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 Sucres.,
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.

CIVIL NO. _____

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

EMERGENCY MOTION REQUESTING TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTIVE RELIEF UNDER FED. R. CIV. P. 65 AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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 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. NATURE OF THE PETITION

Plaintiffs respectfully request that this Honorable Court issue a Temporary Restraining Order, pursuant to Fed. R. Civ. P. 65(b)), against the Executive Director (the "Executive Director") of the Commonwealth of Puerto Rico's Ports Authority ("PRPA") and the Secretary of the Treasury of the Commonwealth of Puerto Rico (the "Treasury Secretary") (collectively, the "Defendants"), forcing Defendants to refrain from implementing PRPA's Regulation No. 8067 (the "Regulation"), as it applies to Plaintiffs. In particular, Plaintiffs request this Honorable Court issues a Temporary Restraining Order enjoining Defendants from:

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

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.

Failure to do so will irreparably harm Plaintiffs.

On this same date Plaintiffs have filed a complaint (the "Verified Complaint") against Defendants, seeking injunctive and declaratory relief from Defendants' decision to implement Regulation No. 8067, which violates, under color of state law, Plaintiffs' federally protected rights under the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution.

On October 1, 2011, PRPA's Regulation No. 8067 came into effect, mandating the compulsory inspection of all domestic and foreign cargo containers unloaded at the Port of San Juan. Regulation No. 8067 also requires that, effective on October 16, 2011, all inbound cargo (both containerized and

uncontainerized) unloaded at the Port of San Juan arriving from any domestic or foreign port pay to the PRPA a so-called enhanced security fee (the "Enhanced Security Fee"). *See* Verified Complaint, **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.

Because PRPA's Regulation No. 8067, in purpose and effect, frustrates the law enforcement jurisdiction of the U.S. Customs and Border Protection ("CBP"), as the agency with exclusive responsibility for the inspection of all inbound foreign cargo (containerized and uncontainerized) unloaded into Puerto Rico, it also runs afoul the Supremacy Clause of the United States Constitution.

Defendants, acting under color of state law, are today openly violating Plaintiffs' constitutional rights under the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution. Defendants' actions must be immediately enjoined because this is the only way of protecting Plaintiffs from clear irreparable harm.

II. THE LEGAL ARGUMENT

a. Standard for issuing a Temporary Restraining Order

"[T]he standards for issuing a TRO are substantively similar to those for a preliminary injunction." *Fairchild Semiconductor Corp. v. Third Dimension (3D)*

Semiconductor, Inc., 564 F. Supp. 2d 63, 66 (D. Me. 2008). In determining whether a preliminary injunction should be granted this Honorable Court must weigh four factors, to wit: (1) the likelihood that the moving party will succeed on the merits; (2) the possibility that, without an injunction, the moving party will suffer irreparable harm; (3) the balance of relevant hardships as between the parties; and (4) the effect of the court's ruling on the public interest. *Iantosca v. Step Plan Servs., Inc.,* 604 F.3d 24, 29 n.5 (1st Cir. 2010) (citations omitted); *Vaquería Tres Monjitas v. Irizarry*, 587 F. 3d 464, 482 (1st Cir. 2009); *Waldron v. George Weston Bakeries Inc.,* 570 F. 3d 5, 9 (1st Cir. 2009).

The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor. "The *sine qua non* of this four-part inquiry is likelihood of success on the merits." *New Comm. Wireless Services, Inc. v. Sprint Com, Inc.,* 287 F. 3d 8, 9 (1st Cir. 2002) (citing *Weaver v. Henderson*, 984 F.2 11, 12 (1st Cir. 1993). *Also see Mary Anne McGuire v. Reilly*, 260 F. 3d 36, 51 (1st Cir. 2001) ("The existence of a four-part framework for granting or denying preliminary injunctive relief does not mean that all four components are weighed equally. In the great majority of cases, likelihood of success constitutes the proper focal point of the inquiry.") *See also*, *Ross-Simons of Warwick Inc. v. Baccarat Inc.*, 102 F.3d 12, 15 (1st Cir. 1996); *Narragansett Indian Tribe v. Guilbert* 934 F.2d 4, 5 (1st Cir. 1991).

