BEFORE THE
FEDERAL MARITIME COMMISSION

Samsung Electronics America, Inc.,	)	
Complainant	)	
v.	)	DOCKET NO. 24-23
HMM Co., Ltd F/K/A Hyundai Merchant Marine, Co. Ltd.,	)	
Respondent	)	

RESPONDENT'S MOTION TO DISMISS

Neil Quartaro
Joshua P. Stein
Kathryn Sobotta
COZEN O'CONNOR
3 WTC
175 Greenwich Street, 55th Floor
New York, NY 10007
(212) 453-3934

July 1, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

BEFORE THE
FEDERAL MARITIME COMMISSION

Samsung Electronics America, Inc.,	)	
Complainant	)	
v.	)	DOCKET NO. 24-23
HMM Co., Ltd F/K/A Hyundai Merchant Marine, Co. Ltd.,	)	
Respondent	)	

RESPONDENT HMM's MOTION TO DISMISS

Respondent HMM Co., Ltd. ("HMM"), through counsel, hereby moves to dismiss each of the claims contained in the complaint in this proceeding ("Complaint").

I. INTRODUCTION AND BACKGROUND

While many of the factual allegations in the Complaint are denied by HMM, it is not necessary to deal with those disputes at this time because, even accepting those facts as true, the Complaint should be dismissed in its entirety as a matter of law. As detailed more fully below, while Complainant Samsung Electronics America, Inc. ("SEA") has gone to great lengths to dress its claim up in Shipping Act clothing, in truth, it is nothing more than a breach of contract claim over which the Commission lacks jurisdiction and SEA otherwise fails to state a claim upon which relief may be granted.

At all times relevant to the Complaint, HMM provided ocean transportation services to SEA and certain corporate affiliates pursuant to service contracts executed between HMM and SEA's affiliates Samsung SDS Asia Pacific PTE. LTD ("SDS") and Samsung Electronics Logitech

Co., Ltd. ("Logitech" and the "Service Contracts").[1] SEA is listed as an affiliate under the Service Contracts and is therefore bound by their terms.[2] Critically, the Service Contracts, as well as the terms of HMM's tariff rules and bills of lading, each of which are incorporated therein, contain express provisions setting forth the parties' respective rights, obligations, and responsibilities with respect to the issues raised in the Complaint, namely responsibility for payment of ancillary charges assessed to SEA (i.e., detention and demurrage) and issues associated with the performance and failure to perform of motor carriers designated by SEA or its affiliates (so-called "Customer Nominated Truckers" or "CNTs").

The Complaint is devoid of reference to the Service Contracts or their respective terms, nor does it cite to any specific provision in HMM's bill of lading reciting the obligations SEA asserts HMM has undertaken with respect to the transportation of SEA's cargo. The only possible explanation for this obfuscation is that SEA does not want to acknowledge that it has accepted contractual responsibility for the very circumstances it now complains of and seeks to rewrite those terms by pretending they don't exist. This is simply an effort to disguise the fact that, at their core, SEA's complaints are nothing more than a dispute over the interpretation of the parties' contractual arrangements. While HMM is confident that, if tested in litigation, its interpretation of the relevant contractual provisions would prevail, it is sufficient for the purposes of this Motion to simply note that jurisdiction to make such a determination has been placed exclusively with the federal courts.

---

[1] The Service Contracts include, but are not necessarily limited to, contracts numbered KR22110P5; KR2011005; KR2111005; KR2200015; KR2211005; 22L1005; KR20L1005; KR21L1005; KR22L10P5; KR22L1005; all are filed with the Commission in accordance with 46 C.F.R. Part 530, and the Commission may take official notice of them pursuant to 46 C.F.R. § 502.226.

[2] For example, Service Contract KR22L1005 identifies SEA as an "affiliate" in Term 9. In Term 10 of the same, Logitech verifies that "[t]he shipper signing this contract warrants (A) it and each shipper in Term 009 is identified by its legal name and business address, (B) it is authorized to bind itself and every other shipper and party, and (C) its status and that of every shipper is: [selected] Owner of the Cargo."

In contrast to its effort to avoid mentioning details that inconveniently place its claims outside of the Commission's jurisdiction, SEA appears to have had no reservations about describing the substance of confidential settlement discussions engaged in by the parties prior to the filing of the Complaint. *See* Compl. ¶¶ 47-58. While the propriety of including such detail in a pleading is dubious, what is plainly acknowledged by SEA in the Complaint is that the parties did, in fact, engage in "good faith" negotiations in an attempt to settle this matter. Compl. ¶ 55. On their face, contrary to how they are characterized in the Complaint, SEA's claims are not based on any refusal to deal or a lack of meaningful procedures by HMM for dealing with disputes, but rather SEA's anger over the fact that HMM didn't agree with SEA's reading of the Service Contracts or SEA's demands for compensation thereunder.

