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 REPLY TO SEA's OPPOSITION TO HMM's MOTION TO DISMISS

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Respondent HMM Co., Ltd. ("HMM"), through counsel, hereby replies to the Opposition ("Response") of Complainant Samsung Electronics America, Inc. ("SEA" or "Complainant") to HMM's Motion to Dismiss ("Motion"). SEA's Response makes no argument that should dissuade the Presiding Officer from dismissing all counts of the Complaint with prejudice.

ARGUMENT

I. COUNT I: SEA Fails to Prove Jurisdiction, Fails to State a Claim of Unreasonable Practice, and Fails to Join Necessary Parties.

A. The Commission Lacks Jurisdiction Over Breach of Contract Claims and Claims of a Breach of a Maritime Contract.

Breach of contract claims arising out of maritime contracts such as those raised by SEA are indisputably reserved for adjudication before federal courts pursuant to 46 U.S.C. § 40502(f) and the Judiciary Act of 1789, 28 U.S.C. § 1333(1).[1] SEA makes no attempt to deal with the

[1] SEA concedes that cargo moved under BOLs in Paragraph 31 of the Complaint; BOLs are maritime contracts falling under the jurisdiction of federal courts. *See, e.g., Norfolk Southern R. Co. v. James N. Kirby Pty, Ltd*., 543 U.S. 14, 24-25 (2004) (holding bill of lading to be a maritime contract even though the last leg, during which the underlying issue arose, was by rail and stating (at 23) that "[i]nterpretation of maritime contracts stems from the

preclusive effect of these statutes on Federal Maritime Commission ("FMC or "Commission") jurisdiction and avoids Commission precedent finding that breach of contract claims should be heard in Federal Court.[2] Instead, SEA argues that because SEA alleges an unreasonable practice under the Shipping Act, these authorities must not apply. Indeed, SEA crafted its Complaint very carefully to avoid directly referencing the applicable transportation contracts to which SEA is bound.[3] This careful dance does not change the fundamental character of SEA's claims.

The gravamen of SEA's Complaint is that HMM agreed to transport SEA Containers under "store door" terms pursuant to through bills of lading or sea waybills. Complaint ¶¶31, 38. SEA alleges that "store door" terms mean that: 1) HMM was responsible for arranging and paying for inland movements, ensuring the removal of containers from U.S. marine and intermodal terminals, and delivering containers to designated inland locations; and 2) demurrage and detention charges should have been borne by HMM, not SEA. Complaint ¶¶35-37.

The Complaint, on its face, asserts that these "store door" terms were the terms of the agreement between HMM and SEA and governed the transportation of SEA's cargo. For SEA to prevail, it must therefore prove that its interpretation of the contract term "store door" is what the

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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").

[2] *See e.g., Definition of Package*, 23 S.R.R. 111, 113 (FMC 1985)(courts are the "exclusive forum" for adjudicating substantive claims about bills of lading); *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). *See also CTM International, Inc. v. Medtech Enterprises, Inc.,* Docket 98-07, 1998 WL 942103 at *2 (ALJ 2013). In *CTM International, Inc.,* Judge Kline stated:

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

[3] In its Response, SEA attempts to distance itself from the Service Contracts by stating that it is not a party to any service contract. Response at 5, FN1. As discussed in the Motion, the Presiding Officer may take judicial notice of the Service Contracts under which SEA's Korean parent or affiliate agreed to the Service Contracts, listed SEA as an affiliate, and warranted they had authority to bind SEA to the Service Contracts.

Parties agreed and that HMM failed to perform accordingly. This analysis of HMM's contractual obligations and performance is clearly a maritime contract dispute within the exclusive jurisdiction of the federal courts.

The holding in *Cargo One*, cited by SEA in its Response, does not save Count I. Response at 7-8. SEA's purported Shipping Act claims rely entirely on the legal propositions that HMM did not perform its obligations under the unnamed maritime contract that defines store door terms and as a result was required to pay all demurrage and detention accrued on the inland leg. This is fundamentally a question of contractual rights and obligations.

