FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

PORTS AMERICA CHESAPEAKE, LLC AND MARINE TERMINALS CORPORATION-EAST, *Complainants* v. APS EAST COAST, INC., *Respondent*.	**DOCKET NO. 23-04**

Served: August 16, 2023

ORDER OF: Alex M. CHINTELLA, *Administrative Law Judge*.

ORDER DENYING APS EAST COAST, INC.'S MOTION TO DISMISS

I. Introduction and Procedural Background

This proceeding was initiated with the issuance of a notice of filing of complaint and assignment by the Commission on June 2, 2023, indicating that Ports America Chesapeake, LLC ("PAC") and Marine Terminals Corporation-East ("MTCE") (collectively "Ports America") had filed a complaint against APS East Coast, Inc. ("AMPORTS") alleging violations of 46 U.S.C. §§ 41102(c), 41106(2), and 41106(3) by AMPORTS and seeking a cease-and-desist order as well as reparations against AMPORTS. On June 27, 2023, AMPORTS filed a motion to dismiss Ports America's complaint ("Motion"). On July 12, 2023, Ports America filed an opposition to AMPORT's motion ("Opposition"). On July 19, 2023, AMPORTS filed a reply to Port America's opposition ("Reply").

For the reasons set forth below, AMPORT's motion to dismiss is **DENIED**. AMPORT is ordered to file an answer to the Complaint by August 28, 2023. The parties must file a joint status report, as discussed below, by September 12, 2023.

II. Arguments of the Parties

Respondent AMPORTS first argues that the Complaint should be dismissed because it fails to state whether PAC and MTCE are related, or which entity incurred the alleged injuries, and the Complaint is not properly verified. Motion at 3-4. In addition, Respondent argues that Counts I, II, and III of the Complaint alleging violations by Respondent of sections 41106(2), 41102(c), and 41106(3) of the Shipping Act respectively, and Complainants' Prayer for Relief fail to state a claim for relief. Complainants assert that they have pled sufficient allegations to adequately plead their claims and in addition to the failure of the specific arguments made by Respondent, the motion to dismiss also fails to address all of the factual allegations or factual theories of the causes of action in the Complaint. Respondent's arguments and Complainants' responses are summarized in greater detail below.

A. Arguments Regarding the Sufficiency of the Pleading of Injury and Verification of the Complaint

Respondent argues that PAC and MTCE are two separate legal entities and that while the Complaint refers to them collectively as "Complainants" or "Ports America," it does not state whether they are related or which entity suffered the alleged injury. According to Respondent, "[t]he Complaint therefore fails to identity with sufficient specificity which specific entity incurred which specific injuries alleged." Motion at 3. Respondent contends, in addition, that while the Complaint is verified by the vice president and deputy general counsel of Ports America, "Ports America is not a complainant and the Complaint does not clarify the relationship between PAC, MTCE, and "Ports America," and does not establish that they are a single entity or whether they were jointly injured by the alleged violation. Motion at 4. Respondent asserts that "because Complainants 'here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed'" (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Motion at 4.

Complainants assert that the argument that the Complaint insufficiently pleads economic injury or harm is not grounds to dismiss for failure to state Shipping Act violations, because, according to them, economic harm is not a requirement for causes of action under the Shipping Act, and in any case, the "factual allegations of actual injury are well supported by ample allegations in the Complaint." Opposition at 8. Complainants state that the alleged facts show that "Complainants are non-preferred stevedore operating in the Port of Baltimore, which AMPORTS intends to subject to its policy and practice of licensing and access fees" and that "identifying 'which specific entity incurred which specific injuries alleged' in greater detail is not required at this stage. Opposition at 9.

Respondent also argues that the Complaint is not properly verified, noting that while the Complaint is verified by Ports America's vice president and deputy general counsel, Ports America is neither identified as a legal entity in the Complaint nor is its connection to Complainants PAC and MTCE stated. In addition, Respondent states that the Complaint does not identity what position Ms. Beller, who verified the Complaint as Port America's vice president and general counsel, serves at the individual Complainant entities. Reply at 12-13. Respondent asserts that "[w]hile an officer of a complainant entity may be presumed to have a basis of knowledge of the facts alleged, a third-party to the Complainants – and therefore the Complaint – may not." Reply at 13.

