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.

RESPONDENT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

Complainants Ports America Chesapeake, LLC (hereafter referred to as "PAC"), and Marine Terminals Corporation-East (hereafter referred to as "MTCE") in their joint complaint, fail to allege facts sufficient support its claim under 46 U.S.C. §41106(2), §41102(c), and §41106(3).

II. STANDARD FOR MOTIONS TO DISMISS

Under the Federal Maritime Commission ("FMC") Rules, a Motion to Dismiss the Complaint is a dispositive motion, per 46 C.F.R. §502.69(g), and litigants may bring such motions, with the corresponding procedure laid out in 46 C.F.R. §502.70. Under 46 C.F.R.

§502.12, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.

To survive a motion 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 Atl. 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). However, 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 (2009) (citing *Twombly*, 550 U.S. at 555).

In considering a motion to dismiss, courts typically begin by identifying the legal conclusions, which are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. "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." *Id*. As the Commission has previously explained, while courts construe the factual allegations in the complaint in the light most favorable to the Plaintiff: "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." *Lisa Anne Cornell and G. Ware Cornell, Complainants, v. Princess Cruise Lines, Ltd. (corp.), Carnival Plc, and Carnival Corporation, Respondents.*, 2014 WL 5316340 at *7, Docket No. 13-02 (FMC, Aug. 28, 2014)

The Commission applies Federal Rule of Civil Procedure 12(b)(6) and related decisions, including *Twombly* and *Iqbal*, to motions to dismiss filed in Commission proceedings. See *Dukart v. Ocean Star International Inc*., 2 F.M.C.2d, 118, 122-123, Docket No. 20-03 (ALJ, July 10, 2020).

III. ANALYSIS

A. Complainant Confusion

APS East Coast, Inc. moves to dismiss this Complaint on the basis that Complainants PAC and MTCE have failed to plead sufficient facts identifying the specific injury allegedly suffered by each of the two separate legal entities appearing as complainants in this matter.

After identifying each of the two Complainants, the Complaint notes that both PAC and MTCE are to be referred to collectively as "Complainants" or "Ports America", however the Complaint fails to state whether the two entities are related, or which entity incurred the injuries alleged. The Complaint therefore fails to identify with sufficient specificity which specific entity incurred which specific injuries alleged.

The Complaint suggests, but does not state, that both PAC and MTCE are allegedly jointly injured to the same degree for the same alleged actions or inactions. However, the invoices that are attached as Attachment B to the Complaint, are addressed to Ports America at 55 N. Arizona Place, Suite 500, Chandler AZ 85225, an entity and address that is not identified in the Complaint. Accordingly, the Complaint fails to set out sufficient factual allegations to plead a cognizable complaint on behalf of either Ports America Chesapeake, LLC, with its principal place of business at 2400 Broening Highway, Baltimore, Maryland, or Marine Terminals Corporation-East, with its principal place of business at 2700 Broening Highway, Baltimore, Maryland.

The failure of the Complaint to sufficiently connect the alleged injuries to a specific complainant is further illustrated by the references in Section VI. of the Complaint, "Violations of the Shipping Act," to a singular "Complainant." That singular term is used instead of the plural "Complainants" defined in the Complaint, making it impossible to identify which of PAC or MTCE is claiming to have incurred the injury alleged.

Respondent further notes that the Complaint is verified solely by the Vice President and Deputy General Counsel of Ports America. "Ports America" however is not a Complainant, and no facts are pled to clarify the relationship between PAC, MTCE, and "Ports America". To the extent that the Complaint treats the two Complainants as a single entity, the Complaint fails to provide sufficient facts to establish that they are a single entity and were jointly injured by the purported violations alleged.

Accordingly, because Complainants "here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *See Twombly*, 550 U.S. at 570.

B. Count I – Alleged Violations of 46 U.S.C. §41106(2): Unreasonable Preference, Prejudice or Disadvantage

a. The Complaint fails to identify the applicable Complainant in Count I.