In *Cargo One*, the Commission confirmed that "allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim." *Cargo One, Inc. v. COSCO Container Lines, Co.*, 28 S.R.R. at 1645 (FMC 2000). This rebuttal is not accomplished simply because a complaint includes cognizable claims under the Shipping Act. In this regard, the Commission specifically stated that "[f]or Section 8(c) to have meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just breach of contract claims, as such claims would not be actionable before the Commission in any event." *Id.* at 1643 (emphasis added). In other words, a party does not invoke Commission jurisdiction simply because it avoids using the word "breach" in its complaint or because the counts in the complaint are based on the Shipping Act. Rather, where the central issues relevant to an alleged Shipping Act violation are questions of contractual interpretation and breach, those issues are properly resolved by Federal Courts.[4]

[4] SEA's reliance on *MCS Industries* is misplaced. While the Commission refused to dismiss the claims in *MCS Industries, Inc. v. Mediterranean Shipping Co. S.A.*, it specifically contemplated that Shipping Act claims sufficient to meet the *Cargo One* standard would involve "broader practices beyond those directly affecting the complainant."

B. Count I Fails to Sufficiently Allege a Practice Under Section 41102(c) of the Shipping Act.

SEA fails to rebut HMM's argument that the Complaint does not adequately allege a "practice" within the meaning of Section 41102(c). In its Interpretive Rule, Shipping Act of 1984, the Commission clarified that the term "practice" means only acts or omissions that occur on a "normal, customary, and continuous basis." 83 Fed. Reg. 64478. The Commission further explained that "[t]his rule restores the Commission's interpretation of § 41102(c) to its pre-2010 understanding and returns the Commission's focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public." 83 Fed. Reg. 64479 (Dec. 17, 2018).[5]

In its Response, SEA does not refute the string of case precedents restored by the Interpretive Rule that decline to find a practice where the complained of activity was alleged to apply only to a single shipper.[6] For example, in *European Trade Specialists v. Prudential-Grace Lines*, the Commission rejected a claim about inadequate notice because it did not establish that the alleged wrongful act was a practice, regularly followed with respect to shippers in general, and not just the complainant. 19 S.R.R. 59, 63 (FMC 1979). The Commission stated that, unless the respondent's "normal practice was not to notify the shipper, such adverse action cannot be

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Dkt. No. 21-05, 2024 WL 95383 at *7 (FMC Jan. 3, 2024). As noted herein, SEA's focus is exclusively on its own dealings with HMM and HMM's alleged failure to perform as required under store door terms.

[5] The Commission also explained that it sought to restore its prior understanding of the requirements of 41102(c) and that "[t]o find a violation of 41102(c), the Commission consistently required that the unreasonable regulation or practice was the normal, customary, often repeated, systematic, unform, habitual, and continuous manner in which the regulated carrier was conducting business." 83 Fed. Reg. at 64479 (Dec. 17, 2018)(footnotes omitted)(*citing Whitam v. Chicago*, R.I. & P. Ry. Co., 66 F. Supp. 1014 (N.D. Tex. 1946) in relation to the requirement for uniformity).

[6] Even the precedent recognized by SEA, *Ports America Chesapeake, LLC v. APS East Coast, Inc*., is misplaced because the Presiding Officer stopped short of outright addressing the issue. Instead, he determined that the complainant sufficiently alleged a practice because it alleged that AMPORTS' policy and practice applied to all of its auto stevedoring in the Port of Baltimore and that AMPORTS published the practice about which Ports America complained in its tariff. Dkt. No. 23-04, 2023 WL 5375588 at *13 (ALJ Aug. 16, 2023).

found to violate the section as a matter of law." *Id.* Indeed, in *Hangzhou Qianwang Dress Co. v. RDD Freight International Inc*., the Commission stated that "[t]he absence of evidence that Respondent unreasonably released the shipments of **other shippers** is also significant." 2 F.M.C. 2d 168, 173 (FMC 2020) (emphasis added); cited with approval in *Crocus Investments, LLC & Crocus, Fze, v. Marine Transport Logistics, Inc.*, 2021 WL 3732849, at *8; *aff'd Crocus Invs., LLC v. Fed. Mar. Comm'n,* 2022 WL 3012275, at *1 (D.C. Cir. July 29, 2022). Here, there is not even an allegation that HMM engaged in the same actions with respect to other shippers or that other shippers are or have been impacted by the alleged actions of HMM.[7] This claim is therefore unsustainable.

