BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 24-17

SAMSUNG ELECTRONICS AMERICA, INC.,

COMPLAINANT,

v.

ORIENT OVERSEAS CONTAINER LINE, LIMITED
AND OOCL (EUROPE) LTD.

RESPONDENTS.

COMPLAINANT'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE COMPLAINT

Complainant Samsung Electronics America, Inc. ("Complainant" or "SEA"), by its undersigned attorneys, respectfully submits this memorandum of law in opposition to the Motion to Dismiss of Respondents Orient Overseas Container Line Limited and OOCL (Europe) Limited (collectively, "OOCL" or "Respondents").

INTRODUCTION

On March 28, 2024, Complainant filed its Verified Complaint (Document No. 01) against OOCL asserting that Respondents had engaged in a pattern of conduct in violation of the Shipping Act of 1984, 46 U.S.C. § 40101, *et. seq.* (the "Shipping Act"). The Complaint alleges the following Shipping Act violations:

Count I: 46 U.S.C. 46 U.S.C. § 41102(c) (Unjust and Unreasonable Practices in Handling Property);

Count II: 46 U.S.C. § 41104(a)(3), and 46 U.S.C. § 41102(d) (Retaliation);

Count III: 46 U.S.C. §41104(a)(10) (Refusal to Deal);

Count IV: 46 U.S.C. § 41104(a)(15) (Non-compliant Invoices);

Count V: 46 U.S.C. § 41104(a)(14) (Unreasonable Charges); and

Count VI: 46 U.S.C. § 41102(c) (Unjust and Unreasonable Dispute Resolution Practices).

The Complaint sets out those serious violations of the Shipping Act in substantial and specific detail.

Respondents' Motion to Dismiss (Doc. No. 10) urges the dismissal of the entirety of the Complaint, primarily by asserting that the Federal Maritime Commission (the "Commission") lacks jurisdiction over the alleged Shipping Act violations and that the Complaint has failed to state claims for which relief can be granted. In support of those contentions, Respondents distort the contents of the Complaint, ignore the allegations addressing each element of the alleged offenses, and proposes various policy arguments, including a creative, if legally unsound, extension of the *Noerr-Pennington* doctrine (discussed below) that would invalidate 46 U.S.C. § 41102(c) by immunizing a common carrier against any claim of refusal to deal.

None of Respondent's arguments and assertions override the fundamental principle that the Commission has an *obligation* to address well-pleaded allegations of the Shipping Act. *See Cargo One, Inc. v. COSCO Container Lines, Co*., Dkt. No. 99-24, 2000 WL 1648961 (FMC, Oct. 31, 2000); *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda. ("Anchor")*, 30 S.R.R. 991, 998 (FMC 2006). As discussed more fully below, the Complaint sets out specific allegations

addressing each element of each violation charged, and therefore sets forth plausible claims for relief, as required to survive the instant motion to dismiss.

FACTUAL BACKGROUND

Complainant SEA is the consignee for shipments into the United States from various locations and suppliers for consumer electronic goods that Complainant provides to the American consumers through Complainant's online store and through brick-and-mortar retailers. During the time-period covered by the Complaint, SEA's procurement arrangements with its affiliated supplier in Korea called for through shipment of the goods by combined ocean carriage and inland transportation to Complainant's warehouses, so-called "store door" delivery. Compl. ¶¶ 33-41.

Under store door delivery, the carrier undertakes the responsibility to transport each container not only for the ocean carriage leg of the transportation, but also onward from the ocean terminal to the ultimate delivery destination, and then to transport the empty container back to the Carrier's designated redelivery terminal, at a premium. That means that a consignee, such as Complainant, bears no responsibility for transportation of the loaded or empty containers.

With the understanding that the carrier subcontracts out to a trucking company the inland transportation of the containers, the shipper and carrier may agree that under a store door delivery service arrangement, the consignee has the right to nominate one or more specific trucking companies; this is referred to as a "customer nominated trucker" or "CNT." In such a case, the carrier remains responsible for the inland transportation and to continue to oversee and manage the transportation to the point of ultimate destination, which includes ensuring the pickup of containers from U.S. marine and intermodal terminals and the delivery of containers to the designated inland locations. Accordingly, the carrier retains the right to determine whether the nominated trucker is suitable, and if not, to reject the nominated CNT.

However, during the relevant period, Respondents, along with Respondents' subcontractor trucker companies, failed to fulfill their delivery responsibilities, and instead adopted a practice of abandoning those duties. When Respondents' inland truckers failed to pick up SEA Containers from U.S. marine and intermodal terminals and timely deliver SEA Containers to their designated inland destinations, it caused substantial logistics problems for Complainant. Complainant then nominated truckers in accordance with the CNT provisions in the hopes of realizing more timely deliveries.

In response, Respondents adopted the policy and practice of treating such nominations as an automatic conversion of a store-door shipment to a container yard shipment, under which the consignee would be responsible for the inland transportation and for the payment of demurrage and detention for containers not timely picked up from, or returned to, the ocean terminal. Respondents imposed those practices notwithstanding their responsibilities for the inland movements, and without regard to the Consignee's practical inability to meaningfully effect the transportation of the containers, which remained under Respondents' control. Compl. ¶¶ 41-47.

