

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 12-02**

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**MAHER TERMINALS, LLC**

**COMPLAINANT**

**v.**

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

**RESPONDENT**

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**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S REPLY  
TO MAHER TERMINALS, LLC'S EXCEPTIONS TO  
THE INITIAL DECISION OF JANUARY 30, 2015**

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Respondent the Port Authority of New York and New Jersey (“Port Authority”) hereby submits its Reply to Maher Terminals, LLC’s (“Maher”) Exceptions to the Initial Decision dated January 30, 2015 (“Exceptions”) dismissing Maher’s complaint in the Dkt. No. 12-02 proceeding (the “Complaint”) with prejudice.

## I. PRELIMINARY STATEMENT

In 2012, in the midst of two other actions then pending between the Port Authority and Maher (Dkt. Nos. 07-01 and 08-03), Maher filed the instant action, alleging fourteen vague and conclusory claims. Despite its obligation to do so, Maher failed to plead factual allegations with respect to any of those claims sufficient to rise to the level of plausibility, as required by well-established Commission precedent adopting the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Judge Wirth correctly held that Maher’s latest Complaint filed against the Port Authority in the Dkt. No. 12-02 proceeding failed to plead sufficient facts to support any plausible cause of action.<sup>1</sup>

In its opposition before Judge Wirth, Maher claimed—without any basis and contrary to the Commission’s precedents—that the Commission had not adopted *Twombly* and *Iqbal*. By now recognizing that its position was indefensible, Maher’s Exceptions argue that while the Commission *has* adopted *Twombly* and *Iqbal*, it nonetheless applies those cases in a manner materially different from the way they are applied in the federal courts. Specifically, Maher asserts that the Commission has continued to apply the very “no set of facts” pleading standard of *Conley v. Gibson* that the Commission itself quoted *Twombly* as having abrogated and retired.

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<sup>1</sup> The Initial Decision dated January 30, 2015 is cited herein as “ID.” Maher’s Exceptions dated February 23, 2014 are cited herein as “Exceptions.” The Port Authority’s Motion to Dismiss and Request for a Stay dated April 26, 2012 is cited herein as “PAMTD.” Maher’s Reply in Opposition to the Port Authority’s Motion dated May 11, 2012 is cited herein as “MTR-PAMTD.” Maher’s Dkt. No. 12-02 Complaint dated March 30, 2012 is cited herein as “Compl.”

*See Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (F.M.C. 2014). Correctly applying *Twombly* and *Iqbal*, Judge Wirth carefully reviewed Maher’s fourteen counts and dismissed each with prejudice for failure to state a claim.

That dismissal was clearly correct, and indeed particularly warranted, given the specific circumstances of this case. This case was not the typical one in which a complaint and a motion to dismiss are filed before a plaintiff has the opportunity to learn facts through the discovery process to which the plaintiff seeks to gain entry. To the contrary, and as noted above, this is the third proceeding before the Commission in which Maher has asserted claims against the Port Authority since 2008—all unsuccessful<sup>2</sup>—relating to the lease that it entered into in 2000, some twelve years before filing this case in 2012. Indeed, it is the fourth, counting the Tonnage Clause action Maher filed in federal court in New Jersey shortly after this one, in which its claims were dismissed on the Port Authority’s motion.<sup>3</sup>

In 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. Thus, of the fourteen claims in Maher’s current complaint, virtually all of them relate to provisions of Maher’s 2000 lease. Other claims concern the same subjects as those claims Maher intensively litigated in Dkt. Nos. 07-01 and 08-03. *See* pp. 19-22, 28-35 *infra* (regarding Counts VII, IX, X and XI relating to APM Terminals’ (“APM”) deferred construction obligations and Port

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<sup>2</sup> *See APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623 (F.M.C. 2009); *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 821 (F.M.C. 2014); *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 861 (A.L.J. 2015).

<sup>3</sup> *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Civ. No. 2:12-6090 (KM) (MAH), 2014 WL 3590142 (D.N.J. July 21, 2014), *appeal docketed* No. 14-3626 (3d Cir. Aug. 20, 2014).

Authority financing, and Counts I, VIII and XIII regarding the Port Authority’s change of control policy and practices).<sup>4</sup>

As Judge Wirth recognized, “[e]ven after extensive discovery in related proceedings, the complaint fail[ed] to provide sufficient information to allege facially plausible violations of the Shipping Act.” ID at 1. Accordingly, Maher’s abject failure to allege facts to show that its claims in this case were plausible is particularly telling and inexcusable. If it had the facts to support its claims, it was in a position, and obliged, to plead them. The notion that Judge Wirth erred by applying *Twombly* and *Iqbal* in accordance with the express language of those decisions and the interpretations of them by federal courts and the Commission itself—rather than in accordance with the now abrogated *Conley v. Gibson* standard—is baseless. Judge Wirth’s decision dismissing the Complaint under the circumstances of this case is unassailable.

Judge Wirth was also correct in dismissing Maher’s claims with prejudice. As she noted, despite having had the opportunity to conduct extensive discovery, Maher never stated that it could meet the *Twombly/Iqbal* pleading requirements, nor did it ever seek leave to amend. That it could not plead facts to support its claims even after having obtained massive discovery in related litigation shows that granting leave to amend would be futile. Indeed, even to this day, Maher’s fifty-page Exceptions brief underscores that futility in failing to proffer what facts it could allege in good faith to show that its claims in this case would be plausible as a matter of law if given the opportunity to amend at this belated juncture.

For these reasons, and as more fully explained herein, Maher’s Objections should be rejected and Judge Wirth’s Initial Decision should be affirmed in all respects.

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<sup>4</sup> As discussed below, of the remaining claims, three counts complain about Port Authority practices to which Maher itself and its lease were not even subject. See pp. 24-27 *infra* (regarding claims III, IV and V).

## II. FACTUAL BACKGROUND

Maier initiated this action against the Port Authority in 2012 by filing the Complaint asserting fourteen claims. In support of its claims, Maier's Complaint set forth the allegations described in this section concerning the Port Authority's dealings with marine terminal operators located in the New York/New Jersey Harbor. The facts as set forth herein are drawn from the Complaint—as supplemented by reference to Maier's 2000 lease with the Port Authority<sup>5</sup>—and are assumed to be true solely for purposes of review of the Order granting the Port Authority's Motion to Dismiss. Since the Order was largely based on the vagueness of Maier's wholly conclusory Complaint, we also point out some examples of what is not alleged.

### A. **The Port Authority's Change Of Control Practices (Counts I, VIII, XIII)**

Maier alleges that, under the Port Authority's change of control policy, the Port Authority conducts “appropriate due diligence” and then requires “entities . . . assuming ownership or control interests of [a] lease or tenant [to] pay to the Port Authority such economic consideration as the Executive Director determines to be appropriate under the circumstances.”

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<sup>5</sup> The Commission may consider Maier's October 2000 lease with the Port Authority, EP-249, attached as Exhibit A to the accompanying Declaration of Kevin Meade dated March 17, 2015, and filed with the Commission on October 1, 2000, FMC Agreement No. 201131, as it is expressly referenced in Maier's Complaint. See *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, 33 S.R.R. 512, 522 (A.L.J. 2014) (a tribunal may consider the contents of a document that is integral to and relied upon in the complaint); see also *Santa Fe Discount Cruise Parking, Inc. v. Bd. of Trs. of the Galveston Wharves*, Dkt. No. 14-06, 2014 WL 7404584, at \*8-9 (A.L.J. Nov. 21, 2014) (same). To the extent that the Complaint's pleaded allegations conflict with the express terms of Maier's lease, the lease controls. See, e.g., *Bentley v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 414 F. App'x 28, 30 (9th Cir. 2011) (“[W]e need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice.”); *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004) (“Nor must we accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice.”); see also *Genesis Bio-Pharm., Inc. v. Chiron Corp.*, 27 F. App'x 94, 99-100 (3d Cir. 2002); *Global Link Logistics, Inc.*, 33 S.R.R. at 522 (where the complaint incorporates a document by reference, “[i]nsofar as the complaint relies on the terms of [the document], therefore, we need not accept its description of those terms, but may look to the [document] itself”).

Compl. ¶ IV(B). Maher alleges that, pursuant to this policy, the Port Authority has required “cash and commitments of other economic considerations” from Port Newark Container Terminal (“PNCT”), the New York Container Terminal, Inc. (“NYCT”), and Maher for its approval of certain changes of tenant ownership or control. *Id.* ¶ IV(C).

Maher asserts that the Port Authority’s change of control policy is “unreasonable” and alleges, without providing any supporting facts, that the Port Authority has applied it inconsistently. It alleges that this has unduly prejudiced Maher by “unjustly” overcharging it, *id.* ¶¶ IV(F)-(H), V(B), V(I), and also constitutes an unreasonable refusal to deal. *Id.* ¶ IV(CC).