First, the Complaint does not identify which of the two Complainants is the singular Complainant making the allegations set out in Count I.

b. The Complaint fails to allege any impact on the relevant market.

Complainants allege that APS East Coast, as a marine terminal operator, violated 46 U.S.C. §41106(2) by giving undue or unreasonable preference or advantage and/or imposing any undue or unreasonable prejudice or disadvantage with respect to any person. However, the

Complaint fails to include any factual allegations as to the relevant market; and it fails to include any factual allegations that the alleged actions of APS East Coast have had a significant impact on competition. Without such factual allegations, the Complaint is fatally insufficient. *See Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC,* 2013 WL 9808672, Docket No. 11-11 (ALJ, Jan. 10, 2013).

In *Marine Repair Services*, the complainant alleged that respondent PAC (the same entity that is a Complainant in the instant matter) violated 46 U.S.C. §41106(2) by giving undue and unreasonable preference to itself and another entity in connection with maintenance and repair work on containers at two Baltimore terminals leased by PAC at which PAC allegedly created a monopoly on certain services. *Id*. at *1-4.

In that case, Administrative Law Judge Paul B. Lang explained that in evaluating whether alleged unequal treatment is proscribed under the Shipping Act, *"*the Commission must first determine the relevant market and then assess the effect of the respondent's practices on competition in that market. If the practices do not have a significant effect on competition, the respondent need not justify its practices and the inquiry is at an end." *Id.* at *31, Docket No. 11-11 (ALJ, Jan. 10, 2013). That ruling was fully consistent and in accord with the applicable standard articulated by the Commission in *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 1999 WL 125991, at *24, Docket No. 96-06 (FMC, Feb. 3, 1999), when it held that:

> before requiring a terminal operator to justify its business decision, there must be a showing of something more than an effect on a "relatively tiny portion of the relevant market occupied by the respondent terminal operator and the minimal impact on the complaining [competitor] resulting from its exclusion from the one terminal in the entire Port.

Id. (citing to *All Marine Moorings v. ITO Corp. of Baltimore*, 27 S.R.R. 539 (1996)). In *All Marine Moorings*, a line handling company challenged a terminal operator's establishment of an exclusive line handling arrangement at its terminal. In that case, the Commission held that:

> The ALJ's conclusion that ITO's exclusive rights at South Locust Point include the right to determine who may provide line-handling services and to provide those services itself appears unassailable. Casting the result more explicitly in terms of market definition, we find that the ALJ correctly concluded that the relevant market for the services at issue was the Port of Baltimore.

Id. at *13.

Here, as in *Marine Repair Services*, a Complainant seeking to state a valid complaint sufficient to withstand a motion to dismiss and require a terminal operator to justify its business decision must make a showing of something more than an effect on a relatively minor portion of the relevant market occupied by the respondent terminal operator and a minimal impact on the complaining competitor resulting from its exclusion from the one terminal in the entire Port. *See also River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 1999 WL 125991, at *24, Docket No. 96-06 (FMC, Feb. 3, 1999) (citations omitted).

Complainants have made no such a showing. The Complaint is devoid of any factual allegations describing the relevant market, or that the actions of APS East Coast have any meaningful impact on Complainants' ability to compete in that market.

Of course, had Complainants made any such allegations, it would necessarily have had to include a discussion of its operations at the terminals at which it acts as the exclusive stevedore. The Commission may take notice of the fact that PAC advertises that it operates on seven terminals in the Baltimore, MD area. Of those seven terminals, excluding the Atlantic and Chesapeake terminals operated by APS East Coast, PAC operates auto/RoRo services on four other terminals. *See* PACS's website at https://www.portsamerica.com/locations/portofbaltimore-maryland.

Accordingly, Complainant(s)' assertion that APS East Coast has the burden of justifying the difference in treatment based on legitimate transportation factors – prior to making a *prima facie* showing of a significant impact on competition in the relevant market – is premature and ignores this Commission's precedents.

