

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

Complainants

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

Respondents

REPLY BRIEF OF COMPLAINANTS

**SANTA FE DISCOUNT CRUISE PARKING, INC. D/B/A EZ CRUISE PARKING
LIGHTHOUSE PARKING, INC., AND
SYLVIA ROBLEDO D/B/A 81ST DOLPHIN PARKING**

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Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking; Lighthouse Parking, Inc.; and Sylvia Robledo d/b/a 81st Dolphin Parking (collectively “Complainants”), pursuant to the Scheduling Order dated January 14, 2015 and 46 C.F.R. 502.221, hereby submit their Reply Brief. In addition to Complainants’ Reply Brief, pursuant to the above-cited Procedural Order, Complainants simultaneously file their Objections and Responses to Respondents’ Proposed Findings of Fact.

INTRODUCTION

Complainants are Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (“EZ Cruise”), Lighthouse Parking, Inc. (“Lighthouse”), and Sylvia Robledo d/b/a 81st Dolphin Parking (“81st Dolphin”). Complainants have each owned and operated private parking lot businesses near the Port of Galveston, serving passengers of cruise ships that have called on that port since as early as 2005.¹ Respondents are the Board of Trustees of the Galveston Wharves (the “Wharves Board”) and the Galveston Port Facilities Corporation (“GPFC”) (collectively “Respondents”). The Wharves Board has been authorized by the City of Galveston to manage and control the Port of Galveston’s wharf and terminal facilities. GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (designating Galveston Wharves as a “separate utility” of the City of Galveston to be managed by the Board of Trustees of the Galveston Wharves); *see also* TEX. TRANSP. CODE § 54.003(a).

RESPONDENTS’ IMPROPER OBJECTIONS TO COMPLAINANTS’ APPENDIX

Respondents’ Response to Complainants’ Proposed Findings of Fact opens with an objection to evidence provided in Complainants’ Appendix. Specifically, Respondents object to a summary provided by Complainants, showing invoices for Access Fees issued to Cruise

¹ Complainant EZ Cruise commenced operations in December of 2003, Complainant Lighthouse commenced operations in 2005, and Complainant 81st Dolphin opened for business in 2006 (transferring to its current location in May 2009). *See* (Resp. Corr. Obj. to Comp. PFF, ¶¶ 1, 10, and 1,7 at pp.2, 5, and 7).

Terminal users. (Resp. Corr. Obj. to Comp. PFF, at pp.1-2). However, and as shown below, Respondents' objection is improper.

Federal Rule of Evidence 1006 provides that “contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.” FED. R. EVID. 1006. To simplify the viewing of 1,736 pages of historical Access Fees charged by the Wharves Board, Complainants provided a summary based solely upon documents provided by Respondents. *See* (Comp. App., at p.000768)(Certificate testifying that “summary based on documents (Bates labeled BOT 015734 – BOT 017470) produced by Respondents in this proceeding.”); (Comp. App., at pp.000769-000770); *see also U.S. v. Syme*, 276 F.3d 131, 151 (3d Cir. 2002) (Providing that FRE 1006 “recommends the value of presenting evidence to a jury in the form of a chart when doing so would increase the clarity of the presentation.”). Respondents object to this summary on grounds that Complainants have not made a showing of qualifications for Ms. Allison Fine, the person who assimilated the summary.² (Resp. Corr. Obj. to Comp. PFF, at pp.1-2). Such an objection is wholly without merit, as the Federal Rules of Evidence do not require a showing of qualifications to compile an admissible summary. *See* FED. R. EVID. 1006.

Respondents also object to transcriptions made by Ms. Fine of audio recordings of public records. (Resp. Corr. Obj. to Comp. PFF at pp.2, 24-26, and 45-46).³ These objections again are grounded on Complainants not showing Ms. Fine's qualifications to transcribe an audio record, and further, that the “transcripts have not been properly authenticated” as required by the Rules.

² Respondents may also be making an argument that the summary was not “properly authenticated as required by Fed. R. Evid. 902,” though the assertion made references a “transcript.” (Resp. Corr. Obj. to Comp. PFF at p.2). Out of abundance of caution, Complainants would show that Ms. Fine has testified that the information contained therein is correct based on documents produced by Respondents. *See* (Comp. App., at p.000768).

³ Respondents objections to Complainants PFF ¶¶ 56 and 59 include objections that transcriptions of public records provided by Complainants fail to conform to the requirements of Fed. R. Evid. 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). *See* (Resp. Corr. Obj. to Comp. PFF, at pp.2 and 24-26).

Id. Federal Rule of Evidence 1005 allows an official record to be proved by a copy that is “certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original.” FED. R. EVID. 1005.

The transcriptions to which Respondents object are from public records and are testified to as being correct by Ms. Fine, a witness who has compared the written transcripts to the audio recordings. Respondents’ objection lacks foundation and attempts to add to the requirements of the Federal Rules. Furthermore, the ALJ enjoys broad discretion regarding the admission of evidence, and is not constrained by common law or statutory rules of evidence or by technical or formal rules of procedure beyond those of provided for in 5 U.S.C. § 554. *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1121 (5th Cir. 1980); *Hughes v. Bethlehem Steel Corp.*, 17 B.R.B.S. 153, 155 n.1 (1985). Accordingly, Respondents’ “Objections to Complainants’ Appendix” should be overruled in their entirety.

RESPONDENTS’ CONCESSIONS

In Respondents’ brief, they have conceded the following:

- The Wharves Board did not enforce the Tariff as published from 2007 through 2014, failing to charge vehicles more than \$10 per access to the Cruise Terminal, when fees as high as \$60 per access should have been charged. (Resp. Corr. Brief, at p.21, fn.5 and p.51); *see* Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007 BOT_017637 (Resp. App. Tab 003, at p.000167); Wharves Tariff Circular No. 6 – Item 111 – effective November 21, 2013 BOT_017708 (Resp. App. Tab 004, at p.000237). This was a “violation of the Tariff” that resulted in “some commercial users paying access fees [being]

charged less than they should have been charged.” (Resp. Corr. Brief, at p.21, fn.5).

- The Wharves Board did not enforce the Tariff against limousines that entered the Cruise Terminal from 2008 through 2014, and waived all such Access Fees due under the Tariff. (*Id.* at p.23, fn.6).
- The Wharves Board fully enforced the Tariff against Complainants between 2006 and 2014, never failing to collect the maximum Access Fees billable. (*Id.* at p.21).

SUMMARY

Complainants have met their burden of showing Respondents’ violations of the Shipping Act of 1984 (“Shipping Act”) and the injuries to Complainants caused by those violations. The violations of the Shipping Act stem from the disparate treatment Complainants received both pursuant to the Tariff and as a result of Respondents’ selective enforcement of the Tariff. While Respondents have admitted to the disparate treatment of Complainants both under the Tariff and in the selective enforcement of the Tariff, they argue a valid transportation factor exists to justify the preferential treatment given to taxicabs alone; and Complainants’ claims for reparations related to hotels, taxicabs, and buses (but not for claims related to limousines), are barred by the statute of limitations. However, Respondents’ affirmative defense, where asserted, is defeated by application of the discovery rule.

Additionally, Respondents argue against Complainant EZ Cruise’s damage model. In response, Complainants offer an alternative damage model, using Respondents’ numbers, which clearly show reparations are still due.

I. RESPONDENTS' VIOLATIONS OF THE SHIPPING ACT

In their brief, Respondents contend they have not violated the Shipping Act, as shown by Complainants, as follows: (1) that Complainants' are not "similarly situated" or in a "competitive relationship" with other Cruise Terminal users; (2) that Complainants are estopped from raising violations of the Shipping Act; (3) that hotels are not "Off-Port Parking Users" under the Tariff; (4) that valid "transportation factors" justify Respondents' favorable treatment of taxicabs; and (5) that Complainants have provided no evidence of hotel/taxi partnerships. (Resp. Corr. Brief, at pp.26, 31, 34, 35, and 37 (respectively)). Complainants address each of these arguments below.

A. COMPLAINANTS MEET THE REQUIREMENTS OF *CERES*

As identified in Complainants' original brief and conceded by Respondents, "to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship..."⁴ *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (FMC 1997); (Resp. Corr. Brief, at p.26). However, *Ceres* also provides that absent such a showing, a violation of the Shipping Act may still be actionable when "there [is] no differentiation in the nature of the cargo or other transportation factors involved in the assessment of fees." *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 1997 WL 35281266, *32 (FMC 1997) ("The Commission found that the port treated different classes of persons and descriptions of traffic unequally in the imposition of fees...")(citing *Louis Dreyfus Corp. v. Plaquemines Port Harbor and Terminal Dist.*, 25 FMC 59, 68, 76 (1982)). In *Ceres*, the complainant was Ceres Marine Terminals, Inc. ("CMT"), a marine terminal operator in Baltimore, and the respondent was the Maryland Port

⁴ Respondents abstain from arguing against the three remaining *Ceres* elements proven by Complainants in their original brief.

Administration (the “MPA”), a state agency charged with administering the state’s ports. *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 1997 WL 35281266, *2 (FMC 1997). The MPA entered into a lease with Maersk Shipping (“Maersk”), a marine terminal operator that was also a Danish shipping company with a large fleet of container ships. *Id.* at 2-3. That lease agreement provided Maersk with preferential rates for the use of port facilities, with the intention of securing Maersk’s continued business in the port. *Id.* In return, Maersk guaranteed to move a certain number of containers through the Port of Baltimore, thus securing a predictable volume of ship traffic for the MPA. *Id.* Despite CMT providing the same guarantee to the MPA, the MPA would not provide CMT with similar rates and moved forward with its preferential treatment of Maersk on the basis that, because Maersk owned a fleet of containerships, Maersk’s guarantee was more reliable than CMT’s. *Id.* at 2-3. Notwithstanding the significant differences in the business, resources, and organization between CMT and Maersk, where each of the two were providing the same service to MPA—the movement of containers through the port—the Federal Maritime Commission (the “Commission”) found CMT and Maersk to be similarly situated and in a competitive relationship with each other. *Id.* at 1.

For that same reason, Complainants are similarly situated and/or in competitive relationships with local hotels/motels, limousines, charter buses, and taxis. Each of these entities provides the same service and makes the same use of Respondents’ Cruise Terminal—they bring cruise passengers into the Cruise Terminal, and they take passengers out of the Cruise Terminal. In fact, it is this very function of accessing the Cruise Terminal for which Respondents’ Access Fees are charged. *See Minutes of Board Meeting, September 22, 2014, BOT_015653 (Resp. App. Tab 087, at p.002617).*

Respondents however, argue that Complainants and the above identified port users cannot be similarly situated and/or in competitive relationships with each other based solely on “[t]he simple fact . . . that the businesses to which Complainants seek to compare themselves are dramatically different.” (Resp. Corr. Brief, at p.27). While that may be so to varying degrees, *Ceres* clearly shows that it is not the differences in the port users’ business that is determinative, but rather the similarities in the port users’ activities within the port. As such, it is irrelevant to the determination of “similarly situated” status whether Complainants own parking lots while limousines, charter buses, and taxicabs may not. (*Id.*).

