

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

**Cámara de Mercadeo, Industria y
Distribución de Alimentos,
Asociación de Industriales de Puerto
Rico,
Cámara de Comercio de Puerto Rico,
Asociación de Navieros de Puerto
Rico,
Horizon Lines of Puerto Rico, Inc.,
Crowley Puerto Rico Services, Inc.,
Trailer Bridge, Inc.,
Sea Star Lines, LLC.,
Flexitank Inc.,
Pérez y Cía de Puerto Rico, Inc.,
Luis Ayala Colón Suces.,
Harbor Bunkering Corporation,
Norton Lilly International,
Island Stevedoring, Inc.,
Puerto Rico Supplies Group,
Sucesores Pedro Cortés, Inc.,
Supermercados Plaza Loíza,
Méndez & Company, Inc.,
Colomer & Suárez, Inc.,
To-Ricos, LTD,
V. Suárez & Co., Inc.,
Coloso Foods, Inc.,
Plaza Provision Co.,
Supermercados Selectos, Inc.,
B. Fernández & Hermanos, Inc.,
Marvel Specialties, Inc.,
Pan Pepín, Inc.,
Supermercados Centro Ahorros, Corp.,
Trafón Group, Inc.,
Ponce Caribbean Distributors, Inc.,
Kraft Foods, LLC.,
Molinos de Puerto Rico, Inc.**

Plaintiffs,

v.

**Bernardo Vázquez, in his official
capacity as Interim Executive
Director of the Commonwealth of
Puerto Rico's Ports Authority,
Jesús Méndez Rodríguez, in his
official capacity as Secretary of the
Treasury of the Commonwealth of
Puerto Rico**

Defendants.

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**TEMPORARY RESTRAINING ORDER;
PRELIMINARY AND PERMANENT
INJUNCTION; DECLARATORY
JUDGMENT; CIVIL RIGHTS
VIOLATIONS**

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TO THE HONORABLE COURT:

COME NOW Plaintiffs, **Cámara de Mercadeo, Industria y Distribución de Alimentos** (hereinafter "**MIDA**"), **Asociación de Industriales de Puerto Rico**, (hereinafter "**Asociación de Industriales**," also known as "**Puerto Rico Manufacturers Association**"), **Cámara de Comercio de Puerto Rico** (hereinafter "**Cámara de Comercio**," also known as "**Puerto Rico Chamber of Commerce**"), **Asociación de Navieros de Puerto Rico** (hereinafter "**Asociación de Navieros**," also known as "**Puerto Rico Shipping Association**"), **Horizon Lines of Puerto Rico, Inc.** (hereinafter "**Horizon**"), **Crowley Puerto Rico Services, Inc.** (hereinafter "**Crowley**"), **Trailer Bridge, Inc.** (hereinafter "**Trailer Bridge**"), **Sea Star Lines, LLC** (hereinafter "**Sea Star**"), **Flexitank Inc.** (hereinafter "**Flexitank**"), **Pérez y Cía de Puerto Rico, Inc.** (hereinafter "**Pérez y Cía**"), **Luis Ayala Colón Sucres.**, (hereinafter "**Ayala Colón**"), **Harbor Bunkering Corporation** (hereinafter "**Harbor Bunkering**"), **Norton Lilly International** (hereinafter "**Norton Lilly**"), **Island Stevedoring, Inc.** (hereinafter "**Island Stevedoring**"), **Puerto Rico Supplies Group**, (hereinafter "**Puerto Rico Supplies**"), **Sucesores Pedro Cortés, Inc.**, (hereinafter "**Cortés**"), **Supermercados Plaza Loíza**, (hereinafter "**Plaza Loíza**"), **Méndez & Company, Inc.**, (hereinafter "**Méndez**"), **Colomer & Suárez, Inc.**, (hereinafter "**Colomer**"), **To-Ricos, LTD**, (hereinafter "**To-Ricos**"), **V. Suárez & Co., Inc.**, (hereinafter "**V. Suárez**"), **Coloso Foods, Inc.**, (hereinafter "**Coloso**"), **Plaza Provision Co.**, (hereinafter "**Plaza**

