

FEDERAL MARITIME COMMISSION

MAHER TERMINALS, LLC

Complainant,

v.

THE PORT AUTHORITY OF NEW
YORK AND NEW JERSEY,

Respondent.

Docket No. 12-02

Served/Reissued: December 18, 2015

BY THE COMMISSION: Mario CORDERO, *Chairman*;
Rebecca F. DYE, Richard A. LIDINSKY, Jr., Michael A. KHOURI,
William P. DOYLE, *Commissioners*.

Memorandum Opinion and Order

Before the Federal Maritime Commission (Commission) on exceptions is the January 30, 2015, Initial Decision of the Administrative Law Judge (ALJ) granting Respondent the Port Authority of New York and New Jersey's (Port Authority or PANYNJ) motion to dismiss with prejudice the complaint of Complainant Maher Terminals, LLC (Maher). *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 861 (ALJ 2015) (hereinafter ALJ I.D.). For the reasons set forth below, we affirm the

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 2

Initial Decision in part and dismiss without leave to amend Counts II, III, IV, V, VII, IX, X, XI, XIII, and XIV for failure to state a claim. We reverse the Initial Decision with respect to Counts I, VI, VIII and XII and remand these claims for further proceedings.

I. FACTUAL BACKGROUND

A. Parties and Marine Terminal Leases

Maher is a marine terminal operator and operates a marine container terminal in Elizabeth, New Jersey. Compl. ¶¶ I.B, IV.H, J, T, W. Maher leases this terminal from the Port Authority under Lease No. EP-249. Compl. ¶¶ III.B; Lease No. EP-249 at 1-4.¹ The parties executed this thirty-year lease in 2000, and, among other things, it requires Maher to perform construction work at its terminal, referred to as Class A Work and Class B Work. Lease No. EP-249 at 1, 4, 16. Maher also has the option of performing Class C Work. *Id.* at 16-17. The lease requires Maher to complete the Class A Work within one year of the completion of the forty-five foot deepening of a channel in the Kill Van Kull and Newark Bay. *Id.* at 17-18, 94-95. The Port Authority agreed to provide Maher with \$46 million in free capital, and up to \$204 million in financing for the construction work. *Id.* at 11-14, 16.

¹ When evaluating a motion to dismiss for failure to state a claim, the Commission considers the facts alleged in the complaint, documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice. *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); 46 C.F.R. § 502.226(a); *see also Santa Fe Discount Cruise Parking, Inc. v. Bd. of Tr. of the Galveston Wharves*, Case No. 14-06, 2014 FMC LEXIS 31, at *22 (ALJ Nov. 21, 2014). Official notice includes judicially noticeable facts and “technical or scientific facts within the general knowledge of the Commission,” 46 C.F.R. § 502.226(a), such as evidence available to it from other proceedings, *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 463 (D.C. Cir. 2004). We consider Lease No. EP-249, which the Port Authority attached as an exhibit to its reply to Maher’s exceptions, as part of the pleadings because it is incorporated by reference in the complaint, it is integral to the complaint, and it is on file with the Commission, making it subject to official notice.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 3

The Port Authority also has terminal leases with Port Newark Container Terminal (PNCT), New York Container Terminal (NYCT), Global Terminal & Container Services, LLC (Global), and APM Terminals North America, Inc. (APM), formerly Maersk Container Service Company, Inc. Compl. ¶¶ IV.C, K-R, V, X-Z. With respect to PNCT, at some point after October 2009, the Port Authority entered an agreement with PNCT to expand its terminal, lower its lease rates, extend its lease term, and provide it with preferential chassis storage. *Id.* ¶ IV.R. In exchange, PNCT agreed to invest in its terminal and to guarantee certain levels of Mediterranean Shipping Company (MSC) cargo. *Id.* As to Global, the Port Authority and Global entered Lease No. LPJ-001 in June 2010 for a marine terminal facility located outside the Bayonne Bridge. *Id.* ¶ IV.V, Z.

As discussed in prior Commission decisions involving the parties, APM, like Maher, has a long-term terminal lease with the Port Authority. *See, e.g., Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 821, 834 (FMC 2014). APM's lease requires it to perform Class A and Class B construction work at its terminal. *Id.* at 849; Lease No. EP-248 at 12.² APM's deadline to perform its Class A Work is within one year of the later of the date that certain property is transferred to APM's terminal or the completion of the forty-five foot deepening. Lease No. EP-248 at 14, 82-83. The lease requires the Port Authority to give APM \$30.4 million in free capital and up to \$143.6 million in construction financing. *Id.* at 12-14.

² We take official notice of Lease No. EP-248 and its terms under 46 C.F.R. § 502.226(a). Maher not only refers to this lease indirectly in its complaint, Compl. ¶¶ X, Y, but Maher also submitted it as evidence in FMC Docket No. 08-03 and thus its terms can be accurately and readily determined from an accurate source. *Maher Terminals*, 33 S.R.R. at 842-852 (referring to Maher Appendix 5A, which includes Lease No. EP-248). Additionally, Lease No. EP-248 is available on the Commission's website. http://www2.fmc.gov/agreement_lib/201106-000.pdf.

B. Alleged Unlawful Conduct

Maher alleges fifteen Shipping Act violations based on eight factual scenarios, which are described in greater detail in Part III.C.4.³ To summarize, Maher first alleges that the Port Authority has a practice or policy of requiring marine terminal operator tenants to pay the Port Authority for its consent to lease transfers or changes in tenants' ownership or controlling interests. According to Maher, the Port Authority's change-of-control policy and its inconsistent application of the policy violate 46 U.S.C. § 41102(c) [Count I], 46 U.S.C. § 41106(2) [Count VIII], and 46 U.S.C. § 41106(3) [Count XIII].

Second, Maher alleges that the Port Authority unreasonably gave ocean carriers and ocean-carrier-affiliated marine terminal operators (specifically, MSC and PNCT) unreasonably preferential treatment and agreed with them to unreasonably discriminate in the provision of terminal services to common carriers. Maher alleges that this conduct violates 46 U.S.C. § 41102(c) [Count II] and 46 U.S.C. § 41106(1) [Count XIV].

The third, fourth, and fifth scenarios involve the Port Authority's allegedly unreasonable leasing practices. According to Maher, the Port Authority violates 46 U.S.C. § 41102(c) by requiring marine terminal leases to contain certain general release and waiver provisions, liquidated damages provisions, and lease rate renewal or extension provisions [Counts III, IV, and V].

Maher alleges in the sixth scenario that the Port Authority categorically and unreasonably refused to consider Maher and other existing terminal operators as potential operators or transferees of a terminal facility located outside the Bayonne Bridge. Maher alleges that this conduct violates 46 U.S.C. § 41102(c) [Count VI] and 46 U.S.C. § 41106(3) [Count XII].

³ Maher's complaint contains fourteen counts, but Count VII appears to allege two discrete Shipping Act violations. Compl. ¶ V.H.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 5

Seventh, Maher alleges that “[o]n July 24, 2008, PANYNJ unreasonably granted to APM the undue preference, effective as of April 1, 2009, which also unduly prejudices Maher, consisting of the deferral until 2017 of APM’s leasehold capital expenditure obligations valued at approximately \$50 million dollars that should have been completed by APM, but which were not completed as required.” Compl. ¶ IV.X. Maher alleges that this “deferral” violates 46 U.S.C. § 41102(c) [Count VII], 46 U.S.C. § 41106(2) [Count IX], and 46 U.S.C. § 41106(3) [Count XI].

Finally, Maher alleges that the Port Authority allowed APM to use Port Authority financing for non-mandatory projects, including expanding APM’s container handling capacity. Maher alleges that because the Port Authority failed to provide Maher with additional financing, it violated 46 U.S.C. § 41102(c) [Count VII] and 46 U.S.C. § 41106(2) [Count X].

II. PROCEDURAL HISTORY

The present case is part of a long-running series of disputes between Maher and the Port Authority. Their litigation includes

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 6

three Commission proceedings, two federal district court cases,⁴ four federal appellate court cases,⁵ and one state court case.⁶

A. FMC Docket No. 07-01: *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*

In 2006, APM filed a Shipping Act complaint alleging that the Port Authority failed to timely deliver certain land to APM as required by its lease. *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 625 (FMC 2009) (FMC Docket No. 07-01). The Port Authority filed a counterclaim alleging that APM failed to timely perform its Class A Work. *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 455, 458 (ALJ 2008). The Port Authority also filed a third-party complaint against Maher alleging that it was required to indemnify the Port Authority for any damages arising from APM's complaint. *Id.* at 458. In response, Maher filed third-party counterclaims against the Port Authority alleging several Shipping Act violations. *Id.* at 459.

⁴ In FMC Docket No. 08-03, the Port Authority moved to enforce an administrative subpoena in federal district court. *See Order, In re Subpoena of David G. Eidman*, Case No. 12-mc-6008-CJS (W.D.N.Y July 11, 2012), ECF No. 17. The district court granted the Port Authority's motion. *Id.* at 5. Additionally, in September 2012 Maher sued the Port Authority and its executive director in federal district court in New Jersey alleging that certain fees assessed by the Port Authority (including throughput rent) violate the Tonnage Clause of the United States Constitution, art. I, § 10, and related statutes. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Case No. 12-6090, 2014 U.S. Dist. LEXIS 98523, at *15 (D.N.J. July 21, 2014). The district court dismissed the complaint in July 2014, *id.* at 44, and the Third Circuit affirmed this dismissal in October 2015, *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Case No. 14-3626, 2015 U.S. App. LEXIS 17243, at *2 (3d Cir. Oct. 1, 2015).

⁵ In addition to its Tonnage Clause appeal, *supra* note 4, Maher has filed three D.C. Circuit cases involving FMC Docket No. 08-03.

⁶ In May 2008, the Port Authority sued Maher in New Jersey state court alleging that Maher was obligated to indemnify the Port Authority against Shipping Act claims brought by APM. The Port Authority dismissed this suit as part of the settlement of FMC Docket No. 07-01. *See APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 455, 459-50, 481 (ALJ 2008).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 7

On July 24, 2008, APM and the Port Authority executed a settlement agreement, and they subsequently moved for settlement approval. *Id.* at 461. Maher opposed the settlement, arguing that it violated the Shipping Act. *Id.* at 466. The ALJ approved the settlement over Maher's objections, *id.* at 481-82, and on April 1, 2009, the Commission denied Maher's exceptions to the ALJ's order and dismissed the case, *APM Terminals*, 31 S.R.R. at 627. The Commission consolidated Maher's counterclaims against the Port Authority with FMC Docket No. 08-03.

B. FMC Docket No. 08-03: *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*

In June 2008, while FMC Docket No. 07-01 was pending, Maher filed a Shipping Act complaint alleging that the Port Authority granted APM more favorable lease terms than it granted Maher, failed to establish, observe, and enforce just and reasonable regulations regarding Maher's lease terms, and unreasonably refused to deal with Maher. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 821, 837 (FMC 2014) (FMC Docket No. 08-03). The Commission granted partial summary judgment to the Port Authority on statute of limitations grounds. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. 1185 (FMC 2013). Maher petitioned the D.C. Circuit for review of this decision and petitioned the Commission for reconsideration. The D.C. Circuit dismissed the petition for review for lack of appellate jurisdiction, *Maher Terminals, LLC v. Fed. Mar. Comm'n*, Case No. 13-1028, 2013 U.S. App. LEXIS 12462, at *1-*2 (D.C. Cir. June 18, 2013), and the Commission rejected the petition for reconsideration, *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 303, 307 (FMC 2014). Maher then filed a petition for review of the summary judgment and reconsideration orders, which the D.C. Circuit dismissed. *Maher Terminals, LLC v. Fed. Mar. Comm'n*, Case No. 14-1051, 2014 U.S. App. LEXIS 13379, at *1-*2 (D.C. Cir. July 14, 2014).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 8

As to the merits, after extensive discovery and motion practice, the ALJ issued an Initial Decision dismissing Maher's claims (and consolidated counterclaims from FMC Docket No. 07-01) on April 25, 2014. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 349 (ALJ 2014). The Commission affirmed the ALJ's Initial Decision over Maher's exceptions on December 17, 2014. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 821 (FMC 2014). Maher petitioned the D.C. Circuit for review of the Commission's orders on February 13, 2015, and the case is pending before that court. *Maher Terminals, LLC v. Fed. Mar. Comm'n*, Case No. 15-1035 (D.C. Cir.).

C. Present Case: FMC Docket No. 12-02

Maher filed a second Shipping Act complaint against the Port Authority on March 30, 2012. At that time, FMC Docket No. 08-03 had been pending almost four years, and FMC Docket No. 07-01 had been settled for almost three years. The Port Authority moved to dismiss the complaint based on failure to state a claim, the statute of limitations, collateral estoppel, and lack of standing or ripeness. Maher opposed the motion, arguing, among other things, that the Commission does not apply the motion-to-dismiss standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but instead applies a more liberal standard that its complaint satisfies.

The ALJ granted the Port Authority's motion to dismiss on January 30, 2015. ALJ I.D. at 1. The ALJ rejected Maher's arguments that the Commission applies a "more lenient pleading standard," reasoning that "the Commission has long referred to federal caselaw regarding FRCP 12(b)(6) in evaluating motions to dismiss" and "has clearly indicated that federal caselaw interpreting FRCP 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings." *Id.* at 4. The ALJ concluded that Maher's complaint did not meet the *Iqbal/Twombly* pleading standard because it "frequently relies on labels, conclusions, and formulaic recitations of elements of claims"

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 9

and “[e]ven after extensive discovery in related proceedings,” it “fail[ed] to provide sufficient information to allege facially plausible violations of the Shipping Act.” *Id.* at 1, 5. The ALJ dismissed the complaint with prejudice and expressly declined to address the Port Authority’s collateral estoppel, standing and ripeness, and statute of limitations arguments. *Id.* at 33.

Maher filed exceptions to the ALJ’s decision on February 23, 2015. Maher argues that the ALJ misapplied the proper standard, which, according to Maher, is “the *Iqbal/Twombly* standard as informed by the Commission’s rules and longstanding administrative precedent.” Maher Exc. at 5, 39. Maher also argues that the ALJ’s dismissal with prejudice was an abuse of discretion. *Id.* at 3, 16-18, 50. The Port Authority counters that the ALJ accurately set forth the standard, correctly found that Maher’s complaint fails to satisfy that standard, and properly denied Maher leave to amend. The Port Authority asserts that dismissal is particularly appropriate here because it is the third time Maher has asserted claims against the Port Authority since 2008 relating to its lease, and “[i]n the course of those proceedings, Maher sought and obtained massive discovery—including millions of documents, hundreds of interrogatory answers, and numerous depositions—relating to the lease and other subjects of its claims in this case.” PA Reply at 2. Consequently, the Port Authority contends, “Maher’s abject failure to allege facts to show that its claims in this case were plausible is particularly telling and inexcusable.” *Id.* at 3.⁷

⁷ Maher requests oral argument and expedited consideration of its exceptions. We deny these requests. The parties have had ample opportunity to make their arguments, and Maher has not identified a compelling reason for expedited consideration.

III. DISCUSSION

A. Standard of Review

The Commission’s rules do not set forth a standard of review for appeals of dismissal orders. *See* 46 C.F.R. § 502.227(b)-(e); *Kawasaki Kisen Kaisha Ltd. v. The Port Auth. of N.Y. & N.J.*, 33 S.R.R. 746, 753 (FMC 2014). The Commission therefore applies the relevant appellate court standard of review, which is *de novo*. *SSA Terminals, LLC v. City of Oakland*, 32 S.R.R. 325, 328 (FMC 2011) (“The Commission reviews denials of motions to dismiss *de novo*, as do the Courts of Appeals.”); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (“We review a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*.”).

