BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. 23-05

RAHAL INTERNATIONAL INC.,

Complainant,

v.

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

Respondents and Third-Party Complainants,

v.

MAHER TERMINALS, LLC, GCT NEW YORK LP

and GCT BAYONNE LP,

Third-Party Respondents.

REPLY IN SUPPORT OF THIRD-PARTY RESPONDENTS' MOTION TO DISMISS

Third-party respondents, GCT New York LP ("GCT NY") and GCT Bayonne LP ("GCT Bayonne") (collectively "GCT Third-Party Respondents")[1] submit this Reply to the Response of Hapag-Lloyd AG and Hapag-Lloyd (America) LLC ("Hapag" or "Third-Party Complainants") to GCT Third-Party Respondent's Motion to Dismiss ("Motion") (Hapag's Response, hereinafter referred to as the "Opposition").[2]

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[1] Effective on or about August 31, 2023, GCT New York LP and GCT Bayonne LP underwent conversions to limited liability companies and ultimately changed their names to Port Liberty New York LLC and Port Liberty Bayonne LLC, respectively.

[2] Hapag's Opposition is titled "Third-Party Complainant's Response to Third-Party Respondent's Motion to Dismiss *for Lack of Jurisdiction*" Opp. 1 (emphasis added). However, the Motion moves to dismiss on the basis of failure to state claims for which relief can be granted, Mot. 1,14, *i.e.* FRCP 12(b)(6), not for lack of jurisdiction, *i.e.,* FRCP 12(b)(1) or (2).

REPLIES

I. The Parties agree that *Iqbal/Twombly*, and the two-pronged approach thereunder, is the applicable legal standard here.

The Motion and the Opposition agree that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) together with *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) ("*Iqbal/Twombly*"), is the appropriate legal standard for evaluating a motion to dismiss for failure to state a claim. *See* Mot. 3-5, Opp. 4-5. Further, both Parties recognize and cite with approval the Commission's application of *Iqbal/Twombly* in *Maher Terminals LLC v. The Port Authority of New York and New Jersey* ("*Maher*"), 34 S.R.R. 35, 2015 WL 9426189 (FMC Dec. 18, 2015).

Both Parties also agree that the two-pronged *Iqbal/Twombly* approach is appropriate here. Mot. 4-5; Opp. at 6. The two-pronged approach guides the Presiding Officer to (1) first identify and eliminate conclusory allegations that are not entitled to the assumption of truth, and (2) second, then evaluate whether the remaining well-pled allegations plausibly give rise to an entitlement to relief. Mot. 4-5; Opp. at 6. The opening Motion is presented in this manner and order. Section III(a) provides a summary of the main argument, Mot. 5-6, Section III(b) address the first prong—conclusory allegations not entitled to the assumption of truth, Mot. 6-8, and Section III(c) addresses the second prong—plausibility, Mot. 8-10.

A. Hapag does not contest the specific application of prong 1 in Section III(b) of the Motion to Dismiss.

Section III(b) of the Motion applies the first prong of *Iqbal/Twombly* to specific allegations in the Third-Party Complaint. Mot. 6-8. The allegations in paragraphs 1, 2, 11, 39, and in the Introduction to the Third-Party Complaint, are conclusory legal assertions not entitled to the assumption of truth. Mot. 6-8. The Opposition does not attempt to rebut the Motion on these points and allegations. Having not responded or opposed these points, Hapag should be deemed

to concede that the allegations referenced in Section III(b) are not entitled to the assumption of truth.

B. Hapag misapplies the plausibility standard of prong 2.

It is apparent that the main issue to be decided is the proper application of the second prong—whether the Third-Party Complaint pleads sufficient factual content to support reasonable inferences that it is not merely possible, but that it is plausible, for the conduct alleged to constitute unlawful practices. Section III(c) of the Motion explains why the remaining substantive allegations in the Third-Party Complaint are not sufficient to draw reasonable inferences of plausible violations. Mot. 8-10.

