

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