Defendants' actions mandating both the compulsory inspection of all inbound domestic and foreign cargo containers unloaded at the Port of San Juan and their imminent charge of the Enhanced Security Fee, effective

October 16, 2011, on all inbound domestic and foreign cargo (both containerized and uncontainerized) unloaded at the Port of San Juan are wholly unconstitutional. Plaintiffs' request for injunctive relief must be granted. Doing otherwise would not only violate Plaintiffs' protected constitutional rights, exposing them to grave irreparable harm, but would also adversely affect the public interest.

b. Plaintiffs have a strong likelihood of success on the merits

i. The Dormant Commerce Clause Challenge

A regulatory system, such as the one embodied in PRPA's Regulation No. 8067, which in purpose and effect discriminates against interstate commerce without the benefit of any valid factor that could possibly justify such economic protectionism is indefensible under the Commerce Clause of the United States Constitution.

Article I Section 8, cl. 3 of the United States Constitution confers upon Congress the affirmative power "to regulate commerce … among the several States …" This affirmative power to regulate includes "a negative aspect, known as the dormant Commerce Clause […]." *Grant's Dairy v. Commissioner of Maine Department of Agriculture*, 232 F. 3d 8, 18 (1st Cir. 2000). As summarized by the Court of Appeals for the First Circuit in *Pharmaceutical Research and Manufacturers of America v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001):

> "The constitutional provision affirmatively granting Congress the authority to legislate in the area of interstate commerce "has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted…' " *National Foreign*

> *Trade Counsel v. Natsios*, 181 F.3d 38, 61 (1st Cir. 1999) (alterations in original) (quoting *Barclays Bank PLC v. Franchise Task Board of California*, 512 U.S. 298, 310 (1994)), aff'd *sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363, (2000). This negative command, known as the Dormant Commerce Clause, prohibits states from acting in a manner that burdens the flow of interstate commerce. *Oklahoma Task Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 179-180 (1995); *Healy v. Beer Institute*, 491 U.S. 324, 326 n.1 (1989)."

This negative aspect of the Commerce Clause, which applies to the Commonwealth of Puerto Rico on the same terms as it applies to the fifty States (*see Walgreen Company v. Rullán*, 405 F.3d 50, 55 (1st Cir. 2005) (citing *United Egg Producers v. Department of Agriculture of Puerto Rico*, 77 F.3d. 567, 569 (1st Cir. 1996). *See also Antilles Cement Corporation v. Aníbal Acevedo Vilá*, 408 F.3d 41, 46 (1st Cir. 2005)), arises not from the letter of the Constitution but from the interpretation the same has received from the U.S. Supreme Court. *H.P. Hood & Sons, Inc.*, 336 U.S. 525, 534-535 (1949) ("While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of Congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by the interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.") *See also Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).[1]

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[1] The U.S. Supreme Court has also recognized that "the 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution', James Madison." See *West Lynn Creamery v. Healy*, 512 U.S. 186, 193, note 9 (1994).

The purpose of the dormant Commerce Clause doctrine is to prohibit "protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." *Grant's Dairy*, 232 F. 3d at 18 (citing *Fulton Corporation v. Faulkner*, 516 U.S. 325, 330 (1996) and *New Energy Company v. Limbach*, 486 U.S. 269, 273-274 (1988)). Clearly, the Framers understood very well the national need for centralized economic regulation and the evils inherent in economic protectionism by the states. Internal free commerce is at the heart of a single unified nation; it is, in the words of Justice Benjamin Cardozo, the basis of "our national solidarity." *Baldwin v. G.A.F. Seeling*, Inc., 294 U.S. 511, 535 (1935). As the Supreme Court itself found in *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978):

> "[The broad purpose of the Commerce Clause] was well expressed by Mr. Justice Jackson in his opinion for the Court in *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-538 (1949):
>
> 'This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting custom barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig*, 294 U.S. [511], 527 [(1935)], 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'"

The U.S. Supreme Court has been consistent in expressing itself against attempts by states to isolate themselves economically. *See H.P. Hood & Sons, Inc.*, 336 U.S. 525 at 538. ("This Court has not only recognized this disability of the state to isolate its own economy as a basis for striking down parochial

legislative policies designed to do so, but it has recognized the incapability of the state to protect its own inhabitants from competition as a reason for sustaining particular exercises of the commerce power of Congress…").

Following the mandate of the Supreme Court in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), the Court of Appeals for the First Circuit has indicated that the application of the Dormant Commerce Clause doctrine requires a "sensitive, case-by-case analysis of purposes and effects" *Id.* at 201, *Grant's Dairy*, 232 F. 3d at 18-19 and *Walgreen Company*, 405 F. 3d at 55.

