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FEDERAL MARITIME COMMISSION

BEFORE THE  
FEDERAL MARITIME COMMISSION

WESTERN HOLDING GROUP, INC.  
MARINE EXPRESS, INC., CORPORATION  
FERRIES DEL CARIBE, INC.

FMC Docket No. 08-06

Complainants

vs.

MAYAGÜEZ PORT COMMISSION,  
HOLLAND GROUP PORT INVESTMENT  
(MAYAGÜEZ), INC.

Respondents

**SECOND AMENDED VERIFIED COMPLAINT**

Western Holding Group, Inc., Marine Express, Inc. and Corporación Ferries del Caribe, Inc. (collectively "Complainants"), all related companies, and, through their undersigned attorneys, respectfully state and pray:

**I. Complainants**

1. Complainant Western Holding Group, Inc. ("Western Holding") is for-profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico, incorporated on April 16, 2004. Western Holding is the owner of the M/V CARIBBEAN EXPRESS, Panama Flag, 19292 gross tons, which, in turn, is time chartered to Marine Express, Inc. for the transportation of passengers and goods in the foreign trade between the Dominican Republic and Puerto Rico. Because of its Mediterranean mooring system (i.e. stern to pier, forward anchors aweigh and stern ramp down for passenger and cargo operations) no other port in Puerto Rico was able to accommodate the M/V CARIBBEAN EXPRESS without taking exceptional measures

and at great costs and expenses. Because of the unreasonable and unjust practices against the operations of the M/V CARIBBEAN EXPRESS, including the threat of denying docking at the Port of Mayagüez, the operations were moved to the Port of San Juan upon taking exception of measures and at great costs and expenses after April 30, 2009. Western Holding's address is PO Box 6448, Mayagüez, Puerto Rico 00681.

2. Complainant Marine Express, Inc. ("Marine Express") is a for-profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico, incorporated on October 6, 1992. Marine Express, with an FMC No. 011247, is legally operating as a Vessel Operating Common Carrier (VOCC). Its primary business is the common transportation by sea of cargo for compensation between the Dominican Republic and Puerto Rico. Since its inception and until April 30, 2009, Marine Express operated in the facilities of the Port of Mayagüez. Because of the unreasonable and unjust practices against the operations of the M/V CARIBBEAN EXPRESS, including the threat of denying docking at the Port of Mayagüez, the operations were moved to the Port of San Juan after April 30, 2009. Marine Express's address is PO Box 6448, Mayagüez, Puerto Rico 00681.

3. Complainant Corporación Ferries del Caribe, Inc. ("Ferries del Caribe") is a for-profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico, incorporated on July 30, 1997. Its primary business is the sea transportation of passengers and motor vehicles for compensation between the Dominican Republic and Puerto Rico. Ferries del Caribe entered into an ocean freight and service agreement with sister company Marine Express for the transportation of passengers and motor vehicles on board the M/V CARIBBEAN EXPRESS. Ferries del Caribe has continuously

submitted its Passenger Financial Responsibility Bond with the Federal Maritime Commission. Since its inception and until April 30, 2009, Ferries del Caribe has operated in the facilities of the Port of Mayagüez. Because of the unreasonable and unjust practices against the operations of the M/V CARIBBEAN EXPRESS, including the threat of denying docking at the Port of Mayagüez, the operations were moved to the Port of San Juan after April 30, 2009. Ferries del Caribe's address is P.O. Box 6448, Mayagüez, Puerto Rico 00681.

## II. Respondents

4. The Mayagüez Port Commission ("Port Commission") is a public corporation of the Municipality of Mayagüez, with the capacity to enter into contracts and to sue and be sued, organized and existing in accordance with Law No. 10 of May 19, 1959 of the Commonwealth of Puerto Rico (Act 10). (As an arm of the Municipality of Mayagüez, the sovereign immunity protection under the Eleventh Amendment of the U.S. Constitution does not apply to the Port Commission.) The Mayor of the Municipality of Mayagüez has the power to designate and remove the five commissioners. 23 L.P.R.A. §553. The Mayagüez Port Commission commenced functions in 2004 and is responsible "to develop, approve, manage, own, operate and administer all port businesses" of the Port of Mayagüez, including its marine terminal facilities. 23 L.P.R.A. §555. In furtherance of Act 10, on March 13, 2008, the Mayagüez Port Commission published the *Handbook and Tariff No. 01: Rules, Regulations, Tariffs* (Effective Date 2008-2011) ("Tariff No. 01") for the Port of Mayagüez, which became effective two days later, on March 15, 2008. The Port Commission is a marine terminal operator that controls and/or furnishes wharfage, dock, warehouse and other marine

terminal facilities and services at the Port of Mayagüez, in connection with common carriers engaged in U.S. coastwise and foreign commerce. The address of the Mayagüez Port Commission is #80 PR-3341, Suite 102, Mayagüez, P.R. 00682-5769.

5. Holland Group Port Investment (Mayagüez), Inc. ("Holland Group") is a for-profit corporation organized and existing under the laws of the Commonwealth of Puerto Rico, incorporated on April 6, 2006. The purpose of its incorporation was to enter into a long-term lease and development agreement of the Port of Mayagüez with the Mayagüez Port Commission. Under the Lease and Development Agreement executed on May 11, 2007 with the Mayagüez Port Commission, Holland Group administers and operates the Mayagüez Port Facilities for a term of 30 years, with an additional 30-year option. Section 17.2 of the Lease and Development Agreement states that both parties, Port Commission and Holland Group, must comply with Local and Federal law. Holland Group is a marine terminal operator that controls and/or furnishes wharfage, dock, warehouse and other marine terminal facilities and services at the Port of Mayagüez, in connection with common carriers engaged in U.S. coastwise and foreign commerce. The address of Holland Group #80, Road 3341, Suite 102, Mayagüez, Puerto Rico 00682.

