BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. 22-35

M.E. DEY & CO., INC.,

Complainant,

v.

HAPAG-LLOYD AG and HAPAG-LLOYD (AMERICA) LLC,

Respondents and Third-Party Complainants,

v.

CSX TRANSPORTATION, INC.,

Third-Party Respondent.

MEMORANDUM OF LAW IN SUPPORT OF THIRD-PARTY RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Third-party Respondent, CSX Transportation, Inc. submits this memorandum of law in support of its Motion to Dismiss the Third-Party Complaint filed in this proceeding by Respondents and Third-Party Complainants, Hapag-Lloyd AG and Hapag-Lloyd (America) LLC.

I. FACTS

On December 23, 2022, the Federal Maritime Commission ("FMC" or "Commission") published a public Notice of Filing of Complaint and Assignment ("Notice")[1] that a complaint[2] against Hapag-Lloyd (America) LLC ("Hapag-Lloyd America") had been filed by M.E. Dey &

[1] *See* Notice of Filing of Complaint and Assignment, FMC Docket No. 22-35, Document Number 2, Dec. 23, 2022.
[2] *See* Verified Complaint, FMC Docket No. 22-35, Document Number 1, Dec. 23, 2022.

Co., Inc. ("Complainant" or "Dey"), alleging violations of Sections 41102(c) and 41104(a)(14) of the Shipping Act of 1984, 46 U.S.C. § 40101, et seq., as amended (the "Shipping Act"). Pursuant to the Notice, Hapag-Lloyd America was required to file an answer to the complaint within twenty-five (25) days from the date of service (thus due on January 17, 2023).

On January 17, 2023, Hapag-Lloyd America filed a motion to dismiss and memorandum in support of its motion to dismiss.[3] In its memorandum, Hapag-Lloyd America asserted that the Commission lacked personal jurisdiction over it because it "does not provide transportation of cargo between the United States and a foreign country" and "does not operate as a regulated entity as required by §41102(c)," and therefore was not subject to Sections 41102(c) and 41104(a)(14) of the Shipping Act.[4]

In light of Hapag-Lloyd America's motion to dismiss, on February 1, 2023 Dey filed a motion for leave to file an amended complaint.[5] The amended complaint added the ocean carrier Hapag-Lloyd AG as a respondent.[6] Hapag did not file an opposition to the motion for leave. On February 28, 2023, the Presiding Officer granted Dey's motion for leave to amend its complaint and denied the motion to dismiss as moot.[7]

On March 1, 2023, the FMC published a public Notice of Filing of Amended Complaint and Assignment ("Amended Notice") that the amended complaint against Hapag-Lloyd AG and Hapag-Lloyd America (collectively "Respondents" or "Third-Party Complainants" or "Hapag")

[3] *See* Respondent's Motion to Dismiss, FMC Docket No. 22-35, Document Number 7, Jan. 17, 2023; Received Memorandum in Support of Respondent's Motion to Dismiss, FMC Docket No. 22-35, Document Number 6, Jan. 17, 2023.
[4] Memo, Mot. to Dismiss, Doc. 6 at pg. 2.
[5] *See* Motion for Leave to Amend Complaint, FMC Docket No. 22-35, Document Number 8, Feb. 1, 2023.
[6] *Id.*
[7] *See* Order on Motion to Amend Complaint and Motion to Dismiss, FMC Docket No. 22-35, Document Number 9, Feb. 28, 2023.

had been filed by Dey, alleging violations of Sections 41102(c) and 41104(a)(14) of the Shipping Act (the "Amended Complaint").[8] Pursuant to the Amended Notice, Hapag was required to file an answer to the Amended Complaint within twenty-five (25) days from the date of service (thus due on March 27, 2023). On March 27, 2023, Hapag filed an answer to Dey's Amended Complaint.[9] Hapag denied the allegation of pendent jurisdiction over Hapag-Lloyd America.[10]

On March 31, 2023, the FMC's Bureau of Enforcement, Investigations, and Compliance ("BEIC") filed a motion to intervene in the proceeding.[11] In its motion, BEIC advised the Commission that it "does not seek to participate in discovery, examination of witnesses, or the presentation of evidence" but sought to participate as a limited party to primarily participate in briefing and "reserving the ability to address jurisdictional or other procedural issues."[12] On April 7, 2023, Hapag filed a response to BEIC's motion to intervene, stating that it takes "no position on the merits of the Motion. Respondents submit this reply solely for purposes of noting for the record their disagreement with the manner in which the facts relating to this proceeding are characterized in the Motion."[13] On April 10, 2023, the Presiding Officer granted BEIC's motion to intervene.[14]

On April 13, 2023, Hapag filed a motion for leave to file a third-party complaint against CSX Transportation, Inc. ("Third-Party Respondent" or "CSXT"), a rail carrier, alleging that it