When Complainant challenged those actions and charges, Respondents did not provide any support for their actions, but instead threatened various retaliatory measures including refusing to release Complainant's goods at the ocean terminal and refusing cargo space accommodations for future shipments and deliveries, all in an effort to force SEA to accept unreasonable and unjust detention and demurrage charges. Compl. ¶¶ 44-46. Complainant's numerous overtures to resolve these issues were rebuffed by Respondents, leading to the necessity of the instant Complaint.

LEGAL STANDARD

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. "In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rules of Civil Procedure 12(b)(6) and the federal case-law interpreting it." *Cornell v. Princess Cruise Lines, Ltd.*, FMC Dkt. No. 13-02, 2014 WL 531634 at *6 (FMC Aug. 28, 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Dkt. No. 09-01, 2011 WL 7144008 at *11 (FMC, Aug. 1, 2011)); s*ee also MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, FMC Dkt. No. 16-16, 2020 WL 6445041 at *5 (FMC, Oct. 29, 2020) (stating that the Commission looks to Rule 12(b)(6) when considering dismissals for failure to state a claim). The Commission ruled in *Mitsui* that:

> To survive motions to dismiss for failure to state a claim under 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). 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." *Ashcroft v. Iqbal,* [556 U.S. 662, 663] (2009). The complaint must be sufficient to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Bell Atlantic, 550 U.S. at 555 (*quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)*); see also 5* Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. §1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

Mitsui, 2011 WL 7144008 at *12.

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. While a "formulaic recitation of the elements of a cause of action" is not sufficient, "[w]hen 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). In assessing the adequacy of the pleadings, a court must accept all factual assertions as true and draw all reasonable inferences in favor of the plaintiff. *See Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 128 (2d Cir.2011).

At the motion to dismiss stage, 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). The Commission explains: "Courts also construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as alleged in the complaint." *Cornell*, 2014 WL 531634 at *6, 33 S.R.R. at 620-621 (citations omitted).

Accordingly, all well-pleaded factual allegations in the Complaint are be assumed to be true and are to be construed in the light most favorable to SEA.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION OVER ALLEGED VIOLATIONS OF THE SHIPPING ACT

Respondents assert that the Commission lacks jurisdiction over SEA's Count I "Violations of 46 USC § 41102(c) Unjust and Unreasonable Practices in Handling Property" because it contends that SEA's claim is more properly a breach of contract claim. OOCL then identifies cases and support for its contention that breach of contract cases (in this instance bills of lading) are the exclusive province of the courts, not the Commission, and cites 46 U.S.C. § 40502(f) for that proposition.

OOCL's argument is premised on the assumption that SEA was a party to a relevant contract, despite its own concession that "SEA is not a party to those service contracts [between OOCL and Samsung Electronics Company., Ltd. ("SE"), all on file at the Commission]." *Respondent's Motion to Dismiss*, Doc. No. 10, at 4. This concession is further admitted under Respondent's argument that Count II fails to state a claim: *"*All shipments addressed in the Complaint moved under service contracts between OOCL and SEA, to which SEA was not a party." *Respondent's Motion to Dismiss*, Doc. No. 10 at 21. This, coupled with the fact that the alleged contract claims that Respondents speculate may exist are not even alleged in the Complaint, is enough to dispose of OOCL's challenge to Count I.

SEA is listed as a consignee on bills of lading and receives invoices for charges assessed in the U.S. However, as the Complaint clearly lays out, SEA is claiming violations of the Shipping Act by OOCL, which include its unjust and unreasonable practice of assessing demurrage and detention charges on a consignee for the movement of cargo that are plainly OOCL's responsibility.

The Commission previously provided guidance in assessing which matters are properly before the Commission, and over which matters the Commission holds jurisdiction in *Cargo One, Inc. v. COSCO Container Lines, Co.*, Docket No. 99-24, 2000 WL 1648961 (FMC, Oct. 31 2000):

> However, ***we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action***. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, ***or whether they also involve elements peculiar to the Shipping Act.*** We find that as a-general [sic] matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. ***In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency***.

Cargo One, Dkt. No. 99-24, Doc 21 at Pg 35, 2000 WL 1648961 at *14 (FMC Oct. 31 2000) (footnotes omitted) (emphasis added).

Under the Commission's *Cargo One* test, it is "inappropriate and contrary" to the Shipping Act to bar any Shipping Act claim on the basis that it "bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action." *Id*. Allegations that are deemed to be essentially contract law claims may still be appropriately before the Commission if Complainant rebuts the presumption that they are only a simple contract claims. When the Complaint alleges violations beyond contractual issues, such as a practice and policy of unlawfully assessing detention and demurrage as alleged in SEA's Complaint, and the claims involve elements peculiar to the Shipping Act, such as seeking reparations for unjust and unreasonably assessed charges, the Complaint is appropriately before the Commission.

As outlined in the Complaint, SEA has alleged elements peculiar to the Shipping Act – namely the practice of invoicing demurrage and detention to consignees who are not responsible for the movement of the cargo. Such practices clearly invoke the Incentive Principle as outlined in the Commission's Interpretive Rule on Demurrage and Detention Under the Shipping Act (85 F.R. 29638), an element peculiar to the Shipping Act and woven throughout SEA's Complaint, in addition to being explicitly enumerated in ¶ 61.

