

PROPOSED FINDINGS OF FACT<sup>1</sup>

American's Business, Pier 7 and the Warehouse

1. American is a marine terminal operator ("MTO") within the meaning of the Shipping Act.

2. American is in the business of, among other things, storing, handling and distributing cocoa and other commodities for the account of American's ocean common carrier, non-vessel operating common carrier, ocean freight forwarder, MTO and shipper customers (Complaint, Docket 04-09, ¶1).

3. American's business operates at what Pier 7 (Diagram, Exhibit G hereto)<sup>2</sup> in Red Hook, Brooklyn. American's business is non-transportable; it exists by virtue of the licensed status of the facilities which it operates (discussed in greater detail, *infra*) (Tr. 180).

4. American is engaged in domestic and foreign commerce. Most of the cocoa stored at Pier 7 is grown on the Ivory Coast of Africa or Indonesia, and arrives on foreign-flagged ships (Exh. 33, ¶4). The ships are unloaded by longshoremen employed by American Stevedoring, Inc. ("American Stevedoring") and stored in the warehouse located at Pier 7 operated by American Warehousing ("Warehouse"). American Stevedoring has some of the same principals as American Warehousing; however, the companies are separate and

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<sup>1</sup> The PA's criticism that American's Statement of Facts should have been enumerated as formal "Proposed Findings of Fact" leaves us no choice but to submit this document. These Proposed Findings of Fact shall also serve as American's response to the PA's Proposed Findings of Fact.

<sup>2</sup> American's post-trial motion to permit consideration of this exhibit and others is filed contemporaneously herewith.

operate independently (Tr. 302, li. 9-10).

5. The Warehouse consists of a wide-open space, with no interior walls. See, generally, Photographs, Exh. 35, Attachment 1. Signs hanging from the ceiling of the Warehouse indicate that there are areas identified as southern, southern central, northern central and northern portions of the interior space (Id.), but there are no lines of demarcation on the floor or walls (Exh. 21 at 2).

6. Pier 7's Warehouse meets New York Board of Trade specifications for cocoa storage and is a New York Board of Trade licensed warehouse for cocoa in the New York harbor (including New Jersey). North America's largest chocolate supplier, Blommer Chocolate, serving major name brands including Nestle's, Mars and Hershey's, and other manufacturers and suppliers, receive and store their cocoa at Pier 7 (Exh. 31, Hall Aff., ¶¶4-6). These manufacturers require, as do their insurers and buyers, that the cocoa be stored in a New York Board of Trade approved facility while it is inspected and graded, and before it is shipped out for grinding and processing (Exh. 8, Walk Aff., ¶4).

7. Pier 7 is a finger pier on the Brooklyn Waterfront in New York Harbor (Exh. A to American's Moving Brief, PANYNJ 00516). The Warehouse, located on the Pier, has an expanse of 269,000 square feet and is used to store food-grade cargo. In addition to being certified for storage of bagged cocoa beans and related products by the New York Board of Trade, it is licensed by the Cocoa Merchants Association of America (Tr. 180; Exh. 33, ¶2). Pier 7 is one of the few remaining "commission piers" in Brooklyn (Tr. 163) and one of only a few facilities in the US that can handle and store break-bulk cocoa (Exh. 33, ¶2).

**The CSI Lease, Accordion Provisions/Swing Space and the PA's Demand that American Lease the Northern Portion on a Full-Time Basis, Virtually Doubling its Rent**

8. American first began to occupy Pier 7 in 1999, when it assumed all of the assets for that location of the prior tenant, Commodity Storage Inc. ("CSI"), including CSI's lease of Pier 7 (Exh. 33, ¶15; also see PA Br. at n. 4, p. 12). By the time it assumed CSI's assets, American already occupied and paid rent, including security guard fees, on several other piers. By 2000, American was occupying Piers 2, 5, 6, 7 and 9 from the Port Authority, and it ultimately obtained subtenancies at Piers 8, 11 and 12 from American Stevedoring (Exh. 33, ¶16).

9. Ships may dock at Pier 7 either on the north or the south side, although the south side is preferred because it is considerably longer and has more bays than the north for unloading cargo. Under the CSI Lease, CSI had rented the southern and south-central portions of the Warehouse (collectively, the "southern portion"), and was permitted, pursuant to an accordion provision in the CSI Lease ("accordion provision"), to occupy the northern and central northern portions (collectively, the "northern portion") of the Warehouse as "swing space" on an "as needed" basis (Tr. 154).<sup>3</sup>

10. An accordion provision is vitally important to the food cargo business,

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<sup>3</sup>Pursuant to stipulation at trial, the CSI Lease, as well as the other leases in the FMC's files, need not be admitted into evidence to be received by the FMC (Tr. 120).

especially cocoa, because the business is seasonal, with peaks and valleys. The cocoa crop arrives in New York and requires storage between approximately October and March. During that period, American's needs for storage space are greater than during the remaining six months of the year, the "off season" (Tr. 173). It is common for the PA to allow tenants and other MTOs to use "swing space" on piers or elsewhere that are unoccupied or unused temporarily to store excess cargo to accommodate seasonal increases in cargo (Exh. 2, ¶7; Exh. 34, Hall Aff., ¶¶3, 6 and 7; Tr. 154). In pertinent part, Scotto testified that:

7) It is common practice that the PA frequently encourages and allows tenants to use unoccupied or temporarily unused spaces to store excess cargo to accommodate seasonal increases in port/cargo operations.

8) It is also common practice for the PA to encourage its tenants to work together to accommodate each other with respect to the foregoing. This above practice is still followed by other MTOs who have leases with the PA (Exh. 2, ¶¶7-8).

11. The PA permitted other MTOs to swing space (Tr. 148), but, as discussed, infra, not to American (Tr. 165).

12. Instead the PA refused even to recognize American's assumption of CSI's assets, including the CSI Lease (Tr. 443-44), thereby depriving American of swing space (Tr. 165).

#### **Negotiations between the PA and American, a New Lease at Pier 7 and the Stop-Gap Concept**

13. In or about 2002, American and the PA began lease negotiations for Pier 7 (Exh. 9, ¶¶12-19). At that point, the PA had never invoiced and/or otherwise demanded rent

from American for Pier 7 (Exh. 14, Attachment 1 at 4), ostensibly because the PA did not recognize American's assumption of the CSI Lease (Tr. 443).

14. During negotiations, the PA represented to American that it was necessary to first negotiate a short-term lease through April 30, 2003, to function as a stop-gap lease ("Lease") until a longer-term lease could be negotiated (Tr. 303-4, 314; 75-76; 367; Exh. 9, ¶¶14, 16).

15. Although concerned at the prospect of agreeing to a short-term lease, even as a stop-gap, American accepted the Lease that would expire just six months later, because the PA had told American to "take it or leave it," and "leaving it" meant that the PA would have evicted American (Tr. 365; Exh. 33, ¶21). Without a facility to conduct its business, American would have been put out of business, costing its employees their jobs (Tr. 365-66; also see Tr. 180). American thus signed the stop-gap Lease under economic duress. This occurred in October 2002 (Exh. 9, ¶16; Tr, 102). The Lease term was retroactive to 1999 and expired in April 30, 2003 (lease).

16. The stop-gap Lease set the rent and accompanying expenses for the southern portion only, on a going-forward basis at \$33,029 per month (Id.).

17. The stop-gap Lease states in pertinent part:

ARTICLE I. The Port Authority hereby lets to the Lessee and the Lessee hereby hires and takes from the Port Authority, at the Brooklyn-Port Authority Marine Terminal (sometimes hereinafter called "the Facility") in the City of New York, County of Kings, State of New York, the following described premises:

the enclosed space shown in diagonal hatching on the sketch attached hereto, hereby made a part hereof, and marked "Exhibit A",

together with the buildings, structures, fixtures, improvements, and other property, if any, of the Port Authority located or to be located therein or thereon, the said enclosed space, buildings, structures, fixtures, improvements, and other property of the Port Authority being hereinafter called "the premises."

18. The "enclosed space" identified in the above-excerpt of the Lease refers to the Warehouse.

19. The "diagonal hatching" identified in the Lease refers generally to the southern portion of the Warehouse.

20. The clause which references "together with the buildings, structures, fixtures," etc., refers to the ways of getting into and out of the warehouse, including the surrounding areas and structures, as well as the approaches such as, for example, ramps and the like (Tr. 115).

21. As distinguished from the CSI Lease, the stop-gap Lease did not include an according provision, instead, it contains a provision which conferred upon American the option to separately and fully rent the northern portion of the Warehouse on a full-time basis ("Option") (Lease at Special Endorsements, ¶10); as discussed supra, the northern portion of the Warehouse was deemed temporary swing space under the CSI Lease, allowing CSI, American's competitor (Tr. 153, 165), to use such space only when necessary to accommodate excess cargo (CSI Lease on File with the FMC). Thus, under the stop-gap

Lease that the PA forced American to sign under duress (Exh. 9, ¶16), American would be required to pay rent on a full-time basis for space which CSI was permitted to use as swing space only temporarily, on an as-needed basis.

22. The rent for the optionable northern portion of the Warehouse was set in the stop-gap Lease with American at \$29,066.25 for the first year and \$30,083.57 thereafter -- nearly the same amount as for the southern portion and thus nearly doubling American's rent (Lease at Special Endorsements, ¶10(g)). The PA, during its discussions with American, refused, for reasons never explained at trial, to provide the northern portion as "swing space" to American, even though American "begged for it" (Tr. 165).

23. Although the stop-gap Lease contains a "Standard Endorsement," purporting to allow the PA to terminate its Lease with American on 30 days notice, this is a standard provision in all of the PA's leases (Tr. 364). There is no record of the PA having ever invoked this Standard Endorsement against any tenant other than American (*Id.*).

24. Once the stop-gap Lease was signed, the PA, in February 2003, invoiced American in the amount of \$1,243,335.24 (February 1, 2003 Invoice, attached as one of the Invoices submitted as Exhibit H hereto) (the "First Invoice").<sup>4</sup> The record unequivocally

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<sup>4</sup>Exhibit 14, Attachment 1 at 4 of 4 indicates that American paid \$1,096,625.33 and \$1,243,335.24 in February and March 2003, respectively. These amounts would total more than \$2.3 Million, which exceeds 75 months or more than 6 years of rent. Insofar as American, as of February 2003, could not possibly have owed 75 months of rent for Pier 7 (since that would incept the occupancy in 1997, two years before the CSI assignment), a substantial question is raised with respect to the accuracy of the information contained in this exhibit. More simply, the PA's records reflect that American paid more rent than could possibly have been owed. While this raises troubling issues regarding the accuracy of Exhibit 14, what is absolutely not inaccurate, however, is that American paid its rent bill.

shows that the PA never invoiced American for rent at Pier 7 prior to the First Invoice (Exh. 14, Attachment 1 at 4; also see Tr. 443). American promptly paid all amounts due (Exh. 14, Attachment 1 at 4). The PA contends in its brief that American should have made rental payments for Pier 7 prior to the First Invoice. As discussed in the rent-payment section, infra, the PA's contentions are completely specious.

### **The PA Did Not Forgive Any Rent Allegedly Due for the Northern Portion**

25. The PA contends that, as part of its negotiation of the stop-gap Lease with American, it forgave rent which American supposedly "owed" for allegedly renting the northern portion of the Warehouse from the date of American's assumption of CSI's assets in 1999 to the execution date of the stop-gap Lease in October 2002. As discussed below, the PA's contention on this point is completely unsupported by the record. No competent evidence was ever introduced during this proceeding to prove or even suggest that American rented or even used the northern portion of the Warehouse prior to June 9, 2004 (See discussion on squatting, infra).<sup>5</sup> To the contrary, the PA acknowledged in a memorandum, dated November 30, 2001 (approximately two years after American assumed CSI's assets) that American had not been using the northern portion since inception of its occupancy (Exh. 22 at 2):

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<sup>5</sup>As discussed infra, Richard Hacker testified that American used the northern portion beginning in December 2003 and Chester Hopkins indicated that he "believed" that was correct, but the photographs taken at the time belie this suggestion. Nonetheless, even if it were true that American had used the northern portion in December 2003 (and it isn't), the PA never even attempted to show that it had occurred earlier than that date. Thus, the earliest date of squatting alleged by the PA is December 2003.