Additionally, no party disputes that the Commission reviews the ALJ’s decision to dismiss the complaint with prejudice—that is, without leave to amend—for abuse of discretion. *Maher Exc.* at 3, 17-18; *PA Reply* at 36-37; *see also Cruz v. FXDIRECTDEALER, LLC*, 720 F.3d 115, 125 (2d Cir. 2013); *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004). This standard of review is consistent with 46 C.F.R. § 502.66(a), which provides that “[a]mendments or supplements to any pleading . . . will be permitted or rejected, either in the discretion of the Commission or presiding officer.”

B. Shipping Act Prohibitions

Maher alleges that the Port Authority violated 46 U.S.C. §§ 41102(c), 41106(1), 41106(2), and 41106(3). Section 41102(c) 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.” “Just and reasonable as applied to terminal practices means a practice otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *Maher Terminals*,

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 11

33 S.R.R. at 852 (internal quotation marks and citations omitted). When charges or fees are at issue, the inquiry is “whether the charge levied is reasonably related to the service rendered.” *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 282 (1968). To assess whether a charge is reasonably related to a service, the Commission looks at “the impact on the payer compared to other payers as well as the relative benefits received.” *NPR, Inc. v. Bd. of Comm’rs of the Port of New Orleans*, 28 S.R.R. 1512, 1532 (ALJ 2000). “Although a practice that is unjustly discriminatory is unreasonable, the justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice, or discrimination.” *Maher Terminals*, 33 S.R.R. at 852 (internal citations and quotation marks omitted). The complainant has the burden of persuading the Commission that a practice is unreasonable, and if it succeeds, the burden of production shifts to the respondent to adduce evidence to justify its conduct. *Id.* at 841.

Section 41106(2) prohibits a marine terminal operator from “giv[ing] any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person.” To succeed under § 41106(2), a complainant must establish that “(1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury.” *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 12751, 1270 (FMC 1997). If a complainant meets its burden of proving that it was subjected to different treatment and was injured as a result, the burden of production shifts to the respondent, which must produce evidence justifying its conduct. *Maher Terminals*, 33 S.R.R. at 840-41. A complainant retains, however, the ultimate burden of showing that the proffered justifications are unreasonable under the Shipping Act. *Id.*; *Petchem, Inc. v. Fed. Mar. Comm’n*, 853 F.2d 958, 963 (D.C. Cir. 1988).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 12

Under 46 U.S.C. § 41106(3) “a marine terminal operator may not . . . unreasonably refuse to deal or negotiate.” In evaluating a § 41106(3) claim, the Commission asks: (1) whether an entity refused to deal or negotiate; and (2) if so, whether the refusal was unreasonable. *Maher Terminals*, 33 S.R.R. at 853. A refusal to deal is not unreasonable if it is “justified by particular circumstances in effect.” *Docking & Lease Agreement By & Between City of Portland, ME and Scotia Prince Cruises Ltd.*, 30 S.R.R. 377, 379 (FMC 2004). “[W]hether a marine terminal operator gave good faith consideration to an entity’s proposal or efforts at negotiation is central to determining whether a refusal to deal or negotiate was reasonable.” *Id.*

Section 41106(1) prohibits a marine terminal operator from “agree[ing] 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.”⁸

C. Failure to State a Claim

The ALJ dismissed Maher’s complaint for failure to state any claims. Maher argues that ALJ erred in defining and applying the legal standard. We hold that the ALJ set forth the correct legal standard – the *Iqbal/Twombly* “plausibility” standard that the Commission adopted in *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011), and reaffirmed in *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (FMC 2014). As to the application of this standard, we affirm the ALJ’s dismissal of Counts II, III, IV, V, VII, IX, X, XI, XIII, and XIV for failure to state a claim and reverse the ALJ’s dismissal of Counts I, VI, VIII, and XII and remand these claims for further proceedings.

⁸ The Commission has jurisdiction because Maher alleges that the Port Authority is a marine terminal operator that violated the Shipping Act. Compl. ¶¶ II.A-B, III.A-D, V.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 13

1. Legal Standard for Failure to State a Claim

In its motion, the Port Authority acknowledged that the Commission's regulations do not address motions to dismiss for failure to meet pleading standards but argued, relying on the Commission's *Mitsui* decision, that the Commission has adopted federal caselaw on Federal Rules of Civil Procedure 12(b)(6) and 8(a), specifically, the standards of *Iqbal* and *Twombly*. PA Mot. Dismiss at 14-15, 27. Maher argued that the *Iqbal/Twombly* standard was inapplicable and that the Commission instead "continues to apply the liberal pleadings standard of administrative proceedings," specifically the standard set forth in the ALJ's *Mitsui* decision, which in turn quoted pre-*Twombly* federal court caselaw. Maher Opp. Mot. Dismiss at 6-12.

The ALJ found that "federal caselaw interpreting FRCP 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings." ALJ I.D. at 4. According to this caselaw, the ALJ noted, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." ALJ I.D. at 3 (quoting *Mitsui*, 32 S.R.R. at 136) (internal quotation marks omitted). The ALJ emphasized that formulaic pleadings and unsupported inferences are insufficient under this standard. ALJ I.D. at 3.

In its exceptions, Maher argues that although the Commission has cited *Iqbal* and *Twombly* in considering motions to dismiss, it has not adopted "the heightened pleading standards inferred by some federal courts" nor rejected "the notice pleading principles long applied by the Commission." Maher Exc. at 4, 16 n.3, 40. Rather, Maher argues, the Commission has applied "*Iqbal/Twombly* consistent with the Commission's rules, longstanding administrative law, and the continued adherence to notice pleading." *Id.* at 4, 39. According to Maher, the Commission applies a "fair notice pleading standard" or "administrative law standard for pleadings" that "is not identical to the varying standards applied under the FRCP in federal courts" but which "accords with"

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 14

and is “congruent” with *Iqbal/Twombly*. *Id.* at 4, 8, 20. Maher argues that under this standard, “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.” *Id.* at 8.

Maher’s arguments are foreclosed by prior Commission caselaw adopting the *Iqbal/Twombly* plausibility standard. In *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (FMC 2014), the Commission held that it relies on Federal Rule of Civil Procedure 12(b)(6) in evaluating whether a complaint states a cognizable claim under the Shipping Act. The Commission further held, quoting *Twombly*, that “[o]n a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), courts will dismiss a claim if the plaintiff’s complaint fails to plead ‘enough facts to state a claim for relief that is plausible on its face.’” 33 S.R.R. at 620 (quoting *Twombly*, 550 U.S. at 570). The Commission also quoted *Iqbal*’s interpretation of that standard. *Id.* The Commission further pointed out that *Twombly* “retir[ed] the standard from *Conley v. Gibson*, 355 U.S. 41, 47 (1957),” which is the same “no set of facts” standard that Maher urges the Commission to adopt here. *Id.* at 620. Maher nevertheless argues that the Commission in *Cornell* did not adopt the *Iqbal/Twombly* plausibility standard but rather “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.” Maher Exc. at 20-21. This argument ignores the actual language of *Cornell*, which unambiguously relied on *Iqbal* and *Twombly* without qualification.

Moreover, in *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011), which the Commission decided before Maher filed its present complaint, the Commission held that “[t]o survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” 32 S.R.R. at 136 (quoting *Twombly*,

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 15

550 U.S. at 570); *see also id.* (quoting *Iqbal*). Although the Commission stated that a complaint must give a respondent “fair notice,” it was quoting *Twombly* when it did so, and nothing in *Mitsui* suggests that the Commission was adopting an administrative pleading standard that differed from *Iqbal/Twombly*, let alone the “no set of facts” standard Maher seeks. *Id.* at 136.

It is true, as Maher notes, that the ALJ in *Mitsui* declined to follow *Iqbal* and *Twombly*. *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1369, 1383 (ALJ 2010). There, the ALJ acknowledged that the Commission’s regulations do not provide for motions to dismiss for failure to state a claim and found that under 46 C.F.R. § 502.12 it was consistent with sound administrative practice to follow Federal Rule of Civil Procedure 12(b)(6). *Id.* at 1379. But the ALJ cited a pre-*Twombly* district court case for the applicable standard, which included the “no set of facts” language. *Id.* at 1379-80. Then, in a separate section of the decision, the ALJ declined to apply *Iqbal* and *Twombly*. *Id.* at 1383. The ALJ characterized these cases as involving the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) and found them inapplicable because the Commission has its own pleading requirements and because it deemed administrative pleadings not to be critically important. *Id.* at 1383.

Maher’s reliance on the ALJ’s analysis in *Mitsui* is misplaced. The Commission did not adopt this analysis but instead applied the *Iqbal/Twombly* plausibility standard. *Mitsui*, 32 S.R.R. at 136. Although Commissioner Khouri in dissent disagreed with the majority’s application of 46 C.F.R. § 502.12 and argued that the majority conflated the *Iqbal/Twombly* standard with the *Conley* standard, nothing in the Commission’s decision can reasonably be read as adopting the ALJ’s approach.

Moreover, to the extent Maher suggests that the Commission failed to explain its reasoning for adopting the *Iqbal/Twombly* plausibility standard, we take this opportunity to reaffirm that standard as opposed to the “no set of facts” standard or Maher’s

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 16

undefined fair notice/administrative pleading standard. Under 46 C.F.R. § 502.12, “for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” This rule contemplates that as the Federal Rules and their interpretation change, so might the Commission’s standards. As for motions to dismiss for failure to state a claim, the Commission has consistently held that its rules do not address such motions and that Rule 12(b)(6) applies. *See, e.g., Mitsui*, 32 S.R.R. at 136; *NPR*, 28 S.R.R. at 1517. The current Rule 12(b)(6) standard is the *Iqbal/Twombly* standard. *See, e.g., Hampton v. Comey*, Case No. 14-cv-1607, 2015 U.S. Dist. LEXIS 125420, at *5 (D.D.C. Sept. 21, 2015). Consequently, the pre-*Twombly* Commission cases Maher cites for the “no set of facts” standard⁹ are not determinative as to the proper standard.¹⁰

The Rule 12(b)(6) standard depends on the pleading standard of Federal Rule of Civil Procedure 8(a). *Cf. Iqbal*, 556 U.S. at 677-78 (interpreting motion-to-dismiss standard in conjunction with Rule 8(a)). The Commission cannot adopt the Rule 12(b)(6) standard and simultaneously reject the Supreme Court’s interpretation of Rule 8(a). Although the Commission has its own rule on pleading, neither the present rule nor the version in effect in 2012 when Maher filed its complaint differ materially from Rule

⁹ *NPR, Inc. v. Bd. of Comm’rs of the Port of New Orleans*, 28 S.R.R. 1011, 1014-18 (ALJ 1999); *McKenna Trucking Co. v. A.P. Moller-Maersk Line*, 27 S.R.R. 1045, 1054 (ALJ 1997) (citing *Conley*, 335 U.S. at 45-46); *Int’l Freight Forwarders & Custom Brokers Ass’n of New Orleans v. Latin Am. Shippers Serv. Ass’n*, 27 S.R.R. 392 (ALJ 1995).

¹⁰ Maher’s describes *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, 33 S.R.R. 710, 724-25 (ALJ 2014), as a case in which the ALJ “confirmed the enduring application of the fair notice standard” and “reaffirmed the vitality of notice pleading.” Maher Exc. at 11, 20. But the ALJ did not apply the “no set of facts” standard. Rather, the ALJ, citing *Iqbal*, *Twombly*, *Mitsui*, and a federal district court case, set forth the plausibility standard. 33 S.R.R. at 716-717.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 17

8(a)'s "short and plain statement of the claim showing that the pleader is entitled to relief." *See* 46 C.F.R. § 502.62(a); 46 C.F.R. § 502.62(a)(2012).¹¹ If anything, the form complaint and checklist in the Commission's 2012 rules indicate that the Commission expected more detailed pleading than the federal standard would require. 46 C.F.R. § 502 Exhibit No. 1 to Subpart E [502.62] Checklist of Specific Information (2012) (noting, e.g., that when an undue preference or prejudice is alleged, the complaint should indicate what manner of prejudice is involved and "how the preference or discrimination resulted and the manner in which the respondents are responsible for the same").¹²

The *Iqbal/Twombly* plausibility standard is consistent with sound administrative practice. The Commission's adjudicative proceedings "bear a remarkably strong resemblance to civil litigation in federal courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 758 (2002). And the concerns that animated *Twombly* and *Iqbal* are relevant to Shipping Act proceedings. The Court in *Twombly* was concerned that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" the summary judgment or trial phases. *Twombly*, 550 U.S. at 559. To avoid "the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support" a claim, the Court reasoned, it was important to require allegations

¹¹ In 2012, a verified Shipping Act complaint had to identify the parties and contain "a concise statement of the cause of action, and a request for the relief or other affirmative action sought." 46 C.F.R. § 502.62(a) (2012). The current rule requires 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 that the complainant is entitled to relief." 46 C.F.R. § 502.62(a)(3)(iii). Maher's focus on the "sufficient to inform" portion of the current rule, Maher Exc. at 10-11, ignores the second clause of the rule, which requires a showing.

¹² Even if we were to find that we had a motion-to-dismiss rule on point, we would nonetheless interpret that rule so as to follow *Iqbal/Twombly* in light of the similarities between 46 C.F.R. § 502.62 and Federal Rule of Civil Procedure 8(a) and between Shipping Act proceedings and district court litigation.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 18

that suggest wrongdoing. *Id.* at 559 (internal quotation marks omitted); *see also id.* at 558 (“As we indicated over 20 years ago . . . ‘a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.’” (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983))).

Although not all Shipping Act proceedings are as complex as antitrust cases, some raise the same concerns about potential discovery abuse and complainants with “largely groundless claim[s] be[ing] allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.” *Id.* at 558 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (internal quotation marks omitted). In contrast, taken literally the “no set of facts” language would permit “a wholly conclusory statement of claim . . . [to] survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish ‘some set of [undisclosed] facts’ to support recovery.” *Twombly*, 550 U.S. at 561. As the Supreme Court found, this language is an “incomplete negative gloss on an accepted pleading standard” that has “earned its retirement.” *Id.* at 563.

Maher’s arguments for applying a quasi-*Iqbal/Twombly* “fair notice” or administrative law pleading standard are unpersuasive. First, Maher does not explain its proposed standard in any detail other than to assert that it is less stringent than the standard applied by the ALJ. Although Maher asserts that the Commission has not adopted the “heightened pleading standards adopted by *some* federal courts,” Maher Exc. at 4, 11, 16 n.3, 19-20, 40, it never identifies these courts. Maher also attempts to draw a distinction between a “fair notice” or notice pleading standard and a “heightened” *Iqbal/Twombly* plausibility standard. Maher Exc. at 4, 8, 9, 11, 20, 40. But as Maher acknowledges, *Iqbal* and *Twombly* did not abrogate notice pleading. Maher Exc. at 4-5, 20; *see also Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 147 (3d Cir. 2014) (treating *Iqbal*’s plausibility inquiry as part of the “notice pleading” standard); *Aktieselskabet AF 21.November 2001 v. Fame*

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 19

Jeans, Inc., 525 F.3d 8, 15-16 (D.C. Cir. 2008) (holding that *Twombly* did not establish a “heightened pleading standard” and left “the long-standing fundamentals of notice pleading intact”). Insofar as Maher’s version of notice pleading differs from *Iqbal/Twombly*, the latter governs. At most, Maher suggests that the proper Commission standard is that set forth by the ALJ in *Mitsui*. Maher Exc. at 4, 8 (citing 31 S.R.R. at 1379-80). But, as noted above, that standard was not adopted by the Commission and is inapplicable insofar as it is inconsistent with *Iqbal* and *Twombly*.

