

FEDERAL MARITIME COMMISSION
Office of Administrative Law Judges

INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC., *Complainant*

v.

OCEAN CARRIER EQUIPMENT MANAGEMENT ASSOCIATION INC.; CONSOLIDATED CHASSIS MANAGEMENT, LLC; CMA CGM S.A.; COSCO SHIPPING LINES Co. LTD.; EVERGREEN LINE JOINT SERVICE AGREEMENT, FMC NO. 011982; HAPAG-LLOYD AG; HMM Co. LTD.; MAERSK A/S; MSC MEDITERRANEAN SHIPPING COMPANY S.A.; OCEAN NETWORK EXPRESS PTE. LTD.; WAN HAI LINES LTD.; YANG MING MARINE TRANSPORT CORP.; AND ZIM INTEGRATED SHIPPING SERVICES, *Respondents*.

DOCKET NO. 20-14

Served: February 6, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION PARTIALLY GRANTING SUMMARY DECISION¹

I. INTRODUCTION

A. Overview

Complainant Intermodal Motor Carriers Conference, American Trucking Associations, Inc. (“IMCC”) filed a complaint alleging violations of the Shipping Act of 1984, as amended (“Shipping Act”) by Respondents Ocean Carrier Equipment Management Association Inc. (“OCEMA”), Consolidated Chassis Management, LLC (“CCM”), and eleven different ocean common carriers (“ocean carriers” or “OCCs”). IMCC alleges that Respondents have “adopted and imposed unjust and unreasonable regulations and engaged in unjust and unreasonable practices by requiring the use of OCEMA member default chassis providers, and denying motor carriers their right to select the chassis provider for merchant haulage movements, all in violation of 46 U.S.C. § 41102(c).” Complaint at 2. Each of the thirteen Respondents filed an answer denying the allegations and raising affirmative defenses, including lack of jurisdiction, failure to join indispensable parties, and failure to demonstrate actual injury or causation. This initial decision adjudicates three motions for summary decision filed by the parties.

¹ This initial decision partially granting summary decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

Chassis are the metal frame and wheels upon which intermodal shipping containers are mounted for movement over the road. Chassis are critical to moving intermodal shipping containers throughout the country, as explained by a recent Federal Maritime Commission (“FMC” or “Commission”) report.

Chassis are the wheels of the supply chain. Prior to 2005, intermodal chassis were typically owned and operated by the ocean carriers, which allowed carriers to more accurately deploy sufficient chassis resources to cover intermodal shipping needs. When the carriers made the decision to disinvest in chassis, because of increasing concerns about safety and the imposition of regulatory requirements for safe management of chassis, it created another coordinating point in the supply chain, the intermodal equipment provider.

While the approach has worked and injected higher levels of safety and maintenance in chassis operations there have been other challenges as well. If chassis are not available, then containers do not move. By removing or delaying the use of one component of operational equipment, the entire supply chain will slow down. Movements from marine terminals to inland and destination points in the interior are heavily reliant on chassis for intermodal trucking services.

Final Report, Commissioner Carl W. Bentzel, *Assessment of P.R.C. Control of Container and Intermodal Chassis Manufacturing*, at 5 (released Mar. 30, 2022), available at: www.fmc.gov/wp-content/uploads/2022/03/ContainerandChassisManufacturingFinalReport.pdf.

Chassis are provided for lease by non-party intermodal equipment providers (“IEPs”), also referred to as chassis providers. Chassis may be provided by individual IEPs or competing IEPs may combine their chassis into interoperable pools with various methods for allocating chassis charges. Motor carriers, also referred to as truckers, arriving at a port or intermodal terminal generally pick up a chassis that is already loaded with a container in wheeled operations or pick up a chassis and have a container loaded onto it in grounded operations.

As part of door-to-door service, the ocean carrier is responsible for arranging and obtaining transportation between the port and a customer’s location, including payment to a chassis provider for the chassis used during transport. Such container movements are referred to as “carrier haulage” or “CH.” For port-to-port service, the ocean carrier’s responsibility ends at the port and the customer (such as a beneficial cargo owner (“BCO”), non-vessel-operating common carrier (“NVOCC”), or motor carrier hired by the customer²) is responsible for arranging and obtaining transportation between the port and the customer’s location, including paying for chassis. Such container movements are classified as “merchant haulage” or “MH.” Generally, the ocean carrier is responsible for chassis used in CH, while the motor carrier is responsible for chassis used in MH. MH tends to be a greater percentage of total movements as compared to CH.

² The focus of this case is motor carriers, so that term will be used to also include the customer who hired the motor carrier, such as the BCO or NVOCC.

Respondent OCEMA is a non-profit corporation established pursuant to an FMC-filed agreement which has been amended a number of times, including to establish and oversee the operation of chassis pools managed by CCM. Respondent CCM, its affiliates, and its affiliated pools are created by and operate pursuant to an FMC-filed agreement. OCEMA and CCM have rules that impact how individual ocean carriers contract for and utilize chassis. Ocean carriers typically contract with IEPs to provide chassis in both CH and MH moves on an exclusive or preferred/default basis. The motor carriers are not parties to these contracts between the ocean carrier and IEP. This proceeding focuses on MH, in which the motor carriers pay for the chassis but may not freely select the chassis provider of their choice, due to the ocean carriers' designation of exclusive or default chassis providers.

Best practices for chassis pools were addressed in the Ocean Shipping Reform Act of 2022, passed on June 16, 2022, after the motions for summary decision *sub judice* were filed. The new law requires the Commission to enter into an agreement to “carry out a study and develop best practices for on-terminal or near-terminal chassis pools that provide service to marine terminal operators, motor carriers, railroads, and other stakeholders that use the chassis pools, with the goal of optimizing supply chain efficiency and effectiveness.” Pub. L. No. 117-146, §19, 136 Stat. 1272, 1283 (2022). In developing best practices, the Transportation Research Board shall: “(1) take into consideration – (A) practical obstacles to the implementation of chassis pools; and (B) potential solutions to those obstacles; and (2) address relevant communication practices, information sharing, and knowledge management.” *Id.* On October 3, 2022, the Commission announced that it had awarded a contract to the National Academies of Science Transportation Research Board to conduct a study examining intermodal chassis pools and to provide recommendations on best practices for their management. “Commission Contracts with National Academies for OSRA Mandated Chassis Study,” FMC News Release, Oct. 3, 2022, available at: www.fmc.gov/commission-contracts-with-national-academies-for-osra-mandated-chassis-study.

This proceeding raises the issue of whether current chassis practices by Respondents violate the Shipping Act. This decision does not address the broader questions involved in determining best practices for chassis pools. Indeed, as early as January 29, 2021, IMCC was cautioned that while “the Commission may have an interest in efficiency, it will be Complainant’s obligation to establish that the regulations and practices are unreasonable, not Respondents’ obligation to establish that the practices are the most efficient.” Order Denying Respondents’ Motion for Leave to File Interlocutory Appeal at 6.

This is a large and complex proceeding with thirteen respondents, discovery from multiple non-parties, and well over a million pages of documents produced in discovery. Given the size of the proceeding, the parties limited the time frame and geographic scope to initially focus their efforts on four geographic regions. Because each geographic area has unique characteristics and the eleven ocean carriers have different regulations and practices in different areas, this decision only addresses the four geographic areas selected and briefed by the parties at this stage.

The parties filed three separate motions for summary decision making novel legal arguments based on complex economic theories and extensive expert economist testimony. The parties also filed corresponding oppositions, replies, and two motions to strike. The parties agreed to 319 jointly stipulated findings of fact; presented 1,048 proposed and disputed facts; and filed

over 9,000 pages of documents. Because there are multiple motions for summary decision,³ many of the filings have similar names. A chart at Appendix A lists the relevant filings, dates filed, and shorthand references used in this decision. The filings are listed in chronological order and the shorthand references are constructed so that oppositions and replies are associated with the motion to which they refer. Public versions of documents with confidential material were also filed.

Summary decision is appropriate when there is no genuine dispute of material facts and the party is entitled to judgement as a matter of law. Complainant IMCC seeks a summary decision, alleging that the Commission has jurisdiction over the complaint and that a number of specific practices by Respondents are unreasonable and violate the Shipping Act. Respondents seek a summary decision, alleging that the Commission does not have jurisdiction to adjudicate the complaint, the non-party IEPs are necessary and indispensable parties, and the practices at issue are reasonable. Evergreen Line Joint Services Agreement (“Evergreen”) joins in Respondents’ motion for summary decision but also files a supplementary motion for summary decision, arguing that Evergreen should be dismissed because it has a different chassis provision model.

As discussed more fully below, IMCC’s motion for summary decision is granted in part and denied in part. Respondents’ motion for summary decision and Evergreen’s supplemental motion for summary decision are denied. Understanding the legal requirements of the Shipping Act will assist regulated entities in ensuring that their practices conform to the requirements of the Shipping Act and help focus further proceedings.

To summarize the findings, IMCC establishes that the Commission has jurisdiction over this proceeding. IMCC has also established as a matter of law based on the undisputed material facts that the *exclusive* chassis agreements at issue violate the Shipping Act when the motor carrier is not able to utilize the chassis provider of its choice for MH transportation. As explained in more detail below, the sometimes overlapping unreasonable practices include: CCMP Operating Rules which limit motor carrier choice of chassis providers for MH; the contractual linkage of CH price with MH volume; the designation of IEPs by Respondent ocean carriers for MH when motor carriers cannot unilaterally select a chassis provider of their choice; and ocean carrier designation of an IEP in the “Pool-of-Pools” (“POP”) at the ports of Los Angeles and Long Beach, while such designation cannot be altered by motor carriers for MH.

However, IMCC has not established as a matter of law based on the undisputed material facts at this stage that a *default* chassis agreement violates the Shipping Act or that having a default chassis provider is necessarily unreasonable, when the default arrangement does not prevent motor carriers from unilaterally using the chassis provider of their choice. As Respondents assert, chassis must be available and utilized to move containers off the port. The assignment of a default provider where a motor carrier does not have another preference may serve the interests of the shipping public by ensuring that a system is in place to efficiently assign chassis to containers and incentivizing the efficient flow of cargo.

³ The term “summary decision” may be used in administrative proceedings where initial decisions are issued, while the term “summary judgment” is used in courts where judgements are issued. Both terms are used interchangeably in this decision.

As an overview, relying primarily on Commission case law regarding exclusive agreements, this decision finds that preferred agreements, where a default chassis provider is selected but not required, are not necessarily unreasonable but that exclusive agreements, which prevent motor carriers from using the chassis provider of their choice for MH, are unreasonable and violate the Shipping Act. In addition, the Commission has the authority to prevent regulated entities from withdrawing from interoperable pools, where multiple IEPs contribute chassis, although additional proceedings will be needed to determine any markets where this is appropriate. The parties are given an opportunity to appeal this decision as a whole prior to determining next steps, including final briefing on the remaining issues in these four regions and discovery regarding other geographic regions.

Next, this section summarizes the procedural history, arguments asserted in each motion, and preliminary evidentiary issues. Section two summarizes the legal and factual background. Section three discusses IMCC and Respondents' motions. Section four discusses Evergreen's supplemental motion. Section five provides the order.

B. Procedural History

On August 24, 2020, this proceeding commenced when a notice of filing of complaint and assignment was issued. On November 18, 2020, an order denied Respondents' motion to dismiss on the basis of a lack of subject matter jurisdiction, failure to state a claim for which relief may be granted, failure to state a claim for which relief may be granted as to Respondents OCEMA and CCM, and failure to join necessary parties. On December 3, 2020, Respondents filed a motion seeking leave to file an interlocutory appeal of the denial of the motion to dismiss. On January 29, 2021, an order denying Respondents' motion for leave to file an interlocutory appeal was issued.

On February 18, 2021, Respondents filed answers to the complaint and the case proceeded, with a March 4, 2021, order on confidentiality and a June 9, 2021, amended order of confidentiality. The parties conducted discovery, including from a number of expert witnesses, with orders issued on various motions to compel on June 1, 2021, August 31, 2021, and September 27, 2021. On February 23, 2022, the parties filed a joint stipulation of facts ("JSF"). A number of scheduling orders were issued, concluding with the fourth amended scheduling order which set the final deadline to complete discovery as April 15, 2022.

On April 29, 2022, three motions for summary decision and related documents were filed: (1) Complainant's motion for summary decision ("CMSD"), Complainant's statement of undisputed material facts ("CSUMF"), appendix, and Complainant's motion for confidential treatment, (2) Respondents' motion for summary decision, Respondents' statement of material facts ("RSUMF"), Respondents' memorandum of law in support of motion for summary decision ("RMSD"), and appendix, and (3) Evergreen's supplemental motion for summary decision and memorandum of law in support thereof ("EMSD"), Evergreen's statement of undisputed material facts ("ESUMF"), and Evergreen's appendix.

On May 4, 2022, Complainant filed a supplemental motion for confidential treatment and Respondents also filed a motion for confidential treatment of certain materials.

On May 27, 2022, two oppositions to the three motions for summary decision and related documents were filed: (1) Respondents' memorandum of law in opposition to CMSD ("CMSD/ROpp"), Respondents' supplemental appendix, and Respondents' response to Complainant's SUMF ("CSUMF/RResp"); and (2) Complainant's response to RMSD and EMSD ("RMSD/COpp"), Complainant's response to RSUMF and ESUMF ("RSUMF/CResp") with Complainant's supplemental statement of undisputed material facts beginning on page 69 of RSUMF/CResp ("CSUMF2"), Complainant's supplemental appendix, and Complainant's motion for confidential treatment.

On June 2, 2022, Complainant filed a supplemental motion for confidential treatment and Respondents also filed a motion for confidential treatment.

On June 13, 2022, Respondents filed their reply memorandum of law in support of RMSD ("RMSD/RReply"), Respondents' response to Complainant's supplemental statement of undisputed material facts ("CSUMF2/RResp"), and Respondents' second supplemental appendix, with Respondents' motion for confidential treatment following on June 16, 2022. Also on June 13, 2022, Complainant filed its reply memorandum in support of CMSD ("CMSD/CReply") and reply appendix, Complainant's reply in support of its SUMF ("CSUMF/CReply"), and Complainant's motion for confidential treatment, with Complainant's supplemental motion for confidential treatment following on June 16, 2022.

In addition, on June 13, 2022, Complainant filed a motion to strike untimely expert declarations from Respondents and for sanctions ("CStrike"). On June 21, 2022, Respondents filed an opposition to CStrike ("CStrike/Opp") followed by a motion for confidential treatment on June 24, 2022.

On June 30, 2022, Respondents filed a motion to strike Complainant's reply to Respondents' response to Complainant's statement of undisputed material facts ("RStrike"). On July 1, 2022, Complainant filed its response to RStrike ("RStrike/Opp").

On December 14, 2022, due to over-redacted public filings, IMCC was ordered to file a corrected public version of Complainant's opposition to respondents' motions for summary decision and Respondents were ordered to file a corrected public version of Respondents' response to IMCC's statement of material facts. IMCC submitted its revised public version of RMSD/COpp on December 19, 2022. Respondents submitted their revised public version of CSUMF/RResp on December 21, 2022.

C. Arguments Asserted in Each Motion for Summary Decision

IMCC asserts that the Commission has jurisdiction over all parties and claims; a number of Respondents' practices are unjust and unreasonable; Respondents' practices proximately caused harm to motor carriers and consumers; the remaining section 41102(c) requirements are met; and IMCC is entitled to cease-and-desist relief. CMSD at 17-30. Respondents oppose these arguments. CMSD/ROpp at 3-29.

Respondents argue that the Commission does not have subject matter jurisdiction over intermodal chassis; IMCC failed to establish that the conduct at issue violates section 41102(c); IMCC failed to demonstrate that motor carriers have been harmed; and the complaint must be

dismissed for failure to join necessary and indispensable parties. RMSD at 5-29. IMCC opposes these arguments. RMSD/COpp at 5-24.

Respondent Evergreen filed a separate supplemental motion for summary decision, contending that it is uniquely situated with respect to the provision of chassis and that the undisputed facts do not support IMCC's allegations against Evergreen. EMSD at 4-9. IMCC opposes these arguments in combination with its opposition to Respondents' motion. RMSD/COpp at 21-22.

Because the arguments in IMCC's motion and Respondents' motion overlap, they will be addressed together, followed by a discussion of Evergreen's supplemental motion. Before addressing the legal and factual background and the motions, rulings are made on preliminary evidentiary issues.

D. Preliminary Evidentiary Issues

1. Stipulations of Fact

Because this proceeding is at the motion for summary decision stage, findings will not be made on genuinely disputed facts. The parties submitted a document labeled as joint stipulations of fact ("JSF"), signed by both parties. No objections were raised regarding the facts in the stipulation and the stipulated facts are thorough and helpful to resolving issues in this proceeding. The 319 stipulated facts are hereby admitted into the record as facts to which the parties jointly agree. The findings of fact provided in the JSF are adopted, however, they are not repeated in their entirety in this decision to make this decision more focused and readable.

There also is factual agreement between the parties found outside of the joint stipulations of fact. The parties both submitted proposed statements of material facts, CSUMF and RSUMF, and Evergreen submitted a proposed statement of material facts, ESUMF. IMCC also submitted a supplemental proposed statement of material facts, CSUMF2. The responses to these proposed statements of material facts, as well as statements by the parties in briefing, disclose agreement on some of the material facts. To the extent that there is no genuine dispute about material facts, they may be utilized in this decision. For example, while the parties disagree as to the application and implications of CCM Pools ("CCMP") Rule 5.7, they agree that Rule 5.7 is contained in CCMP Operations Manual Version 4.0, effective October 1, 2019, available at CX2379, and that the text of this rule remains in effect. CSUMF ¶ 84; CSUMF/RResp ¶ 84. Moreover, the parties agree regarding the general methods of allocating chassis, although there are factual disputes about which Respondents utilize which methods and how those methods are applied. This decision is based on the material facts for which there is no genuine dispute. Any remaining disputed facts would need to be determined as this proceeding progresses.

IMCC requests a hearing on their motion. CMSD at 1. The filings submitted by the parties are sufficient to rule on the issues in the motions for summary decision, therefore, it is hereby ordered that the request for a hearing at this point in the proceeding be **DENIED**.

2. Motions to Strike

a. IMCC's Motion to Strike Expert Declarations

On June 16, 2022, IMCC filed a motion to strike declarations from Respondents' experts, Mr. Coates and Dr. Reitzes; to strike references thereto in Respondents' statement of material facts, responses, and briefing; and for attorney's fees and costs. CStrike at 1. IMCC contends that the two declarations, submitted during summary decision briefing, violate the scheduling order; contain supplementary analysis and opinions that were not disclosed in their previous reports; prejudice IMCC by preventing cross-examination and rebuttal expert opinion; Dr. Reitzes's declaration performs new and complex statistical analyses not included in his rebuttal; and Respondents did not submit any of Dr. Reitzes's underlying work papers that would allow for review. CStrike at 1-7. IMCC presents an affidavit from Dr. Langenfeld in support of IMCC's contentions, and asserts that the Langenfeld Affidavit performs no new analysis, but rather articulates broadly what would be required to rebut the untimely Reitzes Declaration. CStrike at 3 n.2.

Respondents argue that IMCC has mischaracterized the declarations; the declarations were submitted to avoid inadmissible hearsay; an expert is permitted to supplement, elaborate on, and explain his report; rather than constituting new reports, the declarations are recitations under oath of the statements and opinions articulated by Mr. Coates and Dr. Reitzes in their respective reports and elaborations of those opinions; and sanctions are neither warranted nor available. CStrike/Opp at 1-3.

It appears that the declarations were not filed timely and Respondents do not contend that the filings were timely. The fourth amended scheduling order, served December 7, 2021, states that the cutoff for expert discovery was April 1, 2022, and the cutoff for all discovery was April 15, 2022. The disputed Coates declaration is dated April 29, 2022, and the disputed Reitzes declaration is dated May 27, 2022, and therefore both were filed after the discovery cut-off. However, because this proceeding is at the summary decision stage, the focus is not on disputed facts nor resolving competing economic theories, but rather on the controlling legal issues. Accordingly, it is hereby ordered that IMCC's motion to strike the disputed declarations be **DENIED**, however, the declarations are given limited weight.

