BEFORE THE
FEDERAL MARITIME COMMISSION

OJ COMMERCE, LLC,

Complainant, **DOCKET NO. 21-11**

v.

HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG

and

HAMBURG SUD NORTH AMERICA, INC.,

Respondents.

COMPLAINANT OJ COMMERCE, LLC'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Complainant OJ Commerce, LLC ("OJC" or "Complainant"), by and through its undersigned counsel, hereby responds, pursuant to 46 C.F.R. § 502.70(b), to Respondents' Motion to Dismiss and/or for Summary Judgment.[1] In conjunction with this opposition, Complainant has filed a Motion for Leave to File the Verified Amended Complaint that moots all of Respondents' arguments in their motion and mandates the denial of Respondents' motion. Furthermore, Respondents' motion for summary judgment should also be denied for its complete failure to abide by the procedures outlined in ¶ 15 of the Initial Order in this case, as well as 46 C.F.R. § 502.70(a). Respondents' request for summary judgment, which includes the affidavit of one of Respondents' executives, is also premature. To that end, Complainant has also filed a Rule 56(d) declaration,

[1] Respondents filed a Partial Answer to the majority of Complainant's Verified Complaint at the same time and day they filed their motion to dismiss and/or for summary judgment.

requesting that Respondents' premature motion for summary judgment be denied until Complainant has had a chance to discover facts about Hamburg Sud North America, Inc. ("Hamburg NA") and the full nature of its business. For all these reasons, Respondents' motion to dismiss and/or for summary judgment should be denied in its entirety.

LEGAL STANDARDS

I. Motion to Dismiss.

Consistent with Rule 12 of the Commission's Rules, 46 C.F.R. § 502.12, motions to dismiss private party complaints before the Commission are evaluated under the Federal Rules of Civil Procedure and federal case law interpreting those rules. *See, e.g., Marine Transp. Logistics, Inc. v. CMA-CGM (America) LLC*, Dkt. No. 18-07, 2019 WL 5206007, at *2 (FMC ALJ Oct. 8, 2019); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). This standard does not . . . require "heightened fact pleadings of specifics" or detailed factual allegations. *Twombly*, 550 U.S. at 555, 570. … Further, Rule 12(b)(6) does not require "the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120–21 (2d Cir. 2010); *Maher Terminals, LLC v. Port Auth. of N.Y & N.J.*, 34 S.R.R. 35, 58 (FMC 2015). "Instead, 'the complaint's factual allegations [simply] must be enough to raise a right to relief above the speculative level and must nudge claims across the line from conceivable to plausible." *Marine Transp. Logistics, Inc.*, 2019 WL 5206007,

at *3 (quoting *Maher Terminals, LLC*, 34 S.R.R. at 57–58) (internal quotations omitted). All well-pleaded factual allegations in the complaint must be assumed to be true and construed in the light most favorable to the non-moving party (here, Complainant). *See, e.g., Marine Transp. Logistics, Inc.*, 2019 WL 5206007, at *2–3; accord *Maher Terminals, LLC*, 34 S.R.R. at 58.

II. Motion for Summary Judgment.

Pursuant to 46 C.F.R. § 502.70(a), a dispositive motion … must include a concise statement of the legal basis of the motion with citation to legal authority and a statement of material facts with exhibits as appropriate." According to ¶ 15 the Initial Order in this case:

> A party moving for summary decision must include in a separate document a statement of material facts as to which there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine dispute. Each paragraph must be limited as nearly as practicable to a single factual proposition. Each factual proposition must be followed by an exact citation to evidence that the party contends will establish the fact or demonstrate that it is uncontroverted; *i.e.,* a page number in the Appendix.[] *See* 46 C.F.R. § 502.70(a).

Summary judgment must be denied unless no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). A dispute of a material fact is genuine so long as "the evidence is such that a reasonable [fact finder] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The district court must view the facts and any inferences reasonably drawn from them in the light most favorable to the non-moving party, here Complainant. *Kalamazoo Acquisitions, L.L.C. v. Westfield Ins. Co.*, 395 F.3d 338, 342 (6th Cir. 2005) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In other words, "at the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see also Arban*

v. W. Publ'g Corp., 345 F.3d 390, 400 (6th Cir. 2003) ("This court does not weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the [fact finder].").