Further, while attacking the “similarly situated” nature of these port users based on extrinsic differences unrelated to their activities within and related to the Cruise Terminal, Respondents wholly neglect to address the “competitive relationship” between Complainants and these other port users. Respondents have not simply forgotten that the first *Ceres* element requires either “similarly situated” or a “competitive relationship,” instead, they are hoping the Commission will not look into the nature of the relationship between Complainants and the identified port users. Complainants are in the business of operating parking lots for cruise passengers to leave their vehicles while they enjoy the many cruises that depart from the Port of Galveston. As such, Complainants compete for customers with any business that facilitates those passengers parking their vehicles at other locations, be it a hotel/motel parking lot, a charter bus parking lot, or another privately owned location. It is not necessary that an entity own or operate a parking lot for that entity to be in a competitive relationship with Complainants.

Respondents further argue that local hotels “do not offer paid parking to cruise passengers.” (Resp. Corr. Brief, at p.27); *see also* (*Id.* at p.28)(“Complainants have not submitted any evidence of hotels that rent spaces for the duration of a cruise.”)). This however,

is in direct opposition to evidence propounded by both Complainants *and* Respondents. *See Galveston.com: Enhance Your Cruise with an Overnight Stay Prior to Departure* (found at <http://www.galveston.com/parkandcruise/>)(Comp. App. 026, at 000511)(July 25, 2014); and (Resp. App. Tab 043, at 001713)(May 29, 2015)(Showing hotels charging cruise passengers for parking in hotel parking lots for duration of cruise.). These local hotels/motels are similarly situated and in competitive relationships with Complainants. They are similarly situated because they each perform the same function within the Cruise Terminal; they deliver and retrieve passengers. They are in competitive relationships with Complainants because a cruise passenger that pays to park at one of the local hotels/motels, will not be paying to park at Complainants' parking lots.

Respondents seek to overcome these facts by stating that “the businesses to which Complainants seek to compare themselves are dramatically different.” (Resp. Corr. Brief, at p.27). Respondents argue that, because Complainants' businesses are more dependent on the operations of the Cruise Terminal than are the local hotels, limousines, buses, and taxicabs, this somehow demonstrates that Complainants are not similarly situated and/or in competitive relationships with those other port users. (Resp. Corr. Brief, at p.28). This reasoning by Respondents is again in direct conflict with *Ceres*. In *Ceres*, CMT was a marine terminal operator, while Maersk was not only a marine terminal operator, but also a common carrier shipping company with multifaceted, global operations. In determining whether a violation of the Shipping Act occurred, the Commission did not consider the hypothetical effect on each entity's business were the port to close, or whether Maersk would continue to operate vessel in that hypothetical circumstance. *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 1997 WL 35281266, *32 (FMC 1997); *see also* (Resp. Corr. Brief, at p.28)(“If the Cruise

Terminal closed these hotels would still be primarily engaged in the business of lodging.”). Instead, despite the dramatically different businesses of CMT and Maersk, and irrespective of the proportional percentage of business the Port of Baltimore represented to CMT and Maersk, the Commission found that, because the service provided by both CMT and Maersk to the Port of Baltimore was the same, and because the “rates in question—wharfage, dockage, crane rental and land rental—apply universally” and vary only “according to [the] amount of cargo handled, or with crane service, according to hours of usage,” MPA’s disparate, discriminatory, and injurious treatment of CMT was a violation of the Shipping Act. *Id.*

Similarly, the rates in question in the present matter—Access Fees for carrying cruise passengers into and out of the Cruise Terminal—apply universally, and vary only according to the seating capacity of the vehicle transporting those passengers.⁵ Respondents have made clear that the Access Fees are charged, not for operations that occur outside of the Cruise Terminal, but only for access to the Cruise Terminal. (Resp. Corr. Brief, at pp.28-29 (Stating that V.I.P. Lots not charged Access Fees because they do not access Cruise Terminal, even though they operate same business as Complainants.) and p.38 (Wharves Board cannot charge Access Fees to businesses that do not access the Cruise Terminal.)); *see* Minutes of Board Meeting, September 22, 2014, BOT_015653 (Resp. App. Tab 087, at p.002617). Accordingly, Complainants satisfy the *Ceres* requirements for recovery of damages resulting from Respondents’ violations of the Shipping Act.

B. RESPONDENTS’ CLAIM OF ESTOPPEL IS UNAVAILABLE

Respondents admit that Complainants were charged Access Fees under the Tariff based on criteria dissimilar to that applied to other Cruise Terminal users. (Resp. Corr. Brief, at p.31).

⁵ With the exception of Complainants, who have been subjected to disparate, discriminatory, prejudicial, and injurious treatment by Respondents.

In defense of this disparate treatment, Respondents blame Complainants for accepting and operating under the Tariff and assert that the dissimilar rate charged to Complainants was at Complainants' request. Respondents cite to negotiations between Complainant EZ Cruise and Respondents, claiming that an agreement was reached regarding the terms of the Tariff. This is an attempt by Respondents to blur the lines between the Tariff as established and binding, and an agreement between private parties. Despite Respondents' attempt to mischaracterize the regulatory authority acted under for the collection of Access Fees, whether pursuant to an agreement or tariff, "[t]he right to challenge those regulations before the Commission cannot be barred by some vaguely expressed theory of consent or estoppel." *U. S. Lines v. Maryland Port Authority*, 23 FMC 441, 460 (1980)(Commission rejected respondent's argument that tariff could not be challenged because complainant had consented to the tariff.); *see also See Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 2001 WL 1085428, *20 (FMC August 15, 2001)(Holding that complainant's conduct amounting to estoppel or waiver does not bar complainant from seeking relief for violations of the Shipping Act "because waiver and estoppel are not designed to destroy rights conferred by Congress")(internal quotes omitted); *States Lines, Inc. v. Maryland Port Administration*, 20 SRR 290, 299 (I.D., adopted by the Commission, 20 SRR 646 (1980))(use of facilities for many years does not amount to consent nor set up estoppel against complainants who allege unreasonableness of tariff provision.). Whether or not Complainants agreed to the Tariff is immaterial to their right to seek relief for Respondents' violations of the Shipping Act of 1984. Further, Complainants in no way agreed to, or even knew of, the unreasonable, disparate, and discriminatory treatment given to Complainants by the Wharves Board's selective enforcement of the Tariff from 2007 through 2014.

Accordingly, Respondents' argument for dismissal of Complainants' claims based on waiver or estoppel must be denied.

C. LOCAL HOTELS/MOTELS ARE "OFF-PORT PARKING USERS" UNDER THE TARIFF

By establishing a separate class of port users defined as "Off-Port Parking Users" and basing Respondents' criteria for collection of Access Fees on Cruise Terminal users that met that definition, Respondents "had a duty under the Shipping Act to apply those criteria in an even-handed, fair manner..." *See Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 2001 WL 1085428, *19 (FMC August 15, 2001).

In the Wharves Board's 2003 Tariff, the Wharves Board defined "Off-Port Parking User" as "a commercial business entity which provides or arranges for one or more commercial passenger vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves." Wharves Tariff Circular No. 6 – Item 111 – Effective November 1, 2003 BOT_017490 (Resp. App. Tab 001, at p.000020). In 2006, this definition was amended to include "courtesy vehicles," thereafter remaining unchanged in the Tariff through 2014. *See* Wharves Tariff Circular No. 6 – Item 111 – Effective August 28, 2006 BOT_017563 (Resp. App. Tab 002, at p.000093); Wharves Tariff Circular No. 6 – Item 111 – Effective December 17, 2007 BOT_017640 (Resp. App. Tab 003, at p.000170); Wharves Tariff Circular No. 6 – Item 111 – Effective November 21, 2013 BOT_017712 (Resp. App. Tab 004, at p.000241); Wharves Tariff Circular No. 6 – Item 111 – Effective July 1, 2014 BOT_017796 (Resp. App. Tab 005, at p.000325). Complainants have established by Respondents' own documents and evidence that

local hotels/motels provide or arrange for “commercial passenger vehicles, buses or shuttles . . . to pick up or drop off passengers within [the Cruise Terminal] in connection with the operations of a business of the [hotels/motels] involving the parking of motor vehicles . . . at a facility located outside of [Galveston Wharves’ property].” *See* Galveston.com – Enhance Your Cruise with an Overnight Stay Prior to Departure (found at <http://www.galveston.com/parkandcruise/>) (Resp. App. Tab 043, at pp.001712-001713) (May 29, 2015)(showing local hotels/motels operating in a manner that clearly meets the Tariff’s definition of an “Off-Port Parking User”); *see also* Mierzwa Deposition at 173:3-173:12 (Resp. App. Tab 078, at p.002237) (Mr. Mierzwa’s answer, without objection, stating that hotels charging cruise passengers for parking, and arranging transportation to/from the Cruise Terminal, meet the Wharves Board’s definition of an “Off-Port Parking User” under the Tariff.).

Despite the foregoing, Respondents argue that “Off-Port Parking User,” as defined, applied only to Complainants. (Resp. Corr. Brief, at pp.34-35); (Resp. Corr. Obj. to Comp. PFF, at pp.24-25). This, despite Port Director Michael Mierzwa’s unobjected to testimony during his deposition, wherein he stated that a hotel that parks vehicles for a fee and arranges for transportation into the Cruise Terminal for those passengers would meet the definition of an “Off-Port Parking User.” Deposition of Michael Mierzwa, 173:3-12 (Resp. App. Tab 078, at p.002238). The impossibility of Respondents’ position that “Off-Port Parking User” was intended to apply only to Complainants is evidenced by the fact that when the category and definition was placed in the Tariff in 2003, (1) Complainants had not yet raised issue with the Access Fees or Tariff, and (2) not one of Complainants’ were in existence in 2003. Respondents again contradict themselves in their brief by later providing in a footnote that “[n]ot all Off-Port Parking Users as defined in the tariff have joined this action. The \$8 per space per month fee

applied to all such users equally.” (Resp. Corr. Brief, at p.46, fn.13)(showing entities other than Complainants meet the definition of an “Off-Port Parking User.”).

Despite Respondents’ alternating expressions of the entities they intended to be encompassed by the definition of an “Off-Port Parking User,” the definition as written in the Tariff is clear and unambiguous. As defined, the term includes all hotels/motels whose business involves—not whose business is limited to—the parking of cruise passengers’ vehicles and the arrangement of transportation for those passengers to and from the Cruise Terminal. Therefore, local hotels/motels are and have been “Off-Port Parking Users” under the Tariff, and should have been charged Access Fees as such.

