BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 24-23

SAMSUNG ELECTRONICS AMERICA, INC.,

COMPLAINANT,

v.

HMM CO., LTD. F/K/A HYUNDAI MERCHANT MARINE CO., LTD.,

RESPONDENT.

COMPLAINANT SAMSUNG ELECTRONICS AMERICA INC.'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

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Complainant Samsung Electronics America, Inc. ("Complainant" or "SEA") respectfully submits this memorandum of law in opposition to the Motion to Dismiss of Respondent HMM Co., Ltd. f/k/a Hyundai Merchant Marine Co., Ltd. ("HMM" or "Respondent").

INTRODUCTION

On June 5, 2024, SEA filed its Verified Complaint (Dkt. No. 1) against HMM asserting that HMM had engaged in a pattern of conduct violating the Shipping Act of 1984, 46 U.S.C. § 40101, *et seq.* (the "Shipping Act"). The Complaint alleges six counts of Shipping Act violations.

The Complaint sets out these serious violations of the Shipping Act in substantial and specific detail. HMM's Motion to Dismiss ("Motion") (Dkt. No. 12) urges the dismissal of the entirety of the Complaint, primarily by asserting that the Federal Maritime Commission (the "Commission" or "FMC") lacks jurisdiction over the alleged Shipping Act violations and that the Complaint has failed to state claims for which relief can be granted. In support of those contentions, HMM distorts the Complaint's contents, ignores the numerous allegations addressing each element of the alleged offenses, and proposes various policy arguments, including a creative, if legally unsound, extension of the *Noerr-Pennington* doctrine that would invalidate 46 U.S.C. § 41102(c) by immunizing a common carrier against any claim of refusal to deal.

None of HMM's arguments and assertions override the fundamental principle that the Commission has an *obligation* to address well-pleaded allegations concerning Shipping Act violations. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Dkt. No. 02-04, 2006 WL 2007808, at *10 (FMC May 10, 2006) ("the Commission is obligated to hear those allegations particular to the Shipping Act, which is consistent with [its] statutory mandate."); *Cargo One, Inc. v. COSCO Container Lines, Co*., Dkt. No. 99-24, 2000 WL 1648961, at *14 (FMC Oct. 31 2000) ("where the alleged violation raises issues beyond contractual obligations, the Commission will

likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency."). As discussed below, the Complaint sets out specific allegations addressing each element of each violation charged, and therefore sets forth plausible claims for relief that meet the FMC's pleading thresholds. HMM's motion should be denied in its entirety.

FACTUAL BACKGROUND

SEA is the consignee for shipments into the United States from various locations and suppliers of consumer electronic goods that SEA provides to American consumers through SEA's online store or through brick-and-mortar retailers. During the time period covered by the Complaint, SEA's procurement arrangements with its affiliated supplier in Korea called for through shipment of the goods, including both ocean carriage and inland transportation, to SEA's warehouses, for so-called "store door" delivery. Compl. ¶¶ 31-33.

Under store door delivery, the carrier (here HMM) undertakes responsibility to transport each container not only for the ocean leg of the transportation, but also onward from the ocean terminal to the ultimate inland delivery destination, and then back to the Carrier's designated redelivery terminal, at a premium. *Id.* ¶¶ 35-37. With the understanding that the carrier contracts out to a trucking company the delivery of the containers from the ocean terminal to the ultimate inland destination and return of the unloaded empty containers, under a store door delivery service arrangement the carrier remains responsible for the inland transportation, which includes ensuring the pickup of containers from U.S. marine and intermodal terminals and the delivery of containers to the designated inland locations. *Id.* ¶ 35.

During the relevant period, HMM began charging SEA increasing amounts of detention and demurrage ("D&D"), charges which resulted from HMM's inland transportation delays and failures. *Id.* ¶ 41. These charges arose from HMM—along with its subcontractor truckers and rail

companies - failure to fulfill its delivery responsibilities, regularly failing to timely pick up SEA Containers from U.S. marine and intermodal terminals and failing to timely deliver SEA Containers to their designated inland destinations. *Id.* ¶ 40. HMM imposed those charges, notwithstanding its responsibilities for the inland movement and without regard to the consignee's practical inability to meaningfully effect the transportation of the containers, which remained under HMM's control. *Id.* ¶¶ 42-43. These D&D charges (and associated charges and damages suffered by SEA) that are the basis for SEA's Shipping Act claims. *Id.* ¶¶ 55, 59, 64.

When SEA challenged those actions and charges, HMM did not provide any support for its actions but instead threatened various retaliatory measures, which included refusing to release SEA's goods at the ocean terminal to force SEA to pay unreasonable and unjust D&D charges. *Id.* ¶¶ 43-45. SEA's numerous overtures to resolve these issues were rebuffed by HMM, leading to the necessity of the instant Complaint.

LEGAL STANDARD

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule of Practice 12 states that the Federal Rules of Civil Procedure ("FRCP") will be followed in instances that are not covered by the Rules to the extent applying the FRCP is consistent with sound administrative practice. 46 C.F.R. § 502.12. "In evaluating whether a complaint before the Commission states a cognizable claim under the Shipping Act, the Commission has relied on Federal Rules of Civil Procedure 12(b)(6) and the federal case-law interpreting it." *Cornell v. Princess Cruise Lines, Ltd.*, Dkt. No. 13-02, 2014 WL 5316340, at *6 (FMC Aug. 28, 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Dkt. No. 09-01, 2011 WL 7144008, at *11 (FMC Aug. 1, 2011)).

While a "formulaic recitation of the elements of a cause of action" is not sufficient, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Meeting the plausibility standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the alleged violation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). At this dismissal stage, the "choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion." *Anderson News, LLC v. Am. Media, Inc*., 680 F.3d 162, 185 (2d Cir. 2012).

As the Commission confirms: "Courts also construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as alleged in the complaint." *Cornell*, 2014 WL 5316340, at *6 (citations omitted). Accordingly, all well-pleaded factual allegations in the Complaint are assumed to be true and are to be construed in the light most favorable to SEA.

ARGUMENT

I. JURISDICTION EXISTS OVER ALLEGED SHIPPING ACT VIOLATIONS

A. HMM Errs Claiming an Unspecified Lack of Jurisdiction.

HMM's jurisdictional challenge should be rejected. The law is clear that the FMC has subject matter jurisdiction over claims brought under the Shipping Act, *even if* the facts at issue could also give rise to other contract claims between the parties. *Anchor*, 2006 WL 2007808 at *10-11; *Cargo One, Inc.*, 2000 WL 1648961, at *14-15. The FMC reaffirmed this point earlier this year in its unanimous decision in *MCS Industries, Inc. v. Mediterranean Shipping Co. S.A.*, affirming denial of the respondent's motion to dismiss on the basis of purported contract claims because "the FMC in fact has an obligation to address Shipping Act claims even if a related proceeding is underway." Dkt. No. 21-05, 2024 WL 95383, at *6-7 (FMC Jan. 3, 2024).