Further, while federal admiralty courts of course have jurisdiction over complaints for breaches of bills of lading and certain service contract disputes, cases cited by Respondents in support of their effort to avoid Commission jurisdiction concern allegations of specific contractual breaches, rather than complaints about Shipping Act violations and requests for reparations for damages arising as a result of unlawful practices and procedures thereunder as alleged in the Complaint here. Reliance on the Commission to pursue violations solely in its investigatory role, and not as a part of a Complaint under the Shipping Act, "would eviscerate the reparations remedy

afforded complainants by the statute," a Shipping Act remedy exclusively within the Commission's jurisdiction. *See, e.g., MCS Indus., Inc., v. Cosco Shipping Lines Co., Ltd. & MSC Mediterranean Shipping Co. S.A.*, Dkt. No. 21-05, 2022 WL 458569, at *5, Docket No. 21-05, (ALJ, Feb. 4, 2022).

Indeed, even if alleged contract claims that Respondent speculates about in fact existed in another forum, OOCL's challenge would still fail because the Commission's precedent holds that "even when there is litigation between the parties in other courts, the Commission has an obligation to determine whether an entity has violated the Shipping Act." *See VerTerra Ltd. v. D.B. Group Am. Ltd. & D.B. Group India Ltd.*, Dkt. No. 19-09, 2020 WL 1150930, at *2 (ALJ Mar. 5, 2020) (denying motion to stay where the complaint alleged Shipping Act violations that the Commission is obligated to adjudicate and "even though a proceeding in another forum may have resolved some issues between the parties."). Here, there are no other types of claims filed, nor alleged in the Complaint.

The "Shipping Act's text, scheme, and legislative history demonstrate Congress's intent to create a comprehensive, predictable federal framework to ensure efficient and nondiscriminatory international shipping practices." *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 82 (3d Cir. 2017), *as amended* (Jan. 25, 2017). The Shipping Act requires that common carriers 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). If the Commission finds a breach of that duty, the Shipping Act authorizes it to determine, prescribe, and order enforced a just and reasonable regulation or practice. *State of Cal. v. United States*, 320 U.S. 577, 584 (1944). Accordingly, when "allegations either constitute direct and basic charges of violations of [the Shipping Act] provisions, or are so interrelated with such charges as to be, in effect, a

component part of them; and the remedy is that afforded by the Shipping Act…, [t]he matter therefore is within the exclusive preliminary jurisdiction of the [Federal Maritime Commission]." *U.S. Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 485 (1932); *see also,* Seawinds *Ltd. v. Nedlloyd Lines, B.V.*, 80 B.R. 181 (N.D. Cal. 1987), *aff'd,* 846 F.2d 586 (9th Cir. 1988); *A & E Pac. Const. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 71 (9th Cir. 1989).

Respondents point to 46 U.S.C. § 40502(f) as evidence that the Shipping Act's jurisdiction does not extend to SEA's claims under Count I. However, that section deals with the remedy for the breach of a service contract, not unreasonable practices under the Shipping Act:

> (f) Remedy for Breach - Unless the parties agree otherwise, **the exclusive remedy for a breach of a service contract** is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

46 U.S.C. § 40502(f) (emphasis added).

As noted above and in Respondents' Motion to Dismiss, *"*[a]ll shipments addressed in the Complaint moved under service contracts between OOCL and SE, to which SEA was not a party." *Respondent's Motion to Dismiss*, Doc. No. 10, at 21. As Respondents acknowledge, Complainant is not a party to the service contracts, and SEA is not asserting a breach of any applicable service contract. Accordingly, 46 U.S.C. § 40502(f) is clearly inapplicable to the matter at hand.

The law is clear that the Commission has jurisdiction over claims brought under the Shipping Act. The Commission has reaffirmed this point earlier this year in its unanimous decision in *MCS Industries, Inc. v. Mediterranean Shipping Co. S.A.*, Dkt. No. 21-05, 2024 WL 95383 at *6-7 (FMC, Jan. 3, 2024) ("the FMC in fact has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties.").

II. EACH COUNT OF THE COMPLAINT IS SUPPORTED BY SUFFICIENT ALLEGATIONS TO SET FORTH PLAUSIBLE CLAIMS UNDER THE SHIPPING ACT

A. COUNT I

Count I of the Complaint alleges OOCL's unjust and unreasonable practices in handling property pursuant to 46 U.S.C. § 41102(c). The elements of the cause of action are outlined in 46 CFR § 545.4 and state that for a successful claim for reparations under 46 U.S.C. § 41102(c), Complainant must establish:

> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
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> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

Respondents' sole challenge to the merits of Count I is to assert that the Complaint does not plausibly allege a "practice" on the part of Respondents. To assert such an argument is willful blindness to the factual allegations in the Complaint. See ¶¶ 26, 43, 44, and 58 of the Complaint:

> 26. As explained in further detail below, SEA has dealt with and continues to face manifestly unjust and unreasonable charges and practices in connection with inland transportation arrangements that are the responsibility of OOCL under its store door shipments. Like the other complainants in the multiple similar FMC complaint actions filed against OOCL, SEA suffered from OOCL's unreasonable detention and demurrage practices. The consistency in the allegations across the complaints (*See Bed Bath & Beyond Inc. v. Orient Overseas Container Line Limited and OOCL (Europe) Limited* (Dkt No. 23-02); *Impact Products, LLC and Safety Zone, LLC v. Orient Overseas Container Line Limited and OOCL (Europe) Limited* (Dkt No. 24-08)) highlights that OOCL's conduct with respect to the unreasonable imposition of detention and demurrage charges was part of a broader unreasonable practice and policy.