In response, Complainants state that AMPORTS' assertion "is groundless," as, according to them, "[t]he Verification properly verifies the facts of the Complaint 'on behalf of Complainants' as required by the FMC Rules." Opposition at 10 fn. 4.

B. Arguments as to the Count I Claims Alleging Unreasonable Preference, Prejudice or Disadvantage in Violation of 46 U.S. C. § 41106(2)

Similarly, Respondent contends that Count I of the Complaint, which alleges that Respondent violated section 41106(2) by giving unreasonable preference or advantage and/or by imposing unreasonable prejudice or disadvantage, fails to state a claim for relief because it fails to identify which of the two complainants is making the allegations, fails to include any factual

allegations as to the relevant market or to include any factual allegations that the alleged conduct had a significant impact on competition and "[w]ithout such factual allegations, the Complaint is fatally insufficient." Motion at 4-8. Thus, concludes Respondent, "Complainants have failed to plead sufficient facts supporting their theory that any such alleged undue or unreasonable preference or advantage is the proximate cause of an such alleged injury." Motion at 4-7 (citing *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 Aluminum Corporations*, 1999 WL 125991, at *24, Docket No. 96-06 (FMC Feb 3, 1999).

Respondent further posits that "while the unspecified Complainant in Count I alleges 'loss of business, interference with current and future business relations and contracts, and threatened liability for the [access] fee,' those are conclusory allegations without any allegations of fact to support them" and the Complaint does not plead any facts supporting lost business due to Respondent's action nor does it establish "the how or the manner" in which Complainants are injured or harmed by currently unpaid invoices addressed to Ports America. Motion at 7-8. Respondent states that "simply put, Count I does not allege facts sufficient to plausibly entitle the Complainant to relief under the pleading standards applicable for matters before the Commission, particularly with respect to the 'unreasonable' and 'harm' elements of the violation alleged, and lacks sufficient specificity to state a claim. Reply at 6-7.

In their Opposition, Complainants contend that their Count I allegations adequately state plausible claims for unreasonable preference, prejudice or disadvantage under section 41106(2) and "sets forth in significant detail that AMPORTS has engaged in a practice in 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." Opposition at 4-5.

Complainants argue that allegations of a "relevant market" and "a significant impact on competition" are not required elements to properly plead a claim of undue preference or prejudice (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, FMC Docket No. 12-02, 2015 WL 9426189 (FMC Dec. 18, 2015)), and that the cases cited by Respondent contradict its argument that the absence of market allegations is fatal at the motion to dismiss phase because neither address the elements or facts necessary to plead an unreasonable preference or prejudice cause of action since they do not address decisions on motions to dismiss. Opposition at 5–7.

Complainants state that 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," and that its argument "erroneously assumes that the Complaint is an 'exclusive arrangement' case, when the Complaint in fact challenges AMPORT's 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." Opposition at 7.

As for Respondent's arguments regarding the sufficiency of their allegations of harm and claim for lost business, Complainants assert that proof of economic harm is not a requirement for

a section 41106(2) cause of action and that in any case, lost business is recoverable as an "actual injury." Opposition at 8.

C. Arguments as to the Count II Claims Alleging Unjust and Unreasonable Practices by Respondent in Handling Property in Violation of 46 U.S. C. § 41102(c)

AMPORTS also argues that Count II of the Complaint, which alleges that Respondent violated section 41102(c) by engaging in unjust and unreasonable practices in handling property, fails to identify which of the two complainants is making the allegations in Count II and fails to plead sufficient facts to support a claim that its actions were unjust and unreasonable within the meaning of section 41102(c). Motion at 8-9. Respondent contends that the Interpretive Rule that was ultimately codified at 46 C.F.R § 545.4 makes clear that "the proper interpretation of the statute is that it is addressed to 'the activities of maritime regulated entities that negatively affect the broader shipping public,'" whereas the Complaint fails to allege any facts to show that its decisions addressed in Count II have any impact on the broader shipping public. Motion at 8-9. Respondent posits that "to survive a motion to dismiss, an allegation brought under § 41102(c) must include factual allegations showing that the alleged unreasonable practices harm the broader shipping public, that the Complainant is included without the group of such harmed persons, and that the Complainant suffered a specific claimed loss entitling the complainant to reparations," which the Complaint does not. Reply at 9.