"Cases involving allegations of 'undue' or 'unreasonable' preferences and prejudices and the like have required a proper development of the facts and are usually not decided summarily", and "courts are careful not to deny complainants a reasonable opportunity to prove their allegations and will construe doubts in the non-moving complainants' favor." *S.C. Mar. Servs., Inc. v. S.C. State Ports Auth.*, Dkt. No. 99-21, 1999 WL 1294895, at *2 (FMC ALJ Dec. 9, 1999).

ARGUMENT

I. Complainant's Verified Amended Complaint renders moot all of Respondents' arguments for dismissal.

In their motion to dismiss and/or for summary judgment, Respondents raised three arguments: (1) Hamburg NA (or "HSNA" as abbreviated by Respondents) is not a common carrier or a marine terminal operator therefore a Section 41102(c) was improper against it; (2) the facts as alleged did not show that the claimed acts occurred on a normal, customary, or continuous basis; and (3) Complainant's allegations regarding transporting property do not fall under Section 41102(c). All these alleged issues are addressed in and rendered by the Verified Amended Complaint.

As to (1), Respondents contend that because – according solely to them – Hamburg NA is not a "marine terminal operator" or a common carrier, Complainant's Section 41102(c) claim against Hamburg NA must be dismissed. What Respondents critically fail to mention is that an "ocean transportation intermediary" may also be held liable for Section 41102(c) violations. *See* 46 U.S.C. §§ 41102(c) ("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."

(emphasis added)). "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 USC § 40102(20). Indeed, Hamburg NA admits that it "act[s] as the general agent of its ocean common carrier parent, [Hamburg Germany]." Affidavit of Michael Gast, Jr., ¶ 3. Respondents adeptly make no mention of Hamburg NA not being an "ocean freight forwarder or a non-vessel-operating common carrier," because they can't. In its Verified Amended Complaint, Complainant identifies Hamburg NA as the ocean freight forwarder that it is. *See* Verified Amended Complaint, ¶¶ 3, 7. Moreover, the FMC also has personal jurisdiction over Hamburg NA as it is a "person" subject to regulation by the FMC based on its acts in conjunction with Hamburg Germany in violation of 46 U.S.C. §§ 41102(b)(2), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10). *See* Verified Amended Complaint, ¶¶ 3, 7. Therefore, Respondents' proposal dismissal of Hamburg NA should be denied.

As to (2), Complainant added more detail and dates of Respondents' "repeated" – as alleged in the original complaint – refusal over the course of 10 months to operate in accordance with the parties' service contract on a normal, customary, and continuous basis. *See* Verified Amended Complaint, ¶¶ 31, 55. As a result, Complainant does not allege breaches of contract, but instead violations of the Shipping Act, and thus "the existence of a service contract would not be grounds to dismiss the proceeding where Shipping Act violations are alleged." *Marine Transp. Logistics*, 2019 WL 5206007, at *7 (rejecting similar arguments about breach of contract to those made by Respondents, denying the motion to dismiss, and granting leave to file amended complaint). Respondents' request on this issue should also be denied.

Regarding (3), in its Verified Amended Complaint, Complainant amended the source of its claim for Respondents' repeated failure over the course of 10 months – including several dates specifically identified – to Section 41102(b)(2), instead of 41102(c). *See, e.g.,* Verified Amended

Complaint, ¶ 31. Under Section 41102(b)(2), "[a] person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if— (2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission." The parties' service contract is an agreement required to be filed under section 40302(a), as it is an "ocean common carrier agreement," as defined by section 40301(a). *See* Exhibit A to the Verified Amended Complaint, ¶ 9 ("This Contract shall be subject to the U.S. Shipping Act of 1984, as amended"); *see also* Verified Amended Complaint, ¶ 26. Complainant has alleged facts concerning Respondents' failures to operate under the parties' service contract, in violation of Section 41102(b)(2), on a normal, customary, and continuous basis, *see* Verified Amended Complaint, ¶¶ 31, 55, and therefore, Respondents' argument as to the claim being improperly alleged under 41102(c) is moot. *Cf. Griggs v. Hinds Junior College*, 563 F.2d 179, 180 (5th Cir. 1977) (reversing denial of leave to amend, holding that "[g]ranting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim"). As a result, Respondents' motion to dismiss should be denied in its entirety and Complainant's motion for leave to amend should be granted. *Marine Transp. Logistics*, 2019 WL 5206007, at *7.

II. Respondents' motion for summary judgment should be denied because it violates ¶ 15 of the Initial Order in this case, as well as 46 C.F.R. § 502.70(a).

