BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 22-07

ACME FREIGHT SERVICES CORP.

COMPLAINANT,

v.

TOTAL TERMINALS INTERNATIONAL, LLC

RESPONDENT.

ACME FREIGHT SERVICES CORP.'S OPPOSITION TO TOTAL TERMINALS INTERNATIONAL'S MOTION TO DISMISS

Complainant Acme Freight Services Corp. ("Acme") hereby submits its opposition to the Motion to Dismiss (the "Motion") filed by Respondent Total Terminals International, LLC ("TTI").

TTI seeks dismissal on the grounds that the Complaint fails to state a cognizable claim for relief. Specifically, TTI asserts that (1) the Complaint does not allege that TTI was the proximate cause of any loss to Acme; (2) the Complaint does not plead sufficient facts to establish that TTI's acts, or omissions occurred on a normal, customary, and continuous basis; and (3) TTI's collection of demurrage under the circumstances alleged in the Complaint would be reasonable and justified in any event. For the reasons set forth below, the Motion is without merit and should be denied.

I.
RELEVANT FACTS

A. Acme's Complaint

Acme's Complaint alleges, *inter alia*, that MSC transported five (5) containers (the "Containers") from Malaysia to the Port of Long Beach, California. Verified Complaint at ¶ 7. The Containers were said to contain medical gloves and were part of a lot of 20 containers of medical gloves purchased by the importer of record CMJ Medical Supply LLC ("CMJ"). *Id.* Acme was listed as the consignee and notify party on the MSC master bill of lading governing the Containers. *Id.* Prior to the arrival of the Containers, CMJ took delivery of two of the containers transported by another carrier and found the containers were stuffed with used gloves and empty boxes and not new medical gloves. *Id.* at ¶ 8 On information and belief, CMJ suspected fraud and reported the matter to U.S. Customs and Border Protection ("CBP") and the Federal Bureau of Investigation. *Id.* Consequently, CBP issued a hold for inspection on the remaining containers purchased by CMJ, including the Containers. *Id.*

The Containers arrived and were discharged at the TTI terminal at Long Beach on or about January 16, 2021. *Id.* at ¶ 9. Pursuant to the CBP hold and inspection order, the Containers were transferred to a facility operated by Price Transfer on January 29, 2021, for inspection by CBP. *Id.* The Containers were returned to the TTI terminal on or about February 22, 2021, but remained on a government hold imposed by CBP and were unavailable for pick up or release. *Id.* In or about July 2021, CBP issued an Emergency Action Notice requiring that the Containers be re-exported from the U.S. to Malaysia. *Id.* at ¶ 10.

Acme worked diligently to obtain the required authorities to ship the Containers back to Malaysia and paid the freight for the return of the Containers to Malaysia. *Id.* The Containers were re-exported on or about November 2, 2021. *Id.* TTI assessed demurrage on the Containers in the

amount of $185,000. *Id.* at ¶ 11. Acme was required to pay, and did pay, the demurrage charges imposed by TTI under duress in order to be permitted to re-export the Containers. *Id*. at 12. ACME made several requests to TTI for a waiver or discount of the demurrage charges due to the unavailability of the Containers for pick-up, but TTI flatly refused. *Id.* at ¶ 13.

B. Legal Standards Governing Motions to Dismiss

Rule 12 of the Commission's Rules of Practice and Procedure state that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. Because the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or for failure to state a claim, Federal Rule 12(b) applies here. *Mitsui OSK Lines Ltd v. Global Link*, 32 S.R.R. 126, 136 (FMC 2011).

