

**BEFORE THE FEDERAL MARITIME COMMISSION**

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DOCKET NO. 20-14

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INTERMODAL MOTOR CARRIERS CONFERENCE,  
AMERICAN TRUCKING ASSOCIATIONS, INC.

Complainant,

v.

OCEAN CARRIER EQUIPMENT MANAGEMENT ASSOCIATION, INC., *et al.*,

Respondents.

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**BRIEF AMICUS CURIAE OF  
THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION**

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June 20, 2024

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Pursuant to Rule 73 of the Federal Maritime Commission’s (“Commission”) Rules of Practice and Procedure, 46 C.F.R. § 502.73, the Antitrust Division of the Department of Justice (“Division”) respectfully submits this brief as amicus curiae. The Division believes this submission will help to clarify the significance of the business review letter the Division issued to independent equipment providers FlexiVan Leasing, Inc. and Direct ChassisLink, Inc. in 2014.<sup>1</sup>

Respondents have cited to this letter as though it creates ongoing immunity against FMC action or otherwise constrains the Commission’s decisions. That is far from the truth. The letter does not prevent the Division from taking any enforcement action, much less bind any other agency. In the Division’s view, the letter is of no relevance to the Commission’s proceeding.

#### **I. INTEREST OF THE DIVISION AS AMICUS CURIAE**

American consumers and businesses count on reliable and affordable transport of their goods and critical supplies. The supply disruptions of the recent past drove home the importance of shipping costs to the American economy. And competition is crucial to the resiliency of the U.S. shipping and supply chain industry.

The Antitrust Division enforces the antitrust laws on behalf of the American people to promote competition and protect economic freedom and opportunity. The Division and the Commission both recognize that promoting and protecting competition in the shipping industry leads to lower prices, higher quality of service, and stronger supply chains. In July 2021, the

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<sup>1</sup> The request of Flex-Van Leasing Inc. and Direct ChassisLink, Inc. for a business review letter, dated January 22, 2014, is attached as **Exhibit 1**. The Division’s business review letter in response to that request, dated September 23, 2014, is attached as **Exhibit 2**.

Division and the Commission, consistent with a whole-of-government approach to competition,<sup>2</sup> formalized a framework for partnership that enhances cooperation in the enforcement of antitrust and competition laws, including the Shipping Act, 46 U.S.C. §§ 41101-41309.<sup>3</sup> And in February 2022, the Commission and the Division reaffirmed their commitment to jointly enforcing competition laws and announced steps to strengthen their partnership.<sup>4</sup>

The Division has considerable expertise in examining competition in the shipping industry, including bringing enforcement actions focused on stopping anticompetitive mergers and conduct and evaluating the impact of regulations on competition. For example, the Division recently investigated China International Marine Containers Group’s proposed acquisition of Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd.—a deal that would have left the merged firm with more than 90 percent of worldwide production of refrigerated shipping containers and insulated container boxes.<sup>5</sup> After the Division’s thorough investigation

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<sup>2</sup> See Exec. Order No. 14,036, 86 Fed. Reg. 369873 (July 9, 2021) (“Promoting Competition in the American Economy”) (encouraging agencies with overlapping responsibilities that “they should endeavor to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency,” including “soliciting and giving significant consideration to the views of the Attorney General or the Chair of the FTC, as applicable”).

<sup>3</sup> Memorandum of Understanding between the Federal Maritime Commission and the Antitrust Division Department of Justice Relative to Cooperation with Respect to Promoting Competitive Conditions in the U.S.- International Ocean Liner Shipping Industry (July 12, 2021), available at <https://www.justice.gov/opa/press-release/file/1411101/dl?inline>.

<sup>4</sup> See FMC Press Release, Justice Department and Federal Maritime Commission Reaffirm and Strengthen Partnership to Promote Fair Competition in the Shipping Industry (Feb. 28, 2022), available at <https://www.justice.gov/opa/pr/justice-department-and-federal-maritime-commission-reaffirm-and-strengthen-partnership>.