While HMM purports to seek dismissal on the basis that the Commission "lacks jurisdiction" (Motion at 4), it does so without any basis or support. HMM does not deny that SEA has properly pled subject matter and personal jurisdiction (Compl. ¶¶ 3-6): SEA has alleged that HMM is a regulated vessel-operating ocean common carrier within the meaning of the Shipping Act (Compl. ¶ 2), SEA's claims concern the ocean transportation of cargo between foreign and US ports or points in the US (Compl. ¶¶ 31-32); and SEA alleges violations peculiar to the Shipping Act. As the Presiding Offer explained in *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, Dkt. No. 13-07, 2014 WL 5316345, at *13 (ALJ April 17, 2014), a case relied upon by HMM (Motion at 5), even where a complaint is actually based on a contract between the parties, but alleges violations of the Shipping Act, the FMC has jurisdiction. The FMC plainly has jurisdiction here.

B. It is Impermissible for HMM to Attempt to Rewrite SEA's Complaint.

HMM's jurisdictional attack is premised on its erroneous claim that SEA's allegations amount to a breach of contract claim. In support of its contention that breach of contract cases are the exclusive province of the courts, not the Commission, HMM cites 46 U.S.C. § 40502(f) and the Judiciary Act of 1789, currently codified at 28 U.S.C. § 1333(1). But this argument fails because the Complaint does not allege breach of contract, nor does it seek to interpret any contract or contractual provision to which SEA is a party.[1] Rather it alleges that HMM, an FMC-regulated common carrier, failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, specifically in connection with assessing, invoicing, and collecting D&D for the movement of cargo. Compl. ¶¶ 60-66. Had SEA asserted breach claims, SEA would be seeking contractual

[1] SEA denies that it is a party to any Service Contract (Motion at 2, n. 1 and 2).

damages under the contracts, not Shipping Act reparations. The Shipping Act violations pled here are not based on breach of contract and, indeed, go far beyond breach of contract allegations.

To be clear, SEA has alleged elements peculiar to the Shipping Act, including with respect to HMM's D&D practices which resulted in tens of thousands of charges equal to multiple millions of dollars SEA was forced to pay and now seeks in reparations. Such practices clearly invoke the Interpretive Rule on Demurrage and Detention Under the Shipping Act ("Interpretive Rule") at 46 C.F.R. § 545.5 and the Incentive Principle in the Interpretive Rule. *Id*. at § 545.5(c); 85 Fed. Reg. 29638 (May 18, 2020). Attempts to recast allegations in terms of a contract breach, as HMM does here, have been soundly rejected by decisionmakers when ruling on motions to dismiss. Simply stated, the Complaint must be taken as written, and SEA has properly pled violations of the Shipping Act by HMM. The ruling denying a motion to dismiss in *Rahal International Inc. v. Hapag-Lloyd AG* is instructive. In *Rahal,* two of the respondents attempted to recast complainant's Shipping Act claims as COGSA claims, arguing that they were within the sole purview of the federal courts. Dkt. No. 23-05, 2023 WL 6391708, at *1, 5-6 (ALJ Sept. 27, 2023). The presiding officer rejected this argument, finding that the complaint "does not merely allege damages while the cargo in question was being shipped but rather, that Respondents' conduct in violation of the Shipping Act caused the cargo to incur the alleged damages." *Id.*

Here, SEA has pled facts that go far beyond a dispute of contractual terms, including:

- HMM's failure to timely pick up and deliver containers from terminals leading to exorbitant D&D charges (Compl. ¶¶ 51-52);
- HMM's practice of charging SEA exorbitant D&D charges, which resulted from HMM's own practices and failures to effect timely delivery and other transportation delays (*Id.* ¶¶ 47-48, 51-53);
- HMM's retaliatory behavior when challenged by SEA, including holding SEA's goods hostage at the terminal to force SEA to pay the unreasonable D&D charges (*Id.* ¶ 34); and

- HMM's rebuffing of SEA's efforts to resolve these issues (*Id.* ¶¶ 53-59).

HMM seeks early dismissal by recasting, distorting, and limiting the Complaint in order to shoehorn it into a breach of contract claim, in a misguided attempt to place SEA's claims beyond FMC jurisdiction. But as in *Rahal*, HMM's efforts should be rejected as SEA's claims are well within the FMC's jurisdiction. Dkt. No. 23-05, 2023 WL 6391708 at *5-6 (ALJ Sept. 27, 2023).

HMM's reliance on *SeaFair USA LLC v. Sterling Container Line Ltd.*, Dkt. No. 22-34, 2024 WL 1741926 (ALJ April 15, 2024) ("SeaFair"), is misplaced, since *SeaFair* did not concern a motion to dismiss an FMC complaint. Instead, the presiding officer in *SeaFair* issued the initial decision after both parties had an opportunity to conduct discovery and present evidence. Moreover, *SeaFair* does not support HMM's untenable proposition that a regulated entity's policies and practices with respect to assessing D&D charges are beyond FMC jurisdiction simply because a bill of lading was issued for a shipment. If the issuance of a bill of lading was sufficient to preclude the FMC from having jurisdiction over a dispute, the FMC's well-established jurisdiction under the Shipping Act to regulate unreasonable D&D practices would shrink to almost nothing, and would make Congress's mandate in OSRA 2022 virtually meaningless.

Moreover, even assuming, *arguendo*, that SEA's alleged Shipping Act violations overlapped with contract claims, the Commission would still have jurisdiction over the Shipping Act claims, as the decision in *SeaFair* made clear:

> ***The Commission has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties***…The Commission has jurisdiction over Shipping Act claims even if a related proceeding is underway. *Id.* Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant.

Id. at *8 (emphasis added). Likewise, HMM's reliance on breach of contract claims not raised on the face of the Complaint cannot deprive the Commission of jurisdiction. As the Commission made

plain in *Cargo One, Inc. v. COSCO Container Lines, Co.* (also relied upon by HMM), it is "inappropriate and contrary" to the Shipping Act to bar any Shipping Act claim on the basis that it "bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action." 2000 WL 1648961 at *14. And allegations that may be essential to contract law claims do not automatically divest the Commission of jurisdiction:

> However, ***we find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action***. We believe the more appropriate test is whether a complainant's allegations are inherently a breach of contract claim, ***or whether they also involve elements peculiar to the Shipping Act… [W]here the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency***.

Cargo One, 2000 WL 1648961 at *14 (footnotes omitted) (emphasis added). Under the *Cargo One* test, when a Complaint alleges violations of the Shipping Act that go beyond contractual issues, such as a carrier's practice and policy of assessing D&D charges (as alleged in SEA's Complaint) to consignees who are not responsible for the movement of cargo, and seeks reparations for those unjust and unreasonably assessed charges, the carrier's actions are peculiar to the Shipping Act. Such practices invoke both the Incentive Principle as outlined in the Interpretive Rule and reasonableness of HMM's D&D-related practices as set forth in the Shipping Act, both issues peculiar to the Shipping Act and foundational to SEA's Complaint, in addition to being explicitly enumerated in Paragraph 67. As such, the Complaint is appropriately before the Commission and Respondent's jurisdictional challenge fails.