26. The PA's own spreadsheet confirms that the PA never invoiced American for the northern portion (Exh. 14, Attachment 1 at 4; also see Tr. 443, li. 21). Thus, American assumed the CSI space which CSI held under the CSI Lease that did not include renting the northern portion; and American, by the PA's own admission, did not use the northern portion. Under the circumstances, the suggestion in the PA's brief that the PA "forgave" American's past rent for the northern portion borders on the absurd. The PA simply withdrew its demand for rent with respect to premises that American had not rented or used; this occurred roughly contemporaneously with execution of the stop-gap Lease (Exh. 21, p. 2; Tr. 194).<sup>6</sup>

**The Stop-Gap Lease Expires and the PA Refuses to Negotiate any Renewal**

27. The stop-gap Lease expired on April 30, 2003 (Lease at Article II, p. 1).

28. The stop-gap Lease was the only leasehold the PA ever offered American. The PA never offered American a long-term lease (Tr. 381).

29. American regularly interposed offers to enter into a long-term lease with the PA, but the PA, "during the course of the discussions, repeatedly refused to entertain any proposal for a long-term extension/renewal of the [stop-gap] Lease" (Compare 04-09

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<sup>6</sup>The only "evidence" that the PA offered to suggest that American had rented the northern portion was a letter from Michael Scotto, dated April 1, 2001, in which he indicated that he was "terminating" 50% of American's lease at Pier 7 (Exh. 14, Attachment 5). However, Mr. Scotto only provided this letter after receiving a communication from Ms. Keough alleging that she intended to presume American's use and occupancy. (It was as if Ms. Keough, who had only recently taken over American's account from Nick Houselog, did not understand the concept of swing space and misconstrued the CSI Lease.) In any event, Mr. Scotto's letter did not create a tenancy or use where none existed.

Complaint at ¶14 with the PA's Answer in which this allegation was expressly admitted). In fact, Ms. Keough, the PA's chief witness at trial, testified that "there was no way that [the PA] was going to extend the [stop-gap] Lease to American for any term" (Tr. 509).

30. The only offer that the PA tendered to American was an eviction notice that would have permitted American to remain for another 60 days (Tr. 509). The plan to require American to vacate Pier 7 within 60 days was formulated in a PA email memorandum, dated January 15, 2004 (Exh. 43).

31. As discussed infra, the PA's refusal to extend American a long-term lease, coupled with other misconduct created a "terrifying" business environment for American (Tr. 332).

### **The PA's Various and Conflicting Explanations for its Refusal to Deal**

32. The reason offered at trial by the PA for its refusal to entertain any offer for an extended lease was that "they [American] owed \$120,000 in rent, that [the PA] was in court, and there was a notice of termination" (Tr. 509). Each of these statements was false, as shown below.

33. First, Ms. Keough asserted that the reason that the PA refused to entertain the prospect of a long-term lease with American was that American was \$120,000 in arrears in February 2004 (Tr. 509, 510). In fact, the PA had decided not to entertain long-term lease negotiations with American in July 2002 when the PA passed a Board Resolution, deciding to refuse to negotiate any long-term lease with American (Exh. 1 hereto). The PA's counsel

expressly acknowledged that the July 2002 Board Resolution “specifically prohibited any further extension of the lease with American Warehousing” (Tr. 307).<sup>7</sup> Thus, the PA’s alleged explanation during trial for its refusal to deal -- that American’s supposed \$120,000 arrearage in February 2004 foreclosed any such consideration (Tr. 509, 510) -- cannot possibly be true since the PA had already decided not to grant American a long-term lease nearly two years earlier. The PA’s supposed “justification” for refusing to deal that the PA specifically identified at trial cannot possibly be true.<sup>8</sup>

34. Ms. Keough’s assertions that the PA and American were in court at the time and that there was a notice of termination were also false. The court case between the PA and American was settled by a so-ordered stipulation (Keough Cross, Tr. 512). The notice of termination had expired on December 18, 2003 and, in any event, had been resolved by the stipulation (Keough Cross, Tr. 517).

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<sup>7</sup>Matthew Yates of American confirmed that he subsequently learned of the Board Resolution later in 2003 (Tr. 308).

<sup>8</sup>Ms. Keough’s credibility as to the amount of the arrearage in February 2003 was nil by the conclusion of her cross-examination. Ms. Keough testified that the arrearage in February 2004 was alternately \$7,000 (Tr. 509), \$88,000 (Tr. 511), and \$87,000 (Id.). At another point, Ms. Keough testified that it really was \$120,000, but that the date was March 2003, not February (Tr. 509). These wild discrepancies were never explained by Ms. Keough. As discussed supra, Ms. Keough lied about material aspects of this case throughout her testimony.

35. In its brief, the PA identified three other explanations for refusing to deal: alleged squatting on the northern portion of Pier 7 beginning in December 2003; the absence of audited financial statements, and a perceived lack of profitability. As shown below, each of these supposed “justification” was bogus. The PA alleges that American began to squat and use the northern portion of the Warehouse beginning in December 2003 (PA’s Proposed Finding of Fact, ¶8). Even if the PA’s allegation of squatting in December 2003 were true (and, as shown infra, it isn’t), this alleged misconduct by American in December 2003 occurred more than a year after the PA’s July 2002 Board Resolution which, all parties acknowledge, establishes the date on which the PA decided to refuse to entertain any negotiation of a long-term lease with American (Tr. 307; Exh. M hereto). Thus, squatting in December 2003 cannot serve as the “reasonable explanation” for refusing to deal the decision for which was made in July 2002.

36. Even assuming arguendo that American had “squatted” prior to the PA’s decision refusing to entertain a long-term lease (and that is impossible), the PA would be estopped from arguing this point. First, it was undisputed at trial that American, with the PA’s prior knowledge, made capital improvements to the northern part of the Warehouse (Tr. 371). The PA cannot accept capital improvements to facilities and then claim that American never had a right to use them in the first place. See American’s Moving Br. Second, the PA accepted dockage fees for the ships carrying, and wharfage for, all of the cargo that was delivered to, and unloaded and stored in, the northern portion of the Warehouse (Tr. 654,

656). As demonstrated in American's moving brief and hereinafter, under principles of estoppel, a party cannot accept the benefits of a transaction and then claim that the parties never had the right to enter into it in the first instance.

37. Photographs of the Warehouse attached to the testimony of Richard Hacker of the PA confirm that American was not using the northern portion of the Warehouse in December 2003 or January 2004 (See pp. 631-33 and 635-37 (the last six pages) of Attachment 1 to Hacker Testimony, Exh. 35). Indeed, even Mr. Hacker's log of surreptitious inspections reflects that American was not using any part of the northern portion on all but one of his visits (Eh. 35, Attachment 1, referencing "Tenant Clean" as opposed to "Tenant Violation").<sup>9</sup> The evidence of American's first use of the northern portion of Pier 7 consists of photographs taken on June 9, 2004 (Id. at 738) -- nearly two years after the Board Resolution.<sup>10</sup>

38. As to the other explanations offered in the PA's opposition brief for its refusal to deal, Ms. Keough never testified that she or anyone else at the PA refused to deal based upon any failure by American to produce audited financials. Indeed, there was no evidence

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<sup>9</sup>The one instance in which the log indicates that American was squatting on the northern portion is not supported by the photograph to which Mr. Hacker cites in the log as proof of American's use.

<sup>10</sup>To contradict the photographs, the PA relies upon the testimony of a former employee of American Stevedoring, Chester Hopkins. As demonstrated in the reply brief, Mr. Hopkins was incorrect on this point and for good reason. And, in any event, as shown in the conclusions of law, the memories of witnesses with respect to conditions should never be accepted in lieu of authenticated photographs depicting those same conditions.

introduced at trial that the PA ever even requested audited financials.<sup>11</sup>

39. Ms. Keough never testified that she or anyone else at the PA refused to deal based upon any failure by American to show a profit, ostensibly because she could not know. In any event, the evidence at trial showed that American did return a profit, including nearly three-quarters of a million dollars in 2004 (Tr. 247, 409).<sup>12</sup>

### **American is Resigned to a Month-to-Month Tenancy**

40. After expiration of the stop-gap Lease and with the PA refusing to entertain negotiation of a renewal, American became a month-to-month tenant (Tr. 174).

41. Operating as a month-to-month tenant has hindered American's operations (Tr. 174). The cocoa trade services the chocolate industry. Chocolate manufacturers develop long-term (e.g. 10-year) plans with their customers. Consequently, these manufacturers insist upon long-term commitments from their warehousemen such as American (Exh. 8, ¶6; Exh. 12, ¶¶3-7; Exh. 33, ¶¶6-10). Indeed, ensuring the existence of long-term commitments by

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<sup>11</sup>As demonstrated in the reply brief, closely-held corporations are not required to prepare audited financials and, indeed, it is uncommon for them to do so.

<sup>12</sup>As demonstrated in the reply brief, closely-held corporations frequently distribute income in the form of salary and bonuses to employees to avoid double taxation. Accordingly, it is entirely common for closely-held corporations not to show a "profit," even though there is substantial excess revenue after expenses.

their warehousemen is “central” to a manufacturer’s duties to its own customers (Id. ¶7). Because a warehouseman’s ability to ensure long-term commitments to storage of cocoa is so vitally important, manufacturers generally decline to work with a facility, such as American, if its warehouse is subject to a short-term lease (Id. ¶8). American, without the ability to engage in long-term planning (because its continued tenancy could be threatened with termination on a month’s notice), was unable to participate in its customers’ plans (Tr. 175-76). Worse, American’s largest customer, Blommer Chocolate, has since changed its use of American’s services to only those instances in which no other facilities are available, thereby reducing American’s business substantially (Exh. 8, ¶8; Exh. 33, ¶9).

42. Since 2001, the PA has forced American to vacate and/or has de-commissioned virtually every pier previously occupied by American other than Pier 7. Consequently, American has been forced to operate within the confines of constantly reducing space. During the same period during which American’s space has been reduced, the chocolate industry has expanded (Exh. 33, ¶13). Consequently, just at the time when American’s business should be booming, it has been forced to turn away contracts, thereby retracting its business due to the space constraints imposed by the PA (Tr. 173-76; Exh. 2, ¶11).

**The PA’s Habitual Delay in Providing Reimbursement to American for Construction of Capital Improvements**

43. In reliance upon the PA’s representation that the Lease would function merely as a “stop-gap” lease, and in contemplation that American would receive the long-term lease it required, American spent over a million dollars in constructing certain tension membrane

structures at Pier 7 (“TMSs”) (Tr. 368, 369-70). American was not aware of the Board Resolution at the time and did not become aware of it until later in 2003 (Tr. 308).

44. The PA was contractually obligated to reimburse American for the cost of constructing the TMSs, but failed to do so in a timely fashion and in several instances, actually still owes American money (Tr. 369).

45. When the PA failed to reimburse American for the TMSs, it adversely affected American’s cash flow, its wherewithal to complete construction of the TMSs and American’s ability to pay rent (Tr. 373; 327).

46. As a result of the PA’s refusal to honor its obligation to reimburse American, the TMSs were never completed on Pier 7 and, to this day, remain as skeletal structures, unusable for cocoa (Photograph, Exh. 35, Attachment 1 at p. 992).

47. Completion of the TMSs was critical to American’s business, insofar as they were designed to accommodate the ebbs and flows of the cocoa trade, much in the same way that the swing space would have provided; as more cargo was shipped to Pier 7, the TMSs would have afforded a larger space for storage (Tr. 372). And the PA was aware of the need for the TMSs (Id.). Thus, American was deprived of the Piers which it was forced to vacate; the swing space the PA refused to provide; and the TMSs which would have afforded American the additional space it needed --- and this all occurred while the PA was refusing to entertain negotiation of a long-term lease, resigning American to a month-to-month tenancy.

### **The PA Bars Ships from Docking and Unloading**

48. Compounding the problems imposed by its refusals to grant swing space, negotiate a long-term lease, permit American's continued use of other piers, and its refusal to reimburse American for its construction of TMSs, the PA, in December 2003, began the practice of refusing ships scheduled to dock and unload at Pier 7. Specifically, on December 12, 2003, the PA informed American that the former would not permit a ship carrying cargo to Pier 7 to dock at the public berths at Pier 7 (Attachment D to Yates Direct Testimony, Exh. 9; also see Tr. 375).

49. American filed an Article 78 to address, inter alia, the PA's improper refusal to permit the ship to dock and unload cargo; the presiding justice of the New York State Supreme Court ordered the PA to permit the ship to dock and unload (Keough Cross, Tr. 512).