Maher’s Complaint does not specify how much the payments were; who paid them or when; how the Port Authority’s policy or its application was unfair or unreasonable; how the Port Authority applied its policy inconsistently; when Maher was subjected to this policy of requiring a change of control consent fee; how, if at all, Maher could have been injured by any *other* terminal operators’ payments of change of control consent fees; or which terminal operators, if any, benefited unfairly from the alleged inconsistent application of the policy. *See, e.g.,* ID at 12-13, 23. Maher’s vagueness is perhaps understandable, inasmuch as it is public record that the only *specific* challenge Maher has ever made with respect to change of control practices was in conjunction with its failed challenge to the settlement in Docket No. 07-01, where the Presiding Officer expressly reviewed the record and observed that, in contrast to transfers of ownership of other marine terminal operators, APM had undergone *no* change of control. *See APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 455, 478-79 (A.L.J. 2008), *aff’d*, 31 S.R.R. 623 (F.M.C. 2009).

**B. The PNCT Terminal Expansion (Counts II, XIV)**

Maher alleges that at an unspecified time after Mediterranean Shipping Company (“MSC”) transferred its container business from Maher to PNCT in October 2009, the Port Authority “announced an agreement with PNCT and MSC to expand the PNCT terminal and provide other concessions to PNCT.” Compl. ¶¶ IV(L), IV(Q). Maher alleges without any specifics that this amounts to the Port Authority “providing unduly preferential treatment to ocean carriers and ocean-carrier affiliated marine terminals” and that the Port Authority did not provide Maher with comparable “expansion opportunities, rate reductions, lease extension, or other preferences[.]” *Id.* ¶¶ IV(I), IV(S)-(T), V(C). Maher asserts that the Port Authority’s actions and inactions with respect to its agreements with PNCT, MSC and other ocean carriers and carrier-affiliated marine terminals constitute agreements to “unreasonably discriminate in the provision of terminal services to common carriers.” *Id.* ¶ V(O).

Maher does not allege facts specifying how the Port Authority’s agreement to expand the PNCT terminal and provide other concessions amounts to an unreasonable preference. For example, the complaint does not allege that Maher requested the same opportunities and was turned down, or that the PNCT terminal as expanded or the lease terms as revised are more favorable than Maher’s own terminal and lease terms. *See ID* at 12.

**C. The Port Authority’s Leasing Practices (Counts III, IV, V)**

Maher alleges that in entering into leases and lease extensions, modifications and amendments, the Port Authority has a practice of requiring (1) general releases and waivers, (2) liquidated damages provisions, and (3) lease rate renewal and extension provisions purporting “to set future lease rates in advance in a manner not reasonably related to the cost of services

provided.” *See* Compl. ¶¶ IV(U), V(D)-(F). Maher claims that requiring tenants to agree to such lease provisions constitutes an “unreasonable leasing practice.” *See Id.* ¶¶ V(D)-(F).

Maher does not allege facts to show that its own lease contains any such provisions—and a review of its lease shows it does not; how Maher was or could be injured by the presence of any such provisions in *other* terminal operators’ leases; or how such provisions are “unreasonable” under the Shipping Act, either *per se* or in the particular circumstances. *See ID* at 15-16, 18.

**D. APM’s Capital Expenditure Obligations (Counts VII, IX, X, XI)**

Maher alleges that the Port Authority “unreasonably granted to APM” “unduly and unreasonably preferential treatment” in deferring its “capital expenditure obligations,” which unduly prejudiced Maher because it did not receive such a deferral. Compl. ¶ IV(X). Maher claims that the Port Authority “prejudices Maher by requiring Maher to fulfill leasehold capital expenditure obligations and refusing to provide Maher deferral of its obligations or other relief.” *Id.* ¶ V(J); *see id.* ¶¶ V(H), V(L). Maher further alleges that the Port Authority permitted APM to use construction financing provided by the Port Authority “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.” Compl. ¶ IV(Y). Maher claims that this constituted an unreasonable practice that provided APM with “unduly and unreasonably preferential treatment,” which “unduly prejudiced” Maher in violation of the Shipping Act. *See id.* ¶¶ V(H), V(J)-(K). Maher also asserts, without further elaboration, that the Port Authority “unreasonably refused to deal or negotiate” with respect to providing Maher the same concessions that APM received. Compl. ¶¶ IV(BB), V(XI).

Maher does not allege that it sought a deferral of its own construction obligations; it does not allege that APM's permitted use of the construction financing provided by the Port Authority was in any way inconsistent with APM's existing lease terms; and it alleges no facts to support its assertion that the alleged concessions to APM were "preferential." Maher's omission to assert that it had sought a deferral of its construction obligations is understandable and evidently deliberate, inasmuch as it had litigated this issue in connection with its challenge to the settlement in Dkt. No. 07-01, where the Presiding Officer reviewed the record and concluded that "Maher did not contact PANYNJ with a request to negotiate a deferral of [Maher's construction work] completion date." *APM Terminals*, 31 S.R.R. at 477.

**E. The Port Authority's Lease With Global (Counts VI, XII)**

Maher alleges that in June 2010 the Port Authority "entered into a lease agreement with Global . . . for the operation of a marine terminal facility." Compl. ¶ IV(Z). Maher alleges that it requested the opportunity from the Port Authority to negotiate for the letting of the Global terminal prior to the execution of the Global lease, *id.* ¶ IV(AA), but that the Port Authority refused to deal or negotiate with Maher and other existing terminal operators with respect to the letting of the Global terminal, *id.* ¶¶ IV(V)-(W).

Maher does not allege that other terminal operators even expressed an interest in leasing the terminal, and does 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. *See ID* at 19, 30.

**III. PROCEDURAL BACKGROUND**

**A. The Prior Litigations**

As the Commission is well aware, this is not the only litigation that has occurred between the Port Authority and Maher. In fact, Maher has now instigated four separate actions against

the Port Authority since 2008. The first two—the Dkt. Nos. 07-01 and 08-03 proceedings—took place before the Commission. In 2008 and 2009, Judge Guthridge and the Commission, respectively, approved a settlement agreement between the Port Authority and APM that resolved APM’s claims in the underlying Dkt. No. 07-01 proceeding, as to which Maher was a third-party defendant. Maher objected to the settlement, even though it provided for the dismissal of all claims against Maher. In nevertheless objecting to the settlement, Maher made some of the same types of allegations it now seeks to re-adjudicate—including allegations relating to the APM construction financing obligations and alleged change of control. *See* pp. 4-5, 7-8 *supra*; *APM Terminals*, 31 S.R.R. at 477-481, *aff’d*, 31 S.R.R. 623 (F.M.C. 2009).

In 2008, Maher filed a separate complaint, the Dkt. No. 08-03 action, against the Port Authority alleging that the terms of its 2000 lease—the *same lease that underlies Maher’s claims in the instant action*—were unduly prejudicial and unreasonable in violation of the Shipping Act. As in the instant proceeding, Maher also asserted claims alleging that the Port Authority’s conduct constituted unreasonable practices in violation of the Shipping Act and impermissible refusals to deal. During the course of the Dkt. No. 08-03 action, Maher sought, and the Port Authority produced, millions of pages of documents, responded to over 200 interrogatories, and produced for deposition over a dozen witnesses on a broad array of issues—including virtually every current and former Port Authority employee who played a meaningful role in the negotiations of the terms of the lease. After six years of litigation, Judge Wirth dismissed Maher’s claims in their entirety with prejudice and the Commission affirmed. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 349 (A.L.J. 2014), *aff’d*, 33 S.R.R. at 830.<sup>6</sup>

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<sup>6</sup> Maher’s petition for review of the Commission’s decision in Dkt. No. 08-03 is currently pending before the United States Court of Appeals for the D.C. Circuit.

In 2012, Maher filed yet another action against the Port Authority in the United States District Court for the District of New Jersey, attempting to plead claims arising from the 2000 lease it had signed twelve years earlier under a new collection of meritless legal theories. Thus, in the district court lawsuit, Maher challenged its lease payments under the Tonnage Clause of the United States Constitution and two federal statutes. On July 21, 2014, District Judge Kevin McNulty granted the Port Authority's motion to dismiss. *See Maher Terminals, LLC*, 2014 WL 3590142, at \*14. Maher's appeal of that decision is currently pending before the United States Court of Appeals for the Third Circuit.