<sup>5</sup> Press Release, Global Shipping Container Suppliers China International Marine Containers and Maersk Container Industry Abandon Merger after Justice Department Investigation (Aug. 25, 2022), available at <https://www.justice.gov/opa/pr/global-shipping-container-suppliers-china-international-marine-containers-and-maersk>.

raised significant antitrust concerns, China International Marine Containers abandoned the merger.<sup>6</sup>

Apart from its civil enforcement and criminal prosecution efforts, the Division also administers a business review procedure pursuant to 28 C.F.R. § 50.6. This procedure allows parties to seek the Antitrust Division's present enforcement intentions about proposed business conduct but does not bind future conduct of the Division, much less another agency. *See* 28 C.F.R. § 50.6(8). The Antitrust Division has a strong interest in the correct interpretation of our business review assessments.<sup>7</sup>

## II. DISCUSSION

In January 2014, independent equipment providers FlexiVan Leasing, and Direct ChassisLink requested a business review letter from the Division regarding a plan to create a new type of pool of pools run by independent equipment providers in the ports of Los Angeles and Long Beach that “would allow the interchange of chassis among the pools managed by each of [FlexiVan Leasing] and [Direct ChassisLink].” Exhibit 1. In its response, dated September 23, 2014, the Division stated that, based on the information FlexiVan Leasing and Direct

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<sup>6</sup> The Division has also prosecuted companies and individuals for unlawful collusion in the ocean shipping industry, resulting in criminal fines and jail time. *See, e.g.*, Press Release, Two International Shipping Executives Indicted for Participating in Long-Running Antitrust Conspiracy (Jun. 26, 2019), available at <https://www.justice.gov/opa/pr/two-international-shipping-executives-indicted-participating-long-running-antitrust>; Press Release, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), available at <https://www.justice.gov/opa/pr/former-shipping-executive-sentenced-48-months-jail-his-role-antitrust-conspiracy>; Press Release, International Shipping Executives Indicted for Colluding on Bids and Rates (Jun. 27, 2017), available at <https://www.justice.gov/opa/pr/international-shipping-executives-indicted-colluding-bids-and-rates>; Press Release, Third Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Dec. 29, 2014), available at <https://www.justice.gov/opa/pr/third-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks>.

<sup>7</sup> *See generally* U.S. Dept. of Justice, *Introduction to Antitrust Division Business Reviews*, Nov. 3, 2011, <https://www.justice.gov/sites/default/files/atr/legacy/2011/11/03/276833.pdf>.

ChassisLink provided, their proposal did not appear likely to produce anticompetitive effects. The Division further stated that it had “no present intention to challenge the proposed [agreement]” between the parties. Exhibit 2.

In their briefings in this matter, Respondents have asserted that Complainants’ argument would “disturb” the Division’s 2014 business review letter, that any actions by the FMC here would “intrude” on DOJ’s oversight, and that Respondents operate “under a Business Review Letter issued by the US Department of Justice.”<sup>8</sup> The Division’s letter, however, does not bear the weight that Respondents’ ascribe to it and should have no impact on the Commission’s decision in this matter.<sup>9</sup>

The business review procedure enables the Division to offer businesses a point-in-time assessment of proposed joint ventures or other business conduct. Under the governing regulation, the Division can do no more than “state its present enforcement intention with respect to the proposed business conduct.” 28 C.F.R. § 50.6(8). Furthermore, “a business review letter states only the Division’s enforcement intentions as of the date of the letter, and the Division remains

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<sup>8</sup> See, e.g., Respondents’ Mem. of Law in Opposition to Complainant’s Motion for Summary Decision, Doc No. 104, May 29, 2022 (stating that IMCC’s argument would “disturb the DOJ’s stated position that the Pool of Pools was unlikely to produce anticompetitive effects in favor of motor carriers,” and that “[s]uch FMC action would intrude on the DOJ’s antitrust oversight over parties that are neither regulated by the FMC nor included in this litigation.”); Respondents’ Petition for Reconsideration, Doc. No. 152, Mar. 14, 2024 (stating that chassis providers operate “under a Business Review Letter issued by the US Department of Justice”); Brief of *Amici Curiae* Direct ChassisLink Inc. *et al.*, Doc. No. 145, Mar. 21, 2024, at 13 (arguing that the Pool of Pools’ billing rules do not “conflict” with the 2014 business review letter).