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

HMM also challenges the sufficiency of SEA's allegations, but they more than satisfy FMC Rule 62, which states that a complaint before the FMC is sufficiently pled as long as it puts the

defendant on notice of the claims against it—a standard that SEA's Complaint more than satisfies. As set forth more fully below, HMM's suggestion that the Complaint does not meet this standard ignores whole swaths of SEA's allegations. Moreover, the Complaint provides more than sufficient detail to inform HMM which of its practices are alleged to be in violation of law such that discovery can be conducted to determine HMM's fault.

A. Count I Properly and Sufficiently Pleads a Cause of Action Regarding HMM's Unjust and Unreasonable Practices.

Count I of the Complaint alleges HMM's unjust and unreasonable practices in handling property pursuant to 46 U.S.C. § 41102(c). Here, SEA has met the requirements for pleading a reparations claim under § 41102(c) as set forth in 46 C.F.R. § 545.4:

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

HMM does not contend that SEA has failed to allege the five elements. Instead, HMM makes three primary challenges to Count I, all of which are meritless. First, HMM argues that SEA's claims are rooted in contract, despite HMM's own concession that the Complaint does not have "even a single reference to any provision of a bill of lading, tariff rule, the Service Contracts or any other contractual document." Motion at 5. Second, HMM argues that the Complaint does not plausibly allege a "practice", though to assert such an argument is willful blindness to the factual allegations in the Complaint. Motion at 8; Compl. ¶¶ 30-59. Finally, HMM asserts that the Commission lacks jurisdiction because Count I fails to include supposed "Indispensable Parties" over which the FMC lacks jurisdiction. Motion at 10.

1. The Claims Alleged in Count I of the Complaint are Shipping Act Violations Within the Jurisdiction of the FMC.

The Commission has an obligation to address Shipping Act claims, even if the relevant facts may also give rise to other claims between the parties. *See* Section I(B), *supra*; *MCS Indus.*, 2024 WL 95383 at *7. Shipping Act claims are distinct from breach of contract claims, entailing a different analysis of statutory standards that includes review of the carrier's broader practices beyond those directly affecting the complainant. *Id.* While contract breach claims are resolved in court, claimed Shipping Act violations may only be resolved by the FMC. *Id.* at *8.

Even if the alleged contract breach claims about which HMM speculates in fact existed in another forum, HMM's challenge would still fail because Commission precedent holds that "even when there is litigation between the parties in other courts, the Commission has an obligation to determine whether an entity ***has violated the Shipping Act***." *See VerTerra Ltd. v. D.B. Group Am. Ltd. & D.B. Group India Ltd.*, Dkt. No. 19-09, 2020 WL 1150930, at *2 (ALJ Mar. 5, 2020) (denying motion to stay where the complaint alleged Shipping Act violations that the Commission is obligated to adjudicate, "even though a proceeding in another forum may have resolved some issues between the parties.") (emphasis added). While federal admiralty courts have jurisdiction over complaints for breaches of bills of lading and certain service contract disputes, the cases cited by HMM in support of their effort to avoid jurisdiction here concern allegations of specific contractual breaches, rather than complaints alleging Shipping Act violations and requesting reparations arising from unlawful practices and procedures thereunder, as alleged by SEA. *See e.g., SeaFair*, 2024 WL 1741926. HMM's arguments fail to support dismissal here.

2. SEA's Allegations of HMM's Violations of the Shipping Act Occurred Continuously Over Several Years Sufficiently Alleges a "Practice."

SEA has alleged **over 96,000 improper D&D and associated charges** over a three-year period. Compl. ¶¶ 29, 55. It is well established that a "practice" is sufficiently pled within the

meaning of § 41102(c) where, like here, the Complaint "alleges [multiple shipments] were at issue and that this was part of Respondent's regular practices." *Way Interglobal Network, LLC v. Shenzhen Uniflex SCM Ltd.*, Dkt. No. 22-28, 2023 WL 130654, at *4 (FMC Jan. 4, 2023) (denying motion to dismiss a § 41102(c) claim finding a "practice" was sufficiently alleged since the 20 shipments at issue were part of respondent's regular practices); *TPG Pressure v. Omni Logistics*, LLC, Dkt. No. 22-31, 2023 WL 2240480, at *3 (ALJ Feb. 24, 2023) (finding the complaint alleged that the "practices at issue applied to over two hundred containers which is sufficient to allege a normal, customary, and continuous basis").

HMM nevertheless claims that SEA has failed to allege a practice within the meaning of § 41102(c) and § 545.4, arguing that the cause of action cannot concern "actions taken with respect to an individual shipper" and must specifically allege that conduct "negatively affect the broader shipping public." Motion at 8. HMM is incorrect - there is no such pleading requirement. HMM attempts to invent its new pleading requirement by misconstruing discussion in the 2018 Notice of Proposed Rulemaking, 83 Fed. Reg. 45367 (Sept. 7, 2018) ("NPRM"), with respect to the Interpretive Rule ultimately promulgated at 46 C.F.R. § 545.4.

HMM's "broader shipping public" pleading element does not appear in the list of five elements promulgated in the FMC's Final Rule at § 545.4. That is for good reason. The Commission's concern in the NPRM related to applying § 41102(c) to *discrete practices on single shipments* that were not originally intended to be encompassed by the § 41102(c) cause of action, but that following certain decisions in 2010 and 2013 wherein "the Commission has interpreted section § 41102(c) to mean that a single failure to fulfill a single legal obligation of any description itself could constitute a violation of § 41102(c)." NRPM at 45370; *see also id*. at 45367 *citing Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1731 (2013) ("The allegation that a single failure to

'observe or enforce' just and reasonable regulations or practices is not a failure does not comport with the language of section 10(d)(1), which mandates regulated entities not to 'fail to . . . observe and enforce' just and reasonable regulations and practices.)." The Commission addressed the concern with one-off failures in the Final Rule by promulgating the "normal, customary, and continuous" element in § 545.4(b). There is no support for HMM's further extrapolation that shippers alleging a "normal, customary, and continuous" practice nevertheless lack cognizable § 41102(c) claims unless they also allege (1) application on multiple shippers, and/or (2) specifically allege harm "to the broader shipping public." Further, even if § 41102(c) claims did require a complainant to establish "harm to the broader shipping public," SEA's Complaint more than meets this requirement. *See* Compl. ¶ 20. As noted by FMC Chairman Dan Maffei and discussed in the Complaint, carriers' (like HMM) practice of holding cargo on demand of payment exacerbated charges against shippers resulting in significant issues in the shipping industry. *Id.*

A nearly identical argument was rejected in *Ports America Chesapeake, LLC v. APS East Coast, Inc.*, Dkt. No. 23-04, 2023 WL 5375588 (ALJ Aug. 16, 2023). In *Ports America*, respondent moved to dismiss complainants' § 41102(c) cause of action, arguing that "the Interpretive Rule that was ultimately codified at 46 C.F.R § 545.4" was not cognizable without additional allegations that "the activities of maritime regulated entities [] negatively affect the broader shipping public." *Id*. at *4, *9. Denying the motion to dismiss, the ALJ found that complainants' allegations that respondent's practices occurring on a normal, customary, and continuous basis were sufficient to state the cause of action, without the additional purported pleading argued for. *Id*. at *10-11.