50. In early January 2004, the PA refused access to another ship (the MV Zapoteca) scheduled to berth and unload at Pier 7. On January 6, 2004, the PA's lawyer instructed the PA to permit the ship to berth, and, in language portending the PA's aggressive posture in the future, stated further that the PA "could not restrict access until American was evicted" (Exh. 39).

51. In early August 2004, the PA informed American that it would not permit yet another ship (Safmarine Doule) to dock and unload at Pier 7. On August 10, 2004, the PA's lawyer, once again, instructed the PA to permit the ship to berth, stating that it could not

restrict access until American was “evicted” (Exh. 40).

52. In June 2005, the PA, once again, stopped a ship from docking and unloading at Pier 7 (Tr. 379). Instead, the PA permitted another ship, which carried no cargo, to undergo repairs at Pier 7 -- even though other piers, not used by American, were available at the time (Tr. 380). The PA had never before tied up one of its cargo piers in favor of a ship for repairs at a time when another ship laden with cargo needed to dock and unload (Tr. 379).

53. The consequences of refusing access to ships scheduled to unload cargo and dock at Pier 7 were staggering both to American, its customers, and shippers. As to American, it was undisputed at trial that refusal to permit ships to berth at Pier 7 harmed American’s reputation, as it created the impression that American was unreliable and had no control over its facilities (Tr. 376-77). It was also “devastating” to American’s customers, insofar as they were relying on the delivery of cocoa to their own customers for use at their production facilities (Tr. 377). Further, refusal to permit a ship to dock also injured the shippers that were left with cargo in their holds and an inability to discharge it to make room for their next jobs for which they were contractually obligated (Tr. 378). The ships in question were, at the time, carrying “millions and millions of dollars in cocoa” (Tr. 375). The practical ramifications are “fairly obvious even to someone not as familiar with the industry” (ALJ Krantz, Tr. 378).

54. It is “unheard of” for the PA to stop and/or prevent ships from docking and delivering cargo (Tr. 377).

## **The PA Wages Simultaneous Media and Whisper Campaigns Against American**

55. In contrast to certain favorable marketing campaigns wielded by the PA on behalf of other MTOs (discussed infra), the PA regularly contacted newspapers and other media outlets, including Reuters, asserting that American would be evicted from Pier 7 and soon be out of business (Tr. 161-62). Indeed, in August 2003, the PA publicly announced the availability of the Red Hook Container Terminal (currently occupied by American's sister company, American Stevedoring) by publishing a Request for Expression of Interest (Exh. F to American's Moving Brief).

56. The PA's media strategy had a clear impact on American and its business; American's customers were made aware of American's circumstances, as were American's competitors, including, without limitation, Dependable Warehouse and "even some inland warehouses in New Jersey" (Tr. 162). So widespread were the published reports of the PA's program to destroy American that the New York Board of Trade, in anticipation of what it termed, "the certain demise of the Brooklyn Waterfront," issued additional licenses to ports in Baltimore and Albany to handle the expected overflow of cargo traffic once the PA put American out of business (Tr. 180).

57. The PA also contacted industry professionals throughout the cocoa trade, asserting that American would soon be unavailable for cocoa warehousing and distribution (Exh. 8, ¶¶10, 12; also see Exh. 2, ¶19; Exh. 11 and Exh. 12).

58. The PA's refusal to negotiate a long-term lease, boycotting of ships, delay and

ultimate refusal to reimburse American for construction of the TMSs, refusal to provide swing space or other alternate space with the PA for storage of cargo and the ubiquitous media and whisper campaigns forced American to operate its business under “siege,” as it attempted to fight off the PA’s efforts while doing its best to provide vital services for its customers (Tr. 370-71).

**The PA Grants More Favorable Leases to Other MTOs in Terms of Lease Term, Abatements, and Rent Per Square Foot**

59. The lease that the PA extended to Maher Terminals, Inc., Maersk Container Service Company, was for 29 ½ years (Maersk Lease; also see Tr. 122).

60. The PA extended a 25 year lease to Howland Hook Container Terminal (“HHCT”).

61. The PA extended a 30 year lease to Port Newark Container Terminal.

62. The PA extended a 15 year lease to Carco, Inc. located in Greenville, Jersey City.

63. The PA extended a 30 year lease to Albany Port District Commission.

64. As discussed, supra, the PA failed to offer any long-term lease to American.

65. The rent in the HHCT lease to operate Howland Hook Marine Terminal is \$625,000 in the first year, \$1 million in the second year and \$7.7 million thereafter to the final year. As Howland Hook consists of 187 acres, and there are 43,560 square feet in one acre, the top rent that HHCT pays to the PA is \$0.94 ½ cents per square foot annually. The

rents charged by the PA to the MTOs Maher and Maersk at Port Elizabeth, and Port Newark Container Terminal, Inc. at Port Newark Marine Terminal, range between \$0.67 cents per square foot (Maher) and \$1.47 per square foot (Port Newark CT), with the exception of one period in the Port Newark CT lease, from Dec. 1, 2010 to Nov. 30, 2020, where the rent to be charged is slightly higher.

66. By the stop-gap Lease and subsequent month-to-month tenancy, the PA imposes upon American a monthly rent of \$1.68 cents per square foot if American is considered to rent the whole pier (269,000 sq. ft) at \$33,029.44 per month (\$396,353 per year) or \$2.68 per square foot if American is considered to rent just half of the pier (134,500 sq. ft) at \$33,029.44 per month (\$396,353 per year); and \$2.81 per square foot if the PA were to impose an additional \$30,000 charge for American's use of the northern half of Pier 7 ( $\$63,029.44 \times 12 = 756,353.28$  per year divided by 269,000 sq. ft (pier size) = \$2.81 per square foot. The PA is charging a staggering \$3.05 per square foot for Pier 8 -- more than three times the amount charged HHCT, Maher and Maersk.

67. As part of the Maersk Lease, the PA granted an abatement to Maersk in the amount of \$.436 per square foot (Maersk Lease; Tr. 122).

68. Under the stop-gap Lease, American received no abatement whatsoever (Lease at Special Endorsement, ¶3, incorporating in by reference, Standard Endorsement L27.4).

**The PA Grants HHCT and other Similarly Situated MTOs Other Forms of Preferential Treatment over American in Addition to Favorable Lease Terms**

69. Over the last several years, the PA has funded capital improvements and, overall, marshaled its resources to redevelop completely the Howland Hook Marine Terminal facility, whereas American at Pier 7 and Brooklyn Marine Terminal generally received almost nothing. Specifically, the PA funded a capital program for Howland Hook which included, inter alia, a 3,000 foot wharf expansion, designed to accommodate four 725 foot ships (Tr. 737-38); the creation of a direct rail link between Howland Hook and the nation's rail freight system (Tr. 738-39); and the construction of an "intermodal facility" (Tr. 739). All totaled, the PA's investment in the capital project at Howland Hook exceeds \$350 Million (Tr. 739) ("What it says here [in the PA press release] is correct"). This does not include the cost of dredging the Arthur Kill and Kill van Kull which serves HHCT (Tr. 742).

70. The PA's sole capital projects undertaken for development of the facilities operated by American were construction of several TMSs (Tr. 745) and some "infrastructure at Pier 7," all of which totaled a mere "several million dollars" (Tr. 748). Unlike the situation at Howland Hook, the PA did not provide the initial funding of the construction of the TMSs at Pier 7; rather, American funded the construction, and the PA was supposed to provide reimbursement (Exh. C to American Br.). As discussed supra, unlike the situation for HHCT, where the PA was dispensing hundreds of millions of dollars, the PA initially refused to reimburse American, claiming that: (i) American's sister company, American Stevedoring,

was required to first sign a short-term lease with the PA -- even though it had not yet been drafted or presented to American Stevedoring and even though the lease and the TMS reimbursement were unrelated; and (ii) the PA “could only make the check out to American Stevedoring” (Tr. 747) -- this, even though both American and Stevedoring acknowledged that the payment should be made to American (Exh. 28). Thus, whereas Howland Hook received in excess of \$350 Million earmarked for a massive reconstruction and renovation of its entire facility, the PA merely promised to provide only “several million” for Piers 6 and 7 occupied by American -- a promise as to which the PA reneged (Exh. 9, ¶20).

71. Howland Hook received the benefit of a marketing campaign wielded by the PA, whereas the facilities operated by American received no comparable promotions. For example, the PA introduced each new phase of the Howland Hook capital project with a press release publicizing the enhanced facilities (See, e.g., Tr. 730, 745). By contrast, the PA declined to provide any press releases for the few projects at the facilities operated by American (Tr. 750-51).

72. The press releases attracted media attention for HHCT’s port facilities (Tr. 745, 758). And it is self-evident that promotional activities generating positive publicity enhance the prospects for client development and future business. Thus, while the PA made Howland Hook the subject of one press release after another, engendering prospective increases in good will and future business, American struggled to enforce the PA’s promise to reimburse for improvements American made and received no positive press at all.

### **American and HHCT are Competitors and Similarly Situated**

73. Like American, HHCT engages in the handling, storage and distribution of cocoa, both by means of break-bulk and container (Tr. 751; also see Van Tol Examination Before Trial at 126, 135). American and HHCT are competitors (American's Moving Br.).

74. American on the one hand and HHCT, Maersk, Carco and Albany Port District on the other are all similarly situated, insofar as they are all MTOs, all desirous of long-term leases to ensure the continuity of their operations which, as discussed in the reply brief, require long-term arrangements to succeed.

### **Damage to American and Commerce**

75. The PA's refusal to deal, harassment and discriminatory misconduct, all directed at American, were designed to "put American Warehousing out of business" (Tr. 161). Indeed, the PA's desire to put American out of business is "common knowledge" in the cocoa industry (Id.; Exh. 8, ¶12).

76. The PA's campaign of harassment directed at American has had a "chilling effect" within the cocoa industry with respect to American and has reduced industry confidence in American's activities in port commerce (Exh. 8, ¶12).

77. By reason of the PA's conduct, especially its refusal to deal, American is threatened with damages in excess of \$15 Million (based upon the PA's valuation formula) (Exh. 33, ¶12).

78. In addition to the damage to American, the foreign and domestic cocoa

industries would be irreparably harmed by the loss of American's operations, insofar as there is insufficient warehouse capacity available elsewhere (even with the two new facilities being made available, supra) (Exh. 33, ¶11), thereby severely crippling interstate and foreign competition (Id. ¶12).

### **The PA Grossly Mischaracterizes American's Rent Payment History**<sup>13</sup>

#### **History on Pier 7**

79. The PA claims in its Brief at 2-3, and 20, that “[u]nder Lease No. BP-302 for Pier 7, nothing had been paid until February 2003 even though AWI took possession of the space in December of 1999” (PA Br. at 20). The PA's assertion is, on the one hand, incorrect, and on the other, disingenuous.

80. The PA's allegation is incorrect because American did pay rent with respect to Pier 7 in 1999. This is proven by the checks and invoices generated during that time period, which confirm that American paid rents on Piers 2, 5, 6 and 7 together, with one check pursuant to combined invoices from the PA. The rent for Pier 2 was \$7,358.75. The rent for Pier 5 was \$32,282.25 plus guard services for \$2,083.33. The rent for Pier 7 at that time was \$37,011.67. There was also payment of interest (\$192.73) and a note for \$4,203.13. Rent for

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<sup>13</sup> The positions taken by the PA at trial render the extended rent-payment history provided hereafter irrelevant. The PA asserted at trial that its refused to deal and discriminated against American because the latter was purportedly in \$120,000 arrears in February 2004. The purported late payment history prior to that date were not raised at trial -- only in post-trial briefing, rendering that history irrelevant. Nonetheless, American responds to the PA's new history here, if only to ensure that the PA's disingenuous and, in many instance, outright false, allegations do not remain unopposed.

Pier 6 was \$43,365.00. The rental amounts totaled \$126,496.86 (Sample Invoice, annexed as Exhibit L hereto). The check attached as Exhibit L is for \$119,138.11, reflecting the total rent for all of the piers, minus the amount for Pier 2, which, at the time of that check, had already been vacated by American. See Invoice 910638, Exh. L. Indeed, for 1999, American paid all of the rent that was due on all piers (Exh. 14, Attachment 1). Thus, the PA's allegation is absolutely incorrect as to 1999.