Paragraph 15 of the Initial Order in this case mandates explicitly how a motion for summary decision is to be present. It "must include in a **separate document** a statement of material facts as to which there is no genuine dispute," "set[ting] forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine dispute," with "[e]ach paragraph [being] limited as nearly as practicable to a single factual proposition." Initial Order, ¶ 15 (emphasis added); *accord* 46 C.F.R. § 502.70(a) ("a dispositive

motion … must include a concise statement of the legal basis of the motion with citation to legal authority and a statement of material facts with exhibits as appropriate"). This procedure allows Complainant, the opposing party, to substantively and specifically respond to each of Respondents' alleged material facts for which there is no genuine dispute. Initial Order, ¶ 16. Despite being ordered that they "must abide by" the instructions in the Initial Order, *id.* at 2, Respondents nonetheless ignored the requirements. For that reason alone, Respondents' motion for summary judgment should be denied. *Cf. Maale v. Kirchgessner*, No. 08–80131–CIV, 2011 WL 1549058, at *5 (S.D. Fla. Apr. 22, 2011) (noting that "[s]trict compliance with the Local Rules is always preferred and non-compliance may warrant appropriate sanctions").

III. Respondents' motion for summary judgment should be denied because it is premature.

Under Rule 56(d), "[i]f a nonmovant shows by . . . declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." As the Eleventh Circuit has explained in *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11th Cir.1988):

> The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests. *Id.*

Complainant's undersigned counsel, submitted with this opposition a declaration pursuant to Fed. R. Civ. P. 56(d), as Complainant, the nonmovant for summary judgment, cannot present all facts

essential to its opposition. Declaration of Aaron W. Davis in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment (Davis Decl."), ¶ 2.[2] In it, counsel testifies:

> Respondents' first argument in its motion to dismiss is that "the complaint must be dismissed in its entirety with respect to Hamburg Sud North America, Inc. ('HSNA') because the Commission lacks personal jurisdiction over HSNA." Respondents' Memorandum in Support of Motion to Dismiss and/or for Summary Judgment ("Respondents' Memorandum"), p. 1. Respondents also contend that because – according solely to an affidavit submitted by Michael Gast, Jr., "the Supervisor, Risk Management of Maersk Agency USA, Inc." – HSNA is not a "marine terminal operator" or a common carrier, Complainant's Section 41102(c) claim against HSNA must be dismissed. Respondents' Memorandum, p. 2.

Davis Decl., ¶ 3. However, to date, no discovery has been taken in this case yet, as the original complaint was only served on December 13, 2021, *see* Verified Complaint, p. 1 (FMC service stamp), and Respondents' Partial Answer was only served 15 days ago. No discovery schedule has been set, or even proposed yet. Davis Decl., ¶ 4. As a result, Complainant has not yet had the opportunity to take the deposition of Michael Gast, Jr. to cross-examine him or to receive discovery from Respondents regarding the nature of each of their businesses, to determine whether Mr. Gast's allegations are true or not. Davis Decl., ¶ 5. As shown in Mr. Gast's own affidavit, HSNA is part of a web of corporate entities affiliated with Maersk A/S, *see* Affidavit of Michael Gast, Jr., ¶ 2, which Complainant has not been able to conduct discovery on yet either. Davis Decl., ¶ 6.

As noted earlier in this opposition, Respondents fail to mention that an "ocean transportation intermediary" may also be held liable for Section 41102(c) violations. *See* 46 U.S.C. §§ 41102(c) ("A common carrier, marine terminal operator, **or ocean transportation intermediary** may not fail to establish, observe, and enforce just and reasonable regulations and

[2] Even though Complainant has submitted a declaration pursuant to Rule 56(d), filing such an affidavit of declaration "is not required to invoke the protection of the rule." *Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir. 1988).

practices relating to or connected with receiving, handling, storing, or delivering property." (emphasis added)). Davis Decl., ¶ 7. Due to this proceeding's infancy, Complainant has not had a chance yet to discover the facts related to Respondents and the exact nature or natures of their businesses, and what if any other entities may also be liable for violations under the Shipping Act. Additional time to respond to Respondents' motion for summary judgment would allow discovery to be taken on these issues before they are decided. Davis Decl., ¶ 8.

In the meantime, as also noted in Argument § I *supra*, Complainant has provided sufficient evidence to outright deny HSNA's dismissal from the proceeding, because (a) HSNA is a party to the service contract with Complaint and both Respondents, Exhibit A to the Verified Amended Complaint, p. 1, and (b) is subject to other claims included in the Verified Amended Complaint, under sections 41102(b)(2), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10). *See* Verified Amended Complaint, ¶¶ 3, 7; *see also* Davis Decl., ¶ 9.

