

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC. d/b/a EZ
CRUISE PARKING; LIGHTHOUSE PARKING, INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

Complainants

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON
WHARVES and THE GALVESTON PORT FACILITIES
CORPORATION**

Respondents

**COMPLAINANTS' EXCEPTIONS TO AND APPEAL OF
INITIAL DECISION OF DECEMBER 4, 2015**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OVERVIEW OF COMPLAINANTS’ CLAIMS 1

SUMMARY OF THE EXCEPTIONS AND APPEAL..... 2

DISCUSSION 9

 I. LEGAL STANDARDS 9

 II. SUBSTANTIVE ERRORS AND EXCEPTIONS 15

 A. INITIAL DECISION FAILED TO CONSIDER MULTIPLE ISSUES FORMING THE BASIS OF
 THE COMPLAINT.....15

 B. INITIAL DECISION ERRONEOUSLY FINDS THAT COMPLAINANTS HAVE NOT
 SATISFACTORILY PROVEN VIOLATIONS OF SECTION 41106(2)17

 C. THE INITIAL DECISION ERRONEOUSLY FINDS THAT COMPLAINANTS DO NOT MEET
 THE *CERES I* ELEMENTS.....18

 D. THE INITIAL DECISION ERRONEOUSLY APPLIES THE COBLE ACT TO THIS MATTER.....25

CONCLUSION..... 31

TABLE OF AUTHORITIES

CASES

<i>Arizona v. California</i> , 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).....	26
<i>Coker v. Coker</i> , 650 S.W.2d 391 (Tex. 1983)	22
<i>Dep't. of Defense v. Matson Navigation Co.</i> , 17 S.R.R. 671 (F.M.C. 1977).....	9
<i>DeWitt County Electric Cooperative, Inc. v. Parks</i> , 1 S.W.3d 96 (Tex. 1999).....	22
<i>Fernandez-Vargas v. Gonzales</i> , 548 U.S. 30, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006)	29
<i>I.N.S. v. St. Cyr</i> , 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).....	30
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).....	29
<i>Martin v. Hadix</i> , 527 U.S. 343, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999)	28
<i>McComish v. Bennett</i> , 611 F.3d 510 (9th Cir. 2010)	10
<i>Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.</i> , 33 S.R.R. 543 (F.M.C. 2014)	9
<i>Monoson v. United States</i> , 516 F.3d 163 (3d Cir. 2008)	29, 30
<i>Singh v. George Washington Univ. Sch. of Med. and Health Sciences</i> , 667 F.3d 1 (D.C. Cir. 2011).....	29
<i>SuperSpeed, L.L.C. v. Google, Inc.</i> , 2 F.Supp.3d 952 (S.D. Tex. 2014)	22
<i>United States v. St. Louis, S.F. & T.R. Co.</i> , 270 U.S. 1, 46 S.Ct. 182, 70 L.Ed. 435 (1926).....	29
<i>Universal C.I.T. Credit Corp. v. Daniel</i> , 150 Tex. 513, 243 S.W.2d 154 (1951).....	22

STATUTES

TEX. TRANSP. CODE § 54.003(a).....	2
------------------------------------	---

OTHER AUTHORITIES

GALVESTON, TEX., CHARTER, art. XII, §§ 1-2	2
--	---

CODE OF FEDERAL REGULATIONS

46 C.F.R. § 502.227	1, 9
46 C.F.R. 521.1(c)(17).....	18, 22
46 C.F.R. 525.2(a)(2).....	18, 21, 22

UNITED STATES CODE

46 U.S.C. § 41102(c)	10, 12
46 U.S.C. § 41106(2).....	8, 10, 13
46 U.S.C. § 41106(3).....	11, 14
46 U.S.C. § 41305.....	27, 30
46 U.S.C. § 41305(e)	31

EXCEPTIONS TO AND APPEAL OF INITIAL DECISION

Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking; Lighthouse Parking, Inc.; and Sylvia Robledo d/b/a 81st Dolphin Parking (collectively “Complainants”), pursuant to Federal Maritime Commission (“FMC” or “Commission”) Rule 227, 46 C.F.R. § 502.227, through undersigned counsel, file these exceptions, and appeal the Initial Decision (“I.D.”) of December 4, 2015 in this matter. As set forth in the exceptions and bases for appeal herein, the I.D. failed to address certain claims made by Complainants of violations of the Shipping Act of 1984, revealed mistaken interpretations of Complainants’ arguments, and improperly applied the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (“Coble Act”) to this matter. The Commission should reverse the I.D. on the points outlined herein, and reinstate the Complaint, providing for its amendment if necessary, so that this long-delayed proceeding may advance for a decision on its merits.

BRIEF OVERVIEW OF COMPLAINANTS’ CLAIMS

As outlined more fully in the Complaint, Complainants are Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (“EZ Cruise”), Lighthouse Parking, Inc. (“Lighthouse”), and Sylvia Robledo d/b/a 81st Dolphin Parking (“81st Dolphin”). Complainants have each owned and operated private parking lot businesses near the Port of Galveston, serving passengers of cruise ships that have called on that port since as early as 2005.¹ Respondents are the Board of Trustees of the Galveston Wharves (the “Wharves Board”) and the Galveston Port Facilities Corporation (“GPFC”) (collectively “Respondents”). The Wharves Board has been authorized by the City of Galveston to manage and control the Port of Galveston’s wharf and terminal

¹ Complainant EZ Cruise commenced operations in December of 2003, Complainant Lighthouse commenced operations in 2005, and Complainant 81st Dolphin opened for business in 2006 (transferring to its current location in May 2009). *See* Resp. Corr. Obj. to Comp. PFF, ¶¶ 1, 10, and 1,7 at pp.2, 5, and 7.

facilities. GALVESTON, TEX., CHARTER, art. XII, §§ 1-2 (designating Galveston Wharves as a “separate utility” of the City of Galveston to be managed by the Board of Trustees of the Galveston Wharves); *see also* TEX. TRANSP. CODE § 54.003(a).

The Complaint alleges facts establishing disparate treatment of Complainants under Respondents’ Tariff. Indeed, Respondents recognized this fact on September 22, 2014, when the then complained-of discriminatory Tariff, charging Complainants’ \$28.88 per parking space per month, was abandoned in favor of an “amendment [that] would treat everybody the same.” (Comp. App. 030, at 000536-537.) Respondents also admitted to disparate treatment of certain cruise terminal users by allowing limousines free access to the Cruise Terminal in violation of the Tariff, and charging other Cruise Terminal users the minimum rate under the Tariff in violation of applicable rates. (Resp. Brief at 21, fn.5 and 23, fn.6.)

SUMMARY OF THE EXCEPTIONS AND APPEAL

Complainants appeal the dismissal of their claims and take exception to the I.D.’s failure to address violations of the Shipping Act as alleged in their Complaint and submitted briefs. Complainants also take exception to the I.D.’s conclusion that Respondents’ disparate treatment of Complainants which granted preferential treatment to other Cruise Terminal users was within the realm of a reasonable, discretionary business decision, when such conclusion was based solely on the complaint that Complainants were charged per-space per-month, and other users were required by the Tariff to be charged per access. This assessment fails to take into account the fact that the Tariff was selectively enforced. Complainants further take exception to the I.D.’s determination that Complainants do not meet the *Ceres I* elements. Finally, Complainants take exception to the I.D.’s assertion that the Coble Act applies to this matter.

