Before the
Federal Maritime Commission

Docket No. 24-17

Samsung Electronics America, Inc. v. Orient Overseas Container Line, Limited, and OOCL (Europe) Ltd.

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

Respondents Orient Overseas Container Line, Limited, and OOCL (Europe) Ltd. ("OOCL" or "Respondents") reply to the Opposition of Complainant Samsung Electronics America, Inc. ("SEA" or "Complainant") to Respondents' Motion to Dismiss ("Motion"). SEA's Opposition does nothing that should dissuade the Presiding Officer from dismissing all counts of the Complaint for the reasons specified in the Motion.

ARGUMENT

I. COUNT I: SEA Fails to Prove Jurisdiction or State a Claim of Unreasonable Practice

A. SEA Fails to Demonstrate FMC Jurisdiction

SEA has the burden of ***proving*** jurisdiction. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, Docket No. 06-02, 2007 WL 2468431 at *4 (FMC 2017). As the Commission has explained:

> "Under the Administrative Procedure Act (APA) and Commission precedent, Complainants have the burden of proving Respondents violated the Shipping Act, and this burden of proof does not shift. 5 U.S.C. § 556(d); *DSW Int'l Inc. v. Commonwealth Shipping, Inc.*, 32 S.R.R. 763, 765 (FMC 2012)." *Santa Fe Discount Cruise Parking, Inc.,* 3 F.M.C.2d 59, 67 (FMC 2021).

SEA fails to meet that burden. OOCL demonstrated in its Motion that, under the Judiciary Act of 1789, interpretation of bills of lading is a matter within the exclusive jurisdiction of federal courts sitting in admiralty. SEA does not even mention that statute; nor does it attempt to refute OOCL's showings that a bill of lading is a maritime contract and that maritime contracts fall within the exclusive jurisdiction of the federal courts. Indeed, SEA does not cite a single instance where the FMC held that it had jurisdiction over a bill of lading claim.

As demonstrated in the Motion, FMC precedent holds directly to the contrary. In *Definition of Package*, 23 S.R.R. 111, 114 (FMC 1985), for example, the Commission stated:

> "Section 17 of the 1916 Act and Section 10(d)(1) of the 1984 Act [direct predecessors of 46 U.S.C. 41102(c)] deal with 'just and reasonable regulations and practices' relating to the 'receiving, handling, storing, or delivery of property . . . .' Sections 17 and 10(d)(1) do not empower the Commission to address unjust or unreasonable carrier activity that relates to the transportation of property. . . ."

As the bill of lading is indubitably a transportation contract (and not the source of authority for the charges of which SEA complains), this quote means that the FMC does not have jurisdiction over bill of lading disputes. *Id.* at 113 (courts are the "exclusive forum" for adjudicating substantive claims about bills of lading). And as the Commission further emphasized, the Shipping Act and other statutes that the FMC administers "do not authorize the agency to prescribe the substantive content of bills of lading. *Id.* at 114. Id. at 115 n. 9 ("Commission has no authority with respect to the substance of bills of

lading"). If the Commission does not have jurisdiction over the substantive content of bills of lading, *a fortiori* it has no authority to adjudicate claims based on their substantive content.[1]

OOCL discussed *Definition of Package* in its Motion, but SEA does not even mention, much less attempt to distinguish it, in its Opposition. Likewise, in *CTM International, Inc. v. Medtech Enterprises, Inc.,* Docket 98-07, 1998 WL 942103 at *2 (ALJ 1998), Judge Kline stated:

> "[T]he Commission's jurisdiction . . . is not the same as that of an admiralty court. The parties are also reminded to study relevant decisions of the Commission, such as *Waterman Steamship Corporation v. General Foundries, Inc.,* 26 S.R.R. 1173 (I.D.), adopted in relevant part, 26 S.R.R. 1424 (1994); and *Unpaid Freight Charges,* 26 S.R.R. 735 (1993). I also recommend that counsel study other decisions which bear on the question of the Commission's jurisdiction or lack of same in cases that arise under admiralty law, such as loss and damage claims."[2]

SEA asserts that the precedents it ignores do not apply because SEA alleges an unreasonable practice under the Shipping Act. But its claim rests solely on the assertion that OOCL violated the Shipping Act by its "practice of assessing demurrage and detention charges on a consignee ***when the***

[1] The Shipping Act of 1984, as amended, is not intended to provide a remedy for every wrong allegedly committed by an ocean common carrier. *See,* e.g., 46 U.S.C. 40101; Docket No. 18-06 (September 6, 2018) at 20 ("[t]hough the Commission is aware that the interpretive rule may redirect some claims . . . from being brought under the Shipping Act, the Commission believes that existing alternative avenues of redress are fully sufficient to address those cases").

