BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 23-04

PORTS AMERICA CHESAPEAKE, LLC,

and

MARINE TERMINALS CORPORATION-EAST,

COMPLAINANT,

v.

APS EAST COAST, INC.,

RESPONDENT.

OPPOSITION TO MOTION TO DISMISS

Complainants Ports America Chesapeake, LLC ("PAC") and Marine Terminals Corporation-East ("MTCE") (each a "Complainant" and collectively "Complainants" or "Ports America") respectfully submit this memorandum of law in opposition to the Motion to Dismiss ("Mot. Dismiss") of Respondent APS East Coast, Inc. ("AMPORTS").

INTRODUCTION

On June 2, 2023, Complainants filed their Verified Complaint against AMPORTS asserting that AMPORTS had engaged in a pattern of conduct in violation of the Shipping Act of 1984, 46 U.S.C. § 40101, et. seq. (the "Shipping Act"). The Complaint alleges violations of 46 U.S.C. § 41106(2) (Unreasonable Preference, Prejudice or Disadvantage); 46 U.S.C. § 41102(c)

(Unreasonable Practices); and 46 U.S.C. § 41106(3) (Unreasonable Refusal to Deal). The Complaint at hand raises serious violations of the Shipping Act and articulates the causes of action and supporting factual allegations in substantial and specific detail.

On June 27, 2023, AMPORTS filed a motion to dismiss the entirety of the Complaint asserting, inter alia, that the Complaint should be dismissed for failing to state claims for which relief can be granted. However, AMPORTS challenges only some, but not all, of the legal bases and supporting factual allegations in the Complaint. As to the challenges AMPORTS does advance, it argues for dismissal on the basis of its misreading of the Complaint in key respects, for allegedly failing to plead elements of causes of action that do not exist, and quibbling about the merits of factual allegations regarding specific harm and injury that are not proper bases for a motion to dismiss.

With respect to Count I (Undue Preference/Prejudice), AMPORTS asserts that the Count should be dismissed because the Complaint fails to include factual allegations as to a "relevant market." But that is not a requirement to plead an unreasonable preference or prejudice cause of action. Nor does Count I of the Complaint challenge whether AMPORTS violated the Shipping Act by entering into an agreement or agreements, "exclusive" or otherwise, but rather its unequal treatment of allegedly "non-preferred" stevedores and associated access fees. AMPORTS' argument responds to its misinterpretation of Count I, not the actual allegations of Count I.

As to Count II (Unreasonable Practices), AMPORTS claims that to state a claim under 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4, the Complaint requires a specific allegation that conduct "negatively affect the broader shipping public." Again, AMPORTS seeks to dismiss on the basis of requirements that do not exist. The concern with harm to the shipping public was a reason

behind the addition of the continuity requirement now appearing at 46 C.F.R. §545.4(b), but it is not a new, separate element of the cause of action.

AMPORTS moves to dismiss Count III (Unreasonable Refusal to Deal) for failure to state a claim on the bases that (1) a refusal to deal pleading must allege that "Complainants requested to be considered," and (2) the allegations "are refuted by the factual allegations in the Complaint." However, a cognizable refusal to deal cause of action is not limited to only fact patterns alleging an express affirmative request to deal and an express (unreasonable) refusal in response. Plausible refusal to deal claims may be alleged where a respondent has held itself out to deal in some manner, or where the credibility of a respondent's proffered consideration or agreement to deal is called into question. The Complaint advances both of these theories and supporting allegation of fact.

Finally, in addition to the failure of AMPORTS' specific arguments, the motion to dismiss must also fail because AMPORTS' arguments do not purport to address all of the factual allegations or factual theories of the causes of action in the Complaint. As discussed more fully below, Complainants have plead sufficient allegations to adequately plead their claims and AMPORTS' motion to dismiss should be denied.

LEGAL STANDARD

The Commission looks to Federal Rule of Civil Procedure 12(b)(6) when considering a motion to dismiss based on alleged failure to state a claim. *MAVL Capital v. Marine Transport Logistics*, 2020 FMC LEXIS 216, *6 (FMC 2020). "Under Fed. R. Civ. P. 12 (b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant's favor." *MAVL Capital*, 2020 FMC LEXIS 216, at *6 (*citing Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 54 (FMC 2015)).

