Before the
Federal Maritime Commission

Docket No. 24-17

Samsung Electronics America, Inc.

v.

Orient Overseas Container Line, Limited and OOCL (Europe) Ltd.

RESPONDENTS' MOTION TO DISMISS THE COMPLAINT

INTRODUCTION

On March 28, 2024, Complainant Samsung Electronics America, Inc. (Complainant or SEA), filed a complaint (Complaint) against Respondents Orient Overseas Container Line, Limited and OOCL (Europe) Ltd. (collectively Respondents or OOCL), asserting violations of the U.S. Shipping Act (Shipping Act), 46 U.S.C. 40101, *et seq*., *viz*: 46 U.S.C. 46 U.S.C. § 41102(c) (twice); 46 U.S.C. § 41104(a)(3) (before June 16, 2022); 46 U.S.C. § 41102(d) (from June 16, 2022 on); 46 U.S.C. § 41104(a)(10); 46 U.S.C. § 41104(a)(15) (from June 16, 2022 on); and 46 U.S.C. § 41104(a)(14) (from June 16, 2022 on).

Although OOCL disputes many of the alleged facts in the Complaint, no factual dispute need be addressed here, because the Complaint should be dismissed in the entirety as a matter of law based on the facts as alleged in the Complaint. As described in more detail below, the FMC lacks jurisdiction over SEA's claim based on breach of the contract of carriage (the bills of lading) and all of SEA's purported claims fail to state a claim upon which relief may be granted.

Count I (46 U.S.C. § 41102(c)) is at most a claim for breach of contract, for which exclusive jurisdiction rests in the federal courts, under 28 U.S.C. § 1333, and the Shipping Act.

Furthermore, Count I fails to state a claim for violation of 46 U.S.C. § 41102(c) because it does not plausibly allege a "practice."

Count II (46 U.S.C. § 41104(a)(3) and 46 U.S.C. § 41102(d)) must be dismissed for failure to state a claim, because, as Administrative Law Judge Crovella recently held in *20230930-DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Co. SA*, 2024 WL 1299768 (ALJ 2024), the Complaint fails to allege at least one essential element of a retaliation claim -- that the alleged retaliation by OOCL was in response to SEA filing a complaint or otherwise bringing information about OOCL to the attention of the FMC.

Count III (46 U.S.C. § 41104(a)(10)) must be dismissed for failure to state a claim both because the Shipping Act prohibition on refusals to deal does not (and could not under the *Noerr Pennington* doctrine) apply to settlement discussions and because the Complaint itself contradicts any such claim, alleging lengthy (and still ongoing at SEA's pleasure) settlement discussions between OOCL and SEA.

Count IV (46 U.S.C. § 41104(a)(15)) must be dismissed insofar as it seeks reparations, because the Commission has held that an incomplete invoice does not relieve the invoiced party of its underlying obligation to pay the debt. Thus, even assuming that any particular OOCL invoice did not contain certain information required by OSRA22,[1] the only consequence would be for OOCL to issue a revised, compliant invoice.

Count V 46 U.S.C. § 41104(a)(14) must be dismissed because OSRA22 does not apply retroactively to charges incurred before June 16, 2022.

[1] The FMC has subsequently promulgated additional informational requirements for detention and demurrage invoices, but these have not yet gone into effect, and so have no application to past invoices or this proceeding. *Demurrage and Detention Billing Requirements* (Final Rule), 89 Fed. Reg. 14330 (Feb. 26, 2024)(to be codified at 46 C.F.R. Part 541)(effective May 28, 2024); correction issued 89 Fed. Reg. 39569 (May 8, 2024).

Count VI (46 U.S.C. § 41102(c)) must be dismissed because SEA does not address OOCL's published (and FMC-approved) dispute resolution procedure, but rather a unique, *ad hoc* attempt to settle a purported dispute, created largely by SEA itself and not reflecting any practice or policy of OOCL.

Complainant's request for reparations must be dismissed because the Complaint does not comply with the Commission's Rules and standards for seeking reparations. OOCL assumes that SEA will ask the Presiding Officer for permission to file an amended complaint consistent with the Rules and defers until then its objections to Complainant's unprecedented attempt to obtain reparations relating to amounts Complainant allegedly paid to non-jurisdictional entities such warehousemen or truckers, and under the Commission's "direct purchaser" rule.

BACKGROUND

The Presiding Officer may, although need not, take official notice that SEA is a large, sophisticated company in the business of selling a variety of electronic devices. According to the *Journal of Commerce*, SEA was the 8th largest importer of containerized goods to the U.S. in 2022, importing 185,408 TEUs of cargo. 2023 Journal of Commerce Top 100 Importers (available at https://www.joc.com/article/top-100-importerexporter-rankings-us-trade-flows-returning-pre-pandemic-patterns_20230523.html). Similarly, it is general public knowledge that SEA is 100% owned and controlled by Samsung Electronics Company., Ltd. ("SE"), which is incorporated under the laws of the Republic of Korea.[2] SE is one of the 25 largest companies in the world by market

[2]Samsung Electronics Co., Ltd. and Its Subsidiaries, Consolidated Financial Statements December 31, 2023 and 2022 at 15 (available at https://images.samsung.com/is/content/samsung/assets/global/ir/docs/2023_con_quarter04_all.pdf), As used herein, SE means Samsung Electronics Co., Ltd and its subsidiaries/affiliates other than SEA.

cap. *Id*. As of December 31, 2023, SE reported that SEA was its second largest subsidiary (measured by assets) with assets of 41,926,899 Million Korean Won (MKW). For the year ended December 31, 2023, SEA alone made 39,551,809MKW in sales and 477,338MKW in profit. *Id.*

OOCL has provided transportation services to SE in the U.S. foreign oceanborne trades for years, pursuant to service contracts between OOCL and SE, all on file at the Commission, including for the contract years covered by the Complaint.[3] Although SEA is not a party to those service contracts, SE required OOCL to list SEA as an affiliate, to show SEA as consignee on bills of lading, and to send invoices to SEA for ancillary charges assessed to SE in the U.S. (e.g., detention and demurrage). *See* Compl. ¶ 41.

OOCL has a published (Commission-approved) procedure for resolving detention and demurrage disputes, which may be found at https://www.oocl.com/usa/eng/localinformation/localnews/2020/Pages/2020May19.aspx#:~:text=All%20Detention%20and%20Demurrage%20invoices%20should%20be%20disputed,your%20dispute%20within%205%20business%20days%20of%20receipt. The Complaint contains no reference to that procedure, or to SEA making use of that procedure. Instead, as discussed further below, the Complaint describes an *ad hoc* process of attempted settlement, created almost entirely by SEA, covering the period October 7, 2022 through the date of the Complaint. *See* Compl. ¶¶ 51. 52, 89. Although the Complaint is bereft of further details regarding those extended negotiations, it does note that both OOCL and its Counsel participated in the settlement discussions. Thus, the plain language of the Complaint demonstrates that SEA's gripe is not with the process, but rather with the failure to reach a result favorable to SEA.