[2] Judge Kline also cited what he deemed instructive cases, as quoted below:

> "See, e.g., *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.,* 25 S.R.R. 1273, 1277, F.M.C. notice of non-review, December 26, 1990; [(the Commission has never asserted jurisdiction over damage and loss claims)]. *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company,* 2 U.S.M.C. 517, 518 (1941) [(; cf. *Del Monte Corp. v. Matson Navigation Co.,* 19 S.R.R. 1037 (ALJ), F.M.C. notice of finality, December 27, 1979." *Id*.

movement of the cargo was OOCL's responsibility."[3] [Opp. At 7 (emphasis added)][4] Thus, for SEA to prevail, it must prove what it claims, i.e., that the "store door" term of the bill of lading means that OOCL alone is responsible for detention and demurrage on inland transportation, no matter who caused the delay. But it is not the FMC's province to say what the term "store door" means. That is a matter of interpretation of the bill of lading and thus within the exclusive jurisdiction of the federal courts.[5]

SEA tries to save its Shipping Act claim by citing *Cargo One, Inc. v. COSCO,* 28 S.R.R. 1635 (FMC 2000). But that decision is entirely inapposite, not least because it involved a claim under a service contract, not a bill of lading. Of course the FMC has jurisdiction to interpret and adjudicate service contracts (except for claims of breach), because they are creations of the Shipping Act. Bills of lading,

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[3] SEA suggests that this is an allegation of fact, to which deference is due at the pleading stage. But that is obviously untrue, as the interpretation of what a bill of lading means is indisputably a matter of law.

[4] Likewise, SEA asserts [Opp. at 7] that it has alleged "the practice of invoicing demurrage and detention to consignees who are not responsible [under store door terms] for the movement of cargo." SEA's Opposition further asserts that the truckers used to move cargo from the terminal are subcontractors of OOCL. [Opp. At 4] Although that is untrue, the controlling point here is that no such allegation is in the Complaint, and thus Counsel's arguments cannot be considered on this Motion. *See, e.g., Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves,* Docket No. 14-06, 1 F.M.C. 2d 195, 245 (ALJ 2018) ("I conclude that the analysis in the brief is not offered as evidence of injury, but argument of counsel."); *Bimsha International v. Chief Cargo Services, Inc.,* Docket No. 10-08, 2011 WL 714401, *10 (ALJ 2011), aff'd, 32 S.R.R. 1861 (FMC 2013) ("the argument of counsel is not evidence.").

[5] SEA suggests that its claims should not be diverted to court, as the law provides, because it is not a party to the service contract. But SEA's dispute is not about the service contract – which it never mentions in the Complaint – but about the bill of lading. And as it says, SEA is a party (consignee) to the bill of lading, so could file a complaint in federal court in that capacity. [Opp. At 7] In any event, the Commission has said that an affiliate to a service contract, such as SEA here, is a third-party beneficiary of the contract, and so may file suit in court against the carrier party. 52 Fed. Reg. 23989 (June 26, 1987), *see also Kelleher v. Dream Catcher, L.L.C.,* 278 F. Supp. 3d 221, 224 (D.D.C. 2017) ("[A] third party may sue to enforce contract provisions if the contracting parties intended for the third party to benefit directly from the contract.").

by contrast, predate even the Shipping Act of 1916 and are governed by federal laws wholly apart from the Shipping Act, which the FMC does not, by its own assertion, administer.[6]

Even under *Cargo One*, this case belongs in federal court. As established in OOCL's Motion, SEA's purported Shipping Act claims rely entirely on the legal proposition that the bill of lading requires OOCL to bear responsibility for any demurrage and detention accrued on the inland leg, even if the delays were caused by SEA, and that OOCL did not meet its contractual obligation to absorb such costs. Furthermore, SEA omits a crucial FMC statement in *Cargo One*:

> "For Section 8(c) to have meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, ***and not just breach of contract claims***, as such claims would not be actionable before the Commission in any event." 28 S.R.R. a 16443 (emphasis added).[7]

The mere fact that SEA dressed Count I in the garb of the Shipping Act does not disguise the fact that it is, at base, a claim about the meaning of the bill of lading, i.e., a contract claim under *Cargo One*.