**B. The Instant Proceeding (Dkt. No. 12-02)**

Maher filed the current action on March 30, 2012, while the Dkt. No. 08-03 action was ongoing. On April 26, 2012, the Port Authority filed a motion to dismiss Maher's Complaint in its entirety. The Port Authority argued, *inter alia*, citing *Twombly* and *Iqbal*, that the Complaint failed to state causes of action because Maher had failed to plead sufficient factual content to show that its claims were plausible or went beyond the mere conclusory recitation of the legal elements of the claims. The Port Authority asserted that many of Maher's claims suffered additional legal defects, including expiration of the statute of limitations, collateral estoppel, lack of standing, and lack of ripeness, which separately warranted dismissal of those claims.

On May 11, 2012, Maher filed its opposition to the Port Authority's motion, resting largely on the proposition that in Commission proceedings, *Twombly* and *Iqbal* and the federal cases applying them were "inapposite." *See* MTR-PAMTD at 6-12. Maher did not even attempt to argue that the Complaint satisfied the *Twombly/Iqbal* pleading requirements. *See generally id.*; *see also* ID at 33. Nor did Maher seek leave to amend the Complaint so as to indicate, and preserve the position, that it could and would comply in the event that the Presiding Officer

disagreed with Maher as to the applicability of *Twombly/Iqbal*. See MTR-PAMTD; see also ID at 33.

On January 30, 2015, Judge Wirth issued the Initial Decision, rejecting all of Maher's claims because Maher had failed to plead sufficient facts to allege plausible causes of action under *Twombly/Iqbal*. ID at 1. Because Maher's Complaint failed to state any claim, Judge Wirth did not reach the additional grounds for dismissal urged by the Port Authority, such as the expiration of the statute of limitations, collateral estoppel, lack of standing, and lack of ripeness. ID at 33. Judge Wirth denied leave to amend the Complaint as futile, explaining that Maher had obtained "extensive discovery" throughout its "contentious relationship" with the Port Authority, including "two prior Shipping Act proceedings"; and that it had "not requested an amendment to its pleadings and does not even assert that the Complaint meets the *Iqbal* and *Twombly* pleading standards." *Id.* As a result, Judge Wirth dismissed the Complaint with prejudice. *Id.* Maher filed its Exceptions on February 23, 2015.

#### IV. ARGUMENT

- A. JUDGE WIRTH APPLIED THE CORRECT LEGAL STANDARDS AS ADOPTED BY THE COMMISSION
  - 1. The *Twombly/Iqbal* Pleading Requirements, Together With The Federal Cases Applying Them, Have Been Adopted By The Commission For Shipping Act Proceedings

In Maher's briefing before the Presiding Officer in opposition to the Port Authority's motion to dismiss the Complaint, Maher took the patently insupportable position that the *Twombly/Iqbal* pleading requirements did not apply in actions before the Commission. See MTR-PAMTD at 2, 6 (arguing that "the Commission has declined to adopt" the "inapposite *Twombly* and *Iqbal* decisions"); *id.* at 7-10. Faced with the Commission's precedents demonstrating that this position is obviously unfounded, Maher now makes the equally

unsupportable argument that the Commission applies the *Twombly* and *Iqbal* decisions differently than in the federal courts. *See* Exceptions at 4-5, 7-12, 19-21. Thus, the core premise of Maher's Exceptions now is that Judge Wirth "[m]isapplied [t]he *Iqbal/Twombly* [s]tandard [a]s [a]ppplied [b]y [t]he Commission's Rules" to complaints pleading Shipping Act claims. *Id.* at 19.

Maher is apparently suggesting that even though the full Commission has cited *Twombly* and *Iqbal* with approval, and specifically quoted (1) *Twombly* and *Iqbal*'s core requirement that a complaint must be sufficiently specific so as to demonstrate a claim's plausibility, and (2) the Supreme Court's refusal to accept legal labels or conclusions as adequate factual allegations,<sup>7</sup> the Commission somehow did not actually adopt those very principles. *See* Exceptions at 4-5, 7-12, 19-21. In other words, although Maher has now abandoned its position that *Twombly* and *Iqbal* are not relevant at all in Commission proceedings, it attempts to accomplish the same thing by insupportably arguing that there are two completely different ways of "applying" *Twombly* and *Iqbal*: (1) "heightened pleading standards inferred by *some* federal courts," *id.* at 4 (emphasis in original), and (2) a "fair notice" pleading standard used by the Commission, *id.* But this transparent attempt to evade *Twombly* and *Iqbal* by creating a false dichotomy out of whole cloth is just as meritless as Maher's argument before Judge Wirth that *Twombly* and *Iqbal* were entirely "inapposite" in Commission proceedings. MTR-PAMTD at 6.

As Judge Wirth set forth in the Initial Decision, ID at 2-3, the Commission has unequivocally held on multiple occasions that, "[i]n evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rule of Civil Procedure 12(b)(6) and the federal caselaw interpreting it." *Cornell*, 33

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<sup>7</sup> *See, e.g., Cornell*, 33 S.R.R. at 620; *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 125, 136 (F.M.C. 2011).

S.R.R. at 620 (citing *Mitsui* 32 S.R.R. at 136). In *Cornell*, the Commission expressly applied—and quoted—the *Twombly/Iqbal* pleading requirements, explaining 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.’” *Cornell*, 33 S.R.R. at 620 (quoting *Twombly*, 550 U.S. at 570). The Commission also expressly noted that *Twombly* “retir[ed] the standard from *Conley v. Gibson*, 355 U.S. 41, 47 (1957).” *Id.*

*Cornell* applied not only *Twombly*’s requirement that a complaint’s “factual allegations” must include “‘enough to raise a right to relief above the speculative level’ and to ‘nudge . . . claims across the line from conceivable to plausible,’” it also endorsed *Iqbal*’s holdings that the “plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully,” and that where the complaint’s “‘plead[ed] facts . . . are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.’” 33 S.R.R. at 620 (quoting *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678). *Cornell* also expressly cautioned that “the Commission need not, however, accept any inferences drawn by Complainant that are unsupported by the facts pleaded in the complaint [or] . . . ‘accept legal conclusions cast in the form of factual allegations.’” 33 S.R.R. at 621 (citation omitted).

Maher is thus wrong in suggesting that *Cornell* is “silent” in any respect on *Twombly/Iqbal*, and that the Commission does not utilize the *Twombly/Iqbal* pleading requirements. See Exceptions at 4 (“Nor is there any basis to infer that the Commission jettisoned its rules and precedent *sub silentio* to adopt a heightened *Iqbal/Twombly* plausibility pleading standard in *Cornell v. Princess Cruise Lines Ltd., Carnival PLC, & Carnival Corp.*, 33

S.R.R. 614, 620 (F.M.C. 2014).”). Nowhere did the Commission suggest that these principles drawn from United States Supreme Court and other federal court cases apply in some different way or with less force in proceedings before the Commission.

Nor was *Cornell*'s invocation of the *Twombly/Iqbal* requirements for Commission proceedings at all novel. *See, e.g., Mitsui*, 32 S.R.R. at 136; *Global Link*, 33 S.R.R. at 521; *Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 40, 42 (A.L.J. 2011). Indeed, the Commission had expressly applied *Twombly* and *Iqbal* to Shipping Act claims before Maher filed its Complaint in this action. *Mitsui*, 32 S.R.R. at 136. The Commission explained in *Mitsui* that, because its “Rules do not address motions to dismiss for . . . failure to state a claim . . . Federal Rule[] . . . 12(b)(6) appl[ies] in this case.” *Id.* (citing 46 C.F.R. § 502.12); *see ID* at 2-3. The Commission then held, as it would later reaffirm in *Cornell*, that, “[t]o survive [a] motion[] 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.’” *Id.* (quoting *Twombly*, 550 U.S. at 570); *see ID* at 3. The Commission explained in *Mitsui* that under *Iqbal*, “[a] claim ‘has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Id.* (quoting *Iqbal*, 556 U.S. at 678). As *Mitsui* further held, “[t]he complaint must be sufficient to ‘give the defendant fair notice of what the claim is and the grounds upon which it rests.’” *Id.* (quoting *Twombly*, 550 U.S. at 555).<sup>8</sup>

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<sup>8</sup> While Maher disingenuously purports to rely upon *Mitsui* in its Exceptions, the decision that Maher quotes at length is *not* the Commission’s decision but instead the *Presiding Officer’s* decision below. *See* Exceptions at 4, 5, 8-9, 20, 29 (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1369 (A.L.J. 2010)). The Presiding Officer had held that the *Twombly/Iqbal* pleading standard did not apply because *Twombly/Iqbal* articulated the “pleading requirements of Federal Rule of Civil Procedure 8(a)(2),” which, according to the Presiding Officer, did not apply to Commission proceedings. *Mitsui*, 31 S.R.R. at 1383. This portion of

