

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.

**THIRD-PARTY COMPLAINANT’S RESPONSE TO THIRD-PARTY RESPONDENT’S
MOTION TO DISMISS FOR LACK OF JURISDICTION**

Respondents and Third-Party Complainants Hapag-Lloyd AG and Hapag-Lloyd (America) LLC (collectively “Hapag”) respectfully submit this response in opposition to the Third-Party Respondents GCT New York LP and GCT Bayonne LP’s (collectively “GCT” or “Third-Party Respondents”) Motion to Dismiss and Memorandum of Law in Support of Third-Party Respondents’ Motion to Dismiss (the “Motion to Dismiss”).

I. INTRODUCTION

On June 30, 2023, Complainant Rahal International, Inc. (“Complainant” or “Rahal”) filed its verified complaint alleging that Hapag agreed or contracted with one or more marine terminal operators to provide terminal facilities for property transported to the Port of New York and New Jersey, and that such marine terminal operators are agents of Hapag (the “Initial Complaint”).

Exhibit A, Third-Party Complaint at ¶ 2. Complainant also alleges that Hapag invoiced Complainant “(directly or indirectly through beneficial cargo interests or agents)” for demurrage or detention charges that failed to comply with the Shipping Act and all provisions of part 545 of title 46, Code of Federal Regulations, including the principles of the Federal Maritime Commission’s final rule published on May 18, 2020 (the “Interpretive Rule”). *Id.* at ¶ 30-31.

Specifically, the Complainant alleges that Hapag:

- (1) failed to provide services to Complainant in accordance with published tariffs, rules, and practices;
- (2) failed to extend free time for Complainant’s property transported to the Port of New York and New Jersey for the duration of Hapag’s alleged inability to tender cargo for delivery;
- (3) assessed charges in excess of its terminal costs against Complainant while unable to remove from the port due to factors beyond Complainant’s control; and
- (4) assessed Complainant for charges inconsistent with the Shipping Act and Interpretive Rule. *Id.* at ¶ 76-80.

The Complainant thereby argues “[b]ased on the foregoing,” Hapag “(directly *or indirectly* through beneficial *cargo interests or agents*)” improperly invoiced the Complainant for demurrage and detentions charges not in accordance with the Shipping Act or Interpretive Rule. *Id.* at ¶ 81-82 (emphasis added). According to the Complainant, Hapag contracted with marine terminal operators as agents to provide terminal facilities for such property transported to the Port of New York and New Jersey. *Id.* at ¶¶ 7, 11, 12.

On September 8, 2023, Hapag filed its Third-Party Complaint mirroring the aforementioned allegations (the “Third-Party Complaint”). Hapag references the Initial Complaint as a predicate to file the Third-Party Complaint whereby the Complainant alleges Hapag “agreed or contracted with one or more marine terminal operators to provide terminal facilities for property transported to the Port of New York and New Jersey.” Third-Party Complaint at ¶ 14. As such,

the Third-Party Complaint notes the Commission’s jurisdiction extends to Third-Party Respondents as marine terminal operators under the Shipping Act and alleges that the claims against Third-Party Respondents arise out of a common nucleus of operative facts with those against Hapag. *Id.* at ¶¶ 10-11.

At the outset of the Third-Party Complaint, Hapag notes that the Third-Party Respondents, as marine terminal operators, not only had the capability to prevent disruptions, but the means to create them. *Id.* at 1. The Third-Party Complaint also provides that Third-Party Respondents were required to act justly and reasonably when receiving, handling, storing, or delivering property and to ensure that the Third-Party Respondents’ practices do not lead to the assessment of unjust or unreasonable demurrage charges under both the Shipping Act and the Interpretive Rule. *Id.* at 1-2. The charges raised in the Complaint “were assessed, billed, and collected by Third-Party Respondents, without the involvement by or approval of Hapag” while the same Third-Party Respondents “had exclusive control and operation of the underlying containers” raised in the Complaint. *Id.* at ¶ 2. Accordingly, Hapag filed its Third-Party Complaint “based on the actions of Third-Party Respondents that led to [Complainant] filing [the Initial Complaint].” *Id.* at ¶ 1.

