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Michael A. Khouri, Chairman

Rebecca F. Dye, Commissioner

Daniel B. Maffei, Commissioner

Louis E. Sola, Commissioner

Carl W. Bentzel, Commissioner

Office of Administrative Law Judges

Erin M. Wirth, Chief Administrative Law Judge

The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the legal prohibitions in the Shipping Act of 1984, 46 U.S.C. Chapters 401-143. The Commission can also determine to investigate a possible violation of the same law. In the first instance, these claims are heard by an Administrative Law Judge who issues an Initial Decision. That Initial Decision may become the final decision of the Commission 30 days later. However, the Initial Decision can be appealed by the parties to the proceedings, or any Commissioner can ask to review the Initial Decision. In either case, the Commission would then review the Initial Decision and issue a Final Decision in the case. This publication provides a compendium of Initial and Final Decisions in these matters and selected other Orders that may be significant or establish a new legal precedent.

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FEDERAL MARITIME COMMISSION

CONDITIONS AND PRACTICES RELATING TO DETENTION, DEMURRAGE, AND FREE TIME IN INTERNATIONAL OCEANBORNE COMMERCE

FACT FINDING INVESTIGATION NO. 28

Served: March 5, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, and Daniel B. MAFFEI, *Commissioners*.

ORDER OF INVESTIGATION

Pursuant to the Shipping Act of 1984, 46 U.S.C. 40101 et seq. ("Shipping Act"), the Federal Maritime Commission ("FMC" or "Commission") is charged with regulating the common carriage of goods by water in the foreign commerce of the United States ("liner service"). In doing so, the Commission must be mindful of the statutory purposes of its regulation. Those purposes include an efficient and economic transportation system with a minimum of government intervention and regulatory costs, promotion of the growth and development of U.S. exports by placing a greater reliance on the marketplace. 46 U.S.C. § 40101.

On December 17, 2016, the Coalition for Fair Port Practices filed a petition with the Commission. This petition argued, among other things, that the current practices of demurrage, detention, and per diem, i.e., charges by ocean common carriers and marine terminal operators (MTOs) for the use of space and equipment, is unjust and unreasonable. Shippers, consignees, drayage providers, and others described the alleged practices of MTOs and ocean common carriers (OCCs) that came about as a result of federal government inspection requirements, truck shortages, chassis shortages, discrete weather events, labor disputes, lack of effective appointment systems, and general conditions in and surrounding port areas. These stakeholders also aver that they lack control over such events and have incurred significant demurrage and detention charges in connection with these events.

The Commission oversees 255 marine terminals across the East, Gulf, and Pacific coasts, in addition to Alaska. Policies on free time practices vary, even among terminals at the same port. Although some MTOs and ports have tariffs that allow for additional free time or lesser rates where the terminal or port is unable to tender cargo for delivery during free time, these practices do not appear to be universal. There are also several models of how the MTOs collect the charges from shippers, consignees, drayage providers, or carriers. These varying models may

generate uncertainty among shippers, consignees, and drayage providers about how demurrage and detention will be assessed when access to ports is restricted or ports are congested.

Collectively, these reports of demurrage practices, and the lack of visibility surrounding those practices, have raised questions over whether the current practices allow for a competitive and reliable American freight delivery system. Under 46 U.S.C. § 41102, carriers and MTOs must adopt just and reasonable regulations and practices governing free time and demurrage and detention charges. The test of reasonableness as applied to terminal practices "is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view." *W. Gulf Mar. Ass'n v. Port of Houston*, 18 S.R.R 784, 790 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n v. Fed. Mar. Comm'n*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 822 (1980). Demurrage and detention practices are encompassed within § 41102(c) because they relate to the handling, storing, and delivery of property at terminals. *See, e.g.*, *California v. United States*, 320 U.S. 577, 584-85 (1944) (interpreting the analogous provision in the Shipping Act of 1916 as applying to demurrage); *Am. Export-Isbrandtsen Lines, Inc. v. Fed. Mar. Comm'n*, 444 F.2d 824, 829 (D.C. Cir. 1970) (interpreting the analogous provision in the Shipping Act of 1916 as applying to detention).

The international ocean liner trade has changed dramatically over the last fifty years, driven in large part by the advent of containerization. Unloading a 10,000 TEU vessel in a modern terminal is a very different operation than the unloading of a relatively small breakbulk vessel seventy-five years ago. A related issue to consider is whether the legal duty to tender and its relationship to free time and the imposition of demurrage, detention, and per diem fees have kept up with the changes in port practices unloading vessels, moving cargo off the dock, and delivering it to consignees. Also fundamental to the issue of free time and detention and demurrage charges is the question of who bears the economic burden of delay resulting in detention and demurrage, which involves the allocation of risk and can vary greatly depending on the circumstances.

Therefore, consistent with its statutory duty, pursuant to 46 C.F.R. § 502.281 *et seq.*, the Commission hereby **ORDERS** an investigation into current conditions and practices of vessel operating common carriers and marine terminal operators, and U.S. demurrage, detention, and per diem charges. The Commission will use the information obtained in this investigation and recommendations of the Fact-Finding Officer (FFO) to determine its policies with respect to detention, demurrage, and free time practices of regulated entities.

Specifically, the FFO named herein may develop a record on the following:

1. Whether, and if so, how, the alignment of commercial, contractual, and cargo interests enhance or aggravate the ability of cargo to move efficiently through United States ports.
    a. Whether the commercial and contractual conditions in the United States are similar to the conditions in other maritime nations; and
    b. Whether other maritime nations have practices to address detention or demurrage charges imposed due to conditions beyond carriers', MTOs, or shippers' control, and if so, whether they are effective.
2. Whether, and if so, when, the carrier or MTO has tendered cargo to the shipper and consignee.

   a. Common practices for notification of when cargo is tendered; and
   b. Impediments to cargo pickup when notified of tender.
3. Billing practices for invoicing demurrage or detention, specifically:
   a. Billing relationships for VOCCs and MTOs, including which party bills for which services and charges relating to demurrage and detention;
   b. Billing practices on describing or specifically identifying detention or demurrage charges imposed; and
   c. Timeframes for issuance of demurrage or detention invoices.
4. Practices with respect to delays caused by various outside or intervening events;
   a. Whether and when an MTO or VOCC determines to waive or reduce demurrage or detention charges when access to the terminal is impacted by such events; and
   b. The role of truck and chassis issues in different types of container cargo movements (door-to-door versus port-to-port).
5. Practices for resolution of demurrage and detention disputes between carriers or MTOs and shippers.
   a. Existing processes for reviewing or mitigating demurrage or detention charges;
   b. Timeframes for the resolution of demurrage or detention disputes; and
   c. Practices relating to the cancelation or mitigation of demurrage or detention invoices.

The FFO is directed to report to the Commission on these issues and any recommendations for further Commission action, including any investigations of prohibited acts, enforcement priorities, policies, rulemaking proceedings, or other actions warranted by the factual record developed in this proceeding.

IT IS FURTHER ORDERED, That, pursuant to 46 C.F.R. §§ 502.284 and 502.25, Commissioner Dye is designated as the FFO. The FFO shall have, pursuant to 46 C.F.R. §§ 502.281 to 502.291, full authority to hold public or nonpublic sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testifacandum* and *duces tecum),* to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission. The FFO shall be assisted by staff members as may be assigned by the Commission's Managing Director and other officials, and the FFO is authorized to delegate any authority enumerated herein to any assigned staff member that the FFO determines to be necessary.

IT IS FURTHER ORDERED, That the Investigative Officer shall issue an interim report of findings and recommendations no later than September 2, 2018, a final report of findings and recommendations no later than December 2, 2018, and provide further interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

IT IS FURTHER ORDERED, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

IN RE: REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 017843 – WASHINGTON MOVERS, INC.	**DOCKET NO. 15-10**

Served: March 16, 2018

BY THE COMMISSION: Rebecca F. DYE, and Daniel B. MAFFEI, *Commissioners*. Michael A. KHOURI, *Acting Chairman*, concurring.

ORDER AFFIRMING REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 017843

On June 29, 2017, a Commission Administrative Law Judge (ALJ) issued an Initial Decision revoking Washington Movers, Inc.'s ocean transportation intermediary (OTI) license. Washington Movers filed exceptions to this decision. For the reasons set forth below, we affirm the revocation of Washington Movers' License No. 017843 and order Washington Movers to cease and desist all OTI activities.

I. BACKGROUND

A. Factual Background

1. Incorporation and Name Change

Washington Movers is an OTI that was incorporated in 1996. *Revocation of Ocean Transp. Intermediary License No. 017843 – Washington Movers, Inc.*, 34 S.R.R. 912, 914, 924 (ALJ 2017) [hereinafter ALJ I.D.]. From the time of incorporation to 2013, Sam Ghanem served as Washington Movers' owner and president. ALJ I.D. at 2, 4, 17, 19. Washington Movers applied for an OTI license in 2003, identifying Sam Ghanem as its proposed "qualifying individual." ALJ I.D. at 2, 17; BOE Ex. 36 at ix. The Commission granted Washington Movers an OTI license in April 2003. ALJ I.D. at 2, 17.[1] In November 2008, Washington Movers

[1] Washington Movers was initially licensed to operate as an ocean freight forwarder. ALJ I.D. at 2, 17; BOE Ex. 8 ¶ 6. In 2005, the Commission authorized Washington Movers to operate as a non-vessel-operating common carrier. ALJ I.D. at 2, 17; BOE Ex. 8 ¶ 6.

changed its name from "Washington Movers, Inc." to "Washington Movers International, Inc." ALJ I.D. at 2, 18.

2. Criminal Conduct and Legal Proceedings

According to an FBI affidavit in support of a criminal complaint, in March 2013 Sam Ghanem met with a former Washington Movers employee who was working as an FBI informant. ALJ I.D. at 3, BOE Ex. 1, Aff. at 2-3. Mr. Ghanem assisted the informant in shipping a vehicle concealing "money" to Lebanon.[2] BOE Ex. 1, Aff. at 2-4.

Several months later, the affidavit states, Mr. Ghanem and the informant discussed shipping weapons for some of the informant's associates. BOE Ex. 1, Aff. at 4. The informant asked Mr. Ghanem if weapons could be shipped in a container with salvaged vehicles, and Mr. Ghanem indicated that they could, because the salvaged vehicle parts would help conceal the weapons from detection. Following further discussions, Mr. Ghanem purchased salvaged vehicles and had them dismantled in order to ship them in a container with the weapons. *Id.* at 5-7. He also used Washington Movers to make arrangements to ship the container to Lebanon. ALJ I.D. at 3, 18. On Saturday, December 21, 2013, while at the Washington Movers facility, Mr. Ghanem and some (unnamed) employees concealed the informant's weapons in vehicle parts that were then loaded into a shipping container.[3] ALJ I.D. at 3, 18; BOE Ex. 1, Aff. at 8. Mr. Ghanem advised the informant that the container would be transported to Baltimore for shipment overseas. BOE Ex. 1, Aff. at 8. After the container was loaded, law enforcement agents arrested Mr. Ghanem. ALJ I.D. at 3, 18.

Soon after Mr. Ghanem's arrest, a federal grand jury indicted him for attempting to smuggle weapons to Lebanon. ALJ I.D. at 5. On May 1, 2015, a jury found Mr. Ghanem guilty of attempted unlawful export of defense articles under 22 U.S.C. § 2778 and smuggling of goods from the United States under 18 U.S.C. § 554. ALJ I.D. at 5, 19. The court subsequently sentenced Mr. Ghanem to eighteen months in prison, ALJ I.D. 5, 19; BOE. Ex. 2 at 1-2, and he voluntarily surrendered in October 2015, ALJ I.D. at 24. Mr. Ghanem was released from prison on January 20, 2017. ALJ I.D. at 26.

3. Washington Movers' Post-Arrest Operations

Norma Ghanem, Sam Ghanem's wife, was unaware of her husband's plans to ship weapons. ALJ I.D. at 4, 28. When she returned to Washington Movers' facility the week after Mr. Ghanem's arrest, the company's computers and files were gone and its money was seized. ALJ I.D. at 4. At the time, Washington Movers had over 35 shipments either aboard vessels or arrived at destinations. ALJ I.D. at 4. Once Norma Ghanem located the shipments, she paid the carriers to release the shipments to Washington Movers' clients. ALJ I.D. at 4. To do so, she used life insurance money, her children's tuition money, proceeds from selling gold, and loans

[2] The "money" was actually bundles of paper made to resemble $100,000 and secreted inside the vehicle by law enforcement agents. BOE Ex. 1, Aff. at 3.

[3] Law enforcement agents provided the informant with the weapons, which had been rendered inert. BOE Ex. 1, Aff. at 8.

from family. ALJ I.D. at 4, 28.

Meanwhile, the Ghanems attempted to distance Washington Movers the corporation from Sam Ghanem. ALJ I.D. at 4. On December 31, 2013, Sam Ghanem transferred his entire ownership interest in Washington Movers to his wife, who had worked for the company for around twenty years in communications and accounting. ALJ I.D. at 4, 19; Hr'g Tr. at 6-8. The next day, January 1, 2014, the Ghanems, as Washington Movers' stockholders and directors, executed a "Unanimous Written Consent in Lieu of Meeting of Directors" wherein (a) the Ghanems approved the transfer of shares between Sam and Norma Ghanem; (b) Sam Ghanem resigned as an officer and director of Washington Movers; and (c) Norma Ghanem was appointed sole officer (president, secretary, and treasurer) and director of Washington Movers. ALJ I.D. at 4, 19; WM Ex. B.

Despite these maneuverings, Sam Ghanem remained involved with the company after his arrest, though Norma Ghanem testified that she did everything for the company since becoming president in January 2014. Hr'g Tr. at 6. For instance, in June 2014, Sam Ghanem signed Washington Movers' Virginia State Corporation Commission 2014 Annual Report, which listed him as an officer, director, and registered agent of the company. ALJ I.D. at 5, 20. In addition, Mr. Ghanem was an authorized signatory for various Washington Movers bank accounts from 2014-2016. ALJ I.D. at 5, 22. Moreover, on June 10, 2015, after he was convicted and before he was sentenced, Sam Ghanem signed Washington Movers' 2013 and 2014 federal tax returns as president of the company. ALJ I.D. at 5, 25. And Mr. Ghanem requested to delay his voluntary surrender to prison on the grounds that "my company is currently undergoing major changes, such as changing the ownership" and that he needed more time to train and otherwise onboard his new partner. ALJ I.D. at 21-22.[4]

Mr. Ghanem also remained involved with Washington Movers' OTI activities. Washington Movers continued to employ him, and he acted on its behalf, despite Norma Ghanem's testimony that he stopped working for the company as of January 2014. ALJ I.D. at 24. Throughout 2014 and 2015, Mr. Ghanem wrote checks against Washington Movers' bank accounts and negotiated and signed Washington Movers' service contracts with ocean carriers. ALJ I.D. at 5, 22-26.[5]

B. Procedural History

The Commission first learned of Sam Ghanem's legal troubles on October 28, 2014, when the FBI contacted the Commission's Bureau of Certification and Licensing (BCL) about Washington Movers' OTI license. ALJ I.D. at 20. On October 8, 2015, after Ghanem had been convicted and sentenced, the Commission issued an Order to Show Cause directing Washington Movers to show cause why its OTI license should not be revoked due to Ghanem's convictions and alleged violations of Commission regulations. Washington Movers responded to the order,

[4] Mr. Ghanem's letter to the court does not, however, indicate whether the company at issue was Washington Movers or some other business. ALJ I.D. at 5 n.5, 21-22.

[5] Norma Ghanem testified that she was unaware that he was signing service contracts during this time frame. Hr'g Tr. at 16-17.

and the Commission's Bureau of Enforcement (BOE) replied. Additionally, Norma Ghanem moved to intervene in the revocation proceeding.

On February 12, 2016, the Commission denied Norma Ghanem's motion to intervene and assigned this matter to the Office of Administrative Law Judges. The parties engaged in discovery, and the ALJ held an oral hearing at which Norma Ghanem testified. The parties also submitted post-hearing briefs.

The ALJ issued an Initial Decision revoking Washington Movers' OTI license on June 29, 2017. The ALJ found that grounds for revocation existed under the 2015 version of 46 C.F.R. § 515.16(a)(1) and (4). The ALJ also rejected Washington Movers' defenses, which sought to ascribe the corporation's problems to Sam Ghanem, who Washington Movers claimed was no longer involved with the company. Although the ALJ emphasized that Norma Ghanem did a commendable job handling Washington Movers' business in the aftermath of Sam Ghanem's arrest, the ALJ nonetheless determined that revocation was an appropriate sanction for Washington Movers' participation in criminal activities and violation of Commission regulations.

Washington Movers timely filed exceptions to the Initial Decision, and BOE replied.

II. DISCUSSION

A. Standard of Review and Burden of Proof

In reviewing an initial decision, the Commission has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's decision de novo and may enter its own findings. *Santa Fe Discount Cruise Parking, Inc. v. Bd. of Trs. of the Galveston Wharves*, 34 S.R.R. 600, 607 (FMC 2017). Here, the ALJ made 111 findings of fact. The record supports these findings, and neither party challenges them. We therefore adopt the ALJ's factual findings.

In order-to-show-cause revocation proceedings, the burden of proof is on BOE. *Revocation of Ocean Transp. Intermediary License No. 022025 – Cargologic USA LLC*, 33 S.R.R. 666, 669 (FMC 2014); 5 U.S.C. § 556(d); 46 C.F.R. § 502.203. The standard of proof is preponderance of the evidence. *Sea-Land Serv., Inc. – Possible Violations of the Shipping Act*, 30 S.R.R. 872, 882 (FMC 2006).

B. Grounds for Revocation

The Shipping Act gives the Commission the authority to grant, suspend, and revoke ocean transportation intermediary licenses. *See* 46 U.S.C. §§ 40901(a), 40903. Under the regulations in effect when the Commission issued its Order to Show Cause to Washington Movers, the Commission may revoke or suspend an OTI license for any of the following reasons:

> (1) Violation of any provision of the [Shipping] Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;

(2) Failure to respond to any lawful order or inquiry by the Commission;
(3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;
(4) *Where the Commission determines that the licensee is not qualified to render intermediary services*; or
(5) Failure to honor the licensee's financial obligations to the Commission.

46 C.F.R. § 515.16(a) (2015) (emphasis added).

The ALJ revoked Washington Movers' license based on the "violation" and "qualification" subsections of the regulation, § 515.16(a)(1) and (4) (2015), respectively. ALJ I.D. at 33-34, 39. Although we disagree with the ALJ in one minor respect, we agree that grounds for revocation exist under those subsections.

1. Violation of OTI-related Law [46 C.F.R. § 515.16(a)(1) (2015)]

The ALJ found that Washington Movers violated four statutes or Commission regulations "related to carrying on the business of an ocean transportation intermediary" under 46 C.F.R. § 515.16(a)(1) (2015): (a) it violated 22 U.S.C. § 2778 and 18 U.S.C. § 554 regarding Sam Ghanem's weapons-shipping activities; (b) it violated 46 C.F.R. § 515.18(a)(5) (2015) by failing to notify the Commission of its corporate name change; and (c) it violated 46 C.F.R. § 515.12(d) (2015) by failing to notify the Commission of Sam Ghanem's arrest, indictment, conviction, and sentencing. ALJ I.D. at 33-34, 39.

a. *Violation of 22 U.S.C. § 2778 and 18 U.S.C . § 554*

The ALJ concluded that Washington Movers "participated in Sam Ghanem's criminal activities," that Mr. Ghanem's felony convictions were violations of statutes related to carrying on the business of an OTI, and, further, that "a preponderance of the evidence proves Washington Movers violated statutes related to carrying on the business of an ocean transportation intermediary." ALJ I.D. at 33-34; *see also id.* at 35 ("As the discussion above makes clear, Washington Movers itself was involved in Sam Ghanem's activity.").[6] The ALJ reasoned that the fact that "the United States Attorney chose not to include Washington Movers as a defendant in the criminal action . . . [is] irrelevant to the question of whether the Commission may sanction Washington Movers and revoke its license for violations of the Shipping Act related to the criminal activity." *Id.* at 35.

In its exceptions, Washington Movers argues that the ALJ erred in finding that it violated statutes related to carrying on OTI business, namely, 18 U.S.C. § 554 and 22 U.S.C. § 2778. WM Exc. at 3. It asserts that there was no evidence that it was convicted of violating these statutes and that the Commission "do[e]s not have jurisdiction to independently find that Washington Movers violated criminal statutes." WM Exc. at 2-3. According to Washington Movers, "[t]hat finding must have been made by a district court; only then could the Commission and its administrative court conclude that Washington Movers violated a criminal statute related to shipping," and in turn conclude that revocation was available under 46 C.F.R. § 515.16(a)(1)

[6] The statutes at issue are 18 U.S.C. § 554 and 22 U.S.C. § 2778. ALJ I.D. at 19, WM Exc. at 3.

(2015). *Id.* at 3. Washington Movers cites in support Art. III, § 2, cl. 3 of the Constitution, 18 U.S.C. § 3231, and 5 U.S.C. §§ 556-557. *Id.* at 2.

BOE does not address this jurisdictional argument directly. Rather, it argues that revocation of a license under 46 C.F.R. § 515.16(a)(1) (2015) does not require a corporate OTI to have violated an OTI-related statute; it is sufficient under that regulation that Sam Ghanem, Washington Movers' qualifying individual, violated the OTI-related statutes. BOE Reply at 4 ("[T]he Commission's regulation enumerating grounds for revocation does not make the identity of a particular actor determinative of whether revocation is warranted."); *see also id.* at 4-5 (asserting that character and qualifications of OTI are based on that of its qualifying individual, OTIs are responsible for acts of their employees and agents, and precedent on revocation does not require the conviction of a corporate entity).

The regulation at issue – 46 C.F.R. § 515.16(a) (2015) – does not specify *whom* must have violated a statute related to carrying on the business of an OTI for revocation to be an option. It is triggered by "violation of" a statute. § 515.16(a)(1) (2015). And while it is well-established that the Commission may consider the actions of an OTI's qualifying individual in assessing the OTI's experience and character, see 46 C.F.R. §§ 515.11(a)(1), (b), 515.13 (2015), the Commission precedent cited by BOE does not address the extent to which statutory violations by a corporate officer are attributable to a corporate OTI for purposes of § 515.16(a)(1) (2015).[7] *See, e.g.*, *Falcon Shipping, Inc. – Application for a License as an Ocean Transp. Intermediary*, 32 S.R.R. 382, 385 (FMC 2012) (denying license due to lack of requisite character, not violation of OTI-related statutes); *AAA Nordstar Line Inc. – Revocation of License No. 012234*, 29 S.R.R. 663, 664 (FMC 2002) (revoking license because licensee made materially false and misleading statements to Commission and failed to notify Commission of omissions and changes in material fact).[8]

We need not decide, however, the precise focus of § 515.16(a)(1) (2015) in this case, though it appears as if BOE may have the stronger case. *See* Advanced Notice of Proposed Rulemaking: Amendments to Regulations Governing Ocean Transportation Intermediary Licensing & Financial Responsibility Requirements & General Duties, 78 Fed. Reg. 32946, 32947 (May 31, 2013) (proposing to clarify that the licensing requirements "apply to the applicant as a whole, and, for that reason, require the Commission to consider the character of the principal owners and officers of applicants, as well as that of the QI"); *cf. Casanova Guns, Inc. v. Connally*, 454 F.2d 1320, 1322-23 (7th Cir. 1972) (affirming denial of firearms license renewal because applicant was controlled by felon corporation). Assuming Washington Movers is correct, and that the regulation is only triggered by a statutory violation by the licensee itself as opposed to its qualifying individual, the record supports the ALJ's conclusion that Washington

[7] Moreover, the regulations distinguish a corporate applicant or licensee from its officers. *See* 46 C.F.R. § 515.11(b), 515.12(a)(1), 515.14(b) (2015).

[8] Although the Commission in *AAA Nordstar* did not ultimately revoke the license at issue due to the felony convictions of licensee's officers, the Commission's order to show cause in that case did suggest that that revocation might be possible due to those convictions. *Revocation of License No. 012234*, 29 S.R.R. 429, 431 (FMC 2001).

Movers violated statutes related to carrying on the business of an ocean transportation intermediary.[9]

As to Washington Movers' jurisdictional argument, we agree that Washington Movers' was not itself convicted under 18 U.S.C. § 554 and 22 U.S.C. § 2778. We also agree that the Commission's jurisdiction is limited. *See, e.g.*, *Trans-Pac. Freight Confer. of Japan v. Fed. Mar. Bd.*, 302 F.2d 875, 880 (D.C. Cir. 1962) (holding that agency can exercise only those powers conferred by Congress). And, as Washington Movers' points out, the Constitution provides for jury trials for crimes, U.S. Const. art. III, § 2, cl. 3, and district courts, not the Commission or its ALJs, "have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.," 18 U.S.C. § 3231.[10] As a consequence, Washington Movers is correct that the Commission cannot independently convict Washington Movers of a crime.

But that is not what the ALJ did. The ALJ did not find Washington Movers guilty of a felony or impose a criminal sanction. Nor did the ALJ purport to apply a criminal standard of proof. Rather, the ALJ found that "a preponderance of the evidence proves Washington Movers violated statutes related to carrying on the business of an ocean transportation intermediary." ALJ I.D. at 34.

The ALJ had the authority to make this finding for purposes of revoking a license. The Commission can suspend or revoke OTI licenses. 46 U.S.C. § 40903; 46 C.F.R. § 515.16(a) (2015). Further, *Harris News Agency, Inc. v. Bowers*, 809 F.3d 411 (8th Cir. 2015), relied on by Washington Movers, suggests that in exercising this authority, the Commission may independently determine whether an OTI has violated a criminal statute. There, Harris News Agency (HNA) applied for a federal license to sell guns. *Id.* at 412. The regulations provided that an applicant for such a license must not have "willfully violated any of the provisions of [18 U.S.C. ch. 44]." *Id.* at 413. The U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) denied the application on finding that HNA's officers and co-owners willfully allowed a felon to possess firearms, thus violating 18 U.S.C. § 922(g)(1) (making it unlawful for a felon to possess a firearm) and 18 U.S.C. § 2(a) (aiding and abetting).[11] *Id.* HNA petitioned for review, and the district court agreed with the ATF. *Id.* at 413. The Eighth Circuit reversed, holding that the ATF misapplied the aiding-and-abetting statute. *Id.* at 413-14.

[9] Section 515.16(a)(1) (2015) would also be triggered if we were to take BOE's approach and focus the analysis on Sam Ghanem. Mr. Ghanem was and is Washington Movers' qualifying individual, and he was the company's president at the time of his felonious conduct. ALJ I.D. at 17, 19. There is no dispute that Mr. Ghanem violated 18 U.S.C. § 554 and 22 U.S.C. § 2778. *Id.* at 19. And Washington Movers does not challenge the ALJ's conclusion that these statutes are statutes related to carrying on the business of an ocean transportation intermediary for purposes of § 515.16(a)(1) (2015).

[10] Washington Movers cites 5 U.S.C. §§ 556, 557 for the proposition that "the jurisdiction of the Federal Maritime Commission and its administrative court is limited." WM Exc. at 2. These provisions do not, however, set forth the scope of the Commission's authority.

[11] Under 18 U.S.C. § 2(a), whoever aids or abets the commission of an offense against the United States is punishable as a principal.

Significantly, the Eighth Circuit never suggested that the ATF lacked the authority to find that HNA's corporate officers violated the felon-in-possession statute because it was not a district court jury. The court held that the ATF erred in applying the statute, not that it lacked authority to do so. Although it does not appear that the appellants in *Harris News Agency* raised the jurisdictional argument that Washington Movers raises now, the case implies that neither the Constitution nor 18 U.S.C. § 3231 preclude the Commission from determining based on a preponderance of the evidence whether a licensee violated a statute for purposes of § 515.16(a)(1) (2015).

As to the merits of the ALJ's finding, the ALJ noted that at the time of Sam Ghanem's felonies, he was the sole owner, president, and qualifying individual of Washington Movers. *Id.* at 33. The ALJ also pointed out that Mr. Ghanem *and* Washington Movers' employees concealed weapons in the motor vehicles parts and loaded them into a container. *Id.* The ALJ further noted that Mr. Ghanem used Washington Movers' service contract with MSC to arrange for transportation of the container overseas. *Id.* According to the ALJ, Mr. Ghanem used Washington Movers "as his instrumentality to commit crimes involving unlawful smuggling of cargo and attempted export of firearms in foreign commerce." *Id.*

Washington Movers argues that this is not enough. WM Exc. at 2, 3. It challenges the ALJ's finding that Sam Ghanem's conduct took place through Washington Movers, asserting that Mr. Ghanem acted alone, beyond his authority, without assistance from anyone else at Washington Movers. *Id.* at 2-3, 5. BOE counters that "[i]t has long been settled that criminal activity of corporate officers may be properly attributed to the corporate entity." BOE Reply at 5-6. According to BOE, it is undisputed that Mr. Ghanem, as the company's sole owner, president, and qualifying individual, had the authority to act on behalf of Washington Movers to load the container at issue, direct his employees to do so, and book the shipment in Washington Movers' name, using its service contract and license number. *Id.*

Contrary to Washington Movers' arguments, the record supports the ALJ's conclusion that the company violated 18 U.S.C. § 554 and 22 U.S.C. § 2778. The former is titled "Smuggling goods from the United States" and provides that:

> Whoever fraudulently or knowingly exports or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or object contrary to any law or regulation of the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 554(a). The latter is titled "control of arms exports and imports." 22 U.S.C. § 2778. It sets forth a number of requirements for those exporting "defense articles" and makes it a crime for "any person" to willfully violate any provision of the statutory section or regulation issued thereunder. 22 U.S.C. § 2778(c).

The ALJ did not set forth the elements of these statutes and apply them to Washington Movers. Nor did the ALJ formally address corporate criminal liability. The ALJ pointed to Sam Ghanem's convictions and found that "Washington Movers participated in Sam Ghanem's criminal activities." ALJ I.D. at 33.

But corporations can violate these statutes. 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise -- . . . the words 'person' and 'whoever' include corporations . . . as well as individuals."); *see, e.g.*, *Casanova Guns*, 454 F.2d at 1321 (noting that corporation was a "convicted felon"). A corporation "is liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation." *United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008) (quoting *Mylan Lab., Inc. v. Akzo, N.V.*, 2 F.3d 56, 63 (4th Cir. 1993)).[12] "Scope of employment" includes "all those acts falling within the employee's or agent's general line of work, when they are motivated – at least in part – by an intent to benefit the corporate employer." *Singh*, 518 F.3d at 249 (citing *United States v. Automated Med. Labs.*, 770 F.2d 399, 406-07 (4th Cir. 1985)).

To act within the scope of employment, the employee's acts must be the kind he or she is authorized to perform and must occur substantially within the authorized limits of time and space. *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 543 (3d Cir. 2012) (quoting Prosser, Torts 351 (1955)). As for the "intent to benefit the corporate employer" criterion, its purpose is to "insulate the corporation from criminal liability for actions of its agents which be *inimical* to the interest of the corporation or which may have been undertaken solely to advance the interest of that agent or of a party other than the corporation." *Automated Med. Labs.*, 770 F.2d at 407; *see also United States v. DSD Shipping, AS*, Case No. 15-cr-00102-CG, 2016 U.S. Dist. LEXIS 46413, at *15-16 (Apr. 6, 2016) (noting that corporation would not be strictly liable for actions such as bribes paid to officers personally). But "scope of employment is the operative element, with corporate purpose/authority, and/or benefit providing context for that term." *United States v. Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 324 (D. Conn. 2007).

Here, the unchallenged facts support imputing liability to Washington Movers. From the time of Washington Movers' incorporation until January 1, 2014, Sam Ghanem was not a mere employee, he was the company's president, sole shareholder, and qualifying individual, in addition to being a director. ALJ I.D. at 2, 17, 19. Washington Movers continued to employee Sam Ghanem, and he continued to act on the corporation's behalf, after his arrest and after his resignation as president and transfer of shares to his wife. ALJ I.D. at 24.

Moreover, the acts for which Sam Ghanem was convicted were done within the scope of his employment. Washington Movers was licensed to act as a freight forwarder and a non-vessel-operating common carrier, meaning it is in the business of dispatching shipments, handling freight, booking space, arranging for warehouse storage, preparing documents, giving expert advice to exporters, and purchasing transportation services. 46 C.F.R. § 515.2(i), (l), (o) (2015). In its application for an OTI license, Washington Movers stated that its business activities

[12] Additionally, under Commission regulations, a licensed OTI is "strictly responsible for the acts or omissions of any of its employees or agents rendered in connection with the conduct of its business." 46 C.F.R. § 515.4(b)(2) (2015).

included "household goods movers" and "storage facility." BOE Ex. 36 at ix. In that application, Washington Movers certified that as of 2003, Sam Ghanem had five years of OTI experience. *Id.*

Given that Sam Ghanem was the president and qualifying individual for an OTI, his criminal acts – loading the shipping container, arranging for its transport, directing Washington Movers' employees, using a Washington Movers facility and service contract, providing expert shipping advice to the informant, handling monies advanced by the informant for shipment, – were well within the scope of his general line of work. *See* Hr'g Tr. at 6 (noting that a president's duties include "[e]verything needs to be done"); *see also id.* (describing president's duties such as "overlooking documentation, rates with ship lines, wire transfer with banks, communications with customers, booking with ship lines, dock receipts master"). And, as the ALJ noted, "[a]s sole stockholder and officer of Washington Movers, Sam Ghanem's scope of work for Washington Movers was what he wanted it to be." ALJ I.D. at 35.

Washington Movers' assertion that "Mr. Ghanem acted beyond the scope of his authority," WM Exc. at 2, is unsupported by any facts or argument, and is contradicted by the ALJ's findings, which Washington Movers has not challenged. Further, Mr. Ghanem's criminal activities were not outside the scope of his employment because, as Washington Movers argues, his "alleged criminal conduct took place on Saturday, December 21, 2013, when Washington Movers was closed for business." WM Exc. at 5; *see also* Hr'g Tr. at 16 (noting that Washington Movers is closed on Saturdays). Activity on a Saturday is "substantially within the authorized limits of time and space" of Mr. Ghanem's employment, especially given that as company president, he presumably set Washington Movers' hours. *See United States v. Carter*, 311 F.2d, 934, 942 (6th Cir. 1963) (imputing criminal responsibility to corporation based on conduct of president because president, as "chief executive officer" had the "general supervisory authority that attends such office" and because "[a]side from his implied authority as president, he was, in fact, the one who ran the company").

The evidence also indicates that Sam Ghanem acted, at least in part, with the intent to benefit his corporation Washington Movers. By agreeing to ship weapons overseas, Mr. Ghanem was furthering Washington Movers' business. *See, e.g.*, *Standard. Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962) ("If it is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal."); *see also id.* at 128-29.[13] While there is some evidence that Mr. Ghanem himself benefited from the smuggling scheme -- he arranged to purchase some weapons from the informant in exchange for a vehicle, BOE Ex. 1, Aff. at 5, 7, 8 – an agent may act for his own benefit while also acting for the corporation's. *Automated Med. Labs.*, 770 F.2d at 407. Further, Mr. Ghanem's conduct here was a continuation or escalation of, not a departure from, the work he performed as president of Washington Movers. *Cf.* Restatement (Third) of Agency § 7.07(2) (2006) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."); *see also id.* at cmt. b ("An independent course

[13] The affidavit supporting Sam Ghanem's criminal complaint states that he charged the informant $500 per vehicle for dismantling the vehicles and loading the shipping container and $3000 for shipping the vehicles. BOE Ex. 1, Aff. at 6. Ghanem also asked the informant to pay him $3,000 for the cost of purchasing salvaged vehicles, which the informant "deposited into Ghanem's bank account." *Id.*

of conduct represents a departure from, not an escalation of, conduct involved in performing assigned work or other conduct that an employer permits or controls."). Mr. Ghanem was not, for instance, attempting to act to Washington Movers' detriment by stealing from or cheating the company.[14] *Standard Oil Co.*, 307 F.2d. at 129.

Because Mr. Ghanem was acting within the scope of his employment with the intent to benefit Washington Movers when he violated 18 U.S.C. § 554 and 22 U.S.C. § 2778, Washington Movers is liable for violating these statutes as well. Accordingly, we affirm the ALJ's determination that Washington Movers violated statutes related to carrying on the business of an ocean transportation intermediary.

b. *Unapproved Name Change*

The ALJ also concluded that Washington Movers violated 46 C.F.R. § 515.18(a)(5) (2015) by failing to notify the Commission of its corporate name change in 2008. ALJ I.D. at 34, 39. Washington Movers does not challenge this determination,[15] and we affirm it.

The regulation provides that "[a]ny change in a licensee's name" requires "prior approval of the Commission." 46 C.F.R. § 515.18(a)(5) (2015). It is undisputed that Washington Movers, Inc. changed its name to "Washington Movers International, Inc." as of November 7, 2008. ALJ I.D. at 2, 18. It is also undisputed that Washington Movers did not seek prior approval from the Commission by filing the appropriate form as required by § 515.18(a)(5) (2015). *Id.* It was not until November 2, 2015 – seven years after the fact – that Washington Movers sought approval of its name change. ALJ I.D. at 37; 11/02/2015 Ltr. from Washington Movers to BCL.[16] Washington Movers thus violated a "Commission order or regulation related to carrying on the business of an ocean transportation intermediary" for purposes of 46 C.F.R. § 515.16(a)(1) (2015).

c. *Failure to Notify Commission of Criminal Proceedings*

In addition, the ALJ held that Washington Movers violated 46 C.F.R. § 515.12(d) (2015) by failing to notify the Commission of Sam Ghanem's arrest, indictment, conviction, and sentencing. ALJ I.D. at 34, 39. Washington Movers does not challenge this holding. We affirm the ALJ's determination that Washington Movers violated § 515.12(d) (2015) by not notifying the Commission of Sam Ghanem's conviction. We vacate the determination as to Mr. Ghanem's

[14] That Washington Movers might be harmed by being held responsible for Mr. Ghanem's conduct does not exculpate it from liability. *E.g.*, *J.C.B. Super Markets v. United States*, 530 F.2d 1119, 1122 (2d Cir. 1976) ("Presumably no tortious act by an agent redounds to the benefit of the principal where the latter is held responsible for the damage which results. Yet if this reasoning were followed no principal would ever be liable.").

[15] Washington Movers' arguments that it made good faith efforts to comply with Commission regulations and that revocation is too harsh a result are addressed below in Part II.C.

[16] Although this letter does not appear to be part of the record, we take official notice of it under 46 C.F.R. § 502.226(a) as it is from the Commission's files.

arrest, indictment, and sentencing because Washington Movers was not obligated to notify the Commission of those events.

The relevant regulation requires a licensee to submit "an amended FMC-18 Rev. advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur." 46 C.F.R. § 515.12(d) (2015). In Washington Movers' original application for an OTI license in 2003, the company submitted that none of its partners, officers, directors, stockholders, or proposed qualifying individual had ever "been convicted for a crime, other than traffic violations." BOE Ex. 36 at ix. It is undisputed that this fact changed in 2015 when Sam Ghanem was convicted of two felonies. ALJ I.D. at 19. And it is further undisputed that Washington Movers did not file an amended FMC-18 within 30 days of Mr. Ghanem's conviction. *Id.* Washington Movers therefore violated 46 C.F.R. § 515.12(d) (2015), which is a "Commission order or regulation related to carrying on the business of an ocean transportation intermediary" for the purposes of 46 C.F.R. § 515.16(a)(1) (2015).

But Washington Movers' original license application did not ask about arrests, indictments, or sentencing. BOE Ex. 36 at ix.[17] As a consequence, Washington Movers was not required to notify the Commission of these events via an amended FMC-18 form under § 515.12(d) (2015). In holding otherwise, the ALJ erred.

2. Not Qualified to Render OTI Services [46 C.F.R. § 515.16(a)(4) (2015)]

We also affirm the ALJ's conclusion that grounds for revoking Washington Movers' OTI license exist under 46 C.F.R. § 515.16(a)(4) (2015). ALJ I.D. at 33-34, 39. That regulation provides that the Commission may revoke or suspend a license "[w]here the Commission determines that the licensee is not qualified to render intermediary services." To be qualified to render OTI services, an OTI must possess the necessary experience and character. *See* 46 C.F.R. §§ 515.11, 515.14(a) (2015); 46 U.S.C. § 40901(a) (requiring a licensee to be "qualified by experience and character"). The experience and character of a corporate OTI are based on that of its qualifying individual, who must be an active corporate officer. 46 C.F.R. § 515.11(b)(3) (2015). To be sufficiently experienced, an OTI's qualifying individual must have a minimum of three years' experience in ocean transportation intermediary activities in the United States. 46 C.F.R. § 515.11(a)(1) (2015). As for character, the regulations state that an OTI and its qualifying individual must have the character necessary to render ocean transportation intermediary services. 46 C.F.R. §§ 515.11(a)(1), 515.13(c) (2015).