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, 32 S.R.R. 126, 136 (FMC 2011).

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (*quoting Twombly*, 550 U.S. at 555). However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

The question at the motion to dismiss stage is not whether the complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co*., 2014 U.S. Dist. Lexis 125179, *5 (M.D. Tenn. 2014). Meeting the plausibility standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the alleged violation. *Twombly*, 550 U.S. at 556. At the motion to dismiss stage, the "choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, LLC v. Am. Media, Inc*., 680 F.3d 162, 185 (2d Cir. 2012). All well-pleaded factual allegations in the Complaint should be assumed to be true and should be construed in the light most favorable to Ports America. *Cargo One Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1351, 1365 (ALJ 2000).

ARGUMENT

I. Complainants' Allegations of Unequal Treatment By Respondent's "Licensing" Requirements and Respondent's Access Fees State a Claim for Unreasonable Preference, Prejudice or Disadvantage Pursuant to 46 U.S.C. § 41106(2)

The Complaint sets forth in significant detail that AMPORTS has engaged in a practice and policy of affording different and unequal treatment to automobile stevedores in the Port of Baltimore through its purported licensing of stevedores and its assessment of punitive access fees for unlicensed or non-preferred stevedores. *See* Complaint Count I, ¶¶ 48-54, and ¶¶ 28-47. These allegations are more than sufficient to state plausible claims for unreasonable preference, prejudice or disadvantage pursuant to 46 U.S.C. § 41106(2).

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." The elements of the cause of action are summarized in paragraph 50 of the Complaint, which also recites that "[t]he 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." Complaint ¶ 50. FMC Rule 62 requires complaints only to allege facts "sufficient to inform each respondent with reasonable definiteness" of the alleged violation. *See* 46 C.F.R. § 502.62(a)(3)(iii). The plausibility standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the alleged violation. *Twombly*, 550 U.S. at 556.

Paragraph 52 of the Complaint specifically alleges the unequal treatment element of the cause of action in Count I, alleging that AMPORTS' 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."

Complaint ¶ 52. The underlying factual allegations explaining the unequal treatment are extensive and detailed, *see* Complaint ¶¶ 28-54, which include statements against interest made by Respondent and Respondent's counsel, including in Respondent's published tariff schedule, *id*. ¶¶ 40-41.

Nevertheless, AMPORTS erroneously argues that the Complaint, specifically Count I, should be dismissed for failing to state a claim for which relief can be granted because "the Complaint fails to include any factual allegations as to the relevant market" and fails to allege that AMPORTS' unequal treatment "has a significant impact on competition." Mot. Dismiss at 4-5. AMPORTS' argument is erroneous for several reasons.

First, allegations of a "relevant market" and "a significant impact on competition" are not required elements or required factual allegations necessary to properly plead an undue preference or prejudice cause of action. 46 U.S.C. § 41106(2); *see* Complaint ¶ 50; *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 12-02, Doc. 31 at 11 (FMC, Dec. 18, 2015) (*citing Ceres Marine Terminal, Inc. v. Md. Port Admin*., 27 S.R.R. 12751, 1270 (FMC 1997) (outlining the required elements of the cause of action). AMPORTS does not contest the allegations in the Complaint that AMPORTS has afforded different and unequal treatment to Complainant stevedores. Indeed, the Motion to Dismiss with respect to Count I of the Complaint (see Mot. Dismiss Section B, at 4-8) does not directly challenge the sufficiency of any of the allegations supporting the actual elements of an unreasonable preference or prejudice cause of action. For this reason alone, the Motion to Dismiss Count I should be denied.

Second, AMPORTS' argument that the absence of market allegations is fatal at the motion to dismiss phase is plainly contradicted by the two decisions upon which AMPORTS relies.[1]

[1] AMPORTS relies on *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, 2013 WL 9808672, Docket No. 11-11 (ALJ, Jan. 10, 2013) and *River Parishes Company, Inc. v. Ormet Primary*

Neither decision addresses the elements or facts necessary to plead an unreasonable preference or prejudice cause of action, because neither addresses decisions on motions to dismiss. Indeed, both decisions on the merits make abundantly clear that determination of unreasonable terminal practices and potential justifications are matters of *fact*. *See All Marine* at *9 (determinations of unreasonable preference and alleged justifications therefore are "based in each instance on a close reading of the facts and setting of the controversy"); *River Parishes* at *23-24 (evaluation of the applicable shifting burden of production is a matter of fact).

