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**BEFORE THE
FEDERAL MARITIME COMMISSION**

SAN ANTONIO MARITIME CORP.)
AND ANTILLES CEMENT CORP.)
)
Complainants,)
)
v.)
)
PUERTO RICO PORTS AUTHORITY)
)
Respondent.)
)

DOCKET NO. NO. 04-06

**REPLY OF SAN ANTONIO MARITIME CORPORATION AND ANTILLES
CEMENT CORPORATION PURSUANT TO ORDER OF NOVEMBER 22, 2004**

Complainants San Antonio Maritime Corp. ("SAM") and Antilles Cement Corp. ("ACC") respectfully submit the following reply, as required by the Commission's order of November 22, 2004.

The briefs filed pursuant to the Commission's November 22, 2004 Order in this docket demonstrate that the issue of the Commonwealth of Puerto Rico's sovereign immunity implicates exceptionally complex and weighty legal, political and constitutional questions. Our review of the arguments presented reinforces our view that the issue of the Commonwealth's status need not, and should not, be addressed by the Commission in this docket.

Rather than re-brief the merits of the underlying issues, we would simply repeat our request that the Commission dispose of the motion to dismiss filed by the Puerto Rico Ports Authority's based on the finding that PRPA is not an arm of the Commonwealth, based on *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992), which has been cited

approvingly by the First Circuit as recently as 2003. *Fresenius Med. Care Cardiovascular Resources, Inc. v. Puerto Rico & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56 (1st Cir. 2003), cert. denied, 124 S.Ct. 296 (2003).¹

Now that the Commonwealth of Puerto Rico has appeared in this proceeding, its confirms that the broader public interest of Puerto Rico and its citizens is seriously implicated by any effort to contest the Commonwealth's sovereign immunity vis-à-vis the federal government. However, the Commonwealth identifies no similar legal or policy objections to the Commission finding that PRPA is not an arm of the Commonwealth.

Based on principles of administrative and judicial economy, we believe that the Commission should leave aside the issue of the Commonwealth's immunity under the Shipping Act. As the Commonwealth is not a party to this proceeding, we believe the issue of its status to be only a hypothetical one, outside the instant case or controversy. If, however, the Commission is determined to examine the Commonwealth's immunity from Shipping Act claims, we would urge the Commission to affirm that the Commonwealth does enjoy immunity parallel to the states, based the plain language of the Shipping Act, as detailed in our January brief. Under long-established judicial canons, the Commission should avoid unnecessarily reaching any broader constitutional issues, including those regarding the Commonwealth's status.

SAM and ACC are totally dependent on oceanborne trade to supply Puerto Rico with cement, a critically needed commodity for local construction and development. In order to continue fulfilling this essential role in the economy, SAM and ACC need a fair and level

¹ We recognize that the Commission's jurisdiction extends beyond circuit boundaries; however, as a practical matter, a Commission decision that contravened the First Circuit's holding in *Royal Caribbean* would seem bound for reversal by that court. *See United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir.1991) ("We have held, time and again, that in a multi-panel circuit, prior panel decisions are binding upon newly constituted panels in the absence of supervening authority sufficient to warrant disregard of established precedent.").

playing field, i.e., they need the Shipping Act to be enforced as fully, fairly and quickly as possible in Puerto Rico's ports. Accordingly, we would appreciate any measures the Commission sees fit to take to move this matter along quickly towards an efficient, just and expeditious resolution.

This 15th day of February 2005.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew J. Thomas". The signature is fluid and cursive, with a horizontal line drawn underneath it.

Matthew J. Thomas
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*Attorney for San Antonio Maritime Corp. and
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 2005, a copy of the foregoing Second Response to Respondent's Motion To Dismiss was served on the following persons:

BY HAND

Bryant Van Brakle, Secretary
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Washington, D.C. 20573

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