D. NO VALID TRANSPORTATION FACTOR JUSTIFIES RESPONDENTS’ VIOLATIONS OF THE SHIPPING ACT

When a complainant has shown that it was subjected to disparate treatment by the respondent, and was injured as a result of that disparate treatment, the respondent then has the burden to prove that the disparate treatment was justified based on “legitimate transportation factors.” *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (FMC 1997) (citing *Cargill Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287 (FMC 1981)). Here, Respondents only attempt such justification for their preferential treatment of taxicabs, offering no opposition to Complainants’ showing of Respondents’ violations of the Shipping Act with regard to the disparate and discriminatory treatment levied upon Complainants as compared to local hotels/motels, limousines, or buses.

Respondents’ attempt at presenting a valid transportation factor to justify the exemption of taxicabs from paying Access Fees under the Tariff is grounded solely on the proposition that Respondents need to move “a significant number of passengers efficiently out of the cruise

terminal.” (Resp. Corr. Brief, at p.36). In spite of this, Respondents also argue against the foundational assumption therein by claiming that the movement of passengers is not a transportation factor. (Resp. Corr. Brief, at p.27) (arguing that cruise passengers are not a commodity)(Citing *Ceres*, where the transportation factor considered was the loading/unloading of commodities from within the port.)). Disregarding Respondents’ contradictory arguments, for the purpose of showing no valid transportation factor exists, Complainants address Respondents’ second argument, that being in favor of a transportation factor.

The “transportation factor” raised by Respondents to support the disparate and preferential treatment of taxicabs over Complainants under the Tariff, and the selective enforcement of the Tariff against taxicabs between 2007 and 2014, is the efficient movement of passengers into and out of the Cruise Terminal. (Resp. Corr. Brief, at p.36); *see* Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007 BOT_017637-017642 (Resp. App. Tab 003, at pp.000167-000172); Minutes of Board of Trustees of the Galveston Wharves Meeting, May 19, 2014 BOT_000101-000106 (Comp. App., at pp.000495-000500)(showing 2014 proposed changes to Tariff requiring collection of Access Fees from taxicabs with seating capacities of greater than eight persons). Respondents’ “efficiency” argument requires the assumption that the Wharves Board could not, as it does with other Cruise Terminal users and did with taxicabs between 2007 and 2014, charge Access Fees based on the seating capacity of taxicabs. This assumption is necessary because, for any taxicab with a seating capacity less than the limousines and various buses that access the Cruise Terminal, the use of that taxicab would actually be less efficient as it would move fewer passengers per trip.⁶ Further, if efficiency in movement of passengers in and out of the Cruise Terminal is truly the motivating concern of

⁶ Respondents cite traffic congestions as part of their reasoning. *See* (Resp. Corr. Brief, at pp.29, 36).

Respondents, the question must be asked: Why does the Wharves Board charge higher Access Fees for higher occupancy vehicles that best fulfill their claimed transportation factor?

E. TAXICABS ARE CONDUITS IN COMPETITIVE RELATIONSHIPS WITH COMPLAINANTS

Respondents address what they identify as a “vaguely” asserted claim by Complainants that hotels are partnering with taxicab companies in “some sort of financial arrangement” to “circumvent paying Access Fees.” (Resp. Corr. Brief, at p.37). Respondents embark on an explanation of how Complainants have produced no evidence of such an agreement between local hotels/motels and taxicab companies. (Resp. Corr. Brief, at pp.37-38). Complainants have produced no such evidence because Complainants made no such assertions.⁷

What Complainants show, and what Respondents fail to address, is the unreasonable prejudice against Complainants created by the Tariff’s disparate treatment of Complainants, local hotels/motels, and taxicabs. From 2003 to 2007, the Tariff exempted taxicabs from being charged Access Fees when delivering or retrieving passengers from the Cruise Terminal. *See* Wharves Tariff Circular No. 6 – Item 111 – effective November 1, 2003 BOT_017487 (Resp. App. Tab 001, at p.000017); Wharves Tariff Circular No. 6 – Item 111 – effective August 28, 2006 BOT_017560 (Resp. App. Tab 002, at p.000090); Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007 BOT_017637 (Resp. App. Tab 003, at p.000167). Then, from 2007 through 2014, the Tariff required taxicabs with passenger capacities of more than eight (8) persons to pay an Access Fee.⁸ *See* Wharves Tariff Circular No. 6 – Item 111 –

⁷ Complainants do assert that local hotels/motels often made use of various transportation methods other than their own vehicles for the transport of cruise passengers to and from the Cruise Terminal. *See e.g.*, Ex. A, Depo. J. Hayes at 152:14-155:19 (hotels often used third-party limousines and shuttle buses instead of their own vehicles to transport cruise passengers); *see also* (Resp. Corr. Brief at 21, fn.5, and 23, fn.6) (Respondents admit that limousines were not charged between 2008 and 2014, and buses were undercharged \$40-\$50 per trip from 2007 through 2014).

⁸ It must be noted that, despite the Tariff requiring taxicabs to pay Access Fees from 2007 through 2014, Respondents’ argument for not charging Access Fees to taxicabs is that the Wharves Board cannot do so because that is the exclusive purview of the Galveston City Council. *See* Affidavit of Michael Mierzwa, ¶46 (Resp. App.

effective December 17, 2007 BOT_017637 (Resp. App. Tab 003, at p.000167). Despite the Tariff expressly requiring the collection of Access Fees from such taxicabs, the Wharves Board chose to waive the required Tariff for those taxicabs. *See* Minutes of Board of Trustees Meeting of Galveston Wharves, May 19, 2014 BOT_000101-000106, cmts.PS3, PS5, and PS7 (Comp. App., at 000495-000500 (showing 2014 Tariff changes removing taxicabs from list of vehicles to be charged Access Fees and stating that Tariff was never enforced against taxicabs). This unreasonable, disparate, and discriminatory treatment of Complainants, who were consistently charged the full amount proscribed by the Tariff, placed Complainants at an economic disadvantage in their business. As George Templeton, corporate representative of Complainant Lighthouse, Inc., testified: “[H]ow do we compete with free?” Deposition of George Templeton 37:18-24 (Resp. App. Tab 083, at p.002528).

Hotels that offer parking for cruise passenger vehicles are in a competitive relationship with Complainants, who compete for the business of cruise passengers that need a place to park their vehicles while on their cruises. When those hotels that offer such parking, avoid paying Access Fees by use of taxicabs that are allowed free access to the Cruise Terminal, those hotels are unreasonably advantaged by the Tariff in their competitive relationship with Complainants. *See* Deposition of Sylvia Robledo 185:2-187:3 (Resp. App. Tab 080, at pp.002343-002345). As a result of the fact that local hotels/motels, despite meeting the Tariff’s definition of an “Off-Port Parking User,” have historically been charged Access Fees based on different criteria than what has dictated Complainants’ Access Fees, and because taxicabs are not charged Access Fees for their use of the Cruise Terminal, Complainants have been injured.

Tab 075 at p.002077); Affidavit of Peter Simons, ¶9 (Resp. App. Tab 076, at p.002079); (Resp. Corr. Brief, at p.35); (Resp. Corr. PFF, at ¶46).

With Complainants' Access Fees being rooted in the number of parking spaces in their parking lots rather than access to the Cruise Terminal, Complainants could not benefit from the use of taxicabs for transporting their customers to and from the Cruise Terminal. Likewise, had the Wharves Board charged local hotels/motels Access Fees pursuant to the published terms of the Tariff and in the same manner as Complainants were charged, the local hotels/motels would not have received an unjust economic advantage over Complainants. Complainants' injury in this instance derives from two sources: (1) the Wharves Board's disparate treatment of local hotels/motels over Complainants by not charging Access Fees to the hotels/motels as required by the Tariff (per space, per month), and (2) the Tariff's exemption of taxicabs from payment of Access Fees, which allows the taxicabs to operate as a free conduit to Cruise Terminal users who are not charged per space, per month.

II. REPARATIONS

In their brief, Respondents' contend that Complainants' claims for reparations are barred by the statute of limitations as to their claims against hotels, taxicabs, and buses only, and declines to assert such affirmative defense regarding Respondents' violations of the Shipping Act related to their conduct concerning limousines as pled and shown in Complainants' prior pleadings, and admitted to in Respondents' brief. *See* (Resp. Corr. Brief, at p.40 and p. 23, fn.6). Complainants agree with Respondents' statement of law expressing that a three year statute of limitations applies to a claim for reparations under the Shipping Act of 1984. (Resp. Corr. Brief, at p.39). However, it was not until 2014 that the Wharves Board amended the Tariff to exclude taxicabs that carry more than eight (8) persons from having to pay Access Fees. Accordingly, as Complainants filed suit that same year, the statute of limitations is clearly met with regard to that particular violation of the Shipping Act by the Wharves Board. *See* Minutes of Board of

Trustees of the Galveston Wharves Meeting, May 19, 2014, BOT_000101-000106 (Comp. App., at pp.000495-000500)(showing 2014 proposed changes to Tariff requiring collection of Access Fees from taxicabs with seating capacities of greater than eight persons); *see also* Complainants' Verified Complaint, filed with FMC on June 16, 2014. The discovery rule applies to the remainder of Complainants' claims.

A. THE DISCOVERY RULE APPLIES TO TOLL THE STATUTE OF LIMITATIONS

The "discovery rule" allows the tolling of a statute of limitations until such a time as the complainant knew, or should have known, that it had a cause of action. *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991). In *Inlet Fish*, the Commission adopted the discovery rule. *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 2001 WL 1632551, *10 (FMC 2001). The facts of the case at hand track those of *Inlet Fish*, where the complainant, Inlet Fish, was charged an amount known to the complainant at the time of the charges, but which the complainant later learned was less favorable than what its competitors were charged. *Id.* Inlet Fish's complaint was not founded on the unreasonableness of the charges Inlet Fish paid, but on the unreasonably preferential treatment that was enjoyed by Inlet Fish's competitors. *Id.* The Commission reasoned that, even though Inlet Fish filed its complaint against the offending party after the time the statute of limitations would have run had the complaint been based on the charges Inlet Fish paid, because Inlet Fish sought reparations for the undue preferential treatment given to its competitors, the statute of limitations did not begin to run until evidence of the preferential treatment was uncovered. *Id.*

As in *Inlet Fish*, Complainants were aware of the Access Fees charged to them pursuant to the Tariff, but they did not discover their injury caused by the preferential treatment given to

other Cruise Terminal users until 2014, nor should they have through the exercise of diligence.⁹ In asserting their statute of limitations defense regarding hotels, taxicabs, and buses, Respondents claim that the question to be asked is, “when did the Complainant know that it would be charged on a different basis than the hotels or taxis?” (Resp. Corr. Brief, at pp.39-40). This however, is an incorrect inquiry. Pursuant to *Maher*, the proper question is, “when did Complainants know, or when should Complainants have known, that the four *Ceres* factors¹⁰ existed?” *See Maher Terminals, LLC v. Port Authority of New York and New Jersey*, 2013 WL 9808667, *6, Docket No. 08-03 (FMC 2013)(Holding that claim accrues when complainant knew, or should have known, that the four *Ceres* factors existed.). In the present matter, this question must be applied to Complainants’ injury resulting from the disparate and preferential treatment of other Cruise Terminal users caused by the Wharves Board’s selective enforcement of the Tariff.