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Provision”), Supermercados Selectos, Inc., (hereinafter “Selectos”), B. Fernández & Hermanos, Inc., (hereinafter “B. Fernández & Hermanos”), Marvel Specialties, Inc., (hereinafter “Marvel Specialties”), Pan Pepín, Inc., (hereinafter “Pan Pepín”), Supermercados Centro Ahorros, Corp., (hereinafter “Supermercados Centro Ahorros”), Trafón Group, Inc., (hereinafter “Trafón Group”), Ponce Caribbean Distributors, Inc., (hereinafter “Ponce Caribbean”), Kraft Foods, LLC, (hereinafter “Kraft”), and Molinos de Puerto Rico, Inc., (hereinafter “Molinos de Puerto Rico”) (all together, “Plaintiffs”), through their undersigned counsel, in support hereof respectfully state and pray:

I. INTRODUCTION

This case arises out of the discriminatory, arbitrary and unlawful conduct, under color of state law, of the Executive Director (the “Executive Director”) of the Commonwealth of Puerto Rico’s Ports Authority (“PRPA”) and of the Secretary of the Treasury of the Commonwealth of Puerto Rico (the “Treasury Secretary”) which openly violates Plaintiffs’ guaranteed rights under the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution.

Plaintiffs have filed this complaint (the “Complaint”) against the Executive Director and the Treasury Secretary, in their official capacities, for their arbitrary decision to intentionally and knowingly articulate, design and implement a patently discriminatory, incoherent, disruptive and defective regulation for the mandatory inspection of all domestic and foreign cargo

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containers arriving at the Port of San Juan (the “Regulation” also known as “Regulation No. 8067”), **Exhibit 1**. The PRPA’s Regulation, which came into full effect on October 1, 2011, both in its purpose and effect blatantly discriminates against all interstate and foreign commerce arriving at the Port of San Juan. While openly exempting intrastate commerce from its reach, the PRPA’s Regulation also explicitly mandates that all inbound cargo (both containerized and uncontainerized) arriving to the Commonwealth of Puerto Rico by way of the Port of San Juan from any domestic or foreign port pay to the PRPA a so-called enhanced security fee (the “Enhanced Security Fee”) which will become effective on October 16, 2011. (See PRPA’s Board Resolution No. 2011-026 and PRPA’s Memorandum to Maritime Community dated September 30, 2011 **Exhibit 2**.)

Because the Enhanced Security Fee has the same effect as a tariff or customs duty against out-of-state commerce only, effectively neutralizing its potential advantages *vis à vis* in-state commerce, it is clearly unconstitutional as it violates Plaintiffs’ guaranteed rights under the Dormant Commerce Clause of the United States Constitution.

Moreover, Regulation No. 8067’s frustration of the exclusive law enforcement jurisdiction of U.S. Customs and Border Protection (“CBP”) with respect to the inspection of inbound foreign cargo containers and foreign bulk cargo inside domestic or foreign containers (or uncontainerized) arriving at the port facilities of San Juan is clearly preempted by federal law and, thus, indefensible under the Supremacy Clause of the United States Constitution.

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II. JURISDICTION AND VENUE

1. This Honorable Court has original federal question jurisdiction over the instant action pursuant to 28 U.S.C. §1331 (federal question), 28 U.S.C. §1343(a)(3) (civil rights), 42 U.S.C. §1983 (civil rights), U.S. Const. Art. I, §8, cl.3, and U.S. Const. Art. VI, cl.2, as this case involves a substantial federal question arising under the Constitution of the United States, and also, because Defendants, acting under color of state law, deprived Plaintiffs of their rights, privileges and immunities guaranteed by the Constitution and laws of the United States.

III. THE PARTIES

1. MIDA is a non-profit organization organized under the laws of the Commonwealth of Puerto Rico. Its offices are located at 90 Carr. 165 #501 Guaynabo, Puerto Rico 00968. MIDA enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court because MIDA together with its membership has suffered and will continue to suffer grave injury-in-fact proximately caused by the actions of Defendants under color of Regulation No. 8067.

2. Asociación de Industriales de Puerto Rico is a non-profit organization organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 195477, San Juan, Puerto Rico 00919. Asociación de Industriales enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court because together with its membership it has

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suffered and will continue to suffer grave injury-in-fact proximately caused by the actions of Defendants under color of Regulation No. 8067.

