

BEFORE THE  
FEDERAL MARITIME COMMISSION

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DOCKET NO. 23-04  
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PORTS AMERICA CHESAPEAKE, LLC,

and

MARINE TERMINALS CORPORATION-EAST,

COMPLAINANT,

v.

APS EAST COAST, INC.,

RESPONDENT.

**VERIFIED COMPLAINT**

Complainants Ports America Chesapeake, LLC (“PAC”) and Marine Terminals Corporation-East (“MTCE”) (each a “Complainant” and collectively “Complainants” or “Ports America”), by their undersigned attorneys, file this Verified Complaint against Respondent herein, alleging violations of the Shipping Act of 1984, 46 U.S.C. § 40101, *et. seq.* (the “Shipping Act”) as follows:

**I. COMPLAINANTS**

1. Complainant PAC is a limited liability company organized under the laws of the state of Delaware and authorized to do business in Maryland, with its principal place of business



in Maryland at the Port of Baltimore, with an address at 2400 Broening Highway, Suite 105, Baltimore, Maryland 21224.

2. Complainant MTCE is a corporation organized under the laws of the state of California and authorized to do business in Maryland, with its principal place of business in Maryland at the Port of Baltimore, with an address at 2700 Broening Highway, Suite 230B, Baltimore, Maryland 21222.

3. Each of PAC and MTCE are in the business of, among other things, providing auto and RO/RO stevedoring services in the Port of Baltimore.

## **II. RESPONDENT**

4. Respondent APS East Coast, Inc. is an entity organized under the laws of the state of Delaware, registered to do business in the state of Maryland, having its principal office at 10060 Skinner Lake Drive, Suite 205, Jacksonville, FL 32246, and generally doing business as AMPORTS (hereinafter “Respondent” or “AMPORTS”).

5. AMPORTS is in the auto processing business, describing itself on its web site as “one of the largest auto processors in North America” with a “global vision [] to be the premier Automotive Services Company & Port Terminal Operator...”

6. AMPORTS represents on its web site that in the U.S. it operates “seven US port facilities, located in Jacksonville (FL), Freeport (TX), Antioch (CA), Benicia (CA), and three facilities in Baltimore (MD). AMPORTS Global Headquarters is located in Jacksonville, FL, with a Corporate Branch Office at our Atlantic port facility in Baltimore, (MD).”

7. AMPORTS is a Marine Terminal Operator (“MTO”), as that term is defined in the Shipping Act, 46 U.S.C. § 40102(15), subject to regulation by, and registered as an MTO with, the Federal Maritime Commission (the “FMC” or “Commission”), MTO Organization No. 019071.

8. Pursuant to 46 U.S.C. § 40501(f) and 46 C.F.R. § 525.2, AMPORTS has published a schedule of its rates, regulations, and practices to the public, applicable to AMPORTS' Atlantic Terminal and AMPORTS' Chesapeake Terminal, in Baltimore, Maryland, titled "APS ATLANTIC & CHESAPEAKE TERMINAL TARIFF NO. 2, 019071-002" (the "AMPORTS Tariff").

### **III. JURISDICTION**

9. The FMC has subject-matter jurisdiction over this Complaint pursuant to the Shipping Act.

10. The FMC has personal jurisdiction over AMPORTS as a "marine terminal operator" as defined in 46 U.S.C. § 40102(15).

11. This Complaint is being filed pursuant to 46 U.S.C. § 41301. Ports America is seeking a cease and desist order and reparations for injuries proximately caused due to AMPORTS' violations of the Shipping Act.

12. AMPORTS' actions alleged herein constitute violations of the Shipping Act under multiple Shipping Act prohibitions:

- a. 46 U.S.C. § 41106(2) (unreasonable preference, prejudice or disadvantage);
- b. 46 U.S.C. § 41102(c) (unreasonable practices); and
- c. 46 U.S.C. § 41106(3) (unreasonable refusal to deal).

### **IV. STATEMENT OF FACTS AND MATTERS COMPLAINED OF**

#### ***Summary of Complaint***

13. This Complaint is about a marine terminal operator's brazen violations of the Shipping Act. As described herein, the Respondent, AMPORTS, has engaged in a series of schemes and efforts to unlawfully restrict stevedoring services provided by Ports America for vessels and cargo in the Port of Baltimore. The conduct includes (i) assessment of a baseless and

punitive “access fee” on allegedly “non-preferred” stevedores, specifically Ports America; (ii) subjecting Ports America to prejudicial treatment as compared to other stevedores without legitimate transportation justifications; (iii) establishing and seeking to enforce unjust and unreasonable practices in connection with stevedoring in the Port of Baltimore, including the foregoing preferences and prejudices, interfering with Ports America’s stevedoring business and contracts, and charging Ports America in excess of \$1.2 million for the alleged access fees without a legal basis for the collection; and (iv) unreasonably refusing to deal with Ports America.