Maher is also plainly wrong in protesting that the Commission follows an approach to pleading under *Twombly/Iqbal* that is in some way “not identical” to the federal court approach. Exceptions at 8. *Cornell* and *Mitsui* unambiguously adopted the full federal court pleading standard as applicable to private party complaints filed with the Commission. Completely ignoring the Commission’s holdings in *Cornell* and *Mitsui*, Maher blindly insists that the Commission will not dismiss a complaint “unless it appears beyond any doubt that the complaint can prove no set of facts that would entitle the complainant to the relief requested.” Exceptions at 8. But this “no set of facts” formulation is precisely the now-moribund *Conley v. Gibson* pleading standard that, as *Cornell* explicitly observed, had been retired by *Twombly*. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by Twombly*, 550 U.S. at 561-62; *see also Cornell*, 33 S.R.R. at 620. Unsurprisingly, every single case that Maher cites invoking the now-defunct “no set of facts” standard pre-dates the Supreme Court’s 2007 decision in *Twombly* as well as its subsequent adoption by the Commission in *Mitsui* and *Cornell*. See Exceptions at 8, 10-11.<sup>9</sup>

Another equally faulty refrain of Maher’s Exceptions is that Judge Wirth purportedly misapplied *Twombly/Iqbal* as an artificially “heightened pleading standard[.]” not adopted by the

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the Presiding Officer’s opinion was not “upheld by the Commission,” as Maher incorrectly contends. Exceptions at 4. On the contrary, the Commission, on appeal, squarely cited and applied the *Twombly/Iqbal* pleading standard, as discussed above. See p. 14 *supra*.

<sup>9</sup> Citing *McKenna Trucking Co. v. A.P. Moller-Maersk Line*, 27 S.R.R. 1045, 1054-55 (A.L.J. 1997); *Int’l Freight Forwarders & Custom Brokers Ass’n of New Orleans v. Latin Am. Shippers Serv. Ass’n*, 27 S.R.R. 392, 394 (A.L.J. 1995); *NPR, Inc. v. Bd. of Comm’rs*, 28 S.R.R. 1011, 1014-18 (A.L.J. 1999); *Interconex, Inc. v. Fed. Mar. Comm’n*, 572 F.2d 27, 30 (2d Cir. 1978); *Kawasaki Kisen Kaisha Ltd. v. Intercontinental Exch., Inc.*, 28 S.R.R. 1411, 1412 (A.L.J. 2000); *Tak Consulting Eng’rs v. Bustani*, 28 S.R.R. 584, 589 (A.L.J. 1998); *Pac. Coast European Conference – Limitation on Membership*, 5 F.M.B. 39, 42 n.8 (F.M.B. 1956); *N.Y. State Elec. & Gas Corp. v. Sec’y of Labor*, 88 F.3d 98, 104 (2d Cir. 1996); *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 585 (D.C. Cir. 1985), *aff’d in part and rev’d in part*, 1985 WL 44773 (O.S.H.R.C. Dec. 16, 1985).

Commission or the Supreme Court, and that this “heightened” standard is followed only by “some federal courts.” Exceptions at 4 (emphasis in original); *see id.* at 5, 8, 11, 16 n.3, 19-22. Maher’s reference to a “heightened” pleading standard is inapt, and also overtly mischaracterizes the Initial Decision. Not once in her opinion did Judge Wirth invoke or purport to apply a “heightened” pleading standard, much less a standard akin to the Rule 9(b) standard that applies to allegations of fraud, as Maher contends. *See generally* ID; *compare* Exceptions at 21-22. Nor did Judge Wirth rely upon a “strict interpretation of *Iqbal/Twombly*” applied by only “the most unforgiving of Federal courts.” Exceptions at 19-20. On the contrary, Judge Wirth’s articulation of the pleading standard relies *entirely* upon language from *Twombly* and *Iqbal* themselves, as quoted and relied upon by the Commission in *Cornell* and *Mitsui*. ID at 2-4.<sup>10</sup>

Maher nonetheless argues that Judge Wirth applied a “heightened pleading standard[]” instead of the “fair notice standard.” Exceptions at 4. But the plausibility standard set forth by the Supreme Court that was accepted by the Commission in *Mitsui* and *Cornell*, and applied by Judge Wirth, *is* the fair notice standard. *Twombly* expressly reaffirmed that “fair notice” of a claim is what is required, but retired the *Conley* “no set of facts” construction as “an incomplete, negative gloss on [the] accepted pleading standard” that permitted “a wholly conclusory statement of claim . . . [to] survive a motion to dismiss.” 550 U.S. at 555, 561, 563. *Twombly* held that, instead, to provide “fair notice,” a complaint must provide “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. This standard, which “requires more than

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<sup>10</sup> The one passage from a lower federal court opinion cited by Judge Wirth in her discussion of the pleading standard consists of a series of quotations from *Twombly* and *Iqbal*, and does not otherwise elaborate or embellish upon those cases. *See* ID at 4 (quoting *Brown v. Cox*, 2011 U.S. Dist. Lexis 82743, \*4-\*5 (E.D. Va. 2011) (quoting at length from *Iqbal*, 556 U.S. at 678-79, and *Twombly*, 550 U.S. at 570)).

labels and conclusions” or “a formulaic recitation of the elements of a cause of action,” *id.* at 555, was the standard correctly applied by Judge Wirth. *ID* at 3.

Before we leave the subject of *Twombly/Iqbal*, it is worth pausing to reflect on the rationale of those decisions, why the *Conley v. Gibson* “no set of facts” standard was retired, and why it is particularly apt to apply the *Twombly/Iqbal* requirements to Maher’s 12-02 Complaint. As *Twombly* explained, the Supreme Court retired the *Conley* “no set of facts” construction of the fair notice pleading standard precisely because it did nothing to check the abusive pleading and discovery practices that had grown so rampant in modern corporate litigation. 550 U.S. at 559-62. Under *Conley*, “a wholly conclusory statement of claim would 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.” *Id.* at 561 (emphasis added). The survival of this kind of “sketchy complaint” into the discovery phase led to “the problem of discovery abuse,” because the complainant could take advantage of its vague pleadings to launch a broad and onerous fishing expedition that the court was in no position to restrain. *Id.* at 559-560 & n.6. With a vague pleading, the “judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details.” *Id.* (emphasis in original). “Discovery is used to find the details.” *Id.* Moreover, the officer “supervising discovery does not – cannot – know the expected productivity of a given request, because the nature of the requester’s claim and the contents of the files (or head) of the adverse party are unknown.” *Id.* The Supreme Court concluded that such potential abuse could not be avoided by “careful case management” over “a claim just shy of a plausible entitlement to relief.” *Id.* at 559. It reasoned that, “[p]robably, then, it is only by taking care to require allegations that reach the level of suggesting [the wrongdoing alleged] that we can hope 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 [the] claim.” *Id.* (citation omitted). The Supreme Court adopted the “plausib[ility] standard” because it “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence” of the claims pleaded. *Id.* at 556.

Maheer’s vague Complaint in this action presents exactly the sort of risk of expensive and disruptive discovery practices that the *Twombly/Iqbal* plausibility standard was designed to combat. Maheer’s history of serial, multi-claim actions against the Port Authority and aggressive discovery practices over ultimately meritless claims is well known to the Commission. *See pp. 2-3, 8-10 supra.* We note only that, in each of the prior cases, there were numerous discovery disputes. In the 08-03 and 07-01 actions, for example, there were some eighteen separate discovery motions, including seven motions to compel, four motions for protective orders, four motions to quash subpoenas, one motion to exclude expert testimony, and two motions for a stay of discovery. The rulings alone on those discovery motions ran to hundreds of pages. Similarly, in the New Jersey federal action, there were “numerous discovery disputes between the parties” following the filing of the Port Authority’s motion to dismiss, as District Judge Kevin McNulty observed in his opinion dismissing the action. *See Maheer Terminals*, 2014 WL 3590142, at \*5. There can be little doubt that if Maheer were permitted to proceed to full discovery on its sketchy complaint in this action, it would engage in the same aggressive approach to discovery that has characterized its every action to date. Indeed, even though discovery in this proceeding had barely started, there were already numerous discovery disputes pending as of the time of Judge Wirth’s dismissal.<sup>11</sup>

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<sup>11</sup> *See* Port Authority’s Mot. to Compel Discovery from Complainant, dated July 12, 2012 (Doc. No. 13) (thirty-eight pages of briefing, plus 174 pages of exhibits); Maheer’s Reply in Opp’n to Port Authority’s Mot. to Compel Discovery from Complainant, dated July 27, 2012 (Doc. No.

**B. JUDGE WIRTH CORRECTLY HELD THAT MAHER’S COMPLAINT FAILED TO PLEAD SUFFICIENT FACTUAL CONTENT TO ALLEGE ANY PLAUSIBLE CAUSE OF ACTION**

We now turn to each of the fourteen claims that Maher attempted to plead in its Complaint, and explain why Judge Wirth correctly held as to each that Maher failed to “meet the *Iqbal/Twombly* pleading standard.” ID at 5; *see id.* at 10-33.