Further, when considering whether an applicant is qualified for a license, the Commission looks at:

a. The accuracy of the information submitted in the application;
b. The integrity and financial responsibility of the applicant;
c. The character of the applicant and its qualifying individual; and
d. The length and nature of the qualifying individual's experience in handling

[17] In contrast, the Commission's current form FMC-18 asks whether an applicant's partners, officers, directors, stockholders, or proposed qualifying individual has ever been "arrested, charged, [or] convicted of" a crime. *See* https://www.fmc.gov/assets/1/Page/FormFMC-18worksheet.pdf.

ocean transportation intermediary duties.

46 C.F.R. § 515.13 (2015).

The ALJ concluded that "Washington Movers' participation in [Sam Ghanem's] felonies reflects directly upon Washington Movers' continued fitness and character to conduct business as an OTI." ALJ I.D. at 33-34; *see also id.* at 39. Washington Movers contends that "Norma Ghanem and Washington Movers, then and now, remain unimpeachable." WM Exc. at 5. It also argues that the Commission cannot take away Washington Movers' OTI license solely due to Sam Ghanem's conduct. WM Exc. at 3-5. Washington Movers further maintains that it has a "property interest" in its OTI license and that therefore the Commission cannot revoke it due to Sam Ghanem's conduct. *Id.* at 3-4. BOE in contrast argues that the ALJ properly revoked Washington Movers' license based on Sam Ghanem's convictions and disputes the "property interest" argument. BOE Reply at 5-7.

We agree with the ALJ that Washington Movers is not qualified to render intermediary services under § 515.16(a)(4) (2015) because it lacks the necessary character to render ocean transportation intermediary services.[18] As an initial matter, the ALJ did not revoke Washington Movers' license solely due to Sam Ghanem's conduct. ALJ I.D. at 33, 34, 35, 36. Washington Movers itself failed to seek prior Commission approval of its name change and failed to notify the Commission of Sam Ghanem's convictions, thereby violating agency regulations. The violation of the name change regulation continued for years, both before and after Norma Ghanem assumed ownership and control of Washington Movers in 2014. ALJ I.D. at 18. Although Sam Ghanem and, later, Norma Ghanem, controlled Washington Movers, it was the corporate licensee's obligation to comply with the regulations. *Cf. Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, 34 S.R.R. 582, 590 (FMC 2017) (noting that "corporations can only act through individuals"). The purported transfer of ownership and control of Washington Movers from Sam Ghanem to Norma Ghanem does not exculpate the corporation from its conduct. ALJ I.D. at 36; *cf. Casanova Gun*s, 454 F.2d at 1323 (affirming denial of license renewal where applicant corporation was created to circumvent licensing restrictions and was controlled by felon corporation).

Moreover, regardless of whether Washington Movers vicariously violated criminal statutes, the uncontroverted facts show that it participated in the commission of felonies. Despite Washington Movers' claim now that Sam Ghanem acted independent of the company, WM Exc. at 3, the ALJ found, and Washington Movers does not dispute, that ""[o]n December 21, 2013, at the *Washington Movers facility*, Sam Ghanem and *Washington Movers employees*" concealed weapons in a container. ALJ I.D. at 18 (emphasis added). Washington Movers was identified as the exporter, and the booking was made under Washington Movers' service contract. ALJ I.D. at 18, 24.[19]

[18] Washington Movers' experience is not at issue in this proceeding. No one disputes that Sam Ghanem has the requisite OTI experience.

[19] Washington Movers' statement that "[e]ven the administrative court concludes that Sam Ghanem's conduct did not take place 'through Washington Movers'" is incorrect. WM Exc. at 5. Rather, the ALJ corrected a previous finding that erroneously said that Sam Ghanem was indicted for smuggling weapons "through Washington Movers."

Turning to the character of Washington Movers' qualifying individual, no one disputes that Sam Ghanem committed felonies. The character of Sam Ghanem is imputable to Washington Movers. 46 C.F.R. § 515.11(b) (2015). These crimes – smuggling and attempted unlawful export of defense articles – indisputably relate to ocean transportation intermediary services.

Washington Movers and Mr. Ghanem's conduct renders the former unqualified to render OTI services under Commission precedent. *See Falcon Shipping*, 32 S.R.R. at 384 (denying OTI application for lack of requisite character because, among other things, individual violated the Shipping Act and was involved in an illegal scheme and deceptive practice); *Stallion Cargo, Inc*., 29 S.R.R. 665, 683-84 (FMC 2001) (finding licensee lacked necessary character due to Shipping Act violations); *Indep. Freight Forwarder License E.L. Mobley, Inc.*, 21 F.M.C. 845, 847 (FMC 1979) (finding that forgery reflected on fitness); *Independent Ocean Freight Forwarder Application Lesco Packing Co.*, 19 F.M.C. 132, 137 (FMC 1976); *Harry Kaufman – Independent Ocean Freight Forwarder License No. 35*, 16 F.M.C. 263, 271, 276-77 (Examiner 1972).

Washington Movers' "property interest" argument is unpersuasive. Regardless of whether an OTI license constitutes a property interest, the Shipping Act allows the Commission to revoke a license on finding that a licensee is unqualified, and the regulations allow the Commission to take into account the character of a qualifying individual such as Sam Ghanem. 46 U.S.C. § 40903(a)(1); 46 C.F.R. §§ 515.11(a)(1), (b); 515.13 (2015); *Falcon Shipping*, 32 S.R.R. at 384; ALJ I.D. at 17. Further, the cases Washington Movers relies on are inapposite, as they do not involve revocation or denial of a corporation's license where a corporate officer used the corporation to commit felonies. As noted above, in *Harris News Agency*, the court held that the ATF could not deny a corporation a license due to a corporate officer aiding and abetting a crime absent a showing that the officer affirmatively helped in the commission of the offense. *Harris News Agency*, 809 F.3d at 413-14. It did not hold, as Washington Movers implies, that "[t]he law forbids prosecuting a person and taking away that person's property for another person's conduct." WM Exc. at 3-4. Neither did the court in *United States v. Lester*, 85 F.3d 1409 (9th Cir. 1996). Rather, the court said that the government could not use the 'substitute property' provision in the criminal forfeiture statute, 21 U.S.C. § 853(p), to seize an innocent spouse's interest in community property because the statute expressly said that only the property of the defendant spouse could be forfeited. *Id.* at 1411, 1415. The Shipping Act, in contrast, does not expressly state that a corporate OTI's license may be revoked only due to the conduct of the corporate entity itself.

Finally, insofar as Washington Movers is arguing that revoking its license interferes with the property rights of Norma Ghanem, "an innocent spouse," the argument is without merit. The license at issue is Washington Movers,' not Norma Ghanem's. As Washington Movers itself notes, it is a distinct entity from the Ghanems. WM Exc. at 3. The Commission issued License No. 017843 to the corporation, not Sam Ghanem or Norma Ghanem. *See, e.g.*, 46 C.F.R. § 515.14(b) (2015) ("The Commission will issue a license only in the name of the applicant,

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ALJ I.D. at 27. The ALJ pointed out only that the indictment did not use the "through Washington Movers" language. *Id.*

whether the applicant is a sole proprietorship, a partnership, or a corporation."). Because the license is the corporation's, revoking it does not implicate any property of Norma Ghanem.

C. Appropriate Sanction

Having found that grounds to suspend or revoke Washington Movers' OTI license exist under 46 C.F.R. § 515.16(a)(1) and (4) (2015), the next question is what the appropriate sanction should be. The regulations give the Commission discretion to suspend or revoke a license. 46 C.F.R. § 515.16(a) (2015). *Stallion Cargo,* 29 S.R.R. at 683 ("[T]he Commission has considerable discretion in determining appropriate sanctions and remedies but should take care to ensure that the penalties are tailored to the particular facts of each case."). That discretion is not, however, unfettered. Sanctions are remedial in purpose, and the goal is to protect the shipping public from those who choose not to comply with the Shipping Act's licensing requirements. *E.L. Mobley*, 21 F.M.C. at 847; *Stallion Cargo,* 29 S.R.R. at 683-84. They should not be punitive in character. *E.L. Mobley*, 21 F.M.C. at 847. Consequently, license revocation is used only in the most egregious instances. *Stallion Cargo,* 29 S.R.R. at 683-84; *see also In re Ocean Transp. Intermediary License of Apparel Logistics, Inc.*, 30 S.R.R. 567, 570 (FMC 2004) ("Prior decisions have held that revoking or suspending an OTI license should be limited to the most egregious circumstances, such as OTIs violating the Shipping Act or Commission regulations, committing other federal offenses, or materially misrepresenting information regarding their qualifications."). Even when a violation is clear, "[e]vidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case." *E.L. Mobley*, 21 F.M.C. at 847.

The ALJ found that license revocation was warranted. ALJ I.D. at 38-39. Although the ALJ found that Sam Ghanem was the chief malefactor, and that Norma Ghanem was not involved in his crimes and did a commendable job handling Washington Movers' shipments once Mr. Ghanem was arrested, the ALJ nonetheless concluded that Sam Ghanem continued to function as an integral part of the business after his smuggling arrest. *Id.* The ALJ also noted that once Norma Ghanem became president and sole owner of Washington Movers, the corporation continued to violate Commission regulations by not seeking approval for its name change and by failing to notify the Commission of Sam Ghanem's conviction.

On exceptions before the Commission, Washington Movers argues that "revoking [its] license for failure to notify the Commission of its name change and Sam Ghanem's conviction is disproportionate to any offense by Washington Movers." WM Exc. at 6. It cites *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016), and asserts that "[a]t the heart of this case, Washington Movers' license is in jeopardy because of Sam Ghanem's *ultra vires* criminal conduct" and that "no previous licensee has had its license revoked for failing to notify the FMC of its name change." *Id.* Revocation is limited, Washington Movers argues, to instances where a licensee demonstrates no intent at future compliance. *Id.* at 6-7. Washington Movers also implies that mitigating circumstances exist, namely, that Norma Ghanem is an innocent spouse uninvolved in any criminal activity, that Washington Movers in good faith attempted to comply with Commission regulations, and that the public is not protected by denying Norma Ghanem the ability to ship household goods, car parts, and wheelchairs. *Id.* at 5-6.

BOE counters that there is ample reason to revoke Washington Movers' OTI license,

including Washington Movers' regulatory violations and Sam Ghanem's criminal convictions. BOE Reply at 12. According to BOE, there "is no hierarchy of importance attached to the OTI regulations or violations thereof whereby some violations are deemed more significant than others" and there is no difference between technical and non-technical violations. *Id.* BOE contends that Washington Movers' argument that it would be disproportionate to revoke a license for a name change violation misstates the ALJ's holding. *Id.* at 11. BOE further maintains that Washington Movers' claim of good faith is untenable. *Id.* at 8.

Although mitigating circumstances exist, we affirm the revocation of Washington Movers' OTI license. Washington Movers' argument that it would be disproportionate to revoke a license due to a name change violation is meritless. The ALJ revoked Washington Movers' license because of multiple violations of statutes and Commission regulations related to carrying on OTI business and because Washington Movers lacked the necessary character to be qualified to render OTI services. ALJ I.D. at 33, 34, 39.[20]

Also unpersuasive is BOE's suggestion that the Commission may revoke a license for violation of any Commission regulation regardless of its practical effect. While 46 C.F.R. § 515.16(a)(1) (2015) permits suspension or revocation of a license for violation of a regulation, and *Apparel Logistics* included violating a regulation in a list of "egregious" circumstances, 30 S.R.R. at 570, treating any regulatory violation as justifying revocation would ignore the principle that penalties should be tailored to the facts of individual cases. *E.g.*, *Stallion Cargo,* 29 S.R.R. at 683, 684 (revoking a license where respondent committed 167 knowing and willful violations and continued to violate the Shipping Act after it learned of its violations and after the Commission initiated an investigation). Rather, in light of the parties' arguments, we consider the nature and extent of Washington Movers' conduct giving rise to suspension or revocation, Washington Movers' good faith and likelihood of complying with Commission regulations in the future, and Norma Ghanem's character and association with Sam Ghanem.

The nature and extent of Washington Movers' conduct weighs heavily in favor of revocation. First, felony weapons smuggling constitutes egregious conduct that cuts to the core of ocean transportation intermediary services. Second, Washington Movers' failure to obtain Commission approval before changing its name risked confusing the public and making Commission regulatory efforts more difficult.[21] Moreover, it appears that Norma Ghanem purposefully chose not to notify the Commission of the company's change of ownership and control or to change its qualifying individual after Sam Ghanem's 2014 arrest because she was afraid that any changes regarding the company could hurt his prospects at trial. Hr'g Tr. at 30, 31 ("[H]onestly, any changes I make in 2014, I was scared that they will use it against him in court. Any changes. He was awaiting for his trial."). Third, Washington Movers' failure to notify the

[20] *United States v. Weimert*, cited by Washington Movers, is not on point. There, the issue was whether the defendant's conduct amounted to federal wire fraud. 819 F.3d at 353-54. The court reasoned that while wire fraud is a broad tool, the statute must have limits other than simply prosecutorial discretion. *Id.* at 370. Here, the Commission's discretion is not unbridled, as it considers the nature and extent of a licensee's conduct and mitigating factors.

[21] The seriousness of this regulatory violation is mitigated somewhat because "Washington Movers, Inc." is not greatly different than "Washington Movers International, Inc."

Commission of Sam Ghanem's conviction would not likely, taken alone, warrant revocation. By the time of his conviction, the Commission was well aware of Mr. Ghanem's legal troubles. But the failure to notify violation, along with the name change violation, are indicative of ignorance or disregard of Washington Movers' regulatory obligations.

Relatedly, and also weighing in favor of revocation, is that there is little reason for the Commission to be confident that Washington Movers would comply with regulations going forward. Washington Movers did not attempt to cure its failure to notify the Commission of its name change until after the Commission initiated revocation proceedings, years after the actual change. ALJ I.D. at 18; 11/02/2015 Ltr. from Washington Movers to BCL. This regulatory noncompliance existed before and continued after Norma Ghanem became president of the company.

That being said, and weighing against revocation, Washington Movers did try to comply with the name change regulation and replace Sam Ghanem as qualifying individual shortly after the Commission initiated the revocation proceeding. 11/02/2015 Ltr. from Washington Movers to BCL. That Washington Movers ultimately withdrew the application to change its qualifying individual should not be held against it, as it occurred during the pendency of the instant revocation proceeding and while Norma Ghanem was attempting to obtain a license for another company. Hr'g Tr. at 19, 27-28.

Similarly, Norma Ghanem's involvement with Washington Movers is a mark in the company's favor. There is no indication that she was involved in her husband's criminal activity. And, as the ALJ pointed out, once her husband was arrested and the company's assets were seized, she made certain to locate shipments en route, and used life insurance, her children's tuition money, and proceeds of selling personal property to make sure the cargo was released. ALJ I.D. at 3-4, 38. Moreover, there is no indication in the record that shippers complained about Washington Movers, either before or after Norma Ghanem took over.

But outweighing this, and tipping the scales in favor of revocation, is Sam Ghanem's continued involvement with Washington Movers after his arrest for smuggling and after control of the company was ostensibly transferred to Norma Ghanem. Despite Washington Movers' purported efforts to distance itself from Sam Ghanem, he continued to work for Washington Movers and was an integral part of the business. ALJ I.D. at 38-39. He remained Washington Movers' registered agent, he handled its bank accounts, he signed its service contracts, and he signed its tax returns. ALJ I.D. at 20-25. And, as the ALJ found, and Washington Movers does not dispute, Washington Movers "made oral and written representations to third parties that Sam Ghanem was authorized to act on its behalf after January 1, 2014." ALJ I.D. at 24. On this record, we cannot assume that he would remain uninvolved with Washington Movers in the future. And given Sam Ghanem's and Washington Movers' egregious conduct, revocation of Washington Movers' ocean transportation intermediary license is appropriate.

III. CONCLUSION

We recognize the seriousness of license revocation. But, as the ALJ found, Washington Movers violated Commission regulations and its president and qualifying individual used a Commission-licensed OTI in an attempt to smuggle weapons outside the United States.

Revocation is authorized by 46 C.F.R. § 515.16(a)(1) and (4) (2015), and it is appropriate under the circumstances. We therefore **REVOKE** License No. 017843 and **ORDER** Washington Movers, Inc. /Washington Movers International, Inc. to cease and desist all ocean transportation intermediary activities.

By the Commission.

Rachel E. Dickon
Secretary

Acting Chairman Khouri, concurring:

I concur in the revocation of Washington Movers' License No. 017843 and the order to Washington Movers to cease and desist all OTI activities. In addition to the bases set forth in the Order, however, I would add the following reasons for revocation of the license.

The revocation is based in part on the Commission's determination that Washington Movers violated 46 C.F.R. §515.18(a)(5) (2015) by failing to notify the Commission of its corporate name change in 2008.

A far more serious failure of Washington Movers was its failure to advise the Commission that the Qualifying Individual (QI) had resigned. Washington Movers operated without a proper QI from January 1, 2014 until November 2015. Sam Ghanem transferred ownership of Washington Movers, and resigned as an officer and director, on January 1, 2014. ALJ I.D. at 19. This triggered 46 C.F.R. § 515.18(c) (2015), which requires that the FMC be notified when a QI no longer serves in a full-time active capacity, and a licensee must apply to use a new QI. Under 46 C.F.R. § 515.11(b)(3) (2015), a qualifying individual must be an active corporate officer. Washington Movers did not seek to replace Sam Ghanem as QI with Norma Ghanem until it responded to the order to show cause in November 2015. Further, as noted by the Commission's Order, the failure to notify the Commission was knowing, willful, and motivated by an improper reason – namely to conceal the matter from the court and the FMC, so as to avoid further problems during the pending federal case concerning the weapons charges.[1]

This lack of a QI and failure to advise the Commission was not considered as grounds for revocation in the Order to Show Cause[2] because the Commission was unaware that Sam Ghanem had resigned as a corporate officer until after the order was issued and the company responded.[3] The subsequent analysis of the case focused on the allegations in the Order to Show Cause. The Commission could have used operating without a QI, failing to inform the Commission, and failure to timely replace the QI in a timely manner as additional grounds for revoking Washington Movers QI license, and I believe it should have.

Further support for the rationale may be found in the case of Casanova Guns, Inc. v. Connally, 454 F.2d 1320 (7th Cir. 1972). In that case, the Treasury Department's Alcohol, Tobacco and Firearms Division denied the application for renewal of a federal firearms license by Casanova Guns, Inc. (Casanova Guns). The license was denied because of Casanova Gun's relationship with Casanova's Inc. (Casanova's), a convicted felon. The president and major stockholder of Casanova's, a general sporting goods and gun business, was Clarence Casanova. Members of his immediate family held the remaining shares. Casanova's, the corporation, was

[1] "[H]onestly, any changes I make in 2014, I was scared that they will use it against him in court. Any changes. He was awaiting trial." Testimony of Norma Ghanem. Hr'g Tr. at 30, 31.

[2] The Order to Show Cause lists as grounds for revocation: (a) Sam Ghanem's felonies, (b) the failure to notify the Commission of the name change, and (c) the failure to notify the Commission of Ghanem's arrest, indictment, conviction, and sentencing.

[3] In response, Washington Movers, for the first time, notified the Commission that Sam Ghanem had resigned as corporate officer

indicted in 1966 for possession of unregistered firearms and, in 1968 pleaded guilty and was fined. This conviction rendered Casanova's ineligible to renew its federal firearms license. Id. at 1322. Casanova Guns was organized in March 1967, subsequent to Casanova's indictment but prior to the conviction. In February 1967, Casanova Guns applied for and received a federal firearms license. Id.

In April 1969, Casanova Guns purchased the entire inventory of firearms from Casanova's. In exchange for the inventory, Casanova Guns gave an unsecured promissory note for $424,000. John Casanova, Clarence's son, ran Casanova Guns in the same building and used the same display area as Casanova's. Separate books were kept for the two corporations, but John, who considered himself the sole employee of Casanova Guns, was paid by Casanova's. In January 1969, Casanova Guns applied for a renewal license and the application was refused. Id.

The commissioner, the district court, and the Seventh Circuit Court of Appeals upheld the refusal to renew the license based on the facts, Casanova Guns was a corporate successor in interest directly related to a convicted felon, Casanova's, and that the business operations of Casanova Guns were substantially the same as the operations of its related predecessor, and the officers of Casanova Guns were the persons responsible for the operations of Casanova's. Casanova Guns was viewed as a related successor to Casanova's. Id.

The Court of Appeals noted that "a substantial purpose for the incorporation of Casanova Guns was the circumvention of the statute restricting the issuance of firearms licenses to convicted felons. Indeed … the second corporation was formed to insure the continuation of the gun business." The court also noted that there was "a significant unity of interest between the officers and stockholders of the two corporations and the business operations were closely integrated." While recognizing that the denial of the license renewal was a hardship on Casanova enterprises, the Court of Appeals affirmed the commissioner's and the district court's denial of Casanova Gun's firearms license. Id. at 1322-1333.

While Casanova was decided on the express language of the firearms licensing act, it also stands for the well settled principle that "the fiction of a corporate entity must be disregarded whenever it has been adopted or used to avoid the provisions of a statute. Anderson v. Abbott, 321 U.S. 349, 362-363, 64 S. Ct. 531, 88 L.Ed. 793 (1944); Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir, 1965); Joseph A. Kaplan & Sons, Inc. v. F.T.C., 121 U.S. App. D.C. 1, 347 F.2d 785, 787-788 (1965); Ohio Tank Car. Co. v. Keith Ry. Equip, Co., 148 F.2d 4, 6 (7th Cir.) cert denied, 326 U.S. 730, 66 S. Ct. 38, 90 L.Ed. 434 (1945)." Id. At 1333.

As noted in the Commission's Order, in the case before us Sam Ghanem continued to be involved in the company after his arrest for smuggling and after control of the company was ostensibly transferred to Norma Ghanem. He continued to work for and was an integral part of the business and, as noted by the ALJ, Sam Ghanem remained Washington Mover's registered agent, he handled bank accounts, he signed its service contracts, and he signed tax returns. ALJ I.D. at 20-25. Thus, as in Casanova, in the case before us there continued to be a "significant unity of interest" between the two stockholders, i.e. husband and wife, as officers, employees and corporate agent authorized to handle bank accounts, bind the company by executing service contracts, and sign tax returns. It is clear from the record that the transfer of stock to Norma

Ghanem was an effort to circumvent the licensing statute. For this reason, in addition to those in the Order to Show Cause, revocation of Washington Mover's license was proper.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

TARIK AFIF CHAOUCH, *Complainant*

v.

DEMETRIOS AIR FREIGHT CO., DEMETRIOS INTERNATIONAL SHIPPING CO., INC., AND TROY CONTAINER LINE LTD., *Respondents*.

DOCKET NO. 18-02

Served: March 23, 2018

BEFORE: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT AND DISMISSING PROCEEDING WITH PREJUDICE[1]

[Notice Not to Review served 4/24/18, decision administratively final.]

I.

On March 5, 2018, Complainant Tarik Afif Chaouch and Respondents Demetrios Air Freight Co., Demetrios International Shipping Co., Inc., and Troy Container Line Ltd ("Demetrios") filed a joint motion for approval of settlement agreement and dismissal with prejudice and a memorandum of points and authorities in support of the motion ("settlement motion"). The parties attached a copy of the Settlement Agreement and Mutual Release ("settlement agreement"). The parties jointly move for approval of the settlement and dismissal with prejudice.

II.

On January 18, 2018, a Notice of Filing of Complaint and Assignment was issued indicating that Mr. Chaouch filed a complaint against Demetrios. Mr. Chaouch alleged that Demetrios violated the Shipping Act of 1984 ("Shipping Act") in connection with two vehicles shipped from the United States to Algiers, Algeria, allegedly shipped without requested separate bills of lading. On March 5, 2018, the parties filed a motion seeking approval of the settlement agreement and dismissal with prejudice.

[1] This Initial Decision will become the decision of the Commission absent review by the Commission. 46 C.F.R. § 502.227.

The parties state that "Complainant and Respondents desire to avoid the costs and delay of any litigation and have agreed to compromise and settle Tarik Afif Chaouch's claim based upon the terms and conditions set forth in a Settlement Agreement attached hereto." Motion at 2. The parties assert that "the settlement is fair, adequate and reasonable, particularly given the costs and risks of litigation and the amount of damages claimed. Moreover, as all partes are represented by competent counsel and have entered into this settlement willingly, the settlement is not the product of collusion or coercion." Motion at 3-4.

III.

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092, quoting 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

IV.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Tarik Afif Chaouch and Demetrios Air Freight Co., Demetrios International Shipping Co., Inc., and Troy Container Line Ltd be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

PORT ELIZABETH TERMINAL & WAREHOUSE CORP.,
Complainant

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

DOCKET NO. 17-07

Served: April 17, 2018

BEFORE: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION GRANTING MOTION TO PARTIALLY DISMISS COMPLAINT[1]

[Exceptions filed by Complainant, 5/8/18, Commission final decision pending]

I. INTRODUCTION

On January 12, 2018, Respondent The Port Authority of New York and New Jersey ("Port Authority" or "PANYNJ") filed a motion to dismiss the remedy of reparations and some of the claims in the complaint filed by Complainant Port Elizabeth Terminal & Warehouse Corp. ("PETW" or "PET&W"). On January 27, 2018, PETW filed its opposition brief. On February 5, 2018, the Port Authority filed its reply brief.

PETW alleges that the Port Authority violated and continues to violate sections 41106(2), 41104(8), 41104(9), 41106(3), and 41102(c) of the Shipping Act of 1984 ("Shipping Act"). The Port Authority moves to dismiss the claim for reparations as time barred and seeks to dismiss the claims for unreasonable refusal to deal or negotiate and for failing to establish, observe, and enforce just and reasonable regulations as legally insufficient. Motion at 1. The Port Authority does not seek to dismiss the claims of undue or unreasonable preference or advantage and undue or unreasonable prejudice or disadvantage. PETW responds that its complaint "more than satisfies the applicable pleading standard" and that the Port Authority's motion "is largely based on facts outside the Verified Complaint and Certifications which cannot be considered and must be stricken." Opposition at 1.

[1] This Initial Decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

In addition, on March 1, 2018, PETW filed a motion to extend discovery. PETW indicates that the Port Authority did not agree to file the motion jointly; however, the Port Authority did not file a response. The motion requesting an extension indicates that discovery has been conducted, including some depositions, and requests additional discovery, including depositions of non-party witnesses. Motion to Extend at 2-3. The motion to extend discovery is denied. As discussed below, the parties shall meet and confer and file a proposed schedule for the remaining claims by May 22, 2018.

As explained more fully below, the Shipping Act's statute of limitations bars reparations for the complaint, although PETW may seek a cease and desist order. In addition, PETW's complaint does not meet the *Iqbal/Twombly* pleading standard for claims of unreasonable refusal to deal or negotiate and for failing to establish, observe, and enforce just and reasonable regulations and practices. Accordingly, the Port Authority's motion seeking partial dismissal is granted. This decision is divided into four parts: introduction, arguments of the parties, analysis, and order.

II. Arguments of the Parties

The Port Authority moves to dismiss PETW's claim for reparations as well as some of the claims in the complaint. The Port Authority argues that PETW's claim for reparations is barred by the statute of limitations and that claims for unreasonable refusal to deal or negotiate and for failure to establish, observe, and enforce just and reasonable regulations and practices should be dismissed for failure to state a claim under the Shipping Act. Motion at 12-19.

PETW opposes the motion to dismiss, arguing that the verified complaint satisfies the applicable pleading requirements and sets forth facts sufficient to state a timely cause of action for a Shipping Act violation, that the exhibits submitted by the Port Authority which go beyond the verified complaint must be stricken, and that the Port Authority's contention that the statute of limitations mandates a dismissal at the pleading stage is without merit. Opposition at 7-23.

III. Analysis

A. Jurisdiction

The Shipping Act provides, *inter alia*, that a "person may file with the . . . Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). Complainant alleges violations of the Shipping Act by a port authority and the Commission has jurisdiction over the allegations and the parties.

B. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules,

to the extent that application of the Federal Rules 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 caselaw interpreting it." *Cornell v. Princess Cruise Lines, Ltd., Carnival PLC, and Carnival Corp.*, 33 S.R.R. 614, 620 (FMC 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011)).

The Commission explained:

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009). 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., 32 S.R.R. at 136.

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 678. The Commission explained:

> 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 v. Princess Cruise Lines, Ltd., Carnival PLC, and Carnival Corp., 33 S.R.R. at 620-621 (citations omitted). The Commission has clearly indicated that federal caselaw interpreting Federal Rule of Civil Procedure 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 55 (FMC 2015) (docket 12-02) (hereinafter "*Maher Terminals, 12-02*"); *Cornell*, 33 S.R.R. at 620; *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136.

The Commission explained the process for evaluating 12(b)(6) motions to dismiss.

> The first step is typically to identify pleadings that are not entitled to the assumption of truth because they are legal conclusions. These conclusions can provide a framework, but they must be supported by factual allegations. The next step is to assume the truth of the well-pleaded factual allegations and determine "whether they plausibly give rise to an entitlement to relief."
>
> The factual allegations needed to reach plausibility will vary depending on the complexity of the case, "both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind, the dots should be connected." "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Maher Terminals, 12-02, 34 S.R.R. at 58 (citations omitted).

The focus at this stage is not whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Insurance Co.*, 2014 U.S. Dist. Lexis 125179, at *5 (M.D. Tenn. 2014). "What *Twombly* and *Iqbal* teach is that where there are other plausible explanations, it is not sufficient to speculate in a complaint and particularly to base that speculation on no facts at all." *CIBA Vision Corp. v. De Spirito*, 2010 U.S. Dist. Lexis 11386, at *22-23 (N.D. Ga. 2010).

C. Facts

For purposes of evaluating the motion to dismiss, the facts presented by PETW are presumed to be true. PETW states:

> IV. Statement of Facts and Matters Complained Of
>
> A. Port Elizabeth Terminal & Warehouse Corp. provides warehousing and other terminal services and facilities to other marine terminal operators and common carriers handling thousands of shipping containers that enter or depart through the Port of New York and New Jersey.
>
> B. Port Elizabeth Terminal & Warehouse Corp. has been a tenant of PANYNJ and doing business in the Port of New York for over forty-two (42) years.
>
> C. Port Elizabeth Terminal & Warehouse Corp. is a public warehouse company and has been operating warehouses in the Port of New York and New Jersey since 1975.
>
> D. The vast majority of Port Elizabeth Terminal & Warehouse Corp.'s customers ship heavy / dense products to and from the United States.
>
> E. Port Elizabeth Terminal & Warehouse Corp. provides a key component of the supply chain for ocean-borne cargo by handling containers loaded to the rated

capacity of the containers, typically 58,000 lbs. or roughly 26.3 metric tons, by shippers in order to maximize ocean freight savings.

F. These 58,000 lbs. containers cannot be legally shipped on the United States Highway system so the cargo must be transloaded from the containers to legal highway weights.

G. The 58,000 lbs. containers can legally be transported via the Port's Marine Terminal Highways with their significantly higher gross vehicle weights to Port Elizabeth Terminal & Warehouse Corp. warehouses in Port Newark and off-loaded and legally transported Port Elizabeth Terminal & Warehouse Corp. and transloaded on-terminal and prepared to legal off-port highway weights and off-port delivery.

H. During the period of 2010 through 2015 Port Elizabeth Terminal & Warehouse Corp. averaged handling in excess of 50,000 TEU's per year of these types of heavy-loaded import and export containers that require on-terminal transloading.

I. Port Elizabeth Terminal & Warehouse Corp. and PANYNJ have, over these past forty-two (42) years, entered into numerous Leases, agreements and supplements to agreements based upon the parties' needs and to advance the parties' mutual commercial and business interests.

J. Over the past forty-two (42) years, the parties have entered into dozens of agreements and supplements pursuant to an established pattern and practice of working together to facilitate commerce within the port district.

K. On November 1, 2009, PANYNJ entered into an agreement, in writing, designated as Lease No.: LPN-297 (the "Lease Agreement").

L. Pursuant to the Lease Agreement, the PANYNJ, as Lessor, let to Complainant, as lessee, the Premises, which included Building 201 and Building 202 of the Premises.

M. The Lease Agreement as to Building 201 and Building 202 of the Premises commenced on November 1, 2009 with a stated termination date of October 31, 2019.

N. Since November 1, 2009, when PANYNJ entered into Lease No.: LPN-297 Port Elizabeth Terminal & Warehouse Corp., PANYNJ has assured Port Elizabeth Terminal & Warehouse Corp. that, consistent with the longstanding relationship and clear understanding of the parties, PANYNJ would engage in good faith negotiations with Port Elizabeth Terminal & Warehouse Corp. to provide suitable space at reasonable rates for the continuation of Port Elizabeth Terminal & Warehouse Corp.'s operations at Port Newark.

O. Port Elizabeth Terminal & Warehouse Corp. occupied 138,400 Square Feet of warehouse space 1400 Aruba Street Elizabeth, New Jersey 07201 and, at the PANYNJ's request, vacated the premises on December 31, 2014, purportedly to allow for sprinkler repairs.

P. The warehouse space at 1400 Aruba Street Elizabeth, New Jersey 07201 remains vacant.

Q. On or about March 31, 2015, Port Elizabeth Terminal & Warehouse Corp. vacated 312,000 Square Feet of warehouse space at 191 Export Street, 194 Panama Street and 199 Panama Street in Port Newark at the PANYNJ's request to allow for the PNCT Terminal Expansion.

R. On or about November 30, 2015, Port Elizabeth Terminal & Warehouse Corp. vacated 91,855 Square Feet of space at 292 Marlin Street at the request of PANYNJ purportedly to create more room for vessel receiving.

S. PANYNJ seeks to have Port Elizabeth Terminal & Warehouse Corp. vacate 312,000 Square Feet of warehouse space at 201 Export Street and 202 Clipper Street to allow for the PNCT Terminal Expansion.

T. Port Elizabeth Terminal & Warehouse Corp. agreed to PANYNJ's requests to vacate warehouse space and incurred millions of dollars in relocation expenses based upon assurances by PANYNJ and the longstanding practice of the parties to negotiate in good faith and reach agreement regarding alternative suitable marine terminal facilities at reasonable rates for the continuation of Port Elizabeth Terminal & Warehouse Corp.'s operations at Port Newark.

Complaint at 3-6.

D. Allegations

1. Undue or Unreasonable Preference or Advantage and Undue or Unreasonable Prejudice or Disadvantage; 46 U.S.C. §§ 41106(2), 41104(8), 41104(9).

a. Statute of limitations

Pursuant to the Shipping Act at 46 U.S.C. § 41301(a), reparations may only be awarded for injury to a complainant caused by the respondent's violation of the Shipping Act if the complaint is filed within three years after the claim accrues. "Absent an exception, a claim accrues (and the statute of limitations begins to run) 'when a defendant commits an act that injures a plaintiff's business.'" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185, 1191 (FMC 2013) (hereinafter "*Maher I*")[2] (citing *Zenith Radio*

[2] The dispute between Maher Terminals and the Port Authority of New York and New Jersey involved multiple Commission proceedings, federal district court cases, federal appeals, and one state court case. *Maher Terminals, 12-02*, 34 S.R.R. at 51. The Commission issued

Corp. v. Hazeltine Research Inc., 401 U.S. 321, 338 (D.C. Cir. 1971)). The time to file the complaint begins to run "when a complainant knew, or should have known, that it had a cause of action." *Maher I*, 32 S.R.R. at 1193. A statute of limitations argument is an affirmative defense. *Maher I*, 32 S.R.R. at 1193. However, the three-year statute of limitations only bars the award of reparations, not the filing of a complaint or the issuance of a cease and desist order. *Maher I*, 32 S.R.R. at 1190; *Western Overseas Trade and Dev. Corp. v. ANERA*, 26 S.R.R. 875, 885 n.17 (FMC 1993).

The discovery rule is an exception to the time bar provision. "Under the discovery rule, adopted by the Commission . . . a statute of limitations period will not begin to run until 'a party knew or with reasonable diligence *should have known* that it had a claim.'" *Maher I*, 32 S.R.R. at 1191 (emphasis in original); *see also, Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (1991) ("At least eight federal courts of appeals have, within the last four years, agreed . . . that the discovery rule is the general accrual rule in federal courts. As the Seventh Circuit has put it, the discovery rule is to be applied in all federal question cases 'in the absence of a contrary directive from Congress.'" (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990))).

In *Ceres*, the Commission established four elements of an unreasonable preference or advantage or unreasonable prejudice or disadvantage claim:

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury.

Ceres Marine Term., Inc. v. Maryland Port Admin., 27 S.R.R. 1251, 1270 (FMC 1997) (footnote omitted), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Commission*, 164 F.3d 624 (4th Cir. Oct. 13, 1998) (Table). Mere differences in treatment alone, however, do not violate the Shipping Act. *See Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 958, 963 (D.C. Cir. 1988) ("The Act clearly contemplates the existence of permissible preferences or prejudices."). Therefore, only "*undue or unreasonable* preferences and prejudices would be violative of the Prohibited Acts." *Seacon Terminals, Inc. v. The Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993) (emphasis in original). "Indeed, it would be impossible for the Port to insure that all of its tenants are identically situated, since each parcel and each operator has geographical and commercial idiosyncracies." *Seacon*, 26 S.R.R. at 900.

In *Maher I*, the Commission reviewed the statute of limitations issue, finding that the Port Authority's "motion for summary judgment that Maher's claim for reparations . . . is barred by

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three decisions in docket 08-03, *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, which will be referred to as follows:
Maher I, 32 S.R.R. 1185 (FMC 2013) (summary judgement).
Maher II, 33 S.R.R. 821 (FMC 2014) (merits).
Maher III, 34 S.R.R. 322 (FMC 2016) (settlement agreement for dockets 08-03 and 12-02).

the Act's statute of limitations is granted" and that the Port Authority's "motion that Maher's claim for a cease and desist order is barred by any statute of limitations is denied." *Maher I*, 32 S.R.R. at 1195.

In *Maher II*, the Commission found that Maher did not establish that the Port Authority's conduct constituted an unreasonable preference or prejudice and similarly, that Maher had not met its burden of proving that the Port failed to establish, observe, and enforce just and reasonable regulations and practices; that the Port unreasonably refused to deal with Maher; or that the Port operated contrary to Maher's lease. *Maher II*, 33 S.R.R. at 831. The Commission's decision was appealed to the United States Court of Appeals for the District of Columbia Circuit which remanded the case to the Commission for a further explanation of the Commission's decision and policy. *Maher Terminals, LLC v. FMC*, 816 F.3d 888, 892 (DC Cir. 2016) (hereinafter "*Maher, DC Circuit*").

In *Maher III*, the Commission approved a settlement agreement in dockets 08-03 and 12-02 and stated that "it will continue to consider all the relevant factors in its unreasonable preference analysis," including "in the case of marine terminal leases – market conditions, available locations and facilities, and the nature and character of potential lessees" and that it "will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions." *Maher III*, 34 S.R.R. at 326.

The D.C. Circuit, reviewing the decision on the merits in *Maher II*, included a footnote in the procedural history section regarding the decision on the statute of limitations in *Maher I*, stating that the "FMC ultimately held that Maher's request for a cease-and-desist order was not time-barred, and that in the event a violation was found, Maher was entitled to reparations for the full three-year period, though not for the period before that running back to the execution of the lease." *Maher, DC Circuit*, 816 F.3d. at 890 n.2. This footnote was not addressed by the Commission in *Maher III*, when the Commission approved the parties' settlement agreement.

PETW asserts that if it prevails, it would be entitled to reparations for the three-year period before it filed its complaint on the basis of the D.C. Circuit's footnote. However, the footnote was dicta and not controlling, as the D.C. Circuit was not reviewing the statute of limitations issue. The Commission's caselaw has consistently found that the statute of limitations bars any reparations if a violation occurred three years prior to a complaint being filed at the Commission. *See, e.g., Maher I*, 32 S.R.R. at 1190; *Inlet Fish Prod., Inc. v. Sea-Land Serv. Inc.*, 29 S.R.R. 306, 313 (FMC 2001); *Western*, 26 S.R.R. at 885 n.17; *A/S Ivarans Rederi v. Companhia De Navegacao Lloyd Braselleiro*, 23 S.R.R. 1543, 1550 (ALJ 1986); *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth*, 18 S.R.R. 1079, 1081-1082 (ALJ 1979) (all finding that the Commission's three-year statute of limitations applies to requests for reparations).

b. Evidence considered in evaluating statute of limitations arguments in a motion to dismiss

In its motion, the Port Authority contends that PETW knew or should have known about the case more than three years before filing the complaint. Motion at 12-15. The Port Authority relies on correspondence between PETW and the Port Authority, a newspaper article, and

documents from a 2017 legal proceeding contesting the Port Authority's eviction of PETW from certain properties.

PETW asserts that "a court may only consider the facts alleged in the pleading" and requests that exhibits E through R submitted by the Port Authority, which it asserts go beyond the verified complaint, be stricken. Opposition at 17.

The Port Authority replies that the Commission may consider documents outside of the complaint in deciding the motion to dismiss because they are integral to the complaint and that the Commission can take judicial notice of the newspaper article to show what information was in the public realm at the time. Reply at 2-5. The Port Authority contends that the documents are integral to the action. Reply at 3.