In deciding a motion to dismiss for failure to state a claim under Rule 12(b), courts must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Arencibia v. 2401 Restaurant Corp.,* 699 F. Supp. 2d 318, 323 (D.D.C. 2010). A court may not discount factual allegations, but rather must only determine whether the facts as alleged in the complaint are sufficiently plausible to meet the elements of the moving party's claim. *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.,* 709 F.3d 129, 135 (2d Cir. 2013). This standard does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of wrongful conduct. *Id*. at 135 (*citing Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007)). A claim is plausible 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 (2009). Further, "a well-pleaded complaint may proceed even if it strikes a savvy judge that factual proof of the facts is improbable and that recovery is very remote and

unlikely." *Twombly,* 550 U.S. at 556. In order to survive a motion to dismiss, the complaint need only contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Simon v. Keyspan Corp*., 694 F.3d 196, 201 (2d Cir. 2012).

In construing the standards governing a motion to dismiss, the Commission similarly recognizes that it construes complaints in the light most favorable to the plaintiff and accepts all well-pled facts alleged in the complaint as true. *Mitsui OSK Lines Ltd v. Global Link*, 32 S.R.R. at 136 (FMC 2011). Further, relying upon *Twombly,* 550 U.S. 544 (2007), the Commission in *Global Link* recognized that 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. *Id.* Ultimately, the test of a complaint's sufficiency simply is whether the complaint's factual allegations are "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).

Pursuant to Federal Rule of Civil Procedure 8, a pleading states a claim if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a) (2). "Rule 8 *does not* require a plaintiff to attach *evidence* to support its claim as this would contravene the theoretical underpinnings of the notice pleading requirement." *Grooms v. Legge,* No. 09cv489–IEG–POR, 2009 WL 20131730 at * 3 (S.D. Cal. 2009) (emphasis in original); *see also In re Philip Service Corp. Securities Litigation,* 383 F. Supp. 2d 463, 478 (S.D.N.Y. 2004) (even under heightened pleading requirements applicable to a securities fraud case, no requirement to submit documentation supporting claims).

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), courts are limited to considering the sufficiency of allegations set forth in the complaint and the documents attached or incorporated into the complaint. *Zak v. Chelsea Therapeutics Int'l Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015). "Consideration of extrinsic documents by a court during the pleading stage of litigation improperly converts a motion to dismiss into a motion for summary judgment. This conversion is not appropriate when the parties have not had an opportunity to conduct reasonable discovery." *Id*. (citations omitted).

Courts therefore should focus their inquiry on the sufficiency of the facts relied upon by the plaintiffs in the complaint. *Id.* Consideration of a document attached to a motion to dismiss ordinarily is permitted only when the document is "integral to and explicitly relied on in the complaint" and when "the plaintiffs do not challenge the document's authenticity." *Id.* at 606-607. Finally, when documents or other facts are considered under the narrow exception to that standard, the court must construe the facts in the light most favorable to the plaintiff. *Id.*

II.
THE COMPLAINT STATES A PLAUSIBLE CLAIM FOR VIOLATION OF THE SHIPPING ACT

A. The Complaint Properly Alleges That TTI is the Proximate Cause of Acme's Damages

Paragraph 11 of the Complaint alleges that "TTI assessed demurrage on the Containers." Paragraph 12 of the Complaint alleges that "ACME was required to pay, and did pay, the demurrage charges imposed by TTI under duress in order to be permitted to re-export the Containers." Complaint at ¶¶ 11-12. These allegations, as well as all reasonable inferences that can be drawn therefrom, must be taken as true and are clearly sufficient to plead that TTI was the proximate cause of Acme's damages. See *Mitsui OSK Lines Ltd v. Global Link*, 32 S.R.R. at 136

(FMC 2011)("The test of a complaint's sufficiency simply is whether the documents' allegations are detailed and informative enough to enable the defendant to respond.").

TTI raises two challenges to the Complaint's allegation of proximate cause. First, TTI argues that to properly plead proximate cause, the Complaint must allege more than TTI assessed the demurrage charges and Acme paid those charges. TTI asserts that the Complaint must also allege that Acme paid the charges assessed by TTI directly to TTI. However, the assessment of the demurrage charges by TTI and the requirement that those charges be paid to re-export the Containers – as properly pled in the Complaint – constitute the actual proximate cause of Acme's damages. Whether Acme paid the demurrage directly to TTI or to an agent collecting the demurrage on TTI's behalf does not change that fact that it was TTI's assessment of the charges and refusal to waive or discount those charges that caused Acme's damages. Simply put, if TTI had not insisted on assessing the demurrage charges, Acme would never have had to pay the charges.

