BEFORE THE FEDERAL MARITIME COMMISSION

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, HIM 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.

Complainant Intermodal Motor Carriers Conference of the American Trucking Associations ("IMCC") and Respondents Ocean Carrier Equipment Management Association, Inc. ("OCEMA"), Consolidated Chassis Management, LLC ("CCM"), CMA CGM S.A. ("CMA"), COSCO Shipping Lines Co. Ltd. ("COSCO"), Evergreen Line Joint Service Agreement, FMC No. 011982 ("Evergreen"), Hapag-Lloyd AG ("Hapag-Lloyd"), HMM Co. Ltd. ("HMM"), Maersk A/S ("Maersk"), MSC Mediterranean Shipping Company S.A. ("MSC"), Ocean Network Express Pte. Ltd. ("ONE"), Wan Hai Lines Ltd. ("Wan Hai"), Yang Ming Marine Transport Corp. ("Yang Ming"), and Zim Integrated Shipping Services ("ZIM") (collectively the “Parties”) have conferred and submit this Joint Status Report pursuant to the February 23, 2024 Order.
I. **SCOPE OF THE REMAINING PROCEEDINGS**

**IMCC’s Position**

The Commission’s Decision prohibits Respondents from undertaking several forms of conduct found by the Presiding Officer and affirmed by the Commission, upon a comprehensive record, to violate the Shipping Act. The scope of the proceeding on remand will, in IMCC’s view, be primarily be driven by two factors: (1) whether CCM rules and contractual provisions in ocean carrier contracts with IEPs found unlawful by the Commission but enjoined only in four geographies can be enjoined nationwide based upon the current record; and (2) what additional enforcement steps are needed (and must be compelled by the Commission) to bring chassis choice to the Pool of Pools and to eliminate practices that restrict chassis choice in Savannah and at inland terminals in Chicago and Memphis (with IMCC reserving the right to address such practices in other markets).

As an initial step, IMCC submits that Respondents should provide a detailed report as to how they are complying with the Decision and how they plan to comply in the future. As a result, IMCC respectfully requests the Presiding Officer to include such a compliance report in the scheduling order. Such an order will be necessary, as the full extent of Respondents’ practices and contracts are nonpublic. IMCC requests that such a report provide a detailed explanation about Respondents’ compliance with respect to the following subjects:

- Required revisions to CCM Rules;
- Elimination of current and future ocean carrier contract provisions with Intermodal Equipment Providers (“IEPs”) restricting merchant haulage (“MH”) chassis choice;
- Elimination of current and future provisions and practices in or relating to ocean carrier contracts with IEPs linking MH chassis volumes with carrier haulage (“CH”) prices;
• Elimination of current and future practices that effectively lock in the motor carrier to the ocean carrier’s default chassis provider for MH movements, including in Savannah and at wheeled terminals in Chicago and Memphis; and
• The establishment of choice of chassis provider for MH movements in the Pool of Pools at Los Angeles/Long Beach.

Additionally, the Commission has found that the restrictive CCM rules and contract provisions harm motor carriers and detrimentally impact competition. The Commission also found that Respondents have failed to offer any worthy objective justifying such harmful conduct in any market. As a result, IMCC respectfully requests that Respondents’ compliance report explain why the Commission’s relief directed toward CCM rules and ocean carrier-IEP contracts should not become nationwide on the existing record.

Accordingly, IMCC respectfully proposes that the schedule allow the parties a short time after Respondents’ compliance report has issued to confer with respect to actions required by the Respondents to achieve choice in the Pool of Pools and to remove practices that restrict choice at maritime and inland terminals; and any additional necessary discovery as to remaining issues in the litigation, which may include noninteroperable pools. Then, the parties may offer the Presiding Officer a joint status report outlining the remaining issues in the case, any discovery that may be needed, and a more detailed proposed schedule.

Respondents seek to delay the Remand proceeding by reference to their pending Petitions for Reconsideration—in violation of the Commission’s rules—and to assume the need for unduly complex remand fact-finding. They also challenge the scope of the Commission’s injunctive relief when the scope of that relief is apparent on its face. Complainant’s Reply (to be filed March 29) will address each of these positions more fully, but in brief:
A. No basis exists to stay the Remand proceedings. Respondents’ attempt to delay further proceedings on remand by filing petitions for reconsideration should be rejected as procedurally improper and substantively meritless.