In the future, the parties should note that untimely filed expert reports may be stricken and objecting to a filing in a footnote does not constitute a motion to strike. If this case proceeds to a determination on the merits, IMCC may file a motion requesting underlying work papers and that request will be considered at the appropriate time.

b. Respondents' Motion to Strike IMCC's Reply to CSUMF/RResp

On June 30, 2022, Respondents filed a motion to strike IMCC's reply to Respondents' response to IMCC's statement of undisputed material facts. RStrike at 1. Respondents assert that the August 24, 2020, initial order included detailed pretrial procedure and there is no provision permitting the filing of a reply by a movant to a non-movant's response to a movant's statement of material facts; IMCC's headings are argumentative and numbered paragraphs include more than a single proposed fact, erroneously attempting to persuade the Presiding Officer to weigh

disputed evidence; and Respondents assert that once a challenge to a factual statement has been supported with citations to evidence, that fact has been properly disputed and, if material, then summary judgment must be denied because summary judgment can only be granted if the movant shows that there is no genuine dispute as to any material fact. RStrike at 1-5. Respondents therefore move to strike the reply, CSUMF/CReply; or in the alternative, Respondents request that, if a reply is permissible, they also be allowed to file a reply. RStrike at 5.

IMCC argues in response that there is nothing in the Commission Rules or the Presiding Officer's orders that prohibits a reply statement of material facts; Respondents' motion should additionally be denied because it was not timely filed; IMCC filed its reply to assist the Presiding Officer in determining whether material facts were genuinely in dispute; and IMCC did not ask the Presiding Officer to weigh evidence or evaluate credibility. RStrike/Opp at 1-3.

The scheduling order does not allow time to file replies to oppositions to statements of material facts. Typically, such replies should not be filed. Given the procedural posture of this case, such replies are not particularly useful. Because this proceeding is at the summary decision stage, the focus of this decision is not on disputed facts. Therefore, IMCC's reply to Respondents' opposition to Complainant's statement of undisputed material facts has limited relevance and will be given limited weight. For the same reasons, the record will not benefit from allowing Respondents to file a reply to IMCC's response to Respondents' statement of material facts. Therefore, IMCC's CSUMF/CReply will not be stricken but will be given limited weight and Respondents will not be permitted to file a reply to RSUMF/CResp. Accordingly, it is hereby ordered that Respondents' motion to strike CSUMF/CReply be **DENIED**.

3. Motions for Confidential Treatment

On May 24, 2021, an order entering stipulation and amended order of confidentiality was issued. On June 9, 2021, in response to a joint request by the parties, an order entering stipulation and second amended order of confidentiality ("Second Confidentiality Order") was entered. Subsequently, and pursuant to the Second Confidentiality Order, the following requests for confidential treatment were received: (1) a motion for confidential treatment filed by IMCC on April 29, 2022; (2) a motion for confidential treatment of certain materials filed by Respondents on May 4, 2022; (3) a supplemental motion for confidential treatment filed by IMCC on May 4, 2022; (4) a motion for confidential treatment filed by IMCC on May 27, 2022; (5) a motion for confidential treatment of certain materials filed by Respondents on June 2, 2022; (6) a supplemental motion for confidential treatment filed by IMCC on June 2, 2022; (7) a motion for confidential treatment filed by IMCC on June 13, 2022; (8) a motion for confidential treatment of certain materials filed by Respondents on June 16, 2022; (9) a supplemental motion for confidential treatment filed by IMCC on June 16, 2022; and (10) a motion for confidential treatment of certain materials filed by Respondents on June 24, 2022. None of the ten motions for confidential treatment were contested.

These ten motions request confidential treatment for certain testimony and documents that were designated either as confidential or confidential outside counsel eyes only ("OCEO"). Categories of documents falling under these requests include: deposition transcript excerpts; expert reports; declarations and affidavits based on underlying data and documents designated as

confidential or confidential OCEO; contracts and negotiations between IEPs and ocean carriers or between IEPs and motor carriers regarding chassis terms; internal presentations and communications; and non-public business, financial, research, and marketing data, the disclosure of which, these motions attest, would damage party and non-party commercial interests.

Commission Rule 5 outlines the procedure for filing documents containing confidential information. 46 C.F.R. § 502.5. On August 25, 2020, an initial order was issued which provided detailed information about filing confidential material. If confidential information was filed, a “motion justifying confidential treatment” was required which showed “good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information.” Initial Order at 5 (citing 46 C.F.R. § 502.141(j)(1)).

Among the documents for which the parties seek confidential treatment is the CCMP Operations Manual, version 2.9, effective April 1, 2019; and version 4.0, effective October 1, 2019, including what are currently numbered as Rules 5.5 and 5.7 which are directly at issue in this proceeding. CX2170; CX2379; *see also* April 29, 2022, IMCC Motion for Confidential Treatment, Ex. A at 4 (requesting confidential treatment of version 2.9 at CX2170-2220 and version 4.0 at CX2379-2429). However, Respondents did not seek confidential treatment of version 4.5, effective January 26, 2022, APP1799-1848, or quotations of version 4.4, effective July 20, 2020, RSUMF ¶¶ 212-217.

When the complaint was filed, the relevant portion of CCMP Rule 5.7 was included without confidential designation. Complaint ¶ 44. Moreover, the complaint cites the July 20, 2020, version 4.2 of the manual, which was publicly available on the internet. Indeed, the undersigned cited to that version of the manual and downloaded a copy of it from the internet in January 2021. Order Denying Interlocutory Appeal at 5. Version 4.2 of the manual has since been removed from the internet, however, the current CCM website links to CCMP Operations Manual, version 4.6, effective November 25, 2022,⁴ which includes Rules 5.5 and 5.7 and has language identical to the language of the rules marked as confidential. Respondents’ production of version 4.5 of the manual and inclusion of its Rules 5.5 and 5.7 language in its RSUMF, and the current availability online of a later version than included in the exhibits, with identical relevant rules language, heavily weigh against granting versions 2.9 and 4.0 confidential treatment. However, in version 4.2 (previously on the Internet), version 4.4 (quoted in the record), version 4.5 (in the record), and version 4.6 (available on the internet now) neither exhibits C nor G were included. Therefore exhibits C & G of version 4.0 (CX2423 and CX2428-29) and exhibit C of version 2.7 (CX2218) will be granted confidential treatment. There were no exhibits past D in version 2.7.

There were other instances where the parties over-designated confidential material. For example, the parties designated all of the expert witness reports and testimony as confidential, although not everything in those reports and testimony are entitled to confidential treatment. Where information that is not entitled to confidential treatment has been necessary to include in

⁴ Version 4.6 is not part of the record and was not reviewed by the undersigned or considered in this decision, other than to rule on the confidentiality requests. *See*: ccmpool.com/wp-content/uploads/2022/11/CCMP-Ops-Manual-v4.6-change-to-OU-rates-eff-October-1-2022-changes-accepted.pdf.

this decision it has been included, for example: (1) the argument that “CH and MH volumes are not determined by the ocean carriers, but are driven by BCOs,” from CMSD/ROpp at 14 (citing Coates reports at CX1533, CX1692); (2) deposition testimony by Respondents’ expert Coates that ocean carriers “are trying to do things in their own economic self-interest,” from Coates Dep. at CX882; and (3) the statement that: “Without the prospect of losing motor carrier business to a competitor, the default IEP would have no incentive to negotiate a lower rate for MH moves. The fact that IEPs enter into such negotiations and subsequent contracts is evidence that there is competition among the IEPs for the motor carriers’ MH business,” from Coates Rebuttal Report at CX1691. The requests for confidential treatment of these statements is denied.

In addition, the parties designated the entirety of other witnesses’ deposition transcripts as confidential although not everything in those transcripts is entitled to confidential treatment. The parties also over-redacted material that ought to have been public from the public version of briefs as described in the December 14, 2022, order to correct public filings. This has since been remedied by the parties per their December 19 and 21, 2022, submissions of corrected public filings.

The over-designation of confidential material unnecessarily complicates the proceeding, causes delay, and limits discussion of important issues. For example, the utility of the expert reports in this decision is limited, as the only portions that are public are the portions selectively cited by the parties in their filings without confidentiality requests or statements specifically denied confidential treatment. In the future, confidentiality may be denied to all exhibits if parties have not made a conscientious effort to only seek confidential treatment of appropriate portions of documents or testimony. Entire reports, depositions, or transcripts are generally not going to be granted confidential treatment and it is the parties’ responsibility to designate appropriate portions for confidentiality requests.

Commission Rule 5 authorizes confidential treatment for confidential commercial information, such as most of the information identified by the parties. Although not all the information in the confidential exhibits constitutes confidential information, most of the requests are permissible. Further, this decision is readable without the need for significant quotations from material designated as confidential. In the future, the parties must review all exhibits and only mark sections or pages that contain confidential material. Accordingly, it is hereby ordered that these ten motions requesting confidentiality be **GRANTED IN PART AND DENIED IN PART**. The requests for confidentiality of the items noted above and CCMP manual portions at CX2170-2217, CX2219-20, CX2379-2422, and CX2424-27 are **DENIED**.

II. LEGAL AND FACTUAL BACKGROUND

A. Relevant Law

To understand the issues in this case, it is helpful to review the laws governing both motions for summary decision and section 41102(c) claims, before summarizing relevant facts.

1. Summary Decision Standard

Although the Commission’s Rules of Practice and Procedure (“Rules”) do not explicitly provide for motions for summary decision, Rule 12 of the Commission’s Rules states that the

Federal Rules of Civil Procedure (“Federal Rules”) will be followed in instances that are not covered by the Commission’s Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12.

Pursuant to Federal Rule 56, a party is entitled to the entry of summary judgment if “there is no genuine dispute as to any material fact and [the moving party] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Tucker v. Johnson*, 211 F. Supp. 3d 95, 99 (D.D.C. 2016). A material fact is one that is capable of affecting the outcome of litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, “[t]o defeat a motion for summary judgment, the non-moving party must offer more than mere unsupported allegations or denials.” *Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 17 (D.D.C. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). If the non-movant’s evidence is “merely colorable” or “not significantly probative,” summary judgment may be granted. *Tucker*, 211 F. Supp. 3d at 99 (quoting *Anderson*, 477 U.S. at 249-50).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-48. Further, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). However, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

The Commission has emphasized that:

At the summary judgment stage, the role of the judge “. . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact.

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., Docket No. 06-06, 31 S.R.R. 540, 545 (FMC Dec. 18, 2008) (citations omitted).

Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 618 (D.D.C. 1984); *see also* Fed. R. Civ. P. 56 advisory committee notes on 2007 amendments (“although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact”).

2. Section 41102(c) Elements

IMCC alleges that Respondents violated section 41102(c) of the Shipping Act, previously numbered as section 10(d)(1), which states that a “common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and

reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c).

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying five elements for a section 41102(c) claim.

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

- (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
- (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
- (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
- (d) The practice or regulation is unjust or unreasonable; and
- (e) The practice or regulation is the proximate cause of the claimed loss.

Final Rule: Interpretive Rule, Shipping Act of 1984 (“Section 41102(c) Final Rule”), 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); 46 C.F.R. § 545.4.

Although this case is not about demurrage and detention, the Commission’s Demurrage and Detention Rule, which discusses the reasonableness requirement, is instructive.

The main thrust of the rule is that although demurrage and detention are valid charges when they work, when they do not, there is cause to question their reasonableness. This derives from the well-established principle that to pass muster under section 41102(c), a regulation or practice must be tailored to meet its intended purpose, that is, “fit and appropriate for the end in view.” The Commission determined that because the purpose of demurrage and detention are to incentivize cargo movement, it will consider in the reasonableness analysis under section 41102(c) the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.

Final Rule: Interpretive Rule on Demurrage and Detention Under the Shipping Act (“Demurrage and Detention Rule”), Docket No. 19-05, 85 Fed. Reg. 29638, 29651 (May 18, 2020) (citing *Distribution Services Ltd. v. Trans-Pac. Freight Conf. of Japan and its Member Lines*, Docket No. 86-12, 24 S.R.R. 714, 722, 1988 FMC LEXIS 52, at *16-18 (FMC Jan. 6, 1988) (quoting *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 547 (FMC May 24, 1966))).⁵

⁵ Decisions in F.M.C. and F.M.B. from 1919 to 1987 are available at: www.fmc.gov/fmc-reports.

The Commission has long had the responsibility of ensuring an efficient transportation system for ocean commerce. When this case was filed, one of the purposes of the Shipping Act was to “provide an efficient and economic transportation system.” 46 U.S.C. § 40101(2). The Ocean Shipping Reform Act of 2022 modified this to “ensure an efficient, competitive, and economical transportation system.” Pub. L. 117-146, §2, 136 Stat. 1272 (June 16, 2022). Thus, consideration of the efficiency of practices is not limited to detention and demurrage cases.

B. Relevant Facts

1. Parties

1. Complainant IMCC is a conference of the American Trucking Associations, Inc. (“ATA”) whose membership includes ATA member companies engaged in the intermodal transportation of ocean containers on chassis. JSF ¶¶ 1-2.
2. Respondent OCEMA is a non-profit corporation created and established pursuant to FMC Agreement No. 011284. JSF ¶ 3. The OCEMA Agreement has been amended a number of times, including to establish and oversee the operation of chassis pools managed by CCM. JSF ¶ 6.
3. Respondent CCM, its affiliates, and its affiliated pools are created pursuant to, and have operated pursuant to, the Consolidated Chassis Management Pool Agreement (“CCMP Agreement”), FMC Agreement No. 011962, the current version of which is FMC Agreement No. 011962-018, effective January 30, 2021. JSF ¶ 14.
4. The eleven Respondent ocean common carriers are regulated by the Commission. JSF ¶¶ 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176.
5. Each Respondent engages in international maritime commerce and publishes tariffs for transportation of cargo containers to and from ports in the United States. JSF ¶¶ 28, 29, 45, 46, 61, 62, 75, 76, 90, 91, 105, 106, 120, 121, 136, 137, 150, 151, 165, 166, 179, 180.
6. Each Respondent except Wan Hai and Yang Ming is part of both the OCEMA and CCMP agreements. JSF ¶¶ 26, 27, 43, 44, 59, 60, 73, 74, 88, 89, 103, 104, 118, 119, 134, 135, 164, 177, 178.
7. Wan Hai is not a member of CCM but has been a member of OCEMA since 2016. JSF ¶ 149. Yang Ming is a member of CCM and was a member of OCEMA from 2000-2018. JSF ¶¶ 163-164.
8. Evergreen obtains chassis from IEPs at a single, fixed contractual daily rate for use in both CH and MH. ESUMF ¶ 4; RSUMF ¶ 88; RSUMF/CResp ¶ 88. Evergreen’s customers pay a fixed chassis usage charge if they want Evergreen to provide a chassis to the motor carrier for MH. EMSD at 6; ESUMF ¶ 7; RSUMF ¶ 91; RSUMF/CResp ¶ 91. This fee then covers the day of delivery plus four business days, after which time motor carriers pay a per diem of \$20 per day. EMSD at 6; ESUMF ¶ 11; RSUMF ¶ 95; RSUMF/CResp ¶ 95.

2. CH and MH Container Movements

9. Ocean carriers generally provide transportation of containers to and from the United States using store-door, port-to-port, and inland intermodal rates. JSF ¶¶ 33, 50, 66, 80, 95, 110, 122, 123, 124, 141, 155, 170, 184.
10. In store-door, also called “through,” “door-to-door,” or simply “door” moves, the ocean carrier is responsible for arranging and obtaining rail and/or motor carrier transportation between a port or inland intermodal terminal and a customer’s location. Such container movements are classified as carrier haulage or “CH.” JSF ¶¶ 32, 49, 65, 79, 83, 94, 109, 124, 140, 154, 169, 183.
11. In port-to-port moves, ocean carrier customers (such as BCOs or NVOCCs) are responsible for arranging for and obtaining motor carrier transportation between the port and the customer’s location. Such container movements are classified as merchant haulage or “MH.” JSF ¶¶ 30, 47, 63, 77, 83, 92, 107, 122, 138, 152, 168, 181.
12. When an ocean carrier’s rates are to/from inland intermodal terminals, the ocean carrier is responsible for arranging and obtaining rail and/or motor carrier transportation between the port and the inland intermodal terminal. When the ocean carrier’s rates do not include inland transportation, the ocean carrier’s customer is responsible for arranging for and obtaining motor carrier transportation between the inland terminal and the final destination. These latter container movements are also classified as MH. *See, e.g.,* JSF ¶¶ 31, 48, 64, 93, 108, 139, 153, 182.
13. Respondents assert that CH “presently constitutes 45% of all cargo movements.” CMSD/ROpp at 11 (citing to Coates Rebuttal Report at CX1692). IMCC provides its own assessments broken down by year and by ocean carrier but agrees to the extent that MH tends to be a greater percentage of total movements than CH. Langenfeld Report at CX1309, CX1319.

3. Chassis Pools

14. The concept of a single-provider pool is also known as a “proprietary pool,” “private pool,” or a “neutral pool” (because it serves multiple ocean carriers). CSUMF ¶ 42; CSUMF/RResp ¶ 42. The major IEPs denominate their single-provider chassis pools as “neutral” pools because the chassis in those pools may be made available to multiple ocean carriers. JSF ¶ 192.
15. In the single-provider model, an individual IEP owns chassis pooled at selected locations, usually in proximity to container yards, and the motor carrier must pick up and drop chassis from selected locations offered by the IEP. The daily charges for chassis used from a private pool are set via negotiated contract or through posted daily rates. CSUMF ¶ 42; CSUMF/RResp ¶ 42.
16. “Fully interoperable” or “gray” chassis pools are chassis pools managed by a single entity in which equipment contributed by multiple equipment providers are commingled. JSF

- ¶ 193. A gray chassis pool does not require matching a specific equipment provider's chassis with a particular ocean carrier's containers. JSF ¶ 194.
17. According to OCEMA's website, at one point in time CCM had "over 120,000 chassis under management at regional pools in 29 major metropolitan transportation hubs." JSF ¶ 198.
 18. According to the October 28, 2020, OCEMA Senior Steering Committee meeting presentation, CCM chassis inventory had reduced in size. JSF ¶ 199.
 19. Under the CCM Pools Operations Manual, CCM rules establish a mechanism for the assignment of chassis "usage" to a contributor, which gives that contributor the right to bill its customer for usage of a chassis regardless of the contributor of the chassis the customer physically uses. Tock (CCM) Dep. at CX459; CSUMF ¶ 36; CSUMF/RRsp ¶ 36.
 20. CCM Pools Operations Manual Version 4.0, effective October 1, 2019, renumbered Rules 8.5 and 8.7 as Rules 5.5 and 5.7. CSUMF ¶ 84; CSUMF/RRsp ¶ 84; CX2190 (8.5 and 8.7); CX2398-99 (5.5 and 5.7). The text of Rules 5.5 and 5.7 as of October 1, 2019, remains in effect. CSUMF ¶ 84; CSUMF/RRsp ¶ 84.
 21. CCMP Section 5.5 ("Rule 5.5") states: "Usage Days will be assigned by default to the User associated with the Container Line Operator for the container loaded on a Chassis, (i.e., to either the User itself or to the User for whom the Container Line Operator is a customer)." CX2398. "User" is defined as "an entity that has entered into a written Master Chassis Use Agreement with a pool" and "Container Line Operator" is defined as "the ocean carrier that is operating the container at the time of usage." CX2390.
 22. CCMP Section 5.7 ("Rule 5.7") states:

Notwithstanding Section 5.5, under the Choice Program, Usage Days may be directed to another User when the Container Line Operator and the User for whom the Container Line Operator is a Customer authorize a deviation from the default assignment. To utilize this program, the Container Line Operator must notify CCM that it allows exceptions: at the shipment level (based on booking or bill of lading reference); upon request and approval; based on the motor carrier (for merchant haulage moves); or for all merchant haulage moves (provided the Container Line Operator provides CCM with access to shipment data sufficient to make such assignments).

CX2398-99.
 23. CCM's Gulf Consolidated Chassis Pool closed as of August 2020, which had served ports including Houston, El Paso, and New Orleans. JSF ¶¶ 201-202.
 24. CCM's Chicago & Ohio Valley Consolidated Chassis Pool ("COCP") also closed in August 2020, which had served numerous intermodal terminals in the Midwest, including in Illinois, Indiana, and Ohio. JSF ¶¶ 203-204.