Second, TTI relies on factual assertions and purported evidence outside of the Complaint to argue that Acme cannot properly plead proximate cause if Acme did not pay the demurrage charges directly to TTI. As a preliminary matter, TTI's reliance on matters outside the Complaint to seek dismissal of this proceeding is contrary to the legal standard applicable to the consideration of motions to dismiss as noted above. Moreover, TTI's theory that it would be immune from liability if Acme paid the demurrage charges to the carrier and the carrier then paid the charges to TTI is without foundation in law or fact.

Acme believes that TTI's attempt to seek dismissal of the Complaint *with prejudice* before discovery and without an evidentiary hearing based on TTI's assertion of alternative facts is improper. However, to demonstrate that Acme disputes TTI's factual assertions and can plead

additional facts if required, Acme points out that there is considerable evidence contrary to TTI's theory that it is immune from liability unless TTI directly collected the demurrage charges.

As reflected in the Complaint, Acme contacted TTI on multiple occasions and requested relief regarding the demurrage charges assessed by TTI. TTI repeatedly rejected Acme's requests and at no time did TTI ever dispute that the demurrage charges were being assessed by anyone other than TTI. To the contrary, TTI corresponded with Acme to discuss the manner in which the demurrage should be paid directly *to TTI* since TTI's payment system was down. *See* email correspondence, attached as Exhibit A hereto. Moreover, as reflected in correspondence between MSC and Acme, after Acme paid the initial TTI charges, TTI attempted to assess additional demurrage charges against Acme, and required MSC to guarantee the charges for the Containers to be released. *See* email correspondence, attached as Exhibit B. Thus, there is considerable evidence to support the allegation that TTI assessed and required payment of the demurrage charges as a condition for the release of the Containers.

Moreover, TTI's suggestion that the terminal demurrage charges were assessed by MSC and not TTI is also inconsistent with TTI's own public tariff that TTI references in its Motion.[1] TTI's Marine Terminal Operator Rate Schedule applicable to its terminals at the Port of Long Beach sets out TTI's terminal demurrage policies. Part II.I (c) of TTI's Rate Schedule specifically provides that TTI's terminal demurrage charges are assessed against the goods and payable by the owner of the goods. Part V.C of TTI's Rate Schedule provides that TTI's demurrage charges shall be assessed against containers remaining at the TTI terminal after expiration of free time and that only TTI – in its sole discretion – can extend free time beyond the last free day. Consequently,

[1] Although not alleged in the Complaint, MSC agreed to discount its separate detention charges, but advised Acme it was not authorized to waive or discount TTI's demurrage charges and directed Acme to contact TTI directly. As indicated in the Complaint, TTI refused to waive or discount its demurrage charges.

there is significant evidence that the terminal demurrage charges that TTI refused to waive, or discount were assessed by TTI – not MSC.

In addition, TTI's assertion that MSC would not be acting as TTI's agent if it collected demurrage charges is contrary to TTI's tariff. Part II.I(c) of the TTI Rate Schedule provides that TTI's terminal demurrage charges "shall be payable by the owners of the Goods and shall be collected by the Vessel discharging or loading the Goods through its owner, agent, manager, master, berth assignee or other authorized Person acting as an agent for the owner."[2]

While Acme strongly believes the Complaint meets all applicable pleading requirements, if the Presiding Judge deems it necessary, Acme is prepared to file an Amended Complaint addressing any deficiencies in the original Complaint. Fed. R. Civ. P. 15(a) provides that leave to amend a complaint should be freely given when justice so requires. *See also Foman v. Davis,* 371 U.S. 178, 182 (1962) (in absence of bad faith or dilatory motive, leave to amend should be "freely given"); *Ricciutti v. N.Y.C. Transit Authority*, 941 F.2d 119 (2d Cir. 1991) (when complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an amended complaint, the request should ordinarily be granted).