***RO/RO and Automobile Cargo in Port of Baltimore, MD***

14. The Port of Baltimore is one of the nation’s leading ports for handling automobiles, light trucks, and other RO/RO cargoes, and except for declines during the COVID-19 pandemic, the Port of Baltimore reported that in 2019 the private and public terminals handled 857,890 autos and light trucks, the second time passing the 800,000 mark and the most of any U.S. port for the ninth straight year.

15. International transportation of newly manufactured cars has certain unique transportation elements, including that the cargo (the cars) are generally loaded and unloaded under their own power (*i.e.* stevedores drive the cars on and off the vessels), and instead of delivery to an ultimate consignee or a notify party at a port, or contracting with the ocean carrier to ship the cars to their ultimate inland destinations, car shippers (the auto manufacturers) generally ship cars to or from “auto processors” located in ports that perform a combination of functions in connection with receiving and preparing the cars for further transportation and delivery.

16. The contracting arrangements for newly manufactured cars among auto manufacturers/shippers, ocean carriers, stevedores, and auto processors would typically involve the following general arrangement: (1) auto manufacturer contracts with an auto processor to

provide auto processing services in a particular region, port, or facility, which are generally long-term, multi-year contracts; (2) auto manufacturer contracts for ocean shipping of its cars to or from the United States location(s) for deliveries in connection with its auto processing contracts; (3) ocean shipping companies contract for various services required for loading, transportation and discharge of the cars, such as stevedoring services to load and unload the cars between the vessel and the auto processor.

***Ports America Auto Stevedoring in Baltimore, MD***

17. Ports America provides auto and RO/RO stevedoring services to ocean going RO/RO vessels loading and discharging in the Port of Baltimore.

18. Ports America contracts directly with international RO/RO ocean carriers to stevedore vessels under long-term contracts (some with durations over twenty-five years, and contracts currently with more than ten years remaining), as well as short-term or single voyage contracts (but which in many cases involve long-standing commercial relationships going back many years).

***AMPORTS Auto Processing in Baltimore, MD***

19. AMPORTS operates facilities in Baltimore, MD used for auto processing services, which includes terminals and vessel berths where auto and RO/RO vessels dock and load and unload cars processed by AMPORTS, including the two terminals that are the subject of the AMPORTS Tariff: AMPORTS' Atlantic Terminal, located at 2901 Childs Street, Baltimore, MD, and AMPORTS' Chesapeake Terminal, located at 2000 Chesapeake Avenue, Baltimore, Maryland (hereinafter the "AMPORTS Terminals").<sup>1</sup>

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<sup>1</sup> These two terminals are sometimes referred to together as "AMPORTS East", distinguishing them from a third terminal operated by AMPORTS across the river at Dundalk, sometimes referred to as "AMPORTS NORTH."

20. AMPORTS also owns, leases, or otherwise operates various back lots and other parcels of land in the vicinity of the AMPORTS Terminals, used for auto parking/storage, auto processing activities, and in at least one instance, leasing to Ports America for storage of Ports America stevedoring equipment.

21. AMPORTS advertises the AMPORTS Terminal facilities as a “Privately Owned Port” with “4x berths available (2x Owned, 2x MPA)”, with “238 acres of yard space. Dynamic capacity for approx. 700,000 cars” with “53,000 sq ft / 23.500 sqm of fully equipped processing buildings.”

22. In 2021, AMPORTS advertised that its “OEM customers” (referring to its automobile manufacturing customers) included “Mazda, Stellantis, GM, Honda, Ram.”

23. Upon information and belief, auto processing services provided by AMPORTS in connection with the AMPORTS Terminals primarily involve logistical services in connection with receiving and preparing autos for further transportation, in the case of U.S. manufactured cars for export, land-side receiving and preparation for onward transportation on ocean carriers, and in the case of foreign manufactured cars imported into the United States, receiving cars from ocean carriers and preparing the cars for land-side transportation to inland locations, such as car dealerships.

24. Upon information and belief, AMPORTS enters into long term contracts with auto manufactures to perform auto processing services at the AMPORTS Terminals.