Complainants have not identified any significant anti-competitive impact of APS East Coast's business decisions on any relevant market. Accordingly, 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 any such alleged injury.

Unless and until Complainants are able to plead such facts showing that the actions of APS East Coast caused a significant anti-competitive effect on the relevant market, APS East Coast "need not justify its practices and the inquiry is at an end." *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake*, LLC, 2013 WL 9808672, at *31, Docket No. 11-11 (ALJ, Jan. 10, 2013).

c. The Complaint fails to allege any facts to establish actual harm.

Thirdly, 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 assess [sic] fee," those are conclusory allegations without any allegations of fact to support them. At no time in its Complaint, does the Complainant plead any facts supporting its conclusion that business that was lost as a result of APS East Coast's action. Likewise, the Complainant does not allege any facts that support the conclusion that APS East Coast has interfered with any current and future business relations and contracts.

The Complainant also fails to plead any facts that establish the how or the manner in which the entities PAC and/or MTCE are injured or harmed by currently unpaid invoices addressed to Ports America at 55 N. Arizona Place, Suite 500, Chandler AZ 85225.

In the absence of any such allegations of fact, Count I fails to state a claim on which relief may be granted, and therefore should be dismissed.

C. Count II – Alleged Violations of 46 U.S.C. §41102(c): Unjust and Unreasonable Practices in Handling Property

a. The Complaint fails to identify the applicable Complainant in Count II.

As in Count I, the Complaint does not identify which of the two Complainants is the singular Complainant making the allegations set out in Count II.

b. Count II fails to plead sufficient facts to support the claim.

While the unspecified Complainant alleges that APS East Coast, as a marine terminal operator, violated 46 U.S.C. §41102(c) by failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property," the Complaint fails to plead sufficient facts to support a claim that APS East Coast's actions are unjust and unreasonable practice within the meaning of 46 U.S.C. § 41102(c) and 46 C.F.R. §545.4.

As made clear in the Commission's rulemaking developing the interpretive rule ultimately codified as 46 C.F.R. § 545.4 in FMC Docket No. 18-06, 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." Notice of Proposed Rulemaking "Interpretive Rule, Shipping Act of 1984," at p. 4, FMC Docket 18-06, Document No. 1 (83 Fed. R. 45367, 45368 (Sep. 7, 2018)). The Complaint fails to allege any facts to show that the decisions of APS East

Coast addressed in Count II have any impact on the broader shipping public. Rather, the Count consists of complaints solely impacting PAC. As made clear by FMC Docket 18-06, such issues are not within the scope of 46 U.S.C. § 41102(c).

When evaluating a challenge to an exclusive practice, the FMC applies a test for reasonableness, which, as applied to terminal practices, is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view. *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 1999 WL 125991, at *24, Docket No. 96-06 (FMC, Feb. 3, 1999) (citations omitted).

However, before this general test of reasonableness is to be applied to an exclusive arrangement such as a preferred provider, a complainant must first make sufficient factual allegations to show a *prima facie* harm. *Id*. In practice, this means that before requiring a terminal operator to justify its business decision, a complainant must allege facts that show something more than an effect on a relatively tiny portion of the relevant market occupied by the respondent terminal operator and the minimal impact on the Complainant. *Id*. (citations omitted). Here, Complainant(s) have not alleged facts to support such effect, impact, or harm.

Accordingly, Count II fails to state a claim on which relief may be granted, and should therefore be dismissed.

D. Count III. – Alleged Violations of 46 U.S.C. §41106(3): Unreasonable Refusal to Deal

a. The Complaint fails to identify the applicable Complainant in Count III.

As in the preceding Counts, the Complaint does not identify which of the two Complainants is the singular Complainant making the allegations set out in Count III.

b. Count III fails to state a claim because its allegations are refuted by the very facts alleged.