3. Cámara de Comercio de Puerto Rico is a non-profit organization organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 9024033, San Juan PR 00902. Cámara de Comercio enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court because Cámara de Comercio together with its membership has suffered and will continue to suffer grave injury-in-fact proximately caused by the actions of Defendants under color of Regulation No. 8067.

4. Asociación de Navieros de Puerto Rico is a non-profit organization organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 9022714, San Juan, Puerto Rico 00902. Asociación de Navieros enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court because the Asociación de Navieros together with its membership has suffered and will continue to suffer grave injury-in-fact proximately caused by the actions of Defendants under color of Regulation No. 8067.

5. Horizon Lines is a corporation duly organized under the laws of the State of Delaware and operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its offices are located at Metro Office Park, Metro Office 3, Suite 400, Guaynabo, Puerto Rico 00968. Horizon Lines enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual

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violation of Horizon Lines' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

6. Crowley is a corporation duly organized under the laws of the State of Delaware operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its offices are located at Isla Grande Terminal, San Juan, Puerto Rico 00907. Crowley enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Crowley's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

7. Trailer Bridge is a corporation duly organized under the laws of the State of Delaware and operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its offices are located at Metro Office Park, Lot 7, Guaynabo, Puerto Rico 00968. Trailer enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Trailer's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

8. Sea Star is a corporation duly organized under the laws of the State of Delaware and operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its offices are located at 1225 Ponce de Leon Ave., VIG Tower, Office 804, San Juan, Puerto Rico 00919. Sea Star enjoys standing, pursuant to 42 U.S.C. §1983, to bring

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the instant action before this Honorable Court. Both the threatened and actual violation of Sea Star's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

9. Flexitank is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its offices are located at Metro Office Park No.5 Calle 1 Guaynabo Puerto Rico 00968. Flexitank enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Flexitank's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

10. Pérez y Cía is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 10084, San Juan, Puerto Rico 00908. Pérez y Cía enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Pérez y Cía's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

11. Ayala Colón is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 7066, Ponce, Puerto Rico 00732. Ayala Colón enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Ayala Colón's federally protected rights has been

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proximately caused by the actions of Defendants under color of Regulation No. 8067.

12. Harbor Bunkering is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 9023111, San Juan, Puerto Rico 00902. Harbor Bunkering enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Harbor Bunkering's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

13. Norton Lilly is a corporation duly organized under the laws of the State of Alabama and operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its offices are located at One St. Louis Centre Ste 3002, Mobile, Alabama 36602. Norton Lilly enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Norton Lilly's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

14. Island Stevedoring is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 9024164, San Juan, Puerto Rico 00902. Island Stevedoring enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Island Stevedoring's federally protected

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rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

15. Puerto Rico Supplies is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 11908 San Juan, Puerto Rico 00922. Puerto Rico Supplies enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Puerto Rico Supplies' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

16. Cortés is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 363626 San Juan, Puerto Rico 00936. Cortés enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Cortés' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

17. Plaza Loíza is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 12096 San Juan, Puerto Rico 00914. Plaza Loíza enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Plaza Loíza's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

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18. Méndez is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 363348 San Juan, Puerto Rico 00936. Méndez enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Méndez's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

19. Colomer is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 11351 San Juan, Puerto Rico 00922. Colomer enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Colomer's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

20. To-Ricos is a corporation duly organized under the laws of Bermuda and operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 1509 Aibonito, Puerto Rico 00705. To-Ricos enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of To-Ricos' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

21. V. Suárez is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 364588 San Juan, Puerto Rico 00936. V. Suárez enjoys standing, pursuant to 42 U.S.C. §1983, to

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bring the instant action before this Honorable Court. Both the threatened and actual violation of V. Suárez's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

22. Coloso is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 363013 San Juan, Puerto Rico 00936. Coloso enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Coloso's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

23. Plaza Provision is a corporation duly organized under the laws of Delaware and operating in Puerto Rico as a foreign corporation pursuant to the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 363328 San Juan, Puerto Rico 00936. Plaza Provision enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Plaza Provision's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

24. Selectos is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PMB 342 Avenida Río Hondo, Bayamón, Puerto Rico 00961. Selectos enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Selectos' federally protected rights has been

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proximately caused by the actions of Defendants under color of Regulation No. 8067.

