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, 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.	FMC Docket No. 20-14

COMPLAINANT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

W. Stephen Cannon
David D. Golden
Seth D. Greenstein
Richard O. Levine
J. Wyatt Fore
Osob M. Samantar
Constantine Cannon LLP
1001 Pennsylvania Avenue, NW
Suite 1300N
Washington, DC 20004
(202) 204-3500

Richard Pianka
American Trucking Associations, Inc.
950 N. Glebe Rd. Ste. 210
Arlington, VA 22203
(703) 838-1889

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Complainant Intermodal Motor Carriers Conference of the American Trucking Associations ("IMCC") respectfully submits this memorandum of law in opposition to the Motion to Dismiss ("Mot.") of Respondents Ocean Carrier Equipment Management Association ("OCEMA"), Consolidated Chassis Management, Inc. ("CCM"), and the named ocean carriers.

INTRODUCTION

Ocean carriers, acting through OCEMA and CCM and their affiliates, have suppressed chassis choice and interoperability, creating supply chain inefficiencies, and causing overcharges for motor carriers, shippers, and U.S. consumers. IMCC filed its Complaint to stop Respondents' unlawful conduct.

IMCC's Complaint alleges a classic case of Respondents failing to "establish, observe, and enforce just and reasonable regulations and practices." 46. U.S.C. § 41102(c). It describes Respondents' unlawful regulations and practices that control the provision and pricing of chassis used in the delivery and receipt of cargo containers at ports and inland terminals throughout the United States. Respondents' restrictions on chassis competition and choice have resulted in port and terminal inefficiencies, and overcharges paid by motor carriers, their shipper customers, and ultimately U.S. consumers. The Commission focuses on precisely this type of conduct "by regulated entities," who impose "unjust and unreasonable business methods . . . on a normal, customary, and continuous basis, and thereby . . . inflict detrimental effect upon the commerce of the United States." Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45,367, 45,372 (proposed Sept. 7, 2018).

Respondents claim to support chassis interoperability and efficient management, but their actions tell a different story. The Complaint details how they deny motor carrier chassis choice and undermine interoperable chassis pools. First, Respondents—acting through CCM and its

affiliates—have promulgated binding rules that give ocean carriers veto power over motor carrier chassis choice. Compl. ¶¶ 43-44. Ocean carriers and their affiliates have exercised that power as a matter of policy and through their denial of motor carrier requests for "deviations" from an ocean carrier's "default" chassis provider "as a matter of course." *Id.* ¶¶ 44-46. Second, Respondent ocean carriers leverage their contracts with intermodal equipment providers ("IEPs") to control chassis availability and prices for both carrier and merchant haulage moves, which as the Commission's Memphis Supply Chain Innovation Team has found, "limit provider choice" for motor carriers. *Id.* ¶¶ 47-48. As a result, Respondents "eliminate competition for [merchant haulage ('MH')] chassis nationwide" and "force[] chassis providers to overcharge for MH movements and undercharge for [carrier haulage ('CH')]" movements. *Id.* ¶¶ 48-49. Third, Respondent ocean carriers restrain chassis competition by fiat "box rules" to divert chassis assignments and reimbursements to their default IEP, even at ports where interoperable chassis pools exist. *Id.* ¶¶ 50, 55-56. Fourth, Respondent ocean carriers have systematically withdrawn from multi-provider interoperable chassis pools and replaced them with single-provider chassis pools as their default chassis IEP, eliminating all chassis competition at those locations. *Id.* ¶¶ 48-49.

By any metric, Respondents' years-long practices to restrict chassis choice and interoperability are excessive and inappropriate. Under § 41102(c), Respondents' regulations and practices must be "fit and appropriate to the end in view." *Distribution Services, Ltd. v. Transpacific Freight Conference of Japan*, 24 S.R.R. 714 (1988), Dkt. No. 86-12, 1988 WL 340659, at *6 (FMC Jan. 6, 1988). Here, the Commission need only contrast Respondents' actual practices with OCEMA's own crystal-clear criteria for the just and reasonable administration of chassis pools—including interoperability, "an 'open competition'

environment," motor carrier "freedom to use the chassis of his choice," and the ability of motor carriers to "negotiate better terms and lower rates"—to conclude Respondents' conduct is unjust and unreasonable, and violates § 41102(c) of the Shipping Act. Compl. ¶¶ 41-42.

Respondents' Motion does not cite a single case supporting their practices as just and reasonable. Instead they resurrect long-superseded cases in an attempt to contest Commission jurisdiction. Even a cursory review of the Commission's current precedents shows their motion must be rejected. The Commission has jurisdiction over IMCC's Complaint because it "relat[es] to or is connected with" the delivery of property to a shipper or receiver under a through tariff or contract, including "shipments going to inland destinations or points." *Mitsui O.S.K. Lines Lid. v. Global Link Logistics, Inc.,* Dkt. No. 09-01, 2011 WL 7144008 at *6, *24 (FMC Aug. 1, 2011). Further, § 41102(c) applies to the conduct alleged in the Complaint: ocean carrier rules and practices affecting the "through transportation" of cargo, whether at terminals or rail facilities or at remote locations. *Distribution Services*, 24 S.R.R. 714.

Respondents also cannot evade the Complaint by claiming IEPs as necessary parties. They are unnecessary to establish either Respondents' liability or afford IMCC complete relief through a cease and desist order; and in any event, any IEPs may intervene during the remedy stage. Nor can Respondents avoid liability for OCEMA and CCM. The Commission has repeatedly subjected groups of ocean carriers like OCEMA and CCM to jurisdiction under § 41102(c). *Distribution Services*, 1988 WL 340659, at *6-7; *In re Truck & Lighter Loading and Unloading Practices at New York Harbor*, 12 F.M.C. 166, 169 (FMC 1969).[1]

[1] Respondents attempt to distract attention from their own misconduct by seeking to characterize IMCC's motives in seeking equitable relief as reflecting "commercial objectives." Mot. 2-4. Such accusations are not only untrue; they are irrelevant at the pleading stage.

Finally, Respondents cannot seriously claim that IMCC's 42-page, 82-paragraph Complaint fails to plead a facially plausible claim against them. The Complaint provides detailed factual allegations of the "who, what, where, when, why, and how" of Respondent's unjust and unreasonable conduct to (1) systematically deny and suppress chassis choice, (2) engage in contracting practices that link chassis prices for CH delivery under through rates to chassis prices for MH delivery under port-to-port rates, (3) reap the financial benefits from undercharges on chassis for CH movements and overcharges on chassis for MH movements to the detriment of shippers using their port-to-port rates, and (4) create inefficiencies in port and inland terminal operations as the result of their conduct. The Complaint also describes the structure of the intermodal chassis market and the Commission's and Respondents' own public statements extolling the efficiencies associated with interoperable chassis pools, which Respondents' conduct has undermined for their financial benefit and to the detriment of IMCC members, their shipping customers, and the shipping public. Under any standard, IMCC has sufficiently pleaded an actionable claim under § 41102(c), and nothing more is required at this point in the proceeding.