Official state action can be discriminatory against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect. *See Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992). Since ours is a constitutional attack on the application of regulatory power we must concentrate on the last two forms of discrimination under the analytical formulation of the First Circuit in *Walgreen Company*, 405 F. 3d at 55:

> "Under the dormant Commerce Clause, if a state law has either the purpose or effect of significantly favoring in–state commercial interests, over out-of-state interests, the law will "routinely" be invalidated "unless discrimination is demonstrably justified by a valid factor unrelated to economic protectionism" (citing *Houlton Citizen's Coalition v. Town of Houlton*, 175 F. 3d 178, 184 (1st Cir. 1999) which in turn quoted *West Lynn Creamery*, 512 U.S. at 192-193 (1994))."

As the Supreme Court itself has indicated, the legitimate purpose justifying the local discriminatory action has to be one that "…cannot be served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems, Inc. v.*

Dept. of Environmental Quality, 511 U.S. 93, 101 (1994) (citing *New Energy Company v. Limbach*, 486 U.S. 269, 278 (1988)). *See Walgreen Company*, 405 F. 3d at 59 (citing *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977)). Justifications for "discriminatory restrictions on commerce must pass the 'strictest scrutiny.'" *Oregon Waste Systems, Inc.*, 511 U.S. at 101.

PRPA's Regulation No. 8067 fails under both the "purpose" and "effect" tests. In fact, what Defendants are doing here by means of the compulsory imposition against out-of-state commerce of an Enhanced Security Fee, which has the same discriminatory effect as a tariff or customs duty, is exactly what the U.S. Supreme Court has condemned in other Commerce Clause cases. In *West Lynn Creamery*, 512 U.S. 186, 193 (1994) the U.S. Supreme Court made it plain clear that:

> "The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State [...] Because of their distorting effects on the geography of production, tariffs have long been recognized as violative of the Commerce Clause. In fact, tariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means."

This is precisely what Defendants have set out to do here --- namely "reap[ing] some of the benefits of tariffs by other means." *Id.* Defendants are trying to neutralize, through the charge of the Enhanced Security Fee on all domestic and foreign cargo unloaded at the Port of San Juan (containerized and uncontainerized) the natural cost advantages of out-of-state commerce.

The Court has consistently struck down such type of measures, despite their ingenuity, ("Nice distinctions between direct and indirect burdens [are] irrelevant…" when purpose and effect is to suppress or mitigate interstate competition (*Polar Ice Cream*, 375 U.S. 361, 374 (1964) (citing *Baldwin v. G.A.F. Seeling*, Inc., 294 U.S. 511 (1935)) because they have the same effect as an interstate tax or custom duty.) *Oregon Waist Systems v. Department of Envtl. Quality*, 511 U.S. 93, 106 (1994) ("…regulating interstate commerce in such a way so as to give those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere, constitutes …protectionism.")

Measures that neutralize the natural advantages (cost based or otherwise) possessed by lower cost out-of-state producers are routinely held unconstitutional. *See Baldwin*, 294 U.S. at 527 (elimination of milk regulation "designed to neutralize advantages belonging to the [out-of-state] place of origin"); *West Lynn Creamery*, 512 U.S. at 194 (milk market); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (liquor); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 351 (1977) (statute invalidated because it had "the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned.")

Defendants have failed to show how their discriminatory application of the Enhanced Security Fee on all out-of-state cargo unloaded at the Port of San Juan is supported by any legitimate state interest unrelated to protectionism and that said interest cannot be achieved by lawful means.

The Regulation's command that all inbound domestic and foreign cargo (whether containerized or not) unloaded at the Port of San Juan pay PRPA the Enhanced Security Fee is blatantly discriminatory against interstate commerce and, hence, unconstitutional.

As will be discussed in greater detail shortly, not only does Regulation No. 8067 purposefully and effectively discriminate against interstate commerce, it also imposes a burden on the stream of interstate commerce that is clearly excessive in relation to its putative benefits. Even assuming *in arguendo* that Regulation No. 8067 regulates evenhandedly to effectuate a legitimate local public interest, it must nonetheless fail because, as shown below, the burden it imposes on interstate commerce is clearly excessive in relation to the putative local benefits flowing from it.

As the U.S. Supreme Court held in *Pike v. Bruce Church Inc.,* 397 U.S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits [...] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

In applying the so-called *Pike* balancing test, this Honorable Court should consider the following three elements, namely (1) the nature of the putative local benefits advanced by the statute or regulation; (2) the burden the statute

or regulation places on interstate commerce; and (3) whether the burden is "clearly excessive" as compared to the putative local benefits. *Id. See also Walgreen*, 405 F. 3d 50, 55 (1st Cir 2005), *Concannon*, 249 F.3d 66, 83-84 (1st Cir. 2001), *Grant's Dairy*, 232 F. 3d 8, 24 (1st Cir. 2000).