1. The Opposition does not rebut key positions and authorities on plausibility.

As explained in the Motion, "it is not a violation of the Shipping Act for an MTO to maintain control of its terminal facility, the containers . . . or collect fees and charges." *Id*. Those allegations on their face simply do not allege unreasonable or unlawful conduct. *See, e.g., Maher* *13 (as a starting point, the facts alleged must be sufficient to constitute the cause of action at issue: "[complainant] must allege facts that not only allow the Commission reasonably to infer that [respondent] was treated differently than other entities but that also allow the Commission reasonably to infer that the treatment constituted an unreasonable preference or prejudice. Differences in treatment alone do not necessarily violate the Shipping Act.")(the principle applies to other Shipping Act causes of action).

Indeed, the alleged conduct relied upon heavily in the Third-Party Complaint and the Opposition—terminal control and charging published tariff schedule rates—is conduct that is *consistent* with lawful conduct. Mot. 10. MTOs are required to maintain control and security under applicable law and regulations, such as the Maritime Transportation Security Act of 2002

and U.S. Customs and Border Protection laws and regulations, among others, and charging and enforcing published tariff schedule rates is expressly lawful pursuant to 46 U.S.C. § 40501(f). Factual allegations consistent with lawful conduct do not require inferring unlawful conduct. Mot. 10 citing *Maher at* *15 *citing Iqbal*, 556 U.S. at 681. The Opposition does not contest or attempt to rebut these authorities.

Hapag also does not contest (1) the argument in the Motion that certain factual allegations in the Third-Party Complaint are internally inconsistent and therefore not entitled to an assumption of truth and/or plausibility, Mot. 12 (¶¶ 2, 14, 31, 32, 33, 34, 36); and (2) that the Third-Party Complaint only alleges one cause of action, 46 U.S.C. § 41102(c), Mot. 13.

2. The Opposition does not overcome the inadequacy of the alleged facts.

The main problem with Hapag's reliance on allegations of general conduct as allegedly unreasonable is that the Third-Party Complaint fails to "plead facts showing *how* the [respondent's] conduct was unreasonable." *Maher* *14 (emphasis in original). That Hapag is "not required to plead with particularity does not absolve it of the requirement to allege facts that make its claims plausible, which necessarily requires factual allegations involving some combination of the who, what, when, where, and how of Shipping Act violations." *Maher* *14.

The Opposition does not address this shortcoming by pointing to new or other facts, but instead suggests that factual allegations are not that important. Mot. 6-7. Citing *Maher* with approval, Mot. 6 ("in *Maher*, these rules were explained in depth"), Hapag highlights three instances in the *Maher* decision where the Commission found causes of action adequately pled despite the presence of a conclusory legal conclusion. But in each instance there were *also other alleged facts* supporting plausibility of the claims. Opp. 6-7. While the Opposition attempts to

minimize the significance of the *other alleged facts*, it is clear that the other facts were pivotal to the Commission's decisions on plausibility in *Maher*.

The Commission's treatment of Count VI in the *Maher* matter is instructive. In Count VI, Maher alleged that a port practice of excluding Maher from certain locations was an unreasonable exclusion practice. Despite the cause of action inlcuding a conclusory allegation of "unreasonableness," because the complaint also included additional factual allegations about *how* the port engaged in exclusionary practices, the Commission reasoned that the facts "reasonably allowed the inference" that the conduct "was not justified by legitimate transportation factors." *Maher* *22. In the same decision, the Commission expressly distinguished similar claims against another terminal where the Commission found other lawful, plausible explanations for the allegedly unlawful conduct. *Id*. at 22.