Furthermore, "cases [such as this] involving allegations of 'undue' or 'unreasonable' preferences and prejudices and the like have required a proper development of the facts and are usually not decided summarily", and "courts are careful not to deny complainants a reasonable opportunity to prove their allegations and will construe doubts in the non-moving complainants' favor." *S.C. Mar. Servs.*, 1999 WL 1294895, at *2. Having had no opportunity to develop the facts and to prove its allegations, Complainant respectfully requests that Respondents' premature motion for summary judgment be denied in its entirety as well.

CONCLUSION

Respondents' entire motion to dismiss is made moot by Complainant's Verified Amended Complaint and thus, it should be denied. As for Respondents' summary judgment motion, it should also be denied as moot, but also because it violates the Initial Order in this case and 46

C.F.R. § 502.70(a) and is premature. Complainant respectfully requests that the ALJ deny Respondents' motion to dismiss and/or for summary judgment in its entirety, and grant Complainant's motion for leave to file its Verified Amended Complaint.

Dated: February 2, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon Respondents' counsel of record, Wayne R. Rohde at wrohde@cozen.com and Kathryn Sobotta at ksobotta@cozen.com, by emailing a copy to each such person.

Dated: February 2, 2022

By: /s/ Aaron W. Davis
Aaron W. Davis

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DECLARATION OF AARON W. DAVIS IN OPPOSITION TO
RESPONDENTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

I, Aaron W. Davis, do hereby state and declare as follows:

1. I am an attorney with Valhalla Legal, PLLC, and am one of Complainant OJ Commerce, LLC's ("Complainant") attorneys in this proceeding. I have personal knowledge of the facts described below. I am submitting this Declaration in Opposition to Respondents' Motion to Dismiss and/or for Summary Judgment.

2. I am also submitting this declaration pursuant to Fed. R. Civ. P. 56(d), as Complainant, the nonmovant for summary judgment, cannot present all facts essential to its opposition.

3. Respondents' first argument in its motion to dismiss is that "the complaint must be dismissed in its entirety with respect to Hamburg Sud North America, Inc. ('HSNA') because the Commission lacks personal jurisdiction over HSNA." Respondents' Memorandum in Support of

Motion to Dismiss and/or for Summary Judgment ("Respondents' Memorandum"), p. 1. Respondents also contend that because – according solely to an affidavit submitted by Michael Gast, Jr., "the Supervisor, Risk Management of Maersk Agency USA, Inc." – HSNA is not a "marine terminal operator" or a common carrier, Complainant's Section 41102(c) claim against HSNA must be dismissed. Respondents' Memorandum, p. 2.

4. No discovery has been taken in this case yet, as the original complaint was only served on December 13, 2021, *see* Verified Complaint, p. 1 (FMC service stamp), and Respondents' Partial Answer was only served 15 days ago. No discovery schedule has been set, or even proposed yet.

5. As a result, Complainant has not yet had the opportunity to take the deposition of Michael Gast, Jr. to cross-examine him or to receive discovery from Respondents regarding the nature of each of their businesses, to determine whether Mr. Gast's allegations are true or not.

6. As shown in Mr. Gast's own affidavit, HSNA is part of a web of corporate entities affiliated with Maersk A/S, *see* Affidavit of Michael Gast, Jr., ¶ 2, which Complainant has not been able to conduct discovery on yet either.

7. Importantly, Respondents fail to mention that an "ocean transportation intermediary" may also be held liable for Section 41102(c) violations. *See* 46 U.S.C. §§ 41102(c) ("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." (emphasis added)).

8. Due to this proceeding's infancy, Complainant has not had a chance yet to discover the facts related to Respondents and the exact nature or natures of their businesses, and what if any other entities may also be liable for violations under the Shipping Act. Additional time to respond

to Respondents' motion for summary judgment would allow discovery to be taken on these issues before they are decided.

9. In the meantime, Complainant has provided sufficient evidence to outright deny HSNA's dismissal from the proceeding, because (a) HSNA is a party to the service contract with Complaint and both Respondents, and (b) is subject to other claims included in the Verified Amended Complaint, under sections 41102(b)(2), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10). *See* Verified Amended Complaint, ¶¶ 3, 7. Complainant respectfully suggests that these facts, as well as Complainant request under Rule 56(d), justifies the denial of Respondents' motion for summary judgment.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: February 2, 2022

By: /s/ Aaron W. Davis
Aaron W. Davis