C. SDS And Logitech Are Indispensable Parties To This Proceeding.

In its Motion, HMM demonstrated that SDS and Logitech are necessary and indispensable parties to this proceeding because an order granting the relief requested by SEA, specifically a sweeping cease and desist order, would necessarily do violence to the terms of the Service Contracts and rights of SDS and Logitech under same. SEA's technical arguments to the contrary are insufficient to overcome what can be easily determined upon review of the Service Contracts, of which the Presiding Officer may take notice. 46 C.F.R. § 502.226. As such, SEA's Count I must be dismissed in the absence of SDS and Logitech.

II. COUNT II – SEA Fails to Sufficiently Plead a Retaliation Claim.

SEA also fails to overcome HMM's showing that Count II of the Complaint should be dismissed for failure to adequately allege retaliation under Section 41104(a)(3) for the period before June 16, 2022, or Section 41102(d) for the period on and after June 16, 2022. In particular, the Complaint fails to provide even minimal detail as to the protected activity that was

[7] In this regard, SEA's reference to general and unofficial statements made by an individual FMC commissioner to the press regarding ocean carriers does not constitute an allegation of any specific conduct by HMM or let alone that such conduct was repeated by HMM with respect to other entities. Complaint ¶20; Response at 12.

alleged to have been undertaken by SEA, HMM's alleged retaliatory action in response, or the timeline for any of these events.

There is no doubt that, "[i]n 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." See e.g., *Cornell v. Princess Cruise Lines, Ltd.*, FMC Docket No. 13-02, 2014 WL 531634 at * 6, 33 S.R.R. 614, 620 (FMC Aug. 28, 2014) (citation omitted):

> To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); see also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. §1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., FMC Docket No. 09-01, 2011 WL 7144008 at *12, 32 S.R.R. 136 (FMC Aug. 1, 2011).

The *Iqbal/Twombly* "plausibility" standard has been adopted by the Commission, which has stated: "[w]e hold that the ALJ set forth the correct legal standard—the Iqbal/Twombly 'plausibility' standard that the Commission adopted in *Mitsui* [citation omitted], and reaffirmed in *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620 (FMC 2014)." *Maher Terminals, LLC v. The Port Authority of New York and New Jersey,* Docket No. 12-02 (Dec. 18, 2015), 2015 WL 9426189, *6 (F.M.C. 2015) (the "Iqbal/Twombly Plausibility Standard").

Under the Iqbal/Twombly Plausibility Standard, Count II of the Complaint fails. "[R]eferences to statutes with nothing more cannot possibly state a claim upon which relief can

be granted" *Hunter v. District of Columbia*, 534 F.Supp.2d 70 (D.D.C. 2008). Furthermore, as explained by the Commission:

> 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. The Commission need not, however, accept any inferences drawn by Complainants that are unsupported by the facts pleaded in the complaint. Moreover, the Commission need not "accept legal conclusions cast in the form of factual allegations."

Cornell, 2014 WL 531634 at * 6, 33 S.R.R. at 620-621 (citations omitted).

Here, SEA offers little more than a recitation of the statutory elements of retaliation claims under 41104(a)(3) and 41102(d) with HMM's name inserted beforehand. Complaint ¶¶68-75. As to its own purported protected conduct, SEA asserts (for the first time) in the Response that it made a "demand for resolution, which threatened a complaint to the FMC." Response at 20. However, the Complaint is devoid of any such allegation. *See* Complaint ¶¶47, 50, 53-54, 56, 58. Further, the Complaint does not specify how HMM allegedly retaliated in response to a protected activity. While the Complaint alleges that HMM "refus[ed] release of subject SEA Containers and threaten[ed] to refuse release of unrelated SEA Containers", the Complaint alleges only that this was in response to nonpayment of detention and demurrage charges, not a protected activity by SEA. Complaint ¶¶44-45. With no element of a claim under 41104(a)(3) or 41102(d) sufficiently pled, there are no factual allegations for HMM to admit or deny.