That SEA's claim is a breach of contract claim rather than a Shipping Act claim relating to demurrage and detention practices is revealed by the fact that SEA seeks recovery of damages allegedly suffered as a result of OOCL's alleged non-performance beyond demurrage and detention charges. In

[6] As the Commission recently stated: "Although the Commission does have jurisdiction over 46 U.S.C. 41104(a) violations, breach of contract claims are not within the Commission's jurisdiction." *Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier*, 88 Fed Reg 38790, 38795 (June 14, 2023).

[7] Likewise, in another segment of *Cargo One* that SEA quotes, but ignores, the Commission stated: "[A]llegations ***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." *Id.* at 1645 (emphasis added). As shown above, SEA's claim for breach of a bill of lading term is essentially a contract claim and SEA has not even attempted to rebut the *Cargo One* presumption.

other words, the demurrage and detention charges are just part of the measure of damages allegedly caused by the breach of contract, rather than a separate legal claim.

Finally, SEA ignores OOCL's showing in its Motion (at p. 11) that, under the Shipping Act's sister statute, the Interstate Commerce Act, with which the Shipping Act is interpreted *in pari materia*, the courts have held, under a very similar statutory provision, that the Surface Transportation Board is forbidden from adjudicating contract claims.

B. <u>SEA Fails to Identify a Plausible Practice</u>

OOCL demonstrated in the Motion that, even if the FMC has jurisdiction over SEA's contract claim, SEA failed to adequately allege a practice under the prevailing FMC standards. SEA's Opposition does little more than attack a single case, *Whitam v. Chicago, R.I. & P. Ry. Co.,* 66 F. Supp. 1014 (N.D. Tex. 1946), which requires a practice to be aimed at customers generally, not just a single customer. But SEA fails to mention that the Commission cited *Whitam* as a case to be followed when it adopted 46 C.F.R. 545.4 (which details the necessary elements of an unreasonable practice claim; 83 FR 64478-01).

SEA likewise ignores other FMC cases precedents that follow the same rule. In *European Trade Specialists v. Prudential-Grace Lines,* for example, the Commission rejected a claim about inadequate notice because complainant did not establish that the alleged wrongful act was a practice, regularly followed with respect to shippers in general (not just complainant). 19 S.R.R. 59, 63 (FMC 1979). The Commission stated that, unless the respondent's "normal practice was not to notify the shipper, such adverse action cannot be found to violate the section *as a* matter of law." *Id*. at 63. And in *Hangzhou Qianwang Dress Co. v. RDD Freight International Inc.*, (emphasis added), the Commission stated that

"[t]he absence of evidence that Respondent unreasonably released the shipments of ***other shippers*** is also significant." 2 F.M.C. 2d 168, 173 (FMC 2020).

II. COUNT II – SEA Fails to State a Retaliation Claim

OOCL showed in the Motion that Count II of the Complaint must be dismissed for failure to adequately allege retaliation. In response, SEA does little more than disparage Judge Crovella's decision to dismiss alleged retaliation claims in *20230930-DK-Butterfly-1, Inc. v. MSC,* 2024 WL 1299768 (ALJ 2024). SEA cites the Commission's Statement on Retaliation and Chief ALJ Wirth's decision in *OJ Commerce, LLC v. Hamburg Sud*, Docket No. 21- 11, 2023 WL 3969857 (I.D., June 7, 2023), currently pending before the Commission. But SEA simply ignores the fact that Judge Crovella expressly addressed these sources in reaching her decision to dismiss retaliation claims in *20230930-DK-Butterfly*-1.