"When evaluating a motion to dismiss for failure to state a claim the Commission considers the facts alleged in the complaint, documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice." *Maher Terminals, 12-02*, 34 S.R.R. at 49 n.1 (citing *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); 46 C.F.R. § 502.226(a)). In *Maher Terminals, 12-02*, the Commission considered Lease EP-249 "as part of the pleadings because it is incorporated by reference in the complaint, it is integral to the complaint, and it is on file with the Commission, making it subject to official notice." *Maher Terminals, 12-02*, 34 S.R.R. at 49 n.1.

"Official notice includes judicially noticeable facts and 'technical or scientific facts within the general knowledge of the Commission,' 46 C.F.R. § 502.226(a), such as evidence available to it from other proceedings, *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 463 (D.C. Cir. 2004)." *Maher Terminals, 12-02*, 34 S.R.R. at 49 n.1. "Official notice is broader than judicial notice and may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise." *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, 32 S.R.R. 1133, 1161 n.39 (ALJ 2013). A presiding officer can take official notice not only of public records and generally accepted facts, but also of matters related to the shipping industry. *See, e.g.*, *Marine Repair Services of Maryland*, 32 S.R.R. at 1161 (taking official notice of external facts relating to competition and practices in shipping industry); *Bimsha Int'l v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 353, 366, 368-371 (ALJ 2011) (taking official notice of Commission records and report from another federal agency); *John T. Barbour - Possible Violations of Section 8 and 19 of The Shipping Act of 1984*, 34 S.R.R. 959, 968-70 (ALJ 2016) (taking official notice of Commission records related to enforcement actions and federal district court records from a related proceeding).

Courts may take judicial notice of newspaper articles "to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Bernak ex rel. All. Premier Growth Fund v. All. Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir 2006); *see also Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 299 (S.D.N.Y. Dec. 18, 2012). Even a single news article can place a plaintiff on inquiry notice. *Marshall v. Milberg LLP*, 2009 U.S. Dist. LEXIS 121208, at *12 (S.D.N.Y. Dec. 23, 2009); *In re MBIA Inc.*, 2007 U.S. Dist. LEXIS 10416 (S.D.N.Y. Feb. 14, 2007).

In the case *sub judice*, Exhibit E is an article titled "Port Newark Terminal Lease Deal to Double Volume." Motion, Exhibit E. Judicial notice may be taken of this article to establish what information was in the public realm. Exhibits F-M are correspondence, including letters and emails, between the parties. While these documents are relevant to the Port Authority's defense, they are not "documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice" and will be excluded. Exhibits N-P are orders and transcripts from proceedings before the Superior Court of New Jersey for which judicial notice may be taken. Accordingly, the exhibits to the motion will be considered, except for exhibits F-M, which are excluded.

c. Discussion

In the complaint, PETW alleges that the Port Authority gave undue or unreasonable preference to another terminal operator, PNCT, by taking property occupied by PETW and providing it to PNCT, and that because the Port Authority provided PNCT with an undue advantage, it is likely that PETW customers will be forced to seek a new marine terminal operator and PETW will lose business. Complaint at 8.

The Port Authority contends that a reparation award for this cause of action is barred by the Commission's three-year statute of limitations. The Port Authority asserts that "PETW should have filed this action on or before July 20, 2014. However, PETW waited until July 21, 2017, four days before the trial date of the Port Authority's landlord/tenant action to have PETW evicted from buildings 201 and 202, to commence this action. Accordingly, PETW's claim for reparations should be dismissed as it is untimely and no tolling provision applies." Motion at 15.

PETW asserts that differential treatment must be based on valid transportation factors; that there is "no valid transportation purpose for the foregoing undue or unreasonable prejudices" against PETW and if "there is a valid transportation purpose, the discriminatory actions of PANYNJ exceed what is necessary to achieve the purpose;" and that the Port Authority has violated the Shipping Act by giving any undue or unreasonable preference or advantage or imposing any undue or unreasonable prejudice or disadvantage with respect to PETW. Opposition at 16 (quoting the complaint at 8). PETW asserts that the Port Authority's contention that the statute of limitations mandates a dismissal at the pleading stage is without merit, asserting a continuing violation of the Shipping Act, accrual of claims for Shipping Act violations within three years of filing the complaint, and a course of action to mislead PETW, each of which is sufficient to deny the motion at this stage. Opposition at 22-23.

PETW entered into its lease with the Port Authority on November 1, 2009. Complaint at 4. The Port Authority entered into its lease with PNCT on June 14, 2011. Motion, Exhibit D (Lease L-PN-264, incorporated by reference in the complaint at 2). An agreement between the Port Authority and PNCT in January 2012 agrees to provide a "Phase 3 Development Parcel" which was premises leased to and occupied by PETW. Complaint at 7. A news article titled "Port Newark Terminal Lease Deal to Double Volume," published on June 15, 2011, describes the lease agreement between the Port Authority and PNCT and its impact on Complainant PETW, stating that the Port Authority "said the new acreage has been occupied by several small tenants, including the Port Elizabeth Terminal Warehouse" and that "[t]heir leases are not being

renewed, though the Port Authority said it is working to find new locations within the port district." Motion, Exhibit E.

Once PETW knew or should have known about the PNCT lease, this claim accrued. This proceeding was filed on July 21, 2017. In order to be entitled to reparations, the claim must have accrued within three years of filing the complaint, on or after July 20, 2014. The PNCT lease to which PETW objects was signed and in the public realm in June of 2011. PETW did not file its complaint until over six years after the PNCT lease was signed and in the public realm. This far exceeds the Commission's three-year statute of limitations.

PETW contends that "under the Commission's discovery rule, the limitations period begins to run only when the complainant possesses 'conclusive information about such a dispute.'" Opposition at 20 (citing *Inlet Fish Prod., Inc. v. Sea-Land Serv. Inc.*, 29 S.R.R. 306, 313 (FMC 2001)). In the litigation between Maher and the Port Authority, Maher cited the "conclusive information" language in *Inlet Fish* as well; however, the Commission did not find it compelling. *Maher I*, 32 S.R.R. at 1193; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. 1, 22-23 (ALJ 2011) (reviewed in *Maher I*) (discussing *Inlet Fish*). Conclusive information is not required for the Shipping Act's statute of limitations to accrue.

The newspaper article clearly states that PNCT's land will expand and that expansion will include land occupied by PETW. Motion, Exhibit E. It is not credible that PETW would not have seen an article that specifically referenced it by name in a local publication discussing the port in which it operated. Usually these types of lease agreements at ports are significant news within the local port community. While the newspaper article's statement cannot be accepted for the truth of the matters asserted, it is an appropriate indicator of what information was in the public realm. Given that PNCT's lease of land occupied by PETW was in the public realm as of 2011, PETW knew or should have known about its claim.

PETW does not clearly assert that it did not know about the PNCT lease, but rather seems to focus its argument on its belief that the Port Authority would negotiate with it in good faith, stating that the Port Authority "led PET&W on with empty promises to provide alternative suitable marine terminal facilities at reasonable rates for the continuation of Port Elizabeth Terminal & Warehouse Corp's operations at Port Newark and 'conclusive information' about such a dispute was not available to PET&W as a result." Opposition at 21-22. The continuing negotiations between the parties after the PNCT lease was signed did not toll the statute of limitations. Pursuant to the Shipping Act's statute of limitations, PETW had three years after it knew or should have known of the violation to file its complaint. PETW had or should have had such notice more than three years before filing its complaint.

It appears that the statute of limitations would also bar the remaining claims for reparations for any unreasonable refusal to deal and failing to establish, observe, and enforce just and reasonable regulations and practices. However, there are not sufficient factual allegations alleged in the complaint to fully analyze the impact of the statute of limitations on these claims. As explained below, these remaining claims are dismissed for failure to state a plausible cause of action.

2. Unreasonable Refusal to Deal, 46 U.S.C. § 41106(3)

a. Relevant law

Section 41106(3) of the Shipping Act states that a marine terminal operator may not "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3). "This requires a two-part inquiry: whether [respondent] refused to deal or negotiate, and, if so, whether its refusal was unreasonable." *Canaveral Port Auth.*, 29 S.R.R. 1436, 1448 (FMC 2003). The Commission has held that a port authority's refusal to consider a proposal constitutes a refusal to deal or negotiate. *Canaveral Port Auth.*, 29 S.R.R. at 1448. With respect to a port authority, "in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration of an entity's efforts at negotiation." *Canaveral Port Auth.*, 29 S.R.R. at 1450. A refusal is not unreasonable where it is "justified by particular circumstances in effect." *Agreement No. 201158 – Docking and Lease Agreement*, 30 S.R.R. 377, 379 (FMC 2004). Moreover, the Commission may defer to a port's reasonable, discretionary business decisions regarding negotiations. *Seacon Terminals*, 26 S.R.R. at 899.

> 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 OSRA. All that is required is that common carriers . . . refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans, 29 S.R.R. 345, 351 (ALJ 2001), *aff'd*, 29 S.R.R. 1066, 1070 (FMC 2002).

In *Maher II*, the Commission found that "it was not unreasonable for the Port to reject Maher's subsequent requests for lease parity [with APM-Maersk], which Maher initiated in 2007. The evidence establishes that the Port gave good faith consideration to Maher's subsequent requests for parity and that its refusal to accede to Maher's demands was not unreasonable." *Maher II*, 33 S.R.R. at 854. The Commission concluded that "the Port had valid reasons for treating Maher differently than APM-Maersk" and that "as a policy matter it would be unduly burdensome for a port authority to have to renegotiate its leases on demand." *Maher II*, 33 S.R.R. at 854.

b. Discussion

PETW has not pled sufficient facts to plausibly suggest that there was a refusal to deal and to plausibly suggest that such a refusal was unreasonable. PETW's primary allegations seem to be that the Port Authority did not negotiate in good faith, the Port Authority "refused to make any commitments whatsoever regarding its plans" for PETW's continued operations at Port Newark, and PANYNJ pursued an eviction action. Complaint at 9-11.

Accepting the facts asserted by PETW as true, the Port Authority met with PETW on a number of occasions. Complaint at 8-11. Although PETW asserts that those discussions were not done with "good faith" on the part of the Port Authority, the only facts supporting that allegation are that the Port Authority did not agree with the demands of PETW. That the Port Authority did not make a commitment regarding its plans does not suggest that the Port Authority was acting unreasonably or not in good faith. The mere fact of not receiving parity

and of having different lease terms, which demonstrates a difference, is not sufficient to allege that the difference was unreasonable. The Shipping Act does not require "that all interested parties get the same deal." *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 29 S.R.R. 356, 369 (FMC 2001).

As discussed above, judicial notice can be taken of the eviction action in the Superior Court of New Jersey and appeal to the Superior Court of New Jersey Appellate Division, exhibits N-P of the motion. After a hearing and an appeal, the New Jersey courts determined that the eviction was proper and that the landlord-tenant action was properly before the New Jersey courts, stating "the trial court reasonably found defendant's filing of a complaint with the FMC was an inappropriate tactic to delay eviction proceedings." Motion, Exhibit Q at 2. A competent court determined that the eviction was reasonable.

An allegation of refusal to deal requires more than that a request is denied. PETW's conclusory legal statements, such as "unreasonably," provide no factual support of its allegations that the Port Authority's conduct violated the Shipping Act. The complaint does not provide plausible factual support for the allegation that the Port Authority unreasonably refused to deal or violated sections 41106(3) and 41104(10). Accordingly, the complaint, accepted as true, fails to allege sufficient factual matter to state a plausible Shipping Act claim. Therefore, this claim is dismissed.

3. Failure to Establish, Observe, and Enforce Just and Reasonable Regulations and Practices; 46 U.S.C. § 41102(c)

a. Relevant Law

Under the Shipping Act, section 41102(c), a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

The appropriate inquiry under section 41102(c) "is whether the 'charge levied is reasonably related to the services rendered.'" *Maher II*, 33 S.R.R. at 852 (quoting *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 282 (1968)); *see also Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595, 602 (FMC 1987), reaffirmed on reconsideration, 24 S.R.R. 1242, 1248 (FMC 1988). The "Commission has stated that '[t]he test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to the ends in view.'" *Kawasaki Kisen Kaisha, Ltd. v. The Port Authority of New York and New Jersey*, 33 S.R.R. 746, 755 (FMC 2014) (quoting *W. Gulf Mar. Ass'n v. Port of Hous. Auth.*, 18 S.R.R. 783, 790 (FMC 1978), *aff'd without opinion sub nom. W. Gulf Mar. Ass'n. v. FMC*, 610 F.2d 1001 (D.C. Cir. 1979)). With regard to charges assessed by a marine terminal operator, "the question under section [41102(c)] is not whether a complainant has received some 'substantial benefit,' but whether the correlation of that benefit to the charges imposed is reasonable. Such a charge 'is unreasonable if it is not reasonably related, either to an actual service performed for, or a benefit conferred upon, the person being charged.'" *Kawasaki Kisen Kaisha*, 33 S.R.R. at 755 (quoting *Indiana Port Comm'n v. FMC*, 521 F.2d 281, 285 (D.C. Cir. 1975)).

b. Discussion

PETW alleges that the Port Authority "has not established, observed, and/or enforced just and reasonable regulations and practices as they pertain to tenants who receive, handle, store, or deliver property," and that the Port Authority's "regulations and practices favor Marine Terminal Operators over others based upon non-transportation factors in a way so as to unduly favor certain Marine Terminal Operators based upon status." Complaint at 11.

The Port Authority argues that other than "this conclusory legal statement, the complaint is bereft of any facts whatsoever to state a claim for relief that is plausible on its face," that "the complaint does not even mention which regulations or practices the Port Authority failed to establish, observe and/or enforce," and that "the complaint fails to provide any details describing how the Port Authority failed to establish, observe, and/or enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." Motion at 18.

In its opposition to the motion, PETW does not discuss section 41102(c), a failure to establish, observe or enforce, or reasonable regulations or practices in its opposition beyond quoting the complaint.

PETW does not identify specific regulations or practices that the Port Authority failed to establish, observe, or enforce. Complainant's conclusory legal statements, such as "unreasonable," "unduly favor," and "no transportation purpose" provide no factual support for the allegations that Respondent's conduct violated the Shipping Act. In addition, it appears that PETW may have abandoned the allegation. Accordingly, the complaint, accepted as true, fails to allege sufficient factual matter to state a plausible Shipping Act claim under section 41102(c). Therefore, this claim is dismissed.

E. Conclusion

As discussed above, the statute of limitations bars reparations for the unreasonable preference and prejudice claim which was filed over six years after information about the lease was in the public realm and four days prior to an eviction hearing. Moreover, PETW's complaint does not plead sufficient facts to find plausible their claim of an unreasonable refusal to deal and failure to establish, observe, and enforce just and reasonable practices.

The Commission discussed the standard for when leave to amend pleadings is appropriate, stating:

> Valid grounds for denying leave to amend include "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [and] futility of amendment, etc.'"
> "'Additionally, leave to amend may be denied when a party does not request leave to amend or does not indicate the particular grounds on which amendment is sought.'"

Maher Terminals, 12-02, 34 S.R.R. at 77 (emphasis and citations omitted).

PETW has not requested an amendment to its pleadings and does not assert any grounds for permitting amendment. However, none of the other factors are present. The dismissal of the claim for reparations is not based on a pleading deficiency but rather a violation of the statute of limitation and an amended complaint would not cure the statute of limitations problem, so the reparations claim is dismissed with prejudice. However, in an abundance of caution, the dismissal of the claims for unreasonable refusal to deal or negotiate and for failing to establish, observe, and enforce just and reasonable regulations and practices will be without prejudice.

F. Schedule

On or before May 22, 2018, the parties should meet and confer and file a joint status report with a proposed schedule for resolving the remaining claim for a cease and desist order for violation of 46 U.S.C. §§ 41106(2), 41104(8), and 41104(9). The parties should address whether additional discovery is required given this decision limiting the issues in the proceeding.

IV. ORDER

Upon consideration of the motion to dismiss, the opposition thereto, the reply, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the motion seeking a partial dismissal filed by the Port Authority be **GRANTED**. It is

FURTHER ORDERED that the claim for reparations be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the claims for violation of 46 U.S.C. §§ 41106(3) and 41102(c) against the Port Authority of New York and New Jersey be **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that all other pending motions, including the motion to extend discovery, are hereby **DISMISSED AS MOOT**. It is

FURTHER ORDERED that by May 22, 2018, the parties file a joint status report with proposed schedule for the remaining claims for a cease and desist order for violation of 46 U.S.C. §§ 41106(2), 41104(8), and 41104(9).

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

TARIK AFIF CHAOUCH, *Complainant*

v.

DEMETRIOS AIR FREIGHT CO., DEMETRIOS INTERNATIONAL SHIPPING CO., INC., AND TROY CONTAINER LINE LTD., *Respondents*.

DOCKET NO. 18-02

Served: April 24, 2018

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's March 23, 2018 Initial Decision Approving Settlement Agreement and Dismissing Proceeding with Prejudice has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

IN RE: VEHICLE CARRIER SERVICES[1]	**DOCKET NOs. 16-01, 16-07, 16-10, 16-11, and 17-09**

Served: May 7, 2018

BEFORE: Erin M. WIRTH, *Administrative Law Judge.*

INITIAL DECISION GRANTING IN PART AND DENYING IN PART RESPONDENTS' MOTION TO DISMISS AND SUPPLEMENTAL MOTION TO DISMISS[2]

[Appeal filed by Complainants, 7/30/18, final decision pending.]

I. INTRODUCTION

A. Summary

This initial decision addresses a consolidated motion to dismiss filed in four 2016 cases[3] and a supplemental motion to dismiss filed in a fifth case filed in 2017. All five cases allege violations of the Shipping Act by Respondents, ocean common carriers that provide ocean transport of new, assembled motor vehicles using specialized roll-on/roll-off ("RoRo") cargo ships to and from the United States. Complainants assert that Respondents entered into secret agreements and conspired to fix, raise, maintain, and stabilize prices and allocate the market and customers for vehicle shipping services for over fifteen years, impacting millions of consumers.

The initial dispute at this stage is *who* can privately enforce violations of the Shipping Act and obtain reparations. The cargo at issue, new, assembled motor vehicles, likely was

[1]The caption has been shortened due to the number of cases. See Schedule A for the list of parties to these proceedings.

[2] This initial decision partially granting a motion for dismissal will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227(c). An appeal by a party must be filed with the Commission's Office of the Secretary within twenty-two days from the date of service of the decision. 46 C.F.R. § 502.227(b)(1).

[3] The compliant in in 16-01 was filed at the end of 2015 and docketed in 2016. For ease of reference, the four putative class actions docketed in 2016 will be referred to as the "2016 complaints." The term "Complainants" will apply to Complainants in the 2016 complaints as well as Complainants in a fifth case filed in 2017, docket 17-09, unless otherwise noted.

transported from an original equipment manufacturer ("OEM") to an ocean transportation intermediary ("OTI") to a dealer to the ultimate consumer. As a potential claim moves through this transportation chain, the number of potential claimants increases and the value of each individual claim decreases. So, for example, a per-vehicle overcharge would have a larger impact on OEMs who ship many vehicles than a consumer who purchases one vehicle. The question is which, if any, of the competing classes of claimants in this transportation chain has standing to bring an action and recover reparations.

Class actions can be an effective way for consumers to consolidate small, individual claims that otherwise might not be cost effective to pursue individually. However, there is a school of thought that it makes more sense for a direct purchaser, such as an OEM, to pursue a claim as it is more likely to have a larger financial injury, continuing relationship with respondents, and greater bargaining power. Whether claims brought by manufacturers result in a benefit to consumers is a matter of debate that exceeds the scope of this decision.

To be entitled to reparations, complainants in Shipping Act proceedings must establish that the violations occurred within three years of filing the complaint. These five cases all allege violations beginning as early as 1997. As discussed below, although the three-year statute of limitations was tolled while the agreements were secret, once major news organizations announced "dawn raids" and criminal investigations in 2012, the statute of limitations began to run and it was not tolled by the filing of class actions in federal court.

In this decision, the focus is on the Shipping Act and who may pursue claims and seek reparations under this statutory scheme. The Shipping Act limits reparations to complainants who directly suffer actual injury and who file their claims within a three-year statute of limitations. Determination of these issues at this early point in the proceedings will allow the parties to focus and evaluate their claims.

Respondents filed a motion and supplemental motion seeking to dismiss these five proceedings with prejudice. Respondents raise five separate grounds for the dismissal: (1) whether the Commission has authority to hear class actions; (2) whether indirect purchaser Complainants have standing to seek reparations; (3) whether the statute of limitations bars reparations; (4) whether the complaints state cognizable Shipping Act claims; and (5) whether service has been effected. Many of these arguments would dismiss only parts of complaints, for example just the claim for reparations. Complainants assert that the complaints should not be dismissed.

As explained below, the dismissal is granted in part. Specifically, the decision finds that (1) the Commission should not permit class actions in these cases; (2) only the two Complainants who allege that they directly suffered actual injury, OTIs in docket 16-01 and Fiat in docket 17-09, would potentially have standing to seek reparations; and (3) the statute of limitations bars reparations, except for violations that Fiat can establish in docket 17-09 that occurred within the statute of limitations period. The decision, however, denies without prejudice the motion to dismiss regarding (4) whether the complaints state cognizable Shipping Act claims and (5) whether service has been effected.

This decision will address the facts, legal analysis, and order. After discussion of the proceedings, procedural history, and arguments of the parties, the five legal issues raised in the motion will be discussed in the following order: class action, standing to seek reparations, statute of limitations, sufficiency of the pleadings, and service.

B. Proceedings

Complainants in dockets 16-01, 16-07, 16-10, and 16-11 commenced four of the five proceedings by filing complaints on behalf of Complainants and all others similarly situated with the Federal Maritime Commission ("Commission") against Respondents. The four 2016 complaints were filed as putative class actions. 16-01 OTI Complaint ¶ 1; 16-07 End-Payors Complaint ¶ 1; 16-10 Truck Centers Complaint ¶ 1; 16-11 Auto Dealers Complaint ¶ 1. The 17-09 complaint filed by Fiat is not a putative class action. These five cases have been consolidated for preliminary stages, including the filing of the motion and supplemental motion to dismiss.

The 16-01 complaint was filed by Cargo Agents, Inc., International Transport Management Corp., and RCL Agencies, Inc., three ocean transportation intermediaries ("OTIs").[4] The OTI Complainants allege that they represent "companies that arrange for the international ocean transportation of vehicles," that they directly purchased vehicle carrier services from Respondents, and that they "have been harmed by being forced to pay inflated, supra-competitive prices for Vehicle Carrier Services." 16-01 OTI Complaint ¶¶ 25, 8-10, 122. It is not clear whether these OTIs acted as non-vessel-operating common carriers ("NVOCCs") or ocean freight forwarders ("OFFs") for these shipments and that issue can be resolved at a later stage in the proceeding, if necessary.

The 16-07 complaint was filed by twenty-nine individual consumers or "End-Payors." The End-Payor Complainants allege that they "purchased or leased a new motor vehicle subject to Vehicle Carrier Service charges by one or more Respondents." and that they "paid supracompetitive prices for Vehicle Carrier Services" because "OEMs and automobile dealers passed on the inflated charges" to the End-Payors. 16-07 End-Payors Complaint ¶¶ 16-54, 186, 189.

The 16-10 complaint was filed by Rush Truck Centers in twelve states. The Truck Center Complainants allege that they buy and sell vehicles "that were shipped via RoRo by one or more of the Respondents or their co-conspirators," that they "indirectly paid Respondents for Vehicle Carrier Services" and that they "paid supra-competitive prices for Vehicle Carrier Services" because the "inflated prices of Vehicle Carrier Services resulting from Respondents' conspiracies were passed on to [the Truck Centers] . . . by OEMs." 16-10 Truck Centers Complaint ¶¶ 15-26, 27, 165, 168.

The 16-11 complaint was filed by Landers Brothers Auto Group, Inc., and Landers Brothers Auto No. 4, LLC, automobile dealers. The Auto Dealer Complainants allege that they

[4] Complainants in docket 16-01 refer to themselves as Direct Purchaser Complainants or DPCs while Respondents refer to them as Freight Forwarders. Both of these designations are contested, so they will be referred to as OTIs.

"purchased vehicles which were carried by Respondents," they "indirectly paid Respondents for Vehicle Carrier Services," and that they "paid supra-competitive prices for Vehicle Carrier Services" because "the inflated prices of Vehicle Carrier Services in motor vehicles resulting from Respondents' price-fixing conspiracy have been passed on" to the Auto Dealers. 16-11 Auto Dealers Complaint ¶¶ 19, 151, 154.

The 17-09 complaint was filed by Fiat Chrysler Automobiles NV, FCA US LLC, and FCA Italy S.p.A. (collectively "Fiat"). The Fiat complaint alleges that Fiat is the seventh largest automaker in the world; it arranges "for the international transport of its vehicles by Respondents and their co-conspirators" and purchases services "directly from Respondents" to ship vehicles; and because "the current prices for roll on, roll off cargo transport services are based on historic prices, [Fiat] continues to be injured by the secret, unfiled agreements today." Fiat Complaint ¶¶ 5, 18, 47.

There are approximately eighteen separate Respondents identified in the five complaints. There is significant overlap of Respondents although there are a number of variations. The Respondents are all vessel-operating common carriers ("VOCCs") who transport new, assembled motor vehicles by RoRo. The Respondents include: "K" Line America, Inc.; Alliance Navigation LLC; Autotrans AS; Compañia Sud Americana De Vapores S.A.; CSAV Agency North America, LLC; Eukor Car Carriers Inc.; Höegh Autoliners, Inc.; Höegh Autoliners AS; Höegh Autoliners Holdings AS; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Bulk Shipping (USA), Inc.; Mitsui O.S.K. Lines Ltd.; Nippon Yusen Kabushiki Kaisha; Nissan Motor Car Carriers Co. Ltd.; NYK Line (North America) Inc.; Wallenius Wilhelmsen Logistics Americas LLC; Wallenius Wilhelmsen Logistics AS; and World Logistics Service (USA) Inc.

C. Procedural History

Complainants allege that Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b), 41102(c), 41103(a), 41104(10), 41105, and the Commission's regulations at 46 C.F.R. § 535.401 et seq., in connection with vehicle carrier services purchased from Respondents. Respondents and unnamed co-conspirators are alleged to be providers of "Vehicle Carrier Services."

Respondents Nippon Yusen Kabushiki Kaisha and NYK Line (collectively, "NYK"), EUKOR Car Carriers Inc. ("EUKOR"), Wallenius Wilhelmsen Logistics AS and Wallenius Wilhelmsen Logistics Americas LLC, (collectively, "WWL"), Compañia Sud Americana de Vapores S.A. and CSAV Agency North America, LLC (collectively, "CSAV"), and Höegh Autoliners Holdings AS, Höegh Autoliners AS, Höegh Autoliners, Inc., Autorans AS and Alliance Navigation LLC (collectively, "Höegh") entered a special appearance. The remaining Respondents, Mitsui O.S.K. Lines, Mitsui O.S.K. Bulk Shipping (USA) Inc., World Logistics (U.S.A.) Inc., Nissan Motor Car Carrier Co. Ltd., Kawasaki Kisen Kaisha, Ltd., and "K" Line America, Inc., entered a general appearance.

On January 25, 2016, Respondents in docket 16-01 filed a consolidated motion to stay the proceeding pending resolution of a related federal court class action between the parties. On February 16, 2016, Complainants in docket 16-01 filed an opposition to Respondents' motion to stay. On May 12, 2016, Respondents in docket 16-01 filed a status report regarding their motion

to stay the proceeding. On May 31, 2016, Complainants and Respondents in dockets 16-10 and 16-11 filed a joint motion in each case to stay the proceedings. On June 2, 2016, the Complainants and Respondents in docket 16-07 filed a joint motion to stay that proceeding. On January 27, 2017, Complainants in docket 16-01 filed a status report regarding their opposition to the motion to stay.

Citing a January 18, 2017, decision in related federal proceedings, on January 31, 2017, an order was issued requiring the parties in the 2016 proceedings to meet and confer and file, by March 1, 2017, joint status reports in each case. On March 1, 2017, two joint status reports were filed, one by the parties in docket 16-01, and one by the parties in dockets 16-07, 16-10, and 16-11.

On March 16, 2017, an order was issued denying the joint motions to stay, finding no basis to further delay these proceedings. Respondents had indicated in their March 1, 2017, joint status reports that they intended to file a motion to dismiss the proceedings. It was ordered that Respondents' consolidated motion to dismiss be filed by April 26, 2017, Complainants' opposition brief be filed by May 24, 2017, and Respondents' reply brief be filed by June 8, 2017.

On April 26, 2017, Respondents filed a consolidated motion to dismiss and brief in support of their motion to dismiss ("Motion"). On May 24, 2017, Complainants filed a consolidated response to the motion to dismiss ("Opposition"). On June 8, 2017, Respondents filed a consolidated reply to Complainants' response ("Reply").

On October 17, 2017, Fiat initiated docket 17-09 by filing a complaint alleging that Respondents violated the same Shipping Act provisions and Commission regulations alleged in the four 2016 proceedings discussed above, in connection with vehicle carrier services purchased by Fiat.

On October 18, 2017, an initial scheduling order was issued in docket 17-09. The order stated that the complaint in docket 17-09 raised common issues of facts with dockets 16-01, 16-07, 16-10, and 16-11, and required Fiat and the 17-09 Respondents, if they did not believe that the issues raised in all five proceedings were common or that the pending motion to dismiss the four proceedings should apply to docket 17-09, to file by November 14, 2017, a motion objecting to the order. No such motion objecting to the initial scheduling order was filed.

On November 30, 2017, Respondents filed a supplemental consolidated motion to dismiss Fiat's complaint in docket 17-09 ("Supp. Mot."). On January 11, 2018, Fiat filed a response opposing Respondents' supplemental consolidated motion to dismiss ("Supp. Opp."). On January 26, 2018, Respondents filed a reply to Fiat's opposition ("Supp. Reply").

D. Arguments of the Parties

Respondents move for dismissal of dockets 16-01, 16-07, 16-10, and 16-11, arguing that: the Shipping Act's three-year statute of limitations bars the claims for reparations; Complainants cannot maintain a class action before the Commission; Complainants lack standing to seek reparations; the complaints fail to state cognizable Shipping Act claims; and service of process was improper. Motion at 5.

Complainants in the 2016 proceedings oppose the motion to dismiss, arguing that the statute of limitations does not bar their claims; all Complainants have standing to pursue all claims under the Shipping Act; the Commission can and should adjudicate the complaints as class proceedings; and the causes of action under the Shipping Act in the complaints are properly pleaded. Opposition at 1-2.

Respondents assert that the Fiat complaint must be dismissed with prejudice. They rely on the motion in the four 2016 proceedings, and argue that Fiat's claim for reparations is barred by the Shipping Act's three-year statute of limitations; Fiat fails to state cognizable Shipping Act claims; and Fiat lacks standing to seek reparations. Supp. Mot. at 3.

In response, Fiat argues that: no portion of its claims are time-barred; it has pleaded facts sufficient to put Respondents on notice of its claims, which is all that is required; and that Respondents' argument that Fiat has failed to establish its standing to sue under the Shipping Act fails because Fiat has alleged facts demonstrating that it purchased shipping services directly from Respondents and their co-conspirators – the very allegations that Respondents acknowledged were sufficient in their motion to dismiss the 2016 complaints. Supp. Opp. at 3-4.

II. FACTS

For purposes of evaluating the motion and supplemental motion to dismiss, the facts presented in the five complaints are presumed to be true. The five complaints set forth substantially similar detailed accounts of the alleged conspiracy by the Respondents to fix, raise, maintain and/or stabilize prices, and to rig bids to allocate the market and customers for vehicle carrier shipping services to and from the United States.

Vehicle carriers, such as Respondents, transport cars, trucks, and other vehicles in international maritime commerce using specialized ships known as RoRo vessels. 16-07 End-Payors Complaint ¶ 2; 16-11 Auto Dealers Complaint ¶ 2; 16-10 Truck Centers Complaint ¶ 3 (similar); 16-01 OTI Complaint ¶¶ 20-21 (similar). "Vehicle Carrier Services" involve the paid ocean transportation of cars, trucks, and other vehicles on RoRo vessels. 16-07 End-Payors Complaint ¶ 2; 16-11 Auto Dealers Complaint ¶ 2; 16-10 Truck Centers Complaint ¶ 3; 16-01 OTI Complaint ¶¶ 2, 20-21 (similar). Vehicle carriers sell vehicle carrier services to OEMs, such as large automotive, construction, and agricultural vehicle manufacturers. 16-07 End-Payors Complaint ¶ 82; 16-11 Auto Dealers Complaint ¶ 47.

The complaints allege that Respondents have for years participated in secret, unlawful, anticompetitive conduct in the market for ocean shipping of cars, small and large trucks, construction equipment, and other products. 16-01 OTI Complaint ¶¶ 65-80; 16-07 End-Payors Complaint ¶¶ 6-13; 16-10 Truck Centers Complaint ¶¶ 126-140; 16-11 Auto Dealer Complaint ¶¶ 6-13; 17-09 Fiat Complaint ¶¶ 19-38. The complaints allege anticompetitive acts and agreements in furtherance of the conspiracy to fix and maintain inflated charges for vehicle carrier services, as well as to manipulate capacity and restrict the supply of such services via fleet reductions. 16-01 OTI Complaint ¶¶ 46-80; 16-07 End-Payors Complaint ¶¶ 124-175; 16-10 Truck Centers Complaint ¶¶ 97-153; 16-11 Auto Dealer Complaint ¶¶ 88-139; 17-09 Fiat Complaint ¶¶ 25-31. Complainants allege that Respondents allocated the market for shipping services. 16-01 OTI Complaint ¶¶ 50-62; 16-07 End-Payors Complaint ¶¶ 128-157; 16-10 Truck

Centers Complaint ¶¶ 99-122; 16-11 Auto Dealer Complaint ¶¶ 86-113; 17-09 Fiat Complaint ¶¶ 26-28.

Two complaints alleged that Complainants *directly* purchased vehicle carrier services from one or more Respondents: OTIs in 16-01 and Fiat, an OEM, in 17-09. 16-01 OTI Complaint ¶ 2; 17-09 Fiat Complaint ¶ 18. The other three complaints allege that Complainants *indirectly* purchased vehicle carrier services from one or more Respondents and that alleged overcharges were passed on to them. 16-07 End-Payors Complaint ¶¶ 186-189; 16-10 Truck Centers Complaint ¶ 168; 16-11 Auto Dealer Complaint ¶ 154.

The five complaints allege that since at least early September 2012, antitrust and competition authorities in the United States and other countries have been investigating a "global cartel" among vehicle carriers to engage in "unlawful, anticompetitive conduct" in the vehicle carrier services industry. 16-07 End-Payors Complaint ¶ 6; 16-11 Auto Dealers Complaint ¶ 6; 16-10 Truck Centers Complaint ¶ 4; 16-01 OTI Complaint ¶ 65. On September 6, 2012, the U.S. Department of Justice, the European Commission, and the Japan Fair Trade Commission conducted unannounced, coordinated inspections and searches – known as the "dawn raids" – at the offices of several vehicle carriers, including most of Respondents, related to the alleged conspiracy. 16-07 End-Payors Complaint ¶¶ 6, 159; 16-11 Auto Dealers Complaint ¶¶ 6, 123; 16-10 Truck Centers Complaint ¶¶ 4, 136. Fiat alleges that competition authorities around the world have actively investigated Respondents and their co-conspirators' illegal conduct in the roll-on/roll-off cargo services market. 17-09 Fiat Complaint ¶ 20. The investigations by competition authorities in the United States, Canada, the European Union, China, Japan and South Africa resulted in criminal and enforcement actions against Respondents for which Respondents paid millions of dollars in fines and penalties. 16-01 OTI Complaint ¶¶ 65-80; 16-07 End-Payors Complaint ¶¶ 6-13; 16-10 Truck Dealer Complaint ¶¶ 126-140; 16-11 Auto Dealer Complaint ¶¶ 6-13; 17-09 Fiat Complaint ¶¶ 19-38.

On May 24, 2013, and August 30, 2013, respectively, the first purported indirect purchaser and direct purchaser complaints related to the alleged conspiracy in the vehicle carrier services industry were filed in a federal court. 16-01 OTI Complaint ¶ 81. These and related complaints in other federal courts were coordinated for all pretrial proceedings by the Judicial Panel on Multidistrict Litigation before the District of New Jersey under the caption *In re Vehicle Carrier Services Antitrust Litigation*, Master Docket No. 13-3306 (ES), MDL No. 2471 ("MDL Case"). 16-01 OTI Complaint ¶ 82.

On January 24, 2014, Respondents informed both the U.S. District Court for the District of New Jersey and Complainants that Respondents intended to move to dismiss the claims asserted in the Multidistrict Litigation "because the Federal Maritime Commission has exclusive jurisdiction [over the claims] under the Shipping Act." *See* Motion at 8 (Joint Status Letter, ECF No. 62 at 12 (Jan. 24, 2014)). On October 2014, Respondents served their motions to dismiss the consolidated class action complaints filed by Complainants in U.S. District Court; these motions argued that any claims by Complainants must be brought before the Commission under the Shipping Act.

On August 28, 2015, the U.S. District Court for the District of New Jersey dismissed with prejudice the complaints asserting federal antitrust claims brought by the direct purchaser

plaintiffs and the complaints asserting federal and state antitrust claims brought by the indirect purchaser plaintiffs in the MDL Case. *In re Vehicle Carrier Services. Antitrust Litigation,* No. 13-3306, 2015 U.S. Dist. LEXIS 114691 (D.N.J. Aug. 28, 2015). On January 18, 2017, the Third Circuit Court of Appeals affirmed the decision. *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71 (3rd Cir. 2017).

On September 2, 2015 – less than three years following the dawn raids and after the dismissal with prejudice of the federal court actions – General Motors LLC ("GM"), an OEM, filed a timely and public complaint before the Commission seeking reparations from NYK, WWL and EUKOR. FMC Docket No. 15-08 ("GM complaint"). This GM proceeding was stayed until confidential settlement agreements were approved with various Respondents, with the final settlement agreement approved on October 14, 2016. *General Motors LLC v. Nippon Yusen Kabushiki Kaisa; Wallenius Wilhelmsen Logistics AS; and Eukor Car Carriers Inc.*, 34 S.R.R. 7 (ALJ 2016) (stay); *General Motors LLC v. Nippon Yusen Kabushiki Kaisha; Wallenius Wilhelmsen Logistics AS; and Eukor Car Carriers Inc.*, 34 S.R.R. 390 (ALJ 2016) (final settlement agreement).

III. ANALYSIS

A. Relevant Law

1. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure ("Federal Rules") will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules 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.*, 33 S.R.R. 614, 620 (FMC 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011)).

The Commission explained:

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009). 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., 32 S.R.R. at 136.

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. The Commission explained:

> 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, 33 S.R.R. at 620-621 (citations omitted). The Commission has clearly indicated that federal caselaw interpreting Federal Rule 12(b)(6), including *Twombly* and *Iqbal*, continues to apply to motions to dismiss filed in Commission proceedings. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 55 (FMC 2015) (docket 12-02) (hereinafter "*Maher Terminals, 12-02*"); *Cornell*, 33 S.R.R. at 620; *Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136.

The Commission explained the process for evaluating 12(b)(6) motions to dismiss.

> The first step is typically to identify pleadings that are not entitled to the assumption of truth because they are legal conclusions. These conclusions can provide a framework, but they must be supported by factual allegations. The next step is to assume the truth of the well-pleaded factual allegations and determine "whether they plausibly give rise to an entitlement to relief."
>
> The factual allegations needed to reach plausibility will vary depending on the complexity of the case, "both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind, the dots should be connected." "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Maher Terminals, 12-02, 34 S.R.R. at 58 (citations omitted).

The focus at this stage is not with whether a complainant can prevail on its claim, but whether it has adequately pled the claim. *Negron v. USAA Casualty Ins. Co.*, 2014 U.S. Dist. Lexis 125179, at *5 (M.D. Tenn. 2014). "What *Twombly* and *Iqbal* teach is that where there are other plausible explanations, it is not sufficient to speculate in a complaint and particularly to base that speculation on no facts at all." *CIBA Vision Corp. v. De Spirito*, 2010 U.S. Dist. Lexis 11386, at *22-23 (N.D. Ga. 2010).

2. Relevant Shipping Act Provisions

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(19).

"The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16). To be an NVOCC, the entity must meet the Shipping Act's definition of "common carrier."

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The Shipping Act of 1984, under which Complainants in these proceedings filed their complaints, states "[i]f the complaint is filed within 3 years after the claim accrues, *the complainant* may seek reparations for an injury *to the complainant* caused by the violation." 46 U.S.C. § 41301(a) (emphasis added). The Shipping Act further states that the "Commission shall direct the payment of reparations *to the complainant* for actual injury caused by a violation of this part." 46 U.S.C. § 41305(b) (emphasis added).