HMM also contends that the cause of action fails to properly plead a practice because 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." Motion at 9. HMM fails to provide any support showing

that the assessment of D&D charges to SEA across many shipments and many years fails to sufficiently allege a practice. Assuming, *arguendo*, that two[2], three[3], or six[4] instances may not be a "practice," SEA has alleged in excess of over 96,000 D&D and associated charges that have been assessed to SEA by HMM over a three-year period and that such charges were imposed as a result of HMM's standard practice and procedure of shifting responsibility for its inland transportation failures to SEA, and that the assessment of D&D charges as a result of that practice and procedure has been occurring on a normal, customary, and continuous basis since 2020.

The Complaint does not allege one-off mistakes or isolated acts. SEA has alleged an ongoing practice of HMM spanning multiple years, over 96,000 acts and industry-wide impact.[5] The allegations in the Complaint are more than sufficient to constitute cognizable "practices."

3. SDS and Logitech are Not Necessary Nor Indispensable.

In this proceeding, SEA seeks redress for HMM's violations of the Shipping Act, including its unjust and unreasonable practices in handling **SEA's** cargo; in assessing, invoicing and collecting D&D charges **from SEA** for the movement of **SEA's** cargo; its retaliatory conduct directed at **SEA**; and its rebuffing of **SEA's** efforts to resolve these matters. Compl. ¶¶ 24-26, 67. No involvement of SDS or Logitech is alleged in the Complaint. Other than HMM's unsupported, outside of the Complaint assertion that SDS and Logitech (purportedly parties to service contracts

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

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

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

5 HMM's invocation of *Whitam v. Chicago, Rock Island & Pacific Railway Co.*, 66 F. Supp. 1014 (N.D. Tex. 1946), *European Trade Specialists v. Prudential-Grace Lines*, Dkt. No. 74-8, 21 F.M.C 888 (FMC 1979), and *McClure v. Blackshere*, 231 F. Supp. 678, 682 (D. Md. 1964) in support of such additional pleading requirements is misplaced. Motion at 9. The Commission cited those cases in the NPRM when discussing discrete conduct that did not reflect a "practice" under the Shipping Act. It did not rely on those cases to establish additional pleading requirements as claimed by HMM, and the Commission did not do so when promulgating the elements in 46 C.F.R. § 545.4.

with HMM) are "indispensable," there is no credible basis supporting dismissal based on the claimed failure to join these parties. The Complaint seeks reparations for HMM's unlawful conduct in violation of the Shipping Act, including HMM's assessment of D&D charges paid by a consignee, SEA. SEA is not challenging's HMM's performance under contracts with SDS or Logitech, but rather HMM's violations of the Shipping Act.

HMM contends that the complaint must be dismissed because SDS and/or Logitech are "indispensable" parties that must be joined under FRCP 19, and because the FMC lacks personal jurisdiction over them as unregulated entities. Motion at 10. HMM presumably moves to dismiss pursuant to FRCP Rule 12(b)(7), although it does not expressly cite that rule. *See* FRCP 12(b)(7) ("failure to join a party under Rule 19"). The FMC evaluates alleged failure to join necessary parties under FRCP 12(b)(7) and FRCP 19, including the analysis that "[f]irst, the court must determine if the absent parties are "necessary" pursuant to Federal Rule 19(a)" and second, "[i]f a party is necessary under Rule 19(a)(1) but joinder is not feasible, then the court must determine whether the party is indispensable pursuant to Rule 19(b)." *Intermodal Motor Carriers Conference, Am. Trucking Ass'ns, Inc., v. Ocean Carrier Equip. Mgmt. Ass'n Inc*., Dkt. No. 20-14, 2024 WL 641501, at *15 (FMC Feb. 13, 2024) (characterizing the test as a three-part test) ("IMCC"); *IMCC* (Initial Decision), 2023 WL 1963455 at *24-25 (ALJ Feb 6, 2023); *IMCC* (Order Denying Interlocutory Appeal on Rule 19), 2021 WL 409620 at *6 (ALJ Jan 29, 2021); *see also International Shipping Agency, Inc. v. Puerto Rico Ports Authority*, Dkt. No. 04-01, 2004 FMC LEXIS 11, at *72-74 (ALJ Sept. 17, 2004) (denying motion to dismiss for failure to join necessary or indispensable parties and examining the Rule 19). The dispute, such as it is, concerns HMM's misapplication of Rule 19 to this proceeding, which fails at every step.

HMM fails to show that the third parties are necessary parties under Rule 19(a). It is HMM's burden to establish that the parties are necessary. *IMCC* (Initial Decision), 2023 WL 1963455 at *25; *see also Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("The moving party has the burden of persuasion in arguing for [FRCP 12(b)(7)] dismissal."). A party is "necessary" if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. *Id*. at *24 (*citing* FRCP 19(a)). When making that determination for the purpose of a motion to dismiss, "the court must base its decision on the pleadings as they appear at the time of the proposed joinder." *Register v. Cameron Barkley Co*., 467 F. Supp. 2d 519, 530-31 (D.S.C. 2006) (citations omitted); *see also IMCC*, 2021 WL 409620 at *6 (Order Denying Interlocutory Appeal) and fn 6 (noting that as to purported third-party contracts, the factual allegations of the complaint govern).

HMM's argument that Logitech and SDS are "necessary" fails under Rule 19(a)(1)(A). As demonstrated above, the Complaint alleges violations of the Shipping Act by HMM, not alleged contract claims involving third parties. Indeed, HMM's sole basis for its claim that these parties are "indispensable" is its outside-of-the-Complaint argument that the Complaint is really about breach of service contracts involving such third parties. Motion at 10-12. But the actual allegations in the Complaint focus, among others, on HMM's unreasonable practices of exorbitant charging for D&D, and its retaliatory conduct, and seek relief solely from the carrier, HMM. The "complete relief" that SEA seeks does not depend on any other contracts or any claims that HMM may have

under those contracts with other parties, and there is no reason why the complete relief that SEA seeks pursuant to HMM's Shipping Act violations cannot be granted in SDS and Logitech's absence. HMM's indispensable parties argument fails for that reason alone.[6] *See MasterCard Int'l Inc. v. VISA Int'l Serv. Ass'n, Inc*., 471 F.3d 377, 385 (2d Cir. 2006) ("A party is necessary under Rule 19(a)(1) only if in that party's absence "complete relief cannot be accorded among those already parties."); *Lee v. Marvel Enter., Inc*. 765 F. Supp. 2d 440, 453 (S.D.N.Y. 2011) (holding that a company was not an indispensable party in a dispute between a writer and his former employer as relief could be accorded without non-parties being present).