II. APPLICABLE LEGAL STANDARD

The Commission's rules of practice and procedure do not explicitly provide for motions to dismiss. However, Rule 12 (46 C.F.R. §502.12) states that the Federal Rules of Civil Procedure ("FRCP") are followed in instances that are not covered by the Commission's rules, to the extent that the application of the FRCP is consistent with sound administrative practice.

The "Commission looks to Federal Rule of Civil Procedure 12(b)(1) when considering dismissals based on lack of subject matter jurisdiction, and to Rule 12(b)(6) when considering dismissals based on failure to state a claim." *MAVL Capital Inc. v. Marine Transport Logistics, Inc*., Docket No. 16-16, 2020 FMC LEXIS 216, at *6 (FMC Oct. 29, 2020). The Commission has stated:

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that

> the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., Docket No. 09-01, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12, at *25-26 (FMC Aug. 1, 2011).

Furthermore, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The focus at this stage is not with whether a complainant can prevail on its claim but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co*., 2014 U.S. Dist. LEXIS 125179, at *5 (M.D. Tenn. 2014).

Each of SEA's claims fails to meet this standard.

A. Count I of the Complaint Should be Dismissed for Several Reasons.

i. The FMC Lacks Jurisdiction Over Count I Because It is a Breach of Contract Claim Which Falls Exclusively Within the Admiralty Jurisdiction of the Federal Courts.

The FMC lacks jurisdiction over Count I of the Complaint because all of SEA's allegations are breach of contract claims. Pursuant to 46 U.S.C. § 40502(f)[3] and the Judiciary Act of 1789, currently codified at 28 U.S.C. § 1333(1), such claims are reserved for adjudication before federal courts or, as applicable, such other venue as may be agreed to in a service contract. *See 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

[3] Pursuant to 46 U.S.C. § 40502(f), "[u]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court." In that regard, HMM reserves all rights with respect to the question of the applicability of any mandatory forum for dispute resolution provided for in the Service Contracts, HMM's bills of lading, or any applicable tariff rule.

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); *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, 33 S.R.R. 512 (I.D. Granting Motion to Dismiss 2014) (stating that questions of fact and interpretations of service contracts are contract claims subject to exclusive federal jurisdiction under Section 40502).

Central to Count I of the Complaint is a definition of "store door" terms created by SEA for the purposes of the Complaint. In its definition, SEA asserts that "HMM was responsible for the inland transportation to the named place of delivery on the sea waybill under store door terms." *See,* Compl. ¶¶ 25. SEA repeats this reference to the "store door terms" that allegedly govern its relationship with HMM over a dozen times in the Complaint and argues that such terms make HMM responsible for the performance of inland transportation and all associated costs, regardless of cause. *See*, e.g., Compl. ¶¶ 25, 26, 35-40, 43, 45, 67. SEA does not allege what the parties agreed these "store door terms" mean or where those terms were memorialized, despite the repeated references to them in the Complaint because the Complaint avoids even a single reference to any provision of a bill of lading, tariff rule, the Service Contracts or any other contractual document that SEA alleges sets forth such "store door terms" or defines the parties obligations thereunder.[4]

[4] SEA is well aware of the existence of the Service Contracts, as well as relevant provisions in HMM's bills of lading and tariffs, the respective terms of which directly govern this dispute, and presumably has avoided referring to them in the Complaint for strategic purposes related to the jurisdictional deficiencies discussed herein. SEA's careful effort to scrub the Complaint of any direct reference to contractual provisions does not change the fact of their existence or that the interpretation of their terms is what ultimately lays at the heart of SEA's claims.

SEA alleges that these "store door terms" govern the provision of ocean carriage and associated inland transportation of SEA containers by HMM for SEA and further alleges that HMM did not fulfill those obligations. Even accepting as true the assertion that the transportation is governed by "store door terms," whether arising out of a bill of lading, tariff, service contract, or other contractual arrangement relating to ocean transportation of cargo and associated inland through transport, a determination of how "store door terms" apply with respect to the question of each party's respective responsibility the oversight and direction of inland carriers in the performance of inland transportation and the payment of certain associated charges such as detention and demurrage is quintessentially a question of contract interpretation. Additionally, such arrangements are indisputably "maritime contracts."[5] Therefore, under both 46 U.S.C. § 40502(f) and the Judiciary Act of 1789, the task of interpreting the parties' respective contractual rights is vested exclusively with the federal courts.[6]

The Commission has previously drawn a critical distinction between Shipping Act claims that contain elements that are peculiar to the Shipping Act (over which the FMC would have jurisdiction) and claims which are "inherently a breach of contract claim" (over which the FMC

---

[5] *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 with respect to issues associated with inland through and stating 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 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).

[6] Federal courts sitting in admiralty regularly handle detention and demurrage cases as well as claims for breach of bills of landing and/or service contracts. *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, 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).

would not have jurisdiction). *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1644 (FMC 2000). Here, SEA does not credibly allege any specific violation of the Shipping Act; as a result, a federal court is the appropriate forum for this dispute.

