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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

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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

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

Respondents submit this memorandum of law in support of their motion to dismiss ("Motion") the complaint in the above-captioned proceeding (the "Complaint").

I. Introduction

Complainant Intermodal Motor Carrier Conference ("IMCC"), a subgroup of the American Trucking association ("ATA"), an association of motor carriers, seeks to have the Federal Maritime Commission ("FMC" or "Commission") rule that certain alleged practices of ocean carriers relating to their contracts for intermodal chassis violate Section 41102(c) of the Shipping Act of 1984, as amended (the "Act").

Complainant's central premise is that ocean carriers should be prohibited from contracting for intermodal chassis for inland merchant haulage of ocean carrier shipping containers except from "grey pools" that would permit truckers unilateral rights to use their own proprietary intermodal chassis equipment. To be sure, Complainants' may have legitimate commercial objectives in seeking to expand their market share in the intermodal equipment segment of the inland transportation industry. In this regard, the leadership of the IMCC overlaps significantly with the ownership of an intermodal chassis equipment provider.[1] Some motor carriers have alleged that the Complaint is motivated by a desire to improve that provider's market share by disrupting existing contractual arrangements between ocean carriers and intermodal equipment providers.[2] But, notwithstanding Complainant's effort to style its complaints in Shipping Act terminology, the Complainant's commercial objectives fundamentally do not constitute cognizable unreasonable practices claims under the Shipping Act.

The Complaint suffers from a number of internal inconsistencies which undermine its credibility and further call into question its purpose. More specifically, the Complaint:

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[1] Complainant has close ties with the North American Chassis Pool Cooperative ("NACPC"). Complaint, ¶30. NACPC competes with other chassis providers, such as Flexivan, DCLI, and Trac, which are not owned by motor carrier companies. See, https://www.nacpc.org/press-release-nacpc-remains-committed-cost-chassis-rental-pricing-competitors-increase-rates/. Of the five officers of the North American Chassis Pool Cooperative, two are on the Board of Directors of the IMCC and two others are officers of the IMCC and members of its Executive Committee. See, www.nacpc.org/officers/; https://www.trucking.org/sites/default/files/2020-01/IMCC%20Leadership.pdf. The NACPC agreement amongst several motor carrier members of the IMCC is filed with and regulated by the STB. See, *North American Chassis Pool Cooperative, LLC – Pooling Application*, STB Docket No. MCF 21050, served January 22, 2013.

[2] See, https://www.joc.com/trucking-logistics/drayage/ata-files-fmc-complaint-against-container-lines-chassis-manager_20200820.html. The Administrative Law Judge may take judicial notice of the facts set forth in this Introduction and the footnotes thereto. See 46 C.F.R. § 502.226(a); *Maher Terminals, LLC v. Port Auth. Of N. Y. & N.J.*, 34 S.R.R. 35,49 n.1 (FMC 2015) (holding that Commission may consider matters subject to official notice on motion to dismiss); *Stevens Shipping and Terminal Co. v. S.C. State Ports Auth.*, 23 S.R.R. 267, 299 n.25 (ALJ 1985) (taking official notice of news article in Journal of Commerce); see also *Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94,113-14 (D.D.C. 2015) (taking judicial notice of news articles on motion to dismiss).

- alleges that current practices related to the provision of chassis are unreasonable, despite admitting that these practices make chassis available to motor carriers on terms that are more economically advantageous to motor carriers than providing their own chassis. Complaint, ¶ 54.

- alleges motor carriers have been harmed by existing practices, despite admitting that chassis costs are billed to the cargo interest. Complaint, ¶¶ 31(b) and 47.

- alleges that single provider pools are inefficient and therefore essentially unlawful, despite the fact that Complainant's affiliated chassis cooperative sought to create and impose just such a pool with NACPC as the sole provider to supplant a grey pool with multiple competing contributors.[3]

- alleges that ocean carriers' use of CCM pools is unlawful, and also alleges that ocean carriers withdrawing from CCM pools is unlawful.

In effect, Complainant seeks a ruling that ocean carriers are not free to structure their relationships with shippers and chassis providers as they see fit, but are legally required to structure those relationships in a manner that maximizes benefits to motor carriers.

More importantly, the Complaint suffers from a number of legal deficiencies. It seeks to inject the Commission into the relationship between ocean carriers and truckers in the context of domestic transportation, which is beyond the scope of the Commission's jurisdiction. It seeks to apply Section 41102(c) of the Act in a manner that is inconsistent with the long-standing interpretation and application of the statute. The Complaint also fails to include necessary parties and names entities as respondents that are not subject to Section 41102(c).

Quite understandably, given the deficiencies highlighted above and discussed further herein, the Complaint also fails to present sufficient factual allegations adequate to substantiate the conclusory allegations of Shipping Act violations. A cognizable Shipping Act complaint—especially one targeting an entire industry segment and over a dozen respondents and

[3]See, https://www.joc.com/port-news/port-equipment/southern-states-pool-delayed-new-chassis-deal_20190415.html.

international ocean carriers—must do more than assert merely *conceivable* violations; the factual allegations must be sufficient to substantiate at least plausible violations. Complainant's commercial objectives and policy disagreements, despite casting them in conclusory Shipping Act terminology, fail to allege sufficient facts required to meet the Commission's adoption of the *Twombly* pleading standards.