Both the ALJ and the Commission rejected similar Rule 19 arguments in *IMCC*, finding that where the purported contracts were not the subject of the complaint and the relief sought was not against the third parties, respondent failed to establish that complete relief cannot be accorded among those already parties. *IMCC* (Initial Decision), 2023 WL 1963455 at *25 (noting that the focus of the complaint and the relief sought were against the regulated carriers, not the third parties); *IMCC* (Order Denying Interlocutory Appeal), 2021 WL 409620 at *6 (noting that the complaint focuses on the regulated parties' conduct, "not on contracts between ocean carriers and [the third parties]. Indeed, the complaint does not cite provisions in [the third party] contracts"), *IMCC* (FMC), 2024 WL 641501 at *16 ("Complainant is not seeking any relief directly against the [third-parties], either in the form of reparations or a cease-and-desist order"). Because SEA does not allege or seek relief as to the third parties and complete relief can be accorded without the third parties, HMM fails on the first prong of Rule 19(a)(1)(A) necessary party analysis.

[6] HMM may have alleged claims under its service contracts (*see* Motion at 12, n. 8-9), but that does not preclude the Commission's ability to afford complete relief here between SEA and HMM. *Cf. SeaFair,* 2024 WL 1741926 at *8.

Although **not even argued** by HMM, HMM also cannot meet the requirements of Rule 19(a)(1)(B) —in effect that disposition without the third parties would prejudice the third-parties' ability to protect their interests. Whether HMM would be "prejudiced" by having been found in violation of the Shipping Act is a *non sequitur* and irrelevant. Any alleged prejudice to HMM is irrelevant for purposes of the analysis because joinder under Rule 19(a)(1)(B) requires non-parties to claim a legally protected interest in the action. *Roberts v. City of Fairbanks*, 947 F.3d 1191, 1204 (9th Cir. 2020) (non-party was not necessary because it did not claim any interest in the matter). When the non-party maintains a neutral, disinterested posture towards a dispute, they have not claimed an interest. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043-44 (9th Cir. 1983) (non-party's hypothetical interest in the matter did not mandate joinder under Rule 19(a)). Here, there is no indication that the third parties themselves claim any such interests. *See Marine One Inc. v. Jones*, 29 F. Supp. 3d 669, 677-78 (E.D. Va. 2014) (noting there is little precedent addressing what it means to claim a relevant "interest, but the precedent that exists interprets the requirement narrowly, usually requiring some sort of affirmative indication by the absent party in the court hearing the Rule 19 matter.").

As to the alleged interests of third parties to contracts potentially affected by a decision, the Commission has rejected virtually identical arguments, finding that such indirect effects are not sufficient to establish prejudice under the second prong of Rule 19(a)(1)(B)'s necessary party analysis. *See IMCC* (FMC), 2024 WL 641501 at *16-17 (finding that "the [third-parties] do not face a "substantial risk" of being ordered to satisfy multiple or inconsistent obligations. Respondents will need to bring their practices into line with the Commission's cease-and-desist order and modify their dealings with shippers, motor carriers, and chassis providers accordingly--but granting that relief will not subject the [third parties] to conflicting or inconsistent demands.").

The Commission's observation in *IMCC* (FMC), 2024 WL 641501 at *17, rings true here, where HMM would have to bring its conduct "in line" with the Shipping Act (and HMM paying SEA reparations). HMM's argument that the effect on its third-party contracts should foreclose SEA's Complaint here is untenable, as the Commission noted: "Accepting Respondents' argument that indirect impact on the business practices of a non-party forecloses Commission review of alleged Shipping Act violations would allow regulated entities to claim Rule 19 requires dismissal anytime the relief granted may impact their contractual relationships with non-regulated entities. That would be an untenable result and an overly broad interpretation of Rule 19." *Id*.

Even if HMM had cleared the Rule 19(a) hurdle and demonstrated that the third parties qualify as necessary parties, which it has not,[7] HMM still fails to establish that the parties are indispensable under Rule 19(b)'s non-exhaustive list of equitable factors. Those factors all weigh in favor of continuing the proceeding here. Notwithstanding the lack of any allegation or evidence upon which to support its arguments, the crux of HMM's argument on Rule 19(b) concerns alleged prejudicial impacts of a decision on HMM contracts with third parties. Motion at 13-14. But whatever those impacts may be, it is "circular to argue that contracts derived from practices which may be in violation of the Shipping Act may be used to justify the preservation of those practices" via resort to Rule 19. *See IMCC* (Initial Decision), 2023 WL 1963455 at *26. The Commission has long held that contract rights are not a defense to Shipping Act violations. *See Sea-Land Serv.*,

[7] HMM's reliance on *All Marine* and other contract cases to support its argument that complete relief cannot be afforded without all parties to a contract is similarly misplaced. *See* Motion at 12-13 (*e.g., citing All Marine Moorings, Inc. v. ITO Corp*., 26 S.R.R. 1396, 1396 (ALJ 1994); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 276 F.3d 1150, 1156 (9th Cir. 2002); *Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1185 (E.D. Cal. 2013), *etc*.). The Commission has rejected this line of argument in the Rule 19 context before, expressly distinguishing *Natural Resources Defense Council*, *see IMCC* (Initial Decision), 2023 WL 1963455 at *27, as well as *All Marine* and *Dawavendewa*, *see IMCC* (Order Denying Interlocutory Appeal), 2021 WL 409620 at *6.

Inc. & Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers, Dkt. No. 73-17, 18 S.R.R. 553, 557 (FMC June 14, 1978) (regulated entities cannot evade the Shipping Act by entering into contracts with unregulated third parties that if performed would violate the Shipping Act). As to the shape of relief, adequacy of relief, and the forum for Complainant's claims, the Commission has previously dispensed with HMM's conclusory arguments on those factors, Motion at 13-14, explaining that the FMC is the appropriate forum with the appropriate remedies for Shipping Act claims. *IMCC* (FMC), 2023 WL 1963455 at *17.