SEA also makes no effort to set out even a basic timeline of when it allegedly engaged in protected activity and when HMM allegedly retaliated. Complaint ¶¶50-58, 74. Rather, SEA's Notice of Demand for Action letter ("NDFA"), which SEA points to (for the first time) in its Response as the protected activity it engaged in (along with unspecified "other efforts" which the Response does not explain and which are not alleged in the Complaint), is dated October 7,

2022. Complaint ¶51. However, Count II includes a claim that retaliation allegedly occurred under Section 41104(a)(3) for the period before June 16, 2022 – i.e., several months *before* the protected activity that HMM allegedly retaliated against.

Similarly, despite asserting in its Response that the NDFA was the protected activity that HMM allegedly retaliated against, the Complaint fails to allege that any retaliatory action was actually taken after SEA sent the NDFA. SEA alleges that the Parties met on March 17, 2023, after it sent the NDFA, and in response to a request by HMM for "illustrative examples of its allegedly unreasonable conduct," SEA outlined the behavior it believed was unreasonable – i.e., the behavior that served as the basis for its sending of the Notice of Demand for Action. Complaint ¶¶50-53. Even by SEA's own account, the actions on the part of HMM complained of by SEA occurred *prior* to the protected activity SEA now asserts it engaged in. Thus, despite providing so little detail as to the actual alleged sequence of events that gives rise to its claim as to render its allegations in Count II insufficient, even the meager details that are provided by SEA create an irreconcilable timing issue that renders Count II unsustainable on its face.

Such a conclusion is fully consistent with the recent decision in *20230930-DK-Butterfly-1, Inc. v. MSC Mediterranean Shipping Co. SA* where the ALJ explained that "without more than just complaints to the carrier about it not providing the contracted space allocation, retaliation cannot be established." Docket No. 23-12, Order Granting Respondent's Partial Motion to Dismiss at 6 (Mar. 25, 2024). SEA's reliance on *OJ Commerce, LLC v. Hamburg Sudamerikanische Dampfschifffahrtsgesellschaft A/S & Co. Kg*, does not mandate a different result. Dkt. No. 21- 11, 2023 WL 3969857 (ALJ June 7, 2023).[8] Importantly, *OJ Commerce* involved a complaint that a shipper was denied vessel space accommodations under an existing

[8] It is also worth noting that *OJ Commerce* is on appeal before the Commission and thus has limited precedential value. This is confirmed in *DK-Butterfly*. *See 20230930-DK-Butterfly-1, Inc. v. MSC*, 2024 WL 1299768 (ALJ 2024), Order Granting Respondent's Partial Motion to Dismiss at 5.

contract, and the complainant explicitly pled that the complained of actions occurred following its threat to file a complaint with the Commission. *Id.* SEA's allegations fall well short of this mark and are thus insufficient to make out a claim.

III. COUNT III - SEA fails to sufficiently allege a Refusal to Deal in violation of Section 41104(a)(10).

HMM's Motion shows that SEA failed to state a claim pursuant to 46 U.S.C. 41104(a)(10) because it did not allege any instance in which HMM refused to deal or negotiate with SEA, unreasonably or otherwise. In its Response, SEA asserts that the Complaint sufficiently alleges that HMM refused to deal or negotiate: 1) with respect to vessel space accommodations;[9] and 2) with respect to SEA's requests to mitigate, cancel, or waive charges for which SEA claims it was not responsible. Both arguments fail and Count III must be dismissed.