SEA's attempt to distinguish *20230930-DK-Butterfly-1* is futile. The allegation SEA points to is simply an unadorned recitation of the statutory elements. Even if SEA's assertions were true (as they are counterfactually assumed to be), the allegation it relies on is woefully insufficient without supporting factual allegations not found in the Complaint. *See, e.g., Rahal International Inc. v. Hapag-Lloyd AG*, Docket No. 23-05, 2023 WL 8622031 (ALJ December 6, 2023) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' will not do.")

SEA's assertion that it threatened to file an FMC complaint is equally unavailing. It made no such allegation in the Complaint. That SEA ultimately filed a complaint is irrelevant. Any acts alleged in the Complaint occurred ***before*** the Complaint was filed, so such prior acts cannot possibly be retaliation for the later-filed Complaint.

III. COUNT III – SEA Fails to State a Refusal to Deal

OOCL demonstrated in the Motion that, under prevailing law, SEA failed to state a claim pursuant to 46 U.S.C. 41104(a)(1), because it did not allege a refusal to deal, but only a failure to reach a deal. As discussed in the Motion, FMC precedent treats these two matters as totally separate, expressly limiting refusals to deal to situations where a party has totally refused to consider a contract or an application to provide service, not where the complainant failed to achieve a resolution to its liking:

> "The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of the OSRA [1998]. All that is required is that common carriers . . . ***refrain from 'shutting out'*** any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans,* 29 S.R.R. 345, 351 (ALJ 2001), aff'd 29 S.R.R. 1066, 1070 (FMC 2002), aff'd 80 F. App'x 681 (D.C. Cir. 2003) (emphasis added).[8]

Moreover, as SEA itself says, the two parties corresponded, communicated, and met repeatedly over a protracted period of time and exchanged offers. [Compl. ¶¶ 70-74.] As the Commission has explained, once a party has considered an offer, its rejection of the offer cannot be equated with a refusal to deal or negotiate. See *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886 (1993). Further, "[the] Commission [has] recognized that it is proper to give deference to a party's discretionary business decisions." *Id.* at 899. A decision whether to accept or reject a settlement proposal is plainly a matter of business discretion.

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[8] *Port Elizabeth Terminal & Warehouse Corp. v. The Port Authority Of New York And New Jersey*, Docket No. 17-07, 1 F.M.C.2d 29, 40 (I.D. 2018); *see also Santa Fe Discount Cruise Parking, Inc. v. The Board Of Trustees Of The Galveston Wharves*, Docket No. 14-06, 2014 WL 7404584 (ALJ, Admin. Final 2014) (dismissing refusal to deal count because: "Complainants do not allege that they did not have access to the Cruise Terminal, only that the access was on terms not to their liking").

SEA does not address either of these cases; nor does it address the law as it currently stands. Instead, it cites ongoing rulemaking proceedings to suggest what the law may become. But the settlement negotiations occurred in the past, and SEA's Complaint is at issue now. As ALJ Crovella, has held, "[t]he proposed rules have not been adopted, and are therefore ***not applicable*** to this proceeding." *MSRF, Inc. v. HMM Co. Ltd*., Docket No. 22-20, 7 FMC 2d. 85, 86 (I.D. 2023), admin. final, 7 FMC 2d 126 (FMC 2023). In any event, nothing in the rulemaking suggests that the longstanding distinction quoted above, about shutting out versus failure to agree, will be changed.[9]

Second, SEA ignores that 41104(a)(10) does not apply to settlement negotiations. See Mot. at 23. As OOCL explained, handling of claims is addressed under a different section of the Shipping Act, not mentioned in the Complaint. *See id*. It would be astonishing indeed, and quite contrary to the current FMC rules providing for mutually agreed settlement opportunities, if the Presiding Officer were to hold that a party to a dispute ***must*** engage in settlement discussions that are satisfactory to the other party. SEA cites nothing to support such a radical proposition.

Moreover, such a result would run afoul of the *Noerr-Pennington* doctrine, which also requires dismissal of Count III. As OOCL explained in its Motion (pp. 22-23), *Noerr-Pennington* protects "not only petitions sent directly to the court in the course of litigation, but also conduct incidental to the prosecution of the suit," including settlement negotiations "prior to initiating any actual litigation." *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 934 (9th Cir. 2006) (cleaned up); *accord Singh v. NYCTL 2009-A Trust*, 683 F. App'x 76, 77-78 (2d Cir. 2017). SEA does not dispute that in its opposition brief.