Maher also argues that its “fair notice” standard is “consistent with the longstanding and deeply entrenched doctrine applying liberal pleading standards to Shipping Act administrative proceedings.” Maher Exc. at 9. But that there is language in pre-*Twombly* Commission decisions deemphasizing the role of pleadings does not mean that the *Iqbal/Twombly* plausibility standard is inconsistent with sound administrative practice. The plausibility standard “do[es] not require heightened fact pleading of specifics.” *Twombly*, 550 U.S. at 570. Further, the cases on which Maher relies do not involve pleading standards per se; several instead involve the distinct question of when pleadings may be amended. See *Interconex, Inc. v. Fed. Mar. Comm’n*, 572 F.2d 27, 30 (2d Cir. 1978) (discussing “liberal attitude toward pleadings” in finding that amendment should have been permitted); *Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exchange, Inc.*, 28 S.R.R. 1411, 1412 (ALJ 2000) (granting motion to file amended complaint); *Tak Consulting Engineers v. Bustani*, 28 S.R.R. 584, 589 (ALJ 1998) (granting request for leave to amend complaint); *Chr. Salvesen & Co., Ltd., v. W. Michigan Dock & Market Corp.*, 9 S.R.R. 1154, 1156 (Presid. Examiner 1968) (addressing whether amendment relates back to original complaint); see also *Stockton Port Dist. v. Pac. Westbound Conference*, 6 S.R.R. 505, 526-27 (FMC 1965) (rejecting argument that it could not address unjust discrimination that was not specifically raised in complaint); *Pac. Coast European Conference – Limitation on Membership*, 5 F.M.B. 39, 40 (FMB 1956) (denying demand for a bill of particulars). We reject *Intercontinental Exchange, Inc.*, 28 S.R.R. at 1412, *Tak*

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 20

Consulting Engineers, 28 S.R.R. at 589, and *Pacific Coast European Conference*, 5 F.M.B. at 42 n.8, with respect to the statements that pleadings in Shipping Act proceedings are not “critical” or are “unimportant.” These statements are premised on the notion that the “modern” view of pleadings “is that they do little more than indicate generally the type of litigation is involved.” *Pac. Coast European Conference*, 5 F.M.B. at 42 n. 8 (quoting *Administrative Law*, Davis, 1951, section 80, p. 278, 279)). This view of pleadings, however, is not the current view and invites the problems identified in *Twombly*.

Nor do the Commission’s rules “memorialize” a “fair notice pleading standard” that is different from *Iqbal/Twombly*. See *Maier Exc.* at 10-11. As noted above, the Commission’s rules on pleadings are not materially different from Rule 8(a). *Maier* points out that under the 2012 and current rules: (a) the Commission may sua sponte require a complaint to be amended if it fails clearly to state facts which support the allegations; (b) a party may move for a more definite statement if a pleading is so vague or ambiguous that a party cannot prepare a response;¹³ and (c) pleadings may be amended or supplemented in the discretion of the Commission or presiding officer. 46 C.F.R. §§ 502.62(c), 70(a), 71 (2012); 46 C.F.R. §§ 502.62(a)(3)(v), 66(a), 67. Applying the *Iqbal/Twombly* plausibility standard is not, however, inconsistent with these rules. These rules do not purport to set forth a pleading standard, let alone the standard *Maier* advocates. Further, the *Iqbal/Twombly* standard coexists with Federal Rules that permit motions for a more definite statement and amended pleadings. Fed. R. Civ. P. 12(e), 15.

Finally, *Maier* argues that “[a]pplying *Iqbal/Twombly* consistent with this fair notice pleading standard accords with current administrative practice across the Federal Government.” *Maier Exc.* at 11. As *Maier* notes, pleadings in administrative

¹³ The language in the 2012 rule differs slightly from that of the current rule, but the difference is inconsequential here.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 21

proceedings are “traditionally more informal than judicial pleadings.” Maher Exc. at 11. This general statement does not mean that it is inconsistent with sound administrative practice for the Commission to apply the *Iqbal/Twombly* standard in Shipping Act proceedings. That other agencies have apparently applied a different pleading standard under their rules does not preclude the Commission’s approach. And other agencies have not uniformly rejected the *Iqbal/Twombly* standard. Contrary to Maher’s misleading citation, the Federal Trade Commission applies the *Iqbal/Twombly* plausibility standard to motions to dismiss. *In re LabMD, Inc.*, FTC Docket No. 9357, 2014 FTC LEXIS 2, at *5-*6, *6 n.3 (FTC Jan. 16, 2014).¹⁴ So does the EPA. *See In re Bug Bam Product, LLC*, EPA Docket No. FIFRA-09-2009-0013, 2010 EPA ALJ LEXIS 8, at *3-*4 (ALJ Apr. 23, 2010). Moreover, the thrust of the Commodity Futures Trading Commission (CFTC) decision in *Darrah v. Knowles* was that a complaint need not set forth a particular legal theory, a principle that is not inconsistent with the *Iqbal/Twombly* standard. *Darrah v. Knowles*, CFTC Docket No. 05-R042, 2013 CFTC Lexis 72, at *3-*4 (CFTC Dec. 16, 2013). And the cases Maher cites involving the Mine Safety & Health Administration and Occupational Safety & Health Review Commission deal with amending a complaint, not motions to dismiss for failure to state a claim.

The only case cited by Maher that expressly rejected the *Iqbal/Twombly* standard is *United States v. Mar-Jac Poultry, Inc.*, Office of the Chief Admin. Hearing Officer Docket No. 11B00111, 2012 OCAHO LEXIS 6, at *18-22 (ALJ Mar. 15, 2012). There, the

¹⁴ Maher cites *In re LabMD, Inc.*, FTC Docket No. 9357 (Nov. 22, 2013) with the following parenthetical: “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.’” Maher Exc. at 12. But the November 22, 2013, document Maher cites is not a decision of the FTC. Rather, it is a brief filed by the FTC’s Complaint Counsel.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 22

ALJ found no compelling reason to adopt that standard in cases before the Executive Office of Immigration Review. The ALJ was concerned that such a standard would guarantee dilatory and protracted ancillary litigation at the threshold of every case in an “administrative forum where the case load differs sharply from that in a federal district court” and where “every complaint . . . has already been the subject of an underlying administrative process as a condition precedent to the filing of the complaint.” *Id.* at *21. Shipping Act proceedings do not present analogous issues.

2. Contours of Plausibility Standard

Under the plausibility standard, the Commission will dismiss a claim if the complainant “fails to plead ‘enough facts to state a claim for relief that is plausible on its face.’” *Cornell*, 33 S.R.R. at 620 (quoting *Twombly*, 550 U.S. at 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.” *Iqbal*, 556 U.S. at 678. The complaint’s factual allegations “must be enough to raise a right to relief above the speculative level” and must “nudge claims across the line from conceivable to plausible.” *Cornell*, 33 S.R.R. at 620 (quoting *Elemery v. Holzmann*, 533 F. Supp. 2d 116, 130 (D.D.C. 2008)) (internal quotation marks omitted); *Iqbal*, 556 U.S. at 678 (noting that standard “asks for more than a sheer possibility that a defendant has acted unlawfully”). Mere labels and conclusions or a “formulaic recitation of the elements of a cause of action” will not suffice, nor will “naked assertions devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *Id.* (stating that Rule 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation” and that “threadbare recitals of the elements of a cause of action supported by mere conclusory statements, do not suffice”). “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Cornell*, 33 S.R.R. at 620 (citing *Iqbal*, 556 U.S. at 678).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 23

This standard does not, however, require “heightened fact pleadings of specifics” or detailed factual allegations. *Twombly*, 550 U.S. at 555, 570. And the “plausibility standard is not akin to a ‘probability requirement.’” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). “[A] well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” *Twombly* 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Further, Rule 12(b)(6) does not require “the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.” *Arista Records LLC v. v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010).¹⁵

In applying the standard, the Commission must accept as true all factual allegations and construe them in the light most favorable to the complainant. *Cornell*, 33 S.R.R. at 620-21; *Ralls Corp. v. Comm. on Foreign Investment in the U.S.*, 758 F.3d 296, 314-15 (D.C. Cir. 2014); *De Csepel v. Rep. of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013). Similarly, the Commission draws all reasonable inferences from the allegations in the complainant’s favor. *Cornell*, 33 S.R.R. at 620, *Ralls*, 758 F.3d at 314-15; *De Csepel*, 714 F.3d at 597. But the Commission need not accept as true legal conclusions or draw inferences that are not supported by the allegations. *Cornell*, 33 S.R.R. at 621; *see also Iqbal*, 556 U.S. at 678; *Ralls*, 758 F.3d at 315.

The first step is typically to identify pleadings that are not entitled to the assumption of truth because they are legal conclusions. *Iqbal*, 556 U.S. at 679. These conclusions can provide a framework, but they must be supported by factual allegations. *Id.* The next step is to assume the truth of the well-pleaded factual

¹⁵ *Iqbal* and *Twombly* also did not abrogate the principle that “[a] pro se complaint must be held to less stringent standards than formal pleadings drafted by lawyers;” nonetheless, even a pro se complaint must plead factual matter “that permits the court to infer more than the mere possibility of misconduct.” *Jones v. Horne*, 634 F.3d 588, 596 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 24

allegations and determine “whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679; *see also Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (applying two-pronged approach).

The factual allegations needed to reach plausibility will vary depending on the complexity of the case, “both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind, the dots should be connected.” *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010). “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

3. Arguments Common to Multiple Claims

In addition to arguing that the ALJ applied the wrong standard, Maher asserts that its complaint “nevertheless satisfies the heightened *Iqbal/Twombly* plausibility standard applied by some Federal courts.” Maher Exc. at 40. According to Maher, to plead a violation of 46 U.S.C. §§ 41102(c) and 4110(6)(3), it need only allege that a practice or refusal to deal was unreasonable, and to plead a violation of 46 U.S.C. § 41106(2), it need only allege that it was subjected to different treatment by the respondent and was injured as a result. Maher Exc. at 40, 44, 47. Maher also argues that the ALJ erred repeatedly by “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 the Complaint.” Maher Exc. at 5, 21-29. Additionally, Maher contends that the ALJ failed to construe the facts in Maher’s favor and to give it the benefit of all inferences. *Id.* at 5, 29-39.

Although Maher correctly sets forth the elements of Shipping Act claims and the burdens of proof, it must do more than simply allege unreasonableness to state a § 41102(c) or § 41106(3)

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 25

claim. Maher Exc. at 40, 44. As the ALJ found, terms such as “unreasonable,” “preferential,” “unduly,” and “not reasonably related” are “conclusory legal statements” that “provide no factual support for the allegations that Respondent’s conduct violated the Shipping Act.” ALJ I.D. at 12, 14, 15, 18, 23-24. Maher’s allegations about the reasonableness or unreasonableness of the Port Authority’s conduct are not assumed to be true and must be supported by factual allegations. Moreover, although the Commission employs an evidentiary burden-shifting framework to § 41106(2) claims, Maher must allege facts that not only allow the Commission reasonably to infer that Maher was treated differently than other entities but that also allow the Commission reasonably to infer that the treatment constituted an unreasonable preference or prejudice. Differences in treatment alone do not necessarily violate the Shipping Act. *Maher*, 33 S.R.R. at 841. The cases Maher cites for what it must plead are inapposite because they discuss the elements of claims, not pleading standards. Further, with respect to § 41106(2), the Commission does not assume the truth of Maher’s conclusory allegations that “[t]here is no valid transportation purpose for the foregoing undue or unreasonable prejudices against Maher and undue or unreasonable preferences advantaging other entities” and “[i]f there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose.” Compl. ¶¶ P-Q.

Moreover, while Maher accurately sets forth certain legal principles, it overstates their significance to the ALJ’s decision. Maher is correct that it need not plead its claims here with the particularity required by Federal Rule of Civil Procedure 9(b), which requires one alleging fraud or mistake, to “provide a defendant with notice of the who, what, when, where, and how with respect to the circumstances of the fraud.” *Stevens v. InPhonic, Inc.*, 662 F. Supp. 2d 105, 114 (D.D.C. 2009) (internal quotation marks omitted); Fed. R. Civ. P. 9(b); Maher Exc. at 5, 21, 22, 30. But, by requiring Maher to plead facts showing *how* the Port Authority’s conduct was unreasonable, the ALJ was properly requiring Maher to allege facts that would allow one to draw the reasonable inference

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 26

that the Port Authority violated the Shipping Act. That Maher is not required to plead with particularity does not absolve it of the requirement to allege facts that make its claims plausible, which necessarily requires factual allegations involving some combination of the who, what, when, where, and how of Shipping Act violations.

Similarly, the ALJ did not impose a “theory of the pleadings” on Maher. Maher Exc. at 22-23, 30. *Johnson v. City of Shelby*, 135 S.Ct. 346 (2014) is inapposite. There, the district court granted summary judgment in favor of the defendant because the complaint failed to invoke 42 U.S.C. § 1983. *Id.* at 346. The Supreme Court reversed because federal pleading rules “do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.” *Id.* Here, however, the ALJ did not dismiss the complaint due to a technical failure to cite a statutory section or particular legal theory.¹⁶ Nor did the ALJ adopt a “theory of the pleadings” doctrine whereby Maher was required to set forth a particular legal theory from which it could not deviate. C. Wright & A. Miller, 5 *Federal Practice & Procedure* § 1219 (3d ed. 2004) (describing theory of the pleadings doctrine). Rather, the ALJ found that Maher did not allege facts supporting the conclusory allegation that the Port Authority’s conduct was unreasonable. *WiAV Solutions LLC v. Skyworks Solutions, Inc.*, is not helpful to Maher because although the court cited *Johnson*, it found that the complaint sufficiently explained both the “what” and the “how” of the claim at issue. Case No. 13-cv-6683 (PAC), 2015 U.S. Dist. LEXIS 437, at *9-*10 (S.D.N.Y. Jan. 5, 2015) (noting that amended complaint “explains what has been encumbered . . . and how”).

Maher also takes issue with the ALJ’s repeated finding that there was nothing in Maher’s allegations “to suggest that PANYNJ

¹⁶ Further, Commission rules, unlike the Federal Rules of Civil Procedure, require a complaint to contain “[a] recitation of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated.” 46 C.F.R. § 502.62(a)(3)(ii).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 27

did not have a legitimate business reason” for its conduct. *E.g.*, ALJ I.D. at 15. According to Maher, the ALJ, in making this finding, erroneously speculated about facts outside the complaint; required Maher to plead facts about hypothetical defenses; ignored that the Shipping Act has no intent requirement; overlooked that whether PANYNJ might have had business reasons for its conduct is irrelevant; and failed to draw inferences in Maher’s favor. *Id.* at 5-7, 27, 30.

These objections are largely without merit. In general, courts ruling on 12(b)(6) motions cannot consider factual allegations raised in briefs, especially when they contradict the allegations in the complaint. *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994). But the ALJ did not invoke facts outside the complaint when it remarked on the deficiencies therein. Maher is also correct that a complainant is not required to allege facts negating a potential affirmative defense. *Flying Food Grp. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006); *United States Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003). Again, however, the ALJ did not require Maher to negate an affirmative defense. The existence of legitimate business reasons for the Port Authority’s conduct is not an affirmative defense. Rather, Maher bears the ultimate burden of proving that the Port Authority’s conduct was unreasonable with respect to the Shipping Act violations alleged. As the Port Authority points out, the ALJ’s statements recognized that “the potential existence of legitimate business reasons in the absence of some facts negating such reasons, renders the bald allegation of ‘unreasonableness’ impermissibly conclusory under the relevant pleading standards.” PA Reply at 30.

Moreover, that the Shipping Act has no intent requirement and that “the mere doing of an unlawful act, whether part of a seemingly legitimate business decision or otherwise, constitutes a violation” is not relevant here. Maher Exc. at 6-7. The Court in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission* noted that reasonableness “does not depend on unlawful or discriminatory intent.” 390 U.S. 261, 281 (1968). A

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 28

respondent's justifications for its conduct, however, are relevant to whether it violated the Shipping Act. *See, e.g., Ceres*, 27 S.R.R. at 1274. And although "commercial convenience cannot justify a practice that is otherwise unreasonable," *Investigation of Free Time Practices – Port of San Diego*, 7 S.R.R. 307, 323 (FMC 1966), a port authority may consider a number of legitimate business considerations in operating a port and negotiating leases, such as market conditions, available locations and facilities, and the nature and character of potential lessees. *Ceres*, 27 S.R.R. at 1274; *see also* "50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports, 24 S.R.R. 411, 455 (FMC 1987) (listing "recognized transportation considerations"); *N. Atl. Mediterranean Freight Conference – Rates of Household Goods*, 9 S.R.R. 775, 784 (FMC 1967). Contrary to Maher's suggestion, whether a port authority has "business reasons" for its conduct is not irrelevant to its liability under the Shipping Act.