SEA makes no allegation of a refusal to deal with respect to vessel space accommodations sufficient to meet the Iqbal/Twombly Plausibility Standard. Specifically, 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 *only* factual allegation made in the Complaint by SEA with respect to vessel space accommodations is that HMM continued to transport SEA cargo for the duration of the period subject to the Complaint. Complaint ¶ 67(c).[10]

Count III is similarly deficient with respect to any alleged refusal to mitigate, cancel, or waive charges for which SEA claims it was not responsible. Simply stated, SEA does not assert

[9] The Commission's Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier published today affirms same. *See* 89 FR 59648 at 59671.

[10] In this regard, SEA misunderstands HMM's reference in its Motion to Paragraph 67(c). HMM points to Paragraph 67(c) because SEA does not provide any other details relating to HMM's carriage of cargo in its Complaint (i.e., the only fact with respect to vessel space accommodations asserted by SEA is that carriage of cargo continued). SEA's only other references to vessel space accommodations are in paragraphs where it quotes the elements of Shipping Act violations or repeats those elements verbatim in the form of an allegation. *See* Complaint ¶¶ 69, 70, 74, 78. The Complaint is devoid of any instance in which SEA details even a single request for vessel space accommodations made to HMM or a denial of such request by HMM.

that HMM refused to negotiate with SEA on these topics. In fact, the Complaint establishes the opposite, detailing meetings between the Parties occurring between October 7, 2022, and February 24, 2024, extensive correspondence, and discussions. Complaint ¶¶79, 50-58. Indeed, the Complaint characterizes the discussions between the Parties as "good-faith discussions" and goes on to detail a purported proposal by HMM to review the charges at issue to assess responsibility which was apparently rejected *by SEA*. Complaint at ¶55. Accepting the Complaint as true, SEA alleges only that HMM and SEA were unable to settle SEA's claims. A failure to agree is plainly insufficient grounds to support a claim of refusal to deal.

Under Commission precedent, refusals to deal are found where a party has totally refused to consider a contract or a request for service or space, not instances in which the complainant simply disagreed with the end result of discussions:

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of the OSRA [1998]. All that is required is that common carriers . . . refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001), aff'd 29 S.R.R. 1066, 1070 (FMC 2002), aff'd 80 F. App'x 681 (D.C. Cir. 2003) (emphasis added).[11]

In short, not only does SEA fail to sufficiently plead an allegation of refusal to deal by HMM, but the Complaint successfully rebuts such a claim on its face.[12]

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

[12] The cases cited by SEA in the Response are of no avail in this regard. *OJ Commerce* is of limited precedential value and, in any event, is clearly distinguishable in that it involved allegations of a complete denial of vessel space under an existing and future contracts. *OJ Commerce*, *supra*, at 34-35. Similarly, SEA turns to *Canaveral Port Authority* and *Docking & Lease Agreement By & Between City of Portland, ME & Scotia Prince Cruises Ltd*., for the premise that a party must give actual consideration to an entity's efforts at negotiation. *Canaveral Port Authority - 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); *Docking &* Lease, Dkt. No. 04-10, 2004 WL 1895827 (FMC Aug. 23, 2004).

Additionally, as detailed in the Motion, permitting Count III to survive a motion to dismiss would run afoul of the *Noerr-Pennington* doctrine. *Noerr-Pennington* protects "not only petitions sent directly to the court in the course of litigation, but also conduct incidental to the prosecution of the suit," including settlement negotiations "prior to initiating any actual litigation." *Sosa v. DIRECTV, Inc*., 437 F.3d 923, 934 (9th Cir. 2006) (cleaned up); *accord Singh v. NYCTL 2009-A Trust*, 683 F. App'x 76, 77-78 (2d Cir. 2017). SEA does not dispute that in its Response. Rather, it asserts that the settlement negotiations detailed in the Complaint, which constituted approximately 10% of the "factual allegations" contained therein, were not actually the "crux" of its claim. Response at 23. Notwithstanding SEA's attempt to now downplay the role of the settlement discussions it previously viewed as significant enough to discuss in detail in its Complaint and which clearly underpin its claims in Count III, those allegations cannot form the basis for a cause of action because they are incidental to petitioning activity, i.e., communications or negotiations about settling this case before litigation. As such, to avoid a conflict with the right to petition under the First Amendment, the Commission must conclude that HMM's efforts to negotiate with SEA about its allegations prior to SEA's filing of this case, cannot, as a matter of law, violate 46 U.S.C. § 41104(a)(10).[13]

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

SEA's Response does not overcome HMM's argument that Count IV should be dismissed because SEA fails to allege a prima facie claim. SEA does not appear to dispute that

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As noted above, SEA alleges only that HMM considered SEA's claims but was unable to settle them to SEA's satisfaction.