The Commission should not entertain this unprecedented attempt to expand the scope of Section 41102(c) of the Act beyond what Congress intended and the Commission's own interpretation of the statute. Accordingly, Respondents respectfully request that the Complaint be dismissed.[4]

II. Applicable Legal Standard

The Commission's rules of practice and procedure do not explicitly provide for motions to dismiss. However, Rule 12 (46 C.F.R. §502.12) states that the Federal Rules of Civil Procedure ("FRCP") are followed in instances that are not covered by the Commission's rules, to the extent that application of the FRCP is consist with sound administrative practice. Pursuant to Rule 12, the Commission has adopted the standards applicable under Federal Rule of Civil Procedure 12(b)(6) and the federal case law interpreting it. *Cornell v. Princess Cruise Lines, Ltd*., 33 S.R.R. 614, 620 (FMC 2014), citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc*. 32, S.R.R. 126, 136 (FMC 2011).

When considering a motion to dismiss, the Commission evaluates the facts in the complaint, exclusive of legal conclusions presented as fact and inferences made, to determine whether "they plausibly give rise to an entitlement of relief." *In Re: Vehicle Carrier Services,* 1

[4] There was a period of time during which the Commission and/or its administrative law judges applied section 41102(c) more broadly than intended by Congress. The Commission only recently restored the traditional and proper interpretation of this statutory provision. 83 FR 64480 (December 17, 2018). The Commission should not now improperly expand this statutory provision in the manner urged by Complainant.

F.M.C. 2d 45, 53 (ALJ 2018) (citing *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 58 (FMC 2015). Stated another way, a motion to dismiss is appropriate if it is clear that no relief may be granted under any set of circumstances that could be proved consistent with the allegations contained in a complaint. See, e.g., *Cargo One, Inc. v. Cosco Container Lines Company, Ltd.*, 28 S.R.R. 1351, 1362 (ALJ 2000) and cases cited therein.

A motion to dismiss also should be granted when a complaint fails to plead sufficient facts to state a claim to relief that it is plausible on its face. In other words, a complainant must set forth sufficient facts to nudge its claims across the line from conceivable to plausible. See, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Commission has adopted this same standard. *Maher Terminals, LLC v. PANYNJ*, 34 S.R.R. at 55. Under this standard, where there are other plausible explanations, it is not sufficient to speculate in a complaint and particularly to base that speculation on no facts at all. *In Re: Vehicle Carrier Services*, 1 F.M.C. 2d 45, 53 (citing *CIBA Vision Corp. v. De Spirito*, 2010 U.S. Dist. Lexis 11386, at *22-23 (N.D. Ga. 2010).

As explained below, the Complaint fails to meet this standard.

III. The Complaint Must Be Dismissed Because The Commission Lacks Subject Matter Jurisdiction

The Complaint must be dismissed because the Commission lacks subject matter jurisdiction over the relationship between ocean carriers and motor carriers.

A. Subject Matter Jurisdiction is a Threshold Issue

The Commission's jurisdiction over the claim asserted in the Complaint is a threshold issue. *River Parishes, Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 761 (FMC 1999) (upholding general rule that agencies resolve jurisdictional issues before addressing merits). Like any other federal agency, the Commission has subject matter jurisdiction only over

violations within its legislative scope, in this instance the Act. *See* 46 U.S.C. § 41301(a). The Commission has held that subject matter jurisdiction cannot be established when the alleged wrongful conduct falls outside the scope of the provision of the Act at issue. *Cargo One Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1643 (FMC 2000). Moreover, complainants bear the burden of proving the existence of both subject matter and personal jurisdiction. *Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995).

B. The Commission Lacks Jurisdiction Over The Relationship Between Motor Carriers And Ocean Carriers

Because Complainant is a trade association of motor carriers that is not regulated under the Act, the Complaint falls outside of the Act and the FMC's jurisdiction, and must be dismissed.

It is well-established that in administering the Act, the Commission's primary objective is to protect the shipping industry's customers from unfair or discriminatory practices. *See*, e.g., *Sea-Land Dominicana v. Sea-Land Service, Inc.*, 26 S.R.R. 578 (FMC 1992); *American Union Transport, Inc. v. Italian Line*, 2 U.S.M.C. 553 (USMC 1941).