[9] Indeed, the Commission cited the *Seacon* case in its original notice, at footnotes 29 and 30.

Instead, SEA incorrectly suggests that *Noerr-Pennington* only applies in cases involving "antitrust" claims. Opp. at 17. Although the doctrine originated there, it applies "with full force in other statutory contexts." *Sosa,* 437 F.3d at 930; *see, e.g., BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526-27 (2002) (*Noerr-Pennington* applies to a claim under the National Labor Relations Act).[10]

SEA, similarly, and again incorrectly, argues that Noerr-Pennington does not immunize OOCL against SEA's claims in this case because the doctrine only applies to "defendants … engaged in joint conduct (including litigation)" and in this case there is only a "single Complainant and single Respondent." Opp. at 17. In support of that assertion, SEA cites *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555-56 (2014). Yet, neither the facts nor the holding in *Octane Fitness* support SEA's argument.[11] And since *Octane Fitness*, courts have continued applying Noerr-Pennington in cases involving only one complainant and one respondent, irrespective of whether there is "joint" conduct. *See, e.g.*, *P.R. Tel. Co. v. San Juan Cable LLC*, 874 F.3d 767, 768-69 (1st Cir. 2017); *Tri-Corp Hous. Inc.,* 826 F.3d at 449-50; *Venetian Casino Resort, L.L.C.*, 793 F.3d at 87.

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[10] *See also, e.g., Tri-Corp Housing Inc. v. Bauman*, 826 F.3d 446, 450 (7th Cir. 2016) ("[T]he Noerr-Pennington doctrine applies to claims under the Fair Housing Act."); *Venetian Casino Resort, L.L.C. v. NLRB*, 793 F.3d 85, 87, 90 (D.C. Cir. 2015) (applying Noerr-Pennington to labor dispute); *Hydranautics v. FilmTec Corp.,* 204 F.3d 880, 887 (9th Cir. 2000) (applying Noerr-Pennington in case brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) and 42 U.S.C. § 1983); *Whelan v. Abell,* 48 F.3d 1247, 1254 (D.C. Cir. 1995) (explaining that Noerr-Pennington is not limited in application to federal antitrust laws).

[11] *Octane Fitness* involved only one petitioner and one respondent, but that was immaterial to the Court's decision. The Supreme Court merely held that 35 U.S.C. § 285 of the Patent Act did not require a finding (by clear and convincing evidence) of independently sanctionable conduct or both objectively baseless and subjective bad faith in order to justify an award of attorneys' fees under that statutory provision. *Octane Fitness, LLC*, 572 U.S. at 554-58. With respect to Noerr-Pennington, the Supreme Court explained that the doctrine did not justify the Federal Circuit's interpretation of 35 U.S.C. § 285 because, even though "patent suits are similarly protected as acts of petitioning [the government], it is not clear why the shifting of fees in an 'exceptional' case [under 35 U.S.C. § 285] would diminish that right." *Id*. at 556.

Indeed, there is no principled reason to limit application of Noerr-Pennington to cases involving antitrust claims or statutes, or to cases that involve joint conduct between more than one complainant and/or more than one respondent, because the doctrine is a principle of statutory construction grounded in the First Amendment, which protects the "right to petition" the government. *Octane Fitness, LLC*, 572 U.S. at 556; *BE&K Constr. Co*., 536 U.S. at 524-25. In *BE&K*, the Supreme Court explained that "the right to petition extends to all departments of the Government" and that litigation "is but one aspect of the right to petition." *BE&K Constr. Co.,* 536 U.S. at 525 (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972)). Accordingly, "federal statutes" must be construed "so as to avoid conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise*." Sosa,* 437 F.3d at 931; see also *Whelan,* 48 F.3d at 1254 ("[T]he filing of claims … before administrative agencies is part of the protected right to petition….").