[8] *See* Notice of Filing of Amended Complaint and Assignment, FMC Docket No. 22-35, Document Number 11, March 1, 2023.
[9] *See* Hapag-Lloyd's Answer to Amended Complaint, FMC Docket No. 22-35, Document Number 14, March 27, 2023.
[10] Answer to Amended Complaint, Doc. 14 ¶ 10.
[11] *See* BEIC Motion for Leave to Intervene, FMC Docket No. 22-35, Document Number 15, March 31, 2023.
[12] BEIC Mot. to Intervene, Doc. 15 at pg. 4.
[13] *See* Respondents' Reply to Motion for Leave to Intervene by Bureau of Enforcement, Investigations, and Compliance, FMC Docket No. 22-35, Document Number 16, April 7, 2023.
[14] *See* Order on BEIC'S Motion to Intervene, FMC Docket No. 22-35, Document Number 17, April 10, 2023.

should be named as a third-party respondent because CSXT collected or received "the storage charges herein at issue."[15] On April 27, 2023, the Presiding Officer denied Hapag's motion finding that while "[Hapag] sets forth factual allegations and further alleges 'causation and injury to complainants,' [Hapag] does not clearly allege a violation of the Shipping Act or OSRA."[16]

On May 4, 2023, Hapag filed a renewed motion for leave to file a third-party complaint.[17] On May 8, 2023, the presiding officer granted Hapag's motion to file its second third-party complaint, finding that as revised the complaint ("Third-Party Complaint") alleged violations of Sections 41102(c) and 41104(a)(14) of the Shipping Act.[18] On May 12, 2023, the FMC published a public Notice of Filing of Third-Party Complaint ("Notice of Complaint"), which had been served to CSXT as of May 11, 2023.[19] CSXT was required to file a response to the Third-Party Complaint within twenty-five (25) days from the date of service (thus due on June 5, 2023). For the foregoing reasons, counsel for CSXT has entered a limited appearance for the purpose of contesting jurisdiction over the claims alleged against CSXT in the Third-Party Complaint and filing the instant Motion to Dismiss ("Motion").

II. LEGAL STANDARD

Although the FMC Rules do not expressly provide for motions to dismiss, it is well established that a respondent may bring motions pursuant to the Federal Rules of Civil Procedure

[15] *See* Respondents' Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35, Document Number 18, April 13, 2023.
[16] *See* Order on Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35, Document Number 24 at pg. 2, April 27, 2023.
[17] *See* Renewed Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35, Document Number 25, May 4, 2023.
[18] *See* Second Order on Motion for Leave to File Third-Party Complaint, FMC Docket No. 22-35, Document Number 24, May 8, 2023.
[19] *See* Notice of Filing of Third-Party Complaint, FMC Docket No. 22-35, Document Number 29, May 12, 2023.

("FRCP"), which is made applicable to FMC proceedings pursuant to 46 C.F.R. § 502.12 when not inconsistent with FMC Rules and when consistent with sound administrative practice.

Regarding motions to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1), the moving party can assert a facial attack or a factual attack. A facial attack challenges whether the complaint has sufficiently alleged subject matter jurisdiction, while a factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, in which case matters outside the pleadings, such as testimony and affidavits, are considered." *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al*., Docket 09-01, 2011 WL 7144008, *11 (FMC Aug. 1, 2011) (citations omitted). The complainant bears the burden of establishing subject matter jurisdiction in a motion to dismiss. *See Id.*at *26 ("The Commission must presume that it lacks subject-matter jurisdiction until Plaintiff, as the party seeking to invoke the jurisdiction, establishes otherwise") (internal citations omitted). Whether a respondent is a regulated entity subject to the Shipping Act provisions or prohibitions at issue is a question of subject matter jurisdiction. *See Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, Docket No. 06-02, 2007 WL 2468431, at *4 (F.M.C. Aug. 2, 2007) (affirming dismissal for lack of subject matter jurisdiction in Section 10(d)(1) and 10(d)(4) claims on the basis of respondent's failure to qualify as an MTO within the meaning of 46 U.S.C. § 40102(14)). Under FRCP 12(b)(1), a court must grant a motion to dismiss if the court lacks subject matter jurisdiction. *See Mitsui O.S.K. Lines Ltd*., 2011 WL 7144008, *27, *citing Judicial Watch, Inc. v. U.S. Food & Drug Admin*., 514 F. Supp. 2d 84, 86 (D.D.C. 2007).

III. ARGUMENT

The Third-Party Complaint must be dismissed against CSXT because the Commission lacks jurisdiction over CSXT with respect to the Shipping Act causes of action alleged in the Third-Party Complaint. As discussed more fully below, (1) CSXT is not a regulated entity subject to Commission jurisdiction under the causes of action at issue (Sections 41102(c) and 41104(a)(14)); (2) Hapag, as the ocean carrier under the instant through bills of lading is the relevant regulated entity over which the Commission has jurisdiction for the intermodal charges and practices at issue in the Amended Complaint and the Third-Party Complaint; (3) the other allegations added by Hapag in the revised Third-Party Complaint do not establish a basis for jurisdiction over CSXT; and (4) pendent jurisdiction is not a permissible basis to extend Commission jurisdiction over CSXT in this case.