The Presiding Officer recently summarized this point in *20230930-DK-Butterfly-1, Inc. v. Evergreen*.[7] There, because the allegations included an alleged use of COVID-19 "as a cover" to deny space and extract premium pricing and to assess other charges and surcharges, there was an element of the allegations that was unique to issues that might constitute cognizable claims under the Shipping Act. *Id.* at 10. However, the Presiding Officer specifically noted that if the complaint in that proceeding "was simply alleging that Respondents had not fulfilled their service commitments and this was not in line with Complainant's expectations, then this would likely be the kind of case over which the Commission did not have jurisdiction." *Id.*

Similarly, in *Seafair USA LLC v. Sterling Container Line Ltd.*, the Presiding Officer held that determinations of a party's obligations under a bill of lading and/or associated tariff are breach of contract claims outside the jurisdiction of the Commission. FMC Docket No. 22-34, 2024 WL 741926 at *8-9 (I.D. April 15, 2024) (the Commission does not have jurisdiction over contract interpretation disputes, including over the terms and conditions of service). *Seafair* focused on the responsibility of each party for certain charges under the terms of the parties' agreements, and the Presiding Officer correctly determined the claims to be breach of contract claims falling outside the Commission's jurisdiction. *Id*. Where, as here, the Complaint alleges that the carrier has not acted consistently with the terms applicable to the transportation services provided by the carrier or that related charges assessed by the carrier are not consistent with those terms, no issues "peculiar to

[7] *See 2023-DK-Butterfly-1, Inc. f/k/a Bed Bath & Beyond Inc. v. Evergreen Line Joint Service Agreement (FMC #011982)*, FMC Docket No. 24-12, Order Denying Motion for Partial Dismissal of the Complaint (ALJ June 26, 2024).

the Shipping Act" are raised. *Id.* Rather, accepting SEA's characterization of the terms applicable to HMM's services as true, the determinative question as to Count I is whether, under the applicable "store door" terms, HMM had fulfilled its service responsibilities and which party was responsible for charges related to those services or any breach of the applicable terms.

SEA's claims under Section 41102(c) should be dismissed because they are rooted in contract and not in protections afforded by the Shipping Act. Entertaining SEA's allegations would undermine the jurisdiction of federal courts to hear admiralty claims and unnecessarily extend the jurisdiction of the Commission beyond the scope of the Shipping Act.

ii. *Count I of SEA's Complaint Fails Because it Does Not Sufficiently Allege a Practice.*

SEA's allegations do not support a Section 41102(c) claim because SEA's allegations are specific to contractual arrangements agreed to by SDS, Logitech, and SEA, which is not the kind of general and customary practice addressed by the Shipping Act. In the preamble to 46 C.F.R. § 545.4, the Commission explained that "[t]o find a violation of § 41102(c) . . . the unreasonable regulation or practice [must be] 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). Importantly, the Commission recognized that its focus under Section 41102(c) must be trained not on actions taken with respect to an individual shipper or isolated incidents, but on "activities of maritime regulated entities that negatively affect the broader shipping public – all as intended by Congress. . ." *See* 83 Fed. Reg. 45367 (Sep. 7, 2018) ("Interpretive Rule").

Following the issuance of the Interpretive Rule, the Commission has consistently followed this guidance. For example, in *Crocus Investments, LLC v. Marine Transport Logistics, Inc*., the Commission stated that two similar actions were not sufficient to constitute a practice because

"'[t]he essence of a practice is uniformity. It is something habitually performed and implies continuity . . . the usual course of conduct.'" 2 F.M.C. 2d 224 (ALJ 2020), aff'd, 3 F.M.C. 2d 110, 117 (FMC 2021). Similarly, in *Hangzhou Qianwang Dress Co. v. RDD Freight International Inc*., the Commission affirmed the holding of the Presiding Officer in finding that speculative claims regarding "'other clients past and present' were insufficient to prove normal, customary, and continuous conduct." 2 F.M.C.2d 168 (FMC 2020). In short, specific and particular treatment of individual shippers (or consignees) does not amount to the type "normal, customary, often repeated, systematic" behavior required by the Commission to constitute a practice under § 41102(c).

These decisions are also consistent with pre-Interpretive Rule precedent regarding the meaning of a 'practice', such as *European Trade Specialists v. Prudential-Grace* Lines, 19 S.R.R. 59, 63 (FMC 1979) (holding that a practice was not a violation because it applied to a single complainant and not shippers in general); *Whitam v. Chicago, R.I. & P. Ry. Co.* . 66 F. Supp. 1014 (N.D. Tex. 1946) (holding that a practice must be systematic and usually applies "to carriers and shippers generally"); and *McClure v. Blackshere,* 231 F. Supp. 678, 682 (D. Md. 1964) ("Practice ordinarily implies uniformity and continuity,… and uniformity and universality, … must characterize the actions on which a practice is predicated."). In fact, the Final Interpretive Rule cites to *Whitam* for its definition of a "practice." *See* FMC Docket No. 18-06, Final Interpretive Rule, FN10 (Dec. 12, 2018).