Between 2004 and 2006, the Tariff required all Cruise Terminal users—with the exception of taxicabs and limousines—to pay an Access Fee of \$10 per trip into the Cruise Terminal. Wharves Tariff Circular No. 6 – Item 111 – effective December 1, 2004, BOT_017486-017487 (Resp. App. Tab 001, at pp.000016-000017); and Wharves Tariff Circular No. 6 – Item 111 – effective August 28, 2006, BOT_017559-017561 (Resp. App. Tab 002, at pp.000089-000091). In 2006, the Tariff was amended to require “Off-Port Parking Users” to pay Access Fees based on the number of parking spaces located in the Off-Port Parking User’s

⁹ Complainants learned that other Cruise Terminal users were being given preferential and beneficial treatment when Complainants filed suit against Respondents in response to the grossly unjust 261% increase in Complainants’ Access Fees that took effect in the July of 2014. *See also* Ex.A, Depo. J. Hayes at 133:7-134:9.

¹⁰ The *Ceres* factors are: (1) similarly situated or in competitive relationship; (2) accorded different treatment; (3) unequal treatment not justified by differences in transportation factors; and (4) resulting prejudice or disadvantage is the proximate cause of the injury. *Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (FMC 19).

parking facility.¹¹ Wharves Tariff Circular No. 6 – Item 111 – effective August 28, 2006, BOT_017559-017563 (Resp. App. Tab 002, at pp.000089-000093). In 2007, those Access Fees were adjusted for most Cruise Terminal users to varied charges depending on the type and seating capacity of the vehicle accessing the Cruise Terminal, while “Off-Port Parking Users, as defined in the Tariff, were still to be charged Access Fees based on the number of parking spaces in their parking lots. Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007, BOT_017637-017640 (Resp. App. Tab 003, at pp.000167-000170). Additional amendments in 2007 included the Tariff requiring the collection of Access Fees from all limousines and taxicabs with seating capacities greater than eight (8) persons. Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007, BOT_017637 (Resp. App. Tab 003, at p.000167). This methodology of assessing Access Fees remained until 2014 when, in response to Complainants’ legal action protesting Respondents’ unprecedented and unjustified 261% increase in Complainants’ Access Fees, the Wharves Board made further amendments to the Tariff. *See* Complainants’ Verified Complaint, filed with FMC on June 16, 2014.

The Tariff, as it existed in its multiple amended versions between 2006 and 2014, clearly provided that “Off-Port Parking Users,” meeting the definition therein provided, were to be charged a specified Access Fee per parking space, per month. Wharves Tariff Circular No. 6 – Item 111 – effective August 28, 2006, BOT_017559-017563 (Resp. App. Tab 002, at pp.000089-000093); Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007, BOT_017637-017640 (Resp. App. Tab 003, at pp.0000167-000170); Wharves Tariff Circular No. 6 – Item 111 – effective November 21, 2013, BOT_017708-017712 (Resp. App. Tab 004, at pp.000237-000241); Wharves Tariff Circular No. 6 – Item 111 – effective July 1, 2014,

¹¹ “Off-Port Parking User” has been defined in the Tariff since 2003. Wharves Tariff Circular No. 6 – Item 111 – effective November 1, 2003, BOT_017490 (Resp. App. Tab 001, at p.000020).

BOT_017793-017796 (Resp. App. Tab 005, at pp.000322-000325). Because local hotels/motels that were similarly situated and/or in competitive relationships with Complainants clearly met the Tariff's definition of an "Off-Port Parking User," Complainants had neither indication, nor reason to believe, that they were being charged differently from other "Off-Port Parking Users." *See* Deposition of George Templeton, 41:6-42:22 (Resp. App. Tab 083, at pp.002532-002533); and Deposition of Sylvia Robledo, 63:8-14 (Resp. App. Tab 080, at p.002321). It was not until 2014, when Complainants filed suit against Respondents in response to the unjust Tariff enacted July 1, 2014, that Complainants first learned of the unreasonable, disparate, and prejudicial treatment that caused Complainants' injury. Accordingly, the discovery rule applies, tolling the statute of limitations on Complainants' cause of action for reparations based on Respondents' above conduct relating to local hotels/motels under the Tariff.

Likewise, from 2007 through 2014, the Tariff required the Wharves Board to collect Access Fees in graduated rates from Cruise Terminal users. Wharves Tariff Circular No. 6 – Item 111 – effective December 17, 2007, BOT_017637-017640 (Resp. App. Tab 003, at pp.0000167-000170); Wharves Tariff Circular No. 6 – Item 111 – effective November 21, 2013, BOT_017708-017712 (Resp. App. Tab 004, at pp.000237-000241); Wharves Tariff Circular No. 6 – Item 111 – effective July 1, 2014, BOT_017793-017796 (Resp. App. Tab 005, at pp.000322-000325). However, by their own admission, Respondents failed to enforce the Tariff in an even-handed manner as published. (Resp. Corr. Brief, at p.21, fn.5 and p.23, fn.6); Minutes of May 19, 2014 Meeting, BOT_000106 (Comp. App., at p.000500, cmt.PS7). The Wharves Board's selective enforcement of the Tariff, whereby Complainants were, without fail, charged the full Access Fees due under the Tariff, but other Cruise Terminal users were either not charged at all, or charged advantageously reduced Access Fees, caused injury to Complainants. This

unreasonable, disparate, and discriminatory conduct by the Wharves Board gives rise to Complainants' cause of action for violations of the Shipping Act.

Respondents, while admitting that the above disparate and discriminatory conduct persisted from 2007 through 2014, provide they (the parties responsible for enforcing the Tariff and tracking Cruise Terminal access) did not know that they were undercharging Access Fees until 2013. (Resp. Corr. Brief, at p.21, fn.5 and p.23, fn.6). In light of same, Respondents argue that Complainants should have counted all vehicles accessing the Cruise Terminal, determined the passenger capacity of same, and compared those numbers to the Port's records of Access Fees charged. (Resp. Corr. Brief, at p.40). Without justification or authority, Respondents seek to place a burden far in excess of due diligence upon Complainants.

Having not undertaken the extraordinary efforts identified by Respondents as Complainants' avenue for discovering the existence of their causes of action, Complainants did not discover that they were being treated differently by the Wharves Board until after June of 2014, within months of Respondents' own discovery of same, when Complainants pursued discovery in relation to their suit against Respondents for the unreasonable increase in their Access Fees. Because Complainants did not, and could not reasonably have been expected to, discover the disparate and discriminatory treatment they were subjected to until 2014, the discovery rule applies to toll the statute of limitations until that time. Accordingly, Complainants claims for reparations are not barred by the statute of limitations.

B. COMPLAINANTS HAVE MET THE STANDARD OF PROOF FOR REPARATIONS

In their brief, Respondents argue that “[w]hile the fact of injury must be shown with reasonable certainty, the amount can be based on something less than precision but based on a reasonable approximation *supported by evidence* and by reasonable inferences.” (Resp. Corr.

Brief, at pp.40-41) (emphasis in original). In line with Respondents' statement, Complainants have shown the fact of injury with reasonable certainty, and the reparations Complainants seek are, as a result of the nature of Respondents' violations of the Shipping Act of 1984 and their concurrent and associated failure to document the number and passenger capacities of the vehicles accessing the Cruise Terminal, based on allowable "reasonable estimations." *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946)(Providing that "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."); *California Shipping Lines, Inc., v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (October 19, 1990)(Providing that "in situations where a wrongdoer has by its own action prevented the precise computation of damages, the [Supreme] Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data.").

Respondents' violations of the Shipping Act for which Complainants are due reparations include Respondents' unreasonable, disparate, and discriminatory treatment of Complainants by failing to enforce the Tariff in an even-handed manner. Respondents admit to undercharging hotels, limousines, and buses in Access Fees due pursuant to the Tariff from 2007 through 2014, while at the same time, never failing to charge and collect the full Access Fees allowable under the Tariff from Complainants. *See* (Resp. Corr. Brief, at p.21, fn.5 and p.23, fn.6). The Wharves Board's violations of the Shipping Act through selective enforcement of the Tariff directly resulted in the Wharves Board's failure to document the undercharged Access Fees. *See id.* The evidence necessary to precisely account for Complainants' damages, therefore, is unavailable by virtue of the very violation of the Shipping Act giving rise to Complainants claims.

Accordingly, Complainants have been caused to rely upon data extrapolated from the only records made available by Respondents. *See* (Comp. Original Brief, at pp.27-43). While objecting to Complainants' extrapolation method, Respondents rely upon the exact same extrapolation method for their own purposes. *See* (Resp. Corr. Brief, at p.43)(Respondents object to extrapolation of data from six months of records.); *see also* Rebuttal Expert Report of Jeffrey A. Compton (Resp. App. Tab 007, at p.000407)(Respondents' expert extrapolates data in the same manner, but from a mere two months of records.). Furthermore, Respondents themselves admit that more cruise ships called on the Cruise Terminal in 2006 than any other year before or since. (Resp. Corr. Resp. and Obj. to Comp. PFF, at p.42). Therefore, Complainants' use of 2006 access numbers to assign "x" number of trips into the Cruise Terminal per parking space in Complainants parking lots is the most conservative estimate available.¹²

Respondents' assert that Complainants actually benefited from the unreasonable prejudice and disadvantaged caused by Respondents' disparate treatment of Complainants. (Resp. Corr. Brief, at p.43). In support thereof, Respondents cite to the deposition of Mr. Jason Hayes, where they would have the Commission believe that Mr. Hayes confirmed that Complainant EZ Cruise "ran an average of 600 trips per week" into the Cruise Terminal between 2007 and 2014. (Resp. Corr. Brief, at p.44)(citing to Deposition of Jason Hayes, 158:1-160:23). However, Respondents' are blatantly misrepresenting and distorting the truth of Mr. Hayes' testimony in order to reach their desired conclusions. What Mr. Hayes testified to, and did so

¹² *E.g.*, Assuming Complainants operated 100 parking spaces in 2006, and because of the record number of cruise ships calling on the Cruise Terminal, accessed the Cruise Terminal 500 times. When the Cruise Terminal had slower years subsequent to 2006, 2008 for example, Complainants, still operating 100 parking spaces, would be expected to access the Cruise Terminal fewer times. By basing all extrapolation on the 2006 numbers, Complainants provided the most conservative model available; assigning to Complainants the maximum number of accesses to the Cruise Terminal per period recorded.

with the caveat that he was unaware of trip counts any further in the past than approximately August of 2014,¹³ was **not** that EZ Cruise averaged 600 trips per week from 2007 through 2014, but rather that from October 2014 through the beginning of February 2015 (a time period not in consideration for purposes of Complainants' claims), the peak trip-count for EZ Cruise was approximately 600 trips into the Cruise Terminal. (Ex. A, Depo. J. Hayes, at 158:7-9 (establishing the time period), 159:5-160:4 (600 trips/week suggested, but not agreed to); 161:15-162:13 (objections to same mischaracterization and clarification of testimony)). Accordingly, Respondents' attempt based on a deceptive mischaracterization of a single complainant's testimony, at reducing Complainants' estimate, fails.