On October 3, 2023, the Third-Party Respondents filed the Motion to Dismiss, alleging Hapag failed to state a claim for which relief can be granted because, in relevant part:

- (1) Hapag is not entitled to the assumption of truth because it merely set forth legal conclusions in the Third-Party Complaint;
- (2) Hapag failed to allege plausible violations of the Shipping Act; and
- (3) the allegations raised in the Third-Party Complaint undermine plausibility.

As discussed in further detail below, the Motion to Dismiss must be denied because the Third-Party Respondents’ arguments unnecessarily limit the scope of the entire Third-Party Complaint

and applies the erroneous “heightened” standard for pleadings. Hapag clearly set forth well-pleaded factual allegations in the Third-Party Complaint meeting the threshold standard and is therefore entitled to the assumption of truth and all reasonable inferences should be drawn in its favor. Likewise, the Third-Party Complaint provides well-pleaded factual allegations raised in the Initial Complaint that are integral to the claim and which are entitled to the assumption of truth. Additionally, the Third-Party Complaint and Initial Complaint articulate well-pleaded factual allegations that are more than plausible and give rise to an entitlement to relief. Accordingly, the Motion to Dismiss must be denied.

II. LEGAL STANDARD

The “Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim.” *MAVL Capital v. Marine Transport Logistics*, 2020 WL 13512925, at *4 (FMC Oct. 29, 2020).

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “When evaluating a motion to dismiss for failure to state a claim, the Commission considers the facts alleged in the complaint, documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice.” *Maher Terminals LLC v. The Port Authority of New York and New Jersey (“Maher”)*, 34 S.R.R. 35, 2015 WL 9426189, at *1, *41 (FMC Dec. 18, 2015); *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013). A claim “has facial plausibility when the [complainant] pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (noting the standard “asks for more than a sheer possibility that a defendant has acted unlawfully”). When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679.

The standard does not require “heightened fact pleadings of specifics” or detailed factual allegations. *Twombly*, 550 U.S. at 555, 570. Nor does Rule 12(b)(6) required “the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.” *Maher*, 2015 WL 9426189, at *12 (quoting *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010)). “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.” *Iqbal*, 556 U.S. at 678. Meeting the plausibility standard “simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence” of the alleged violation. *Twombly*, 550 U.S. at 556.

At the motion to dismiss stage, the question is not whether the complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 WL 4411676, *2 (M.D. Tenn. Sept. 8, 2014). The “choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.” *Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). However, the Commission must construe the complaint in light most favorable to the non-moving party and accept all well-pled facts alleged in the complaint as true. *Combustion Store Ltd. v. Unigroup Worldwide, Inc.*, 2015 WL 6110609, at *7, *13 (FMC Oct. 9, 2015) (citing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009)).

III. ARGUMENT

A. The Third-Party Complaint Sets Forth Facial Plausibility Entitled to Reasonable Inference

The Third-Party Respondents' Motion to Dismiss must be denied because the Third-Party Complaint contains sufficient factual detail and demonstrates plausibility. Reasonable inferences should be drawn in concluding that the Third-Party Respondents violated the Shipping Act and the Interpretive Rule. The two-pronged approach set forth in *Iqbal* requires first to identify whether the pleadings are not entitled to the assumption of truth because they are legal conclusions. *Maher*, 2015 WL 9426189, at *13 (citing *Iqbal*, 556 U.S. at 679). "Conclusions can provide a framework, but they must be supported by factual allegations." *Id.* Once it is found that the pleading contains sufficient factual allegations, the Commission will "assume the truth of the well-pleaded factual allegations and determine 'whether they plausibly give rise to an entitlement to relief.'" *Id.*

It has been established that motions to dismiss must be denied under these facts and that pleading specific facts, which the Third-Party Complaint did, is necessary. In *Maher*, these rules were explained in depth. In that case, the complaint alleged that the respondent violated the Shipping Act by failing to enforce just and reasonable practices relating to the "establishment, observation, and enforcement of its practices with respect to the transfer and/or change of ownership and/or control interests." *Maher*, 2015 WL 9426189, at *17. That allegation directly tracks the language of the Shipping Act, which provides "[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to 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). Nonetheless, the Commission found that although the allegations regarding unreasonableness and unfairness are legal conclusions and represent a formulaic recitation of the elements of a Shipping Act claim, the complaint also alleged facts that

the Commission took as true. *Maher*, 2015 WL 9426189, at *18. The Commission inferred that the respondent failed to establish, observe, and enforce just and reasonable practices. *Id.* Specifically, the Commission found that the complainant “is not required to allege specifics such as amount of fees paid, the dates, and which entitled paid or did not pay in order to give the [respondent] fair notice of its plausible claim, especially given that [the complainant] identifies some of the entities involved.” *Id.*