Here, the allegations are related to only HMM's carriage of SEA's cargo under the Service Contracts and bills of lading, not a general practice. Moreover, the Service Contracts have dissimilar terms, were modified upon renewal, amended a number of times, and thus varied even as between SDS and Logitech. The absence of a practice is not overcome by SEA's allegation regarding the number of times it was charged for detention or demurrage. SEA was charged in

accordance with the terms of the Service Contracts that are particular to HMM, SDS, Logitech, and their corporate affiliates such as SEA, including the "store door" terms about which SEA complains. SEA makes no allegation that such charges were assessed under similar circumstances to any entity other than SEA or that doing so was part of a broader practice or policy by HMM. . Accordingly, the Presiding Officer is on safe ground to dismiss Count I for failure to allege a practice within the meaning of Section 41102(c).

iii. *The FMC Lacks Jurisdiction Over Count I Because It Fails to Include Indispensable Parties Over Which the FMC Lacks Jurisdiction.*

SEA failed to join SDS and Logitech, the signatories to the Service Contracts that control the services about which SEA complains, and this proceeding should not continue in the absence of these indispensable parties. SEA seeks a cease and desist order which would prevent HMM from acting in compliance with the Service Contracts agreed between HMM and SDS and/or Logitech. Therefore, because relief cannot be granted without SDS and Logitech participating and because the Commission lacks jurisdiction over SDS and Logitech, the Complaint must be dismissed. Moreover, the Service Contracts at issue are really the focal point of the Complaint, making SDS and Logitech key parties to the proceeding.

The Commission's rules do not expressly address the joinder of necessary parties. Under 46 C.F.R. §502.12, however, the Commission relies on the FRCP in such instances. FRCP 19 describes the requirements for joinder of parties:

> 1. Persons to be Joined If Feasible:
>
> a. Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> i. In that person's absence, the court cannot accord complete relief among existing parties; or
>
> ii. that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(1) as a practical matter impair or impede the person's ability to protect the interest; or

(2) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If a person who is required to be joined cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

The FMC has applied Rule 19 in its proceedings. See, *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, 26 S.R.R. 1396, 1397 (ALJ 1994), citing *CGM/ICT v. Maduro*, 23 S.R.R. 1495 (ALJ 1986).

It is well-settled that for purposes of FRCP 19, where two parties enter into a contract and a plaintiff sues one of the contracting parties to enjoin that contracting party from performing under its contract, the presence of the other party to the contract is required in the lawsuit. *See*, e.g., *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.,* 276 F3d. 1150, 1156 (9th Cir. 2002) (case dismissed because landlord could not be joined but was necessary party where defendant could be faced with choice between adhering to lease with landlord or complying with requested injunction); *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-701 (2nd Cir. 1980) ("in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable"); *Natural Resources Defense Council v. Kempthorne*, 539

F.Supp.2d 1155, 1185 (E.D. Cal. 2013) ("in an action to set aside a contract, all parties to the contract must be present"); *Camacho v. Major League Baseball*, 297 F.R.D. 457, 461-62 (S.D. Cal. 2013) (party to contract indispensable to litigation seeking to decimate that contract).

The Commission applied the forgoing principles in *All Marine*. In that case, the complainant challenged the lawfulness of the respondent's refusal to allow All Marine to perform berthing and line handling functions at respondent's terminal. Respondent, in defending against the allegations, claimed that provisions of its lease with the landlord port authority and the port authority's tariff required it to engage in the conduct that was the subject of the complaint. The ALJ concluded that, given the allegations concerning the terms of the lease and port authority tariff, even if the complainant was able to establish that the practices were unreasonable, it would not be possible to grant complete relief if the port authority was not a party to the action.

Here, SEA alleges that HMM had certain obligations in light of the "terms" and "responsibilities" for store door shipments without explaining the source of these obligations. *See* Complaint. However, these terms and responsibilities are defined and agreed to in the Service Contracts between HMM, SDS and Logitech as the shippers of the goods. The Service Contracts explicitly state that detention and demurrage are the responsibility of the shipper or cargo owner, in these instances SEA, under certain circumstances.[8] HMM acted in accordance with its Service Contracts and imposed responsibility for certain charges resulting from the non-performance of CNTs moving SEA's cargo.[9] SEA seeks to change the contractual agreement in a manner that

[8] For example, when a customer-nominated trucker ("CNT") is selected by SDS or Logitech, SDS and Logitech agreed that demurrage and detention, among other costs, resulting from the non-performance or other delay of the CNT is for the account of the shipper or cargo owner.