Respondents further attack Complainants' damage model as relates to Complainant EZ Cruise—not for Complainants 81st Dolphin or Lighthouse—by arguing that the trip counts attributed to Complainant EZ Cruise did not include the trips made by Galveston Limo on behalf of EZ Cruise. (Resp. Corr. Brief, at p.47). Complainants' original brief based EZ Cruise's reparations damage model for the unreasonable, disparate, and discriminatory treatment it received pursuant to the Tariff on EZ Cruise accounting for 11.2% of Cruise Terminal traffic during 2006 (the last six months records of Complainants' trip counts were kept until 2014). (Comp. Brief, at p.31); *see also* Port Tariff Access Fee Study 2006, BOT_010831-010832 (Comp. App., at pp.000532-000533)(showing percent traffic calculated by dividing trips made by EZ Cruise by the total trips counted). Applying, as Respondents request, the trips made by Galveston Limo on behalf of EZ Cruise in 2006 increases EZ Cruise's percent use of the Cruise Terminal during that time period increases from 11.2% to just shy of 20.0%. *See id.*; *see also* Cindy Hayes Letter, June 14, 2005, BOT_010820 (Resp. App. Tab 051, at p.001766) (showing 1297 total trips made by Galveston Limo on behalf of EZ Cruise). Applying Respondents'

¹³ *See* Ex. A, Depo. J. Hayes at 83:3-7.

numbers, as a result of the Wharves Board charging EZ Cruise per space per month, in a facially disparate manner than other Cruise Terminal users were charged and in violation of the Shipping Act, the amount EZ Cruise was overcharged reduces from a total of \$112,614.15 to \$23,053.55. *See* (Comp. Brief, at pp.31-34); Port Tariff Access Fee Study 2006, BOT_010831-010832 (Comp. App., at pp.000532-000533); Cindy Hayes Letter, June 14, 2005, BOT_010820 (Resp. App. Tab 051, at p.001766).

Complainants have provided reasonable estimations of their injuries and damages, supported by evidence available, justifying the reparations they seek. A more precise showing has been denied Complainants by the very conduct comprising the Shipping Act violations which support this cause of action.

C. PREJUDICIAL TREATMENT DID NOT BENEFIT COMPLAINANTS

As shown by Complainants above, Complainants seek reparations for damages incurred as a result of the Wharves Board's violations of the Shipping Act of 1984. Specifically, those violations include the Wharves Board's conduct of (1) charging Complainants Access Fees based on the number of parking spaces in their parking lots rather than, as all other Cruise Terminal users, based on their use of the Cruise Terminal; and (2) by selective enforcement of the Tariff. Respondents assert that the unreasonable, disparate, and discriminatory treatment of Complainants actually benefitted Complainants. (Resp. Corr. Brief, at p.48). To arrive at their conclusion, Respondents, like Complainants, look at Complainants' recorded use of the Cruise Terminal before the establishment of the per space, per month Access Fee structure. *Id.* Respondents multiply Complainants' then recorded trip counts by \$10, subtracting from that the product of Complainants' then total parking spaces multiplied by \$8. *Id.* The difference between the two products for each Complainant is the "benefit" that Respondents claim

Complainants received. However, the calculations Respondents use completely fail to consider the disadvantageous position Complainants were placed in as a result of the preferential treatment given to Complainants' competitors.

Complainants seek reparations for violations of the Shipping Act arising out of the selective enforcement of the Tariff. As admitted by Respondents, from 2007 to 2014, (1) other "Off-Port Parking Users," specifically, hotels/motels, were not charged as required by the Tariff, (2) the Access Fees charged to hotels/motels was not even in compliance with the Tariff's fee schedule based on vehicle seating capacity, (3) taxicabs with seating capacities of greater than eight persons were not charged as required by the Tariff, (4) buses were not charged as required by the Tariff, and (5) limousines were not charged as required by the Tariff. (Resp. Corr. Brief, at p.21, fn.5 (buses and shuttle vans charged less than they should have been), p.23, fn.6 (limousines not charged from 2008 through 2014), p.34 (hotels meeting Tariff's definition of "Off-Port Parking User" not charged as such), p.51 (contrary to the requirements of the Tariff, Cruise Terminal users not charged based on passenger capacity)); *see also* Minutes of May 19, 2014 Meeting, BOT_000106 (Comp. App., at p.000500, cmt.PS7)(Tariff provisions charging taxis never enforced). However, throughout that entire period, Complainants were consistently charged as required by the Tariff for "Off-Port Parking Users." Complainants' Invoices, BOT_016105-015791 (Comp. App., at pp.000058-00277). Unsurprisingly, Respondents' calculated "benefit" wholly avoids consideration of this significant fact. Instead Respondents' calculation assumes that, despite the reduced fees and free passes routinely enjoyed by other Cruise Terminal users during the relevant seven (7) year time period, such preferential treatment would still be withheld from Complainants, or in the alternative, that such preferential treatment would not have been given to others. Either assumption is contrary to the facts at hand,

relegating Respondents' arguments made there under to the realm of the imaginary ideal. It is precisely that missing data, measured by the Wharves Board's failure to track and bill Cruise Terminal users between 2007 and 2014, for which Complainants seek reparations.

Respondents earnestly and repeatedly tell the Commission that Complainants' arguments are supported by nothing more than naked allegations and without evidence. However, Respondents admit that all identified categories of Cruise Terminal users—other than Complainants—received economic advantages by the selective enforcement of the Tariff. *See* (Resp. Corr. Brief, at p.21, fn.5 (buses and shuttle vans charged less than they should have been), p.23, fn.6 (limousines not charged from 2008 through 2014), p.34 (hotels meeting Tariff's definition of "Off-Port Parking User" not charged as such), p.51 (contrary to the requirements of the Tariff, Cruise Terminal users not charged based on passenger capacity)); *see also* Minutes of Board of Trustees of the Galveston Wharves Meeting, May 19, 2014, BOT_000106 (Comp. App., at p.000500, cmt.PS7)(Tariff provisions charging taxis never enforced). Additionally, Complainants original brief provides evidentiary proof through Respondents' own invoices clearly showing the same. *See, e.g.*, (Comp. Brief, at pp.36-42). These clearly documented and admitted practices that gave unreasonable economic advantages to other Cruise Terminal users while prejudicially withholding the same from Complainants, caused Complainants injury and economic damages. Respondents argue that these violations of the Shipping Act did not amount to Complainants subsidizing other Cruise Terminal users because "[Complainants] were not required to pay anything more because of the underpayments by others."¹⁴ (Resp. Corr. Brief, at

¹⁴ Respondents' reasoning fails to take into account the Wharves Board's stated purpose for increasing Access Fees in 2014, which was to compensate for an asserted deficit in revenue. *See* Depo. M. Mierzwa, at 68:11-19, 80:25-87:12, and 91:8-24 (Comp. App., at pp.000304, 000306-000309). While Complainants were injured by the economic advantage given to other Cruise Terminal users and withheld from Complainants, the injury was compounded when Respondents increased Complainants' Access Fees as a result of the benefits bestowed upon others and denied Complainants.

p.52). However, to the extent that Complainants paid their full share of Access Fees while the Wharves Board, in violation of the Shipping Act, allowed other Cruise Terminal users to pay less than their required share of Access Fees, Complainants were subsidizing those other users.

CONCLUSION

Based on the foregoing, Respondents' conduct has clearly violated Section 41106(2) of the Shipping Act of 1984. Moreover, Respondents' violations of the Shipping Act have given undue and unreasonable preference and advantage to local hotels/motels, buses, limousines, and taxicabs; and have imposed undue and unreasonable prejudice and/or disadvantage on Complainants. Respondents affirmative defense of statute of limitations, asserted only against Complainants' claims for reparations related to hotels, taxicabs, and buses, fails by application of the discovery rule. Complainants have established the necessary proof of injury and damages as required. Accordingly, Complainants respectfully request the relief sought in Complainants' original brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document on this **24th day of June, 2015**, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

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**ATTORNEYS FOR THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES
AND GALVESTON PORT FACILITIES CORPORATION**



Douglas T. Gilman

JASON HAYES - February 05, 2015

Page 1

1 FEDERAL MARITIME COMMISSION
 2 DOCKET NO. 14-06
 3 SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
 4 CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
 SYLVIA ROBLEDO d/b/a 81ST DOLPHIN PARKING
 5 Complainants
 6 v.
 7 THE BOARD OF TRUSTEES OF THE GALVESTON
 8 WHARVES and THE GALVESTON PORT FACILITIES
 CORPORATION
 9 Respondents

11 ORAL DEPOSITION OF
 12 JASON HAYES
 13 FEBRUARY 5, 2015

16 ORAL DEPOSITION OF JASON HAYES, produced as a
 17 witness at the instance of the Respondents, and duly
 18 sworn, was taken in the above-styled and numbered
 19 cause on February 4, 2015, from 9:14 a.m. to 2:10
 20 p.m., before Jo Ann Kelley, CSR in and for the State
 21 of Texas, reporting by machine shorthand, at the
 22 offices of Gilman & Allison, 2005 Cullen Boulevard,
 23 Pearland, Texas, pursuant to the Federal Rules of
 24 Civil Procedure and the provisions stated on the
 25 record or attached hereto.

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 2
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 13
 14 ALSO PRESENT:
 15 Mr. Charles Tompkins
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 4

1 S T I P U L A T I O N S
 2 JASON HAYES,
 3 having been first duly sworn, testified as follows:
 4 THE REPORTER: Would you like to waive
 5 the 30(b)(5) Rule?
 6 MR. COWEN: Yes.
 7 MR. GILMAN: Yes.
 8 THE REPORTER: And would you like to
 9 state stipulations?
 10 MR. GILMAN: We'll read and sign.
 11 MR. COWEN: By the Rules.
 12 MR. GILMAN: By the Rules, pursuant to
 13 the Rules.
 14 EXAMINATION
 15 BY MR. COWEN:
 16 Q. Will you please state your full name for the
 17 record, sir?
 18 A. Jason L. Hayes.
 19 Q. What does the "L" stand for?
 20 A. Lynn.
 21 Q. L-y-n-n?
 22 A. Yes, sir.
 23 Q. My name is David Cowen. We have not met, I
 24 don't believe. Amanda Wright is my associate here
 25 with us. We are going to take your deposition today.