It is essential to note, moreover, that as the U.S. Court of Appeals for the First Circuit found in *Concannon*, "the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Concannon*, 249 F.3d 66 at 84 (citing *Instructional Sys. v. Computer Curriculum Corp.,* 35 F. 3d 813, 827 (3rd Cir. 1989)).

Different from the Maine statute challenged in *Concannon*, Regulation No. 8067 does not merely have a detrimental effect on the profits of an individual interstate firm, but rather it imposes a prohibitive burden on Puerto Rico's out-of-state market as a whole; directly affecting in a severe manner a whole panoply of interstate economic markets vying for entry into Puerto Rico.

PRPA's Regulation superimposes on Defendants a prohibitive and yet ill-defined set of inspection rules and unloading charges that are clearly excessive in relation to their putative local benefits. In particular, Regulation No. 8067 unduly burdens Plaintiffs' constitutional rights under the Dormant Commerce Clause of the United States Constitution in the following manner:

Unavailability of Technology and Protocols

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.

Both U.S. Department of Homeland Security ("DHS") and U.S. Customs and Border Protection ("CBP") officials have consistently raised concerns that the necessary technology and protocols are not yet available to satisfy the above-referenced conditions.

False Alarms

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.

Secondary Inspections

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 of San Juan.[2] 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.[3] 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.

Third Party Scanning Standards

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's inspections, which are based on the 'seven-layered' approach to cargo risk 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 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.

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2 http://www.portoftheamericas.com/(last visited October 2, 2011).
3 Regulation, Article IV (Section C).

Contraband Detection

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.

C-TPAT Certified Trade Partners[4]

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 fully controlled and supervised by it (emphasis added) at all times." (*See* Article IV (Section D)) (Verified Complaint, **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.

[4] 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.

Staffing and Training Challenges

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

The superimposition of this ill-construed and yet unsettled inspection regime on all domestic and foreign cargo containers unloaded at the Port of San Juan is excessively burdensome on interstate commerce if compared to the limited benefits flowing from it. It shocks the conscience that five years after the dismantling of the Commonwealth's excise tax regime and the full implementation of the sales tax or "IVU" (which entered into force in November 2006), at a time when the only products requiring excise tax inspection at the Port of San Juan are but motor vehicles, cigarettes, alcoholic beverages, and oil products (all of which are already heavily regulated outside the port precisely for purposes of tax evasion prevention) that the PRPA and the Treasury Department insist so vehemently in implementing this Regulation No. 8067 which imposes a burden on interstate and foreign commerce that is so clearly

excessive in relation to the tax evasion prevention objective which has allegedly led to its enactment.

Similarly, the Regulation's purported objective of ensuring security at the port by means of the 100% non-intrusive inspection of all inbound domestic and foreign cargo containers is utterly misguided. For instance, while the U.S. Government has undertaken efforts overseas to scan cargo containers with non-intrusive inspection equipment under the U.S. Department of Energy's "Second Line of Defense" and "MegaPorts" programs, as well as pursuant to the pilot programs of the Container Security Initiative required by the Security and Accountability for Every Port Act (6 U.S.C. §901 (2006)) (hereinafter the "SAFE Port Act"),[5] at no point has the U.S. Government or any U.S. State or local authority used non-intrusive scanning technology to inspect up to 100% of all inbound domestic and foreign cargo containers with the goal of detecting contraband, let alone levy a discriminatory security fee tantamount to a tariff or duty against out-of-state trade, either for security or tax-evasion-discouragement purposes as this Regulation attempts to achieve in a patently unconstitutional manner.

The U.S. Department of Homeland Security and the U.S. Customs and Border Protection, moreover, have been constantly raising grave concerns about the impact on commercial traffic flows associated with routinely subjecting containerized cargo to non-intrusive scanning. In 2010, DHS

5 Each of these programs, however, uses non-intrusive inspections for the sole purpose of detecting both shielded and unshielded radiological material.

Secretary Janet Napolitano (the "Secretary of Homeland Security") testified before the U.S. Congress that she intends to issue a two-year extension of the requirement established by the Implementing of the 9/11 Commission Act (6 U.S.C. §101 (2007)) that 100% of maritime containerized cargo entering the United States be inspected with non-intrusive scanning and radiation detection equipment at a foreign port by July 1, 2012. The Act authorizes the Secretary of Homeland Security to follow through with this if the following conditions exist:

(a) Systems to scan containers become available for purchase and installation.