Responding, Complainants assert that the Complaint pleads continuous and unreasonable conduct within the meaning of section 41102(c). They contend that the Complaint explains and alleges facts in support of the elements for a section 41102(c) cause of action, noting, as an example, that the Complaint alleges that the AMPORTS practices and procedures in question have been occurring on a normal, customary, and continuous basis and AMPORTS indicated its intent for its practice to be ongoing and continuous since at least November 1, 2022. Opposition at 10-11 (citing to the Complaint at ¶ 59). Complainants state that there is no requirement that the alleged conduct "negatively affect the broader shipping public" or element requiring pleading and proving harm to the shipping public in order to plead a section 41102(c) violation, thus, Respondent seeks dismissal on grounds that do not exist. Opposition at 11-12.

D. Arguments as to the Count III Claims Alleging Unreasonable Refusal to Deal or Negotiate in Violation of 46 U.S. C. § 41106(3)

In addition, AMPORTS argues that Count III of the Complaint, which alleges that Respondent unreasonably refused to deal, in violation of section 41106(3), fails to identify which of the two complainants is making the allegations in Count III, and fails to state a claim because its allegations are refuted by the very facts alleged. Motion at 9-11.

Respondent asserts that the Complaint shows it did not refuse to deal or negotiate and contains no factual allegation that either complainant requested to be considered as a licensed or exclusive stevedore at AMPORTS' terminal facilities, but instead, challenges AMPORTS' right to designate a preferred stevedore at its Baltimore location even though Complainant PAC acts as an exclusive stevedore at the Seagirt Terminal in Baltimore. Motion at 10. Respondent maintains that, as alleged in the Complaint, Ports America sent a letter on December 6, 2022,

requesting that AMPORTS "agree to meet to negotiate" "equivalent terms for PAC, MTCE, and other stevedores" and concedes that AMPORTS "agreed to discuss such a possibility with PAC and MTCE." In a March 31, 2023 letter to Complainants, AMPORTS expressly stated that it "would be pleased to receive PAC and MTCE's safety records and any efficiency metrics available." Motion at 11. Respondent states that "Complainants unilaterally disregarded that offer;" instead, disputing AMPORTS right to "rationalize stevedoring services on its own terminal" rather than providing the requested records. Motion at 11. Respondent posits that the Complaint does not allege that Complainants made an offer to negotiate with AMPORTS. Motion at 10. Respondent concludes that "Count III is bare of any factual allegations that such an alleged refusal to negotiate, even if remotely plausible, was unreasonable," and thus, Count III fails to state a claim for relief. Reply at 10-11.

Complainants contends that the complaint sufficiently pleads unreasonable refusal to deal under section 41106(3). For example, AMPORTS undertook a competitive bidding process for preferred stevedores and Ports America expressly asked to negotiate with AMPORTS when they first received notice of the competitive bidding process, but AMPORTS did not offer to include Ports America in the bidding process, instead offering to include Complainants "in the next round" "in the future." Opposition at 12. Complainants assert that "AMPORTS' 'offer' to consider doing something in the future is not a substitute for what it should have done at the time." Opposition at 12-13. Complainants assert that a cognizable refusal to deal cause of action is not limited to only fact patterns alleging an express affirmative request to deal and express unreasonable refusal in response and that a refusal to deal may arise out of a course of conduct by the respondent or where the respondent's proffered consideration lacks credibility. Opposition at 13. Complainants argue, moreover, that AMPORTS' argument that it offered to consider Complainants for a future competitive bidding selection process "demonstrates an actual request" thus, AMPORTS fails to argue any valid basis to dismiss Count III. Motion at 13-14.

E. Arguments as to the Complaint's Prayer for Relief

In addition, Respondent argues that the Complaint's Prayer for Relief "is impermissibly vague" because it "is stated on behalf a singular Complainant, with no identification of which party is that singular Complainant." Motion at 11. Further, Respondent asserts that Complainants have not pled any facts sufficient to establish an "actual injury" under 46 U.S.C. § 41305, because the Complaint does not allege any amount that has been paid by either Complainant to AMPORTS as a result of its alleged actions. Complainant posits that as a result Complainants' Prayer for Relief should be stricken. Motion at 11-12.

In its Reply to Complainants' Opposition, Respondent further asserts, citing 46 C.F.R. § 502.62(a)(4)(i), that "[w]here reparation is sought, the complaint must set forth the injury caused by the alleged violation and the amount of the alleged damages. This was not done in the Complaint." Respondent contends that thus, the Prayer for Relief is inadequate. Reply at 11-12.