3. Allegations in the complaints

Although there are slight variations, most of the Complainants allege six violations of the Shipping Act and one violation of Commission regulations. The complaints allege wide-ranging, serious allegations of Shipping Act violations impacting the transportation of new, assembled motor vehicles for a period of over fifteen years and potentially impacting millions of American consumers. Respondents deny these allegations.

First, Complainants allege that Respondents made agreements which they failed to file, in violation of filing requirements. 16-01 OTI Complaint ¶¶ 112-115; 16-07 End-Payors Complaint ¶¶ 207-208; 16-10 Truck Centers Complaint ¶¶ 184-185; 16-11 Auto Dealers Complaint ¶¶ 171-172; 17-09 Fiat Complaint ¶¶ 48-52. The section states:

> (a) In General.-A true copy of every agreement referred to in section 40301(a) or

> (b) of this title shall be filed with the Federal Maritime Commission. If the agreement is oral, a complete memorandum specifying in detail the substance of the agreement shall be filed.

46 U.S.C. § 40302(a).

Second, Complainants allege that Respondents violated regulations regarding operating under unfiled agreements. 16-01 OTI Complaint ¶ 116; 16-07 End-Payors Complaint ¶¶ 209-210; 16-10 Truck Centers Complaint ¶¶ 186-187; 16-11 Auto Dealers Complaint ¶¶ 173-174; 17-09 Fiat Complaint ¶¶ 53-54. The section states:

> (b) Operating Contrary to Agreement.-A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if - (1) the agreement has not become effective under section 40304 of this title or has been rejected, disapproved, or canceled; or (2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission.

46 U.S.C. § 41102(b).

Third, Complainants allege that Respondents violated regulations regarding unreasonable practices with international transportation. 16-01 OTI Complaint ¶ 118; 16-07 End-Payors Complaint ¶¶ 211-212; 16-10 Truck Centers Complaint ¶¶ 188-189; 16-11 Auto Dealers Complaint ¶¶ 175-176; 17-09 Fiat Complaint ¶¶ 55-56. This section states:

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

46 U.S.C. § 41102(c).

Fourth, Complainants allege that Respondents improperly disclosed information. 16-07 End-Payors Complaint ¶¶ 213-214; 16-10 Truck Centers Complaint ¶¶ 190-191; 16-11 Auto Dealers Complaint ¶¶ 177-178; 17-09 Fiat Complaint ¶¶ 57-59. The 16-01 OTI Complaint does not allege this violation. The section states:

> (a) Prohibition.-A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information - (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or (2) may improperly disclose its business transaction to a competitor.

46 U.S.C. § 41103(a).

Fifth, Complainants allege that Respondents allocated customers and refused to deal. 16-01 OTI Complaint ¶ 121; 16-07 End-Payors Complaint ¶¶ 215-216; 16-10 Truck Centers Complaint ¶¶ 192-193; 16-11 Auto Dealers Complaint ¶¶ 179-180; 17-09 Fiat Complaint ¶¶ 60-61. The sections state that a "common carrier, either alone or in conjunction with any other person, directly or indirectly, may not- . . . (10) unreasonably refuse to deal or negotiate." 46 U.S.C. § 41104(10).

Sixth, Complainants allege that Respondents engaged in concerted action. 16-01 OTI Complaint ¶¶ 119-120; 16-07 End-Payors Complaint ¶¶ 217-218; 16-10 Truck Centers Complaint ¶¶ 194-195; 16-11 Auto Dealers Complaint ¶¶ 181-182; 17-09 Fiat Complaint ¶¶ 62-64. The section states:

> A conference or group of two or more common carriers may not . . . (1) boycott or take any other concerted action resulting in an unreasonable refusal to deal, . . . [or] (6) allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is a party to the agreement from soliciting cargo from a particular shipper, except as - (A) authorized by section 40303(d) of this title; (B) required by the law of the United States or the importing or exporting country; or (C) agreed to by a shipper in a service contract.

46 U.S.C. § 41105(1), (6).

Seventh, Complainants allege that Respondents violated the Commission's regulations regarding the filing of agreements, alleging violations of 46 C.F.R. § 535.401 et seq. 16-01 OTI Complaint ¶ 117; 16-07 End-Payors Complaint ¶¶ 219-220; 16-10 Truck Centers Complaint ¶¶ 196-197; 16-11 Auto Dealers Complaint ¶¶ 183-184; 17-09 Fiat Complaint ¶¶ 65-66. The regulations mandate that all agreements be put in writing and filed with the Commission for review. The regulations also sets forth the general requirements for the filing of agreements, including *inter alia*, the number of copies of the agreement to be provided for paper agreements, instructions for filing electronic agreements, the required contents for agreements and the filing fees amount.

4. Waiver and Estoppel

The parties agree that the "doctrine of waiver requires a showing that there has been a 'voluntary, intentional relinquishment of a known right or privilege manifested either by express statement or by conduct which can only be reasonably considered consistent with such relinquishment.'" Opposition at 16; Reply at 7 (quoting *Port Authority of N.Y. v. N.Y. Shipping Ass'n.*, 22 S.R.R. 1329, 1346 (ALJ 1985), *adopted with modification* 23 S.R.R. 21 (FMC 1985)).

The Supreme Court has addressed when judicial estoppel should apply.

> "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." This rule, known as judicial estoppel, "generally prevents a party from prevailing in one

> phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."
>
> Although we have not had occasion to discuss the doctrine elaborately, other courts have uniformly recognized that its purpose is "to protect the integrity of the judicial process," by "prohibiting parties from deliberately changing positions according to the exigencies of the moment[.]" Because the rule is intended to prevent "improper use of judicial machinery," judicial estoppel "is an equitable doctrine invoked by a court at its discretion."
>
> Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 749-751 (2001) (citations omitted).

B. Issues

1. Class Actions

There are many procedural devices that the Commission uses to enhance efficiency in its proceedings, such as joinder of parties and consolidation of proceedings. Complainants ask the Commission to utilize class action procedures, including binding those who are "similarly situated" but who do not appear in the proceeding. As explained below, such class action procedures have never been used by the Commission, are not authorized by Congress, and it is not clear that class action procedures would be consistent with sound administrative practice.

The issue being decided at this point is not whether these particular cases meet the requirements of Federal Rule 23; rather, the issue is the separate question of whether the Commission has the authority to hear class actions at all. Although the undersigned finds that the Commission should not hear these class actions, in the event that the Commission could hear class actions, the Complainants would still need to demonstrate that they meet Federal Rule 23's requirements. This section does not apply to the 17-09 Fiat complaint, as Fiat is not seeking class action treatment.

a. Parties' Arguments

Respondents contend that the Commission lacks the statutory authority to hear class actions; class actions are not permitted under the Commission's rules and the Commission has not enacted regulations necessary to hear class actions; and a class action based on Commission Rule 12 is not sound administrative practice. Motion at 22-32. In their reply brief, Respondents argue that they have not waived any arguments and Complainants fail to establish that the Commission may or should hear class actions. Reply at 11-14.

Complainants assert that the Commission can – and should – adjudicate these matters as class proceedings; Respondents should be judicially estopped from arguing that class proceedings are barred before the Commission; multiple authorities have recognized that the Commission may hear and adjudicate class claims; the Commission's "gap-filler rule," Commission Rule 12, allows the Commission to apply Federal Rule 23; adoption of class action procedures is "consistent with sound administrative practice;" Federal Rule 23 does not conflict with any Commission rule; the Commission can adopt class action procedures even without relying on the gap-filler rule just as other administrative agencies have done in similar situations; administrative agencies are encouraged to develop aggregation procedures, including class action procedures; other administrative agencies have adopted class action procedures; and the Commission can implement class action procedures in the present matter without additional rulemaking. Opposition at 34-45.

b. Class Action Proceedings

Complainants filed the four 2016 proceedings, dockets 16-01, 16-07, 16-10, and 16-11, as putative class actions. The Commission does not have a Rule of Practice and Procedure authorizing class action complaints. Complainants rely on Commission Rule 12 and Federal Rule 23 as the basis for the Commission's authority to entertain a class action case. Commission Rule 12 states: "[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Federal Rule of Civil Procedure 23 governs class actions in the federal courts.

A class action case is an exception to the rule that a judgment binds only parties to that case, as it binds those who are not before the court and have not participated in the litigation.

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires.
>
> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or

> "representative" suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it.

Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) (citations omitted).

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)); 5-23 Moore's Federal Practice – Civil § 23.02 (3 Ed. 2010) ("Fairness and due process concerns make litigation by and against named parties the normal rule and litigation by or against a class the exception to the normal rule."). The class action suit is a procedural device for joining parties. *See, e.g., Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1454 (E.D. Pa. 1995); 5-23 Moore's Federal Practice – Civil § 23.02. "A class action is 'a multiple joinder device, permitting the litigation, in one single action, of multiple claims involving similar or identical questions of law and fact, usually arising from the same set of operative facts.'" *Eyak Native Village v. Exxon Corp*., 25 F.3d 773, 781 (9th Cir. 1994) (quoting *Lesch v. Chicago & Eastern Illinois R.R. Co.*, 279 F. Supp. 908, 911 (N.D. Ill. 1968)); 5-23 Moore's Federal Practice – Civil § 23.02.

> . . . Rules allowing multiple claims (and claims by or against multiple parties) to be litigated together are also valid. *See, e.g.*, Fed. Rules Civ. Proc. 18 (joinder of claims), 20 (joinder of parties), 42(a) (consolidation of actions). Such Rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed. For the same reason, Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action – falls within § 2072(b)'s authorization. A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

"Class actions may not be maintained under Rule 23, however, when Rule 23's procedures are inconsistent with the substantive statute under which the action is brought or when the substantive statute provides an alternative means for obtaining class or group relief." 5-23 Moore's Federal Practice – Civil § 23.04; *see also La Chapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975) (finding that a class action was inappropriate in a proceeding in which there was "a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA § 16(b)"). As discussed below and in the standing section, it does not appear that the Shipping Act authorizes the Commission to entertain class action cases brought by private parties.

c. Waiver and Estoppel

Complainants contend that Respondents should not be allowed to object to class treatment based on waiver and estoppel. Complainants state:

> Respondents' position that this Commission is not able to adjudicate class claims is directly contrary to the argument they have successfully made to other judicial bodies. Respondents repeatedly argued that the same class claims that Complainants present here should in fact be heard here before the Commission. For brevity, Complainants incorporate by reference their earlier arguments in sections II.A and B explaining why Respondents' shifting positions constitute a waiver and judicial estoppel of their standing defenses. Complainants' arguments apply with equal force to Respondents' claims that the Commission cannot adjudicate claims on a class-wide basis.
>
> Further, a finding of waiver or judicial estoppel is necessary and warranted because several Respondents cited expectation of liability in these class action as a reason to reduce the criminal penalties imposed by government regulators. Most of the Respondents in the current proceeding were criminally charged by the Department of Justice. Those same Respondents pleaded guilty. Though fines were assessed in connection with those guilty pleas, no restitution for the victims was ordered. The exclusion of such restitution was expressly based on "the civil cases filed against the defendant[s] which potentially provide for a recovery of a multiple of actual damages." *See, e.g.*, NYK Line Sentencing Agreement, Ex. D at ¶9(b). Those civil cases were, of course, Complainants' class action claims. To now allow Respondents to avoid all civil damages liability would grant them an undeserved windfall and violate the spirit of their plea agreements with the government.
>
> Respondents therefore waived and should be judicially estopped from now taking the inconsistent position that the Commission is precluded from hearing class claims.

Opposition at 35-36.

> Respondents respond:
>
> Complainants assert that Respondents waived the argument that class actions are unavailable "because they took the exact opposite position before the district court and Third Circuit." That is simply and patently untrue. Respondents never indicated that the Commission could hear class actions, and, as explained above, Respondents expressly reserved their defenses before the Commission. Tellingly, Complainants fail to note that the only time the subject of class actions arose in the Third Circuit argument was when the court asked counsel for Complainants whether "a class action approach may be available" in the Commission, and he candidly admitted that this was an open question. The Third Circuit's ruling did not in any way rely on the availability of class actions before the Commission and, in any event, statutory authority to hear class claims depends on Congress and cannot be manufactured by waiver or actions of the parties.

Reply at 11 (citation omitted).

The question of the availability of class actions at the Commission was brought up by Complainants' counsel during the Third Circuit oral argument.

> Mr. Kilsheimer: … [T]hey announced that they're going to move to dismiss our cases before the FMC and I believe they're going to oppose any class action treatment before the FMC, so that the victims of the conspiracy, the admitted conspiracy, are facing the prospect of no recovery whatsoever.
>
> The Court: But at least one District Court opinion suggests that because the FMC follows the federal – the civil procedure in many ways, that class action – a class action approach may be available. Are you familiar with that?
>
> Mr. Kilsheimner: I am, your Honor, and in fact the FMC did inquire of counsel about that subject, about [whether] class is available. I believe there [were] letters that were submitted, but there's been no decision on that, there's been no full briefing on that and we are effectively subject to the stay.

Opposition Exhibit A (Transcript pages 14-15). It should be noted that this was a discussion between Complainants' counsel and the court, not a statement by Respondents' counsel.

Complainants' counsel made the Third Circuit aware that Respondents might oppose class action treatment at the Commission, that the issue had been raised, and that no decision had been issued. The Third Circuit did not address the availability of class actions at the Commission in its ruling. *In Re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71 (3rd Cir. 2017). The cited comments by Complainants' counsel and the court do not demonstrate a voluntary, intentional relinquishment of a known right by Respondents. Regarding judicial estoppel, Respondents' current arguments are not clearly inconsistent with their earlier position, it is not clear that the federal courts accepted an earlier inconsistent position, and there is no showing of an unfair advantage or unfair detriment to the opposing party. Waiver and judicial estoppel do not apply.

In settling the criminal and regulatory actions, Respondents paid fines and penalties to the government for violations but did not pay any restitution. The Complainants argue that to "allow Respondents to avoid all civil damages liability would grant them an undeserved windfall and violate the spirit of their plea agreements with the government" and that "Complainants who bore the costs of Respondents' violations of the Shipping Act would be barred from recovery while Respondents would be granted an unjust windfall." Opposition at 29, 36. However, a finding that class actions cannot be heard by the Commission does not mean that Respondents will avoid all civil damages liability. Rather, it means that Respondents would only face liability from Complainants named in Commission proceedings. And, as discussed in the section on standing, while some Complainants, such as indirect purchasers, may not be able to recover reparations, other Complainants, including direct purchasers or those parties who directly suffer actual injury, may be able to proceed before the Commission. Indeed, this is not theoretical as General Motors filed a timely complaint and settled its claim against many of these Respondents.

d. Discussion

i. The Commission Has Not Previously Held That It Has Jurisdiction to Entertain a Class Action Proceeding

The parties have not identified any class actions that have been heard by the Commission. The Shipping Act does not mention "class actions," actions on behalf of others "similarly situated," suits by "representatives," or the power to bind non-parties. However, there have been two cases which discussed class actions and suggested they might be available in Commission proceedings, although those comments were *dicta*, not necessary to the ultimate decisions in those cases. As discussed more fully below, the Commission has not held that it has authority to hear class actions brought by private parties.

Complainants assert that the Commission and federal courts "have found that the Commission has the ability to hear class action complaints," relying on the Commission's decision in *Mar-Mol*. Opposition at 36-37 (citing *Mar-Mol Co. and CopyCorp. v. Sea-Land Service, Inc.*, 27 S.R.R. 1085, 1090 (FMC 1997) ("*Mar-Mol"*)). Respondents reply argues that:

> Complainants also misleadingly cite several cases as having "found" that class actions are available before the Commission. As noted, no such "finding" was made in any of the cases on which Complainants rely: the availability of class actions was not squarely presented for decision in any of those cases. Nothwithstanding *dicta* on class actions, the Commission denied Mar-Mol's claim for an order of restitution on behalf of others because "[t]he Act authorizes an award of reparations only to complainants, not to non-parties."

Reply at 12 (citing *Mar-Mol*, 27 S.R.R. at 1089).

Mar-Mol relied on district court and circuit court opinions in *Gov't of Guam v. American President Lines, Ltd*., 809 F. Supp. 150 (D.D.C. 1993), *aff'd*, 28 F.3d 142 (D.C. Cir. 1994). The comments of the courts in *Gov't of Guam v. American President Lines* and of the Commission in *Mar-Mol* were dicta as they were unnecessary to the decision in the cases and therefore not precedential.

In *Mar-Mol*, the Administrative Law Judge found that Sea-Land violated section 18(a) of the Shipping Act, 1916 by collecting a "license tax" from shippers that Sea-Land did not have to pay and that Sea-Land did not remit to Puerto Rico, the taxing authority. Mar-Mol and CopyCorp sought a reparation award for themselves and also sought a reparation award for non-parties damaged by Sea-Land's alleged violations. After finding that Sea-Land violated the Shipping Act, the judge held in abeyance the question of restitution for non-parties damaged by Sea-Land's violations. *Mar-Mol*, 27 S.R.R. at 1086.

Sea-Land filed exceptions and the Commission held that Sea-Land violated section 18(a). *Mar-Mol*, 27 S.R.R. at 1089. Regarding reparations for non-parties, the Commission stated:

> Mar-Mol seeks an "order of general restitution" as a means of reimbursing all shippers charged the license tax by Sea-Land. Sea-Land argues that this is beyond the scope of the FMC's jurisdiction, and that it is an attempt to turn the

proceeding into a *de facto* class action. The ALJ decided to hold in abeyance the issue of restitution to non-parties, after having given Sea-Land the opportunity to voluntarily submit a restitution plan and avoid any further litigation, which opportunity Sea-Land chose not to utilize.

Mar-Mol cites *Merger Agreement – U.S. Lines, Inc.*, 16 F.M.C. 134 [13 S.R.R. 587] (1973), for the proposition that the Commission has the tools to fashion whatever remedy is appropriate, and that in this case the appropriate remedy is an order of general restitution. *Merger Agreement* was a case addressing whether the FMC has jurisdiction over mergers. The Commission, citing *California v. U.S.*, 320 U.S. 577, 584 (1944), stated that it has the authority to "devise the appropriate remedy for the situation in which the terms of a merger approval are violated. . . ." *Merger Agreement*, 16 F.M.C. at 196-197. This does not mean as a general matter that the FMC has the authority to impose whatever equitable remedy it feels is appropriate, regardless of statutory constraints. In the *California* case, the Court stated, "the Maritime Commission . . . may, *within the general framework of the Shipping Act*, fashion the tools" necessary for remedial action. 320 U.S. at 584 (emphasis added). The Act itself specifically states, at section 22, that the FMC "may direct the payment, on or before a day named, of full reparation *to the complainant* for the injury caused by such violation." (emphasis added). The Act authorizes an award of reparations only to complainants, not to non-parties. *Merger Agreement* does not support the proposition that the FMC may issue an order of general restitution in this case.

Mar-Mol cites *Interstate Commerce Commission v. B&T Transportation Co.*, 613 F.2d 1182 (1st Cir. 1980), for the notion that the FMC can order Sea-Land to make full restitution to all shippers from whom it obtained funds under the unreasonable charge. Mar-Mol's reliance on the *B&T* opinion is misplaced. The case involved an action brought by the ICC, not a private party, in which the ICC sought equitable restitution for shippers injured by an unfiled tariff. The appeals court in *B&T* held that the district court could entertain the ICC's argument that equitable restitution was appropriate. *Id.* at 1186.

The complaint brought by Mar-Mol is a private dispute, and the FMC itself has not taken any action against Sea-Land in this case. A private dispute between two parties adjudicated before the FMC is not analogous to an enforcement action initiated by the Commission. Therefore, *B&T* cannot be employed to argue that an order of general restitution is appropriate. The appropriate remedy in this case is a reparations award granted to the Complainant alone.

Finding that an order of general restitution cannot be issued in this case does not deprive anyone of remedies. Other interested parties could have joined Mar-Mol's suit, or initiated one of their own, as the court in *Government of Guam v. American President Lines, Ltd.* made clear:

> [P]otential class members do have an effective remedy: they can file a complaint with the Commission, where it will, for aught that appears, be consolidated with the other complaints in the FMC proceeding.

Government of Guam v. American President Lines, 809 F. Supp. at 155. Furthermore, had it chosen to do so, Mar-Mol could have brought a class action before the Commission:

> The district court suggested to appellants' counsel that there could be representation of other shippers by appellants' counsel, and that equitable and other remedies could be a part of the administrative proceedings [before the FMC], including requesting that the Guam shippers be certified as a class before the administrative agency. Noting that appellants' counsel had not asked the administrative agency for class relief, the district court observed that although the agency rules were silent on class relief, there was nothing to prohibit it.

Government of Guam v. American President Lines, 28 F.3d 142, 148 [n.5] (DC Cir. 1994). Rule 23 of the Federal Rules of Civil Procedure provides the mechanism by which a class action can be undertaken. Furthermore, Commission procedural rules do not preclude litigants using the class action Rule:

> In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.

46 C.F.R. § 502.12. If Mar-Mol had wanted to bring a class action against Sea-Land, the necessary tools were there. The Commission therefore holds that an order of general restitution will not be issued in this case. It is not appropriate at this final stage of the proceeding to change the nature of the case and let it become a *de facto* class action.

Mar-Mol, 27 S.R.R. at 1089-1090. The statement that Mar-Mol could have brought a class action was *dicta* that was unnecessary to its decision that it was not appropriate to permit a change in the nature of the case to a class action at that point in the litigation.

Perhaps more importantly, the Commission in *Mar-Mol* found that the Shipping Act "authorizes an award of reparation only to complainants, not to non-parties." *Mar-Mol*, 27 S.R.R. at 1089. The Commission also noted that remedies available in enforcement proceedings were not necessarily available in private party proceedings. This issue is addressed more fully in the standing section.

In *Gov't of Guam v. American President Lines*, on December 7, 1989, Guam and other shippers filed a complaint with the Commission alleging that shipping rates charged by two VOCCs for transportation between the United States and Guam violated the Shipping Act of

1916 and the Intercoastal Shipping Act. *Inter alia*, Guam sought reparations on behalf of all similarly situated Guam shippers under a *parens patriae* theory. On March 9, 1990, the Administrative Law Judge dismissed this portion of the complaint, relying on Commission decisions holding that reparations may be awarded only to those who have actually paid unreasonable rates unless there has been a valid assignment from one with a legal right to reparations. *Gov't of Guam v. Sea-Land Service, Inc.*, 25 S.R.R. 842 (ALJ 1990); *Gov't of Guam v. American President Lines*, 809 F. Supp. at 151-152 (parallel proceeding).

On March 10, 1992, Guam filed a virtually identical complaint in the district court with the purpose of tolling the statute of limitations for the Guam shippers that had allegedly been injured by the unlawful shipping rates. Guam also moved in the district court for certification of a class consisting of shippers and persons who have dispatched or received shipments into or out of Guam via the defendant carriers and at the same time, moved for a stay of the district court proceedings pending the Commission's determination in the parallel administrative proceeding. Guam conceded that the Commission had the task of resolving the merits of the dispute and called on the court essentially to preserve, and ultimately to administer, the claims of the class. *Gov't of Guam v. American President Lines*, 809 F. Supp. at 151-152.

The case was before the district court on the VOCC's motion to dismiss for lack of subject matter jurisdiction. Guam conceded that the Shipping Act created an express right of action for reparations for rate violations in the Commission, but did not create a right of action in the district court. Guam argued that the court should infer that the Shipping Act created a private right of action in the court. As one of its grounds, Guam argued that the Administrative Law Judge's dismissal of the complaint for reparations on behalf of all similarly situated Guam shippers in the Commission proceeding indicated that "the Commission lacks a class action procedure." The court stated:

> Plaintiffs insist that the Commission remedy has inherent procedural limitations, as evidenced by the rejection of Guam's *parens patriae* theory of recovery for the entire class. The rejection of Guam's *parens patriae* theory is subject to review in the Court of Appeals. It may also be noteworthy that the rejection of Guam's theory appears to have been based on substantive, not procedural, rulings by the Commission. Thus, to the extent that the Commission's ruling on this issue proves to be correct on appeal, the ruling simply shows the scope and nature of the remedy provided by Congress under the Shipping Act. *This serves to emphasize again that the unique remedy of a Commission complaint for reparations, although it may have its limitations, is the remedy that Congress expressly provided in the statute.*

Gov't of Guam v. American President Lines, 809 F. Supp. at 155 (emphasis added). The court dismissed the complaint for lack of subject matter jurisdiction. *Gov't of Guam v. American President Lines*, 809 F. Supp. at 155.

On appeal, Guam contended "that the district court erred by not inferring an implied private civil action under the Shipping Acts, and by not allowing appellants an opportunity to amend the complaint." *Government of Guam v. American President Lines*, 28 F.3d at 144. Guam argued that the administrative remedy before the Commission was inadequate in part because of

"the unavailability of class action or *parens patriae* administrative procedures." *Gov't of Guam v. American President Lines*, 28 F.3d at 148. The court stated:

> Whether procedural inadequacies exist in the administrative proceeding can be addressed on appeal from a final order of the Federal Maritime Commission, as appellants acknowledge. Further, as appellants' colloquy with the district court regarding the possibility of a class action before the Commission makes clear, their contention that the remedies under the Shipping Acts are unavailable to the Guam shippers is still to be demonstrated. Indeed, were there evidence that the administrative proceedings could not adapt to what appellants characterize as a proceeding that is unique in scope, such considerations would not overcome the absence of evidence that Congress intended to imply the existence of a private protective cause of action in anticipation of a favorable administrative ruling on behalf of a class.

Gov't of Guam v. American President Lines, 28 F.3d at 148 (footnote omitted). In the footnote, the court stated:

> The district court suggested to appellants' counsel that there could be representation of other shippers by appellants' counsel, and that equitable and other remedies could be a part of the administrative proceedings, including requesting that the Guam shippers be certified as a class before the administrative agency. Noting that appellants' counsel had not asked the administrative agency for class relief, the district court observed that although the agency rules were silent on class relief, there was nothing to prohibit it. Appellants' counsel did not dispute that these possibilities could be pursued in the administrative proceedings, but counsel focused on the burden of notifying all Guam shippers in addition to the three points noted in the text of this opinion. In their brief on appeal, appellants acknowledge the possibility of assignment of claims.

Gov't of Guam v. American President Lines, 28 F.3d at 148 n.5. The court affirmed the dismissal for lack of subject matter jurisdiction. *Gov't of Guam v. American President Lines*, 28 F.3d at 149. The court recognized that unavailability of class relief in a Commission proceeding was "still to be demonstrated," but unavailability of class relief "would not overcome the absence of evidence that Congress intended to imply the existence of a private protective cause of action" in the district court. The court of appeals did not hold that the Commission could entertain class action proceedings, a holding that was unnecessary to its decision that the district court did not have jurisdiction over claims for reparations for violations of the Shipping Act.

At least one court, discussing *Gov't of Guam v. American President Lines*, thought that class actions would not be available. "The shippers sought to continue the court action in order to preserve ultimate claims of a class, claims which the FMC could not hear." *Puerto Rico Maritime Shipping Auth. v. FMC*, 75 F.3d 63, 67 n.3 (1st Cir. 1996). Commentators have suggested that courts hearing class actions should "consider the underlying substantive rules and remedial regimes at stake." J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. Pa. L. Rev. 1625, at 1627 (2017). Given the Shipping Act's limitation of reparation awards to named complainants, discussed in the standing section, a class action would

be a dramatic broadening of the size and scope of Commission proceedings. Although class actions have been mentioned in a few Commission cases, the viability of such an action has never been determined. No case has proceeded as a class action at the Federal Maritime Commission. Therefore, Commission caselaw does not clearly answer the question of whether class actions are available. It is helpful to consider how the issue is treated by federal courts and agencies.

ii. Federal Courts and Agencies

The authority for federal courts to hear and decide class action lawsuits originated in the equity power of the courts.

> The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction, or because their whereabouts is unknown, or where, if all were made parties to the suit, its continued abatement by the death of some would prevent or unduly delay a decree. In such cases, where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

Hansberry v. Lee, 311 U.S. at 41-43 (citations omitted). The Commission "is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress." *Trans-Pacific Freight Conference of Japan v. FMB*, 302 F.2d 875, 880 (D.C. Cir. 1962).

Jurisdiction for the federal district courts to hear class action lawsuits is now affirmatively established by the Class Action Fairness Act, although nothing in this Act suggests it applies to federal agencies. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (Feb. 18, 2005). "The purposes of this Act are to–(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for *Federal court* consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b), 118 Stat. at 5 (emphasis added). Federal Rule 23 has provided the procedure governing class action lawsuits in the district courts before and after enactment of the Class Action Fairness Act. It establishes rules to guide the court when considering prerequisites for a class, types of class actions, defining the class, appointment of class counsel, notice to class members, judgment, settlement, appeals, and attorney fees. Federal Rule 23.

Even in federal court, class actions are appropriate only where substantively supported.

> We therefore follow the path taken by the Court of Appeals, mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). *See also* Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend . . . the [subject matter] jurisdiction of the United States district courts").

Amchem Prods. v. Windsor, 521 U.S. 591, 612-613 (1997).

The Administrative Conference of the United States ("ACUS") recommended that administrative agencies adopt procedures to encourage formal and informal aggregation. *Adoption of Recommendations*, 81 Fed. Reg. 40259 (June 21, 2016) (Aggregation of Similar Claims in Agency Adjudication) ("ACUS Recommendation"); *see also* Supp. App. at Ra0396 (ACUS, *Final Report: Aggregate Agency Adjudication*) ("ACUS Report"). Aggregation procedures range from consolidating cases to class actions. A number of the recommended aggregation procedures have been utilized in the cases *sub judice*, including assigning the cases to the same adjudicator, consolidating them for motions, and utilizing other complex litigation practices.

The ACUS Recommendation states that while the Administrative Procedure Act does not expressly provide for aggregation procedures, it also does not foreclose their use, and that "administrative agencies often enjoy broad discretion, *pursuant to their organic statutes*, to craft procedures they deem 'necessary and appropriate' to adjudicate the cases and claims that come before them." 81 Fed. Reg. at 40260 (emphasis added). There are over seventy agencies with aggregation rules from consolidation to class action, however, only seven agencies have class actions rules and five of those seven agencies did not have any reported cases utilizing class actions. Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1657-89 (2017). "A number of other agencies have formally considered, and rejected, class action procedures, reasoning that they lack the capacity, authority, or good reason to do so." ACUS Report at 31.

The ACUS Report mentions these specific cases before the Commission but does not specifically state that a class action is appropriate in these cases and does not analyze whether or not class actions are appropriate under the Shipping Act. ACUS Report at 59, n.240.

Complainant cites *Kurtz v. Kimberly-Clark Corp.*, which cited the ACUS Report and encouraged the parties to explore aggregate agency adjudication of their claims regarding flushable wipes with the Federal Trade Commission ("FTC"). *Kurtz v. Kimberly-Clark Corp.*, 315 F.R.D. 157, 159 (E.D.N.Y. 2016). The FTC, however, hears only enforcement cases brought by the FTC Commission and the FTC Commission declined to pursue an enforcement action for flushable wipes. *See* http://www.law360.com/articles/818144/ftc-frees-kimberly-clark-from-false-ad-case-co-says. Specifically, the FTC stated that "it cannot engage in 'aggregate adjudication' of claims, due to its administrative design." *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 495 (E.D.N.Y. 2017).

"Many administrative agencies are statutorily authorized to bring enforcement actions to vindicate the public interest. Courts have consistently held that government enforcement actions

do not need to comply with Rule 23 even though they affect groups of individuals." 5-23 Moore's Federal Practice – Civil § 23.04; *see, e.g.*, *General Tel. Co. v. EEOC*, 446 U.S. 318, 323 (1980) ("Rule 23 is not applicable to an enforcement action brought by the EEOC in its own name and pursuant to its authority."). Critically, these EEOC actions do not bind absent parties. *General Tel. Co. v. EEOC*, 446 U.S. at 333 ("we are unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgement or settlement against the employer." "We do no more than follow a straightforward reading of the statute." *General Tel. Co. v. EEOC*, 446 U.S. at 324 (finding that the EEOC was authorized to sue in its own name to obtain relief for a class of people). The proceedings at issue here, however, are not enforcement actions brought by the Commission's Bureau of Enforcement but rather private party proceedings.

Congress has given specific agencies the express power to hear class actions. For example, Congress granted the Commodity Futures Trading Commission ("CFTC") the power to hear cases brought on behalf of "other persons similarly situated, if the [CFTC] permits such actions pursuant to a final rule issued by the [CFTC]." 7 U.S.C. § 18(a)(2)(A). Similarly, the Consumer Product Safety Commission has statutory authority to preside over hearings in which "a class of participants who share an identity of interest" participate "through a single representative." 15 U.S.C. § 2064(f)(1). Congress has not provided such express authority to the Commission and the Commission has not issued any rules authorizing class action proceedings.

The United States Court of Claims, an Article I court created by statute, found it had the right to adjudicate class actions but declined to do so. *Quinault Allottee Assoc. v. United States*, 453 F.2d 1272, 1274 (Ct. Cl. 1972). The court in *Quinault* specifically noted that "binding absent members of the class" has evoked controversy. *Quinault,* 453 F.2d at 1275. Subsequently, the Court of Claims became the Court of Federal Claims and adopted class action rules that did not bind non-parties. Under the Court of Federal Claims rules, "in order to become a class member, an individual must affirmatively respond to a Rule 23(c)(2) notice to 'opt in' by requesting inclusion in the action. *See* USCS Claims Ct. Rule 23(c)(2) and (3). Under the [Federal Rules], all members of a class are included in the action and are bound by the judgment unless they 'opt out' by affirmatively requesting exclusion. *See* FRCP 23(c)(2) and (3)." *Bright v. United States*, 603 F.3d 1273, 1277 n.1 (Fed. Cir. 2010).

Congress has not specifically given the Commission the authority to hear class action proceedings and the Commission has not adopted any rules authorizing class action proceedings. Given the significant impacts of permitting class action proceedings, Respondents suggest that "the Administrative Procedure Act and sound administrative practice require that a rule on class actions be promulgated through standard notice and comment procedures." Motion at 31. It is not clear that class action procedures are consistent with sound administrative practice, and, if they were to be adopted, it may be advisable to adopt them through rulemaking. In these cases, it would not be consistent with sound administrative procedure to bind those who do not appear in the proceeding.

e. Conclusion

Given the decision in the standing section, it may not be necessary to reach this issue. However, in the event it is necessary to decide this issue in these cases, the undersigned would not permit these class actions to proceed and bind those who do not appear in the proceeding, as this would be a significant deviation from prior Commission jurisprudence, would significantly expand the Commissions' jurisdiction and reach, and is not explicitly authorized by the Shipping Act or any other statute. This is a ruling regarding whether Commission Rule 12 can be used to apply Federal Rule 23. This is not a ruling under Federal Rule 23 of whether these particular Complainants meet the class certification requirements.

Although several cases have suggested that the Commission may hear class actions, no case has decided the issue squarely. On the other hand, several cases have held that the Commission may award reparations only to named parties. *See Gov't of Guam v. Sea-Land*, 25 S.R.R. at 842; *Mar-Mol*, 27 S.R.R. at 1090; *Guam v. Pacific Far East Line, Inc.*, 7 S.R.R. 167, 168 (ALJ 1966). Congress has not specifically granted to the Commission the power to issue a ruling in private cases that would bind persons who are not parties to the proceeding and have not participated in the litigation. Given the question of whether the Commission has the jurisdiction to bind non-parties and the lack of rulemaking regarding class actions, there is no reason to depart from the clear holdings that the Commission may award reparations only to named parties.

While the Complainants *sub judice* are concerned that this will deny justice to non-parties, as the Commission said in *Mar-Mol*, "'potential class members do have an effective remedy: they can file a complaint with the Commission, where it will, for aught that appears, be consolidated with the other complaints in the FMC proceeding.'" *Mar-Mol*, 27 S.R.R. at 1090 (quoting *Gov't of Guam v. American President Lines*, 809 F. Supp. at 155).

As a practical matter, Commission rules were not written with class actions in mind. For example, under the Coble Act, prevailing parties may be eligible for attorneys' fees. 46 U.S.C. § 41305(e). If Respondents prevailed and were entitled to attorneys' fees, it is not clear who would be responsible for payment of those attorneys' fees. *See Lankhorst v. Indep. Sav. Plan Co.*, 2015 U.S. Dist. LEXIS 130283, at *32 (M.D. Fla. Sep. 28, 2015).

If, as a jurisdictional matter, the Commission has the power to bind those similarly situated, then the procedures of Federal Rule 23 would be appropriate to utilize via Commission Rule 12. However, Commission Rule 12 cannot be used to expand the Commission's jurisdiction by reference to the Federal Rules.

2. Standing to Seek Reparations

Like many products, automobiles go through steps on their way from manufacturer to consumer. For example, one could imagine a scenario where a 17-09 Fiat vehicle is manufactured, then a 16-01 OTI arranges for the vehicle to be transported to a 16-10 or 16-11 dealer who subsequently sells the vehicle to a 16-07 consumer. If entities at each step the vehicle passed through could seek reparations, Respondents could be subject to liability multiple times for the transportation of the same vehicle. Traditionally, the Commission has avoided this issue

by limiting recovery of reparations to direct purchasers. The argument for indirect purchaser standing is that charges can be passed on, for example a manufacturer may pass on charges to a dealer, who then passes on charges to the ultimate consumer. As explained below, there is no compelling reason to deviate from Commission practice which limits standing to seek reparations for a violation of the Shipping Act to parties who suffer an actual injury.

The Commission has a long history of limiting recovery of reparations to parties who directly suffer actual injury. This approach is consistent with federal antitrust decisions and eliminates the need to apportion damages between different classes of complainants, which would require determining not only the Complainants' relationships with the Respondents, but also the Complainants' relationships with each other. This section focuses on standing to seek reparations. Standing to seek cease and desist orders does not require demonstrating an actual injury.

Two cases are alleged to involve direct purchasers who suffered actual injury. The 16-01 OTI Complainants claim that they are direct purchasers, although their position is contested. In 17-09, Fiat contends that it is a direct purchaser, although this position is contested on slightly different grounds. After reviewing the parties' arguments, waiver and estoppel, the federal direct purchaser rule, and the indirect purchasers, the direct purchasers will be discussed.

a. Parties' Arguments

Respondents claim that all of the 2016 Complainants lack standing to seek reparations; only direct purchasers have standing to seek reparations under the Shipping Act and the complaints do not establish that the 2016 Complainants are direct purchasers; and the 2016 Complainants are indirect purchasers who lack standing. Motion at 33-42. Respondents further contend that Complainants' waiver and estoppel arguments lack merit; the indirect purchaser Complainants lack standing; and the 16-01 OTI Complainants lack standing. Reply at 6-10. In their supplemental motion, Respondents assert that Fiat also lacks standing to seek reparations. Supp. Mot. at 17-18.

Complainants assert that all Complainants have standing to pursue all claims under the Shipping Act; Respondents waived the right to argue that Complainants lack standing; Respondents should be judicially estopped from arguing that Complainants lack standing; all Complainants have standing to seek reparations for violations of the Shipping Act – irrespective of whether they directly purchased services from Respondents – because the Act gives any person standing to file a complaint; the direct purchaser Complainants have validly pleaded that they are direct purchasers of vehicle carrier services from Respondents; and the supposedly narrow direct purchaser rule Respondents assert does not preclude indirect purchasers from pursuing their claims before the Commission. Opposition at 16-25. Fiat asserts that Respondents have not identified a fatal pleading flaw and that they have standing to pursue their claims. Supp. Opp. at 12-13.

b. Waiver and Estoppel

Complainants assert that waiver and judicial estoppel should prevent Respondents' right to contest Complainants' standing and ability to seek reparations, stating:

The Commission should find that Respondents waived their right to contest Complainants' standing and ability to seek reparations. During oral argument, the Third Circuit expressed concern that preempting Complainants' state-law claims would leave consumers without redress for the damages that Respondents' conspiracy had inflicted. To allay those concerns and convince the court that Complainants had an adequate remedy, counsel for Respondents emphasized that [Complainants] would face no obstacle to bringing their claims under the Shipping Act and before the Commission. In fact, Respondents represented that Complainants have standing to seek reparations under the Shipping Act before the Commission.

> [T]his statute creates a specific forum, a specific cause of action, and a specific set of remedies for anyone who was aggrieved. So Congress has created a place where these people [Complainants] can go, a cause of action – and that's the FMC – a cause of action that they can allege – which is an action for reparations.

Tr. of Oral Arg. before 3rd Cir., Ex. A[5] at 41, *In re: Vehicle Carrier Servs. Antitrust Litig.*, No. 15-3353 (3rd Cir. Nov. 17, 2016) (hereafter "3rd Cir. Oral Arg.").

Counsel for Respondents was asked directly by the Court whether Respondents were "going to suggest as the FMC lacks the authority to adjudicate the dispute." 3rd Cir. Oral Arg., Ex. A at 31. Respondents' counsel replied "No, we're not going to suggest that they lack the authority to adjudicate disputes of the type alleged in the complaint." 3rd Cir. Oral Arg., Ex. A at 31.