<sup>9</sup> See Initial Decision Partially Granting Summary Decision, Doc. No. 133, at 53-54 (observing that the business review letter “does not apply to the [Pool of Pools] as implemented in the eight years since DOJ issued its business review letter.”); Order Affirming Initial Decision and Remanding for Further Proceedings, Doc. No. 150, at 61 (affirming the Administrative Law Judge’s findings with respect to the challenged practices relevant to the Pool of Pools).

free to bring whatever action it subsequently comes to believe is required by the public interest.”<sup>10</sup>

Thus, the Division’s business review process does not constitute an ongoing engagement with or review of conduct described in the letter. A business review letter also can have no binding effect on the Division’s enforcement discretion or confer any future antitrust immunity. It is therefore inaccurate to describe any recipient of a business review letter, including the Respondents here, as operating “under” a letter in a way that preempts or prevents enforcement of any law. Moreover, the business review letter was “predicated on the accuracy of the information and assertions” provided by the requesting parties, Exhibit 2, and representations made by the parties a decade ago cannot substitute for the facts found by the Commission in this case.<sup>11</sup>

For these reasons, nothing in either the 2014 letter or the governing regulations supports any argument that a decision by another agency would “disturb” or “intrude” on the Division’s enforcement mission. The business review letter regulations make this clear: “If the business conduct for which review is requested is subject to approval by a regulatory agency,” the letter “shall in no way be taken to indicate the Department’s views on the legal or factual issues that may be raised before the regulatory agency” and “is not to be represented to mean that the

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<sup>10</sup> 28 C.F.R. § 50.6(9); *see also Sterling Merchandising, Inc. v. Nestle, S.A.*, 470 F. Supp. 2d 77, 81 n.2 (D.P.R. 2006) (“The opinion issued by the [Antitrust Division] pursuant to [the business review procedure] states only the enforcement intention of the Division, who remains free to bring whatever action it deems appropriate to protect the public interest.”); *United States v. Firestone Tire and Rubber Co.*, 374 F. Supp. 431, 434 n.1 (N.D. Ohio 1974) (noting that in the business review procedure, the Division remains free to bring any action at any time); *United States v. Grinnell Corp.*, 30 F.R.D. 358, 363 (D.R.I. 1962) (The Department of Justice’s statement of a “present intention not to take action” cannot be equated with future immunity).

<sup>11</sup> *See* Order Affirming Initial Decision at 61 (affirming the Administrative Law Judge’s finding that the pool’s operating practices “conflict with representations the [independent equipment providers] made to the DOJ in obtaining the business review letter”).



Division believes that there are no anticompetitive consequences warranting agency consideration.” 28 C.F.R. § 50.6(7)(a). To the contrary, the Division has a strong interest in other federal agencies making full use of their authority to protect competition in the industries they regulate.

### III. CONCLUSION

A business review letter “states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest.” 28 C.F.R. § 50.6(8). It provides no immunity or defense to any violation of the antitrust laws, nor does it supplant the independent decisions of other agencies. Accordingly, the Division’s 2014 business review letter has no relevance to the Commission’s decision in this matter.

Dated: June 20, 2024

Respectfully submitted,

*/s/ Craig L. Briskin*

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# **Exhibit 1**

January 22, 2014

William J. Baer, Esq.  
Office of the Assistant Attorney General  
Antitrust Division  
Department of Justice  
Main Justice Building  
Room 3109  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Via courier

### **Request for Business Review Letter**

Dear Assistant Attorney General Baer,

Flexi-Van Leasing Inc. ("FVLI") and Direct ChassisLink, Inc. ("DCLI") are writing to request a business review letter under 28 C.F.R. § 50.6 concerning their plan to enter into a chassis use agreement at the ports of Los Angeles and Long Beach.