B. Count II Properly and Sufficiently Pleads Retaliation.

Count II of the Complaint alleges that HMM threatened to retaliate and in fact did retaliate against SEA and SEA Containers with respect to the delivery of cargo and by refusing available cargo space accommodation in response to SEA's efforts to address HMM's shipping and charging practices. Compl. ¶¶ 68-75. OSRA 2022 amended the Shipping Act's retaliation provisions by, among other things, adding the prohibition against retaliation to § 41102, "General Prohibitions" as new subsection (d). Concurrently, OSRA 2022 amended § 41104(a)(3) to include "unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods." OSRA 2022, Pub. L. 117-146, June 16, 2022, 136 Stat 1272, §§ 5, 7. By amending the statutory language to include '***or for any other reason***', OSRA 2022 explicitly expands the prohibition on retaliation beyond cases where the shipper has patronized another carrier or has filed a complaint. *DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Co. SA*, Dkt. No. 23-12, 2024 WL 1299768, at *6 (ALJ Mar. 25, 2024) (emphasis added).

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

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

In short, a "complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods), with respect to a protected entity (shipper), because the protected entity engaged in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class)." *Id*. at *36 (citing Statement on Retaliation, Dkt. No. 21-15, 3 F.M.C.2d 201, 209 (FMC Dec. 28, 2021)). SEA alleges that HMM engaged in prohibited conduct (refusing available cargo space accommodations and delivery of cargo), with respect to a protected entity (the consignee), because the protected entity engaged in protected activity (SEA's Notice of Demand for Action letter and other efforts to address HMM's shipping and charging practices, dispute resolution, and disputing of invoices). The Complaint at paragraphs 44-45 and 50 sets out the background of HMM's unlawful actions; and the Complaint at paragraphs 47, 50, 53-54, 56, and 58 details SEA's demand for resolution, which threatened a complaint to the FMC, and resulted in the HMM retaliation.

HMM claims that paragraph 67(c) of the Complaint is an admission by SEA that HMM did not retaliate since it continued to accept cargo despite challenging conditions. Motion at 15. First, HMM completely mischaracterizes paragraph 67(c). Continuing to carry some cargo despite failing to perform does not establish that there was no refusal of cargo space accommodations. Second, HMM fails to address the second half of SEA's retaliation allegation under the statute, namely retaliation with respect to delivery of cargo which falls within "other unfair or unjustly discriminatory methods" pursuant to § 41104(a)(3) and § 41102(d). Third, HMM's argument

appears to be a form of estoppel defense, which, while unlikely to be successful under Commission precedent, is a matter for its Answer and its defense on the merits, not a motion to dismiss.

The development of this case will establish that SEA informed HMM that its actions were in violation of the Shipping Act and that continued misconduct would lead to a complaint with the FMC, which in fact occurred. Indeed, SEA notes that HMM appears to have conceded that its retaliatory actions were undertaken in response to the threat of a complaint to the FMC in its argument regarding Count III, where it claims immunity for actions undertaken in contemplation of litigation. Motion at 17-18. Accordingly, the Complaint has alleged facts sufficient to state a claim of retaliation by HMM in violation of § 41104(a)(3) and § 41102(d).

C. Count III Properly and Sufficiently Pleads a Refusal to Deal or Negotiate.

Count III of the Complaint alleges that HMM unreasonably refused to deal or negotiate in violation of 46 U.S.C. § 41104(a)(10). While the Commission is still in the process of finalizing OSRA 22 regulations "unreasonable refusal to deal or negotiate" provisions, neither reasonableness nor refusal to deal are new concepts for the Commission and both are considered fact dependent and determined case-by-case. *See* Notice of Proposed Rulemaking, Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 87 Fed. Reg. 57674, 57676 (Sept. 21, 2022) ("Refusal NPRM"); *See also* Supplemental Notice of Proposed Rulemaking, Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, 88 Fed. Reg. 38789 (June 14, 2023) (the "Refusal SNPRM").

To date, Commission rulemaking "has found various situations that inform what refusal to deal entails." *Id.* at 57676-77. For example, a common carrier's repeated refusal to respond to email or telephone requests for negotiations over an extended period of time may be viewed as an unreasonable method of shutting another party out. *Id.*; *OJ Commerce*, 2023 WL 3969857 at *29.

To plead a refusal to deal, a party must allege a refusal, *e.g.*, refusing to entertain a proposal or to engage in good faith discussions. *See OJ Commerce, LLC*, 2023 WL 3969857 at *28. Second, the refusal must be unreasonable, as ultimately not every refusal to deal is unreasonable, *e.g.,* if it is "justified by particular circumstances in effect." *Docking & Lease Agreement By & Between City of Portland, ME & Scotia Prince Cruises Ltd.*, Dkt. No. 04-10, 2004 WL 1895827 at *3 (FMC Aug. 23, 2004) (Order of Investigation and Hearing). A refusal to negotiate under the Shipping Act means refusal "to give actual consideration to an entity's efforts at negotiation." *Canaveral Port Auth.-Possible Violations of Section 10(B)(10), Unreasonable Refusal to Deal or Negotiate*, Dkt. No. 02-02, 2003 WL 723336 at *18 (FMC Feb. 24, 2003).

Here, SEA has alleged that HMM refused to deal or negotiate with respect to vessel space accommodations and that HMM's refusal to deal or negotiate is unreasonable. Compl. ¶¶ 74, 79-80. The Complaint further alleges that when HMM was asked to mitigate, cancel, or waive charges for which SEA was not responsible, HMM refused to do so, instead repeatedly demanding payment of disputed charges and threatening various punitive actions, including threatening to refuse and actually refusing to release SEA containers, and refusing to release containers moving under store door terms on the basis of allegedly outstanding charges. Compl. ¶¶ 43-45. SEA has alleged facts sufficient to state a claim for refusal to deal by HMM against SEA in violation of § 41104(a)(10) as set out in Count III.

Alternatively, HMM argues that Count III fails to state a claim because HMM's non-acceptance of SEA's monetary demand to settle and avoid litigation cannot give rise to liability under the Shipping Act. HMM invokes the *Noerr-Pennington* doctrine to support this argument.

Motion at 17-18. *Noerr-Pennington* has no application here. This doctrine[8] "protects those who petition governmental actors for redress from liability based on their petitioning activity." *Toyo Tire & Rubber Co. v. Atturo Tire Corp*., Case No. 14 C 0206, 2017 WL 1178224, at *3, *8 (N.D. Ill. Mar. 30, 2017) (declining to apply *Noerr-Pennington* immunity to private settlement agreements, even where the settlement agreements were central to issues raised in subsequent litigation). The doctrine originated in the antitrust context, but has since evolved to afford protection for individuals "who 'use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view.'" *Id*. at *4 (citations omitted), and has been extended to some pre-litigation activities preliminary to the filing of a complaint. *See, e.g., Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 937 (9th Cir. 2006).