[3] Pursuant to 46 CFR § 502.226, official notice may be taken of the FMC-filed Service Contracts—specifically, numbers PE213002 and PE223002-- between SE and OOCL.

LEGAL STANDARD FOR MOTION TO DISMISS

Although the FMC Rules do not expressly provide for a motion to dismiss, it is well-established that litigants before the Commission may bring such motions pursuant to the Federal Rules of Civil Procedure, as applicable to Commission proceedings pursuant to 46 C.F.R. § 502.12. *See, e.g.*, *YSN Imports Inc. v. Oberlander*, 2021 WL 2935838 at *2 (ALJ Order, July 7, 2021); *Carlstar Group LLC v. UTI United States, Inc.*, 1 F.M.C.2d 103 (FMC 2018). As the Presiding Officer explained in *YSN Imports*, "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.'" *YSN Imports*, 2021 WL 2935838 at *3 (quoting *MAVL Capital v. Marine Transport Logistics*, 2020 FMC LEXIS 216 at *6 (FMC 2020)).

OOCL moves to dismiss the Complaint for failure to state a claim and lack of jurisdiction. On a motion to dismiss for failure to state a claim, the Presiding Officer must assume that well-pleaded allegations in the complaint are true. However, the Presiding Officer should not "accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint" nor should the Presiding Officer "accept legal conclusions cast in the form of factual allegations." *Ian Mills v. Crowley Logistics, Inc.*, No. 1995(F), 2024 WL 1855588, at *2 (ALJ 2024) (partially granting motion to dismiss) (quoting *Cornell v. Princess Cruise Lines, Ltd.*, No. 13-02, 2014 WL 5316340, at *6-7 (FMC Aug. 28, 2014). Additionally, the Presiding Officer must scrutinize the specific language of the complaint, because "[m]ere labels and conclusions or a formulaic recitation of the elements of a cause of action will not suffice, nor will naked assertions devoid of further factual enhancement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 555-57 (2007) (internal quotation marks and citation omitted).

This motion to dismiss raises both failures to state a claim and lack of jurisdiction. For alleged failures to state a claim, the Presiding Officer must assume that well-pleaded allegations in the complaint are true. For jurisdictional challenges, however, a party moving to dismiss may make either a facial attack (which assumes that well-pleaded allegations are true) or a factual attack, which "challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Carlstar Group LLC*, 1 F.M.C.2d at 116 (quoting *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009)); *see also, MAVL Capital Inc. v. Marine Transport Logistics, Inc.,* 2 F.M.C.2d 190 (FMC 2020).

ARGUMENT

A. The FMC Lacks Jurisdiction Over Count I of the Complaint, Which Also Fails to State a Claim.

1. The FMC Lacks Jurisdiction Over Count I Because it is, at its Core, a Breach of Contract Claim that Falls Exclusively Within the Admiralty Jurisdiction of the Federal Courts.

Count I of the Complaint rests entirely on the assertion that the term "store door," when used in a bill of lading, magically means that the ocean carrier must pay not only for the cost of the inland transportation, but also for any costs of delay, even if such delay is caused by the consignee, in this case SEA. *See, e.g.*, Compl. ¶¶ 16, 26, 42.[4]

For now it is sufficient to note that Count I is inescapably a claim that, if the bill of lading is interpreted as SEA says it should be, OOCL breached its alleged contractual obligations to SEA, as

[4] OOCL would, if necessary, demonstrate that "store door" delivery does not mean what SEA says, and that SEA was, with respect to the relevant charges, the party that controlled the inland provider and was thus responsible for the delays.

the bill of lading consignee.[5] But the task of interpreting what the term "store door" means in context and determining whether, given that context, OOCL breached contractual obligations, is not a matter for the FMC. Rather, it is, as it has been ever since the founding of this country, a matter reserved exclusively for the courts under both the Judiciary Act of 1789 and 46 U.S.C. § 40502(f). The Judiciary Act of 1789, currently codified at 28 U.S.C. § 1333(1), provides the federal courts with generally exclusive jurisdiction over claims in admiralty or maritime law.[6]

SEA's claims under Count I of the Complaint are properly, and hence exclusively, cognizable in the Federal district court pursuant to their admiralty jurisdiction. Count I is expressly based on bills of lading (including seaway bills/waybills) for ocean transportation between the United States and a foreign country issued by OOCL. *See, e.g.*, Compl. ¶¶ 34-36, 38-41, 44, 48. Such bills of lading (whether for port-to-port or intermodal transportation), as well as the service contract under which they are issued, are indisputably "maritime contracts." *See, e.g., Norfolk Southern R. Co. v. James N. Kirby Pty, Ltd.*, 543 U.S. 14, 24-25 (2004) (holding bill of lading to be a maritime contract even though the last leg, during which the underlying issue arose, was by rail and stating (at 23) that "[i]nterpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts"); *Thypin Steel Co. v. Asoma Corp.,* 215 F.3d 273, 277 (2d Cir. 2000) ("A bill of lading for ocean carriage is a maritime contract"); *Sinotrans Container Lines*

[5] *See, e.g.*, Compl. ¶¶ 35-36 (asking the Commission to interpret the meaning of bill of lading terms).

[6] *See, e.g., Fluence Energy. LLC v. M/V BBC Finland*, No. 3:21-cv-01239, 2024 WL 1310666 at *4 (S.D. Cal. Mar. 27, 2024) (28 U.S.C. § 1333 "vest[s] federal courts with exclusive jurisdiction over admiralty and maritime claims.") (citing *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 918 (9th Cir. 2002)); *NYK Line v. FIL Lines USA Inc.*, 977 F. Supp. 2d 343, 347 (S.D.N.Y. 2013)("28 U.S.C. § 1333(1) provides original and exclusive federal court jurisdiction over '[a]ny civil case of admiralty or maritime jurisdiction.'")(alterations in original).

Co. v. North China Cargo Service Inc., No. CV 06-7848, 2009 WL 10700621 at *3 (C.D. Cal. Feb. 3, 2009) ("[B]oth the Bills of Lading and the Service Contracts are maritime contracts."), *aff'd*, 380 F. App'x 588 (9th Cir. 2010); *Hapag-Lloyd v. Levy*, No. 2:20-cv-11155, 2021 WL 5630299 (D. NJ Dec. 1, 2021).[7] Accordingly, disputes over the meaning of bills of lading and service contracts, the application of their terms to the parties' conduct, and alleged breaches thereof, fall exclusively within the admiralty jurisdiction of the federal courts. *See, Zim Am. Integrated Shipping Servs. Co., LLC v. Sportswear Grp., LLC,* 550 F. Supp. 3d 57, 64 (S.D.N.Y. 2021).

