BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 23-04

PORTS AMERICA CHESAPEAKE, LLC,

and

MARINE TERMINALS CORPORATION-EAST

COMPLAINANTS,

v.

APS EAST COAST, INC.

RESPONDENT.

RESPONDENT'S REPLY
IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

The question presented by the Motion to Dismiss (the "Motion") submitted by Respondent APS East Coast, Inc. ("APS East Coast) is whether, with regard to each count, Complainants Ports America Chesapeake, LLC (hereafter referred to as "PAC"), and Marine Terminals Corporation-East (hereafter referred to as "MTCE," and collectively with PAC, the "Complainants") have provided sufficient factual matter, accepted to be true, to state a claim to relief that is plausible on its face. As discussed in detail in the Motion, they have not. Secondarily, the Motion raises the question of whether the Complaint in this matter has been

properly verified in accordance with the applicable Rules of Practice and Procedure before the Federal Maritime Commission (the "Commission")

II. THE PLAUSIBILITY STANDARD UNDER MOTIONS TO DISMISS

While Complainants argue that the question at the Motion to Dismiss stage is not whether the complainant can prevail on its claim but whether it has adequately pled enough facts to raise a plausible expectation that discovery will reveal evidence of the alleged violation, the standard is not one of speculation in hopes of a successful fishing expedition. Rather, when evaluating the factual content of a Complaint, its plausibility, and possible entitlement to relief, Courts evaluate whether a complainant has plead its statement of facts with enough heft to show that the pleader is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-557 (2007). Accordingly, allegations without further factual enhancement fail to move a complaint from possible claims to a plausible entitlement of relief. *Id.* at 557. Accordingly, when the allegations in a complaint, however true, cannot raise a claim of entitlement to relief, such a basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court. *Id.* at 558.

In this matter, as set forth in greater detail in the Motion and below, the Complainants' allegations have failed to include the necessary factual allegations to state a claim, and the Complaint should be dismissed.

III. COUNT I – ALLEGED VIOLATIONS OF 46 U.S.C. §41106(2): UNREASONABLE PREFERENCE, PREJUDICE OR DISADVANTAGE

A. Applicable elements of the claim

Count I alleges a violation of 46 U.S.C. § 41106(2), which provides that 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." Specifically,

the Complainant in Count 1[1] alleges that the granting by APS East Coast of an exclusive license to Ceres Terminal, Inc. for stevedoring work at a terminal owned by APS East Coast in Baltimore, Maryland, is an undue or unreasonable preference or advantage.

The allegations necessary to state a claim under § 41106(2) are often stated as: (1) 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. *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 1997 WL 35281266, at *31 (FMC, Oct. 10, 1997). However, the Commission has explained that as a predicate to stating a claim, a claimant must allege facts identifying the relevant market, and showing a harm imposed an effect in the relevant market. Motion at pp 4-6, *citing to, inter alia*, *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 1999 WL 125991 at *24, Docket No. 96-06 (FMC, Feb. 3, 1999). As explained by the Commission in *River Parishes*, a showing of the impact on the relevant market is a part of the complainant's initial burden to show harm. *River Parishes* at *24.

B. Count I fails to allege any impact on the relevant market or impact on competition within such market and therefore fails to state a claim.

Failure to identify the relevant market and to allege any impact on the relevant market or significant impact on competition is therefore fatal to the Complaint under the Motion to Dismiss standard, since the lack of such allegations is a failure to allege a cognizable "harm," and further

[1] In all three counts of the Complaint, the allegations are stated as being made by a single Complainant, but the averments do not clarify whether each count is intended to be brought on behalf of both Complainants or one of them, and if the latter, which Complainant.

results in a failure to sufficiently allege the "unreasonable" nature of Respondent's practice under the Shipping Act.

Complainants' Opposition to the Motion argues that their failure to identify the relevant market is not required at this stage and that providing factual support for allegations of harm and unreasonableness can wait until the parties address the actual merits of the Complaint. However, when levying accusations of "unreasonable" preference, prejudice, or disadvantage, a complainant must allege facts that, if true, would establish that the alleged preference, prejudice, or disadvantage is actually "unreasonable," and further establishes a specific harm to the complainant. With regard to claims of harm, as stated by the Commission, "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." *River Parishes*, *24. The Complaint is this matter has failed to make such a showing.

Complainants point to *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 12-02[2], to assert that allegations of "relevant market" and "significant impact on competition" are not required elements. However, Complainants overlook that stating an injury in the relevant market is a necessary component of showing a cognizable injury. *River Parishes, supra*.