The complaint also alleged that the respondent “failed to establish, observe, and enforce reasonable practices relating to the [respondent’s] ‘practice of unreasonably excluding [the complainant] and existing tenants from consideration as a lease, operator or Qualified Transferee of the marine terminal that is the subject of the Global Lease.’” *Id.* at *21. Similar to the first claim mentioned above, the Commission found that although the allegations of “unreasonableness” are legal conclusions, the allegations included facts permitting the inference that the respondent’s conduct was not reasonably related to the legitimate goal. *Id.* at *22.

Furthermore, the complaint alleged that the respondent unreasonably refused to deal or negotiate “with respect to the leasing and operation of the marine terminal which is the subject of the Global Lease.” *Id.* Like the aforementioned claims, the Commission found the complaint satisfied the plausibility requirement, reasoning that a complaint must only “allege some facts making it reasonable to infer that a respondent refused to deal or negotiate.” *Id.* at *23.

Here, the Third-Party Respondents attack just two minor aspects of the Third-Party Complaint in an attempt to narrow the review of the entire complaint, including “documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice.” *Maher*, 2015 WL 9426189, at *1, *41 (citations omitted). The Third-Party Respondents argue that the Third-Party Complaint “does nothing more” than

allege the Third-Party Respondents are subject to section 41102(c) of the Shipping Act as marine terminal operators and violated section 41102(c). Motion to Dismiss at 5. According to the Third-Party Respondents, to survive its Motion to Dismiss, the complaint must allege “why containers were allegedly ‘unremovable from the Port of New York and New Jersey,’” what specific “unlawful act or omission by Third-Party Respondents caused the alleged unremovability,” and “what pattern or practice of an MTO made demurrage or storage charges allegedly unreasonable.” Motion to Dismiss at 6. Without these detailed factual allegations, the Third-Party Respondent will have you believe that Hapag asserts mere conclusory legal assertions not entitled to an assumption truth.

First, that argument is factually incorrect. Hapag pleaded sufficient factual specificity. In particular, Hapag pleaded that at all times relevant to the Initial Complaint:

- (1) The Third-Party Respondents, as contracted marine terminal operators, had absolute control over the Port of New York and New Jersey where the Complainant stored the containers and determined the place and movement of such containers;
- (2) The Third-Party Respondents, as contracted marine terminal operators, had absolute control over the Complainant’s ability to access the containers and control over the billing and collection against the Complainant;
- (3) The Third-Party Respondents billed the underlying charges through its Terminal Tariff and assessed detention and demurrage charges against the Complainant while the containers were under its exclusive control and unremovable from the Port of New York and New Jersey;

- (4) The Third-Party Respondents received payment from the Complainant for detention and demurrage for such unremovable containers while under the Third-Party Respondents' exclusive control and remitted a small portion to Hapag;
- (5) The Third-Party Respondents independently caused the Complainant to incur additional, extra expenses, and excessive fees; and
- (6) Based on the foregoing, the Third-Party Respondents violated the Shipping Act and Interpretive Rule.

Third-Party Complaint at ¶¶ 28-37. These well-pleaded allegations must be construed in light most favorable to Hapag and accepted as true. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 32 S.R.R. 126, 136 (FMC 2011).