[9] In a number of the Service Contracts, terms related to the performance of CNTs specifically shift the risk of non-performance of the motor carrier for a door move to the shipper or owner of the cargo, in this case, SEA. For example, in Service Contract KR22L1005, the parties to the contract agreed that, under store door terms in Term 6-3-3, "Carrier will be responsible for the Chassis only for the allowed period of Chassis detention free-time." The parties also agreed that, when a CNT is relied upon in Term 5, "[a]ll responsibilities of any demurrage and

will fundamentally alter the agreement between HMM, SEA, and non-parties to this proceeding. Under federal jurisprudence interpreting Rule 19, SDS and Logitech are therefore indispensable parties. Just as complete relief could not be granted in *Dawavendewa* without the landlord or in *All Marine* without the port authority, complete relief cannot be granted here unless the SDS and Logitech are parties to this proceeding.

Although SDS and Logitech are indispensable parties, the Commission lacks personal jurisdiction over them, given that they are not common carriers, marine terminal operators or ocean transportation intermediaries, the only entities subject to 46 U.S.C. §41102(c). Therefore, it is necessary to consider the factors listed in the second part of FRCP 19 in order to determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.

An analysis of the four factors listed in the second part of FRCP 19 shows that the Complaint should be dismissed. While HMM wholly rejects the notion that its existing practices are unlawful under the Act, a judgment in favor of SEA rendered in the absence of its own corporate affiliates that negotiated the Service Contracts and book cargo under them, SDS and Logitech, would prejudice HMM (as explained above) and also potentially prejudice SDS and Logitech. The prejudice cannot be lessened or avoided by protective provisions in the judgment, shaping the relief, or other measures. If the current practices which are the subject of the Complaint are found unlawful, the contracts to which SDS and Logitech are parties will need to

---

detention charges and chassis rental costs shall be fore the account of the cargo after the respective free time for demurrage and detention expires." Term 6 imposes additional requirements including that "[a]ny CNT cancellation or change of CNT has to be notified by Shipper or the owner of the cargo to Carrier and it shall be accepted by Carrier in at least fourteen (14) calendar days prior to the scheduled trucking date" and that "[i]n any event, Shipper or the owner of the cargo is fully responsible for all costs associated with CNT cancellation or change of CNT including but not limited equipment rental charges, demurrage (including rail ramp storage), detention costs." The Term 6 also states that "Shipper or the owner of the cargo shall be responsible for all the charges including but not limited to demurrage, storages at ports and ramps in the event that their CNT is unavailable or fails to deliver the cargo. . ."

be revised or will be effectively amended by that ruling. It is therefore possible that a judgment rendered in the absence of the shippers would not be effective because there is no guarantee that the existing contracts will be amended to reflect a ruling here. Finally, SEA could bring an action against the HMM in another forum if this Complaint is dismissed, including the forum prescribed by the Service Contracts.

In light of the foregoing, given the absence of indispensable parties and the implications that absence has for the missing parties and HMM, the Complaint should be dismissed.

B. SEA Fails to State a Claim Under Section 41104(a)(3) and/or Section 41102(d) Because It Does Not Allege that HMM Retaliated Against SEA for Bringing a Matter to the Attention of the FMC.

Count II of the Complaint alleges that HMM violated two sections of the Shipping Act with respect to prohibitions on unlawful retaliation. First, for the period before June 16, 2022, the Complaint alleges that HMM violated Section 41103(a)(3), which at the time it was in effect 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. ¶ 69. Second, for the period following June 16, 2022, the Complaint alleges that HMM violated Section 41102(d), 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[ing] to other unfair or unjustly discriminatory action for – the reason that a shipper. . . has . . . filed a complaint against the common carrier. . . or for any other reason." Compl. ¶ 70. Thus, in both instances, a central requirement for a claim under either

provision is that the shipper was subjected to retaliatory action and that such action was a response to the filing or threatened filing of a complaint with the FMC.[10]

Count II therefore fails to state a claim under either provision for one very basic reason: Beyond its bare and conclusory assertion in Count II that HMM engaged in such activity, SEA does not allege facts anywhere in the Complaint that it was refused cargo space accommodations or subjected to any specific retaliatory action by HMM or that either action was done by HMM in response to a complaint or threatened complaint to the FMC. *See* Compl. ¶¶ 30-59, 94. Rather, SEA admits that HMM continued to accept SEA's cargo during challenging market conditions. *See* Compl. ¶ 67(c). The Complaint fails to provide even minimal detail regarding the timeline upon which SEA alleges any alleged protected activity may have occurred and when any alleged retaliation may have followed. SEA's Complaint is therefore facially deficient because it fails to allege the basic elements of a Section 41104(a)(3) or Section 41102(d) claim.

C. SEA Fails To State A Claim Under Section 41104(a)(10)

i. Count III Should Fail Because SEA Does Not Allege that HMM Denied It Vessel Space Accommodations.