Further, Respondents represented in their briefing to the Third Circuit that Complainants can seek "reparations before the FMC":

> The district court "emphasize[d] that the putative class members can seek relief before the FMC, 46 U.S.C. § 41301(a), and then bring actions in district court as appropriate and consistent with Congress's full intent[.]" Ibid. (citations omitted).
>
> . . . .
>
> [I]n lieu of any Clayton Act claim, *the Shipping Act provides a clear private remedy for operating under an agreement that has not become effective or for other violations of the Shipping Act: a complaint for reparations before the FMC. 46 U.S.C. § 41301. As the district court explained, the FMC* "possesses power not unlike a district court" and may award up to double actual damages. JA51-52 (holding that, "while no private party may sue for damages or for injunctive relief under the

[5] Exhibit citations in this quote are from the Exhibits to the Opposition.

> antitrust laws for conduct [prohibited by the Shipping Act], *the FMC is empowered to order reparations*, including double damages, to impose sanctions and penalties for prohibited conduct") (quoting *A & E Pac. Const. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 71 (9th Cir. 1989)).

See Respondents' Consolidated Supplemental Brief to Third Circuit, *In re: Vehicle Carrier Services Antitrust Litig*., No. 15-3353 (Aug. 8, 2016), Ex. B at 9, 20.

Similarly, before the district court, Respondents argued that the Commission did not present obstacles to Complainants' recovery, stating that "*any person* can file a complaint before the FMC *and obtain reparations* for injuries caused by violations of the Act." Tr. of Oral Arg. before District Court, Ex. C at 16, *In re Vehicle Carrier Services Antitrust Litig.*, No. 13-3306 (D.N.J. July 23, 2015) (hereafter "D.N.J. Oral Arg.").

The representation that "we're not going to suggest that [Complainants] lack authority to adjudicate disputes of the type alleged in the complaint" and similar representations were not mere offhand comments on a side-issue. Respondents' positions and multiple representations to the federal courts unambiguously constitute waiver – a knowing relinquishment of the option of arguing the contrary in this FMC proceeding. Respondent[']s arguments to the federal courts should foreclose any contrary arguments in these proceedings.

Opposition at 16-17 (footnotes omitted) (emphasis in original).

Respondents assert:

> Complainants argue that Respondents either waived their right to contest standing, or they should be judicially estopped from doing so. In support, Complainants quote selectively from statements made by Respondents' counsel to the U.S. Court of Appeals for the Third Circuit. Their arguments lack merit.
>
> During oral argument, the Third Circuit asked Respondents' counsel if Respondents were "going to suggest the FMC lacks the authority to adjudicate the dispute." Resp. at 17. Respondents' counsel answered: "No, we're not going to suggest that they lack the authority to adjudicate disputes of the type alleged in the complaint." *Ibid.; see also id.* at 18. Remarkably, Complainants ignore the very next words by Respondents' counsel: "*We may challenge standing*. . . . So we have other defenses." Resp. Ex. "A" at 31 (emphasis supplied).
>
> Under the same standards Complainants invoke, their waiver and estoppel arguments must fail. Given Respondents' clear statement that "[w]e may challenge standing," Complainants cannot possibly show that there has been a "voluntary, intentional relinquishment of a known right or privilege" for the purposes of waiver. *Port Auth. of N.Y. v. N.Y. Shipping Ass'n*, 22 S.R.R. 1329, 1346 (1985). Nor can they show, for estoppel purposes, that Respondents have

> taken a position "clearly inconsistent with" their "earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001).
>
> In any event, standing cannot be waived. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990). The Commission has an independent obligation to ensure it has jurisdiction. *Crowley Liner Servs., Inc. and Trailer Bridge, Inc. v. P.R. Ports Auth.*, 29 S.R.R. 394, 396 (ALJ, 2001) ("It is elementary law that a tribunal should determine its jurisdiction before addressing the merits of a controversy brought before it. This principle is especially relevant when the tribunal has limited jurisdiction such as this Commission."). Private parties "cannot agree to waive jurisdiction of the agency charged with the statutory responsibility [for oversight]." *Anchor Shipping Co. v. Aliança Navegação e Logística Ltda*., 30 S.R.R. 991, 997 (FMC 2006) (citation omitted). It cannot be disputed: neither of the doctrines of waiver and estoppel apply.

Reply at 6-8.

It is helpful to put the Third Circuit exchange at issue in context. The transcript shows the following:

> The Court: And your adversary made a representation that despite sort of a request that the federal court not adjudicate this dispute and it's going to the . . . Federal Maritime Commission, that there's going to be an application to dismiss that claim. Is it going to be because the FMC lacks the authority to decide it or is it going to be on some other ground?
>
> Mr. Nelson: I can assure you that we will not say to the Federal Maritime Commission that these claims should have been brought in federal court. We may have – we have various –
>
> The Court: Are you going to suggest the FMC lacks the authority to adjudicate the dispute? You may have other grounds, but are you going to make a claim?
>
> Mr. Nelson: No, we're not going to suggest that they lack the authority to adjudicate disputes of the type alleged in the complaint. We may challenge standing and we have some other claims below here in the District Court challenging whether the named plaintiffs are appropriate, whether there's any injury. So we have other defenses, but that will not be one of them.

Opposition Exhibit A (Transcript page 31).

Although Respondents told the court that they were not going to suggest that the Commission lacks "the authority to adjudicate disputes of the type alleged in the complaint," Respondents immediately indicated that they might "challenge standing and we have some other claims below here in the District Court challenging whether the named plaintiffs are appropriate, whether there's any injury." Opposition Exhibit A (Transcript page 31). In addition, statements that "the FMC is empowered to order reparations" and that "any person can file a complaint before the FMC and obtain reparations for injuries caused by violations of the Act" are not

statements about whether Respondents believed that all of these particular Complainants would ultimately be entitled to reparations.

The parties agree that "[t]he doctrine of waiver requires a showing that there has been a 'voluntary, intentional relinquishment of a known right or privilege manifested either by express statement or by conduct which can only be reasonably considered consistent with such relinquishment.'" Opposition at 16; Reply at 7 (quoting *Port Authority of N.Y. v. N.Y. Shipping Ass'n.*, 22 S.R.R. at 1346).

Respondents' statements do not rise to the level of waiver as there is no showing of a voluntary, intentional relinquishment of a known right or privilege. Indeed, Respondents specifically mentioned their intention to object to standing, injury, and other issues. Here, the Respondents are not arguing that the Commission lacks the authority to adjudicate disputes of the type alleged in the complaint but rather are raising standing, timeliness, sufficiency of the pleadings, and other defenses. Respondents are not arguing that this case should be heard or decided in federal court.

In addition to waiver, Complainants allege judicial estoppel. Judicial estoppel does not apply here because Respondents' prior position was not clearly inconsistent with their current position, it is not clear that the federal courts accepted an earlier inconsistent position, and there is no showing of an unfair advantage or unfair detriment to the opposing party. The federal direct purchaser rule will be discussed before addressing the merits of the standing issue.

c. Federal Direct Purchaser Rule

Respondents' arguments regarding direct and indirect purchasers have been examined in depth in recent Supreme Court antitrust cases. Federal antitrust actions under the Clayton Act are limited to direct purchasers. Understanding the origins and rationale of the federal direct purchaser rule will aid when analyzing the Commission's long history of allowing reparations only to parties who suffered actual injury.

The Third Circuit described the origins of the direct purchaser rule:

> We find it useful to begin by reviewing the origins of the direct purchaser doctrine. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. The Supreme Court has developed two limitations on Section 4. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962-63 (3rd Cir. 1983). The first restriction, the "direct purchaser rule," limits antitrust actions to suits brought by parties that are the direct purchasers of the product. *See generally Illinois Brick v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). The second limitation asks whether the "injuries [are] *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4." *Blue Shield of Va. v. McCready*, 457 U.S.

465, 476, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982) (bracketing in original). In this appeal, only the first limitation is at issue.

The direct purchaser rule was first considered by the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Mach. Corp*., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968). There, the namesake shoe manufacturer brought suit against a manufacturer and distributor of shoe machinery, alleging that the manufacturer had illegally monopolized the shoe industry, in violation of Section 2 of the Sherman Act. *Id.* at 483-84. The defendant argued that the plaintiff lacked standing to sue under Section 4 of the Clayton Act because the plaintiff had effectively "passed on" any injury to its customers. *Id.* at 488 n.6. The Supreme Court rejected that defense, finding that only the *direct purchaser* of an illegally overcharged good, and not others in the chain of manufacturing or distribution, is the party "injured" within the meaning of Section 4. *Id.* at 489-91. The Court based its decision on two conclusions: (1) if indirect purchasers were permitted to bring antitrust suits, the offer of proof alleging injury and the extent of that injury would become extremely complicated, *id.* at 491-93, and (2) because indirect purchasers would have "only a tiny stake in a lawsuit" and have fewer incentives to sue, a doctrine that allowed *only* indirect purchasers to bring suit would enable antitrust violators to "retain the fruits of their illegality," *id.* at 493-94.

Illinois Brick tackled the next logical question: may an *indirect purchaser* bring suit against an antitrust violator on the ground that the overcharge cost was passed on to him by the direct purchaser? 431 U.S. at 726. In that case, the defendant was a brick manufacturer and distributor who sold bricks to masonry contractors, who then in turn submitted bids (relying on those bricks) to general contractors. *Id.* These general contractors then created and submitted bids to final consumers, like the State of Illinois, who became the indirect purchaser of the bricks. *Id.* The State of Illinois, representing a number of customers, sued the original manufacturer of the bricks under Section 4 of the Clayton Act alleging that the brick manufacturer had engaged in an illegal price-fixing conspiracy. *Id.* at 726-27. The Supreme Court held that Illinois, which purchased the bricks following "two separate levels in the chain of distribution," *id.* at 726, was an *indirect purchaser* without standing, *id.* at 735.

Illinois Brick rests on three policy considerations. The first policy rationale that the Court drew on was the "serious risk of multiple liability for defendants." *Id.* at 730. The Court found that permitting the offensive use of the pass-on theory without the defensive use (prohibited in *Hanover Shoe*) would "create a serious risk of multiple liability for defendants," since defendants could be sued by indirect purchasers and direct purchasers. *Id.* This would "substantially increase[] the possibility of inconsistent adjudications and therefore of unwarranted multiple liability." *Id.*

Next, the Court drew attention to the "evidentiary complexities and uncertainties" involved in ascertaining how much of the overcharge was "passed on" to the indirect purchasers. *Id.* at 732. This problem, which constituted "[t]he

principal basis for the decision in *Hanover Shoe*," was also present in the *Illinois Brick* factual scenario. *Id.* at 731-32. The calculations necessary to determine how much of the overcharge had been "passed on" would be "long and complicated" and would have to be "repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff." *Id.* at 732-33 (internal quotation marks omitted). Therefore, "the difficulty of reconstructing the pricing decisions of intermediate purchasers at each step in the chain beyond the direct purchaser generally will outweigh any gain in simplicity from not having to litigate the effects of the passed-on overcharge on the direct purchaser's volume." *Id.* at 733 n.13. This is because of the "uncertainties and difficulties in analyzing price and out-put decisions in the real economic world rather than an economist's hypothetical model." *Id.* at 731-32 (internal quotation marks omitted).

Finally, the Court also examined the third policy rationale: the need for effective enforcement of antitrust law. *Id.* at 733-34. Relying on *Hanover Shoe*, the Court explained that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id.* at 735. Therefore, this rationale also weighed against conferring direct purchaser status.

Although the direct purchaser rule was grounded in these policy rationales, the Supreme Court explicitly stated that its rule was the result of statutory construction. *Id.* at 736-37 (explaining that "considerations of *stare decisis* weigh heavily in the area of statutory construction" and a "presumption of adherence to our prior decisions construing legislative enactments would support our reaffirmance of the *Hanover Shoe* construction of [Section 4]"). In making this point, the Court manifested its unwillingness to recognize any exceptions to the direct purchaser rule, *id.* at 743-45, warning that "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid," *id.* at 744-45.

The final case in this trilogy is *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990). In *UtiliCorp*, several public utilities brought suit against a pipeline company and natural gas producers under Section 4 of the Clayton Act, alleging that the defendants conspired to inflate the price of the natural gas supplied to public utilities. *Id.* at 204-05. The states of Kansas and Missouri, acting as *parens patriae*, asserted the same claims on behalf of all persons residing in the states who purchased the gas. *Id.* at 204. The defendants argued that the utility companies—the direct purchasers of the gas—lacked standing to bring suit because state and municipal regulations ensured that the utility companies had "passed on" 100 percent of the alleged overcharge to their customers. *Id.* at 205. The states argued that the residential customers should have standing to bring suit because none of the policies underlying *Hanover Shoe* or *Illinois Brick* were implicated and because the customers bore the full cost of the price-fixing conspiracy. *Id.* at 208.

> The Supreme Court acknowledged that "the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances" but held that it was "inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities." *Id.* With regard to the states' argument that there would be no litigation over the apportionment of the overcharge because they "prove the exact injury to the residential customers," *id.*, the Court found that this argument "oversimplified the apportionment problem," *id.* at 209. First, the nature of market forces meant it was possible that the overcharge still injured the utility, "even if the utility raise[d] its rates to offset its increased costs." *Id.* Second, "[e]ven if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process," and thus the utility is also injured by the defendant's actions. *Id.* at 210. The states also argued *Illinois Brick's* second policy rationale, the risk of multiple recoveries, was inapplicable because the plaintiffs sought different damages, that is, the residents "would recover the amount of the overcharge and the utilities would recover damages for their lost sales." *Id.* at 212-13. The Court roundly rejected this argument, noting that the "case already ha[d] become quite complicated" and "involve[d] numerous utilities and other companies . . . under federal, state, and municipal regulation" and had the potential to expand to other direct purchasers and unrepresented consumers. *Id.* at 213. Any "expansion of the case would risk the confusion, costs, and possibility of error inherent in complex litigation." *Id.* Finally, the Court concluded by dismissing the argument that suits by indirect purchasers are more effective at "promot[ing] the vigorous enforcement of the antitrust laws." *Id.* at 214.

Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 83-87 (3rd Cir. 2011); *see also Crayton v. Concord EFS, Inc. (In re ATM Fee Antitrust Litig.)*, 686 F.3d 741, 748-49 (9th Cir. 2012). Many of these rationales apply to Commission proceedings.

d. Discussion

i. Indirect Purchasers (Dockets 16-07, 16-10, 16-11)

Complainants in dockets 16-07, 16-10, and 16-11 acknowledge that they are indirect purchasers – that they are "consumers who had no direct contact or interaction with the Respondents" (16-07 End-Payors Complaint ¶ 197); "Complainants indirectly paid Respondents for Vehicle Carrier Services" (16-10 Truck Centers Complaint ¶ 27); and "Complainants indirectly paid Respondents for Vehicle Carrier Services" (16-11 Auto Dealers Complaint ¶ 19). Complainants in dockets 16-01 and 17-09 allege that they are direct purchasers; their standing will be addressed below.

The Shipping Act authorizes "reparations *to the complainant* for actual injury caused by a violation of this part." 46 U.S.C. § 41305(b) (emphasis added). Commission cases clarify that only direct purchasers suffer an "actual injury" that confers standing to seek reparations. A reparations award is the only remedy sought by Complainants in dockets 16-07 (End-Payors), 16-10 (Truck/Equipment Dealers), and 16-11 (Auto Dealers). If they did not suffer an actual

injury and are not entitled to reparations, there is no right to recovery and the complaints should be dismissed.

Respondents rely on the more recent case of *Gov't of Guam v. Sea-Land Service, Inc.*, 29 S.R.R. 894, 902 (ALJ 2002) to argue that the Commission has consistently applied the direct purchaser standing rule for reparations complaints. Complainants argue in response:

> The Commission should reject this argument, for four reasons: First, the Commission reached its decision in *Government of Guam*, in part, because the complainants originally took a position before the federal courts that blatantly conflict[ed]" with their position later before the Commission. Second, to the extent that a strict "direct purchaser" rule once existed under FMC precedent, its stated or implied exceptions must be used in light of the modern realities of the shipping industry and the deleterious consequences that such an antiquated rule could have on parties injured by Respondents' blatant violations of the Shipping Act. Third, even if the Commission were to apply its "direct purchaser" rule, Respondents are not entitled to dismissal because Respondents cannot show from the face of the Complaints that [indirect purchasers] fail to satisfy such a rule. Fourth, the Commission's recognition of "shipper" standing broadens the direct purchaser requirement and was not argued or germane in Government of Guam.

Opposition at 25.

As explained more below, but to briefly respond directly to these four arguments in Complainants' opposition, first, there is no indication that *Gov't of Guam* was decided based on waiver or estoppel. Second, the traditional "strict 'direct purchaser' rule" does not need to be changed due to the "modern realities of the shipping industry" or current federal practice. Third, the direct purchaser rule applies to dockets 16-07, 16-10, and 16-11 from the face of their complaints. Fourth, it is not clear that anything has "broaden[ed] the direct purchaser requirement" as argued by Complainants in their Opposition at 25.

Complainants assert that "[u]nder the reasoning of *Rose International*, [indirect purchasers] independently fall within the scope of shippers under the Act based on their beneficial interest in the vehicles being transported and the vehicles for which they ultimately pay those inflated costs." Opposition at 34 (referring to *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119 (FMC 2001)). *Rose Int'l*, however, did not deal with the question of indirect purchaser's standing to seek reparations. Moreover, the Commission in *Rose Int'l* stated:

> The awarding of reparations in a complaint case is governed by section 11(g) of the Shipping Act, which requires the Commission to "direct payment of reparations to the complainant for actual injury . . . caused by a violation of this Act." 46 U.S.C. App. § 1710(g). Complainant must prove with "competent evidence" that it sustained actual loss or injury and that the violation of law was the proximate cause of that loss or injury with "reasonable certainty."

Rose Int'l, 29 S.R.R at 187 (citations omitted).

The Commission has recognized repeatedly and consistently that the language of section 41305(b) prohibits the Commission from hearing claims on behalf of non-parties or parties seeking to represent other claimants. For example, in *Guam v. Pacific Far East Line, Inc.*, the complainant tried "to sue for reparation on behalf of others." *Guam v. Pacific Far East Line, Inc.*, 7 S.R.R. at 168. That attempt was rejected because the Commission lacked statutory authority to hear such a claim. *Guam v. Pacific Far East Line, Inc.*, 7 S.R.R. at 168 ("The award of reparations under Section 22 is limited to parties having legal claims for damages, i.e., shippers, consignees, persons paying the freight charges or holders of valid assignments. Guam has such standing only as to its own shipments."). Twenty-three years later, in 1989, Guam again tried to sue on behalf of others as *parens patriae*. *Gov't of Guam v. Sea-Land*, 25 S.R.R. at 842 (discussed extensively in the class action section). It met the same fate: Guam's claim was dismissed because such representative actions are not permitted by the Shipping Act. The Administrative Law Judge stated the view succinctly: "Insofar as the Complaint seeks reparation to Guam for shipments made by other shippers, it is hereby dismissed." *Gov't of Guam v. Sea-Land*, 25 S.R.R. at 842.

Similarly, in *Mar-Mol.*, the complainants sought relief for "all similarly situated shippers." *Mar-Mol*, 27 S.R.R. at 1090 (discussed extensively in the class action section). The Commission rejected that claim, explaining that its statutory authority extended no further than "direct[ing] the payment . . . of full reparation *to the complainant*." *Mar-Mol*, 27 S.R.R. at 1089 (emphasis in original). The Commission reiterated that the Shipping Act "authorizes an award of reparations only to complainants, not to non-parties." *Mar-Mol*, 27 S.R.R. at 1089.

In *Adenariwo*, the Settlement Officer found the claim facially deficient because Mr. Adenariwo had not sufficiently demonstrated that the claim was assigned to him; however, she allowed him time to obtain the assignment. *Adenariwo v. BDP Int'l*, 2012 FMC Lexis 42 at *12-14 (SO 2012). In her subsequent decision on the merits, the Settlement Officer accepted the assignment that Mr. Adenariwo obtained and ordered damages. *Adenariwo v. BDP Int'l*, 33 S.R.R. 503, 511 (SO 2013). It does not appear that the assignment was raised as an issue again, although the damages award was reviewed by the Commission, appealed to the D.C. Circuit, and remanded to the Commission which issued a final order. *Adenariwo v. BPD Int'l*, 33 S.R.R. 223 (FMC 2014), *vacated and remanded Adenariwo v. FMC*, 808 F.3d 74 (D.C. Cir. 2015), final order on remand *Adenariwo v. BDP Int'l*, 34 S.R.R. 595 (FMC 2017).

The Commission's approach is similar to that of other federal agencies. The D.C. Circuit reviewed a decision by the Federal Energy Regulatory Commission ("FERC") regarding oil pipeline shipments. The relevant part of the decision addresses a cost-plus contract where carriers charged for transportation plus an additional amount dependent on various factors. *Frontier Pipeline Co. v. FERC*, 452 F.3d 774, 789 (D.C. Cir. 2006). An argument was made that the charges had been passed on; however, "FERC rejected this 'pass-on' theory, holding that damages under the [Interstate Commerce Act ("ICA")] were available only to shippers who were in privity with the carrier (i.e., who directly or through an agent contracted with it)." *Frontier Pipeline*, 452 F.3d at 789 (citations omitted). The D.C. Circuit stated:

> Reparations for violations of the ICA are generally governed by § 8, 49 U.S.C. app. § 8 (1988), under which a person who commits an "unlawful" act under the statute is "liable to the person or persons injured thereby for the full amount of

> damages sustained in consequence of any such violation." The language appears very general, saying nothing to suggest that it would be unreasonable under *Chevron* for the Commission to limit damages to parties who were directly charged for the overpriced service.
>
> Nor do prior judicial interpretations of the ICA support the shipper-petitioners' contention. In *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 38 S. Ct. 186, 62 L. Ed. 451 (1918), carriers asserted passing on as a defense, i.e., they argued that plaintiff-shippers had passed the overcharge onto their customers and therefore hadn't been injured. The Court rejected the defense, declaring that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step," *id*. at 533, thus avoiding the "endlessness and futility of the effort to follow every transaction to its ultimate result," *id*. at 534. The shipper-petitioners say that *Darnell-Taenzer* applies only to passing-on as a defense, but it was hardly unreasonable of FERC to find that the Court's critique of the theory applies as well when it's used offensively. Cf. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729-36, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (holding that under Clayton Act § 4, 15 U.S.C. § 15, the pass-on theory *must* be treated the same regardless of whether it's used offensively or defensively).

Frontier Pipeline Co., 452 F.3d at 789-90.

Complainants have not provided a persuasive reason not to apply the Commission's longstanding rule limiting actions for reparations to complainants who have directly suffered actual injury. On its face, this provision does not appear to authorize the Commission to award reparations to members of a class who are not complainants and more important, issue a decision that is binding on those similarly situated non-parties. The Commission's approach is consistent with that of other federal agencies and federal antitrust law. Moreover, the Commission's approach fulfills the same objectives of avoiding multiple liability and inconsistent judgments, avoiding evidentiary complexities regarding pass-through charges, and encouraging effective enforcement by concentrating the full recovery in those with the closest relationship with the wrongdoers.

Accordingly, the Complainants in dockets 16-07, 16-10, and 16-11 do not have standing to seek reparations. As there is no other remedy sought and amendment would be futile, these three complaints will be dismissed with prejudice. The next issue is the treatment of the Complainants in dockets 16-01 and 17-09 who allege that they are direct purchasers.

ii. Ocean Transportation Intermediaries (Docket 16-01)

The 16-01 OTI complaint states that Complainants "directly purchased Vehicle Carrier Services from one or more Respondents;" that "Complainants and members of the proposed Class include companies that arrange for the international ocean transportation of vehicles;" and that "Complainants are direct purchasers of Vehicle Carrier Services." 16-01 OTI Complaint ¶¶ 8-9, 25, 107. Complainant Cargo Agents, Inc. was licensed as an NVOCC and an ocean freight forwarder (License No. 018789), but its licenses were revoked in 2012 and 2014, respectively; Complainant International Transport Management Corp. is licensed as a NVOCC

(License No. 003089); and Complainant RCL Agencies, Inc. is licensed as an ocean freight forwarder (License No. 016241).

Respondents argue that the 16-01 Complainants are freight forwarders who, as agents of the shippers, cannot enter into service contracts, and because the 16-01 Complainants did not allege that they paid ocean freight on their own behalf, they are not direct purchasers and do not have standing to assert a claim for reparations under the Shipping Act. Motion at 39-42; Reply at 10.

Complainants argue that the 16-01 Complainants have validly pleaded that they are "direct purchasers" of vehicle carrier services from Respondents; they alleged that they directly purchased vehicle carrier services from Respondents; they are NVOCCs who are shippers and direct purchasers; and even if they were freight forwarders, they may still be direct purchasers. Opposition at 20-25.

The 16-01 complaint does not state whether Complainants were OFFs or NVOCCs. To meet the Shipping Act definition of OFF, shipments would need to be dispatched from the United States and it is not clear whether the shipments at issue were dispatched *to* or *from* the United States. In addition, if Complainants had a cost-plus system where their clients were billed for the costs of shipping plus a percentage of shipping costs, then there may be no injury as inflated shipping costs would have inflated their compensation. *See, e.g., Gov't of Guam v. Sea-Land Service*, 29 S.R.R. at 901. It is too early to make these determinations at this stage of the proceeding, however, for purposes of this motion, the 16-01 Complainants will be considered OTIs, without determination of the type of OTI services rendered.

Under the Shipping Act, generally, complainants seeking reparations must directly suffer an injury. However, the Commission has found limited exceptions to apply, including where there is an assignment or an agent. "The Commission has long recognized that an ocean freight forwarder is an agent of its shipper customer and has a fiduciary duty to that shipper customer." *S.A. Chiarella v. Pacon Express Inc.*, 29 S.R.R. 335, 337 (FMC 2001) (discussing substantially similar language in the Shipping Act, 1916). In *Chiarella*, the Commission found that a freight forwarder had standing to seek reparations, because he was "acting within the scope of his duties as an agent of his shipper customer in bringing this claim." *Chiarella*, 29 S.R.R. at 337-338.

In a number of cases, the Commission has permitted complainants to obtain an assignment of the claim, even after the statute of limitations has run. For example, the Commission allowed a parent company to seek reparations, as long as it obtained an assignment from its foreign subsidiary. *Rohm & Haas Co. v. Italian Line*, 21 S.R.R. 212, 215-216 (FMC 1981). The Commission also permitted a reparations claim by a company that "engaged in the business of auditing ocean freight charges" whose services were performed on a percentage of collection basis. *Ocean Freight Consultants, Inc. v. The Bank Line Ltd.*, 9 F.M.C. 211, 212-213 (FMC 1966) (requiring an assignment under substantially similar language in the Shipping Act, 1916).

Further case development will be necessary to determine the role played by the 16-01 Complainants in the shipments at issue and to determine whether or not Complainants have standing to seek reparations. At this point, based on the allegations in the 16-01 OTI complaint,

it is not clear that the reparations claim should be dismissed for lack of standing. In addition, Complainants list a cease and desist order in their prayer for relief and at least some of the Complainants may have an on-going relationship with Respondents. The issue of standing to seek reparations in docket 16-01 will be denied without prejudice at this point but may be raised again later if appropriate.

iii. Fiat (Docket 17-09)

Respondents contend that only the entity that paid for ocean freight charges has standing to seek reparations and that the Commission has routinely applied this requirement to reject claims by corporate parents, subsidiaries, and affiliates of the actual freight-payor. Supp. Mot. at 17. Specifically, Respondents object that Fiat failed to allege which of the three Fiat entities actually purchased vehicle carrier services and failed to provide additional information about the purchases. Supp. Mot. at 18.

Fiat responds that it met its "burden by making the allegations of the wrongdoing and facts to support its allegations that the [Fiat] entities were injured." Supp. Opp. at 13.

The 17-09 Fiat complaint identifies the three Fiat entities: Fiat Chrysler Automobiles N.V. (the "Fiat Parent"), headquartered in the United Kingdom; Fiat US LLC, a wholly-owned subsidiary of the Fiat Parent headquartered in Auburn Hills, Michigan; and Fiat Italy S.p.A, a wholly-owned subsidiary of the Fiat Parent headquartered in Turin, Italy. 17-09 Fiat Complaint ¶ 5. Further, the Fiat complaint states that Fiat made "purchases for roll on, roll off cargo services from its headquarters in Auburn Hills, Michigan and Turin, Italy," and that Fiat "also, from its headquarters in Auburn Hills and Turin, issued payments to Respondents for roll-on, roll-off cargo shipments." 17-09 Fiat Complaint ¶¶ 18, 41.

As discussed more fully in the sufficiency of pleadings section, Fiat's allegations are sufficient to meet the *Iqbal/Twombly* pleading standard. The 17-09 Fiat complaint sufficiently alleges plausible allegations that the Fiat entities directly purchased vehicle carrier services from Respondents. At this point, it is not necessary to determine the specifics of each Fiat entity's involvement. Moreover, because the proceeding will continue for determination of the cease and desist order, there is no harm to keeping the reparation claim in at this point.

e. Conclusion

The Commission has a long history of limiting standing to seek reparations to parties who suffer actual injury, a policy which is consistent with modern practice. The motion to dismiss the complaints filed by indirect purchasers in dockets 16-07, 16-10, and 16-11 is granted and those three complaints are dismissed. The motion to dismiss the 16-01 OTI complaint and the 17-09 Fiat complaint for lack of standing to seek reparations is denied without prejudice. Although this decision finds that some of the reparations claims are barred by standing rules, in the alternative, the statute of limitations will also be fully addressed.

3. Statute of Limitations to Seek Reparations

The OTI complaint in docket 16-01 was filed on December 29, 2015; the End-Payors complaint in docket 16-07 was filed on March 18, 2016; and both the Truck Center complaint in

docket 16-10 and the Auto Dealer complaint in docket 16-11 were filed on April 21, 2016. The Fiat complaint in docket 17-09 was filed on October 6, 2017.

The 16-01 OTI complaint alleges that the statute of limitations "did not begin to run until Complainants had all the hard facts necessary to be fully aware of the conspiracy alleged herein and its negative effects on their businesses" and that the statute of limitations was tolled, at the latest, by the filing of the first federal direct purchaser class action on August 9, 2013. 16-01 OTI Complaint ¶¶ 101-102. Three of the complaints allege that the claims are not barred by the statute of limitations; because of the Respondents' conduct, the 2016 Complainants did not and could not discover that their claims had accrued earlier; and fraudulent concealment tolled the statute of limitations which did not begin to run until no earlier than May 2013. 16-07 End-Payors Complaint ¶¶ 195-206; 16-10 Truck Centers Complaint ¶¶ 173-183; 16-11 Auto Dealer Complaint ¶¶ 160-170. The 17-09 Fiat complaint will be discussed after addressing the four 2016 complaints.

a. Parties' Arguments

Respondents assert that Complainants' Shipping Act claims accrued no later than September 6, 2012, making the complaints' request for reparations untimely; Complainants cannot meet their burden of demonstrating that, even with the exercise of reasonable diligence, they could not have known of their Shipping Act claims within the limitations period; Complainants knew or should have known they had potential claims no later than September 6, 2012, when media reports alerted the public to the dawn raids of Respondents' offices and global antitrust investigations; and reasonable Complainants would have engaged in further inquiry related to the widely reported antitrust investigations. Motion at 6-21.

Complainants contend that under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the antitrust class actions they filed in the federal district courts tolled the limitations period; the facts as alleged in the complaints, which the Commission must accept as true and not weigh against extrinsic evidence, show that Complainants' claims did not accrue until May 2013, the date on which Complainants had completed a reasonable inquiry into the sufficiency of the factual contentions; Respondents' statute of limitations argument is procedurally improper because it asks the Commission to weigh the allegations in the complaints against extrinsic evidence, which is improper at the motion to dismiss stage; and the dawn raids in September 2012 did not trigger the statute of limitations. Opposition at 5-16.

Respondents argue in their reply brief that the Shipping Act's three-year statute of limitations is jurisdictional, and thus is not subject to tolling; *American Pipe* tolling does not save Complainants' time-barred claims because Complainants' federal complaints and Commission complaints were brought under different statutes and forums; and Complainants knew or should have known they had potential Shipping Act claims no later than September 6, 2012. Reply at 1-6.

Respondents contend in the supplemental motion that Fiat gets no relief from the discovery rule; Fiat has not adequately pled a distinct violation within the statutory limitations period; and even if Fiat adequately alleged impact within the statutory period, its allegations do not constitute a continuing violation. Supp. Mot. at 3-13.

Fiat's supplemental opposition argues that its claims are not time-barred for two reasons:

> First, no portion of [Fiat]'s claims are time-barred, because the running of the applicable limitations period was tolled both by Respondents' concealment of their illegal behavior, and by the pendency of the antitrust class action which immediately proceeded this case. Second, even if some portion of [Fiat]'s claims were untimely, [Fiat] would still have other, plainly timely claims based on Respondents' continuing violations of the Shipping Act into the limitations period urged by Respondents.

Supp. Opp. at 3-4.

The Respondents' supplemental reply asserts that Fiat both fails to address key points and misstates the law, stating.

> First, even if the highly publicized 2012 "dawn raids" somehow did not put [Fiat] on notice of the conduct alleged in its complaint, multiple Commission press releases about seven-figure settlements between the Commission's Bureau of Enforcement ("BOE") and multiple Respondents put [Fiat] on notice well before the limitations period expired. Second, [Fiat]'s claim that Respondents rely on facts "inappropriate" for consideration on a motion to dismiss simply misunderstands the governing legal standard; on a motion to dismiss, the Commission can take official notice of Commission records and widespread media reports relied on by Respondents to demonstrate that [Fiat]'s reparations claims are plainly time-barred. Third, any claims based on shipments completed prior to October 6, 2014 are time-barred under *Seatrain*, as relied on by [Fiat]. Fourth, the "continuing violations" theory does not give [Fiat] a timely claim as to shipments after October 6, 2014. And, fifth, class action tolling does not apply here, and thus cannot save [Fiat]'s time-barred claims.

Supp. Reply at 1-2 (emphasis omitted). Fiat's arguments will be dealt with separately from the other Complainants.

b. Relevant Rules

Under the Shipping Act, reparations may only be awarded to a complainant for injury caused by a respondent's violation of the Shipping Act if the complaint is filed within three years after the claim accrues. 46 U.S.C. § 41301(a). "Absent an exception, a claim accrues (and the statute of limitations begins to run) 'when a defendant commits an act that injures a plaintiff's business.'" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185, 1191 (FMC 2013) (citing *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971)). The time to file the complaint begins to run "when a complainant knew, or should have known, that it had a cause of action." *Maher Terminals*, 32 S.R.R. at 1193. The statute of limitations is an affirmative defense. *Maher Terminals*, 32 S.R.R. at 1191. However, the statute of limitations only bars the award of reparations, not the filing of a complaint or the issuance of a cease and desist order. *Maher Terminals*, 32 S.R.R. at 1190.

The discovery rule is an exception to the time bar provision. "Under the discovery rule, adopted by the Commission . . . a statute of limitations period will not begin to run until 'a party

knew or with reasonable diligence *should have known* that it had a claim.'" *Maher Terminals*, 32 S.R.R. at 1191 (emphasis in original); *see also Connors v. Hallmark & Son Coal Co*., 935 F.2d 336, 342 (D.C. Cir. 1991) ("At least eight federal courts of appeals have, within the last four years, agreed . . . that the discovery rule is the general accrual rule in federal courts. As the Seventh Circuit has put it, the discovery rule is to be applied in all federal question cases 'in the absence of a contrary directive from Congress.'" (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990))).

"When evaluating a motion to dismiss for failure to state a claim the Commission considers the facts alleged in the complaint, documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matters subject to official notice." *Maher Terminals, 12-02*, 34 S.R.R. at 49 n.1 (citing *Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.C. Cir. 2013); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); 46 C.F.R. § 502.226(a)).

"Official notice includes judicially noticeable facts and 'technical or scientific facts within the general knowledge of the Commission,' 46 C.F.R. § 502.226(a), such as evidence available to it from other proceedings, *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 463 (D.C. Cir. 2004)." *Maher Terminals, 12-02*, 34 S.R.R. at 49 n.1 (citations omitted). "Official notice is broader than judicial notice and may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise." *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, 32 S.R.R. 1133, 1161 n.39 (ALJ 2013). A presiding officer can take official notice not only of public records and generally accepted facts, but also of matters related to the shipping industry. *See, e.g., Marine Repair Services of Maryland*, 32 S.R.R. at 1161 (taking official notice of external facts relating to competition and practices in shipping industry); *Bimsha Int'l v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 353, 366, 368-371 (ALJ 2011) *aff'd* 32 S.R.R. 1861 (FMC 2013) (taking official notice of Commission records and report from another federal agency); *John T. Barbour – Possible Violations of Section 8 and 19 of The Shipping Act of 1984*, 34 S.R.R. 959, 968-970 (ALJ 2016) (taking official notice of Commission records related to enforcement actions and federal district court records from a related proceeding).

c. Discussion

i. *American Pipe* Tolling

Complainants assert that filing class actions in federal courts tolled the statute of limitations, pursuant to *American Pipe*. Opposition at 6, Supp. Opp. at 9-10. If *American Pipe* tolled the statute of limitations, then all of the complaints would be timely. The Supreme Court found in *American Pipe* that the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. "[T]olling only applies to claims that were or could have been brought in the original class action." *Lee v. Dell Prods.*, L.P., 236 F.R.D. 358, 362 (M.D. TN 2006) (citing *Weston v. AmeriBank*, 265 F.3d 366, 368-69 (6th Cir. 2001)). The parties have not identified any Commission cases addressing this issue, which appears to be a novel one.

There is a split in the circuits as to whether to allow "cross-jurisdictional tolling" in which actions filed in state court tolls the statute of limitations in later-filed actions filed in federal court. *Compare Sawyer v. Atlas Heating and Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011) (permitting cross-jurisdictional tolling) *with FDIC v. Countrywide Financial Corp.*, 2012 U.S. Dist. LEXIS 167696, at *47-48 (C.D. Cal. 2012) (not permitting cross-jurisdictional tolling). Only a small minority of jurisdictions allow for cross-jurisdictional tolling and the majority rule is to "not import cross-jurisdictional tolling into federal limitations law in the absence of controlling authority permitting such tolling." *NCUA Bd. v. Morgan Stanley & Co.*, 2013 U.S. Dist. LEXIS 180563, at *14 (D. Kan. 2013); *see also* Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev 339 (Winter 2016).

Generally, to toll a proceeding, the previously filed class action must have involved the same claims. The Eighth Circuit explained:

> We conclude, however, that *American Pipe* tolling should be limited to claims filed in a later action that are the same as those pleaded in the putative class action. As the Supreme Court later observed, "the tolling effect given to the timely prior filings in *American Pipe* . . . depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 467, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). A broader rule would not enhance the "efficiency and economy" of Rule 23 class actions. The Supreme Court's concern was that without tolling, putative class members would needlessly bring motions to intervene or a multiplicity of actions raising identical claims. *Crown, Cork & Seal*, 462 U.S. [345,] 350-51 [1983]; *American Pipe*, 414 U.S. at 553-54. But where a putative class member wishes to pursue a claim that is outside the scope of the class action, his separate timely lawsuit is not "needless," because the class action would not prosecute his different claim. A class action also does not notify defendants of substantive claims that are different from those pleaded in the action, so tolling of the time limits applicable to those different claims does not safeguard "essential fairness to defendants." *American Pipe*, 414 U.S. at 553-55; see *Johnson*, 421 U.S. at 467 & n.14. Because the federal claim brought by the Zarecors against Morgan Keegan is different from the claims that were alleged in the 2007 class action, *American Pipe* tolling does not apply. Accord *Williams v. Boeing Co.*, 517 F.3d 1120, 1136 (9th Cir. 2008); *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1283 (11th Cir. 2003) (per curiam); *Cullen v. Margiotta*, 811 F.2d 698, 734-36 (2d Cir. 1987) (Meskill, J., dissenting); cf. *In re Copper Antitrust Litig.*, 436 F.3d 782, 794 (7th Cir. 2006).

Zarecor v. Morgan Keegan & Co., 801 F.3d 882, 888 (8th Cir. 2015).

In the case *sub judice*, Complainants contend that the Shipping Act's statute of limitations was tolled by the filing of antitrust class actions in federal court. Not only were those cases filed in a different forum, but they alleged different violations of law – antitrust claims, not Shipping Act claims – with different remedies. It is not unusual to have related cases pending before the Commission and federal or state courts. No party suggests that Congress or the Shipping Act have authorized such tolling in Commission proceedings. *American Pipe* tolling

does not apply to this situation where the previously filed claims were filed in different courts, alleged different causes of action, and sought different remedies.

In the event that additional complainants seek to join this proceeding within the appeal period from the finding that the class action will not stand, and those additional complainants would have been part of the class proposed by Complainants, than those additional complainants may be permitted to join this proceeding under the same logic as *American Pipe*. *See, e.g.*, *United Airlines v. McDonald*, 432 U.S. 385, 392 (1977). So far, however, none of the Complainants are seeking to join on the basis of a previously filed class action before the Commission and it does not appear that Fiat would fit into any of the classes proposed by the earlier filed putative class action proceedings currently before the Commission as Fiat has not asserted that it is within the proposed class of OTIs in docket 16-01, End-Payors in docket 16-07, Truck Centers in docket 16-10, or Auto Dealers in docket 16-11.