### **III. Jurisdiction**

6. This action is brought pursuant to the Shipping Act of 1984, as amended, 46 U.S.C. § 40101 *et seq.* Complainants Ferries del Caribe and Marine Express are common carriers within the meaning of Section 40102 (6); Complainant Western Holding is the owner of the vessel in the common carriage of cargo and passengers. This Honorable Commission has jurisdiction over this Complaint because the Port Commission and Holland Group are marine terminal operators within the meaning of the

Shipping Act, 46 U.S.C. § 40102(14) and the actions of the Respondents which are the subject of this Complaint are violations of the Shipping Act. The Complainants respectfully request from the Federal Maritime Commission (“FMC”) reparations for injuries caused by the Mayagüez Port Commission’s and the Holland Group’s violations of Sections 41102(c) and 41106 (1), (2) and (3) of the Shipping Act of 1984, for their unreasonable tariffs, unjust practices, undue prejudice and their unreasonable refusal to negotiate with respect to the Complainants. Complainants also seek from the Commission to order the Mayagüez Port Commission and the Holland Group to cease and desist from future violations of the Shipping Act of 1984.

Respondents rates, tariffs and practices are irrational, discriminatory, confiscatory, and are not rationally related to the services and/or benefits provided thus violate the U.S. Constitution, including the Tonnage Clause, Import-Export Clause, the Fifth and Fourteenth Amendment; and the Mayagüez Port Commission’s enabling law.

#### **IV. Factual Background**

##### **a. Complainants’ operation in the Port of Mayagüez.**

7. Complainant Marine Express began operating at the terminal facilities of the Port of Mayagüez in 1993, subject to the rules and tariffs of the non-party Puerto Rico Ports Authority (“PRPA”), which was then the owner and operator of the Port of Mayagüez.

8. Complainant Ferries del Caribe began operating at the terminal facilities of the Port of Mayagüez in 1998.

9. Until September of 2008, Marine Express and Ferries del Caribe had occupied 3.55 cuerdas out of the 19 cuerdas of the Mayagüez Terminal, or approximately 18.6% of the available terminal area.

10. In 2003, Western Holding chartered the M/V CARIBBEAN EXPRESS from previous owners. The vessel made the transatlantic crossing under her own power and navigation from the Mediterranean Sea to the Port of Mayagüez.

11. Complainant Western Holding purchased the M/V CARIBBEAN EXPRESS for \$12,800,000.00 in 2004 for the sole purpose of chartering the vessel to its sister company Marine Express to service the foreign trade between the Dominican Republic and Puerto Rico from the Port of Mayagüez. Marine Express, in turn, has an ocean freight and service agreement with sister company Ferries del Caribe for the transportation of passengers and motor vehicles. The FMC lists Complainants, Marine Express, as a "Vessel Operating Common Carrier." Marine Express' Vessel Operating Common Carriers organization number is 011247 (FMC) and Complainants published their tariffs electronically ([www.etmrates.com](http://www.etmrates.com)), issue passenger tickets and bills of lading as required by the Federal Shipping Act.

12. The M/V CARIBBEAN EXPRESS offers 365 passenger cabins, a sit-down style restaurant with seating for 100, a buffet restaurant with seating for 175, a coffee shop, four night club/bars with seating ranging from 60 to 350 people, a Beauty Salon & Massage Spa providing a full range of hair care & styling services, a Casino with table games and 35 slots machines, a duty free shop and jewelry shop, a cinema, a fully equipped Gym room, a Kid's Club with a big ball pool, and a fully equipped and staffed infirmary and helicopter evacuation area. The M/V CARIBBEAN EXPRESS has a

capacity of 1067 passengers, 165 crewmembers, forty 45' containers, and 50 motor vehicles (including cars and trucks). M/V CARIBBEAN EXPRESS complies with all international regulations and treaties applicable to ocean going vessels in commercial trade, including SOLAS, MARPOL, ISM, and ISPS. The vessel is a fully classed vessel that has all the trading certificates, including the International Load-Line certificate.

13. Complainants transport in the foreign trade between the Dominican Republic and Puerto Rico up to 169,000 passengers, 18,800 motor vehicles and 13,500 (22,500 20' trailer equivalent unit) containers a year on an average of three voyages per week, which, prior to April 30, 2009, amounted to over 160 entries to the Port of Mayagüez each year and over 2,560 entries during Complainant Marine Express's 16 years of operation. On its overnight voyage, the M/V CARIBBEAN EXPRESS travels in excess of 160 nautical miles between Puerto Rico and the Dominican Republic.

14. For several years prior to and since 1993, no other common carrier, private carrier or intermediary has operated on a regular basis at the Mayagüez Port Terminal facilities. However, since the Port Commission took over control of the Port of Mayagüez in August 2004 less than 10 cruise ships have used the Port as a stop and have been furnished marine terminal facilities and services by Respondents as the Port's marine terminal operators.