Finally, Maher rightly notes that the Commission must draw all reasonable inferences from the factual allegations in Maher's favor. *Cornell*, 33 S.R.R. at 620. But this does not mean that the Commission must infer that the Port Authority's conduct is unreasonable or otherwise unlawful simply because Maher alleges conclusorily that it is, especially when that conduct is equally consistent with lawful behavior. *See Iqbal*, 556 U.S. at 681 (finding that the plaintiff did not adequately plead "invidious discrimination" because although the factual allegations were consistent with a discriminatory purpose, "given more likely explanations, they do not plausibly establish this purpose"); *Twombly*, 550 U.S. at 565-66, 685 (finding that allegations of parallel business conduct did not plausibly suggest conspiracy in restraint of trade because the conduct was compatible with, and more likely explained by, lawful free market behavior). Rather, "[t]he plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *16630 Southfield Ltd. P'ship v. Flagstar Bank*, F.S.B., 727 F.3d 502, 504 (6th Cir. 2013).

As the court explained in *Flagstar*:

To be sure, the mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal. . . . Thus, if a plaintiff's claim is plausible, the availability of other explanations—even more likely explanations—does not bar the door to discovery. But you can't assess the plausibility of an inference in a vacuum. The reasonableness of one explanation for an incident depends, in part, on the strength of competing explanations. (How reasonable is it to infer that it rained last night from the fact that my lawn is wet? It depends, among other things, on whether I own a sprinkler.) Where, as here, the complaint alleges facts that are merely consistent with liability (i.e., being Iraqi and being denied a loan extension) as opposed to facts that demonstrate discriminatory intent (i.e., disparate impact or direct evidence), the existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made.

Id. at 505. Consequently, although the Commission may not assume that the Port Authority had legitimate business reasons for its alleged conduct on a motion to dismiss, the extent to which the Port Authority's alleged conduct is consistent with lawful behavior affects the plausibility of the inference that the Port Authority acted unreasonably or otherwise unlawfully.¹⁷

¹⁷ Maher correctly points out that the Commission does not “turn a blind eye” to a port authority's conduct “under the shibboleth of deference.” Maher Exc. at 27-28 (citing *Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 27 S.R.R. 1123, 1130 (FMC 1997)). Acknowledging the common-sense notion that the Port Authority might have legitimate reasons for its conduct, however, does not constitute deferring to the Port Authority.

4. Specific Claims

Along with its more general arguments, Maher asserts that each claim satisfies the requisite pleading requirements. Maher Exc. at 40-50. We review each claim *de novo* under the *Iqbal/Twombly* plausibility standard, organized by fact pattern.

a. *Change-of-Control Claims*

Maher alleges that the Port Authority “has a practice of requiring payments and other economic consideration from marine terminal operators in order to obtain PANYNJ’s consent to transfers of marine terminal leases and changes in ownership and/or control interests of marine terminal operator tenants.” Compl. ¶ IV.A. Maher further alleges that the Port Authority has a published policy providing that the “entity . . . assuming ownership or control of the lease or tenant . . . shall pay to the Port Authority such economic consideration as the Executive Director determines to be appropriate under the circumstances.” *Id.* ¶ IV.B. The policy allegedly states that the Executive Director will not require such payment until “after appropriate due diligence has been conducted.” *Id.* According to Maher, the Port Authority applied its change of control policy to require Maher, PNCT, and NYCT to pay “approximately \$237 million” in cash and other economic consideration for the Port Authority’s consent to transfers of control. *Id.* ¶ IV.C. Maher alleges that in other instances, however, the Port Authority has consented to transfers of marine terminal ownership or control without requiring any economic consideration. *Id.* ¶ IV.D.

Maher alleges that the Port Authority’s change-of-control policy is problematic because: (1) the policy “unjustly and unreasonably requires economic consideration in exchange for consent for reasons unrelated to, and/or for consideration in excess of, the cost of the service provided;” (2) it “unduly prejudices Maher by unjustly overcharging Maher for the benefit received;” (3) “it unduly prejudices Maher by unjustly overcharging Maher as compared to other marine terminal operators;” and (4) the Port

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 31

Authority has not “fairly, uniformly or reasonably” conducted “appropriate due diligence” or required “appropriate consideration.” *Id.* ¶¶ IV.E, F, G, H. Maher further alleges that the Port Authority’s practice of requiring entities assuming ownership or control of a lease to pay “unreasonable economic consideration” for the Port Authority’s consent is an unreasonable refusal to deal. *Id.* ¶ IV.CC.

i. Count I [46 U.S.C. § 41102(c)]

In Count I, Maher alleges that the Port Authority failed to establish, observe, and enforce just and reasonable practices relating to the Port Authority’s “establishment, observation, and enforcement of its practices with respect to the transfer and/or change of ownership and/or control interests.” Compl. ¶ V.B. The ALJ determined that Maher “fail[ed] to plead sufficient facts to make a Shipping Act violation plausible.” ALJ I.D. at 11. The ALJ reasoned that Maher’s allegations do not “suggest how PANYNJ’s policies regarding the transfer and change of ownership are unfair or unreasonable” and do not “identify the entities, dates, or amounts which Maher thinks violate the Shipping Act.” *Id.* at 12. The ALJ also noted that “[g]iven the different risks and benefits presented [by the lessees], it is not surprising that the payments are not uniform.” *Id.* The ALJ concluded that differences in change-of-control payments alone are not sufficient to plead a Shipping Act violation given that “[t]here is nothing to suggest that PANYNJ did not have a legitimate business reason for these decisions.” *Id.* The ALJ rejected as conclusory the “legal statements” such as “just and unreasonable.” *Id.* at 13.

In its exceptions, Maher argues that by suggesting that “different risks and benefits” might explain why the Port Authority required different change-of-control consideration, the ALJ relied on facts outside the allegations of the complaint. Maher Exc. at 28. According to Maher, the ALJ should have inferred that the Port Authority acted unreasonably when it required less consideration from some marine terminal operators than others. *Id.* at 31. Maher also argues that the ALJ should have inferred that any legitimate

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 32

business purpose reflects not a valid transportation purpose but rather illegitimate “commercial convenience” or “business purpose, “i.e., making money by exercising monopoly power over port tenants.” *Id.*

The Port Authority counters that Maher’s change-of-control allegations are too vague to state a claim because the complaint fails to specify the amount of change-of-control consideration paid, the dates of the relevant transactions, and which entities did and did not pay change-of-control consideration. PA Reply at 5, 20-22. According to the Port Authority, without such factual allegations the complaint lacks “a factual basis supporting a plausible claim of unreasonableness.” *Id.* at 21. “Simply adding in the word ‘unreasonable’ on top of innocuous factual allegations cannot carry the day,” the Port Authority argues, because it amounts to a legal conclusion in the form of a factual allegation. *Id.* The Port Authority further argues that Maher’s allegations that the change-of-control policy require economic consideration “in excess of the cost of the service provided” constitute recitation of legal standards devoid of factual content.

Maher’s allegations regarding unreasonableness and unfairness are legal conclusions that the Commission need not accept as true. And Count I itself is a formulaic recitation of the elements of a Shipping Act claim. Nevertheless, Maher alleges factually that the Port Authority has a published policy whereby, after conducting due diligence, the Port Authority requires entities assuming ownership or control of a port tenant or lease to provide the Port Authority economic consideration that it deems is appropriate under the circumstances. According to the allegations, the Port Authority applied the policy to Maher, PNCT, and NYCT and obtained approximately \$237 million. Maher also alleges that the Port Authority has not required change-of-control consideration from other tenants nor applied its policy uniformly with respect to appropriate due diligence or consideration. Maher further alleges that the Port Authority overcharges Maher for the benefit received,

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 33

and that it requires consent payments for reasons unrelated to and in excess of the cost of the service provided.

Taking these factual allegations as true, Maher has pleaded enough for the Commission to infer that the Port Authority failed to establish, observe, and enforce just and reasonable practices with respect to Count I. The Commission must accept as true the allegation that the change-of-control consideration is unrelated to the costs of service provided by the Port Authority. Although the Port Authority asserts that this is a legal conclusion, it is reasonable to infer from the fact that some terminal tenants are charged nothing and other terminal tenants are charged millions of dollars that the Port Authority's practices might be excessive and not fit and appropriate to the end in view. In the context of this claim, Maher is not required to allege specifics such as the amount of fees paid, the dates, and which entities paid or did not pay in order to give the Port Authority fair notice of its plausible claim, especially given that Maher identifies some of the entities involved. We reverse the ALJ as to Count I and remand the claim for further proceedings.

ii. Count VIII [46 U.S.C. § 41106(2)]

In Count VIII, Maher alleges that the Port Authority "impos[ed] on Maher unduly and unreasonably more prejudicial requirements for payments and economic considerations for PANYNJ consent to transfer and/or change of ownership and/or control interests than required of Maersk, APM, PNCT, NYCT, and other marine terminal operators, and by providing undue preferences to other marine terminal operators." Compl. ¶ V.I. The ALJ dismissed Count VIII for failure to state a claim, first noting in general that "mere differences, alone do not violate the Shipping Act, the violation must plausibly be undue or unreasonable." ALJ I.D. at 22. The ALJ also declined to give weight to Maher's allegations that there were no valid transportation purposes for the preferences or that the preferences exceeded what was necessary to achieve the transportation purposes, because these were "conclusory legal allegations" that "do not provide sufficient factual support to

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 34

make the Shipping Act allegations plausible.” *Id.* The ALJ noted that Maher did not plead facts suggesting how the change-of-control practices were unreasonable and that the complaint did not identify the entities who did or did not pay change-of-control consideration, the dates of any payments, or any amounts paid. *Id.* at 23. The ALJ reasoned that the “lack of uniformity in payments may be due to different risks and benefits associated with each lease” and “[t]he difference, alone, is not sufficient to plead a Shipping Act violation.” *Id.*

Maher argues that the ALJ relied on facts outside the complaint when the ALJ suggested that “different risks and benefits” might explain why the Port Authority required different change-of-control consideration from different port tenants. Maher Exc. at 28. Maher also complains that the ALJ impermissibly drew inferences in favor of the Port Authority. *Id.* at 32. The Port Authority responds that that the “same defects that require the dismissal of Count I . . . require that this unreasonable preference claim be dismissed as well.” PA Reply at 29. According to the Port Authority, although Maher vaguely suggests that the Port Authority’s application of its change-of-control policy has been inconsistent, Maher does not allege facts to suggest that it has been disadvantaged by any such inconsistency. *Id.* at 30. The Port Authority further argues that Maher does not allege facts supporting its “bald assertion that any preference in connection with change of control fees was ‘unreasonable.’” *Id.* The Port Authority also asserts that differences in treatment of tenants alone is not unreasonable and that the ALJ correctly noted that there is nothing to suggest that the Port Authority did not have a legitimate business reason for how it applied its change-of-control policy.

As with Count I, the allegations that Maher imposed “unduly and unreasonably more prejudicial requirements” and the allegations about lack of valid transportation purposes are, standing alone, legal conclusions. But Maher also alleges that the Port Authority applied its change-of-control policy to Maher differently than the Port Authority applied it to Maersk, APM, PNCT, NYCT

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 35

and other marine terminal operators. Maher also alleges that it, PNCT, and NYCT were required to pay hundreds of millions of dollars whereas other entities who sought the Port Authority's consent for changes in ownership interests did not pay cash or make "commitments of other economic considerations." Compl. ¶ IV.D. Maher also alleges generally that the Port's conduct injured it. *Id.* ¶ VI.A.

Taking these allegations as true, Maher has adequately stated a claim of an unreasonable preference/prejudice under 46 U.S.C. § 41106(2). It is reasonable to infer from the factual allegations that Maher is in a similar position as APM. PNCT, NYCT, and Maersk regarding the change-of-control policy. Maher also alleges that the Port Authority treated these entities differently—some entities were required to pay millions of dollars and others were not. It is reasonable to infer from the magnitude of the difference in consideration (millions of dollars for some, nothing for others) that the differences amounted to a preference or prejudice. Although there are few factual allegations supporting the unreasonableness of the Port Authority's conduct, it is also reasonable at this stage to infer from the magnitude of the consideration that the Port Authority's treatment of the port tenants is not supported by legitimate factors. We therefore reverse the ALJ as to Count VIII and remand the claim for further proceedings.

iii. Count XIII [46 U.S.C. § 41106(3)]

Maher alleges in Count XIII that the Port Authority unreasonably refused to deal or negotiate "with respect to PANYNJ's practice to condition PANYNJ's consent to a change in ownership interest/and or control on requiring entities assuming ownership or control of a lease to pay and/or provide unreasonable economic consideration." Compl. ¶ V.N. The ALJ dismissed Count XIII for failure to state a claim. The ALJ found that the complaint did not identify the entities, dates, or amounts that Maher thinks violate the Shipping Act. ALJ I.D. at 31. The ALJ noted that, at most, the complaint indicated that the Port Authority denied

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 36

Maheer's request. But, the ALJ found, "[r]efusal to deal allegations require more than that the request is denied." *Id.* The ALJ also reasoned there was nothing to suggest that the Port Authority did not have a legitimate business reason for its decisions. *Id.*

Maheer argues that it pleaded the elements of an unreasonable refusal to deal regarding Maheer's change-of-control policy. According to Maheer, the Port Authority's refusal to deal was unreasonable for the same reasons that Maheer's change-of-control policy is unreasonable: the refusal was based on ocean-carrier-affiliate status, overcharges in excess of the costs of the services or benefits received, and lack of valid transportation purposes. Maheer Exc. at 47. The Port Authority counters that "[a]lthough Maheer alleges conclusorily that the Port Authority had a policy of asking for concessions in exchange for consenting to a change in ownership or control of a lessee, Maheer nowhere alleges that it sought to deal with the Port Authority as to that policy." PA Reply at 35. According to the Port Authority, without such an allegation, there cannot be a "plausible refusal to deal at all, much less an unreasonable refusal to deal." *Id.*

Maheer has failed to state a facially plausible claim that the Port Authority unreasonably refused to deal or negotiate with respect to the change-of-control allegations. Maheer has not pleaded facts that would allow the Commission reasonably to infer that there was any refusal to deal, let alone an unreasonable one. Count XIII is an insufficient formulaic recitation of the elements of a § 41106(3) claim. Maheer does not plead any facts suggesting that it actually sought to negotiate or deal with the Port Authority about the change-of-control policy. Without any allegation that Maheer tried to negotiate with the Port Authority, there is no basis to infer that the Port Authority refused to negotiate. And Maheer does not allege any facts suggesting that it would have been futile to try to negotiate with the Port Authority. We affirm the ALJ's dismissal of Count XIII.

b. *Global Terminal Claims*

Maher alleges two claims about a marine terminal facility located outside the Bayonne Bridge. Compl. ¶ IV.V. According to Maher, despite its request, the Port Authority “unreasonably refused to deal or negotiate with Maher with respect to the letting” of that facility and “unreasonably excluded Maher from consideration as a prospective operator of” it. *Id.* ¶¶ V, AA. Instead, Maher alleges, the Port Authority leased the facility to Global Terminal & Container Services, LLC (Global) on June 23, 2010. *Id.* ¶¶ V, Z. Maher further alleges that because the Global lease excludes “existing terminal operators from qualifying as Qualified Transferees,” the Port Authority is “categorically excluding Maher, and other existing container terminal operators, from operating” the Global terminal in the future. *Id.* ¶ W.

i. Count VI [46 U.S.C. § 41102(c)]

In Count VI, Maher alleges that the Port Authority failed to establish, observe, and enforce reasonable practices relating to the Port Authority’s “practice of unreasonably excluding Maher and existing tenants for consideration as a leasee, operator or Qualified Transferee of the marine terminal that is the subject of the Global Lease.” Compl. ¶ V.G. The ALJ dismissed Count VI for failure to state a claim because Maher did not plead facts suggesting “how excluding existing tenants from consideration for additional leases is unreasonable under the Shipping Act.” ALJ I.D. at 19. The ALJ noted that Maher did “not point to any obligation by a port to allow other tenants to present bids and in Docket 08-03, there was evidence that the Maher lease with the PANYNJ was also not competitively bid.” *Id.* Moreover, the ALJ found, there was nothing to suggest that the Port Authority did not have a legitimate business reason for its decision and terms such as “unreasonably” were conclusory legal statements. *Id.*

Maher characterizes its complaint as alleging that the Port Authority “categorically barred, because of status, existing marine

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 38

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.” Maher Exc. at 36. Maher argues that the ALJ’s comment that there was evidence in FMC Docket No. 08-03 about the bidding of the Maher terminal invokes facts outside the allegations of the complaint. *Id.* at 37. Maher also argues that the ALJ should have inferred that the Port “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.” *Id.*

The Port Authority argues that Maher did not allege that other terminal operators expressed an interest in leasing the terminal, and “does not otherwise elaborate beyond the conclusory allegation that Maher had itself expressed an interest in the terminal.” PA Reply at 8, 27. The Port Authority contends that Maher does not allege facts suggesting that the Port Authority unreasonably excluded Maher and other existing tenants from consideration as a prospective operator of the Global terminal. *Id.* To find that these allegations are sufficient, the Port Authority asserts, “would be tantamount to ruling that anything other than a competitive bidding process is per se unreasonable.” *Id.* at 27-28. The Port Authority points out that the Commission and ALJ in FMC Docket No. 08-03 noted that Maher’s own lease “was the result of a one-on-one negotiation without competitive bidding, while giving not even the slightest hint that that was in any way unreasonable under the Shipping Act.” *Id.* at 28.