The arguments in the Opposition asserting that the factual allegations in the Third-Party Complaint are sufficient and plausible are almost entirely composed of different variations of reshuffling, paraphrasing, and in some cases expanding and/or adding new allegations not in the Third-Party Complaint or the Underlying Complaint. For example, the Underlying Complaint alleges in certain paragraphs that there were containers that "Rahal was unable to remove from the Port due to factors beyond Rahal's controls." Compl. ¶¶ 28, 78. The Underlying Complaint does not allege that Rahal's inability to remove a container was because of a terminal's control of a container, or whether a terminal caused, contributed or was even related to the reason Rahal was unable to remove a container from a Port. For example, a shortage of trucks, drivers, equipment, or space to move containers could cause a consignee to be unable to remove a container from a port for reasons beyond its control.

In the Third-Party Complaint, Hapag uses a similar sounding, but different, turn of phrase: referring in three paragraphs (33, 34 and 81) to charges "for containers unremovable" from the port. "Unremovable" itself does not convey a factual reason for the alleged unremovability, but it does change the meaning of the word from a condition applicable to Rahal's ability to remove, to a condition that is applicable to the container generally. Finally, Hapag takes further liberties in the Opposition, for example, arguing that "[t]he Third-Party Complaint establishes that the Third-Party Respondents acted as marine terminal operators and "had exclusive control over the facility, *including the placement and movement of unremovable* containers." Opp. 17 (emphasis added). This quoted "allegation" does not appear in either the Underlying Complaint or the Third-Party Complaint.

Although this is just one of many recharacterizations of the factual allegations appearing in the Opposition, this example is notable for the attempt to change the facts and implying a connection between a terminal's control over a container and a containers alleged "unremovability," which the actual allegations in the complaints do not make. It goes without saying that a party cannot amend a complaint in an opposition, but it is important to highlight that the focus of the sufficiency of the pleadings for this Motion is on the pleadings themselves, not on a parties retelling of them.

Hapag also advances new arguments further afield from accepted pleading standards. Hapag asserts that "*capability* to create and prevent disruptions of containers in the supply chain" can plausibly allege a violation of the Shipping Act. Opp. 1, 9 (emphasis added). Hapag provides no basis or authority supporting the assertion that capability to cause disruption constitutes a Shipping Act violation. It is hard to image how it could. The mere capability to drive over the speed limit does not plausibly allege a moving violation. Like the other generalized allegations in

the Third-Party Complaint, Hapag makes no attempt to point to other facts from which it would be reasonable to infer how the alleged conduct—in this instance capability to cause disruption—could constitute a plausible violation, rather than, at best, a mere possibility.

3. The Opposition's attacks on GCT's application of the plausibility standard are unfounded and unavailing.

Hapag makes several unsubstantiated attacks on GCT's application of the plausibility prong.

(1) Hapag argues that its general allegations of otherwise permitted conduct are actually plausible factual allegations under a "lesser" standard that need only provide "fair notice" of the nature of the claims. Opp. 14, 16, 17. Hapag argues that "[t]hese factual allegations alone provide the Third-Party Respondents "fair notice" of the nature of its violation of the Shipping Act." Opp. 15, and Opp. 17 (claiming that "fair notice" establishes facial plausibility). However, the reference to "fair notice" in *Twombly* was not referring to a different or lesser standard than the plausibility standard. Indeed, in *Maher*, the Commission rejected the very same type of lesser/"fair notice" argument. *Maher* * 8 ("Although the Commission stated that a complaint must give a respondent "fair notice," it was quoting *Twombly* when it did so, and nothing in *Mitsui* suggests that the Commission was adopting an administrative pleading standard that differed from *Iqbal/Twombly*.").