In *Sea-Land Dominicana*, the Commission dismissed a complaint against an ocean carrier by its sales representative for lack of subject matter jurisdiction. In a thoughtful analysis of the scope of its jurisdiction, the Commission explained:

> While it is true, as Complainants assert, that the 1984 Act contains broad language permitting "any person" to file a complaint with us and protecting "any person" against unlawful prejudice and disadvantage and the effects of unlawful preference and advantage, such broad general language cannot be read in the abstract, but must be restricted to the purpose of the relevant regulatory legislation. *NAACP v. FPC*, 425 U.S. 662, 669-71(1976).
>
> * * *
>
> There is nothing in the specific language, structure, or legislative history of the 1984 Act which shows an intention to subject the dispute between Complainants and Sea-Land to our jurisdiction. The "any person" language in section 11 of the

> 1984 Act relates only to who may bring an action. It is procedural in nature, and does not give the Commission any jurisdiction over a particular subject matter. Such jurisdiction must be found in the substantive provisions of that statute. *See e.g.*, *International Association of NVOCCs v. Atlantic Container Line*, (Order Affirming Dismissal of Collective Bargaining Associations), 25 S.R.R. 734, 744 (1990); *Cargill, Inc. v. Waterman Steamship Corp.*, 21 S.R.R. 287, 300 (1981).
>
> The language of the substantive provisions of the statute fails to indicate any intention that the Commission assert jurisdiction over the matters here in controversy.
>
> * * *
>
> The 1984 Act lists in section 10 many "prohibited acts," all of which, to the extent they attempt to define the prohibited conduct, appear to relate to relationships either between regulated entities or between those entities and the shipping public. In fact, it is well established that the primary objective of the shipping laws administered by the Commission is generally to protect the shipping industry's customers rather than members of the industry. *See Boston Shipping Association v. FMC*, 706 F.2d 1231, 1238 (1st Cir. 1983) ("BSA"); *New York Shipping Association, Inc. v. FMC*, 854 F.2d 1338, 1374 (D.C. Cir. 1988), cert. denied, 488 U.S. 1041 (1989) ("NYSA").

Sea-Land Dominicana, 26 S.R.R. at 581 (emphasis added).[5]

The Commission applied this rationale to a complaint brought by a motor carrier against an ocean carrier in *Pro Transport, Inc., et al. v. Seaboard Marine of Florida, Inc. and Seaboard Marine Ltd., Inc.*, FMC Docket No. 16-12 (ALJ April 26, 2017), administratively final May 31, 2017. In *Pro Transport*, the complainant motor carrier alleged that the respondent ocean carrier had violated several provisions of the Act by refusing to pay the motor carrier, terminating the relationship between the two entities, and refusing to cooperate with respect to the resolution of outstanding insurance claims. Quoting *Sea-Land Dominicana*, the ALJ granted Seaboard's motion to dismiss for lack of subject matter jurisdiction. The ALJ rejected arguments that

[5] See also, *McKenna Trucking Company v. A.P. Moller-Maersk Line and Maersk Incorporated*, 27 S.R.R. 1045 (ALJ 1997); administratively final: June 23, 1997; complaint dismissed, 27 S.R.R. 1343 (ALJ 1997); administratively final: September 16, 1997 (the Commission lacks authority to regulate relationships between ocean carriers and unregulated members of the industry such as intermodal truckers).

performance of the inland leg of a through move in foreign commerce brought the dispute within the jurisdiction of the Commission, stating:

> In this case, however, the dispute does not involve a provision in a through bill of lading. Rather, the payment dispute involves the terms of an agreement between Pro Transport and Seaboard for domestic trucking services. It is not the terms of the through bill of lading that would determine the outcome, but rather the terms of the agreement for domestic trucking services. The reasons that justified the Supreme Court's decision in *"K" Line* do not apply to this dispute. Although the parties have not identified a case specifically dealing with domestic trucking services, to find that this agreement and disputes arising under it are subject to the Commission's jurisdiction would appear to be inconsistent with prior Commission decisions recognizing the limits of the Commission's reach. "It is well-settled that the Commission does not have jurisdiction over disputes involving purely domestic transportation services." *AMR Industries, Inc. v. INTLMove, LLC*, Dkt. 1952(I), (SCO Oct. 26, 2015) ("Small Claims Officer Decision Dismissing Complaint").

(ALJ, April 26, 2017, pp. 11-12).

This case is similar to *Pro Transport*. Complainant is an association of motor carriers. Neither the association nor its members are among the entities protected by the Act. Moreover, the Complaint is based in significant part on alleged commercial arrangements between ocean carriers and chassis providers (the latter of which are also not subject to the Act or the Commission’s jurisdiction). Those commercial arrangements relate solely to domestic trucking services in that the allegations of the Complaint relate to merchant haulage moves. Complaint, ¶31. These moves are not the inland portion of a move covered by international through bill of lading, but rather occur before or after the ocean transportation provided by the ocean carrier. Thus, just as in *Pro Transport,* the dispute is not governed by the terms of a through bill of lading, but by commercial agreements relating solely to certain aspects of the domestic

transportation arrangement (i.e., the provision of chassis). In short, this is precisely the type of dispute over which the FMC has previously held that it had no jurisdiction.[6]

The lack of jurisdiction is evident from the Commission's own interpretation of section 41102(c). In adopting an interpretative rule with respect to this statutory provision, the Commission stated:

> The Interstate Commerce Commission (ICC), the United States Shipping Board (USSB)(the agency created by Congress in the 1916 Act), its successor agencies, and the currently constituted Commission, together with state and federal courts have consistently ruled that "practice" means: (1) the acts/omissions of regulated common carriers that were positively established by the regulated common carrier <u>and imposed on the passenger/cargo interest</u>…

83 Fed. Reg. 45367, 45369 (September 7, 2018) (emphasis added, footnote omitted). Given that the Commission, its predecessors, other agencies, and both state and federal courts have consistently held that Section 41102(c) and comparable statutes apply only to regulations and practices imposed on the cargo interest, and that motor carriers are not cargo interests, it is clear that motor carriers cannot bring a claim under Section 41102(c).

The Commission's own conduct supports this conclusion. Respondents are aware of only two occasions on which the Commission has engaged in regulation that might be viewed as relating to motor carriers. The first was the publication of regulations relating to truck detention at the Port of New York. *Truck Lighter Loading and Unloading Practices at New York Harbor*, 12 F.M.C. 166 (1969). The second was the recently issued interpretative rule regarding demurrage and detention practices. 85 FR 29639 (May 18, 2020). Both are distinguishable.

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[6] The Complaint solely involves situations where the cargo being transported is moving under merchant haulage conditions, where the consignee is responsible for trucking the cargo from the port to its final destination, the ocean carrier's obligations end at the port, and the inland trucking move is regulated by the Surface Transportation Board, not the Commission.

The truck detention regulations at the Port of New York were adopted because marine terminal operators published provisions in their marine terminal operator schedules disclaiming liability for delays to trucks. 12 FMC at 167. Those regulations had nothing to do with the relationship between ocean carriers and motor carriers.

The recently published interpretative rule on demurrage and detention focuses on the relationship between ocean carriers and their shipper customers, not motor carriers. Indeed, the genesis of the interpretative rule was a petition filed by a coalition that involved primarily shippers.[7] Moreover, in light of the Commission's own interpretation of the application of Section 41102(c) and the extensive jurisprudence supporting it, the suggestion in the interpretative rule that the Commission has jurisdiction over the Uniform Intermodal and Interchange and Facilities Access Agreement may be subject to significant legal limitations and/or challenges, at least insofar as Section 41102(c) is concerned.

Moreover, both the truck detention regulations and the interpretative rule on demurrage and detention differ from this case in a significant respect. The regulations addressed matters that carriers or marine terminal operators published in their tariffs, which indicate they are regulations that impact the shipping public, whose interests the Act in general and Section 41102(c) in particular are intended to protect. Thus, the Commission could at least arguably assert its authority with respect to the provisions of marine terminal operators and ocean carriers in those instances. The conduct that is the subject of the Complaint, however, is not required to be, and often is not, covered by a provision in the ocean carriers' tariffs or service contracts. The conduct here relates to private contracts between ocean carriers and motor carriers as to which the Act and regulations make no reference. The fact that the practices at issue are not subject to

[7] Of the 26 associations that made up the Coalition for Fair Port Practices, only 3 were motor carrier associations. The remainder were associations of shippers or transportation intermediaries. Exhibit B, Petition P4-16.

publication in a tariff shows that they are, as held in *Sea-Land Dominicana* and *Pro Transport,* related to a category of persons that the Act is not intended to protect and therefore beyond the scope of the Act and the Commission's authority.

In light of the foregoing, the Complaint must be dismissed for a lack of subject matter jurisdiction.

IV. The Complaint Must Be Dismissed Because It Fails To State A Claim For Which Relief May Be Granted

Because Section 41102(c) of the Act applies only to terminal and forwarding services, it does not apply to the conduct that is the subject of the Complaint. Thus, the Complaint fails to state a claim for which relief may be granted and must be dismissed.

A. Section 41102(c) Is Limited To Terminal And Forwarding Services

Section 41102(c) of the Act states:

> Practices in Handling Property.- 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.

The Commission has for many years interpreted Section 41102(c) and its predecessor provisions as limited to terminal and forwarding activities. In *Los Angeles By-Products Co., et al. v. Barber S.S. Lines, Inc., et al.,* 2 U.S.M.C. 106 (USMC 1939), the Commission's predecessor considered the application of the second paragraph of Section 17 of the Shipping Act, 1916, to charges imposed by carrier for the handling of cargo at U.S. West Coast ports. The then-Commission quoted Section 17, which read:

> Every such carrier (common carrier by water in foreign commerce) and every other person subject to his act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

Immediately after quoting the statute, the Commission stated:

> This paragraph relates to services performed at the terminal as distinguished from the carrying or transporting by the vessel.

2 U.S.M.C. at 114 (emphasis added). This decision began an uninterrupted and undisturbed line of precedent which limits the application of Section 41102(c) to terminal and forwarding activities.