(b) Systems to scan containers reach a sufficiently low false alarm rate for use in the supply chain.

(c) Systems to scan containers can be purchased, deployed, or operated at ports overseas, including, if applicable, because a port does not have the physical characteristics to install such a system.

(d) Systems to scan containers can be integrated, as necessary, with existing systems.

(e) Use of systems that are available to scan containers does not significantly impact trade capacity and the flow of cargo.

(f) Systems to scan containers adequately provide an automated notification of questionable or high-risk cargo as a trigger for further inspection by appropriately trained personnel.

Both the DHS and CBP officials have raised concerns that the technology and protocols are not yet available to satisfy all of these conditions.

Thus, the alleged benefits this Regulation brings forth are eclipsed if compared to the utter and complete disruption it will create in Plaintiffs' commercial operations at the Port of San Juan at a time when the PRPA could achieve those same security and tax evasion prevention objectives by other less burdensome means on interstate commerce.

As the PRPA itself showcases, the Port of San Juan is by far one of the busiest ports in the Caribbean Basin and one of the greatest centers of commercial trade in the U.S. customs area. (Verified Complaint, **Exhibit 8**.) Among all the ports of the United States, as the statistics of the American Association of Port Authorities show, the Port of San Juan ranks in the 10th position in container movement. *Id.* In Fiscal Year 2009-10 alone the cargo movement through the various ports of San Juan totaled 8,466,298 tons (including both interstate and international cargo). *Id.* Of these, close to 70% or 5,926,408 tons exclusively amount to interstate cargo streaming into Puerto Rico from the several States. This stream of interstate commerce represents not just the lifeline of Puerto Rico's economic life, but of Plaintiffs' commercial survival. The charge of the Regulation's Enhanced Security Fee on all inbound domestic and foreign cargo (including uninspected bulk cargo) and its requirement of 100% inspections on all inbound domestic and foreign cargo containers will, in all certainty, lead Plaintiffs to lose incalculable revenues and sustain harm to their goodwill.

Undisputedly, PRPA's Regulation imposes a clearly excessive burden on interstate commerce, in relation to its putative local benefits. Because Defendants' actions are wholly unconstitutional, Plaintiffs' request for injunctive relief must be granted.

ii. The Supremacy Clause Challenge

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 is preempted both by the United States Constitution and the applicable federal law.

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. Hence, Regulation No. 8067 is indefensible under the Supremacy Clause of the United States Constitution.

Article VI, cl. 2 of the federal Constitution explicitly ordains that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding."

The dictates of the Supremacy Clause, moreover, apply in full force to the Commonwealth of Puerto Rico.[6]

It is a well-settled principle of U.S. constitutional law that "[t]he Constitution gives Congress broad, comprehensive powers 'to regulate Commerce with foreign Nations.' Art. I, § 8, cl.3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.'" *United States v. Ramsey et. al.,* 431 U.S. 606,619 (1977) (citing *United States v. 12200 – Ft. Reels of Film,* 413 U.S. 123, 125 (1973)).

Ever since the founding of the Republic, Congress has enjoyed "plenary customs power" pursuant to the Constitution. *Ramsey* at 616.

It has been precisely in the exercise of its plenary customs power that "Congress, since the beginning of our Government, 'has granted the Executive *plenary authority* to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband in this country.'" *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004). *See also United States v. Montoya de Hernádez*, 473 U.S. 531, 537 (1985).

In *Flores-Montano*, moreover, the U.S. Supreme Court made it abundantly clear that:

> "The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, we have stated that

[6] For a thorough analysis on the applicability of the Supremacy Clause to the Commonwealth of Puerto Rico, see, for instance, *S.L.G. Hernández Villanueva v. S.L.G. Hernández*, 150 D.P.R. 171 (2000).

> 'searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.'" *Flores-Montano* at 152 (citing *Ramsey* at 616).

It is widely established that even before proposing the Bill of Rights to the several States (on September 25, 1789), the Nation's first Congress, in exercising its plenary customs power, enacted the first federal customs statute (Act of July 31, 1789, c. 5 also referenced as 1 Stat. 29) granting "customs officials 'full power and authority' to enter and search 'any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed …'" *Ramsey* at 616.