But *Noerr-Pennington* does not apply here, however, for the simple reason that HMM's argument seeking immunity is based on a false premise – that SEA's claim in Count III is based on HMM's failure to accede to a settlement demand (Motion at 17) (it is not) – and completely ignores the multiple allegations discussed above that set out the bases of SEA's claim for refusal to deal or negotiate. Indeed, the refusal to deal or negotiate encompasses a series of actions, and not simply an act of not reaching a settlement. It is these practices – those addressing SEA's challenges to HMM's many actions and charges, and HMM's unreasonable responses, threats, and retaliation to those challenges - that form the crux of SEA's claim. In effect, HMM's argument turns *Noerr-Pennington* on its head to provide immunity *for* unlawful, unreasonable conduct under the Shipping Act. HMM seeks to invoke the doctrine to immunize itself from any underlying Shipping Act violations. Such "immunity" for its actions would extend *Noerr Pennington* to

[8] Set out by the U.S. Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Frieght, Inc*., 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

effectively invalidate § 41104(a)(10) any time parties violate the Shipping Act in the context of disputed or contested matters that potentially violate the Shipping Act.

HMM's *Noerr-Pennington* arguments concerning HMM's refusals to deal specifically to dispute resolution matters does not address the broader refusals to deal alleged in the Complaint.

D. Count IV Properly Pleads Violations of 46 U.S.C. § 41104(a)(15).

Count IV of the Complaint alleges that HMM invoiced SEA for D&D charges after the OSRA 2022's effective date without including the information required by that statute, in violation of 46 U.S.C. § 41104(a)(15). Respondent argues that SEA's allegations are deficient as SEA "does not allege any specific deficiency, specific invoice, specific time period, or other identifying information" to support its claim. Motion at 18. However, under the *Twombly* and *Iqbal* pleading standard, specific details of that nature are not required to support a plausible claim for relief. *See Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co.*, 81 F. Supp. 3d 1, 8 (D.D.C. Feb. 24, 2015); *Tan v. Compass Grp. USA, Inc.*, No. 23-cv-00224 (APM), 2023 WL 6975935, at *1 (D.D.C. Oct. 23, 2023). Moreover, contrary to HMM's claim that SEA's allegations are premised on a "single paragraph" stating that HMM "sought to invoice and/or charge for demurrage and detention" in violation of OSRA 2022's requirements (Motion at 18), the Complaint alleges that "HMM's invoices routinely lacked adequate information to determine the basis for the individual demurrage and detention charges" imposed on SEA and that HMM "failed to provide SEA with adequately detailed billing information and/or invoices related to demurrage and detention charges that would permit SEA to meaningfully understand and/or contest the charges." Compl. ¶¶ 46, 67(e). Further, the Complaint alleges that HMM has, contrary to the Shipping Act, invoiced SEA for D&D charges without including the information required to comply with § 41104(a)(15)(A), (B), and § 41104(d). Compl. ¶ 83. Accepting these factual allegations as true, which is required for purposes of the motion to dismiss, *Oxbow Carbon & Minerals*, 81 F. Supp. 3d at 8-9, they

"suggest a plausible scenario" showing that SEA is entitled to relief under Section 41104(a)(15). *Sandpiper Residents Ass'n v. U.S. Dep't of Hous. and Urban Dev.*, No. 22-5334, 2024 WL 3308358, at *6 (D.C. Cir. July 5, 2024) ("In determining whether a complaint fails to state a claim, we must accept Plaintiffs' allegations as true and draw all inferences in their favor.")

HMM's contention that even if it were found to have violated the statute, that it can re-issue the deficient invoices, and that thus Complainant has no remedy, is not a basis to dismiss the Complaint. Motion at 19. HMM again relies on what is at best a purported defense to OSRA 2022 liability. The Complaint alleges that the invoices were unlawfully issued and paid. Whether HMM could remedy the alleged violations by re-issuing invoices, or whether re-invoicing such invoices years later would be permissible under the Shipping Act, are matters for HMM's Answer and determination on the merits, not a basis to dismiss the Complaint.

E. COUNT V Properly Pleads Violations of 46 U.S.C. § 41104(a)(14).

Count V of the Complaint alleges that HMM invoiced SEA for assessing D&D charges after the effective date of OSRA 2022 in violation of 46 U.S.C. § 41104(a)(14). Like Count IV, HMM argues that Count V fails to meet the *Twombly* and *Iqbal* standard. Motion at 19. As noted above, under *Twombly* and *Iqbal*, specific details of that nature are not required to support a plausible claim for relief. *See Oxbow Carbon & Minerals*, 81 F. Supp. 3d at 8; *Tan*, 2023 WL 6975935 at *1. SEA has satisfied this standard.

The statute provides that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not--…assess any party for a charge that is inconsistent or does not comply with all applicable provisions and regulations, including subsection (c) of section 41102 or part 545 of title 46, Code of Federal Regulations (or successor regulations)." 46 U.S.C. § 41104(a)(14). As set out in the Complaint paragraphs 46 and 50-58, HMM's billing

practices have caused significant injury to SEA and the parties have had extensive discussions over the issues with HMM's invoices, and as a result, HMM is well aware of both the claims and shortcomings of its invoices. Further, a more specific statement is not required to put HMM on notice to sufficiently prepare its answer, nor is a request for superfluous specificity a basis for dismissing for failure to state a claim. The Complaint alleges that HMM assessed charges in the period after implementation of OSRA 2022, in violation of OSRA 2022. *See* Compl. ¶¶ 38-49, 50, 59. Unreasonable charges in violation of § 41104(a)(14) are properly alleged.

F. COUNT VI Properly Pleads Violations of 46 U.S.C. § 41102(c).

1. Section 41102(c) is Applicable to Dispute Resolution Practices of Regulated Entities.

HMM opens its argument that Count VI fails to state a § 41102(c) claim with the bold statement that "[s]ection 41102(c) of the Act applies only to terminal and forwarding services and not the sufficiency of carrier dispute resolution procedures for detention and demurrage." Motion at 20. Therefore, HMM concludes, Count VI fails to state a claim for which relief may be granted. *Id.* HMM's only support for that contention are a series of cases predating the Shipping Act of 1984. HMM glaringly ignores current FMC regulation of D&D practices, including dispute resolution practices, and OSRA 2022. It is unclear if HMM is unaware of the Commission's Interpretive Rule at 46 CFR § 545.5, or has simply chosen to ignore it, but either way the regulation applies and HMM's argument must fail.

The purpose of the Interpretive Rule is expressly to "provide guidance about how the Commission will interpret 46 U.S.C. § 41102(c) and § 545.4(d) in the context of demurrage and detention." 46 CFR 545.4(a). Among those factors, the Interpretive Rule includes a provision on D&D policies which expressly includes dispute resolution policies. *See* § 545.5(d) ("*Demurrage and detention policies.* The Commission may consider in the reasonableness analysis the existence

[of] dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements."). Thus, the Shipping Act provides a cause of action for unreasonable practices in connection with D&D, including dispute resolution practices. And recent Commission precedent has uniformly held that Section 41102(c) applies to ocean carrier D&D charges and practices. *See, e.g., Interpretive Rule*, 85 Fed. Reg. at 29650 ("Ocean carrier demurrage and detention practices are subject to section 41102(c) and Commission oversight, regardless of whether the practices relate to conduct at ports or inland, with some caveats"); *Way Interglobal Network, LLC v. Shenzhen Unifelix SCM Ltd.*, Dkt. No. 22-28, 2024 WL 1741944 at *24-26 (ALJ April 19, 2024).[9] The Complaint sufficiently alleges HMM dispute resolution practices violations under § 41102(c).