AMPORTS confuses the *prima facie* showing of facts for the purposes of shifting an evidentiary burden of moving forward on the merits in those decisions with the standard applicable to sufficiently pleading the cause of action in the Complaint. AMPORTS will have an opportunity to raise purported defenses in this proceeding, but its assertion of allegedly missing facts, and its arguments about the facts themselves, are not appropriate bases for a motion to dismiss.

Third, the entire premise of AMPORTS' argument fundamentally misreads the Complaint. AMPORTS erroneously assumes that the Complaint is an "exclusive arrangement" case, when the Complaint in fact challenges AMPORTS' different and undue treatment of allegedly "licensed" versus unlicensed stevedores and its different and undue treatment of stevedores with respect to the $25 per car access fee. Whether AMPORTS violated the Shipping Act by entering into an agreement or agreements with allegedly "preferred" stevedores is not a basis for the violations alleged in the Complaint—regardless of whether AMPORTS argues that such agreements are "exclusive agreements" or otherwise.[2] The test of the sufficiency of the

Aluminum Corporation, 1999 WL 125991, at *24, Docket No. 96-06 (FMC, Feb. 3, 1999).

[2] Having misread the Complaint, AMPORTS also misapplies the exclusive practices cases *All Marine* and *River Parishes*, in addition to the procedural misapplication explained above. Nor is there any relevance to AMPORTS'

Complaint at this stage is not the plausibility of AMPORTS' misplaced theory of the Complaint, but on the facts and legal theory actually alleged in the Complaint.

AMPORTS' remaining arguments that the allegations of economic injury or harm are insufficient at the pleading stage are easily dispensed with. Mot. Dismiss at 3-4 and 7-8. As an initial matter, AMPORTS does not separately move for dismissal of a reparations cause of action, but rather moves for dismissal of the Complaint for failure to state Shipping Act violations. In that context, economic harm is not even a requirement for the cause of action. *Petchem Inc. v. Canaveral Port Authority*, 1985 WL 148954 (1985) (damages are not a prerequisite to finding violations of the Shipping Act, as a finding of violation could result in the issuance of a cease and desist order). In any event, factual allegations of actual injury are well supported by ample allegations in the Complaint. *E.g*., Complaint ¶¶ 13, 30(f), 31, 32, 38(g), 42, 43, 44, 46, 47, 52, 54, 59, 63 and 75. Given that so much of the Complaint is about AMPORTS' purported access fees assessed against all non-preferred stevedores, such as Complainants, AMPORTS' argument that the facts fail to allege any harm is simply not credible.

As to lost business, it is well established that lost business is a recoverable "actual injury" under the Shipping Act. *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal District and Lake Charles Stevedores, Inc*., Docket No. 94-32, 1998 WL 940867 (ALJ June 16, 1998) (denying respondent's motion to dismiss certain reparations claims because complainant was entitled to an opportunity to prove actual injury based on alleged lost business profits). The Complaint does not require detailed specification of the source and quantum of the claimed damages, but rather "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence." *Twombly*, 550 U.S. at 556.

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arguments about allegedly exclusive arrangements at other marine terminals in the Port of Baltimore or elsewhere, which are not at issue in the Complaint. *E.g.,* Mot. Dismiss at 6.