25. The ocean transportation of cars processed by AMPORTS at the AMPORTS Terminals is arranged between the auto manufacturer and the ocean carrier, not by or between AMPORTS.

26. The stevedoring of the cars processed by AMPORTS at the AMPORTS Terminals is arranged between the ocean carrier and the stevedore, such as Ports America, not by or between AMPORTS.

27. Upon information and belief, except for berthing-related services AMPORTS may provide to vessels at the two AMPORTS berths, which AMPORTS assesses via the AMPORTS Tariff, AMPORTS provides no services to, and AMPORTS has no relevant contractual relationships with, the ocean carriers loading and discharging cars processed at the AMPORTS Terminals.

#### **The AMPORTS “Announcement” and “Access Fee” Implementation**

28. On or about November 1, 2022, Ports America obtained a copy of a letter dated November 1, 2022, on AMPORTS letterhead, addressed only to “Dear valued partners” and signed by AMPORTS’ Chief Operating Officer, Ben Buben (the “AMPORTS Announcement”).

29. AMPORTS did not send the AMPORTS Announcement letter to Ports America at that time.

30. The AMPORTS Announcement stated, among other things, that:

- a. AMPORTS had selected a “sole stevedoring provider” for Benicia, CA, locations and its Atlantic/Chesapeake location in Baltimore, MD;
- b. each stevedore “will have exclusive rights to perform RO/RO vessel operations at their respective locations beginning January 1st, 2023”;
- c. such stevedores “have agreed to honor existing stevedoring agreements currently in place at our locations until expiration. It may be beneficial for our customers to open dialog with both companies to explore a long-term deal”;

- d. representatives of such stevedores “will be in contact soon to discuss the change in stevedoring service at our locations and to answer any questions you may have;
- e. only the designated stevedoring companies would be “licensed to perform stevedoring services” at the AMPORTS Terminals after 12/31/2022;
- f. “[i]f a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a \$25.00 per unit fee to enter our facility”; and
- g. all stevedoring activities performed by another stevedoring company must be “approved by AMPORTS COO 14 days before vessel activities.”

31. On December 6, 2022, Ports America counsel sent a letter to AMPORTS in response to the AMPORTS Announcement, stating Ports America’s understanding that AMPORTS had taken, or planned to take, the following actions:

- a. AMPORTS intended to “license” stevedores delivering or receiving cargo at certain AMPORTS terminals;
- b. AMPORTS intended to restrict allegedly “unlicensed” stevedores providing RO/RO stevedoring services to third-party vessels in Baltimore for cargo received from or delivered to AMPORTS terminals after December 31, 2022;
- c. AMPORTS was coordinating with other allegedly “licensed” stevedores to interfere with existing stevedoring services relationships and agreements that ocean carriers have with stevedores such as Ports America; and
- d. If an ocean carrier failed or declined to change stevedores to a “licensed” stevedore—which in many cases would require an ocean carrier to breach an



existing stevedoring agreement—AMPORTS intended to charge “a \$25.00 per unit fee” on each car in order “to enter our facility.”

32. Ports America’s December 6, 2022 letter expressly put AMPORTS on notice that AMPORTS’ actions and proposed actions violated federal and state laws and regulations, including giving rise to causes of action for violations of the Shipping Act, which the letter described with specificity:

AMPORTS qualifies as a Marine Terminal Operator (“MTO”) subject to regulation under the Shipping Act, both in its capacity as a Federal Maritime Commission (“FMC”) registered MTO, and in the capacity in which it is acting in relation to commercial cargo handling transactions, assessment of fees in connection with cargo, and in regulating, restricting and/or controlling access to public and private terminal facilities.

MTOs “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). MTOs are prohibited from “give[ing] any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106(2). And MTOs are prohibited from “unreasonably refus[ing] to deal or negotiate.” 46 U.S.C. § 41106(3).

Virtually every aspect of AMPORTS’ actions violate (or if implemented would violate) the Shipping Act under multiple, well-established Shipping Act principles. There is no legitimate basis for claiming that the purported “licensing,” and a \$25 fee for purportedly unlicensed stevedores, is necessary at the Atlantic/Chesapeake sites to “shorten drive times, design staging areas for cargo, and expedite vessel operations.” Nor does your letter explain how assessing punitive access fees, interfering with existing stevedoring contracts and reducing competitive stevedoring choices is necessary to achieve such results.