Respondents' Motion should be denied.

STATEMENT OF FACTS

A. The Role of Chassis in Container Movement

Chassis are a "pivotal element" of the international supply chain. *Surface Transportation Board Oversight Hearing on Demurrage and Accessorial Charges* (May 22, 2019) ("Commissioner Dye Statement"), https://www.fmc.gov/statement-of-dye-stb-demurrage.[2] A chassis used by motor carriers "is a frame with a suspension and axle system, wheels and tires,

[2] The Commission may consider the Commissioner Dye Statement, and other documents cited in the Complaint, as "adopted by reference." Compl. ¶ 28; *see* Fed. R. Civ. P. 10(c).

brakes, a lighting and electrical system, a coupling behind a truck tractor, and twistlocks that provide the securement points to the corner castings on a container." Compl. ¶ 22. Motor carriers use chassis to move containers between intermodal terminals and shipping facilities. *Id.* ¶ 23. Between 400,000 and 500,000 chassis currently are used in the haulage of international containers in the United States. *Id.* ¶ 24.

There are multiple business models by which chassis may be provided for daily use for the interchange of containers. Historically, ocean carriers owned or leased chassis, and motor carriers had to pick up and return both chassis and containers from an ocean carrier. *Id.* ¶ 25. This led to inefficiencies if some ocean carriers had shortages while others had surpluses. *Id.* As a result, a second business model arose whereby ocean carriers would cooperate by pooling available container slots and chassis. *Id.* ¶ 26. For example, CCM independently operates regional chassis pools on behalf of OCEMA members. *Id.* Under a third business model, third-party leasing companies organize interoperable "gray" chassis pools. *Id.* ¶ 27. Third-party leasing companies may operate single-provider pools, a fourth business model, that are not interoperable with the chassis of other providers. *Id.* Last, in a fifth model, motor carriers own their own chassis. *Id.* ¶ 30.

For all business models, financial responsibility for the payment of daily chassis charges can be divided into two types. CH movements occur when the ocean carrier tariff or contract includes the cost of transport of the container, including chassis charges. *Id.* ¶ 31. MH movements are when the motor carrier (or in some instances, the shipper or receiver) bears financial responsibility for daily container and chassis fees. *Id.* Unlike CH, under MH, the motor carrier pays the ocean carrier or IEP and then bills its customer, the shipper or receiver, for the chassis usage. *Id.*

Dedicated or single-provider chassis pools, where chassis are assigned to serve the containers of only one or a few ocean carriers, have produced "gridlock" and impeded "supply chain velocity." *Id.* ¶ 39. As a result, the Commission and, ostensibly, OCEMA and CCM, have recognized the benefits of interoperable chassis pools (where chassis can be used with containers of multiple ocean carriers), that are managed by a neutral party with no interest in favoring particular ocean carriers or IEPs. *Id.* ¶¶ 39-42. In practice, however, Respondents have actively worked to undermine the viability of interoperable chassis pools, as IMCC's Complaint alleges in detail.

B. Respondents' Suppression of Chassis Competition and Interoperability

The Complaint alleges that Respondents have engaged in an unjust and unreasonable scheme to suppress chassis choice for motor carriers for MH movements and reap the financial benefits. Compl. ¶¶ 1, 6, 43. The Complaint details how, beginning in 2006, OCEMA members filed the Consolidated Chassis Management Pool Agreement (the "CCMP Agreement") to form regional chassis pools, and then sold their chassis to third-party providers (the IEPs). *Id.* ¶ 2. OCEMA then adopted and enforced policies, including CCM Pool Rule 5.7, which enabled Respondent ocean carriers to engage in practices specifically designed to suppress chassis choice and interoperability for motor carriers by:

- Giving ocean carriers veto power over motor carriers' chassis choice;
- Systematically denying consent to motor carriers' choice of chassis;
- Preventing chassis choice by adopting and enforcing "box rules" relating to the assignment and billing for chassis used for the receipt and delivery of their containers in non-CCM ports and terminals;

- Withdrawing from CCMP Agreement pools and designating single-provider chassis pools as the default provider for all container movements;
- Systematically designating an IEP as the ocean carrier's default chassis provider for *all* haulage movements, but basing the decision on the price of CH haulage, when the ocean carrier is billed for chassis usage; and,
- Compelling IEPs to undercharge the ocean carrier for chassis usage for CH delivery movements under through rates while overcharging for chassis used in MH delivery movements under port-to-port rates, thus restricting competition and motor carrier choice for chassis, to the benefit of ocean carriers.

Id ¶¶ 3, 31-56.

The Complaint details the unjust and unreasonable conduct of each individual Respondent. *Id.* ¶¶ 57-69. And it describes how non-interoperable chassis pools cause inefficiencies—including "lost time and revenue," "duplicative repositioning," "confusion on terminals and rail ramps," and "gridlock"—in chassis provisioning, availability, and port or inland terminal operations, *id.* ¶¶ 39, 55. Last, the Complaint notes how Respondents restrained competition for motor carrier chassis choice, causing motor carriers overcharges for chassis on MH movements, and how these overcharges are passed on to the shipping public and ultimately U.S. consumers. *Id.* ¶¶ 47-49.

LEGAL STANDARDS

The Commission evaluates motions to dismiss using Fed. R. Civ. P. 12(b) and federal case law as an interpretive guide. *Mitsui O.S.K. Lines Ltd.*, 2011 WL 7144008 at *12; *Marine Transp. Logistics, Inc. v. CMA-CGM (America) LLC*, Dkt. No. 18-07, 2019 WL 5206007, at *2 (FMC Oct. 8, 2019). *See* Fed. R. Civ. P. 12(b)(1) (subject-matter jurisdiction); *id.* 12(b)(6)

(failure to state a claim upon which relief can be granted); *id.* 12(b)(7) advisory committee's note to 1946 amendment (failure to join indispensable party).

All well-pleaded factual allegations in the Complaint should be assumed to be true and should be construed in the light most favorable to IMCC. *Cargo One Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1351, 1365 (ALJ 2000).