25. CCM's pools described as open at the time of briefing included: Denver Consolidated Chassis Pool (serving Denver, CO and Salt Lake City, UT); Mid-South Consolidated Chassis Pool LLC ("MCCP") (serving Memphis, TN and Nashville, TN); Mid-West Consolidated Chassis Pool LLC (serving St. Louis, MO, Kansas City, KS, and Omaha, NE); and South Atlantic Chassis Pool LLC (serving Atlanta, GA, Charleston, SC, Charlotte, NC, Jacksonville, FL, Savannah, GA, and Tampa, FL). JSF ¶¶ 200-206.
26. At the "Pool-of-Pools" ("POP"), established by DCLI, TRAC Intermodal, and Flexi-Van at the ports of Los Angeles and Long Beach ("LA/LB"), chassis owned by those IEPs can be used on an interoperable basis. JSF ¶ 195.
27. As of August 20, 2020, the POP website stated:

Prior to the POP, the operation of multiple independent chassis pools in Los Angeles and Long Beach created situations where chassis in different pools were segregated at facilities for use only by certain user bases, and returnable only to a fraction of the facilities otherwise available to receive chassis. These inefficiencies often resulted in lost time and revenue to a motor carrier, duplicative repositioning, and confusion on terminals and rail ramps. The "gray fleet" that is the POP has smoothed the impacts to chassis operations that would have otherwise occurred in the ever-changing landscape of ocean carrier alliances and terminal operations, increases overall efficiency and availability, and significantly reduces chassis splits.

Pool of Pools, *About Us*, web.archive.org/web/20200820222149/http://www.pop-lalb.com; JSF ¶ 196.
28. The U.S. Department of Justice issued a business review letter to Flexi-Van Leasing, Inc. and Direct ChassisLink, Inc. with respect to the POP. JSF ¶ 196. Usage of chassis in the POP is assigned to the IEP that has a contractual relationship with the ocean carrier whose container is being moved. JSF ¶ 197.
29. Non-party North American Chassis Pool Cooperative, LLC ("NACPC") was formed by motor carriers and is an enterprise that has leased and rented chassis as an IEP. JSF ¶ 191; RSUMF ¶ 6; RSUMF/CResp ¶ 6.
30. As of August 24, 2020, the three major IEPs – TRAC Intermodal, DCLI, and Flexi-Van – leased chassis to ocean carriers and motor carriers. NACPC and several smaller chassis providers also have leased chassis to ocean carriers and motor carriers. JSF ¶ 207.
31. The Chicago region was previously served by an interoperable CCM pool which collapsed and is now only served by proprietary IEP pools. JSF ¶¶ 200, 203-204; CMSD at 5-6; CMSD/ROpp at 26; Reitzes Report ¶ 120 at CX1675.
32. The Savannah region is served by a CCM interoperable gray pool. JSF ¶¶ 200, 206; Reitzes Report ¶ 123 at CX1676; CMSD at 7.

33. The Memphis region is served by a CCM interoperable gray pool, as well as by proprietary pools from DCLI and TRAC. JSF ¶ 200; CSUMF ¶ 646; CSUMF/RResp ¶ 645 (responding to CSUMF ¶ 646); CMSD at 7.
34. The LA/LB region is served by the POP, which is interoperable, however usage of chassis in the POP is assigned to the IEP that has a contractual relationship with the ocean carrier whose container is being moved, regardless of the IEP whose chassis is physically being used. JSF ¶ 195, 197; CSUMF ¶ 48; CSUMF/RResp ¶ 48; CX1701 at ¶ 6; CX1703 at ¶ 6; CX1705 at ¶ 6; CMSD at 6. These “box rules” remain in force, and motor carriers do not have the ability to select an IEP other than the IEP designated by the ocean carrier. CMSD ¶ 50; CMSD/RResp ¶ 50; Coates Rebuttal Report at CX1693; CMSD at 6.

III. IMCC AND RESPONDENTS’ MOTIONS

This section discusses the motions filed by IMCC and Respondents, addressing subject matter jurisdiction, joinder, reasonableness of five practices, other section 41102(c) elements including proximate cause, conclusions and remedy, and exceptions and appeal. Evergreen’s motion is addressed in the next section.

A. Subject Matter Jurisdiction

1. Summary

Both parties request summary decision regarding subject matter jurisdiction, with IMCC requesting a decision that the Commission has subject matter jurisdiction and Respondents requesting a decision that the Commission does not have subject matter jurisdiction.

As explained more fully below, taking into consideration the facts not in dispute, the Commission has jurisdiction over Respondents’ practices as Respondents are regulated entities alleged to have violated the Shipping Act. Therefore, IMCC’s motion for summary decision on the issue of jurisdiction is granted and Respondents’ is denied. However, Respondents’ arguments that there are limits to the Commission’s jurisdiction are well-taken and this decision is limited to ruling on matters within the Commission’s jurisdiction.

2. Parties’ Arguments

IMCC asserts that the Commission has jurisdiction over all Respondents and claims, arguing that ocean carrier Respondents are common carriers subject to the Commission’s jurisdiction; OCEMA and CCM are controlled by Respondent ocean carriers, and have filed governing agreements and minutes with the Commission; the shipping public needs chassis to move containers containing property and the Shipping Act governs ocean carrier practices that affect receiving, handling, storing, or delivering property in containers being transported in connection with common carrier services; chassis are an integral part of through-transportation for shipments in international maritime commerce, and the Commission’s jurisdiction extends to domestic portions of that through-transportation; Respondents’ practices are related to the cost and access to chassis necessary for receipt or delivery of containers under Respondents’ port-to-port and port-to-terminal tariffs and service contracts; and Respondents cannot shield their illegal

conduct behind contracts with unregulated entities, like the IEPs. CMSD at 17-18; RMSD/COpp at 5-7; CMSD/CReply at 4-5.

Respondents allege that the Commission does not have subject matter jurisdiction over intermodal chassis, arguing that the Shipping Act does not regulate the ownership, leasing, and utilization of chassis; the Commission lacks authority to regulate IEPs and motor carriers in connection with chassis; the Commission lacks statutory authority to remedy every allegation of misconduct against unregulated parties; IMCC has failed to substantiate its allegations that Respondents in fact control the provision of chassis to motor carriers for domestic only movements; the Commission does not have subject matter jurisdiction with respect to the MH segment of a transit; and IMCC has not carried its burden of establishing that subject matter jurisdiction exists. RMSD at 5-11; CMSD/ROpp at 3-4; RMSD/RReply at 5-7.

3. Standard

The Shipping Act provides that a “person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See, e.g., Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC LEXIS 19, at *24 (FMC May 10, 2006) (holding “the Commission is obligated to hear those allegations particular to the Shipping Act”); *Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 FMC LEXIS 14, at *33-34, (FMC Oct. 31, 2000) (affirming that alleged violations of the Shipping Act including claims regarding “just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission.”); *Chief Cargo Services. v. FMC*, 586 Fed. Appx. 730, 731, 2014 U.S. App. LEXIS 18831, at *2 (2d Cir. 2014) (“The FMC’s jurisdiction extends to all alleged violations of the Act.”).

While the Commission has a limited jurisdiction, it is fully empowered to hear Shipping Act disputes. “Congress specifically authorized the FMC” to review, approve, and police “agreements among ocean common carriers. This delegation of authority by Congress, coupled with the FMC’s technical knowledge of the subject matter, cautions us to accord great weight to the agency’s judgment.” *A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1447, 1990 U.S. App. LEXIS 1687, at *19 (D.C. Cir. 1990). Indeed, the Commission is not only authorized – it is obligated – to hear Shipping Act claims. *See, e.g., Anchor Shipping Co.*, 2006 FMC LEXIS 19, at *24 (finding that the ALJ’s determination not to exercise jurisdiction over the complainant’s Shipping Act claims was incorrect and explaining “[b]ecause alleged Shipping Act violations are intertwined with breach of contract issues in the present case, such matters must be resolved before the Commission.”); *New York Shipping Ass’n v. FMC*, 854 F.2d 1338, 1364, 1371 (D.C. Cir. 1988).

“It is elementary law that a tribunal should determine its jurisdiction before proceeding to the merits of a controversy.” *NPR, Inc. v. Board of Comm’rs of the Port of New Orleans*, Docket No. 98-23, 28 S.R.R. 1178 (ALJ Nov. 23, 1999); *see also River Parishes Co. v. Ormet Primary Aluminum Corp.*, Docket No. 96-06, 28 S.R.R. 751, 762 (FMC Feb. 3, 1999) (“As the ALJ

correctly held, an agency must reach jurisdictional issues before addressing the merits of a case.” (citations omitted)).

4. Analysis

The complaint alleges that “OCEMA members control the operation of chassis pools at ports and intermodal terminals nationwide through the rules and practices they adopt for pool operation, their contracts with equipment providers, and their own rules and practices governing how the cargo containers that they own may be interchanged.” Complaint at 2. The complaint further contends:

The Commission has jurisdiction over this Complaint pursuant to 46 U.S.C. § 41301 because it alleges violations of the Shipping Act of 1984, 46 U.S.C. § 41102(c), by ocean common carriers and their agents engaged in international maritime commerce of the United States at ports and inland intermodal terminals where they engage in the interchange of cargo containers and container chassis moving in such commerce.

Complaint at 11.

The Commission’s jurisdiction has been considered at two prior points in this proceeding. First, in the context of a motion to dismiss, it was held:

Complainant asserts that Respondents are ocean common carriers and their agents engaged in international maritime commerce of the United States at ports and inland intermodal terminals where they engage in the interchange of cargo containers and container chassis moving in such commerce. As the Commission indicated, the chassis situation is “complicated,” ocean carriers may “substantially affect chassis availability via chassis pools owned by ocean carrier agreements such as OCEMA,” and “[o]cean carriers also exert control over chassis via “box rules,” under which ocean carriers determine which chassis a trucker must use in a carrier haulage situation.” 85 FR at 29655 (citations omitted). Complainant makes a plausible claim of jurisdiction by alleging that ocean carriers affect and exert control over chassis availability through their regulations and practices. Accepting the allegations in the complaint as true, subject matter jurisdiction is sufficiently alleged.

Order Denying Motion to Dismiss at 4 (Nov. 18, 2020).

It was later noted in the order denying interlocutory appeal that:

The complaint *sub judice* does not cite any terms of contracts between ocean carriers and trucking companies, but rather cites terms in FMC agreements among

ocean carriers, including the OCEMA agreement,⁶ CCMP agreement,⁷ and CCMP operations manual.⁸ It is alleged that through these and related agreements, ocean carriers affect and exert control over chassis availability, implying that they may be effectively functioning as a standard setting organization.⁹

....

In this proceeding, Respondents' arguments focus on whether the Commission has jurisdiction over the relationship between ocean carriers and truckers. This focus is misplaced as the complaint does not object to contracts between specific trucking companies and individual ocean carriers but rather contests industry-wide agreements among regulated entities filed with the FMC. In contrast to *Sea-Land Dominicana*, this complaint objects to regulations and practices regarding the receiving, handling, storing, and delivering of property, subjects specifically regulated by section 41102(c), implemented pursuant to Commission approved agreements, where adverse effects on shippers are alleged.

Order Denying Respondents' Motion for Leave to File Interlocutory Appeal at 4-6 ("Order Denying Interlocutory Appeal") (Jan. 29, 2021). The order thus held:

Ocean carriers sought the protection and benefits of FMC-approved agreements over the last thirty years and now that regulations and practices adopted pursuant to their authority are contested, the ocean carriers claim that the FMC lacks jurisdiction. This argument is not persuasive. Indeed, it is unlikely that the parties' challenges to these FMC agreements and related regulations could be heard anywhere else.

Order Denying Interlocutory Appeal at 6.

⁶ Ocean Carrier Equipment Management Association, FMC Agreement No. 011284, available at: www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/1560. Complaint at 16.

⁷ Consolidated Chassis Management Pool Agreement, FMC Agreement No. 011962-016, available at www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/454. Complaint at 17.

⁸ CCMP Operations Manual, Version 4.2 (July 20, 2020), available at www.ccmpool.com/UploadedDocuments/Membership/Resources/LEGAL-45198472v1-CCMP-Ops-Manual-v42.pdf. Complaint at 22.

⁹ See, e.g., *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988) ("Typically, private standard-setting associations . . . include members having horizontal and vertical business relations. There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.") (citations omitted).

Now considering jurisdiction at the summary decision stage, there continues to be no basis to dismiss this case for lack of subject matter jurisdiction. Rather, as explained below, IMCC presents questions central to the Shipping Act, including allegations and evidence that regulated entities have acted in violation of the Shipping Act, and therefore IMCC has established that the Commission has jurisdiction over this proceeding.

Discussing the issue of section 41102(c) as it relates to chassis providers, the Commission noted in the Section 41102(c) Final Rule that section 41102(c) “does not cover chassis providers who do not otherwise fall within the definition of a regulated entity under the Shipping Act.” Section 41102(c) Final Rule, 85 FR 29650 n.185. Therefore, this proceeding does not seek to adjudicate claims against chassis providers that are not FMC-regulated entities.

The eleven ocean common carrier Respondents are regulated entities. JSF ¶¶ 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176. In addition, OCEMA and CCM, as associations of carriers created by FMC agreements, are regulated entities under the Shipping Act. *See Int’l Assoc. of NVOCCs v. Atl. Container Line (“NVOCCs”)*, Docket No. 81-5, 25 S.R.R. 734, 743, 1990 FMC LEXIS 37, at *27 (FMC Feb. 5, 1990); *Distribution Services*, 1988 FMC LEXIS 52, at *35. Here, the OCEMA and CCMP agreements were filed with the FMC and conferred benefits and protections onto the signatories, including limited antitrust immunity, concurrently assuring the Commission’s jurisdiction over the agreements.

The complaint is focused on the actions of ocean common carriers and their associations, who are regulated entities under the Shipping Act, and whose regulations and practices are at issue. As was stated in the order denying interlocutory appeal:

The Commission has jurisdiction over Respondents, who are regulated entities. The Commission also has subject matter jurisdiction over the OCEMA and CCMP agreements which authorize the operating rules at issue. Moreover, to the extent that agreements between regulated entities implement regulations and practices regarding the receiving, handling, storing, and delivering of property that are shown to violate the Shipping Act, the Commission has jurisdiction over those claims.

Order Denying Interlocutory Appeal at 6.

As noted above, this case is not about regulating non-FMC-regulated providers of chassis or IEPs, just as the Commission’s action in *California Stevedore & Ballast Co. v. Stockton Port District* was not about regulating stevedoring. Docket No. 898, 7 F.M.C. 75, 81 (FMC Jan. 25, 1962) (“Respondents’ second claim that section 15 does not apply, and that we lack power to strike down an unjust and unreasonable practice setting up a stevedoring monopoly, because we lack power to regulate the stevedoring business, is also without merit, and a plain *non sequiter*. Our action in condemning and preventing such unjust and unreasonable practices does not constitute regulation of stevedoring.”). Respondents’ arguments with respect to registration requirements for IEPs is thus beside the point because the Commission does not seek to regulate IEPs.

The Commission may not fail to hear Shipping Act claims because ocean common carriers also have contracts with IEPs, whose conduct may be subject to antitrust regulation under the antitrust laws. *See, e.g., New York Shipping Ass’n*, 854 F.2d at 1364 (“the Commission may not in any event ‘abandon an independent inquiry into the requirements of its own statute’”) (quoting *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 357 U.S. 93, 111 (1958)). Indeed, even in the case that “an irreconcilable conflict is presented, the agency should not shrink from pursuing its statutory mandate” and would be bound to assess Shipping Act implications, allowing other agencies to perform their statutory responsibilities on their own terms. *New York Shipping Ass’n*, 854 F.2d at 1371. Here, no irreconcilable conflict is present – the Commission has been presented with allegations of Shipping Act violations by regulated entities and it must decide these claims; and IEPs are not parties to this action, neither are their practices under review, but rather, Respondents’ practices.

In a recent decision addressing Commission jurisdiction, the Commission stated:

The Commission can adjudicate allegations that contract terms are violative of the Shipping Act. *See Final Rule: Interpretive Rule on Demurrage and Detention*, Docket No. 19-05, 85 Fed. Reg. 29638 at 29648 (May 18, 2020) (“Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c.)”); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 FMC LEXIS 14, *32 (FMC Oct. 31, 2000) (the test for the Commission’s jurisdiction is whether a Claimant’s allegations “also involve elements peculiar to the Shipping Act”).

TCW, Inc., v. Evergreen Shipping Agency (Am.) Corp., Docket No. 1966(I), 2022 FMC LEXIS 589, at *6 (FMC Dec. 29, 2022).

Respondents are entirely correct, however, that the Commission’s jurisdiction is limited. If this case presented *only* questions concerning chassis usage as between IEPs and motor carriers, then the Commission might not have jurisdiction to resolve those issues. But Respondents, in citing to *American Union Transport v. River Plate & Brazil Conferences*, appear to have focused insufficiently on the latter portion of the guidance: “we wish to point out that this agency’s jurisdiction is as set out in statute, and we cannot, by our own act or omission, enlarge or divest ourselves of that statutory jurisdiction.” Docket No. 758, 5 F.M.B. 216, 224 (FMB Mar. 25, 1957); *see also* Demurrage and Detention Rule, 85 F.R. at *29644.

Regarding the Commission’s jurisdiction with respect to CH and MH, it is well established that the Commission’s jurisdiction does not automatically stop at the port. “Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce – and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage.” *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14, 27 (2004). The Supreme Court explained that the fundamental interest giving rise to maritime jurisdiction is “‘the protection of maritime commerce.’” *Kirby*, 543 U.S. at 25 (citations omitted). Thus “[w]hile it may once have seemed natural to think that only contracts embodying commercial obligations between the ‘tackles’ (i.e.,

from port to port) have maritime objectives, the shore is now an artificial place to draw a line.” *Kirby*, 543 U.S. at 25. “Furthermore, to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires.” *Kirby*, 543 U.S. at 27.

Respondents agree that “[s]ubject matter jurisdiction applies to a through bill of lading during the times that a containerized shipment is in transit pursuant to the terms of that bill of lading.” RMSD/RReply at 7. They argue, however, that FMC jurisdiction does not apply during the MH segment, which occurs before the ocean carrier takes possession of a shipment or after delivery has been made. RMSD/RReply at 7.

Kirby showed that a through bill of lading can pull domestic transport into the Commission’s jurisdiction. The Commission has found that a “port’s exclusive tug system “extend[ed] the . . . [marine terminal operator’s] furnishing of terminal facilities from the pier onto the waters of the harbor,”” and had “an underlying purpose relating to terminal operations and a more than incidental relationship to the receiving and handling of property and cargo.”” *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, Docket No. 02-02, 2003 FMC LEXIS 28, at *30 (FMC Feb. 24, 2003) (citing *Petchem, Inc. v. Canaveral Port Authority*, Docket No. 84-28, 23 S.R.R. 974, 987 (FMC Mar. 28, 1986)). Similarly, here, the conduct of regulated ocean common carriers pulls the MH segment of transit into the Commission’s jurisdiction to the extent that the regulated entities are exerting control over chassis in MH.

IMCC alleges that “chassis are an integral part of through-transportation for shipments in international maritime commerce, and the Commission’s jurisdiction extends to domestic portions of that through-transportation” and that “Respondents’ practices are ‘related to or connected with’ the cost of, and access to, chassis necessary to the receipt or delivery of containers under Respondents’ port-to-port and port-to-terminal tariffs (and service contracts), putting burdens on shippers, and their motor carrier agents using those tariffs.” RMSD/COpp at 5-6. Thus, IMCC alleges that Respondents’ practices extend beyond the boundaries of CH into the province of MH and that Respondents’ conduct and practices regarding CH tie to and directly and negatively impact MH.

While the Commission generally may not have jurisdiction based on domestic inland movements only, there is no dispute that the Commission has jurisdiction over ocean common carriers and chassis used in CH. To the extent that Respondents have chosen to tie CH to MH, a Shipping Act question is presented which the Commission must resolve. Stated differently, the question is whether Respondents have, through their CH practices, exerted control over MH practices.

Respondents also contend that *McKenna Trucking* supports the proposition that the Commission lacks authority to regulate relationships between ocean carriers and unregulated members of the industry, such as motor carriers, even when there are allegations of unlawful, prejudicial, and discriminatory conduct under the Shipping Act. RMSD at 9-10 (referring to *McKenna Trucking Co. v. A.P. Moller-Maersk Line*, Docket No. 97-02). The *McKenna Trucking* decision is of limited usefulness, however, for a number of reasons. *McKenna Trucking* did not involve a section 41102(c) claim. In addition, the parties in *McKenna Trucking* requested that the

complaint be dismissed, so the decision was not subject to review by the Commission and is not binding. Docket No. 97-02, 27 S.R.R. 1343, 1344, 1997 FMC LEXIS 17, at *1 (ALJ Aug 12, 1997). Further distinguishing *McKenna Trucking*, at issue was an ocean carrier who had signed a contract with a specific trucking company. This is a far jump from alleged industry-wide practices of regulated entities present here.