In addition to the above, Complainants take exception to the following particular statements made in the I.D.:

1. Complainants take exception to the following statement on page 2 of the I.D.:

The Port continued to impose access fees on other commercial passenger vehicles accessing the cruise terminal at the per trip rate.

This statement fails to acknowledge the Port's selective enforcement of the Tariff as then written and in force, and further fails to acknowledge the preferential treatment of limousines in violation of the published Tariff.

2. Complainants take exception to the following statement on page 5 of the I.D.:

Note D provides that in lieu of the \$10.00 per trip access fee, parking lot operators pay a flat access fee of \$8.00 per month for each parking space in Complainants' lot.

As made, this statement implies that Note D of the Tariff applies only to Complainants' parking lots, as opposed to all Off-Port Parking Users as defined in the Tariff.

3. Complainants take exception to the following statement on page 24 of the I.D.:

80. Between August 28, 2006, and October 1, 2014, Note D of Tariff Circular No. 6 did not provide a mechanism to determine "billable parking spaces" for hotels providing parking to cruise passengers with transportation to and from the cruise terminal.

Throughout the time period identified in the ALJ's Findings of Fact number 80, Note D of Tariff Circular No. 6 required that all "Off-Port Parking Users," as defined within the Tariff, were to be charged a flat rate monthly Access Fee. The mechanism by which the rate of this Access Fee was to be calculated was through periodic inspection by the Galveston Wharves, wherein the number of parking spaces located in Off-Port Parking Users' facilities would be multiplied by \$8.00, resulting in each Off-Port Parking User's monthly Access Fee. As determined in the I.D., the hotels addressed by Complainants are "Off-Port Parking Users," and should have been charged under the Tariff in the same manner as Complainants.

4. Complainants take exception to the following statement on page 27 of the I.D.:

Complainants also paid far less for each shuttle trip to the cruise terminal than hotels that provided parking to their customers in connection with an overnight visit and transported their customers to the cruise terminal in shuttles.

The time period to which this statement is intended to apply is unclear. If this statement applies to the same time period as the previous sentence, that being prior to June 2006, then Complainants take exception to this statement based on the fact that Complainants are not seeking reparations for Respondents' violations of the Shipping Act that occurred prior to June 2006. If, however, this statement applies to the time period relevant to Complainants' allegations of Respondents' violations of the Shipping Act, then Complainants take exception to this statement based on the fact that (a) it is supported only by the ALJ's assumptions as to the number of times Complainants accessed the Cruise Terminal; (b) it fails to consider the Port's selective enforcement of the Tariff upon hotels, whereupon hotel shuttles were charged, if at all, the minimum Access Fee prescribed to any vehicle accessing the Cruise Terminal, without regard to the Tariff rate required for the hotels' specific vehicles; and (c) it fails to consider the fact that the hotels were "Off-Port Parking Users," and were required to be charged as such.

5. Complainants take exception to the following statement on page 33 of the I.D.:

Complainants compete with each other for cruise passengers who want to leave their vehicles in secure parking while they cruise.

Viewed in context of the paragraph containing this statement, the statement implies that Complainants do not compete with hotels for cruise passengers who desire to leave their vehicles in secure parking while they cruise. This implication is incorrect.

6. Complainants take exception to the following statement on page 33 of the I.D.:

The unlimited access provision in the \$8.00 flat rate provided a significant transportation advantage to Complainants.

The statement that the “\$8.00 flat rate provided a significant transportation advantage to Complainants” is an incomplete assessment of the circumstances and evidence. Any “advantage” that this fee schedule purportedly grants to Complainants must be weighed against the disadvantage suffered as a result of the Port’s selective enforcement of the Tariff. Where the Port routinely practiced selective enforcement of the Tariff by allowing free access and greatly reduced access to other Cruise Terminal users, but never to Complainants, it can hardly be said that Complainants enjoyed an “advantage.”

7. Complainants take exception to the following statement on page 33 of the I.D.:

Complainants do not identify any contemporary evidence to support a finding that during the negotiations between Complainants and the Port to resolve the access fees invoiced for the period January 2005 through June 2006 and development of the \$8.00 flat rate, either Complainants or the Port contemplated applying the flat rate to hotels offering parking for cruise passengers.

Complainants would show that the Port, not Complainants, defined “Off-Port Parking Users” in the Tariff. Complainants would further show that the Port, not Complainants, then required “Off-Port Parking Users” to pay Access Fees in accordance with Note D of Tariff circular No. 6. Beyond what applied to Complainants’ negotiation positions alone, they had no say in the designation of fee schedules for other Cruise Terminal users or otherwise in the writing of the Tariff. The Port did not consult with Complainants regarding the Port’s intentions or reasons for allocating Access Fees as they saw fit for local hotels/motels, taxicabs, limousines, buses, or any other Cruise Terminal user.

8. Complainants take exception to the following statement on page 33 of the I.D.:

Limousine operations are substantially the same as taxicab operations. Likewise, I conclude that the decision not to charge access fees to limousines for access to the cruise terminal is a reasonable discretionary business decision of the Port.

According to Respondents' own briefing, limousine operations are substantially different from taxicab operations. Additionally, the reasoning used to conclude that the Port's decision not to charge Access Fees to taxicabs is based on the Port's observations of circumstances unique to the relationship between taxicabs, the City of Galveston, and the Cruise Terminal; such relationship does not exist with regards to limousines. Furthermore, the excepted-to statement identifies only the Port's decision to not charge certain limousines Access Fees under the Tariff. However, the I.D. wholly fails to address the Port's own admission that it mistakenly failed to collect the Access Fees that were required of limousines under the Tariff.

9. Complainants take exception to the following statement on page 34 of the I.D.:

Complainants do not identify any evidence supporting a finding that the hotels they argue should have been assessed access fees calculated at the \$8.00 flat rate – Holiday Inn, Moody Gardens, Comfort Inn & Suites on the Beach, and the other hotels identified in ALJFF 81 – were start-up companies such as EZ Cruise for which the flat rate would be much easier to budget.

The above statement implies that the Tariff's definition of "Off-Port Parking Users" was limited to "start-up companies." Complainants were not privy to the contents of, and issues raised in the tariff negotiations that took place, if any, between the Port and other Cruise Terminal users. The definition clearly covered hotels that provided parking for cruise passengers.

10. Complainants take exception to the following statement on page 34 of the I.D.:

Complainants do not identify any evidence supporting a finding that when the Port amended the tariff, it intended to apply the flat rate to hotels in lieu of the per trip rate already applicable to hotel shuttles.

Complainants briefing did not attempt to prove Respondents' intentions, merely their violations of the Shipping Act. Complainants did not draft the Tariff; the Port did. In fact, the definition of "Off-Port Parking Users" was present and clear in the Tariff before the Port amended it to

require all “Off-Port Parking Users” to pay Access Fees based on the number of parking spaces in their lots.

11. Complainants take exception to the following statement on page 35 of the I.D.:

(1) the \$8.00 flat rate does not provide a mechanism to determine the number of billable parking spaces for [the] hotels; (2) developing a mechanism to determine access fees for determining the billable parking spaces of hotels that use only a small percentage of their parking spaces for cruise passenger is virtually impossible; and (3) there is no contemporaneous evidence that either the Port or Complainants intended to require these hotels to use the \$8.00 flat rate in lieu of the \$10.00 per trip access fee when the flat rate was adopted, the Port did not intend to require the hotels to use the flat rate.