This is particularly true here, where Respondents' motion raises a *facial* challenge under Rule 12(b)(1) to the Commission's jurisdiction, rather than a *factual* one—*i.e.*, that "the alleged wrongful conduct falls outside the scope of the provision of the Act." Mot. 6. *See Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 877-78 (10th Cir. 2017); *cf. McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line & Maersk Inc.*, 27 S.R.R. 1045, 1054 (ALJ 1997) (ordering limited discovery in *factual* rather than facial challenge to jurisdiction). IMCC has the burden of invoking the Commission's jurisdiction by a preponderance of the evidence. *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc.*, 697 F.3d 59, 65 (2d Cir. 2012).

When evaluating a motion's 12(b)(6) arguments, the Commission should "construe the factual allegations in the complaint in the light most favorable to [IMCC] and must grant [IMCC] the benefit of all inferences that can be derived from the facts as alleged in the complaint." *Marine Transport*, 2019 WL 5206007, at *3. A complaint need only provide a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law," 46 C.F.R. § 502.62(a)(iii); *see also* 5 C.A. Wright & A.R. Miller, *Fed. Prac. & Proc. Civ.* § 1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond."). A complaint must contain—as here—non-conclusory allegations of fact that, if true, would demonstrate that a

violation occurred. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 418 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 556); *see also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (Posner, J.) (plausibility "need not be as great as such terms as 'preponderance of the evidence' connote.").

Last, "[d]etermining whether to dismiss a case for failure to join an indispensable party [under Fed. R. Civ. P. 19(a)] requires a two-step inquiry." *Hood ex rel. Mississippi v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009). First, the Commission "must determine whether the party should be added under the requirements of Rule 19(a)." *Id.* Fed. R. Civ. P. 19(a)(1) requires that a person

> subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction be joined 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.'

Id. (citing Fed. R. Civ. P. 19(a)(1)). "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.'" *Hood*, 570 F.3d at 628 (citation omitted). Second, "[i]f the necessary party cannot be joined without destroying subject-matter jurisdiction," then the Commission "must then determine whether that person is 'indispensable,' that is, whether litigation can be properly pursued without the absent party." *Id.* at 629.

ARGUMENT

I. The Commission Has Subject-Matter Jurisdiction over Respondents' Conduct Because It Relates to Tariffs and Contracts for the Through Delivery of Property and Burdens "an Efficient Terminal System."

The Commission has subject-matter jurisdiction for two independent reasons: (1) Respondents' conduct affecting chassis choice and price is intertwined with the receipt and delivery of property under tariffs and contracts for through-transportation; and (2) Respondents' regulations and practices affecting chassis pool interoperability burden the efficient operation of ports and inland terminals.

A. Respondents' Regulations and Practices Relate to Delivery on a Through Rate.

The Commission has jurisdiction over through transportation, which "begins at the port or point of receipt, whether the cargo is tendered directly to the ocean carrier or to another carrier under arrangement for through transport to destination" and ends when the cargo is delivered to the place of destination. *Mitsui O.S.K. Lines Ltd*, 2011 WL 7144008 at *7 (citation omitted); *see also Norfolk S. Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004). The Commission's jurisdiction implements Congressional policy under the Shipping Act of 1984 favoring the use of single intermodal bills of lading covering shipments from abroad to inland points of destination, including by defining terms such as "through rate" and "through transportation" that incorporate "modern intermodalism concepts and practices in our foreign trade." *Mitsui O.S.K. Lines Ltd.*, 2011 WL 7144008 at *6-7 ("In the Ocean Shipping Reform Act of 1998, Congress did not override the Commission's assertion of comprehensive intermodal jurisdiction.").

Respondents argue that the Commission lacks jurisdiction over IEP pricing and motor carrier inland transportation for MH movements. Mot. 8-9. But this is misdirection. The Complaint alleges that Respondents' regulations and practices relate to or are in connection with

chassis rental and per diem fees incorporated into Respondents' through rates for the *delivery* of property to an inland point through contracts with IEPs for container movements. These contracts intertwine CH chassis fees with the MH chassis fees imposed on shippers and motor carriers when shippers use Respondents' port-to-port rates, to the detriment of both groups. *See* Compl. ¶¶ 1-5. The Respondents' regulations and practices thus relate to or are concerned with both Respondents' through delivery of property to an inland point and Respondents' port-to-port delivery of containers at the relevant port or inland terminal.

Respondents' regulations and practices unreasonably burden shippers and receivers obtaining *delivery* of property under Respondents' port-to-port MH tariffs and contracts by increasing the price of chassis used in such delivery. For example, Respondents restrict chassis choice (using CCM Pool Operations Manual Section 5.7 and their contracts with their designated IEPs) to generate overcharges for MH container delivery, so that the designated IEP has sufficient revenue so as to undercharge Respondents for chassis rentals for CH movements. *Id.* ¶¶ 3-4, 47. Further, the Complaint details how ocean carriers use IEP contracts to restrict chassis choice. *Id.* ¶ 49 (noting that, due to its contract with an IEP, "HMM … cannot grant open choice!").

The Complaint does not challenge IEP conduct. Rather, it challenges the Respondent ocean carriers' conduct in granting default status for MH container movements to the same IEP that provides chassis for CH movements, and seeks to hold the Respondents accountable for the overcharges on MH chassis that their conduct has caused. Similarly, the Complaint alleges that *all* ocean carrier Respondents have instructed that the carrier-designated IEP will bill for usage, not the actual chassis provider. *Id.* ¶ 56 (reprinting matrix from website of the Pool of Pools). As a result, the Commission has subject-matter jurisdiction to determine whether Respondents'

regulations and practices relating to chassis used in the delivery of containers under tariffs and contracts for through transportation burden the delivery of delivery of containers under port-to-port MH tariffs and contracts—and thereby violate the Shipping Act.

Respondents conspicuously avoid the implications of their arguments in light of the Commission's holding in *Vehicle Carrier Services* that indirect purchasers of ocean carrier services have no standing to sue for reparations, even if they are considered shippers under the Shipping Act. 1 F.M.C. 2d 440, 455 (FMC 2019) ("shippers must still be direct purchasers to sue for reparations."). If the Commission adopts Respondents' argument that IMCC members, as the direct purchasers of the overcharges resulting from Respondents' conduct, cannot file a complaint under the Shipping Act, then ***no one*** will have standing to challenge these unjust and unreasonable practices.