Moreover, in a recent decision, the Commission concurred with the statement that “during the [demurrage and detention] rulemaking process the Commission made clear that truckers were one of the entities meant to be protected under § 41102(c).” *TCW v. Evergreen*, 2022 FMC LEXIS 589, at *15 (also expressly affirming the rejection of Evergreen’s argument that because the claimant was a motor carrier the claim was outside Commission jurisdiction); *see also “50 Mile Container Rules” Implementation by Ocean Common Carriers Serving U.S. Atl. and Gulf Coast Ports*, Docket No. 81-11, 24 S.R.R. 411, 462, 1987 FMC LEXIS 20, at *167 (FMC Aug. 3, 1987) (*pet. for review denied, sub nom., N.Y. Shipping Ass’n v. FMC*, 854 F.2d 1338, 1377 (DC Cir. 1988)) (“While we need not decide in this case the outer limits of the group entitled to protection under section 10(b)(6)(C), it seems clear that such protection extends at least to those entities seeking containers on behalf of shippers. Thus, truckers, warehousemen, freight forwarders, customs brokers and non-NVO consolidators may not be unjustly discriminated against in the matter of cargo space accommodations or other facilities, to the extent that they are seeking and utilizing such accommodations or facilities as or on behalf of members of the shipping public.”)

IMCC posits that if the Commission does not have the power to review whether those practices are just, reasonable, and consistent with the ocean carriers’ common carrier obligations under the Shipping Act, then nobody does. RMSD/COpp at 6-7. The assertion that if these claims cannot be reviewed by the Commission, they probably cannot be reviewed by anyone, may be correct.

Therefore, taking into consideration the facts not in dispute, the Commission has jurisdiction over Respondents’ practices as Respondents are regulated entities alleged to have violated the Shipping Act. Therefore, IMCC’s motion for summary decision on the issue of jurisdiction is **GRANTED** and Respondents’ motion for summary decision on the issue of jurisdiction is **DENIED**. However, Respondents’ arguments that there are limits to the Commission’s jurisdiction are well-taken and this proceeding is limited to ruling on matters within the Commission’s jurisdiction.

B. Joinder

1. Parties’ Arguments

Respondents allege that the complaint must be dismissed because IMCC has failed to join necessary and indispensable parties without whom relief cannot be granted, arguing that the allegations of IMCC’s complaint actually target the IEPs’ conduct; the IEPs, not the ocean carriers, contribute chassis to pools; and the IEPs are necessary and indispensable parties to this proceeding. RMSD at 26-29; *see also* RMSD/RReply at 7-9; CMSD/ROpp at 25-26.

IMCC asserts that the IEPs are not necessary parties; the Presiding Officer can tailor relief at the initial decision stage; the IEPs are not ignorant of the proceedings and could have requested intervention but have chosen not to; and Commission precedent establishes that the IEPs are not necessary parties. RMSD/COpp at 22-24; CMSD/CRreply at 15.

2. Standard

The Commission's Rules do not explicitly address required joinder of parties. Therefore, as explained *supra*, the Federal Rules will be applied. To determine if a party is "indispensable" under Federal Rules 12(b)(7) and 19, a court must perform a two-step analysis. *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007). First, the court must determine if the absent parties are "necessary" pursuant to Federal Rule 19(a), which provides:

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. Proc. Rule 19(a)(1).

If a party is necessary under Rule 19(a)(1) but joinder is not feasible, then the court must determine whether the party is indispensable pursuant to Rule 19(b), which provides:

If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

- (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
- (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
- (3) whether a judgment rendered in the person's absence would be adequate; and
- (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. Proc. Rule 19(b).

Both the term "necessary" and "indispensable" are legal terms of art. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him

puts the matter the wrong way around: a court does not know whether a particular person is ‘indispensable’ until it has examined the situation to determine whether it can proceed without him.” *Provident Tradesmens Bank Co. & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968).

“While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after ‘an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder.’” *Ameriprise Fin., Inc. v. Bailey*, 944 F. Supp. 2d 541 (N.D. Tex. 2013) (quoting *Hood ex rel Mississippi v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009)).

3. Analysis

Applying the two-step analysis discussed *supra*, first as to whether the absent parties are “necessary” pursuant to Federal Rule 19(a), Respondents have not carried their initial burden of demonstrating that IEPs are necessary parties. The complaint’s focus is on the OCEMA and CCMP agreements, CCMP Operations Manual, and ocean carrier regulations and practices. Complaint at 16-42; *see also* CMSD at 18-30. The complaint requests relief in the form of an order to remove and to cease and desist enforcement of a section of the CCMP Operations Manual; to cease and desist adopting, maintaining, and/or enforcing any regulation or practice that limits the ability of a motor carrier to select the chassis provider it designates, including default provider designations, for MH movements or other movements for which a motor carrier is billed for usage or per diems; and to cease and desist from utilizing single-provider chassis pools that are not interoperable with pools operated by other IEPs at all ports and intermodal terminals serving more than one Respondent under rules that do not permit effective chassis choice for motor carriers. Complaint at 40-41. Respondents have offered no compelling evidence to suggest that the court would be unable to accord the complete relief requested in the absence of the IEPs. For instance, Respondents’ contention that IEPs contribute chassis to pools would not hinder the Commission from providing the relief requested from the existing parties.

It is possible that this proceeding could have an impact on ocean carrier contracts with chassis providers if a violation of the Shipping Act is found. But that possible impact does not equate to them having status as “necessary” parties. *See Provident Tradesmens Bank*, 390 U.S. at 123 (holding “the Court of Appeals’ reliance on . . . language to show that in *any* case where an outsider ‘may be affected’ it is necessarily unjust to proceed [without him], is altogether misplaced.” (emphasis in original)). Here, Respondents have not carried their burden of demonstrating IEPs to be necessary parties.

Further, even if chassis providers were necessary parties who could not be joined, the case could nevertheless continue, because the analysis does not stop there. Federal Rule 19(b) provides factors for a court to consider in determining if an action can proceed even if necessary parties cannot be joined.

The indispensability analysis balances various interests based on the particular facts of each case The inquiry is flexible and pragmatic. Some courts have voiced the opinion that they prefer not to dismiss for nonjoinder. Any such preference simply recognizes that dismissal is by nature a disruptive event that should not be ordered routinely. Obviously, dismissal should be ordered if the

court decides that equity and good conscience require it. The issue of whether to proceed or dismiss is vested in the sound discretion of the district judge, whose conclusion will be upheld unless it constitutes an abuse of discretion.

4 Moore's Federal Practice – Civil § 19.05 (2020) (citations omitted).

Applying these factors, even if chassis providers were necessary and their joinder were not feasible, the Federal Rule 19(b) factors – prejudice, shaping relief, adequate relief, and alternative forum – weigh in favor of continuing the proceeding. Because this is a Shipping Act claim, no other venue would be able to adjudicate it. In addition, any prejudice may be lessened or avoided by shaping any relief ordered.

Respondents argue that ocean carriers' relationships with IEPs are governed by separate chassis usage agreements between those parties, that ocean carriers therefore owe legal duties and obligations under those chassis usage agreements, and that in the event that the Commission grants the relief requested the ocean carriers would be in material default under their chassis usage agreements with IEPs; thus, IEPs must be joined but the Commission lacks personal jurisdiction over the IEPs per 46 U.S.C. § 41102(c). But it is circular to argue that contracts derived from practices which may be in violation of the Shipping Act may be used to justify the preservation of those practices.

Entities regulated by the Shipping Act may not be allowed to evade review of their conduct simply by entering into contracts with unregulated third parties. *Sea-Land Serv., Inc. & Gulf Puerto Rico Lines, Inc. – Proposed Rules on Containers*, Docket No. 73-17, 18 S.R.R. 553, 557, 21 F.M.C. 1, 4 (FMC June 14, 1978) (Rejecting respondents' contention, which it characterized as “tantamount to an acknowledgement by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily . . . entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act.”)

Indeed, the necessity of FMC review in exchange for limited antitrust immunity is central to the purpose of the Shipping Act itself. “The scheme of regulation adopted [by the Shipping Act] thus permits the conferences to continue operation but insures that their immunity from the antitrust laws will be subject to careful control.” *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968); *see also Agreement No. 57-96, Pac. Westbound Conference Extension of Authority for Intermodal Svs.*, 19 F.M.C. 291, 301 (FMC Sept. 15, 1976) (Reviewing conference agreements and asserting that the Commission must “assure that ‘the conduct legalized [by such agreements] does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the regulatory statute.’” (citation omitted)).

Ocean carriers cannot point to IEP contracts to avoid review of their own regulations and practices. The Commission has also demonstrated it is willing and able to provide relief in the form of orders that would necessarily result in the need for the regulated party to alter separate contracts. *50 Mile Container Rules*, 24 S.R.R. at 414-415, 1987 FMC LEXIS 20, at *7, *10-11, *188-189 (ordering that the carriers cease and desist from publishing in their tariffs and enforcing the relevant provisions of the Rules on Containers despite the fact that underlying

agreements between the carrier and the International Longshoremen's Association reflected this same content).

In *50 Mile Container Rules*, the Commission allowed for the effective date of the order to be delayed for 90 days from the date of the decision, "in order to give the carriers a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws." 1987 FMC LEXIS 20, at *10-11. The Commission explained that this "serves the public interest and will avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate the ILA's interests in some manner other than the present Rules on Containers." 1987 FMC LEXIS 20, at *188 (also noting that the delay of the effective date of its order was consistent with the initial decision in *Sea-Land*, Docket No. 73-17, 21 F.M.C. 7, 35 (ALJ Oct. 9, 1975)). However, regarding its decision to delay the order's effective date, the Commission emphasized that it did "not take this step casually, because it requires us to countenance 90 more days of continuing violations of the Intercoastal Act and the 1984 Act with the accompanying burdens upon shippers and other affected persons." *50 Mile Container Rules*, 1987 FMC LEXIS 20, at *10-11. Similar protective measures, allowing for time for certain aspects of an order to take effect, could be taken here.

Respondents' argument that all parties to a contract must be present per *Natural Resources* fails for related reasons. RMSD at 29 (quoting *Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1185 (E.D. Cal. 2013)). The chassis usage agreements are separate contracts entered into by ocean carriers, apart from those identified in the complaint and regulated by the FMC. "It is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action." *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1472 (1st Cir. 1992) (citing *Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 820 (8th Cir. 1977)); see also *Casas Office Machs. v. Mita Copystar Am.*, 42 F.3d 668, 676 (1st Cir. 1994) ("When a person is not a party to the contract in litigation and has no rights or obligations under that contract, even though he may have obligated himself to abide by the result of the pending action by another contract that is not at issue, he will not be regarded as an indispensable party in a suit to determine obligations under the disputed contract, although he may be a Rule 19(a) party to be joined if feasible." (citing 7 Charles A. Wright, Fed. Prac. & Proc. § 1613, at 199-200 (1986))); *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 28, 2002 U.S. Dist. LEXIS 7264, at *16 (D.D.C. 2002) ("a third party is not a necessary or indispensable party to an action to determine the rights of other parties under a contract" (citations omitted)).

Respondents have not established that this proceeding should be dismissed for failure to join necessary and indispensable parties. Accordingly, Respondents' motion for summary decision on the issue of failure to join indispensable parties is **DENIED**. IMCC did not move for summary judgement on this issue. Next, the section 41102(c) elements are reviewed, starting with reasonableness.

C. Reasonableness

Of the five elements necessary to establish a violation of section 41102(c), the issue most contested between the parties is the element of the reasonableness of the practices. This section focuses on the element of reasonableness and discusses the parties' arguments, antitrust principles and exclusive arrangements, and analysis of the five specific violations alleged by IMCC: (a) CCMP Rules 5.5 and 5.7, (b) contractual linkage of CH and MH, (c) designation of IEP for MH in chassis usage agreements, (d) designation of proprietary chassis pools and withdrawal from interoperable pools, and (e) MH chassis in the LA/LB Pool of Pools. The other section 41102(c) elements are discussed in the next section.

1. Parties' Arguments

IMCC alleges a number of ways in which Respondents' conduct is unreasonable. Specifically, IMCC argues that CCMP Rules 5.5 and 5.7 unnecessarily restrict chassis choice and are more restrictive than necessary; ocean carriers' contracts that link MH volumes with CH prices are unjust and unreasonable; ocean carrier contracts that designate an IEP for MH movements are unjust and unreasonable; ocean carriers' designation of a proprietary chassis pool and withdrawal from an interoperable chassis pool is unjust and unreasonable; and ocean carriers' contracts and practices to use MH chassis in the Pool of Pools are unjust and unreasonable while they fail to implement chassis choice for motor carriers. CMSD at 18-25. Each of these five reasonableness arguments will be addressed in turn.

Respondents contend that Sections 5.5 and 5.7 of the CCMP Operations Manual are neither unjust nor unreasonable because the sections do not restrict choice, are not unreasonable, and are not more restrictive than necessary; IMCC has not demonstrated that chassis usage agreements unfairly and unjustly link MH volumes with CH prices; designation of an IEP for MH movements in chassis usage agreements is not unjust or unreasonable; IEPs make business decisions about whether to serve their ocean carrier customers at a particular location via an interoperable pool or a proprietary pool and the ocean carrier customer may have input into how it is served, or it may have no choice but to go along with the decisions of the IEP; the withdrawal of IEPs from interoperable pools does not constitute a violation of the Shipping Act by Respondents; and IMCC's argument with respect to the Pool of Pools is flawed. CMSD/ROpp at 4-20. Respondents also raise defenses, such as the deference given to reasonable business discretion, which are also addressed.

2. Antitrust Principles and Exclusive Arrangements

In the Shipping Act, a balance was created whereby limited antitrust immunity was granted to regulated ocean common carriers, with the understanding that effective government supervision would also be required to avoid abuses. *FMC v. Svenska Amerika Linien*, 390 U.S. at 242-43 (1968); *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 218-19 (1966). Discussing the historical background of the Shipping Act, the Supreme Court recounted that the "Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act." *Carnation*, 383 U.S. at 218 (footnote omitted). This committee remarked: "While admitting their many

advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized.” *Carnation*, 383 U.S. at 219 (quoting H. R. Doc. No. 805, 63rd Cong., 2d Sess., pp. 417-18 (1941)). The Supreme Court concluded: “Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited antitrust exemption.” *Carnation*, 383 U.S. at 219; *see also FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *New York Shipping Ass’n v. FMC*, 854 F.2d 1338, 1374 (D.C. Cir. 1988) (citing *FMC v. Svenska Amerika Linien*, 390 U.S. at 243).

The Commission, reviewing allegations of unreasonable preference or disadvantage and unreasonable practices under the Shipping Act of 1984, has recognized the “limited role of the antitrust laws in Shipping Act enforcement” as well as “the usefulness of antitrust principles in analysis of the issues raised by exclusive arrangements or self-preference by marine terminal operators or ports under the Shipping Acts.” *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, Docket No. 94-10, 1996 FMC LEXIS 68, at *29 (FMC May 15, 1996). The Commission discussed *Gulf Container Line*, stating:

In that case, we recognized that it was not necessary to show that a practice would constitute a violation of the antitrust laws in order to establish that it was sufficiently anti-competitive to be found unreasonable under the Shipping Acts. The case did not, however, hold that the antitrust laws or antitrust analysis of relevant market or competitive effects are irrelevant to the reasonableness standard.

All Marine, 1996 FMC LEXIS 68, at *30 (discussing *Gulf Container Line v. Port of Houston Auth.*, Docket No. 89-18, 25 S.R.R. 1454, 1991 FMC LEXIS 107 (FMC May 3, 1991)).

“While no determination of whether a particular practice or action would be considered violative of the antitrust laws is necessary to a determination of reasonableness under the Shipping Act, the concepts, terminology, and framing and analysis of issues involved in antitrust cases are frequently useful in such determinations.” *All Marine*, 1996 FMC LEXIS 68, at *31.

Antitrust concepts can help articulate and explain the practices at issue here. “Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.” *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 730 (1988).

The relationships between ocean carriers, IEPs, motor carriers, and BCOs are primarily vertical. “The antitrust laws also affect a variety of ‘vertical’ relationships – those involving firms at different levels of the supply chain – such as manufacturer-dealer or supplier-manufacturer.” FTC, “Dealings in the Supply Chain,” available at: www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-supply-chain. Generally, the law considers “most vertical arrangements as beneficial overall because they reduce costs and promote efficient distribution of products. A vertical arrangement may violate the antitrust laws, however, if it reduces competition among firms at the same level (say among retailers or among wholesalers) or prevents new firms from entering the market.” *Id.*

The relationship between ocean carriers is horizontal, as well as potentially the relationship of the motor carriers in MH with the ocean carriers in CH. Horizontal relationships refer to relationships among competitors in the relevant market. *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451, 471 n.18 (1992); *see also Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 317-18 (D.D.C. 2011) (explaining “as participants in a number of different markets, wireless carriers are related both horizontally and vertically. In certain markets, the carriers compete with each other to sell outputs, and in other markets, they compete to purchase inputs. Such relationships are deemed horizontal in that they pit carriers against carriers, acting in parallel as either sellers or buyers. . . . In yet other markets, the wireless carriers buy and sell services to and from each other, and are therefore vertically related. In this complex and constantly evolving industry, markets are interconnected and the carriers play multiple roles simultaneously.”).

Respondents’ practices may be considered akin to exclusive dealing. “The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition.” *Sanofi-Aventis U.S., LLC v. Mylan, Inc.*, 44 F.4th 959, 983 (10th Cir. 2022) (citation omitted). Reliance on antitrust principles is not necessary, however. As the Commission has stated:

The Commission has in the past found unreasonable various terminal practices involving requirements that terminal users purchase related services from certain providers granted exclusive status (*Agreement Nos. 8225 and 8225-1 Between Greater Baton Rouge Port Commission and Cargill Inc.*, 5 F.M.B. 648 (1959) *aff’d sub nom. Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86 (5th Cir. 1961)), or from terminal operators themselves (*Perry’s Crane Service v. Port of Houston Authority*, 16 SRR 1459 (I.D. 1976), adopted in part, [19 F.M.C. 548 (FMC Feb. 25, 1977)]) without reliance on the antitrust laws. We do so again here.

Gulf Container Line, 1991 FMC LEXIS 107, at *18.

The Commission has addressed exclusive arrangements, stating: “In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the *St. Philip* and *Agreement No. T-2598* decisions. Such arrangements are generally undesirable and, in the absence of justifications by their proponents, may be unlawful under the Shipping Acts.” *Petchem, Inc. v. Canaveral Port Authority*, Docket No. 84-28, 23 S.R.R. 974, 990 (FMC Mar. 28, 1986) (*aff’d, sub nom. Petchem, Inc. v. FMC*, 853 F.2d 958 (D.C. Cir. 1988)). In *Seacon Terminals*, “the Commission again reviewed its doctrine and reconfirmed that proponents of exclusive or monopolistic arrangements at ports had to justify them, although the ultimate burden of proof remained with parties complaining about the arrangement.” *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, Docket No. 94-10, 1995 FMC LEXIS 22, at *39 (ALJ Oct. 6, 1995) (*aff’d, All Marine*, 1996 FMC LEXIS 68 (FMC 1996)) (citing *Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 26 S.R.R. 886, 898 (FMC Apr. 14, 1993)).

However, in certain circumstances, such [exclusive] arrangements may be necessary to provide adequate and consistent service to a port’s carriers or shippers, to ensure attractive prices for such services and generally to advance

the port's economic well-being. The burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement, both because they are the arrangement's proponents and because evidence of that nature usually lies within their control. Nevertheless, the ultimate burden of proof in any Shipping Act challenge to an exclusive terminal arrangement or franchise rests with the party wishing to overturn the franchise.

Petchem, 23 S.R.R. at 990.

Once a *prima facie* case of unreasonableness is raised, the burden of producing evidence justifying the practices shifts to Respondents. However, the proponent of the proposition that a practice is unreasonable "bears the burden of proving that proposition, including the burden of producing evidence adequate to persuade the Commission. Respondent is not required to show that the practice is reasonable." *All Marine*, 1996 FMC LEXIS 68, at *34 (footnote omitted); *see also Seacon Terminals*, 26 S.R.R. at 898.