"The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is," in the words of the U.S. Supreme Court, "manifest." *Ramsey* at 617 (citing *inter alia Boyd v. United States*, 116 U.S. 616, 623 (1886)).

Today's federal customs statutes, as the U.S. Supreme Court acknowledged in *Flores-Montano*, are derived from that first Congress' 1789 customs act and, moreover, delegate to U.S. Customs and Border Protection wide authority to protect the Nation's territorial integrity.

The CBP, as the unified border agency within the U.S. Department of Homeland Security, is charged with the management, control and protection of the U.S. borders at and between the official ports of entry. More specifically, U.S. Customs and Border Protection is responsible for guarding nearly 7,000 miles of land border the United States shares with Canada and Mexico and

2,000 miles of coastal waters surrounding the Florida peninsula and off the coast of Southern California. The agency also protects 95,000 miles of maritime border in partnership with the United States Coast Guard. [7] To secure this vast terrain, CBP's U.S. Border Patrol agents, Air and Marine agents, and CBP officers and agriculture specialists, together with the Nation's largest law enforcement canine program, stand guard along America's front line.[8] CBP officers protect America's borders at official ports of entry, while Border Patrol agents prevent illegal entry into the United States of people and contraband between the ports of entry. [9]

CBP's Office of Air and Marine, which manages the largest law enforcement air force in the world, patrols the Nation's land and sea borders to stop terrorists and drug smugglers before they enter the United States. [10] CBP's agriculture specialists prevent the entry of harmful plant pests and exotic foreign animal diseases and confront emerging threats in agro and bioterrorism.[11] Each year, more than 11 million maritime containers arrive at American seaports. At land borders, another 11 million arrive by truck and 2.7 million by rail. CBP is responsible for knowing what is inside, whether it poses a risk to the United States, and ensuring that all proper revenues are

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[7] http://www.cbp.gov/ (last visited October 2, 2011).
[8] Id.
[9] Id.
[10] Id.
[11] Id.

collected.[12] (*See* Summary of Laws and Regulations Enforced by CBP, Verified Complaint, **Exhibit 14**.)

Thus, in order to effectively and efficiently execute its mission, CBP is authorized under federal law to, *inter alia*, inspect all foreign cargo containers as well as all foreign bulk cargo inside domestic containers arriving or leaving Puerto Rico.[13] In particular, pursuant to 19 U.S.C. § 1581(a):

> "Any officer of the customs may *at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters* or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district, *and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance*." (Emphasis added).

It is essential to note that the term "United States" therein includes all Territories and possessions of the United States including the Commonwealth of Puerto Rico, except the U.S. Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and Guam. *See* U.S.C. 19 § 1401.

More importantly, in construing the reach of U.S.C. § 1581(a), the U.S. Supreme Court has found that this modern statute derives "from a statute passed by the First Congress, the Act of Aug. 4, 1790, ch 35, § 31, 1 Stat 164, […] *and reflects the 'impressive historical pedigree' of the Government's power*

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[12] Id.
13 *See* Testimony of CBP's María Palmer and Marcelino Borges at PRPA's January 21 and June 15, 2011 public hearings, **Exhibit 11** and **Exhibit 13**.

and interest, […] [i]t is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *Flores-Montano* at 153 (Emphasis added).

Furthermore, 19 U.S.C. § 1467 establishes that:

> "Whenever a vessel from a foreign port or place or from a port or place in any Territory or possession of the United States arrives at a port or place in the United States or the Virgin Islands, whether directly or via another port or place in the United States or the Virgin Islands, the appropriate customs officer for such port or place of arrival may, under such regulations as the Secretary of the Treasury may prescribe and for the purpose of assuring compliance with any law, regulation, or instruction which the Secretary of the Treasury or the Customs Service *is authorized to enforce, cause inspection, examination, and search to be made of the persons, baggage, and merchandise discharged or unladen from such vessel*, whether or not any or all such persons, baggage, or merchandise has previously been inspected, examined, or searched by officers of the customs." (Emphasis added).

Against this background, Regulation No. 8067's impermissible frustration of CBP's exclusive law enforcement jurisdiction with respect to the inspection of inbound foreign cargo containers and foreign bulk cargo inside domestic containers (or uncontainerized) arriving at the Port of San Juan is clearly preempted by federal law and indefensible under the Supremacy Clause of the United States Constitution. Defendants' actions are, thus, blatantly unconstitutional.

As the U.S. Supreme Court found in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 204 (1983):

> "[I]t is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms [...] *Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room to supplement it*,' 'because 'the Act of Congress may touch *a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject*,' or 'because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose' [...] *Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law*." (Emphasis added).