Second, the Third-Party Respondents mischaracterize the proper standard. *See Twombly*, 550 U.S. at 555, 570 (standard does not required "heightened fact pleading or specifics" or detailed factual allegations); *Maher*, 2015 WL 9426189, at *12 (finding Rule 12(b)(6) does not require "the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible."). Under the correct standard, Hapag far exceeded the pleading standard established in *Maher*, which is very low to survive a motion to dismiss. *Id.*

The Third-Party Complaint provides a detailed account of factual allegations entitling Hapag to the assumption of truth. The Third-Party Complaint alleges that the Third-Party Respondents were marine terminal operators during the period alleged in the Initial Complaint, and the Third-Party Respondents as marine terminal operators actually assessed, billed, and collected the charges in dispute. Third-Party Complaint at ¶¶ 25-27. The Third-Party Complaint details that the Third-Party Respondents had the capability to create and prevent disruptions of containers in the supply chain. In addition, the Third-Party Respondents agreed to a terminal

services agreement and had absolute control over the facility where it stored the containers and determined the placement and movement of the containers. *Id.* at ¶¶ 28-29. The Third-Party Respondents had absolute control over the Complainant's ability to access the containers and control over the billing and collection against the Complainant. *Id.* at ¶ 30. Further, the Third-Party Complaint alleges that the marine terminal operators billed the underlying charges through their respective Terminal Tariff, exclusively and independently handling the pricing and invoicing against the Complainant for detention and/or demurrage for containers unremoveable from the Port of New York and New Jersey in the amount of \$298,911.16. *Id.* at ¶¶ 31-34. As a result of these practices, the Complainant paid the Third-Party Respondents for demurrage and detention of the unremovable containers, resulting in minor payment remission to Hapag. *Id.* at ¶¶ 35-36. Moreover, the Third-Party Complaint alleges that the Third-Party Respondents independently caused the Complainant to incur \$154,909.26 for additional, extra, and/or excessive haulage fees by drayage providers and \$63,013.30 for extra expenses as alleged in the Initial Complaint. *Id.* at ¶ 37. Applying the aforementioned facts, Hapag alleges that the Third-Party Respondents violated the Shipping Act by failing to establish, observe, and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering property by charging the Complainant for storage of the containers, especially given the Third-Party Respondents maintained full control of the containers and the assessment, billing, and collection of the charges at issue in the Initial Complaint.

Considering these detailed accounts and factual allegations as set forth in the Third-Party Complaint, the Third-Party Respondents' argument is erroneous. The Third-Party Complaint clearly articulates that the Third-Party Respondents had exclusive control and operation of the underlying containers that were unremovable from the Port of New York and New Jersey; they

exclusively handled the pricing, invoicing, and charging of the Complainant for detention and demurrage for containers unremovable from the Port of New York and New Jersey; and they independently caused the Complainant to incur additional, extra, and excessive fees. These assertions are directly supported by detailed facts and accounts set forth in the Third-Party Complaint, including exact dollar figures charged against the Complainant for detention and demurrage for containers unremovable, which form the basis for the argument that the Third-Party Respondents violated 46 U.S.C. § 41102(c). Again, these assertions must be construed in light most favorable to Hapag and accepted as true. *Mitsui O.S.K. Lines Ltd*, 32 S.R.R. at 136.

Therefore, the Third-Party Respondent's Motion to Dismiss must be denied because the Third-Party Complaint meets the plausibility standard with cushion. The Third-Party Complaint provides far more than the threshold bar for "some facts making it reasonable" to infer the respondent violated the Shipping Act. *See Maher*, 2015 WL 9426189, at *23. It meets the requirement to "raise a right to relief above the speculative level" and "nudge[s] claims across the line from conceivable to plausible." *Marine Transp. Logistics, Inc.* 2019 WL 5206007, at *3. Consequently, the Motion to Dismiss must be denied.

B. The Facts and Allegations Set Forth in the Initial Complaint Should Also be Considered

Consideration must also be given to the documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice. the complaint and documents integral to it. *Maher*, 2015 WL 9426189, at *1, *41; *Farah*, 736 F.3d at 534. In determining whether a complaint adequately states a claim, we must "consider attachments to the complaint as well as the allegations contained in the complaint itself." *Crawford v. Duke*, 867 F.3d 103, 108 (D.C. Cir. 2017) (quoting *English v. District of Columbia*, 717 F.3d 968, 971 (D.C. Cir. 2013); *see also Atherton v. District of Columbia Office of Mayor*, 567 F.3d

672, 677 (D.C. Cir. 2009) (drawing on the complaint and “additional materials submitted,” “including affidavits and exhibits incorporated therein,” in resolving a motion to dismiss).