25. B. Fernández & Hermanos is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 363629 San Juan, Puerto Rico 00936. B. Fernández & Hermanos enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of B. Fernández & Hermanos' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

26. Marvel Specialties is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 363306 San Juan, Puerto Rico 00936. Marvel Specialties enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Marvel Specialties' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

27. Pan Pepín is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 100 Bayamón, Puerto Rico 00960. Pan Pepín enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Pan Pepín's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

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28. Supermercados Centro Ahorros is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its offices are located at Río Hondo Cinemas Building #11, Suite 60, Bayamón, Puerto Rico 00961. Supermercados Centro Ahorros enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Supermercados Centro Ahorros' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

29. Trafón Group is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its offices are located at Mercado Central, Calle C # 1229, Puerto Nuevo, Puerto Rico 00920. Trafón Group enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Trafón Group's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

30. Ponce Caribbean is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its offices are located at Carretera # 869, Barrio Palmas, Cataño, Puerto Rico 00962. Ponce Caribbean enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Ponce Caribbean's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

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31. Kraft Foods is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its offices are located at Montehiedra Office Center, Suite 801, 9174 Avenida Los Romeros, San Juan, Puerto Rico 00926. Kraft Foods enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Kraft Foods' federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

32. Molinos de Puerto Rico is a corporation duly organized under the laws of the Commonwealth of Puerto Rico. Its postal address is PO Box 364948 San Juan, Puerto Rico 00936. Molinos de Puerto Rico enjoys standing, pursuant to 42 U.S.C. §1983, to bring the instant action before this Honorable Court. Both the threatened and actual violation of Molinos de Puerto Rico's federally protected rights has been proximately caused by the actions of Defendants under color of Regulation No. 8067.

33. Defendant Bernardo Vázquez ("Executive Director") is a natural person who occupies the position of Interim Executive Director of the PRPA. The Executive Director's postal address is PO Box 362829 San Juan, Puerto Rico 00936. The Executive Director is being sued in his official capacity. The PRPA is a public corporation, and an instrumentality and agency of the Commonwealth of Puerto Rico, created under P.R. Law No. 125 of 1942 (Title 23, P.R. Laws Ann. §§331-52). The PRPA is charged with the organization, administration, implementation of the ports and maritime facilities of the Commonwealth of Puerto Rico, pursuant to the Docks and Harbors Act of

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Puerto Rico (Law No. 151 of 1968, also cited as Title 23 P.R. Laws Ann. §§2101-2801).

34. Defendant Jesús Méndez Rodríguez ("Secretary") is a natural person who occupies the position of Secretary of the Treasury Department of the Commonwealth of Puerto Rico. The Secretary's postal address is PO Box 9024140 San Juan, Puerto Rico 00902. The Secretary is being sued in his official capacity. The Treasury Department is an agency of the Commonwealth of Puerto Rico, created pursuant to Article IV, Section 6 of the Constitution of the Commonwealth of Puerto Rico.

IV. FACTS COMMON TO ALL COUNTS

1. In the wake of the events that took place on September 11, 2001, the International Maritime Organization (IMO) adopted the International Ship and Port Facility Security Code, **Exhibit 3**. Consistent with the development of a global maritime security system, the U.S. Congress enacted in 2002 the Maritime Transportation Security Act (the "MTSA") (46 U.S.C. §§ 70101-70119 (2006)), **Exhibit 4**, as subsequently amended by the 2006 Security and Accountability for Every Port Act (the "SAFE Port Act") (6 U.S.C. § 901 *et. seq.*), **Exhibit 5**. Pursuant to this legislation Congress initiated efforts at implementing new international instruments for establishing technologically advanced security systems across U.S. port facilities.

2. On August 2, 2007, by means of an executive order signed by the Governor of the Commonwealth of Puerto Rico, the Commonwealth's Departments of State, Treasury, Transportation, Police, Office of Budget and

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Management, and the PRPA, executed a memorandum of understanding (the "MOU"), **Exhibit 6**, with the purpose of delineating a common front with which to purportedly secure the Commonwealth's ports from illegal weapons, drugs, contraband and any other type of illegal activity and, moreover, comply with Congress' public policy as had already been reflected in the MTSA.

3. On February 18, 2008, the Commonwealth enacted Law No. 12 of 2008 ("Law regarding the Public Policy in the Area of Port Security for the Commonwealth of Puerto Rico") (23 P.R. Ann. St. §§3221-25) (hereinafter "Law No. 12"), (**Exhibit 7**) with the purpose of delineating the Commonwealth's port security policy.