It has long been settled that Congress may preempt state power to regulate in three ways: by express statement, by implied occupation of a regulatory field, or by implied preclusion of conflicting state regulations. SULLIVAN AND GUNTHER, CONSTITUTIONAL LAW 237 (17th ed. 2010).

The first modality of implied preemption, so-called "field preemption," arises where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the several States to supplement it. *See Gade v. National Solid Waste Management*, 505 U.S. 88, 98 (1992). In other words, as the Supreme Court suggested in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963), Congress will be deemed to have preempted an area only where its intent is unmistakable or where the subject-matter of the regulated field allows for no other conclusion. The second modality of implied preemption, commonly known as "conflict preemption," is triggered in two distinct contexts, on the one hand, where compliance with

both federal and state regulations is physically impossible and, on the other, where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal law." *See Williamson v. Mazda Motors of Am., Inc.*, No. 08-1314, slip op. at 5 (U.S. Feb. 23, 2011) ("Under ordinary conflict pre-emption principles a state law that 'stands as an obstacle to the accomplishment' of a federal law is pre-empted.") *See also United Parcel Service, Inc. v. Juan Flores Galarza*, 210 F. Supp. 2d 33, 42 (D. Puerto Rico 2002) ("Congressional intent is the touchstone of preemption analysis.")

Not only does Regulation No. 8067 directly conflict with federal law, but it clearly stands as an obstacle to the accomplishment and execution of the full purpose of Congress' intent, as reflected by the applicable federal customs law.

Article I (Section G) of PRPA's Regulation provides that:

> "The inspection process will include any foreign inbound Cargo Containers or foreign cargo that arrives to the island of Puerto Rico, *unless the US Customs and Border Protection specifically requests that certain foreign inbound Cargo Container or foreign cargo in a domestic inbound Cargo Container can be excluded*." (Emphasis added).

Thus, pursuant to Regulation No. 8067, it will be PRPA and not CBP the agency with primary jurisdiction over the inspection of any inbound foreign cargo arriving at the Port of San Juan, regardless of whether it comes in a foreign container or as foreign bulk cargo in a domestic container. Only if CBP specifically requests that certain foreign cargo container or foreign cargo in a domestic container be excluded shall PRPA exempt it from the inspection process.

Because such an obvious encroachment on CBP's law enforcement jurisdiction along the Nation's borders severely interferes and limits its ability to execute the mission Congress has delegated to it, Regulation No. 8067 must fail in its application to all inbound foreign inbound cargo containers or foreign cargo that arrives to the island of Puerto Rico by way of the San Juan port facilities.

Consequently, Regulation No. 8067 must also fail in its application to those Plaintiffs who are exclusively or partially engaged in the unloading of inbound foreign cargo containers and inbound foreign cargo in domestic containers at the San Juan port facilities, including Plaintiffs acting as local agents for out-of-state shipping companies unloading foreign cargo containers and inbound foreign cargo in domestic containers at the San Juan port facilities, such as Horizon, Crowley, Trailer, Sea Star, Flexitank, Pérez y Cía, Ayala Colón, Harbor Bunkering, Norton Lilly and Island Stevedoring.

Because Regulation No. 8067 is preempted under the Supremacy Clause of the United States Constitution, Defendants' actions are wholly unconstitutional and Plaintiffs' request for injunctive relief must be granted.

c. Plaintiffs will be irreparably harmed if the Temporary Restraining Order is not granted

The above discussion demonstrates that Plaintiffs are being deprived of their federal constitutional rights under the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution. It is settled that "[a] deprivation of a [federal] constitutional right for 'even minimal periods of time,

unquestionably constitutes irreparable injury' " *De Novellis v. Shalala*, 135 F. 3d 58, 71-72 (1st Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Furthermore, it has been amply recognized that some economic losses can be deemed irreparable. In *Vaquería Tres Monjitas*, 587 F. 3d 464, 485 (1st Cir. 2009) (holding *inter alia* that the district court did not abuse its discretion in granting plaintiffs' motion for a preliminary injunction"), the U.S. Court of Appeals for the First Circuit found that:

> "[I]t has also been recognized that some economic losses can be deemed irreparable. For instance, 'an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business.' (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (finding no abuse of discretion in determination that 'absent preliminary relief [movants] would suffer a substantial loss of business and perhaps even bankruptcy.') ... we have held that the irreparable harm requirement may be met upon a showing that 'absent a restraining order, [a party] would lose incalculable revenues and sustain harm to its goodwill.' Moreover, the measure of irreparable harm is not a rigid one; it has been referred to as a sliding scale, working in conjunction with a moving party's likelihood of success on the merits." See also *Ross-Simons v. Baccarat Inc.*, 102 F.3d 12, 19 (1st Cir. 1996).