Complainants assert, however, that economic harm is not a requirement for a cause of action and that "[i]n any event the Complaint's factual allegations of actual injury are well supported by ample allegations in the Complaint." Opposition at 8 (citing the Complaint ¶¶ 13, 30(f), 31, 32, 38(g), 42, 43, 44, 46, 47, 52, 54, 59, 63 and 75). Complainants contend that a "detailed specification of the source and quantum of the claimed damages" is not required in the

Complaint, but rather, "enough facts to raise a reasonable expectation that discovery will reveal evidence." Opposition at 8 (citing *Twombly*, 550 U.S. at 556).

III. Discussion

A. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. "In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rules of Civil Procedure 12(b)(6) and the federal case-law interpreting it." *Cornell v. Princess Cruise Lines, Ltd.,* FMC Docket No. 13-02, 2014 WL 531634 at * 6, 33 S.R.R. 614, 620 (FMC Aug. 28, 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, FMC Docket No. 09-01, 2011 WL 7144008 at * 11, 32 S.R.R. 126, 136 (FMC Aug. 1, 2011)). *See also MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, FMC Docket No. 16-16, 2020 WL 6445041 at *5 (FMC Oct. 29, 2020) (stating that the Commission looks to Rule 12(b)(6) when considering dismissals for failure to state a claim).

> 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). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. §1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

Mitsui, 2011 WL 7144008 at * 12, 32 S.R.R. at 136.

"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). "When 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 678. The focus at this stage is not with whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 WL 441676 at *2 (M.D. Tenn. 2014).

As the Commission explains:

> Courts also construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as alleged in the complaint. The Commission need not, however, accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint. Moreover, the Commission need not "accept legal conclusions cast in the form of factual allegations."

Cornell, 2014 WL 531634 at * 6, 33 S.R.R. at 620-621 (citations omitted).

"[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, 'but mere 'labels and conclusions' or 'formulaic recitations[s] of the elements of a cause of action *will* not do'; rather, the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level,' i.e., enough to make the claim 'plausible.'" *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 555 (emphasis in original)).

B. Complainant's Claims as to Injury are Sufficiently Pled and the Complaint is Properly Verified.

Pursuant to 46 U.S.C 41301, "[a] person may file with the Federal Maritime Commission a sworn complaint alleging a violation of [the Shipping Act]." If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). *See also* 46 C.F.R. § 502.62 ("A person may file a sworn complaint alleging violation of the Shipping Act of 1984, 46 U.S.C. 40101 *et seq*.").

The Complaint in this case sufficiently alleges that certain enumerated actions by AMPORTS constitute violations of sections 41106(2), 41102(c), and 41106(3) of the Shipping Act. Complaint pg. 3, at ¶ 12(a-c). Moreover, Complainants allege that "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." Complaint pg. 23, at ¶ 75. Therefore, the Complaint alleges that Complainants suffered injury as a result of the alleged conduct. Whether Complainants in fact suffered injury due to the alleged violations and if so, the specific amount of injury each of them suffered, is not an issue that is required to be resolved at this early stage of the proceeding. Further, because it is not required that a person suffer injury from a Shipping Act violation in order to file a complaint, a purported failure to properly allege injury is not adequate grounds to dismiss a complaint.

C. The Complaint Sufficiently Pleads a Claim for Relief Under the Shipping Act

Respondent argues that the Complaint should also be dismissed because it fails to sufficiently plead a claim for relief under the Shipping Act. Respondent contends that one of the reasons to dismiss the Complaint is that Complainants fail to identify which of them is making each specific Shipping Act claim and allegation of injury and damages, and the Complaint's Prayer for Relief is inadequate.

As an initial matter, Respondent's general argument that the Complaint should be dismissed because each claims fails to identify the specific complainant making each specific allegations, lacks merit. The Complaint alleges that Complainants MTCE and PAC are collectively referred to as "Complainants" or "Ports America." Complaint at pg. 1. Throughout the Complaint, the allegations and claims refer to actions and conduct directed collectively at Ports America or actions undertaken collectively by Ports America. Moreover, in the summary of the Complaint it is alleged that "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." Complaint at pg. 3 (emphasis added). Further, the Complaint asserts throughout Counts I to III that Ports America was collectively subjected to the alleged conduct and collectively incurred injury as a result of the alleged conduct by AMPORTS. Therefore, the Complaint makes clear that the alleged conduct by Respondent was directed at both MTCE and PAC, and that both Complainant entities suffered the injuries and damages alleged in the Complaint. Discovery between the parties should provide greater specificity as to the merits of the allegations with regard to each Complainant, and assuming Complainants demonstrate the veracity of their claims, the specific injury suffered by each of them, and the reparations due to each. Thus, the level of specificity as to the allegations and claims that Respondent argues the Complaint should contain is not required at this early stage of the proceeding.