81. On the other hand, with respect to the rent history for Pier 7 after 1999, the PA's allegation is utterly disingenuous because Lease No. BP-302 to which the PA refers in its brief as having been breached between December 1999 and February 2003 (PA Br. 20) had not yet even been negotiated, much less executed, until October 2002, and the PA refused to accept rent from American on Pier 7 from 2000 until February 2003, asserting that American had not assumed CSI's Lease (Keough's Cross, Tr. 443-44; Exh. 14, Attachment 1 at 4). When the PA finally did issue the First Invoice including all retroactive rent for Pier 7 in February 2003, American promptly paid it (Id.).

82. There is no evidence that the PA ever invoiced or even demanded rent from American with respect to Pier 7 from 2000 to February 2003; and there is no evidence that the PA ever complained about American's "non-payment" during this period. Quite the opposite, the PA essentially rejected payment, i.e., declining to accept rent where there was no lease (Tr. 443-44).<sup>14</sup> The PA's Brief, at p. 20, is the first time that the PA has ever

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<sup>14</sup>Indeed, the PA refused even to invoice American, instead, continuing to send bills CSI to the

advanced the claim that American wrongfully did not pay on Pier 7 at all from 1999 until 2003.

83. The PA further claims that, “beginning in May 2003 through December 2003, AWI fell in arrears for Pier 7 in the amount of \$246,043.81” (PA Br. at 20). The PA’s statement is also disingenuous. As reflected supra, following execution of the stop-gap Lease in October 2002, the PA, inter alia:

- refused to permit at least four ships scheduled to unload at American’s Warehouse to berth at Pier 7 (including one ship in December 2003, almost immediately after execution of the stop-gap Lease);
- refused to negotiate a long-term lease (as it had promised);
- defaulted on reimbursements on the TMSs;
- performed massive capital improvement projects for American’s competitors, but refused to do so for American; and
- began its dual media and whisper campaigns designed to drive American out of business while simultaneously promoting American’s competitors.

Under these circumstances, which were created entirely by the PA, American withheld rent until an acceptable resolution could be reached. As set forth in the reply brief, American has the right under New York law to withhold rent under those circumstances.

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attention of Gerald Ponsiglione, at 738 Third Ave., Brooklyn (See discussed infra).

84. As discussed supra, American thought it had obtained a resolution in December 2003 when it reached an accommodation with the PA in the New York Supreme Court and thereafter paid \$210,000. However, the PA quickly resumed its misconduct, including repeatedly stopping additional ships (Exh. 39 and 40; Tr. 379)), and refusing to deal (Exh. 43), leading to further disputes. American never refused to pay rent; it withheld rent pending the outcome of disputes created by the PA (Tr. 162).<sup>15</sup> At all times, American was ready to pay rent provided that the PA complied with the law or otherwise agreed to resolve American's lawfully maintained claims against the PA.

#### **History on Pier 8**

85. The PA leases Pier 8 to American Stevedoring, but the rent is paid by American Warehousing, and the PA is fully aware of this fact (Keough, Tr. 454).

86. Ms. Keough admitted that rent for Pier 8 has been timely paid (Tr. 454:15-25) by American Warehousing.

#### **History on Piers 2, 5 and 6**

87. The PA claims at p. 20 of its Brief that for Pier 5, "for the period January 1999 through April 2003 (52 months), AWI was over 30 days late 13 times, over 60 days late 8 times and over 90 days late 24 times with only 7 timely payments." The PA characterizes this as being late "87 percent of the time." Brief p. 2. The PA further claims that for Pier 6, American was late for the same period "85 percent of the time" (Id.). The PA claims further

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<sup>15</sup>The only currently withheld rent for Pier 7 had been escrowed by American (Exh. O hereto).

that for January through March 2003, American “paid each of these months over 30 days late.” These characterizations constitute a gross misrepresentation of the events as they occurred.

88. The rental history of Pier 5 (Exh. 14, page 1 of 4 of Attachment 1) attached to the direct testimony of Keough) shows that American and the PA had an established course of dealing, namely that American paid all rent due approximately 4-10 weeks after invoice. This was the case for the entire period of 1999 and 2000, prior to the PA’s entering into the stop-gap Lease with American in November 2002 (Exhibit 14, Attachment 1). American’s payments were made on a monthly basis; it was just that the payments always pertained to invoices that had been issued 4-8 weeks earlier. For example, the rents invoiced by the PA on 8/1/99 were all paid with a single check for \$126, 496.85 on 10/21/99, posted 10/29/99. The rents for 9/1/99 were all paid with a single check for \$119,138.11, less than a month later, on 11/16/99 (posted 11/26/99). See Exhibit L. The 10/1/99 rents were paid on 12/14/99, again, approximately one month later than the preceding month’s rent payment (posted 12/27/99). The 11/1/99 rents were paid in a single check on 1/1/00, two weeks after the preceding month’s payment, but eight weeks after invoice (posted 1/02/00). The 12/1/99 rents were paid on 1/25/99, seven weeks after invoice but three weeks after the 1/1/00 payment (posted 2/1/00). And so forth (Exhibit 14, Attachment 1).<sup>16</sup>

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<sup>16</sup>The only gaps in the otherwise regular payment history of payments being made every three or four weeks were the rent payment that should have been in August or September and over Christmas, periods during which vacations were taken by those responsible for paying rent or for entering payments

89. Because this was an established course of dealing between the parties, and because rent payments were made in the regular course, the PA did not complain about American's payment practice at any time prior to entering into either the July 2002 Resolution or entering into the November 2002 stop-gap Lease. During trial, the PA did not admit into the record or even identify any correspondence, late notices, or any other document which would suggest that it was concerned about American's alleged "tardiness" during 1999 or 2000. Nor did the PA admit into the record or even identify any correspondence, late notices, memoranda, or anything else purporting to show that it was concerned about American's ability to pay all the rents regularly.

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received (Exh. 14, Attachment 1).

90. Most importantly, the PA also did not enter into the record or even identify any document or other evidence tending to suggest that purported late payment of rent was the reason for its Board resolution on July 15, 2002 prohibiting its staff from entering into any addition leases with American. The PA's sudden interest in the payment history for Pier 5 reflects a strategic decision by counsel, not a bona fide ground for refusing to deal.<sup>17</sup>

91. Also partially contributing to the 4-10 week payment schedule was the PA's mis-directing of invoices. For example, although American was paying rent for Pier 7 in 1999 as part of a consolidated monthly payment, the PA, as noted supra, refused to invoice American for Pier 7 rent (Tr. 443, li. 21-25). Instead, the PA continued to invoice CSI to the attention of Gerald Ponsiglione, at 738 Third Ave., Brooklyn (Sample Invoice (third to last page of attachment), annexed as Exhibit L hereto).<sup>18</sup> This is not an American address. As shown supra, CSI was American's competitor. American had to arrange to get the Pier 7 invoices from Mr. Ponsiglione during 1999; this delayed the payment that was made on all piers (Piers 2, 5, 6 and 7).<sup>19</sup>

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<sup>17</sup>As discussed in the motions to re-open and supplement, numerous documents that typically precede resolutions of this type were never produced in discovery. The absence of documents explaining the PA's decision-making practice (which is otherwise its custom) suggests that the PA is shielding from disclosure documents which are inconsistent with its theory of the case, warranting an order of preclusion or, at the very least, an adverse inference (i.e., a missing document inference).

<sup>18</sup>See n. 13.

<sup>19</sup>Also contributing to the 4-10 week payment schedule was the fact that the PA issued rent invoices to American for piers it had already vacated. For example, when American vacated Pier 2, it should not have been billed for rent; however, the PA continued to bill American as if it were still occupying Pier 2 (Exh. L hereto, p. 1). A correction that had to be figured out, deducted and corrected each month to reflect the actual events.

92. As discussed supra, when the PA began to engage in its misconduct, including, inter alia, withholding reimbursement for the TMSs (despite that American had laid out hundreds of thousands of dollars for same), stopping ships, refusing to deal, establishing American's business through its media and whisper campaigns (etc.), American began withholding and escrowing rent which was its right under New York law (see discussion, supra).

93. Rather than try to resolve this dispute, through an offset or credit procedure, or an escrow account, or a separate accounting, or any appropriate mechanism, Ms. Keough continued to invoice American for rents on all piers as though there were no disputes over space or reimbursements at all.

94. To this day, Ms. Keough seems to think the space constraints and reimbursement disputes occasioned by the fact that American needs more space to run its commodity business and depends on timely cash flow are unimportant or even imagined (Tr. 412-413).

**The PA Did Not Forgive Rent/Once a Deal Was Struck on the Stop-Gap Lease, American Paid All Rent Due on Piers 2, 5 and 6**

95. Contrary to Ms. Keough's direct testimony where she claimed that the agreement included a rent reduction for American, the PA did not "give back" or "forgive" rent (Exh. J, November 18, 2002); rather, the PA withdrew its demand for late fees (Exh. J hereto).

96. Excusing late fees was the only credit American received except for a minor

credit of \$37,011.67 unrelated to any issue in this case (Id.).

97. The only obligation that was “forgiven” by the PA was a loan (not rent) owed American Stevedoring in the amount of \$1,328,480.50 (Id.). American Warehousing was not “forgiven” any rent at all nor is there any evidence in the record that American Warehousing requested such forgiveness (Id.).

98. On November 21, 2002, three days after Ms. Keough faxed the terms of the stop-gap Lease, American paid the PA the entire \$1,475,351.81 in a single check (#17165) in payment of rent on piers 2, 5 and 6 (Check and Bookkeeping entry, Exhibit H hereto). As to Pier 7, the PA, as discussed supra, did not issue an invoice until February 2003, at which time, American paid that amount in full as well (Exh. 14, Attachment 1 at 4).

### **The PA’s Objection to American’s Demand for an Offset in 2003**

99. Mr. Scotto wrote to Keough on October 31, 2003 and enclosed a rent payment. The Scotto letter proceeds to state that American intended to offset rent obligations for September and October 2003 with the monies that the PA owed for the TMS reimbursements (which more than equaled the rent due). At that time, American had submitted its last payment application for \$79,464 for the TMSs (Exh. H hereto) plus another \$75,000 in retainage was still outstanding (Keough Email dated August 17, 2000 to Lillian Borrone, and Yetka’s email dated January 16, 2004 proposing to bargain the retainage down to \$50,000 in exchange for an agreement to vacate within 60 days, both annexed as part of Exhibit C to American’s Moving Br.; also see Tr. 369,372). The PA thus owed American over \$154,000

for the TMS construction reimbursement and for retainage on November 3, 2003. That amount is equal to more than five months' rent on Pier 7.

100. On November 13, 2003, in response to Mr. Scotto's letter asking that the PA offset rent with the monies owed on the TMSs, the PA, rather than paying the monies it owed American or agreeing to the offset, served Mr. Scotto with a Rent Demand for \$206,134.11, preparatory to filing an eviction action.

101. On October 8, 2003, Keough had apparently decided to terminate American (Exhibit B to American's Moving Brief, Telephone Log).

102. This set of facts shows that: 1) American regularly paid the rent on Pier 7 in 1999; 2) American's rent payments for Pier 7 from 2000 through January 2003 were declined by the PA because there was not a lease in place; 3) American was a regular payer of rent on all of its other piers 4-10 weeks after the invoice date; 4) the PA acquiesced in this custom of paying invoices and never complained about it prior to November 2003; 5) during two periods, American legitimately sought to offset against rent amounts indisputedly due to American from the PA; 6) that the PA's refusal to deal or negotiate with American as embodied in the July 2002 Resolution was not based on a habitual late rental payment history between 1999 and 2002; 7) neither a tenant's legitimate credit offset against rent nor a custom of dealing between two parties resulting in rent payment being made by the middle of the following month and regularly made equate with the characterization of "habitually late" payments; and 8) that the "late" rent is a post hoc rationalization for its refusal to deal.