In *Perry's Crane*, the complaint alleged that certain tariff rules and related practices gave the Port of Houston's cranes first priority, or "first call" on jobs, even to the extent of displacing, or "bumping" Perry's cranes that were already working. *Perry's Crane Serv., Inc. v. Port of Houston Authority of Harris County, TX*, Docket No. 75-51, 19 F.M.C. 548 ("Perry's Crane FMC") (FMC Feb. 25, 1977). Perry's Crane argued that Houston's practices interfered with the right of the stevedores to hire cranes of their choice; disrupted the proper handling of ships; and increased expenses and financial harm to stevedores as well as private crane owners. *Perry's Crane Serv. v. Port of Houston Authority of Harris County, TX*, Docket No. 75-51, 16 S.R.R. 1459, 1471 ("Perry's Crane ALJ") (ALJ Sept. 28, 1976) (*aff'd in part, Perry's Crane FMC*, 19 F.M.C. 548). Houston defended its practices by arguing that "bumping" is a last resort; stevedores decide which private crane to displace; Houston has a heavy investment in its cranes and is a state agency; Houston is losing out in the competitive battle for the crane rental business; and private owners agreed to the conditions. *Perry's Crane ALJ*, 16 S.R.R. at 1472

The ALJ in *Perry's Crane* found the first call and bumping practices to be unjust and unreasonable and held that they should be modified by the Commission "to restore to the stevedores as far as circumstances warrant the right to select the most suitable cranes available to work the ships without interference." *Perry's Crane ALJ*, 16 S.R.R. at 1472. The ALJ further noted that the "right of the stevedore as well as the master of the vessel to select proper equipment and personnel to service the ship is well recognized by this Commission and the courts." *Perry's Crane ALJ*, 16 S.R.R. at 1477.

The ALJ did not find that Houston was seeking to monopolize the crane market "in the sense of seeking an exclusive right to carry on the business" but did find a "limited mini-monopoly" which required justification. *Perry's Crane ALJ*, 16 S.R.R. at 1472, 1476. The ALJ stated, "it is not only private crane owners like Perry who have been affected by these violations of law but also stevedores who must hire cranes and ultimately vessels which may be serviced by cranes which are not the best ones suitable and available for the job." *Perry's Crane ALJ*, 16 S.R.R. at 1479. The ALJ concluded:

Ultimately vessels, the Port, and the public suffer since the present practices, having curtailed the stevedore's right to choose freely the most suitable and least costly equipment, perpetuate inefficiencies and higher costs. This is a direct violation of respondent's duty to promote efficiencies and facilitate the flow of cargo over its piers.

Perry's Crane ALJ, 16 S.R.R. at 1479 (citing *American Export-Isbrandtsen Lines, Inc. v FMC*, 444 F.2d 824 (D.C. Cir. 1970)).

The Commission adopted the ALJ's initial decision in *Perry's Crane*, except the portion which permitted limited "bumping," finding that "the practice of 'bumping' cannot be justified even as modified by the Presiding Officer." *Perry's Crane FMC*, 19 FMC at 552-53.

In a case just a few years after *Perry's Crane*, the D.C. Circuit set aside violations found by the Commission for failure to condition use of the terminal on, and failure to allow, sharing of high-speed container cranes by a competing carrier. *Puerto Rico Ports Authority v. FMC*, 642 F.2d 471, 473 (D.C. Cir. 1980). The Court found that the Commission's findings were not supported by substantial evidence in the record. Regarding exclusive arrangements, the court stated:

Commission precedent establishes that the exclusive assignment of public facilities to one carrier does not violate section 16 unless the challenged lease either fails to compensate the port adequately or unreasonably forecloses other carriers from securing adequate facilities. Moreover, the Commission has expressly refused to find discrimination or preference in a situation in which the port indicated willingness to make similar, but not necessarily identical, arrangements available to other carriers.

Puerto Rico Ports Authority, 642 F.2d at 482-83 (footnotes omitted).

This case *sub judice* does not involve an exclusive arrangement provided by a public port or marine terminal operator but rather the practices of regulated ocean common carriers. Moreover, the allegations here involve motor carriers allegedly denied the ability to utilize chassis provider of their choice, resulting in disruption and delays to moving containers, and increasing expenses and financial harm to motor carriers. Although there are differences between the exclusive dealing cases and this proceeding, this line of cases is instructive and provides a useful analytical framework.

3. Analysis

The parties organize their discussion of reasonableness into five specific practices. The first three focus on preferred and exclusive agreements: (a) CCMP Rules 5.5 and 5.7, (b) contractual linkage of CH and MH, and (c) designation of IEP for MH in chassis usage agreements. The last two focus on proprietary and interoperable pools: (d) designation of proprietary chassis pools and withdrawal from interoperable pools, and (e) MH chassis in the LA/LB Pool of Pools.

a. CCMP Rules 5.5 and 5.7

(1) Arguments of the Parties

The complaint alleges that the Respondents violated the Shipping Act by “[a]dopting and enforcing CCM Pool Rule 5.7, giving ocean carriers ultimate control by mandating their power of ‘consent’ over chassis choice.” Complaint ¶ 3a. The complaint further alleges that “the CCMP Operations Manual gives ocean carriers veto power over motor carrier chassis choice and prevents motor carriers from exercising ‘the freedom to use the chassis of [their] choice.’” Complaint ¶ 44 (citation omitted).

In its MSD, IMCC begins its reasonableness analysis by arguing that Rules 5.5 and 5.7 of the CCMP Operations Manual violate section 41102(c) “because they give ocean carriers the unfettered right to veto a motor carrier’s selection of MH chassis;” the “ocean carrier veto right warps competition because the entity paying for the MH chassis (the motor carrier or BCO) is not the same entity selecting the chassis;” and therefore, that the CCMP operating rules unreasonably restrain competition and increase costs in the market for MH chassis. CMSD at 18-19 (footnote omitted). In addition, IMCC asserts that “CCM’s ‘Choice Program’ is more restrictive than necessary, and thus not ‘tailored to meet its intended purpose.’” CMSD at 19.

Respondents contend that a number of ocean carriers grant exceptions or have a policy of allowing choice; Rules 5.5 and 5.7 “do not result in the ‘systematic’ denial of choice that IMCC has alleged;” the facts do not show that ocean carriers deny choice; and the rules are not more restrictive than necessary and do not apply in geographic regions wherein CCM pools are not present. CMSD/ROpp at 5-13.

In their MSD, Respondents also contend that IMCC fails to establish that Rule 5.7 of the CCMP Operations Manual is unlawful and assert that Respondents have not systematically denied choice requests. RMSD at 15-17. In opposition, IMCC reasserts that the CCMP Operations Manual rules unreasonably restrict chassis choice. RMSD/COpp at 10-12.

(2) CH, MH, and Chassis Choice

IMCC asserts that because “*motor carriers and their customers*, not the Respondents, have the duty and responsibility for chassis supply in MH movements, the proper ‘end in view’ for this case for ocean carriers is to secure sufficient chassis *only* for CH movements.” RMSD/COpp at 10 (emphases in original). Respondents acknowledge that “cargo interests determine whether their shipments move via CH or MH.” CMSD/ROpp at 2.

It is agreed that ocean carriers have the responsibility to provide chassis for CH. However, the responsibility for providing chassis for MH rests with the motor carriers. If motor carriers prefer to contract for MH chassis through an IEP other than the IEP selected by the ocean carrier, then ocean carriers should not be able to prevent them from doing so. This finding does not depend on whether or not the price for chassis will be lower or higher. Indeed, it is possible that individual motor carriers will face higher costs for chassis when they are contracting for a limited volume. With freedom to compete, however, the market may freely adjust.

A purpose of CCMP Rules 5.5 and 5.7 is to establish who may determine the allocation of charges to entities for chassis, which are an integral part of the international transportation of containerized cargo. To be tailored to meet its intended purpose, these charges should incentivize the efficient flow of cargo, whether the chassis is used for CH or MH. To determine whether the rules are more restrictive than necessary, it is important to understand the limitations on chassis choice under these rules.

In the few locations where CCM pools are present, CCMP Rule 5.5 assigns chassis charges to the ocean carriers' preferred provider while Rule 5.7 allows choice, i.e. another provider to be utilized, but only if ocean carriers and IEPs permit the exception. CX2398-99; JSF ¶¶ 200-206. There are a number of ways the ocean carrier can permit exceptions and different carriers have utilized different approaches. For example, Respondents assert that Hapag Lloyd, Yang Ming, ZIM, and Wan Hai grant choice when requested. CMSD/ROpp at 5. Respondents also contend that chassis choice is moot in some situations, for example, when the shipper accepts Evergreen or MSC's offer to provide a chassis at the discharge port. CMSD/ROpp at 7. The parties dispute, as a factual matter, the extent to which various ocean carriers permit or deny exception requests. Resolving this issue would require a factual determination not appropriate at the summary decision stage of the proceeding.

The contractual framework that permits ocean carriers to exert control over how chassis are charged for MH is not disputed. CCMP Rule 5.5 assigns charges for chassis based on the ocean carriers' preferred provider, including for MH moves which are paid for by motor carriers. CX2398. Respondents do not dispute the clear language of Rule 5.5, but rather point to the ability to obtain exceptions under Rule 5.7 to argue that choice is not restricted. CMSD/ROpp at 4-5.

IMCC describes the choice program as follows:

CCM Pools offer a "Choice Program" using a "choice by exception" model, under which every ocean carrier is both permitted and presumed to assign both CH and MH chassis usage to its "default" IEP with which it has a contractual relationship. Thus, for MH movements, current Rule 5.5 permits the ocean carrier to require that a motor carrier or BCO must use that default IEP. Current Rule 5.7 permits, but does not require, the ocean carrier to allow the motor carrier or BCO to request an exception in favor of an alternative IEP in the pool. Thus the Rules give ocean carriers a final veto right over MH chassis choice.

RMSD/COpp at 10 (citations omitted); *see also* CX2160 ("Chassis 'Choice' Dilemma" presentation); CSUMF ¶ 86 (referencing CCM *Choice Program* webpage, CX1992).

Respondents agree that both the ocean carrier and the IEP must approve choice. *See, e.g.*, CSUMF/RResp ¶ 87 (responding in part that the "language listed on CCM's website is handled by both the IEP and ocean carrier after 'both parties sign off'" (citations omitted)). For purposes of the present analysis, what is relevant is not whether an IEP may *also* act to block a choice request, but that an ocean carrier, acting on its own, retains the ability to block a motor carrier choice request under the present rules.

Thus, there is no genuine dispute that although Rule 5.7 allows a motor carrier to request a different chassis provider, the ocean carrier can block such a request. Moreover, the language of Rule 5.7 on its face supports IMCC's assertion that ocean carriers have the power to veto a motor carrier's choice of an alternate chassis provider. Thus, the ocean carriers are giving the selected IEP an exclusive right to provide chassis, or a de facto mini-monopoly.

Respondents argue that there is no evidence that a number of ocean carriers, including CMA-CGM, COSCO, Hapag-Lloyd, Yang Ming, Wan Hai, and ZIM, deny choice requests. CMSD/ROpp at 5. Respondents further assert that HMM and Maersk support chassis choice but confer with their chassis provider in response to choice requests, while ONE's policy is to grant requests for choice. CMSD/ROpp at 6 (also acknowledging an example of "choice requests that were initially deferred because ONE was in the process of re-negotiating its contract with TRAC"). Respondents state that "Evergreen and MSC have unique business models which give the shipper, at the time that a shipment is booked, the option to allow Evergreen/MS to provide the chassis at the discharge port." CMSD/ROpp at 7 (footnote omitted). IMCC agrees that "ocean carrier policies differ significantly with respect to allowing MH chassis choice, reflecting the discretion granted to ocean carriers and their IEPs by the Rules." RMSD/COpp at 11.

Respondents assert that choice requests are not common and that "choice is usually granted when requested." CMSD/ROpp at 10-11; *see also* RMSD at 12. IMCC responds that MH choice requests are routine and that "many choice requests would be futile because ocean carriers automatically deny choice, or impose burdensome procedures." CMSD/CREply at 7.

Respondents' assertions that exceptions under Rule 5.7 are often granted argues against the necessity for this rule in the first instance and support IMCC's arguments that the rule unduly restricts motor carriers' ability to choose their own IEPs for MH. If, as Respondents argue, chassis choice requests are frequently approved, then there is no need for a clause in the CCMP operating manual allowing ocean carriers to restrict chassis choice. But the inclusion of such a clause, and all of the argument concerning the clause's preservation in the instant proceeding, suggests that ocean carriers are concerned about motor carriers choosing chassis providers other than that which the ocean carrier would prefer, in the absence of compulsion. In *Transshipment*, the Commission identified a similar inconsistency of sorts, noting "if JNYRA now enjoys a *de facto* monopoly of the transshipment cargo originating in Indonesia, there is no need for an exclusive arrangement clause in their contract with Pelni. But the inclusion of such a clause leads inescapably to the conclusion that the JNYRA members are concerned that some independent competition may be inaugurated." *Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atl. and Gulf Ports*, Docket No. 65-17, 10 F.M.C. 183, 195 (FMC Oct. 13, 1966).

It is also somewhat confusing that Respondents insist on preserving their right to deny chassis choice when such chassis would be provided by an alternate IEP, and yet simultaneously assert that a motor carrier can always bring its own chassis. *See, e.g.*, CMSD/ROpp at 8 (asserting that IMCC's argument "ignores both the availability of choice and *the ability of motor carriers to provide their own chassis (via ownership or long term lease)*." (emphasis added)); *see also* CMSD/ROpp at 8 ("no motor carrier is required to use a CCM pool chassis to perform an MH move."). If it is acceptable to ocean carriers, with no additional reservations or terms specified, for motor carriers to utilize a self-owned chassis, this suggests a lack of actual

transportation or functional reasons underlying exercises of denial of choice to use an alternate chassis provider.

At this point, it is more appropriate to focus on the policy rather than specific instances of particular choice requests. The parties agree that requests for choice under Rule 5.7 are made; those requests are sometimes granted and sometimes denied; and different ocean carriers impose different requirements to process such requests. It is not necessary to determine the precise number of requests that are made or that would be made if requests for exceptions were not required. Also, given the current Rule 5.7, even if an ocean carrier were to grant a request for an exception today, it would be free to deny a similar request tomorrow, with no recourse available to motor carriers.

Essentially, the ocean carriers have given the IEPs a mini-monopoly over chassis that can move their containers. At this stage, it is not necessary to determine the factual questions regarding the extent to which each specific ocean carrier permits or denies requests for choice. Rather, the legal issue is whether it is reasonable for ocean carriers to designate default chassis providers and to require approval for motor carriers to utilize the chassis provider they prefer for MH. As these practices are exclusive or monopolistic, restricting the motor carriers' right to select the chassis provider of their choice, the Respondents must justify them.

(3) Justifications

Respondents raise a number of justifications for their practices, including ensuring a supply of safe chassis, IEP veto, and deference to business decisions. They are addressed below.

(a) Supply of Safe Chassis

Respondents argue that contracts with IEPs are necessary to ensure the supply of chassis, stating that "unless entities such as local port authorities step up to ensure chassis are made available, the burden to ensure adequate supplies has by default landed on the shoulders of the ocean carriers." CMSD/ROpp at 12. IMCC responds that "there is not a single piece of record evidence demonstrating that MH chassis choice has any negative effect on the supply [of] chassis." CMSD/CReply at 7 (emphasis omitted). IMCC also points to deposition testimony by Respondents' expert, where Coates acknowledges that ocean carriers "are trying to do things in their own economic self-interest."¹⁰ CMSD/CReply at 2-3 (citing Coates Dep. at CX882).

Sufficient supply of safe chassis is a legitimate concern. However, Respondents do not sufficiently explain how ocean carrier control over chassis will ensure sufficient and safe supply. Respondents assert as well that "the ocean carrier Respondents own or lease the containers in which international cargo is transported and have a legitimate interest in ensuring the safe and reliable delivery of those containers. This is true for CH movements for which the carrier bears responsibility for the inland move as well as MH moves for which it does not, because the customer experience with both types of moves impacts the reputation of the ocean carrier in the eyes of the customer." CMSD/ROpp at 16. But here again, motor carriers' interests are well

¹⁰ This quote does not disclose confidential material and is not entitled to confidential treatment.

aligned, as their reputation is similarly on the line where they have been hired to complete the delivery.

In *California Stevedore*, the Commission evaluated the reasonableness of a “practice relating to and connected with the receiving, handling, storing, or delivering of property” – an arrangement by which the Port of Stockton, a public corporation, paid certain sums of money for the exclusive right to stevedore bulk grain cargoes. 7 F.M.C. at 76, 79, 82. They found the arrangement to be “both unjust and unreasonable” and also commented on the lack of evidence concerning the justification offered by Respondents, writing: “We have as is our duty weighed and considered the meager argument offered to justify this monopolistic practice, and find it singularly lacking in weight. It seems to be primarily that the terminal facilities would be safer in hands selected by respondents (there is no *proof* of this)” 7 F.M.C. at 82-83. Commenting on the evils “likely to accompany monopoly, such as poor service and excessive costs,” the Commission continued, in an accompanying footnote: “It is not significant that these evils have not been proved to actually exist yet at Stockton. Healthy competition for business which is the best known insurance against such evils has been destroyed.” 7 F.M.C. at 83 & n.5. Here, the motor carrier being a captive audience for the IEP selected by the ocean carrier, rendered unable to select another chassis provider, may similarly result in the destruction of healthy competition for business.

There may be motor carriers who do not have a preference for which chassis provider is used and, in those cases, it would be reasonable and efficient to allow the ocean carriers to identify a default chassis provider. Respondents assert that ocean carriers “have a significant interest in ensuring that their customers’ containers arrive timely and safely at their destination . . . even those moving under MH.” CMSD/ROpp at 13. It should also be reiterated, however, that in terms of ensuring an available supply of safe chassis, motor carrier incentives would seem to be well aligned with those of ocean carriers. A motor carrier who cannot obtain a chassis cannot deliver the container to the end destination, as every container ultimately needs a chassis. *See* Coates Report at CX1542. Thus, if a motor carrier desires to use a different chassis provider, it stands to reason that this decision would be based on an assessment of chassis availability and safety in addition to other factors it sees as beneficial. Therefore, ensuring a sufficient supply of safe chassis does not justify the restraints on competition.

(b) IEPs Can Veto Choice Requests

Respondents contend that they do not control chassis choice because IEPs may separately veto choice requests. Yet, any veto right that IEPs may also possess (in addition to the ocean carriers’ veto right) is an ability that the ocean carriers have provided contractually or by other agreement. The IEPs have no pre-existing right or ability to contractually bind MH truckers when those motor carriers are not themselves a party to the contract and have not consented to be bound.

Respondents argue that “the terms of chassis usage agreements which provide favorable rates to ocean carriers for chassis utilized in CH moves are the lawful result of the ocean carriers’ commitment to long-term leases and usage volumes.” RMSD at 12-13. But Respondents fail to reasonably explain by what right ocean carriers utilize MH volume to negotiate prices and then do not pass on to truckers the negotiated prices premised in part upon their captive volume. That

ocean carriers utilize chassis choice denials to enhance their negotiating position is acknowledged by their expert. Coates Report at CX1550. To the extent that ocean carriers are binding not only themselves, but also motor carriers – with ocean carriers passing on an obligation to use a particular IEP, yet withholding the deal’s volume discount – this impacts the reasonableness of the arrangement.

The Commission has expressed concern regarding restraints placed on third parties. “If we are to discharge our regulatory obligations under section 15, we must be especially wary of any agreement which places restraints upon third parties.” *Transshipment*, 10 FMC at 194. The Commission also cited to the Supreme Court’s admonition that “[f]reedom allowed conference members to agree upon terms of competition subject to Board approval is limited to freedom to agree upon terms regulating competition *among themselves*.” *Transshipment*, 10 FMC at 194 (emphasis added) (citing *FMB v. Isbrandtsen Co.*, 356 U.S. 481, 491, 493 (1958)).

Thus, the concern is allowing Respondents to alter the rights of motor carriers through contracts or agreements to which the motor carriers are not parties, thereby giving IEPs the right to veto motor carriers’ MH choice requests. Therefore, that IEPs can also veto chassis choice requests does not justify the restraints on competition.