Further, in the same paragraph in *Maher* cited by Complainants, the Commission notes that a complainant must show "that the proffered justifications are unreasonable under the Shipping Act", citing *Ceres Marine Terminal, Inc. v. Md. Port Admin*., 27 S.R.R. 12751, 1270

[2] The referenced FMC ruling should properly be cited as Doc. **32** (FMC, Dec. 18, 2015) in both the Motion to Dismiss and Complainant's Opposition to the Motion.

(FMC 1997), as well as *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958, 963 (D.C. Cir. 1988). *Maher Terminal* at 11.

The Commission in *Maher Terminals* conducted a thorough analysis of motions to dismiss that illustrates the pleading standards required for Complaints filed with the Commission. In *Maher Terminals*, the Commission states that "terms such as 'unreasonable,' 'preferential,' 'unduly,' and 'not reasonably related' are 'conclusory legal statements' that 'provide no factual support for the allegations that Respondent's conduct violated the Shipping Act'" and that "allegations about the reasonableness or unreasonableness of the Port Authority's conduct are not assumed to be true and must be supported by factual allegations." *Maher Terminals* at 25.

The Commission further note that Complainants "must allege facts that not only allow the Commission reasonably to infer that [Complainants were] treated differently than other entities but that also allow the Commission reasonably to infer that the treatment constituted an unreasonable preference or prejudice. Differences in treatment alone do not necessarily violate the Shipping Act." *Id*.

Notably, in *Maher Terminals*, the Commission declined to assume the truth of Maher's allegations with regards to the validity of the transportation factors at issue, and noted that:

> [by requiring Maher to] plead facts showing how the Port Authority's conduct was unreasonable, the ALJ was properly requiring Maher to allege facts that would allow one to draw the reasonable inference that the Port Authority violated the Shipping Act. That Maher is not required to plead with particularity does not absolve it of the requirement to allege facts that make its claims plausible, which necessarily requires factual allegations involving some combination of the who, what, when, where, and how of Shipping Act violations.

Id. at 25-26.

The Commission noted further that "the potential existence of legitimate business reasons in the absence of some facts negating such reasons, renders the bald allegation of 'unreasonableness' impermissibly conclusory under the relevant pleading standards." *Id*. at 27.

The Commission elaborated that while all reasonable inferences must be drawn from the factual allegations in Complainant's favor, this does not mean that a Respondent's conduct is unreasonable or otherwise unlawful simply because it is alleged, particularly when that conduct is equally consistent with lawful behavior, and that the plausibility of an inference depends upon a host of considerations including common sense and the strength of competing explanations for Respondent's conduct. *Id*. at 28.

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.

C. Count I fails to allege any specific facts to show any other actual injury and therefore fails to state a claim.

Even if Count I could survive a failure to identify the relevant market and establish an impact on Complainants beyond exclusion or the requirement to pay an access fee to one privately owned terminal in the entire port, the Complaint fails to provide specific factual allegations of any actual harm.

In their Opposition, Claimants assert that they have made sufficient factual allegations of injury in the Complaint, by reference to ¶ 13 (a summary paragraph devoid of facts); ¶ 30(f) (referencing a letter from Respondent noting its intention to assess a charge on unlicensed stevedores for access to the facility owned by Respondent); ¶ 31 (referencing a letter from Ports America); ¶ 32 (referencing legal arguments by Ports America in a letter); ¶ 38(g) (referencing a comment from a letter by Respondent to Ports America regarding accruals); ¶¶ 42 and 43

(referencing legal arguments by Ports America); ¶ 44 (referring to invoices for access fees); ¶ 46 (claiming injury due to "uncertainty," "potential liability," and potential, but unspecified "substantial and material loss of business and related injury and damages to Ports America"); ¶ 47 (claiming that the unspecified "injury and damages" are ongoing); ¶ 52 (alleging differences in treatment of a licensed stevedore); ¶ 54 (claiming an unspecified "loss of business, interference with current and future business relations and contracts, and threatened liability). However, as noted in the parentheticals, those allegations are, at best, mere general allegations without any actual factual averments. Complainants also refer to ¶¶ 59. 63, and 75, but those paragraphs are not made in connection with Count I, and, as with the preceding paragraphs, do not allege any specific facts, but are merely conclusory allegations.