> 43. During that same period, OOCL began charging SEA dramatically increasing amounts for alleged demurrage and detention charges resulting from OOCL's inland transportation failures.
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> 44. When asked to explain the reason for asserting the charges on SEA, OOCL has asserted that the use of a customer nominated trucker ("CNT") somehow converts a "store door" move into a "container yard" move. OOCL has not provided any documentation or support for that novel assertion to date.
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> 58. OOCL's foregoing practices and procedures relating to the assessment of demurrage and detention have been occurring on a normal, customary, and continuous basis, involving since 2021 in excess of 4,400 individual demurrage, detention, and associated charges.

Assuming, *arguendo,* that two[1], three[2], or six[3] instances may not be a "practice," Complainant has alleged in excess of 4,400 individual demurrage, detention, and associated charges that have been assessed to Complainant by Respondents and that such charges were imposed by Respondents as a result of their standard practice and procedure of unilaterally converting store door moves into container yard moves when a consignee nominates a trucker, thus shifting responsibility for its inland transportation failures to Complainant, and further, the assessment of detention and demurrage as a result of that practice and procedure has been occurring on a normal, customary, and continuous basis since 2021. Compl. ¶¶ 19, 20, 21, 32, 58. SEA has clearly addressed the motion to dismiss question of "whether some plausible narrative supports Plaintiff's claim such that the case merits discovery." *Iqbal,* 556 U.S. at 678–79.

Respondents' assertion that a Complaint must allege an application to "multiple customers" is not a pleading requirement under the regulations or the Commission's precedents. Respondents' reliance on the World War II-era case of *Whitam v. Chicago, R. I. & P. Ry. Co.*, 66 F. Supp. 1014 (N.D. Tex. 1946) to claim such a pleading requirement is ill-founded. The *Whitam* case concerned

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1 *Crocus Inv., LLC v. Marine Transp. Logistics, Inc.*, 2 F.M.C. 2d 224 (ALJ 2020), *aff'd*, 3 F.M.C. 2d 110 (FMC 2021)

2 *Hangzhou Qianwang Dress Co. v. RDD Freight International Inc.*, 2 F.M.C.2d 168 (FMC 2020)

3 *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 178, 201 (FMC 1964)

a shipper's complaint that it was overcharged as a result of the defendant railroads' failure to properly comply with a war regulation concerning the weighing of rail cars. *Id*. at 1015. The defendants challenged the district court's jurisdiction by asserting that the matter was subject to the primary jurisdiction of the Interstate Commerce Commission. The court noted that the plaintiff's grievance was that it had been cheated, not that any defendant's rule or practice was improper. *Id*. at 1017.

The proper reading of the pleading requirement is simply that specific acts or violations may not constitute a practice, as the Commission of course does not wish to adjudicate instances of one-off billing disputes. In this case, Complainant has explicitly alleged an ongoing practice of Respondents' dating back several years, and over 4,400 times. Moreover, to the extent that broader application of a practice is considered, Complainant has further alleged in the Complaint at ¶ 26 (quoted above) that Respondent has imposed the complained-of practice on multiple shippers or consignees in addition to Complainant.

In short, Complainant has clearly alleged the acts and omissions of Respondent that are occurring on a normal, customary, and continuous basis, against SEA and other parties. Accordingly, the Complaint properly alleges a violation of 46 U.S.C. § 41102(c) in Count I.

B. COUNT II

Count II of the Complaint alleges that OOCL threatened to retaliate and in fact did retaliate against SEA and SEA Containers with respect to the delivery of cargo and by refusing available cargo space accommodation in response to Complainant's efforts to address OOCL's shipping and charging practices. Complaint at ¶ 68.

Before the Ocean Shipping Reform Act or 2022 ("OSRA 2022")'s enactment on June 16, 2022, 46 U.S.C. § 41104(a)(3) provided that "a common carrier, either alone or in conjunction

with any other person, directly or indirectly, may not – … retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodation when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41104(a).

OSRA 2022 amended the Shipping Act's retaliation provisions by expanding its reach to marine terminal operators and ocean transportation intermediaries and adding the prohibition against retaliation to 46 U.S.C. § 41102, "General Prohibitions" as new subsection (d). Concurrently, OSRA 2022 amended 46 U.S.C. § 41104(a)(3) to read "unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods." OSRA 2022, Pub. L. 117-146, June 16, 2022, 136 Stat 1272, §§ 5, 7.

As amended by OSRA 2022, 46 U.S.C. § 41102(d) reads as follows:

> (d) Retaliation and Other Discriminatory Actions. --a common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with any other person, directly or indirectly, may not--
>
> > (1) retaliate against a shipper, an agent of a shipper, an ocean transportation intermediary, or a motor carrier by refusing, or threatening to refuse, an otherwise-available cargo space accommodation; or
> >
> > (2) resort to any other unfair or unjustly discriminatory action for--
> >
> > > (A) the reason that a shipper, an agent of a shipper, an ocean transportation intermediary, or motor carrier has--
> > >
> > > > (i) patronized another carrier; or
> > > >
> > > > (ii) filed a complaint against the common carrier, marine terminal operator, or ocean transportation intermediary; or
> > >
> > > (B) any other reason.