The Tariff does provide a mechanism to determine the number of billable parking spaces for the hotels operating as “Off-Port Parking Users.” As quoted in the I.D., Note D of the Tariff provides in pertinent part, that “Off-Port Parking Users, as defined herein . . . shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of \$8.00 per parking space located in the Off-Port Parking User’s parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves.” (Initial Decision at 5.)

Complainants also contend that the development of a mechanism to determine the billable parking spaces for hotels is far from a virtual impossibility. As identified above, Complainants contend that a mechanism already exists in the Tariff, but, while Complainants do not intend to conduct a feasibility study, they would suggest that rather simple measures are available as additional solutions. For instance, the hotels that contend a mere 3% of their guests park at the hotels’ lots rather than at Complainants’ lots during cruises, could easily section off 3% of their parking and identify it as “cruise passenger parking.” Furthermore, violations of this nature are not depend upon the intent of the violator; the existence of the Tariff as devised and written by the Port is contemporary evidence of the Port’s contemplated intent.

12. Complainants take exception to the following statement on pages 42-43 of the I.D.:

Complainants do not cite to any contemporaneous evidence proving or even suggesting that the Port based the \$8.00 flat rate figure on the “study” Complainants cite or any other study.

In fact, Complainants cited to the January 30, 2015 deposition of Michael Mierzwa, wherein Mr. Mierzwa was introduced to Exhibit 12 of that deposition, “Port Tariff Charges for the Year 2006.” (Comp. App. 016 at 000316; *see also id.* at 000396.) When asked if that document reflected an attempt “to do an allocation based on those – the traffic that was actually being experienced at the cruise terminal,” Mr. Mierzwa confirmed that it was. (Comp. App. 016 at 000316; *see also id.* at 000396.)

13. Complainants take exception to the following statement on page 51 of the I.D.:

Complainants did not subsidize other users as a result of the May 19, 2014, increase in the flat rate to \$28.88.

Complainants allegations of subsidization do not include allegations that the May 19, 2014 increase in the Access Fees required of “Off-Port Parking Users” caused Complainants subsidization of other Cruise Terminal users. Complainants allege, among other things, that subsidization occurred as a result of the Port’s selective enforcement of the Tariff; granting unreasonable and advantageous low-cost, and even free, access to the Cruise Terminal to other users, while consistently charging Complainants the full price.

14. Complainants take exception to the following statement on page 52 of the I.D.:

Complainants do not cite any authority that would support a conclusion that when a regulated entity charges one (or several) customers at amounts less than the tariff rate, it has unreasonably imposed an undue or unreasonable prejudice or disadvantage in violation of section 41106(2) with respect to all other customers who paid the tariff rate.

46 U.S.C. § 41106(2) 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...” (emphasis added). Complainants contend that it is

unduly and unreasonably advantageous to be charged less than a tariff requires for access to a port when other port users are charged the full tariff rate.

15. Complainants take exception to the following determination on page 52 of the I.D.:

Even assuming that Complainants have proved that the Port violated section 41106(2), Complainants have not proved by a preponderance of the evidence that they suffered any actual injury from the violation.

Complainants injury from Respondents' conduct referenced in the above statement is twofold. First, by granting other ground transportation companies and "Off-Port Parking Users" undue and unreasonable preference and advantage in the assessment of Access Fees prescribed by the Tariff and relied upon by Complainants in the decision making and operation of their businesses, complainants suffered actual injury. Second, Respondents' conduct spanned many years and resulted in Respondents increase of Complainants' Access Fees. Complainants were injured by being caused to subsidize other Cruise Terminal users' use of the Cruise Terminal. Additionally and significantly, should the Commission rule that the Coble Act applies to this matter despite Complainants' showing below, this issue would be moot as Complainants could still be deemed "prevailing parties" upon a showing of Respondents' violations, and may recover their attorney fees regardless of a showing of actual injury.

DISCUSSION

I. LEGAL STANDARDS

A. COMMISSION RULE OF PRACTICE AND PROCEDURE 227

Commission Rule 227 provides that any party may file an appeal or exceptions within twenty-two (22) days of an initial decision. The Commission reviews an initial decision *de novo*. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 33 S.R.R. 543, 553 (F.M.C. 2014) (quoting 46 C.F.R. § 502.227(a)(6); *see also Dep't. of Defense v. Matson Navigation Co.*, 17 S.R.R. 671, 674 (F.M.C. 1977) (reviewing a dismissal *de novo*). With *de novo* review, the

Commission must “[consider] the case anew, the same as if it had not been heard before, and as if no decision previously had been rendered, and giving *no deference* to the [ALJ’s] determinations.” *McComish v. Bennett*, 611 F.3d 510, 519-20 (9th Cir. 2010) (internal quotes omitted) (emphasis added), rev’d on other grounds, 131 S.Ct. 2806 (2011).

B. SHIPPING ACT VIOLATIONS ALLEGED IN THE COMPLAINT

1. Unjust, Unreasonable, and Unlawful Practices by Respondents

Title 46 U.S.C. § 41102(c) provides that a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connect with receiving, handling, storing, or delivering property.” Complainants alleged that Respondents violated 46 U.S.C. § 41102(c) by “refusing to observe, implement, enforce and collect Access Fees from all Off-Port Parking Users under the Tariff;” by Respondents’ method of “allocation of the Cruise Terminal’s costs;” disproportionate increases in Complainants’ Access Fees as compared to increases to other Cruise Terminal users’ Access Fees; and relegating Complainants’ travel routes and pick-up/drop-off locations of lesser convenience than those made use of by Respondents’ shuttle buses. Complainants further alleged that they had been charged Access fees under Respondents’ Tariff that were “excessive and not reasonable related to the value of services rendered to Complainants,” by which Complainants were “forced to subsidize Respondents’ costs associated with services provided to other users of port facilities.”

2. Unreasonable Preference or Advantage, and/or Imposing Undue or Unreasonable Prejudice or Disadvantage Created by Respondents’ Conduct

Title 46 U.S.C. § 41106(2) 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.” Complainants alleged that Respondents violated 46

U.S.C. § 41106(2) by “refusing to observe, implement, enforce and collect Access Fees from all Off-Port Parking Users under the Tariff;” by Respondents’ method of “allocation of the Cruise Terminal’s costs;” disproportionate increases in Complainants’ Access Fees as compared to increases to other Cruise Terminal users’ Access Fees; and relegating Complainants’ travel routes and pick-up/drop-off locations of lesser convenience than those made use of by Respondents’ shuttle buses. Complainants further alleged that Respondents’ conduct gave rise to “undue and unreasonable preferences in favor of Cruise Terminal parking lots, private parking lots to which [the] Tariff does not apply, and hotels engaged as Off-Port Parking Users under the Tariff,” which resulted in “the prejudice and disadvantage of Complainants.”

3. Respondents’ Unreasonable Refusal to Deal or Negotiate with Complainants

Title 46 U.S.C. § 41106(3) provides that a marine terminal operator may not “unreasonably refuse to deal or negotiate.” Complainants alleged that Respondents violated 46 U.S.C. § 41106(3) by, despite Complainants’ requests for corrective action, continuing to assess to Complainants Access Fees that fail to “represent a reasonable approximation of the services actually received.” Complainants also alleged that this conduct by Respondents gave rise to “undue and unreasonable preferences in favor of Cruise Terminal parking lots, private parking lots to which [the] Tariff does not apply, and hotels engaged as Off-Port Parking Users under the Tariff,” resulting in the “prejudice and disadvantage of Complainants.” Complainants further alleged that Respondents had “unreasonably refused to deal or negotiate with Complainants regarding their recent string of modifications to their Tariff with respect to Access Fees” by reliance upon “intentionally misleading information about the Cruise Terminal’s financial condition” rather than any “legitimate business rationale.” Additionally, Complainants alleged that Respondents “refused to negotiate any modification of [the Tariff’s] Access Fees charged to Off-Port Parking Users that were increased more than three-fold on May 19, 2014.”

