BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 22-07

ACME FREIGHT SERVICES CORP.,

Complainant,

v.

TOTAL TERMINALS INTERNATIONAL, LLC,

Respondent.

RESPONDENT TOTAL TERMINALS INTERNATIONAL, LLC's REPLY IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

ACME's opposition to TTI's motion to dismiss confirms that ACME filed a complaint against the wrong party. ACME did not pay demurrage to TTI, instead it apparently paid the carrier. ACME's dance around that fatal fact cannot save it. Under the statute's plain language and the Commission's interpretive rule, ACME's demurrage dispute lies with the carrier which proximately caused the alleged loss, not TTI. ACME's complaint can be dismissed without resort to any extrinsic evidence because ACME's "complaint does not contain any factual allegation sufficient to plausibly suggest" a claim against TTI. *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009).

To avoid wasting Commission and party resources, however, this tribunal should take judicial notice of the carrier's tariff to dismiss the complaint with prejudice. MSC's tariff is the only one that could apply given the amount disputed for the number of days at issue. And ACME's complaint does not even allege that TTI's tariff applied. Because MSC's tariff governed demurrage, not TTI's, all of ACME's arguments about TTI's tariff are irrelevant.

ACME also never alleges any facts showing that the challenged acts—assessing demurrage—occurred on a normal, customary, and continuous basis. And finally, it is reasonable to charge demurrage on containers that were part of an attempt to defraud American consumers and which stayed on TTI's terminal for ten months before being re-exported to Malaysia.

I. The complaint does not allege facts showing that TTI is the proximate cause of ACME's alleged injuries.

ACME never alleges that it paid demurrage to TTI. Instead, ACME leaves the party to whom ACME paid the demurrage unnamed. *See* MTD at 17–19. As ACME's response makes clear, this is no oversight. *See* Resp. at 5–6. In its response, ACME suggests that who ACME paid does not matter and attempts to amend its complaint in its response by arguing that an (unalleged) agency relationship between an unnamed party and TTI somehow adequately establishes proximate cause. *Id.* ACME's maneuver cannot save its flawed complaint.

First, ACME is unable to muster a single case to support its theory that Company A proximately causes harm to Company B when Company B pays a charge to Company C. It does not. Proximate cause requires a direct link between the alleged misconduct and injury. *See Bank of Am.*

Corp. v. City of Miami, 137 S. Ct. 1296, 1305–06 (2017); *Wolf v. Fauquier Cnty. Bd. of Supervisors*, 555 F.3d 311, 321 (4th Cir. 2009). In applying the proximate cause standard, courts generally do not "go beyond the first step." *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quotation marks omitted). Here, ACME does not even identify where the first step leads. All we know is that ACME does not allege that the first step was paying TTI.

Second, ACME fails to grapple with the interpretive rule's language applying this straightforward understanding of proximate cause. To the extent ACME's new theory of liability (which is not in its complaint) is that an unnamed party (i.e., the carrier) charged demurrage and then passed that money on to TTI, the interpretive rule explains that ACME's dispute is with MSC. As the interpretive rule makes clear:

> The rule might be relevant to that compensation if marine terminal charges to ocean carriers are passed on to shippers and their agents via demurrage. In those instances, however, the Commission would be assessing the reasonableness of *ocean carrier demurrage practices* vis-a`-vis shippers, intermediaries, and truckers, not marine terminal operator practices with respect to ocean carriers.

Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29,638, 29,650–51 (May 18, 2020) (emphasis added) (footnote omitted). According to the interpretive rule, TTI's contractual

relationship with MSC does not turn TTI into a proper party in a dispute over charges ACME paid MSC. ACME's dispute is against the carrier, not TTI.

Third, ACME appears to now be relying on a new theory of causation: there was an agency relationship between TTI and an unnamed party (i.e., the carrier). *See* Resp. at 8. But ACME never pleaded this theory or any agency relationship in its complaint. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 448 (7th Cir. 2011) (rejecting plaintiff's "subtl[e] reorienting [of] its response brief toward a more straightforward ... claim of a type that it might have pled in the alternative"). ACME cannot amend its complaint through its brief. *See id.* (noting "the axiomatic rule that a plaintiff may not amend his complaint in his response brief").