**1. Count I: Unreasonable Practice Based On Change Of Control Policy**

Count I of the Complaint asserts that the Port Authority engaged in an unreasonable practice with respect to “the transfer and/or change of ownership and/or control interests.” Compl. ¶ V(B).

Unreasonableness is the primary element of an unreasonable practice claim. 46 U.S.C. § 41103(c). As Maher acknowledges, the complainant “has the burden of persuading the Commission that [a Port] practice . . . [i]s unreasonable.” Exceptions at 13 (quoting *Exclusive Tug Arrangements in Port Canaveral, Fl.*, 29 S.R.R. 1199, 1222 (F.M.C. 2003)). As Judge Wirth noted, the Commission’s “test for unreasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.” ID at 10 (quoting *Kawasaki Kisen Kaisha, Ltd. v. The Port Auth. of N.Y. & N.J.*, Dkt. No. 11-12, at 18 (Order Affirming Dismissal of Complaint) (F.M.C. Nov. 20, 2014)).

The Complaint alleges that the Port Authority has a policy of requiring entities “assuming ownership or control of [a] lease or tenant [to] pay [it] such economic consideration as the

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15) (sixty-three pages of briefing, plus 158 pages of exhibits); Maher’s Mot. to Compel Discovery from Resp’t Port Authority, dated Sept. 10, 2012 (Doc. No. 17) (eighty-two pages of briefing, plus 240 pages of exhibits); Port Authority’s Reply in Opp’n to Maher’s Mot. to Compel Discovery from Resp’t Port Authority, dated Sept. 25, 2012 (Doc. No. 18) (ninety-four pages of briefing, plus ninety-six pages of exhibits).

Executive Director determines to be appropriate under the circumstances.” Compl. ¶ IV(B). Maher alleges that the Port Authority has required Maher, PNCT, NYCT, and unidentified others, to pay fees for changes of control, while permitting other changes of control “without requiring” economic consideration. *Id.* ¶ IV(C)-(D).

Judge Wirth correctly held that these conclusory allegations failed to plead facts sufficient to support a legally plausible claim that the Port Authority’s change of control practices “are unfair or unreasonable.” ID at 12-13. As Judge Wirth noted, Maher failed to identify the amount of the change of control fee that either it or others paid. *Id.* at 12. Nor has it identified the dates on which the alleged transactions occurred, which would be relevant for statute of limitations purposes,<sup>12</sup> or which, if any, entities were not required to pay a change of control fee. *Id.* Maher’s pleading was deliberately vague in this regard because the only entity that Maher has *ever* identified as having been exempted from a change of control fee is APM, and Judge Guthridge had already rejected—in a decision affirmed by the Commission—the erroneous contention that APM underwent a change of control in the Dkt. No. 07-01 action based on the undisputed evidence adduced in that case. *See APM Terminals*, 31 S.R.R. at 478-79 (noting that the APM settlement provision permitting transfer of interest to “an ‘affiliate’ of Maersk” over which “Maersk would still have the ultimate control” was not a change of control, in contrast to the actual changes of control undergone by PNCT, NYCT, and Maher, each of

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<sup>12</sup> It is characteristic that Maher would conspicuously omit the date of its own change of control, as it is now a matter of public record that Maher was purchased in 2007 by Deutsche Bank, as the Commission noted in its decision in the Dkt. No. 08-03 proceeding. *See Maher Terminals*, 33 S.R.R. at 835 (“On March 18, 2007, Deutsche Bank, through RREEF Alternative Investments, purchased Maher for approximately \$1.8 billion.”). Of course, 2007 is outside the Shipping Act’s three-year statute of limitations for reparations in this action that was filed in 2012. 46 U.S.C. § 41301(a).

which “involved transfer of an ownership interest in a lease from a PANYNJ lessee to an unaffiliated entity”), *aff’d*, 31 S.R.R. 623 (F.M.C. 2009).

In fact, the sheer vagueness of Maher’s conclusory allegations required a ruling under *Twombly* and *Iqbal* that Maher’s unreasonable practice claim relating to change of control consent fees be dismissed. The absence of any allegation of fact as to who paid the fees and what the amounts were means that there was no factual basis supporting a plausible claim of unreasonableness. Simply alleging that the change of control policy was applied inconsistently was likewise insufficient to suggest the existence of any difference in treatment that was sufficiently meaningful to raise a question as to the reasonableness of any such difference. Judge Wirth correctly held that a “difference, alone, is not sufficient to plead a Shipping Act violation.” *Id.* at 12; *see also Maher Terminals*, 33 S.R.R. at 848 (Maher “has not shown that the differences are meaningful, *i.e.*, that APM-Maersk received a preference or that Maher suffered prejudice” and “[f]urther . . . that the differences are unreasonable”).

As the Commission noted in *Cornell*, the *Twombly/Iqbal* plausibility standard requires more than that a complaint plead facts that are “merely consistent with a defendant’s liability.” *Cornell*, 33 S.R.R. at 620. Rather, the allegations must include “‘enough to raise a right to relief above the speculative level’ and to ‘nudge . . . claims across the line from conceivable to plausible,’” and also, where the complaint’s “‘plead[ed] facts . . . are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 678). Simply adding in the word “unreasonable” on top of innocuous factual allegations cannot carry the day, as that adds nothing more than a “legal conclusion[] cast in the form of [a] factual allegation[],” which, the Commission has held, it “need not ‘accept.’” *Id.* at 621; *accord Iqbal*, 556 U.S. at 678 (“A

pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’”). For this reason, Maher cannot save Count I – or any of its other claims for that matter – by simply pointing to the Complaint’s use of the word “unreasonable,” or “preference” or “injury,” as these are nothing more than legal conclusions masquerading as allegations of fact. Exceptions at 40-41; *see also id.* at 42-50. The Complaint’s conclusory assertions that the change of control policy “unreasonably requires economic consideration . . . in excess of[] the cost of the service provided” and “unduly prejudices Maher by unjustly overcharging Maher as compared to other marine terminal operators,” Compl. ¶¶ IV(F)-(H), do no more than recite the legal standards for a Shipping Act violation without any actual factual content.

Judge Wirth was thus correct in holding that those allegations failed to set forth a plausible violation of the Shipping Act,<sup>13</sup> ID at 12, and her proper dismissal of Count I should be affirmed.

2. **Count II: Unreasonable Practice Based On Dealings With Ocean Carriers MSC And PNCT**

Count II asserts that the Port Authority engaged in an unreasonable practice “with respect to providing preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals.” Compl. ¶ V(C). Maher does not specify which allegations purportedly underlie this Count, but evidently Maher is referencing its allegations concerning the Port Authority’s dealings with PNCT and MSC in granting consent to MSC’s taking an ownership interest in PNCT and agreeing to the expansion of the PNCT terminal, the “lowering [of] PNCT’s lease rates,” the provision of “preferential chassis storage,” and the extension of the PNCT lease for

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<sup>13</sup> Accordingly, there is no need to reach the obvious statute of limitations bar to Maher’s reparations claim based on the consent fee that it paid in 2007. *See n.12 supra.*

twenty years in exchange for PNCT's investment in the terminal and "guaranteeing, via rent, certain levels of MSC cargo." *Id.* ¶¶ IV(L), IV(Q)-(R). Although Maher claims that the Port Authority did not provide the same or comparable "expansion opportunities, rate reductions, lease extension, or other preferences to Maher" and did not provide for a reduction in Maher's container volume, rent, or other lease obligations, Maher conspicuously does *not* allege either that it sought these things 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. *Id.* ¶¶ IV(S)-(T). Maher nonetheless conclusorily alleges that the Port Authority's dealings with PNCT and MSC amount to an "unreasonable practice of providing unduly preferential treatment to ocean carriers and ocean-carrier-affiliated marine terminals," which unduly prejudices Maher. *Id.* ¶¶ IV(I), V(C).

As pleaded, Maher's Complaint contains no allegations that would suggest that PNCT's terminal, as expanded, is larger than Maher's, or that its lease, as amended, contains terms that are any more favorable than those in Maher's existing lease. 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. But, as the Commission stated, "as a policy matter it would be unduly burdensome for a port authority to have to renegotiate its leases on demand." *Maher Terminals*, 33 S.R.R. at 854. Accordingly, there is no pleaded basis for a plausible claim that there is any preference at all, much less one that is unreasonable.