Respondents cite *20230930-DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Co. SA*, No. 23-12, 2024 WL 1299768 (ALJ, Mar. 25, 2024) for the proposition that to be actionable, alleged retaliation must be in response to "the shipper bringing a matter to the attention of the

Commission, whether through a formal complaint or less formal means, such as a charge complaint or providing information in connection with an FMC proceeding." While that may have been the requirement in that specific case based on the vague Complaint allegations[4], it simply is not the singular requirement OOCL alleges in its Motion.

> "The statutory language, by including the phrase 'or for any other reason' explicitly applies this section beyond cases where the shipper has patronized another carrier or has filed a complaint."

DK-Butterfly, 2024 WL 1299768, at *6.

Further, in its December 2021 Statement on Retaliation, the Commission stated that in addition to protecting shipper activities including patronizing another carrier and filing a complaint, the statute:

> also, however, protects shippers from being retaliated against 'for any other reason.' The Commission interprets "any other reason" to mean that protected activity under § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its mission.

Statement of the Commission On Retaliation, 2021 WL 9204128, at *5, Dkt. No. 21-15, 3 F.M.C.2d 201, 207 (FMC, Dec. 28, 2021).

As noted by the ALJ in *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrts-gesellschaft A/S & Co. Kg and Hamburg Sud North America, Inc.*, Dkt. No. 21-11, 2023 WL 3969857, (ALJ, June 7, 2023), a case of first impression concerning the meaning of "any other reason,", a complainant's threats to file a complaint with the Commission in response

[4] "The Complaint alleged that BBBY complained to and questioned Respondent about its allocation of space to BBBY, and MSC responded "by systematically failing to meet its remaining service commitments to Complainant...." Complaint at 7-8. Complainant does not dispute that it did not report this conduct to the Commission by participating in an investigation or enforcement proceeding, rulemaking commentary, bringing the dispute to the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS), **or filing a complaint with the Commission** during the term of the two service contracts." *DK-Butterfly*, 2024 WL 1299768, at *5. (emphasis added).

to prohibited conduct are closely related to the listed violations and the inclusion of such threats within the "for any other reason" language would be consistent with the Commission's Policy Statement with respect to interpreting the anti-retaliation provision broadly. Accordingly, threats to file with the Commission are encompassed under the "for any other reason" language. *Id.* at *38-39.

The Commission further explains in its Statement on Retaliation that "shipper" is defined broadly:

> Unless amended by Congress, § 41104(a)(3) applies only to prohibited conduct directed at a "shipper." But **this term protects entities other than just the cargo owner**. The term "shipper" means a cargo owner, the person for whose account the ocean transportation of cargo is provided, **the person to whom delivery is to be made**, a shippers' association,[33] or a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

Id., 2021 WL 9204128, at *4, 3 F.M.C.2d 201, 207 (FMC, Dec. 28, 2021) (footnotes omitted) (emphasis added).

In short, a "complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods), with respect to a protected entity (shipper), because the protected entity engaged in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class). *Id.*, 2021 WL 9204128, at *6, 3 F.M.C.2d 201, 209.

As set out in the Complaint, Complainant has alleged that Respondent engaged in prohibited conduct (refusing available cargo space accommodations and delivery of cargo), with respect to a protected entity (the consignee to whom delivery is made), because the protected entity engaged in protected activity (SEA's Notice of Demand for Action letter and other efforts to address OOCL's shipping and charging practices, resolve disputes, and dispute invoices). The Complaint at ¶¶ 41-47 sets out the predicate background of Respondents' unlawful actions; and

The Complaint at ¶¶ 51 and 68 details Complainant's demand for resolution, which threatened a complaint to the Commission, and resulted in the retaliation of Respondent:

> 51. On October 7, 2022, SEA sent a Notice of Demand for Action letter ("Demand Letter") to OOCL regarding unreasonable and unlawful charges for demurrage, detention, handling, and/or storage, and other unreasonable and unlawful conduct. The Demand Letter invited OOCL to respond in a substantive manner, and asked that OOCL indicate its interest in discussing cooperative resolution.
>
> 68. In response to Complainant's efforts to address OOCL's shipping and charging practices, resolve disputes, and dispute invoices, OOCL threatened to retaliate, and in fact did retaliate, against Complainant and SEA Containers with respect to delivery of cargo and refusing available cargo space accommodation.

The development of this case will establish that Complainant noted to Respondents that its actions were in violation of the Shipping Act and that continued misconduct would lead to a complaint with the Commission, which in fact occurred. Indeed, Complainant notes that Respondent appears to have conceded that its retaliatory actions were undertaken in response to the threat of a complaint to the Commission in its argument with regard to Count III, where it claims immunity for actions undertaken in contemplation of litigation. Respondent's Motion to Dismiss, Doc. No. 10, at 22.

Accordingly, the Complaint has clearly alleged facts sufficient state a claim of retaliation by Respondent against Complainant in violation of 46 U.S.C. § 41104(a)(3) and 46 U.S.C. § 41102(d) as set out in Count II.

C. COUNT III

Count III of the Complaint alleges that Respondents unreasonably refused to deal or negotiate in violation of 46 U.S.C. § 41104(a)(10). The Commission is still in the process of determining the definition of the statutory phrase "unreasonable refusal to deal or negotiate." Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space

Accommodations Provided by an Ocean Common Carrier, 88 F.R. 38789 (Supplemental Notice of Proposed Rulemaking Jun. 14, 2023) (to be codified at 46 C.F.R. § 542.1) (the "SNPRM").