C. SHIPPING ACT VIOLATIONS ALLEGED IN THE FIRST AMENDED VERIFIED COMPLAINT

Complainants filed their original Verified Complaint in June of 2014, alleging violations as outlined above. On September 22, 2014, admitting the validity of Complainants' allegations regarding disparate treatment of Complainants, both under and in violation of the Tariff, Respondents withdrew the May 19, 2014 amendment to the Tariff, removing the \$28.00 per space per month Access Fee for Off-Port Parking Users. In response to Respondents' attempt to make Complainants' allegations of Shipping Act violations moot, Complainants filed their First Amended Verified Complaint on October 24, 2014. Unless otherwise identified, any reference hereafter to Complainants' "Complaint" means Complainants' First Amended Verified Complaint.

1. Unjust, Unreasonable, and Unlawful Practices by Respondents

Title 46 U.S.C. § 41102(c) provides that a marine terminal operator "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connect with receiving, handling, storing, or delivering property." Complainants allege that Respondents are in violation of 46 U.S.C. § 41102(c) by "refusing to observe, implement, enforce and collect Access Fees from all Commercial Passenger Vehicles accessing the Cruise Terminal;" by Respondents' "unreasonable, unduly prejudicial, and discriminatory allocation of the Cruise Terminal's costs;" disproportionate increases in Complainants' Access Fees as compared to increases to other Cruise Terminal users' Access Fees; and relegating Complainants' travel routes and pick-up/drop-off locations of lesser convenience that those made use of by Respondents' shuttle buses. Complainants further allege that they are charged Access fees under Respondents' Tariff that are "excessive and not reasonable related to the value of services rendered to Complainants," and include "arbitrary and irrational increases," by which

Complainants have been “forced to subsidize Respondents’ costs associated with services provided to other users of the same port facilities.”

Complainants allegations of Respondents’ violations of section 41102(c) of the Shipping Act, 46 U.S.C. § 41102(c), was summarily dismissed with prejudice by the ALJ in the November 21, 2014 *Order on Pending Motions and Partial Dismissal*, wherein all of Complainants claims and allegations were subject to summary dismissal with prejudice by application of the Shipping Act as it existed before the December 18, 2014 enactment of the Coble Act.

2. Unreasonable Preference or Advantage, and/or Imposing Undue or Unreasonable Prejudice or Disadvantage Created by Respondents’ Conduct

Title 46 U.S.C. § 41106(2) 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.” Complainants allege that Respondents are in violation of 46 U.S.C. § 41106(2) by “refusing to observe, implement, enforce and collect Access Fees from all Commercial Passenger Vehicles accessing the Cruise Terminal;” by Respondents’ “unreasonable, unduly prejudicial, and discriminatory allocation of the Cruise Terminal’s costs;” disproportionate increases in Complainants’ Access Fees as compared to increases to other Cruise Terminal users’ Access Fees; and relegating Complainants’ travel routes and pick-up/drop-off locations of lesser convenience that those made use of by Respondents’ shuttle buses. Complainants also allege that as a result of Respondents’ conduct, including their selective and inconsistent enforcement of the Tariff, “Complainants have been forced to subsidize” other entities use of the Cruise Terminal. This subsidization resulting in those other users receiving “greater levels of service and benefit from the Respondents’ services at a lower cost” than what Complainants receive, thereby placing Complainants at a considerable disadvantage while granting those other users unreasonable advantage.

Complainants further allege that Respondents' conduct gives rise to "undue and unreasonable preferences in favor of Cruise Terminal parking lots (which Carnival Cruise Line has an interest in), taxi cabs not being charged Access Fees under the Tariff, hotels transporting passengers to the Cruise Terminal not being charged Access Fees under the Tariff, and private parking lots to which the Tariff does not apply," which results in "the prejudice and disadvantage of Complainants."

3. Respondents' Unreasonable Refusal to Deal or Negotiate with Complainants

Title 46 U.S.C. § 41106(3) provides that a marine terminal operator may not "unreasonably refuse to deal or negotiate." Complainants allege that Respondents are in violation of 46 U.S.C. § 41106(3) by, despite Complainants' requests for corrective action, continuing to assess to Complainants Access Fees that fail to "represent a reasonable approximation of the services actually received." Complainants also allege that this conduct by Respondents gives rise to "undue and unreasonable preferences in favor of Cruise Terminal parking lots (which Carnival Cruise Line has an interest in), taxi cabs not being charged Access Fees under the Tariff, hotels transporting passengers to the Cruise Terminal not being charged Access Fees under the Tariff, and private parking lots to which the Tariff does not apply," which results in "the prejudice and disadvantage of Complainants." Additionally, Complainants allege that Respondents have "refused to negotiate the amounts of money they seek to recover from Complainants by charging them increased Access Fees under their now *modified* Amended Tariff." Complainants further allege that Respondents have "unreasonably refused to deal or negotiate with Complainants regarding their recent string of modifications to their Tariff with respect to Access Fees" by reliance upon "intentionally misleading information about the Cruise Terminal's financial condition" rather than any "legitimate business rationale." Additionally,

Complainants alleged that Respondents “refused to negotiate any modification of [the Tariff’s] Access Fees charged to Off-Port Parking Users that were increased more than three-fold on May 19, 2014.”

Complainants allegations of Respondents’ violations of section 41106(3) of the Shipping Act, 46 U.S.C. § 41106(3), was summarily dismissed with prejudice by the ALJ in the November 21, 2014 *Order on Pending Motions and Partial Dismissal*, wherein all of Complainants claims and allegations were subject to summary dismissal with prejudice by application of the Shipping Act as it existed before the December 18, 2014 enactment of the Coble Act.

II. SUBSTANTIVE ERRORS AND EXCEPTIONS

In addition to and expanding upon those exceptions identified in the Summary section above, Complainants specifically raise and address the following exceptions:

A. INITIAL DECISION FAILED TO CONSIDER MULTIPLE ISSUES FORMING THE BASIS OF THE COMPLAINT

The I.D. omits and fails to consider significant allegations made by Complainants.

Specifically, the I.D. provides that, in arriving at its conclusion, it considered the following:

Complainants’ claim that the Port violated section 41106(2) is based on their contention that by amending Tariff Circular No. 6 on August 28, 2006, to calculate access fees for Complainants at the \$8.00 per parking place per month rate instead of the per trip rate and calculating access fees based on the \$8.00 flat rate, the Port discriminated against Complainants in favor of hotels that provide parking to cruise passengers and in favor of other commercial passenger vehicles charged per trip.