The ongoing deprivation of Plaintiffs' constitutional rights, which results from having to comply with PRPA's unlawful regulatory scheme for unloading inbound domestic and foreign cargo (containerized and uncontainerized) at the San Juan port facilities as the only way to provide service in Puerto Rico is itself "a factor in assessing irreparable injury." *United Parcel Service,* 210 F. Supp. 2d 33 at 44.

Only the issuance by this Honorable Court of the requested emergency injunctive relief will protect Plaintiffs from continuing to suffer irreparable harm.

d. <u>The Balance of the Equities favors the issuance of the Temporary Restraining Order</u>

To balance the relevant equities this Honorable Court ought to compare the hardship meted at Defendants if the Temporary Restraining Order is issued with the hardship Plaintiffs will suffer if denied relief. *See Vaquería Tres Monjitas*, 587 F. 3d 464, 482 (1st Cir. 2009); *Camel Hair and Cashmere Institute v. Associated Dry Goods Corporation*, 799 F 2d 6, 12 (1st Cir. 1986); *Matos v. Clinton Sch. Dist.*, 367 F. 3d 68 (1st Cir. 2004).

It is clear that the Defendants against whom this Temporary Restraining Order would be issued will not be affected by a restraining order that basically requires them to respect the constitutional rights of Plaintiffs and regulate the port facilities of San Juan in a non-discriminatory and constitutional manner.

Even assuming that the hardship to Defendants has to be considered also, there is nothing comparable to the harm Plaintiffs are enduring today.

The constitutional rights of Plaintiffs, imperiled as they are by the permanent loss of market share and potential harm to their goodwill, override the rights of Defendants to continue enforcing, with respect to Plaintiffs, a recently enacted Regulation that is *prima facie* discriminatory against interstate commerce and, moreover, preempted by federal law.

e. <u>The Public Interest favors the issuance of the Temporary Restraining Order</u>

In issuing the requested emergency injunctive relief, this Honorable Court must also consider "the effect of the court's ruling on the public interest." *Vaquería Tres Monjitas*, 587 F. 3d 464 at 482.

Undisputedly, after two years of Plaintiffs' incessant and yet fruitless efforts at pointing out to Defendants the unconstitutionality of the regulatory system embodied in Regulation No. 8067, namely its patently discriminatory purpose and effect on interstate commerce and its frustration of federal law, they have been left no other choice but to request this Honorable Court act in order to protect the public interest.

Not only are Plaintiffs' protected constitutional rights at stake here, but the stability of the enormous out-of-state market vying for entry into Puerto Rico by means of San Juan's port facilities. The widespread uncertainty now shrouding the legality of PRPA's regulatory scheme and, furthermore, the unprecedented nature of the inspection regime itself requires this Court issue the Temporary Restraining Order Plaintiffs are hereby requesting.

After all, the severe disruption of the interstate and foreign commercial traffic entering into Puerto Rico by the Port of San Juan would be severely harmful for Puerto Rico, particularly at this distressed economic juncture.

III. CONCLUSION

A Temporary Restraining Order is always an extraordinary remedy for extraordinary circumstances. It is difficult to conceive a case presenting a clearer picture of violation of constitutional rights under the Dormant Commerce Clause and the Supremacy Clause of the United States Constitution.

Plaintiffs have shown a strong likelihood of succeeding in their constitutional challenge against PRPA's Regulation No. 8067 and, hence, against Defendants' actions under color of state law to implement it with respect to them.

Plaintiffs have, moreover, shown that (1) purposefully and effectively PRPA's Regulation discriminates against all interstate and foreign commerce arriving at the Port of San Juan; that (2) PRPA's Regulation is preempted by federal law and, thus, indefensible under the Supremacy Clause; and that (3) they will suffer grave irreparable harm if this Honorable Court fails to issue at once a Temporary Restraining Order enjoining Defendants from:

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

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.

Both the balance of relevant hardships as between the parties and the effect of this Court's ruling on the compelling public interest surrounding this controversy, counsel in favor of granting the Temporary Restraining Order Plaintiffs are hereby requesting pursuant to Fed. R. Civ. P. 65(b).

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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