Accordingly, *American Pipe* does not toll the statute of limitations for any of the parties in any of these proceedings. Thus, it will be necessary to review the discovery rule, dawn raids, and alleged continuing violations.

ii. Discovery Rule

The parties agree that the discovery rule applies. The question is whether the Complainants knew or should have known that they had a claim more than three years before filing their complaints. Respondents maintain that the Complainants knew or should have known that they had a claim on September 6, 2012, when dawn raids were conducted and news reports of the dawn raids circulated.

After briefing and argument, on August 28, 2015, the U.S. District Court dismissed with prejudice all of the federal complaints, noting that Shipping Act complainants "may seek reparations for injury if the complaint is filed within three years of the date of accrual." *In re Vehicle Carrier Services. Antitrust Litigation*, 2015 U.S. Dist. LEXIS 114691 at *57, 67 (D.N.J. Aug. 28, 2015) ("the putative class members can seek relief before the FMC."). That decision was rendered just under three years from the dawn raids.

The 16-10 Truck Centers Complaint and the 16-11 Auto Dealers Complaint state that:

> Complainants and members of the Classes did not discover, and could not have discovered through the exercise of reasonable diligence, the existence of the conspiracy alleged herein until no earlier than May 2013, at or about the time the first civil complaints were filed in federal district court after extensive factual investigation. In fact, it was not until February 27, 2014 that the first of the Defendants, CSAV, pleaded guilty in federal court to charges stemming from the allegations described herein, presenting publicly for the first time facts establishing the violations alleged herein.

16-10 Truck Centers Complaint ¶ 174; 16-11 Auto Dealers Complaint ¶ 161. The other complaints include similar allegations. 16-01 OTI Complaint ¶¶ 95-101; 16-07 End-Payor Complaint ¶¶ 204-206.

Respondents point to the General Motors complaint in docket 15-08, which was filed on September 2, 2015, within three years of the dawn raids, to support their argument that Complainants should have known of their claims as of the dawn raids. The GM complaint stated:

> Despite engaging in the secret anticompetitive conduct alleged herein, *prior to the time when the investigations by the antitrust regulators became public*, neither Respondents nor their co-conspirators disclosed to GM that they were engaging in the unlawful conduct alleged in this Complaint. GM did not discover and could not have discovered the alleged conspiratorial agreement and/or agreements at an earlier date by the exercise of reasonable diligence.

GM complaint, docket 15-08, at 33-34 (¶ OOOO) (emphasis added). While GM's complaint is helpful to Respondents' argument that the publicity regarding the dawn raids started the limitations period, it is not conclusive of that issue.

Respondents state that "Complainants admit in their federal court complaints that they were on notice of their claims as of September 6, 2012." Motion at 10. Respondents cite specific paragraphs in the federal complaints to support this allegations. Motion at 10. The cited federal complaints do not support Respondents' contention. For example, the federal complaint for the OTIs states:

> 68. In early September 2012, the Japan Fair Trade Commission ("JFTC"), the European Commission, and the DOJ carried out raids and unannounced inspections at the offices of a number of the Defendants, including NYK Line, MOL, "K" Line, WWL, EUKOR, and HAL; news organizations have reported that NMCC was also being investigated for the same unlawful conduct.

Motion, Appendix pages Ra0022-Ra0023. The other federal complaints similarly indicate that the Respondents were under investigation since September 2012, but do not state when the Complainants became aware of those investigations.

Complainants' contention that they could not have known about the alleged conspiracy prior to the dawn raids is accepted. The complaints clearly allege secret agreements and that enforcement officials did not publicize their investigation prior to the dawn raids. The discovery rule, therefore, tolls the statute of limitations to at least the dawn raids. The next question is when the secret conspiracy became public enough that the statute of limitations began to run.

iii. Dawn Raids

Respondents contend that Complainants had actual or constructive knowledge and knew or should have known of "the highly publicized September 6, 2012 'dawn raids' of Respondents' offices and the investigations by antitrust authorities around the world." Motion at 13. Complainants assert that the dawn raids did not trigger the statute of limitations and that the Commission cannot consider extrinsic evidence at the motion to dismiss stage. Opposition at 10-16.

In Complainants' arguments regarding *American Pipe*, they argue that within the Shipping Act's three-year statute of limitations, Complainants had sufficient facts to file antitrust

proceedings in federal court. Those proceedings were filed in June of 2014. Motion, Appendix pages Ra001-Ra363. Complainants do not explain why they had sufficient information to file the federal court proceedings in 2014 but did not have sufficient information to file their Shipping Act claims until 2016.

Courts may "take judicial notice of facts that various newspapers, magazines, and books were published solely as an indication of information in the public realm at the relevant time, not whether the contents of those articles were, in fact, true." 1 Weinstein's Evidence Manual § 4.02 (2018); *see also Benak ex rel. Alliance Premier Growth Fund v. All. Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3rd Cir 2006); *Effie Film, LLC v. Pomerance,* 909 F. Supp. 2d 273, 299 (S.D.N.Y. 2012). Even a single news article can place a plaintiff on inquiry notice. *Marshall v. Milberg LLP,* 2009 U.S. Dist. LEXIS 121208, at *12 (S.D.N.Y. 2009); *In re MBIA Inc.*, 2007 U.S. Dist. LEXIS 10416, at *19 (S.D.N.Y. 2007); *see also Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 985 (N.D. Cal. 2010).

There are five news articles about the September 6, 2012, dawn raids in the record. The notice of filing issued today includes copies of these five articles. Reuters reported that, in coordination with Japanese and U.S. antitrust authorities, the European Commission "conducted unannounced inspections of several maritime shipping companies that are suspected of operating a cartel" related to "maritime transport services for cars and construction and agricultural machinery" and that the U.S. Justice Department "was looking at potentially illegal pricing practices in the ocean shipping of cars, trucks, construction equipment, and other products." Philip Blenkinsop, *EU raids car shipping service firms suspected of cartel*, Reuters (Sept. 7, 2012), *available at* www.reuters.com/article/us-eu-raids-maritime-idUSBRE8861AS20120907.

Bloomberg reported that five shipping lines were raided by antitrust regulators regarding "a possible breach of an anti-monopoly act that involves price fixing." Chris Cooper and Kiyotaka Matsuda, *Nippon Yusen, Wilhelmsen Raided by Antitrust Regulator*, Bloomberg Business (Sept. 6, 2012), *available at* web.archive.org/web/20151130084605/ http. bloomberg.com/news/ articles/2012-09-06/nippon-yusen-tumbles-on-fair-trade-commission-raid-tokyo-mover.

The European Commission issued a press release which stated that it "made 'unannounced inspections at the premises of several providers of maritime transport services for cars and construction and agricultural rolling machinery.'" *Antitrust: Commission confirms inspections in the sector of maritime transportation services*, September 7, 2012 European Commission press release, *available at* europa.eu/rapid/press-release_MEMO-12-655_en.htm.

The Journal of Commerce reported that the "Japan Fair Trade Commission raided the nation's top three shipping companies – NYK Line, MOL and "K" Line . . . for allegedly violating the antitrust law in transporting automobiles and other exports." Hisane Masaki and Bruce Barnard, *Antitrust Watchdog Raids Major Japanese Shipping Firms*, Journal of Commerce (Sept. 6, 2012), *available at* www.joc.com/maritime-news/container-lines/antitrust-watchdog-raids-major-japanese-shipping-firms_20120906.html.

On September 7, 2012, a DOJ spokeswoman stated to the media that the Antitrust Division was "'investigating the possibility of anticompetitive practices involving the ocean

shipping of cars, trucks, construction equipment and other products.'" *EU and US Join Japan in Antitrust Raid of Leading Car Carrier Operators*, GCaptain (Sept. 7, 2012), *available at* gcaptain.com/car-carrier-operators-raided-japan/.

The first of the complaints, 16-01, was filed on December 29, 2015, more than three years after major news organizations such as Reuters, Bloomberg, and the Journal of Commerce reported the dawn raids. The other four complaints were filed even later. The dawn raids and publicity about them were sufficient that with due diligence, Complainants could have discovered their claims. While the Complainants with direct and on-going relationships with the Respondents, such as Fiat and the OTIs, may have been more likely to see the articles, this in just another reason the direct Complainants are more appropriate Complainants. The publicity regarding the dawn raids was sufficient for Complainants, exercising due diligence, to have discovered their claims.

In addition, the Respondents point to the Commission's press releases announcing settlements between the Commission and some of the respondents which were issued on December 23, 2013 (K-Line and NYK), February 12, 2014 (MOL/NMCC), and March 5, 2014 (CSAV). Supp. Reply at 3. These Commission press releases should have put the parties on notice of the potential of a claim. All but the 17-09 Fiat complaint were filed within three years of the first Commission press release regarding K-Line and NYK. The 17-09 Fiat complaint was filed more than three years after all three of these Commission press releases. Therefore, even if the dawn raids and the publicity about them were not sufficient to put the 2016 Complainants on notice, Fiat's complaint would be time-barred based on the Commission's press releases.

Complainants assert that the federal class actions should toll the limitations period and that the federal class actions were filed within three years of the dawn raids. Although the federal complaints and Shipping Act complaints are based on different legal theories, the underlying factual basis is similar. *See* Motion, Appendix pages Ra001-Ra363 (federal court complaints). If Complainants had sufficient information to file the federal class actions in June of 2014, within *two* years of the dawn raids, then they had sufficient information to file the Shipping Act complaints within *three* years of the dawn raids. Indeed, the federal district court issued its ruling finding that these claims belonged before the Commission less than three years after the dawn raids and the court specifically explained in its decision that the parties "may seek reparations for injury if the complaint is filed within three years of the date of accrual" and the court provided a citation to the Commission's rule for filing private party complaints. *In re Vehicle Carrier Services. Antitrust Litigation*, 2015 U.S. Dist. LEXIS at *57 (citing 46 U.S.C. § 41301; 46 C.F.R. § 502.62).

Under the Shipping Act and well-established Commission caselaw, to seek reparations, proceedings must be filed within the Commission's three-year statute of limitations. While the statute of limitations may be tolled under the discovery rule, under these facts, it was only tolled while the conspiracy was secret. Once the conspiracy was publicized after the dawn raids, the discovery rule no longer applied to toll the statute of limitations. In addition, *American Pipe* only tolls the statute of limitations for proceedings with the same cause of action. Because the federal antitrust suits were filed alleging different violations in a different forum, the federal antitrust suits did not toll the Shipping Act's statute of limitations. With reasonable diligence, Complainants could have discovered their claims more than three years prior to filing their

complaints. Therefore, application of the discovery rule does not make the complaints timely. Because the complaints were not filed within three years of the date the cause of action accrued, Complainants are not entitled to seek reparations.

iii. Continuing Violations

The 2016 Complainants do not contend that the violations went beyond 2012, identifying the proposed class period as February 1997 to as late as December 31, 2012. 16-01 OTI Complaint ¶ 4 (class period is February 1997 to December 31, 2012); 16-07 End-Payors Complaint ¶ 3 (class period is January 1, 2000 until anticompetitive effects ceased); 16-10 Truck Centers Complaint ¶ 195 (class period is February 1, 1997 through at least September 2012); 16-11 Auto Dealers Complaint ¶¶ 6, 174-184 (class period is class period is January 1, 2000 until anticompetitive effects ceased, but also that the conspiracy started as early as February 1997 and continued until at least September of 2012). Fiat, however, specifically alleges continuing violations. 17-09 Fiat Complaint ¶ 4.

In *Maher*, continuing payments under leases signed more than three years prior to the filing of the complaint were not sufficient to permit a claim for reparations to proceed although a claim for a cease and desist order was allowed to proceed. *Maher Terminals*, 32 S.R.R. at 1195. In *Seatrain Gitmo*, the statute of limitations ran from each new act denying access to a specific dock, what the decision refers to as a continuing violation. *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Authority*, 18 S.R.R. 1079, 1081 (ALJ 1978) (adopted January 3, 1979). The term "continuing violation" is subject to multiple meanings[6] and it is not clear whether the continuing violations alleged in the 17-09 Fiat complaint would impact the statute of limitations for reparations.

The Fiat complaint was filed significantly later than the other cases, however, Fiat makes allegations in its complaint of continuing violations. Respondents contend that Fiat's allegations do not constitute continuing violations and argue that the claims here are analogous to the time-barred claims in *Maher* that accrued when the lease was signed and are different from the claims in *Seatrain Gitmo* that accrued each time a new violation occurred, in that case, denial of a berth. Supp. Mot. at 11-13.

Fiat asserts that Respondents have conceded that "a Shipping Act claim accrues when the claimant pays the illegal price" and that each "time Respondents charged Fiat the anticompetitive price and included it [in] a new contract" Respondents violated the Shipping Act. Supp. Opp. at 7-9. Fiat asserts that it alleged violations of the Shipping Act within the last three years and that "Respondents have continued to enter into agreements with [Fiat] and 'because the current prices for roll on roll off cargo transport services are based on historic prices, [Fiat] continues to be injured by the secret, unfiled agreements today.'" Supp. Opp. at 7.

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[6] *See Turley v. Rednour*, 729 F.3d 645, 654-655 (7th Cir. 2013) (concurring opinion) where Judge Easterbrook explained the differences between continuing violations that begin and continue (ongoing action or inaction is a new violation); are actionable if there are sufficient violations that add up (statute of limitations runs from the last act); and discrete wrongful acts (new violations do not extend the time to sue for old violations).

Respondents reply that Fiat "has failed to plead an independent act within the Shipping Act's three-year statute of limitations for reparations that would constitute an actionable violation of the Shipping Act," pointing out that the 17-09 Fiat complaint does not allege specific dates after 2012 and that the complaint "only alleges agreements between or among Respondents *before* September 6, 2012. Supp. Reply at 5-7 (emphasis in original).

Fiat's complaint lacks details that would assist with determining whether or not their claim for reparations for continuing violations is time barred by the three-year statute of limitations. Specifically, Fiat does not indicate when their contracts with the Respondents for RoRo services were negotiated. Fiat alleges that Respondents have not "offered to renegotiate the prices in the contracts," Fiat Complaint ¶ 44, although Fiat does not state whether or not it requested such renegotiation. Fiat may be entitled to reparations if it can establish a violation that accrued within three years of filing their complaint. It is unclear from the face of the complaint when Fiat's reparations claim accrued and at this early stage of the proceeding there is not enough information to grant a motion to dismiss Fiat's reparations claim on the basis of the statute of limitations.

Even if reparations are not available, Fiat could pursue a cease and desist order. If Fiat can show, as it alleges, that the Respondents violated the Shipping Act, they could request a cease and desist order. It is too early to determine whether or not Fiat will be able to establish both a violation of the Shipping Act and an entitlement to reparations. At this stage of the proceeding, Fiat only needs to make a plausible claim. Fiat has made a plausible claim that it may be entitled to a cease and desist order and possibly reparations, if it establishes violations that occurred within three years of filing its complaint.

d. Conclusion

The dawn raids in June 2012 triggered the statute of limitations to begin to accrue and therefore, the motion to dismiss the claim for reparations is granted for the four 2016 complaints. It does not appear from the face of the 17-09 Fiat complaint that the allegations of a continuing violations are not plausible. Therefore, at this stage, Fiat's reparations claim will be allowed to proceed. Fiat may seek reparations for violations that occurred within three years of filing the complaint. In addition, both the OTIs and Fiat may seek a cease and desist order for any alleged Shipping Act violations which are established. Accordingly, the motion to dismiss the reparations claims is granted for all complaints except for any violations in the 17-09 complaint that Fiat can establish accrued within three years of the filing of Fiat's complaint. The dismissal of the reparation claims because of the statute of limitations would be sufficient, on its own, to dismiss the complaints in dockets 16-07, 16-10, and 16-11, in which there are no remaining claims.

4. Sufficiency of Pleadings

a. Parties' Arguments

Respondents assert that all five of the complaints fail to state cognizable Shipping Act claims, arguing that the section 41102(c) claims should be dismissed for lack of subject matter jurisdiction and that all of the claims should be dismissed for failure to state cognizable claims.

Motion at 42-56; Supp. Mot. at 14-17. Complainants contend that all causes of action under the Shipping Act are properly pleaded. Opposition at 45-60; Supp. Opp. at 10-12.

b. Discussion

Respondents argue two issues regarding the sufficiency of the pleadings: whether the Commission has subject matter jurisdiction over the section 41102(c) claims and whether the complaint alleges plausible claims. Although the same issues are raised regarding Fiat's complaint, because it differs from the other complaints, its plausibility analysis will be discussed separately. As explained more fully below, at this preliminary stage, none of the complaints will be dismissed for failure of subject matter jurisdiction or for failure to state a plausible claim. If any of the cases proceed, the parties may raise these issues at appropriate points. Subject matter jurisdiction will be discussed prior to discussing the plausibility of Complainants' claims.

i. Subject Matter Jurisdiction For Section 41102(c) Claims

The Complainants allege that the Respondents violated 46 U.S.C. § 41102(c). 16-01 OTI Complaint ¶¶ 118; 16-07 End-Payors Complaint ¶¶ 211-212 ; 16-10 Truck Centers Complaint ¶¶188-189; 16-11 Auto Dealers Complaint ¶¶ 175-176; 17-09 Fiat Complaint ¶¶ 55-56. Under the Shipping Act, a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

Respondents argue that the section 41102(c) allegations are beyond the Commission's subject matter jurisdiction as they do not involve regulations and practices related to "receiving, handling, storing, or delivering" of property. Motion at 42-45; Supp. Mot. at 14. Complainants assert that the Commission has not held that the types of activities alleged here are outside of its subject matter jurisdiction. Opposition at 45-48; Supp. Opp. at 10-11.

At this early stage, when no discovery has been conducted, the complete extent of the alleged conspiracy is not clear. The allegations in the complaints are detailed and involve the international shipment of cargo by water to and from United States ports. There are allegations that the Respondents divided up routes, which could arguably be relevant to delivering property. An argument could be made that the allegations impact receiving, handling, storing, or delivering motor vehicles by RoRo sufficiently to invoke the jurisdiction of the Commission. Moreover, the Commission has subject matter jurisdiction over the remaining allegations, so that if they proceed, this claim could be further pursued. The parties may raise this argument again, if the case proceeds, as appropriate.

ii. Plausibility Of Claims In The Four 2016 Complaints

The four 2016 complaints in these cases provide over one hundred detailed factual allegations regarding the vehicle carrier industry; the market structure and characteristics of the market for vehicle carrier services including barriers to entry, inelasticity of demand, concentrated market, homogeneous services, opportunities to conspire, and excess capacity; conspiracy to fix prices and allocate customers and routes, including coordination of price increases, coordination of responses to price reduction requests, conspiracy to allocate customers and routes, conspiracy to restrict capacity, guilty pleas, and government fines; and other evidence of collusion in the vehicle carrier services market, including price increases that exceeded demand and previous collusion. 16-01 OTI Complaint ¶¶ 20-102; 16-07 End-Payor Complaint ¶¶ 79-194; 16-10 Truck Centers Complaint ¶¶ 49-153; 16-11 Auto Dealers Complaint ¶¶ 41-139; 17-09 Fiat Complaint ¶¶ 17-47. The complaints include references to specific agreements, routes, and other practices.

The sections of the 2016 complaints identifying the Shipping Act violations are significantly more limited, reciting the time period and legal conclusions. In some of the complaints' violation sections, there are references to specific practices and agreements; however, the specific correlations between the legal and factual allegations are not always spelled out in the complaints.

The sections of the complaints alleging violations, however, are not read separately from the other sections of those complaints. Although the sections of the complaints that allege the violations may be somewhat limited in factual detail, that factual detail is provided elsewhere in the complaints. Moreover, the factual allegations provide sufficient facts to allege plausible claims. Respondents have settled numerous lawsuits, including criminal suits and an enforcement proceeding by the Commission's Bureau of Enforcement. On the other hand, Complainants were not parties to any of the prior proceedings and have not had the opportunity to conduct any discovery.[7] At this stage, it is sufficient that the complaints have presented plausible Shipping Act claims. Accordingly, Respondents' motion to dismiss for failure to state a claim is denied.

iii. Plausibility of 17-09 Fiat Complaint

Respondents assert that Fiat's complaint "is inadequate for additional reasons," arguing that the complaint "provides no factual details whatsoever about its alleged interactions or contracts with Respondents" and "this information is well-known to [Fiat] and plainly within [Fiat]'s possession; the failure to plead these necessary facts is inexcusable and compels dismissal as a matter of law." Supp. Mot. at 15.

Fiat asserts that it "has met and exceeded the factual pleading standard," that Respondents are on notice of the claims, that it was not required to "plead the evidentiary details of its case: the dates of the parties' contracts, the specific terms that evidence Respondents'

[7] Complainants request that "[i]f this Court disagrees that Plaintiffs have failed to plead their claims without sufficient factual detail, Complainants request leave to amend." Opposition at 45 n.44.

Shipping Act violations, the precise amount of Respondents' illegal overcharge, etc." and that it would be improvident and premature to dismiss the complaint without allowing Fiat to develop the factual record in discovery. Supp. Opp. at 10-12.

Respondents reply that notice pleading is not the standard; that Complainants fail to provide the required factual "heft" to be entitled to relief; that the pleading standard "serves a critical gatekeeping function" and avoids unnecessary discovery expenses; and that Fiat "intentionally chose to omit any factual 'heft' from its complaint in the hope of delaying the inevitable dismissal of its time-barred reparations claims." Supp. Reply at 8-12.

The allegations of the Fiat complaint are significantly sparser than the allegations in the 2016 complaints. The Fiat complaint has twenty-five paragraphs describing RoRo cargo, the Respondents and their co-conspirator's illegal, anti-competitive conduct, Respondents' admissions of entering into secret, unfiled agreements, and Fiat's purchase of RoRo transportation services for prices made in accordance with unfiled agreements and its continuing payment of those prices. 17-09 Fiat Complaint ¶¶ 17-47. Fiat does not identify specific contracts that it claims were part of the alleged Shipping Act violations. Allegations of specific causes of action consist of a restatement of the legal requirements and a reference to the general factual allegations. 17-09 Fiat Complaint ¶¶ 48-67.

Fiat's failure to plead specific information regarding the contracts it believes violated the Shipping Act is not fatal at this stage of the proceedings. Fiat did provide a factual basis including specific facts about the market, the parties, the conduct alleged to violate the Shipping Act, and the alleged harm. While the allegations in Fiat's complaint could be more detailed, they offer a plausible factual basis, unlike the cases cited by Respondents. Supp. Mot. at 16; *Transhorn, Ltd. v. United Tech. Corp. (In re Elevator Antitrust Litig.)*, 502 F.3d 47, 52 (2d Cir. 2007) (Allegations lacked "evidence of linkage between such foreign conduct and conduct here" and "offer nothing more than conclusory allegations: for example, there are no allegations of global marketing or fungible products, no indication that participants monitored prices in other markets, and no allegations of the actual pricing of elevators or maintenance services in the United States or changes therein attributable to defendants' alleged misconduct.") (citations omitted); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008) ("Plaintiffs only offer bare allegations without any reference to the 'who, what, where, when, how or why.' Similarly, the vague allegations in the instant case 'do not supply facts adequate to show illegality' as required by *Twombly*.").

c. Conclusion

It is anticipated that through discovery, the Complainants would be able to obtain information that would more clearly flesh out their complaints. At this stage, however, it is sufficient that all five complaints have presented plausible Shipping Act claims. Given the complaints' detailed factual allegations, all five complaints present plausible Shipping Act allegations. Accordingly, Respondents' motion to dismiss for insufficiency of the pleadings is denied without prejudice.

5. Service

Respondents raise the issue of whether proper service has been obtained on the non-United States respondents, suggesting that the express mail service utilized may violate the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"). Motion at 57. Respondents suggested, however, that this issue be deferred as a pending Supreme Court case, *Water Splash*, may resolve the issue. Motion at 57-58. Fiat Respondents state that "if *Water Splash* is reversed, then the propriety of the method of service of process used here must be reexamined on a non-U.S. Respondent-by-non-U.S. Respondent basis, in order to determine whether each State of destination opted out of the provisions of Article 10(a) of the Hague Convention, thereby disallowing service by mail and requiring service of process according to Articles 5 and 10(b) and (c) of the Hague Convention." Motion at 58.

Complainants do not address this issue in their opposition or supplemental opposition. The issue of service was also not addressed by Respondents in the supplemental motion or supplemental reply, all filed after the *Water Splash* decision was issued by the Supreme Court.

The Supreme Court recently issued its decision in *Water Splash*, vacating and remanding the decision below and stating: "[t]oday we address a question that has divided the lower courts: whether the Convention prohibits service by mail. We hold that is does not." *Water Splash v. Menon*, 137 S. Ct. 1504, 1507 (2017). While it appears that service by mail does not violate the Hague Convention, the parties have not had an opportunity to file briefs addressing the Court's decision. Therefore, the motion to dismiss for insufficiency of service is denied without prejudice.

C. Conclusion

The Commission discussed the standard for when leave to amend pleadings is appropriate, stating:

> Valid grounds for denying leave to amend include "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [and] futility of amendment, etc.'" "'Additionally, leave to amend may be denied when a party does not request leave to amend or does not indicate the particular grounds on which amendment is sought.'"

Maher Terminals, 12-02, 34 S.R.R. at 77 (emphasis and citations omitted).

The Complainants state in a footnote in their opposition that the "End-Payor Complainants, Truck Center Complainants, and Auto Dealer Complainants intend to amend their complaints to include claims for equitable relief in order to enforce signed settlement agreements." Opposition at 3 n.2. No settlement agreements have been filed with the Commission. If the parties reach a settlement, they should file a motion requesting approval of the settlement along with a copy of the settlement agreement. If there is no settlement on file with the Commission, it is unlikely that the Commission would have any power to enforce the settlement agreement.

None of the Complainants have requested leave to amend nor have they explained how an amended claim would impact any of the arguments raised. The dismissals for class actions, indirect purchasers, and statute of limitations are unlikely to be resolved by amended pleadings. It appears that amendment would be futile. Accordingly, the dismissals are with prejudice.

Respondents also request leave to present oral argument on their consolidated motion to dismiss and their supplemental consolidated motion to dismiss. Motion to Dismiss at 2; Supp. Mot. to Dismiss at 2. Complainants do not address the request. Having reviewed the filings, additional argument by counsel is not required. Accordingly, the requests for oral argument on these motions are hereby **DENIED**.

D. Appeal

Respondents' motion and supplemental motion seek dismissal with prejudice of all five complaints. The motion to dismiss the request for class action treatment by Complainants in 16-01, 16-07, 16-10, and 16-11 is granted as it is not clear that the Commission has the authority to hear representative actions. The motion to dismiss is granted with respect to the complaints filed in 16-07, 16-10, and 16-11 because these Complainants lack standing to seek reparations as they do not allege that they directly suffered actual injury and they do not have remaining claims. The motion to dismiss the claim for reparations for the five complaints is granted for failure to file within the three-year statute of limitations, except that in 17-09, Fiat may attempt to seek reparations for violations that occurred within three years of filing its complaint. This would be an alternative basis to dismiss the complaints in dockets 16-07, 16-10, and 16-11. The motion to dismiss for failure to state cognizable Shipping Act claims and the request to dismiss for improper service are denied without prejudice. Therefore, the claims that remain are the 16-01 OTI claims for a cease and desist order and the 17-09 Fiat claims for a cease and desist order and reparations claim for violations within three years of filing the complaint.

Pursuant to Commission Rule 227(b)(1), Complainants may file exceptions as a matter of right and pursuant to Commission Rule 227(d), the Commission may choose to review this decision. 46 C.F.R. § 502.227. Because some claims in dockets 16-01 and 17-09 are not dismissed, those portions of this ruling would not be reviewed at this time pursuant to Rule 227. However, it is anticipated that if these cases proceed at this level, there will be a need for extensive discovery covering vehicles shipped to and from the United States over at least a fifteen-year period.

Commission Rule 221 provides that the presiding officer may allow an interlocutory appeal if he or she finds it necessary "to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party." 46 C.F.R. § 502.221(a); *Maher Terminal, LLC v. Port Authority of New York and New Jersey*, 32 S.R.R. 1, 32-33 (ALJ 2011) *aff'd in part* 32 S.R.R. 1185 (FMC 2013). Permitting an interlocutory appeal of the partial denial of the motion and supplemental motion to dismiss would allow a determination of the scope of the proceeding before the parties engage in expensive and time-consuming discovery. In addition, complex litigation is often resolved by settlement agreements between the parties. The parties should know the potential recovery possible prior to expending additional resources litigating these claims. Moreover, efficiency is enhanced by maintaining these proceedings in a consolidated state. Accordingly, *sua sponte*,

Respondents are granted leave to appeal the partial denial of the motion to dismiss. If Respondents choose to appeal, their brief is due twenty-two days after this decision and Complainants' response is due twenty-two days after Respondents file their briefs.

Therefore, if any of the five proceedings are reviewed by the Commission, either by request of the parties or the Commission itself, the Commission will have that entire proceeding before it.

IV. ORDER

Upon consideration of the motion and supplemental motion to dismiss, the opposition and supplemental opposition, the reply and supplemental reply, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the Respondents' motion to dismiss and supplemental motion to dismiss be **GRANTED IN PART AND DENIED IN PART**. It is

FURTHER ORDERED that the motion to dismiss the 16-01 complaint by the OTIs be **GRANTED IN PART AND DENIED IN PART**. The claims for a class action and for reparations are **DISMISSED WITH PREJUDICE**, however, the claim for a cease and desist order for named parties may proceed. It is

FURTHER ORDERED that the motion to dismiss the 16-07 complaint by the End-Payors be **GRANTED**. The claims for a class action and for reparations is **DISMISSED WITH PREJUDICE**, and the proceeding is **DISMISSED WITH PREJUDICE** as no other claims remain. It is

FURTHER ORDERED that the motion to dismiss the 16-10 complaint by the Truck Centers be **GRANTED**. The claim for a class action and for reparations is **DISMISSED WITH PREJUDICE**, and the proceeding is **DISMISSED WITH PREJUDICE** as no other claims remain. It is

FURTHER ORDERED that the motion to dismiss the 16-11 complaint by the Auto Dealers be **GRANTED**. The claim for a class action and for reparations is **DISMISSED WITH PREJUDICE**, and the proceeding is **DISMISSED WITH PREJUDICE** as no other claims remain. It is

FURTHER ORDERED that the motion to dismiss the 17-09 complaint by Fiat be **GRANTED IN PART AND DENIED IN PART**. The claim for reparations is **DISMISSED WITH PREJUDICE IN PART**, and the claims for a cease and desist order and for reparations for violations within three years of filing the complaint may proceed. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that Respondents are granted leave to appeal the partial denial of the motion to dismiss pursuant to Rule 221. If Respondents choose to appeal, their brief is due

twenty-two days after this decision and Complainants' response is due twenty-two days after Respondents filed their briefs.

Erin M. Wirth
Administrative Law Judge

SCHEDULE A

Docket No.	Case Name
16-01	Cargo Agents, Inc., International Transport Management Corp., and RCL Agencies, Inc. v. Nippon Yusen Kabushiki Kaisha, NYK Line (North America) Inc., Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (USA) Inc., World Logistics Service (U.S.A.), Inc., Kawasaki Kisen Kaisha Ltd., "K" Line America, Inc., Eukor Car Carriers Inc., Wallenius Wilhelmsen Logistics AS,Wallenius Wilhelmsen Logistics Americas LLC, Compañía Sud Americana De Vapores S.A., CSAV Agency North America, LLC, Höegh Autoliners Holdings AS, Höegh Autoliners AS, Höegh Autoliners, Inc., Autotrans AS, Alliance Navigation LLC, and Nissan Motor Car Carrier Co., Ltd.
16-07	Jill M. Alban, Grant M. Alban, Mary Arnold, Al Baker, Katrina Bonar, Emmett R. Brophy, Steven Bruzonsky, Monica Bushey, Craig Buske, Doda "Danny" Camaj, Stephanie B. Crosby, Melinda Deneau, Jennifer Dillon, Jeffrey L. Gannon, Pamela Goessling, Thomas Goessling, Sean Gurney, Sheryl Haley, Lesley Denise Hart, Bruce Hertz, Elizabeth Ashley Hill nèe Edwards, Maria Kooken, Adair Lara, Christine Laster, Kori Lehrkamp, Michael Lehrkamp, John Leyva, Joan Macquarrie, Daniel Morris, Tony Nikprelaj, Gustavo Adolfo Perez, Judy A. Reiber, Roberta Rothstein, Jeffrey Rubinstein, Alexandra Scott, Jason Smith, Catherine Taylor, Richard Tomasko, and Demian Vargas v. Nippon Yusen Kabushiki Kaisha, NYK Line (North America) Inc., Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (USA), Inc., World Logistics Service (USA) Inc., Höegh Autoliners AS, Höegh Autoliners, Inc., Nissan Motor Car Carriers Co. Ltd., Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc., Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics Americas LLC, Eukor Car Carriers Inc., Compañía Sud Americana De Vapores S.A., and CSAV Agency North America, LLC
16-10	Rush Truck Centers of Arizona, Inc., Rush Truck Centers of California, Inc., Rush Truck Centers of Colorado, Inc., Rush Truck Centers of Florida, Inc., Rush Truck Centers of Georgia, Inc., Rush Truck Centers of Idaho, Inc., Rush Truck Centers of Kansas, Inc., Rush Truck Centers of North Carolina, Inc., Rush Truck Centers of Ohio, Inc., Rush Truck Centers of Oklahoma, Inc., Rush Truck Centers of Texas, LP, and Rush Truck Centers of Utah, Inc. v. Nippon Yusen Kabushiki Kaisha, NYK Line (North America) Inc., Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (USA), Inc., World Logistics Service (USA) Inc., Höegh Autoliners AS, Höegh Autoliners, Inc., Nissan Motor Car Carriers Co. Ltd., Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc., Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics Americas LLC, Eukor Car Carriers Inc., Compañía Sud Americana De Vapores S.A., and CSAV Agency North America, LLC

16-11	Landers Brothers Auto Group, Inc., Landers Brothers Auto No. 4, LLC v. Nippon Yusen Kabushiki Kaisha, NYK Line (North America) Inc., Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (USA), Inc., World Logistics Service (USA) Inc., Höegh Autoliners AS, Höegh Autoliners, Inc., Nissan Motor Car Carriers Co. Ltd., Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc., Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics Americas LLC, Eukor Car Carriers Inc., Compañía Sud Americana De Vapores S.A., and CSAV Agency North America, LLC
17-09	Fiat Chrysler Automobiles NV, FCA US LLC, and FCA Italy S.P.A. v. Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics Americas LLC, Eukor Car Carriers Inc., Nippon Yusen Kabushiki Kaisha, NYK Line (North America) Inc., Mitsui O.S.K. Lines, Ltd., Mol (America) Inc., Kawasaki Kisen Kaisha, Ltd., "K" Line America, Inc., Compañía Sud Americana De Vapores, And Hoëgh Autoliners AS

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

CARLSTAR GROUP LLC F/K/A CARLISLE TRANSPORTATION PRODUCTS, INC. AND CTP TRANSPORTATION PRODUCTS, LLC, *Complainants*

v.

UTI UNITED STATES, INC.; UTI UNITED STATES, LLC; AND DSV AIR & SEA, INC., *Respondents*.

DOCKET NO. 17-08

Served: May 18, 2018

BEFORE: Clay G. GUTHRIDGE, *Chief Administrative Law Judge*.

INITIAL DECISION PARTIALLY DISMISSING COMPLAINT[1]

[Notice of Commission Determination to Review served 6/19/18; Commission's Order Granting Joint Petition for Approval of Settlement Agreement, Dismissal with Prejudice, and Confidentiality of Settlement Agreement served 10/17/18, proceeding discontinued.]

INTRODUCTION

I. BACKGROUND.

On August 31, 2017, complainants The Carlstar Group LLC f/k/a Carlisle Transportation Products, Inc., and CTP Transportation Products, LLC, filed a Complaint with the Commission alleging that respondents UTi, United States, Inc.; UTi, United States, LLC; and DSV Air & Sea, Inc., violated sections 41102(c), 41104(2), and 41104(4) of the Shipping Act of 1984. 46 U.S.C. §§ 41102(c), 41104(2), and 41104(4). Although Carlisle is the entity that signed the Carlisle Transportation Products Agreement (Agreement) that is the subject of this proceeding, in their Complaint, Complainants refer to themselves as Carlstar. For convenience, except when describing the Agreement, they will be referred to as Carlstar in this memorandum. Respondents will be referred to as UTi, the non-vessel-operating common carrier (NVOCC) that signed the Agreement.

[1] The initial decision on the part of the Complaint that is dismissed will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

On joint motion of the parties, the time for UTi to answer or otherwise respond to the Complaint was extended twice to give the parties an opportunity to engage in settlement discussions and mediation with the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS). *Carlstar Group LLC f/k/a Carlisle Transportation Products, Inc. and CTP Transportation Products, LLC v. UTi, United States, Inc.; UTi United States, LLC; and DSV Air & Sea, Inc.*, FMC No. 17-08 (ALJ Sept. 28, 2017) (Order Staying Proceeding for Limited Time) (*Carlstar v. UTi*); *Carlstar v. UTi*, FMC No. 17-08 (ALJ Oct. 23, 2017) (Second Order Staying Proceeding for Limited Time). Settlement discussions did not result in resolution of the parties' dispute.

On December 8, 2017, UTi filed a motion to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim. UTi also contends that the Agreement between the parties requires that their dispute be resolved by arbitration, not on a complaint filed with the Commission. If the Complaint is not dismissed in its entirety, UTi argues that the Act's statute of limitations bars claims for alleged violations that occurred more than three years before Carlstar filed its Complaint.

On December 26, 2017, Carlstar filed a response to the motion. Carlstar argues that the Agreement "should be considered a 'service contract' under 46 U.S.C. § 41104(2)(A)." (Carlstar Response at 3.) Carlstar argues that "UTi needs to justify that the charges were covered by the service contracts, which it did not record, or were authorized by properly filed tariffs or an alternative Commission-compliant rate vehicle." (*Id*. at 5.) A request by UTi for enlargement of time to reply was granted with instructions for UTi to address the effect, if any, of agreements tolling the statute of limitations described in paragraphs 32 through 34 of the Complaint on UTi's statute of limitations argument. *Carlstar v. UTi*, FMC No. 17-08 (ALJ Dec. 26, 2017) (Order Enlarging Time to File Reply Memorandum).

On January 2, 2018, an order was entered directing Carlstar to file a supplemental memorandum setting forth its contentions regarding the operational status of UTi on the shipments that were subject to the parties' transportation agreement because it was not "clear from Complainants' Complaint, the Carlisle Transportation Products Agreement, or Complainants' opposition to Respondents' motion to dismiss whether Complainants contend UTi was operating as an NVOCC or an ocean freight forwarder on the shipments that were subject to the Carlisle Transportation Products Agreement." *Carlstar v. UTi*, FMC No. 17-08, Order at 4 (ALJ Jan. 2, 2018) (Amended Order Enlarging Time to File Reply Memorandum and Order Directing Complainants to Supplement Brief Responding to Respondents' Motion to Dismiss). The order further enlarged the time for UTi to file its reply to permit it to address Carlstar's response to the motion to dismiss and to Carlstar's supplemental memorandum in one reply. The order also granted leave for Carlstar to file a sur-reply limited to UTi's reply to Carlstar's response to the question regarding the tolling agreements and UTi's response to Carlstar's supplemental memorandum. *Id.* at 5.

Carlstar filed a supplemental memorandum stating that "[i]t is Carlstar's contention that UTi was operating as an NVOCC on the shipments that were subject to the Carlisle

Transportation Products Agreement." (Complainants' Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss at 1-2.) UTi filed a reply stating that UTi operated "exclusively" as an NVOCC on the shipments. (Respondents' Reply to Complainants' Opposition and Supplemental Brief to Motion to Dismiss at 3.)

In a Preliminary Ruling on February 23, 2018, the undersigned stated that it did not appear that the Agreement's arbitration clause requires dismissal of the Complaint, *Carlstar v. UTi*, FMC No. 17-08, Ruling at 12-13 (ALJ Feb. 23, 2018) (Preliminary Ruling on Respondents' Motion to Dismiss), and that it appeared that the Complaint failed to state a claim of violation of section 41102(c). *Id*. at 16-19. The Preliminary Ruling invited the parties to seek reconsideration of the rulings, but neither party has sought reconsideration. The Preliminary Ruling discussed the statute of limitations issue raised by UTi and made some observations on the issue, but did not enter a ruling. The statute of limitations issue is not addressed in this Initial Decision.