Respondent also argues that the Complaint is not properly verified because it is verified by Ports America's vice president and deputy general counsel, whose position at each individual Complainant entity is not identified. This is essentially a restatement of Respondent's argument regarding "complainant confusion" (addressed above) and is similarly rejected – the verification is sufficient to comply with the requirements of Rule 62 (a)(3).

1. Section 41106(2)

Respondent contends that Count I of the Complaint alleging a violation of section 41106(2), fails to include any factual allegations as to the relevant market, or to include any factual allegations that the alleged conduct had a significant impact on competition. Complainants argue that allegations of a "relevant market" and "a significant impact on competition" are not required elements to properly plead a claim of undue preference or prejudice, and that the cases cited by Respondent are not applicable to motions to dismiss.

Among other allegations in the Complaint, Complainants allege that:

> 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.

Complaint § 52. In addition, Complainants allege: "Upon information and belief, the unequal treatment is not justified by differences in legitimate transportation factors." Complaint § 53.

Pursuant to section 41106(2), a marine terminal operator may not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2). The section 41106(2) claims contain specific facts and allegations as to the alleged conduct and why they constitute a violation of section 41106(2) and are not "labels and conclusions" or "a formulaic recitation" of the elements of a section 41106(2) cause of action. "When 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 678. Accepting as true, for the purposes of the motion to dismiss, Complainants' allegations that AMPORTS imposed a $25 per car access fee on them that it did not impose on other stevedores in the Port of Baltimore, and that this unequal treatment is not justified by differences in legitimate transportation factors, Complainants' allegations constitute a plausible basis to find a violation of section 41106(2).

Moreover, as Complainants correctly note, the cases cited by Respondent in support of its contention that a complaint alleging a violation of section 41106(2) must include factual allegations as to the relevant market and factual allegations that the alleged conduct had a significant impact on competition are not applicable here. The decisions in *Marine Repair* and *River Parishes* were issued after conduct of discovery and briefing on the issues by the parties and do not address pleading requirements.

2. Section 41102(c)

Similarly, Respondent argues that Count II fails to plead sufficient facts to support a claim that its actions were unjust and unreasonable within the meaning of section 41102(c) because the Interpretive Rule that was ultimately codified at 46 C.F.R. § 545.4 requires that the alleged conduct involve the activities of maritime regulated entities that negatively affect the broader shipping public, whereas the Complaint fails to allege any facts to show that the alleged conduct in Count II has any impact on the broader shipping public. Complainants state that there is no requirement that the alleged conduct negatively affect the broader shipping public and that their Complaint adequately pleads the elements to demonstrate a section 41102(c) violation.

Section 41102(c) provides: "A common carrier, marine terminal operator, or ocean transportation intermediary 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). To establish a successful claim for reparations under section 41102(c), the claimant must demonstrate that:

> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

Regarding their claim that Respondent violated section 41102(c), Complainants allege in pertinent part that:

> 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 to for its practice to be ongoing and continuous since at least November 1, 2022 as set forth in 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 month 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.
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> 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 basis. . . .
>
> 63. AMPORTS' foregoing practices and procedures are the proximate cause of Ports America's claimed injury and damages.

Complaint ¶¶ 58-61, and 63.

The section 41102(c) claim thus contains specific facts and allegations, not "labels and conclusions" or "a formulaic recitation" of the elements of a section 41102(c) cause of action.

Accepting as true their allegation that Respondent is an MTO, and that its enumerated auto stevedoring practices and procedures, which are directly related to receiving, handling, storing, or delivering property occurred, are unjust and unreasonable, Complainants state a plausible basis to find a violation of section 41102(c). Moreover, the Complaint alleges that the unjust and unreasonable practices and procedures by AMPORTS are occurring on a normal, customary, and continuous basis, and are the proximate cause of Complainants' alleged injury and damages. Accepting Complainants' well-pled claims as true, Complainants also state a plausible basis for an award of reparations against AMPORTS. Thus, the Complaint also states a claim of violation of section 41102(c).