Taking the factual allegations of the complaint as true, Maher has stated a facially plausible claim as to Count VI. According to the complaint, Maher asked the Port Authority if it could operate or lease the marine terminal facility outside the Bayonne Bridge. The Port Authority refused to consider Maher or other existing terminal operators as tenants or operators of that terminal. Instead, on June 23, 2010, the Port Authority entered into a lease agreement with Global. The Port Authority continued categorically to exclude Maher and other existing container terminal

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 39

operators from operating the Global terminal by excluding them from qualifying as “Qualified Transferees” under the Global terminal lease.

Given these facts, Maher has adequately alleged that the Port Authority has a practice of excluding Maher and existing port tenants for consideration as tenants, operators, or Qualified Transferees of the Global terminal. Although Maher’s allegations of “unreasonableness” are legal conclusions, the allegations that Maher and others were categorically excluded from leasing the Global terminal reasonably allow the inference that the Port Authority’s conduct was not reasonably related to a legitimate Port Authority goal. Maher has alleged more than a categorical refusal to consider existing terminal operators as tenants or operators of the Global terminal; Maher alleges that the Port Authority also excluded existing terminal operators from being considered Qualified Transferees. Categorical exclusions and treating entities differently based on status alone generally invite Shipping Act scrutiny. *Ceres*, 27 S.R.R. at 1273 (holding that “status alone” is not an appropriate way of distinguishing between lessees). Unlike the PNCT claims, discussed below, where there are obvious legitimate explanations for the Port Authority’s conduct that cast doubt on the plausibility of the claims, here there are no similarly obvious reasons for the alleged categorical exclusion of existing terminal operators from operating the Global terminal. Allowing this claim to go forward is not tantamount to finding that anything other than competitive bidding is per se unreasonable. The Port Authority remains free to justify its conduct via motion practice or otherwise. We reverse the ALJ as to Count VI and remand the claim for further proceedings.

ii. Count XII [46 U.S.C. § 41106(3)]

In Count XII, Maher alleges that the Port Authority unreasonably refused to deal or negotiate “with respect to the leasing and operation of the marine terminal which is the subject of the Global Lease.” Compl. ¶ V.M. The ALJ dismissed this count because Maher did not sufficiently explain how the Port Authority’s

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 40

negotiations were undue or unreasonable. ALJ I.D. at 30. The ALJ reasoned that “[r]efusal to deal allegations require more than that the request is denied,” and that Maher did “not address how excluding existing tenants for consideration for additional leases is unreasonable under the Shipping Act.” *Id.* The ALJ further noted that Maher did not establish that that ports are required to allow other terminal tenants to bid on a terminal. *Id.*

Maier argues that it was not required to plead the “wholly unnecessary fact” that it “bid or requested consideration for the other marine terminal” because it is not an element of a § 41106(3) claim. Maher Exc. at 23. Maher further asserts that it need not have bid for or sought the Global terminal because the Shipping Act imposes affirmative duties on the Port Authority not to act unreasonably. *Id.* at 24. Maher also contends that it requested to be considered for the Global terminal. *Id.* at 24-25. The Port Authority responds that Maher “d[id] not set forth any facts that would show why the Port Authority’s decision to proceed with the Global lease amounts to an *unreasonable* refusal to deal with Maher.” PA Reply at 8, 34. According to the Port Authority, an allegation that a “request is denied” does not allege facts suggesting that the Port Authority refused to deal, let alone that it unreasonably refused to deal. *Id.* at 34.

Maier has stated a facially plausible claim as to Count XII. Maier is correct that requesting to be considered as an operator of the Global terminal is not an element of the claim. But a complainant must allege some facts making it reasonable to infer that a respondent refused to deal or negotiate. Maier’s allegations satisfy this requirement. Maier alleges that it requested consideration as a lessee or operator of the Global terminal and that Maier denied the request. Compl ¶¶ IV.V, AA. Maier also alleges that the Port Authority categorically excluded Maier and other terminal operators from operating or leasing the Global terminal based on their status as existing terminal operators. As noted above, these allegations support an inference of unreasonableness. Maier has

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 41

pleaded more than a generic “request is denied.” We reverse the ALJ as to Count XII and remand the claim for further proceedings.

c. *PNCT Terminal Claims*

Maher also alleges that the Port Authority “has an unreasonable practice of providing unduly preferential treatment to ocean carriers and ocean-carrier affiliated marine terminals that has and continues to unduly prejudice Maher.” Compl. ¶ IV.I. Despite the breadth of this allegation, Maher’s factual allegations center on the Port Authority, PNCT, and MSC. *Id.* ¶¶ IV.I-T. Prior to October 1, 2009, Maher alleges, MSC was Maher’s largest customer by container volume at Port Elizabeth. *Id.* ¶ IV.J. During that time, PNCT had tried unsuccessfully to reach an agreement with the Port Authority to expand its terminal. *Id.* ¶ IV.K. Then, on or about October 1, 2009, Maher alleges, MSC moved its container business from Maher to PNCT. *Id.* ¶ IV.L. Maher alleges that the Port Authority knew that “PNCT did not have sufficient container handling capacity to adequately handle MSC’s container volume served by Maher,” and that “MSC’s move to PNCT was not feasible in the long term without substantial expansion of PNCT’s terminal.” *Id.* ¶¶ IV.M-N. Maher alleges that the Port Authority also knew that “the loss of MSC’s business to PNCT would harm Maher.” *Id.* ¶ IV.P.

Maher alleges that after MSC moved to PNCT, the Port Authority “announced an agreement with PNCT and MSC to expand the PNCT terminal and provide other concessions to PNCT.” *Id.* ¶ IV.Q. In this alleged agreement, the Port Authority: (a) lowered PNCT’s lease rates; (b) agreed to a terminal expansion nearly doubling the size of PNCT’s terminal; (c) provided PNCT preferential chassis storage; (d) extended PNCT’s lease for approximately twenty years; and (e) consented to MSC taking an ownership interest in PNCT (the consent being required by the Port’s change-of-control policy). *Id.* ¶¶ IV.O, R. In exchange, PNCT agreed to invest in the terminal and “purportedly guarantee[d], via rent, certain levels of MSC cargo.” *Id.* Maher complains that the Port

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 42

Authority “did not provide the same or comparable expansion opportunities, rate reductions, lease extension, or other preferences to Maher.” *Id.* ¶ IV.S. Maher likewise alleges that the Port Authority “did not provide for a reduction of Maher’s container volume, rent or other obligations under its lease with [the Port].” *Id.* ¶ IV.T.

i. Count II [46 U.S.C. § 41102(c)]

In Count II, Maher alleges that the Port Authority failed to establish, observe, and enforce reasonable practices relating to the Port’s “establishment, observation, and enforcement of its practices with respect to providing preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals.” Compl. ¶ V.C.¹⁸ The ALJ found that Maher did not state a claim because Maher did not plead facts suggesting how the Port Authority unreasonably favored ocean carriers. At most, the ALJ reasoned, Maher alleged that PNCT and MSC, and possibly other ocean carriers or affiliated terminals, “received concessions when negotiating their leases.” ALJ I.D. at 14. The ALJ noted that Maher did not, however, allege that it requested comparable concessions or lease terms, and that “differences in leases, by themselves, do not create a Shipping Act violation.” *Id.* The ALJ further stated that “[t]here is nothing to suggest that PANYNJ did not have a legitimate business reason for providing concession or to plausibly claim that PANYNJ’s agreements with PNCT and MSC were unreasonable.” *Id.* The ALJ found that terms such as “preferential” were conclusory legal statements. *Id.*

¹⁸ Maher suggests in its Exceptions that this count encompasses its PNCT/MSA allegations *and* its allegations that APM was treated preferentially. Maher Exc. at 25, 32-35. But this characterization is not supported by a reasonable reading of the complaint. The section of the complaint titled “Unreasonable and Discriminatory Actions and Practices with Respect to Ocean Carriers and Ocean-Carrier-Affiliated Marine Terminals” implicates only the PNCT terminal allegations. Compl. ¶¶ IV.I.-T. Moreover, the complaint does not even allege that APM is an ocean-carrier affiliated marine terminal. Consequently, the analysis of Count II is limited to Maher’s allegations about PNCT and MSC.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 43

Maher argues that it was not required to plead the “wholly unnecessary facts” that it requested comparable concessions or lease terms or that the Port Authority’s concessions to MSC/PNCT were unreasonable in isolation. Maher Exc. at 23. According to Maher, these facts are not elements of an unreasonable practice claim and the Shipping Act imposes affirmative duties on the Port Authority not to act unreasonably. *Id.* at 24. The Act does not, Maher argues, impose pre-filing requirements as a precondition to filing suit. *Id.* Additionally, Maher argues that the ALJ should have inferred from the complaint that the Port Authority violated the Shipping Act 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.” *Id.* at 34, 41. Similarly, Maher contends, the ALJ should have inferred 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.” *Id.* at 34. Maher further contends that ALJ should have inferred from the timing of MSC’s affiliation with PNCT that the Port Authority’s decision to grant PNCT concessions was because of its change in status from an unaffiliated marine terminal operator to an ocean-carrier affiliated one. *Id.* at 35.

The Port Authority argues that Maher “conspicuously does *not* allege either that it sought” the alleged concessions granted to PNCT or that “as a result of the Port Authority’s agreement with PNCT, PNCT’s terminal or lease arrangements were any better than those Maher already had.” PA Reply at 23. According to the Port Authority, Maher does not allege facts suggesting that PNCT’s expanded terminal is larger than Maher’s or that its amended lease contains terms more favorable than those in Maher’s lease. *Id.* Further, “Maher’s claim also presupposes that a port authority is obliged to consider amending every marine terminal lease any time it grants a concession to some other marine terminal.” *Id.* The Port Authority argues there is no basis for a plausible claim that there is

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 44

any preference, much less an unreasonable one favoring ocean carriers. And even if Maher had alleged that its lease was less advantageous than PNCT's, the Port Authority contends, lease differences alone do not create a Shipping Act violation. *Id.* at 24. The Port Authority maintains that Maher has done nothing more than state that the Port Authority took some action that is innocuous on its face and then label it unreasonable. *Id.*

Count II and Maher's factual allegations only conceivably support a Shipping Act violation, not plausibly, and therefore Maher fails to state a claim. Maher alleges factually that the Port Authority did not provide it with the same terminal expansion opportunities, rate reductions, lease extensions, or other preferences that the Port Authority gave to PNCT, and that the Port Authority did not reduce Maher's container volume or rent. Maher also alleges that the Port Authority only gave PNCT concessions after MSC left Maher's terminal and took its business to PNCT's terminal, which, at the time, could not have handled MSC's container volume. According to Maher, PNCT received concessions due to its affiliation with ocean-carrier MSC.

Maher's allegations do not plausibly state a § 41102(c) claim because they do not allow the Commission reasonably to infer that Maher's lease rates are not commensurate with the benefits Maher received. Maher does not allege that its lease rates or lease terms were excessive or that they were not related to any services at issue. Instead, Maher's § 41102(c) claim is based solely on what the Port Authority gave PNCT and did not give Maher. Although comparative differences can support such a claim, *see* NPR, 28 S.R.R. at 1532, comparative differences are only relevant to the extent that they show that the charge or practice at issue is excessive or disproportionate.¹⁹ Maher's complaint lacks sufficient factual

¹⁹ *Sec'y of the Army v. Port of Seattle*, 24 S.R.R. 595 (FMC 1987), cited by Maher, stands for the proposition in that assessing whether a charge is reasonably related to the service rendered, the Commission can look to charges for similar services. 24 S.R.R. at 601-02.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 45

content about its lease to allow the inference that the Port Authority's practices with respect to Maher's lease are excessive or disproportionate, even in comparison to the PNCT concessions. In other words, the mere fact that PNCT received concessions and that Maher did not receive "the same or comparable" concessions does not plausibly suggest a Shipping Act violation, where, as here, the complaint contains little to no factual context.

In addition, the plausibility of the inference that the Port Authority acted unreasonably by granting concessions based on ocean-carrier status is undermined by obvious lawful explanations for the Port Authority's conduct. The marine terminal leases at issue are complex, long-term documents that are subject to extensive negotiations between the parties. *See, e.g., Maher*, 33 S.R.R. at 831-35. There are any number of legitimate reasons why marine terminal leases might contain different terms, including the size of a terminal, its configuration, access to intermodal facilities, investment and construction requirements, and the creditworthiness of the tenant. *Maher*, 33 S.R.R. at 842-43, 850; *Ceres*, 27 S.R.R. at 1274.²⁰ Maher in fact alleges that the Port Authority gave PNCT concessions "in exchange for PNCT investing in the terminal and purportedly guaranteeing, via rent, certain levels of MSC cargo." *Id.* ¶ IV.R. Maher asks the Commission to infer that the Port Authority violated the Shipping Act under § 41102(c) because: (a) MSC took its business from Maher to a competitor; (b) at some later time the Port

²⁰ The complexity of the leases is apparent from the documents themselves, and Maher's lease negotiations with the Port Authority are reflected in FMC Docket Nos. 07-01 and 08-03 and thus subject to official notice. Further, by acknowledging the existence of potentially legitimate reasons for lease differences, which undermine the plausibility of Maher's allegation that the Port Authority acted unreasonably, we are not relying on facts outside the record but exercising our experience and common sense as directed by the Court. *Iqbal*, 556 U.S. at 679; *see also id.* at 682 (noting that an "obvious alternative explanation" for respondent's arrest was need to detain aliens who were in the United States illegally and who had potential connections to terrorists); *Twombly*, 550 U.S. at 568 (relying on history and noting that "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing").