In *Proposed Rule Covering Time Limit On The Filing Of Overcharge Claims,* 7 S.R.R. 418 (FMC 1966), the Commission opted not to adopt a proposed rule which would have rendered invalid the time limits carriers had established for customers to file overcharge claims. In so doing, the Commission stated:

> Finally, the second paragraph of Section 17 of the Shipping Act, 1916, under which the carriers' limitation were alleged to be invalid by our Notice of Proposed Rule Making does not relate to the practices of the type here involved. It relates only to practices "relating to or connected with the receiving, handling, storing or delivering of property," and its application has thus been confined to forwarding and terminal operations.

7 S.R.R. at 425, citing *Los Angeles By-Products Co.*, supra (emphasis added). *See also*, *North River Insurance Co. and Northwestern National Insurance Co. v. Federal Commerce and Navigation Co., Ltd.,* 20 S.R.R. 1078, 1084 (ALJ 1981) ("Respondent correctly points out that the paragraph relied upon by complainants has expressly been limited to the operations of terminals and forwarders.")

The limited application of Section 41102(c) and its predecessor provisions is discussed in detail in *Heavy Lift Practices And Charges of Hapag-Lloyd Aktiengesellschaft*, 17 S.R.R. 505, 528-533 (ALJ 1977). In that case, the ALJ was considering whether certain carrier practices and charges violated various provisions of the Shipping Act, 1916, including the predecessor of Section 41102(c). The ALJ reached the following conclusion regarding the scope of Section 17:

> As Hearing Counsel have noted, at least as early as 1939, the Commission held that Section 17, second paragraph, applied to "services performed at the terminal as distinguished from the carrying or transporting by the vessel." *Los Angeles By-Product Co. v. Barber S.S. Co. Lines, Inc*., cited above, 2 USMC at 114.

17 S.R.R. at 529. The ALJ's conclusions were found to be "proper and well-founded" by the Commission, which adopted them. 18 S.R.R. 1491 (1979).

Heavy Lift Practices And Charges is also instructive because of the position taken by the Commission's Bureau of Hearing Counsel with respect to the scope of Section 17, which the ALJ described as follows:

> Hearing Counsel contend that the Commission had established that the type of practice covered by this particular law does not relate to tackle-to-tackle ocean freight service, i.e., line-haul transportation, but instead refers to so-called terminal services. Terminal services are such activities as carloading and unlading, handling of cargo from place of rest to ship's tackle and the reverse, and free time and demurrage practices relating to the storing of cargo at the terminal. Hearing Counsel cite *Los Angeles By-Products Co. v. Barber S.S. Lines, Inc*., 2 USMC 106, 114 (1939), which stated that Section 17, second paragraph, "relates to services performed at the terminal as distinguished from the carrying or transporting by the vessel." Hearing Counsel contend furthermore that non-terminal activity has been held to fall within the scope of Section 17, second paragraph, only to the extent such activity is performed by a terminal operator or becomes intimately related to terminal operation through the action of a terminal operator…

17 S.R.R. at 529 (citations omitted).

Under the foregoing Commission decisions, Section 41102(c) is clearly and expressly limited to terminal and forwarding services. The terms of chassis use for domestic transport of cargo does not constitute terminal services within the meaning of *Heavy Lift Practices,* as it is not carloading and unlading, handling of cargo from place of rest to ship's tackle and the reverse, or free time and demurrage practices relating to the storing of cargo at the terminal. Similarly, the terms of chassis usage are not determined by a terminal operator, nor are they intimately related to terminal operation through the action of a terminal operator. Moreover, the terms of

chassis use do not fall within the Commission's current definition of "terminal services," which is:

> *Terminal services* includes checking, dockage, free time, handling, heavy lift, loading and unlading, terminal storage, usage, wharfage, and wharf demurrage, as defined in this section.

46 C.F.R. §525.1(c)(19). Finally, the provision of chassis does not constitute forwarding services. *See,* definition of forwarding services at 46 C.F.R. §525.2(h).

B. Section 41102(c) Does Not Apply To Transportation

The fact that the conduct alleged in the Complaint does not fall within the scope of section 41102(c) is further confirmed by other Commission decisions. In this regard, the Commission has consistently held that Section 41102(c) does not apply to the transportation of cargo. See, e.g., *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962) (claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the Act, citing *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 517 (1941)); *Bills of Lading – Incorporation of Freight Charges*, 3 U.S.M.C. 111, 113 (USMC 1949)(section 17, second paragraph, is confined to the receiving, handling, storing, or delivering of property, to the exclusion of transportation). As the Complaint acknowledges, chassis are used in the transportation of cargo. Complaint, ¶22.

Moreover, the Complaint relates solely to the terms under which chassis are made available to motor carriers for use in domestic transportation. As noted above in Section III.B, the allegations do not relate to regulations and practices imposed on cargo interests by carriers in connection with the receiving, handling, storing or delivering of property. Indeed, the property being transported is conspicuously absent from this case. As a result, the conduct at issue does not fall within the scope of Section 41102(c).