(c) Deference to Business Decisions

Respondents assert that the Commission should defer to commercial parties’ reasonable, discretionary business decisions. CMSD/ROpp at 5 (citing *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, Docket No. 08-03, 33 S.R.R. 821, 853 (FMC Dec. 17, 2014)). IMCC contends in response that Respondents have erroneously interpreted their obligations under the Shipping Act and that regulated carriers “must adopt policies that are least intrusive for the shipping public, not themselves” and that “the Commission evaluates whether the challenged conduct is ‘excessive and thus unreasonable,’ including by whether ‘less intrusive methods’ exist to satisfy a ‘worthy objective’ – not merely an ocean carrier’s financial self-interest.” CMSD/CREply at 6 (emphasis omitted) (citing *Distribution Services*, 1988 FMC LEXIS 52, at *17-18).

The Commission has given deference to the managerial decision of public ports, explaining:

We are of the opinion that under such circumstances as currently prevail at Port Canaveral, the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port’s efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of this Port, nor would it be appropriate for us to do so. . . . Clearly it is not the function of this agency to substitute its judgment for that of the Port. It is, however, our duty to direct appropriate changes upon finding that the Port’s action or inaction based on its own judgment is contrary to the statutes we administer.

Agreement No. T-2598 – Port Canaveral and Luckenbach S.S., Docket No. 72-24, 17 F.M.C. 286, 297 (FMC Mar. 20, 1974).

Such deference to business decisions does not extend to permitting conduct that violates the Shipping Act. As discussed previously, this case is about whether the practices at issue violate the Shipping Act. Thus, any deference to business decisions does not justify unreasonable practices. Moreover, unlike in the *Maher* case cited or the *Port Canaveral* case above, this proceeding does not involve a public port authority. Respondents are making decisions based on their economic self-interest, which is not improper, but where those decisions harm the supply chain and violate the Shipping Act, the case law does not support finding that they are entitled to deference.

(4) More Restrictive than Necessary

Respondents do not articulate a legitimate reason why it is necessary for ocean carriers to review motor carrier requests to use other chassis providers or to have the power to prohibit motor carriers from using the chassis provider of their choice. Respondents also do not explain when or why it would be necessary and appropriate for ocean carriers to deny motor carriers the ability to utilize the chassis provider of their choice for MH.

IMCC relies on *Distribution Services* to argue that the rules are more restrictive than necessary. In *Distribution Services*, the rules at issue provided for reimbursement of the costs of transloading cargo from an ocean container into containers/trailers provided by inland carriers but stated that such costs would not be reimbursed if the transloading services were performed at the facilities of a shipper, consignee, freight forwarder, NVOCC, or ocean carrier. *Distribution Services*, 1988 FMC LEXIS 52, at *4-8. The Commission found that prevention of rebates and false billing, asserted by Respondents as justification for the rules at issue, was a “worthy objective,” but held that there was insufficient proof to find that the “more intrusive” methods required by the challenged rule were necessary. *Distribution Services*, 1988 FMC LEXIS 52, at *17-18. “In order to pass muster under section 10(d)(1), a regulation or practice must be tailored to meet its intended purpose. A regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose.” *Distribution Services*, 1988 FMC LEXIS 52, at *17. Respondents assert that reliance on this case is misplaced.

Respondents assert that “OCEMA and CCM’s current policy is as unrestrictive as possible since it allows the ocean carrier Respondents, which are members of OCEMA, to decide what their policy as to chassis choice is to be.” CMSD/ROpp at 10. But by agreeing amongst themselves that ocean carriers must approve choice requests by motor carriers, the policy is not as unrestrictive as possible for motor carriers. Respondents assert further that ocean carrier Respondents’ conduct “was neither ‘systematic’ nor was it impermissible, insofar as sections 5.5 and 5.7 were intended to allow flexibility, a principle the Commission has emphasized when evaluating commercial relationships.” CMSD/ROpp at 7. This perspective is self-focused, providing flexibility for ocean carriers but denying choice to motor carriers.

Neither IMCC nor any individual motor carrier is a party to the CCMP agreement. In the context of billing, the Commission clarified that a goal for the Detention and Demurrage Rule “was to emphasize the importance of ocean carriers and marine terminal operator bills aligning with contractual responsibilities” and stating that “[g]eneral contract law principles provide that one party cannot enforce a contract against another who did not assent to be bound by its terms

and conditions. This can include situations where one party attempts to bind another party with unilaterally defined terms.” Notice of Inquiry – Vessel-Operating Common Carrier Definition & Application of the Term ‘Merchant’ in Bills of Lading, Docket No. 20-16 at 4 (Oct. 7, 2020) (citing Demurrage and Detention Rule, 85 Fed. Reg. at 29662). Although this is not a demurrage and detention case, the general principle of having contracts align with contractual responsibilities applies.

IMCC has established that Rules 5.5 and 5.7 limit the ability of motor carriers to utilize the chassis provider they prefer for MH, because their requests must be approved. If choice is denied, then motor carriers are required to use the IEP selected by the ocean carrier. This essentially makes the motor carrier a captive audience for the IEP selected by the ocean carrier and creates a mini-monopoly. In addition, this restrains competition in the IEP market, as motor carriers are limited in their ability to select other chassis providers. These rules are not narrowly tailored to ensure an efficient transportation system. By permitting the ocean carriers to veto a motor carrier’s choice of chassis provider for MH, the rules go beyond what is necessary.

(5) Conclusion

IMCC has not established as a matter of law, based on the uncontested facts at this stage, that the default provision in Rule 5.5 violates the Shipping Act if the motor carrier is able to freely select the chassis provider of its choice for MH. IMCC has not established that having a default IEP, in and of itself, creates anticompetitive harm or is otherwise unreasonable. As Respondents assert, chassis must be available and utilized to move containers off the port. The assignment of a default provider where a motor carrier does not have another preference serves the interests of the shipping public by ensuring that a system is in place to efficiently assign chassis to containers. Further development of the facts could change the analysis.

The record does, however, establish that the limitations on motor carriers’ ability to choose their own chassis provider for MH is unreasonable. And, the evidence from the ocean carriers who allow choice demonstrates that a less restrictive alternative is available.

Accordingly, based on the uncontested facts in the record, IMCC has established that the choice program in CCMP Rule 5.7 is more restrictive than necessary and therefore unreasonable, because it places the final decision on MH chassis provider in the hands of the regulated ocean common carrier rather than in the hands of the motor carrier who is responsible for arranging and paying for the chassis. Moreover, Respondents have not produced evidence of a legitimate justification for requiring approval of choice requests. Therefore, IMCC has met its burden of persuasion that the choice requests in Rule 5.7 for MH is unreasonable as a matter of law, based on the facts not in dispute. The next issue raised is the contractual linkage of CH and MH.

b. Contractual Linkage of CH and MH

(1) Arguments of the Parties

IMCC asserts that each “ocean carrier unjustly and unreasonably benefits from contracts with IEPs that trade lower CH rates to the ocean carrier in exchange for provisions that enhance the ability of IEPs to obtain higher MH rates and reduced MH price [competition].” CMSD at 20. IMCC contends that “the contracts award *lower* CH pricing for *lower* CH volume” so that “the

linkages are the *opposite* of ‘volume discounts’ by which one typically receives a lower price in exchange for more volume” to argue that “the contracts are not volume discounts, but rather cross-subsidization: ocean carriers fund undercharges for CH chassis using the overcharges for MH chassis.” RMSD/COpp at 12 (emphasis in original) (footnote omitted). Stated another way, IMCC contends that “through their contracts, ocean carriers agree to restraints on competition that enhance IEPs’ pricing power to increase MH rates, in exchange for lower CH rates or direct payments.” RMSD/COpp at 13.

Respondents acknowledge that ocean carriers enter into a “chassis usage agreement, typically after engaging in an extensive [request for proposal (“RFP”)] process with multiple IEPs, which contains language that designates the counter-party IEP as an exclusive or preferred provider of chassis under that agreement.” CMSD/ROpp at 13. Respondents add that if “ocean carriers did not make contractual commitments to utilize the chassis of a particular IEP, that IEP would be less likely to provide chassis at the location in question.” CMSD/ROpp at 13-14. Respondents further argue that ocean carriers “ensure adequate supplies of chassis;” have “a significant interest in ensuring that their customers’ containers arrive timely and safely at their destination;” that “CH and MH volumes are not determined by the ocean carriers, but are driven by BCOs;”¹¹ and “MH rates are determined by the IEPs.” CMSD/ROpp at 13-15.

(2) Market Impacts

There is no genuine dispute that Respondent ocean common carriers entered into chassis usage agreements providing for total chassis volumes, including both CH and MH, with CH rates calculated based on these total volumes. CSUMF ¶ 497; CSUMF/RResp ¶ 496 (responding to CSUMF ¶ 497). When Respondents structure contracts with IEPs providing for a total chassis volume, including MH volumes, and calculate CH rates based on these total volumes – or otherwise integrate or incorporate MH volumes in the course of structuring pricing with IEPs – this constitutes a contractual linkage of CH and MH. IMCC has pointed to numerous ways that such linkages may be created. CSUMF ¶ 497; *see also* CMSD at 21. The relevant market will be discussed before addressing chassis rates.

(a) Relevant Market Definition

The “definition of the appropriate market for consideration of the effect on competition of a challenged practice is the kind of antitrust-type analysis which is appropriate to cases arising under the Shipping Act standards of ‘undue’ preference or ‘unreasonable’ practice.” *All Marine*, 1996 FMC LEXIS 68, at *31-32. Relevant markets require determination of the relevant geographic market and the relevant product market.

IMCC notes that at “the Presiding Officer’s suggestion, the parties focused discovery on four geographic regions, Chicago, Los Angeles/Long Beach, Memphis, and Savannah” and resulting from that, “analysis of the Respondents’ conduct with respect to participation in interoperable pools primarily concerns these four areas.” CMSD at 5. IMCC identifies, as relevant geographic markets: (1) the region surrounding the intermodal rail facilities of Chicago, Illinois, (2) the region surrounding the port facilities at Los Angeles/Long Beach, California,

¹¹ This quote does not disclose confidential material and is not entitled to confidential treatment.

(3) the region surrounding the intermodal rail facilities of Memphis, Tennessee; and (4) the region surrounding the port facilities at Savannah, Georgia. CMSD at 6-7.

Regarding the relevant product market, IMCC asserts that “[i]n each of the four geographies, ocean carriers and motor carriers (and their customers) obtain chassis on a daily usage basis from pools under contracts with IEPs or at their posted rates.” CMSD at 7. IMCC contends that the relevant market should be defined as daily chassis usage, and notes that it has provided two reports from an expert economist, Dr. Langenfeld, on product market definition from an antitrust perspective. CMSD at 8 n.5. IMCC adds “[a]lthough defining a market is not strictly necessary to evaluate the effects of Respondents’ conduct under the Shipping Act, Dr. Langenfeld has confirmed the appropriateness of daily usage chassis as a relevant product market and the provision of daily-rate chassis for MH movements as a relevant submarket.” CMSD at 8 n.5. IMCC further asserts in its proposed statement of facts that chassis “supplied by IEPs on a daily usage basis is a relevant product market because that is the basis by which both ocean carriers and motor carriers (and their customers) obtain chassis from chassis pools. Chassis at daily usage prices are obtained either through contracts with IEPs or at the IEP’s posted daily prices. CSUMF ¶ 682.

Respondents contend that the “fact that discovery was ultimately limited to certain locations – at IMCC’s vehement insistence – does not mean those locations are appropriate proxies for every port and location in the United States” and further that “the record plainly establishes that there are significant geographic and market differences in the many different chassis supply regions in the United States.” CMSD/ROpp at 28. Thus, Respondents do not contest these four geographic markets but rather assert that the four markets may not be indicative of other geographic locations. This decision focuses only on these four geographic markets, so if other markets have other relevant justifications or factors, those can be raised at a later date.

Respondents do not directly address the relevant product market in their motion for summary decision briefing, nor in their proposed statements of material facts. Respondents, however, assert in their response to IMCC’s proposed material facts that the relevant product market is in dispute, citing to the May 27, 2022, Reitzes Declaration. CSUMF/RResp ¶ 681 (responding to CSUMF ¶ 682). IMCC asserts in response that there is no dispute of material fact regarding the relevant product market, adding that “Respondents cite solely to an untimely expert declaration as support for their contention that ‘the relevant product market is in dispute.’” CSUMF/CReply ¶ 682. It is not necessary at this stage, however, to make a determination regarding the relevant product market. This issue can be further developed by the parties when appropriate.

(b) Chassis Rates

IMCC asserts that “each ocean carrier has contracts whereby the ocean carrier receives lower CH rates in exchange for higher or more predictable MH volumes” and that ocean carriers’ linkage of MH volumes with CH prices unreasonably restrains competition. CMSD at 20-21. Respondents, in contrast, contend that this “is not an issue of cross-subsidizing as alleged by Complainant. Rather, it is a pragmatic system of securing sufficient chassis to meet the needs of ocean carrier Respondents’ customers” and arguing that “any price differentials between CH and

MH chassis usage rates are attributable to long term lease commitments and volume discounts.” CMSD/ROpp at 8, 13 n.7. Whether it is labeled as cross-subsidizing or “loss of volume” discounts, the chassis usage agreements between ocean carriers and IEPs set CH rates based on total chassis volume, including both CH and MH. This ensures that any benefits of long term lease commitments and volume discounts go to the ocean carrier and not the motor carrier paying for the MH shipments.

Ocean carriers assert that they enter into “a chassis usage agreement, typically after engaging in an extensive RFP process with multiple IEPs, which contains language that designates the counter-party IEP as an exclusive or preferred provider of chassis under that agreement.” CMSD/ROpp at 13. Yet after such lengthy RFPs, Respondents claim that any “incentives are largely ignored by and do not influence the behavior of the ocean carrier Respondents.” CMSD/ROpp at 2, *see also* CMSD/ROpp at 14.

IMCC does not allege that ocean carriers set MH prices, but rather that “ocean carriers restrict MH chassis choice, which gives pricing power to IEPs because motor carriers and BCOs have no reasonable alternatives to which to turn.” CMSD/CReply at 9. Respondents argue that they “play no role in establishing the charges assessed for chassis used in MH moves;” that there “is no dispute that MH rates are determined by the IEPs;” and that “ocean carrier Respondents do not establish, discuss, or agree on chassis usage charges for MH moves – that is done exclusively by the IEPs without ocean carrier involvement.” CMSD/ROpp at 2, 15, 24. To the extent that ocean carriers are binding motor carriers to a particular IEP, and yet are playing no role in establishing the chassis charges to be assessed, motor carriers have little hope of any negotiating power, and likewise would be unable to commit to the same “long-term leases and usage volumes,” to which Respondents contend they owe their “favorable rates.” *See* RMSD at 12-13; *see also* CMSD/ROpp at 8 (referring to “Respondents’ evidence that any price differentials between CH and MH chassis usage rates are attributable to long term lease commitments and volume discounts.”)

Respondents conclude this section by arguing that “motor carriers can purchase chassis, enter into long term leases of chassis and/or can negotiate chassis usage agreements with IEPs providing for lower daily rates based on volume usage.” CMSD/ROpp at 15-16; Coates Report at CX1538; Coates Rebuttal Report at CX1690-91. However, it is not cost effective for motor carriers to own or long-term lease chassis if they pick up a mix of CH and MH shipments as ocean carriers may not compensate them for the chassis for CH containers and there may be additional costs and delays, for example from flips. And, without bargaining power, motor carriers are unlikely to be able to negotiate volume discounts from IEPs.

Respondents cite to their expert’s rebuttal report, which argues that IEPs compete for MH business, relying on the increasing number of choice requests, and asserts: “Without the prospect of losing motor carrier business to a competitor, the default IEP would have no incentive to negotiate a lower rate for MH moves. The fact that IEPs enter into such negotiations and subsequent contracts is evidence that there is competition among the IEPs for the motor carriers’

MH business.”¹² Coates Rebuttal Report at CX1691. This logic supports IMCC’s argument that the ability to select a different chassis provider is critical to ensure price competition.

Thus, based on the undisputed evidence in the record, when ocean carriers link CH to MH, often linking CH price in part to MH volume, this limits the motor carriers’ ability to negotiate volume discounts for itself and therefore must be justified by Respondents.

(3) Justifications

There is no genuine dispute that ocean carrier contracts, which set CH pricing, also include MH volumes, with Respondents admitting that ocean carriers typically enter into a chassis usage agreement which designates IEPs as exclusive or preferred providers of chassis. CMSD/ROpp at 13. To the extent that ocean carriers choose to link CH with MH, thereby limiting the ability of motor carriers to select the chassis of their choice and impacting the market for MH chassis, those practices must be justified. It is noted that Evergreen has a different model which is addressed separately below.

Respondents justify these practices by arguing that ocean carriers “ensure adequate supplies of chassis” and have “a significant interest in ensuring that their customers’ containers arrive timely and safely at their destination.” CMSD/ROpp at 13. However, as previously discussed, motor carriers also have an interest in ensuring a sufficient supply of safe chassis. Moreover, motor carriers have the responsibility to arrange for MH chassis under port-to-port movements. In addition, contractually linking CH with MH is not narrowly tailored to ensure a sufficient supply of safe chassis.

Respondents also contend that “CH and MH volumes are not determined by the ocean carriers, but are driven by BCOs,” that “MH rates are determined by the IEPs,” and that any incentives in chassis usage agreements do not influence the behavior of the ocean carriers. CMSD/ROpp at 2, 14 n.9, 14-15. However, the fact that MH volumes are driven by beneficial cargo owners similarly argues against permitting a contractual linkage as it denies beneficial cargo owners the financial benefit of higher potential volumes. Moreover, by contracting for an exclusive chassis provider, the ocean carrier is financially rewarded for creating and providing to its selected IEP a captive, monopolistic market and the motor carrier is denied the opportunity to utilize the chassis provider of its choice for MH. In situations where the ocean carrier only contracts for a preferred provider but allows the motor carrier to opt-out and select a different chassis provider, without limitations, the market impacts are more limited.

(4) Conclusion

Based on the facts not in dispute, IMCC has established that typically, an ocean carrier contract links CH prices with MH volume to establish an exclusive or preferred/default chassis provider, creating a mini-monopoly. Respondents have not provided sufficient justification for contractually obligating motor carriers, who have the responsibility for arranging and paying for MH movements, to utilize the IEP selected by the ocean carrier for MH, especially as the motor carrier is not a party to that agreement. Where an exclusive IEP arrangement has been

¹² This quote does not disclose confidential material and is not entitled to confidential treatment.

contractually created by the ocean carrier, and where this prevents a motor carrier from using a chassis at a lower rate from an alternate chassis provider of its choice, the motor carrier is financially harmed and the market for chassis is restrained. Motor carriers are responsible for arranging and paying for chassis in MH, and motor carriers should derive any benefit from MH volume. However, where the motor carrier does not have a preference for the MH chassis provider, contracts which only set up a preferred, or default, provider may not be unreasonable, as long as there is an option exclusively within the control of the motor carrier to opt-out of using the default IEP. Therefore, IMCC has established that linking CH to MH is unreasonable where the contract creates an exclusive arrangement limiting the motor carrier's ability to use the chassis provider of its choice for MH.

At this stage of the proceeding, it cannot be determined which Respondents may have violated this provision in particular markets as the factual basis for these determinations is disputed. However, it appears that the Respondent ocean carriers regularly link CH with MH. IMCC has established as a matter of law, based on the facts not in dispute, that the contractual linkage of CH prices and MH volume is unreasonable in the four markets currently at issue. The next argument raised, which is related to this issue, is the designation of an IEP for MH in chassis usage agreements.

c. Designation of IEP for MH in Chassis Usage Agreements

The parties' arguments in this section overlap significantly with their arguments in the previous section. IMCC asserts that ocean carriers "steer MH chassis usage to the IEP supplying chassis for CH movements by designating that IEP for MH movements" which results in going beyond what is necessary to ensure the supply chain has sufficient MH chassis. CMSD at 22.

Respondents contend that ocean carriers "have a legitimate interest in ensuring the safe and reliable delivery of those containers" because they "own or lease the containers in which international cargo is transported," and because MH moves impact "the reputation of the ocean carrier in the eyes of the customer." CMSD/ROpp at 16. Respondents argue that the Commission "gives deference to the parties' exercise of reasonable business discretion" and that "IMCC has failed to meet its burden of proof and to overcome this deference." CMSD/ROpp at 17.

As established in the section above, ocean common carriers enter into chassis usage agreements which frequently identify an exclusive or preferred/default chassis provider. This section focuses on the designation of an IEP as opposed to the linkage of CH and MH. Similar to the analysis in the section on CCM pools, such exclusive or preferred designations limit competition and must be justified by Respondents.