SEA fails to state a claim under Section 41104(a)(10), the current version of which makes it unlawful for a carrier to:

> unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier.

[10] The Commission issued a Statement on Retaliation in its Docket No. 21-15 on December 28, 2021, clarifying that the Commission "interprets 'any other reason' to mean that protected activity under 46 U.S.C. § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures." The Commission only intended to protect conduct which brings allegations of unlawful activity to the attention of the Commission via some recognized Commission procedure can constitute "for any other reason." *See* Statement on Retaliation at 7.

However, the version of Section 41104(a)(10) in effect prior to June 16, 2022, which is applicable in this proceeding, merely made it unlawful for a common carrier to "unreasonably refuse to deal or negotiate." Regardless of which version of the statute is used, SEA's claim is deficient because it does not allege any instance in which HMM refused to deal or negotiate with SEA, unreasonably or otherwise.

In interpreting the prohibition against unreasonable refusals to deal, the FMC has stated:

> 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. 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 (FMC 2002), aff'd *New Orleans Stevedoring Company v. Federal Maritime Commission*, 30 S.R.R. 1066 (D.C. Cir. 2002)(emphasis added). More recent decisions confirm that an unreasonable refusal to deal necessarily involves imposition by a common carrier of an unreasonable impediment to a shipper's access to common carriage. *MSRF, Inc. v. HMM Co. Ltd*., Docket No. 22- 20, 2023 WL 8242695 (ALJ Nov. 22, 2023), citing *Definition of Unreasonable Refusal to Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier,* 88 Fed. Reg. 38789, 38791 (June 14, 2023).

SEA does not allege that HMM engaged in a "shut out" or that any impediment was placed on SEA's ability to access common carriage. Rather, the Complaint acknowledges that HMM continue to transport SEA cargo for the duration of the period subject to the Complaint. Complaint, ¶ 67(c). Instead, SEA's claim appears to simply be based on the fact HMM would not pay SEA's demand. The Complaint admits that HMM and SEA engaged in lengthy settlement

negotiations prior to SEA's filing of the Complaint. Complaint ¶¶ 50-55. In other words, the only thing the Complaint alleges with any specificity is that HMM refused to accept SEA's settlement offers or to make settlement offers acceptable to SEA. Even if true, this is not a violation of the Shipping Act.

Accordingly, SEA fails to state a *prima facie* claim that HMM engaged in an unreasonable refusal to deal or negotiate, and SEA's Section 41104(a)(10) claim should be dismissed.

ii. *Count III Also Fails Under the Noerr-Pennington Doctrine.*

Count III also fails to allege a refusal to deal by HMM because this claim appears to be based on HMM's non-acceptance of SEA's monetary demand to settle SEA's purported claims and avoid this litigation. Compl. ¶¶ 79-80. However, 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.

Moreover, engaging in "settlement talks[] is conduct incidental to a petition." *Freeman*, 410 F.3d 1180, 1185 (9th Cir. 2005)(internal quotation marks omitted).[11] 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 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

[11] 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").

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.

An ocean carrier does not violate the Shipping Act when good faith negotiations with a shipper or consignee fail under the *Noerr-Pennington* doctrine. As a result, SEA's claim under Count III must fail because its allegations do not support a cognizable Shipping Act claim.

D. SEA Fails to State a Claim Under Section 41104(a)(15).

Count IV of the Complaint is so vague as to fail under the standards set forth in *Twombly* and *Iqbal.* A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, *supra*, at *25-26. The crux of SEA's allegation appears to be a single paragraph, premised on "information and belief", that HMM "sought to invoice and/or charge for demurrage and detention on and after the effective date of OSRA without complying" with its terms. Complaint ¶ 83. SEA does not allege any specific deficiency, specific invoice, specific time period, or other identifying information that would give any understanding of the allegations it purports to raise.

Importantly, SEA stops short of actually alleging that HMM invoiced or charged SEA improperly. Instead, SEA alleges that HMM somehow "sought to invoice and/or charge" SEA and that "such invoices . . . would be a violation" under Section 41104(a)(15). Complaint ¶¶ 83-84. To the extent that this conduct has not actually occurred, as SEA alleges, allegations of prospective conduct are insufficient to state a claim for which relief can be granted.

Moreover, Section 41104(a)(15) does not apply retroactively and would apply only to invoices or charges issued after June 16, 2022, to the extent such invoices or charges exist.[12] SEA fails to specify in its Complaint when the allegedly improper invoices were issued. To the extent any invoices or charges were issued in violation of Section 41104(a)(15), which HMM denies, the Commission has instructed that the invoiced party is not permanently absolved from payment responsibility for such charges, but may temporarily postpone payment until a proper invoice is issued.[13] As a result, the only remedy available to SEA would be for HMM to issue a new, compliant invoice.