C. <u>The Conduct Alleged In The Complaint Is Not Prohibited By Section 41102(c)</u>

The Complaint also fails to state a claim for which relief may be granted in that much of the conduct alleged is not the type of conduct prohibited by section 41102(c) of the Act. Under 46 C.F.R. §545.4(b), conduct must be "normal, customary, and continuous" in order to violate Section 41102(c). The Respondents' alleged conduct does not meet this standard.

For example, withdrawal from a chassis pool is not "normal, customary and continuous," but is something unusual that is done infrequently. It is certainly not the type of repetitious behavior covered by Section 41102(c). Similarly, awarding a contract to a chassis provider is an infrequent and non-repetitive event. Accordingly, to the extent the Complaint alleges violations of the Act based on resignation from a chassis pool and/or awarding contracts to chassis providers, it fails to state a claim for which relief may be granted under section 41102(c).

In light of the foregoing, arrangements relating to the terms of chassis usage are not subject to Section 41102(c) of the Act and the Complaint must be dismissed.

V. The Complaint Must Be Dismissed Because The Complainants Have Failed To Join Necessary Parties Without Whom Relief Cannot Be Granted

Complainants have failed to join the companies that own and provide the chassis (the "chassis providers"). Because relief cannot be granted without the chassis providers, and the Commission lacks jurisdiction over the chassis providers, the Complaint must be dismissed.

The Commission's rules do not expressly address the joinder of necessary parties. Under 46 C.F.R. §502.12, however, the Commission relies on the FRCP in such instances. FRCP 19 describes the requirements for joinder of parties:

> 1. Persons to be Joined If Feasible:
>
> a. *Required Party.* A **person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction <u>must</u> be joined as a party if:**

i. In that person's absence, the court cannot accord complete relief among existing parties; or

ii. 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:

(1) as a practical matter impair or impede the person's ability to protect the interest; or

(2) **leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest**.

If a person who is required to be joined 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.

(emphasis added). The FMC has applied Rule 19 in its proceedings. See, *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, 26 S.R.R. 1396, 1397 (ALJ 1994), citing *CGM/ICT v. Maduro*, 23 S.R.R. 1495 (ALJ 1986).

It is well-settled that for purposes of FRCP 19, where two parties enter into a contract and a plaintiff sues one of the contracting parties to enjoin that contracting party from performing under its contract, the presence of the other party to the contract is required in the lawsuit. *See*, e.g., *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.,* 276 F3d. 1150, 1156 (9th Cir. 2002) (case dismissed because landlord could not be joined but was necessary party where defendant could be faced with choice between adhering to lease with landlord or

complying with requested injunction); *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-701 (2nd Cir. 1980) ("in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable"); *Natural Resources Defense Council v. Kempthorne*, 539 F.Supp.2d 1155, 1185 (E.D. Cal. 2013) ("in an action to set aside a contract, all parties to the contract must be present"); *Camacho v. Major League Baseball*, 297 F.R.D. 457, 461-62 (S.D. Cal. 2013) (party to contract indispensable to litigation seeking to decimate that contract).

The ALJ applied the forgoing principles in *All Marine*. In that case, the complainant challenged the lawfulness of the respondent's refusal to allow All Marine to perform berthing and line handling functions at respondent's terminal. Respondent, in defending against the allegations, claimed that provisions of its lease with the landlord port authority and the port authority's tariff required it to engage in the conduct that was the subject of the complaint. The ALJ concluded that given the allegations concerning the terms of the lease and port authority tariff, even if the complainant was able to establish that the practices were unreasonable, it might not be possible to grant complete relief if the port authority was not a party to the action.

The chassis providers are parties to binding contracts with each of the individual ocean carriers against which Complaint seeks a cease and desist order. Under federal jurisprudence interpreting Rule 19, the chassis providers are indispensable parties. Just as complete relief could not be granted in *Dawavendewa* without the landlord or in *All Marine* without the port authority, complete relief cannot be granted unless the chassis providers are party to the case. The ocean carrier Respondents allegedly entered into contractual arrangements governing the

chassis to be used for transport of the ocean carriers' containers. Complaint, ¶ 49.[8] If the conduct of Respondents under the contracts is found to be unlawful, the Commission could order the Respondents to cease and desist from such conduct, which order would have the effect of requiring Respondents to revise their contracts with the chassis providers to comply with the Commission's ruling. However, the chassis providers would be under no obligation to agree to such amendments. If the chassis providers refuse to agree, the ocean carrier Respondents will be subject to a substantial risk of incurring inconsistent obligations (i.e., having to choose between breaching their agreements with the chassis providers and being liable to the chassis providers for that breach, or continuing to honor the contractual arrangement and thereby continuing to engage in conduct which has been found to violate the Act, either of which could expose them to considerable liability). This is virtually identical to the situation in *Dawavendewa*, and makes the chassis providers indispensable parties under FRCP 19.