a. CSXT Is Not a Regulated Entity Subject to the Jurisdiction of the Commission with Respect to the Shipping Act Violations Alleged in the Third-Party Complaint

The Third-Party Complaint alleges violations of 46 U.S.C. § 41102(c) and § 41104(a)(14) of the Shipping Act. Third-Party Complaint, Section VII, ¶¶ 35-44 (Count I) and ¶¶ 45-48 (Count II). Chapter 411 of Part A, Subtitle IV, of Title 46 contains the codification of "Prohibitions and Penalties" under the Shipping Act, as amended and codified, at 46 U.S.C. §§ 41101 through 41110. Section 41102 sets forth certain "General Prohibitions" while other sections in Chapter 411 address prohibitions specific to certain categories of entities regulated under the Shipping Act, *e.g.*, Section 41104 prohibitions are applicable to "Common Carriers" and Section 41106 prohibitions are applicable to "Marine Terminal Operators."

Section 41102(c) of the Shipping Act, which is within the "General Prohibitions" section, prohibits "A common carrier, marine terminal operator, or ocean transportation intermediary" from failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

Section 41104(a)(14) of the Shipping Act, which is within the "Common Carriers" section (as amended by Section 7 of the Ocean Shipping Reform Act of 2022 ("OSRA 2022")), provides that "A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not—. . . . (14) assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations)."

Each of the terms "common carrier", "marine terminal operator", and "ocean transportation intermediary" refer to regulated entities as specifically defined in the Shipping Act, 46 U.S.C. § 40102 (46 U.S.C. §§ 40102(7), (15), and (20), respectively). The Commission has addressed on many occasions the jurisdictional nature of the regulated entities subject to the Shipping Act prohibitions. Certain Shipping Act causes of action are cognizable against any person, see, e.g., Section 41102(a) and (b) ("A person may not..."), and its precursor Section 10(a) of the 1984 Act ("No person may..."). However, the jurisdictional scope of many other Shipping Act provisions and prohibitions is limited only to the specific class or classes of regulated entities identified therein, e.g., only a "common carrier", a "marine terminal operator", or an "ocean transportation intermediary" is subject to Section 41102(c) (and its precursor Section 10(d)(1) of the 1984 Act).

For this reason, the Commission has not hesitated to dismiss causes of action brought against a respondent that does not qualify as one of the jurisdictionally regulated entities. *See Lake Charles Harbor and Terminal District*, Docket No. 06-02, 2007 WL 2468431 at *5-6 (affirming motion to dismiss Section 10(d)(1) cause of action (the predecessor to Section 41102(c)) for lack of jurisdiction on the basis that the respondent was not a marine terminal operator as required for the cause of action); *see also Pate Stevedore Company of Mobile, et al. v. Alabama State Docks Department, et al. v. Aetna Casualty & Surety Company*, 1987 FMC LEXIS 25, *23-*24 (December 2, 1987, Kline, ALJ) (granting motion for summary judgement dismissing section 10(d)(1) and 10(b)(12) causes of action against subrogated insurance company, Aetna, on the basis that Aetna was not a regulated entity as required for the purposes of the causes of action).

Here, the Third-Party Complaint does not allege that CSXT is any of the foregoing regulated entities required to establish jurisdiction under either Section 41102(c) or 41104(a)(14). To the contrary, the Third-Party Complaint alleges that CSXT "is a rail and intermodal transportation carrier." Third-Party Complaint ¶ 6. That allegation does not meet the definition of any regulated entity pursuant to 46 U.S.C. §§ 40102(7), (15) or (20). Hapag has not sufficiently alleged a basis for subject matter jurisdiction for the claims alleged against CSXT in the Third-Party Complaint.[20]

[20] Having failed to meet its burden to sufficiently allege jurisdiction, the Third-Party Complaint must be dismissed. It is also apparent that Hapag could not establish jurisdiction outside of the complaint either. While Hapag implies in its second Motion for Leave to File that Hapag could file "a separate complaint against CSX" (Second Motion for Leave, at 5), Hapag cites no support or argument for how the Commission would have jurisdiction over a railroad like CSXT in a Shipping Act complaint brought directly by Hapag against CSXT. Nor is Hapag's assertion that it could bring its own separate action supported by the allegations in the Third-Party Complaint, which is premised on a theory of contingent liability in the event that Hapag is first found to be in violation of the Shipping Act. *See* Third-Party Complaint ¶ 49 ("in the event that Respondents are found to be in violation of [the Shipping Act], CSX[T] is likewise in violation...and is liable to Respondents for whatever reparations and other relief Respondents may be ordered to pay to Complainant."). Notably, Hapag did not argue in either of its motions for leave to file a third-party complaint that Hapag could bring Section 41102(c) or 41104(a)(14) causes of action directly against

b. The Commission has Jurisdiction Over Hapag as the Regulated Ocean Carrier for the Activity Alleged in the Amended Complaint, but the Commission Does Not Have Jurisdiction over Hapag's Subcontractor CSXT for the Activity of CSXT Alleged in the Third-Party Complaint