SEA's allegations are woefully insufficient to support its claim under Count IV of the Complaint and should be dismissed for failure to state a claim and because any prospective invoice claim is not ripe. Even if SEA's allegations were sufficient, Section 41104(a)(15) does not apply retroactively, does not entitle SEA to reparations, and claims thereunder arising before June 16, 2022 must be dismissed.

E. SEA Fails to State a Claim Under Section 41104(a)(14).

Count V of the Complaint is also so vague as to fail under *Twombly* and *Iqbal.* The Complaint alleges that, "on information and belief", HMM's alleged practices "would also violate" Section 41104(a)(14) of OSRA 2022. Complaint ¶ 88. This is insufficient to overcome a motion to dismiss because it does no more than recite the terms of the statute and raise an empty allegation.

---

[12] *See* FMC's Interim Guidelines on Charge Complaints (Dec. 1, 2022)(available at https://www.fmc.gov/ocean-shipping-reform-act-of-2022-implementation/guidance-on-charge-complaint-interim-procedure/)(last accessed Jun. 21, 2024).

[13] 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 meeting 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).

If HMM invoiced multiple charges improperly, the burden to identify an invoice or a particular feature of any number of invoices that was improper under Section 41104(a)(14) is low. Regrettably, the Complaint fails to identify any specific invoices that are alleged to be improper and so SEA has not met its pleading burden for this count.

Separately, SEA's claim also fails because its allegations are inconsistent with the statute's prohibitions. Section 41104(a)(14), which applies only after June 16, 2022, provides that a common carrier should not "assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46." It does not extend to "practices and actions in connection with assessment" of charges which are what SEA alleges. Complaint ¶ 88. A plain reading of the statute in contrast with the allegations of the Complaint makes clear that SEA does not allege it was assessed charges improperly, and so this claim must also fail.

SEA's allegations under Count V that certain actions would violate Section 41104(a)(14) are insufficient to allege a plausible claim. Even if they were sufficient to make out a claim, SEA's claim is misplaced in that its allegations are not protected by the law to which it cites. SEA's claim under Section 41104(a)(14) is therefore legally defective and should be dismissed.

F. SEA Fails To State a Claim Under Section 41102(c) in Count VI

i. SEA's Allegations Fail Because Section 41102(c) Does Not Apply to Dispute Resolution Processes.

Section 41102(c) of the Act applies only to terminal and forwarding services and not to the sufficiency of carrier dispute resolution procedures for detention and demurrage. Thus, because the allegations of the Complaint relate solely to the sufficiency of HMM's dispute resolution procedures, Count VI fails to state a claim for which relief may be granted and should be dismissed.

Section 41102(c) of the Act states:

> Practices in Handling Property.- A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

The Commission has for many years interpreted Section 41102(c) and its predecessor provisions as limited to terminal and forwarding activities. In *Los Angeles By-Products Co., et al. v. Barber S.S. Lines, Inc., et al.*, 2 U.S.M.C. 106 (USMC 1939), the Commission's predecessor considered the application of the second paragraph of Section 17 of the Shipping Act of 1916 to charges imposed by carrier for the handling of cargo at U.S. West Coast ports. The then-Commission quoted Section 17, which read:

> Every such carrier (common carrier by water in foreign commerce) and every other person subject to his act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

Immediately after quoting the statute, the Commission stated:

> This paragraph relates to services performed at the terminal as distinguished from the carrying or transporting by the vessel.

2 U.S.M.C. at 114 (emphasis added). This decision began an uninterrupted line of precedent which limits the application of Section 41102(c) to terminal and forwarding activities.

In *Proposed Rule Covering Time Limit On The Filing Of Overcharge Claims*, 7 S.R.R. 418 (FMC 1966), the Commission opted not to adopt a proposed rule which would have rendered invalid the time limits carriers had established for customers to file overcharge claims. In so doing, the Commission stated:

> Finally, the second paragraph of Section 17 of the Shipping Act, 1916, under which the carriers' limitation were alleged to be invalid by our Notice of Proposed Rule Making does not relate to the practices of the type here involved. It relates only to practices "relating to or connected with the receiving, handling, storing or

> delivering of property," and its application has thus been confined to forwarding and terminal operations.

7 S.R.R. at 425, citing *Los Angeles By-Products Co*., supra (emphasis added). See also, *North River Insurance Co. and Northwestern National Insurance Co. v. Federal Commerce and Navigation Co., Ltd*., 20 S.R.R. 1078, 1084 (ALJ 1981) ("Respondent correctly points out that the paragraph relied upon by complainants has expressly been limited to the operations of terminals and forwarders").