Respondents contend that they have safety and reputational interests that justify these provisions. CMSD/ROpp at 16. While ocean carriers may have an interest in safe and reliable delivery of containers, motor carriers also have an interest in safe chassis. Moreover, that interest could be addressed in other ways, for example by limiting use of chassis in disrepair. It is also not clear that ocean carriers would have a reputational interest in the chassis utilized in MH movements if motor carriers were able to freely select the chassis.

Ocean carriers cannot require motor carriers to utilize specific chassis providers for MH, where the motor carrier is responsible for arranging and paying for the MH shipment, especially as the motor carrier is not a party to the agreement between the ocean carrier and IEP. Agreements for a default provider may be acceptable, however, as long as the alternate chassis provider of the motor carrier's choice can be utilized without limitation or approval when desired by the motor carrier.

As discussed earlier, based on the uncontested facts in the record, IMCC has not established that having a preferred or default chassis provider is unreasonable as long as the motor carrier is not required to use the preferred IEP (i.e. the motor carrier can select from any available pools or chassis providers with no restrictions imposed by virtue of elections made by the ocean carrier). Therefore, IMCC's motion for summary decision that preferred or default IEPs for MH movements are unreasonable is denied. As discussed above, however, exclusive arrangements or limitations that prevent motor carriers from selecting the chassis provider of their choice for MH are unreasonable and violate that element of section 41102(c).

d. Designation of Proprietary Chassis Pools and Withdrawal from Interoperable Chassis Pools

IMCC alleges that interoperable pools avoid significant hidden costs including: chassis splits, chassis flips, additional demurrage and detention, longer terminal wait times, repositioning, additional equipment inventory needs, limits on motor carrier paid trips and efficiency, reduced rail efficiency, and increased BCO inventory needs. CMSD at 8-9. IMCC argues that decisions to withdraw from existing interoperable chassis pools are unjust and unreasonable and that by designating a proprietary pool for MH movements, the ocean carrier grants the IEP pricing power for that ocean carrier's MH movements. CMSD at 22. IMCC contends, as well, that because proprietary pools are inherently non-interoperable, none of the benefits of interoperability accrue to the supply chain. CMSD at 22-25. IMCC adds that these "arrangements not only prevent chassis interoperability and choice, but also reduce the number of interoperable chassis available in CCM pools in their regions. When an ocean carrier signs a contract to use the proprietary pool, the IEP then withdraws those respective chassis from the CCM pool. When a CCM pool no longer contains sufficient chassis to service the remaining ocean carriers using the pool, the pool collapses. This dynamic caused the COCP to cease operations in 2020." CMSD at 12.

Respondents contend that IEPs, not ocean carriers, join or withdraw from interoperable pools; IMCC must establish that the chassis provision regulations and practices are unreasonable; and, the Commission cannot require IEPs, over which it has no jurisdiction, to contribute their assets to interoperable chassis pools to benefit motor carriers. CMSD/ROpp at 18-20.

The parties agree that "fully interoperable" or "gray" chassis pools are chassis pools managed by a single entity in which equipment contributed by multiple equipment providers are commingled and a "gray chassis pool does not require matching a specific equipment provider's chassis with a particular ocean carrier's containers." JSF ¶¶ 193-194. Another business model is a proprietary pool, a single-provider pool which is not interoperable with other pools, therefore allowing for negotiation only with one proprietary vendor, versus the possibility of negotiating with multiple vendors in a gray pool like CCM. CX1155 (CMA Dep.); CSUMF ¶ 525.

Regarding interoperability, Commissioner Dye noted in a May 22, 2019, statement: “Today, shipping lines, cargo owners or trucking companies rent the equipment – often obtaining it through chassis pools of various types – including, for example, ‘interoperable’ or gray pools that offer chassis from multiple providers.” *See* www.fmc.gov/statement-of-dye-stb-demurrage. IMCC in its complaint referred to “chassis pools that are interoperable (from the standpoint of usage with the containers of multiple ocean carriers)” and point to the Memphis Team conclusion that the essential qualities of a high performing gray chassis pool include: “1. Adequate supply of interoperable chassis” Complaint at 19-20. Respondents have also referred to interoperability as meaning that a motor carrier can use any chassis in the pool to transport the container of any container line. *See, e.g.,* Coates Rebuttal at CX1693; JSF ¶ 193.

As discussed above, based on facts not in dispute, Respondents violate the Shipping Act when they restrict the ability of motor carriers to utilize the chassis provider of their choice for MH, when the motor carrier is paying. Therefore, the remaining issue here is whether it is unreasonable for ocean carriers to benefit from IEPs withdrawing from interoperable pools for CH. Because ocean carriers are responsible for obtaining and paying for chassis for CH, they have greater latitude to determine the best business model to utilize. Moreover, the evidence shows that ocean carriers utilize different business models in different geographic regions and at different times, adjusting to changing market conditions. There is value in allowing ocean carriers to innovate and allow market forces to guide their approach, as long as unreasonable practices are not adopted.

Respondents do not assert that non-interoperable pools are more efficient than interoperable pools, although they do state that “there are ‘different operational situations where the actual dynamics are going to either favor or not favor interoperable pools.’” CMSD/ROpp at 19 (citing Coates Dep, APP2136-37). However, the focus of this proceeding is not determining the most efficient model of chassis provision but rather whether the Respondents’ conduct is unreasonable and violates the Shipping Act.

“IMCC seeks an order for ocean carriers to cease and desist from ongoing withdrawals from interoperable CCM pools, such as the MCCP,” which, it argues, is different from requiring ocean carriers, or IEPs, to construct and operate interoperable pools. CMSD/CReply at 12 (emphasis omitted). The Commission could order Respondents to cease and desist withdrawing from interoperable CCM pools if such withdrawals violate the Shipping Act. Respondents are correct that IMCC has the burden of proof to establish that withdrawing from interoperable pools violates the Shipping Act.

In its motion for summary decision, IMCC asserts that the supply chain benefits from interoperability are being lost, stating that “in pursuit of lower CH chassis pricing, Respondents have willingly agreed to their IEPs’ withdrawal of chassis from interoperable pools – depriving the American supply chain of the benefits of those gray pools and limiting the throughput of containers moving along the supply chain.” CMSD at 2. IMCC asserts that the benefits of interoperability include: fewer chassis splits, fewer chassis flips, reduced demurrage and detention, shorter terminal wait times, less repositioning, less equipment inventory needed, increased motor carrier and rail efficiency, and less BCO inventory needed. CMSD at 8-9. The Memphis Supply Chain Innovation Team White Paper similarly identified that, due to non-interoperability, the “result is handcuffed chassis usage, which requires shippers and truckers to

use a specific color chassis when the train arrives” such that “[s]upply is restricted and held captive to ocean carrier alignments with chassis providers that they have no part in the selection process, yet pay the cost. The result is rising costs and wasted time. Access is limited and supply is an on-going problem.” White Paper, *A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity*, (“Memphis White Paper”), at 3.¹³

IMCC argues that in the Chicago region, the interoperable COCP collapsed, depriving the entire region of the benefits of the interoperable pool. CMSD at 2, 22-23. IMCC contends that the Memphis geographic region could be next. CMSD at 2, 23. IMCC asserts that “these withdrawal decisions achieve short-term reductions in CH chassis prices and shift the burden of non-interoperability to others in the supply chain.” CMSD at 24. Indeed, IMCC presents compelling evidence that ocean carriers receive discounted rates in return for withdrawing from interoperative pools and entering proprietary pools. This is rational and in the economic self-interest of both the ocean carrier, which receives a discounted rate, and the IEP, which ensures greater utilizations of their chassis. However, it may have a negative impact on competition and potentially on prices for motor carriers and the shipping public.

Essentially, interoperable pools are joint ventures between competing IEPs authorized by competing ocean carriers. The Supreme Court has found that withdrawing from a cooperative joint venture may violate antitrust laws. In *Aspen Skiing*, the Court upheld a jury verdict for the plaintiff that a dominant firm operating three of four mountain ski areas in Aspen, Colorado, had violated the Sherman Act by refusing to continue cooperating with its smaller rival in offering a combined four-mountain ski pass. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603-04, 608-611 (1985). The Supreme Court explained in *Trinko* that the *Aspen Skiing* Court “found significance in the defendant’s decision to cease participation in a cooperative venture,” particularly where the defendant’s “unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.” *Verizon Communications, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610-11)). Moreover, “the defendant’s unwillingness to renew the [joint] ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.” *Verizon Communications*, 540 U.S. at 409. The *Aspen Skiing* court considered the impact on consumers and competition and noted that in other markets, the defendant participated in interchangeable lift tickets, undermining the stated justifications. *Aspen Skiing*, 472 U.S. at 605, 608-09. The United States Department of Justice (“DOJ”), in a recent filing, similarly stated that “under certain circumstances, ceasing a profitable prior course of dealing with a shipper could be an indicator of unreasonableness.” NPR – Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-24, Comments of the DOJ at 5 (Oct. 21, 2022).

As discussed above, the Commission has long had the responsibility of ensuring an efficient transportation system for ocean commerce. When this case was filed, one of the purposes of the Shipping Act was to “provide an efficient and economic transportation system.” 46 U.S.C. § 40101(2). The Ocean Shipping Reform Act of 2022 modified this to “ensure an efficient, competitive, and economical transportation system.” Pub. L. 117-146, §2, 136 Stat.

¹³ Available at: www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf.

1272 (June 16, 2022). The D.C. Circuit recognized the Commission’s power to reject unreasonable practices in upholding the Commission’s truck detention rule at the Port of New York and New Jersey. “Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.” *American Export-Isbrandtsen Lines*, 444 F.2d at 828. The power conferred “is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.” *American Export-Isbrandtsen Lines*, 444 F.2d at 829.

In *Puerto Rico Port Authority*, where the D.C. Circuit set aside two Commission decisions that had found Shipping Act violations with respect to crane-sharing agreements, the Court considered the requirements of efficient port management, noting that they may change over time.

As we noted above, in early years, when adequate facilities were limited, efficient port management, in the Ports Authority’s judgment, required crane sharing. Now, with a number of berths at Puerto Nuevo remaining under-developed and unprofitable despite huge investments, that sharing is no longer necessary. Indeed, by minimizing the carrier’s incentive to improve a berth suitable for its own operations, the continued requirement of crane sharing may inhibit the development of the Port of San Juan.

Puerto Rico Port Authority, 642 F.2d at 485.

It is therefore clear that while the Commission may require the sharing of facilities, those decisions are heavily fact dependent. IMCC presents a strong argument that interoperable chassis pools are more efficient and that ocean carriers agree to withdraw from interoperable chassis pools in exchange for their own financial benefits. *See, e.g.*, CSUMF ¶¶ 563-66, 569-577, 598-605.¹⁴

In this proceeding, the facts necessary to determine the reasonableness of decisions to withdraw from interoperable pools are disputed. Therefore, it cannot be determined by summary decision whether the decisions to withdraw from interoperable pools in the four geographic regions at issue are unreasonable. However, one of the regions at issue here is the Memphis area, and IMCC points specifically to this region, asserting that a “collapse of the MCCP would increase costs for all supply chain stakeholders in the region.” CMSD at 23.

The Commission’s Memphis Supply Chain Innovation Team found that the “current chassis provisioning model is broken and needs immediate address to improve supply chain velocity” and recommended a “gray chassis pool with the following critical elements to improve velocity and fluidity in moving international containers in Memphis and the Mid-south: 1. Adequate supply of chassis/Interoperability; 2. Quality and Safe chassis; 3. Fair Access to

¹⁴ Respondents’ argument that, to the extent an agreement was executed, the “discussions and negotiations are merged in the agreement and are not admissible,” *see, e.g.*, CSUMF/RRResp ¶¶ 562-564, is not supported by legal argument and is not adopted. Both the negotiations and the agreement are relevant and admissible.

chassis (Choice!); [and] 4. Accountability of chassis supply by a single manager.” Memphis White Paper at 1. If this case progresses at this level, the parties may be required to submit final briefing on Memphis as the next step, prior to conducting any additional discovery on other geographic regions.

Respondents also assert that IMCC must establish that the chassis provision model is unreasonable and the Commission cannot require IEPs, over which it has no jurisdiction, to contribute their assets to interoperable chassis pools to benefit a second unregulated entity, motor carriers. CMSD/ROpp at 18-20. It appears that IMCC may have sufficient evidence to establish that withdrawing from interoperable pools is unreasonable. The Commission can require conduct that conforms to the Shipping Act from regulated entities, such as Respondents. Moreover, the decision in this proceeding is not based on motive but rather whether specific practices violate the Shipping Act.

Accordingly, at this stage of the proceeding, IMCC’s motion for summary decision that withdrawing from interoperable pools is unreasonable cannot be granted. However, as a matter of law, the Commission has the power to make such a determination, may consider what chassis system would be most efficient, and could require Respondents to continue to participate in interoperable chassis pools if there is sufficient evidence in the record. Because the factual basis for these determinations is disputed, such a decision would be premature at this stage. The next question raised is about how IEPs are utilized at one of the geographic regions at issue, the ports of Los Angeles and Long Beach.

e. MH Chassis in the Pool of Pools

At the Pool of Pools (“POP”), established by DCLI, TRAC Intermodal, and Flexi-Van at the California ports at Los Angeles and Long Beach, chassis owned by the three IEPs can be used on an interoperable basis. JSF ¶ 195. Usage of chassis in the POP is assigned to the IEP that has a contractual relationship with the ocean carrier whose container, or “box,” is being moved. JSF ¶ 197; CX1700 ¶ 6; CX1702 ¶ 6; CX1704 ¶ 6.

IMCC asserts that “current POP rules do not allow the motor carrier or BCO to exercise chassis choice in MH movements” so that “ocean carrier agreements to obtain chassis from the POP IEPs are unjust and unreasonable because ocean carriers are taking advantage of lower CH rates and the benefits of interoperability in a more restrictive manner than is necessary.” CMSD at 25-26.

Respondents contend that “rules governing the operation of the Pool of Pools are established and enforced by the IEPs that operate the Pools of Pools;” that “when performing MH moves, no motor carrier is required to use a chassis from the Pool of Pools;” and that “IEPs secured a Business [R]eview Letter from the DOJ with respect to the operation of the Pool of Pools prior to initiating operations.” CMSD/ROpp at 20-21. Respondents further contend that ocean carriers have “rightly prioritized their interests in securing an adequate chassis supply from the Pool of Pools at competitive prices in order to support the interests of the shipping public and legitimate business interests that have been historically recognized by the FMC” and the “IMCC has not met its burden here because it has failed to demonstrate – and has not even

alleged – that any particular ocean carrier conduct is unreasonable or unjust as it relates to the Pool of Pools.” CMSD/ROpp at 22.

As of August 20, 2020, the POP website stated the following:

Prior to the POP, the operation of multiple independent chassis pools in Los Angeles and Long Beach created situations where chassis in different pools were segregated at facilities for use only by certain user bases, and returnable only to a fraction of the facilities otherwise available to receive chassis. These inefficiencies often resulted in lost time and revenue to a motor carrier, duplicative repositioning, and confusion on terminals and rail ramps. The “gray fleet” that is the POP has smoothed the impacts to chassis operations that would have otherwise occurred in the ever-changing landscape of ocean carrier alliances and terminal operations, increases overall efficiency and availability, and significantly reduces chassis splits.

Pool of Pools, About Us, available at: web.archive.org/web/20200820222149/http://www.pop-lalb.com; JSF ¶ 196.

The impact of the business review letter and the box rules will each be discussed.

(1) Business Review Letter

The DOJ issued a business review letter to Flexi-Van Leasing, Inc. (“FVLI”) and Direct Chassis-Link, Inc. (“DCLI”) with respect to the POP. JSF ¶ 196. The 2014 DOJ business review letter states that it is based upon the following representations made by FVLI and DCLI to the DOJ:

The parties propose to enter into the Chassis Use Agreement in order to establish a “gray” chassis concept. The gray chassis concept extends benefits associated with individual pools by allowing the interchange of chassis across multiple pools, which encompasses several terminals, container yards, rail ramps and other locations within the greater LA/LB port complex. You represent that the increased flexibility created by the interchangeability will enhance customer service, improve chassis productivity and respond to the desire of LA/LB port authorities to achieve better overall utilization of the region’s chassis fleets. **You represent that after a period of initial implementation, the parties intend to permit open participation by any other pools and third parties in the LA/LB port complex.**

The proposed agreement would allow users of any of the pools managed by FVLI or DCLI to interchange chassis among each others’ pools. Pursuant to this arrangement, a chassis user could pick up a chassis from one of the DCLI-managed pool start/stop locations and eventually return it to one of the FVLI-managed start/stop locations, and vice versa.

You represent that the parties will continue to (a) manage their respective pools; (b) independently establish their published merchant haulage rates for motor

carriers in the region; (c) compete openly with one another and other chassis providers for steamship line customers that desire to participate in the gray chassis pool; and (d) negotiate independently with other users in the region for access to chassis.

DOJ BRL, available at: www.justice.gov/atr/response-flexi-van-leasing-inc-and-direct-chassislink-inc-request-business-review (emphasis added) (cited in Complainant's Memorandum of Law in Opposition to Motion to Dismiss at 27 n.9); JSF ¶ 196.

The parties represented to the DOJ that the POP would have "open participation by any other pools and third parties in the LA/LB port complex;" would "compete openly with one another and other chassis providers;" and would "negotiate independently with other users in the region for access to chassis." DOJ BRL at 2. If these policies were in place, IMCC's allegations regarding the POP may not have been brought. Because this is not the policy, the DOJ business review letter does not apply to the POP as implemented in the eight years since DOJ issued its business review letter. *See, e.g.,* CX461-62 (Tock/CCM depo). Moreover, the DOJ was addressing individual IEPs whereas this decision is focused on the practices of Respondents which are entities regulated by the Commission and bound by the Shipping Act.

(2) POP Box Rules

The parties do not sufficiently explain how the POP box rules work in their briefs. However, from reviewing the evidence presented, it appears that in the LA/LB region, the POP is the exclusive chassis provider, which bills MH at the rates set by the IEP selected by the ocean carrier's container, or "box," which is being transported. Therefore, if a motor carrier is using a POP chassis, the motor carrier does not have a choice of which chassis provider will bill it and the motor carrier must ultimately accede to the rate imposed by whichever IEP has contracted with the ocean carrier. CX663; APP1085; CX4102; CX1540-43.

The parties agree on how the POP operates. JSF ¶¶ 195-197. Pursuant to the undisputed facts, motor carriers are required to pay the IEP selected by the ocean carrier, even for MH shipments where the motor carrier is being billed. CX1701 ¶ 6; CX1703 ¶ 6; CX1705 ¶ 6. Moreover, common carriers receive discounts based on the volume of MH shipments, but those discounts are not passed on to the motor carrier. CX1540-43. Rather, the motor carrier is a captive audience which must pay the rate determined by the IEP selected by the ocean carrier, even though the motor carrier is not a party to that agreement. CX1701 ¶ 6; CX1703 ¶ 6; CX1705 ¶ 6.

Respondents contend that the POP establishes and enforces its own rules. However, ocean carriers select an IEP with full knowledge that the motor carrier will not be able to change that election, and therefore ocean carriers are explicitly committing both MH volumes and CH volumes, resulting in their ultimate CH pricing. They are thus benefiting from lower CH prices due, in part, to MH volumes.

Because the POP does not allow choice and is not operating consistent with the "open participation" it promised to the DOJ, it is restricting competition for MH. The POP is only able to operate in this manner because of the consent of ocean carriers and the contracts that ocean

carriers sign with it. The Commission may require ocean carriers, as regulated entities, not to participate in contracts which undermine the efficient flow of international ocean commerce. Ocean carriers, through selecting an IEP for themselves in the POP, may not obligate motor carriers to utilize the same IEP for MH shipments. Motor carriers transporting MH shipments in LA/LB should have the right to select the chassis provider of their choice.

That is not to say that the ocean carriers may not participate in the POP at all. But ocean carriers may not deny, or benefit from an IEP denying, motor carriers the free choice of chassis provider that ocean carriers themselves have available – and thereby obtain the benefits from that captive MH volume in the contracts that they sign, while motor carriers are left with no ability to select the chassis provider of their choice from within the POP, and no real negotiating leverage, when all involved understand that motor carriers are bound by the ocean carriers' selected IEP even though the motor carriers are not party to the ocean carriers' contracts with the POP IEPs.