The Preliminary Ruling stated that it appeared the Commission has subject matter jurisdiction over Carlstar's claims that UTi violated sections 41104(2) and 41104(4), but that additional submissions would be required before ruling on the motion to dismiss the Complaint for failure to state a claim of violation of these sections. UTi was required to respond to questions based on its assertion that it operated "exclusively" as an NVOCC and asked how its actions complied with section 41104(2) of the Act, which requires a common carrier to transport cargo pursuant to a tariff or a service contract. UTi was also asked whether it transported the cargo pursuant to an NVOCC Service Arrangement or an NVOCC Rate Agreement (NRA). In its response to the questions, UTi now states that it does not contend that it operated as an NVOCC, but that it "functioned in a manner akin to an ocean freight forwarder (albeit for inbound shipments to the United States), negotiating favorable rates for Carlstar with ocean carriers, passing through those rates and surcharges without any mark-up and providing for the arrangement of transportation services in exchange for a management fee." (Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 7.) In addition to responding to the questions, UTi seeks reconsideration of the ruling that the Commission has subject matter jurisdiction over the claims of violation of sections 41104(2) and 41104(4). Carlstar filed a response to the brief and UTi filed a reply. On April 20, 2018, the parties appeared by telephone for oral argument on the motion. An audio recording was made of the transcript and provided to counsel. The Commission has not prepared a transcript of the argument.

The motion to dismiss the claim that UTi violated sections 41104(2) and 41104(4) for lack of subject matter jurisdiction and for failure to state a claim are addressed together in this decision. Neither party sought reconsideration of the preliminary ruling that the arbitration clause in the Agreement does not deprive the Commission of jurisdiction or the preliminary ruling that the Complaint fails to state a claim for violation of section 41102(c). These preliminary rulings are incorporated into this decision.

As discussed more fully below, the Commission has subject matter jurisdiction over the Complaint and the Complaint states a claim for violation of sections 41104(2) and 41104(4). Therefore, the motion to dismiss these claims is denied.

II. FACTS AND PROCEDURAL HISTORY.

A. Complaint.

Except where noted, the facts are summarized from Complainants' Complaint filed with the Commission on August 31, 2017, the attachments to the Complaint, and the subsequent factual assertions of the parties that are not in dispute.

Complainant Carlstar Group LLC is a Tennessee corporation. In 2011, Carlstar was known as Carlisle Transportation Products, Inc. By 2014, complainant CTP Transportation Products LLC had been established to take Carlisle's place. On February 26, 2015, CTP Transportation Products, LLC, changed its name to Carlstar Group LLC.

Respondent UTi, United States, Inc., was an NVOCC and ocean freight forwarder licensed by the Commission (License No. 001792). I take official notice of Commission records, 46 C.F.R. § 502.226, indicating that UTi, United States, Inc., voluntarily surrendered its Commission license effective December 12, 2016. Respondent UTi, United States, LLC, is a successor-in-interest to UTi United States, Inc. UTi, United States, Inc., is alleged to be a subsidiary of respondent DSV Air & Sea, Inc., an ocean transportation intermediary that provides transport and logistics services, including warehousing, distribution, packing, and loading. I take official notice of Commission records indicating that DSV Air & Sea, Inc., is licensed by the Commission as an NVOCC and ocean freight forwarder (License No. 017331). DSV Air & Sea, Inc., is alleged to be the United States subsidiary of its parent company, DSV Air & Space Holding A/S in Copenhagen, Denmark.

The Complaint alleges that on June 1, 2011, Carlisle and UTi executed a Carlisle Transportation Products Agreement (Agreement) that obligated UTi to provide Carlisle with "world-class ocean freight negotiation and management services" including, but not limited to, "freight forwarding, brokerage, contract logistics and consulting services" as well as duties delineated in a Statement of Work attached to the Agreement. (Complaint ¶¶ 8-9 and Exhibit 1.) In return, Carlisle agreed to compensate UTi in accordance with the rates in the schedule of pricing and handling fees attached to the Agreement. The pricing schedule reflected "usual commercial terms in the service area provided" and would be reviewed on an annual basis. Where industry and commerce trends and conditions allowed for more favorable rates, UTi pledged its best efforts to modify its rate structures so that both parties could take advantage of the more favorable rates without sacrificing service. UTi agreed to notify Carlisle promptly when commercial and world conditions required increased rates and costs. (Complaint ¶¶ 10-13.) The original Agreement was in effect until June 30, 2012, and was extended by amendments through December 31, 2015. The amendments also recorded changes in Carlisle's name. (Complaint ¶¶ 14-22.)

The Agreement obligated UTi "to perform and provide such Services as may be mutually agreed to by Carlisle and UTi, including but not limited to freight forwarding, brokerage, contract logistics and consulting services" and obligated Carlisle to "use UTi exclusively for its ocean freight forwarding and NVOCC requirements in Asia Pacific, Africa, North and South America, Europe and Australia." (Complaint Exhibit 1 at 1.) UTi is described as "an independent contractor for all purposes." (*Id*. at 4.)

Appendix A to the Agreement provides, *inter alia*:

> o UTi will conduct joint Carlisle UTi RFP/negotiations for each ocean contract required.
> o UTi will draft RFP requirements in accordance with Carlisle's reasonable instructions and business rules to present to carriers at the commencement of each RFP.
> * * *
> o Carriers invited into process will be chosen jointly by Carlisle & UTi team[.] UTi assesses and recommends carriers by lanes from the RFP process and presents to Carlisle for approval
> o UTi is responsible for managing carriers.
> o UTi is responsible for signing ocean freight contracts and the subsequent (MQC) Minimum Quantity commitment fulfillment.
> * * *
> o As noted, all rates fees and charges are between UTi & Carlisle. That those rates [*sic*], fees and charges mirror the actual rates, fees and charges between UTi and each Ocean Carrier.
> o UTi agrees to provide comprehensive management and access to all rates, fees, charges that are agreed upon by Carlisle, UTi and the Ocean carriers used to transport Carlisle shipments by UTi.

(Complaint Exhibit 1 Appendix A.) To establish the rates for full container load shipments, "[t]ripartite negotiated activities will be conducted in open book sessions during the [request for quotation] with the provision that multiple carrier selections per lane will be utilized and managed within the operational context of each transactional lane." (Complaint Exhibit 1 Appendix B.) The tripartite activities apparently included Carlisle, UTi, and a vessel-operating common carrier under consideration under the provisions of Complaint Exhibit 1 Attachment A.

In 2016, due to concerns about the rates UTi charged Carlisle for transportation services, Carlstar retained Ocean Audit, Inc., to engage in an audit of the invoices, payments, and financial records reflecting payments by Carlisle to UTi during the period from 2011 through 2016. The audit allegedly revealed significant discrepancies between the amount UTi billed Carlisle versus the amount UTi should have billed Carlisle under the Agreements. Carlstar alleges that UTi overcharged by at least $805,825.56 for the period from 2011 through 2016. Carlstar contends that prior to the audit, it was not aware of the overcharges. UTi allegedly imposed the charges by multiple billing for shipments, improperly charging bill of lading fees on a per container basis

rather than on a per shipment basis, ocean freight billing errors, and bunker fuel charge invoice errors. As a result of the alleged overcharges uncovered by Ocean Audit, Carlstar conducted an internal audit of the pass-through and miscellaneous charges paid by Carlisle to UTi from January 2014 through April 2016 and found additional alleged overcharges.

As specific acts in violation of the Shipping Act committed by UTi, Carlstar alleges:

24. This Ocean Audit . . . revealed significant discrepancies between the amount UTi billed Carlstar under the Agreements versus the amount UTi should have billed Carlstar.

25. Prior to the Ocean Audit, Carlstar was not aware of UTi's overcharges alleged in this Complaint.

26. The amount Carlstar was overcharged, and the amount it overpaid, for UTi shipments was at least $805,825.56 for the period from 2011 through 2016. See Exhibits 5-12.

27. The Ocean Audit analysis suggests that $151,925.63 is due for duplicate pay and hybrid claims. *See* Exhibits 5-9. More specifically, the following five (5) shipments were double-billed, triple-billed, or incorrectly billed:
a. Invoice Nos. CLT338574300 and CLT338574302 show double billing, as the same Shipment No. 5861142431 is listed on these two (2) invoices, resulting in an overcharge of $39,384.51. *See* Exhibit 5.
b. Invoice No. 29000103373 shows double billing as Shipment No. 5861206526 only had two (2) containers, but Carlstar was billed for four (4) containers, resulting in an overcharge of $7,120.00. *See* Exhibit 6.
c. Invoice No. 29000799420-1 shows that UTi overcharged Carlstar by $19,209.00, as it contains incorrect BAF billing on Shipment No. 114109940. *See* Exhibit 7.
d. Invoice No. 29000070632 shows that UTi overcharged Carlstar $63,694.12 as: (1) Shipment No. 5861211869 only had four (4) containers, but Carlstar was billed for eight (8) containers; (2) Shipment No. 5861211869 contains an incorrect freight billing amount on Shipment No. 5861211869 [sic]; and (3) Shipment No. 5861211869 was billed twice. *See* Exhibit 8.
e. Invoice Nos. 29000262702-1, 29000262702-2 and 29000262702-4 reflect an over-payment by Carlstar of $22,518.00 related to Shipment No. 103906865. *See* Exhibit 9.

28. The Ocean Audit analysis suggests that UTi improperly charged Carlstar bill of lading fees on a per container basis, rather than on a per shipment basis, for 548 shipments invoiced between February 2014 and February 2016, resulting in $132,519.00 of bill of lading fee overcharges. *See* Exhibit 10.

> 29. The Ocean Audit analysis suggests that $385,730.93 is due for ocean freight billing errors. *See* Exhibit 11.
>
> 30. The Ocean Audit analysis suggests that $135,650.00 is due for bunker fuel charge invoice errors. *See* Exhibit 12.
>
> 31. As a result of the overcharges uncovered by Ocean Audit, Carlstar conducted an internal audit of the pass-through and miscellaneous charges paid by Carlstar to UTi from January 2014 through April 2016. Carlstar has not identified any back-up documentation provided by UTi evidencing that $4,349,344.50 of these alleged charges were actually incurred by UTi, thereby constituting overcharges, and UTi has failed to provide the documentation to Carlstar as requested. *See* Exhibit 13.

(Complaint (emphasis deleted).)

Carlstar contends that UTi violated section 41102(c) of the Shipping Act by failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property; section 41104(2) by charging rates greater than the published tariff and/or the Agreement; and section 41104(4) by charging unfair and potentially discriminatory fees. 46 U.S.C. §§ 41102(c), 41104(2), and 41104(4).

Beginning January 13, 2017, UTi, United States, Inc. and Carlstar Group LLC entered into a series of agreements tolling the running of time under any applicable statute of limitations, laches, or other defense of similar import the parties may have against each other. The last tolling agreement expired August 31, 2017, the date the Secretary received Carlstar's Complaint.

B. UTi's Motion to Dismiss.

1. Uti's Argument.

UTi filed a motion to dismiss arguing that the Commission does not have jurisdiction over the Complaint and that the Complaint fails to state a claim of violation of the Shipping Act. UTi also contends that the Agreement, which requires arbitration of any disputes the parties are unable to resolve themselves, (Complaint Exhibit 1 ¶ 19.h), mandates dismissal of the Commission Complaint. UTi further contends that if the Commission does have jurisdiction over the Complaint, the Act's statute of limitations provision precludes a reparation award for any damages that Carlstar suffered on shipments more than three years before Carlstar filed its Complaint.

2. Carlstar's Response.

Carlstar filed a response to the motion to dismiss. Carlstar disputes the arguments that UTi contends justify dismissal of the Complaint.

3. Order to Supplement.

UTi moved for an enlargement of time to file its reply to Carlstar's response. In the order granting the motion, UTi was instructed "to include in their reply a discussion of the effect of the tolling agreements described in paragraphs 32-34 of the Complaint on Respondents' statute of limitations argument." *Carlstar v. UTi*, FMC No. 17-08 (ALJ Dec. 29, 2017) (Order Enlarging Time to File Reply Memorandum).

As noted above, UTi was licensed by the Commission as both an NVOCC and as an ocean freight forwarder. It was not clear from Carlstar's Complaint, the Carlisle Transportation Products Agreement, or Carlstar's opposition to UTi's motion to dismiss whether Carlstar contends UTi was operating as an NVOCC or an ocean freight forwarder on the shipments that were subject to the Carlisle Transportation Products Agreement. Therefore, Carlstar was ordered *sua sponte* to supplement its response to the motion to dismiss with a brief setting forth its contentions regarding the operational status of UTi on the shipments that were subject to the Agreement. Carlstar was also directed to state whether UTI issued its own bills of lading on the Carlisle shipments and whether vessel-operating common carriers or other NVOCCs issued bills of lading identifying UTi as the shipper on the Carlisle shipments. *Carlstar v. UTi*, FMC No. 17-08, Order at 5 (ALJ Jan. 2, 2018) (Amended Order Enlarging Time to File Reply Memorandum and Order Directing Complainants to Supplement Brief Responding to Respondents' Motion to Dismiss).

4. Carlstar's Supplemental Memorandum.

In its supplemental response, Carlstar states that "[i]t is Carlstar's contention that UTi was operating as an NVOCC on the shipments that were subject to the Carlisle Transportation Products Agreement." (Complainants' Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss at 1-2.) Carlstar states that UTi issued its own bills of lading on the Carlisle shipments and that the vessel-operating common carriers issued bills of lading identifying UTi as the shipper on the Carlisle shipments. (Complainants' Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss at 2.) Carlstar attached representative documentation to support these statements.

5. UTi's Reply.

UTi filed a reply to Carlstar's arguments in response to UTi's motion. In response to the order instructing it to address the effect of the tolling agreements, UTi modifies its argument on the statute of limitations to contend that claims that arose more than three years before December 20, 2016, apparently the date on which the parties agreed to the tolling, are barred by the statute of limitations. In response to Carlstar's supplemental brief, UTi states that UTi operated "exclusively" as an NVOCC on the shipments. (Respondents' Reply to Complainants' Opposition and Supplemental Brief to Motion to Dismiss at 3.) UTi does not contest the

documentation attached to Carlstar's supplemental response demonstrating that UTi and vessel-operating common carriers issued bills of lading for the shipments.

6. Carlstar's Sur-Reply.

The order granted leave for Carlstar to file a sur-reply "**limited solely to the issue of the operative date for the statute of limitations and to respondents' reply to complainants' supplemental brief**." *Carlstar v. UTi*, FMC No. 17-08, Order at 5 (ALJ Jan. 2, 2018) (Amended Order Enlarging Time to File Reply Memorandum and Order Directing Complainants to Supplement Brief Responding to Respondents' Motion to Dismiss) (emphasis in original). Carlstar did not limit its sur-reply solely to the issue of the operative date for the statute of limitations and to UTi's reply to Carlstar's supplemental brief, but reargued positions argued in Carlstar's response to the motion to dismiss. The portions of Carlstar's sur-reply not addressing the operative date for the statute of limitations or UTi's reply to Carlstar's supplemental brief were stricken. *Carlstar v. UTi*, FMC No. 17-08 (ALJ Feb. 22, 2018) (Order Striking Complainants' Sur-Reply).

C. Preliminary Ruling on Respondents' Motion to Dismiss.

Based on the filings of the parties, the undersigned determined that UTi's motion "is ripe for decision on some of the issues raised by the motion. One issue requires additional information and briefing." *Carlstar v. UTi*, FMC No. 17-08, Order at 2 (ALJ Feb. 23, 2018) (Preliminary Ruling on Respondents' Motion to Dismiss). It appeared that the arbitration clause of the Agreement did not require the Commission to dismiss the Complaint (*id*. at 12-13), that the Commission has subject matter jurisdiction over the Complaint (*id*. at 14-16), and that the Complaint fails to state a claim of violation of 46 U.S.C. § 41102(c) (*id*. at 16-19). The parties were invited to request reconsideration of the preliminary rulings. "A request for reconsideration should identify a substantive error in material fact contained in the preliminary ruling." *Id*. at 2. Although some observations were made about the statute of limitations issue, no preliminary ruling was made. *Id*. at 19-23.

Section 41104(2)(A) of the Shipping Act states that a common carrier may not provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a published tariff or a service contract. 46 U.S.C. § 41104(2)(A). Section 41104(4)(A) governs common carrier "service pursuant to a tariff." 46 U.S.C. § 41104(4)(A). These sections are applicable to an entity operating as an NVOCC, but not to an entity operating as an ocean freight forwarder.

The Preliminary Ruling noted that Carlstar was ordered to supplement the record because "[i]t was not clear from Carlstar's Complaint, the Carlisle Transportation Products Agreement, or Carlstar's opposition to UTi's motion to dismiss whether Carlstar contends UTi was operating as an NVOCC or an ocean freight forwarder on the shipments that were subject to the Carlisle Transportation Products Agreement." *Id*. at 7. Carlstar responded to the order to supplement by stating "[i]t is Carlstar's contention that UTi was operating as an NVOCC on the shipments that

were subject to the Carlisle Transportation Products Agreement." *Id*. at 8. In its reply, UTi stated that "[o]ver the course of its existence, UTi operated exclusively as a non-vessel-operating common carrier ('NVOCC')." (Respondents' Reply to Complainants' Opposition and Supplemental Brief to Motion to Dismiss at 4.) The Preliminary Ruling observed:

> The rates that UTi charged Carlisle for providing its services do not appear to be in accordance with a tariff, but the rates determined by the Agreement. UTi contends that the Agreement is not a service contract as defined by the Act, however. (Respondents' Reply to Complainants' Opposition and Supplemental Brief to Motion to Dismiss at 3-4.) If the service was not provided in accordance with a published tariff or a service contract, UTi's compliance (or non-compliance) with sections 41104(2)(A) and 41104(4)(A) is implicated.

Carlstar v. UTi, FMC No. 17-08, Order at 26 (ALJ Feb. 23, 2018) (Preliminary Ruling on Respondents' Motion to Dismiss). The Preliminary Ruling noted that the Commission had exempted NVOCCs from certain provisions of the Act when it transported cargo pursuant to an NVOCC Service Arrangements (NSA) or an NVOCC Negotiated Rate Arrangement (NRA). Therefore, UTi was ordered to supplement the record by answering four questions: Whether it transported cargo for Carlisle pursuant to (1) a tariff, (2) a service contract, (3) an NSA, or (4) an NRA. It was also ordered to describe the authority pursuant to which it transported cargo under the Agreement. *Id*. at 27-28.

D. Supplemental Briefing on Motion to Dismiss.

1. UTi's Response to the Order to Supplement the Record.

UTi does not seek reconsideration of the preliminary ruling on the arbitration clause. UTi seeks reconsideration of the preliminary ruling on subject matter jurisdiction, confirming that it is making a facial challenge to subject matter jurisdiction. (Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 3-6.)

UTi answered "No" to the four questions whether it transported the cargo pursuant to a tariff, pursuant to a service contract, pursuant to an NSA, or pursuant to an NRA. In response to the question how its activities complied with section 41104(2)(A) of the Shipping Act, UTi now states (contrary to its earlier assertion that it operated exclusively as an NVOCC) that on the Carlisle shipments, it "essentially function[ed] as an ocean freight forwarder" and "the essential character of UTi's services for [Carlisle] were those of an ocean freight forwarder, the respective obligations of the Parties were governed by parameters and conditions set forth in the Carlisle Transportation Products Agreement." (Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 8.)

2. Carlstar's Response to UTi's Response to the Order to Supplement the Record.

Carlstar states that it agrees with the preliminary ruling on arbitration and that it does not contest the preliminary ruling that the section 41102(c) claim should be dismissed. Other than stating that the tolling agreement tolled the running of time under any applicable statute of limitations, laches, or other defense of similar import running from December 20, 2016, through August 31, 2017, Carlstar does not address the statute of limitations. (*Id*. at 3 n.2.)

Carlstar notes UTi's reversal of course in its new contention that it was not acting as an NVOCC on the Carlisle shipments and contends that "UTi's claim that it was not aware that it was operating as an NVOCC is both incredible and belied by the record." (Complainants' Response to Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 4.) Carlstar contends that UTi operated as an NVOCC on the shipments and that UTi's contention that it did not "is also a 'factual assertion[] not based on documents already in the record' that UTi has not 'supported by affidavit and/or other competent evidence,' as directed by Your Honor's Preliminary Ruling. (*See* Preliminary Ruling at *28.)" (*Id*. at 4 n.3.) Carlstar claims that UTi has not provided it with documentation that the Shipping Act requires UTi to keep. Carlstar argues that the Commission has subject matter jurisdiction over its section 41104 claims, contending that the Agreement is properly characterized as an NSA. (*Id*. at 6.)

3. UTi's Reply.

In its Reply, UTi states that "UTi did not function as a non-vessel operating common carrier . . . while providing services to Carlstar. Rather, throughout the duration of the arrangement, UTi passed through actual rates, fees and charges." (Respondents' Reply to Complainants' March 23, 2018 Response to Respondents' Supplemental Memorandum at 2.) UTi denies withholding information from Carlstar. (*Id*. at 4-5.)

III. STATUTORY FRAMEWORK.

Carlstar filed its Complaint pursuant to section 41301 of the Shipping Act. "A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

The Act establishes two kinds of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(19). "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes

> responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

> The term "ocean freight forwarder" means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(18). UTi was licensed by the Commission as an NVOCC and as an ocean freight forwarder within the meaning of the Act.

The Act sets forth requirements and prohibitions on NVOCCs and ocean freight forwarders. The Complaint alleges that UTi violated sections 41102(c), 41104(2), and 41104(4) of the Act.

Section 41102(c) of the Act provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

Section 41104 governs operations by common carriers, including NVOCCs.

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title or (B) under a tariff or service contract that has been suspended or prohibited by the . . . Commission under chapter 407 or 423 of this title; . . . (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges; (B) cargo classifications; (C) cargo space accommodations or other facilities, with due regard being given to the proper loading of the vessel and the available tonnage; (D) loading and landing of freight; or (E) adjustment and settlement of claims.

46 U.S.C. § 41104.[2]

[2] The Complaint cites section 41104(2) and 41104(4), but does not appear to claim violations of sections 41104(2)(B) or 41104(4)(B) through 41104(4)(E).

The Shipping Act grants the Commission the power to exempt agreements from requirements of the Act.

> The . . . Commission, on application or its own motion, may by order or regulation exempt for the future any class of agreements between persons subject to this part or any specified activity of those persons from any requirement of this part if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to an exemption and may, by order, revoke an exemption.

46 U.S.C. § 40103(a). Pursuant to this authority, NVOCCs are exempt from some provisions of the Shipping Act when using an NVOCC Service Arrangement (NSA) or an NVOCC Negotiated Rate Arrangement (NRA). *Non-Vessel-Operating Common Carrier Service Arrangements*, 69 Fed. Reg. 75850, 75853 (Dec. 20, 2004), codified at 46 C.F.R. Part 531; *Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements*, 76 Fed. Reg. 11351, 11360 (Mar. 2, 2011), codified at 46 C.F.R. Part 532.

The Complaint alleges that Carlstar was injured by UTi's alleged violations of the Act and seeks a reparation award for the injuries. The Act defines actual injury.

> (a) Definition. – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) Basic amount. – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305. "In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees." 46 U.S.C. § 41305(e).

IV. THE COMMISSION RULES OF PRACTICE AND PROCEDURE PERMIT CONSIDERATION OF A MOTION TO DISMISS.

The Commission's Rules of Practice and Procedure (Rules), 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim.

> Rule 12 of the Commission's Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6)

apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

> Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

Sinaltrainal v. Coca-Cola Company, 578 F.3d 1252, 1260 (11th Cir. 2009).

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 677] (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 No. 09-01, Order at 19-20 (FMC Aug. 1, 2011) (Order Denying Appeal, etc.).

> The first step is typically to identify pleadings that are not entitled to the assumption of truth because they are legal conclusions. These conclusions can provide a framework, but they must be supported by factual allegations. The next step is to assume the truth of the well-pleaded factual allegations and determine "whether they plausibly give rise to an entitlement to relief."

> The factual allegations needed to reach plausibility will vary depending on the complexity of the case, "both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind, the dots should be connected." "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

Maher Terminals, LLC v. The Port Authority of New York and New Jersey, 34 S.R.R. 35, 58 (FMC 2015).

DISCUSSION

V. THE ARBITRATION CLAUSE DOES NOT REQUIRE DISMISSAL OF THE COMMISSION PROCEEDING.[3]

A. UTi's Argument.

UTi contends that the arbitration clause in the Agreement requires Carlstar to arbitrate its claims; therefore, the Commission should dismiss this proceeding.

> A separate and independent reason to dismiss the Verified Complaint is that the Parties' agreement contains a binding, mandatory arbitration clause, pursuant to which Carlstar must arbitrate its claims. The Agreement between the Parties clearly states that "[a]ny controversy which shall arise between CTP and UTi regarding the rights, duties, or liabilities of either party hereunder . . . shall be settled by binding arbitration in New York, New York in accordance with the Arbitration Act and pursuant to the rules of the American Arbitration Association." Compl. Ex. 1, page 7.
>
> It is well established that the Federal Arbitration Act embodies the liberal federal policy in favor of arbitration, and the United States Supreme Court has held that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). The Federal Maritime Commission therefore routinely requires parties to submit to arbitration when an approved contract has a mandatory arbitration provision. *See Ivarans I*, 895 F.2d at 1446 (citing *Firestone Int'l Co. v. Far E. Conference*, 9 F.M.C. 119, 128 (1965)).

[3] The preliminary ruling found that the arbitration clause does not require dismissal of the Complaint. UTi did not seek reconsideration of this ruling. Carlstar agrees with the preliminary ruling. (Complainants' Response to Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 2.)

> Carlstar expressly alleges that these charges by UTi breached the agreement, *see* Compl. ¶ ¶ 8-24. Therefore, Carlstar's claims must be arbitrated pursuant to that agreement's arbitration provision, and the Commission should dismiss this proceeding.

(Motion to Dismiss at 10.)

B. Final Ruling.

Commission precedent establishes that an arbitration provision does not deprive the Commission of its authority to determine whether a respondent committed Shipping Act violations. Anchor Shipping Co. (Anchor), an NVOCC licensed by the Commission, and Aliança Navegação E Logística Ltda. (Aliança), a vessel-operating common carrier, were parties to a service contract that included an arbitration clause. Before commencing its Commission proceeding, Anchor initiated arbitration against Aliança as required by the terms of the service contract. An arbitrator from the Society of Maritime Arbitrators issued a decision addressing issues under the service contract and issues under the Shipping Act. The arbitrator found in Anchor's favor, deducted an amount for freight charges and interest she found that Anchor owed Aliança, and awarded Anchor a net of $381,880.59 in damages, interest, legal expenses, and "Allowance for Party costs leading to the interim Award." (Arbitration between Anchor and Aliança Under Service Contract EC99-0511, Decision and Final Award at 57 (July 31, 2001)). Aliança paid the $381,880.59 awarded by the arbitrator. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, FMC No. 02-04, Memorandum at 3 (ALJ Sept. 27, 2007) (Memorandum and Order on Respondents' Partial Motion to Dismiss and/or for Summary Judgment) (summarizing proceeding).

Anchor then filed a complaint with the Commission alleging Shipping Act violations and sought $1 million as a reparation award. The Administrative Law Judge dismissed the complaint based on the arbitration award. The Commission vacated the dismissal and remanded for further proceedings. The Commission held that the fact the service contract between the parties required arbitration:

> does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. . . . To preclude Anchor from proceeding with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., 30 S.R.R. 991, 998 (FMC 2006). The Commission stated that "[o]n remand, we direct the ALJ to address only those allegations involving Shipping Act violations, and any dispute previously addressed by the Arbitrator that are based upon common law breach of contract claims shall remain binding upon the parties." *Id.*, at 999-1000. Accordingly, even if Carlstar had successfully pursued arbitration prior to filing the Complaint and been awarded damages, the Commission would still need to "address . . . those allegations [in Carlstar's Complaint] involving Shipping Act violations."

Therefore, UTi's motion to dismiss because of the arbitration clause is denied.

VI. THE COMPLAINT FAILS TO STATE A CLAIM OF VIOLATION OF 46 U.S.C. § 41102(c).[4]

A. The Parties' Arguments.

UTi argues:

> Complainants' claim of a violation of 46 U.S.C. § 41102(c) must be dismissed, because Complainants [fail] to allege with any level of factual detail that UTi has failed to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." It is well established that Section 10(d)(1) of the Shipping Act, as amended, 46 U.S.C. § 41102(c), relates not to alleged overcharges and billing issues that arise after the shipment has been completed, but to unreasonable practices connected with the handling, storage or delivery of freight and property when it is in the custody of the NVOCC. *See Petra Pet, Inc. v. Panda Logistics Ltd, Panda Logistics Co., Ltd and RDM Solutions*, 33 S.R.R. 4 (F.M.C. 2013) (finding that an NVOCC's withholding and aborting of a shipment to coerce payment of a debt for other shipments was an unreasonable practice and violated section 10(d)(1), and that the failure of an NVOCC to remit freight payments and to communicate with or provide the status of the shipment to the shipper was a Section 10(d)(1) violation); *William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) & World Line Shipping, Inc.*, 29 S.R.R. 6 (F.M.C. 2001) (NVOCC held to have violated Section 10(d)(1) when it refused to release the cargo at the destination port unless additional money was paid, and instructed its agent to place the shipment on hold); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871 (ALJ 1993) (NVOCC's failure to carry out its obligation to transport the cargo or to return the money despite repeated demands was held a violation of section 10(d)(1) as it showed "a failure to establish, observe and enforce just and reasonable regulations and practices"); *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 18-19 (ALJ 1991) (finding that ocean freight forwarder's failure to pay ocean freight in a timely manner is a section 10(d)(1) violation); *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991) (NVOCC failed to establish, observe, and enforce just and reasonable regulations and practices in violation of section 10(d)(1) when the NVOCC unreasonably aborted a shipment,

[4] The preliminary ruling found that the Complaint fails to state a claim of violation of section 41102(c). Neither party seeks reconsideration of this ruling. (Complainants' Response to Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 2; Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 6 n.1.)

> notwithstanding the fact that it had issued an onboard bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process).
>
> None of Complainants' claims allege any mishandling of cargo or any failure by UTi to appropriately transport or deliver its cargo as instructed. Instead, Complainants' claims relate to shipping rates and billing practices, about which Carlstar, very belatedly, developed "concerns." Aside from a formulaic recitation of the statutory provision, Complainants have failed to provide any factual basis to allege a violation of § 41102(c). Therefore, this claim must be dismissed.

(Motion to Dismiss at 11-12.)

Carlstar did not respond to UTi's argument on section 41102(c) in its response to the motion. (Carlstar Response at 5-6.) "[A party's] failure to brief and argue [an] issue is grounds for finding that the issue has been abandoned." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000). *See MAVL Capital Inc., IAM AL Group Inc., and Maxim Ostrovskiy v. Marine Transport Logistics, Inc. and Dmitry Alper*, FMC No. 16-16, Decision at 8 (ALJ Sept. 15, 2016) (Initial Decision Partially Dismissing Complaint) (dismissing claims not addressed in response to show cause order), exceptions filed Feb. 8, 2017.

The Preliminary Ruling found that the Complaint did not state a plausible claim of violation of section 41102(c). *Carlstar v. UTi*, FMC No. 17-08, Order at 17-19 (ALJ Feb. 23, 2018) (Preliminary Ruling on Respondents' Motion to Dismiss). Neither UTi (Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 6 n.1) nor Carlstar (Complainants' Response to Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 2) seeks reconsideration of the Preliminary Ruling.

B. Final Ruling.

Addressing the section 41102(c) allegation in Carlstar's Complaint, the Commission recently had occasion to identify cases in which an NVOCC had been found to violate section 41102(c), enacted as section 10(d)(1) of the Shipping Act of 1984 and often referred to by that term.

> [T]he Commission has indeed recognized that NVOCCs violate section 10(d)(1) when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and therefore engage in an unjust and unreasonable practice. *See Yakov Kobel, et al. v. Hapag-Lloyd A.G., et al.*, [32 S.R.R.1720, 1730-1731] (FMC July 12, 2013) (Order Vacating Initial Decision in Part and Remanding for Further Proceedings); [*Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400, 1405 (FMC 2010)] (NVOCC failed to make payments "necessary to secure release of cargo" and failed to resolve a commercial dispute); *William J. Brewer v. Saeid B.*

> *Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 29 S.R.R. 6 at 6 (FMC 2001) (NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release the cargo at destination port unless additional money was paid, and instructed its agent to place the shipment on hold.); *Tractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788 (ALJ 1992) (freight forwarder held to have violated section 10(d)(1) by failing to establish, observe and enforce just and reasonable practices with respect to two shipments when the freight forwarder prepared incorrect booking notes and dock receipts, and issued an altered bill of lading containing false information.); [*Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871, 873 (ALJ 1993)] (NVOCC failed to carry out obligation it was paid to perform, thus failing to "establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, etc. of property . . . .); *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 19-20 (ALJ 1991)] (NVOCC reneged on agreement and refused to refund freight even though it "never performed the transportation service"); *Maritime Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655,1662 (ALJ 1978), *aff'd.* 18 S.R.R. 853 (FMC 1978) (section 10(d)(1) violation found because of NVOCC's failure to "pay applicable demurrage charges," subjecting "property of the shipping public to vessel-operating common carrier's liens"); *Corpco Int'l, Inc., v. Straightway, Inc.*, 28 S.R.R. 296, 300 (1998) (forcing shipper to pay transshipment costs for the release of cargo after shipper had already paid a rate previously agreed was an unreasonable business practice); *Total Fitness Equipment, Inc. d/b/a, Professional Gym v. Worldlink Logistics, Inc.*, 28 S.R.R. 534, 542 (FMC 1998), *aff'd, Worldlink Logistics, Inc. v. Federal Maritime Comm'n*, 203 F.3d 54 (D.C. Cir. 1999) (attempting to collect an unreasonable debt by refusing the release of cargo was a violation of the Act). In the preceding cases, failures to act, similar to the failure of Chief Cargo to require original bills of lading prior to releasing cargo, were found to constitute violations of section 10(d)(1).

Bimsha International v. Chief Cargo Services, Inc., FMC No. 10-08, Memorandum at 11-12 (FMC Sept. 4, 2013), *aff'd sub nom. Chief Cargo Services, Inc. v. FMC*, 586 Fed. Appx. 730 (2d Cir. 2014). *Bimsha* itself involved a carrier that released cargo to the consignee without requiring original bills of lading when the consignee had not paid the seller/shipper for the cargo that was released.

While the Commission did not suggest and the undersigned does not suggest that this is an exhaustive list of possible violations of section 41102(c), the proceedings cited in *Bimsha* have one thing in common: The respondent did something or failed to do something that interfered with the receiving, handling, storage, or delivery of cargo. Carlstar does not allege that UTi's actions were related to the receiving, handling, storage, or delivery of cargo. For example, Carlstar does not allege that UTi failed to make payments necessary to secure release of cargo (*Houben*); refused to release cargo at destination port unless additional money was paid (*William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*);

improperly prepared shipping documents causing a delay in the shipment and altering bills of lading to misrepresent the date shipments were loaded on board the ship (*Tractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc.*); took Carlstar's money, then failed to carry out its obligation to pay for the shipment and arrange to carry it to destination (*Symington v. Euro Car Transport*); reneged on the shipping agreement and refused to refund freight even though it never performed the transportation service (*Adair*); failed to pay applicable demurrage charges, subjecting Carlstar's property to vessel-operating common carrier liens (*Maritime Corporation v. Acme Fast Freight*); forced Carlstar to pay transshipment costs for the release of cargo after Carlstar had already paid a rate previously agreed (*Corpco v. Straightway*); or attempted to collect an unreasonable debt from Carlstar by refusing the release of cargo (*Total Fitness Equipment*).

The factual allegations in Carlstar's Complaint relate to conduct that occurred after completion of the transportation: "[D]iscrepancies between the amount UTi billed Carlstar under the Agreements versus the amount UTi should have billed Carlstar [for the transportation]." (Complaint ¶ 23. *See also* Complaint ¶¶ 23-33.) Carlstar does not allege that any problem occurred with the receiving, handling, storage, or delivery of any shipment transported pursuant to the Agreement that would plausibly state a claim of violation of section 41102(c). Therefore, the motion to dismiss the section 41102(c) claim is granted.

VII. THE MOTION TO DISMISS THE 46 U.S.C. §§ 41104(2) AND 41104(4) CLAIMS IS DENIED.

A. The Parties' Arguments.

In the section of its motion seeking dismissal for lack of subject matter jurisdiction, UTi contends that Carlstar's claims are based on alleged violations of the Carlisle Transportation Products Agreement, not on alleged violations of the Shipping Act.

> Complainants' claims are based on UTi's alleged breach of the Parties' agreement, including subsequent amendments, between Carlstar and UTi. Complainants assert a total claim of $5,155,170.06, plus interest, costs, and attorneys' fees, against Respondents. Of the total amount of the claim, $521,380.93 of the claim arises out of so-called "overcharges" based upon an audit from a dubious and disreputable source, which allegedly calculated the correct rate that UTi should have charged Carlstar "under the Agreements" by relying on an unknown methodology. *See* Compl. ¶¶ 24–30 & Exs. 11 and 12. The majority of the claim, for $4,349,344.50, is based upon UTi's alleged failure to provide back-up documentation evidencing that these charges were actually incurred by UTi. *See id.* ¶ 31 & Ex. 13. Further, $132,519.00 of the claim is based upon the Parties' dispute of a commercial term of service between Carlstar and UTi, mainly whether UTi should have charged Carlstar bill of lading fees on a per container or per shipment basis. *See id.* ¶ 28 & Ex. 10. And lastly,

> $151,925.63 of the claim is based upon alleged double, triple or otherwise incorrect invoicing or billing issues. *See id.* ¶ 27 & Exs. 5-9.
>
> It is apparent that the allegations asserted by Complainants set forth pure breach of contract claims and commercial claims for alleged failures to charge what was agreed upon per the agreement between the Parties, alleged failures to substantiate charges with back-up documentation, and allegedly incorrect billing and improper calculation of a documentation fee. Even if true, these allegations would not involve any violation of the Shipping Act. Complainants' claims regarding alleged overcharges allege a breach of the agreement between the Parties, *see id.* ¶ 24 – which called for all freight charges to Carlstar to mirror the charges between UTi and the Ocean Carrier, *see id.*, Ex. 2, App. A – and not for violation of any tariff or a FMC compliant instrument. *See id.*, Exs. 11-12 (setting forth an explanation of alleged ocean freight and bunker adjustment fuel overcharges based on an unexplained calculation of the "correct rate" conjured up by Ocean Audit, Inc. and not based on analysis of any FMC-compliant rate vehicle). Moreover, Carlstar has in no way described how an alleged failure to substantiate charges with back-up documentation or an alleged failure to calculate correctly a documentation fee would constitute an overcharge in violation of any published tariff, see the Shipping Act, as amended, § 41104(2), or an application of unfair or discriminatory practices in the matter of rates and charges for service provided pursuant to a tariff, *see id.* § 41104(4).
>
> The Commission has statutory responsibility to ensure that parties implement agreements as approved by and filed with the Commission. *See I A/S Ivarans Rederi v. United States* (*Ivarans I*), 895 F.2d 1441, 1446 (D.C. Cir. 1990); *Duke Power Co. v. FERC*, 864 F.2d 823, 829 (D.C. Cir. 1989); *Swift & Co. v. FMC*, 306 F.2d 277, 282 (D.C. Cir. 1962). That authority, however, does not extend to agreements that are not filed with the FMC, nor to claims that amount to mere breach of contract claims with no elements particular to the Shipping Act. *See* [*Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000)].

(Motion to Dismiss at 8-9.)

In the portion of its motion contending the Complaint fails to state claims of violation of sections 41104(2) and 41104(4), UTi contends:

> Complainants' claim of a violation of 46 U.S.C. § 41104(2) must . . . be dismissed, because Complainants allege no factual basis whatsoever to support a violation of the provision. Among other things, § 41104(2) prohibits a common carrier, either alone or in conjunction with any other person, directly or indirectly, from providing service in a liner trade that is not in accordance with rates, charges, classifications, rules, and practices contained in a valid and published

> tariff. Complainants allege that UTi violated § 41104(2) "by charging rates greater than the published tariff and/or the Agreements." Compl. ¶ 37. Beyond this naked assertion, Complainants provide no details whatsoever in the Verified Complaint that UTi provided services not in accordance with the rates contained in any tariff. Indeed, Complainants even fail to discuss the application or relevancy in any way of UTi's potential tariff.
>
> It is apparent that Complainants have not alleged a violation of § 41104(2) in any way. At best, as shown above, Complainants allege straightforward breach of contract claims for alleged failures to charge what was agreed upon per the agreement, bill correctly, substantiate charges, and calculate a documentation fee properly. Because Complainants fail to provide any factual basis to allege a violation of § 41104(2), this claim must be dismissed.
>
> Complainants' claim of discriminatory pricing under 46 U.S.C. § 41104(4) must also be dismissed, because Complainants allege no factual basis whatsoever to support the bald assertion that UTi charged Carlstar "unfair and potentially discriminatory fees." Compl. ¶ 38.
>
> Not only does the Verified Complaint fail to provide a single detail regarding the nature of these alleged "unfair and potentially discriminatory fees," but Complainants even fail to recite accurately what 46 U.S.C. § 41104(4) prohibits. In brief, § 41104(4) prohibits a carrier, directly or indirectly, to engage in any unfair or unjustly discriminatory practices in the matter of rates and charges, among other things, for service provided pursuant to a tariff. Among other things, Complainants allege no facts suggesting that UTi provided services to Carlstar pursuant to a tariff, nor do Complainants allege how UTi engaged in any unfair or unjustly discriminatory practice. Interpreted generously, this claim is at best a textbook example of a "formulaic recitation of the elements of [the] cause of action," which the Supreme Court made clear is *not* sufficient to state a plausible cause of action under Rule 12(b)(6). *Iqbal*, 556 U.S. at 678. As a result, this claim must be dismissed.