**b. The Mayagüez Port Commission's unreasonable cancellation of the Terminal Lease Agreement and refusal to negotiate.**

15. On January 28, 2003, PRPA entered into a five-year terminal lease agreement with Complainant Marine Express for the terminal facilities of the Port of Mayagüez ("the Mayagüez Terminal Lease Agreement"), in accordance with PRPA's Tariffs M-1-6 (Rates, Fees and Charges for the Use of Public Marine Facilities and Port

Services) with a right of renewal. The monthly rental payment was \$8,611.91, including \$618.70 for utilities. Under the lease the Complainants occupied a total of 3.55 cuerdas or approximately 129,000 square feet of the Port of Mayagüez. As per PRPA's Tariffs M-1-6, this rental payment is subject to a yearly increase of 2%.

16. The Mayagüez Terminal Lease Agreement provided the Complainants the use of exclusive and preferential areas for cargo operations, as well as for warehousing, office and open spaces for passengers and cargo operations. Marine Express and Ferries del Caribe essentially work out of the same facilities. The office area also provides space for U.S. Immigration and Customs Officials.

17. On July 23, 2004, PRPA, through Covenant AP 04-5(4)-33 ("Covenant for the Transfer of the Port of Mayagüez") and with the approval of the Commonwealth of Puerto Rico and the Municipality of Mayagüez, transferred the properties, facilities, rights and obligations of the Port of Mayagüez to Respondent Port Commission, with the exception of the navigational rights.

18. The Covenant for the Transfer of the Port of Mayagüez required the Port Commission to honor the terms and conditions of any existing agreement entered into by the Port Authority, which included the Complainants' Mayagüez Terminal Lease Agreement. It also required the application of PRPA's rates and tariffs until the Port Commission published its own rates and tariffs.

19. On August 18, 2004, the Respondent Port Commission notified the Claimants that pursuant to the Covenant of the Transfer of the Port of Mayagüez the rental under the Mayagüez Terminal Lease Agreement were now payable to the Port Commission. The Port Commission also gave notice that it would soon analyze and

evaluate the Mayagüez Terminal Lease Agreement and communicate its determination to Claimants.

20. On September 2, 2004, Claimants Marine Express and Ferries del Caribe replied to the Port Commission providing information concerning the leased premises and rent payment.

21. Almost 18 months after the fact, on January 12, 2006, in violation of the Covenant for the Transfer of the Port of Mayagüez, without due process of law or foundation on fact and acting under color of law, the Port Commission arbitrarily and without reason notified the cancellation of the Mayagüez Terminal Lease Agreement.

22. Regardless of Complainants Marine Express' and Ferries del Caribe's timely objections in January through March 2006, the Port Commission confirmed on March 6, 2006 its unreasonable decision to cancel the Mayagüez Terminal Lease Agreement. The cancellation came two years prior to the Port Commission's enactment of Tariff No. 1, in direct breach of the Covenant for the Transfer of the Port of Mayagüez.

23. The Port Commission unreasonably refused to negotiate and unilaterally determined to allow the Complainants to continue operations at the Mayagüez Port Terminal only on a month-to-month basis, with a 5-day cancellation clause, which caused great uncertainty to the Complainants' business.

**c. The Port Commission and Holland Group refused to negotiate a lease agreement with the Complainants.**

24. By letter dated January 29, 2007, Complainants complained to the Port Commission that their requests to negotiate a lease agreement had gone unanswered. They also requested the Port Commission to name a representative to begin negotiations.

25. On March 22, 2007, Complainants again notified the Port Commission of their proposed requirements and conditions for a new lease agreement.

26. On April 13, 2007, the Port Commission sent to the Complainants a draft of a proposed terminal lease agreement, reducing the lease area from 128,886.87 square feet to 3,000 square feet. This is a reduction in operational area of more than 97%, even though the rest of the Port facilities remained unoccupied. This amounted to a constructive refusal to negotiate and unjustifiably forcing the Complainants to vacate the premises.

27. By letter dated April 23, 2007, Complainants notified to the Mayor of Mayagüez their objections to the Port Commission's proposed lease agreement in that it reduced the operational area to be leased to Complainants by approximately 90%; it increased the water charge by 45%; and it was only for five years. The Complainants also objected to the unconscionable condition that if the Port Commission's terms and conditions were not unilaterally accepted the Complainants would have to leave the premises in 15 days. If not, a daily penalty of \$1,000.00 would be imposed.

28. On May 1, 2007, the Complainants again voiced their objections and concerns to the Port Commission.

29. On May 25, 2007, Holland Group notified Complainants of the signing of the contract with the Port Commission for the administration, operation and development of the Mayagüez Port. Holland Group also requested information from Complainants regarding their operational needs.

30. Complainants submitted the required information to Holland Group on May 30, 2007.

31. Subsequently, on June 8, 2007 the Port Commission admonished the Complainants that during the transition period of 90 days from the date of the signing of the Lease and Development Agreement between the Port Commission and Holland Group (which was on May 11, 2007), the Port Commission would not entertain negotiations regarding the lease agreement with Complainants. It further instructed Complainants that any future negotiations would have to be conducted with Holland Group upon taking over in August 2007.

32. During the August 9, 2007 change of command ceremony between the Port Commission and Holland Group, Holland Group requested from Complainants a short-term and long-term plan for terminal space requirement.

33. The next day, on August 10, 2007, the Complainants submitted to Holland Group and the Port Commission the proposed short-term and long-term terminal space plan.

34. Subsequently, Complainants made several efforts to negotiate a terminal lease agreement with Holland Group and the Port Commission to no avail. In fact, Complainants written communications went unanswered.