(2) Hapag also argues that Maher advances a "heightened" pleading standard, *see* Opp. 8-9, even though the Motion simply follows the application of standards consistent with Commission precedent, *e.g.,* in *Maher*. Opp. 9. Having erected its artificially-high pleading standard, Hapag asserts in entirely conclusory fashion that the same general recitation of general conduct alleged in the Third-Party Complaint, reshuffled and viewed in context with the heighted strawman standard, are thereby "entitled to the assumption of truth," Mot. 9, Opp. 8. But paraphrasing and

recasting parts of the allegations in the Third-Party Complaint does not transmogrify them into new and additional facts. Opp. 8 (styling the Complaint as pleading sufficient factual specificity in 6 numbered sentences that neither quote from the Third-Party Complaint nor individually cite to allegations in the Third-Party Complaint. Opp. 8-9

(3) Hapag also claims the benefit of a "common sense" pleading standard. Opp. 16-17. Hapag argues that a two-page retelling of the same conclusory and general allegations in the Third-Party Complaint, on pages 15-16 of the Opposition, should meet the plausibility standard by permissibly "adopting 'common sense'" as discussed in *Maher*. Opp. 16. But that is not what the Commission meant when applying "common sense" to plausibility in *Maher*. The Commission explained in *Maher* that drawing all reasonable inferences from factual allegations does not mean that alleged conduct must be inferred as unreasonable or unlawful "simply because [a complainant] alleges conclusory that it is, especially when that conduct is equally consistent with lawful behavior." *Maher* * 15. Rather, the Commission explained, "[t]he plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *Maher* *15 (*quoting 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.,* 727 F.3d 502, 504 (6th Cir. 2013). The "common sense" applied by the Commission was that allegations consistent with lawful behavior negatively affect the plausibility of inferences of violations. *Maher* *16, *see also* FNs 17 and 20 (common sense that permissible, lawful alternatives affect plausibility of unlawful inferences). Indeed, applying the "common sense" concept here would yield the same outcome—the lawful general allegations that MTO's control terminals and collect tariff charges would negatively affect the plausibility of inferences that the behaviors are not lawful.

V. The Motion to Dismiss considered the Underlying Complaint.

Hapag argues in the Opposition that the Motion "attempt[s] to narrow the review of the entire complaint" and "attacks just two minor aspects of the Third-Party Complaint." Mot. 7. It is not at all clear what Hapag is referring to, as the Motion is by no means "narrow" and it is not limited to two aspects. However, we suspect that Hapag may be referring to its erroneous assertions that the Motion did not consider the facts alleged in the Underlying Complaint. Opp. 17. The Motion expressly addressed the facts of the underlying complaint in numerous instances. Mot. 8, 10, 11, 14.

Because the Motion in fact considered the Underlying Complaint, the Opposition is arguing about the meaning and application of the factual allegations in the Underlying Complaint. But instead of directly responding to the argument in the Motion that the Third-Party Complaint "contains no factual allegations of any act, omission, practice or procedure on the part of Third-Party Respondents," Mot. 10, Hapag pivots to making the unremarkable argument that attachments to complaints can be considered for the purposes of a motion to dismiss. Opp. 17. This is a diversion and Hapag should be deemed to have conceded the argument on this point in the Motion.

Hapag then proceeds to reformat and reargue its own version of the Underlying Complaint, inlcuding asserting that the Underlying Complaint alleges that the violations occurred due to ... terminal operators. The Underlying Complaint does not allege that, but rather, it is cobbled together by borrowing from allegations using the "directly or indirectly" phrase and bootstrapping that reference to argue that the allegations in the Underlying Complaint target marine terminal operators or other agents. That is not so.

The allegations with that phase in the Underlying Complaint use it because they each specifically relate to a carrier cause of action against Hapag under Section 41104(a), that language

makes it clear that a common carrier is responsible for violations under Section 41104(a) whether alone "or in conjunction with any other person, directly or indirectly." See ¶ 30 (46 U.S.C. § 41104(d), ¶ 31 (46 U.S.C. § 41104(a)(15), ¶ 81 (including 46 U.S.C. § 41104(d), and ¶ 82 (46 U.S.C. § 41104(a)(15). The Commission has on many occasions addressed the meaning and purpose of the jurisdictional scope of the direct/indirect and any other person phrase, which in Section 41104(a) is intended to bind jurisdiction on carriers even if there is another entity involved. It is equally clear that it is not a means to shift liability or blame to such other parties.