The limited application of Section 41102(c) and its predecessor provisions is discussed in detail in *Heavy Lift Practices And Charges of Hapag-Lloyd Aktiengesellschaft*, 17 S.R.R. 505, 528-533 (ALJ 1977). In that case, the ALJ considered whether certain carrier practices and charges violated various provisions of the Shipping Act of 1916, including the predecessor of Section 41102(c). The ALJ reached the following conclusion regarding the scope of Section 17:

> As Hearing Counsel have noted, at least as early as 1939, the Commission held that Section 17, second paragraph, applied to "services performed at the terminal as distinguished from the carrying or transporting by the vessel." *Los Angeles By-Product Co. v. Barber S.S. Co. Lines, Inc*., cited above, 2 USMC at 114.

17 S.R.R. at 529. The ALJ's conclusions were found to be "proper and well-founded" by the Commission, which adopted them. 18 S.R.R. 1491 (1979).

Heavy Lift Practices And Charges is also instructive because of the position taken by the Commission's Bureau of Hearing Counsel with respect to the scope of Section 17, which the ALJ described as follows:

> Hearing Counsel contend that the Commission had established that the type of practice covered by this particular law does not relate to tackle-to-tackle ocean freight service, i.e., line-haul transportation, but instead refers to so-called terminal services. Terminal services are such activities as carloading and unlading, handling of cargo from place of rest to ship's tackle and the reverse, and free time and demurrage practices relating to the storing of cargo at the terminal.

> Hearing Counsel cite *Los Angeles By-Products Co. v. Barber S.S. Lines, Inc*., 2 USMC 106, 114 (1939), which stated that Section 17, second paragraph, "relates to services performed at the terminal as distinguished from the carrying or transporting by the vessel." Hearing Counsel contend furthermore that nonterminal activity has been held to fall within the scope of Section 17, second paragraph, only to the extent such activity is performed by a terminal operator or becomes intimately related to terminal operation through the action of a terminal operator…

17 S.R.R. at 529 (citations omitted). Under the foregoing Commission decisions, Section 41102(c) is clearly and expressly limited to terminal and forwarding services.

That Section 41102(c) is applicable only to terminal and forwarding services and not to the sufficiency of detention and demurrage dispute resolution procedures is further confirmed by other Commission decisions. In this regard, the Commission has consistently held that Section 41102(c) does not apply to dispute procedures. See, e.g., *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962) (claims for loss of or damage to cargo or for damages due to failure to follow routing instructions do not fall within the Act, citing *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Co*., 2 U.S.M.C. 517 (1941)); *Bills of Lading – Incorporation of Freight Charges*, 3 U.S.M.C. 111, 113 (USMC 1949)(section 17, second paragraph, is confined to the receiving, handling, storing, or delivering of property).

The alleged failure to provide an undefined (but higher) standard of dispute resolution options for a consignee such as SEA relates to the sufficiency of dispute resolution procedures, and thus SEA has failed to allege a cognizable claim under Section 41102(c).

ii. *SEA's 41102(c) Claims Also Fail to State a Claim Upon Which Relief Can Be Granted Because the Allegations are Insufficiently Pled.*

To make out a plausible claim that HMM's dispute resolution procedures were insufficient, SEA must allege both that it attempted to use HMM's existing dispute resolution procedures and why the procedures were insufficient, but it does not. 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 SEA is correct, (which it is not), the key phrase is "practices, policies and procedures." SEA complains only about its own unique experience rather than HMM'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.

Setting aside SEA's failure to allege a practice, 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 (and inappropriate) 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.

If the FMC were to permit settlement discussions to be the basis for a Shipping Act violation, such a determination would also run afoul of the *Noerr-Pennington* doctrine as discussed above. Ultimately, SEA's Count VI should fail for its failure to satisfy the necessary requirements under Section 41102(c) and because it would be contrary to *Noerr-Pennington* doctrine and public policy.

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 require 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). The lack of any detail in the reparations claim makes it impossible for HMM to identify the amounts at issue on each alleged injury and thereby defend the claims, which is the purpose of the rule requiring sufficient detail and alleged damages that a respondent is on notice of the complainant's claims. SEA's failure to comply with the Commission's regulations accordingly warrants dismissal of its claim for reparations.

III. CONCLUSION

For the foregoing reasons, the claims identified above should be dismissed with prejudice.

Respectfully submitted,

Neil Quartaro
Joshua P. Stein
Kathryn Sobotta
COZEN O'CONNOR
3 WTC
175 Greenwich Street, 55th Floor
New York, NY 10007
(212) 453-3934

Dated: July 1, 2024

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2024, the foregoing Respondent's Motion To Dismiss was served via electronic mail on:

Carrol P. Hand (Carrol.Hand@hklaw.com)
Christopher R. Nolan (chris.nolan@hklaw.com)
Gerald A. Morrissey III (gerald.morrissey@hklaw.com)
Kristine O. Little (kristine.little@hklaw.com)
Marisa Marinelli (marisa.marinelli@hklaw.com)

Counsel to Samsung Electronics America, Inc

Dated: July 1, 2024

/s/ Kathryn Sobotta

Kathryn Sobotta
Cozen O'Connor