Fourth, ACME misapprehends which tariff applies. In its complaint, ACME declines to identify which company's tariff governed the challenged demurrage. Judicially noticeable documents and simple math, however, lead to the firm conclusion that MSC apparently charged its own demurrage rates against ACME according to MSC's own tariff. It is established that a tribunal deciding a motion to dismiss may review

"matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). *See also Farah v. Esquire Mag.*, 736 F.3d 528, 534 (D.C. Cir. 2013) ("Judicial notice is properly taken of publicly available historical articles ...."). The allegations here match MSC's judicially noticeable tariff perfectly and do not fit with either the TTI or the Port of Long Beach tariffs. Tellingly, ACME does not challenge the accuracy of MSC's tariff.

Under MSC's tariff, for a 40HC container, MSC charges $80 for the first 5 days ($400 per container) and $150 dollars for the remaining 244 days ($36,600 per container). MTD Ex. A § A.1. These sums combined for five containers amount to exactly $185,000. ACME does not contest the conclusion reached in the motion to dismiss that MSC billed ACME the demurrage at MSC's rates. *See* MTD at 13–14, 18. Moreover, the tariffs for the Port of Long Beach and TTI show different rates, and none of those rates correspond with the alleged charge of $185,000 for the alleged dates identified in the complaint. Because TTI's tariff was not applied, its terms are not at issue and ACME's arguments about TTI's tariff and its terms are irrelevant.[1]

[1] In any case, the language in TTI's tariff does not support ACME's gloss. Resp. at 8.

Finally, ACME's response suggests that email exchanges show that TTI attempted to assess other demurrage charges and required MSC to guarantee the charges. *See* Resp. at 7. ACME also references an email where TTI refers ACME back to MSC. *Id.* But these new email-based allegations fail for at least three reasons. First, and most fundamentally, the emails cannot be subject to judicial notice and are improper at this stage of the litigation. Although documents like a public facing tariff made available through FMC's website are subject to judicial notice, *see* MTD at 13 n.4, ACME cites no cases supporting the notion that tribunals can take notice of emails. Second, the emails still do not address the critical question: whether ACME paid the disputed $185,000 demurrage charge to TTI. If anything, the emails suggest that ACME had a contractual relationship with MSC, not TTI. And what matters is which tariff was actually applied and what demurrage was actually paid, not some hypothetical demurrage discussed but never collected. Finally, ACME cannot amend its complaint through its response brief. *See Pirelli,* 631 F.3d at 448. In sum, ACME's "complaint does not contain any factual allegation sufficient to plausibly suggest" a claim against TTI. *Iqbal*, 556 U.S. at 683.

II. ACME does not allege facts showing that any challenged acts occur on a normal, customary, and continuous basis.

ACME likewise does not sufficiently allege that any challenged act occurred on a normal or continuous basis. In its response, ACME does not dispute that its complaint centers only on the single alleged demurrage at issue. *See* Resp. at 9. Instead, ACME suggests that it need not point to a continuous act because it is challenging TTI's tariff. *Id.* To support this contention, ACME cites a number of cases in which a party alleged that it paid charges to the respondent, under the respondent's tariff, bill of lading, or a standard form contractual agreement. *See* Order Denying Motion to Dismiss at 4, *Ocean Network Express Pte., LTD. and Ocean Network Express (N. Am.) Inc.—Possible Violations of 46 U.S.C. § 41102(c)*, No. 21-17 (FMC Feb. 23, 2022); *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp., & Evergreen Line Joint Service Agreement*, No. 1966(I), 2021 WL 794708, at *1–2, 2021 FMC LEXIS 233, at *1–5 (Feb. 19, 2021); *see also* Initial Decision on Remand at 20–21, *MAVL Cap. Inc. v. Marine Transp. Logistics, Inc.*, No. 16-16 (FMC Sept. 29, 2021) (relying on respondent's house bill of lading to establish customary practice, but where complainant actually sued the party who liquidated its goods).

But unlike those cases, ACME's complaint never mentions TTI's tariff, let alone challenges it. And as explained in detail, *supra*, Part I, MSC's tariff is evidently the one that applied here, not TTI's. There is no way to massage TTI's tariff numbers into anything approximating the $185,000 in demurrage that ACME alleges it paid. Because ACME appears to agree that it is not challenging any acts that occur on a normal, customary, and continuous basis—and never alleges a challenge to TTI's tariff (nor could it because the conduct it complains of was apparently under MSC's published tariff)—its claim should be dismissed.

