

**ORIGINAL**

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

**RECEIVED**

07 JUL 30 PM 3: 21

**Docket No. 07-01**

OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMM

cc OS/GC  
Pub  
ALJ(2)

**APM TERMINALS NORTH AMERICA, INC.**

**COMPLAINANT**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

**ANSWER AND COUNTERCLAIM**

Respondent, the Port Authority of New York and New Jersey, ("the Port Authority"), for answer and counterclaim to the complaint in this proceeding, states:

I. A. The Port Authority is without knowledge as to the corporate status of APM Terminals ("APMT") and must therefore deny the allegations of the first sentence of paragraph I. A. of the Complaint. The Port Authority is without knowledge as to the extent of APMT operations and must therefore deny the allegations of the second sentence of paragraph I. A. of the Complaint except that the Port Authority does admit that APMT does conduct operations at the Elizabeth Marine Terminal in Elizabeth, New Jersey.

I. B. The Port Authority is without knowledge as to APMT's current mailing address and therefore denies the allegations contained in paragraph I. B. of the Complaint.

II. A. Paragraph II. A. of the Complaint states a legal conclusion and requires no response. To the extent that it alleges that the Port Authority is subject to the jurisdiction of the Commission in this action, the Port Authority denies such allegations

II. B. The Port Authority admits the allegations contained in paragraph II. B. of the Complaint.

III. The first sentence of paragraph III. of the Complaint contains legal conclusions that require no response. To the extent that the sentence alleges that the Port Authority is subject to the jurisdiction of the Commission in this action, the Port Authority denies such allegations. The Port Authority denies all other allegations contained in the paragraph.

IV. A. The Port Authority admits the allegations contained in the first sentence of paragraph IV. A. of the Complaint. The Port Authority denies that the Agreement became effective on August 2, 2000.

IV. B. The Port Authority admits the allegations contained in paragraph IV. B. of the Complaint.

IV. C. The Port Authority denies the allegations contained in paragraph IV. C of the Complaint.

IV. D. The Port Authority denies the allegations contained in paragraph IV. D. of the Complaint.

IV. E. The Port Authority is without knowledge as to what APMT knew or didn't know and when any knowledge may have been acquired, and so denies the allegations contained in paragraph IV. E. of the Complaint.

IV. F. The Port Authority admits that APMT sent a letter to the Port Authority on or about December 23, 2003. The Port Authority denies all other allegations contained in paragraph IV. F. of the Complaint.

IV. G. The Port Authority denies the allegations contained in paragraph IV. G. of the Complaint.

IV. H. The Port Authority admits that APMT did not take possession of the Added Premises on or before December 31, 2003. The Port Authority denies all other allegations contained in paragraph IV. H. of the Complaint.

IV. I. The Port Authority admits that APMT did not take possession of the Added Premises by August 23, 2005. The Port Authority denies all other allegations contained in paragraph IV. I. of the Complaint.

IV. J. The Port Authority denies the allegations contained in paragraph IV. J. of the Complaint.

IV. K. The Port Authority denies the allegations contained in paragraph IV. K. of the Complaint.

IV. L. The Port Authority denies the allegations contained in paragraph IV. L. of the Complaint.

IV. M. The Port Authority admits that APMT took possession of the Added Premises on or about December 25, 2005. The Port Authority denies all other allegations contained in paragraph IV. M. of the Complaint.

IV. N. The Port Authority denies the allegations contained in paragraph IV. N. of the Complaint.

IV. O. The Port Authority denies the allegations contained in paragraph IV. O. of the Complaint.

IV. P. The Port Authority denies the allegations contained in paragraph IV. P. of the Complaint.

IV. Q. The Port Authority denies the allegation contained in paragraph IV. Q. of the Complaint.

V. A. The Port Authority denies the allegations contained in paragraph V. A. of the Complaint.

V. B. The Port Authority denies the allegations contained in paragraph V. B. of the Complaint.

V. C. The Port Authority denies the allegations contained in paragraph V. C. of the Complaint.

V. D. The Port Authority denies the allegations contained in paragraph V. D. of the Complaint.

V. E. The Port Authority denies the allegations contained in paragraph V. E. of the Complaint.

V. F. The Port Authority denies the allegations contained in paragraph V. F. of the Complaint.

VI. A. Paragraph VI. A. of the Complaint contains legal conclusions that require no response. To the extent that the provisions of paragraph VI. A. allege that the Port Authority has violated any provision of law, the Port Authority denies such allegations.

VI. B. Paragraph VI. B. of the Complaint contains legal conclusions that require no response. To the extent that the provisions of paragraph VI. B. allege that the Port Authority has violated any provision of law, the Port Authority denies such allegations.

VI. C. Paragraph VI. C. of the Complaint contains legal conclusions that require no response. To the extent that the provisions of paragraph VI. C. allege that the Port Authority has violated any provision of law, the Port Authority denies such allegations.