B. Respondents' Regulations and Practices Relate to Terminal Efficiency.

The Commission also has jurisdiction over regulations and practices imposed on motor carriers that burden port and inland terminal efficiency. *See Am. Export-Isbrandtsen Lines, Inc. v. FMC,* 389 F.2d 962, 967 (D.C. Cir. 1968) ("*Isbrandtsen I*"). By its terms, §41102(c) applies to terminal operators as well as ocean carriers, including regulations and practices that harm terminal operations. In so doing, Congress enacted a policy choice "facilitating the free flow of commerce by guaranteeing an efficient terminal system." *Am. Export-Isbrandtsen Lines, Inc. v. FMC*, 444 F.2d 824, 829 (D.C. Cir. 1970) ("*Isbrandtsen II*"). Accordingly, because of their impact on port and terminal efficiency, regulations, and practices for chassis usage, including chassis pool interoperability, fall within the Commission's jurisdiction. *Holt Cargo Sys., Inc. v. Delaware River Port Authority*, Dkt. No. 96-13, 2000 WL 246442, at *33 (FMC Feb. 9, 2000) ("FMC should use its statutory authority under the reasonableness standard to further 'an efficient terminal system.'" (citation omitted)).

The Complaint properly alleges Commission jurisdiction. Ocean carriers control the assignment of chassis at ports and inland intermodal terminals. Compl. ¶¶ 3, 50, 81. And the Complaint asserts that Respondents' reliance on non-interoperable single-provider chassis pools creates port and terminal wastefulness. *Id.* ¶¶ 25, 41, 43-46, 53-54. These allegations echo the Commission's findings that the variation in chassis supply models has created "serious inefficiencies in the freight delivery system." *Interpretive Rule on Demurrage and Detention Under the Shipping Act. Policy Statement*, 84 Fed. Reg. 48850, 48851 n.7 (proposed Sept. 17, 2019). Independent factfinders, such as the Commission's Memphis Supply Chain Innovation Team, also confirm how restrictions on chassis interoperability lower the operational capability of port and terminals: "In order to keep trains moving, team members believe full interoperability with all chassis providers in a gray pool model in Memphis is needed."[3] The Pool-of-Pools likewise observed port inefficiencies arising from the lack of chassis pool interoperability. Compl. ¶ 55. Even Respondent CCM has published a report on the beneficial impact of interoperable chassis pools on "supply chain efficiency." Compl. ¶ 42 (quoting CCM, *Interoperability Matters! The Interoperable Gray Pool Model, Enhancing Supply Chain Efficiencies*).

The allegations of the Complaint fall squarely within the Commission's focus on port terminal operations. In adopting the recent Demurrage and Detention Policy Statement, the Commission confirmed its jurisdiction over practices of ocean carriers affecting truckers, to "improve throughput velocity at U.S. ports, allow for more efficient use of assets, and result in administrative savings." *Interpretive Rule on Demurrage and Detention Under the Shipping Act,*

[3] Federal Maritime Commission, *A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity Team* at 2, https://www.fmc. gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf (hereinafter "Memphis Supply Chain White Paper").

85 Fed. Reg. 29,638, 29,640 (Final May 18, 2020); *see also id.* at 29,650-51 (noting that "the Commission would be assessing the reasonableness of ocean carrier demurrage practices vis-à-vis shippers, intermediaries, and ***truckers***") (emphasis added). Although Respondents try to distinguish the Demurrage and Detention Policy proceeding on the grounds that the unreasonable conduct alleged was embodied in a tariff, rather than a non-tariff "practice" (*see* Mot. 10-11), the Commission already has explicitly rejected such a reading: "if the ***practice*** at issue relates to rail but is nonetheless an ocean carrier practice, *e.g., is contained in an ocean carrier tariff or service contract*, then the guidance in the rule would likely apply." 85 Fed. Reg. at 29,650 (emphasis added). The Memphis Supply Chain Task Force similarly affirmed that ocean carrier arrangements at inland rail terminals are subject to the Commission's jurisdiction: "In essence, the ocean carrier has predetermined usage of chassis provider within their captive pool models when that train arrives." Memphis Supply Chain White Paper at 2.

Despite Respondents' assertion to the contrary, *Truck & Lighter Loading and Unloading Practices,* 12 FMC 166, upheld in *Isbrandtsen II,* is exactly on point. *Truck & Lighter Loading* dismissed the terminal operators' attempt to limit Commission jurisdiction to only "tariffs of [ocean] carriers" and not terminal operators. 12 F.M.C. at 169. Rather, the Commission found jurisdiction over tariffs and practices of both ocean carriers and terminal operators that would cause "delays at [] terminals." *Id.* at 170. In affirming the Commission's concern with potential withholding of detention payments to certain motor carriers, the D.C. Circuit focused precisely on the impact of the challenged rules on port efficiency. It expressly affirmed that the imposition of financial penalties on truckers who unloaded their own cargo (instead of using port employees) would be unreasonable because it could lead to port congestion:

> It is also contended by the Terminals that there is no evidence to support a conclusion that there is any danger of their discriminating against driver unloaded trucks. We

> conclude, however, in view of the magnitude of the potential problem of driver unloaded trucks, representing as they do 85% to 90% of all export cargo, that the Commission was well advised to insert section 4(c) in the detention rule. *If servicing of driver unloaded trucks could be held up indefinitely in such large numbers it is hard to see how the congestion situation would be improved*.

Isbrandtsen II, 444 F.2d at 837 (emphasis added). Thus, Respondents' attempted distinction that the "regulations had nothing to do with the relationship between ocean carriers and motor carriers," Mot. 10, ignores the Commission's finding that marine terminal operators were liable under Section 10(d)(1) for imposing port inefficiencies on motor carriers.

Nor can Respondents rely on *Sea-Land Dominicana* or *Pro-Transport*.[4] In *Sea-Land*, the Commission dismissed a dispute between a carrier and its sales agent for failure to allege a "sufficient nexus . . . between the regulated carriers" and the shipping public. 26 S.R.R. at 583. In contrast here, the Complaint directly connects Respondents' regulations and practices to the overcharges paid by IMCC members and rebilled to their shipper customers. *See Isbrandtsen I*, 389 F.2d at 968 ("Savings from [terminal] efficiencies will presumably be passed on to shippers and receivers" and thus "is clearly within its statutory authority"). Similarly, *Pro Transport* involved a dispute regarding "purely domestic transportation services," *i.e.*, ***only*** the terms of an agreement for ***domestic trucking services*** between a motor carrier and an ocean carrier. *Pro-Transport*, slip op. at 12 (citation omitted). In contrast here, the Complaint alleges unreasonable practices that (1) impose inefficiencies on the operations of ports and terminals, Compl. ¶¶ 25, 41, 43-46, 53-54, and (2) create costs relating to delivery under ocean carriers' port-to-port bills of lading that the shipping public must pay through motor carriers, *id.* ¶¶ 1-5, 47, 49, 56.