First, the request to delay remand proceedings is a too-clever-by-a-half attempt to evade the express requirements of the Commission’s rules. Rule 502.261(a)(3) provides: “A petition … shall not operate as a stay of any rule or order of the Commission”; and Rule 502.261(b) provides: “A petition for stay of a Commission order which directs the discontinuance of statutory violations will not be received.” As a pure matter of procedure, the Presiding Officer should reject Respondents’ request to delay remand proceedings.

Second, to the extent that the petitions assert additional discovery is necessary, IMCC’s proposal that Respondents file a Compliance Report expressly contemplates that there may be additional discovery relevant to achieving compliance, expressly including compliance at the Pool of Pools and intermodal terminals. Thus, proceeding with IMCC’s scheduling proposal would give the Presiding Officer the near-term opportunity to shape the scope of remand fact-finding, rather that effectively staying such fact-finding in violation of Commission rules.

B. IMCC’s proposed Compliance Report mechanism already provides the opportunity to update relevant evidence concerning operational conditions at Savannah and Memphis. IMCC is well aware that OCEMA and CCM have implemented “SACP 3.0” at Savannah pursuant to Agreement No. 201391. Consequently, Respondents’ verified Compliance Report should explain the current and anticipated governance and operations of SACP 3.0 as relevant to compliance with the Commission’s injunctive relief. The second joint status report could then address the need for the need for additional discovery, if any, with respect to Savannah.
C. Respondents state that the MCCP pool at Memphis is expected to close in the near term. Respondents thus validate the prediction in our Initial Decision briefing that, with respect to CCM pool closures, “Memphis could be next.” Dkt. 93, Complainant’s Motion for Summary Decision, at 2, 23; see Dkt. 133, Initial Decision at 50. The focus of our remand briefing in this context would be how Respondents plan to enable chassis choice for MH movements, particularly at wheeled terminals, in light of the prospective MCCP closure, and in Chicago.

However, pool operations at other geographies are not an issue. Pending further information from Respondents in the initial compliance report, IMCC has no present intention to seek relief with respect to the operation of pools at locations beyond the four initial geographies.

D. While this Status Report is not the place to debate substantive issues related to the scope of relief, which are more appropriately addressed in the proposed Compliance Report, as noted above, the scope of the relief requested by IMCC is clear. IMCC submits that Respondents’ compliance report should explain why the Commission’s relief directed toward CCM rules and ocean carrier-IEP contracts should not become nationwide on the existing record.

IMCC believes there is nothing ambiguous regarding the scope of the Commission’s decision regarding MH and CH pricing linkages, or in their application to inland terminals in Chicago and Memphis. Under the Commission’s Order, these linkages are expressly unlawful in all contracts. If there are specific situations needing clarification they can be addressed in the compliance report and by proposals in the proposed April 25 joint status report. As the Commission ordered, Respondents must cease and desist from “practices that lock in the motor carrier to the chassis provider the ocean carrier selected.” Order at 72. Such “practices” necessarily would include use of non-interoperable or proprietary pools at “wheeled” rail
terminals. Potential remedies for this lock-in also can be addressed in the compliance report and the April 25 joint status report.

E. The Pool of Pools Can be addressed in the compliance report and further proceedings. IMCC will address in its March 29 reply the substance of Respondent’s arguments concerning the Commission’s conclusions regarding the POP. IMCC anticipates that fact finding will be necessary to develop appropriate compliance steps by Respondents (including in their contractual relationships with IEPs) to implement choice in the POP.

Finally, IMCC itself does not seek reparations for the injuries suffered by motor carriers for Respondents’ illegal conduct. IMCC cannot make any representations for third parties, including motor carriers, who may be entitled to assert their own claims for reparations flowing from Respondents’ Shipping Act violations.