Respondents may address this through working with the POP to allow for motor carrier selection of an IEP, as is allowed for ocean carriers. But this is not the only path open to Respondents. Respondents could themselves not make an election of an IEP in the POP, while it remains impossible to sever the ocean carrier's election in CH from the motor carrier's election in MH. Or, Respondents could consider seeking a contractual arrangement that fully includes both the motor carrier and the IEP. Or, in the vein of Respondents' own argument, if "no motor carrier is required to use a chassis from the Pool of Pools" then it would seem to follow that no ocean carrier is required to use a chassis from the Pool of Pools. CMSD/ROpp at 20.

Respondents also contend that under the POP rules, motor carriers could bring their own chassis, in which case they would not be charged by the ocean carrier's IEP when picking up the MH container. CMSD/ROpp at 20-21. In addition to all of the factors addressed earlier in this decision, there are a range of logistical considerations making this a sub-optimal choice for motor carriers. As one example, if the motor carrier brings its own chassis and then ends up picking up a CH container, the ocean carrier generally will not pay the motor carrier for the chassis, as ocean carriers typically contract away their ability to pay for chassis from any providers other than the exclusive IEP. *See, e.g.,* CX4103; CX1286-87. For motor carriers, therefore, it is typically not cost effective to bring one's own chassis, because they may end up picking up a CH container or may want to pick up a CH container after delivering a container, among other logistical inefficiencies resulting from a motor carrier bringing its own chassis. CX251-53.

Accordingly, IMCC's motion for summary decision that ocean carrier practices regarding the Pool of Pools are unjust and unreasonable is granted. Ocean carrier agreements to obtain chassis from the POP IEPs are unjust and unreasonable to the extent that ocean carriers are taking advantage of lower CH rates and the benefits of interoperability in a more restrictive manner than is necessary. Respondent ocean carriers shall not take any action which limits a motor carriers' ability to utilize the chassis provider of their choice for MH. As requested by IMCC, Respondent ocean carriers shall not extend or continue their contracts with an IEP in the POP while motor carriers cannot unilaterally elect a different IEP of their choice for MH. Having addressed the parties' reasonableness arguments, the other elements of a section 41102(c) claim are addressed next.

D. Other Section 41102(c) Elements, including Proximate Cause

The parties' arguments regarding proximate cause overlap with their arguments regarding the appropriate remedy. This section will address the 41102(c) elements, including proximate cause. The separate issue of remedy will be addressed later.

Section 41102(c) requires the following elements: (a) the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; (b) the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis; (c) the practice or regulation relates to or is connected with receiving, handling, storing, or delivering property; (d) the practice or regulation is unjust or unreasonable; and (e) the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4.

Respondents are ocean common carriers or associations of common carriers which are regulated entities. JSF ¶¶ 3, 14, 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176. The practices at issue are occurring on a normal, customary, and continuous basis for the vast majority of shipments which arrive on container ships. *See, e.g.*, JSF ¶¶ 14, 16, 20, 24, 27, 41, 44, 57, 60, 71, 74, 86, 89, 101, 104, 116, 119, 133, 135, 147, 161 164, 175, 178, 195-197, 207-319. The practices are related to the receiving and delivering of property as chassis are used to transport shipments to and from United States ports. *See, e.g.*, JSF ¶¶ 45-50, 61-66, 75-81, 90-95, 105-110, 120-126, 136-141, 150-156, 165-170, 179-184. These three elements are not contested on the basis of facts genuinely in dispute. The issue of whether specific practices are unjust or unreasonable has been addressed above and some of the practices at issue are found to be unreasonable. The final element, then, is whether the practice or regulations at issue are the proximate cause of the claimed loss.

IMCC alleges that Respondents' conduct forces motor carriers and their customers to pay higher prices for MH chassis; Respondents' conduct harms the prompt handling of cargo; and Respondents' violations proximately caused motor carriers harm, and are occurring on a normal, customary, and continuous basis. CMSD at 26, 28, 29; *see also* RMSD/COpp at 19-21. Respondents contend that IMCC failed to provide evidence that any cargo owner or other motor carrier customer has suffered economic harm; IMCC failed to carry its burden to show that Respondents' practices have proximately caused harm to motor carriers or to the shipping public; IMCC offers no evidence of any causal relationship between the CH usage rates and the MH usage rates; and by focusing solely on MH, IMCC neglects to consider the benefit of the highly competitive CH market to transport users. RMSD at 25-26; CMSD/ROpp at 10, 22-25.

"In numerous decisions, the Commission has ruled that only the party who actually paid the carrier (or the valid assignee of the payor) can sue for reparations." *TCW v. Evergreen*, 2022 FMC LEXIS 589, at *16 (citing *In Re Vehicle Carrier Services*, Docket No. 16-01, 1 F.M.C. 2d 440, 446 (FMC Oct. 21, 2019)). Therefore, if motor carriers paid for MH chassis, even if that cost was passed on to the shipping public, proximate cause is established.

Moreover, as discussed above, the practices found to be unreasonable are CCMP Operating Rules which limit motor carrier choice of chassis providers for MH; the contractual linkage of CH price with MH volume; the designation of IEPs by Respondent ocean carriers for MH when motor carriers cannot unilaterally select a chassis provider of their choice; and ocean

carrier designation of an IEP in the POP at the ports of Los Angeles and Long Beach, while such designation cannot be altered by motor carriers for MH. The harm is not merely the financial impacts on IMCC members, which have not been quantified and are disputed at this point, but also harms to competition in the chassis market and harms to the efficiency of the transportation system – harms caused by the practices at issue. Therefore, for these practices, IMCC has established proximate cause.

E. Conclusions and Remedy

Based on legal precedent and the material facts not in dispute, IMCC’s motion for summary decision is **GRANTED IN PART AND DENIED IN PART**. Respondents’ motion for summary decision is **DENIED**. Issues that could not be determined by summary decision will be resolved as this case proceeds. However, the parties will be given an opportunity to appeal this decision as a whole prior to determining next steps.

IMCC asserts that at the “relief phase, IMCC will seek to tailor the injunction to allow all parties enough time to construct a POP that allows MH chassis choice;” that a “cease-and-desist order will be necessary to prevent Respondents’ ongoing violations of the Shipping Act, even if they voluntarily cease particular acts because ‘there is a reasonable likelihood that [Respondents] would continue to violate the Shipping Act without’ one;” and that on this motion, “the Presiding Officer is not required to determine specific relief. Rather, if the Presiding Officer finds liability, the parties will brief the proper remedy for the Initial Decision.” CMSD at 26 n. 18, 30. IMCC states in its opposition to Respondents’ motion that it “seeks only cease-and-desist relief, and so the Presiding Officer need not resolve any factual disputes as to the amount of damages.” RMSD/COpp at 20; *see also* CMSD/CReply at 4.

Respondents contend that IMCC seeks relief that cannot be granted and/or is unjustified, arguing that requiring ocean carriers and IEPs to provide chassis through interoperable pools that offer choice for MH movements is beyond the authority of the Commission; Congress “eliminated the Commission’s authority to determine, prescribe, and order enforcement of a just and reasonable regulation or practice;” the Commission lacks authority to require such practices from entities that are not subject to the Shipping Act; IMCC’s requested relief goes beyond the scope of the record and these four geographic regions; and bifurcation of the remedy is not appropriate in this case. CMSD/ROpp at 26-29; *see also* RMSD/RReply at 10-11.

It is not clear whether IMCC intends to seek reparations at a later date or if all it would be seeking in this proceeding is a cease-and-desist order. There is not sufficient evidence in the record to award reparations at this stage of the proceeding. Whether reparations are appropriate can be addressed later if the issue is properly raised. At a later date, the parties can further address the relevant arguments, including Respondents’ assertion that there is no financial harm as the motor carriers mark up the chassis charges to customers.

“Under Commission precedent, a cease-and-desist order may be issued where there is a violation of the Shipping Act.” *TCW v. Evergreen*, 2022 FMC LEXIS 589, at *17. The Commission explained:

The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. *See Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express*, [Docket No. 97-01,] 27 SRR 1335, 1342 (ALJ 1997) (“a cease and desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses”); and *Portman Square Ltd.-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, [Docket No. 96-17,] 28 SRR 80, 86 (ALJ 1998) (“the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities”). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

Maher Terminals, LLC v. Port Authority of New York and New Jersey (“PANYNJ”), Docket No. 08-03, 32 S.R.R. 1185, 1190 n.8 (FMC Jan. 31, 2013).

A cease-and-desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, Docket No. 85-13, 23 S.R.R. 857, 871-72 (ALJ Feb. 13, 1986). In addition to protecting the shipping public, a cease-and-desist order will alert the shipping industry, forestall future violations, and facilitate injunctions against possible unlawful activity in the future. *Pac. Champion Express Co. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, Docket No. 99-02, 28 S.R.R. 1185, 1190-91 (ALJ Nov. 17, 1999). Once a practice has been found to be unreasonable, the Commission can “determine, prescribe, and order” a reasonable rule. “Inherent in our authority to prescribe a reasonable rule or practice is the authority to set aside any rule or practice which would interfere with this authority.” *American Export-Isbrandtsen Lines*, 444 F.2d at 828 (citation omitted). The “language used in cease-and-desist orders generally mirrors the violations committed coupled with the statutory language.” *Universal Logistic Forwarding Co. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, Docket No. 00-10, 29 S.R.R. 474, 476 (FMC Jan. 18, 2002).

IMCC asserts that a cease-and-desist order will be necessary and that without such an order, the Shipping Act may continue to be violated. Respondents, however, properly contend that only four regions have been investigated and briefed so far in this proceeding. Therefore, an appropriate cease-and-desist order may only be directed at the Respondents’ conduct in the four regions briefed. However, the legal analysis may apply to other regions and the shipping industry is on notice of the type of conduct that violates the Shipping Act. If such conduct continues in other regions, that may be the basis not only for a cease-and-desist order directed to those regions but also for reparations. Moreover, as discussed earlier, the cease-and-desist order is only addressed to the regulated parties in this proceeding. As to bifurcation of the remedy, because this decision does not address all of the allegations in the complaint, it will be necessary to revisit a number of issues, including the issue of reparation and any other remedies, at a later date.

The cease-and-desist order imposed closely tracks a portion of the language requested in the complaint’s request for relief at ¶ 3(c), which should be sufficient to address the violations of the Shipping Act found here. Complaint at 41. Respondents are ordered to cease and desist from violating the Shipping Act in Chicago, Los Angeles/Long Beach, Memphis, and Savannah by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for MH.

Therefore, Respondents shall cease and desist from those practices found unlawful in this decision in the relevant regions. Balancing the need to expedite resolution of these violations with the need for orderly implementation, the cease-and-desist order shall be effective thirty days after the date this decision becomes final. *See 50 Mile Container Rules*, 1987 FMC LEXIS 20, at *10-11 (90 days to revise tariffs); *Sea-Land Serv.*, 21 F.M.C. at 6 (“30 days is sufficient time to allow Respondent to order its affairs and conform its tariffs, if necessary”). The case may continue to adjudicate remaining practices not resolved through summary decision and other geographic regions.

F. Exceptions and Appeal

IMCC’s motion for summary decision is granted in part and certain practices of Respondents are found to violate the Shipping Act. Other practices at issue in the complaint cannot be decided at this stage of the proceeding. Respondents’ motion for summary decision is denied and Evergreen’s supplemental motion for summary decision is also denied. Therefore, the claims that remain are the allegations relating to whether withdrawal from an interoperable chassis pool violates section 41102(c). Typically, a grant of summary decision is appealable while a denial of summary decision is not appealable as the case continues to a decision on the merits.

Pursuant to Commission Rule 227, Respondents may file exceptions as a matter of right to the granting of summary decision and pursuant to Commission Rule 227(d), the Commission may choose to review this decision. 46 C.F.R. § 502.227. Because some claims, such as those relating to withdrawal from interoperable pools, are not dismissed, those portions of this ruling would not be reviewed at this time pursuant to Rule 227.

Commission Rule 221, previously Rule 153, provides that the presiding officer may allow an interlocutory appeal to the Commission if she finds it necessary “to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.” 46 C.F.R. § 502.221(a); *Maher Terminals, LLC v. PANYNJ*, Docket No. 08-03, 32 S.R.R. 1, 33 (ALJ May 16, 2011) (*aff’d in part*, 32 S.R.R. 1185 (FMC Jan. 31, 2013)). Permitting an interlocutory appeal of the denial of Respondents’ motion, denial of Evergreen’s supplemental motion, and for the partial denial of IMCC’s motion would allow the Commission to review novel legal issues before the parties engage in additional expensive and time-consuming discovery and briefing. In addition, efficiency is enhanced by maintaining the proceeding in a consolidated state. Accordingly, *sua sponte*, the parties are granted leave to appeal the denial of all or part of the motions for summary decision. If a party chooses to appeal, their brief is due twenty-two days after this decision and the response is due twenty-two days after the appeal, unless the Commission directs otherwise. 46 C.F.R. § 502.227.

The remaining issues are intertwined with the issues decided. Therefore, if any portion of this proceeding is reviewed by the Commission, either by request of the parties or the Commission itself, the Commission will have the entire proceeding before it. If the proceeding is not heard by the Commission, the parties shall file a joint status report with proposed schedule within forty-five days of the date of this decision. The parties should address whether any discovery is needed before briefing the remaining issues in these four geographic regions.

IV. EVERGREEN'S MOTION

Evergreen fully adopted the Respondents' MSD and also filed its own MSD arguing that Evergreen provides chassis to motor carriers free of charge; motor carriers are not overcharged for Evergreen MH chassis; there is no difference in Evergreen's daily usage fees for CH and MH; choice is moot for Evergreen MH moves; and Evergreen nonetheless allows choice. EMSD at 5-9.

IMCC contends that Evergreen's business model does not absolve its harm to the shipping public, asserting that Evergreen does not provide chassis free of charge because its customers pay a chassis usage charge, and that Evergreen's model is harmful to MH carriage because it denies motor carriers chassis choice in MH movements, thus restricting the ability of motor carriers to switch away from chassis per diems. RMSD/COpp at 21-22.

Evergreen obtains chassis from IEPs at a single, fixed contractual daily rate for the transport of shipments on both a CH and MH basis. RSUMF ¶ 88; RSUMF/CResp ¶ 88. Evergreen's customers pay a fixed chassis usage charge ("CUC") if they want Evergreen to provide a chassis to the motor carrier for MH. EMSD at 6; ESUMF ¶ 6; RSUMF ¶ 91; RSUMF/CResp ¶ 91. Evergreen asserts that motor carriers then receive use of these chassis for MH "free of charge" for the day of delivery plus four business days; but if the motor carrier does not return the chassis within the free time period, it must pay Evergreen a per diem rate of \$20 per day, commencing the day after "free time" expired and running until the chassis is returned. EMSD at 6; RUSMF ¶¶ 92, 95; ESUMF ¶¶ 8, 11. IMCC notes that the initial five days are neither "free time" nor "free of charge" as those days are covered by the \$80 CUC paid by the BCO. RSUMF/CResp ¶¶ 93, 95.

By obtaining chassis from exclusive chassis providers at a single, fixed contractual daily rate for use in both CH and MH moves, Evergreen is presumably benefitting from volume discounts as well as profiting from any upcharges on chassis daily late fees. The undisputed evidence shows that the IEP charges Evergreen at the same rate, whether the shipment is CH or MH. However, Evergreen is not passing these same charges on to the motor carrier. Rather, Evergreen is linking MH volumes to obtain discounted prices for MH and CH chassis and instituting a separate pricing system for motor carriers, including that after the five initial days, motor carriers must pay a daily late fee, with any profits over the amount Evergreen is being charged going to Evergreen.

By designating an IEP as the preferred and exclusive chassis provider for Evergreen's CH and MH moves, Evergreen is exerting an influence over competition in the market. The harm from this may include less competition for chassis and potentially higher prices for motor carriers and/or for shipping consumers. In a sense, Evergreen itself has become the exclusive IEP in this model, in that Evergreen determines the per diem charge for motor carriers and the motor carrier has no ability to substitute away, if the end shipper has selected this arrangement. Evergreen also does not address the situation when an end shipper does not elect for Evergreen to provide a chassis, in which case Evergreen would be in the position of any other Respondent ocean carrier in handling an MH shipment. Thus, while Evergreen's shipping model may have some competitive benefits, it also has competitive harms. Therefore, a summary decision in favor of Evergreen is not appropriate.

IMCC did not move for summary decision against Evergreen separately from the other Respondents. Evergreen's practices violate the Shipping Act to the extent that Evergreen engages in the practices found above to violate the Shipping Act.

Evergreen has not established that it is entitled to summary decision on the basis of its model for providing chassis in the regions of Chicago, Los Angeles/Long Beach, Memphis, and Savannah. Therefore, Evergreen's motion for summary decision is **DENIED**.

V. ORDER

Upon consideration of IMCC's motion for summary decision; Respondents' motion for summary decision; Evergreen's motion for summary decision; the related filings including the oppositions, replies, motions, joint statement of facts, and exhibits; and the record herein, for the reasons stated above and the determination that Respondents violated the Shipping Act, it is hereby

ORDERED that the ten Motions for Confidential Treatment be **GRANTED IN PART AND DENIED IN PART**. Confidentiality is granted as requested with the exception of the non-confidential CCMP manual portions at CX2170-2217, CX2219-20, CX2379-2422 and CX2424-27, the selected statements used in this decision, and the corrected public filings. It is

FURTHER ORDERED that IMCC's Motion to Strike Declarations and Respondents' Motion to Strike both be **DENIED**. It is

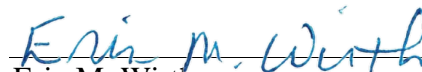
FURTHER ORDERED that IMCC's Motion for Summary Judgment be **GRANTED IN PART AND DENIED IN PART**. Within thirty days of the date this decision becomes final, Respondents shall cease and desist from violating the Shipping Act in Chicago, Los Angeles/Long Beach, Memphis, and Savannah by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for merchant haulage. It is

FURTHER ORDERED that Respondents' Motion for Summary Decision be **DENIED**. It is

FURTHER ORDERED that Evergreen's Supplemental Motion for Summary Decision be **DENIED**. It is

FURTHER ORDERED that the parties are granted leave to file an interlocutory appeal of the denial of all or part of the motions for summary decision. If a party chooses to appeal, their brief is due twenty-two days after this decision and the response is due twenty-two days after the appeal, unless the Commission directs otherwise. It is

FURTHER ORDERED that if the Commission does not review this proceeding, by exceptions, appeal, or its own request, that the parties shall file a joint status report with proposed schedule within forty-five days of the date of this decision.


Erin M. Wirth
Chief Administrative Law Judge

Appendix A

Filings are referred to as follows:

<i>Reference</i>	<i>Filing</i>	<i>Date Filed¹⁵</i>
JSF	Joint stipulations of facts	February 23, 2022
CMSD	Complainant's motion for summary decision	April 29, 2022
CSUMF	Complainant's statement of undisputed material facts	April 29, 2022
RMSD	Respondents' memorandum of law in support of motion for summary judgment	April 29, 2022
RSUMF	Respondents' statement of material facts	April 29, 2022
EMSD	Evergreen's supplemental motion for summary judgment	April 29, 2022
ESUMF	Evergreen's statement of undisputed material facts	April 29, 2022
RMSD/COpp	Complainant's response to RMSD	May 27, 2022
RSUMF/CResp	Complainant's response to RSUMF and ESUMF	May 27, 2022
CSUMF2	Complainant's supplemental statement of undisputed material facts (beginning on page 69 of RSUMF/CResp)	May 27, 2022
CMSD/ROpp	Respondents' memorandum of law in opposition to CMSD	May 27, 2022
CSUMF/RResp	Respondents' response to CSUMF	May 27, 2022
CMSD/CReply	Complainant's reply in support of CMSD	June 13, 2022
CSUMF/CReply	Complainant's reply to CSUMF/RResp	June 13, 2022
CStrike	Complainant's motion to strike untimely expert declarations from Respondents and for sanctions	June 13, 2022
RMSD/RReply	Respondents' reply memorandum of law in further support of RMSD	June 13, 2022
CSUMF2/RResp	Respondents' response to CSUMF2	June 13, 2022
CStrike/Opp	Respondents' opposition to CStrike	June 21, 2022
RStrike	Respondents' motion to strike CSUMF/CReply	June 30, 2022
RStrike/Opp	Complainant's response to RStrike	July 1, 2022

¹⁵ Pursuant to Rule 5, public versions of confidential documents may be filed within three days of the confidential filing. 46 C.F.R. §502.5. The date listed here is for the confidential version.