B. The Complaint Adequately Pleads That TTI's Demurrage Practices Are Normal, Customary and Continuous

TTI asserts that Acme has failed to allege facts to establish that the "claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis" as required by 46 C.F.R. § 545.4(b). TTI asserts that Acme must allege multiple instances where TTI assessed demurrage against Acme to establish a Shipping Act violation. However, as an initial

[2] To the extent that the Presiding Judge considers it proper to consider facts outside of the Complaint on a motion to dismiss and issue a ruling on the merits without the benefit of a full evidentiary hearing, all factual disputes should be resolved in favor of Acme. *See Cholakyan v. Mercedes-Benz USA, LLC,* No. CV 10-05944 MMM (JCx), 2012 WL 12861143 at * 17 (C.D. Cal. 2012).

matter, the Complaint's allegation that TTI repeatedly refused to waive or discount the demurrage is sufficient to demonstrate at the pleading stage that TTI's policy of assessing demurrage on containers subject to a government hold occurs on a normal, customary and continuous basis.

Moreover, alleging repeated occurrences—while potentially necessary in some cases—is not required when the conduct is pursuant to a tariff. *See e.g.,* Docket No. 21-17, *Ocean Network Express Pte., LTD. and Ocean Network Express (North America) Inc.—Possible Violations of 46 U.S.C. § 41102(c),* Order Denying Motion to Dismiss (Feb. 23, 2022). TTI's assessment of demurrage to while the Containers were pending a government hold is pursuant to its tariff. Accordingly, the assessment of demurrage as alleged in the Complaint pursuant to TTI's tariff is itself sufficient to demonstrate a standard practice by TTI.

In Docket No. 16-16, *MAVL Capital Inc. v. Marine Transport Logistics, Inc.* (Sept. 29, 2021), the Presiding Judge recently held that a carrier's bill of lading is evidence of its normal business practices. Marine Transport Logistics, Inc. ("MTL") asserted a lien and liquidated the vehicles based upon the terms of its standard house bill of lading. There the Presiding Judge held that the provision of MTL's bill of lading established that MTL's "conduct is occurring on a normal, customary, and continuous basis and is a part of MTL's normal business practices or business model. Accordingly, this element required to demonstrate a § 41102(c) violation is also demonstrated by TTI's tariff." *Id.* at 23; *see also TCW, Inc., Claimant v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement, Respondents*., 2021 WL 794708, at *20 (finding that an addendum included in the Carrier's Preferred Truck Agreement was sufficient to establish that that imposition of the disputed per diem charged by Respondents is "occurring on a normal, customary, and continuous" basis and is a part of Respondents' normal business practices").

TTI's imposition of the demurrage charges pursuant to its tariff under the circumstances and TTI's repeated refusals to extend free time or waive the demurrage charges for the Containers subject to a government are sufficient to show TTI's routine and normal business practice at the pleading stage. Moreover, to the extent it would be necessary to amend the Complaint, Acme can allege that after it had already paid the accrued TTI demurrage charges, TTI attempted to assess additional demurrage charges against Acme, and required MSC to guarantee the charges for the Containers to be released. *See* Exhibit B hereto.

Taking Acme's allegations as true for the purpose of TTI's Motion to Dismiss, TTI's normal business practices have been adequately pleaded as required by 46 C.F.R § 545.4(b). Accordingly, Acme has stated a claim that is plausible on its face and provides fair notice of the nature of the claims and bases for asserting them. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570; *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) and *Twombly*, 550 U.S. at 555

C. The Demurrage Charges Assessed on Containers Subject to a Government Hold Were Unreasonable

TTI seeks dismissal of the Complaint with prejudice on the grounds that TTI's demurrage charges were presumptively reasonable under the circumstances. Specifically, TTI argues that (1) the Commission is bound by a 1948 Commission decision and the interpretative rule published at 46 C.F.R. § 545.5 cannot overrule that decision, and (2) even if § 545.5 does apply, it does not establish a *per se* rule that demurrage charges assessed during a government hold are unreasonable. Neither argument has merit.