Pursuant to OSRA 2022 and Commission precedent, the Commission initially proposed that complainants would be required to meet three elements to establish a violation for unreasonable refusal to deal or negotiate. As indicated in the NPRM, the elements would apply in cases where the allegation relates to vessel space accommodations by an ocean common carrier. As proposed, the elements were derived directly from the statutory text established in OSRA 1998 and are: (1) the respondent is an ocean common carrier under the Commission's jurisdiction; (2) the respondent refuses to deal or negotiate with respect to vessel space accommodations; and (3) that the refusal is unreasonable. *See* SNPRM at 38798; *OJ Commerce*, 2023 WL 3969857 at *22.

As the Commission has noted, "[r]efusals to deal or negotiate are factually driven and determined on a case-by-case basis," with the ultimate burden of persuasion remaining with the Complainant to show that the refusal to deal or negotiate was unreasonable. *Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal To Deal Or Negotiate*, 2003 WL 723336, at *13, *18; *OJ Commerce*, 2023 WL 3969857 at *22. Here, Complainant has alleged that: (1) Respondents are ocean common carriers under the Commission's jurisdiction – *see* Complaint at ¶¶ 2, 3, and 10; (2) that Respondents refuse to deal or negotiate with respect to vessel space accommodations – *see* Complaint at ¶¶ 68 and 73; and (3) that Respondents' refusal to deal or negotiate is unreasonable – *See* Complaint at ¶¶ 51, 52, 73, and 74.

Respondents imaginatively but incorrectly invoke the venerable *Noerr-Pennington* doctrine to contend that any conduct relating to pending or future litigation is immune from liability. Respondents' Motion to Dismiss, Doc. No. 10, at 22. Concisely stated, the *Noerr–Pennington* doctrine was set out by the U.S. Supreme Court in *Eastern Railroad Presidents*

Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and immunizes defendants from ***antitrust liability*** based on their having engaged in joint conduct (including litigation) that is intended to influence governmental decision-making. *See, e.g., Octane Fitness, LLC v. ICON Health & Fitness, Inc*., 572 U.S. 545, 555–56 (2014). The point of the doctrine is to protect the right of multiple competitors to collaborate in petitioning the government without risk of potential of antitrust liability which might arise from their concerted action. *See, e.g., Sosa v. DIRECTV, Inc*., 437 F.3d 923, 932 (9th Cir. 2006). The doctrine simply does not fit the facts or circumstances set forth in the Complaint.

Here, as alleged in the Complaint, Respondents refused to deal with Complainant in violation of the Shipping Act. Respondents claim immunity for such conduct based on the threat that Complainants would take that misconduct to the Commission, thus contending in effect that the *Noerr-Pennington* doctrine can be extended to invalidate 46 U.S.C. § 41104(a)(10) in its entirety.

However, while a party is free to settle or not settle complaints, the Shipping Act requires that any refusal to deal with regard to the vessel space accommodations be reasonable. 46 U.S.C. § 41104(a)(10). As noted in the SNPRM, any such refusals must be based on transportation-related factors. SNPRM at 38807.

The Complaint therefore has clearly alleged facts sufficient state a claim of refusal to deal by Respondent against Complainant in violation of 46 U.S.C. § 41104(a)(10) as set out in Count III.

D. COUNT IV

Count IV of the Complaint alleges that Respondents invoiced Complainant for demurrage and detention charges after the effective date of OSRA 2022 without including the information required by that statute, in violation of 46 U.S.C. § 41104(a)(15).

Under OSRA 2022, 46 U.S.C. § 41104(a)(15) provides that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not-- … invoice any party for demurrage and detention charges unless the invoice includes information as described in subsection (d) [referring to 46 U.S.C. § 41104(d)] showing that such charges comply with (A) all provisions of part 545 of title 46, Code of Federal Regulations (or successor regulations); and (B) applicable provisions and regulations, including the principles of the final rule published on May 18, 2020, entitled 'Interpretive Rule on Demurrage and Detention Under the Shipping Act' (or successor rule)."

46 U.S.C. § 41104(d)(2) lists the requirements for detention and demurrage invoices and Section 41104(f) states that failure to include the information required under subsection (d) on an invoice for any demurrage or detention charge shall eliminate any obligation of the charged party to pay the applicable charge.

The Complaint has set out specific allegations that Respondents' have, contrary to the Shipping Act, invoiced Complainant for detention and demurrage charges without including the information required to comply with 46 U.S.C. § 41104(a)(15) and (d). *See* Compl. ¶¶ 48(a), 48(c), 61(e), 77.

Respondents' Motion fails to set out any grounds on which Count IV may be dismissed. Instead, Respondents effectively admit having violated the statute, contending that even if found to have violated the statute, they will re-issue the deficient invoices. *Respondents Motion to*

Dismiss, Doc. No. 10, at 25. Such an argument is irrelevant to Respondents' violation of OSRA 2022, and any such possible invoices would of course be subject to the determination of Respondents' other violations of the Shipping Act in connection with their unlawful demurrage and detention charges.

Moreover, even if Respondents might theoretically have the ability to re-invoice in accordance with the revised law and collect for services legitimately rendered, if they act within some reasonable period of time, Respondents have not done so as of this date. The pending invoices pending are unlawful because they are predicated on unreasonable practices violative of the Shipping Act, and SEA is not legally obligated to pay them.