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<p>1 shuttle to the terminal and get them filled up for one 2 night. They weren't doing that then. 3 Q. Okay. They weren't doing that then? 4 A. They weren't -- no. 5 Q. When did they start doing that? 6 A. I don't know the date. 7 Q. Okay. Was it because -- 8 A. But I know they weren't doing it to the 9 extent that they're doing it now. 10 Q. What about in 2014, were they doing that? 11 A. Listen, we're not going to be -- the cruise 12 parking lots are not getting any support. It's the 13 hotels -- 14 Q. I didn't ask you that. 15 A. The hotels are what's going to be the 16 biggest thing -- 17 MR. GILMAN: He asked -- he asked 18 you -- 19 Q. (By Mr. Cowen) I asked you -- 20 MR. GILMAN: He asked you -- 21 A. What's your question? 22 MR. GILMAN: -- in 2014 -- 23 Q. (By Mr. Cowen) In 2014, were the hotels 24 involved in this new marketing program to specifically 25 try to bring in cruise terminal people?</p>	<p>1 Q. I'm asking you if you know one way or the 2 other. 3 A. I don't know what our trip count -- to be 4 honest with you, I don't even know what trip coun -- I 5 have no idea what trip counts are to the last -- the 6 last six, seven, eight months. You know, it has been 7 off our radar, you know. 8 Q. Right. Now, in 2006, did EZ Cruise keep 9 track of trips? 10 A. I personally didn't because I didn't -- my 11 mom might have. 12 Q. Did your people keep track of trips? 13 A. I -- I -- that's a question you have to ask 14 my mom because I don't know the answer to that. I 15 really don't. 16 Q. Okay. Do you know one way or the other 17 whether the -- in 2006 -- 18 A. I think I was in Colorado in 2006, to be 19 honest with you. 20 Q. All right. Let's break -- 21 A. Yeah. I really think -- 22 Q. Okay. So -- 23 A. -- I might have been in Colorado in 2006. 24 Q. Okay. So, in 2006, were you involved in the 25 operation of the Port at all?</p>
<p>Page 82</p> <p>1 MR. GILMAN: Objection, 2 mischaracterizes, new marketing program. 3 Q. (By Mr. Cowen) Or the marketing program. 4 A. What's -- what's the question again? What 5 about it? 6 Q. You said before that the hotels now have 7 this -- and I'll put it in my words. And I apologize 8 if I misstate you -- marketing program to really try 9 and get cruise terminal passengers, right? 10 A. Is it just for 2014? They have been doing 11 it. 12 Q. How long have they been doing that? 13 A. Years. 14 Q. Okay. 15 A. Yeah. I mean, I would -- if I owned a 16 hotel, that's exactly what I'd try to do. 17 Q. All right. 18 A. That's a great deal. 19 Q. Do you know in 2006 that -- whether or not 20 your company -- 21 A. I'd fill my rooms up. 22 Q. Do you know in 2006 whether your company had 23 -- took more trips to the port terminal than any other 24 hotel individually? 25 A. Are you saying that, in 2006, we --</p>	<p>Page 84</p> <p>1 A. Yeah. I don't think I was. As a matter of 2 fact, I think I was in Colorado. Is that the time 3 Lighthouse was -- because I know when Lighthouse -- I 4 was in Colorado when Lighthouse was incorporating and 5 all that stuff and starting up. So, I really don't 6 think I was around. 7 Q. When do you think you came back? 8 A. I'm not sure. In 2007. I was there in and 9 out for years. 10 Q. Okay. 11 A. So, I really haven't been back solid for, 12 like, 2011. 13 Q. Okay. That helps a lot. Thank you. 14 Because I -- 15 A. I mean, I know -- I know certain things, but 16 it's -- it's -- it's usually secondhand hearsay. It's 17 from my mom. So -- 18 Q. Well, do you know one way or the other where 19 in -- in 2006, the parking rate -- I mean, the access 20 rate went from a 10-dollar per trip to an 8-dollar per 21 space per month rate, that the new rate was cheaper 22 than the 10-dollar trip for EZ Cruise? 23 MR. GILMAN: Object to form. 24 I'm not sure what the question is. 25 A. I'm not either.</p>

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<p style="text-align: right;">Page 133</p> <p>1 were aware that EZ Cruise was being charged by the 2 port an 8-dollar per space per month access fee? 3 A. Right. We didn't have a choice. 4 Q. I didn't ask you that. I asked you if you 5 knew you were being charged that? 6 A. Yes. 7 Q. And you knew that the hotels were not being 8 charged on that same basis during that same time 9 period? 10 MR. GILMAN: Objection, foundation. 11 A. You know the funny thing about the hotels, I 12 was at a -- at a little event in my neighborhood the 13 other day with Frank Carnes. He owns Republic 14 Limousine. He just bought Galveston Limousine. He 15 laughed, he said, "You guys have stirred a lot up 16 because now for the first time ever in my three years 17 with Republic Limousine I just received a bill for 18 access fees." 19 And Galveston Limousine company he just 20 bought was received -- I said, "Man, I thought 21 Galveston Limousine was charged access fees," you 22 know, letting me believe that that happened. You 23 know, he said, "They were until Ike. After Ike, they 24 weren't charged access fees." 25 So, I believe we were being charged</p>	<p style="text-align: right;">Page 135</p> <p>1 rate, correct? 2 MR. GILMAN: Objection. 3 A. Some hotels -- 4 MR. GILMAN: Don't answer that 5 question. You've already given an answer. 6 THE WITNESS: Okay. 7 Q. (By Mr. Cowen) Have you ever read the 8 tariffs issued by the Port for parking fees? 9 A. Yeah. I've skimmed through it, some of it. 10 Q. Did you try to keep track of the different 11 changes over the years? 12 A. Not always, no. 13 Q. Well, if it affected your company, did you 14 try to figure out what the effect would have been? 15 A. Yeah. 16 Q. Okay. And would you agree with me that as 17 far as the base rate of \$8 per month, from the 2006 18 time period through at least May of 2014, that 19 space-per-fee rate did not go up for your company? 20 A. No, it did not go up, not because it was our 21 fault. It was -- actually, the Port was supposed to 22 go up. It's their neglect that they didn't raise 23 their rates, because it was built into the tariff. I 24 did read that part. But, you know, they put -- you 25 know, publicly-made comment that they had bad</p>
<p style="text-align: right;">Page 134</p> <p>1 \$8 a space. We were. And I believe some hotels maybe 2 were charged \$10 per trip fee. Under the old tariff, 3 they should have been charged -- a lot of those -- 4 there's not one hotel that I know that was running the 5 passenger count under -- I forget a certain amount -- 6 for \$10. So, it's been charged 8 -- \$50 per trip fee. 7 But, yeah, there's a lot of people that 8 weren't being charged trip fees. I think only a 9 select few. 10 MR. COWEN: I've got to object to the 11 responsiveness. 12 Q. (By Mr. Cowen) The question was: Do you -- 13 MR. GILMAN: Actually, he just answered 14 your question. 15 MR. COWEN: I don't think he did. 16 MR. GILMAN: Well, I'm going to 17 instruct him not to answer it if you're going to ask 18 the same question again. 19 MR. COWEN: That's fine. 20 Q. (By Mr. Cowen) Are you going to not answer 21 it? Are you going to follow the advice of your 22 counsel? 23 A. I just told you, we were paying \$8 per 24 space. 25 Q. And the hotels were not paying that same</p>	<p style="text-align: right;">Page 136</p> <p>1 administration. And they just -- they failed to do 2 what they were supposed to do. 3 So, it's not my fault that they didn't 4 -- they didn't go up on their rates. 5 MR. COWEN: And I will object to the 6 responsiveness after he immediately answered the 7 question. I didn't ask you any of that. 8 THE WITNESS: Right. 9 MR. COWEN: I just asked you -- well, I 10 asked you what I asked you. You answered the first 11 part. I object to the rest of it. 12 Q. (By Mr. Cowen) Now, let's go to 2014, May. 13 Go up to that time period. Okay? 14 Were you involved at all in discuss -- 15 in discussions with anybody at the Port about what the 16 access rate should be? 17 A. Not that I'm aware of. 18 Q. Okay. Did you sit in any meetings between 19 Port officials or staff and your company where that 20 subject matter was discussed? 21 A. Well, I think we went to mitigation or 22 something like that. 23 Q. I'm sorry? 24 A. Mitigation. 25 Q. Mediation?</p>

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<p style="text-align: right;">Page 149</p> <p>1 Q. -- do you recall having any type of 2 discussions with anybody at a hotel or anybody related 3 to a hotel about that rate? 4 A. No. 5 Q. Okay. Since -- now, as I understand it, in 6 September, the board came back and changed the \$28 to 7 a 20-dollar per trip for you-all; is that right? 8 A. Correct. 9 MR. GILMAN: Objection, form. 10 Are you talking -- go ahead. 11 Q. (By Mr. Cowen) In September. 12 MR. GILMAN: Recently? 13 THE WITNESS: The tariff? 14 MR. COWEN: Yeah. I'm sorry. 15 MR. GILMAN: But not for that. 16 MR. COWEN: I'll go back. 17 MR. GILMAN: Change of tariff. 18 Q. (By Mr. Cowen) In 2014, they changed the 19 tariff, correct? 20 A. Uh-huh. 21 Q. In September 2014, the board of trustees 22 decided to charge EZ Cruise and other similar parking 23 lots a per-trip access fee instead of a per-space 24 access fee; is that right? 25 MR. GILMAN: Objection, form. Go</p>	<p style="text-align: right;">Page 151</p> <p>1 a legal conclusion, speculation. 2 A. Yeah. I don't know the answer to your 3 question. 4 Q. (By Mr. Cowen) Well, in the tariff -- 5 you've read that tariff, right? 6 A. Yes. 7 Q. You know if you have got a shuttle that's 14 8 or less, it's going to be charged \$20 access fee, 9 correct? 10 MR. GILMAN: Objection, form, 11 speculation. 12 Q. (By Mr. Cowen) And it doesn't matter if 13 it's a shuttle from one of your lots or a shuttle from 14 one of the hotels, there's -- the rates -- the tariff 15 says it's going to charge the same rate, correct? 16 A. All I know is we're paying \$8 to you guys 17 and \$20 to the Port Registry. 18 Q. Okay. That's what you're paying right now. 19 Okay. That's what your understanding is? 20 A. Right. 21 Q. But the tariff, you've read the tariff. 22 Okay? 23 A. Yeah. But I don't know if the tariff is 24 legal. I don't -- I don't know -- 25 Q. And if --</p>
<p style="text-align: right;">Page 150</p> <p>1 ahead. To the extent it calls for a legal conclusion. 2 Go ahead. 3 A. All I know is in midship here or midways 4 through this deal, they -- I guess they didn't like 5 the lawsuit thing. So, they said, "Well, we'll go 6 ahead and amend this tariff and make it per trip 7 instead of per space." 8 So, that's -- that's what has happened. 9 Q. (By Mr. Cowen) And at this point, if it's a 10 hotel shuttle or one of your shuttles of the same or 11 similar capacity, as far as you know, the Port is 12 going to charge both the same rate to access the 13 terminal right now; is that correct? 14 MR. GILMAN: Objection, form. 15 Go ahead. 16 A. Repeat your question. 17 Q. (By Mr. Cowen) Right. 18 If the hotel has a 14 person or less 19 capacity shuttle going into the Port -- 20 A. Correct. 21 Q. -- and EZ Cruise has also a 14 shuttle, 14 22 person capacity shuttle going to the Port, as far as 23 you know, both of those are going to be charged the 24 same rate now; is that correct? 25 MR. GILMAN: Objection, form, calls for</p>	<p style="text-align: right;">Page 152</p> <p>1 A. -- anything. 2 Q. And what I'm just asking you -- 3 A. Yeah, yeah, yeah. 4 Q. -- it's your understanding that the rate 5 that they would charge under the September tariff and 6 it's in force now for your shuttles would be the 7 same -- 8 A. What's in force now? 9 Q. -- as the hotels? 10 I'm sorry? 11 A. What's enforced? 12 Q. Yes. 13 A. What's enforced? 14 Q. I'm asking you, on the tariff that's been 15 adopted in September of 2014, the rate being charged 16 your shuttles is the same rate being charged hotel 17 shuttles of similar capacity? 18 A. I can't -- I can't -- 19 MR. GILMAN: Objection, form, calls for 20 a legal conclusion. 21 A. No. I can't -- 22 MR. GILMAN: Speculation. 23 A. There is no way for me to prove it if 24 they're being charged the same or not. You know, 25 because the truth is, I thought everybody was being</p>