Section 41106(3) of the Shipping Act states that a marine terminal operator may not "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3). Such an allegation requires a two-part inquiry: (1) whether respondent refused to deal or negotiate, and, if so, (2) whether its refusal was unreasonable. *Port Elizabeth Terminal & Warehouse Corp. v. The Port Authority of New York and New Jersey*, 1 F.M.C.2d 29, 40, Docket No. 17-07 (ALJ, April 17, 2018) (citations omitted).

To survive a motion to dismiss, a complainant "must do more than simply allege unreasonableness …" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 12-02, Doc. 31 at 24 (FMC, Dec. 18, 2015). Allegations such as "unreasonable," "preferential," and "unduly," are merely conclusory, and do not provide factual support; rather, they must be supported by factual allegations. *Id* at 15. Among other things, without an allegation that a complainant tried to negotiate, there can be no basis to infer that the respondent refused to negotiate. *Id*. at 36.

The Complaint clearly shows that APS East Coast did not refuse to deal or negotiate and that Complainant's conclusory contentions in Count III to the contrary are refuted by the factual allegations in the Complaint. *See* Complaint ¶ 71.

The Complaint includes no factual allegation that either of the Complainants requested to be considered as a licensed or exclusive stevedore at the terminal facilities owned by APS East Coast. Rather, the Complaint shows that Complainants instead challenged the right of APS East Coast to designate a preferred stevedore at its Baltimore location, notwithstanding that PAC acts as an exclusive stevedore at the Seagirt Terminal in Baltimore. *See* Complaint at ¶¶ 32, 42.

The Complaint does include an allegation that PAC included in its December 6, 2022 letter a request that APS East Coast "agree to meet to negotiate" "equivalent terms for PAC, MTCE, and other stevedores." *See* Complaint at ¶ 33(e). However, the Complaint also concedes that APS East Coast agreed to discuss such a possibility with PAC and MTCE in its letter of March 31, 2023, expressly stating that it "would be pleased to receive PAC and MTCE's safety records and any efficiency metrics available." *See* Complaint at ¶ 71. The Complaint goes on to show that Complainants thereafter unilaterally disregarded that offer by APS East Coast; instead of offering the requested records, Complainants instead merely disputed the right of APS East Coast to rationalize stevedoring services on its own terminal. See Complaint at ¶¶ 42, 43.

Thus, the Complaint fails to make any allegation that Complainants made any offer to negotiate with APS East Coast, beyond its demands that APS East Coast abandon the preferred stevedore model it had adopted for sound and legitimate transportation and business reasons, notwithstanding PAC's own implementation of an exclusive stevedore arrangement on its own terminal.

Accordingly, Count III fails to state a claim on which relief may be granted, and should should be dismissed.

E. Prayer for Relief

As in the three Counts discussed above, the Prayer for Relief is stated on behalf of a singular Complainant, with no identification of which party is that singular Complainant. As such, the Prayer for Relief is impermissibly vague.

Further, while the unspecified Complainant alleges "loss of business, interference with current and future business relations and contracts, and threatened liability for the assess [sic] fee" as well as "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," Complainant(s) have not pled any facts sufficient to establish an "actual injury" as defined under 46 U.S.C. §41305. Those allegations are simply legal conclusions without the pleaded facts to support them.

Specifically, the Complaint does not allege any amount that has been paid by (either) Complainant to APS East Coast as a result of the complained-of business decisions by APS East Coast. Accordingly, the Prayer for Relief for reparations should be stricken.

IV. CONCLUSION

For the foregoing reasons, and pursuant to 46 C.F.R. §502.62(b), §502.69, and §502.70, Respondent APS East Coast, Inc. respectfully moves for an Order dismissing with prejudice the complaint against APS East Coast, Inc. in its entirety, striking Complainants' prayer for reparations, and granting all such other and further relief as may be just and proper.

Dated: June 27, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by electronic mail upon the following persons/addresses:

1. Office of the Secretary
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2. Hon. Alex M. Chintella - *Administrative Law Judge*
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