III. Had TTI collected demurrage form ACME, the charges would have been reasonable.

FMC's past precedent establishes that it is reasonable to charge demurrage during a government hold. *See Free Time & Demurrage Charges at N.Y.* ("NYI"), 3 U.S.M.C. 89, 107 (FMC 1948) (holding that ocean carriers are not required to extend free time for government inspections). ACME acknowledges that FMC's interpretive rule does not overrule past precedent. *See* Resp. at 10. This alone is dispositive.

Moreover, ACME provides no reason why it is unreasonable under the interpretive rule to charge demurrage for the storage of containers that were part of a "criminal" scheme to defraud American consumers,

that the U.S. Government ordered re-exported to Malaysia, and that languished at TTI's terminal for ten months. Resp. at 12. ACME cites two cases showing it may be unreasonable to charge demurrage where detention could not incentivize the return of the containers. Resp. at 11 (citing *Hapag-Lloyd, A.G. and Hapag-Lloyd (Am.) LLC—Possible Violations of 46 U.S.C. § 41102(c)*, No. 21-09 (FMC Apr. 22, 2022); *TCW, Inc.*, 2021 WL 794708, at *27, 2021 FMC LEXIS 233, at *64. But those do not apply here, because detention in this case *does* incentivize freight fluidity. Freight fluidity is hindered when containers linger on a terminal for months because they are filled with unimportable goods. This is not a scenario where goods have been held up due to port closures or supply chain problems, like the cases cited by ACME. Initial Decision at 30–33, *Hapag-Lloyd, A.G.*, No. 21-09 (charging demurrage was inappropriate because there were no available appointments to pick up the cargo); *TCW, Inc.*, 2021 WL 794708, at *23–27, 2021 FMC LEXIS 233, at *50–64 (charging demurrage was inappropriate because cargo was unavailable for pick up due to holiday and COVID-19 port closures). The goods at issue here were held by the Government because they could not be lawfully brought into the United States and then sat for months at on

TTI's terminal after they were ordered to be re-exported. Companies should not be rewarded for contracting with irreputable companies to import containers filled with illegal goods that clog a terminal for months, even after the government orders them re-exported. This is especially true during an international pandemic and supply chain crisis.

IV. ACME cannot amend its complaint to state a claim against TTI.

Perhaps realizing that its complaint is deficient, ACME quickly turns away from defending the complaint and argues that it can remedy its complaint's gaps through amendment and the referenced emails. *See* Resp. at 7–8. In support, ACME cites the general rule that leave to amend should be freely given when justice so requires. Resp. at 8 (citing Fed. R. Civ. P. 15(a)).

Justice does not require leave to amend here. Dismissal with prejudice is warranted because "allegation of other facts consistent with the challenged pleading *could not possibly cure the deficiency*." *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (per curiam) (emphasis added) (quotation marks omitted). Consistent with ethical obligations of candor, ACME cannot allege facts showing that it paid the disputed demurrage to TTI because ACME apparently paid the

demurrage to MSC according to a MSC's published tariff rates. The emails that ACME references—which are not properly before the tribunal in any case—do not refute this reality. While a TTI demurrage clerk had a back-and-forth with ACME, TTI ultimately referred ACME back to MSC about the demurrage charges. Resp. Ex. A. And MSC's emails with ACME appear to reference some other charges not at issue in this case showing a contractual relationship between MSC and ACME. Resp. Ex. B.

According to the Commission's interpretive rule, the statute's language, and common sense, the dispute is between ACME and MSC. In short, there are no "factual allegation[s] sufficient to plausibly suggest" a claim against TTI. *Iqbal*, 556 U.S. at 683.

CONCLUSION

ACME failed to plead a cognizable claim against TTI. And, based on MSC's judicially noticeable tariff, ACME cannot plead a cognizable claim against TTI. To avoid futile discovery and briefing, the complaint should be dismissed with prejudice.

Dated: May 23, 2022

Respectfully submitted,

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Verification Pursuant to 46 CFR § 502.6

I, Manuel Alvarez, declare as follows:

1. I am the Director of Risk Management of Total Terminals International, LLC.

2. I am duly authorized to make this verification of behalf of Total Terminals International, LLC.

3. I have read the contents of the Reply in Support of the Motion to Dismiss in FMC Docket No. 22-07 attached hereto, and I verify under penalty of perjury under the laws of the United States of America that the foregoing reply is true and correct to the best of my knowledge, information, and belief.

Date: 5/23/2022

Manuel Alvarez
Total Terminals International, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2022, a true and correct copy of the foregoing Motion to Dismiss was served via email on:

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