Notwithstanding the consideration of the Underlying Complaint, the Third-Party Complaint alleges only an unreasonable practices cause of action against Third-Party Respondents. Section 41104(a) causes of action are not alleged in the Third-Party Complaint, and furthermore, paragraphs 30, 31 and 81 are all denied by Hapag in the Answer (also attached to the Third-Party Complaint). Hapag admitted paragraph 82, admitting that Hapag invoiced Rahal for detention and demurrage, but denied as to the allegations that such charges failed to comply with the interpretive rule. As to Hapag's argument that other paragraphs in the Underlying Complaint are entitled to the assumption of truth, that is only the case to the extent that Hapag relies on the content therein for its truthfulness. *See Gary/Chicago International Airport Authority v. Zaleski*, 144 F. Supp. 3d 1019, 1022 (2015) (denying assumption of truth for allegations in underlying complaint where the defendant had denied allegations in Answer). The lengthy discussion of paraphrased factual allegations of the Underlying Complaint, at pages 18-19 of the Opposition, purport to rely almost entirely on paragraphs in the Underlying Complaint that Hapag denied in the Answer.

VI. Seeking leave to amend in the alternative supports granting the Motion, not denying the Motion

Hapag advances a somewhat unusual argument in the last section of its Opposition, which is titled under the heading "Motion to Amend the Third-Party Complaint," but in substances it

appears more like an alternative argument, and it does not clearly move for relief. Opp. 19-21. First, if Hapag intends to move to amend, it should move to amend. Second, if an amendment is actually "so vital" one would think Hapag would have moved to amend. Third, the purposed basis for the amendment is not essential. Hapag asserts that a purported amendment would have the sole function of adding the Exhibit 1 from the Underlying Complaint to the Third-Party Complaint. Opp. 19, 21. As previously discussed in the Motion, Mot. 11, the exhibit is a list of containers and charges, but it does not add detail relevant for the instant Motion, nor is the instant Motion reliant on this issue. Mot. 11. The exhibit could just as easily be exchanged as an initial disclosure, or in discovery. Further, because Hapag's proposal to amend for the purpose of only adding Exhibit 1, granting leave to amend would be futile and not well founded. *See United States ex rel. Williams v. Martin-Baker Aircraft Co*., 389 F.3d 1251, 1259 (D.C. Cir. 2004).

IV. CONCLUSION

For the foregoing reasons, we respectfully request dismissal with prejudice of the Third-Party Complaint as to the GCT Third-Party Respondents for failure to state a claim for which relief can be granted.

Dated: October 25, 2023

Respectfully submitted,

HOLLAND & KNIGHT LLP

By: */s/ Gerald A. Morrissey III*
Gerald A. Morrissey III
Kristine O. Little
800 17th St NW
Washington, DC 20006
Telephone: (202)469-5497
gerald.morrissey@hklaw.com
kristine.little@hklaw.com

Counsel to Third-Party Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the execution date which appears below, the undersigned served the attached document on counsel at the following email addresses:

Complainant:

William M. Fennell
GIULIANO MCDONNELL & PERRONE, LLP
170 Old Country Road, Suite 608
Mineola, New York 11501
Telephone: (646) 328-0120
WFennell@GMPlawfirm.com

Respondents :

Wayne Rohde
Kathryn Sobotta
Rachel Schwartz
COZEN O'CONNOR
1200 19th Street NW
Washington, DC 20036
Telephone: (202) 463-2507
wrohde@cozen.com
ksobotta@cozen.com
rschwartz@cozen.com

Third-Party Complainants:

Jake Evans
Timothy McLister
GREENBERG TRAURIG, LLP
Terminus 200
333 Piedmont Road NE, Suite 2500
Atlanta, Georgia 30305
Telephone: (678) 553-2100
Jake.Evans@gtlaw.com
Timothy.McLister@gtlaw.com

Executed: October 25, 2023

By: */s/ Gerald A. Morrissey III*
Gerald A. Morrissey III