## EXHIBITS

### New Exhibits

- A. PA Map, Brooklyn Marine Terminal, Piers 1-12, PANYNJ 00516
- B. Telephone Log of Patricia Keough
- C. Pages from PA Tenant Alteration Application File, Fabric Tents
- D. Orders Dismissing Eviction Actions, dated February 6, 2006
- E. January 6, 2006 Letters from Van Tol to Scotto; from Van Tol to Capt. Skov-Nissen
- F. Port Authority Request For Expressions of Interest (RFEI)
- G. PA Diagram of Pier 7, cover letter from P. Keough, Affidavit as to Accuracy M. Scotto, Exhibit A from Lease (diagram)
- H. AW Application for Payment to PA, Fabric Tent Construction
- I. AW Worksheet, Check # 00017165 \$1,475,351.81
- J. Memo from P. Keough to L. Direktor, Nov. 5, 2002 re Rent for Pier 7; PA Invoices dated Feb 1, 2003 for Pier 7 (including retroactive rent 01/01/00- 01/31/03), Pier 5, Pier 2 and Pier 6; Check drawn on American Warehousing account to PA for Feb. 2003 rent for piers excluding retroactive rent; Memo from P. Keough to M. Scotto re rent
- K. Letter staying Eviction Case by PA dated May 15, 2006
- L. PA Invoices for Piers 5, 2, 6, 7 dated Sept. 1, 1999 (Pier 7 invoiced to Commodity Storage, Inc.) and check # 011106 drawn on American Warehousing account to PA in payment of rent for all piers
- M. PA Board resolution dated July 15, 2002 (PA NY/NJ 00353)
- N. PA Invoices dated April 1, 2003 for Piers 5, 6 and 7; Check # 00017960 drawn on American Warehousing account in payment of rent for piers
- O. Escrow Check for Outstanding Dec 2003 and Spring 2004 Rent

**BEFORE THE  
FEDERAL MARITIME COMMISSION  
Washington, D.C.**

AMERICAN WAREHOUSING OF NEW YORK, INC.	:	
	:	
Complainant,	:	
	:	Docket No. 04-09
	:	Docket No. 05-03
v.	:	
	:	
THE PORT AUTHORITY OF NEW YORK AND	:	AFFIDAVIT OF
	:	MICHAEL SCOTTO
NEW JERSEY,	:	
	:	
Respondent.	:	

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Michael Scotto, of full age and sound mind, hereby deposes and states:

1. I am the president of American Warehousing of New York, Inc. ("American").
2. I have worked for American for ten (10) years. Before that I owned RPM, which was a break bulk commodity business operating in the New York port district out of Staten Island.
3. I am very familiar with all of American's cargo operations at Pier 7, as well as the layout of the pier, its function and how cargo is moved into and out of the cargo shed.
4. I have examined a diagram provided to me by counsel that was attached to a letter written by Patricia Keough to Phoenix Beverage dated May 17, 2004.
5. That diagram (Exhibit G) is more accurate than the diagram that was attached to the lease between American and the Port Authority, which I signed on behalf of American on October 24, 2002 and which the Port Authority counter-signed on November 7, 2002. (Exhibit A to the Lease, dated Dec. 1, 1999)
6. There are several doors in the east-facing front of the buildings at Pier 7.
7. There is the office, or head-house, which has an office-type double glass door. Cargo does not move through these doors. On either side of the head-house there are ramps leading to garage- or bay-type doors. Trucks do not take on cargo from these garage doors. These ramps and garage-type doors on either side of the head-house are for small

equipment that must actually go into the cargo shed and move around on the pier. These doors are used for the entry of cars and light trucks, hi-los, forklifts and small equipment like that. Inspectors, customs officials, PA personnel, workers operating small equipment between the upland and the actual pier, move through these doors.

9. These garage-type doors on the east-facing front of the shed next to the head house would be too narrow to take cocoa out of the cargo shed and to load onto trucks for distribution to the mainland.

8. On the northeast side of Pier 7, there is a truck ramp. This is the ramp where cargo is loaded from the shed onto trucks for transport to the mainland. Large trucks that service American's business (40 foot, 45 foot and 48 foot in length, usually 8.5 feet in width) pull in along the northeastern side of the pier and are loaded with cocoa for transport to manufacturers.

9. This northern truck ramp is called the loading platform because it perfectly fits a truck's width and height, and was designed for the purpose of loading cargo onto trucks from the shed.

10. Trucks are not loaded at any other location than on the north side of the pier. There is no truck ramp on the south side of the pier. Ships are unloaded on the south side berth, onto the string piece, and then moved into the cargo shed. Empty trailers are parked on the southeastern side until room can be made on the northeastern side for loading. After loading, full trailers are jockeyed to the southeastern side until picked up.

11. The truck ramp on the north side of the pier noted as "20' platform" on Exhibit G is visible on Exhibit A, but it is more visible and detailed on Exhibit G. The doors, ramps and garage-type bays on either side of the head-house are also more visible on Exhibit G. These are not visible on Exhibit A. To me, it looks as though on Exhibit A every structure in front of the cargo shed (the ramps, bays, doors and head-house itself) was collapsed into a small rectangle without any detail.

12. I also note that on Exhibit G, there is a crib area inside the cargo shed, which is fenced off. Cargo that had to be inspected by customs was put in that area. That is no longer how cargo is inspected, but the fenced off area in the middle of the shed is still there.

13. Under penalty of perjury for unsworn testimony pursuant to 28 U.S.C. 1746, I declare that the foregoing statements are true and accurate.

  
MICHAEL SCOTTO

**THE PORT AUTHORITY OF NY & NJ**



NEW JERSEY MARINE TERMINALS  
260 BELLOGG STREET  
PORT NEWARK, NEW JERSEY 07114  
(973) 578-2120

May 17, 2004

Mr. John Crowley  
Executive Vice President  
Phoenix Beverages, Inc.  
37-88 Review Avenue  
Long Island City, NY 11101

Dear Mr. Crowley:

It was a pleasure meeting you and your colleagues to discuss the possibility of a lease of Pier 7 at the Brooklyn-Port Authority Marine Terminal. As you requested, I am enclosing a criteria drawing of Pier 7.

If you have any questions or require additional information please contact me at (973) 578-2125. I look forward to further discussing proposed lease terms for Pier 7.

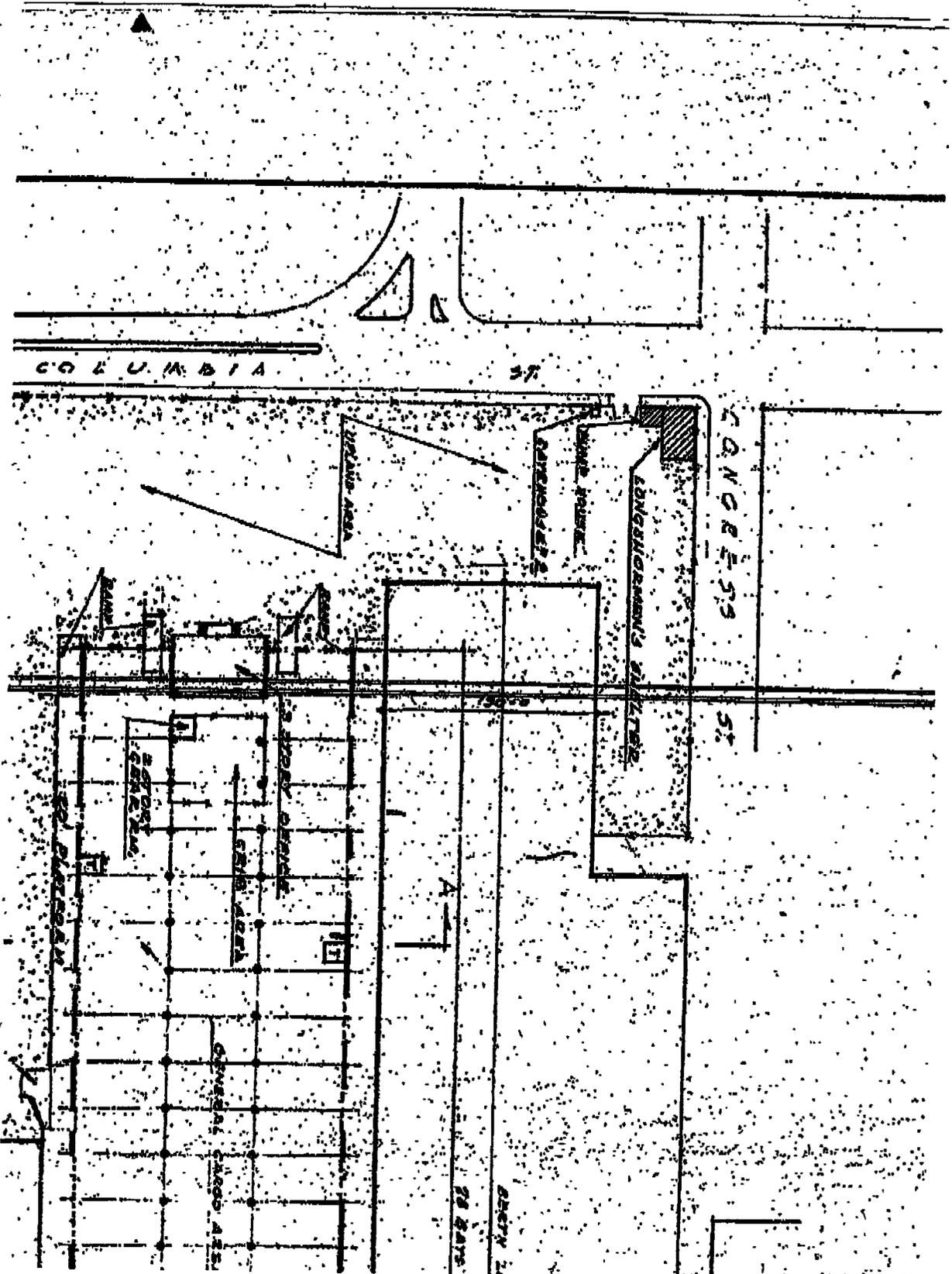
Sincerely,

Patricia Keough  
Sr. Property Representative  
Port Commerce Department

enclosure

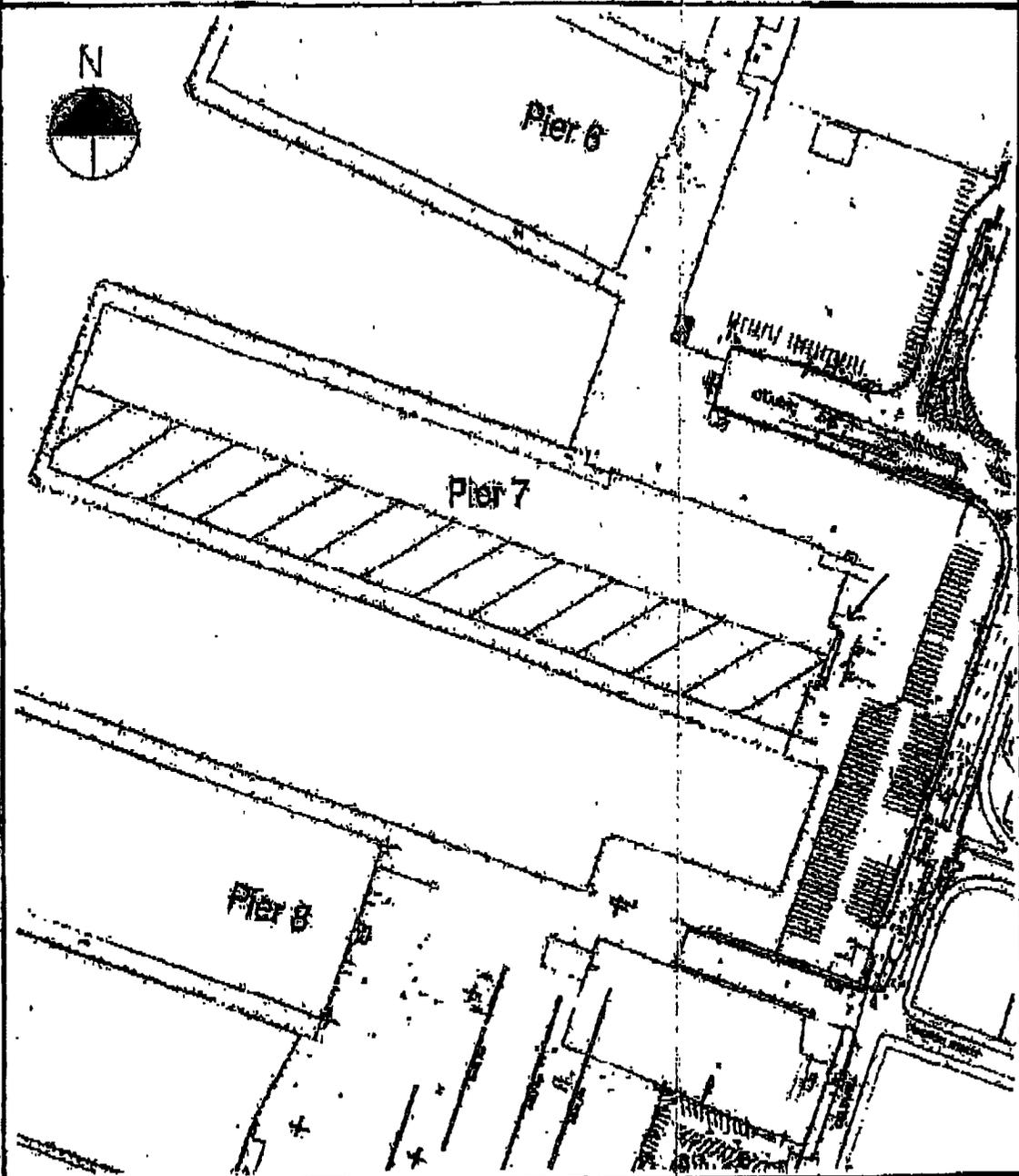
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9-9