[4] *See* Mot. 6-8 (citing *Sea-Land Dominicana v. Sea-Land Serv., Inc.*, 26 S.R.R. 578 (FMC 1992) and *Pro-Transport, Inc. et al v. Seaboard Marine of Florida, Inc. and Seaboard Marine Ltd.*, Dkt. No. 16-12 (ALJ Apr. 26, 2017, administratively final May 31, 2017)).

In sum, the Commission clearly has subject-matter jurisdiction over the regulations and practices of ocean carriers harming operational efficiencies at ports and inland terminals, including those restricting or permitting chassis pool interoperability.

II. The Complaint's Allegations That Respondents Have Suppressed Chassis Choice and Interoperability State a Claim for Unreasonable Practices Under the Shipping Act.

As the Complaint sets out, despite OCEMA and CCM's policy statements purporting to favor chassis choice and interoperability, Respondents have adopted and maintained rules and practices that frustrate chassis choice and interoperability. These allegations are more than sufficient to state a claim for unreasonable practices under § 41102(c). *Cf.* 46 C.F.R. § 545.4 (Commission interpretative statement on the elements of reparation claims for unjust and unreasonable practices).

A. Section 41102(c) Includes Delivery of Property at Inland Points.

The interchange and assignment of motor carrier chassis relates to the "receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). With the Shipping Act of 1984, Congress overruled previous caselaw imposing a requirement that this section relate to terminal and forwarding services. *See Mitsui O.S.K. Lines Ltd.*, 2011 WL 7144008 at *6-7. As a result, the Commission should reject Respondents' argument that the challenged conduct falls outside § 41102(c).

Distribution Services is the first major adjudication following the inland intermodal transportation expansion of Commission jurisdiction after the passage of the Shipping Act of 1984, and remains the leading case setting out the principles for determining violations of § 41102(c). In *Distribution Services*, the Commission found unlawful a Freight Conference rule that restricted the payment of allowances for non-neutral parties to transload cargo from ocean containers to domestic containers, where such allowances were intended to promote the efficient

use of international containers by shortening the length of their round-trips. 1988 WL 340659, at *4. Thus, the Commission confirmed that the scope of § 41102(c) includes determining unfair and unjust practices relating to inland through transportation, including transfer of cargo containers at ports and inland terminals. More specifically, the Commission found that it had the power under § 41102(c) to adjudicate unreasonableness where a rule created financial disincentives to certain conduct (transloading), which could potentially be well off-port. Importantly, the Commission noted that parties potentially injured by the rule included those regulated by the ICC:

> Rule 2(J) authorizes the payment of a transloading allowance to any consignee meeting the conditions of the Rule. One of those conditions is that the cargo may not be transloaded at the facilities of a shipper, consignee, ICC-regulated freight forwarder, NVOCC or ocean carrier. This requirement does not exclude any class of consignee from receiving a transloading allowance. It simply means that no consignee may use its own facilities for transloading or the facilities of any of the entities named….

1988 WL 340659, at *5.

IMCC's Complaint similarly addresses conduct relating to through transportation—the assignment of chassis at ports and inland terminals—by means of contractual terms for the provision of chassis used to deliver containers under tariffs or contracts for through transportation. Compl. ¶¶ 3, 47-58, 71. It also addresses the impact of those contractual terms on Respondents' (and IMCC members') customers who obtain delivery of containers under Respondents' port-to-port tariffs and contracts. *Id.* ¶¶ 31, 47, 56.

Respondents' argument (Mot. 11-14) that § 41102(c) applies only to terminal and forwarding services is thus easily discarded, as it relies on out-of-date precedents that predate the Shipping Act's statutory granting to the Commission jurisdiction over inland intermodal through

transportation.[5] For example, *Heavy Lift Practices and Charges of Hapag-Lloyd AG*, 17 S.R.R. 505 (ALJ 1977), *aff'd* 18 S.R.R. 1491, merely determined that the Commission did not have jurisdiction over surcharges for heavy lift services performed on the ship side of "ship's tackle" because those were part of "ocean transportation." However, the recent Demurrage and Detention Policy Statement is premised on the Commission's jurisdiction over ocean carrier charges once containers have been offloaded from the container vessel.

Respondents' contention (at Mot. 14) that inland transportation, *standing **alone***, is beyond the reach of the Shipping Act is true—but irrelevant. The Complaint specifically alleges unreasonable practices by Respondents with respect to the availability and assignment of *chassis* used to effect the delivery of Respondents' containers at ports and inland terminals (and not domestic trucking), which are clearly subject to § 41102(c). Compl. ¶¶ 70-79. *See Distribution Services*, 1988 WL 340659, at *6-7 (finding unreasonable a regulation governing reimbursement of "transshipment" that prevented entities who did the transshipment from using an affiliated entity); *see also Commission Interpretive Statement*, 83 Fed. Reg. at 45,372 ("the purposes of the Shipping Act" include focus on "regulated entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and . . . . inflict detrimental effect upon the commerce of the United States."). Thus, "arrangements related to the terms of chassis usage," Mot. 15, are fully subject to section 41102(c).

[5] *See Los Angeles By-Products Co. et al. v. Barber S.S. Lines, Inc. et al.*, 2 U.S.M.C. 106 (USMC 1939) (pre-dates the '84 Shipping Act and *Distribution Services*); *North River Ins. Co. and Nw. Nat'l Ins. Co. v. Fed. Commerce & Navigation Co., Ltd.*, 20 S.R.R. 1078 (ALJ 1981) (same); *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, 7 S.R.R. 418 (FMC 1966) (same).

B. The Complaint Alleges a Facially Plausible Claim Against Respondents and Provides Clear Notice of the Asserted Violation.

Commission Rule 62 requires complaints only to allege facts "sufficient to inform each respondent with reasonable definiteness" of the alleged violation. *See* 46 C.F.R. § 502.62(a)(3)(iii). The plausibility standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the alleged violation. *Twombly*, 550 U.S. at 556. "A complaint survives a motion to dismiss even '[i]f there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (citation omitted). At the pleading stage, the "choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). Thus, it is improper to dismiss a complaint "that states a plausible version of the events merely because the court finds a different version more plausible." *Id.* Such an inquiry confuses "probability and plausibility" by "weighing the competing inferences that can be drawn from the complaint." *SD3*, 801 F.3d at 425.