35. On January 28, 2008, the 5-year term of the Terminal Lease Agreement with PRPA expired. Because the Port Commission and Holland Group refused to negotiate a lease agreement, Complainants had no other option but to continue to pay rent on monthly basis as per the PRPA Lease Agreement, which, in turn, was based on PRPA's tariffs for the Port of San Juan.

36. After 14 years of successfully negotiating with the Respondents' predecessors, PRPA, Complainants were not even able to get negotiations started with the

Port Commission or Holland Group. Respondents' refusal to negotiate a valid lease agreement, with their only tenant, is unreasonable because it does not rationally relate to the Port's intended purpose. Furthermore, there is no valid transportation purpose for the forgoing undue and unreasonable prejudices against Complainants or the Respondents' refusal to deal with Complainant. Even if there is a valid transportation purpose, the discriminatory actions of Respondents exceed what is necessary to achieve the purpose.

**d. The Port Commission and Holland Group failed to establish, observe, and enforce just and reasonable regulations and practices.**

37. On March 13, 2008, Respondent Holland Group notified the Complainants that Respondent Mayagüez Port Commission published the *Handbook and Tariff No. 01: Rules, Regulations, Tariffs* (Effective Date 2008-2001) ("Tariff No. 01") for the Port of Mayagüez, which became effective two days later, on March 15, 2008. In April 2008, Complainants objected to the tariffs as vague, unreasonable and discriminatory. The objections went unanswered.

**i. Rule 8.3 and Rate 16.7.5**

38. Tariff No. 01, Rule 8.3 (Penalty) and Rate 16.7.5 (Docking Penalty) are unreasonable, unjust and vague. Rule 8.3 provides:

**8.3 Penalties**

Any Vessel that stays at the Port beyond the requested time frame without submitting a schedule change on a timely manner nor receiving the approval from the Port Administrator for a Docking Permit or a request for dockage time extension will be charged by the Port Administrator with a penalty of \$5,000 per each hour or fraction of hour overdue. Vessels with an overdue schedule which provoke other Vessels' business interruption will also be responsible for the compensation of any costs incurred, loss or damages claimed to the Port

Administrator and/or the Mayagüez Port Commission by any vessel because its departure or entrance is delayed by the overdue schedule vessel.

39. First, based on information and belief and the experience of operating in several Ports in the Caribbean, there is no similar penalty in any other jurisdiction. In fact, PRPA's Tariff M-1-6, Rule 6.4 provides for twice the dockage charges per day or fraction when a vessel uses a facility without authorization. Applying PRPA's Rule 6.4 to the M/V CARIBBEAN EXPRESS, the daily penalty would be \$2,851.34 (instead of paying the straight docking charge of \$1,425.67). In contrast, the penalty under the Port Commission's Rule 8.3 would be \$120,000.00 per day. Clearly, Rule 8.3 is unjust and unreasonable and is not rationally related to any marine terminal services or benefits.

40. Moreover, Tariff 8.3 is vague as it does not define what is "in timely manner" to submit a schedule change. It is also vague and unjust in that if the vessel does not receive approval from the Port Administrator, it will be charged \$5,000.00 per hour or fraction.

41. Rule 8.3 must also be read in connection with Rate 16.7.5, which provides:

**16.7.5 Docking Penalty**

Penalty is applicable to any unauthorized delay time which interrupts the entrance or exit to the Port to other Vessels.

\$5,000/hour and or fraction plus the reimbursement to the Vessel affected for the business interruption in the amount nor [sic] exceed to \$5,000.

42. Rate 16.7.5 appears to piggyback on Rule 8.3, meaning a penalty for delay of \$5,000 per hour will apply, plus a second penalty of \$5,000 per hour when the time

delay interrupts the entrance or exit of other vessels. Moreover, Rate 16.7.5 adjudicates a claim without due process of law in providing for the reimbursement to the Vessel affected for the business interruption in an amount not to exceed \$5,000.00. In other words, a triple penalty.

**ii. Rules 1.37 and 9.1.1.4 and Rate 16.2.9**

43. Rules 1.37 and 9.1.1.4 and Rate 16.2.9 are patently discriminatory as it targets the Complainants. They provide as follows:

**1.37 PBC**

Initials for Passenger Baggage Cargo, used to refer to the General Cargo Container units used to transport such baggage, boxes, and any type of cargo when a passenger is traveling in the same Vessel that such PBC. For the purpose of this tariff, three different measures of PBC are applicable to Wharfage:

PBC 20'  
PBC 40'  
PBC 45'

**9.1.1.4**

Whenever the Vessel carrier of passenger transports baggage either as part of the passenger ticket cost and/or based on a baggage tariff applicable to pieces either by measures and/or by weight, the Port Administrator shall assess a fixed charge per PBC type unit reported in the Vessel Manifest as per Section 16.2.9, even if the PBC's is partially or fully loaded.

**9.1.1.4.1**

The Vessel Owner or Vessel Agent shall report all inbound and outbound PBC, as part of the Vessel Manifest, including such PBC used for non-charged baggage.

**9.1.1.4.2**

The Port Administrator shall apply a credit of 20% over the total PBC tariff invoice. This credit provides the method to compensate the Vessel Owner or Vessel Agent for Section 9.2.3.