Indeed, claims for breach of bills of lading and/or service contracts, including claims about detention and demurrage thereunder, are routinely handled by federal courts sitting in admiralty and might be said to be such courts' admiralty bread and butter. *See, e.g*., *Ocean Transport Line, Inc. v. American Philippine Fiber Industries,* 743 F.2d 85 (2d Cir. 1984) (affirming district court's award of demurrage under admiralty jurisdiction); *Zim Am. Integrated Shipping Servs. Co., LLC v. Sportswear Grp., LLC,* 550 F. Supp. 3d 57, 64 (S.D.N.Y. 2021)(claims pertaining to detention and demurrage allegedly due under bills of lading are admiralty claims); *Hyundai Merchant Marine Co. Ltd. v. All New, Inc.,* No. CV 19-8858-GW-FFMx, 2020 WL 13590029 at *2 (C.D. Cal. Aug. 20,

[7] In addition, *see*, among others, the following cases: *Shelter Forest International Acquisition, Inc. v. COSCO Shipping (USA) Inc.*, 511 F. Supp.3d 1118, 1123 (D. Or. 2021)("maritime contracts such as a bill of lading or a service contract"); *Calchem Corp. v. Activsea USA LLC*, No. CV-06-1585, 2007 WL 2127188, at *3 (E.D.N.Y. July 25, 2007)(service contract is a maritime contract); *Zim Am. Integrated Shipping Servs. Co., LLC v. Sportswear Grp., LLC,* 550 F. Supp. 3d 57, 63 (S.D.N.Y. 2021*)* ("bills of lading [for international ocean transportation] constitute maritime contracts"); *NYK Line v. FIL Lines USA Inc.*, 977 F.Supp.2d 343, 348 (S.D.N.Y. 2013); *Saray Dokum Ve Madeni Aksam Sanayi Turizm A.S. v. MTS Logistics, Inc.*, No. 17 Civ. 7495, 2023 WL 5164211, at *8 (S.D.N.Y. Aug. 11, 2023) ("[T]he Original Bills of Lading are clearly maritime contracts…."); *BRM Trades LLC v. All-Ways Forwarding International, Inc.*, No. 21 CV 7151, 2022 WL 2788087, at *4 (S.D.N.Y. July 15, 2022)(bill of lading "is a paradigmatic 'maritime contract'"); *Euro Trust Trading S.A. v. Allgrains U.K. Co*., No. 09 Civ. 4483(GEL), 2009 WL2223581 at *4 (S.D.N.Y. July 27, 2009).

2020) ("Demurrage claims clearly fall within the court's admiralty jurisdiction)(quoting from *Ocean Atlantic, Inc. v. Maersk Lines*, 740 F. Supp.1002, 1006 (S.D.N.Y. 1990); *FR. Meyers Sohn Canada Inc. v. Resource Utilization LLC*, 2024 WL 1509256 (S.D.N.Y. 2024); *Shelter Forest International Acquisition, Inc. v. COSCO Shipping (USA) Inc.*, 511 F. Supp.3d 1118 (D. Or. 2021); *A.P. Moller-Maersk A/S v. Safewater Lines PVT, LTD*, 276 F. Supp.3d 700 (S.D. Tex. 2017); *Seaboard Marine, Ltd. v. Apache Sales, Inc.,* 2006 WL 8434118 at *3 (S.D. Fla 2006) (same), and cases cited therein.[8]

By contrast to the numerous court cases where federal courts sitting in admiralty addressed purported breaches of bills of lading, Counsel for OOCL have not identified a single instance in which the Commission resolved a claimed breach of a bill of lading or purported to interpret what a bill of lading requires. Quite to the contrary, the Presiding Officer has recently held that disputes as to a respondent's obligations under a bill of lading (and associated tariff) are breach of contract claims and may not be heard by the Commission. *Seafair USA LLC v. Sterling Container Line Ltd*., FMC Docket No. 22-34, 2024 WL 741926 (I.D. April 15, 2024). There, the complainant asserted that the respondent was obligated by the bill of lading/tariff to pay certain destination charges

[8] For a small sample of additional cases where courts adjudicated alleged breaches of bills of lading or service contracts, including demurrage or detention claims, pursuant to their admiralty jurisdiction, *see, e.g.*, *BRM Trades LLC v. All-Ways Forwarding International, Inc.*, 2022 WL 2788087 (S.D.N.Y. Jul 15, 2022); *Gulf Puerto Rico Lines, Inc. v. Associated Food Co*., 366 F. Supp. 631 (D. PR 11973); *Shelter Forest International Acquisition, Inc. v. OOCL Shipping (USA) Inc.*, 511 F. Supp.3d 1118 (D. Or. 2021)*; OOCL (USA) Inc. v. Transco Shipping Corp.*, No. 13-cv-5418, 2015 WL 9560565 (S.D.N.Y. December 23, 2015); *Mediterranean Shipping Co. (USA) v. Cargo Agents, Inc.*, 2011 WL 6288422 (S.D.N.Y. 2011); *A.P. Moller-Maersk A/S v Ocean Express Miami*, 550 F. Supp. 2d 454 (S.D.N.Y. 2008); *Sinotrans Container Lines Co. v. North China Cargo Service Inc.*, No. CV 06-7848, 2009 WL 10700621 (C.D. Cal. Feb. 3, 2009), *aff'd*, 380 F. App'x 588 (9th Cir. 2010); *CMA CGM (America) L.L.C .v. Peekay International, Inc.*, No. 08-cv-1854, 2008 WL 4876853 (E.D.N.Y. Nov. 12, 2008); *Dynamic Worldwide Logistics, Inc. v. Exclusive Expressions, LLC*, 77 F. Supp. 3d 364 (S.D.N.Y. 2015); *Laufer Group International, Ltd. v. Sonder Distribution USA, LLC*, No. 1:22-cv-03313, 2023 WL 6317949 (S.D.N.Y. Sept. 28, 2023); *Hapag-Lloyd v. Levy*, No. 2:20-cv-11155, 2021 WL 5630299 (D.N.J. Dec. 1, 2021);); *A.P. Moller-Maersk A/S v. Safewater Lines PVT, LTD*, 276 F. Supp.3d 700 (S.D. Tex. 2017).

(including demurrage), but the Presiding Officer found that these were quintessential breach of contract claims, and thus the issue was "not a question I can answer in this proceeding." *Id.* at *17. *See also, Id*. at *8 (dispute over which party was required to pay destination charges "is primarily an argument over an alleged breach of contract, over which "the Commission does not have jurisdiction").[9]

The Commission has likewise eschewed authority over bill of lading disputes. In *Definition of Package*, 23 S.R.R. 111, 114 (1985), for example, the FMC stated that the statutes administered by the FMC:

> "do not authorize the agency to prescribe the substantive content of bills of lading. . . . . The Commission has recognized that neither before nor after [the tariff-filing requirement was imposed] has it possessed the power to prescribe substantive tariff provisions. . . . The agency's authority is restricted to 'prescribing the form and manner in which tariffs are published and filed.'"

FMC jurisdiction over Count I is also precluded by 46 U.S.C. § 40502(f), which, in accordance with the exclusive grant of admiralty jurisdiction to the federal courts, recognizes that claims sounding in breach of contract are for the courts, not the Commission.[10] This is evidenced both by the legislative history and by a similar provision previously incorporated by Congress into the Interstate Commerce Act (ICA).