4. On August 6, 2009, the PRPA invited eligible cargo system providers to submit proposals in response to a request for proposals ("RFP"), **Exhibit 8**, for a complete turn-key solution for the 100% inspection of both interstate and international cargo unloaded at the Port of San Juan.

5. The scope of the services to be rendered by the contractor, and other aspects related to the project, were laid out in the RFP, as amended during the procurement process.

6. On August 20, 2009, Rapiscan Systems Inc. ("Rapiscan")¹ submitted its proposal in response to the PRPA's RFP.

7. On October 23, 2009, the PRPA's evaluation committee selected Rapiscan. The agreement between the PRPA and Rapiscan was signed on December 17, 2009 (the "PRPA-Rapiscan Contract"), **Exhibit 9**. The PRPA-

¹ Rapiscan is a for-profit corporation organized under the laws of the State of California.

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Rapiscan Contract provides for the 100% inspection of all cargo containers, both domestic and foreign, arriving at the Port of San Juan.

8. Hence, in a bizarre turn of events, the PRPA-Rapiscan Contract was signed at a time when there was not even a semblance of a regulation for the implementation of the 100% cargo scanning system nor a protocol for conducting the primary and secondary inspections.

9. Following various informational meetings in 2010, convened at the request of the PRPA's Committee on Operations and Logistics, an initial draft of an inspection regulation, **Exhibit 10**, was published for public discussion late in 2010.

10. On January 21, 2011, public hearings were convened at the behest of the PRPA for discussing a preliminary draft of the Regulation. The PRPA, thereafter, produced a transcript of the proceedings, **Exhibit 11**.

11. The transcript from the hearings shows that the PRPA did not pay heed to Plaintiffs' well founded concerns regarding the real danger of injury-in-fact to their commercial operations flowing from the implementation of the Regulation's openly discriminatory character against interstate and foreign commerce and undue burdens on the free flow of that commercial traffic.

12. One by one of the witnesses offering testimony at the January 21 hearings, including (but without limitation to) the U.S. Customs and Border Protection, showed how the implementation of the PRPA's Regulation would gravely imperil the free and unencumbered flow of interstate and foreign commerce at the Port of San Juan.

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13. Having set out to achieve the 100% non-intrusive inspection of both interstate and foreign cargo containers, the PRPA following the January 21 hearings retracted from its misguided intention of interfering with the exclusive jurisdiction of the U.S. Customs and Border Protection with respect to the inspection of foreign cargo containers and, equally importantly, from unduly burdening the unencumbered flow of international commerce.²

14. Hence, the initial version of the Regulation (discussed at the January 21 hearings) was subsequently amended to provide that the 100% inspection and its nefarious Enhanced Security Fee, along with its burden on the flow of trade would solely apply to interstate commerce; that is, commerce streaming into Puerto Rico from the 50 States.

15. Following the January 21 hearings, an amended version of the Regulation was subsequently circulated to the public on February 25, 2011, **Exhibit 12.**

16. Shortly after the publication of the February 25 version of the Regulation, the PRPA held a new round of public hearings on March 30, 2011 to discuss the draft. Surprisingly, at no point did the PRPA pay heed to any of the concerns voiced by the Plaintiffs.

17. Following the hearings held on March 30, the PRPA produced yet another draft of the Regulation, which it published on May 16, 2011. On June 15, 2011, public hearings were held with respect to the new draft and

² See Testimony of Mr. Marcelino Borges, from U.S. Customs and Border Protection, offered at the January 21 hearings, **Exhibit 11.**

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unsurprisingly Plaintiffs' concerns were yet again shelved. (See Transcript of June 15 public hearings, **Exhibit 13.**)

18. On August 31, 2011, the PRPA's Board of Directors finally authorized the Executive Director to adopt the Regulation.

19. Surprisingly, the Regulation, as it finally stands today, departs from previous drafts in two fundamental ways.

20. Firstly, the Regulation in full force today surprisingly reverts back to interfering with foreign cargo as well, as had been originally contemplated in the January 21 draft and subsequently eliminated in the February 25 draft.

21. Secondly, it completely shifts the focus of earlier drafts from enhancing the security at the Commonwealth's Port of San Juan to an emphasis on contraband detection for the alleged purpose of tax collection.