Like other cases applying Noerr-Pennington, "[t]his case raises the same underlying issue of when litigation," and conduct incidental to litigation, "may be found to violate federal law." *BE&K Constr. Co.*, 536 U.S. at 526. "Where … the burdened conduct could fairly fall within the scope of the Petition Clause and a plausible construction of the applicable statute is available that avoids that burden, [the Commission] must give the statute the reading that does not impinge on the right of petition." *Sosa*, 437 F.3d at 932. SEA's claim in Count III is predicated on OOCL's "response to Complainant's efforts … to address" and "resolve disputes" between the parties about particular charges prior to SEA filing suit. Compl. ¶ 68. Under Noerr-Pennington, those allegations cannot form the basis for a cause of action because they are incidental to petitioning activity, i.e., communications or negotiations about settling this case before litigation. In other words, to avoid a conflict with the right to petition under the First Amendment, the Commission must conclude that OOCL's efforts to negotiate with SEA about its

allegations prior to SEA's filing of this case, do not, as a matter of law, violate 46 U.S.C. § 41104(a)(10). *Cf. BE&K Contr. Co.,* 536-37 (construing NLRA provision to avoid a conflict with the First Amendment); *Sosa*, 437 F.3d at 942 ("Because the demand letters at issue here sought settlement of claims against Sosa under the Federal Communications Act, and no sham is claimed, they cannot form the basis of liability under RICO."); *Columbia Pictures Indus. v. Prof'l Real Estate Investors, Inc.,* 944 F.2d 1525, 1528 (9th Cir. 1991) ("A decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability").

IV. COUNT IV – Must be Dismissed as to Reparations

OOCL demonstrated in its Motion that the only remedy for an invoice without all of the information required by OSRA22 is the issuance of a corrected invoice. SEA's response is that the FMC could not have meant to include SEA.

The Commission has foreclosed SEA's end run around the requirements, explaining that:

> "[I]ssuing an invoice that does not comply with OSRA 2022's requirements ***does not*** permanently eliminate the billed party's obligation to pay those charges. In particular, 46 U.S.C. § 41104(f) cancels the obligation to pay an invoice that does not conform to OSRA ***but does not prevent the carrier from reissuing the charges*** on an invoice/bill that does meet the statutory requirements. The correctly billed party ***has an obligation to pay charges billed via a compliant invoice***." 89 Fed. Reg. 14330, 14349 (Feb. 26, 2024) (emphasis added).

There is no wiggle room for SEA to claim that they are exempt from this plain language. There is no "SEA exception" or any time bar on a carrier's ability to reissue invoices in order to comply with the informational requirements. This is of course perfectly reasonable, as a shipper who gets to defer payment until a compliant invoice is issued gains the time value of the unpaid charges.

V. COUNT V – SEA Fails to State a Claim of Improper Invoices

SEA's response to OOCL's demonstration that Count V fails to state a claim is without merit. SEA simply ignores the unalterable fact that, as shown in the Motion, the date for application of the new rules is the date of ***assessing*** or ***invoicing*** charges, not the date of an allegedly improper practice, act or omission. Neither OOCL nor the Presiding Officer can tell from the Complaint whether ***any*** invoices were issued, or charges assessed, after June 16, 2022, and if so, which ones.

Second, SEA relies not on the allegations of the Complaint, but on its Counsel's assertion that, because of confidential settlement negotiations, OOCL "was well aware" of SEA's claims. Opp. at 22. SEA's bald assertions in its Opposition cannot cure the obvious gaps in SEA's Complaint.

VI. COUNT VI – SEA Fails to State a Claim for an Unreasonable Dispute Resolution Procedure

Tellingly, SEA's Complaint contains absolutely no reference to OOCL's ***published procedure*** for resolving demurrage or detention invoice disputes, no citation to where it may be found, or any suggestion that SEA sought to use that procedure. Not a single allegation in the Complaint says anything about OOCL's published process. Instead, the only allegations concern the particular settlement discussions between the parties.

SEA now argues it is not complaining about the settlement discussions. But even if this sleight of hand were permissible, SEA still does not identify the policy it now claims to challenge or say where it may be found. Nor does SEA allege that it complied with the procedures of that policy.

Furthermore, like Count III, the Noerr-Pennington doctrine also requires dismissal of Count VI. Count VI is based on OOCL's alleged "failures to meaningfully engage in commitments to address disputed charges beyond those paid directly to it…." Compl. ¶ 86. In other words, SEA seeks to hold

OOCL liable under 46 U.S.C. § 41102(c) on the basis that SEA is dissatisfied with the result of the parties' settlement negotiations. That is not a permissible basis for liability. See Section III, *supra*.