3. Section 41106(3)

AMPORTS further argues that Count III of the Complaint does not support a claim of unreasonable refusal to deal or negotiate because, according to AMPORTS, it responded to Complainants' request to meet and negotiate, and Count III contains no factual allegation that either complainant requested to be considered as a licensed or exclusive stevedore at AMPORTS' terminal facilities. Complainants assert that Count III contains adequate factual allegations demonstrating a valid claim of unreasonable refusal to deal or negotiate and, moreover, that AMPORTS' argument that it offered to consider Complainants for a future competitive bidding selection process "demonstrates an actual request" from Complainants.

Pursuant to section 41106(3), a marine terminal operator may not "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3). Complainants allege, amongst other claims that:

> 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."
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> 66. AMPORTS represented in its published tariff schedule that it selected its preferred stevedore "[a]fter a competitive bidding process."
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> 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.
>
> 69. Indeed, the March 31, 2023 letter [from AMPORTS] reiterated the alleged "competitive process" and described the alleged "factors" considered and the alleged "selection process" employed by AMPORTS.
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> 70 However, AMPORTS does not represent that Ports America was part of that bidding process or the resulting 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. . .

Complaint ¶¶ 65-67, and 69-71.

"In evaluating a § 41106(3) claim, the Commission asks (1) whether an entity refused to deal or negotiate; and (2) if so, whether the refusal was unreasonable." *Maher*, 2015 WL 9426189 at *6 (internal citations omitted). Here, Complainants' allegations in support of their section 41106(3) claim are specific and detailed, not a formulaic recitation. Complainants allege that they asked AMPORTS to meet with them and negotiate, to make equivalent terms offered to Respondent's preferred stevedores also available to Complainants, and that they asked AMPORTS to include them in AMPORTS' competitive bidding process for selection of preferred stevedores, but AMPORTS refused to meet and negotiate with Complainants and refused to include Complainants in the competitive bidding process for no reasonable cause. Accepting those allegations as true, the claim raises a plausible basis to find that AMPORTS violated section 41106(3). Therefore, the Complaint states a claim of violation of section 41106(3).

4. The Complaint Sufficiently Pleads the Prayer for Relief.

Respondent argues that the Complaint's Prayer for Relief fails to show actual injury because it does not identify any amount paid to Respondent and does not plead any injury caused by the alleged violation or the amount of the alleged damages. Complainants assert, however, that economic harm is not a requirement for a cause of action and that their claim of actual injury is supported by the allegations in the Complaint.

Section 502.62(a) of the Commission's Rules requires in pertinent part that a complaint contain a "request for the relief and other affirmative action sought," and that "[w]here a reparation is sought, the complaint must set forth the injury caused by the alleged violation and the amount of alleged damages." 46 C.F.R. § 502.62(a).

The Complaint alleges that due to Respondent's violations of the Shipping Act, Ports America has sustained "serious and substantial injuries and monetary damages," including access fees incurred in the amount of $1.277 million, future access fees and loss of future business. Complaint at ¶ 75. Further, the Prayer for Relief seeks an order requiring Respondent to cease and desist from engaging in the alleged unlawful conduct and to pay reparations for the alleged damages. Complainants have sufficiently pled a prayer for relief. The focus at this stage is not whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron*, 2014 WL 441676, at *2.

Accordingly, AMPORTS' does not demonstrate that Ports America's Complaint fails to state a claim for relief. AMPORTS Motion to Dismiss is, therefore, **DENIED**.

Pursuant to 46 C.F.R. § 502.62(b)(1), AMPORTS must file an answer to the Complaint by August 28, 2023; within 15 days of service of the answer, the parties must submit a joint status report with a proposed schedule that completes discovery within 150 days of service of the answer and allows issuance of the initial decision within one year.

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Respondent AMPORTS' motion to dismiss be **DENIED**. It is

FURTHER ORDERED that AMPORTS file an answer to the Complaint by August 28, 2023. It is

FURTHER ORDERED that the parties shall submit a joint status report with proposed schedule by September 12, 2023.

Alex Michael Chintella

Digitally signed by Alex Michael Chintella
Date: 2023.08.16 13:06:55 -04'00'

Alex M. Chintella
Administrative Law Judge