(Initial Decision at 26.) While it is true that Complainants do assert that claim as addressed, the I.D. fails to consider Complainants’ other asserted claims for violation of section 41106(2), including *de facto* subsidization caused by Respondents’ selective enforcement of the Tariff. In their Complaint, Complainants allege as follows:

[T]he Wharves Board has not enforced or collected [Access Fees pursuant to the Tariff] from any such hotel since inception of the Tariff. By contrast, the

Wharves Board has enforced and collected Access Fees from Complainants since inception of the Tariff. This, in and of itself, has created a substantial loss of revenue to the Cruise Terminal, and resulted in the situation at bar; that is, Complainants are now [by virtue of disproportionate increases in Access Fees] being asked to subsidize Respondents' past and future failures to implement, enforce, and collect Access Fees under the Tariff from these other Off-Port Parking Users.

(First Amend. Comp. at 22-23.) Complainants further allege that Respondents' conduct was discriminatory against Complainants and preferential toward other Cruise Terminal users.

Respondents have historically failed to charge and/or collect Access Fees from a material percentage—if not a majority—of commercial vehicles that have accessed the Cruise Terminal since the Tariff's inception. As such, Respondents have forced Complainants to subsidize other non-paying users' share of Cruise Terminal costs, providing those users with an undue preference or advantage over Complainants.

(First Amend. Comp. at 25.)

Imposing an unreasonable, unduly prejudicial, and discriminatory allocation of the Cruise Terminal's costs upon Complainants, but not other users of the Respondent's services under Tariff Circular No. 6, Item 111—Other Licenses and Permits.

(First Amend. Comp. at 29.)

Unreasonably and unjustifiably modifying and/or increasing the Access Fees (for the third time in nine months) under the Tariff for Complainants.

(First Amend. Comp. at 29.)

Unreasonably discriminating against Complainants by imposing an unfair and disproportionate increase in Access Fees in comparison to increases, if any, imposed on other users of Respondents' services under Tariff Circular No. 6, Item 111—Other Licenses and Permits.

(First Amend. Comp. at 29.)

Unreasonably, unjustifiably, unfairly, and with undue prejudice, refusing to observe, implement, enforce and collect Access Fees from all Commercial Passenger Vehicles accessing the Cruise Terminal.

(First Amend. Comp. at 29.) Complainants' original Brief similarly raises these unaddressed issues by stating:

Through disparate treatment of Complainants based on Tariff rates charged, and in the form of Respondents' preferential exclusion of certain port users from collection of Access Fees, coupled with Respondents' selective enforcement of the Tariff, Complainants have been burdened with an unjust economic disadvantage and a resulting *de facto* subsidization of benefits received by other Cruise Terminal users who are similarly situated and/or in a competitive relationship with Complainants.

(Comp. Br. at 13.) The I.D. addresses only Complainants' allegations of subsidization in relation to the May 19, 2014 increase in Access Fees. Complainants take exception to the failure of the I.D. to consider Complainants other allegations of subsidization. Complainants take exception to the I.D.'s statement that "Complainants did not subsidize other users as a result of the May 19, 2014, increase in the flat rate to \$28.88." (Initial Decision at 51.) Complainants also take exception to the I.D.'s determination that, because Respondents did not collect the difference between the increased rate and the prior \$8.00 rate, that no subsidization occurred.

B. INITIAL DECISION ERRONEOUSLY FINDS THAT COMPLAINANTS HAVE NOT SATISFACTORILY PROVEN VIOLATIONS OF SECTION 41106(2)

1. The Initial Decision erroneously attempts to absolve the Port's violations of 41106(2) under the guise of "discretionary business decisions."

The I.D. erroneously attempts to absolve the Port's violations of 41106(2) under the guise of the discretionary business decisions. However, as pointed out above, the I.D. addresses only the disparate treatment of Complainants effected by the August 28, 2006 Tariff amendment ~~which required Off-Port Parking Users, such as Complainants, to pay per-parking space per-month rather than per trip access fees.~~ The I.D. is silent as to all other violations of 41106(2).

With regard to the disparate treatment addressed by the I.D., Complainants maintain that it is not within the shelter of discretionary action for a marine terminal operator to routinely enforce its published tariff against only certain port users, while giving advantageous reduced, or free, access to other port users. Further, as indicated above, the I.D. failed to address multiple claims made by Complainants of the Port's violations of the Shipping Act. As provided in

Complainants' Brief, Complainants maintain that the Port's selective enforcement of the Tariff, in violation of 41106(2), was not a "reasonable business decision" that is within a marine terminal operator's discretion. A marine terminal operator is required to follow and enforce the Tariff as published. 46 C.F.R. 525.2(a)(2) provides that "Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule."² Complainants relied upon the dictates of the published Tariff to inform them on the Access Fees paid by other Cruise Terminal users and as a basis for business decisions and expectations.

C. THE INITIAL DECISION ERRONEOUSLY FINDS THAT COMPLAINANTS DO NOT MEET THE CERES I ELEMENTS

1. The Initial Decision Erroneously Finds that Complainants Are Not Similarly Situated Or In A Competitive Relationship With Hotels

Complainants take exception to the I.D.'s conclusion that local hotels/motels are not similarly situated and/or in a competitive relationship with Complainants. In developing its conclusions, the I.D. misconstrues the element of time with regard to the competition for storage of cruise passengers' vehicles. Complainants, as outlined in Complainants' Brief, operate ~~parking lots for cruise passengers to park their vehicles while on cruises. The I.D. fails to~~ consider the issue at hand, the parking of vehicles for the duration of cruises, and the transportation of cruise passengers to and from their vehicles. Instead, the I.D. considers the

² Here, the term "schedule" refers to "a publication containing the actual rates, charges, classifications, regulations and practices of a marine terminal operator. The term 'practices' refers to those usages, customs or modes of operation which in any way affect, determine or change the rates, charges or services provided by a marine terminal operator." 46 C.F.R. 521.1(c)(17).

functions of hotels/motels on days before and after the relevant activity; a time-period irrelevant to Complainants' businesses and their use of the Cruise Terminal.

The I.D., in determining that local hotels/motels that allow cruise passengers to park in their parking lots at a cost, and transport those passengers to and from those parking lots, are not in competition with Complainants, who also allow cruise passengers to park in their parking lots at a cost, and transport those passengers to and from those parking lots, fails to consider and acknowledge the fact that those same cruise passengers would have to park their vehicles in someone's parking lot if those hotels did not offer parking and shuttling services. The mere consideration that identified hotels require the passengers to spend one night at the hotel does not remove the competition for those vehicles during the cruise. The I.D. states that "Complainants do not operate hotels and are not in competition for the market of cruise passengers who want or need to stay overnight in Galveston." (Initial Decision at 29.) This statement is only partially correct. Clearly stated, the market of cruise passengers that Complainants are in competition for are those cruise passengers who need a secure place to store their vehicles in Galveston for the duration of their cruise. This includes many of the cruise passengers who accomplish same by parking at a local hotel/motel, because they would otherwise have to pay to park somewhere else.

It is based on incomplete and erroneous considerations that the I.D. concludes that "Complainants have not proved by a preponderance of the evidence that Complainants and hotels that provide parking for their customers who are taking cruises are 'similarly situated or in a competitive relationship'." (Initial Decision at 30.)

Furthermore, in finding against Complainants being similarly situated and/or in a competitive relationship with taxicabs, limousines, and buses, the I.D. determined that

Complainants “operate parking lots that provide a place for cruise passengers to park their vehicles, then transport their customers to the cruise terminal,” while those other identified businesses do not. In contrast, here, with respect to the identified hotels, it is abundantly clear that same absolutely do “operate parking lots that provide a place for cruise passengers to park their vehicles, then transport their customers to the cruise terminal.” Based upon the reasoning provided with respect to taxicabs, limousines, and buses, the identified local hotels/motels should unquestionably be considered similarly situated and/or in competitive relationships with Complainants.