AMERICAN WAREHOUSING OF NEW YORK, INC. BP-302



Initialed:  
*Kah* *SS*  
 For the PORT AUTHORITY  
 For the Lessee

EXHIBIT:  
**A**

AMERICAN WAREHOUSING OF NEW YORK, INC.  
**BROOKLYN - PORT AUTHORITY MARINE TERMINAL**  
 Date: Dec. 1, 1998

PA 2152  
7-74

SHEET \_\_\_\_\_ OF \_\_\_\_\_

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY  
ONE WORLD TRADE CENTER, NEW YORK, N.Y. 10048

APPLICATION FOR PAYMENT

LESSEE American Stevedoring, Inc. FOR CONSTRUCTION WORK UNDER LEASE #/TAA # BP-285 PAYMENT NO 8

ADDRESS C.N. 319007 Brooklyn, NY 11231-0036

DATE \_\_\_\_\_ Approximate work performed to \_\_\_\_\_, 2004

CONTRACT NO.	CONTRACTOR AND DESCRIPTION OF WORK	TOTAL CONTRACT AMOUNT	APPROXIMATE QUANTITIES		DEDUCT		AMOUNT THIS APPLICATION
			% COMPLETION (EST.)	AMOUNT TO DATE	RETAINED AMOUNT	ADVANCES PRIOR APPLICATIONS	
1	Brooklyn Liberty, LLC	\$282,732.00	100%	\$282,732.00	\$0	\$268,595.05	\$14,136.95
2	Saizman, Ingber, Winer	\$7,575.00	100%	\$7,575.00	\$0	\$7,196.25	\$378.75
3	Big Top Mfg	\$665,561.00	100%	\$665,561.00	\$0	\$632,282.95	\$33,278.05
4	Topsfield Engineering	\$41,194.00	100%	\$41,194.00	\$0	\$39,134.30	\$2,059.70
5	NZ Design Group	\$15,000.00	100%	\$15,000.00	\$0	\$14,250.00	\$750.00
6	Giannos Bros Electric	\$207,000.00	100%	\$207,000.00	\$0	\$196,650.00	\$10,350.00
7	BAR Master Builders	\$65,536.00	100%	\$65,536.00	\$0	\$62,259.20	\$3,276.80
8	F.R. Harris, Inc	\$11,401.00	100%	\$11,401.00	\$0	\$10,830.95	\$570.05
9	Nations Rent	\$25,274.00	100%	\$25,274.00	\$0	\$24,010.30	\$1,263.70
10	JEMS & Assoc	\$202,002.00	100%	\$202,002.00	\$0	\$195,567.95	\$6,434.05
11	Con Ed of NY	\$6,786.00	100%	\$6,786.00	\$0	\$6,446.70	\$339.30
12	Testwell Labs, Inc	\$19,702.00	100%	\$19,702.00	\$0	\$18,716.90	\$985.10
13	Primer Constr. Corp	\$5,900.00	100%	\$5,900.00	\$0	\$5,605.00	\$295.00
14	DMJM Archs. & Engrs.	\$8,394.00	100%	\$8,394.00	\$0	\$7,974.30	\$419.70
15	McKeon Door Co.	\$17,352.00	100%	\$17,352.00	\$0	\$16,484.40	\$867.60
16	Rodgers Surveying	\$900.00	100%	\$900.00	\$0	\$855.00	\$45.00
17	Able Welding	\$1,500.00	100%	\$1,500.00	\$0	\$1,425.00	\$75.00
18	Premium Tech. Svcs	\$2,975.00	100%	\$2,975.00	\$0	\$2,826.25	\$148.75
19	FSR	\$2,500.00	100%	\$2,500.00	\$0	\$2,375.00	\$125.00
20	Amount deducted from payment application #7						\$3,666.05
Total		\$1,589,284.00		\$1,589,284.00	\$0	\$1,513,485.50	\$79,464.55

It is hereby certified that the work or materials covered by the attached invoice(s) has been satisfactorily accomplished or furnished and that payment thereof is due.

Wm. Brennan PE  
Architect

CERTIFY HERE IF DIRECT PAYMENT TO CONTRACTOR

It is hereby certified that the above invoices are for actual work satisfactorily performed in accordance with the terms of the contracts and payment thereof is due. It is further certified that the work covered by these contracts is within the scope of Lease Agreement No. \_\_\_\_\_

\_\_\_\_\_  
Officer's Signature  
\_\_\_\_\_  
Title

CERTIFY HERE IF REIMBURSEMENT TO LESSEE

It is hereby certified that the above amounts have been paid to the contractors as shown for actual work satisfactorily performed in accordance with the terms of the contracts. It is further certified that the work covered by these contracts is within the scope of Lease Agreement No. \_\_\_\_\_

Robert F. Hughes  
Officer's Signature  
\_\_\_\_\_  
Title

Company Code	Business Area	G/L Account	Cost Center	Internal Order	WBS Element

CORRECT AND IN ACCORDANCE WITH CONTRACT  
CONSTRUCTION 4001

Recommended For Payment:

\_\_\_\_\_  
Title

Approved For Payment:

\_\_\_\_\_  
Port Comptroller

*WILSON JONES*  
*SCOTT*

*P.A. RENT*  
*THRU 11/31/02*

*1/3*

initiale	Date
Prepared By	
Approved By	

1	RENT DUE						
2	PORT AUTHORITY						
3	AS OF 11/31/02	\$	2,803,518.31				
4							
5	LESS:						
6	ASI LOAN		1,200,000.00				
7	ASI SECURITY LOAN		1,288,050.50				
8			1,328,050.50				
9							
10							
11	BALANCE AMT MAINTENANCE		714,753.81				
12							
13							
14							
15							
16							
17							
18							
19							
20							
21							
22							
23							

*11-14*

AMERICAN WAREHOUSING OF NY, INC.  
FURMAN ST. PIER #5  
BROOKLYN, NY 11201

FLEET BANK  
205 MONTAGUE STREET  
BROOKLYN, NY 11201  
1-32/210

*APR 4/03/01*  
*leave on Rent 17165*  
*(38)*

00017165

PAY ONE MILLION FOUR HUNDRED SEVENTY-FIVE THOUSAND THREE HUNDRED FIFTY-ONE AND 81 / 100 Dollars

TO THE ORDER OF The Port Authority of NY&NJ  
P.O. Box 17309  
Newark, NJ 07194-0001

11/21/02 \*\$1,475,351.81

*Robert J. Caputo*  
AUTHORIZED SIGNATURE

⑈017165⑈ ⑆021000322⑆ 2152 70 6199⑈ ⑆0147535181⑆

Security features Details on back

CONTROL NO.: NY2-037

**MOVE IN/MOVE OUT REPORT**

**TO:** Lana Direktor, Revenue Accounting  
**FROM:** Patricia Keough  
**DATE:** November 5, 2002  
**SUBJECT:** **BROOKLYN-PORT AUTHORITY MARINE TERMINAL –  
 AMERICAN WAREHOUSING OF NEW YORK, INC.  
 – LEASE BP-302**

**COPY:** R. Evans, K. Foley, D. Mancinelli, C. McCarthy, J. Moriarty, J. Raczynski,  
 C. Yetka, Central Files

Please note the following change on your billing records:

**FACILITY:** Brooklyn-Port Authority Marine Terminal  
**TENANT:** American Warehousing of New York, Inc:  
**LEASE NO.:** BP-302  
**PREMISES:** Pier 7  
**EXHIBIT:** A  
**TYPE OF CHANGE:** New Lease  
**EFFECTIVE DATE:** December 1, 1999 – April 30, 2003  
**RENT:** Effective January 1, 2000, AW will have the right to phase-in its basic rental in one-third increments as follows:

<u>Period</u>	<u>Annual</u>	<u>Monthly</u>
01/01/00-01/31/00	\$ 89,866.00	\$ 7,488.83
02/01/00-02/28/00	\$179,734.00	\$14,977.67
03/01/00-05/31/00	\$269,600.00	\$22,466.67

**ADDITIONAL RENT:** Effective May 1, 2000, AW will pay an annual rental of \$33,000.00, payable at \$2,750.00 per month, for the partial payment of the cost of a guard service.

Lana Direktor

- 2 -

November 5, 2002

ESCALATION:

Effective June 1, 2000, the basic rental will escalate as follows:

<u>Period</u>	<u>Annual</u>	<u>Monthly</u>
06/01/00-11/30/01	\$337,000.00	\$28,083.33

The basic and additional rent will escalate on December 1, 2001 and every year thereafter at a fixed rate of 3 1/2 percent.

Basic Rent

<u>Period</u>	<u>Annual</u>	<u>Monthly</u>
12/01/01-11/30/02	\$348,795.00	\$29,066.25
12/01/02-04/30/03	\$361,002.83	\$30,083.57

Additional Rent

<u>Period</u>	<u>Annual</u>	<u>Monthly</u>
12/01/01-11/30/02	\$34,155.00	\$2,846.25
12/01/02-04/30/03	\$35,350.43	\$2,945.87

OTHER LEASE PROVISIONS:

Standard Port Authority late charge provision is included in the agreement.

REVENUE CODE:

P9-230-585-400

  
 Patricia Keough  
 Senior Property Representative  
 Leasing Division

<b>THE PORT AUTHORITY OF NY &amp; NJ</b> PA 3651 A, 2008 BK 3170		ACCOUNT NO. <b>04010</b>	DATE OF INVOICE <b>02/01/03</b>	INVOICE NUMBER <b>387624</b>
RENT AND/OR SERVICE FEES AT BROOKLYN MARINE TERMINAL UNDER AGREEMENTS: UP 3028 PIER 7 EXHAUST RETRO 01/01/00 - 01/31/03 UP 3028 RETRO 01/01/00 - 01/31/03 UP 3028 J RETRO 05/01/00 - 01/31/03 UP 3028 J RETRO 05/01/00 - 01/31/03				
RENT: <b>30,083.57</b> Security: <b>2,945.87</b> <b>33,029.44</b>				
DATE RECEIVED: _____ APPROVED BY: _____ DATE: _____ APPROVED BY: _____ DATE: _____				
PAY THIS AMOUNT \$ <b>33,029.44</b>				

FOR FURTHER INFORMATION SEE REVERSE SIDE

AMERICAN WARRENHOLMING  
 1100 5th FURMAN ST  
 BROOKLYN NY 11201

PLEASE ENTER THE ABOVE INVOICE NUMBER ON YOUR CHECK

MAKE ALL CHECKS PAYABLE TO THE PORT AUTHORITY OF NY & NJ

MAIL INVOICE WITH PAYMENT TO  
 P.O. BOX 17309  
 NEWARK, N.J. 07184-0001

CHARGES COVERED BY THIS INVOICE ARE NOW DUE AND PAYABLE. LATE CHARGES MAY BE APPLIED TO THE UNPAID PORTION OF YOUR ACCOUNT

CUSTOMER COPY

PA 3591 A 2/98 BK 3170	<b>THE PORT AUTHORITY OF NY &amp; NJ</b>	ACCOUNT NO. 4402610	DATE OF INVOICE 02/01/03	INVOICE NUMBER 4402610
PORT AND/OR SERVICE FEES AT BROOKLYN PIER 1-5 FOR FEBRUARY 2003 HP 28881 PIER 5 CAN A-2 27,094.00 HP 28881 PIER 5 CANE SUPP 2 6,586.00 HP 28881 PIER 2 - SUPP 3 7,338.75 HP 28881 GUARD SERVICE 2,231.71				
DATE RECEIVED: _____ APPROVED BY: _____ DATE: _____ APPROVED BY: _____ DATE: _____			AMOUNT 44,250.50 44,250.50	