[13] *Cf. BE&K Contr. Co.,* 536 U.S. 516, 526-27 (2002) (construing NLRA provision to avoid a conflict with the First Amendment); *Sosa*, 437 F.3d at 942 ("Because the demand letters at issue here sought settlement of claims against Sosa under the Federal Communications Act, and no sham is claimed, they cannot form the basis of liability under RICO."); *Columbia Pictures Indus. v. Prof'l Real Estate Investors, Inc.,* 944 F.2d 1525, 1528 (9th Cir. 1991) ("A decision to accept or reject an offer of settlement is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability").

the Complaint "does not allege any specific deficiency, specific invoice, specific time period, or other identifying information" in support of SEA's claim in Count IV (Motion at 18). Instead, SEA simply argues in the Response that "specific details of that nature are not required to support a plausible claim for relief." Response at 24. SEA is mistaken.

Count IV of the Complaint offers only a formulaic recitation of the statute, labels and conclusions, and lacks any specificity allowing HMM to respond to the allegations. SEA's Response is no better because it simply repeats the deficient allegations of the Complaint. If the Iqbal/Twombly Plausibility Standard is to have any meaning, it must require more than simply listing statutory requirements and baldly asserting in conclusory fashion that a respondent did not meet them. As is consistent with Commission precedent, a well-pleaded complaint requires at least minimal detail as to the circumstances of the alleged non-compliance. *See Cornell*, 2014 WL 531634 at * 6, 33 S.R.R. at 620-621 (citations omitted)("the Commission need not 'accept legal conclusions cast in the form of factual allegations.'"). The Complaint fails to meet this standard.

Even if SEA did plead Count IV sufficiently, it fails as to reparations. HMM demonstrated in its Motion that the only remedy for an invoice without all of the information required by OSRA 2022 is the issuance of a corrected invoice. SEA's response is, essentially, that surely the FMC did not mean what it has said. SEA instead suggests (without citation or support) that its misunderstanding of OSRA 2022 must be determined on the merits. Because the Commission has clearly specified the means by which a deficiency is to be remedied, SEA's arguments are baseless.

V. COUNT V - SEA Fails to State a Claim under 46 U.S.C. § 41104(a)(14).

SEA's response to HMM's Motion to dismiss Count 5 is without merit for two reasons. First, SEA ignores that the date for application of the new rules is the date of assessing or

invoicing charges, not the date of an allegedly improper act or omission. While SEA asserts that "[t]he Complaint alleges that HMM assessed charges in the period after implementation of OSRA 2022, in violation of OSRA 2022," in fact, none of the paragraphs in the Complaint cited in support actually say this. The paucity of factual allegations means that, even accepting the allegations in the Complaint as true, neither HMM nor the Presiding Officer can tell from the Complaint whether any invoices were issued, or charges assessed, after June 16, 2022, and, if so, which ones are at issue.

Second, SEA makes the curious (and new) assertion that HMM "was well aware" of SEA's claims which SEA apparently believes relieves it of the need to provide sufficient detail in the Complaint. Response at 26. This is immaterial because the Iqbal/Twombly Plausibility Standard is not abrogated simply because a complainant believes a respondent already knows the nature of the complainant's allegations. SEA's refusal to provide detail as to Count V sufficient to meet the Iqbal/Twombly Plausibility Standard therefore supports dismissal of Count V.