2. The Initial Decision Erroneously Finds that Complainants Are Not Similarly Situated Or In A Competitive Relationship With Other Ground Transportation Entities

Complainants take exception to the determination in the I.D. that Complainants are not similarly situated or in a competitive relationship with taxicabs, limousines, and buses that bring cruise passengers to the terminal is in error. The I.D. concludes that Complainants are neither similarly situated nor in a competitive relationship with taxicabs, limousines, or buses based on reasoning that only considers factors relating to the similarity of the compared entities’ situations. The entirety of the bases upon which the I.D. bases its conclusion is that taxicabs, limousines, and buses do not operate parking lots, and that “Complainants do not claim to be and are not common carriers under Texas law.” (Initial Decision at 31.) While Complainants take exception to the I.D.’s decision that Complainants are not similarly situated with those identified entities, Complainants also take exception to the I.D.’s conclusion that Complainants are not in a competitive relationship with those identified entities without considering the existing competition between same.

3. The Initial Decision Erroneously Finds that Complainants Have Not Proved by a Preponderance of the Evidence that the Port Unreasonably Gave Preferential Treatment to Hotels

Complainants take exception to the I.D.'s determination that, despite being "Off-Port Parking Users," hotels do not have to pay the Tariff required of Off-Port Parking Users based solely on the assertion that neither the Port nor Complainants intended the Tariff to so apply. The I.D. justifies this decision by finding that Complainants have offered no proof showing that, "when the Port amended the tariff, it intended to apply the flat rate to hotels in lieu of the per trip rate already applicable to the hotel shuttles." (Initial Decision at 34.) Complainants respectfully disagree on this point. When a marine terminal operator publishes a tariff, the terms of that tariff are enforceable as an implied contract "between the marine terminal operator and the party receiving the services..." 46 C.F.R. 525.2(a)(2). As parties receiving the services of the Port, Complainants have relied upon the terms and requirements of the Tariff published by the Port, and seek enforcement of the Tariff as written, and damages for past violations.

Complainants did not write the Tariff; the Port wrote it. Complainants did not attempt to define the range of applicability to which the Port's Tariff would apply by providing the definition of "Off-Port Parking Users." The Port defined "Off-Port Parking Users." The Port, not Complainants, decided, after engaging in whatever consideration the Port deemed sufficient, to define the various entities to which the varied layers of the Port's Tariff would apply. The terms of the Tariff are clear, definite, and unambiguous. The fact that the Port, after due consideration, included business entities similarly situated, performing a similar function, and making similar use of the Cruise Terminal, in the same Tariff bracket, is evidence of the Port's intent. The I.D. suggests that the Port's conduct displays that the Port had no intention of treating hotels as Off-Port Parking Users under the Tariff. (Initial Decision at 35.) If that is true—if the Port's conduct is the gauge by which unwritten exceptions to the published Tariff are measured—then clearly Complainants have sufficiently proven that the Port's practice of

enforcing the Tariff only against Complainants was intentional, and granted unreasonable advantage and preference to other Cruise Terminal users,³ while subjecting Complainants to unreasonable prejudice and disadvantage. Otherwise, as evidenced by the Port's repeated, longstanding, and ongoing practice of disregarding its own Tariff regulations, the fact that the Port chose not to enforce the Tariff against local hotels carries no weight in determination of the Port's intention when drafting the definition of "Off-Port Parking Users" in the Port's own Tariff.

While it is indisputable that the Port either intended to violate the Tariff, or the Port mistakenly violated the Tariff, it is of no consequence to a showing of the Port's intention to draft the Tariff as it did. Under Texas law, when a "written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."⁴ *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "A contract is not ambiguous merely because of a simple lack of clarity, or because the parties proffer conflicting interpretations of a term." *SuperSpeed, L.L.C. v. Google, Inc.*, 2 F.Supp.3d 952, 959 (S.D. Tex. 2014)(citing *DeWitt County Electric Cooperative, Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999)). "Extrinsic evidence is not admissible for the purpose of creating an ambiguity. *Id.* (citing *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 157 (1951)). No ambiguity exists in the Tariff's definition of "Off-Port Parking Users" or in the Access Fees chargeable to Off-Port Parking Users. Because the Port, not Complainants

³ The Port allowed free access to limousines in violation of the Tariff, and reduced Access Fee rates to all other port users (with the exception of Complainants) from 2007 through 2013. *See* Resp. Brief at 21, fn.5, and 23, fn.6.

⁴ 46 C.F.R. 525.2(a)(2) provides that "Any schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule." The term "schedule" refers to "a publication containing the actual rates, charges, classifications, regulations and practices of a marine terminal operator. The term 'practices' refers to those usages, customs or modes of operation which in any way affect, determine or change the rates, charges or services provided by a marine terminal operator." 46 C.F.R. 521.1(c)(17).

drafted the Tariff and the definitions included therein, it is presumed that the Port did so with knowing intention.

Complainants take further exception to the I.D.'s conclusion that the Tariff "does not provide a mechanism to determine the number of billable parking spaces" for hotels, and the I.D.'s statement that it would be "virtually impossible" to develop such a mechanism. (Initial Decision at 33.) Complainants also take exception to the fact that, in reaching its conclusion that Complainants did not prove by a preponderance of the evidence that Respondents acted unreasonably in their assessment of Access Fees upon hotels, the I.D. considered only whether it was unreasonable to charge Complainants in a manner different than the hotels were charged. This assessment fails to consider Complainants allegations of unreasonableness in the selective enforcement of the Tariff in favor of hotels under either method of assessing Access Fees therein. Specifically, Complainants allege that the Port's selective enforcement of the Tariff includes, among others, (1) failing to charge hotels as "Off-Port Parking Users" pursuant to the Tariff, (2) charging hotels Access Fees of only \$10 per vehicle access without regard to the size of vehicle accessing the Cruise Terminal, (3) charging other Cruise Terminal users Access Fees of only \$10 per vehicle access without regard to the size of vehicle accessing the Cruise Terminal, (4) failing to collect Access Fees from limousines as required by the Tariff, and (5) excluding limousines of certain capacities from being charged an Access Fee under the Tariff.

4. The Initial Decision Erroneously Finds that Complainants Have Not Proved by a Preponderance of the Evidence that the Port Unreasonably Gave Preferential Treatment to Taxicabs, Limousines, and Buses

Complainants again take exception to the I.D.'s failure to address the Port's selective enforcement of the Tariff, whereby Complainants were burdened with full assessments of Access Fees while other Cruise Terminal users were allowed to pay substantially reduced, minimal rates,

if they were charged at all.⁵ Instead, the I.D. addresses only whether it was unreasonable for the Port to charge Complainants per-space per-month while charging common carriers per access to the Cruise Terminal. Further, Complainants take exception to the I.D.’s conclusion that such disparate treatment, advantageous to other Cruise Terminal users and disadvantageous to Complainants, both under the Tariff and in violation of same, was reasonable.