It is essential to understand the scope of the Commission's jurisdiction over practices and charges relating to intermodal rail movement of cargo under through bills of lading in order to properly understand why the Commission lacks jurisdiction over CSXT under the Third-Party Complaint. One of Hapag's new jurisdictional allegations in the revised Third-Party Complaint is especially instructive. Hapag alleges that "[c]onsidering that the Complaint's claim is a Shipping Act claim arising out of the terms and conditions controlled by CSX[T] and applicable directly to Dey, this is the only appropriate venue for this claim." Third-Party Complaint ¶ 11. This allegation highlights Hapag's misapprehension about the Commission's jurisdiction in connection with cargo moving under intermodal through bills of lading.

The Commission has jurisdiction over the *cargo and practices of a regulated entity* in connection with cargo moving under intermodal through bills of lading, but the Commission does not have jurisdiction over the practices of an *unregulated entity* in connection with cargo moving under intermodal through bills of lading. Thus, the Commission has jurisdiction over Hapag with respect to the Dey cargo moving under its through bills of lading, but the Commission does not have jurisdiction over CSXT or over its practices at inland terminals in connection with the Dey cargo moving under Hapag's through bills of lading (nor would it have jurisdiction over intermodal rail movements not under an ocean carrier's through bills of lading).

CSXT itself, nor does Hapag allege that the Commission has jurisdiction to order CSXT itself to pay reparations, to Hapag or to Complainant.

The Commission addressed this issue in the 2020 interpretive rulemaking on demurrage and detention. In response to comments about the proposed language now codified at 46 C.F.R. § 545.5, the Commission clearly distinguished the jurisdiction that it has over regulated ocean carriers for activities and practices in connection with inland/intermodal cargo under through bills of lading, from the jurisdiction that it does not have over the unregulated subcontractors of ocean carriers in connection with inland/intermodal cargo.

> Another scope-related comment involved the application of the rule outside of marine terminals. The American Cotton Shippers Association noted that ocean carriers, "responding to the demands of consumers, have crafted service contracts that incorporate inland movements and services" and "[t]hus the reasonableness of detention and demurrage practices and regulations, as they apply to inland movements in point-to-point service contracts, have an equally significant impact on the fluidity of all ocean-borne trade." It urges that the rule account for the inland components of oceanborne shipping transactions and apply to point-to-point service contracts. Similarly, IMC Companies believes there is a "gray area of jurisdiction" in intermodal shipping, and requests "greater clarity directed to ocean carriers[']intermodal shipments moving on a through bill of lading with regard to application of the incentive principles the FMC has outlined."
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> Nothing in the rule limits its scope to shipping activities occurring at ports or marine terminals. Rather, section 41102(c) concerns ocean carrier, marine operator, and ocean transportation intermediary practices and regulations "relating to or connected with receiving, handling, storing, or delivering property." Ocean carrier demurrage and detention practices are subject to section 41102(c) and Commission oversight, regardless of whether the practices relate to conduct at ports or inland, with some caveats.[21]

The Commission further explained two jurisdictional boundaries (the "caveats" noted at the end of the block quote above). First, the ocean carrier has to be acting in a regulated capacity, which is not contested here (*see, e.g.,* Answer ¶¶ 18-20 (containers moved under Hapag intermodal

[21] Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 at 29650 (Final Rule May 18, 2020)(emphasis added).

through bills of lading from Antwerp, Belgium to CSX's rail terminal in Nashville, TN)).[22] Second, the Commission's jurisdiction covers the ocean carrier—including the ocean carrier's rates and the practices of its subcontractors, such as its rail carriers under ocean through bills—but not the rail carriers or their practices themselves.[23]

As the Commission expressly recognized, the Surface Transportation Board ("STB") has jurisdiction over regulation of railroads and inland rail terminal demurrage and detention practices, *except* that in the case of inland rail movements under ocean through bills of lading, the Commission has jurisdiction over the *ocean carrier's* practices relating to the inland rail movements, including holding the *ocean carrier* responsible for the practices of its subcontractors, but the Commission does not have jurisdiction over the rail carrier itself or authority to regulate the practices of the rail carrier, which are matters within the jurisdiction of the STB.[24]

The Commission addressed this same issue again less than a year ago in response to a recommendation from the National Shipper Advisory Committee ("NSAC") seeking: "to expand the scope of the Federal Maritime Commission to include oversight over all carriers, subcontractors, rates, demurrage, detention, storage under any other name, terms and conditions,

[22] "[N]ot everything an ocean carrier or marine terminal operator does is within the Commission's purview—an ocean carrier or marine terminal operator must be acting as a common carrier or marine terminal operator as defined by the Shipping Act with respect to the conduct at issue. This is often not a difficult question, but the further one gets away from the terminal, the more complicated the inquiry may become, and it is not a question that can always be answered in the abstract." FMC Interpretive Rule, 85 Fed. Reg. 29638 at 29650.