*A fortiori*, there is nothing to support a plausible claim that the Port Authority "unreasonably favored ocean carriers." *Id.* at 14. Indeed, as Judge Wirth correctly held, even if Maher had actually alleged that its lease was less advantageous than PNCT's after the concessions allegedly granted to PNCT by the Port Authority, which Maher has *not* alleged,

“differences in leases, by themselves, do not create a Shipping Act violation.” *Id.* And, Maher’s “conclusory legal statements” that the Port Authority’s practices with regard to ocean carriers were “unreasonable” or “preferential” provide “no factual support for the allegations.” *Id.* Maher does no more than state that the Port Authority took some action that is innocuous on its face, and then label it “unreasonable,” without providing any factual allegations to suggest why that might be so. Such a bald allegation of a legal conclusion masquerading as fact does not pass muster under *Twombly/Iqbal* as the Commission observed in *Cornell*. See p. 13 *supra*.

Thus, Judge Wirth’s proper dismissal of Count II of the Complaint should be affirmed.

**3. Count III: Unreasonable Practice Based On Releases And Waivers In Port Leases**

Count III asserts that the Port Authority engaged in an unreasonable practice “of requiring tenants to provide general releases and/or waivers of claims,” including for “potential violations of the Shipping Act” in leases and various lease modifications. Compl. ¶ V(D). The Complaint provides no facts in support of this Count. See *id.* ¶ IV(U). There are numerous reasons supporting the dismissal of the claim.

For reasons that are perhaps all too obvious, Maher does not even allege that it is itself subject to any such release or waiver provisions. As a review of its lease, EP-249, that is referenced in the Complaint shows, its lease does not contain any such provisions. See n.5 *supra*; see also Declaration of Kevin Meade dated Mar. 17, 2015 (“Meade Decl.”) Ex. A: EP-249, FMC Agreement No. 201131 (Oct. 1, 2000). Nor does Maher’s Complaint 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. Merely reciting a legal conclusion like “injury” is not equivalent to allegations of fact plausibly suggesting that an injury could have occurred. See *Cornell*, 33 S.R.R. at 620-21.

Finally, as Judge Wirth held, Maher “does not plead facts suggesting how the release or waiver provisions are unreasonable under the Shipping Act.” ID at 15. Such provisions could well be reasonable in light of other concessions granted to the lessee by the Port Authority, which the Port Authority would not have been willing to agree to absent the release or waiver provisions. Simply to allege that such provisions are “unreasonable,” with no accompanying allegations of fact to establish why, fails to set forth a legally plausible Shipping Act claim for unreasonable practices under *Twombly*, *Iqbal*, *Cornell* and *Mitsui*.

Thus, Judge Wirth’s proper dismissal of Count III of the Complaint should be affirmed.

**4. Count IV: Unreasonable Practice Based On Liquidated Damages Terms In Port Leases**

Count IV asserts that the Port Authority engaged in an unreasonable practice “of requiring tenants to agree to liquidated damages provisions that are unreasonable and which are designed to trigger if Shipping Act claims are brought against PANYNJ” in leases and various lease modifications. Compl. ¶ V(E). The Complaint provides no further facts in support of this Count. *See id.* ¶ IV(U). The defects of this Count are much the same as those that were discussed in connection with Count III.

Maher does not allege that its own lease contains a liquidated damages provision. Nor could it. A review of that publicly-filed lease referenced in the Complaint shows that there is none. Maher also does not plausibly allege any facts to support its conclusory (and counterintuitive) allegation that it could have been injured by the presence of a liquidated damages provision in some *other* marine terminal operator’s lease. And, as Judge Wirth correctly held, Maher failed to “plead facts suggesting how liquidated damages provisions are unreasonable under the Shipping Act.” ID at 16. Liquidated damages provisions in marine terminal leases are not only not *per se* unreasonable, but have been held to be entirely

reasonable. *See Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251, 1272 (F.M.C. 1997) (holding that reasonable penalties for violations include “liquidated damages provision[s]”); *see also Maher Terminals*, 33 S.R.R. at 846 (noting with approval a lease’s “shortfall penalty”). As with its claim based on releases and waivers, Maher alleges no facts to support the notion that any liquidated damages provisions contained in any marine terminal operator’s lease with the Port Authority are other than reasonable in the circumstances. *See ID* at 16.

Thus, Judge Wirth’s proper dismissal of Count IV of the Complaint should be affirmed.

**5. Count V: Unreasonable Practice Based On Lease Terms Setting Future Rates**

Count V asserts, in conclusory fashion, that the Port Authority engaged in an unreasonable practice “of requiring lease rate renewal and/or extension provisions that purport to set future rates in advance in a manner not reasonably related to the cost of the services provided,” in leases and various lease modifications. Compl. ¶ V(F). The Complaint provides no facts in support of this Count. *See id.* ¶ IV(U). For much the same reasons as apply to Counts III and IV, this claim is defective under the applicable pleading requirements.

Maher does not allege that its lease contains any renewal or extension provisions that set future rates in advance; does not allege facts showing how it could plausibly be injured by the presence of such provisions in *other* terminal operators’ leases; and, as Judge Wirth correctly held, failed to “plead facts suggesting how setting future lease rates is unreasonable under the Shipping Act.” *ID* at 18. There is nothing inherently unreasonable about a lease that sets future rates, as Judge Wirth observed. *Id.* Maher does not allege any facts that differentiate such future rates in terms of unreasonableness from a long-term lease. Thus, as Judge Wirth noted, Maher’s conclusory claim that these terms are unreasonable “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. In short, Maher’s Count V sets forth no factual allegations that support a plausible claim of “unreasonableness,” and is accordingly insufficient under *Twombly*, *Iqbal*, *Cornell*, and *Mitsui*.

Thus, Judge Wirth’s proper dismissal of Count V of the Complaint should be affirmed.

**6. Count VI: Unreasonable Practice Based On Exclusion From Global Terminal**

Count VI asserts that the Port Authority engaged in an unreasonable practice by “unreasonably excluding Maher and existing tenants for consideration as a leasee [*sic*], operator or Qualified Transferee of the marine terminal that is the subject of the Global Lease.” Compl. ¶ V(G); *see also id.* ¶ IV(V). As noted above, *see p. 8 supra*, Maher does not allege that any other terminal operator expressed an interest in the terminal that is the subject of the Global lease, and does not otherwise elaborate beyond the conclusory allegation that Maher had itself expressed an interest in the terminal.

As Judge Wirth correctly held, Maher failed to “plead facts suggesting how” the practice alleged is “unreasonable under the Shipping Act.” ID at 19. Maher does not allege any facts that even remotely support its claim that the Port Authority *unreasonably* excluded Maher and other existing tenants from consideration as a prospective operator of the terminal. There is no requirement that all marine terminal leases be the subject of competitive bids. And nothing that Maher has pleaded suggests the existence of any fact or circumstance that could support a plausible conclusion that the Port Authority’s decision to enter a lease with Global was unreasonable.

To permit an alleged claim of unreasonableness challenging a decision to enter a lease with a particular tenant to survive a motion to dismiss, facts must be alleged that, if proven,

would establish the actual occurrence of something that was unreasonable as a matter of law. To hold otherwise would be tantamount to ruling that anything other than a competitive bidding process is *per se* unreasonable. And clearly that is not the law under the Shipping Act, given that in ruling on Maher's Dkt No. 08-03 action, both the Presiding Officer, *see* 33 S.R.R. at 386, and the Commission, *see* 33 S.R.R. at 852, noted that Maher's own lease, EP-249, 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. Maher's Count VI, which alleges only that the Port Authority did not consider Maher and other existing marine terminal operators in leasing the Global terminal, and then baldly labels that action as "unreasonable," is entirely insufficient under the applicable pleading requirements.

Thus, Judge Wirth's proper dismissal of Count VI of the Complaint should be affirmed.

7. **Count VII: Unreasonable Practice Based On Deferral Of APM Construction Obligations**

Count VII asserts that the Port Authority engaged in an unreasonable practice of "granting a deferral of marine terminal operator leasehold obligations, including but not limited to capital expenditures, and agreeing to providing financing allotted for mandatory projects for terminal capacity expansion projects." Compl. ¶ V(H). This relates to Maher's allegations that the Port Authority permitted APM to defer certain capital expenditure obligations until 2017 and to use construction financing for non-mandatory projects, *id.* ¶¶ IV(X)-(Y), matters that related to the settlement with APM in the Dkt. No. 07-01 case. *See APM Terminals*, 31 S.R.R. at 477-478, *aff'd*, 31 S.R.R. 623 (F.M.C. 2009).

Count VII is defective for its complete failure to allege anything to support its legal conclusion of "unreasonableness." As Judge Wirth correctly held, Maher failed to "plead facts suggesting how deferral of obligations, including capital expenditures, by APM-Maersk or other

port tenants is unreasonable under the Shipping Act.” ID at 21. Since an agreement permitting such a deferral of certain mandatory construction projects can well be reasonable depending on the circumstances, such as where it is part of a larger agreement releasing claims, or agreeing to certain lease changes and so on, *cf. APM Terminals*, 31 S.R.R. at 478, *aff’d*, 31 S.R.R. 623 (F.M.C. 2009), 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.