The Shipping Act, 1916 allowed carriers and shippers to use certain contracts for negotiated rates, but only if the contracts were approved by the FMC. Pub. L. No. 356, Section 14b., 75 Stat. 762, 763 (October 3, 1961)("Any contract…not permitted by the Commission shall be unlawful,

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[9] *See also CTM International, Inc. v. Medtech Enterprises, Inc.,* 1998 WL 942103 (ALJ 1998)(noting that Commission's jurisdiction "is not the same as that of an admiralty court").
[10] 46 U.S.C. § 40502(f) states in pertinent part that "the exclusive remedy for a breach of a service contract is an action in an appropriate court."

and contracts…shall be lawful only when and as long as permitted by the Commission."). Thus, there was no need at that time to address where such contracts could be enforced.

In 1980, Congress substantially revised the ICA in order to de-regulate transportation thereunder. As part of this process, Congress directed disputes over contracts between carriers and their customers to the courts: "The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree." Section 208(i)(2) Pub. L. No. 96-448, 94 Stat. 1909 (Oct. 14, 1980).

Just a few years later, in the sweeping changes made by the Shipping Act of 1984, Congress made similar changes to the freedom of ocean carriers and shippers to contract and added a virtually identical provision about the exclusive judicial jurisdiction over claims stating breach of contract. Pub. L. No. 98-237, 98 Stat. at 88 (March 20, 1984). This limitation was retained and reaffirmed when Congress adopted the Ocean Shipping Reform Act of 1998, which further de-regulated the use of service contracts. Pub. L. No. 105-258 (October 14, 1998). *See* S. Rep. 61, 105th Cong., 1st Sess., p. 23 (1997) (emphasis added)("[t]he bill would retain the 1984 Act provision providing that the exclusive remedy for a breach of a service contract is an appropriate court, ***not the FMC***").

The Interstate Commerce Act and the Shipping Acts have long been interpreted and applied *in pari materia*. *See, e.g. Sea-Land Serv., Inc. v. Murrey & Son's Co. Inc.*, 824 F.2d 740, 744 (9th Cir. 1987)(ICA and Shipping Act should be interpreted in tandem, because "the regulatory structure and purposes of the two Acts are substantially the same") (citing *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 481 (1932)); *North Atlantic Mediterranean Freight Conference - Rates on Household Goods*, 11 F.M.C. 202, 209 (1967) ("[i]t is well settled that the

provisions of the Shipping Act closely parallel those of the Interstate Commerce Act . . . and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in light of the similar provisions of the Interstate Commerce Act"), modified on appeal, 409 F.2d 1258 (2d Cir. 1969). Here, the provisions are not just similar, but virtually identical. Hence, experience with the ICA is highly relevant in understanding what Congress intended when it added what is now 49 U.S.C. § 14101(b)(2).

It has been consistently held that the Interstate Commerce Commission (ICC) (including its successor, the Surface Transportation Board (STB)) lacks jurisdiction to adjudicate breaches of contract. See, e.g., *Cleveland-Cliffs Iron Co. v. I. C. C.*, 664 F.2d 568, 592 (6th Cir. 1981); *H.B. Fuller Co.*, 2 S.T.B. 550 (1997); *Detroit, Toledo & Ironton R. Co. v. Consol. Rail Corp.*, 727 F.2d 1391, 1397 (6th Cir. 1984); *Schoenmann Produce Co. v. Burlington N. & Santa Fe Ry. Co.*, 420 F. Supp. 2d 757, 760 (S.D. Tex. 2006).

Because the Shipping Act precludes the adjudication by the Commission of claimed service contract breaches, *a fortiori* it must at least equally preclude breach of bill of lading (contract of carriage) claims, as evidenced by *Seafair, supra*. Service contracts are a specific creation of the Shipping Act (46 U.S.C. § 40502) and are governed thereby and by the Commission's implementing regulations (46 C.F.R. Part 530, including a requirement that common carriers adhere to their service contracts (46 U.S.C. § 41104(a)(2)). Bills of lading, by contrast, are barely mentioned in the Shipping Act (and then only by reference to define terms or explain other requirements) or the FMC regulations (and then only by reference to the requirement to show a sample bill of lading in the tariff or how an NVOCC must fill out the shipper box).

OOCL is aware that one of the Commission's Administrative Law Judges has tended to disregard the express language of 46 U.S.C. § 40502(f), at least as to service contract disputes,

essentially holding that as long as a complainant omits the precise phrase "breach of contract" and substitute a reference to the Shipping Act, 46 U.S.C. § 40502(f) need not be considered. But even apart from the fact that these were about service contract disputes, not bills of lading, this cannot possibly be correct as it renders 46 U.S.C. § 40502(f) entirely superfluous and devoid of meaning. Such a conclusion would offend the principle that congressional commands may not be rendered nugatory by crabbed construction,[11] and would also be directly contrary to the Commission's statement that:

> "For Section 8(c) [the same provision prior to codification] 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." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1644 (FMC 2000) (emphasis added).

Indeed, as the Commission further explained:

> "[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. (

This statement clearly means that a would-be complainant cannot jurisdiction shop just by using the term "breach of contract" or "violation of the Shipping Act" for the exact same conduct, depending on which jurisdiction it prefers. As the Commission explained in *Cargo One*, above, the bar of 46 U.S.C. § 40502(f) applies not just when the complaint expressly states breach of contract, but also whenever the "allegations essentially compris[e] contract law claims." *Id.*

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[11] As the Commission explained in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.,* 25 S.R.R. 1213, 1220 (FMC 1990) "Courts have made it clear that federal agencies must give effect to every word of as statute so that no part will be rendered inoperative, superfluous, void or insignificant." *See, e.g., National Association of Recycling Industries, Inc. Inc. v. ICC, 660 F.2d 795, 799* (D.C. Cir. 1981); *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980).

It is clear beyond peradventure that although Complainant has dressed Count I up in the guise of a Shipping Act claim, the reality is that Count I is nothing more than a garden variety breach of contract claim relating to alleged failure to fulfill bill of lading obligations. SEA repeatedly states allegations that sound in contract:

- "OOCL fell far short of its responsibilities and obligations" under the store door bills of lading. Compl. ¶ 18.
- "OOCL began repeatedly failing to properly perform its obligations for inland transportation…." Compl. ¶ 19.
- "OOCL[] fail[ed] to perform under 'store door' terms…." Compl. ¶ 48.
- "OOCL began repeatedly and chronically failing to properly perform its inland transportation obligations…." Compl. ¶ 51