Respondents, nonetheless, erroneously argue that IMCC "fails to allege sufficient facts to make [its] claims for relief plausible." Mot. 19. But IMCC specifically articulates why ocean carriers embarked on their unlawful conduct: to reap the financial benefits of *under*charges on chassis rentals on CH movements by shifting the costs elsewhere—to motor carriers and their customers renting chassis on MH movements. Compl. ¶ 3, 48. And IMCC explains how they did so—by restricting chassis choice and interoperability. More specifically, IMCC alleges in detail:

- Respondents' scheme to suppress chassis choice for motor carriers for MH movements and reap the financial benefits. Compl. ¶ 1. *Supra* 6-7.
- Each Respondent's role in the scheme. *Id.* ¶¶ 57-69.
- Why the scheme is unreasonable, by creating inefficiencies in port and inland terminal operations, *id.* ¶¶ 39, 55.
- How Respondents restrained competition for motor carrier chassis choice, causing motor carrier overcharges for chassis on MH movements. *Id.* ¶¶ 47-49.
- How the scheme was created and enforced. *Id.* ¶ 2.
- How Respondents adopted and enforced CCM Pool Rule 5.7, which gives ocean carriers veto rights over motor carriers' chassis choice. *Id.* ¶ 3.
- How ocean carriers systematically deny consent to motor carriers for their choice of chassis. *Id.*
- How ocean carriers have used "box rules" over their containers in non-CCM ports and terminals to suppress chassis choice there. *Id.* ¶¶ 3, 50.
- How ocean carriers have withdrawn from CCMP Agreement pools, and designated single-provider chassis provider chassis pools as their default providers for all container movements. *Id.* ¶¶ 3, 51-54.
- How ocean carriers use their contract negotiations and resulting provisions in their contracts with IEPs to compel IEPs to undercharge the ocean carrier for chassis usage for CH movements, while overcharging for MH movements, which has restricted competition and motor carrier choice for chassis, to the financial benefit of ocean carriers. *Id.*; *see also id.* ¶¶ 3, 31-56.

- How each ocean carrier Respondent has engaged in and continues to engage in denying chassis choice and their contracting practices that cause overcharges on chassis used in MH movements at multiple named ports and inland terminals. *Id.* ¶¶ 58-68.

These factual allegations offer more than mere "labels and conclusions." *Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *3 (quoting *Iqbal*, 556 U.S. at 678). Rather, IMCC proffers a theory of how Respondents' regulations and practices are not "fit and appropriate to the end in view," for chassis management and interoperability. *Distribution Services,* 1988 WL 340659, at *7. Thus, the Complaint is more than sufficient to "inform each respondent with reasonable definiteness of the acts" giving rise to IMCC's unreasonable practices claim under the Shipping Act. 46 C.F.R. § 502.62(a)(3)(iii).[6]

C. The Complaint Pleads Continuous and Unreasonable Conduct by Respondents.

The Complaint alleges Respondents' "normal, customary, and continuous" practices have suppressed and continue to suppress chassis choice, using several different enforcement mechanisms. 46 C.F.R. § 545.4(b). These mechanisms include the negotiation and implementation of ocean carrier-IEP contracts on a repeated, systematic, and habitual basis since Respondents began to sell their chassis to IEPs starting in 2009. *Id.* ¶ 47 ("although carriers have transferred ownership of chassis to IEPs, they still exert significant control over chassis provision—and thus availability—through their contracts with IEPs." (citation omitted)). The Complaint then asserts that *each* of the Respondent ocean carriers has "engaged in and

[6] If the Commission disagrees that IMCC has failed to plead its claims without sufficient factual detail, IMCC respectfully requests leave to amend. *See Trane Co v. South African Marine Corp. (N.Y.)*, 19 F.M.C. 375, 380 (Init. Dec., adopted 1976).

continue[s] to engage in" such contracting practices with respect to multiple named ports and inland terminals where they have acted to restrict chassis choice. *Id.* ¶¶ 58-68.

Contrary to Respondents' arguments, Mot. 15, no rule or precedent requires the Commission to evaluate Respondents' misconduct atomistically, or prevents the Commission from evaluating such conduct on a systemic basis. For example, Respondents' withdrawal from CCM-administered chassis pools, Compl. ¶ 51, represents a pivot point for each ocean carrier's change from ongoing participation in a CCM-pool to ongoing participation in a single-provider pool, with continuing, systemic effects on the availability and pricing of chassis for shippers who chose transportation on a port-to-port basis. Each carrier's withdrawal is part of the systematic conduct of CCMP Agreement signatories over the last two years to abandon the CCM pools and replace them with single-provider pools, *id.* ¶¶ 51-52, such that the pools' managing boards terminated those pools. As a result, their violations are "normal, customary, and continuous." 83 Fed. Reg. 45372.

The Complaint also explains how the suppression of chassis choice for motor carriers is unreasonable because the regulations and practices are not "fit and appropriate to the end in view," *Distribution Services,* 1988 WL 340659, at *7 (quoting *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 547 (1966)). Here, the Commission, OCEMA, and CCM all recognize that the "end in view" includes the goal of chassis pools that are interoperable across containers of multiple ocean carriers in order to facilitate efficient commerce for the shipping public. *See* Compl. ¶ 39-42 (quoting Memphis Supply Chain White Paper at 4; Commissioner Dye Statement; CCM, *Interoperability Matters!* at slides 5, 9). Nor is it reasonable to the goals of interoperable chassis pools and effective management for Respondents

to shift their chassis rental costs to their MH customers through contracts that link the provision of chassis for CH movements to the provision of chassis for MH movements.

Contrary to these goals, Respondents' practices operate together to suppress choice, thus harming "marine transportation competition," and "inflict[ing] detrimental effect upon the commerce of the United States." 83 Fed. Reg. at 45,372. The Complaint's allegations identify Respondents' noxious policies and practices, such as CCMP Operations Manual section 5.7; systemic denials by ocean carriers and other entities of motor carrier requests for non-default chassis usage; as well as the use of "box rules" to prevent chassis choice in non-CCM pools, that "go beyond what is necessary to achieve" the purpose of interoperable chassis pools or to manage chassis. *See Distribution Services*, 1988 WL 340659, at *7; Compl. ¶¶ 74, 76. Further, the Complaint asserts that ocean carriers continually designate default chassis providers for both CH and MH movements by their CH movement price alone. *Id.* ¶¶ 45, 48.