Even if there were a remotely plausible basis for AMPORTS assertions, AMPORTS has not identified the terms and has not made those terms available to similarly situated parties, such as [Ports America]. It is doubtful whether the terms of such contracts even address legitimate transportation distinctions, given that actual stevedoring contracts are between the stevedores and the ocean carriers, not AMPORTS. And whatever the terms or the service actually being provided by AMPORTS to purportedly “licensed” stevedores, or they to AMPORTS, if any at all, the intended charge of \$25 per car to access the AMPORTS terminal without a contract is blatantly excessive, both in relation to the cost of providing the

mysterious alleged service for access, and in relation to the overall economics of RO/RO stevedoring on a per unit basis.

33. The December 6, 2022 letter requested that AMPORTS reverse its position on licensing stevedores and assessing access fees, publicly withdraw the letter with notice to ocean carriers, and cease and desist from taking additional actions in furtherance thereof, and further requested that AMPORTS:

- a. explain how and upon what basis AMPORTS intends to “license” stevedores;
- b. indicate how and from whom AMPORTS intends to collect the access fees;
- c. provide in writing the basis for the \$25 per unit amount of the access fee;
- d. offer to make equivalent terms available to PAC, MTCE and other stevedores for consideration; and
- e. after providing a reasonable opportunity to consider the foregoing information, agree to meet to negotiate concerning such agreements and terms.

34. On December 29, 2022, three days before the AMPORTS access fee was to take effect, AMPORTS responded through counsel to Ports America’s December 6, 2022 letter.

35. The AMPORTS response noted that: “[a]s you might expect, in addition to your letter, AMPORTS, INC. has received inquiries from other affected entities concerning the November 1, 2022 announcement advising of preferred stevedoring providers at the AMPORTS’ Benicia, CA and Atlantic/Chesapeake, MD facilities;” that AMPORTS intended to prepare a “comprehensive response” to concerns raised by Ports America and others; and that in the interim AMPORTS was unilaterally suspending collection of the fee (which at that time had not yet commenced).<sup>2</sup>

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<sup>2</sup> The December 29 letter stated in relevant part: “AMPORTS wishes to continue its cordial commercial relationship with Ports America, and so in the interim, AMPORTS has agreed as a matter of comity to temporarily suspend the

36. In reliance on AMPORTS' December 29, 2022 suspension of the access fee, Ports America continued to perform stevedoring services for cars delivered to and/or from the AMPORTS Terminals pursuant to Ports America's ocean carrier agreements.

37. More than three months after the December 29, 2022 suspension letter, by letter dated March 31, 2023, AMPORTS' counsel provided the further response noted in its prior letter.

38. The March 31, 2023 AMPORTS letter, among other things:

- a. conceded that AMPORTS is subject to the Shipping Act as an MTO;
- b. represented that the intended purpose of the "preferred stevedore" arrangement and the alternative \$25 access fee was to "better optimize its terminal and operations, which it expects will increase the quality and efficiency of service for its vessel operating customers, while lowering costs at its terminals.";
- c. claimed that its "preferred stevedore" arrangement and the alternative \$25 access fees were justified by three allegedly legitimate transportation factors:
  - i. reducing berthing delays allegedly caused "when multiple stevedores would be chosen for the unloading of a single vessel."
  - ii. reduction in terminal efficiency allegedly occurring "in the presence of an array of stevedores, each with their own equipment that may require storage, and cause congestion on the terminal, along with their own unique approaches to arranging customer vehicles on the terminal, reduced the amount of available yard space"; and

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collection of the \$25 per unit fee proposed to cover the costs associated with the use of other stevedoring companies at the Benicia, CA and Atlantic/Chesapeake, MD facilities."

- iii. alleged difficulty of identifying responsibility for terminal and cargo damage “[w]hen numerous stevedores are on the terminal at the same time, operating independently within the same terminal areas.”;
  - d. claimed that AMPORTS undertook a selection process to determine its preferred stevedores, disclosing two of the factors upon which the selections were allegedly based: (1) “health and safety track records” and (2) “the ability to ensure sufficient and consistent dockside labor.”;<sup>3</sup>
  - e. asserted that the \$25 fee would be collected from “any unlicensed stevedore company for access to AMPORTS’ facilities and it is not a charge payable by our carrier customers.” AMPORTS stated that “We appreciate that the use of the term “they” in the Announcement may have been somewhat ambiguous.”;
  - f. stated that it would commence collection beginning on April 10, 2023; and
  - g. finally, in connection with stating that AMPORTS would commence collection on April 10, 2023, made a cryptic statement that “[w]e are advised that Ports America has accrued approximately USD \$1.2 million in fees since January 1, 2023.”
39. On April 12, 2023, Ports America accessed the AMPORTS Tariff.
40. As of April 12, 2023, the AMPORTS Tariff contained Rule 34 2, with a stated effective date of January 1, 2023, providing in part as follows:

(a)(2) Exclusive License for Ro/ro Unloading Services.