First, the Commission's interpretative rule provides that it is intended as guidance for how the Commission will analyze demurrage and detention practices in future proceedings. It does not purport to expressly overrule prior precedent, but for the reasons stated by the Commission upon its publication, it gives notice that the "incentivizing principle" will apply in future considerations

of demurrage and detention practices. Since its publication, the interpretative rule and the "incentivizing principle" have been applied in subsequent proceedings. *See, e.g.,* Docket No. 21-09, *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC—Possible Violations of 46 U.S.C. § 41102(c)* (April 22, 2022)(finding that Carrier's assessment of detention was unreasonable "because no amount of detention could have incentivized the return of the containers"); *TCW, Inc., Claimant v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement, Respondents*., 2021 WL 794708, at *27 (finding that the per diem charges did not meet their incentivizing principle "when it was impossible for Claimant to return the equipment at issue was unjust and unreasonable"). The Commission is entitled to prospectively change or modify policies in adjudicatory proceedings, particularly involving fact-based inquires like those relating to the reasonableness of marine terminal practices. *See, e.g., Friends of Animals v. Bernhardt*, 961 F.3d 1197 (D.C. Cir. 2020)(An agency has broad discretion to implement its statutory directives through rulemaking or adjudication).

Second, the fact that the Commission did not establish a *per se* rule in § 545.5 finding demurrage during a government hold unreasonable does not mean that such charges are deemed *per se* reasonable. Indeed, the Commission made clear in issuing §545.5 that it will determine whether demurrage practices are reasonable or unreasonable on a case-by-case basis considering all relevant facts and circumstances. *See* 85 FR 29641. By requesting a ruling on the reasonableness of its demurrage practices in a motion to dismiss prior to any discovery or submission of evidence, TTI is essentially requesting a ruling on the merits of the case at the pleading stage. TTI's, attempt to evade liability by shortcutting this proceeding should be denied.

Finally, TTI's Motion repeatedly implies that Acme is somehow at fault for the circumstances which led to the government hold in this case, arguing the "companies should not

be rewarded for importing containers filled with illegal goods." However, as made clear in the Complaint, Acme and the other parties involved in the importation of the Containers were victims of a criminal and fraudulent scheme that has already cost Acme significant sums to return the Containers to origin. Acme in an unfortunate and innocent victim here. To suggest otherwise in order to attempt to justify the collection of $185,000 in demurrage is simply inaccurate and unfair.

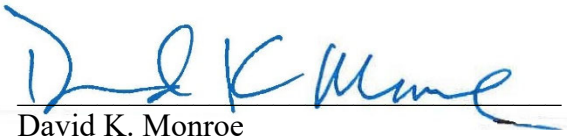
No amount of demurrage assessed against Acme could have incentivized Acme to remove the Containers from the Port because the Containers were subject to a government-imposed hold. TTI's policy to assess demurrage charges at both the base and penalty levels on the Containers is inconsistent with the incentive principle and is thus unreasonable.

III.
CONCLUSION

For all of the foregoing reasons, Acme respectfully requests that the Presiding Judge deny Respondent TTI's motion to dismiss.

Dated: May 16, 2022

Respectfully submitted,



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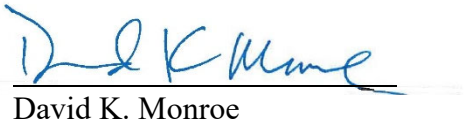
CERTIFICATE OF SERVICE

I do hereby certify that on this 16th day of May 2022, I have delivered a true and correct copy of the foregoing document to the parties to this proceeding by depositing same in the United States mail, first class postage prepaid, an d/or via email transmission.



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