With respect to AMPORTS' claimed "confusion" over which of the Complainants is injured to what degree, Mot. Dismiss at 3-4, specific allocation of the amount of damages to each Complainant is neither required at the pleading stage, nor is the absence of such detail a basis to dismiss for failure to state a claim. The facts alleged in the Complaint are more than sufficient to show that Complainants are non-preferred stevedores operating in the Port of Baltimore, which AMPORTS intends to subject to its policy and practice of licensing and access fees. Identifying "which specific entity incurred which specific injuries alleged" in greater detail is not required at this stage. Moreover, as AMPORTS appears to concede, if AMPORTS is found in violation of the Shipping Act, the proper inference from the Complaint is that Complainants are both harmed by the violations. Mot. Dismiss at 3. A determination of the current, and future, quantum of reparations for each party is not required at this stage. [3]

As to AMPORTS' invoices for access fees, the Complaint alleges that the invoices were issued for AMPORTS' purported access fees for "stevedoring of vessels at the Chesapeake Terminal" Complaint ¶ 44, which is an AMPORTS terminal in Baltimore, Complaint ¶¶ 8, 19, where the Complainants provide stevedoring services, Complaint ¶ 17, and for which the Complaint alleges that AMPORTS sought to charge for Complainants' operations on AMPORTS' terminals, Complaint ¶¶ 38, 40. AMPORTS does not challenge the allegation in the Complaint that it issued the invoices, and the Complaint challenges both the underlying legal basis for the charges as well as for their assessment and billing, *e.g.,* Complaint ¶ 62. It is more than a reasonable inference from the allegations in the Complaint that AMPORTS sought, and

[3] AMPORTS' repetition of the same argument as to each Count of the Complaint is similarly baseless.

will seek, to assess the access fees from the Ports America Complainants in this proceeding that provide stevedoring services in the Port of Baltimore.[4]

At the pleading stage, the "choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, LLC v. Am. Media, Inc*., 680 F.3d 162, 185 (2d Cir. 2012). It is thus improper to dismiss a complaint "that states a plausible version of the events merely because the court finds a different version more plausible." *Id*. If AMPORTS wants to actually argue that it invoiced the wrong entity for its wrongful invoices, or that AMPORTS does not in fact intend to charge non-preferred stevedores the access fees, it may make such admissions and arguments on the merits, but such arguments are not a basis to dismiss the Complaint.

II. The Complaint Pleads Continuous and Unreasonable Conduct within the Meaning of 46 U.S.C. § 41102(c)

Count II of the Complaint alleges AMPORTS' unjust and unreasonable practices in handling property pursuant to 46 U.S.C. § 41102(c). The elements of the cause of action are outlined in Paragraph 57, including the element that the "claimed acts or omissions are occurring on a normal, customary, and continuous basis." The Complaint explains and alleges facts in support of the applicable elements, including with respect to the continuous element addressed at 46 C.F.R. §545.4:

> 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

[4] AMPORTS also feigns confusion on the basis of the verification of the Complaint by the Vice President and Deputy General Counsel of Ports America. The Verification properly verifies the facts of the Complaint "on behalf of Complainants" as required by the FMC Rules. AMPORTS' assertion that the Complaint should be dismissed on the basis of additional facts "to clarify the relationship between" the parties is groundless.

> 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.

Complaint ¶ 59.

Nevertheless, AMPORTS argues that Count II should be dismissed on the pleadings for failure to allege facts sufficient to state a claim under 46 U.S.C. § 41102(c) and 46 C.F.R. §545.4 based on the spurious assertion that pleading the cause of action requires a specific allegation that the conduct "negatively affect the broader shipping public." Mot. Dismiss at 8. There is no such requirement.

AMPORTS invents its alleged new requirement from a discussion in the Notice of Proposed Rulemaking ("NPRM") with respect to the Interpretive Rule ultimately promulgated at 46 C.F.R. §545.4. AMPORTS' "harm to the shipping public" element does not appear in the list of five elements promulgated in the final rule. And, that is for good reason. The reference to "harm to the shipping public" in the NPRM related to addressing discrete practices on single shipments that were not intended to be encompassed by the cause of action, and hence the addition of the element requiring that the practices had to be "occurring on a normal, customary, and continuous basis." The concept of harm to the shipping public was a reason underlying the continuity requirement reflected in 46 C.F.R. §545.4(b), but contrary to AMPORTS' assertion, 46 C.F.R. §545.4 does not contain a silent, sixth element requiring pleading and proving harm to the shipping public. *See e.g., Mavl Capital Inc., Iam & Al Group Inc., v. Marine Transport Logistics, Inc*., 2021 WL 4554718, at *18 (ALJ Sept. 29, 2021) (normal and continuous business

practices are appropriately adjudicated under section 41102(c) as practices that "negatively affect the broader shipping public").