SEA does not assert or allege that a policy of assessing detention and demurrage to consignees is *per se* unreasonable under the Shipping Act. To the contrary, SEA's argument is based entirely on the proposition that the imposition of charges was, in this particular case, inconsistent with the specific bills of lading. This, in turn, is founded solely on the SEA position that a reference in the OOCL bill of lading to "store door" delivery should be interpreted by the Commission to mean what SEA says it does. Although SEA's interpretation is wrong, as OOCL will demonstrate, if necessary, the critical point is that SEA's claim is not based on any provision of the Shipping Act or FMC regulations, such as the Incentive Principle (if necessary, OOCL will show that the principle favors assigning responsibility to SEA). In other words, SEA alleges only that OOCL was contractually obligated under the bills of lading to perform certain functions relating to inland transportation and that OOCL failed to perform up to the standards allegedly set by those contracts – *i.e.,* OOCL breached its obligations under the contracts. Accordingly, Commission jurisdiction

over SEA's claim is plainly pretermitted by 46 U.S.C. § 40502(f). *See, e.g.*, *Global Link Logistics, Inc. v. Hapag-Lloyd AG,* 33 S.R.R. 512 (I.D. Granting Motion to Dismiss 2014).[12]

2. <u>SEA Fails to State a Claim Under Count I Because it Does Not Plausibly Allege a "Practice" by OOCL.</u>

By its terms, 46 U.S.C. § 41102(c) applies only to "regulations and practices."[13] Moreover, as stated in the Interpretative Rule, codified at 46 C.F.R. § 545.4, the term "practice" means only acts or omissions that occur on a "normal, customary, and continuous basis."

The Interpretative Rule, including the preambles to the Proposed and Final Rules and the precedents cited in those preambles, as well as decisions rendered before and after promulgation of the Interpretive Rule, make clear that the requirement of a "normal, customary, and continuous basis" is not to be taken lightly or to be given a cursory analysis. As the Commission explained in the preamble to the Final Rule:

> "Congress chose the word "practice" and the phrase, "establish, observe, and enforce just and reasonable regulations and practices," to describe actions or omissions engaged in on a ***normal, customary, and continuous basis***. . . . To find a violation of § 41102(c), the Commission consistently required that the unreasonable regulation or practice was the ***normal, customary, often repeated, systematic, uniform, habitual, and continuous manner*** in which the regulated common carrier was conducting business." 83 Fed. Reg. 64478 (Dec. 17, 2018) (footnotes omitted, emphasis added).

[12] In *Global Link*, the ALJ held, based on *Cargo One*, that claims premised on the assertion that a service contract was amended by the parties' course of dealing were outside the FMC's jurisdiction because they were "inherently contract claims – questions of fact and interpretation of the service contract." *Id*. at 528. He likewise held that issues relating to the carrier's alleged failures to perform under the contract, including carrier errors that sometimes made it impossible for *Global Link* to book cargo were "also inherently contract claims . . . not within the Commission's jurisdiction to decide." *Id.*

[13] For present purposes, OOCL uses the term "practice" to include OOCL regulations, although the Complaint makes no mention of such.

The requirement that the alleged acts and omissions be proven to occur on a "normal, customary, often repeated, systemic, uniform, and habitual, and continuous" basis reflects the two-fold purposes of the Interpretative Rule. The Interpretive Rule is intended specifically to restrict the category of claims that could be brought at the Commission, leaving other claims to be resolved in other forums, applying non-Shipping Act law:

> "The Commission is aware that the interpretive rule may prevent some claims from being brought under the Shipping Act. Matters that may previously have been brought under § 41102(c) however, can still find resolution in other provisions or regulations of the Shipping Act or be adjudicated as matters of contract law, agency law, or admiralty law." FMC Docket No. 18-06, *Interpretive Rule, Shipping Act* (Final Rule) (December 12, 2018), Preamble to the Final Rule at 6; *see id*. at 20 ("[t]hough the Commission is aware that the interpretive rule may redirect some claims in certain fact situations from being brought under the Shipping Act, the Commission believes that existing alternative avenues of redress are fully sufficient to address those cases")."

The Commission's deliberate decision to shift certain types of claims from the FMC to other forums was not made only to lighten the Commission's workload. Rather, it was intended to carry out congressional intent, as expressed in the Shipping Act, and to improve the ability of the Commission to act in its own jurisdictional sphere, by focusing on cases where the actions of regulated entities affected the shipping public as a whole. As the Commission explained:

> "This interpretation restores § 41102(c) to its proper function and purpose under the Shipping Act of 1984 and will return the Commission's focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public – all as intended by Congress in its enactment of the 1916 Act and the 1984 Act." 83 Fed. Reg. 45367 (Sep. 7, 2018).

The Commission identified the original understanding of the Shipping Act by reference to FMC decisions such as *Investigation of Certain Practices of Stockton Elevators,* 8 F.M.C. 178, 201 (FMC 1964); *European Trade Specialists v. Prudential-Grace Lines,* 19 S.R.R. 59, 63 (FMC 1979); *Kamara v. Honesty Shipping Service,* 29 S.R.R. 321 (ALJ 2001); *Intercoastal Investigation,* 1935, 1 U.S.S.B.B. 400, 432 (1935); *J.M. Altieri v. Puerto Rico Ports Authority,* 7 F.M.C. 416

(ALJ 1962); and *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.,* 25 S.R.R. 1273 (SO 1990). The Commission also cited court cases such as *Whitam v. Chicago, R.I. & P. Ry. Co.,* 66 F. Supp. 1014 (N.D. Tex. 1946); *Wells Lamont Corp. v. Bowles,* 149 F.2d 364 (Em. Ct. App. 1945); *J.C. Francesconi v. Baltimore & O. R. Co.,* 274 F. 687 (S.D.N.Y. 1921); and *McClure v. Blackshere,* 231 F. Supp. 678, 682 (D. Md. 1964). It is therefore worth examining some of these older precedents, as well as more recent decisions.

In *Stockton Elevators*, the Commission held that actions taken in six instances could not be considered a "practice":

> "It cannot be found that the Elevator engaged in a 'practice' within the meaning of Section 17. The essence of a practice is ***uniformity***. It is something ***habitually*** performed and it implies ***continuity*** . . . the *usual* course of conduct. 3 S.R.R. at 618 (emphasis added, ellipses in original).

Likewise, in *European Trade Specialists,* the Commission held that the complainant had not made out a violation, because it did not establish that the alleged wrongful act -- failure to notify -- was a practice, regularly followed with respect to shippers in general (not just complainant). In this respect, 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***." 19 S.R.R. at 63 (underlining in original, emphasis added). And in *A.N. Deringer, Inc.* 25 S.R.R. at 1276 (SO 1990), the Settlement Officer held that the FMC lacked jurisdiction over a claim, even if the alleged activity was unreasonable:

> "[T]he sustaining of an alleged violation of Section 10(d)(1) requires more than the showing of unjust or unreasonable activity. It requires that the complainant prove failure: "to establish, observe, and enforce just and reasonable regulations and practices…." . . . Nothing in the record casts light upon [Respondent's] regulations or practices, and this constitutes a fatal flaw in [Complainant's] case."