Although the chassis providers are indispensable parties, the Commission lacks personal jurisdiction over them, given that they are not common carriers, marine terminal operators or ocean transportation intermediaries, the only entities subject to 46 U.S.C. §41102(c). Therefore, it is necessary to consider the factors listed in the second part of FRCP 19 in order to determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.

An analysis of the four factors listed in the second part of FRCP 19 indicates that the Complaint should be dismissed. While Respondents wholly reject the notion that existing

[8] While all ocean carrier respondents have contracts with chassis providers, the terms and provisions of these contracts vary from carrier to carrier, as do the chassis-related practices of each carrier. However, for purposes of this motion to dismiss, the factual allegations contained in the Complaint (which are discussed in greater detail in Section VI below) are accepted as true, which means for purposes of this motion that the contracts would need to be amended.

practices are unlawful under the Act, a judgment in favor of Complainants rendered in the absence of the chassis providers would prejudice Respondents (as explained above) and also potentially prejudice the chassis providers. The prejudice cannot be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures. If the current practices which are the subject of the Complaint are found unlawful, the contracts to which the chassis providers are parties will need to be revised. Given the need to revise the existing contracts between the Respondents and the chassis providers in the event of a ruling adverse to the Respondents, it is possible that a judgment rendered in the absence of the chassis providers would not be adequate, as Respondents cannot guarantee that existing contracts could be amended. Finally, Complainants could presumably bring an action against the Respondents in another forum if this Complaint is dismissed.

In light of the foregoing, given the absence of an indispensable party and the implications that absence has for the missing party (the chassis providers) and the existing parties, the Complaint should be dismissed.

VI. The Complaint Must Be Dismissed Because It Fails To State A Claim For Which Relief May Be Granted By Failing To Allege Sufficient Facts To Make Complainant's Claim For Relief Plausible

As noted above in Section II, a motion to dismiss is also appropriate when a complaint fails to plead sufficient facts to state a claim to relief that it is plausible on its face. In other words, a complainant must set forth sufficient facts to nudge its claims across the line from conceivable to plausible. See, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Commission has adopted this standard. *Maher Terminals, LLC v. PANYNJ*, 34 S.R.R. at 55. The Complaint should be dismissed because it fails to allege sufficient facts to make Complainant's claim for relief plausible.

The inappropriately titled "Factual Allegations" set forth in paragraphs 22 through 42 of the Complaint fail to meet the *Twombly* standard. These paragraphs do not contain factual allegations with respect to the conduct of Respondents, but rather are conclusory descriptions of the business models under which chassis are made available to motor carriers, the OCEMA and CCM agreements, and the alleged benefits of "gray" pools. These paragraphs do not contain factual allegations that make a violation of the Act by Respondents more plausible. Rather, the "Factual Allegations" are essentially a policy argument that because "gray" pools which afford motor carriers unfettered choice of chassis provider are most efficient in the eyes of the motor carriers (i.e., apparently enabling them to maximize profits), any other means of making chassis available to motor carriers is ipso facto unreasonable. These are precisely the type of conclusory statements that are insufficient under *Twombly* and Commission decisions adopting the *Twombly* pleading standards.

The portion of the Complaint which purports to allege the unjust and unreasonable regulations and practices of the individual Respondents fares no better. In virtually identical language, most Respondents are alleged to have engaged in the conduct described in paragraphs 43, 44, 48 and 50-56 of the Complaint.[9]

Paragraphs 43 and 44 do not contain any factual allegations which make Complainant's claim for relief more plausible. Paragraph 43 states that rules which frustrate chassis choice have been adopted and maintained. Paragraph 44 describes the rule and alleges that "innumerable" denials have been received, with no details of the date/location of the requests, the motor carrier(s) that made them, or the ocean carriers that allegedly denied them. Under *Twombly*, a

[9]Four of Respondents (CMA CGM, COSCO, Hapag-Lloyd and Wan Hai) are not alleged to have engaged in the conduct described in paragraph 43-44. Evergreen is not alleged to have engaged in the conduct described in paragraph 48. Maersk is not alleged to have engaged in the conduct described in paragraph 51, and Wan Hai is not alleged to have engaged in the conduct described in paragraphs 51-54.

plaintiff's obligation to provide the grounds for its entitlement to relief requires more than labels and conclusions, and a "formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Paragraphs 43 and 44 provide no details that would entitle them to the assumption of truth. *In Re: Vehicle Carrier Services*, 1 F.M.C.2d 45, 53 (ALJ 2018). Instead of facts, the Complaint offers conclusory generalizations, which, even in the face of alleged "innumerable denials" fail to articulate how such denials plausibly substantiate alleged violations when ocean carriers may grant or deny requests for "innumerable" plausible reasons that are not violations. Like the "Factual Allegations" described above, these "allegations" fail to rise to the minimal level required to sustain a complaint in the face of a motion to dismiss.