Similarly, 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. There is no suggestion, for example, that such permission was in contravention of any lease, or that use of construction funds for non-mandatory projects is even unusual. *See Maher Terminals*, 33 S.R.R. at 850 (“[C]ontrary to Maher’s assertion, its financing was more flexible than APM-Maersk’s because Maher could use its financing for [optional] Class C work but APM-Maersk could not.”). In short, there was no plausible unreasonable practice claim alleged in Count VII.

Thus, Judge Wirth’s proper dismissal of Count VII of the Complaint should be affirmed.

**8. Count VIII: Unreasonable Preference Based On Change Of Control Policy**

Count VIII asserts that the Port Authority subjected Maher to “unreasonably more prejudicial requirements” with respect to change of control fees, as compared to the requirements imposed on “Maersk, APM, PNCT, NYCT, and other marine terminal operators.” Compl. ¶ V(I). The same defects that require the dismissal of Count I, which purports to base an unreasonable practice claim on change of control fees, require that this unreasonable preference claim be dismissed as well. *See pp. 19-22 supra*.

Other than a vague suggestion, unsupported by any facts, that the Port Authority’s application of its change of control consent fee policy has been inconsistent, Compl. ¶¶ IV (D), (E), Maher alleges nothing even to suggest that it has been disadvantaged by any such inconsistency. And in addition to the statute of limitations issue that Maher transparently seeks to avoid by conspicuously omitting to allege when it paid a change of control consent fee, *see n. 12 supra*, Maher fails to allege any facts that would support its bald assertion that any preference in connection with change of control consent fees was “unreasonable,” as Judge Wirth correctly held. ID at 23. As Judge Wirth observed, a “difference, alone,” does not establish a preference, much less an unreasonable preference, as the Commission recently reaffirmed in the Dkt. No. 08-03 action. ID at 23; *see also Maher Terminals*, 33 S.R.R. at 848. And, as Judge Wirth noted, “[t]here is nothing to suggest that PANYNJ did not have a legitimate business reason” for its change of control fee practices rendering them reasonable. ID at 23.

Maher’s argument that Judge Wirth’s reference to “legitimate business reasons” improperly required it to plead and defeat “[h]ypothetical defenses” is entirely misguided. Exceptions at 27-28. Judge Wirth’s point, a fairly obvious one, is 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 requirements. *See, e.g., Cornell*, 33 S.R.R. at 620 (where complaint’s “plead[ed] facts . . . are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief”) (quoting *Iqbal*, 556 U.S. at 678).

Thus, Judge Wirth’s proper dismissal of Count VIII of the Complaint should be affirmed.

**9. Count IX: Unreasonable Preference Based On Deferral Of APM Construction Obligations**

Count IX asserts that the Port Authority “grant[ed] APM unduly and unreasonably preferential treatment than provided to Maher and which prejudice Maher” by granting APM a deferral of its required leasehold capital expenditures, while “requiring Maher to fulfill leasehold capital expenditure obligations and refusing to provide Maher deferral of its obligations or other relief.” Compl. ¶ V(J). This Count, like the Count VII unreasonable practice claim founded on the same basic facts, is well short of sufficient under the relevant pleading standards. In addition to the obvious failure in Maher’s pleading noted above in connection with Count VII to show that these actions were “unreasonable,” *see pp. 28-29 supra*, nowhere does Maher allege that it even sought a similar deferral of mandatory construction.

This is an unreasonable preference claim, which to be cognizable requires, at a minimum, that at the outset there be a showing of preference. But while Maher conclusorily claims that APM received a preference based on the Port Authority’s agreeing to allow APM to defer certain construction obligations, Maher’s failure to allege that it even asked for a similar deferral makes any notion of preference entirely implausible on its face. *See p. 8 supra* (discussing Presiding Officer’s conclusion in the Dkt. No. 07-01 proceeding that Maher made no such request).

Additionally, even if Maher were deemed to have alleged enough facts to amount to a preference, its vague pleading is insufficient to support a plausible claim that any such preference was “unreasonable.” *See ID at 25* (holding that Maher fails to “plead facts suggesting how an agreement to defer APM-Maersk’s leasehold construction obligations is undue or unreasonable”). “Identifying a difference, alone, is not sufficient to plead a Shipping Act violation.” *Id.*; *see Maher Terminals*, 33 S.R.R. at 848 (“ . . . [Maher] has not shown that the differences are meaningful, i.e., that APM-Maersk received a preference or that Maher suffered

prejudice”). As noted above, *see* pp. 28-29 *supra*, in connection with Count VII, Maher’s pleading is too vague to suggest a plausible claim of unreasonableness.

Thus, Judge Wirth’s proper dismissal of Count IX of the Complaint should be affirmed.

**10. Count X: Unreasonable Preference Based On Approval Of APM’s Use Of Construction Financing For Other, Non-Mandatory Projects**

Count X asserts that the Port Authority “grant[ed] to APM unduly and unreasonably preferential treatment than provided to Maher and which prejudice Maher” 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 capacity expansion.” Compl. ¶ V(K).

This Count, like the Count VII unreasonable practice claim based on the Port Authority’s agreement to permit APM to use Port Authority financing for non-mandatory projects, is insufficient for many of the same reasons under applicable pleading standards. But in addition, as this is an unreasonable preference claim, Count X is also defective because Maher does not allege that it sought and was denied a similar privilege. Indeed, as a review of Maher’s publicly filed lease that was referenced in its Complaint shows, its own lease, by its express terms, permits Maher to use Port Authority financing for non-mandatory “Class C” work. *See* Meade Decl. Ex. A: EP-249 § 7; *Maher Terminals*, 33 S.R.R. at 849-850. The bare facts Maher does plead do not even support any plausible preference, much less an unreasonable one.<sup>14</sup>

Thus, Judge Wirth’s proper dismissal of Count X of the Complaint should be affirmed.

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<sup>14</sup> Oddly, although Maher alleges that it (Maher) was not provided “*additional*” construction financing, it does not even allege that *APM* was provided additional financing. Compl. ¶ V(K). Rather, it alleges only that APM was permitted to use the financing it already had for non-mandatory projects. *Id.*

**11. Count XI: Unreasonable Refusal To Deal Based On Deferral Of APM Construction Obligations**

Count XI asserts that the Port Authority “unreasonably refus[ed] 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).

An unreasonable refusal to deal claim pursuant to 46 U.S.C. § 41106(3) requires that (1) respondent “refus[ed] to deal or negotiate” and, if so, that (2) its “refusal was unreasonable.” *Canaveral Port. Auth. – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1448 (F.M.C. Feb. 24, 2003); *see also Maher Terminals*, 33 S.R.R. at 853; ID at 27. “In determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration of an entity’s efforts at negotiation.” ID at 27 (quoting *Canaveral Port. Auth.*, 29 S.R.R. at 1450). “A refusal is not unreasonable where it is ‘justified by particular circumstances in effect.’” *Id.* (citation omitted).

Judge Wirth correctly held that Maher fails to allege “sufficient factual matter to state a plausible Shipping Act claim” for unreasonable refusal to deal. ID at 29. As previously noted, *see pp. 8, 31 supra*, Maher nowhere alleges that it actually requested a deferral of mandatory construction obligations. Thus, there is nothing that the Port Authority failed to respond to in this regard that could even rise to the level of a refusal to deal, much less an unreasonable one. And Maher’s failure to allege that it requested such a deferral is no mere oversight. *See pp. 8, 31 supra*.<sup>15</sup> But even if Maher had alleged that it had requested a deferral, a mere allegation that the Port Authority denied that request would not support a plausible refusal to deal, much less a

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<sup>15</sup> Although Maher makes a vague and broad reference to having requested “parity,” Compl. ¶ IV(BB), it pointedly fails to allege anywhere as to what it sought “parity,” much less that it sought a comparable deferral of its construction obligations, something it could not have alleged in good faith. *See pp. 8, 31 supra*.

plausible *unreasonable* refusal to deal. *See Maher Terminals*, 33 S.R.R. at 854 (holding that there was no unreasonable refusal to deal despite the Port Authority’s “ultimate decision not to give Maher” what it requested); *see also* ID at 29 (“A refusal to deal allegation requires more than that a request is denied.”). Because Maher pleads no further facts supporting either element, it fails to state a plausible unreasonable refusal to deal claim.

Thus, Judge Wirth’s proper dismissal of Count XI of the Complaint should be affirmed.