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<p style="text-align: right;">Page 153</p> <p>1 charged a fair rate for all these years. And then 2 recently I find out that there's a lot of hotels that 3 weren't even being charged. So, what now -- what is 4 now going to be any different from -- 5 Q. (By Mr. Cowen) How do -- 6 A. -- from the past? 7 Q. How do you know a lot of hotels weren't 8 being charged anything? 9 A. If Republic Limousine wasn't being charged, 10 if Galveston Limousine wasn't being charged, and 11 obviously if -- the San Luis is going through there 12 with their big buses, you know, as many times as they 13 are and not being charged properly, I mean, they 14 wouldn't be running -- if it was costing \$50 per bus, 15 they wouldn't be coming through there as much as they 16 were. 17 Q. First of all, with Republic and Galveston 18 Limos, those are not hotels, correct? 19 A. But they have been hired by the hotels to 20 shuttle and so has Clear Lake Shuttle Bus. Clear Lake 21 Shuttle Bus was -- was hired by Galvez. 22 Q. Okay. I'm asking you -- 23 A. And so was -- 24 Q. I'm asking you -- 25 A. So --</p>	<p style="text-align: right;">Page 155</p> <p>1 Q. Do you know -- 2 A. These things happen over years of time. And 3 you don't really think about it until something like 4 this comes up. And then things start connecting the 5 dots. All these dots started connecting. And you're 6 like, "Wow." 7 Q. So, this -- 8 A. So, all this was happening in the past. 9 MR. COWEN: I'm going to object to 10 responsiveness. 11 Q. (By Mr. Cowen) You do agree that everything 12 you're telling me right now is something you heard 13 from somebody else as far as -- 14 A. Well, no. When you see Clear Lake Shuttle 15 Bus picking up and dropping people off at the front 16 door of the Galvez and you see them running over to 17 the Port, then what am I going -- it's a -- it's a -- 18 it's an objectable feedback. It's something I can see 19 and hear. 20 Q. Do you know how many times that occurs -- 21 A. No, I can't -- 22 Q. -- in any given day? 23 A. No. I can't -- I don't -- I don't have 24 those numbers. 25 Q. Okay. So, you -- you don't know if it's</p>
<p style="text-align: right;">Page 154</p> <p>1 Q. I'm asking you the simple question. As far 2 as you know, Galveston Limousine is not a hotel, 3 right? 4 MR. GILMAN: Objection, form, asked and 5 answered. 6 A. Galveston Limousine, Clear Lake Shuttle Bus, 7 all these companies have been hired in the past by the 8 hotels to run cruise passengers into the terminal. 9 Q. (By Mr. Cowen) How do you know that? 10 A. They told me. 11 Q. Okay. 12 A. They -- it's -- 13 Q. Who told you? 14 A. Well, one, Clear Lake Shuttle Bus -- Galvez 15 has. Clear Lake Shuttle Bus people have. 16 Q. So, this is all something you've been told? 17 A. Yes, in the past. It hasn't been that big 18 of a deal. But yes. I've used Clear Lake Shuttle Bus 19 myself -- 20 Q. How often? 21 A. -- as a service. So, I've asked -- I've 22 asked the owner one time to shuttle some people for 23 us. He says, "No, I'm tied up with Galvez right now. 24 I'm shuttling for them." 25 So, that's just --</p>	<p style="text-align: right;">Page 156</p> <p>1 once or a million times, do you? 2 A. No. 3 Q. Okay. Do you have any documents in your 4 possession that would tell you -- 5 A. No. I am sure -- 6 Q. -- how many -- 7 A. -- we can probably subpoena the records. 8 Q. Well, they were subpoenaed, weren't they? 9 A. Well, I mean, I don't -- I don't have those. 10 Q. Okay. 11 A. I don't even know if he has knowledge of 12 Clear Lake. 13 MR. GILMAN: Object -- 14 Q. (By Mr. Cowen) So, you would -- you would 15 agree with me that your -- you don't have any clue 16 what numbers you're talking about as far as -- 17 MR. GILMAN: Object -- 18 Q. (By Mr. Cowen) -- these -- 19 MR. GILMAN: Object to form to the 20 extent that it calls for information subject to 21 attorney/client privilege. 22 MR. COWEN: Well, I'm not going to -- 23 MR. GILMAN: And/or -- and/or and/or -- 24 let me finish my objection. 25 MR. COWEN: Sure.</p>

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<p style="text-align: right;">Page 157</p> <p>1 MR. GILMAN: And/or previous 2 communications, anything we've talked about. 3 Q. (By Mr. Cowen) You can answer outside -- 4 MR. GILMAN: If you have personal 5 knowledge of this outside the scope of something we've 6 talked about -- 7 A. This is personal know -- 8 MR. GILMAN: -- you've learned from -- 9 THE REPORTER: Whoa! One at a time, 10 please. 11 MR. GILMAN: -- outside the scope of 12 anything we've talked about and you learned from me, 13 independent knowledge, you can answer his question. 14 A. This -- this is knowledge I just remembered 15 just a second -- just a second ago about talking with 16 the Clear Lake Shuttle Bus in trying to hire them. 17 So, this is something that just came up just now. I 18 didn't think about it until you asked. 19 Q. (By Mr. Cowen) How long ago did you know 20 that? 21 A. I'm not for sure. But I mean, I -- I have 22 used shuttle companies in the last three years, two to 23 three years, I've used different companies to 24 alleviate when some of my buses break down. 25 Q. Okay.</p>	<p style="text-align: right;">Page 159</p> <p>1 Q. Okay. And if you've been charged by the -- 2 by the trip, that would have been what, \$1600 each 3 day, wouldn't it? 4 A. Correct. 5 Q. How many cruise days in a month back in 6 2014? 7 A. I mean, if we're averaging -- the 160 would 8 be for Sundays, for two ship days. 9 Q. Okay. 10 A. Yeah. So, you would have half of that for 11 the Triumph days. So, you have what, four Sundays. 12 So -- 13 Q. A month? 14 A. Uh-huh. 15 Q. And then the other two days would be the 16 Triumph? 17 A. No. The Triumph is six days. So, six to -- 18 yeah. Somewhere around six. 19 Q. So, if I've got two days at 160, right? 20 A. Uh-huh. 21 Q. And 80 for the other days, I've got five 22 days a week at 80? 23 A. Yeah. 24 Q. That's 400? 25 A. Yeah.</p>
<p style="text-align: right;">Page 158</p> <p>1 A. It's just the nature of my business. So, I 2 have to call other shuttle companies, bus companies, 3 to do work for us sometimes. 4 Q. And you were being charged your rate at that 5 time, right, by the Port, the \$8? 6 A. Well, yeah. 7 Q. Okay. Let me ask: How many trips since 8 October of last year, how many access trips do you 9 guys make on an average cruise day? 10 A. We used to average around 120 to 160. 11 Q. That many? 12 A. We used to go in there pretty heavily. 13 Q. That's -- under the 8-dollar rate? 14 A. Huh? 15 Q. Under the 8-dollar rate? 16 A. Period, yes. 17 Q. So, when -- when your company had an 18 8-dollar-per-space rate on any given cruise days, you 19 would run somewhere upwards of 160 trips into the 20 cruise terminal. Is that what you're telling us? 21 MR. GILMAN: Are you talking per day or 22 per month? 23 MR. COWEN: Per cruise day. 24 Q. (By Mr. Cowen) Is that what -- 25 A. Yeah.</p>	<p style="text-align: right;">Page 160</p> <p>1 Q. That's 600 trips a week? 2 A. 600 trips a week? 3 Q. Is that right? 4 A. I don't know what -- 5 Q. What are you doing? 6 A. I'm doing the math. 7 Q. You're getting your calculator out here? 8 A. What are you trying to get at here? Six 9 what -- if I ran my business the current way -- and I 10 know what you're alluding to, you're alluding to that 11 -- if I ran the business the current way, it would be 12 like \$64,000 a month we would have to pay in trip 13 fees. 14 Q. Okay. I'm not -- 15 A. And that's the truth. 16 Q. I'm not asking you that. I'm asking you how 17 many trips normally -- 18 A. I'm telling you -- 19 Q. -- you guys would be running. Okay. 20 A. If we ran the company the way we ran it 21 before all this, it would cost me \$64,000 -- 22 Q. Okay. So, under the -- 23 A. -- of trip fees. 24 Q. And the -- 25 A. And our gross revenue is not even that.</p>