22. Article IV ("General Rules") of the Regulation imposes an Enhanced Security Fee on all interstate and foreign cargo (both containerized and uncontainerized) unloaded in the Port of San Juan.

23. Thus, the sole criterion for imposing the Enhanced Security Fee is the geographic location of the port of origin. If the cargo comes to the Port of San Juan by sea from any of the fifty States or from a foreign port overseas it must pay the Enhanced Security Fee.

24. Pursuant to the Regulation's Article IV, the formula for calculating the Enhanced Security Fee is based on the weight of the particular cargo, including uncontainerized bulk cargo not subject to inspection. Hence, even if

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no inspection is conducted the cargo (interstate or foreign) (containerized or uncontainerized) will be liable to the PRPA for the Enhanced Security Fee.

25. From October 1, 2011 until June 30, 2014, the Regulation requires that each ship's or vessel's agent with "inbound cargo" that effectively arrives, and is unloaded, in the Port of San Juan must pay the PRPA an Enhanced Security Fee to be calculated as follows:

- a. All domestic and foreign cargo arriving in containers \$4.00 per ton (up to a total of \$69.00 per container);
- b. General cargo \$3.25 per ton;
- c. Motor vehicles \$4.00 per ton;
- d. Liquid cargo huddled in bulk \$0.039 per 42 gallon barrel;
- e. Liquid sugar and molasses \$0.58 per ton; and
- f. Empty Containers or Chassis \$4.00 per unit.

26. The Regulation, more specifically, does not describe with any degree of specificity the inspection protocol nor the technology's detection capabilities and false alarm rates.

27. The Regulation, furthermore, does not offer any details as to the size of the purported inspection lanes, nor does it describe (not even cursorily) the protocol to be followed if and when false alarms are triggered or secondary inspections required.

28. The Regulation's Article IV(C) establishes that in the event there is an "undue delay and waiting period" in any of the inspection lanes the PRPA can reduce the amount of containers to be inspected by randomly selecting

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amongst them. Such escape valve, nonetheless, is devoid of an enabling protocol.

29. On September 30, 2011, Harry Santiago Pérez (PRPA's Finance Director) issued a memorandum addressed to the maritime community announcing that the Enhanced Security Fee will become effective on October 16, 2011. **Exhibit 2.**

30. Only the immediate and decisive intervention of this Honorable Court will do away with Defendants' obvious and unconstitutional violation of Plaintiffs' federal rights under the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution.

V. FIRST CLAIM FOR RELIEF

Dormant Commerce Clause

31. The allegations set forth in paragraphs 1 through 30 are herein incorporated by reference.

32. The actions undertaken by the Executive Director and the Treasury Secretary both in purpose and effect significantly favor in-state commercial interests over out-of-state interests without the benefit of any valid factor that could possibly justify such economic protectionism. Moreover, the Regulation Defendants seek to enforce imposes a burden on interstate and foreign commerce that is clearly excessive in relation to the local benefits flowing from it.

33. Because the Enhanced Security Fee has the same effect as a tariff or customs duty of neutralizing the advantages enjoyed by out-of-state

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products to the sole benefit of in-state products it is clearly discriminatory and, hence, cannot stand.

34. Because the PRPA's Regulation, moreover, imposes a clearly excessive burden on interstate commerce in relation to its putative local benefits, it must fail.

35. The PRPA's Regulation unduly burdens Plaintiffs' constitutional rights under the Dormant Commerce Clause of the United States Constitution in the following manner:

a. Unavailability of Technology and Protocols

- i. The PRPA has failed to resolve the operational challenges that arise from the fact that systems to scan containers do not have sufficiently low false alarm rates for use in the supply chain; cannot be purchased, deployed or operated at ports overseas because a port does not have the physical characteristics to effectively and efficiently install such a system; cannot be integrated, as necessary, with existing systems; do not adequately provide automated notifications of high-risk cargo as trigger for further inspection by appropriately trained personnel; and significantly impact trade capacity and the flow of cargo.
- ii. Both DHS and CBP officials have consistently raised concerns that the necessary technology and protocols are

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not yet available to satisfy the above-referenced conditions.