**Respondents’ Position**

Respondents seek to comply with the Decision’s cease and desist order through the restructuring of their obligations that are within their control. As to future proceedings, Respondents herewith advise the Presiding Officer of the following matters which will affect the timing and substance of further proceedings in this matter following issuance of the Order Affirming Initial Decision and Remanding for Further Proceedings (“Decision”):

A. **Petitions for Reconsideration**

Respondents filed a Petition for Reconsideration (Dkt. No. 152), and Evergreen filed a Supplemental Petition for Reconsideration (Dkt. No. 153) on March 14, 2024. The Petitions requested the FMC to remand the proceeding to the Presiding Officer for further findings because of material factual errors with respect to the following:
• The finding that trucker-owned wheels or “TOW” are not a viable and competitive source of chassis at the four major intermodal locations upon which the Decision focused was a material factual error that was contradicted by evidence in the record which demonstrated that TOW are a major source of chassis in operation at the four locations which were the subject of the Decision.

• The finding that chassis usage agreements are exclusive arrangements was a material error which was contradicted by the terms of the agreements and the ready availability of chassis choice in contributory pools.

• The finding that chassis supply will be unaffected by the Decision because motor carriers have an “interest” in an adequate supply ignored the willingness and ability of motor carriers to ensure that supply. This finding was a material error of fact because there was no evidence to support it and because publicly available information shows relatively small and discrete investments by motor carriers transporting international containers and rare – if any – instances of a willingness to pre-position chassis at marine and rail intermodal terminals.

• The Commission correctly concluded that the complexity of ocean carrier arrangements with IEPs made it impossible to rule on the withdrawal issue at the summary judgement phase; however, the Commission ignored that the same complexities existed with respect to the Pool of Pools.

The significance of the latter issue is highlighted further by the filing of an amicus by the three major chassis providers in the United States, i.e., Direct Chassis Link, Inc., TRAC and Flexi Van on March 21, 2024, which urged the Commission to grant the Petition.
Since Respondents have asked that the Commission remand all issues relating to interoperable pools in all four geographic locations that were the subject of the Decision for further proceedings, there should be no further proceedings in this matter before the Petition is ruled upon by the Commission.

**B. Operational Changes Since Issuance of the Initial Decision**

The Port Authorities serving the ports within the South Atlantic region required that a single provider pool make chassis available at rates that are based upon the volume of chassis usage. This new chassis provision model in the Southeast is known as “SACP 3.0.” Given this, it is not clear to Respondents what practices IMCC is referencing with respect to chassis choice in Savannah, particularly given fundamental changes in the structure of the chassis pool in Savannah since the commencement of this proceeding. A factual record will have to be developed on the operation of the SACP 3.0 model before any findings can be made in this proceeding.

The need for further development of a factual record is also necessitated due to operational changes to a pool that occurred before issuance of the Decision. The Mid-south Chassis Consolidated Pool (“MCCP”), a multi-contributor, interoperable pool, will be closing and chassis will be withdrawn from this pool in the near future. A factual record will have to be developed with respect to these fundamental changes before relief, if any, can be fashioned in this geographic area. Further, to the extent that IMCC may be seeking to apply the Commission’s decision to chassis pools other than multi-contributor, interoperable pools, further proceedings will be required to determine whether the facts and rationale of the Decision would be applicable in whole or in part to geographic areas where other types of pools are in operation. Finally, the Decision affirmed the ALJ’s Initial Decision Partially Granting Summary Decision
dated February 6, 2023 which held that “(t)he case may continue to adjudicate remaining practices not resolved through summary decision and other geographic regions.” Initial Decision at p. 59.

A factual record will have to be developed with respect to the above developments and the issues which the Decision had remanded before relief, if any, can be fashioned in these geographic areas.

**C. Other Geographic Regions**

To the extent that IMCC may be seeking to apply the Commission’s decision to chassis pools outside of the subject markets, further proceedings will be required to determine whether the facts and rationale of the Decision would be applicable in whole or in part. Respondents’ position is that the conduct at issue in this proceeding should not be enjoined nationwide on the basis of the limited, existing record because reasonableness is a question of fact. The reasonableness of a particular practice in a particular location cannot be determined in a vacuum. The development of a factual record that would permit adjudication of the lawfulness of any ocean carrier practice would include, but not necessarily be limited to, identifying the relevant geography(ies) and local chassis provisioning arrangements, determining what practices may be at issue in the relevant geography(ies), and assessing whether there are factual justifications for the challenged practices, if any, in the relevant geography(ies).