[23] "Commenters were also concerned about railroads and railyards. To be clear, section 41102(c) of the Shipping Act applies to common carriers, marine terminal operators, and ocean transportation intermediaries. The Commission is without authority to address practices of railroads or rail facilities unless they fall within one of those statutory definitions. That said, if the practice at issue relates to rail but is nonetheless an ocean carrier practice, e.g., is contained in an ocean carrier tariff or service contact [sic], then the guidance in the rule would likely apply." FMC Interpretive Rule, 85 Fed. Reg. 29638 at 29650.

[24] 49 U.S.C. § 10702 gives the STB exclusive jurisdiction to regulate railroad practices, and 49 U.S.C. § 10746 gives the STB exclusive jurisdiction to regulate railroad demurrage charges. *See* 49 U.S.C. § 10501(b) (providing that STB's jurisdiction over transportation by rail carriers is "exclusive"). Note, however, that railroad transportation of intermodal containers on flatcars has been exempted from STB regulation pursuant to 49 U.S.C. § 10502. *See* 49 C.F.R. Part 1090.

and modes reflected on any Bill of Lading issued by an ocean carrier."[25] The Commission responded in relevant part that the Commission has jurisdiction over intermodal through bill practices via its jurisdiction over the regulated entity, e.g., the ocean carrier, but that it did not have jurisdiction over unregulated entities involved with the intermodal movements, *e.g*, rail carriers, absent a change in law to expand the Commission's jurisdiction:

> Any expansion of the FMC's jurisdiction must be legislated by Congress. The Commission has direct jurisdiction over common carriers, marine terminal operators (MTO), and ocean transportation intermediaries (OTI). This includes jurisdiction over "through transportation."
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> Through transportation means continuous transportation between the origin and destination and is offered or performed by one or more carriers, at least one of which is a common carrier under the Shipping Act. An ocean carrier that provides a shipper with a through transportation rate from Asia to an inland destination in the United States will be subject to Commission jurisdiction for the entire through transportation, as will any ocean transportation intermediaries and/or marine terminal operators involved in the through transportation. In other words, ocean cargo that is shipped under a through bill of lading to a final destination in the United States remains under Commission jurisdiction for any Shipping Act violations.
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> The Commission agrees with the importance of information accuracy to ensure an efficient supply chain. The provision of inaccurate information by an ocean carrier, OTI, or MTO, particularly with regards to cargo and equipment locations, is subject to the general prohibition contained in 46 U.S.C. § 41102(c) against failure "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."[26]

Returning to the allegation in Paragraph 11 of the Third-Party Complaint, the Commission has jurisdiction over Hapag for the allegations against it in the Amended Complaint because Hapag is the ocean carrier responsible for the movement under the through bills of lading at issue. In that

[25] *See* June 30, 2022 Response of FMC Secretary William Cody to the National Shipper Advisory Council, on behalf of the Commission in response to Recommendation No. 2 of the NSAC dated May 6, 2022 ("NSAC Response").
[26] *Id*. at 1-2 (emphasis added).

regard, the Commission is indeed the appropriate venue for Dey's claims against Hapag. Moreover, if, as Hapag alleges in Paragraph 11 of the Third-Party Complaint, the claim was only "arising out of the terms and conditions controlled by CSX and applicable directly to Dey"—instead of arising under the ocean carrier's obligations as common carrier under an intermodal through bill of lading—the Commission would plainly have no jurisdiction over such practices in connection with separate inland intermodal moves under the jurisdiction of the STB.

c. The Other New Allegations in Counts I and II do Not Establish Jurisdiction for the Causes of Action against CSXT

Hapag's first effort to file a third-party complaint against CSXT did not allege that CSXT itself violated any prohibitions of the Shipping Act. Having failed to allege violations of the Shipping Act by CSXT, as required for any complaint pursuant to Rule 502.62(b)(4), the ALJ denied Hapag's request for leave to file. Order on Mot. to Amd. Compl., Doc. 24. Undeterred, Hapag tried again. The second time, Hapag added a section titled "Violations of the Shipping Act" containing two counts alleging violations of 46 U.S.C. § 41102(c) and § 41104(a)(14). Hapag argued in its renewed Motion for Leave to File that "[t]he proposed complaint clearly alleges specific violations of the Shipping Act." Renewed Mot. for Leave, Doc 25, at 5. But while the new allegations "clearly" alleged Shipping Act violations *generally*, they still fail to allege cognizable violations of the Shipping Act *by CSXT*. We address each Count in turn:

1. Count 1 – Section 41102(c)

Hapag's new Count I is set forth in Section VII, ¶¶ 35-44 of the Third-Party Complaint. Hapag acknowledges, as it must, that the prohibition in Section 41102(c) expressly applies to a common carrier, marine terminal operator, or ocean transportation intermediary. Third-Party Complaint ¶ 35. As discussed above, the Third-Party Complaint does not allege that CSXT

qualifies as any such regulated entity against which the Shipping Act has jurisdiction for the purpose of bringing a Section 41102(c) claim.