PAY 3456165 440-05  
 283171 440-05  
 3681329

FOR FURTHER INFORMATION SEE REVERSE SIDE  
 CUSTOMER COPY  
 AMERICAN WAREHOUSES  
 FURNACE STREET  
 PIER 5 PORT AUTHORITY  
 BROOKLYN

PLEASE ENTER THE ABOVE INVOICE NUMBER ON YOUR CHECK  
 MAKE ALL CHECKS PAYABLE TO THE PORT AUTHORITY OF NY & NJ  
 MAIL INVOICE WITH PAYMENT TO P.O. BOX 17809 NEWARK, N.J. 07194-0001

FEES COVERED BY THIS INVOICE ARE NOW DUE AND PAYABLE. LATE CHARGES MAY BE APPLIED TO THE UNPAID PORTION OF YOUR ACCOUNT

PA 3501 A 2006 BK 3170	<b>THE PORT AUTHORITY OF NY &amp; NJ</b>	ACCOUNT NO. <b>0403610</b>	DATE OF INVOICE <b>02/01/03</b>	INVOICE NUMBER <b>380629</b>
BENTON/ OR SERVICE FEES AT BROOKLYN MARINE TERMINAL FOR FEBRUARY 2003 \$2 294R EXH A - PIER 6		AMOUNT <b>46,453.67</b>		
DATE RECEIVED: _____ APPROVED BY: _____ DATE: _____ APPROVED BY: <i>[Signature]</i> DATE: <i>[Date]</i>				
FOR FURTHER INFORMATION SEE REVERSE SIDE				

PLEASE ENTER THE ABOVE  
 INVOICE NUMBER ON YOUR C-4F  
 MAKE ALL CHECKS PAYABLE  
 TO THE PORT AUTHORITY OF NY & NJ

MAIL INVOICE WITH PAYMENT TO  
 P.O. BOX 17908  
 NEWARK, N.J. 07184-0001

CHARGES COVERED BY THIS INVOICE ARE NOW DUE AND PAYABLE. LATE CHARGES MAY BE APPLIED TO THE UNPAID PORTION OF YOUR ACCOUNT

AMERICAN MARINE TERMINAL, INC. NY  
 200 MARINE STREET  
 PIER 6  
 BROOKLYN NY 11201

CUSTOMER COPY

17704

FLEET BANK  
205 MONTAGUE STREET  
BROOKLYN, NY 11201

AMERICAN WAREHOUSING OF NY, INC.  
FLYMAN ST. PIER #5  
BROOKLYN, NY 11201

1-32/210

PAY ONE HUNDRED SIXTEEN THOUSAND TWO HUNDRED NINETY SIX AND 37/100 CENTS

DATE 3/24/03 AMOUNT 116,296.37

TO THE ORDER OF  
The Port Authority of NY + NJ  
P.O. Box 17309  
Newark, NJ 07194-0001

Robert F. Lopez  
AUTHORIZED SIGNATURE

VOID AFTER 90-DAYS

⑆0011629637⑆

⑆017704⑆ ⑆021000322⑆ 21527 06199⑆

AMERICAN WAREHOUSING OF NY, INC.

17704

ENDORSEMENT	NUMBER	DATE	DISCOUNT TAKEN	AMOUNT OF PAYMENT
Port Authority of NY/NJ.		3/24/03		
		Feb 03 - Piers 5, 6, 7		
				116,296.37

2006-05-22

FLEET

1703 116 1 00 44012003

0403574370

PNC BANK, C  
8800 TINCUM BL  
PHILADELPHIA PA 19103  
CREDIT TO PAYEE  
ABSENCE OF  
ENDORSEMENT GUARANTEED

004-031-003 001/0019 1703/0019 001 001 001/0019 001/0019 001/0019 001/0019

0310000534  
PNC BANK TINCUM BL PA  
03812003 PNC BANK

20060522

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

**NEW JERSEY MARINE TERMINALS**

**FAX TRANSMITTAL**

**TO: Michael Scotto**

**FROM: Patricia Keough**

**DATE: 11/18/02**

**SUBJECT: Revised monthly fees**

**TO FAX MACHINE: (718) 797-5447**

**NUMBER OF PAGES (INCLUDING COVER SHEET): 3**

1/3

**AMERICAN WAREHOUSING OF NY, INC.  
OUTSTANDING ARREARS \$2,803,832.31**

as of November 2002 with proposed escalations and settlements

- \$ 83,266.94 RENT (NOVEMBER 2002) Piers 5 and 6
- \$ 83,266.94 RENT (OCTOBER 2002) Piers 5 and 6
- \$ 83,266.94 RENT (SEPTEMBER 2002) Piers 5 and 6
- \$ 80,451.16 RENT (AUGUST 2002) Piers 5 and 6
- \$ 80,451.16 RENT (JULY 2002) Piers 5 and 6
- \$ 80,451.16 RENT (JUNE 2002) Piers 5 and 6
- \$ 80,451.16 RENT (MAY 2002) Piers 5 and 6
- \$ 80,451.16 RENT (APRIL 2002) Piers 2, 5, and 6
- \$ 80,451.16 RENT (MARCH 2002) Piers 2, 5, and 6
- \$ 80,451.16 RENT (FEBRUARY 2002) Piers 2, 5, and 6
- \$ 80,451.16 RENT (JANUARY 2002) Piers 2, 5, and 6
- \$ 80,451.16 RENT (DECEMBER 2001) Piers 2, 5, and 6
- \$ 80,451.16 RENT (NOVEMBER 2001) Piers 2, 5, and 6
- \$ 80,451.16 RENT (OCTOBER 2001) Piers 2, 5, and 6
- \$ 80,451.16 RENT (SEPTEMBER 2001) Piers 2, 5, and 6
- \$ 77,730.58 RENT (AUGUST 2001) Piers 2, 5, and 6
- \$ 77,730.58 RENT (JULY 2001) Piers 2, 5, and 6
- \$ 77,730.58 RENT (JUNE 2001) Piers 2, 5, and 6
- \$ 82,830.58 RENT (MAY 2001) Piers 2, 5, 6 and 12
- \$ 90,189.33 RENT (APRIL 2001) Piers 2, 5, 6 and 12
- \$ 90,189.33 RENT (MARCH 2001) Piers 2, 5, 6 and 12
- \$ 90,189.33 RENT (FEBRUARY 2001) Piers 2, 5, 6 and 12
  
- \$ 1,030,566.45 PIER 7 RENT & SECURITY GUARD FEES (JANUARY 2000 - NOVEMBER 2002)  
(NOT POSTED)
  
- \$ 5,916.00 DOCKAGE / WHARFAGE / WATER FEES
  
- \$ 377,722.51 LATE CHARGES
  
- \$ 2,556.48 MISCELLANEOUS FEES AND TEMPORARY STORAGE FEES
  
- \$ 3,218,566.49
  
- \$ (37,011.67) CREDIT ON ACCOUNT - NOT APPLIED
  
- \$ (377,722.51) SETTLEMENT OF LATE CHARGES
  
- \$ 2,803,832.31

3/3

AMERICAN WAREHOUSING - SUMMARY OF MONTHLY FEES W/PROPOSED ESCALATIONS

	Pier 2		Pier 5		Pier 6		Pier 7		Pier 12 rent	TOTAL	TOTAL w/o Pier 7
	rent	security guard	rent	security guard	rent	security guard	rent	security guard			
Nov-02	\$ 34,581.55	\$ 2,231.72	\$ 46,453.67	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 115,179.44	\$ 83,266.94		\$ 115,179.44	\$ 83,266.94
Oct-02	\$ 34,581.55	\$ 2,231.72	\$ 46,453.67	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 115,179.44	\$ 83,266.94		\$ 115,179.44	\$ 83,266.94
Sep-02	\$ 34,581.55	\$ 2,231.72	\$ 46,453.67	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 115,179.44	\$ 83,266.94		\$ 115,179.44	\$ 83,266.94
Aug-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Jul-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Jun-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
May-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Apr-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Mar-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Feb-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Jan-02	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Dec-01	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,846.25	\$ 29,066.25	\$ 2,846.25	\$ 112,363.66	\$ 80,451.16		\$ 112,363.66	\$ 80,451.16
Nov-01	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 111,284.49	\$ 80,451.16		\$ 111,284.49	\$ 80,451.16
Oct-01	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 111,284.49	\$ 80,451.16		\$ 111,284.49	\$ 80,451.16
Sep-01	\$ 33,412.13	\$ 2,156.25	\$ 44,882.78	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 111,284.49	\$ 80,451.16		\$ 111,284.49	\$ 80,451.16
Aug-01	\$ 32,282.25	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 108,563.91	\$ 77,730.58		\$ 108,563.91	\$ 77,730.58
Jul-01	\$ 32,282.25	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 108,563.91	\$ 77,730.58		\$ 108,563.91	\$ 77,730.58
Jun-01	\$ 32,282.25	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 108,563.91	\$ 77,730.58		\$ 108,563.91	\$ 77,730.58
May-01	\$ 32,282.25	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 108,563.91	\$ 77,730.58	\$ 5,100.00	\$ 113,663.91	\$ 82,830.58
Apr-01	\$ 7,356.75	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 121,022.66	\$ 90,188.33	\$ 5,100.00	\$ 121,022.66	\$ 90,188.33
Mar-01	\$ 7,356.75	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 121,022.66	\$ 90,188.33	\$ 5,100.00	\$ 121,022.66	\$ 90,188.33
Feb-01	\$ 7,356.75	\$ 2,083.33	\$ 43,365.00	\$ 2,750.00	\$ 28,083.33	\$ 2,750.00	\$ 121,022.66	\$ 90,188.33	\$ 5,100.00	\$ 121,022.66	\$ 90,188.33
Jan-01					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Dec-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Nov-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Oct-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Sep-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Aug-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Jul-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Jun-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
May-00					\$ 28,083.33	\$ 2,750.00	\$ 30,833.33			\$ 30,833.33	
Apr-00					\$ 22,466.67	\$ 2,750.00	\$ 25,216.67			\$ 25,216.67	
Mar-00					\$ 22,466.67		\$ 22,466.67			\$ 22,466.67	
Feb-00					\$ 22,466.67		\$ 22,466.67			\$ 22,466.67	
Jan-00					\$ 14,977.67		\$ 14,977.67			\$ 14,977.67	
TOTALS	\$ 22,076.25	\$ 47,153.47	\$ 981,509.37	\$ 86,405.00	\$ 944,181.45	\$ 20,400.00	\$ 2,832,371.50	\$ 1,801,805.05	\$ 1,030,568.45	\$ 2,832,371.50	\$ 1,801,805.05

MAY-15-2006 09:55

P.01/01



**CIVIL COURT OF THE CITY OF NEW YORK  
141 LIVINGSTON STREET  
BROOKLYN, NEW YORK 11201**

CHAMBERS OF  
**LOREN BAILY-SCHIFFMAN**  
JUDGE, CIVIL COURT

Tel: 718-643-3312  
Fax: 212-401-9222

**CHERISE HEWITT**  
COURT ATTORNEY

May 15, 2006

**BY FAX: 212-753-4530**  
Michael S. Hiller, Esq.  
Weiss & Hiller  
600 Madison Avenue  
New York, NY 10022

**BY FAX: 212-947-0994**  
Janine G. Bauer, Esq.  
416 Clark Street  
South Orange, NJ 07079

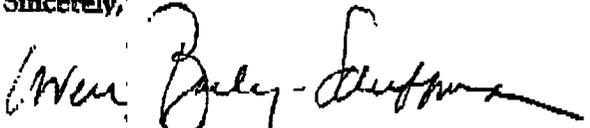
**BY FAX: 212-435-3584**  
Jay A. Selcov, Esq.  
Port Authority of NY & NJ  
225 Park Avenue South, 14<sup>th</sup> FL  
New York, NY 10003

**Re: The Port Authority of NY & NJ v. American Warehousing of NY, Inc.  
Index No. L&T014787/06**

**Counselors:**

I have reviewed the motion, opposition and reply papers and oral argument of the motion for a stay of this Court's proceedings in the above referenced matter and have determined that the stay will be granted until the Federal Maritime Commission rules on the matter that has been tried before it. A full decision will follow.