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<p style="text-align: right;">Page 161</p> <p>1 Q. So, under the years you guys were running -- 2 were paying, rather, \$8 per space per month, right? 3 A. Yes. 4 Q. That's 2006/2014, right? 5 A. Repeat. 6 Q. Okay. From 2006 to 2014, you-all paid \$8 7 per space per month, right? 8 A. Where are you going with \$8 a space? 9 Q. Can I ask my questions, please? 10 A. Well, I'm trying to get through this. 11 Q. I'm trying to get through it, too. So, let 12 me ask the questions and you answer them and I'll get 13 through them. All right? 14 A. Then just ask "yes" or "no" questions. 15 Q. From 2006 to 2014, you-all paid the \$8 -- 16 A. Yes. 17 Q. -- per space? 18 Yes. Now, in that time period, this -- 19 you were running two days a week at 160 on the 20 average, right? 21 MR. GILMAN: Object to form, 22 mischaracterize. He said that that was since -- this 23 last couple of months you asked him how much he's 24 running. 25 MR. COWEN: No. I asked him --</p>	<p style="text-align: right;">Page 163</p> <p>1 get through that. I'm going to get through that. 2 MR. GILMAN: No, not to the extent it's 3 a confusing question and you're attempting to 4 mischaracterize what he had testified to, I do have a 5 problem with that. 6 Q. (By Mr. Cowen) Well, since you -- let's 7 start with the two lots. Since you've had the two 8 lots, which began what year, 2012? 9 A. Yes. 10 Q. Has this been the numbers you've been 11 running since -- the 160 and 80 on peak days, on peak 12 weeks? 13 A. One day I can run 160, another day I can run 14 another number. At peak, yes, 160, at that time. 15 Now, no. 16 Q. Right. Well, now it's because why? You 17 don't want to pay the fee, right? 18 MR. GILMAN: Objection. 19 A. Yeah. Yeah. 20 MR. GILMAN: Objection, argumentative. 21 A. The whole deal is, I run my company a 22 certain way because -- because if -- if I had to run 23 it -- if we were running it \$10 the whole time, we'd 24 run it a little different. That's just it. But since 25 -- since it was a per space and I didn't have a</p>
<p style="text-align: right;">Page 162</p> <p>1 MR. GILMAN: Now you're trying to say 2 that's what he's been running from '06 to now. 3 THE WITNESS: Yeah. I -- 4 MR. GILMAN: That's not what he 5 testified to. You're mischaracterizing. 6 A. Yeah. At the -- at the peak, we were 7 running 160. 8 Q. (By Mr. Cowen) Okay. At the peak. Okay. 9 Let's say that. Okay. 10 And in the peak, you were running 80 11 per day, per cruise day for the other days; is that 12 correct? 13 A. Yeah. 14 Q. And altogether, that's about -- 15 A. Listen, I had drivers going in there, 16 picking up one person, and coming out. I mean, it 17 wasn't a problem at that time. 18 MR. GILMAN: And he also -- just for 19 purposes of clarification, they're also running two 20 lots now, David. And they didn't -- they were only 21 running -- 22 MR. COWEN: That's fine. 23 MR. GILMAN: -- one before. No. 24 But -- 25 MR. COWEN: That's fine. I'm going to</p>	<p style="text-align: right;">Page 164</p> <p>1 choice, I had to pay the per-space fee if I filled up 2 or not, so we just kept running continuously, as fast 3 as possible. 4 You know, if I would have started off 5 at a \$10 per trip and that's been all the choice, that 6 would be an easy fix. I can tell you now how you can 7 run it base I figured it out. But that's -- that's 8 now. But I didn't know how to do it when they were 9 trying to change things first. I didn't understand. 10 I do understand now. It's pretty simple -- 11 Q. (By Mr. Cowen) Okay. 12 A. -- to adjust -- adjust my numbers. 13 But we had no restrictions on buses 14 then. We do now. It didn't -- because it didn't 15 matter, because we had to pay \$8 per space. We had no 16 choice. That was -- that was just it. 17 Q. All right. 18 A. So, we had no choice. So, we ran the buses 19 in as -- as freely as the customers wanted to. 20 Q. On a good month, on a peak month, let's say 21 in 2012 -- 22 A. You have those numbers. What are those? 23 Q. -- you could have -- on a peak month in 24 2012, you could have had a week where you ran 720 25 shuttles.</p>

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1 Has she been involved at all in any of
 2 the day-to-day operations?
 3 A. (Moving head side to side.)
 4 Q. "No"?
 5 MR. GILMAN: "No"?
 6 A. I have only seen her probably five times my
 7 whole life.
 8 Q. (By Mr. Cowen) Okay. What about -- well,
 9 Cindy Tompkins, your mother, right?
 10 A. Yes.
 11 Q. Frances Coursey?
 12 A. She's the same way.
 13 Q. Same way.
 14 MR. GILMAN: As who?
 15 Q. (By Mr. Cowen) As who?
 16 A. As Marcia Davenport.
 17 Q. Okay. So, she doesn't come by and work on
 18 the lot at all, right?
 19 A. Huh-uh.
 20 Q. Okay. That's a "no"?
 21 A. No.
 22 Q. Just so I am -- Jim Sanford?
 23 A. Grandfather.
 24 Q. Okay. Grandfather. All right.
 25 And I -- your mother said he acquired

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1 sweat equity of some sort?
 2 A. Correct.
 3 Q. What did he do for the sweat equity?
 4 A. He helped with the lot.
 5 Q. Okay.
 6 A. Services.
 7 Q. Okay. And then Jason Hayes, here. He said
 8 things that were here. Let's see.
 9 When Galveston -- I mean -- yeah. When
 10 Galveston Limousine was being used by EZ Cruise way
 11 back in what, 2005 or '06, or whatever it was, do you
 12 know what the financial arrangement was with Galveston
 13 Limousine for the trips?
 14 A. Huh-uh.
 15 Q. "No"?
 16 A. No.
 17 Q. Okay.
 18 A. I know what my arrangement is with other bus
 19 companies now but not then.
 20 Q. Well, what is your arrangement -- who do you
 21 use now?
 22 A. I've used Al and Sherry, they owned -- they
 23 own Travel Zone. They have a bus, do some bussing and
 24 stuff around the Port. And I'll just pay them a flat
 25 rate. So, it's a minimum of five hours. Just --

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1 that's just normal bus, when you rent/lease a bus,
 2 it's anywhere from 65 to -- it could be as much as 150
 3 depending on what size bus, where you're going. And
 4 they usually require minimum of five hours. That's
 5 just it.
 6 Q. In the past year, how often have you --
 7 A. I'm not sure. A couple of times.
 8 Q. Okay. Anybody else that you've got some
 9 kind of arrangement with like that?
 10 A. No. We've used a bunch of different
 11 companies in the last 10 years like that, but other
 12 than that -- not just them.
 13 Q. Okay. Are you currently using anyone on any
 14 regular basis to --
 15 A. No.
 16 Q. -- to transfer people?
 17 A. No, not at all. We're talking about one
 18 time last year, one day. And that's because a bus
 19 broke down.
 20 Q. I'm just making sure.
 21 A. We're not talking about anything like that.
 22 MR. COWEN: Well, very good. I
 23 appreciate your time. I pass the witness.
 24 MR. GILMAN: We reserve our questions.
 25 (The deposition concluded at 2:16 p.m.)

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1 CHANGES AND SIGNATURE
 2 WITNESS: JASON HAYES DATE: FEBRUARY 5, 2015
 3 PAGELINE CHANGE REASON
 4 _____
 5 _____
 6 _____
 7 _____
 8 _____
 9 _____
 10 _____
 11 _____
 12 _____
 13 _____
 14 _____
 15 _____
 16 _____
 17 _____
 18 _____
 19 _____
 20 _____
 21 _____
 22 _____
 23 _____
 24 _____
 25 _____

JASON HAYES - February 05, 2015

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1 I, JASON HAYES, have read the foregoing
 2 deposition and hereby affix my signature that same is
 3 true and correct, except as noted herein.
 4
 5 _____
 6 JASON HAYES
 7 THE STATE OF _____)
 8 COUNTY OF _____)
 9
 10 Before me, _____, on this day
 11 personally appeared JASON HAYES, known to me (or
 12 proved to me under oath or through _____)
 13 (description of identify card or other document) to be
 14 the person whose name is subscribed to the foregoing
 15 instrument and acknowledged to me that they executed
 16 the same for the purpose and consideration therein
 17 expressed.
 18 Given under my hand and seal of office this
 19 _____ day of _____, _____.
 20
 21
 22
 23
 24 _____
 25 NOTARY PUBLIC IN AND FOR
 THE STATE OF _____

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1 30(3) that the signature of the deponent:
 2 XX was requested by the deponent or a party
 3 before the completion of the deposition and that the
 4 signature is to be before any notary public and
 5 returned within 30 days from date of receipt of the
 6 transcript. If returned, the attached Changes and
 7 Signature Page contains any changes and the reasons
 8 therefore:
 9 _____ was not requested by the deponent or a
 10 party before the completion of the deposition.
 11 I further certify that I am neither counsel for,
 12 related to, nor employed by any of the parties of
 13 attorneys in the action in which this proceeding was
 14 taken, and further that I am not financially or
 15 otherwise interested in the outcome of the action.
 16 Certified to by me this 23rd day of February,
 17 2015.
 18
 19
 20
 21

 22 Jo Ann Kelley, CSR, #5116
 23 Expiration Date: 12/31/15
 24 Firm Registration No. 62
 1225 North Loop West, Suite 327
 Houston, Texas 77008
 25 Phone: (713) 626-2629

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1 FEDERAL MARITIME COMMISSION
 2 DOCKET NO. 14-06
 3 SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
 4 CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
 5 SYLVIA ROBLED0 d/b/a 81ST DOLPHIN PARKING
 6 Complainants
 7 v.
 8 THE BOARD OF TRUSTEES OF THE GALVESTON
 9 WHARVES and THE GALVESTON PORT FACILITIES
 10 CORPORATION
 11 Respondents
 12 REPORTER'S CERTIFICATION
 13 ORAL DEPOSITION OF JASON HAYES
 14 FEBRUARY 5, 2015
 15 I, Jo Ann Kelley, a Certified Shorthand Reporter
 16 in and for the State of Texas, hereby certify to the
 17 following:
 18 That the witness, JASON HAYES, was duly sworn by
 19 the officer and that the transcript of the oral
 20 deposition is a true record of the testimony given by
 21 the witness;
 22 That the original deposition was delivered to
 23 MR. DAVID COWEN;
 24 That a copy of this certificate was served on all
 25 parties and/or the witness shown herein on
 _____.

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1 COUNTY OF HARRIS)
 2 STATE OF TEXAS)
 3 I hereby certify that the witness was notified on
 4 _____ that the witness has 30 days or
 5 (_____ days per agreement of counsel) after being
 6 notified by the officer that the transcript is
 7 available for review by the witness and if there are
 8 changes in the form or substance to be made, then the
 9 witness shall sign a statement reciting such changes
 10 and the reasons given by the witness for making them;
 11 That the witness' signature was/was not returned
 12 as of _____.
 13 Subscribed and sworn to on this, the _____ day
 14 of _____, 2015.
 15
 16
 17
 18
 19
 20
 21
 22 _____
 23 Jo Ann Kelley, CSR, #5116
 24 Expiration Date: 12/31/15
 25 Firm Registration No. 62
 1225 North Loop West, Suite 327
 Houston, Texas 77008
 Phone: (713) 626-2629