VI. D. Paragraph VI. D. of the Complaint contains legal conclusions that require no response. To the extent that the provisions of paragraph VI. D. allege that the Port Authority has violated and provision of law, the Port Authority denies such allegations.

VII. The Port Authority denies the allegations contained in paragraph VII. of the Complaint.

VIII. Paragraph VIII. requires no response.

#### **AFFIRMATIVE DEFENSES**

First affirmative defense:

The Port Authority is a body corporate and politic created by Compact between the States of New York and New Jersey. As such the Port Authority is a sovereign entity beyond the reach of an Administrative complaint brought by APMT.

Second affirmative defense:

The Complaint fails to state a claim upon which relief can be granted.

Third affirmative defense:

The provisions of section 1 (d) of the Agreement of Lease relied upon by APMT provides for the exclusive remedy should the added premises not become part of the premises by December 31, 2003, and that exclusive remedy was to allow APMT, at

its option to terminate the Lease within 180 days of December 31, 2003. APMT chose not to terminate the Agreement but rather to stay in possession of the premises during the 180 day period thereby accepting the benefits of the Lease Agreement.

Fourth affirmative defense:

Having accepted the benefits of the Lease Agreement rather than terminating the Lease according to its terms, APMT is now estopped from claiming damages resulting directly from its failure to terminate the Lease.

Fifth affirmative defense:

The accepted benefits arising from APMT's continued possession of the premises constitutes accord and satisfaction of any obligation of the Port Authority arising from APMT's not occupying the added premises on December 31, 2003.

Sixth affirmative defense:

APMT made no effort to seek specific performance of the Lease terms with respect to the added premises against either the Port Authority or Maher Terminals. Thus, APMT failed to attempt to mitigate its damages from any alleged breach and comes to the Commission with unclean hands due to that failure.

Seventh affirmative defense:

As demonstrated by the Counterclaim below, APMT is in material breach of the Lease Agreement and therefore comes before the Commission with unclean hands.

### **COUNTERCLAIM**

1. Section 7 (a)(1)(i) of the Lease Agreement requires APMT to perform certain "Class A Work" within one year of its occupancy of the added premises. APMT occupied the added premises but has not completed the Class A Work as of the filing of

this Counterclaim more than nineteen months after its occupancy. In fact, some of the Class A Work has no completion date in sight and no plans have been developed or submitted to the Port Authority according to the requirements of the Lease Agreement.

2. The delay in the Class A Work has adversely affected the Port Authority and put in jeopardy its plans for the future of the Newark/Elizabeth Port complex.

3. In view of its failure to complete, and in some cases even to start, the required Class A Work, APMT is in material breach of the Lease Agreement.

Wherefore, Respondent prays that Complainant be required to answer the Counterclaim herein and that this proceeding be subsequently dismissed and that the Commission grant such other relief as may be warranted.

The undersigned declares and certifies under the penalty of perjury that the statements set forth in this instrument are true and correct.

A handwritten signature in black ink, appearing to read "Dennis Lombardi", written over a horizontal line.

Dennis Lombardi, Deputy Director  
THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY  
Port Commerce Department  
225 Park Avenue South, 11<sup>th</sup> Floor  
New York, NY 10003

Dated: July 30, 2007

Respectfully submitted,



Paul M. Donovan  
LAROE, WINN, MOERMAN &  
DONOVAN  
4135 Parkglenn Court, N.W.  
Washington, DC 20007  
Telephone (202) 298-8100  
Facsimile (202) 298-8200

Donald F. Burke, New Jersey Solicitor  
THE PORT AUTHORITY OF NEW YORK  
AND NEW JERSEY  
225 Park Avenue, south, 13<sup>th</sup> Floor  
New York, NY 10003

*Attorneys for the Port Authority of New York  
and New Jersey*

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

---

**Docket No. 07-01**

---

**APM TERMINALS NORTH AMERICA, INC.**

**COMPLAINANT**

**v.**

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY**

**RESPONDENT**

---

**CERTIFICATE OF SERVICE**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LAROE, WINN, MOERMAN & DONOVAN, P.L.C., Attorneys for Respondent, to print this document. I am an employee of Counsel Press.

On the **30<sup>th</sup> day of July, 2007**, I served 2 copies of the within **Answer and Counterclaim** in the above captioned matter upon:

Marc J. Fink  
Anne E. Mickey  
Heather M. Spring  
SHER & BLACKWELL  
1850 M Street, N.W. Suite 900  
Washington, DC 20036  
(202) 463-2500

**via Hand Delivery**

Unless otherwise noted, an original and 15 copies have been sent to the commission via hand delivery on the same date.

July 30, 2007

  
\_\_\_\_\_  
John C. Kruesi, Jr.  
Counsel Press, LLC