b. False Alarms

- i. While false alarms associated with radiological materials can typically be resolved by non-intrusive means, this is not the case for resolving issues associated with the possible shipment of undisclosed items and products unlisted in the manifest or bill of lading (as is the case here). This particular type of suspicions would require opening the container and examining its contents. This is very labor intensive, typically involving up to 15-manhours to unload a single 40' container. It is unclear from the PRPA's Regulation where and how the PRPA intends to conduct such inspections.

c. Secondary Inspections

- i. Secondary inspections whether by non-intrusive or manual methods are always more time consuming than primary inspections. There would have to be sufficient space to store containers awaiting secondary inspections. However, the PRPA acknowledges that it already has serious problems of saturation and congestion at the Port

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of San Juan.³ The PRPA's proposed process for managing a possible backlog of containers consists of reducing the percentage of containers to be scanned so as to reduce the inspection lane waiting period to an acceptable level.⁴ However, if such reductions would have to be routinely implemented because of congestion in the designated secondary inspection area, the security efficacy of the regulation would suffer accordingly; hence, defeating the purported objective behind the 100% cargo scanning scheme.

d. Third Party Scanning Standards

- i. It is unclear what standards would be employed to guide the third party that has been hired by the PRPA to perform the required scanning services. To date, this function has been performed exclusively by CBP agents for maritime containerized cargo. CBP inspections, which are based on the 'seven-layered' approach for risk cargo management, are supported by additional information than that which is typically found on the cargo manifest and/or bill of lading. If the third party inspectors have only limited information to support interpreting the

³ <http://www.portoftheamericas.com/> (last visited on October 2, 2011.)

⁴ Regulation, Article IV (Section C), **Exhibit 12**.

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scanned images of cargo containers, it will be difficult for these inspectors to make judgments about which containers should be referred for secondary inspection elevating the risk of false alarms or missed alarms; and, hence, of severely burdening the flow of interstate commerce.

e. Contraband Detection

- i. At no point does the Regulation establish a discernible protocol for efficiently confirming that cargo suspected to be contraband based on a scanned image is in fact contraband. Doing so would nearly always require breaking the container seal, opening the container door, and devanning the contents. This is a time consuming and labor intensive process that will require a sizeable throng of Treasury personnel on hand to conduct these inspections.

f. C-TPAT Certified Trade Partners⁵

- i. In order to garner exemption from the scanning, the Regulation requires that C-TPAT certified trade partners certify in writing that "the Inbound Container has been

⁵ The C-TPAT program encourages the development of voluntary partnerships with members of the international trade community comprised of importers, customs brokers, forwarders, air, sea and land carriers; and contract logistics providers. Private companies agree to improve the security of their supply chains in return for a reduced likelihood that their containers will be examined.

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fully controlled and supervised by it (emphasis added) at all times." (See Article IV (Section D)) (**Exhibit 1.**) It is highly unrealistic that a C-TPAT participant could provide such written certification. Once a container leaves a factory or a consolidation facility, the importer must rely on surface and maritime transportation providers to ensure that the container is supervised and has not been tampered with. In its current form the Regulation will undoubtedly unduly burden C-TPAT certified trade partners' capacity to avail themselves of the Puerto Rican market by way of said federally sanctioned program.

g. Staffing and Training Challenges

- i. In order to conduct the inspections, the officials from the local Treasury Department will have to rapidly discern that a scanned image of a container's contents matches what is declared on the manifest. To routinely accomplish this task for several tons of cargo typically found within a 20', 40' or 45' cargo container would take several minutes per image and require significant manpower and considerable training since currently there is no automated process available for detecting contraband as broadly defined by this Regulation. In the interim, the smooth flow of interstate and international commerce in

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the Port of San Juan will be disrupted by a constant high inspection error rate.

36. The discriminatory treatment afforded by the Defendants' to Plaintiffs' rights under the Dormant Commerce Clause of the United States is clearly unconstitutional.

VI. SECOND CLAIM FOR RELIEF

Preemption under the Supremacy Clause

37. The allegations set forth in paragraphs 1 through 36 are herein incorporated by reference.

38. The PRPA's Regulation in its application to those Plaintiffs who are exclusively or partially engaged in the unloading of foreign cargo (either containerized or uncontainerized) into the Port of San Juan and/or act as local agents for out-of-state shipping companies unloading foreign cargo (either containerized or uncontainerized) into the Port of San Juan, such as Horizon, Crowley, Trailer, Sea Star, Flexitank, Pérez y Cía, Ayala Colón, Harbor Bunkering, Norton Lilly and Island Stevedoring, is preempted pursuant to the Supremacy Clause of the United States Constitution.