(i) Terminal reserves the right to enter into exclusive arrangements ofr [sic] the provision of handling services at the Terminal ("Exclusive License").

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<sup>3</sup> AMPORTS also represented that it “concluded that providing a preferred stevedore would improve safety on the yard, by (among other things) ensuring a primary stevedore that is highly experienced with the terminal and its procedures, and that has agreed to undergo more stringent safety and security procedures at the terminal.” It is not clear whether these were selection criteria, or conclusions.

(ii) After a competitive bidding process, Terminal has granted an Exclusive License to Ceres Terminals, Incorporated ("Service Provider"), a company incorporated under the laws of Delaware, to provide unloading services for all roll-on/roll-off ("Ro/ro") Motor Vehicle cargo at the Terminal.

(iii) Service Provider will provide such Ro/ro unloading services pursuant to direct agreements to be entered between Service Provider and specific recipients of Ro/ro unloading services ("Customer"). If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a \$25.00 per unit fee. All stevedoring activities not performed by Ceres must be approved by AMPORTS COO 14 days before vessel activities.

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If a customer would like to continue to use their current partnership with another stevedoring company, they will be able to do so by paying a \$25.00 per unit fee. All stevedoring activities not performed by Ceres must be approved by AMPORTS COO 14 days before vessel activities.<sup>4</sup>

41. It is presumed that the customer to which the AMPORTS Tariff refers in Rule 34 2 is an ocean carrier, although it could possibly refer to the AMPORTS car manufacturer customer, but it is readily apparent that the customer is *not* referring to “another stevedoring company.”

42. On April 13, 2023, Ports America responded to AMPORTS’ letter, reiterating its position on Shipping Act violations, but focused on responding to AMPORTS’ stated plan to commence its proposed \$25 access fee or collect it from Ports America:

In the interests of time, and in light of your statement in your letter that AMPORTS intends to start its previously suspended “collection of the \$25 per unit fee which was the subject of the Announcement,” we are specifically writing to make it clear that (1) we reject AMPORTS’ assertion of the purported access fee; (2) we reject AMPORTS’ assertion that it has a legal basis upon which to assess or collect such a fee from a stevedore in Baltimore, specifically including [Ports America], and (3) we intend to continue providing stevedoring services to ocean carrier customers loading and unloading at AMPORTS facilitates at our discretion and expressly without agreeing to AMPORTS’ assessment of its proposed \$25/unit fees and without paying any such fees.

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<sup>4</sup> The AMPORTS Tariff is published via the tariff publisher Descartes. Rule 34 2 is attached as (“**Attachment A**”).

43. The letter also expressly challenged the legal basis for the purported fee and its collection from Ports America, both on the basis of Ports America never having agreed to such a fee, and AMPORTS having unilaterally suspended it before it ever started until at least April 10, 2023:

We also reject any claim that PAC or MTCE, or anyone, owes AMPORTS for any such \$25 fee for any period prior to your recent letters, including with regard to the perplexing statement in your March 31, 2023 letter that “[w]e are advised that Ports America has accrued approximately USD \$1.2 million in fees since January 1, 2023.” First, you admitted that AMPORTS “suspended” its proposed fee from the time of your December 29, 2022 letter until the time stated in your March 31, 2023 letter, which in the case of [Ports America], was April 10, 2023. Second, even if AMPORTS had not suspended the proposed January 1, 2023 start of its unlawful fee on December 29, 2022, [Ports America] clearly rejected the lawfulness of the proposed fee on December 6, 2022, and [Ports America] continue[s] to reject the lawfulness of the proposed fee through and including today. AMPORTS’ unilateral assertion that it has assessed, or intends to assess, the unlawful fee on [Ports America] does not constitute a legal basis to actually assess it or collect it from [Ports America].

44. AMPORTS did not provide any further response to Ports America’s April 14, 2023 letter, including providing no response concerning the legal basis to collect the disputed fee, but on April 17, 2023, AMPORTS issued three (3) invoices to Ports America, one for each month of January, February, and March 2023, all dated April 17, 2023, for the purported access fee in connection with Ports America stevedoring of vessels at the Chesapeake Terminal, in aggregate totaling \$1.277 million.<sup>5</sup>

45. As of the date of verification of this Complaint, AMPORTS has not received a further response from counsel, and upon information and belief, AMPORTS has not changed the language of Rule 34 2.