VII. SEA Fails to Properly Plead a Reparations Claim

OOCL demonstrated in the Motion that SEA did not comply with the FMC's rule requiring a complaint seeking reparations to "set forth the injury caused …and the amount of alleged damages." Mot. at 28 (quoting 46 C.F.R. § 502.62(a)(4)(i)).SEA does not, and could not, dispute its failure to satisfy the rule. Instead, it argues that "shipment-by-shipment" data is not required, and its failure to comply with the rule should be excused under the Federal Rules of Civil Procedure. Opp. at 25.

SEA's arguments cannot stand. OOCL's motion to dismiss SEA's reparations claim is based on SEA's failure to allege the "amount of alleged damages," not its failure to provide damages for each shipment. And regardless of what may be allowed in some ordinary civil cases,[12] the FMC's rules control this proceeding. The Federal Rules may be used to fill gaps, like allowing motions to dismiss, but where the two sets of rules conflict, the FMC's own Rules must prevail.[13] If SEA does not like the procedural rules established by the Commission through rulemaking, it may always make its policy arguments to the Commission, perhaps in the form of a Petition for rulemaking. But it cannot properly ask the Presiding Officer to overrule the Commission.

[12] The cases cited by SEA do not make its point. In *J. Ambrogi Food Distr., Inc. v. Teamsters,* 595 F. Supp.3d 352, 358 *(*E.D.PA. 2022), the complaint alleged damages of $3-4 million; *Block v. Seneca Mortg. Servicing,* 221 F. Supp. 3d 559, 594 (D.N.J. 2016) involved a claim under a state statute.

[13] By way of an example, the FMC Rules allow 22 days for a party to file exceptions to an initial decision. The Federal Rules, by contrast, generally allow 30 days for a party to appeal a decision against it. Nobody could reasonably assert that the Federal Rules should, in a particular case, apply instead of the Commission's own rules.

SEA makes an equally specious argument about the need to prove its case on a shipment-by-shipment basis. Although OOCL specifically reserved, and continues to reserve that argument, we note that the requirement to proceed on a shipment-by-shipment, and day-by-day basis is not just a matter of reparations but is also necessary to establish a ***violation***.

In *Hapag-Lloyd, A.G. -- Possible Violations of 46 U.S.C. § 41102(c)*, 4 F.M.C. 2d 53, 94 (I.D. 2022), for example, Chief Administrative Law Judge Wirth found it necessary to look at the alleged violations of the Shipping Act on a container-by-container ***and*** day-by-day basis and concluded that "BOE did not establish a violation for all eleven shipments or for all days of detention."[14] See also *TCW, INC. v. Evergreen Line Joint Service Agreement*, Docket 3 FMC 2d 1 (S.O. 2021), *aff'd* 5 FMC 2d 192 (FMC 2022) (determining violations by reference to the specific days on which return was impossible).[15] SEA's assertion that it can address all of the shipments *en masse* simply underscores that SEA's claim is not based on a practice, but rather on a purported obligation under the bill of lading that it claims OOCL breached.

CONCLUSION

For the reasons stated in the Motion and this Reply, the Presiding Officer should dismiss the Complaint with prejudice and terminate this proceeding.

DATED: June 28, 2024

[14] More recently, Chief ALJ Wirth stated that an allegation of a violation of 41102(c) concerning multiple shipments made it "likely that [complainant] would need to establish an inability to return each container." FMC Docket No. 24-13, *Access One v. COSCO* (Order Denying Partial Motion to Dismiss, June 4, 2024).

[15] This is of course the usual course for determining violations which relate to what the respondent did with respect to individual shipments. *See Anderson International Transport – Possible Violations*, 32 S.R.R. 1678 (FMC 2013) (shipment-by-shipment review of acting as an unauthorized NVOCC).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 28th day of June, 2024, a true and correct copy of the foregoing **RESPONDENTS' REPLY TO COMPLAINANT'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE COMPLAINT** was served by email on all counsel of record in accordance with 46 CFR Part 502 and the Commission's Order of May 12, 2020.

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