D. Count I fails to identify which Complainant has incurred an alleged injury by the alleged conduct.

The Motion pointed out that while the Complaint is brought by two entities, PAC and MTCE, and it identifies them collectively as "Ports America," it fails to state whether they are related entities, or which entity incurred the injuries that the Complaint summarily alleges. Count I refer to a single Complainant, but does not identify which Complainant is making the allegations. Assuming that the "Complainant" in Count I is intended to refer to both entities, the lack of the requisite factual allegations to show an actual "injury" as required to state a claim is even more clear. Regardless whether the term "Complainant" is intended to refer to both Complainants, or one of them, the Count lacks sufficient specificity to state a claim.

IV. COUNT II – ALLEGED VIOLATIONS OF 46 U.S.C. §41102(C): UNJUST AND UNREASONABLE PRACTICES IN HANDLING PROPERTY

A. The nature of the claim and its elements

Commission regulations at 46 CFR § 545.4, which the Complaint quotes but does not cite, and the Opposition cites but does quote, sets out the elements required under § 41102(c) "in order to establish a successful claim for reparations." 46 CFR § 545.4 (emphasis added). However, Count II is not a claim for reparations, but rather a complaint about a change in business practices that Complainants do not like. Simply put, the claim does not fit the statute.

B. The failure to identify the Claimant under Count II

Complainants' failure to identify the actual claimant under Count II, and to identify any actual damages, clearly shows the lack of factual support for the Count, and the ill fit between the statute and the challenged business decision of Respondent.

C. Claimants misrepresent the Motion and ignore the Commission's guidance

In their Opposition, Complainants misrepresent the Motion by ignoring the specific point that to state a claim of an alleged unjust and unreasonable practice in handling property, a Count must contain sufficient factual allegations to support its allegation of unjust and unreasonable practices that plausibly entitle it to relief.

Specifically, Complainants mis-state the Motion when they contend that APS East Coast has argued that Count II must include a "specific allegation that the conduct negatively affect the broader shipping public." The point raised in the Motion is that the Commission has clarified that § 41102(c) is intended to apply not to individual grievances, which are more properly addressed under § 41106(2), but instead is addressed to "the activities of maritime regulated entities that negatively affect the broader shipping public." *See* 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)), cited in Motion at p. 8.

Therefore, 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. Count II does not include such any such factual allegations.

D. Count II fails to sufficiently allege unreasonableness

Moreover, even if Count II had contained sufficient factual allegations with regard to a claim for reparations and harm to the broader shipping public, it fails to make sufficient allegations that the stevedore licensing arrangement at issue is unreasonable.

The FMC's test for reasonableness, 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). Here, Complainants assert that Respondent raises no other valid challenges to the factual sufficiency of the allegations, which is an inaccurate reading of the Motion. The Motion clearly raises the issues of lack of factual support for the allegations of unreasonableness, as well as the failure to show any actual loss incurred by each Complainant as a result of the practice.

Accordingly, the Complaint fails to plead sufficient facts to support a claim that Respondent's actions are unjust and unreasonable practices within the meaning of 46 U.S.C. § 41102(c) and 46 C.F.R. §545.4 and that Complainants are plausibly entitled to relief as a result. Thus Count II fails to state a claim and should therefore be dismissed.

V. COUNT III. – ALLEGED VIOLATIONS OF 46 U.S.C. §41106(3): UNREASONABLE REFUSAL TO DEAL

A. Applicable elements of the Claim

A claim of an unreasonable refusal to deal requires a two-part inquiry: whether the respondent refused to deal or negotiate, and, if so, whether its refusal was unreasonable. *See, e.g. The Auction Block Company et. al v. the City of Homer et al*, 2013 WL 9808688, at *10 (*citing to Canaveral Port Auth*., 29 S.R.R. 1436, 1448 (FMC 2003)).

B. Count III fails to state a claim because its fails to include factual allegations showing that the alleged refusal was unreasonable

Complainants' argument with regard to Count III and the Motion to Dismiss attempts to broaden the scope of theories for a refusal to deal that go beyond an express request and express refusal, and impinge on the rights of a private marine terminal owner and operator to exercise control over its own terminal. Complainants allege, only now in its Opposition to the Motion, that PAC and/or MTCE were not given due consideration; but they fail to allege any facts sufficient to support such a claim, either in its Complaint or its Opposition to the Motion to Dismiss.

Complainants contend that they were not included in the original selection of a preferred stevedore for the APS East Coast terminal. However, they fail to provide any factual allegations to support their claim that the original determination by APS East Coast that they were not suitably qualified for consideration was unreasonable. Notably, the commission has held, in an earlier Baltimore case, that a marine terminal had no obligation to permit a competitor onto its leased terminal to perform services. *See ITO Corporation of Baltimore and the Maryland Port Administration*, 1995 WL 610825, at *25. In this case, while APS East Coast did not initially view PAC or MTCE as qualified, Complainants' own allegations show that APS East Coast was

and is willing to permit Complainants to be considered – an offer that Complainants have not accepted to date.