#### 16.2.9

Passenger Baggage Containers – A 20% credit is applicable over total amount

16.2.9.1 PBC 20' - \$125.00

16.2.9.2 PBC 40' - \$200.00

16.2.9.3 PBC 45' - \$225.00

44. Because of the nature of the operation, the baggage that passengers will not use during the overnight transit between Dominican Republic and Puerto Rico and vice-versa are placed inside a container for safekeeping. Upon disembarkation, the container is taken ashore and opened to deliver the baggage to the passengers. On information and belief, and based on the experience of operating the M/V CARIBBEAN EXPRESS and similar type vessels for over 14 years, no other vessel in the Port of Mayagüez or any other port in Puerto Rico operates in similar fashion. PRPA's, Tariff M-1-6 does not have similar charge. Therefore, this charge is unjust and discriminatory as it is only applies to Complainants, and is not rationally related to any marine terminal services or benefits.

#### **iii. Unwarranted 800% increase in rental charges under Rule 15.0.**

Tariff No. 01 Rule 15.0 provides, in pertinent part, that:

The precise rental rate applicable to a particular parcel of such land will depend at each facility at which land is available on assessment of land values and taking into consideration, its location in relation to the waterfront, the

service high ways, the existing utilities, and similar factors which have direct bearing on rental value.

In accordance with the Port of Mayagüez policy, rental agreements, involving land at the Port of Mayagüez Marine Terminals, will provide for the re-establishment of the rental rate by the Port Administrator [Holland Group] without limitation.

45. The Mayagüez Port Commission, however, has not published the rates that are applicable to land and terminal space rental. Therefore, the rental rates are at the whim of Holland Group, without limitation. In contrast, PRPA published such rates, as follows:

- a. Office area- \$5.00 per square feet per year;
- b. Warehouse area- \$2.50 per square feet per year;
- c. Open space/ Exclusive area- \$25,000.00 per cuerda per year; and,
- d. Space/Preferential area- \$.25 per square foot per year.

In addition, the Port of Ponce published such rates, as follows:

- a. Office area- \$3.00-15.00 per square feet per year;
- b. Warehouse area- \$2.25 per square feet per year;
- c. Land- per cuerda per year
  - Improved- \$7,800-\$10,000
  - Unimproved- \$2,000-\$7,799
- d. Space/Preferential area- \$.05 per square foot per year.

46. On September 9, 2008, Holland Group, with the privity of the Port Commission, unjustifiably and without prior notification, unilaterally increased the rent payment by over 800% plus 30% of all utility expenses of the Terminal retroactive to September 1, 2008. The monthly rent increased from \$9,118.82 based on the current PRPA's M-1-6 Tariff and rental rates for the Port of San Juan to \$66,597.73 plus 30% of

all utilities. The per cuerda charge under PRPA's rates is \$25,000.00, under Holland Group's is calculated at \$304,920. Respondents had collected, with no objections, the \$9118.82 rent payments as established by the PRPA for two and a half year after the wrongful terminal of the PRPA lease agreement and the enactment of their tariff. Holland Group did not provide any reasonable or rational basis for this unjustifiable increase.

47. Complainants notified their written objections to the unreasonable increase in rent to both the Port Commission and Holland Group on September 10 and 11, 2008 and other subsequent dates. Complainants also addressed the Holland Group's practice of not answering Complainants' communications regarding the lease agreement negotiations for over a year.

48. Respondents did not attempt to negotiate this rental increase with Complainants before its implementation. This arbitrary and unreasonable imposition of an 833% rental increase is a direct violation of Act 10, which mandates that the Port Commission hold "public hearings, to determine, fix, alter, charge, and collect reasonable rates, fees, rentals, and other charges for the use of the facilities or services of the Port Commission..." 23 L.P.R.A. §555(1). In addition, this rental increase directly violates Respondents' own tariff. Because the rental increase was of 833% a public hearing must have been held before such rate was imposed, however, no such public hearing was ever held. Second, contrary to § 15.0 of Tariff No. 1, Respondents never provided Complainants with an assessment of the value of the said property in order to impose the "precise rental rate applicable to a particular parcel of such land." *Handbook and Tariff No. 01*, § 15.0.

49. Failure to hold these public hearings before determining and charging an increase in rent is prima facie evidence that the Respondents unreasonably refused to negotiate; failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property; and imposed unreasonable prejudice and disadvantage with respect to the Complaints. Further evidence that the increase of rent is unreasonable is that the increase in rental came with absolutely no increase or change in services provided by the respondents.

**e. Holland Group threatens to close the terminal and attempts to extort \$600,000.00.**

50. On October 1 and 2, 2008, Holland Group unjustifiably threatened to close the Mayagüez Terminal and notified the Complainants that:

- a. Holland Group would no longer accept the rent payment from the Complainants;
- b. It voided and returned the check in payment of the rent for the month of October 2008;
- c. Holland Group and the Port Commission had previously rejected the PRPA Lease Agreement;
- d. Marine Express and Ferries del Caribe were immediately to vacate the office and maintenance shop spaces, both essential for passenger and cargo operations;
- e. The air conditioning system would be shut-off in the Terminal building;
- f. The U.S. Immigrations and Customs office would have to pay rent or be vacated; and
- g. All non-essential services related to cargo operations would be discontinued.

51. On October 2, 2008 the Complainants met with representatives of the Port Commission and the Holland Group. Without any evidence to support its position, Holland Group, in an attempt to extort the Complainants, requested \$600,000.00 a year to be paid in any manner.

52. The President of Holland Group stated that if the \$600,000.00 would not be paid as increased rent, then a \$3.00 fee would be imposed on each passenger embarking or disembarking the vessel. Holland Group also stated that this fee, which was only applicable to Complainants' passengers, was outside the Port of Mayagüez Tariff No. 01 and would be physically collected as a "Customs Access Fee" from a desk before allowing the passengers to continue to the U.S Customs check point. In other words, if a passenger were not to pay the "Customs Access Fee", the passenger would not be allowed to proceed to the U.S. Customs checkpoint. This amounts to an illegal restriction of the passengers' fundamental right to travel as well as an unreasonable regulation or practice in violation of 46 U.S.C. § 41102 (c) and 41106, because it is not rationally related to any marine terminal services or benefits provided.