Paragraph 48 is similarly deficient. It alleges that certain contracts (none of which are identified) restrain competition and increase costs to motor carriers (with no facts regarding the costs, how overcharging is allegedly "force[d]," the impact on the shippers that contract for and pay for door to door shipping via carrier haulage vs. merchant haulage, or how the evolution of a diversity of IEPs nevertheless "eliminate[s]] competition" for equipment). Again, these are conclusions rather than factual allegations and are not entitled to an assumption of truth.

Paragraphs 50 through 56 suffer from the same lack of factual content. Paragraph 50 is a general description of so-called "box rules." Other than the Ports of Los Angeles and Long Beach, it does not identify where these rules apply, or which Respondents apply them. Paragraph 51 claims Respondents have withdrawn from certain pools, without identifying which Respondents have withdrawn from which pools. Paragraph 52 merely states the obvious fact that ocean carriers have chassis providers. Paragraph 53 alleges harm without stating any facts. Paragraph 54 is a lament about the alleged inability of motor carriers to provide their own chassis, and does not make any allegation, factual or otherwise, about the conduct of

Respondents. Paragraphs 55 and 56 describe documents issued by persons other than Respondents.

In short, Paragraphs 50-56 at best contain vague, general descriptions of alleged conduct. They are devoid of the type of specific facts which entitle them to an assumption of truth and which are necessary to make a claim for relief at least plausible. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Cornell*, 33 S.R.R. at 620 (citing *Ashcroft v. Iqbal*, 446 U.S. 662, 678 (2009)).

The insufficiency of Complainant's factual allegations is further evidenced by the difficulty Respondents would have in identifying precisely what they would be responding to in answering these Paragraphs of the Complaint. Under *Twombly*, the inability of a defendant to answer (one way or another) an allegation is an indication of its factual insufficiency. See 550 U.S. at 565, n. 10 (a defendant seeking to respond to plaintiffs' conclusory allegations in the §1 context would have little idea where to begin). Much of Paragraphs 43 through 56 consists of conclusory observations about events or the impact of the supposed conduct of Respondents rather than factual allegations relating to the conduct of Respondents. These conclusory observations are well beyond the scope of any knowledge Respondents might have, which makes them difficult (if not impossible) to answer. More importantly, the difficulty of formulating an answer demonstrates that these are not factual allegations that make Complainant's claim for relief more plausible, but conclusions which do not meet the legal standard applicable to pleadings.

In light of the Complaint's failure to set forth sufficient factual allegations to make the claim for relief plausible, the Complaint must be dismissed.

VII. The Complaint Must Be Dismissed Because It Fails To State A Claim For Which Relief May Be Granted As To OCEMA And CCM

The Complaint must be dismissed as to the Ocean Carrier Equipment Management Association, Inc. ("OCEMA") and Consolidated Chassis Management, LLC ("CCM") because Section 41102(c) of the Act does not apply to these entities.[10]

Section 41102(c) of the Act, the only provision Respondents are alleged to have violated, provides:

> A <u>common carrier, marine terminal operator, or ocean transportation intermediary</u> may not fail to establish, observe and enforce just and reasonable regulations and practices in relating to or connected with receiving, handling, storing, or delivering property.

(emphasis added). On its face, Section 41102(c) plainly applies only to the conduct of common carriers, marine terminal operators, and ocean transportation intermediaries. OCEMA and CCM are not common carriers, marine terminal operators, or ocean transportation intermediaries, and the Complaint does not allege that they fall within any of these categories. Complaint, ¶¶ 7 and 8.

Even if the Complaint named the FMC Agreements pursuant to which OCEMA and CCM were formed as respondents rather than the corporate entities, the result would be the same. Where Congress intended a provision of the Act to apply to the activities of carrier agreements or multiple carriers, it so provided. *See, e.g.*, Sections 41104 (prohibitions apply to a common carrier, acting alone or in conjunction with another person) and 41105 (prohibitions apply to a conference or group of two or more common carriers). In light of the absence of

[10] The Ocean Carrier Equipment Management Association Agreement and the CCMP Agreement are filed with the Commission pursuant to, are effective under, and remain subject to, the Act. Respondents' argument relates only to the application of section 41102(c), not application of the Act generally.

language in Section 41102(c) similar to that elsewhere in the Act, it is clear that that Congress intended Section 41102(c) to apply only to the activity of individual common carriers.

In light of the foregoing, OCEMA and CCM are not subject to Section 41102(c) and the Complaint must be dismissed with respect to these two entities.[11]

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[11] If 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 that the Complaint alleges to be in violation of law. This highlights the fact that the Complaint is an attempt to alter the structure of an industry in a manner that favors motor carriers and their affiliates rather than an allegation that specific conduct on the part of a regulated entity violates the Act.

VIII. Conclusion

For the foregoing reasons, the Complaint must be dismissed in its entirety as to all Respondents.

Respectfully submitted,

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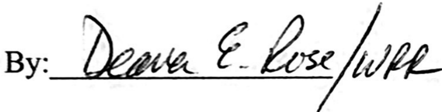
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2020, a true and correct copy of the foregoing Motion to Dismiss and Memorandum of Law in support thereof was served via electronic mail on:

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