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<sup>5</sup> INV14-393, INV14-394 and INV14-395 (**Attachment B**).

46. Ports America has sustained injury as a result of AMPORTS' actions, and faces significant threat of continued and future injury and damages:

- a. the specter and uncertainty of the prohibitively expensive access fee is threatening the commercial viability of Ports America's car stevedoring business and customer contracts in Baltimore and has caused and is causing Port America to lose business from ocean carrier customers;
- b. the alleged Ports America liability for the access fee, for \$1.277 million in January, February and March 2023 alone, and potential liability thereafter in the event of continued attempts to assess the unlawful fee, represent direct and ongoing injury to Ports America; and
- c. collection of the access fee from Ports America would result in direct injury to Ports America and cause substantial and material loss of business and related injury and damages to Ports America.

47. Ports America's injury and damages are ongoing, and continuing to be tabulated and accruing as of the filing of this Complaint.

## **VI. VIOLATIONS OF THE SHIPPING ACT**

### **COUNT I - VIOLATIONS OF 46 U.S.C. § 41106(2)**

#### **Unreasonable Preference, Prejudice or Disadvantage**

48. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

49. 46 U.S.C. § 41106(2) prohibits a marine terminal operator from "give[ing] any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage with respect to any person."

50. The elements of an unreasonable preference or prejudice claim are (1) (in some cases) that two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

51. Although a *prima facie* case of the Section 41106(2) violation here should not require a showing that the AMPORTS' "licensed" stevedoring provider is similarly situated or in a competitive relationship with Ports America, it is evident in any event that Ports America is both similarly situated, and in a competitive relationship, with the preferred stevedore in Baltimore.

52. AMPORTS' proposed practices are premised on affording different treatment to the "licensed" versus the unlicensed stevedore, Ports America. Among other things: the licensed stevedore is not subjected to the \$25 per car access fee, while AMPORTS is purporting to assess the \$25 fee on Ports America; the non-preferred stevedores are also subjected to the purported additional approval process, with 14 days advance notice, not applicable to the preferred stevedore; and AMPORTS has in fact charged the \$25 fee to Ports America.

53. Upon information and belief, the unequal treatment is not justified by differences in legitimate transportation factors. Among other things:

- a. The three alleged "factors" that AMPORTS asserted that it considered for having preferred stevedores (potential for berth delay due to two or more stevedores working a vessel at the same time; efficiency losses due to too many stevedores on the terminal at the same time and mismanaging parking; and difficulties assigning



responsibility for damage when more than one stevedore services a vessel) (i) do not occur on a regular or routine basis, if at all, and (ii) in any event do not distinguish Ports America from the preferred stevedore;

- b. The two other factors that AMPORTS said it “took into account” to identify the preferred stevedore (“health and safety track records” and “ability to ensure sufficient and consistent dockside labor”) also fail to meaningfully distinguish Ports America from the preferred stevedore; and
- c. As discussed further below, upon information and belief, AMPORTS did not actually conduct any “comparative bidding process” nor meaningfully consider these alleged factors as to Ports America.

54. The resulting prejudice and disadvantage is the proximate cause of injury, resulting in loss of business, interference with current and future business relations and contracts, and threatened liability for the assess fee.

## **COUNT II - VIOLATIONS OF 46 U.S.C. § 41102(c)**

### **Unjust and Unreasonable Practices in Handling Property**

55. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

56. Section 46 U.S.C. § 41102(c) prohibits a marine terminal operator from failing to “establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

57. FMC regulations provide that establishing a 46 U.S.C. § 41102(c) violation requires the following elements: (1) the respondent is an MTO; (2) claimed acts or omissions are occurring on a normal, customary, and continuous basis; (3) the practice or regulation relates to or is

connected with receiving, handling, storing, or delivering property; (4) the practice or regulation is unjust or unreasonable; and (5) the practice or regulation is the proximate cause of the claimed loss.