**D. Nature of the Relief That Was Granted**

Respondents disagree with IMCC’s characterization of the relief that has been granted. Even focusing on the regions that were the subject of the Decision, IMCC improperly attempts to expand the scope of the Initial Decision and Decision by seeking to apply all findings with respect to all challenged practices in all markets. As described by the Commission:
Two challenged practices relate to CCM-managed chassis pools servicing Memphis and Savannah: (1) designating exclusive or preferred/default chassis providers; and (2) contractually linking merchant haulage volume and carrier haulage rates to give ocean common carriers the benefit of lower rates for carrier haulage. *Id.* at 16, 36. The challenged practices of withdrawing from interoperable pools and designating proprietary pools relate to the Chicago region and the Ports of Los Angeles and Long Beach. And finally, a third challenged practice questions the reasonableness of merchant haulage restrictions at the Los Angeles/Long Beach Pool of Pools. *Id.*

Furthermore, whereas IMCC suggests that all provisions and practices linking MH chassis volumes with CH chassis prices are unlawful, it is Respondents’ understanding that such linkages are prohibited only where the motor carrier does not have a choice of chassis provider and only in instances in which the motor carrier is required to pay for the use of the chassis. Similarly, IMCC suggests that the decision prohibits practices that effectively lock in the motor carrier to the ocean carrier’s default chassis provider for MH movements, including in Savannah and at wheeled terminals in Chicago and Memphis, but Respondents’ understand that designation of a non-exclusive default chassis provider is permissible.

It is also unclear what practices IMCC is referencing with respect to inland terminals in Chicago and Memphis. The order did not address any practices specific to inland terminals in Chicago and Memphis.

**E. Pool of Pools**

In terms of the additional enforcement steps that are needed, the Respondents disagree with IMCC’s characterization of the issues. The only means of compliance within the exclusive control of Respondents would be to withdraw from the Pool of Pools and cease to provide
chassis on carrier haulage moves entirely. Respondents have no means to require the operators of the Pool of Pools to contract with motor carriers for merchant haulage moves as any change to the operating model of the Pool of Pools is within the exclusive discretion of the IEPs. If choice is legally required in the Pool of Pools, then the Commission must exercise jurisdiction over the IEPs (which it has ruled it cannot do) and order them to provide choice. Otherwise, there is no certain means of bringing about that result. Unfortunately, the Commission chose to ignore this reality in its decision, which is an issue that is central to Respondents’ Petitions for Reconsideration.

F. Reparations

Respondents agree that IMCC does not have standing to seek reparations and that reparations are not at issue in this proceeding.

II. PROPOSED SCHEDULE

IMCC’s Proposed Schedule:

For the reasons stated above, IMCC believes its proposal for Respondents to file a compliance report and plan, followed by a joint status report and schedule would efficiently address the remaining issues in this case. This proposal will promote the timely conclusion of this proceeding and avoid the inappropriate delay of the Remand proceedings that Respondents seek. We propose the following schedule:

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<tr>
<th>Event</th>
<th>IMCC’s Proposed Deadline</th>
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<tbody>
<tr>
<td>Respondents to file comprehensive compliance plan and report</td>
<td>April 15, 2024</td>
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<tr>
<td>Joint status report and proposed schedule</td>
<td>April 25, 2024</td>
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Respondents’ Proposal:
Respondents disagree with the foregoing schedule, particularly in light of their pending Petitions for Reconsideration. If the Petitions are granted in whole or in part, it will impact the scope of issues to be considered on remand. Rather than commence discovery and/or briefing on those issues that have already been remanded (about which there would need to be clarification in any event, as noted above) and then have additional issues remanded based on Respondents’ Petitions, Respondents propose that any further discovery and/or briefing be scheduled only after the Commission has ruled on Respondents’ Petitions. Notwithstanding Respondents’ view that moving forward is premature, Respondents note that Complainant’s proposed deadlines are woefully insufficient for all Respondents to collectively provide and agree upon a plan and/or report. Should the Presiding Officer determine that a compliance plan and/or report is necessary, Respondents anticipate that 45 days would be appropriate for such an undertaking.

DATED: March 25, 2024

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