Here, we must consider the Initial Complaint as an attachment and integral document to the Third-Party Complaint. The Third-Party Complaint demonstrated throughout that it is clearly predicated on the Initial Complaint, which was attached as Exhibit A. Third-Party Complaint at ¶ 13. It also alleges that the claims against the Third-Party Respondents arise out of a common nucleus of operative facts with those raised in the Initial Complaint. *Id.* at ¶ 11. The Third-Party Complaint details that the Initial Complaint alleged Hapag agreed or contracted with one or more marine terminal operators to provide terminal facilities for property transported to the Port of New York and New Jersey. *Id.* at ¶ 14. It also alleges that the Third-Party Respondents were marine terminal operators during the period alleged in the Initial Complaint and assessed, billed, and collected the charges in dispute. *Id.* at ¶¶ 25-27. Where the charges referenced in the Initial Complaint were assessed, billed, and collected by the Third-Party Respondents for containers under their exclusive operation and control and which were unremovable, the Third-Party Complaint argues that to the extent Hapag is found liable under the Initial Complaint, the Third-Party Respondents should be liable to Hapag. *See id.* at ¶¶ 2, 81.

The Third-Party Respondents were referenced throughout the Initial Complaint. The Initial Complaint alleges that Hapag “(directly *or indirectly* through *beneficial cargo interests or agents*)” violated the Shipping Act by improperly invoicing the Complainant for demurrage or detention charges. Exhibit A, Third-Party Complaint, at ¶ 81. The Initial Complaint also alleges that the Complainant was not provided service in accordance with published tariffs, rules, and practices; it was not extended free time for property transported to the Port of New York and New Jersey while it was unremovable; it was charged in excess of its terminal costs while the property

was unremovable and due to factors beyond the Complainant's control; and such charges did not comply with the Shipping Act. *Id.* at ¶¶ 76-80. Moreover, the Initial Complaint argues that Hapag had a backlog of empty containers building up in the Port of New York and New Jersey yet continued to accept for receipt, handling, storage, and/or delivery inbound shipments of property into the port. *Id.* at ¶¶ 34-40. According to the Complainant, Hapag failed to offer free time or to deviate or otherwise change the destination of the Complainant's goods at the Port of New York and New Jersey and Hapag's practice was unreasonable because, *inter alia*, the terminal operators (Third-Party Respondents) were not accepting containers from Hapag. *Id.* at ¶¶ 47-49, 57.

Because the Initial Complaint and the Third-Party Complaint are so deeply intertwined even such that the Third-Party Complaint attaches the Initial Complaint as a referenced exhibit, we must consider each document under the plausibility requirement. While the Third-Party Complaint clearly provides well-pled and detailed factual allegations, it also attaches the Initial Complaint as supporting documentation. The Initial Complaint, too, provides more than bare legal conclusions and lists a detailed account of what the Complainant perceives as violations of 46 U.S.C. § 41102(c). As noted above, the Complainant argues that these alleged violations occurred due to Hapag, the terminal operators, or beneficial cargo interests or agents. These assertions must be construed in light most favorable to Hapag and accepted as true. *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136.

Given the factual allegations set forth in both the Third-Party Complaint and the Initial Complaint, Hapag has put forth sufficient factual matter that is plausible on its face. The claims raised in the Third-Party Complaint and its attached exhibits plead factual content that details why the Third-Party Respondent is liable for violating the Shipping Act. *Iqbal*, 556 U.S. at 678. The

allegations raised are neither speculative nor conclusory, as the Third-Party Respondents contend, and to hold otherwise would be illogical. Accordingly, the Motion to Dismiss must be denied.