Thus, IMCC's Complaint states a claim for unreasonable practices. Respondents' conduct eliminates motor carriers' ability to negotiate MH chassis rates and service terms, which in turn restrains competition, harms motor carriers' customers, and undermines the stability of interoperable, neutrally-managed chassis pools. *Id.* ¶¶ 75, 77. And Respondent members of CCM Pool agreements who have withdrawn from the GCCP and COCP, and in turn designated single-provider pools, have unreasonably maintained their default IEP's ability to undercharge the Respondent for CH moves and overcharge motor carriers for chassis used in MH moves. *Id.* ¶ 78. These harms to the interchange of containers and chassis, and the ultimate delivery of property for shippers far exceed any purported benefit to the shipping public. 85 Fed. Reg. 29,651 (practice unreasonable when it is not "tailored to meet its intended purpose").

Distribution Services is on all fours here. There, the Commission struck down an ocean carrier conference rule governing reimbursement of "transshipment" services, which governed the transfer of cargo from an ocean container to an inland container at an off-port location. This rule incentivized minimizing the transportation of empty ocean carrier containers back to port, shifting the cost of transporting empty containers elsewhere. *Distribution Services*, 1988 WL 340659, at *2. Although minimizing the transportation of empty ocean containers and preventing false billing for transloading expenses were "worthy objective[s]," the Commission found the ocean carriers' regulations to be "excessive and unreasonable"—because "less intrusive methods" existed to accomplish those goals. *Id.* at *7. The same holding applies here. IMCC challenges ocean carrier conference rules and practices that shift costs from ocean carriers to motor carriers and the shipping public. IMCC does not argue that single-provider chassis pools will *never* be needed, but rather that Respondents' rules and practices are unnecessarily restrictive to accomplish the purported goals of interoperable chassis pools and chassis management and the procurement of chassis for delivery of containers under through rates.

Respondents do not cite a single case to argue that their conduct is reasonable, but rather attempt to mischaracterize the challenged conduct as outside the scope of the Shipping Act. For example, they argue that the Complaint fails to state that any "property" is shipped. Mot. 14. Not so. The Complaint articulates specifically how "motor carrier chassis relate[] to the 'receiving, handling, storing, or delivery of property' under § 41102(c)." Compl. ¶ 71 (citing *Petition of the Ass'n of Bi-State Motor Carriers*, 30 S.R.R. 104 (2004)).[7] And of course, the

[7] In *Distribution Services*, neither the ALJ nor the Commission felt it necessary to specify whether transloading rules were related to receiving, to handling, to storing, or to the delivery of the property in the containers. There is thus no need at this stage for the Commission specifically to require a determination as to which category of conduct in § 41102(c) the allegations of the Complaint apply.

Complaint extensively details the chain of ocean carriers, chassis pools, and motor carriers that deliver ***containers*** in which ***property*** is shipped. Compl. ¶¶ 3, 6-7, 22-26, 39-42, 54, 71-72, 77.

While Respondents argue that the Complaint's allegations are too "vague," Mot. 3, 20-22, the 82 paragraphs of IMCC's Complaint prove otherwise. Regardless, at the motion to dismiss stage, IMCC need only allege facts sufficient to create "a reasonable expectation that discovery will reveal evidence" that Respondents' conduct has violated § 41102(c). *Twombly*, 550 U.S. at 556; *Vehicle Carrier Servs.*, 1 F.M.C.2d 45, 96 (2018) (at motion to dismiss stage "it is sufficient" that complainant has "presented plausible Shipping Act claims."). IMCC's Complaint more than does this. *See supra* 19-21. Similarly, Respondents' attempt to pick apart individual paragraphs must be rejected—the allegations are all read together as "factual detail is provided elsewhere in the complaint[]." *Vehicle Carrier Servs.*, 1 F.M.C.2d at 96. Accordingly, IMCC has stated a claim upon which relief can be granted.

III. IEPs Are Not Indispensable Parties to This Action.

The IEPs are not indispensable parties; the action may proceed without them.

Respondents cannot meet their burden of showing that complete relief requires participation from the IEPs. Fed. R. Civ. P. 19(a)(1)(A). In fact, none of the relief requires Commission action with respect to IEPs. For example, the Complaint seeks an Order requiring that the Ocean Carriers and CCM change the text and enforcement of "CCMP Operations Manual Section 5.7," Compl. Request for Relief ¶¶ 3(a)-(b). Such an order requires only parties to the CCMP, *i.e.*, CCM, OCEMA, and their members. *See* Compl. ¶¶ 2-3. IMCC further seeks an injunction against any practice that "limits the ability of a motor carrier to select the chassis provider it designates," or otherwise advantages "the use of default chassis providers" or "restricts the ability of motor carriers independently to negotiate chassis prices" for MH movements. *Id.* ¶¶ 3(c), (d). The Commission could satisfy this relief with an order solely on

ocean carriers, OCEMA, and CCM. And last, the Complaint seeks a cease and desist order against ***participation*** in "single-provider chassis pools that are not interoperable with pools operated by other IEPs at ports and intermodal terminals serving more than one Respondent under rules that do not permit effective chassis choice for motor carriers for [MH] container movements," *id.* ¶ 3(e). As a result, the Commission can award complete relief without participation from the IEPs. *See "50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, Dkt. No. 81-11, 1987 WL 209053, at *4 (Aug. 3, 1987) (finding a term in an agreement with third parties unlawful and giving ocean carriers "a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws"), *aff'd, New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338 (D.C. Cir. 1988).

Respondents also cannot argue that nonjoinder of IEPs would prevent any Respondent from defending itself, or subject Respondents to multiple recovery. IMCC asks only for a cease and desist order, and seeks no reparations capable of duplicative recovery. *See* Compl. Request for Relief.

Further, Respondents' argument, citing 46 U.S.C. § 41102(c), that the Commission must dismiss the case because of an alleged lack of personal jurisdiction over IEPs misses the mark.[8] To the extent that IEPs' participation would facilitate relief or protect their interests, they are free

[8] Personal jurisdiction is wholly irrelevant to the Commission's ability to adjudicate fully Respondents' liability and to issue a cease and desist order to halt their illegal conduct. Regardless, Congress has authorized the Commission to adjudicate controversies involving "a violation" of the Shipping Act, 46 U.S.C. § 41301(a), and Respondents cite to no authority that holds the Commission lacks personal jurisdiction over IEPs. *See Union Pacific R. Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Cent. Region*, 558 U.S. 67, 71 (2009) (reversing dismissal for lack of jurisdiction) ("The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies").

to intervene at the remedy phase.[9] Moreover, Respondents would suffer no prejudice from the absence of the IEPs during the liability phase; they are free to produce their contracts and correspondence with IEPs as part of their defense, and they—like Complainant—may serve subpoenas on non-parties for relevant and necessary discovery.