53. Complainants on October 8, 2008 objected again to the Port Commission about Holland Group's irrational actions. It also warned the Port Commission that the Complainants were forced out of the Mayagüez Port Terminal, including the preferential area.

**f. Holland Group retaliates by imposing other unwarranted fees and charges in the amount of \$112,917.64.**

54. During the October 2, 2008 meeting, the President of Holland Group, threatened that if the \$600,000 were not paid, Respondents would start to retaliate against

the Complainants. Because Complainants refused to pay the \$600,000, without first receiving a rational explanation for the charge, and in breach of the Port of Mayagüez Tariff No. 01, respondent Holland Group notified to Complainants several invoices (Nos. 0357, 0358, 0401-403, 0405-0409, 0411, 0413-0415, 0419-0420, 0422, 0425, 0428-0430, 0434, 0437-438, 0442-0445, 0448, and 0452-0453) for the collection of container demurrage, imposition of penalty for equipment left at the pier without authorization, and interest penalty for late payment totaling \$112,917.64.

55. Because the rent was paid and collected for the month of September 2008, the containers parked in the preferential area that had been leased to the Complainants were on free time for the first six days of October 2008. Therefore, demurrage charges for this period are invalid.

56. The container demurrage invoices are also invalid because they do not provide the inventory identifying the containers allegedly found in demurrage, as is the standard in the industry.

57. Holland Group also seeks to penalize the Complainants under rate 16.6.3.1 of Tariff No. 01, which provides that:

Vessels Owners or Vessel Agents will in addition be held responsible fro [sic] violations to any of the Port of Mayagüez resolution or regulation concerning equipment left at the Pier without the corresponding authorization.

The penalty rate is \$28.56 per unit per day. Because the Port Commission has not promulgated any resolution or regulation concerning equipment left at the Pier without authorization, such penalty is not applicable. Moreover, this rate is a sub-section of rate 16.6.3 that applies specifically to cranes and specialized equipment and not to containers, platforms or any other such equipment at the pier with authorization. In other words, if

the container is in demurrage, then the demurrage rate applies and not rate 16.6.3. Finally, the 16.6.3.1 charges are unsupported in that they do not provide the inventory identifying the cranes or specialized equipment allegedly left at the Pier without authorization.

58. Holland Group also arbitrarily imposed a penalty of 9% daily interest rate on outstanding balance allegedly under Rate 16.7.1.3 (Invoices 402 and 403) for delinquent accounts (not paying Invoices Nos. 357-358 in 24 hours). First, the interest rate under rate 16.7.1.3 is "9% annual interest over delinquent balance." Furthermore, as described in paragraphs 54-57 above, the invoices for demurrage and penalty for unauthorized specialized equipment on the pier are retaliatory, contrary to the Port of Mayagüez Tariff No. 01 and invalid. Therefore, an interest penalty for the non-payment of invalid invoices is likewise invalid.

59. On October 10 and 20, 2008, the Complainants objected to Holland Group about the unreasonable practices and invoices. On October 21, 2008, the Complainants likewise notified their objections to the Port Commission regarding Holland Group's unjust actions.

60. By imposing these charges, Respondents as marine terminal operators, failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property; and unreasonably discriminate, prejudice, and place the Complainants at a disadvantage.

**g. Holland Group unjustifiably closed Area Gate #5 of the Terminal, impeding cargo operations.**

61. In retaliation, Holland Group closed the Gate #5 Area of the Terminal on October 23, 2008, impeding Complainants from conducting cargo operations. This is a

violation of Section 6.3 of the Lease and Development Agreement between the Port Commission and Holland Group, which provides for a \$35,000.00 per business day for disruption, closure or interruption of the Mayagüez Port if caused by the negligence of Holland Group. This is also a violation of the Shipping Act because it is a failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property; and, imposed unreasonable prejudice and disadvantage with respect to the Complainants.

62. Meanwhile, Holland Group continued to send invoices charging for demurrage and the penalty for leaving specialized equipment on the pier, even for October 23, 2008, when Holland Group locked out the Complainants from the Terminal.

63. According to Holland Group, because the Complainants were delinquent in payment of the invoices, Complainants did not have credit and were put on a cash pre-payment basis. These was so even though Complainants have a stellar credit record and were on the 5% incentive program for early payment until Holland Group arbitrarily terminated the incentive as to the Complainants.

64. On October 24, 2008, Holland Group restricted the removal of the containers from the Terminal on a one-by-one basis, subject to pre-payment of demurrage charges that Holland Group randomly and arbitrarily imposed upon the containers.

65. Because of the unreasonable closing of the cargo operation area by Holland Group and to avoid further interruptions to their operations and the continuous imposition of unreasonable charges, the Complainants had no other option but to remove all the containers and equipment from the Mayagüez Terminal and park them on the

public streets, parking spaces, and private parcels of land outside of the Mayagüez Port at great costs, expenses and risk.

66. Only after receiving the October and November rental invoices did the Complainants know that they had been evicted from the preferential area, which amounts to two (2) cuerdas, of the Port Terminal. The Respondents have never articulated a rational reason nor negotiated the eviction of said parcel of land.