C. Hapag Demonstrated Plausible Facts Giving Rise to Entitlement

The Motion to Dismiss should also be denied because the well-pled factual allegations must be assumed true and give rise to an entitlement to relief. When “jurisdictional facts are intertwined with facts central to the merits of a claim, the Rule 12(b)(6) standard applies.” *MAVL Capital*, 2020 WL 13512925, at *5 (citing *Kerns v. United States*, 585 F.3d 187, 192-93 (4th Cir. 2009)). “Under Fed. R. Civ. P. 12(b)(6), the facts alleged are taken as true and all reasonable inferences are drawn in the complainant’s favor.” *MAVL Capital*, 2020 WL 13512925, at *5 (citing *Maher*, 2015 WL 9426189, at *36)). The facts alleged must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570; *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136. “[A] well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” *Twombly*, 500 U.S. at 556 (quoting *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974)). Further, “[t]he facts alleged must allow the Commission to reasonably infer that [the Third-Party Respondents] may be liable for the conduct alleged and provide ‘fair notice’ of the nature of the claims and bases for asserting them.” *MAVL Capital*, 2020 WL 13512925, at *5 (quoting *Iqbal*, 556 U.S. at 677; *Twombly*, 550 U.S. at 555)).

Indeed, “[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*, 2015 WL 9426189, at *15 (citing *Southfield Ltd. P’ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013)). “To be sure, the mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal.” *Maher*, 2015 WL 9426189, at *16 (quoting

Flagstar Bank, 727 F.3d at 505)). Therefore, where a complainant’s claims are plausible, “the available of other explanations—even more likely explanations—does not bar the door to discovery.” *Id.*

The Third-Party Respondents argue that although the allegations in paragraphs 25 to 37 of the Third-Party Complaint would qualify as “factual allegations,” the facts are “not sufficient to plausibly give raise to an entitlement to relief by Hapag against Third-Party Respondents.” Motion to Dismiss at 8. According to the Third-Party Respondents, Hapag merely described the conduct of marine terminal operators and not unlawful acts or omissions that would constitute a violation of the Shipping Act. *Id.* These allegations are a mischaracterization of the Third-Party Complaint, and again, demonstrate an attempt to limit the review of the entire Third-Party Complaint, including attachments or factual allegations integral to the claims alleged.

Here, all facts alleged must be taken as true and all reasonable inferences drawn in Hapag’s favor. *MAVL Capital*, 2020 WL 13512925, at *5. The Third-Party Complaint provides that the Third-Party Respondents were required to ensure that their practices involving the receiving, handling, storing, or delivering of property were just and reasonable by ensuring the practices do not lead to widespread logistical disruptions and further that the Third-Party respondents were required to ensure their practices did not lead to the assessment of unjust or unreasonable demurrage charges under the Interpretive Rule. Third-Party Complaint at 1-2. However, the Third-Party Respondents violated these duties and are liable for such violations. *Id.* at 2. In particular, the Third-Party Complaint alleges that the charges in question were assessed, billed, and collected by the Third-Party Respondents, which had exclusive control and operation of the containers unremovable from the Port of New York and New Jersey. *Id.* Thus, to the extent Hapag is found liable to the Complainant, the Third-Party Respondents are liable to Hapag. *Id.* These

factual allegations alone provide the Third-Party Respondents “fair notice” of the nature of its violation of the Shipping Act. *See Iqbal*, 556 U.S. at 677; *Twombly*, 550 U.S. at 555.

Moreover, the Third-Party Complaint alleges that the Third-Party Respondents had absolute control over the facility where they stored the containers at issue and to determine the placement and movement of the containers. *Id.* at ¶ 29. They also had control over the billing and collection against the Complainant. *Id.* at ¶ 30. Because of such duties and control, the Third-Party Complaints had absolute control over the Complainant’s ability to access the containers. *Id.* Further, the Third-Party Complaint alleges that the Third-Party Respondents handled the pricing, invoicing, and charging for detention and demurrage for containers that the Complainant was unable to remove from the Port of New York and New Jersey. *Id.* at ¶ 33. The Third-Party Complainants then charged the Complainant \$298,911.16 for detention and demurrage regarding the containers that the Complainant were unable to remove from the Port of New York and New Jersey, and the Complainant paid such amount to the Third-Party Respondents. *Id.* at ¶¶ 34-35. Hapag only received a small remission payment from the Third-Party Respondents. *Id.* at ¶ 36. Lastly, the Third-Party Complaint alleges that the Third-Party Respondents independently caused the Complainant to incur \$154,909.26 for additional, extra, and/or excessive haulage fees by drayage providers and \$63,013.30 for extra expenses raised in the Initial Complaint. *Id.* at ¶ 37. Taking these factual allegations as a whole, the Third-Party Complaint alleges that the Third-Party Respondents violated the Shipping Act by failing to establish, observe, and enforce just and reasonable regulations and practices related to the receiving, handling, storing, or delivery of the containers and charging the Complainant for storage of the containers. These facts establish a claim for relief that is plausible on its face. *Twombly*, 550 U.S. at 570. Adopting “common sense,”

these allegations meet the plausibility standard and should not bar the door to discovery. *See Maher*, 2015 WL 9426189, at *16 (citations omitted).