Not a single one of Respondents' cited authorities does them any favors. For example, in *All Marine*, both parties agreed that the Maryland Port Administration, as a lessor to a "terminal operator," was an "indispensable party," because it might adopt rules to forbid what the Commission might order as a remedy in the proceeding; so, full relief might have required the Commission to order the MPA to not interfere in the remedy. *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, 26 S.R.R. 1396, 1396-98 (ALJ 1994). Yet, rather than dismissal, the ALJ ordered that the Complaint be amended. *Id.* Here, the IEPs cannot impose contractual terms on an ocean carrier that the Commission determines to be in violation of the Shipping Act. *50 Mile Container Rules*, 1987 WL 209053, at *4.

Finally, Respondents' claim that all parties to a contract are required to be named in the suit does not apply here. Mot. 16-17.[10] IMCC's claim is based on § 41102(c), and does not arise

[9] See 46 C.F.R. § 502.68. Similarly, injunctions under Federal Rule of Civil Procedure 65(d)(2)(C) apply to "other persons who are in active concert or participation" with the defendants, without rendering such persons indispensable parties. *See Benjamin ex rel. Yock v. Dep't of Public Welfare of Pennsylvania*, 701 F.3d 938, 949 (3d Cir. 2012) (affirming motion to intervene at remedy phase as "timely"). In this regard, IEPs are capable of independently and voluntarily establishing interoperable pools. *See* Dep't of Justice, Letter re: Flexi-Van Leasing, Inc. and Direct ChassisLink, Inc. Business Review Letter Request (Sept. 23, 2014, https://www.justice.gov/atr/response-flexi-van-leasing-inc-and-direct-chassislink-inc-request-business-review. IMCC requests that the Commission take judicial notice of this Business Review letter. 46 C.F.R. § 502.204; Fed. R. Evid. 201.

[10] Respondents cite *Dawavendewa v. Salt River Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156 (9th Cir. 2002); *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-01 (2d Cir. 1980); *NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1185 (E.D. Cal. 2013); *Camacho v. Major League Baseball*, 297 F.R.D. 457, 461-62 (S.D. Cal. 2013). But unlike these cited cases, IMCC does not seek adjudication of performance or determination of rights arising under IEP contracts.

under contract law. Regardless, contract issues raise no special Rule 19 concerns. Instead, the "proper approach today" with respect to contract claims "is to examine each case in light of the factors mentioned by" Rule 19. 7 Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1613 (3d ed. through Apr. 2020 update).

IV. OCEMA AND CCM Are Subject to § 41102(c) Under Commission Precedent.

The Commission has repeatedly held that *conferences* of common carriers can engage in unreasonable practices that violate § 41102(c). *Distribution Services*, 1988 WL 340659, at *6-7; *see also In re Truck & Lighter Loading and Unloading Practices*, 12 F.M.C. at 169 (conference liable for unreasonable practices under predecessor statute to § 41102(c)). Respondents incorrectly assert: "[i]f the Complaint is dismissed as to CCM, there is a serious question as to whether relief can be granted with respect to the provision of the CCM Operations Manual…." Mot. 24 n.11. In fact, the Commission has recognized Respondents' argument and rejected it. Here, OCEMA and CCM are entirely comprised of, or governed by, common carriers, and thus each "is a particularly appropriate party" because the "conference-wide practice is under attack," *Int'l Ass'n of NVOCCs v. Atl. Container Line*, Dkt. No. 81-5, 1990 WL 427461, at *13 (FMC Feb. 5, 1990) ("As was the case in *Distribution Services*, conferences often are joined as co-respondents with their member lines in proceedings involving allegations of discriminatory or unreasonable tariff rates or practices. The inclusion of the conference is a recognition that the conference tariff is the target of the private complaint or Commission investigation and it is that tariff that will have to be corrected if violations are found.").

CONCLUSION

For all of the foregoing reasons, IMCC respectfully requests that the Commission deny Respondents' Motion to Dismiss.

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Respectfully submitted,

/s/ *W. Stephen Cannon*

W. Stephen Cannon
David D. Golden
Seth D. Greenstein
Richard O. Levine
J. Wyatt Fore
Osob M. Samantar
CONSTANTINE CANNON LLP
1001 Pennsylvania Avenue, NW
Suite 1300N
Washington, DC 20004
Phone: 202-204-3500
scannon@constantinecannon.com

Richard Pianka
American Trucking Associations, Inc.
950 N. Glebe Rd. Ste. 210
Arlington, VA 22203
(703) 838-1889
rpianka@trucking.org

Counsel for Complainant
Intermodal Motor Carriers Conference of the American Trucking Associations

CERTIFICATE OF SERVICE

I certify that, on October 5, 2020, a true and current copy of the foregoing brief in opposition to Respondents' Motion to Dismiss was filed via electronic mail with the Secretary of the Federal Maritime Commission, and a copy was served via electronic mail on the following Respondents' counsel:

Wayne R. Rohde
Christopher Raleigh
Kathryn Sobotta
Cozen O'Connor
1200 Nineteenth Street, NW
Washington, D.C. 20036
wrohde@cozen.com
craleigh@cozen.com
ksobotta@cozen.com

Counsel for Ocean Carrier Equipment Management Association, Inc.; Consolidated Chassis Management, LLC.; CMA CGM S.A.; COSCO Shipping Lines Co. Ltd.; HMM Company Limited; Maersk A/S; MSC Mediterranean Shipping Company S.A.; Ocean Network Express Pte. Ltd.; Wan Hai Lines Ltd.; Zim Integrated Shipping Services; and co-counsel for Evergreen Line Joint Service Agreement, FMC No. 011982

Paul M. Keane
Joseph De May
Cichanowicz Callan Keane & De May, LLP
50 Main Street
White Plains, NY 10606
pkeane@cckd-ny.com
jdemay@cckd-ny.com

Counsel for Evergreen Line Joint Service Agreement, FMC No. 011982

Deana E. Rose
Manelli Selter PLLC
1725 I Street, NW, Suite 300
Washington, D.C. 20006
drose@mdslaw.com

Counsel for Yang Ming Marine Transport Corp.

Gerald A. Morrissey III
Christopher Nolan
Holland & Knight LLP
800 17th Street NW, Suite 1100
Washington, D.C. 20006
gerald.morrissey@hklaw.com
chris.noland@hklaw.com

Counsel for Hapag-Lloyd AG

DATED: October 5, 2020

/s/ *David D. Golden*

David D. Golden
CONSTANTINE CANNON LLP