Additionally, Complainants take exception to the I.D.’s adoption of Respondents’ reasoning as to why taxicabs are granted access to the Cruise Terminal without being assessed an Access Fee. While Complainants disagree with Respondents’ purported reliance upon taxicabs, Complainants take particular exception to the I.D.’s assertion that “[l]imousine operations are substantially the same as taxicab operations.” (Initial Decision at 36.) Two faults are immediately apparent with this statement. First, this statement fails to address the Port’s selective enforcement of the Tariff as written; instead, implying that the Port actually intended all limousines to be granted access without bearing the burden of paying Access Fees.⁶ In fact, the Tariff required limousines to pay Access Fees depending on their capacity. *See* Comp. App. 021 at 000444, 023 at 000460, 024 at 000466, and 041 at 000756. Second, the statement is made without bases. In fact, Respondents themselves admit and argue that limousines provide a significantly different service than do taxicabs.⁷ Therefore, limousines do not evoke the same transportation factor that Respondents argued, and the I.D. adopted, apply to taxicabs.

⁵ In Respondents’ Brief, Respondents admit their “failure to collect the higher amounts charged for larger buses and shuttle vans required by the amended Tariff.” Resp. Brief at 21, fn.5. Respondents further admit that, through their failure, they “charged all such vehicles a \$10 access fee per trip regardless of size – in violation of the Tariff. As a result, some commercial users paying access fees on a per-trip basis were charged less than they should have been charged.” *Id.* Respondents continue, admitting that “limousines were not being charged,” but that Respondents are now “resolved to enforce access rates on limousines.” Resp. Brief at 23, fn.6.

⁶ Respondents admit that they violated the Tariff by failing to charge limousines as they intended – pursuant to the Tariff. Resp. Brief at 21, fn.5.

⁷ *See* Respondents’ Response Brief at 16, fn. 2 (“The reasons taxicabs are not charged Access Fees are discussed more fully below. Generally, their charges are exclusively regulated by the City of Galveston.”); at 29 (“Limousines

D. THE INITIAL DECISION ERRONEOUSLY APPLIES THE COBLE ACT TO THIS MATTER

1. Unequal Application of the Law

The I.D. reasons that application of the Coble Act is not retroactive, but prospective, because it makes attorneys fees available to Respondents from the date of enactment (December 18, 2014) forward. (Initial Decision at 54 (adopting *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*; *IFS International Forwarding, S.L.*; and *IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Apr. 15, 2015)(Initial Decision Dismissing Proceeding for Failure to Prosecute), Notice Not to Review, May 18, 2015, at 21).) This method of applying the Coble Act does not work with equal justice should Complainants prevail.

If Complainants are successful in proving reparations due for Respondents' violations of the Shipping Act, and the Coble Act is applied as suggested by the I.D.—from December 18, 2014 forward—then Complainants cause of action and recovery will be governed by two distinct versions of the law. Having already carried the burden of the law as it existed when the Complaint was filed and through the gauntlet of Respondents' motion for dismissal, including the application of resources and directing strategy to both pleading and proving reparations, for attorneys fees accrued prior to December 18, 2014, Complainants would thereby be guaranteed recovery of their attorneys fees from Respondents pursuant to the law in effect at the time Respondents violated the Shipping Act, and at the time Complainants filed their causes of action. Then, after December 18, 2014, Complainants would lose their statutory right to recovery of attorney fees, which would then be discretionary in the ALJ's newly-granted equitable authority. Complainants take exception to their cause of action being governed by two contrary laws. The application of the Coble Act as suggested by the I.D. can work if either (a) Respondents prevail,

and coach buses are typically from out of town.”); and at 30 (“Limousines and coach buses access the Cruise Terminal sporadically – from a few time a year to a two times a month.”).

or (b) Complainants prove Respondents' violations of the Shipping Act without proving reparations (whereby, under the I.D.'s application of the Coble Act, Complainants may recover attorney fees that accrued after December 18, 2014 without the need to prove reparations). However, the I.D.'s reasoning fails should Complainants prove reparations due.

If adopted, the effect of the I.D. would be to propagate a double-standard. Simply put, it is unfair to require Complainants to both plead and prove reparations in order to recover their attorney fees, while not requiring the same of Respondents.

2. Law-of-the-Case Was Established

The law-of-the-case, by which Complainants causes of action have been governed, was established to include 46 U.S.C. § 41305 in its pre-Coble Act formulation. "As most commonly defined, the doctrine [of law-of-the-case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). In the case at hand, on November 21, 2014, in response to Respondents' Motion to Dismiss, the ALJ issued an Order on Pending Motions and Partial Dismissal in this matter. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Nov. 21, 2014) (Order on Pending Motions and Partial Dismissal), Notice Not to Review, Dec. 23, 2014.

Therein, the ALJ decided against Respondents' motion to dismiss Complainants' section 41106(2) claims on grounds that:

The Complaint alleges injury and seeks a reparation award for payments under the 2006 tariff. Therefore, the Complaint states a claim of violation of section 41106(2).

Id. at pg. 17 (internal citations omitted). Had Complainants not properly alleged injury and sought reparations in their Complaint in accordance with the law in force at that time, Complainants' 41106(2) cause of action would have, as happened to other claims made by

Complainants in their Complaint, been summarily dismissed.⁸ Accordingly, Complainants claims for violations of section 41106(2) were subject to dismissal and decided upon based on the law as it existed before the effective date of the Coble Act. To now apply a new rule of law to Complainants' claims would be in violation of the principle of the law-of-the-case.

At the time Complainants filed this action with the FMC, in order to recover attorney fees incurred in litigating against a marine terminal operator for violations of section 41106(2) of the Shipping Act, a complainant was required to plead and prove "actual injury" and to seek recovery of, and be awarded, reparations. 46 U.S.C. § 41305. In doing so, the complainant was protected from liability for the respondent's attorneys' fees. *See id.* Therefore, without an award of reparations, even if Complainants were identified as prevailing parties, they were precluded from recovering their attorneys' fees and expenses incurred in pursuing and prevailing in their action.

The law in force at the time Complainants filed this action controlled Complainants recovery, which provided in pertinent part:

- (a) DEFINITION.—In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
- (b) BASIC AMOUNT.—If the complaint was filed within the period specified in section 41301(a) of this title, the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

By its adoption of the reasoning in *Edaf Antillas*, the I.D. holds that "[i]t does not upset the reasonable expectations of the parties to award attorney fees to a prevailing respondent." (Initial Decision at 54 (adopting reasoning in *Edaf Antillas*, FMC No. 14-04 (ALJ Apr. 15,

⁸ See *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Nov. 21, 2014) (Order on Pending Motions and Partial Dismissal), Notice Not to Review, Dec. 23, 2014 (ALJ dismissed Complainants' claims of violations of sections 41102(c) and 41104(3) of the Shipping Act.).

2015), at 21). In forming that conclusion, the initial decision in *Edaf Antillas* relied on the Supreme Court’s reasoning in *Martin v. Hadix*, wherein the Court considered application the Prison Litigation Reform Act of 1995 (“PLRA”), which acted to limit the fee award to attorneys performing postjudgment monitoring. *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999). In that case, the Court held that, despite the PLRA arising while appeal was pending, there was “no manifest injustice in telling an attorney performing postjudgment monitoring services that, going forward, she will earn a lower hourly rate than she had earned in the past.” *Id.* at 361-62. Accordingly, Complainants take exception to the I.D.’s attempt to compare the enactment of a statute placing a cap on the amount attorneys can charge for postjudgment monitoring to the instant case.