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 46

Authority renegotiated the competitor's lease to give it better terms than it had before; (c) the Port Authority consented to MSC taking an ownership interest in PNCT; and (d) the Port Authority did not give Maher the same or comparable terms that it gave the competitor. In this context, Maher's allegations are not sufficient to state a claim and allow "a potentially massive factual controversy to proceed" given the likely and obvious legitimate explanations for the conduct. *Twombly*, 550 U.S. at 558. We therefore affirm the ALJ's dismissal of Count II.

ii. Count XIV [46 U.S.C. § 41106(1)]

Maher alleges in Count XIV that "PANYNJ's actions and failures to act with respect to PANYNJ's agreements with PNCT, MSC and other ocean carriers and carrier affiliated marine terminals" violate the Shipping Act by "agreeing and continuing to agree with other marine terminal operators and common carriers to unreasonably discriminate in the provision of terminal services to common carriers." Compl. ¶ V.O. The ALJ dismissed this claim for failure to state a claim. The ALJ acknowledged that the Port Authority did not specifically challenge this claim in its motion to dismiss but found that "[w]hile PANYNJ could have addressed this allegation more fully, the motion was sufficient to put Maher on notice that PANYNJ moved to dismiss this count." ALJ I.D. at 33. The ALJ reasoned that Maher did not sufficiently explain "how PANYNJ unreasonably discriminated against Maher or to what concessions provided to PNCT, MSC, or others it objects." *Id.* There was nothing in the complaint, the ALJ also found, to suggest that the Port Authority did not have a legitimate business reason for its decisions. *Id.*

Maher argues that it alleges detailed facts showing that the Port Authority entered into agreements with, and gave concessions to, PNCT, MSC, and APM, but did not deal comparably with Maher, thus "discriminating against Maher and the common carriers operating at Maher." According to Maher, the logical inference is that the Port Authority has no valid transportation reason for its

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 47

conduct, “which injures Maher and common carriers operating at Maher’s terminal” in violation of 46 U.S.C. § 41106(1). Maher Exc. at 39, 49-50. The Port Authority contends that Maher does not plead facts suggesting that the Port Authority’s agreements with PNCT and other ocean carriers discriminated against Maher at all, let alone discriminated unreasonably against Maher. PA Reply at 35. The Port Authority also argues that Maher fails to identify the lease provisions or concessions provided to PNCT, MSC or other ocean carriers to which it objects or allege that such provisions or concessions were more favorable than Maher’s own lease terms.

Maher has failed to state a facially plausible claim that the Port Authority violated the Shipping Act by agreeing with a marine terminal operator or common carrier to “unreasonably discriminate in the provision of terminal services to, a *common carrier or ocean tramp*.” 46 U.S.C. § 41106(1) (emphasis added). Maher does not allege any facts that suggest that the Port Authority agreed to discriminate in the provision of terminal services to a common carrier or ocean tramp. To the contrary, Maher alleges that the Port Authority provided ocean carriers and their affiliated marine terminals unduly preferential treatment. Compl. ¶¶ IV.I, V.A(b). Throughout the complaint, Maher alleges that *it* was injured by discrimination, not common carriers or ocean tramps that call at its terminal. *Id.* ¶¶ IV.H, VI.A. Maher’s argument that common carriers operating at its terminal were discriminated against is not supported by the allegations. And Maher cannot amend its complaint via arguments made in its exceptions brief. *Pa. ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988); *Koker v. Aurora Loan Servicing, LLC*, 915 F. Supp. 2d 51, 59 (D.D.C. 2013). We affirm the ALJ’s dismissal of Count XIV.

d. *Waiver, Liquidated Damages, and Future Lease Rate Claims*

Maher also takes issue with the Port Authority’s alleged practice of requiring waiver, liquidated damages, and future lease rate provisions in marine terminal leases, lease extensions, and lease

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 48

amendments. Compl. ¶ IV. U. Maher alleges that the Port Authority “unreasonably require[s] tenants to provide general releases and/or waivers of claims, including to release PANYNJ from potential violations of the Shipping Act.” *Id.* Maher also alleges that the Port Authority “require[s] tenants to agree to liquidated damages provisions that are unreasonable, and which are designed to trigger if Shipping Act claims are brought against PANYNJ.” *Id.* Maher further alleges that the Port Authority “require[s] lease rate renewal and/or extension provisions that purport to set future lease rates in advance in a manner not reasonably related to the cost of the services provided.” *Id.*

i. Counts III, IV, V [46 U.S.C. § 41102(c)]

In Counts III, IV and V, Maher alleges that the Port Authority failed to establish, observe, and enforce reasonable practices with respect to its unreasonable practice of requiring waiver, liquidated damages, and future lease rate provisions in marine terminal operator leases, lease extensions, and lease amendments. Compl. ¶¶ V.D-F. The ALJ concluded that Maher did not state a claim with respect to these counts because Maher did not plead facts suggesting how these provisions were unreasonable under the Shipping Act. ALJ I.D. at 15, 16, 18. The ALJ also pointed out that with respect to the waiver and liquidated damages provisions, Maher did not allege that it is subject to the provisions, what would trigger them, their content, whether the provisions had been utilized, or which leases contained the provisions. *Id.* at 15, 16. The ALJ also stated that there was nothing to suggest that the Port Authority did not have a legitimate business reason for the waiver and liquidated damages provisions. *Id.* at 15, 16. As to the future lease rates provision, the ALJ stated that “Maher’s argument suggests 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.” *Id.* at 18. “This would,” the ALJ found, “create uncertainty for both ports and tenants.” ALJ I.D. at 18. The ALJ further found that there was “nothing to suggest that PANYNJ did

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 49

not have a legitimate business reason for setting future lease rates.” *Id.* at 18.

Maher argues that it adequately alleges that the Port Authority forces its tenants, as a precondition to doing business in the port, to waive the protections of the Shipping Act and to accept liquidated damages provisions that “trigger against any tenant that seeks Commission protection.” Maher Exc. at 42-43. Maher also argues that by focusing on what Maher failed to allege, the ALJ erroneously imposed the heightened pleading standards of Federal Rule of Civil Procedure 9(b). *Id.* at 21. Additionally, Maher asserts that it was not required to plead the “wholly unnecessary fact” that it was subject to the waiver and liquidated damages provisions. *Id.* at 23. According to Maher, this fact is not an element of an unreasonable practice claim, and “any person” can file a Shipping Act complaint. *Id.* at 26. As to the future lease rates claim, Maher contends that the ALJ invoked facts outside the complaint when it stated that prohibiting future release rates would create uncertainty for both ports and tenants. *Id.* at 28. Maher further contends that the ALJ should have inferred that the Port Authority’s leasing practices “exculpate[] itself from Shipping Act scrutiny and chill[] the statutory right to challenge unlawful PANYNJ practices . . . for its own business convenience.” *Id.* at 36. Maher argues that “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.” *Id.* Maher also argues that the ALJ should have inferred that Maher has been subjected to the challenged lease provisions. *Id.* at 36. The ALJ also should have inferred, Maher asserts, that the Port Authority’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 provision.” *Id.* at 38.

The Port Authority counters that the complaint provides no facts in support of these counts. PA Reply at 24-27. The Port Authority first points out that Maher does not allege that it is subject to the challenged lease provisions. *Id.* The Port Authority also

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 50

asserts that the complaint does not “set forth any facts plausibly indicating how it was or could have been injured by the presence of any such release or waiver provisions in the leases of other marine terminal operators.” *Id.* at 24. According to the Port Authority, alleging a legal conclusion such as “injury” is not the same as alleging facts plausibly suggesting that an injury could have occurred. Moreover, the Port Authority contends that Maher has failed to allege facts suggesting how the waiver, liquidated damages, and future lease rate provisions are unlawful. Such provisions could be reasonable, the Port Authority argues, in light of other concessions granted by a tenant to the Port Authority. The Port Authority also argues that “[l]iquidated damages provisions in marine terminal leases are not only not per se unreasonable, but have been held to be entirely reasonable.” *Id.* at 25-26. The Port Authority maintains that alleging “unreasonableness” without accompanying facts is insufficient and that there is nothing inherently unreasonable about a lease that sets future rates.” *Id.* at 26.

Maher has failed to state a facially plausible claim that the Port Authority’s alleged practice of including the waiver, liquidated damages, and future lease rate provisions in leases violates 46 U.S.C. § 41102(c). Taking the factual allegations as true, the Port Authority requires marine terminal leases, lease extensions, and lease amendments and modifications to contain general releases and waivers that release the Port Authority from potential violations of the Shipping Act. The Port Authority also requires such documents to contain liquidated damages provisions that are designed to trigger if Shipping Act claims are brought against the Port Authority. Further, the Port Authority requires leases to contain lease rate renewal and extension provisions that set future lease rates in advance.

These allegations do not contain sufficient facts to allow the Commission reasonably to infer that the Port Authority acted unlawfully. To plead a § 41102(c) claim, Maher must allege facts that allow a reasonable inference that the practice of including these provisions in these leases is excessive or not fit and appropriate to

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 51

the end in view. But Maher has done nothing more than allege that these provisions exist and that they are unreasonable. It is up to Maher to allege some facts to allow the Commission to infer that the lease provisions at issue are unreasonable. Although Maher does not have to plead with particularity required by Federal Rule of Civil Procedure 9(b), Maher must plead more than simply that waiver and liquidated damages provisions exist, both to give the Port Authority notice of which leases and provisions are at issue and to make reasonable the inference that the provisions violate the Shipping Act.

That the waiver and liquidated damages provisions allegedly implicate Shipping Act claims is not, standing alone, enough to nudge the allegations of unreasonableness from conceivable to plausible. Further, not all liquidated damages provisions are necessarily unlawful. *Compare Ceres*, 27 S.R.R. at 1272 (finding that a vessel call guarantee did not justify different lease rates in part because it was not supported by “a shortfall penalty or liquidated damages provision”), *with W. Gulf Maritime Ass’n v. City of Galveston*, 19 S.R.R. 779, 784-85 (FMC 1979) (finding that attorney fee provisions in a tariff were unreasonable). Nor is the allegation that future lease rates are set “in a manner not reasonably related to the cost of the services provided” sufficient; unlike the allegations regarding change-of-control policy, this allegation recites the elements of a cause of action without including factual allegations allowing an inference in Maher’s favor. We affirm the ALJ’s dismissal of Counts III, IV, and V.²¹

²¹ Given this conclusion, we need not address the Port Authority’s argument that Maher lacks standing to challenge the Port Authority’s leasing practices because its lease does not contain the challenged waiver, liquidated damages, and future lease rate provisions. We note, however, that Maher does not allege that its lease contains the challenged provisions, and we agree with the Port Authority that the complaint lacks factual allegations that would allow the Commission reasonably to infer that Maher was injured by unlawful provisions found in its competitor’s leases.

e. *APM Deferral Claims*

Maher alleges in its complaint that “on July 24, 2008, PANYNJ unreasonably granted to APM the undue preference, effective as of April 1, 2009, which also unduly prejudices Maher, consisting of the deferral until 2017 of APM’s leasehold capital expenditure obligations valued at approximately \$50 million dollars that should have been completed by APM, but which were not completed as required.” Compl. ¶ IV.X. Maher further alleges that “[d]espite Maher’s request for parity, PANYNJ unreasonably refused to deal or negotiate with Maher with respect to the deferral of Maher’s leasehold capital expenditure obligations or other financial obligations like the foregoing deferral granted to APM or provide other relief.” *Id.* ¶ IV.BB.²²

i. Count VII [46 U.S.C. § 41102(c)]

In Count VII, Maher alleges that the Port Authority failed to establish, observe, and enforce reasonable practices relating to the Port Authority’s “granting a deferral of marine terminal operator leasehold obligations, including but not limited to capital expenditures, and agreeing to provid[e] financing allotted for mandatory projects for terminal capacity expansion projects.” Compl. ¶ V.H. This count appears to encompass two types of allegedly unlawful conduct – deferring APM’s capital expenditures and allowing APM to use Port Authority financing for non-mandatory projects. The ALJ did not differentiate between the

²² Although the complaint does not make this explicit, Maher’s deferral allegations appear to be based on the settlement between APM and the Port Authority in FMC Docket No. 07-01. As part of the settlement, APM and the Port Authority amended APM’s lease on July 24, 2008, to defer the deadline for APM to complete its remaining Class A work to, at the latest, December 31, 2017. This Class A work appears to be the same as the “leasehold capital expenditures” alleged in the present complaint. As noted above, the ALJ in FMC Docket No. 07-01 found that the Port Authority’s deferral of APM’s Class A work did not justify disapproval of the settlement. *APM Terminals N. Am., Inc. v. The Port Auth. of N.Y. & N.J.*, 31 S.R.R. 455, 478 (ALJ 2008).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 53

conduct and dismissed Count VII for failure to state a claim. The ALJ found that Maher did not plead facts suggesting how deferral of APM's obligations was unreasonable. ALJ I.D. at 21. As an example, the ALJ noted that "the complaint does not allege facts regarding which capital expenditures or projects it objects to and who received deferrals of marine terminal operator leasehold obligations other than APM." *Id.* According to the ALJ, "[t]here is nothing to suggest that PANYNJ did not have a legitimate business reason for deferring leasehold obligations." *Id.*

Maher argues that it adequately alleged that the deferral was based on APM's status as an affiliate of an ocean carrier. Maher Exc. at 44. Maher also argues that the Commission should infer that the Port Authority had a practice of treating Maher differently "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." *Id.* at 34. The Port Authority responds that "Count VII is defective for its complete failure to allege anything to support its legal conclusion of unreasonableness." PA Reply at 28. According to the Port Authority, an agreement permitting APM to defer mandatory construction projects could be reasonable depending on the circumstances, "such as where it is part of a larger agreement releasing claims, or agreeing to certain lease changes." *Id.* at 29. The Port Authority contends that "a bald accusation that such a deferral is 'unreasonable' unaccompanied by facts suggesting why that might be so, fails to allege an 'unreasonable' practice claim under applicable pleading requirements." *Id.* The Port Authority also points out that Maher did not allege that it sought a deferral of its own construction obligations.

Maher has failed to state a facially plausible claim that the Port Authority's deferral of APM's capital expenditure obligation constitutes a violation of § 41102(c). Presumably, Maher is not alleging that it was unreasonable for the Port Authority to defer APM's obligations, but rather that it was unreasonable for the Port Authority to deny Maher a comparable deferral. But the complaint

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 54

does not allege facts that plausibly suggest that the APM and Maher were in similar circumstances. The Commission does not weigh competing inferences on a motion to dismiss for failure to state a claim, but without any allegations suggesting that APM and Maher were similarly situated, there is no reason for the Commission to infer that the Port Authority's decision to grant a deferral to APM but not Maher was unreasonable. Stripped of legal conclusions, Maher alleges that the Port Authority deferred \$50 million of APM's capital expenditure obligations until 2017, but Maher completed its capital expenditure obligations without a deferral. Alleging different treatment alone does not state a facially plausible § 41102(c) claim, and there are no factual allegations that would allow the Commission to infer that the Port acted unreasonably. Although Maher now claims that Count VII is based on APM's status as a carrier affiliate, the ocean-carrier affiliation allegations in the complaint refer to the PNCT claims. Compl. ¶¶ IV.I-T, V.C, O. The Commission construes complaints liberally in the light most favorable to the complainant but it need not rewrite a complaint. The factual allegations regarding the deferral of APM's obligations are simply too sparse for the Commission to infer any wrongdoing. We affirm the ALJ's dismissal of Count VII with respect to the deferral allegations.

ii. Count IX [46 U.S.C. § 41106(2)]

Maher alleges in Count IX that the Port Authority granted and continues to grant APM unduly and unreasonably preferential treatment that prejudices Maher. Compl. ¶ V.J. This treatment "includ[es] but [is] not limited to, PANYNJ granting APM a deferral until 2017 of required leasehold capital expenditures, while PANYNJ prejudices Maher by requiring Maher to fulfil leasehold capital expenditure obligations and refusing to provide Maher deferral of its obligations or other relief." *Id.* The ALJ found that Maher had not stated a claim. According to the ALJ, Maher did not plead facts suggesting how deferring APM's leasehold construction obligations is undue or unreasonable. ALJ I.D. at 25. The ALJ reasoned that there was nothing to suggest that the Port Authority

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 55

did not have a legitimate business reason for its decision to defer APM's capital expenditure obligations. *Id.* The ALJ also noted that "[i]dentifying a difference, alone, is not sufficient to plead a Shipping Act violation." *Id.*

Maier argues that it was not required to plead the "wholly unnecessary fact" that the Port Authority's "deferral of \$50 million of APM's capital expenditure obligation was unreasonable." Maier Exc. at 23. According to Maier, this fact is not an element of a § 41106(2) claim. Maier argues that the Port Authority provided unreasonable preferences to APM and not Maier because the former is an ocean-carrier-affiliated marine terminal operator. *Id.* at 25. The Port Authority counters that "[t]his is an unreasonable preference claim, which to be cognizable requires, at a minimum, that at the outset there be a showing of preference." PA Reply at 31. The Port Authority argues that Maier's failure to allege that it even asked for a similar deferral makes "any notion of preference entirely implausible on its face." *Id.* at 31. Additionally, the Port Authority asserts that even if Maier were deemed to have adequately alleged a preference, "its vague pleading is insufficient to support a plausible claim that any such preference was 'unreasonable.'" *Id.* at 31.