The court cases cited by the Commission point in the same direction just as sharply. In *Wells Lamont,* for example, the court explained:

> "According to dictionaries, both lay and legal, a practice is a custom or usage, a customary usage, something ***habitually and uniformly*** performed. It implies uniformity and continuity. To establish is to make stable or firm; to fix in in permanence and regularity; … to settle firmly or to fix unalterably…." 149 F.2d at 366 (emphasis added).

In *Whitam*, the court emphasized, consistent with *European Trade Specialists*, that a "practice" typically must involve not only repetition, but also application to ***multiple customers***. As the court explained: "The word 'a practice' as used . . . anywhere properly, implies ***systematic*** doing of the acts complained of, and usually as applied to carriers and shippers generally." 66 F. Supp. at 1017 (emphasis added).[14] *See also, e.g., McClure*, 231 F. Supp at 682 ("Practice ordinarily implies uniformity and continuity,… and uniformity and universality, … must characterize the actions on which a practice is predicated."); *Francesconi*, 274 F. at 690-91 (concluding that defendant's actions were "not uniform," which precluded the court from finding a practice; stating that "[o]ccasional and ***even common*** assertions of right do not make such a practice. Its essence is uniformity.") (emphasis added).

Commission cases decided since the Interpretative Rule was issued on December 17, 2018, confirm that the current rule is the same as the original. In *Hangzhou Qianwang Dress Co. v. RDD Freight International Inc.*, 2 F.M.C.2d 168 (FMC 2020), for example, the Commission held that three failures to deliver cargo to the correct party were not frequent enough or regular enough to constitute a practice. In so holding, the Commission agreed with the Presiding Officer's finding that the complainant's assertion that Respondent "might have acted similarly regarding 'other clients past and present' was insufficient to prove normal, customary, and continuous conduct." *Id.*

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[14] As the court in *Whitam* further explained:

> "[Plaintiff] does not make it a practice even between them. Specific acts of violation of this rule does not constitute a ''practice.'… As far as plaintiff's pleadings go, no other shipper was mentioned or involved…." *Id.*

at 172 (citation omitted). Likewise, in *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, 2 F.M.C. 2d 224 (ALJ 2020), *aff'd*, 3 F.M.C. 2d 110 (FMC 2021), the Presiding Officer concluded that two similar actions by Marine Transport Logistics were not enough to make out a practice. The Commission affirmed, stating that "'[t]he essence of a practice is uniformity. It is something habitually performed and implies continuity . . . the usual course of conduct.'" *Id.* at 117 (quoting *Stockton Elevators* 201).[15] Accordingly, the Commission held that "Crocus has not proved that Marine Transport's conduct occurred on a normal, customary, and continuous basis as required by § 545.4." *Id*.

Other than the formulaic (and hence inadequate) recitation that "Respondent's foregoing practices and procedures relating to the assessment of demurrage and detention have been occurring on a normal, customary, and continuous basis," and the equally formulaic assertion that this is shown by OOCL's purported actions regarding multiple SEA shipments, the Complaint says nary a word to show a practice. It thus plainly fails to adequately allege that OOCL's challenged

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[15] *See id*. at 15:

> "An 'occasional transaction' or isolated act is not a 'practice.' *Stockton Elevators,* 8 F.M.C. at 201. *Two or three incidents over a short time period are not enough to show* that the conduct in question is an entity's normal and customary practice. *Hangzhou,* 2 F.M.C.2d (releasing 3 shipments to the same consignee without an original bill of lading over a 2-month period insufficient to show that was respondent's normal practice or that it was customary or continuous). Even six instances of "unreasonable conduct" carried out over a period of several months involving the same entities have been ruled insufficient to prove that conduct was "uniform or continuous" under § 41102 (or its predecessor, section 17 of the Shipping Act). *Stockton Elevator,* 8 F.M.C. at 200-201 (charges to the same customer inconsistent with tariff rates on six occasions amounted to a "single transaction")."

To like effect, *see Marie Carew v. Maersk Line A/S*, 3 F.M.C. 2d 179.(I.D., Admin. Final 2021).

actions reflect "the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner" in which OOCL was conducting business.

Although the Complaint alleges a large number of shipments and even larger number of charges, and assuming, for purposes of this motion that the numbers are accurate, SEA does not link any of those shipments/charges to any specific practice. In any event, as demonstrated above (including by citation to *European Trade Specialists* and *Whitam)* the Commission and court cases require much more – i.e., that the alleged "practice" applied to customers generally, not just a particular customer. *European Trade Specialists*, supra, *Whitam,* supra. Because SEA has failed to identify any alleged practice on the part of OOCL that is "something habitually performed…that implies continuity…in the usual course of conduct,"" *Crocus Investments* at 117 (quoting *Stockton Elevators* at 201), it has failed to plausibly allege a "practice."

B. <u>Count II Fails to State a Claim Because SEA was Not the Shipper, and SEA Does Not Allege that OOCL Retaliated Against SEA for Bringing a Matter to the FMC.</u>

Count II of the Complaint asserts that OOCL violated two sections of the Shipping Act regarding unlawful retaliation. First, for the period before June 16, 2022, the Complaint claims that OOCL violated 46 U.S.C. § 41104(a)(3) (emphasis added), which at the time prohibited a common carrier from "retaliat[ing] against a ***shipper*** by refusing, or threatening to refuse, cargo space accommodations 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." Compl. ¶ 63 (alterations in original). Second, for the period after June 16, 2022, the Complaint claims that OOCL violated 46 U.S.C. § 41102(d) (emphasis added), which prohibits a common carrier (from "retaliat[ing] against a ***shipper*** . . . by refusing, or threatening to refuse, an otherwise-available cargo space accommodations, or . . . resort to other unfair or unjustly

discriminatory action for – the reason that a shipper . . . has . . . filed a complaint against the common carrier . . . or any other reason." *Id.* at ¶ 64.

Count II fails because SEA was not the shipper of the shipments about which SEA complains. All shipments addressed in the Complaint moved under service contracts between OOCL and SE, to which SEA was not a party.[16] These contracts are all on file at the Commission pursuant to 46 CFR Part 530 and are subject to official notice under 46 C.F.R. § 502.226. Nor, as SEA admits, was SEA a shipper on the bills of lading (that was SE), but rather appeared only as consignee. *See* Compl. ¶ 33. OOCL understands that, in some circumstances, the consignee may be treated as a shipper,[17] but neither Congress nor the Commission could have intended there to be at least two shippers on each bill of lading. Rather, the shipper is the entity shown as shipper on the bill of lading and the Shipper Party to the service contract under which the cargo moved.

Second, Count II fails to make out any claim of retaliation under the standards set out by the FMC. As the Commission has explained, claims of retaliation must be supported by allegations that the reason for the alleged retaliation was an action by the shipper ***bringing a matter to the attention of the FMC.*** In *20230930-DK-Butterfly-1, Inc. v. MSC*, for example, ALJ Crovella held that, in order for a retaliation claim to survive a motion to dismiss, a complaint must include sufficient allegations that the alleged "retaliation" was 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. *20230930-DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Co. SA*, No. 23-12, 2024 WL 1299768 (ALJ

[16] The Shipper Party signatory to Contracts such as PE213002 and 2E223002 is Samsung Electronics Company, Ltd. As explained above, SEA was listed solely as an affiliate of SE.