**12. Count XII: Unreasonable Refusal To Deal Based On Exclusion From Global Terminal**

Count XII asserts that the Port Authority unreasonably refused to deal or negotiate with Maher “with respect to the leasing and operation of the marine terminal which is the subject of the Global Lease.” Compl. ¶ V(M). Maher alleges that the Port Authority refused to deal with it “[d]espite Maher’s request.” *Id.* ¶ IV(AA).

Judge Wirth correctly held that Maher failed to plead sufficient facts to support a plausible unreasonable refusal to deal claim in relation to the Global terminal. ID at 30. As with Maher’s Count VI unreasonable practice claim concerning the Global terminal, *see* pp. 27-28 *supra*, Maher fails to allege any facts that support that the Port Authority *unreasonably* refused to deal with Maher or that the Port Authority was under any obligation to accept Maher’s request for consideration. *See* ID at 30. Maher pleads only that it made a request for consideration and that the Port Authority denied this request – and even this Maher states without any factual support. An allegation that a “request is denied” does not allege facts that the Port Authority refused to deal – much less that it unreasonably refused to deal. *See id.* Maher’s conclusory statement that the Port Authority’s denial of Maher’s request was “unreasonable,” without factual support, fails to state a plausible Shipping Act claim.

Thus, Judge Wirth’s proper dismissal of Count XII of the Complaint should be affirmed.

**13. Count XIII: Unreasonable Refusal To Deal Based On Change of Control Policy**

Count XIII asserts that the Port Authority “unreasonably refus[ed] to deal or negotiate with respect to [its] practice to condition [its] 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). Although Maher 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, Maher nowhere alleges that it sought to deal with the Port Authority as to that policy. In such circumstances there could be no plausible refusal to deal at all, much less an unreasonable refusal to deal.

Thus, Judge Wirth’s proper dismissal of Count XIII of the Complaint should be affirmed.

**14. Count XIV: Agreement With Ocean Carrier To Unreasonably Discriminate Based On Dealings With Ocean Carriers MSC And PNCT**

Count XIV asserts that the Port Authority’s “actions and failures to act with respect to [its] agreements with PNCT, MSC, and other ocean carriers and ocean carrier affiliated marine terminals” constitute agreements “with other marine terminal operators and common carriers to unreasonably discriminate in the provision of terminal services to common carriers.” Compl. ¶ V(O).

Judge Wirth correctly held that Maher failed to plead sufficient facts to make out a plausible claim of an agreement to unreasonably discriminate. ID at 33. As with Maher’s Count II unreasonable practice claim premised on the Port Authority’s dealings with ocean carriers, *see* pp. 22-24 *supra*, Maher fails to plead any facts supporting that the Port Authority’s agreements with PNCT and other ocean carriers discriminated against Maher, much less “unreasonably” discriminated against it. Maher does not even 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 terms. As with all of its preceding claims, Maher simply sets forth a legal label, such as "unreasonably discriminatory," rather than any specific allegations of fact. *See* ID at 33.

Thus, Judge Wirth's proper dismissal of Count XIV of the Complaint should be affirmed.

**C. JUDGE WIRTH PROPERLY EXERCISED HER DISCRETION TO DENY LEAVE TO AMEND, PARTICULARLY WHERE, AS HERE, MAHER HAS ALREADY OBTAINED MASSIVE DISCOVERY ON, AND LITIGATED, SIMILAR CLAIMS AND NEVER REQUESTED LEAVE TO AMEND**

Maher's challenge to Judge Wirth's dismissal with prejudice and denial of leave to amend misconceives the governing legal standards in Commission proceedings. *See* Exceptions at 3-4, 16-18. Under Commission Rule 66, "[a]mendments or supplements to any pleading (complaint . . . counterclaim, crossclaim, third-party complaint, and answers thereto) will be permitted or rejected, either in the discretion of the Commission or presiding officer." 46 C.F.R. § 502.66(a).<sup>16</sup>

The Commission's Presiding Officers have repeatedly held that "[w]hen a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile." *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, 33 S.R.R. 710, 719 (A.L.J. 2014); *accord Santa Fe Discount Cruise Parking, Inc.*, 2014 WL 7404584, at \*12. Maher concedes that whether to grant leave to amend is a matter committed to the Presiding Officer's "discretion." *See* Exceptions at 3-4 (acknowledging the "abuse of discretion" standard of review); *see also* 46 C.F.R. § 502.66(a); *Bd. of Comm'rs of the Port of New Orleans v. Kaiser*

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<sup>16</sup> Because leave to amend is "covered by a specific Commission rule," the Federal Rules and federal court decisions construing them do not govern the Presiding Officer's discretion on the issue. Notably, the Commission Rule does not include any provision favoring amendment, in contrast to the Federal Rule. *Compare* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires.").

*Aluminum & Chem. Corp.*, 28 S.R.R. 337, 337 (A.L.J. 1998). Accordingly, appellate review of a decision denying leave to amend should be governed by the abuse of discretion standard. *Cf. Kawasaki Kisen Kaisha Ltd. v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 746, 754 (F.M.C. 2014) (holding that “abuse of discretion” is the “appropriate standard of review” in reviewing a Presiding Officer’s discretionary dismissal of a complaint for failure to abide by discovery orders). Denial of leave to amend is particularly appropriate where it has not been timely sought. Indeed, the Commission has rejected a complainant’s request for leave to amend on appeal, where it had not previously sought such leave from the Presiding Officer. *W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, 26 S.R.R. 874, 880, 883 n.11 (F.M.C. 1993).

In light of all of the above, Judge Wirth’s denial of leave to amend the Complaint was a proper exercise of her “discretion” under 46 C.F.R. § 502.66(a). Judge Wirth denied leave to amend based on her determination that “amendment of the pleadings would be futile.” ID at 33; *see also* p. 11 *supra*. As Judge Wirth observed, despite the fact that the *Twombly* and *Iqbal* requirements for pleadings had been accepted by the Commission before Maher filed the instant Complaint, *see* ID at 4, Maher persisted in contending that *Twombly* and *Iqbal* were irrelevant. Furthermore, as Judge Wirth observed, “Maher has not requested an amendment to its pleadings and does not even assert that the complaint meets the *Iqbal* and *Twombly* pleading standards.” ID at 33.<sup>17</sup>

Nothing meaningful has changed since. While no longer arguing that *Twombly* and *Iqbal* are “inapposite,” Maher wrongly asserts that they apply differently in Commission proceedings than they do in federal courts. *See* pp. 11-17 *supra*. And while Maher complains about the

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<sup>17</sup> Accordingly, Maher’s suggestion, that Judge Wirth “failed to provide reasons for refusing to grant leave to amend,” is entirely specious. Exceptions at 17; *id.* at 3, 16.

dismissal with prejudice and now says it would like to amend, not only did Maher not seek leave to amend from Judge Wirth, but even now, in its fifty-page Exceptions, it 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*. That it has not done so, even after having had massive discovery on much of the same subject matter, having had access to all manner of publicly filed documents pertaining to its vague allegations, and having been specifically apprised of the manifold deficiencies of its Complaint, simply underscores that any such amendment would be futile.

In *Western Overseas*, see p. 38 *supra*, the complainants, like Maher, argued on appeal from the dismissal of their complaint that, “if the ALJ believed that the complaints were deficient in any respect, he should have given [c]omplainants the opportunity to amend them,” even though they had “never hinted in briefs to the ALJ how they would amend their pleadings to cure the defects.” 26 S.R.R. at 880, 882. The Commission held that it would “not permit [c]omplainants to amend their complaints with respect to those issues that are now before the Commission on appeal of the ALJ’s Orders.” *Id.* at 883 n.11. The Commission reasoned that “[c]omplainants had ample time to amend their complaints while the issues were before the ALJ,” yet “[t]hey did nothing until they received an adverse ruling from the ALJ.” *Id.* Maher is guilty of the same failure and, as noted above, to this day has not even attempted to show that any amendment at this belated juncture would not be futile.

Thus, Judge Wirth’s decision to dismiss Maher’s Complaint with prejudice without leave to amend was a proper exercise of discretion and should be affirmed.

V. CONCLUSION

For the foregoing reasons, Maher's Exceptions should be denied and Judge Wirth's decision should be approved in its entirety.

Dated: March 17, 2015

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the Port Authority of New York and New Jersey's Reply to Maher Terminals, LLC's Exceptions to the Initial Decision of January 30, 2015, and the Declaration of Kevin F. Meade in support thereof, along with the attached exhibit, upon the persons listed below via Federal Express and e-mail.

<p><b><u>Via Federal Express and E-mail:</u></b> Lawrence I. Kiern Gerald A. Morrissey III Bryant E. Gardner Rand K. Brothers Winston &amp; Strawn LLP 1700 K Street, NW Washington, DC 20006</p>	<p>Dated at New York, New York this 17th day of March, 2015</p>
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Kami Lizarraga