In an attempt to overcome this substantial jurisdictional defect, Hapag advances a number of novel theories. First, in Paragraphs 36 to 41, Hapag appears to allege that Hapag's common carrier obligations under its intermodal through bills were completed "after free time expired." Third-Party Complaint ¶¶ 36-41 (e.g., "[a]fter free time expired, Hapag's delivery obligations ended and CSX[T] was handling and storing the cargo on behalf of Complainant" and "Dey was responsible for transportation of the containers beyond the CSX[T] facility on merchant haulage terms."). These allegations fail to provide a basis for jurisdiction over CSXT for the same reason discussed above in connection with Paragraph 11. If, as Hapag appears to allege, the charges at issue were assessed in effect under merchant haulage terms, instead of carrier haulage terms (which is just another way of describing charges arising under a separate inland bill of lading, instead of arising under an intermodal through bill of lading), then the Commission would obviously lack jurisdiction over such charges.

Next, in Paragraphs 42 and 43, Hapag theorizes that if "Hapag is found liable to Complainant [for] the charges unilaterally imposed by CSX[T] then CSX[T], as the party responsible for the charges, it is in violation of the Shipping Act and liable to Hapag." Third-Party Complaint ¶ 42. But a party outside of the jurisdiction conveyed by the Shipping Act cannot somehow come within that jurisdiction simply on an allegation that they are somehow "responsible" for an alleged Shipping Act violation. If that were true, then the jurisdictional limits of the Shipping Act would have no meaning. CSXT does not qualify as a regulated entity and Hapag does not allege that it does, either in the allegations in Paragraph 42, in the similar allegation

in Paragraph 43 referencing CSXT as Hapag's subcontractor, or elsewhere in the Third-Party Complaint.

Finally, in Paragraph 44, Hapag alleges that "CSX[T]'s failure to permit Dey's motor carrier to provide its own chassis constitutes an unreasonable practice that violates § 41102(c)." Third-Party Complaint ¶ 44. However, this paragraph too fails to allege a jurisdictional basis for a violation of the Shipping Act *by CSXT*. As addressed more fully herein in section III(b) above, because CSXT is not subject to the Shipping Act, even assuming that chassis provisioning issues during the inland movement under an ocean carrier's through bill of lading constitute unreasonable practices under the Shipping Act, such alleged violations are the responsibility of the ocean carrier that is subject to Shipping Act jurisdiction.[27] CSXT is not itself subject to the reasonableness standards of the Shipping Act with respect to its intermodal rail movements; rather, CSXT's intermodal rail movements are subject to the jurisdiction of the STB.[28] Thus, simply alleging that "CSX[T]'s failure . . . violates § 41102(c)" does not overcome the threshold fact that CSXT is not a regulated entity for which the Commission has jurisdiction for the purpose of a Section 41102(c) claim.

2. Count II – Section 41104(a)(14)

Hapag's new Count II is set forth in Section VII, ¶¶ 45-48 of the Third-Party Complaint. As with Count I, Hapag acknowledges in Paragraph 45 that Section 41104(a)(14) expressly applies to a common carrier. Third-Party Complaint ¶ 45 ("a common carrier, either alone or in

[27] *See, e.g.*, NSAC Response ("An ocean carrier that provides a shipper with a through transportation rate from Asia to an inland destination in the United States will be subject to Commission jurisdiction for the entire through transportation.").
[28] *See* Section III(b).

conjunction with any other person, directly or indirectly, shall not..."). As noted above, CSXT is not, and is not alleged to be, a common carrier within the meaning of 46 U.S.C. § 40102(7).

Hapag tries another novel, quasi-jurisdictional assertion in Paragraph 46, alleging that "CSX[T] acted as "any other person" as described in section 411014(a)(14)[sic]." Third-Party Complaint ¶ 46. But, the "alone or in conjunction with any other person" language in Section 41104(a) (former Section 10(b) of the Shipping Act of 1984) does not extend jurisdiction under Section 41104(a) to "any other person" akin to "any person" prohibitions such as Section 41102(a) and (b) (Section 10(a) of the 1894 Act). In *International Association of NVOCC's v. Atlantic Container Line Direct Container Line*, the Commission affirmed dismissal for lack of subject matter jurisdiction and expressly rejected the argument that the "in conjunction with" carriers language under Section 10(b) expanded the jurisdiction of a Section 10(b) claim to parties other than regulated entities. Docket No. 81-5, 1990 WL 427461, at *12 (FMC Feb. 5, 1990). Complainants in *International Association of NVOCC's* argued that Section 10(b) permitted jurisdiction over associations because the alleged negotiation and enforcement of the rules challenged in that case was done "in conjunction with" the carriers. Rejecting the argument, the Commission stated that "[t]his is a distortion of the statute. Section 10(b) forbids carriers from certain practices undertaken by the carriers alone or with other persons. It does not provide that if a carrier engages in one of the condemned activities 'in conjunction with' someone else, that other person has violated the statute as well and is equally liable for reparations to an injured party. As section 10(a) shows, Congress did make all "persons" liable for some Shipping Act violations. . . . If Congress had wished to make a similar choice with respect to the practices covered by section 10(b), the statutory language would have so indicated." *Id*. at * 12 (internal citations omitted); *see also, DNB Exports LLC v. Barsan*, Docket No. 11-07, 2014 WL 5316332, *35 (ALJ Jan. 24, 2014)