E. COUNT V

Count V of the Complaint alleges that Respondents assessed Complainant for demurrage and detention charges after the effective date of OSRA 2022 in violation of 46 U.S.C. § 41104(a)(14). That statute provides that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not--…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)."

With respect to Count V, Respondents assert that "[a]bsent a statement that particular charges were 'assessed' to SEA after June 16, 2022, the Complaint fails to state a claim". *Respondent's Motion to Dismiss*, Doc. No. 10, at 26. OOCL asserts that this level of specificity is required "to permit OOCL to prepare a meaningful answer."

That argument is meritless in fact as well as by law. As set out in the Complaint at ¶ 52, the parties have had extensive discussions over the issues with Respondents' invoices, and

Respondents are well aware of the shortcomings of their invoices. Further, while a more specific statement is not required to put Respondents on notice sufficiently to prepare their answer, nor is the request for superfluous specificity a basis for claiming a failure to state a claim, Complainant has in fact alleged charges were assessed by Respondents in the period subsequent to implementation of OSRA. *See* Compl. ¶¶ 19, 20, 26, 27, 41-46, 53, 58, 82. Additionally, as addressed further below in Section III, Rule 251 expressly addresses complaints that request reparations in relation to multiple shipments. In cases such as this, involving over 4,400 demurrage and detention charges, the Commission's rules of procedure are specifically designed to allow adjudication of the categories of alleged violations and then, once liability is established, address the individual charges. 46 C.F.R. § 502.251.

Accordingly, the Complaint has sufficiently stated a claim against Complainant of unreasonable charges in violation of 46 U.S.C. § 41104(a)(14) as set out in Count V.

F. COUNT VI

As with Count I, Count VI of the Complaint alleges OOCL's unjust and unreasonable practices relating to or connected with receiving, handling, storing, or delivering property in violation of 46 U.S.C. § 41102(c). Specifically, Count VI alleges that Respondents' practices, policies and procedures in connection with the dispute resolution of charges relating to or connected with receiving, handling, storing, or delivering property were unreasonable.

As noted above in the section addressing Count I, the elements of the cause of action for reparations under 46 U.S.C. § 41102(c) are outlined in 46 CFR § 545.4.:

> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

Contrary to Respondents' challenge to the application of 46 U.S.C. § 41102(c) to dispute resolution practices, the Commission has made clear that the statute ***does*** apply to such issues. In its interpretative rule on unjust and unreasonable practices with respect to demurrage and detention, in which the Commission provided "guidance about how the Commission will interpret 46 U.S.C. 41102(c) and [46 C.F.R.] § 545.4(d) in the context of demurrage and detention," the Commission stated as follows:

> (d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, ***including dispute resolution policies and practices*** and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

46 C.F.R. § 545.5(d) (emphasis added).

Notwithstanding Respondent's further argument that protecting shippers, consignees, and others against unavailable, inadequate, sham, or otherwise unreasonable dispute resolution processes "would make no sense as a matter of regulatory policy," the Commission clearly disagrees. *Id*.

Further, Respondent's argument that it has adopted a reasonable dispute resolution process that is "FMC-approved", attempts to side-step the allegations in the Complaint. Complainant alleges that Respondents' actual dispute resolution practices violate the Shipping Act. Respondents offer no substantive basis for its contention to dismiss Count VI, other than its policy disagreements (including a further attempt to stretch the inapplicable *Noerr- Pennington* doctrine).

The Complaint clearly identifies the resolution practice that violates the Shipping Act – specifically Respondents' dispute resolution practices regarding detention and demurrage. *See* Compl. ¶¶ 85, 86.

Respondents lastly mischaracterize or misread the Complaint at Count VI as simply a complaint about unsuccessful settlement discussions, ironically claiming that the Complaint's request for relief from Respondents' unreasonable practices of failing to respond meaningfully to complaints and disputes is somehow contrary to the Commission's long-standing policy of encouraging settlement. *Respondents' Motion to Dismiss*, Doc. No. 10, at 27.

The Complaint itself could not be more clear. Faced with dramatically increasing charges for detention and demurrage due to Respondents' own inland transportation failures, Complainant asked Respondents for an explanation, in response to which Respondents asserted that they had unilaterally converted the store door shipment to a container yard shipment, and Respondents refused to provide any documentation or support for their actions. Compl. ¶ 44. When Complainant requested relief from charges for which it was not responsible, Respondents simply refused, demanded payments, threatened punitive actions, and refused the release of containers. Compl. ¶¶ 45-47, 48(d). Further, Respondents failed to meaningfully engage in commitments to address disputed charges, and failed to provide any workable practice, policy, or procedure to meaningfully evaluate disputed charges. Compl. ¶ 86.

Accordingly, the Complaint properly alleges a claim of unjust and unreasonable dispute resolution practices in violation of 46 U.S.C. § 41102(c).