C. Count III fails to state a claim because its allegations of refusal to deal are refuted by the facts alleged

In short, Complainants' argument that its allegations are sufficient to constitute a refusal to deal cannot stand, as its factual allegations do not plausibly entitle it to the relief it seeks. The allegations that Complainants contend are sufficient instead directly refute their argument.

Specifically, Count III alleges that Ports America sent a letter on December 6, 2022 that requested that APS East Coast "agree to meet to negotiate" "equivalent terms for PAC, MTCE, and other stevedores" and that APS East Coast agreed to discuss such a possibility with PAC and MTCE in its letter of March 31, 2023, stating that it "would be pleased to receive PAC and MTCE's safety records and any efficiency metrics available." *See* Complaint at ¶¶ 33(e) and 71.

Accordingly, the Complaint on its face makes clear that Respondent did not refuse to negotiate. Further, Count III is bare of any factual allegations that such an alleged refusal to negotiate, even if remotely plausible, was unreasonable. Thus, Count III fails to state a claim on which relief may be granted and should be dismissed.

VI. PRAYER FOR RELIEF: REPARATIONS

A. The Prayer for Reparations fails to comply with 46 CFR § 502.62(a)(4)(i).

Complainants' Opposition on pages 8 and 9 argues that: "The Complaint does not require detailed specification of the source and quantum of the claimed damages…" (page 8 of the Opposition) and "A determination of the current, and future, quantum of reparations for each party is not required at this stage." (page 9 of the Opposition). However, 46 CFR § 502.62(a)(4)(i) is to the contrary: "Where reparation is sought, the complaint must set forth the

injury caused by the alleged violation and the amount of alleged damages." This was not done in the Complaint.

B. The Prayer for Relief fails to state a claim for reparations.

As further elaborated on in Respondent's Memorandum in support of its Motion to Dismiss, Complainant(s) have not pled any facts sufficient to establish an "actual injury" as defined under 46 U.S.C. §41305. Accordingly, the Prayer for Relief fails to state a claim for reparations.

VII. THE COMPLAINT IS NOT PROPERLY VERIFIED

Complainants' Opposition dismisses in a footnote (fn. 4, page 10) the fact that the Complaint is not properly verified, as noted in the Motion. However, the bald assertion in the footnote that the Verification "properly verifies the facts of the Complaint" is not supported in any way.

Commission regulations at 46 CFR § 502.62(a)(3) require that a private party complaint for formal adjudication, such as the Complaint in this matter, must verified. Commission regulation 46 CFR § 502.6(b) concerning verifications generally provide that when a person other than a person admitted or qualified to practice before the Commission verifies a document, such person must be either the party or a "duly authorized officer or agent of the party, whose address and title shall be stated."

As the Motion points out, while the Complaint alleges that both PAC and MTCE provide stevedoring services in the port of Baltimore, it fails to state whether, or how, the entities are related. The purported Verification of the Complaint is by a "Courtney R. Beller," identified as "Vice President and Deputy General Counsel" of "Ports America." But "Ports America" is not identified as a legal entity in the Complaint, and its connection to Complainants PAC and MTCE,

if any, is not stated. Likewise, the purported "Verification" of the Complaint does not state what position, if any, Ms. Beller has with each of the identified Complainants, if any. While 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.

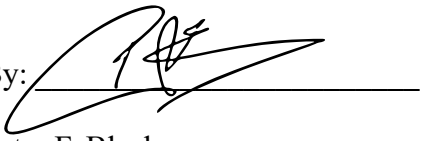
Accordingly, as noted in the Motion, the Complaint is not properly verified in accordance with 46 CFR § 502.62(a)(3).

VIII. CONCLUSION

For the foregoing reasons, and pursuant to 46 C.F.R. §502.62, §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: July 19, 2023

Respectfully Submitted,

By: 

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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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3. Gerald A. Morrissey III - *Counsel for Complainants*
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Dated: July 19, 2023

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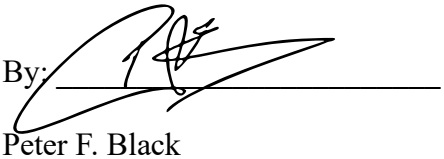
By: 

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