(distinguishing the broader jurisdiction of Shipping Act prohibitions that may be brought against "any person" such as Section 10(a) of the 1984 Act versus prohibitions that may only be brought against specific regulated entities, such as Section 10(b)(13)).[29]

To the contrary, the "in conjunction with any other person" proviso in Section 41104(a), and Section 10(b) before it, makes it clear that an ocean carrier subject to Section 41104(a) cannot dodge its responsibility by pointing to another person that may have been involved with the ocean carrier's violation of the Shipping Act. *See International Association of NVOCC's*, 1990 WL 427461, at *12 (affirming the view that the "in conjunction with" language in Section 10(b) "was meant to foreclose carriers from certain defenses" and based on a review of prior precedent, holding that "[t]hese rebuffs of carrier efforts to shift responsibility for discriminatory practices to "other persons" are consistent with our conclusion that section 10(b) regulates only carrier practices."). Simply put, § 41104(a) applies to violations by common carriers, whether acting alone or in conjunction with "any other person," and an allegation that an entity was such a "person" acting alongside the common carrier does not transform the entity into an ocean common carrier subject to the Commission's jurisdiction. Indeed, the allegation actually highlights that *Hapag* is the entity subject to jurisdiction under Section 41104(a)(14).

In addition, in Paragraph 47, Hapag's allegations that CSXT "independently assessed, billed, collected" etc. and "without prior notice to or approval of Hapag" have no jurisdictional bearing on CSXT. As discussed in connection with Hapag's "party responsible for the charge"

[29] Exceptions were not filed with respect the the relevant jurisdictional findings of the Initial Decision. *See* Docket No. 11-07, Order on Exceptions to Initial Decision, Docket No. 11-07 (FMC Sept. 4, 2014). Section 10(b)(13) is now codified as 46 U.S.C. § 41103(a), and provides in relevant part that "a common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not ..." which is the same "either alone or in conjunction with" jurisdictional scope proviso as 46 U.S.C. § 41104(a): "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not..."

assertions (in Paragraphs 42-43 of Count I, discussed above, and repeated in Paragraph 48 in Count II), allegations about Hapag's alleged notice and/or approval of the charges in connection with inland transportation under Hapag's intermodal through bill of lading are not jurisdictionally relevant factors for CSXT.

However, Hapag's allegations in Paragraph 47 are relevant to Dey's claims against Hapag. Whether or not Hapag billed the charges itself, or had prior notice or approved the charges at issue, may be relevant to Commission's determination of reasonableness, or unreasonableness, of Hapag's practices in connection with its provision of intermodal services. *See, e.g., Marcella Shipping Co., Ltd*., 23 S.R.R. 857, 862-63 (ALJ March 26, 1986) (the Shipping Act does not permit evasion of a regulated entities responsibilities under the Act on account of "a plea of ignorance" over the conduct of an agent or subcontractor).

d. Pendent Jurisdiction Does Not Permit the Commission to Exercise Jurisdiction Over CSXT for the Allegations in the Third-Party Complaint

Hapag's first attempt to bring a third-party complaint against CSXT alleged that the "FMC has personal jurisdiction over CSXT through pendent jurisdiction because claims against CSX[T] arise out of a common nucleus of operative facts with those against Hapag." Hapag included that same allegation, unchanged, in the revised Third-Party Complaint, and added an allegation following it that the "FMC has personal jurisdiction over CSX[T] for the same reasons that the FMC has personal jurisdiction over Hapag-Lloyd (America) LLC." Third-Party Complaint ¶¶ 9-10. It is not clear what "same reasons" Hapag is referring to in the allegations.

Notwithstanding its present assertion against CSXT, Hapag took the position in n its Motion to Dismiss, that the pendent jurisdiction principle that the Commission had recently sanctioned in *TCW v. Evergreen* with respect to a U.S. agent of an ocean carrier should not be

applied to Hapag-Lloyd America, its U.S. agent in this case. See Motion to Dismiss, at 1, n. 1.[30] Then, after Dey filed the Amended Complaint asserting the same pendent jurisdiction allegations, Hapag denied that the Commission has pendent jurisdiction over Hapag-Lloyd America. Answer ¶ 10, (denying third sentence). Since Hapag is currently contesting pendent jurisdiction as to Hapag-Lloyd America, Hapag cannot credibly allege that the jurisdictional basis it is contesting in the Amended Complaint should, for the "same reasons," provide a valid basis for jurisdiction in the Third-Party Complaint.