**h. Holland Group unjustifiably required all charges be prepaid and over charges for docking.**

67. Holland Group also required the prepayment of charges related to the docking of the M/V CARIBBEAN EXPRESS in the amount of \$6,000.00, an overcharge of over \$400.00 per docking operation. If not paid as requested, Holland Group threatened to deny docking to the M/V CARIBBEAN EXPRESS.

68. Because no other port in Puerto Rico can accommodate the M/V CARIBBEAN EXPRESS with its Mediterranean mooring system without taking exceptional measures and at great costs and expenses, the Complainants formally notified the U.S. Coast Guard, San Juan Sector and U.S. Customs of the threats of denial of dockage at the Port of Mayagüez.

69. In their attempts to get solutions to the heavy-handed and egregious treatment, on October 28, 2008, the Complainants submitted a formal complaint with the Mayagüez Port Commission regarding Holland Group's egregious breach of the Mayagüez Port Tariff No. 01, requesting:

- a. The imposition of \$25,000.00 penalty per occurrence as provided for Section 3.8 of the Lease and Development Agreement between the Mayagüez Port Commission and Holland Group;
- b. That all unreasonable charges be declared null and void;

- c. That the practice of requesting prepayment for services be declared null and void; and,
- d. The imposition of any other penalty or condition that the Port Commission may deem proper.

**i. Unfit condition of Mayagüez Terminal.**

70. In violation of 46 U.S.C. § 41102(c), the Mayagüez Terminal is lacking in maintenance and repair. The container operation area lacks pavement and is full of holes. Part of the Pier apron on which the passengers and their vehicles transit on or off the Vessel is collapsing. Moreover, the seawall lacks fenders or defenses to protect the pier structure and the vessel during berthing maneuvers.

71. Because of Holland Group's inaction in correcting these obvious deficiencies, on October 31, 2008 the Complainants filed a formal complaint with the Port Commission.

**j. Retaliations after the filing of the Verified Complaint with the FMC.**

72. On November 14, 2008, the Respondents were served with the Verified Complaint served with the FMC.

73. On that same date, the Port Commission notified the Claimants that the administrative complaint filed on October 28, 2008 with the Port Commission against Holland Group for its egregious breach of the Mayagüez Port Tariff No. 01 (see paragraph 69, above) was to be addressed and filed with Holland Group, a clear conflict of interest.

74. On November 17, 2008, the Complainants notified the Port Commission that they did not accept the request to address the complaints to Holland Group and, that in view of the Port Commission's refusal to act; this was their final decision.

75. Also on November 14, 2008, Holland Group notified two letters unjustifiably increasing the docking charges to \$7,500.00 (an over-charge of over \$1,900.00 per docking) and notifying of a charge of \$1,020.00 for the cleaning of the premises. Holland Group also notified that it was crediting the over charges to the 833% increased rent for the month of October 2008 to which Complainants objected and did not accept.

76. On November 17, 2008, the Complainants objected to Holland Group's November 14, 2008 letters.

77. Holland Group began charging \$6.00 per cubic meter of fresh water served to the vessel, where the charge in the Port of San Juan for the same service is \$3.30 per cubic meter.

**k. Retaliation in crescendo: the docking permit.**

78. The long-standing procedure to authorize the Complainants to dock at the Mayagüez Terminal was to issue the docking permits on a weekly basis the week prior to voyages. In comparison, based on information and belief, the cruise ship companies provide to PRPA their schedule one year in anticipation. PRPA issues docking permits to the cruise ships visiting the Port of San Juan on monthly basis the month prior the voyages.

79. In building-up the campaign of retaliation, persecution and economical destabilization against the Complainants for filing the FMC Complaint, Holland Group, with the knowledge and privity of the Mayagüez Port Commission, began issuing docking permits on a daily basis. This action imposes an unreasonable and unjust burden on the Complainants. With three entries into the Port of Mayagüez a week, Complainants

did not know until hours before docking whether they have authorization to dock at the Mayagüez Terminal.

**I. The straw that broke the camel's back.**

80. By letter dated March 31, 2009 and docking invoices, Holland Group upped the ante by increasing the passenger charges by 600% as well as a substantial increase in vehicle movement charges, which resulted in docking charges of ranging between \$11,000.00 and \$20,000.00 per entry. This resulted in an overcharge in the range of \$5,000.00 to \$14,000.00, inclusive, per entry, which equates to yearly overcharges of millions of dollars a year. The threat against the docking of the vessel was the rule of the day.

81. On April 27, 2009, Holland Group notified by letter a docking pre-payment charge basis of \$16,000.00 plus water charges of more than \$900.00.

82. Because of the impossible conditions imposed upon the operations at the Mayagüez Terminal and the clear and present threat of not allowing the vessel to dock unless all of the illegal charges were paid, the Complainants had no other option but to urgently move the operations to the Port of San Juan at great costs and expenses and under excruciating conditions on three days' notice.