Therefore, it must be found that the Third-Party Complaint alleges facts taken as true and all reasonable inferences are drawn in Hapag's favor. *MAVL Capital*, 2020 WL 13512925, at *5. As demonstrated above, the Third-Party Complaint provides far more than legal conclusions. The Third-Party Complaint does not, as the Third-Party Respondents contend, merely describe the lawful acts of marine terminal operators. The Third-Party Complaint establishes that the Third-Party Respondents acted as marine terminal operators for the claims in question; had exclusive control over the pricing, invoicing, and charging for detention and demurrage; had exclusive control over the facility, including the placement and movement of unremovable containers at the Port of New York and New Jersey; independently charged the Complainant for detention and demurrage related to unremovable containers; and caused the Complainant to incur additional, extra expenses, and excessive haulage fees by drayage providers. The Third-Party Complaint provides the Third-Party Respondents fair notice of the claims and bases for alleging the Third-Party Respondents violated the Shipping Act. Thus, the Third-Party Complaint has facial plausibility.

Even so, consideration must be given to the factual allegations set forth in the Initial Complaint. According to the Third-Party Respondents, "the allegations in the underlying Complaint are made against Hapag, not Third-Party Respondents[.]" Motion to Dismiss at 10. While the Third-Party Respondents concede that the Initial Complaint refers to the marine terminal operators as handlers of empty containers in the Port of New York and New Jersey, they argue that the Third-Party Complaint "contains no factual allegations of any act, omission, practice or procedure on the Party of Third-Party Respondents" regarding the empty containers. *Id.* Indeed,

“[t]he Commission may consider not only factual allegations within the complaint but also documents attached to the complaint, incorporated by reference, or integral to the claims alleged, and matters subject to official notice.” *Maher*, 2015 WL 9426189, at *1, *41 (citations omitted).

Here, the Third-Party Complaint articulates that while the Initial Complaint alleges that Hapag is liable to Complainant, the charges in question were assessed, billed, and collected by the Third-Party Respondents, which had exclusive control and operation of the underlying containers. Third-Party Complaint at 2. It alleges jurisdiction over the Third-Party Respondents because the claims arise out of a common nucleus of operative fact with those raised in the Initial Complaint, which was attached as an exhibit to the Third-Party Complaint. *Id.* at ¶¶ 11, 13. The Initial Complaint alleges that Hapag “(directly *or indirectly* through *beneficial cargo interests or agents*)” improperly invoiced the Complainant for demurrage or detention charges. Exhibit A, Third-Party Complaint at ¶ 30, 31, 81. In addition, the Initial Complaint alleges that Hapag contracted with marine terminal operators (Third-Party Respondents) to provide terminal facilities for property transported to the Port of New York and New Jersey and that such marine terminal operators are agents of Hapag. *Id.* at ¶¶ 19, 20. It also alleges that the appointment-based practices for returning empty containers were unreasonable because the terminal operators (Third-Party Respondents) did not accept containers from Hapag resulting in cancelled appointments for drayage providers. *Id.* at ¶ 57. Further, the Complainant encountered a backlog of empty containers building up in the Port of New York and New Jersey but Hapag (directly or indirectly) continued to accept for receipt, handling, storage, and/or delivery of inbound shipments of property into the port. *Id.* at ¶¶ 34-40. The Initial Complaint alleges that the Complainant was not extended free time for property transported to the Port of New York and New Jersey while the containers were unremovable and was charged in excess of terminal costs while the containers were

unremovable due to factors beyond the Complainant's control. *Id.* at ¶¶ 76-80. According to the Complainant, it was invoiced (directly or indirectly) for detention and demurrage charges that failed to comply with the Shipping Act and the Interpretive Rule. *Id.* at ¶¶ 81, 82. The Complainant alleges that such violations caused the Complainant to sustain actual injuries and damages in the amount of \$298,911.16 for detention and demurrage for containers unremovable from the Port of New York and New Jersey, \$154,909.26 for additional, extra, and excessive haulage fees by drayage providers, and \$63,013.30 for extra expenses. *Id.*