Whatever Hapag's allegations of the "same reasons" actually means, it is quite clear that CSXT is not remotely in the same posture as an ocean carriers' U.S. subsidiary and agent acting on behalf of the ocean carrier, at the ocean carrier's direction and control, in connection with assessing and collecting disputed demurrage or detention charges.[31] Indeed, Hapag attempts to distance itself from CSXT, alleging in the jurisdictional section of the Third-Party Complaint that "CSX independently imposed and collected the per diem charges." *See, e.g.*, Third-Party Complaint ¶ 12 (*also, see* Hapag's allegations in in Paragraphs 36-41 of Count I).

Hapag otherwise provides no argument or authority for how pendent jurisdiction would permit causes of action against an unregulated third-party over which the Commission lacks subject matter jurisdiction simply because the claims allegedly "arise out of a common nucleus of operative facts." Third-Party Complaint ¶ 9. To do so would upend the Commission's statutory

[30] Hapag mainly sought to distinguish *TCW v. Evergreen* by noting that in the original Dey complaint Hapag-Lloyd (America) LLC was the sole respondent, unlike in *TCW v. Evergreen* where both the carrier and its U.S. agent were both originally respondents. However, Hapag also argued that the Commission's underlying reliance on *Action Embroidery Corp. v. Atl. Embroidery, Inc*., 268 F. 3d 1174 (9th Cir. 2004) to find "personal jurisdiction over an agent in TCW is flawed and incorrect."

[31] It is therefore not necessary to address the Commission's application of pendent jurisdiction in *TCW v. Evergreen*, or the Commission's reliance on *Action Embroidery* therein to find pendent jurisdiction over two different defendants as opposed to two a single defendant under different statute.

jurisdiction and render moot years of considered jurisdictional precedent. Consider, for example, ALJ Kline's analysis of the subrogated insurer of a marine terminal, Aetna, in *Pate Stevedore Company*, stating that:

> If Aetna is to be found to be subject to the Commission's jurisdiction, therefore, it must be found to be carrying on or to be engaged in the business of furnishing terminal facilities in connection with a common carrier by water. Obviously, since Aetna is admittedly an insurance company, the question arises as to how it can be transformed into a marine terminal operator on the basis of the statutory definitions set forth above and the operative facts to which the parties have agreed.
>
> It is basic law that an administrative agency is limited in its jurisdiction by its parent statute and that parties cannot confer jurisdiction on the agency by stipulation. Nor can an agency assert jurisdiction because it has a salutary purpose in mind. As the Commission has stated:
>
> ". . . [W]e wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission enlarge or divest ourselves of that statutory jurisdiction. *American Union Transport v. River Plate & Brazil Confs*., 5 F.M.B. 216, 224 (1957)."[32]

Attempting to apply pendent jurisdiction to extend the Commission's jurisdiction over an unregulated party such as CSXT for the causes of action at issue in the Third-Party Complaint would exceed the express jurisdiction of the Shipping Act.

Finally, notwithstanding the conclusory allegations in the Third-Party Complaint of a "common nucleus of operative facts" and that Shipping Act liability of CSX would *ipso facto* follow a finding that Hapag violated the Shipping Act, see e.g., Third-Party Complaint ¶¶ 9, 42, 43, 48 and 49, the Third-Party Complaint is replete with allegations that show that any alleged putative liability of CSXT to Hapag would involve substantially *separate issues and facts* from Hapag's common carrier liability under the Shipping Act to Dey. These include Hapag's

[32] *Pate Stevedore Company of Mobile, et al. v. Alabama State Docks Department, et al. v. Aetna Casualty & Surety Company*, 1987 FMC LEXIS 25, *23-*24 (December 2, 1987, Kline, ALJ).

allegations of liability allegedly "arising out of the terms and conditions controlled by CSXT" (¶ 11); whether the terms of service between CSXT and Hapag were allegedly satisfied "as agreed" between CSXT and Hapag (¶ 37); whether CSXT's charges were "without prior notice to or approval of" Hapag, (¶ 41); and whether the alleged failure of CSXT regarding provision and use of chassis violated any obligations of CSXT to Hapag (¶ 44).

To the extent that Hapag alleges that CSXT has liability to Hapag, perhaps under the terms of an agreement between CSXT and Hapag implied by the allegations highlighted above, such liability would be a function of obligations between CSXT and Hapag outside of the Shipping Act over which the Commission lacks jurisdiction to adjudicate. *See, e.g., Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, Docket No. 09-01, 2011 WL 7144008, *12, *20-21 (FMC August 1, 2011) (affirming dismissal for lack of jurisdiction of cross-claim premised on indemnification of Shipping Act liability arising under the terms of agreements between the parties).

III. Conclusion

For the foregoing reasons, the Third-Party Complaint against CSXT should be dismissed with prejudice because CSXT is not an ocean common carrier or marine terminal operator, and is not subject to 46 U.S.C. § 41102(c) or § 41104(a)(14).

Dated: June 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June 2023, the foregoing Third-Party Respondent's Motion to Dismiss was served via electronic mail on:

Complainant:
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By:/s/ Kristine O. Little
Kristine O. Little