58. AMPORTS is an MTO as defined by the Shipping Act.

59. AMPORTS' practices and procedures relating to auto stevedoring in the Port of Baltimore that are the subject of the AMPORTS Announcement have been occurring on a normal, customary, and continuous basis. AMPORTS indicated its intent for its practice to be ongoing and continuous since at least November 1, 2022 as set forth in the AMPORTS Announcement, as well as in its publication of Rule 34 2 in the AMPORTS Tariff at some time prior to January 1, 2023. Notwithstanding AMPORTS' December 29, 2022 representation that it was temporarily suspending collection of the asserted access fee, AMPORTS responded three months later reiterating its intent and that it planned to initiate collection on April 10, 2023. Moreover, on April 17, 2023, AMPORTS issued three (3) separate invoices for access fee charges for the months of January, February, March 2023, each issued on April 17, 2023, and in aggregate totaling \$1.277 million. The challenged practices have thus been ongoing on a continuous basis, and absent obtaining the relief requested in this Complaint, it is apparent that AMPORTS intends that the challenged practices would continue on a normal and continuous basis.

60. AMPORTS' practices and procedures relating to auto stevedoring in the Port of Baltimore that are the subject of the AMPORTS Announcement are directly related to receiving, handling, storing, or delivering property, *e.g.* stevedoring cars.

61. Respondent's foregoing practices and procedures are unjust and unreasonable in violation of Section 41102(c), including, but not limited to, on the following bases:

- a. AMPORTS' stated purpose of improving terminal efficiency and reducing transportation costs may be legitimate ends in general terms, but the preferred stevedore practice, and the access fee for non-preferred stevedores, are not reasonably related to legitimate ends, and not "fit and appropriate to the ends in view."
- b. The preferred stevedore practice, and the access fee for non-preferred stevedores, are excessive in relation to a purported cost, benefit, or service and with respect to the level of the access fee.
- c. The alleged "factors" AMPORTS asserted that it considered for the preferred stevedore and its selection (i) for the most part do not occur on a regular or routine basis, if at all, and (ii) in any case they do not distinguish Ports America from the preferred stevedore.
- d. The additional approval requirements, and the 14-days advance notice requirement, purportedly applicable to non-preferred stevedores is not rationally related to legitimate transportation factors, is excessive, and is not fit and appropriate to the end in view.
- e. AMPORTS' stated intent to knowingly interfere with, and to encourage preferred stevedores to interfere with, Ports America customers with long term contracts, is unjust and unreasonable.
- f. It is not apparent what, if any, actual service is being provided, or legitimate cost compensated, in exchange for charging Ports America the access fee, given that the vessels are already subject to assessment of dockage and wharfage, that the liability and damage risks relating to having stevedores on the AMPORTS Terminals are

already provided for, and the incremental costs to allow physical access the AMPORTS Terminals are negligible, if any.

62. In addition to the foregoing, AMPORTS' efforts to implement the AMPORTS Announcement, and to charge Ports America access fees, are also unjust and unreasonable for multiple reasons that include the following:

- a. Purporting to collect the access fee from Ports America via the AMPORTS Notice of November 1, 2022 is unjust and unreasonable because (i) the unilateral AMPORTS Notice is not an agreement; (ii) AMPORTS did not even provide the AMPORTS NOTICE to Ports America; (iii) on its face the AMPORTS Notice purported to collect the charge from AMPORTS' "customers" not from "other stevedores" such as Ports America; and (iv) in all events Ports America did not agree, and expressly rejected, the AMPORTS Notice in writing on December 6, 2022.
- b. Purporting to collect the access fees from Ports America during the period between January 1, 2023 to April 10, 2023 is additionally unjust and unreasonable when AMPORTS had expressly suspended collection of the purported access fee during that period.
- c. Although AMPORTS to date has not claimed that the AMPORTS Tariff is a legal basis to collect the access fee from Ports America, purporting to collect the access fee from Ports America on the basis of the AMPORTS Tariff, Rule 34 2 would also be unjust and unreasonable because that Rule does not on its face provide for collection of the access fee from Ports America or from an "other stevedore."

d. Purporting to collect the access fees from Ports America is also unjust and unreasonable for the reasons set forth in Counts I, the preceding paragraphs of this Count II, and in Count III below.

63. AMPORTS' foregoing practices and procedures are the proximate cause of Ports America's claimed injury and damages.

### **COUNT III - VIOLATIONS OF 46 U.S.C. § 41106(3)**

#### **Unreasonable Refusal to Deal**

64. Complainant repeats and realleges each and every allegation above as if fully set forth herein.

65. In response to the AMPORTS Announcement concerning preferred stevedores, on December 6, 2022, Ports America specifically asked that AMPORTS "offer to make equivalent terms available to [Ports America] and other stevedores for consideration" and that "after providing a reasonable opportunity to consider the foregoing information, agree to meet to negotiate concerning such agreements and terms."

66. AMPORTS represented in its published tariff schedule that it selected its preferred stevedore "[a]fter a competitive bidding process."