Complainants filed their Complaint with the FMC on June 16, 2014, seeking protection from the targeted, discriminatory, and injurious conduct of Respondents. Complainants did so upon full consideration of the laws and statutes in effect at the time they filed their Complaint. Such laws and statutes provided that a complainant would not risk having to pay the attorney fees of a disproportionately wealthy marine terminal operator in the event they were unsuccessful in enforcing their rights through the FMC. In reliance thereon, Complainants initiated this action and accrued approximately \$70,000.00 in attorney fees by December 18, 2014, the date the Coble Act was enacted. The reasoning in the I.D. suggests that at that point—after expending significant resources—there would be no injustice in changing the law-of-the-case and requiring Complainants to choose between either (1) forfeiting both the substantial sum of money they invested in the matter and the opportunity for compensation for the damages they suffered as a result of Respondents violations of the Shipping Act; or, on the other hand, (2) risking the unexpected possibility that the FMC would burden Complainants with the

requirement to conform to two versions of the same law, and cause them to pay a substantial portion of the nearly \$500,000.00 that Respondents claim to have incurred in attorneys fees defending their conduct. Complainants respectfully take exception to such reasoning and conclusions.

3. Application of the Coble Act Has Retroactive Effects

Application of the Coble Act to this matter, even in the manner outlined in the I.D., will produce unavoidable retroactive effects. Unless Congress has expressly provided otherwise, courts apply newly enacted statutes with a presumption against retroactivity. *Landgraf v. USI Film Products*, 511 U.S. 244, 263, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006)(“Accordingly, it has become ‘a rule of general application’ that ‘a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.”)(quoting *United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3, 46 S.Ct. 182, 70 L.Ed. 435 (1926)). The I.D., through reference to and adoption of the reasoning applied in the initial decision of *Edaf Antillas*, determined that Congress made no express provision calling for retroactive application of the Coble Act. (Initial Decision at 54 (adopting *Edaf Antillas*, FMC No. 14-04 (ALJ Apr. 15, 2015), at 15.))

A new law has retroactive effect if it “restricts or impairs the plaintiff’s rights of action or the potential recovery available to him under the law in effect when suit was commenced.” *Monoson v. United States*, 516 F.3d 163, 169 (3d Cir. 2008) (citing *Landgraf*, 511 U.S. at 280; *see also Singh v. George Washington Univ. Sch. of Med. and Health Sciences*, 667 F.3d 1, 4 (D.C. Cir. 2011) (“Damages constitute retrospective relief and thus raise retroactivity concerns.”). In *Monoson*, the Third Circuit addressed the issue of a new statute’s interference

with an expectation in recovery held by a party. In that case, the statute at issue placed a new cap on a plaintiff's recovery of noneconomic damages. The court, with due consideration given to the Supreme Court's decision in *Landgraf*, ruled application of the statute to a pending matter to be impermissibly retroactive. See *Monoson*, 516 F.3d at 168, fn.2 ("We are cognizant of *Landgraf*'s observation that '[w]hen [an] intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.' We reject, however, any attempt by [appellant] to align [appellee's] expectancy in an award of damages in his civil action with prospective relief. The prospective relief the *Landgraf* Court considered was equitable relief that 'operate[d] *in futuro*.").

When Complainants commenced this action in June of 2014, the recovery available to Complainants upon successfully proving Respondents' violations of the Shipping Act and Complainants actual injury, was a statutorily mandated recovery of reparations and their attorneys fees—not equitable relief. See 46 U.S.C. § 41305. Upon passing of the Coble Act, which removed Complainants' guaranteed recovery of attorneys fees, the potential recovery available to Complainants was significantly impaired. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)(Holding as impermissibly retroactive, the application of a statute enacted between pleading and sentencing which replaced a discretionary action with a mandatory action.). The Coble Act did not merely make the recovery of attorneys fees available to respondents in matters before the Commission. Rather, the Coble Act effected substantive change to a complainant's cause of action for violations of the Shipping Act and granted equitable authority to the Commission where none existed before.

On this issue, the I.D. relies solely on the reasons expressed in the initial decision of *Edaf Antillas* for its decision to apply the Coble Act to this matter. (Initial Decision at 54.) In the

ALJ's decision in *Edaf Antillas*, the ALJ considered application of the Coble Act to a matter in a similar stage of FMC proceedings as the one at hand. *Edaf Antillas*, FMC No. 14-04 (ALJ Apr. 15, 2015). Therein, the ALJ concluded that reasonable attorney fees accruing subsequent to the enactment of the Coble Act were awardable to respondents because doing so "does not upset the reasonable expectations of the parties." *Id.* at 21. However, in resolving to apply the Coble Act in that manner, only the effects of the addition of section 41305(e)⁹ to the statute were considered; no consideration was given to the effects of the removal of language from section 41305(b).¹⁰ What was removed from section 41305(b) was not an issue collateral to the cause of action, nor was it an equitable remedy. What was removed was both an affirmative right of recovery and an assurance against liability for a respondent's attorney fees.

For reasons outlined above, Complainants contend that the removal of a substantive portion of section 41305(b), a portion inextricably intertwined with Complainants cause of action, raises significant issues of retroactivity and bars application of the Coble Act to this matter. Accordingly, where application of the Coble Act to this matter would give rise to retroactive effects, the long-standing presumption against retroactivity should preclude such application.

CONCLUSION

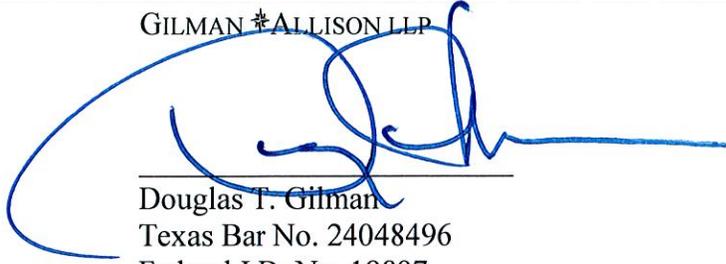
For the foregoing reasons, Complainants submit that the I.D. should be reversed, and the Coble Act found impermissibly retroactive for application to this matter.

⁹ 46 U.S.C. § 41305(e) provides: "Attorney Fees. – In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees."

¹⁰ Complainants acknowledge that on page five (5) of that initial decision, it identifies that the amendment has two effects, one being the availability of attorneys fees to a prevailing respondent, and the second being the shift from a mandatory award of attorneys fees to a discretionary award. *Edaf Antillas, Inc.*, FMC No. 14-04 (ALJ Apr. 15, 2015) at 9. However, the analysis in that initial decision considers only section 43105(e) and the implications of asserting the new equitable power granted to the Commission.

Respectfully submitted,

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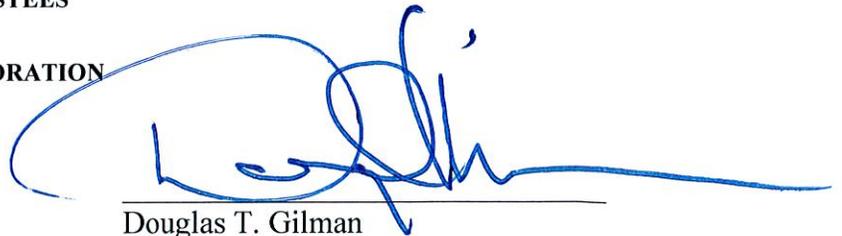
CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document on this **11th day of January, 2015**, and that a true and correct copy of the foregoing was served on all counsel of record *via* certified mail – return receipt requested and email, as indicated below:

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