Sincerely,

  
Loren Baily-Schiffman

LBS/

<p>321282.85 NO</p>	<p>35761144</p>
<p>EXH. SUPP 2 PIER 2 SUPP 2 GUARD SERVICE CARRIAGE AGREEMENT PRINCIPAL INTEREST</p>	<p>FOR FURTHER INFORMATION SEE REVERSE SIDE</p> <p>CUSTOMER'S COPY</p>
<p>PLEASE ENTER THE ABOVE INVOICE NUMBER ON YOUR CHECK MAKE ALL CHECKS PAYABLE TO THE PORT AUTHORITY OF NY &amp; NJ MAIL INVOICE WITH PAYMENT TO P.O. BOX 17309 NEWARK, N.J. 07184-0001</p>	





No. 011106

INVOICE NUMBER	OUR REFERENCE NO.	DATE	INVOICE AMOUNT	DISCOUNT	NET AMOUNT
9F0636		9/1/99	38761.44		
9F0626		9/1/99	37011.67		
9F0624		9/1/99	43365.00		
<b>TOTAL</b>					<b>919,138.11</b>

AMERICAN WAREHOUSING OF N.Y., INC.  
744 CLINTON ST., BROOKLYN, N.Y. 11231

PLEASE DETACH BEFORE DEPOSITING

AMERICAN WAREHOUSING OF N.Y., INC.  
744 CLINTON ST.  
BROOKLYN, N.Y. 11231

VOID 90 DAYS AFTER DATE SHOWN BELOW  
DATE: 9/1/99

AMOUNT: 919,138.11

NON-NEGOTIABLE

10011106 021000320 2152 70 6199IP

Member of Washington Bank USA  
206 MONTAGUE STREET  
BROOKLYN, NY 11203

ONE HUNDRED NINETEEN THOUSAND ONE HUNDRED THIRTY EIGHT

THE PORT AUTHORITY OF NY & NJ,  
P.O. BOX 17309  
NEWARK, NJ 07194-0001

2

11-26-99 201700 FLEETG980 8101125967 021 16 00 0504

2334 112 1 08 11291999  
0500100045

PNB BANK (PH  
8000 TINCUM  
PHILADELPHIA PA  
CREDIT TO P  
ABSENCE C  
ENDORSEMENT GU

PNB BANK ENR 8000 TINCUM  
11/26/99 - PA PA 19153  
0310000534  
23451453

(Board - 7/15/02)

287

**BROOKLYN-PORT AUTHORITY MARINE TERMINAL/RED HOOK CONTAINER TERMINAL/PORT NEWARK - AMERICAN STEVEDORING, INC. AND AMERICAN WAREHOUSING OF NEW YORK, INC. - LEASE EXTENSION AND SETTLEMENT OF DISPUTES**

It was recommended that the Board authorize the Executive Director to enter into: (1) an agreement with American Stevedoring, Inc. (ASI) to extend the term of its lease covering the Red Hook Container Terminal (Red Hook) in Brooklyn, New York, through April 30, 2004; and (2) agreements with ASI and American Warehousing of New York, Inc. (AW) to settle numerous rent and space disputes arising out of their tenancies at Red Hook, the Brooklyn-Port Authority Marine Terminal, and Port Newark.

The lease with ASI, which expired on August 31, 2001, will be extended on its existing terms and conditions with two exceptions. First, the annual minimum throughput rental of \$175,000 for salt will be deleted effective July 31, 2002. Second, if the Port Authority leases two post-panamax electric container cranes from the New York City Economic Development Corporation, the cranes will be added to ASI's leasehold with no change to the existing crane rental of \$10 per container and the annual minimum crane rental of \$180,000; however, the cap of \$750,000 on the annual crane rental will be deleted.

The settlement agreements with ASI and AW reflect business considerations and will provide for the reduction of their arrearages of rental and related charges with respect to their tenancies at Red Hook, the Brooklyn-Port Authority Marine Terminal, and Port Newark from approximately \$6.3 million to approximately \$4.9 million, with the adjusted arrearages to be paid to the Port Authority, and for the Port Authority and ASI/AW to release each other from any claims relating to these tenancies.

Pursuant to the foregoing report, the following resolution was adopted with Commissioners Blakeman, Chasanoff, Kushner, Mack, Martini, Philiposian, Pocino, Sinagra and Song voting in favor, none against:

**RESOLVED**, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into: (1) an agreement with American Stevedoring, Inc. (ASI) to extend the term of its lease covering the Red Hook Container Terminal (Red Hook) in Brooklyn, New York, through April 30, 2004; and (2) agreements with ASI and American Warehousing of New York, Inc. to settle numerous rent and space disputes arising out of their tenancies at Red Hook, the Brooklyn-Port Authority Marine Terminal, and Port Newark, substantially in accordance with the terms and conditions outlined to the Board, provided that such agreement or agreements shall reflect the fact that the term of said lease will not be extended at its expiration on April 30, 2004; the form of the agreements shall be subject to the approval of General Counsel or his authorized representative.

PA 9567 A 258 BK 9170	<b>THE PORT AUTHORITY OF NY &amp; NJ</b>	ACCOUNT NO 0402610	DATE OF INVOICE 04/01/03	INVOICE NUMBER 300436
RENT AND/OR SERVICE FEES AT BROOKLYN PIER 1-5 FROM APRIL 2003 UNDER AGREEMENT(S):		AMOUNT \$ 10,813.25		
OP 248R2 PIER 5 EXH A-2 OP 248R3 PIER 5 WHSE SPACE SUPP 2 OP 248R4 GUANO SERVICE	27,994.59 6,506.96 2,431.71	<p style="text-align: center;">3438165</p>		
DATE RECEIVED: MAR 31 2003				
APPROVED BY: <i>[Signature]</i>				
DATE: 04-01-03				
APPROVED BY: <i>[Signature]</i>		PAY THIS AMOUNT		
DATE: 04-01-03		\$ 10,813.25		

PLEASE ENTER THE ABOVE  
INVOICE NUMBER ON YOUR CHECK  
MAKE ALL CHECKS PAYABLE TO  
THE PORT AUTHORITY OF NY & NJ  
MAIL INVOICE WITH PAYMENT TO  
P.O. BOX 17308  
NEWARK, N.J. 07194-0001

AMERICAN BANKNOTE CO.  
FURNAM STREET  
PIER 5 PORT AUTHORITY  
BROOKLYN NY 11201

FOR FURTHER INFORMATION  
SEE REVERSE SIDE  
CUSTOMER COPY

CHARGES COVERED BY THIS INVOICE ARE NOW DUE AND PAYABLE. LATE CHARGES MAY BE APPLIED TO THE UNPAID PORTION OF YOUR ACCOUNT

PA 5691 A 2/98 BY 9170	<b>THE PORT AUTHORITY OF NY &amp; NJ</b>	ACCOUNT NO. 0409510	DATE OF INVOICE 04/07/03	INVOICE NUMBER 300024
RENT AND/OR SERVICE FEES AT BROOKLYN MARINE TERMINAL FOR APRIL 2001 OF 2948 EXP A - PIER 6		AMOUNT \$ 4,533.07		
DATE RECEIVED: <b>MAR 31 2003</b>		PAY THIS AMOUNT		
APPROVED BY:				
DATE:	3-10-03			
APPROVED BY:				
DATE:	3/10/03			

PLEASE ENTER THE ABOVE  
INVOICE NUMBER ON YOUR CHECK

MAKE ALL CHECKS PAYABLE TO  
THE PORT AUTHORITY OF NY & NJ

MAIL INVOICE WITH PAYMENT TO  
P.O. BOX 17309  
NEWARK, N.J. 07194-0001

AMERICAN BUREAU OF ENGRAVING AND PRINTING  
300 W. 4TH STREET  
NEW YORK, NY 10014

CUSTOMER COPY

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PA 3591 A 2/98 BK 0170	<b>THE PORT AUTHORITY OF NY &amp; NJ</b>	ACCOUNT NO. 0403610	DATE OF INVOICE 06/01/03	INVOICE NUMBER 300623
REP: AMO/UR SERVICE FEES AT BROOKLYN MARINE TERMINAL FROM APRIL 2003 UNDER AGREEMENT(S): UP 30281 PIER 7 FANCA BY 30204 GUARD SERVICE				
DATE RECEIVED: <b>MAR 31 2003</b>				
APPROVED BY: <i>[Signature]</i> DATE: <u>4-1-03</u>				
APPROVED BY: <i>[Signature]</i> DATE: <u>4-1-03</u>				
				AMOUNT \$ 53,029.44

PLEASE ENTER THE ABOVE  
INVOICE NUMBER ON YOUR CHECK  
MAKE ALL CHECKS PAYABLE TO  
THE PORT AUTHORITY OF NY & NJ

MAIL INVOICE WITH PAYMENT TO  
P.O. BOX 17309  
NEWARK, N.J. 07194-0001

PAY THIS AMOUNT  
300623

AMERICAN BANKING  
P.O. BOX 500  
BROOKLYN NY 11201

CUSTOMER COPY

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CHARGES COVERED BY THIS INVOICE ARE NOW DUE AND PAYABLE. LATE CHARGES MAY BE APPLIED TO THE UNPAID PORTION OF YOUR ACCOUNT

17960

FLEET BANK  
205 MONTAGUE STREET  
BROOKLYN, NY 11201

1-32/210

AMERICAN WAREHOUSING OF NY, INC.

FURMAN ST. PIER #6  
BROOKLYN, NY 11201

00017960

PAY ONE HUNDRED SIXTEEN THOUSAND TWO HUNDRED NINETY-SIX AND 37 / 100 Dollars

DATE 05/08/03 \*\*\*\$116,296.37

Void After 90 Days

TO THE ORDER OF The Port Authority of NY&NJ  
P.O. Box 17309  
Newark, NJ 07194-0001

*[Signature]*  
AUTHORIZED SIGNATURE

Security Features Details on back

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⑈0011629637⑈

AMERICAN WAREHOUSING OF NY, INC.

17960

INVOICE NUMBER	INVOICE DATE	INVOICE AMOUNT	PREVIOUS PAY/CREDIT	MEMO	NUMBER	DATE	DISCOUNT TAKEN	AMOUNT OF PAYMENT
3D0623	04/01/03	33,029.44	-7	0.00	00017960	05/08/03	0.00	33,029.44
3D0624	04/01/03	46,453.67		0.00			0.00	46,453.67
3D0636	04/01/03	36,813.26		0.00			0.00	36,813.26
								**\$116,296.37

FLEET

1699 118 1-08 05222003

100523622

031000534  
PNC BANK (PHILA)  
8800 TIKKUM BLVD  
PHILADELPHIA PA 19153

CREDIT TO PAYEE  
ABSSENCE OF

ENDORSEMENT GUARANTEED

031000534  
PNC BANK (PHILA)  
8800 TIKKUM BLVD  
PHILADELPHIA PA 19153  
230923473

18955



1-32/210

00019955

AMERICAN WAREHOUSING OF NY, INC.  
FURMAN ST PER #5  
BROOKLYN, NY 11201

ONE HUNDRED THIRTY-TWO THOUSAND ONE HUNDRED SEVENTEEN  
AND 76 / 100 Dollars 580062288 14 010405 DATECHARGE

AMOUNT

12/20/04 \*\*\*\$132,117.76

Void After 90 Days

Thacher Proffitt & Wood  
As Attorneys For AMERICAN WAREHOUSING OF N.Y.  
2 World Financial Center  
New York, NY 10281

PAY

TO THE ORDER OF

*[Signature]*  
AUTHORIZED SIGNATURE

Security features. Details on back.

⑆019955⑆ ⑆210000322⑆ ⑆2127 06199⑆ ⑆0012211776⑆

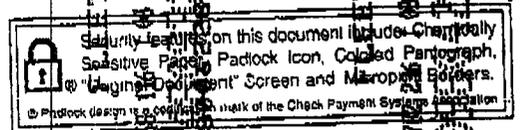
ENDORSE HERE

For Deposit only  
#5547558

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REF: DEPOSIT  
015-01 ACCT#

01/04/05 10:23 FC#00001FAH 040  
5547558 \$132,117.76 DNL



⑆021000089⑆ ⑆5512⑆ ⑆2019-0008K⑆  
⑆2019-0008K⑆ ⑆NY1BANK NY⑆  
⑆0667 580062288 010405 2012422627⑆

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