67. Ports America was not contacted by AMPORTS concerning the alleged competitive bidding and was not asked to provide or submit any information to AMPORTS for the purpose of such bidding or selection.

68. AMPORTS' December 29, 2022 letter did not disavow the "competitive bidding process" that AMPORTS represented having undertaken in the AMPORTS Tariff.

69. Indeed, the March 31, 2023 letter reiterated the alleged “competitive bidding process” and described the alleged “factors” considered and the alleged “selection process” employed by AMPORTS.

70. However, AMPORTS does not represent that Ports America was part of that bidding process or the resulting selection process

71. The March 31, 2023 letter, however, did not offer to include Ports America in such a process, or offer such terms to Ports America at that time, instead only offering to include Ports America “in the next round” “in the future,” despite noting that “it appears [Ports America] may be well suited”:

AMPORTS wishes to continue and support its commercial relationships with Ports America and MTCE. AMPORTS will be reviewing and evaluating its relationships with its preferred stevedore providers and the resulting efficiencies on an ongoing basis. Should Ports America or MTCE be interested in bidding to be AMPORTS’ preferred stevedore provider in the future, for which it appears they may be well suited, AMPORTS will ensure that both entities are included in the next Request for Quote round. In connection with such future evaluations, AMPORTS’ would be pleased to receive PAC and MTCE’s safety records and any efficiency metrics available.

72. AMPORTS’ words quoted above stand in stark contrast to its actions, and needless to say, AMPORTS has not offered to provide equivalent terms or to negotiate with Ports America presently.

73. Having represented that AMPORTS in fact undertook a competitive bidding process, and/or an initial “Request for Quote round,” it is incumbent on AMPORTS to have done so and to have meaningfully included Ports America for consideration.

74. AMPORTS' failure to have done so in the first place, and failure to deal with Ports America after Ports America found out about it and asked to deal in writing, constitutes unlawful and unreasonable refusal to deal.

#### **VII. CAUSATION AND INJURY TO COMPLAINANTS**

75. As a result of Respondent's violations of the Shipping Act, Ports America has sustained serious and substantial injuries and monetary damages, including but not limited to the alleged invoices for \$1.277 million and future access fees and loss of future business. AMPORTS' unreasonable and unlawful conduct is continuing, and Ports America continues to sustain injury and damages.

#### **VIII. ALTERNATIVE DISPUTE RESOLUTION**

76. Ports America has unsuccessfully attempted to resolve this matter with Respondent prior to filing this Verified Complaint. In light of the prior exchanges and Respondent's initial suspension of its proposed actions and its decision to later reinstate its actions, Ports America did not seek to use the FMC's alternative dispute resolution process prior to filing this Verified Complaint.

77. Complainant has not had any preliminary consultations with the FMC's Dispute Resolution Specialist regarding the availability of alternative dispute resolution under the FMC's ADR program (46 C.F.R. § 502.64).

#### **IX. REQUEST FOR ORAL HEARING**

78. Complainant requests a hearing on this matter, and further requests that the hearing be held at the Federal Maritime Commission, 800 N. Capitol St., NW, Washington, D.C. 20573-0001.

## X. PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests that Respondent be required to answer the charges in this Complaint, and that after a hearing, the FMC issue an Order:

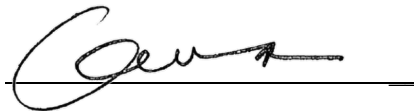
1. Ordering that Respondent cease and desist from the unlawful conduct;
2. Requiring Respondent to pay Complainant reparations for the unlawful conduct described above, along with interest and Complainant's attorneys' fees and costs as described in 46 U.S.C. § 41305;
3. Requiring the payment of any other amounts that the FMC deems appropriate; and
4. Providing Complainant such other and further relief that the FMC deems is just and proper.

Dated: May 30, 2023

Respectfully Submitted,

**HOLLAND & KNIGHT LLP**

By:



Gerald A. Morrissey III  
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Washington, D.C. 20006  
Telephone: (202) 469-5497  
gerald.morrissey@hkllaw.com

*Counsel to Complainants*



## VERIFICATION

I, Courtney R. Beller, Vice President and Deputy General Counsel of Ports America, hereby declare and attest under penalty of perjury on behalf of Complainants that I have read the foregoing Verified Complaint and believe, to the best of my knowledge, information, and belief, that the facts stated therein are true and correct.

Dated: May 22, 2023

*Courtney R. Beller*

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Courtney R. Beller  
Vice President and Deputy General Counsel  
Ports America