AMPORTS does not raise any other valid challenges to the factual sufficiency of the allegations supporting Count II, nor does AMPORTS address other factual allegations in the Complaint underlying the cause of action, including but not limited to the allegations in the Complaint with respect to AMPORTS' tariff schedule and its manner of assessing the access fee on its "customer" as stated in the tariff, but then purporting to charge the stevedore instead of its customer. *E.g.,* Complaint ¶¶ 40-42.[5] It is improper to grant a motion to dismiss if a complaint plausibly states a claim on *any set of facts* alleged in the complaint. The motion to dismiss Count II should be denied.

III. The Complaint Sufficiently Pleads Unreasonable Refusal to Deal Pursuant to § 46 U.S.C. § 41106(3)

Count III of the Complaint alleges that AMPORTS unreasonably refused to deal or negotiate with respect to AMPORTS' purported "competitive bidding" process for preferred stevedores, which *AMPORTS itself represented* that it undertook in its published tariff schedule. *See* Complaint ¶ 66-68. AMPORTS reiterated that it undertook a competitive bidding process in later quoted communications, *id*. ¶ 69, and the Complaint alleges that Ports America was not included in such a process, *id*. ¶ 70. The Complaint also alleges that Complainants expressly asked to negotiate with AMPORTS when they first received notice of the competitive bidding process, but in response AMPORTS did not offer to include Complainants in such a process at that time, or offer such terms at that time, but instead only offered to include Complainants' "in the next round" "in the future." Complaint ¶ 71. As also alleged in the Complaint, AMPORTS'

[5] The two other bases advanced as to Count II have been refuted above. AMPORTS merely reprises it baseless argument demanding specification of how much each Complainant is specifically injured (Section III(C)(a) at 8), and its inapposite "exclusive arrangement" misinterpretation of the Complaint, (Section III(C)(c) at 9).

"offer" to consider doing something in the future is not a substitute for what it should have done at the time. Complaint ¶¶ 72-74. These allegations constitute specific and plausible factual bases for the refusal to deal cause of action.

Nevertheless, AMPORTS moves to dismiss Count III for failure to state a claim on the bases that (1) a refusal to deal pleading must allege that "Complainants requested to be considered," Mot. Dismiss at 10, and (2) the allegations "are refuted by the factual allegations in the Complaint," *id., citing* Complaint ¶ 71.

A refusal to deal cause of action is not limited to only fact patterns with an express request to deal and an express (unreasonable) refusal in response. Plausible refusal to deal claims may be alleged where a respondent has held itself out to deal in some manner, like for example the representation in the AMPORTS tariff of a competitive bidding process. *See, e.g., Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal To Deal Or Negotiate*, 2003 WL 723336, (Feb. 24, 2003) (Port's failure to conduct its public necessity process was a basis for a refusal to deal claim). Plausible refusal to deal claims may also be alleged where the credibility of a respondent's purported agreement to consider or negotiate is challenged, like AMPORTS' response that it might consider Complainants next time. *Id*. (Port's alleged consideration that failed to demonstrate actual due consideration was a basis for a refusal to deal claim).

As to AMPORTS' argument that its "offer" to consider Complainants for a future competitive bidding selection process defeats the refusal to deal cause of action, the allegation on its face demonstrates an actual request. AMPORTS' argument with the interpretation of the facts alleged, *e.g.* whether its failure to include Complainants initially in its purported selection process, or its empty offer of future consideration, are sufficient to constitute a refusal to deal,

they are arguments of fact for the merits, not the sufficiency of the pleadings. AMPORTS fails to advance any valid basis to dismiss Count III.[6]

CONCLUSION

For all of the foregoing reasons, Complainants respectfully request that the Presiding Officer deny Respondent's Motion to Dismiss.

Dated: July 12, 2023

Respectfully Submitted,

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[6] AMPORTS reprises another version of it baseless argument demanding specification of which Complainant is specifically alleging the cause of action (Section III(D(a) at 9).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the execution date which appears below, the undersigned served the attached document on counsel at the following email addresses:

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Executed: July 12, 2023

/s/ Kristine O. Little

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