2. SEA's 41102(c) Claims are Sufficiently Pled.

HMM claims that SEA has failed to state a plausible claim that HMM's dispute resolution procedures were insufficient, arguing that "SEA must allege both that it attempted to use HMM's existing dispute resolution procedures and why the procedures were insufficient." Motion at 23.

[9] There is no need to delve into details of HMM's misguided reliance on cases in support of its spurious "terminal and forwarding services" argument. As to its assertion of "uninterrupted precedent," HMM also includes regulatory history from an unadopted 1966 FMC proposed rule dealing with the time limit carriers can impose on shippers for overpayment of freight charges (not D&D charges) (*Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, Dkt. No. 65-5 (FMC Jun. 27, 1966) and a 1981 case involving jurisdictional questions for subrogated claims when multiple yachts were damaged in transit from Hong Kong to the U.S. and Canada (*North River Ins. Co. and Nw. Nat'l Ins. Co. v. Fed. Commerce Navigation Co.*, Dkt. No. 80-72, 1983 AMC 2500 (ALJ Apr. 30, 1981)). In one cited case that touches on disputed demurrage charging practices, *J.M Altieri v. P.R. Ports Auth*., No. 987, 7 FMC 416, 420 (FMC Oct. 18, 1962), the Commission held that while a single instance of an ocean carrier improperly not refunding a demurrage payment did not warrant relief under section 17 (the precursor to § 41102(c)), the Commission found that "if the action of respondent were one of a series of such occurrences, a practice might be spelled out that would invoke the coverage of section 17." The authorities HMM attempts to rely upon do not support its theory that § 41102(c) is inapplicable to D&D practices, nor related dispute resolution practices.

HMM provides no precedent or support for these alleged pleading requirements. They do not exist and are not required. HMM further claims that SEA "complains only about its own unique experience" and does not identify a general practice, policy, or procedure, thereby failing to state a § 41102 (c) claim. Motion at 24. In both cases, HMM's arguments are misplaced. At the pleading stage all that is required is a clear and concise statement of the claim showing that the pleader is entitled to relief. 46 CFR § 502.62(a)(iii); *see also* Fed. R. Civ. P. 8(a)(2). The Complaint alleges that Respondent lacks a meaningful dispute resolution practice, policy, or procedure to evaluate disputed charges (Compl. ¶¶ 46(e), 67(h), 89-93), which is sufficient.

III. SEA'S REQUEST FOR RELIEF SUFFICIENTLY PLEADS REPARATIONS.

HMM's argues that the claims for reparations should be dismissed because the Complaint allegedly fails to comply with FMC Rule 62 by not stating a specific dollar amount of damages. Motion at 25. Rule 62 is not a jurisdictional element of a reparations cause of action, nor is it a code pleading requirement. Rule 62 sets forth standards to give HMM fair notice of the claims alleged in the Complaint. HMM's contention that a Complaint must be dismissed, or more narrowly a Complaint seeking reparations must be dismissed, for not pleading alleged damages with a specific dollar amount or without more "detail," is not supported by Commission precedent or practice. The Shipping Act plainly authorizes the ordering of reparations without limitation to an amount set out in a complaint. 46 U.S.C. § 41305 (allowing the Commission to award "additional amounts" for violations of §§41102(c) and 41104(a)(3) or (6), up to the actual injury).

The current Rule 62 is consistent with the liberal pleading standard under Federal Rules of Civil Procedure 8. *See J. Ambrogi Food Distrib., Inc. v. Teamsters Local Union,* 595 F.Supp.3d 352, 358 (E.D.Pa. 2022) (denying defendant's motion to dismiss for failure to allege a specific dollar amount of claimed damages, citing the liberal notice pleading regime set out in Fed. R. Civ. P. 8); *Block v. Seneca Mortg. Servicing*, 221 F. Supp. 3d 559, 594 (D.N.J. 2016) ("[P]laintiffs 'need not

plead the exact dollar amount of their loss'" so long as the complaint provides sufficient notice of the potential damages.) (internal citations and quotations omitted). Here, HMM is well aware of the nature and scale of the damages SEA is alleging. HMM acknowledges in its motion to dismiss that, following the Demand Letter sent to HMM on October 7, 2022, SEA and HMM "did, in fact, engage in 'good faith' negotiations in an attempt to settle this matter." Motion at 3. Given the purpose of the negotiations was to discuss SEA's claims related to D&D invoices, participating in detailed negotiations clearly put HMM on notice of SEA's damage claims. Compl. ¶¶ 50-58.

Indeed, the Complaint alleges that the amount of the claims was made known to HMM. Paragraph 53 alleges that at one meeting "SEA made a detailed presentation addressing eleven categories of unreasonable HMM actions in violation of the Shipping Act, including evidentiary support" and the meeting closed with HMM agreeing to "discuss the offer internally and respond to SEA in due course." Compl. ¶ 53. After discussions had reached an impasse, SEA sent a Renewed Notice of Demand for Action, which included "substantial data and documentation supporting the claims that had already been provided to HMM, [and] *an enhanced analysis of the damages suffered*…" Compl. ¶ 58 (emphasis added). The Complaint alleges sufficient information to put HMM on notice of the nature and amount of the damages.

Finally, HMM's reliance on Rule 62 as a *de facto* code pleading standard requiring specification of specific dollar amounts is inconsistent with FMC Rule 251, especially in cases like this one, where the SEA is seeking reparations for 96,000+ individual D&D and associated charges. *See* Compl. ¶ 29. Rule 251, 46 C.F.R. § 502.251, effectively permits bifurcation of proceedings in cases where reparations are being sought for damages related to a significant number of shipments. Moreover, the amount of damages incurred by SEA continues to accrue, as alleged in the Complaint at paragraph 59. Contrary to HMM's assertion that SEA must allege the total

amount of reparations at the outset or face dismissal, Rule 251 contemplates circumstances where the determination of the quantum of reparations derived from many shipments may be better addressed after determination of liability, and obviously not cut off at the outset if not stated as a dollar total in the Complaint. The precise dollar figure HMM seeks is a merely a proxy for wanting a more definite statement, which it did not seek, or wanting discovery at the pleading stage, to which it is not entitled at present, but will be after properly answering the Complaint.

CONCLUSION

For the foregoing reasons, SEA respectfully requests that the motion to dismiss be denied, and HMM ordered to file their answer in accordance with the Rules of the Commission.

Dated: July 16, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the execution date which appears below, the undersigned served the attached document on counsel at the following email addresses:

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