[17] As one example, some consignee companies in the United States enter into service contracts in their own names for use by their foreign suppliers.

Mar. 25, 2024). In reaching this holding, the Presiding Officer recognized and reaffirmed FMC precedent that the term "for any other reason" must be read *in pari materia* with the specifically referenced reasons of patronizing another carrier or filing a complaint. Thus, a claim of "retaliation" not relating to use of another carrier must include allegations that complainant brought its complaints to the attention of the FMC or at the very least threatened to do so. *Id.* at 5-6.[18]

SEA's allegations do not come close to meeting that standard. Rather, the Complaint says only that:

> "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." Compl. ¶ 68.

This skimpy statement is essentially the same as that found insufficient by Judge Crovella in *DK-Butterfly.*

Finally, in order to make out a retaliation claim, logic dictates that the shipper action alleged to have been the cause of the purported retaliation have occurred before the alleged action in retaliation. The Complaint cites nothing to satisfy this requirement.

C. Count III Fails Because Failure to Accept a Settlement Demand Does Not Constitute a Refusal to Deal.

Count III purports to allege a refusal to deal by OOCL, based on OOCL's non-acceptance of SEA's monetary demand to settle SEA's purported claims and avoid this litigation. Compl. ¶¶ 73-74.

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[18] *See also, e.g.*, *California Shipping Line, Inc. v. Yangming Marine Transport Corp.,* 25 S.R.R. 1213, 1225 (1990) (statue applies "solely to retaliatory acts of a carrier against a shipper"); *Consumer Electronics Shippers Ass'n v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 85, 91 (1991) (retaliation should not be interpreted so broadly as to read out of the statute the opening reference to retaliation, and if the statute "were applied to any act of discriminatory conduct, it could render the other provisions of the Act prohibiting discrimination superfluous").

But Count III fails to state a claim because the failure to accede to a settlement demand does not (and cannot) constitute a refusal to deal under the Shipping Act. For example, engaging in "settlement talks[] is conduct incidental to a petition." *Freeman*, 410 F.3d 1180, 1185 (9th Cir. 2005)(internal quotation marks omitted).[19]

As a starting point, pre-litigation actions, including settlement discussions, are exempt from liability under the *Noerr-Pennington* doctrine. Courts have held that, in the adjudicatory context, the right to petition applies not only to speech in the courtroom, but also to speech outside the court relating to pending or future litigation. *Sosa v. DirectTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). The Ninth Circuit there explained that, because protecting the First Amendment right to petition requires "breathing space" [id. at 932], "[c]onduct incidental to a lawsuit ... falls within the protection of the Noerr-Pennington doctrine." Theme Promotions v. News America Marketing FSI, Inc., 546 F.3d 991, 1007 (9th Cir. 2008). "Conduct incidental to a petition is protected by Noerr-Pennington if the petition itself is protected." Freeman v. Lasky, Haas & Cohler, 410 F.3d at 1184.

Second, irrespective of the *Noerr-Pennington* doctrine, 46 U.S.C. § 41104(a)(10) does not apply to settlement negotiations. On its face, it talks about vessel space accommodations, so under the principles enunciated by Judge Crovella in *DK-Butterfly*, it cannot be extended so far afield as to involve settlement discussions, as Complainant seeks to do. This is especially true as another section of the Shipping Act, 46 U.S.C. § 41104(a), specifically addresses carriers' handling of claims. That

[19] See, e.g., *EcoDic Tech. AG v. DVD Format/Logo Licensing Corp*., 711 F.Supp.2d 174, 1082 (C.D. Cal. 2010) ("all communications between private parties related to litigation-including presuit demand letters and settlement offers-are entitled to immunity")(citations omitted); *Gifford v. Kampa*, No. 2:17-CV-2421-TLN-DMC, 2021 WL 1143507 at *11 (E.D. Cal. Mar. 25, 2021) ("Communications related to litigation are sufficiently within the protection of the Petition Clause to trigger the Noerr-Pennington doctrine to bar claims against a private attorney as to such communications").

section forbids a carrier of tariff shipments to engage in an unfair or unjustly discriminatory practice in the matter of adjustment and settlement of claims.

As the Commission has said about refusal to deal claims:

> "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 *New Orleans Stevedoring Co. v. Fed. Mar. Comm'n*, 80 F. App'x 681 (D.C. Cir. 2003) (emphasis added).

See also, e.g., *Consumer Elec. Shippers Ass'n, Inc. v. Asia North America Eastbound Rate Agreement,* 26 S.R.R. 85, 93 (ALJ 1991*)* (no refusal to deal where the carrier made a contract offer, "albeit one not fully to [Complainant's] liking"); *Kobel v. Hapag-Lloyd AG,* 32 S.R.R. 1720 (FMC 2013*)*; *California Shipping Line, Inc. v. Yangming Marine Transport Corp*., 25 S.R.R. 1213 (FMC 1990).

The Complaint fails to plausibly allege anything more than OOCL refused to cave to SEA's demands. That is a failure to reach a deal, not a refusal to deal. *See, New Orleans Stevedoring Co.*, 29 S.R.R. at 351; *Consumer Elec. Shippers Ass'n, Inc.*, 26 S.R.R. at 93; *Way Interglobal Network, LLC v. Shenzhen Unifelix SCM Limited*, FMC Docket No. 22-28, slip op. at 39 (I.D. April 19, 2024).

D. Count IV Must be Dismissed Insofar as SEA Seeks Reparations, Which are Not Available for Such a Claim.

Count IV of the Complaint asserts that OOCL sent invoices to SEA that did not meet the informational requirements of OSRA22. Because, as the FMC has explained, OSRA22 is not retroactive, this claim would apply at most to charges assessed by OOCL on or after June 16,

2022.[20] Thus, SEA's allegation that non-compliant invoices were, it believes, sent "through and to the date of this Complaint" is meaningless. Compl. ¶ 77. Only charges assessed after June 16, 2022 may be asserted as potential violations.

In any event, even if OOCL did send non-compliant invoices (which OOCL disputes), the only remedy available to SEA would be for OOCL to issue new, compliant invoices. As the Commission very recently explained, issuance of a deficient invoice does not erase the underlying debt of the invoiced party, but instead only relieves it (temporarily) of the obligation to pay that specific, defective invoice. Thus, the invoiced party remains obligated to pay the debt if the carrier presents a new, compliant invoice.[21]

To the extent, if any, that a specific assessment by OOCL after June 16, 2022 is determined to be insufficient, OOCL will issue a new invoice. Indeed, OOCL will do so at any time if SEA identifies the specific invoices that it asserts are deficient and details how they are noncompliant.

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[20] *See, e.g.,* FMC's Interim Guidelines on Charge Complaints, which say OSRA22 does not apply to charges "invoiced or assessed prior to the effective date of OSRA on June 16, 2022." (December 1, 2022)(available at https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/).