**V. Violations of the Shipping Act of 1984**

As a direct result of the Mayagüez Port Commission's and Holland Group's violations of the Shipping Act of 1984, Complainants have suffered, and will continue to suffer, substantial economic damages and injury (including the cancellation of financial facilities of over \$24,000,000.00 because the lack of a long-term lease agreement at the Mayagüez Port) which are valued at not less than \$25,000,000.00. The actions of the

Mayagüez Port Commission and the Holland Group constitute violations of the Shipping Act of 1984, including: unjust, unreasonable and unlawful practices in violation of 46 U.S.C. § 41102 (c); and, unreasonable refusals to negotiate, unreasonable discrimination and undue or unreasonable prejudice or disadvantages in violation of 46 U.S.C. § 41106 (1)-(3). Such violations by the Mayagüez Port Commission and the Holland Group include but are not limited to:

1. Unreasonably terminating the Mayagüez Terminal Lease Agreement;
2. The Port Commission and Holland Group unreasonably and unjustifiably refusing to negotiate with Complainants a long-term lease agreement;
3. The Port Commission and Holland Group acting with undue prejudice to force the Complainants to vacate the Mayagüez Port Terminal;
4. The Port Commission and Holland Group unreasonably failed to establish, observe, and enforce just and reasonable regulations and practice;
5. Tariff No. 1, Rule 8.3 and Rate 16.7.5 are unreasonable, unjust and vague;
6. Tariff No. 1, Rules 1.37 and 9.1.1.4 and Rate 16.2.9 are patently discriminatory;
7. Holland Group unreasonably and unjustifiably increasing the rental rates by 833%;
8. Holland Group unreasonably and unjustifiably attempting to extort \$600,000.00 from the Complainants;
9. Holland Group unjustifiably, unreasonably and with undue prejudice threatening to close the Mayagüez Terminal to the Complainants;
10. Holland Group unreasonably threatened to impose a \$3.00 fee on each passenger, outside the applicable tariffs, as a "Customs Access Fee" before allowing the passengers to continue to the U.S. Customs checkpoint;

11. Holland Group unjustifiably and unreasonably imposing unwarranted fees and charges in the amount of \$112,917.64;
12. Holland Group unjustifiably and unreasonably and with undue prejudice closing Area Gate #5 of the Terminal, impeding cargo operations;
13. Holland Group unjustifiably and unreasonably, and with undue prejudice evicted the Complainants from two cuerdas of the Terminal Area;
14. Holland Group unjustifiably, unreasonably and with undue prejudice requiring that all charges be prepaid and overcharging for docking, retaining over \$90,000.00 of overcharges;
15. Holland Group unjustifiably and unreasonably refusing to maintain and repair the Mayagüez Terminal Area; and,
16. The Port Commission unreasonably failing to observe reasonable practice and not ordering the Holland Group to comply with the Tariffs No. 1 and the Lease and Development Agreement.

#### **VI. Prayer For Relief**

Wherefore, Complainants respectfully request from this Honorable Commission that the Mayagüez Port Commission and the Holland Group be required to answer the charges, and that after due investigation and hearing, both Respondents and each of them be ordered to:

- i. Cease and desist from the above described violations of the Shipping Act of 1984;
- ii. Establish and put in force such practices as this Honorable Commission determines to be lawful and reasonable;
- iii. Pay to the Complainants by way of reparations for the unlawful conduct described above a sum of no less than \$25,000,000, including attorney's fees, interests and costs;
- iv. Pay any other damages that may be determined proper; and,

- v. Take any other such action or provide any other such relief as this Honorable Commission determines to be warranted under the circumstances.

**VII. Place of Hearing**

The Complainants desire the Hearing to be held in San Juan, Puerto Rico.

**VIII. Alternate Dispute Resolution**

The Commission's informal dispute resolution procedures were utilized in April 2009, with no avail.

**RESPECTFULLY SUBMITTED.**

I certify that on this same date, a copy of the foregoing Motion was served by mail and e-mail upon respondents through: Atty. Edward W. Hill Tollinche, [ehill@qslaw.net], Quiñones & Sánchez, PSC, PO Box 71405, San Juan, PR 00936-8505; Atty. Elliot J. Halperin [ehalperin@mdslaw.com], Atty. Deana E. Rose [drose@mdslaw.com], and Atty. Michael Selter [mselter@mdslaw.com], Manelli Denison & Selter PLLC, 2000 M Street NW, Suite 700, Washington, DC 20036.

In San Juan, Puerto Rico, this 20<sup>th</sup> day of May, 2009.

**JIMÉNEZ, GRAFFAM & LAUSELL**

By: 

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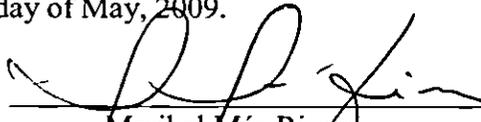
Counsel for Western Holding Group, Inc.  
Marine Express, Inc., Corporation Ferries  
Del Caribe, Inc.

### Verification of Complaint

I, Maribel Más, of legal age, married, single, executive and a resident of Mayagüez, Puerto Rico, duly state as follows:

1. That my personal circumstances and residency as set forth below are true and correct.
2. That I am Vice-President of Western Holding Group, Inc., Marine Express and Corporación Ferries del Caribe, Inc.
3. That I have reviewed the attached Second Amended Verified Complaint in the case of Western Holding Group, Inc., Marine Express, Corporación Ferries del Caribe, Inc. vs. The Mayagüez Port Commission and The Holland Group Port Investment (Mayagüez), Inc. and believe the facts stated therein to be true and correct.

In Mayagüez, Puerto Rico, this 20<sup>th</sup> day of May, 2009.

  
Maribel Más Rivera

Affidavit Number: 2704

Sworn and subscribed to and before me by Maribel Más Rivera, of the above stated personal circumstances and personally known to me. In Mayagüez, Puerto Rico, this 19<sup>th</sup> day of May, 2009.

  
Notary Public

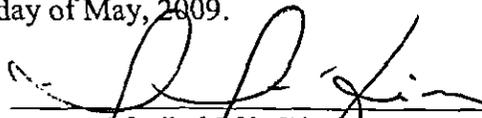


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