39. Because the Constitution of the United States explicitly bestows on Congress broad and comprehensive powers to regulate commerce with foreign countries and, thus, grants Congress plenary customs power to prevent smuggling and criminal activity in the Nation's borders, PRPA's Regulation cannot stand.

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40. The PRPA's Regulation runs afoul the federal constitutional design as it directly touches upon a field in which the federal interest is so dominant that the federal system inherently precludes its enforcement.

41. The Regulation's impermissible displacement of CBP as the agency with exclusive jurisdiction over the inspection of inbound foreign cargo (both containerized and uncontainerized) arriving at the Port of San Juan, not only imperils the constitutional rights of the aforementioned Plaintiffs under the Dormant Commerce Clause but equally importantly violates the Supremacy Clause of the United States Constitution.

VII. THIRD CLAIM FOR RELIEF

Temporary Restraining Order and Preliminary Injunctive Relief

42. The allegations set forth in paragraphs 1 through 41 are herein incorporated by reference.

43. Pursuant to Fed. R. Civ. P. 65(a) and the Memorandum of Law in Support of Plaintiffs' petition for injunctive relief, which this Complaint adopts in its entirety, Plaintiffs request that this Honorable Court immediately issue a temporary restraining order and, subsequently, issue a preliminary injunction enjoining Defendants from:

- a. Implementing PRPA's Regulation No. 8067 or any other order to similar effect;

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- b. Levying the Enhanced Security Fee, or any similar charge, on all interstate and foreign cargo (both containerized or uncontainerized) unloaded at the Port of San Juan;
- c. Holding Plaintiffs liable for the payment of the Enhanced Security Fee, or any similar charge, with respect to all the interstate and foreign cargo (both containerized or uncontainerized) they hereinafter unload at the Port of San Juan; and
- d. Initiating the inspection, or any other activity of similar effect, of all interstate and foreign cargo containers unloaded at the Port of San Juan;
- e. Refrain from retaliating in any way against Plaintiffs in a discriminatory manner during any process of licensing or certification, submittal of bids or any other activity connected or arising out of Plaintiffs' ongoing relationships with the PRPA or the Department of the Treasury.

VIII. FOURTH CLAIM FOR RELIEF

Declaratory Judgment

44. The allegations set forth in paragraphs 1 through 43 are herein incorporated by reference.

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45. Pursuant to the provisions of the Federal Declaratory Judgment Act (28 USC §2201 *et. seq.*), Plaintiffs seek a declaration of this Honorable Court to the effects that PRPA's Regulation is unconstitutional inasmuch as:

- a. Regulation No. 8067 is unconstitutional because it violates Plaintiffs' protected rights under the Dormant Commerce Clause of the United States Constitution since both in purpose and effect it significantly favors in-state commercial interests over out-of-state interests without the benefit of any valid factor that could possibly justify such economic protectionism; imposing, moreover, a burden on interstate and foreign commerce that is clearly excessive in relation to the local benefits flowing from it.
- b. Regulation No. 8067 is unconstitutional because it violates the Supremacy Clause of the United States Constitution as it directly touches upon a field in which the federal interest is so dominant that the federal system inherently precludes its enforcement.

PRAYER FOR RELIEF

WHEREFORE, in view of the foregoing, Plaintiffs, respectfully request that this Honorable Court grant the aforementioned remedies together with attorneys' fees and costs and for such other and further relief as may be just and equitable.

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VERIFICATION UNDER PENALTY OF PERJURY

I, Hernán F. Ayala Rubio, of legal age, married, President of the Puerto Rico Shipping Association, and resident of Guaynabo, Puerto Rico, on personal knowledge declare under oath as follows:

I have read the foregoing Verified Complaint and attest that the facts alleged therein are true, except as to those facts alleged upon information and belief and assertions of law, and as to those I believe them to be true.

I certify under penalty of perjury that the foregoing is true and correct.

At San Juan, Puerto Rico, this 4th day of October, 2011.



Hernán F. Ayala Rubio

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RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 4th day of October, 2011.

I hereby certify that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all the attorneys of the record.

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