Maier has failed to state a facially plausible claim that the Port Authority violated § 41106(2) with respect to the deferral of APM's capital expenditure obligations. Maier alleged that the Port Authority deferred the deadline for APM to complete its capital expenditure obligations but did not defer Maier's deadlines. From this, the Commission could reasonably infer that APM received a preference and that Maier suffered a prejudice. But, for the same reasons as above, Maier has not alleged facts sufficient to allow the Commission to infer that the disparate treatment was unreasonable. Allying a difference alone is not enough for a claim to proceed and trigger the discovery process. A complainant must plead some facts that allow the Commission to infer that the Port Authority acted unreasonably. Maier argues that APM's status as an ocean carrier is a factual basis for this inference, but this reasoning and factual

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 56

allegations supporting it are not found in the complaint. We affirm the ALJ's dismissal of Count IX.

iii. Count XI [46 U.S.C. § 41106(3)]

In Count XI, Maher alleges that the Port Authority unreasonably refused to deal or negotiate “with respect to the deferral of Maher’s leasehold capital expenditure obligations or other financial obligations like the foregoing deferral granted to APM.” Compl. ¶ V.L. The ALJ found that Maher failed to state a claim with respect to this count because there were insufficient facts to suggest that the Port had an obligation to renegotiate its thirty-year lease with Maher based on agreements it made with other port tenants.” ALJ I.D. at 29. According to the ALJ, “[a] refusal to deal allegation requires more than that a request is denied” because “[o]therwise, ports would constantly be renegotiating every lease agreement and there would be no certainty provided to any parties to the lease.” *Id.* The ALJ also reasoned that there was nothing to suggest that the Port Authority did not have a legitimate business reason for its decision. *Id.*

Maher argues that it alleges that it “requested parity with ocean-carrier-affiliated marine terminal operator APM” and that the Port Authority “unreasonably refused such requests for parity.” Maher Exc. at 48. Maher asserts that the refusal was unreasonable based on “all of the factual allegations of the” complaint,” i.e., that the refusal was unreasonable because it was based on status, overcharges in excess of the costs of the service or benefits received, and lack of a valid transportation purpose. *Id.* at 48. According to Maher, the ALJ’s statement about ports being required constantly to renegotiate every lease agreement and the lack of certainty involved invokes facts outside the allegations in the complaint. *Id.* at 29. Maher also argues that these statements are “striking manifestations of hyperbole in the I.D. invoked to protect PANYNJ,” which “highlight the remarkable lengths to which the I.D. strained to import purported facts and inferences from outside the Complaint to dismiss it.” *Id.* at 35.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 57

The Port Authority contends that because Maher does not allege that it requested a deferral of mandatory construction obligations, “there is nothing that the Port Authority failed to respond to in this regard that could be seen rise to the level of a refusal to deal, much less an unreasonable one.” PA Reply at 33. The Port Authority argues that although “Maher makes a vague and broad reference to having requested ‘parity,’” it fails to allege what parity means in this context and does not allege that it sought a “comparable deferral of its construction obligations, something it could not have alleged in good faith.” *Id.* at 33 n.15. The Port Authority also asserts that even if Maher had alleged that it requested a deferral, this would not state a refusal to deal claim because Maher did not allege facts suggesting that any refusal to deal was unreasonable. *Id.* at 33-34.

Maher has failed to state a facially plausible claim that by declining to defer Maher’s leasehold capital expenditure obligations, the Port Authority violated § 41106(3). Maher alleges that there was a refusal to deal in the form of a request for parity that the Port Authority rejected. Compl. ¶ IV.BB. Although Maher does not explain what “parity” means, it is reasonable for the Commission to infer that Maher is alleging that it requested a deferral of its capital expenditure obligations. Compl. ¶ V.J.²³ But Maher has not, for the same reasons discussed above, alleged facts that would allow the Commission reasonably to infer that the Port’s refusal to defer Maher’s obligations was unreasonable. We affirm the ALJ’s dismissal of Count XI.

²³ The Port Authority points out that the ALJ in FMC Docket No. 07-01 found that “Maher did not contact PANYNJ with a request to negotiate a deferral of the completion date.” 31 S.R.R. at 477. Whether in light of this finding Maher can continue to assert in good faith that it requested parity regarding the APM deferral, is not, however, a pleading matter but rather a matter of possible disciplinary action under 46 C.F.R. § 502.6(a) and, potentially, attorneys’ fees—issues that are not before the Commission.

f. *APM Financing Claims*

Maher further alleges that the Port Authority “approved APM’s use of PANYNJ construction financing, in amounts equal to or exceeding the costs of the deferred mandatory work, for other projects, including but not limited to, a large expansion of APM’s container handling capacity.” *Id.* ¶ IV.Y.

i. Count VII [46 U.S.C. § 41102(c)]

In Count VII, Maher alleges that by “agreeing to provid[e] financing allotted for mandatory projects for terminal capacity expansion projects,” the Port Authority failed to establish, observe, and enforce reasonable regulations in violation of § 41102(c). Compl. ¶ V.H. The ALJ dismissed this claim because Maher did not plead facts suggesting that this conduct was unreasonable and did not allege which projects were at issue. The ALJ also found that the complaint did not suggest that the Port did not have a legitimate business reason for its conduct. ALJ I.D. at 21.

Maher asserts that it adequately alleges that the Port Authority allowed APM to use construction financing designated for mandatory projects for other projects preferred by APM, while failing to provide Maher “comparable preferences in an even-handed manner.” Maher Exc. at 33, 44. According to Maher, the Commission should infer that the Port’s conduct unreasonably favored APM because it is an ocean-carrier-affiliated terminal and Maher is not. Maher Exc. at 34-35.

The Port Authority argues that “merely alleging that the Port Authority permitted APM to use Port Authority construction funds for non-mandatory projects, unaccompanied by any allegations of fact tending to show that such permission was unreasonable, is likewise deficient.” PA Reply at 29. The Port Authority asserts that the complaint does not suggest that such permission violated any lease or that use of construction funds for non-mandatory projects is unusual. The Port Authority further points out that in FMC Docket

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 59

No. 08-03, the Commission noted that Maher was permitted to use its financing for optional Class C work. *Id.*

Maher has failed to state a facially plausible claim that the Port Authority violated § 41102(c) by allowing APM to use its construction financing for non-mandatory projects. In addition to alleging few facts about the APM's or Maher's construction financing or the projects at issue, Maher has not alleged facts sufficient for the Commission to infer that the Port Authority acted unreasonably. At most, the allegations show that the Port allowed APM to use its existing financing for a purpose different than originally intended, and the Port did not give Maher *additional* financing. There are no factual allegations to plausibly suggest that the Port Authority's conduct with respect to APM was unreasonable. Nor are there factual allegations plausibly showing that the Port's decisions not to give Maher additional financing constitutes a failure to establish, observe, or enforce a reasonable practice. Finally, the Port Authority's treatment of APM relative to Maher does not plausibly suggest a violation of the Shipping Act. The allegation that the Port Authority allowed APM to do X, but did not let Maher do Y, does not plausibly suggest any unlawful conduct. Maher's argument that the Commission may infer unreasonable conduct because APM is affiliated with an ocean carrier and Maher is not is not supported by the allegations of the complaint. Maher does not allege any facts to suggest that Maher was treated worse than APM because of ocean-carrier status. We affirm the ALJ's dismissal of Count VII with respect to the APM financing claims.

ii. Count X [46 U.S.C. § 41106(2)]

In Count X, Maher alleges that the Port Authority granted APM an unreasonable preference, and imposed on Maher an unreasonable prejudice, by "approving APM's use of PANYNJ construction financing allocated for mandatory projects for other projects, including but not limited to an expansion of APM's container handling capacity while not providing additional PANYNJ financing for other Maher projects, including Maher

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 60

capacity expansion.” Compl. ¶ V.K. The ALJ found that “Maher does not sufficiently explain how PANYNJ’s approval of APM’s use of construction financing is undue or unreasonable.” ALJ I.D. at 26. The ALJ further found that there were not sufficient facts to suggest that the Port Authority had “an obligation to renegotiate its thirty-year lease with Maher based on agreements it made with other port tenants” and “[t]here is nothing to suggest that PANYNJ did not have a legitimate business reason for this decision.” *Id.* at 26.

Maher argues that it adequately alleged that the Port Authority failed to provide Maher similar construction-financing preferences in an even-handed manner. The Port Authority counters that the Count X allegations are insufficient for the same reasons as Maher’s § 41102(c) claim. PA Reply at 32. The Port Authority also argues that this count fails to state a claim because Maher did not allege “that it sought and was denied a similar privilege,” which the Port Authority believes is necessary to plausibly allege a preference. *Id.* at 32. The Port Authority implies that Maher cannot allege that it sought and was denied the ability to use Port Authority financing for non-mandatory projects because Maher’s lease expressly allows Maher to use Port Authority financing for non-mandatory Class C work. *Id.* at 32. Instead, the Port Authority points out, Maher alleges that that APM was permitted to use existing financing for non-mandatory projects and Maher was not provided “*additional* construction financing.” *Id.* at 32 n.14 (emphasis added).

Maher has failed to state a facially plausible claim that the Port Authority violated § 41106(2) by allowing APM to use its construction financing for non-mandatory projects and by not providing Maher additional financing. First, Maher has not alleged facts giving rise to an inference that the Port Authority granted APM a preference or imposed a prejudice on Maher. That the Port allowed APM to use its existing financing for new purposes does not plausibly imply that the Port Authority acted unreasonably by not giving Maher additional money to fund terminal expansion. Moreover, there are no factual allegations about the relative sizes of the terminals that would allow an inference of preferential or

prejudicial conduct. Further, for the reasons noted above, Maher has not alleged facts that show that any preferential or prejudicial conduct is unreasonable. Maher's only arguments are based on APM's ocean-carrier affiliation, and these allegations are not found the complaint. We affirm the ALJ's dismissal of Count X.

D. Collateral Estoppel

In addition to arguing that Maher fails to state a claim, the Port Authority argues in its motion to dismiss that Counts I and VIII are barred by collateral estoppel.²⁴ PA Mot. Dismiss at 8-13. According to the Port Authority, Maher previously litigated these change-of-control claims when it objected to the APM/Port Authority settlement in FMC Docket No. 07-01. Because the ALJ and Commission expressly approved the settlement over Maher's objections, the Port Authority argues, Maher is precluded from relitigating them now as Counts I and VIII. PA Mot. Dismiss at 9-10. The ALJ did not reach the collateral estoppel issue, and the parties did not address it in the exceptions briefing. ALJ I.D. at 33. Reviewing this issue *de novo*, we find that Counts I and VIII are not barred by collateral estoppel.

Under the doctrine of collateral estoppel, also known as issue preclusion, "if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Hecht v. Puerto Rico Mar. Shipping Auth.*, 26 S.R.R. 1327, 1332 (ALJ 1994). Although different courts define the elements of issue preclusion differently, the Eighth Circuit provides a useful framework:

[I]ssue preclusion has five elements: (1) the party sought to be precluded in the second suit must have

²⁴ The Port Authority also argues that collateral estoppel bars Counts VII, IX, XI, and XIII. We need not address those counts, however, because we are dismissing them for failure to state a claim.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 62

been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.

Ginters v. Frazier, 614 F.3d 822, 826 (8th Cir. 2010). Regardless of how the elements are delineated, collateral estoppel only bars relitigation of issues that were actually decided in a previous action. *See Martin v. Dep't of Justice*, 488 F.3d 445, 454 (D.C. Cir. 2007). The party asserting issue preclusion bears the burden of establishing its elements. *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008).

There is no dispute that Maher was a party to FMC Docket No. 07-01. And Maher's change-of-control claims here overlap substantially with Maher's objections to the APM/Port Authority settlement, which Maher actually litigated in FMC Docket 07-01. As part of that settlement, the Port Authority consented to the transfer of Maersk, Inc.'s interest in APM to any affiliate of Maersk, subject to certain conditions. Joint Mot. for Approval of Settlement Agreement & Dismissal with Prejudice, FMC Docket No. 07-01 (Aug. 14, 2008). Maher objected that the settlement violated the Shipping Act because the Port Authority "requires other terminal operators to pay tribute to obtain [the Port Authority's] consent to a change in ownership interest, but not APM." Maher Reply in Opposition, at 12, 15-18, FMC Docket No. 07-01 (Aug. 29, 2008). Maher also argued, similar to its allegations in the present case, that the Port Authority obtained commitments of \$237 million from PNCT, NYCT, and Maher for consent to changes of control. Compare *Id.* at 15-16 with Compl. ¶ IV.C.

But even assuming that Maher's change-of-control objections in FMC Docket No. 07-01 are identical to its change-of-

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 63

control claims here, the Port Authority has not established that issue preclusion applies. First, the issues to be precluded—whether the Port Authority’s change-of-control policy and application thereof violate the Shipping Act—were not determined by a final judgment. Neither the ALJ nor the Commission decided the merits of Maher’s argument that the change-of-control provision in the settlement agreement violated the Shipping Act. Rather, the ALJ found that “Maher’s claims regarding the ‘change of ownership’ provision in the Settlement Agreement *do not preclude approval of the Agreement.*” *APM N. Am.*, 31 S.R.R. at 479 (emphasis added); *see also id.* at 481-82 (“Maher’s contentions do not lead to a conclusion that the proposed Settlement Agreement should be disapproved.”). Although the ALJ stated that the “Agreement d[id] not create any new violations of the Shipping Act,” it found that the Port Authority and APM “have met their burden to demonstrate that the Settlement Agreement does not *appear* to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable.” *Id.* at 481 (emphasis added). The Commission found that the ALJ applied the correct standard of review and did not decide the change of control claims. *APM N. Am.*, 31 S.R.R. at 626. Moreover, the Port Authority itself emphasized to the Commission that “the Presiding Officer’s task on a motion to approve a settlement is to satisfy himself that the settlement does not appear to violate the any law” and that “any such determination is obviously not a final adjudication of the merits of any legal issue or claim.” Port Reply to Maher Exc. at 12 n.10, FMC Docket No. 07-01 (Dec. 9, 2008).

To be sure, the ALJ’s Initial Decision approving the settlement was a final judgment, as was the Commission’s order denying Maher’s exceptions thereto. *See, e.g., Reyn’s Pasta Bella LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006). But unlike in *Reyn’s Pasta Bella*, where the court approving the settlement expressly determined the issue to be precluded, *id.* at 745, here the issues to be precluded were not “conclusively determined” or actually decided by a final judgment. *See N.Y. Shipping Ass’n v. Fed. Mar. Comm’n*, 854 F.2d 1338, 1360 (D.C. Cir. 1988) (finding

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 64

no issue preclusion where prior decision expressly did not address merits of issue); *Lans v. Adduci Mastriani & Schaumberg, LLP*, 786 F.Supp. 2d 240, 303 (D.D.C. 2011) (noting that the issue for which preclusion is sought must have been “actually decided” by a final judgment).