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

SEA's Response is insufficient to support its allegation that HMM lacked "just and reasonable dispute resolution practices" in violation of Section 41102(c). Here too, SEA mistakes conclusory statements for allegations of fact. While it is true that SEA stated in the Complaint that HMM "lacks a meaningful dispute resolution practice, policy, or procedures to evaluate disputed charges," this is a legal conclusion and not a factual allegation. *See Cornell*, 2014 WL 531634 at * 6, 33 S.R.R. at 620-621 (citations omitted). SEA does not actually assert that it ever attempted to utilize HMM's dispute resolution procedures, thus it is unclear how it could assess their sufficiency. Indeed, even in its Response, SEA fails to point to a single allegation in the Complaint in which it provides even an inkling into *how* it alleges HMM's

dispute resolution processes were deficient. As discussed above, the only facts alleged by SEA in this regard relate to the extensive discussions and correspondence engaged in by the Parties in a "good faith" attempt to resolve this matter, SEA's refusal to review the details of individual invoices with HMM when offered by HMM, and the Parties' inability to resolve the matter.

Even accepting the factual allegations in the Complaint as true, SEA has not alleged sufficient facts to support a claim that HMM's dispute resolution process was unreasonable. Additionally, SEA makes no allegation that such deficiencies occurred on a normal, customary, and continuous basis so as to constitute a "practice" as required for a violation of 41102(c).

Finally, as explained in Section III, SEA's dissatisfaction with the result of the negotiations between SEA and HMM cannot serve as the basis for its claim in Count VI in light of the *Noerr-Pennington* doctrine. For the foregoing reasons, SEA has not sufficiently pled its Count VI and it should be dismissed.

VII. SEA Also Fails to Properly Plead a Claim for Reparations.

HMM demonstrated that SEA's motion failed to "set forth the injury caused …and the amount of alleged damages" in compliance with 46 C.F.R. § 502.62(a)(4)(i). SEA concedes that it failed to satisfy Rule 62 but instead now argues that "HMM is well aware of the nature and scale of the damages SEA is alleging." Response at 29. As noted above, the novel argument that the specificity needed to satisfy pleading requirements may be waived if the plaintiff believes that the respondent knows of the allegations is meritless.[14] SEA provides no explanation for why, if information was provided to HMM during "detailed negotiations" (many of which were confidential settlement negotiations the contents of which are inadmissible in evidence), it is now

[14] SEA cites to no precedent from the Commission, or anywhere else for the proposition that pre-suit correspondence can obviate a pleading standard. HMM also disputes that SEA may rely on allegations not included in its Complaint as it attempts to do here.

excused from formally supporting its claim here.[15] Similarly, SEA's position that it cannot now quantify its damages is glaring in light of its claim that HMM is apparently already "on notice" of the "amount of the damages." [16] Response at 29. SEA simply cannot have it both ways.

HMM's motion to dismiss SEA's reparations claim is based on SEA's failure to allege the "amount of alleged damages," not its failure to provide a shipment by shipment accounting. Ordinary civil cases may differ in their requirements,[17] but the FMC's Rules control this proceeding. The Federal Rules are used to fill gaps, like allowing motions to dismiss, but where the Federal Rules and the Commission's Rules conflict, the Commission's own Rules must prevail.[18] The Presiding Officer should decline to indulge SEA in its self-serving arguments and inconsistent pleadings, and SEA's claim for reparations should be dismissed.

CONCLUSION

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

[15] SEA also argues that its allegations in Paragraph 53 and 58 of the Complaint give HMM notice, but they do not. Neither paragraph alleges that HMM was given notice of the amount of damages SEA alleges here. SEA alleges that it gave HMM documentation, data, and an analysis of damages and also provided categories of HMM's alleged actions. Presumably, SEA is not conceding that it waived the right to seek damages in amounts exceeding those previously discussed with HMM. However, for its argument to be correct that HMM already has notice of the amounts of its claims on the basis of prior discussions, this would necessarily be required.

[16] SEA's arguments that its alleged "damages" are still accruing based on Paragraph 59 and that a bifurcated proceeding may be appropriate are equally unpersuasive; neither of these circumstances prevents SEA from quantifying its alleged damages to date.

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

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2024, the foregoing Reply to Complainant's Opposition to Respondent's Motion To Dismiss was served via electronic mail on:

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