These factual allegations should be weighed because they are integral to the claims alleged and attached as well as referenced as a supporting exhibit. In viewing the factual allegations detailed in both the Initial Complaint and Third-Party Complaint, they should be taken as true and all reasonable inferences drawn in Hapag's favor. *MAVL Capital*, 2020 WL 13512925, at *5. The Third-Party Complaint sufficiently states a claim for relief that is plausible on its face to which Hapag is entitled to relief. Consequently, the Motion to Dismiss must be denied.

D. Motion to Amend the Third-Party Complaint

Assuming, *arguendo*, the Third-Party Complaint fails to meet the aforementioned pleading standards—which Hapag has met—Hapag should be granted leave to amend the Third-Party Complaint. Pursuant to Commission Rule 66, amendments to a complaint will be permitted in the discretion of the Commission or presiding officer. 46 C.F.R. § 502.66. “No amendment will be allowed that would broaden the issues, without the opportunity to reply to such amended pleading and to prepare for the broadened issues.” *Id.* If granted, a party may be directed to state its case more fully and in more detail by way of an amendment. *Id.* In evaluating whether to grant a Motion to Amend, arguments raised in a motion to dismiss do not provide a basis to deny a Motion to Amend, especially at the initial stages and discovery has not yet been completed. *See Marine*

Transport Logistics, Inc. v. CMA-CGM (America) LLC, 2019 WL 5206007, at *1 (FMC Oct. 8, 2019) (granting motion to amend complaint where the proceeding was at the initial stages, discovery has not yet been completed).

Here, if it is found that the Third-Party Complaint falls short of the pleading standards detailed above, Hapag should be granted leave to amend the Third-Party Complaint. An amendment should be granted because Hapag, as Third-Party Complainant, was not provided a critical exhibit relied upon in the Initial Complaint until after the Third-Party Complaint was filed. The Initial Complaint refers to Exhibit 1 as a true and accurate summary of the containers and storage, late fees, additional drayage, and other charges the Complainant incurred for the containers in questions. However, the exhibit is not attached to the Initial Complaint uploaded to proceeding's docket. Because the exhibit is so vital to the Complainant's claims and Hapag, as Third-Party Complainant, was not provided the exhibit until after it filed the Third-Party Complaint, Hapag should be granted leave to amend the Third-Party Complaint to include factual details provided in the Exhibit 1.

Furthermore, the nature of the Third-Party Complaint mirrors the allegations raised in the Initial Complaint and will therefore not broaden the issues contemplated in either the Initial Complaint or Third-Party Complaint. If granted, the amended Third-Party Complaint would include heightened factual detail conforming to the Third-Party Respondents' adopted strict standard for pleadings. Because the proceeding is in the initial stages and discovery has just begun, allegations raised in the Third-Party Complaint would provide the Third-Party Respondents more than sufficient opportunity to reply to the same issues raised in the Third-Party Complaint, albeit with heightened fact specifics beyond what is needed to make the claim plausible.

Therefore, assuming *arguendo*, the Third-Party Complaint lacks facial plausibility, Hapag should be granted leave to amend the Third-Party Complaint to include details found in Exhibit 1. If granted, the Third-Party Complaint would not broaden the issues raised and provide the Third-Party Respondents sufficient opportunity to reply at the early stages of this proceeding.

IV. CONCLUSION

For the foregoing reasons, Hapag respectfully requests that the Presiding Officer deny Third-Party Respondents' Motion to Dismiss for Lack of Jurisdiction. Or, in the extreme alternative, Hapag respectfully requests that it be granted relief to amend the Third-Party Complaint.

DATE: October 18, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October 2023, the forgoing Third-Party Complainant's Response to Third-Party Respondent's Motion to Dismiss for Lack of Jurisdiction was served via electronic mail on:

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