Additionally, it was not necessary for the ALJ to determine whether the change-of-control portion of the settlement agreement actually violated the Shipping Act in order to approve the settlement. Although the ALJ and Commission necessarily had to address Maher’s objections, under Commission caselaw, a settlement will be approved if it “does not appear to violate any law or policy.” *APM N. Am.*, 31 S.R.R. at 472 (quoting *Old Ben Coal Co. v. Sea-Land Servs., Inc.*, 18 S.R.R. 1085, 1092-93 9ALJ 1978)) (emphasis added). The Commission confirmed this standard of review in denying Maher’s exceptions. *APM N. Am.*, 31 S.R.R. at 626. Therefore, actually deciding whether the change-of-control aspect of the settlement violated the Shipping Act was not essential to the ALJ or Commission’s judgments. The court’s finding in *Reyn’s Pasta Bella* that the court in a prior action necessarily had to adjudicate objections to a class action settlement under Federal Rule of Civil Procedure 23 for issue preclusion purposes is not determinative here. *Reyn’s Pasta Bella*, 442 F.3d at 746. Under the Commission’s standard, the presiding officer has a “relatively limited role to perform in scrutinizing settlements and assesses whether settlements “appear to violate any law or policy.” *APM N. Am.*, 31 S.R.R. at 626.

Finally, the burden of proof regarding the settlement in FMC Docket No. 07-01 differs from Maher’s burden of proving its Shipping Act claims here. Compare *APM N. Am.*, 31 S.R.R. at 481 (finding that APM and the Port Authority met their burden of demonstrating that the settlement does not appear to violate any law or policy), with *APM N. Am.*, 31 S.R.R. at 626 (finding that Maher had the burden of showing that the ALJ erred in making a finding of fairness and reasonableness in the settlement), with Part III.B., *supra* (noting that the burden of proving Shipping Act violations is on

complainant). These differing burdens militate against applying collateral estoppel. *See Cobb v. Pozzi*, 363 F.3d 89, 113 (2d Cir. 2003) (“Courts and commentators alike have recognized that a shift or change in the burden of proof can render the issues in two different proceedings non-identical, and thereby make collateral estoppel inappropriate.”); *Whelan v. Abell*, 953 F.2d 663, 668 (D.C. Cir. 1992).²⁵

E. Statute of Limitations

The Port Authority further argues that Counts I and VIII are barred by the statute of limitations. PA Mot. Dismiss at 8, 18-21.²⁶ According to the Port Authority, although “Maher evasively avoids alleging any dates as to its change-of-control claims,” the Commission may take judicial notice of facts establishing that the change-of-control policy was adopted in 2007, RREEF acquired Maher and paid change-of-control consideration in 2007, and PNCT and NYCT agreed to pay negotiated change-of-control consideration in 2007. *Id.* at 19-20. The Port Authority also notes that it “acknowledged an internal restructuring” of APM in 2008. *Id.* at 20. The Port Authority contends that because Maher was aware of these facts by August 2008 when it made its change-of-control objections to the settlement in FMC Docket No. 07-01, its claims here—filed March 30, 2012—are barred by the Commission’s three-year statute of limitations. The ALJ did not address this

²⁵ This is not to say, however, that the APM-Port Authority settlement, the ALJ’s analysis of Maher’s objections, and the Commission’s presumption in favor of settlements are irrelevant to the merits of Maher’s change-of-control claims, and in particular, to whether the Port Authority’s conduct was reasonable.

²⁶ The Port Authority makes the same argument with respect to Counts VII, IX, X, XI, and XIII, but we need not address the timeliness of these claims because they are being dismissed on other grounds. The Port Authority also argues that Maher has not alleged ongoing or future violations such that it would be entitled to cease-and-desist relief. PA Motion Dismiss at 21. This argument is unpersuasive because Maher alleges continuing violations, Compl. ¶¶ V.B, I, nothing in the complaint suggests that the Port Authority has discontinued its change-of-control policy, and it would be premature to assess Maher’s entitlement to cease-and-desist relief before adjudicating the merits of its claims in this case.

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 66

argument in the Initial Decision, and the parties did not address it in the exceptions briefing. ALJ I.D. at 33. Reviewing this issue *de novo*, we deny the Port Authority's motion to dismiss with respect to the statute of limitations.

“The essential element of the statute of limitations defense for reparations claims under the Act is that the cause of action accrued more than three years prior to the filing of the complaint.” *Maher Terminals*, 32 S.R.R. at 1191; *see also* 46 U.S.C. § 41301(a); 46 C.F.R. § 502.62(a)(4)(iii). A claim accrues “when a complainant knew or should have known that it had a cause of action as opposed to a prima facie case.” *Maher*, 32 S.R.R. at 1193. A respondent bears the burden of proving that a claim is untimely. *Id.* at 1191.

Because the statute of limitations is an affirmative defense, *Id.*, it “need not be negated by the language of the complaint,” *United States ex rel. Landis v. Tailwind Sports Corp.*, 51 F. Supp. 3d 9, 38 (D.D.C. 2014); *Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 14 F. Supp. 2d 191, 209 (S.D.N.Y. 2014). A respondent may nonetheless raise a statute of limitations defense in a motion to dismiss “when the facts that give rise to the defense are clear from the face of the complaint.” *Smith-Haynie v. Dist. of Columbia*, 155 F.3d 575, 578 (D.C. Cir. 1998); *see also Streak Prods., Inc. v. UTI, United States, Inc.*, 32 S.R.R.1959, 1966 (ALJ 2013). Because statute of limitations defenses are often based on contested facts, dismissal is appropriate only if the complaint is conclusively time-barred on its face. *Rudder v. Williams*, 47 F. Supp. 3d 47, 50 (D.D.C. 2014) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). The standards of Rule 12(b)(6) apply to a motion to dismiss based on a statute of limitations. *In re Mirena IUD Prods. Liability Litig.*, 29 F. Supp. 3d 345, 350 (S.D.N.Y. 2014); *Rudder*, 47 F. Supp. 3d at 50.

The Port Authority has not met its burden of proving that Counts I and VIII are time-barred based on the face of the complaint and other facts properly considered by the Commission. First, the complaint itself does not contain any dates regarding Maher's

change-of-control claims. Second, the officially noticeable facts do not clearly show that these claims accrued more than three years before March 30, 2012. Although the facts cited by the Port Authority occurred outside the limitations period, it is unclear whether Counts I and VIII are limited to these facts. For instance, the complaint alleges that in some instances, the Port Authority consented to tenants' changes of control without requiring payment of cash or other economic consideration. Compl. ¶ IV. D. Neither the complaint nor the officially noticeable facts identify these tenants nor indicate when the Port Authority consented to changes of control. The Port Authority's focus on APM's change of control in 2008 improperly narrows the scope of Counts I and VIII without any basis for doing so in the complaint. In sum, the Port Authority has not established that dismissal of Counts I and VIII based on the statute of limitations is appropriate at this stage of the proceedings.

F. Leave to Amend

The ALJ dismissed Maher's entire complaint with prejudice, that is, without leave to amend. ALJ I.D. at 33. We find that the ALJ did not abuse her discretion in doing so with respect to Counts II, III, IV, V, VII, IX, X, XI, XIII, and XIV. The abuse of discretion standard requires only that the presiding officer base her ruling on a valid ground. *Nat'l Wrestling Coaches Assoc. v. Dep't of Education*, 366 F.3d 930 (D.C. Cir. 2004) (quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1095, 1099 (D.C. Cir. 1996)); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (stating that "it is an abuse of discretion to deny leave to amend unless there is sufficient reason"); see also *Dimuro v. Clinique Labs., LLC*, 572 Fed. Appx. 27, 33 (2d Cir. 2014) ("A district court only exceeds its discretion when its decision rests on an error of law, a clearly erroneous factual finding, or it cannot be located within the range of permissible decisions."). "[O]utright refusal to grant the leave [to amend] 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." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 68

Valid grounds for denying leave to amend include “undue delay, *bad faith* or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] *futility of amendment, etc.*” *Anchor Shipping Co. v. Alianca Navegacao E Logistica LTDA*, 29 S.R.R. 1047, 1060 (ALJ 2002) (quoting *Foman*, 371 U.S. at 182) (emphasis in original). “Additionally, leave to amend may be denied when a party does not request leave to amend or does not indicate the particular grounds on which amendment is sought. *W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 874, 883 n.11 (FMC 1993); *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004) (finding that “vague offer to add hundreds of pages and write a ‘massive complaint’ tells us nothing about how such added verbiage would yield a successfully stated FCA claim”). Courts not only consider whether a party has filed multiple complaints in the same case, they also consider whether a party has brought similar claims in cases based on related facts. *See Confederate Memorial Ass’n v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993) (noting that appellants effectively “had multiple bites at the apple already” because the claim was in effect “a restatement of their previous state court attempt”); *Dimuro*, 572 Fed. Appx. at 33 (noting that “much of the information necessary for a properly pled complaint is and has always been in the possession of the Plaintiffs” and that the district court correctly recognized “that this is the fourth complaint regarding these matters”).

Although an ALJ may in her discretion dismiss a motion without leave to amend, the Commission typically allows amendments liberally. *See, e.g., Anchor Shipping*, 29 S.R.R. at 1060; *Tak Consulting*, 28 S.R.R. at 589; cf. 46 C.F.R. §§ 502.62(a)(3)(v); 502.66(a) (allowing an ALJ to sua sponte require pleadings to amended for clarification). This approach is similar to that taken by federal courts, which usually allow leave to replead after granting a motion to dismiss. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991); *Birdette v. Saxon*

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 69

Mortgage, 502 Fed. Appx. 839, 841 (11th Cir. 2012) (“Generally, where a more carefully drafted complaint might state a claim, a plaintiff must be provided with at least one opportunity to amend before the court dismissed with prejudice.”). “The standard for dismissing a complaint with prejudice is high.” *Belizan v. Herson*, 434 F.3d 579, 583 (D.C. Cir. 2006) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)).

Here, after finding that Maher’s complaint failed to state any claims, the ALJ noted that “the parties have had a contentious relationship,” they engaged in extensive discovery in prior proceedings, Maher did not request leave to amend its pleadings, and it did “not even assert that the complaint meets the *Iqbal* and *Twombly* pleading standards.” ALJ I.D. at 33. The ALJ then concluded that it “appears that in this proceeding, amendment of the pleadings would be futile and therefore the complaint is dismissed with prejudice.” *Id.*

Maher argues that the ALJ abused her discretion by not granting Maher leave to amend its complaint and requests that “[i]f 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 Exc. at 50. In particular, Maher argues that the ALJ failed to provide reasons for denying it leave to amend. Maher Exc. at 3, 17. Maher contends that dismissal with prejudice is warranted only if allegation of other facts could not possibly cure the deficiency, and, here, “[t]here is no basis to conclude that Maher cannot allege additional facts to cure the asserted deficiency.” *Id.* at 3, 16-17. Rather, Maher asserts, the ALJ repeatedly identified facts that could have been pleaded but were not. *Id.* Additionally, Maher asserts that it should be granted leave to amend because “[c]ourts have freely allowed amendments to complaints brought before, but decided after *Iqbal/Twombly*.” *Id.* at 18.

The Port Authority asserts that the ALJ properly exercised discretion to deny Maher leave to amend given that Maher already

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 70

obtained “massive discovery” on similar claims and never requested leave to amend. PA Reply at 36. The Port Authority also argues “even now, in its fifty-page Exceptions, [Maher] nowhere sets forth what facts it would seek to allege by way of amendment to expand upon and cure its vague allegations so as to make them plausible under *Twombly* and *Iqbal*.” *Id.* at 38.

We hold that the ALJ did not abuse her discretion in denying Maher leave to amend with respect to the claims dismissed for failure to state a claim: Counts II, III, IV, V, VII, IX, X, XI, XIII, and XIV. Contrary to Maher’s assertion, the ALJ provided reasons for dismissing these claims without leave to amend: the ALJ stated that Maher failed to request leave to amend, Maher had already engaged in extensive discovery, and Maher did not assert that it could meet the *Iqbal/Twombly* standard. ALJ I.D. at 33. The ALJ also found that amendment of the complaint would be futile. *Id.* Moreover, Maher is not entitled the extra leeway given to complaints filed prior to *Twombly*. The Commission first adopted the *Iqbal/Twombly* standard in an order issued on August 31, 2011. *Mitsui*, 32 S.R.R. at 125, 136. Maher subsequently filed its complaint on March 30, 2012.

The ALJ’s conclusion that amendment would be futile, however, is unsupported. The ALJ did not explain why it would be futile for Maher to amend its complaint nor find “that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.” *Firestone*, 76 F.3d at 1209. There is no reason to believe that, if granted leave to amend, Maher could not cure some of the complaint’s deficiencies. Consequently, dismissal premised on futility alone would be unwarranted.

But the ALJ’s decision was also based on Maher’s failure to seek leave to amend its complaint and the prior history between the

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 71

parties, including prior discovery efforts.²⁷ As the ALJ indicated, Maher has not moved to amend its complaint. Maher also did not request leave to amend its complaint in its reply in opposition to the Port Authority's motion to dismiss. And even on appeal to the Commission, Maher does not suggest how an amended complaint could cure its failure to state plausible claims. Rather, Maher argues that "[i]f 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 Exc. at 50. This is the sort of "bare request" that permits dismissal with prejudice. *United States ex rel. Williams*, 380 F.3d at 1259; *Confederate Memorial Ass'n*, 995 F.2d at 299.

Maher's request is similar to one rejected by the Commission in *Western Overseas Trade & Development Corp.* There, the complainants argued that "if the ALJ believed that the complaints were deficient in any respect, he should have given Complainants the opportunity to amend them." 26 S.R.R. at 880. The respondent countered that the complainants "never hinted in briefs to the ALJ how they would amend their pleadings to cure the defects." *Id.* at 882. The Commission declined to permit amendment with respect to the issues on appeal, reasoning that "[c]omplainants had ample time to amend their complaints while the issues were before the ALJ" but "did nothing until they received an adverse ruling from the ALJ." 26 S.R.R. at 883 n.11. Similarly, Maher did not indicate that it desired to amend its complaint until after the ALJ dismissed its claims with prejudice.

Moreover, although Maher's request for leave to amend is its first such request in this case, many of the facts necessary to flesh

²⁷ Although the D.C. Circuit in *Belizan*, 434 F.3d at 579 (D.C. Cir. 2006) and *Firestone*, 76 F.3d at 1209, suggested that futility is the only proper basis for a dismissal with prejudice, the court relied on a case that cited, among other cases, *Foman*, which held that futility was one of several reasons for denying leave to amend. *Jarrell v. United States Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985).

MAHER TERMINALS V. PORT AUTHORITY OF NY & NJ 72

out Maher's allegations have presumably been in its possession for years. Maher implicitly acknowledges in its briefs that the APM deferral and financing claims and some aspects of its change-of-control claims are related to the settlement in FMC Docket No. 07-01 that the ALJ approved in 2008. But rather than reflect this in its complaint, Maher chose to plead those and other claims vaguely. Moreover, this is Maher's third set of claims against the Port Authority related to its lease. While this fact alone does not preclude amendment, in conjunction with Maher's failure to seek leave to amend, it militates in favor of dismissal with prejudice. The other *Foman* factors do not tip the scales either way. Consequently, we find that the ALJ did not abuse her discretion in dismissing claims with prejudice.

G. Discovery Motions

In addition to dismissing the complaint, the ALJ dismissed all other pending motions as moot. ALJ I.D. at 34. At the time, pending were: (1) the Port Authority's motion for a protective order; (2) the Port Authority's motion to compel; and (3) Maher's motion to compel. The parties did not address the dismissal of these motions. In light of the dismissal of most of Maher's claims, and given that many of the discovery requests at issue are overbroad on their face, we affirm the ALJ's dismissal of the pending discovery motions.

IV. CONCLUSION

Counts II, III, IV, V, VII, IX, X, XI, XIII, and XIV are dismissed without leave to amend. Counts I, VI, VIII, and XII are remanded for further proceedings. In light of these rulings, the parties' pending discovery motions are dismissed.

By the Commission.

Rachel E. Dickon
Assistant Secretary