FVLI and DCLI are chassis leasing companies that also manage chassis pools in the Los Angeles and Long Beach area. FVLI manages the Los Angeles/Long Beach Basin Chassis Pool ("LABP"). DCLI manages the Grand Alliance Chassis Pool ("GACP"), as well as chassis in other pools in the area. Through these pools, the companies lease chassis to motor carriers and other users for the transport of intermodal freight containers. The pools include chassis owned by the parties, as well as chassis owned by third parties. Chassis pools provide efficiency benefits, such as improved utilization, and are prevalent throughout the industry.

The proposed agreement would allow users of one pool to interchange chassis managed by the other pool. For example, pursuant to this arrangement, a chassis user could pick up a chassis from one of the DCLI start/stop pool locations and eventually return it to one of the FVLI-managed LABP start/stop locations. The parties would continue to operate each pool independently, including decisions by individual chassis owners on the rates to charge chassis users, but the agreement would facilitate interchangeability among a larger group of chassis in a materially-expanded geographic scope.

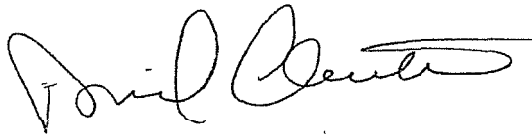
This agreement enhances utilization and responds to the desires expressed by the governing bodies of the Ports of Los Angeles and Long Beach regarding more widely available interchange and enhanced efficiency of chassis operations throughout the greater port area.

In addition to this letter request, the parties are submitting a memorandum and accompanying exhibits in support of their joint request, for which confidential treatment is requested under 28 C.F.R. § 50.6(10)(c).

These materials contain commercially sensitive operational details and strategy the disclosure of which would have a detrimental effect on the parties. The parties will be prepared to supplement this showing, as necessary, in accordance with the provisions of 28 C.F.R. § 50.6(10)(c).

Thank you for your consideration. We would be pleased to respond to any questions.

Sincerely,



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Encl.

# **Exhibit 2**



**U.S. DEPARTMENT OF JUSTICE**  
Antitrust Division

**WILLIAM J. BAER**  
Assistant Attorney General

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950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001  
(202)514-2401 / (202)616-2645 (Fax)

September 23, 2014

David A. Clanton, Esq.  
Baker & MacKenzie LLP  
815 Connecticut Avenue, NW  
Washington, DC 20006

Valarie C. Williams, Esq.  
Alston & Bird LLP  
One Atlantic Center  
1201 Peachtree Street  
Atlanta, GA 30309

Re: Flexi-Van Leasing, Inc. and Direct ChassisLink, Inc. Business Review  
Letter Request

Dear Mr. Clanton and Ms. Williams:

This letter responds to your request for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6.<sup>1</sup> You have requested, on behalf of Flexi-Van Leasing, Inc. ("FVLI") and Direct ChassisLink, Inc. ("DCLI"), a statement of the Department's present enforcement intentions regarding a proposed Chassis Use Agreement at the ports of Los Angeles and Long Beach, California ("LA/LB"). Chassis are used for the intermodal transportation of marine containers. FVLI and DCLI are chassis leasing companies that also manage chassis pools operating at the LA/LB port complex. FVLI and DCLI propose to enter a Chassis Use Agreement that would allow the interchange of chassis among the pools managed by each of FVLI and DCLI. The FVLI and DCLI pools will continue to compete for business, and leasing terms and rates will continue to be set independently by each chassis provider. After initial implementation, the parties intend that the Agreement will become open to other pools operating at LA/LB.

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<sup>1</sup>January 22, 2014 Letter from David Clanton and Valarie Williams to Assistant Attorney General William J. Baer.

David A. Clanton, Esq.  
Valarie C. Williams, Esq.  
September 23, 2014  
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At LA/LB, there are six chassis pools operating in 13 different terminals. FVLI manages the Los Angeles/Long Beach Basin Chassis Pool ("LABP"). DCLI manages the Grand Alliance Chassis Pool ("GACP"). DCLI also manages and owns the DCLI Pool. The remaining pools at LA/LB are the West Coast Chassis Pool ("WCCP") and two steamship-specific pools.