[21] In this respect, the Commission stated:

> "While billing parties have an obligation under 46 U.S.C. § 41104(d)(2) to issue accurate invoices, issuing 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).

E. Count V Must Be Dismissed For Failure To State A Claim For Assessments Made Before June 16, 2022.

Count V addresses allegedly unreasonable charges pursuant to 46 U.S.C. § 41104(a)(14). SEA acknowledges that this section applies only to activities occurring after June 16, 2022, but asserts that this section applies broadly not just to the assessment or invoicing of charges (as the Commission has stated), but rather should be expanded so as to reach all of "OOCL's practices and actions in connection with assessment of demurrage and detention charges after the effective date of OSRA..." Compl. ¶ 82

SEA's attempt to apply 46 U.S.C. § 41104(a)(14) retroactively contravenes the statutory language and the FMC's position. 46 U.S.C. § 41104(a)(14), as effective June 16, 2022, applies only where a carrier "assess[es]" a charge. The Complaint does not allege that OOCL "assess[ed]" any charge after June 16, 2022, but rather, vaguely alleges "practices" and "actions" somehow connected with an "assessment" (or in SEA's revision of the statute, an "invoicing"). Absent a statement that particular charges were "assessed" to SEA after June 16, 2022, the Complaint fails to state a claim, and fails to include sufficient specificity to permit OOCL to prepare a meaningful answer.

F. Count VI Must be Dismissed for Failure to State a Claim Because SEA Does Not Plausibly Allege a General Dispute Resolution Practice, Policy, or Procedure by OOCL, and Settlement Negotiations Between the Parties Cannot, as a Matter of Law, Provide the Basis for a Claim.

Count VI purports to challenge OOCL's dispute resolution process. As noted earlier, OOCL has a published procedure for disputing detention and demurrage invoices. The Complaint does not allege that SEA used, or even sought to use, that procedure. Rather, the Complaint makes clear that SEA's purported grievance is about an *ad hoc* process SEA created on its own, sending "Demand" letters asserting that OOCL must refund charges allegedly paid by SEA.

Thus, as with Count I, SEA fails to identify a practice. SEA asserts that "Section 41102(c) applies equally to dispute resolution practices, policies and procedures (or lack thereof) in connection with assessment, collection, and dispute resolution of charges relating to or connected with receiving, handling, storing, or delivering property." Even assuming that is correct, (which OOCL disputes as contrary to the statute and regulations), the key phrase is "practices, policies and procedures." SEA complains only about its own, one-time and *sui generis* experience, created more by SEA than OOCL, and not about OOCL's published dispute resolution procedure. Nor does SEA identify any general practice, policy, or procedure, as defined in FMC Docket No. 18-06, *Interpretive Rule, Shipping Act* (Final Rule) (December 12, 2018). *See* 46 C.F.R. § 545.4(b) ("the claimed acts or omissions … are occurring on a normal, customary, and continuous basis"). Thus, SEA has failed to state a claim.

Even apart from this legal disability, it would make no sense as a matter of regulatory policy to allow every complainant to challenge its own, individual settlement negotiations. The Shipping Act intentionally addresses practices, not individual negotiations, and it would be quite unreasonable for the FMC to get into the details of every, presumably confidential, attempt to settle a dispute. As with the alleged refusal to deal addressed above, the Complaint alleges nothing more than the obvious observation that SEA is dissatisfied with the result and says nothing about the actual process.

Allowing unsuccessful settlement discussions to serve as a basis for a claim of Shipping Act violation would appear to violate the *Noerr-Pennington* doctrine, as discussed above. It would also be directly contrary to the Commission's long-standing policy of encouraging settlement.[22] What

[22] *See, e.g.*, *D.F. Young v. Wallenius*, 2024 WL 1435415 (I.D., Admin. Final Mar. 27, 2024)(citing *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002); *Old Ben Coal*

ocean carrier or other regulated entity would even agree to commence settlement discussions if it knew that failure to reach an agreement could be reviewed by the Commission as a Shipping Act violation? Such a regime would also obliterate the supposed confidentiality of settlement discussions promised by the FMC Rules and Federal Rule of Evidence 408, as SEA has done here.

G. SEA's Request for Reparations Must be Dismissed Because SEA Did not Allege its Amount of Alleged Damages

SEA states repeatedly that it suffered "actual" injury and thus is entitled to reparations. Its allegations, however, fail to meet the requirements for a complaint seeking reparations. The Complaint as filed fails to comply with the FMC's procedural requirements, which specifically state that a complaint seeking reparations "must set forth the injury caused by the alleged violation and the amount of alleged damages." 46 C.F.R. § 502.62(a)(4)(i) (emphasis added). This flouting of the Commission's regulations fully warrants dismissal of SEA's claim for reparations, absent an amendment to the Complaint rendering it compliant with the Commission's Rules.

In focusing on this procedural defect, OOCL does not concede in any respect that the vague language of the Complaint adequately alleges an actual injury caused by the OOCL. We recognize that the Presiding Officer is likely to allow SEA an opportunity to amend its Complaint, so reserve until then our arguments that SEA has not alleged actual injury. OOCL likewise reserves until then its argument that the Complaint improperly fails to allege reparations on a shipment-by-shipment basis, as the Commission has required in prior cases. See, e.g., *TCW, Inc. v. Evergreen*, 2022 WL 18068977 (FMC 2022).

Co. v. Sea-Land Serv., Inc., 18 S.R.R. 1085, 1091 (ALJ 1978); *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co*., 20 S.R.R. 761, 762 (ALJ 1981)).

CONCLUSION

Based on the foregoing, because the FMC lacks jurisdiction over SEA's claim based on breach of the contract of carriage (the bills of lading) and all of SEA's purported claims fail to state a claim upon which relief may be granted. the Complaint should be dismissed.

DATED: May 13, 2024

Respectfully submitted,

/s/ Rebecca A. Fenneman

ATTORNEYS FOR RESPONDENTS, Orient Overseas Container Line, Ltd. and OOCL (Europe) Ltd.

JEFFREY/FENNEMAN LAW + STRATEGY, PLLC

Eric C. Jeffrey
EJeffrey@JeffreyFenneman.com
Rebecca A. Fenneman
RFenneman@JeffreyFenneman.com
Kaya C. Massey
KMassey@JeffreyFenneman.com
Nicholas L. Webb
NWebb@JeffreyFenneman.com

700 12th Street, NW Suite 700
Washington, DC 20005

CERTIFICATE OF SERVICE

I certify that on the 13th day of May, 2024, a true and correct copy of the foregoing **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.

ATTORNEY FOR COMPLAINANT:

Peter F. Black
1215 19th Street, NW
Washington, DC 20036
pblack@millsblack.com

MILLS BLACK LLP

/s/ Rebecca A. Fenneman

Rebecca A. Fenneman
RFenneman@JeffreyFenneman.com
Tel: (202) 904-2301
Jeffrey/Fenneman Law + Strategy, PLLC
700 12th Street, NW Suite 700
Washington, DC 20005