III. COMPLAINANT'S REQUEST FOR REPARATIONS MEETS THE STANDARDS UNDER 46 CFR §§ 502.62 and 502.251.

Respondents' final argument is that the Complaint should be dismissed because it allegedly fails to comply with FMC Rule 62, specifically by "improperly fail[ing] to allege reparations on a

shipment-by-shipment basis." *Respondent's Motion to Dismiss*, Doc. No. 10, at 28-29. First, Rule 62 is not a jurisdictional element of a reparations cause of action, nor is it a code pleading requirement. The Shipping Act plainly authorizes the ordering of reparations without limitation to an amount set out in a complaint. 46 U.S.C. § 41305. Specifically, Section 41305(c) allows the Commission to award "additional amounts" for violations of Sections 41102(c) and 41104(a)(3) or (6), up to the actual injury. Rule 62 sets forth standards to give Respondents fair notice of the claims alleged in the Complaint. Respondents' contention that that a Complaint must be dismissed, or more narrowly a Complaint seeking reparations must be dismissed, for not pleading alleged damages with a specific dollar amounts or on a shipment-by-shipment basis, is not supported by Commission precedent or practice.

Respondents' Rule 62 argument is really about its allegation that the Complaint "improperly fails to allege reparations on a shipment-by-shipment basis." *Respondent's Motion to Dismiss,* Doc. No. 10, at 29. The precise dollar figure Respondent seeks is a proxy for urging a specific shipment-by-shipment tally of damages. Prior to 2012, Rule 62 required that complaints seeking reparations plead specific shipment details, down to individual bill of lading numbers, charges made or collected, and the amount of damages. The Rule was amended in 2012 to "update and clarify the rules and to reduce the burden on parties to proceedings before the Commission." NPRM Amendments to Commission's Rules of Practice and Procedure-Subparts E and L, 77 F.R. 12528 (3/1/2012). The current Rule 62 does not require identifying specific shipments and damages to the level of detail that Respondent seeks.

The current Rule 62 is also consistent with the liberal pleading standard under Federal Rule of Civil Procedure 8. *See J. Ambrogi Food Distrib., Inc. v. Teamsters Local Union No. 929,* 595 F. Supp. 3d 352, 358 (E.D. Pa. 2022) (denying defendant's motion to dismiss for failure to allege

a specific dollar amount of claimed damages, citing the liberal notice pleading regime set out in Rule 8); *Block v. Seneca Mortg. Servicing*, 221 F. Supp. 3d 559, 594 (D.N.J. 2016) ("[P]laintiffs 'need not plead the exact dollar amount of their loss" so long as the complaint provides sufficient notice of the potential damages.) (internal citations and quotations omitted). Here, Respondent OOCL is well aware of the nature and scale of the damages Complainant is alleging. Compl. ¶52. Given the purpose of the negotiations was to discuss SEA's claims related to detention and demurrage invoices, participating in detailed negotiations clearly put Respondent on notice of SEA's claims and the Complaint alleges sufficient information to put Respondent on notice of the nature and amount of the damages.

Specifically, the Complaint notes that Complainant has incurred damages subject to reparation through the course of multiple shipments at paragraph 32:

> 32. As a result of OOCL's conduct, SEA has sustained serious and substantial injuries and monetary damages, including paying over 4,400 erroneous demurrage, detention and associated charges which continue to be tabulated and accrued as of the filing of this Complaint.

Likewise, the Complaint alleges at paragraph 52:

> 58. OOCL's foregoing practices and procedures relating to the assessment of demurrage and detention have been occurring on a normal, customary, and continuous basis, involving since 2021 in excess of 4,400 individual demurrage, detention, and associated charges.

Respondent's reliance on Rule 62 as a *de facto* code pleading standard requiring specification of specific dollar is inconsistent with Rule 251, especially in cases, like this one, where the Complainant is seeking reparations for in excess of 4,400 individual demurrage and detention-type charges. *See* Compl. ¶¶ 32, 58. Rule 251, 46 C.F.R. § 502.251, reads as follows in its entirety:

> If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought (See § 502.63), the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation.

> If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts.

Rule 251 effectively bifurcates the proceeding in cases where reparations are being sought for damages related to a significant number of shipments. Given the volume of shipments at issue, which involve thousands of containers, each subject to specific charges imposed in violation of the Shipping Act, this is a case where Rule 251 is plainly appropriate.

Moreover, the amount of damages incurred by the Complainant continues to accrue, as alleged in the Complaint at ¶ 88: Contrary to Respondents' suggestion that the Complainant must allege reparations on a shipment-by-shipment basis, the clear purpose of Rule 251 is to account for the circumstances where the determination of the quantum of reparations derived from many shipments may be more efficiently addressed after a determination of liability.

Imposing the burden on a complainant to calculate reparations resulting from tens of thousands of shipments in advance of any finding of a right to reparation would be unreasonable, and avoiding such an unreasonable burden is the clear purpose of Rule 251. In this case, doing so, while damages, and therefore potential reparations, continue to accrue, would be even more unreasonably burdensome.

The Shipping Act plainly authorizes the ordering of reparations without limitation to an amount set out in a complaint. 46 U.S.C. § 41305. Likewise, 46 CFR § 502.62 recognizes that the Commission has flexibility to award reparations even when reparations are not requested, by noting that under unusual circumstances and for good cause shown, reparations may be awarded even on a complaint in which reparations are not specifically requested. 46 CFR § 502.62(a)(4)(ii).

Accordingly, the demand for reparations should not be dismissed. Upon a finding of violations giving a right to reparations, the parties may follow the procedure set out in Rule 251 for the determination of specific reparations due as of the applicable date as determined in this proceeding.

CONCLUSION

For the foregoing reasons, Complainant respectfully requests that the Motion to Dismiss be denied, and Respondents ordered to file their answer in accordance with the Rules of the Commission.

Dated: June 14, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by electronic mail upon the following persons/addresses:

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