Growth in cargo volume at the ports of LA/LB, fueled by the chassis industry transition, has caused increased marine terminal congestion at the port complex. This has led to long truck lines and delayed deliveries. Currently, motor carriers must drop off the chassis at one of the locations operated by the pool from which the chassis originated, which often is a different location from where the motor carriers go for their next pick up. In addition, motor carriers at LA/LB often must make "split moves" in which they drop off a container at one location, and then need to go to a different location to drop off the chassis. This contributes to congestion at the terminals, wastes the motor carriers' time and money, and frequently leads to chassis shortages or dislocations.

You have made the following representations in your letter and follow-up information to the Department:

The parties propose to enter into the Chassis Use Agreement in order to establish a "gray" chassis concept. The gray chassis concept extends benefits associated with individual pools by allowing the interchange of chassis across multiple pools, which encompasses several terminals, container yards, rail ramps and other locations within the greater LA/LB port complex. You represent that the increased flexibility created by the interchangeability will enhance customer service, improve chassis productivity and respond to the desire of LA/LB port authorities to achieve better overall utilization of the region's chassis fleets. You represent that after a period of initial implementation, the parties intend to permit open participation by any other pools and third parties in the LA/LB port complex.

The proposed agreement would allow users of any of the pools managed by FVLI or DCLI to interchange chassis among each others' pools. Pursuant to this arrangement, a chassis user could pick up a chassis from one of the DCLI-managed pool start/stop locations and eventually return it to one of the FVLI-managed start/stop locations, and vice versa.

You represent that the parties will continue to (a) manage their respective pools; (b) independently establish their published merchant haulage rates for motor carriers in the region; (c) compete openly with one another and other chassis providers for steamship line customers that desire to participate in the gray chassis pool; and (d) negotiate independently with other users in the region for access to chassis.

In addition, you represent that the parties will use a third-party service provider to support the operation of the agreement. The third-party service provider will have access

David A. Clanton, Esq.  
Valarie C. Williams, Esq.  
September 23, 2014  
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to information required to allow the parties to track chassis usage, and that the type of information exchanged is industry standard practice and necessary to implementing cooperative chassis pools. No information will be exchanged regarding customer pricing or other competitively sensitive terms.

Based on your representations and our investigation of the particular facts and circumstances relating to competitive conditions related to the supply of chassis at LA/LB, it does not appear likely that the proposed Chassis Use Agreement between FVLI and DCLI, as presented to the Division, will produce anticompetitive effects.

The Department has no present intention to challenge the proposed Chassis Use Agreement between FVLI and DCLI. This letter expresses the Department's current enforcement intentions and is predicated on the accuracy of the information and assertions you have presented to us in your January 22, 2014 letter, March 4, 2014 e-mails<sup>2</sup>, March 5, 2014 e-mails<sup>3</sup>, April 14, 2014 e-mail<sup>4</sup>, April 15, 2014 e-mail<sup>5</sup>, April 25, 2014 e-mail<sup>6</sup>, April 30, 2014 e-mail<sup>7</sup>, June 9, 2014 e-mail<sup>8</sup>, August 18, 2014 e-mail<sup>9</sup> and in oral communications to the Department.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within thirty (30) days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

  
William J. Baer

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<sup>2</sup> E-mails from David A. Clanton to Michele Cano on March 4, 2014 at 6:12pm and 10:12pm.

<sup>3</sup> E-mails from Jimmy Heidenreich to Michele Cano on March 5, 2014 at 4:05pm and 4:10pm.

<sup>4</sup> E-mail from David A. Clanton to Michele Cano on April 14, 2014 at 3:34pm.

<sup>5</sup> E-mail from Valarie Williams to Michele Cano on April 15, 2014 at 9:57am.

<sup>6</sup> E-mail from David A. Clanton to Michele Cano on April 25, 2014 at 12:21pm.

<sup>7</sup> E-mail from David A. Clanton to Michele Cano on April 30, 2014 at 4:01pm.

<sup>8</sup> E-mail from David A. Clanton to Michele Cano on June 9, 2014 at 3:52pm.

<sup>9</sup> E-mail from David A. Clanton to Michele Cano on August 18, 2014 at 4:55pm.