(Motion to Dismiss at 12-14 (subpart caption omitted).)

Carlstar responds:

> UTi contends that the five-year shipping relationship between Carlstar, a shipper, and UTi, [an NVOCC] licensed by the Commission during the relevant time period, . . . falls outside the scope of the Shipping Act, and, consequently, outside the subject matter jurisdiction of the . . . Commission. UTi attempted to assert an identical argument in its motion to dismiss in *Streak Products, Inc. v. UTi, United States, Inc.*, in 2013. *See Streak Products, Inc. v. UTi, United States, Inc.*, FMC

> No. 13-04, Order ([ALJ[5]] Oct. 23, 2013) (Order Denying Motion to Dismiss). The Commission rejected UTi's argument in the *Streak Products* case in 2013, and should do the same now in this matter.
>
> Indeed, UTi once again seeks refuge in a regulatory quagmire of its own making. UTi's Motion admits that the Agreements between UTi and Carlstar "called for all freight charges to Carlstar to mirror the charges between UTi and the Ocean Carrier." (Mot. at 9.) Carlstar's claim under 46 U.S.C. § 41104(2) includes an allegation that UTi violated the Act by charging rates greater than those permitted by the Agreements, which Carlstar contends should be considered a "service contract" under 46 U.S.C. § 41104(2)(A). UTi contends that Carlstar cannot maintain claims under the Act to remedy UTi's apparent overcharging scheme because UTi inexplicably failed to file the Agreements with the Commission, as UTi was required to do pursuant to 46 U.S.C. § 40502(b)(1). (Mot. at 9.) While UTi notes that "[t]he Commission has statutory responsibility to ensure that parties implement agreements as approved by and filed with the Commission" (citations omitted), UTi contends that the Commission's authority "does not extend to agreements that are not filed with the [Commission]." (Mot. at 9.)
>
> UTi made a similar argument in the *Streak Products* case, but the Commission rejected UTi's contention that "if the common carrier completely fails to comply with the Act and does not publish a tariff at all . . . a shipper may not receive a reparation award because there is no measure of damages – no 'delta between the service rate charged and the applicable tariff rate.'" *See Streak Products*, FMC No. 13-04, Order at 7-8 ([ALJ] Oct. 23, 2013). The Commission should likewise reject UTi's subject matter jurisdiction arguments here, as UTi should not be able to escape regulation by the Commission by deliberately failing to comply with the Act's filing requirements for service contracts like the Agreements between UTi and Carlstar.

(Carlstar Response at 3-4.)

Carlstar continues:

> UTi also attempts to side-step Carlstar's allegation that UTi violated 46 U.S.C. § 41104(2) by charging rates greater than its published tariff, (Compl. ¶ 37), contending that the Complaint fails to discuss the "application or relevancy in any way of UTI's potential tariff[.]" (Mot. at 13). Similarly, UTi attempts to dodge Carlstar's allegation that UTi violated 46 U.S.C. § 41104(4) by charging unfair and potentially discriminatory fees, (Compl. ¶ 38), contending that Carlstar does

[5] *Streak Products* was before a Commission Administrative Law Judge on a motion to dismiss. The quoted language is from the Judge's order, not a decision of the Commission on review of a judge's decision.

not allege "facts suggesting that UTi provided services to Carlstar pursuant to a tariff[.]" (Mot. at 13.) The Commission should not dismiss Carlstar's claims at this juncture, and should instead permit Carlstar to discover whether and when UTi even filed tariffs with the Commission and/or established some alternative Commission-compliant rate vehicle, and to discover their terms.

UTi needs to justify that the charges were covered by the service contracts, which it did not record, or were authorized by properly filed tariffs or an alternative Commission-compliant rate vehicle. UTi has promised documents to Carlstar for prior extensions to justify the charges. Yet, to date, UTi has not provided the full scope of requested documents, forcing Carlstar to seek the involvement of the Commission. However, the documents that are available clearly indicate that UTi charged amounts in excess of what the Agreements provided. A final resolution may require Carlstar to seek documents from third party carriers since UTi claims not to have retained the documentation.

Indeed, the Commission rejected similar arguments made by UTi in the Streak Products case, where the Court noted:

> The Complaint alleges that "UTi issued invoices to Streak for FCL shipments in excess of the amounts set forth in UTi's tariff," that "UTi has overcharged [Streak] by billing amounts in excess of [UTi's] lawful tariff from 2003 until the present," and that UTi "charg[ed] Streak rates greater than those it charged other shippers." These factual allegations, which must be taken as true when considering a motion to dismiss for failure to state a claim, "are detailed and informative enough to enable [UTi] to respond" to the allegation that UTi violated section 41104(4) by charging Streak rates greater than those it charged other shippers. UTi's motion to dismiss the claim of violation of section 41104(4) is denied.

See Streak Products, FMC N0. 13-04, Order at 9 ([ALJ] Oct. 23, 2013) (internal citations omitted).

(Carlstar Response at 5-6.)

UTi was licensed by the Commission as both an NVOCC and an ocean freight forwarder. As set forth above, it was not clear from Carlstar's Complaint, the Carlisle Transportation Products Agreement, or Carlstar's opposition to UTi's motion to dismiss whether Carlstar contends UTi was operating as an NVOCC or an ocean freight forwarder on the shipments that were subject to the Carlisle Transportation Products Agreement.[6] Therefore, Carlstar was

[6] Both NVOCCs and ocean freight forwarders are subject to the provisions of section 41102(c) of the Act, which applies to common carriers (including NVOCCs) and ocean

ordered *sua sponte* to supplement its response to the motion to dismiss with a brief setting forth its contentions regarding the operational status of UTi on the shipments that were subject to the Agreement. As part of the supplemental response, Carlstar was directed to respond to the following questions:

1. Did UTi issue its own bills of lading on the shipments subject to the Carlisle Transportation Products Agreement?

2. Did vessel-operating common carriers or other NVOCCs issue bills of lading identifying UTi as the shipper on the shipments subject to the Carlisle Transportation Products Agreement?

Carlstar v. UTi, FMC No. 17-08, Order at 5 (ALJ Jan. 2, 2018) (Amended Order Enlarging Time to File Reply Memorandum and Order Directing Complainants to Supplement Brief Responding to Respondents' Motion to Dismiss).

In its supplemental response, Carlstar states that "[i]t is Carlstar's contention that UTi was operating as an NVOCC on the shipments that were subject to the . . . Agreement." (Complainants' Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss at 1-2.) Carlstar states that UTi issued its own bills of lading on the Carlisle shipments and that the vessel-operating common carriers issued bills of lading identifying UTi as the shipper on the Carlisle shipments. (Complainants' Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss at 2.) Carlstar attached representative documentation to support these statements.

UTi filed a reply to Carlstar's arguments in response to UTi's motion and Carlstar's supplemental brief. UTi states that UTi operated "exclusively" as an NVOCC on the Carlisle shipments. (Respondents' Reply to Complainants' Opposition and Supplemental Brief to Motion to Dismiss at 3.) UTi does not contest the documentation attached to Carlstar's supplemental response demonstrating that UTi and vessel-operating common carriers issued bills of lading for the shipments.

B. Preliminary Ruling.

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transportation intermediaries. 46 U.S.C. § 40102(19). Section 41104 applies only to common carriers, however, and an ocean freight forwarder is not a common carrier. Therefore, if UTi operated as an ocean freight forwarder on the Carlisle shipments, it would not be subject to the provisions of section 41104. Furthermore, the Act defines "ocean freight forwarder" to be a person that "in the United States, dispatches shipments *from* the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers." 46 U.S.C. § 40102(18)(A) (emphasis added). Performance of services comparable to ocean freight forwarder services on shipments *to* the United States is not subject to the provisions of the Shipping Act.

The Preliminary Ruling stated that construing UTi's argument as a facial attack on subject matter jurisdiction, the Complaint alleges that UTi, an ocean transportation intermediary licensed by the Commission to engage in international transportation of cargo by water, violated the Shipping Act while transporting cargo internationally for Carlstar. "It appears that this sufficiently alleges the Commission's subject matter jurisdiction." *Carlstar v. UTi*, FMC No. 17-08, Order at 16 (ALJ Feb. 23, 2018) (Preliminary Ruling on Respondents' Motion to Dismiss). Construing UTi's argument as a factual attack on subject matter jurisdiction, it appears that the attack implicates the merits of Carlstar's claims and should be dealt with as a direct attack on the merits of Carlstar's case. "Therefore, it appears that UTi's motion to dismiss [the section 41104 claims] for lack of subject matter jurisdiction should be denied." (*Id*.)

Addressing the motion to dismiss the Complaint for failure to state a claim of sections 41104(2) and 41104(4), the Preliminary Ruling recognized UTi's acknowledgment that UTi operated as a common carrier (an NVOCC) on the shipments. Section 41104(2)(A) states that a common carrier may not provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a published tariff or a service contract. 46 U.S.C. § 41104(2)(A). Section 41104(4)(A) governs common carrier "service pursuant to a tariff." 46 U.S.C. § 41104(4)(A).

As set forth in Appendix A to the Carlisle-UTi Agreement, it appeared that the rates that Carlisle paid for transportation of its cargo resulted from joint Carlisle-UTi negotiations with ocean common carriers that responded to requests for proposals drafted by UTi in accordance with Carlisle's instructions. Carlisle and UTi jointly chose the carriers invited into the process. UTi assessed the carriers and presented its assessment to Carlisle for approval. UTi was responsible for signing ocean freight contracts and the subsequent minimum quantity commitment fulfillment. Rates and fees charged by UTi to Carlisle mirrored the actual rates, fees and charges between UTi and each ocean carrier. (Complaint Exhibit 1 Appendix A.)

The rates that UTi charged Carlisle for providing its services do not appear to be in accordance with a tariff, but the rates determined by the Agreement. UTi contends that the Agreement is not a service contract as defined by the Act, however. (Respondents' Reply to Complainants' Opposition and Supplemental Brief to Motion to Dismiss at 3-4.) If the service was not provided in accordance with a published tariff or a service contract, UTi's compliance (or non-compliance) with sections 41104(2)(A) and 41104(4)(A) is implicated.

Pursuant to section 40103(a) of the Act, 46 U.S.C. § 40103(a), the Commission may exempt classes of agreements from requirements of the Act. Exercising that authority, the Commission has exempted NVOCC Service Arrangements (NSAs) and NVOCC Negotiated Rate Arrangements (NRAs) from certain requirements. 46 C.F.R Part 531 (NSAs); 46 C.F.R. Part 532 (NRAs). UTi was ordered to state whether it had transported the Carlisle shipments pursuant to a tariff, a service contract, an NSA, or an NRA. If it claimed that it had not transported the shipments pursuant to a tariff, service contract, NSA, or NRA, UTi was ordered to explain how it had complied with section 41104(2)(A) of the Shipping Act. Any factual

assertions not based on documents already in the record should be supported by affidavit and/or other competent evidence. Carlstar was given an opportunity to respond to UTi's filing and UTi an opportunity to respond to Carlstar's filing. *Carlstar v. UTi*, FMC No. 17-08, Order at 25-28 (ALJ Feb. 23, 2018) (Preliminary Ruling on Respondents' Motion to Dismiss).

C. Responses to Order for Supplemental Briefs and UTi's Request for Reconsideration.

In its response to the Preliminary Ruling, UTi answered "No" to the four questions asking whether it transported the Carlisle cargo pursuant to a tariff, pursuant to a service contract, pursuant to an NSA, or pursuant to an NRA. (Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 6-7.) In response to a question how its activities complied with section 41104(2)(A) of the Shipping Act that prohibits a common carrier from providing service in the liner trade that is not pursuant to a tariff or a service contract, contrary to its earlier statements, UTi now states that it did not operate as an NVOCC on the Carlstar shipments.

> UTi functioned in a manner akin to an ocean freight forwarder (albeit for inbound shipments to the United States), negotiating favorable rates for Carlstar with ocean carriers, passing through those rates and surcharges without any mark-up and providing for the arrangement of transportation services in exchange for a management fee.
>
> Despite UTi essentially functioning as an ocean freight forwarder with respect to the ocean import services provided to Carlstar, and UTi's practice of passing through all rates, fees and charges to Carlstar obtained from the respective underlying ocean carrier, UTi concedes that its overseas offices and agents, due to a lack of understanding of U.S. law and FMC regulations, did issue house bills of lading for the shipments handled for Carlstar and appeared on the master bills of lading issued by the ocean carriers. In this respect only UTi's services for Carlstar resembled those of a non-vessel-operating common carrier.
>
> Given that the essential character of UTi's services for Carlstar were those of an ocean freight forwarder, the respective obligations of the Parties were governed by parameters and conditions set forth in the Carlisle Transportation Products Agreement. This Agreement did not constitute a valid tariff, service contract, NVOCC Service Arrangement or NVOCC Negotiated Rate Agreement. Instead the Agreement was a commercial contract, the alleged breach of which should be resolved by arbitration per the Agreement's specific dispute resolution provision.

(*Id*. at 7-8.) UTi contends that it "passed through actual rates, fees and charges from the ocean carriers without any mark-up by UTi. In exchange for its services, UTi charged a fixed ocean management fee and certain other specified charges or fixed fees, such as a brokerage fee, handover charges and container management fees." (*Id*. at 9.)

UTi seeks reconsideration of the ruling that the Commission has subject matter jurisdiction over Carlstar's Complaint. UTi confirmed that it was making a facial challenge to subject matter jurisdiction using the plausibility standard outlined in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), contending that the Complaint is insufficient "without specifying specific portions of the Act and/or providing particularized facts in support which could plausibly give rise to a determination of subject matter jurisdiction." (*Id.* at 5.)

> To the extent that the February 23, 2018 Preliminary Ruling suggests that an assertion that UTi 'violated the Shipping Act while transporting cargo internationally for Carlstar' is in and of itself sufficient to plausibly give rise to the Commission's subject matter jurisdiction, Respondents respectfully request reconsideration of this preliminary ruling.

(*Id*. at 6 (citations to record omitted).)

In its response, Carlstar contends that UTi did operate as an NVOCC. Carlstar "expressly notes that UTi has already conceded that 'UTi operated "exclusively" as an NVOCC on the shipments.' Nonetheless, UTi now inexplicably reverses course and contends in response to Your Honor's Question 5 that it did not function as an NVOCC." (Carlstar Response at 4 (citations to record omitted).)

> UTi[] contends, in its responses to Your Honor's Questions 1-4, that UTi did not provide services described in the Carlisle Transportation Products Agreement in accordance with the rates, charges, classifications, rules, and practices contained in: (1) a tariff; (2) a service contract; (3) a valid NVOCC Service Arrangement as permitted by and in compliance with 46 C.F.R. Part 531; or (4) a valid NVOCC Negotiated Rate Arrangement as permitted by and in compliance with 46 C.F.R. Part 532. Therefore, according to UTi's own factual position, UTi failed to comply with Section 41104(2)(A).

(*Id*. at 5.) Carlstar continues:

> Moreover, . . . it appears that the . . . Agreement at issue in this case is properly characterized as an [NSA] as defined under 46 C.F.R. § 531.3(p), where Carlstar was the NSA shipper, UTi was the NVOCC, and Carlstar granted UTi an exclusive NVOCC role – agreeing to provide UTi one hundred percent (100%) of its cargo or freight revenue during the original and amended contract terms, and UTi committed to the specific rates and service levels set forth in the . . . Agreement.

(*Id*. at 6.)

> UTi denies that the Agreement was an NSA.

> The Agreement and amendments thereto did not serve as an NSA. NSAs must specify origin and destination port ranges and the line-haul rate, and must have a certainty of terms. Further, NSAs must be filed with the Commission. Not only did UTi and Carlstar not intend the Agreement to be an NSA and, therefore, had no obligation to file the Agreement with the Commission, but per Commission regulations an agreement cannot be an effective NSA unless filed. An "unfiled NSA," in other words, is a contradiction of terms. It is clear from the format of the Agreement – which is not in a format in which NSAs are typically drafted – and from Carlstar's failure to ever mention an NSA or to inquire as to the status of its filing during the many years of dealings between the Parties that Carlstar did not intend for the Agreement to be an NSA.

(Respondents' Reply to Complainants' March 23, 2018 Response to Respondents' Supplemental Memorandum at 3.)

B. Discussion.[7]

"A person may file with the . . . Commission a sworn complaint alleging a violation of [the Shiping Act]." 46 U.S.C. § 41301(a). The Commission has subject matter jurisdiction over allegations that "involve elements peculiar to the Shipping Act." *Cargo One v. COSCO*, 28 S.R.R. at 1645.

> [U]nder Rule 12(b)(1), the court may find a plausible set of facts by considering any of the following: "(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."

Lane v. Halliburton, 529 F.3d 548 (5th Cir. 2008), *quoting Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). Federal Rule 12(d) provides:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

> [O]n a motion to dismiss, a court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Because this

[7] The preliminary ruling found that the Commission has subject matter jurisdiction. UTi seeks reconsideration, arguing that the Complaint is facially defective. No preliminary ruling was made on the motion to dismiss for failure to state a claim.

> standard has been misinterpreted on occasion, we reiterate here that a plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough. *See* [*Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991)].

Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (emphasis and ellipses in original) (footnote omitted).

Carlstar cited to each of their exhibits attached to the Complaint and relied on them when they drafted the Complaint. Therefore, I conclude that the exhibits are integral to the Complaint and may be considered in connection with the motion to dismiss without treating it as a motion for summary judgment as provided by Federal Rule 12(d). At the request of the undersigned, Carlstar provided representative samples of bills of lading for the transportation of Carlisle cargo issued by UTi and by VOCCs with its response to the January 2, 2018, Order. These documents are also integral to the Complaint.

The Commission regulates the common carriage of goods by water in the foreign commerce of the United States. 46 U.S.C. § 40101. The Carlisle shipments were transported by water in the foreign commerce of the United States. UTi, an NVOCC licensed by the Commission to transport cargo by water between ports or points in the United States and ports or points in foreign countries, is alleged to have operated as an NVOCC on the shipments. UTi now contends that it was not operating as an NVOCC on the shipments, but that it functioned in a manner akin to an ocean freight forwarder. The Commission has subject matter jurisdiction to determine whether UTi operated as an NVOCC or "functioned in a manner akin to an ocean freight forwarder (albeit for inbound shipments to the United States)," and whether or not it violated the Shipping Act on the shipments. Therefore, the motion to dismiss for lack of subject matter jurisdiction is denied.

UTi also moves for dismissal under Rule 12(b)(6) for failure to state a claim. The facts alleged in the Complaint, the documents on which Carlstar relied when drafting the Complaint, and facts of which official notice may be taken support the following findings for the purpose of ruling on the motion to dismiss for failure to state a claim.

- UTi was an NVOCC licensed by the Commission to transport cargo by water between ports or points in the United States and ports or points in foreign countries.
- The Carlisle Products Transportation Agreement contemplates that UTi will be handling, storing, and transporting Carlisle property. (Complaint Exhibit 1 ¶ 5.)
- Under the Agreement, UTi is responsible for signing ocean freight contracts and for the subsequent Minimum Quantity commitment fulfillment. (Complaint Exhibit 1 Appendix A.)
- UTi charges rates and pledges to modify its rate structures as rates change. (Complaint Exhibit 1 ¶ 3.)

- Undisputed documents in the record demonstrate that UTi issued bills of lading for the transportation and that VOCCs issued bills of lading identifying UTi as the shipper for Carlisle shipments that were transported by water between a port in a foreign country and a port in the United States.

Furthermore, while addressing the section 41102(c) claim in its motion to dismiss, UTi stated "[i]t is well established that [section 41102(c)] relates not to alleged overcharges and billing issues that arise after the shipment has been completed, but to unreasonable practices connected with the handling, storage or delivery of freight and property when it is in the custody of the NVOCC." (Motion to Dismiss at 11.) "None of Complainants' claims allege any mishandling of cargo or *any failure by UTi to appropriately transport or deliver its cargo as instructed*." (*Id*. at 12 (emphasis added).) These statements suggests that when UTi filed its motion to dismiss, it considered itself to be operating as an NVOCC handling, transporting, and delivering Carlisle's shipments. In its Reply to Carlstar after the undersigned instructed Carlstar to state whether it claimed UTi was operating as an NVOCC or as an ocean freight forwarder, UTi stated that "[o]ver the course of its existence, UTi operated exclusively as a non-vessel-operating common carrier ('NVOCC')." (Reply at 4.) If UTi believed it was not operating as an NVOCC between 2011 and 2016 when it was performing services carrying out its duties under the Agreement, it is not likely that it would have made these statements.

UTi now claims that it was not operating as an NVOCC, but that its "essential functions with respect to Carlstar were those of an ocean freight forwarder," albeit on shipments coming to the United States, not shipments from the United States.

> UTi concedes that its overseas offices and agents, due to a lack of understanding of U.S. law and FMC regulations, did issue house bills of lading for the shipments handled for Carlstar and appeared on the master bills of lading issued by the ocean carriers. In this respect only UTi's services for Carlstar resembled those of a non-vessel-operating common carrier.

(Respondents' Supplemental Memorandum in Support of Motion to Dismiss and in Response to February 23, 2018 Preliminary Ruling at 8.)[8]

Determining whether an intermediary operated as an ocean freight forwarder or an NVOCC on any particular shipment requires an examination of what it actually does on that shipment, as "an intermediary's *conduct*, and not what it labels itself, will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. 1679, 1684 (FMC 1991) (Final Rule) (emphasis added); *Rose Int'l, Inc. v. Overseas Moving Network Int'l Ltd., et al.*, 29 S.R.R. 119, 171 (FMC 2001) ("'[A] carrier's status is determined by the nature of its service offered to the public and not upon its own declarations.' [*Tariff Filing Practices, Etc., of*

[8] Although UTi is taking a position contrary to one taken earlier in this proceeding, it does not appear that judicial estoppel would apply to prevent it from arguing that it did not operate as an NVOCC on the Carlisle shipments. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001) (addressing when judicial estoppel should apply).

Containerships, Inc., 9 F.M.C. 56, 64 (FMC 1965)], citing [*Bernhard Uhlmann v. Porto Rican Express Co.*, 3 F.M.B. 771, 775 (FMB 1952])"). *See also Possible Violations of Section 18(a) of the Shipping Act, 1916*, 16 S.R.R. 425, 431-439 (ALJ 1975) (evaluating factors). "[T]he question whether an entity is a freight forwarder [or an NVOCC on a particular shipment] is a mixed question of law and fact." *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000).

On a motion to dismiss for failure to state a claim based on a record showing that UTi is a licensed NVOCC that (even through its agents) issued bills of lading for a period of five years on the Carlisle shipments, and operated pursuant to an Agreement that contemplates that UTi will be handling, storing, and transporting Carlisle property, it cannot be found as a matter of law that UTi was *not* operating as an NVOCC on the Carlisle shipments.

Section 41104(2)(A) states that a common carrier may not provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a published tariff or a service contract. 46 U.S.C. § 41104(2)(A). UTi states that it did not transport the Carlisle cargo pursuant to a tariff, service contract, NSA, or NRA. Therefore, if it operated as an NVOCC on the shipments, it may have violated section 41104(2)(A) of the Act. If the evidence were to support a finding that the Carlisle Agreement was actually an NSA, ("[f]ailure to comply with the provisions of [the NSA regulations] shall result in the application of the terms of the otherwise applicable tariff." 46 C.F.R. § 531.12(g). Therefore, the claims of violation of section 41104 should not be dismissed at this time. Carlstar alleges that it was injured when UTi charged rates that were not authorized by the Agreement or a tariff. The Complaint and the records on which it relies state a plausible claim that UTi violated the Shipping Act. Therefore, the motion to dismiss for failure to state a claim of violation of sections 41104(2) and 41104(4) is denied.

ORDER

Upon consideration of Respondents' Motion to Dismiss, the opposition thereto, the subsequent filings of the parties, and the record herein, it is hereby

ORDERED that the motion to dismiss the Complaint based on the arbitration claims in the Carlisle Transportation Products Agreement be **DENIED**. It is

FURTHER ORDERED that the motion to dismiss the claim of violation of section 41102(c) of the Shipping Act of 1984, 46 U.S.C. § 41102(c), be **GRANTED**. It is

FURTHER ORDERED that the motion to dismiss the claim of violation of sections 41104(2) and 41104(4) of the Shipping Act of 1984, 46 U.S.C. §§ 41104(2) and 41104(4), be **DENIED**.

Clay G. Guthridge
Administrative Law Judge

FEDERAL MARITIME COMMISSION

D.F. YOUNG, INC. *Complainant,*

v.

NYK LINE (NORTH AMERICA) INC., *Respondent*.

DOCKET NO. 16-02

Served: May 22, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, and Daniel B. MAFFEI, *Commissioners*.

ORDER GRANTING JOINT PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT, DISMISSAL WITH PREJUDICE, AND MOTION FOR CONFIDENTIALITY OF THE SETTLEMENT

On April 18, 2018, Complainant and Respondent jointly requested that the Commission approve a settlement agreement, dismiss this action, and grant confidential treatment to the settlement agreement. For the reasons set forth below, the Federal Maritime Commission (Commission) grants the request.

I. BACKGROUND

On January 29, 2016, Complainant D.F. Young, Inc. (DFY or Complainant), a licensed freight forwarder, filed a Complaint alleging that NYK Line (North America) Inc. (NYK or Respondent), an ocean common carrier, violated the Shipping Act of 1984. DFY alleged that NYK violated 46 U.S.C. § 41102(c) and 46 C.F.R. § 515.42 by refusing to compensate DFY for the freight forwarding services performed on shipments placed on vessels owned or operated by NYK, its agents, or its affiliates. Compl. at 11.

NYK filed a Motion for a Summary Decision on January 9, 2017. DFY filed its own Motion for Summary Judgment on January 11, 2017. On August 1, 2017, the Administrative Law Judge (ALJ) issued an Initial Decision denying DFY's Motion for Summary Judgment and granting NYK's Motion for a Summary Decision, and dismissed DFY's Complaint. *D.F. Young, Inc. v. NYK Line (North America) Inc.*, 34 S.R.R. 874 (ALJ 2017).

This proceeding is before the Commission by DFY's filing on September 6, 2017, of a Motion to Recognize the Terms of NYK's Tariff and Bills of Lading, or, in the alternative, to Re-open and Remand. On the same day, DFY also submitted Exceptions to the ALJ's Initial Decision. While the Commission was reviewing the Motion and Exceptions, the parties filed on March 27, 2018, a Joint Petition to Hold This Action in Abeyance Pending Settlement between the Parties. Subsequently, on April 18, 2018, the parties filed a Joint Petition for Approval of a

Settlement between Complainant and Respondent and for Dismissal of This Action with Prejudice, together with a Motion to Maintain the Confidentiality of the Settlement.

II. DISCUSSION

The Commission's regulations permit settlement, subject to Commission approval. 46 C.F.R. §§ 502.72(a)(3), 502.75 (a)-(b). The Commission reviews settlement agreements to determine "whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). As part of this analysis, "the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighed against the risks and costs of continued litigation." *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (FMC 2009) (quoting *Delhi Petroleum Pty. Ltd. v. U.S. Atl. & Gulf/Australia – New Zealand Conference and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988)). The Commission's inquiry is informed, however, by its "strong and consistent policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid." *APM Terminals*, 31 S.R.R. at 625 (quoting *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002)) (internal quotation marks and brackets omitted).

Having reviewed the proposed settlement, the Commission finds that it does not appear to violate any law or policy. The settlement resolves a simple claim for monetary reparations arising out of a dispute over the applicability of certain tariff provisions. It does not call for any act or omission that contravenes the Shipping Act, and it does not affect any third parties.

The Commission also finds that the settlement is fair, adequate, and reasonable, and it is free of fraud, duress, undue influence, mistake or other defect that might make it unapprovable. Both DFY and NYK are sophisticated business entities. In reaching the settlement, both had the benefit of advice from attorneys that have represented them throughout this proceeding. Jt. Petition at 4. The settlement appears to be the result of the factual discovery and analysis, as well as year-long negotiations between the parties. Further, the parties have good cause to settle. This proceeding has been ongoing for more than two years, and DFY filed a motion to recognize NYK's tariff and bills of lading, a motion to reopen and remand, and exceptions to the ALJ's initial decision. In spite of incurring substantial litigation costs and expenses for this proceeding, the parties recognize that the Commission's decision could still be appealed to an appellate court, thus further prolonging the litigation. The parties further recognize that the outcome is still uncertain to both parties, and a losing party risks being liable for the prevailing parties' attorney fees, which can be substantial. Although the Commission does not rubber-stamp settlements, it also does not second-guess such valuations. *APM Terminals*, 31 S.R.R. at 626.

Finally, pursuant to the parties' joint motion for confidential treatment, the Commission will treat the proposed settlement agreement confidentially under 46 C.F.R. § 502.5. While they have done little to demonstrate that the information at issue is a trade secret or other confidential research, development, or commercial information, 46 C.F.R. § 502.5(b), the Commission has granted confidential treatment to settlement information in the past. *See Global Link Logistics, Inc. v. Hapag-Lloyd AG*, FMC Dkt. No. 13-07, 2015 FMC LEXIS 4, at *16-*19 (FMC Apr. 14,

2015). And the Commission recognizes that settlement agreements often contain sensitive commercial information that should be protected from public disclosure.

III. CONCLUSION

THEREFORE, The Commission **GRANTS** the parties' joint request, and **ORDERS** that:

(1) the proposed settlement agreement is **APPROVED**;

(2) the proposed settlement agreement is **CONFIDENTIAL**;

(3) the above-captioned proceeding shall be **DISMISSED WITH PREJUDICE AND WITHOUT COSTS OR ATTORNEY FEES TO EITHER PARTY**; and

(4) this proceeding shall be **DISCONTINUED**.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

MAVL CAPITAL, INC., IAM & AL GROUP INC., AND MAXIM OSTROVSKIY *Complainants*,

v.

MARINE TRANSPORT LOGISTICS, INC. AND DIMITRY ALPER, *Respondents*.

DOCKET NO. 16-16

Served: June 12, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, and Daniel B. MAFFEI, *Commissioners*.

ORDER GRANTING RESPONDENTS' MOTION TO WITHDRAW

Counsel for Respondent Marine Transport Logistics, Inc. (Marine Transport) move to withdraw their representation on the grounds that Marine Transport has failed to pay substantial legal bills, fundamentally disagrees with counsel's recommendations, and refuses to consider or follow their legal advice. Marine Transport does not contest counsel's motion to withdraw. Complainants and Respondent Alper have not responded to the motion to withdraw. Respondents have filed a Stipulation of Substitution of Counsel substituting Garry Pogil, Esq. as counsel for Marine Transport.

The Commission grants Marine Transport's counsel leave to withdraw because they have demonstrated good cause for terminating their representation under Rule 23 of the Commission's Rules of Practice and Procedure and Rule 1.16 of the American Bar Association (ABA) Model Rules of Professional Conduct.

I. BACKGROUND

A. Factual Background

Complainants MAVL Capital, Inc., IAM & AL Group, Inc., and Maxim Ostrovskiy allege multiple violations of the Shipping Act related to the overseas shipment of two automobiles (a Mercedes and a Porsche) and three Harley Davidson motorcycles. Compl. ¶¶ 27-51. Complainants allege that they engaged Respondent Marine Transport Logistics (Marine Transport) to store and ship the Mercedes and Porsche. *Id.* According to Complainants, without their permission, Respondents converted the vehicles, shipped them to the United Arab Emirates, and may have sold them. *Id*. Complainants further allege that they selected another company to store the three motorcycles for shipment overseas, but Respondents directed that company not to

ship the vehicles. *Id.* Complainants allege that Respondents have violated 46 U.S.C. §§ 41102(c), 41104(3), and 41104(10).

The parties are litigating issues related to the same vehicles in an action before the United States District Court for the Eastern District of New York. *MAVL Capital, Inc. v. Marine Transport Logistics, Inc*. (*MAVL-EDNY*), No. 13-CV-7110 (E.D.N.Y.) (alleging violations of the Shipping Act, RICO,[1] and state law).

B. Procedural History

Complainants filed this action in August 2016 seeking reparations for Respondents' alleged violations of the Shipping Act. Compl. ¶¶ 1-51. The case was assigned to Administrative Law Judge Clay G. Guthridge. In January 2017, the ALJ issued an Initial Decision partially dismissing the complaint. Initial Decision (I.D.), Jan. 17, 2017, at 19-27. The ALJ dismissed with prejudice all claims related to one vehicle (a Mercedes) and three motorcycles. *Id.* The ALJ dismissed the claims on jurisdictional grounds because Complainants did not allege or prove there was a contract to transport those vehicles overseas. *Id*. at 14-15. The ALJ did not dismiss the claims related to a Porsche. *Id*. at 28.

Complainants filed timely exceptions. Complainants' Brief in Support of its Exceptions to Initial Decision, Feb. 8, 2017. Both Respondents replied to Complainants' exceptions. Reply to Complainants' Exceptions to the January 17, 2017 Initial Decision, filed by Marine Transport, Mar. 2, 2017; Resp't Dimity Alper's Brief in Opposition to Complainants' Exceptions to Initial Decision, Mar. 2, 2017. Complainants later petitioned for leave to supplement their exceptions. Pet. for Leave to Supplement Exceptions of Complainants to the Initial Decision, Mar. 7, 2017. Marine Transport opposed Complainants' request to supplement their exceptions. Reply to Complainants' Pet. for Leave to Supplement Exceptions, Mar. 9, 2017.

In January 2017, the ALJ stayed all proceedings until Complainants' exceptions are decided. Order Staying Proceeding Pending Commission Decision on Exceptions, Jan. 27, 2017, at 2. In October 2017, Complainants requested the Commission issue a subpoena compelling nonparty Maersk Line to respond to written deposition questions. The Commission denied Complainants' request. Order Denying Request for Issuance of Subpoena, Dec. 7, 2017.

In February 2018, Marine Transport's counsel, Stephen H. Vengrow, Esq., and Eric Chang, Esq., of Montgomery McCracken Walker & Rhoads, LLP, moved to withdraw their representation. Mot. to be Relieved as Counsel for Respondent Marine Transport Logistics, Inc. (Counsel's Mot.), Feb. 22, 2018. Counsel served Marine Transport with the motion by email and United States mail on the date of filing. *Id*. at 4. None of the parties responded to counsel's motion to withdraw. On May 2, 2018, Respondents filed a Stipulation of Substitution of Counsel substituting Garry Pogil, Esq. as counsel for Marine Transport, and Mr. Pogil has entered his appearance.

[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.*

III. DISCUSSION

A. Motion to Withdraw by Marine Transport's Counsel

Counsel for Marine Transport move to withdraw because their client has failed to pay overdue legal bills despite repeated warnings that failure to pay would lead to counsel withdrawing their representation. *Id.* at 2. Counsel explain that Marine Transport also fundamentally disagrees with their litigation strategy and has refused to consider or follow legal advice. *Id*. Counsel served Marine Transport with the motion to withdraw on the date of filing (*Id*. at 4), but Marine Transport has not filed an opposition disputing counsel's stated reasons for moving to withdraw.

Under Commission Rule 23, counsel seeking leave to withdraw without their client's consent when the client is not "otherwise represented" must demonstrate "appropriate reasons" for allowing counsel to withdraw. 46 C.F.R. § 502.23(e). Granting leave to withdraw is subject to the Commission's discretion. *See generally Brandon v. Blech*, 560 F.3d 536, 537 (6th Cir. 2009) (leave to withdraw legal representation subject to judicial discretion).

Rule 23 cites the factors set forth in ABA Rule 1.16 as the governing standard. § 502.23(e); *Crocus Investments, LLC v. Marine Transport Logistics, Inc*. (*Crocus* Opin.), Docket No. 15-04, slip op. (FMC Jul. 14, 2016) (applying ABA Rule 1.16 factors in granting Complainants' prior counsel leave to withdraw). Rule 1.16 lists the following as circumstances that can justify withdrawing representation:

> (1) absence of material, adverse impact on the client's interests; (2) client's insistence on "taking action" with which counsel fundamentally disagrees; (3) client's failure to "substantially to fulfill an obligation to the lawyer regarding the lawyer's services" despite receiving "reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;" (4) continuing representation will impose an unreasonable financial burden on counsel or has been made "unreasonably difficult" by the client; and (5) when "other good cause for withdrawal exists." *Id.*

Marine Transport's counsel cite multiple Rule 1.16 grounds for terminating their representation. Counsel's Mot., at 2. First, Marine Transport is four months in arrears in paying substantial fees for services provided in this case and other matters. *Id*. Counsel contend that continuing to provide legal services without compensation would financially burden their firm. *Id.* The attorney/client relationship is contractual, and clients' failure to pay for legal services violates the basic terms of that contractual arrangement. *See Hammond v. T.J. Little and Co*., 809 F. Supp. 156, 159 (D. Mass. 1992). By failing to pay for services rendered, Marine Transport has not met its contractual responsibility. *See, e.g*., *Lieberman v. Polytop Corp.*, 2 Fed. Appx. 37, 39 (1st Cir. 2001) (client owing substantial fees failed to meet contractual obligation); *Honda Power Equip. Mfg., Inc. v. Woodhouse*, 219 F.R.D. 2, 6 (D.D.C. 2003) (counsel justified in withdrawing when client is unresponsive and in arrears).

Second, counsel state that Marine Transport fundamentally disagrees with counsel's recommended legal strategy and is not willing to consider or follow their advice. Counsel's Mot.

at 2. A client's refusal to follow advice and substantial disagreement on how to proceed are sound reasons for withdrawing representation. *See, e.g. Sabre Int'l Sec. v. Torres Advanced Enter. Sols., LLC*, 219 F. Supp. 3d. 155, 158-59 (D.D.C. 2016).

Finally, Marine Transport will not be prejudiced by counsel withdrawing at this stage of the proceedings. Respondents are now represented by Mr. Pogil who entered his appearance on their behalf on May 2, 2018. There are no impending deadlines that require counsel's preparation or assistance. Complainants' exceptions and their petition to supplement the exceptions have been fully briefed. *Cf. Spann v. N.C. Dep't of Pub. Safety*, No. 1:17-cv-104, 2017 U.S. Dist. LEXIS 200732 (W.D.N.C. Dec. 6, 2017) (denying motion to withdraw representation because responsive pleadings were due within days).

The Commission hereby grants counsel's motion to withdraw as justified under ABA Rule 1.16 and Commission Rule 23. *See Crocus*, slip op. at 2 (citing clients' lack of cooperation and failure to meet obligations and absence of material prejudice as grounds for allowing counsel to withdraw). Proceedings before the ALJ are stayed pending a decision on Complainants' exceptions to the Initial Decision.

III. CONCLUSION

THEREFORE, IT IS ORDERED:

(1) Respondents' motion to withdraw representation is granted; and

(2) The final decision deadline, which is currently June 26, 2018, is hereby extended by 6 months to December 26, 2018.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH, *Complainants*

v.

HAPAG-LLOYD, A.G., HAPAG-LLOYD, INC., LIMCO LOGISTICS, INC., AND INTERNATIONAL TLC, INC., *Respondents*.

DOCKET NO. 10-06

Served: June 18, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, and Daniel B. MAFFEI, *Commissioners*.

ORDER GRANTING MOTION TO WITHDRAW AND DISMISS

In November 2015, Complainants filed a petition seeking $187,440 in attorney fees from Respondents Limco Logistics, Inc., and International TLC, Inc. (ITLC). Complainants settled with Limco, and on May 30, 2018, moved to withdraw and dismiss their petition as to ITLC. According to Complainants, the request for withdrawal and dismissal is the result of an agreement between Complainants and ITLC.

Given the parties' agreement, there is no need for the Commission to rule on Complainants' petition. The Commission therefore GRANTS Complainants' motion to withdraw and dismiss and ORDERS that Complainants' petition for attorney fees is deemed withdrawn and this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

CARLSTAR GROUP LLC F/K/A CARLISLE TRANSPORTATION PRODUCTS, INC. AND CTP TRANSPORTATION PRODUCTS, LLC, *Complainants*

v.

UTI UNITED STATES, INC.; UTI UNITED STATES, LLC; AND DSV AIR & SEA, INC., *Respondents*.

DOCKET NO. 17-08

Served: June 19, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman* and Rebecca F. DYE, *Commissioner*.

NOTICE OF COMMISSION DETERMINATION TO REVIEW

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's May 18, 2018, Initial Decision Partially Dismissing Complaint in this proceeding.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

IN RE: RATIFICATION OF FEDERAL MARITIME COMMISSION ADMINISTRATIVE LAW JUDGES	**DOCKET NO. 18-05**

Served: June 28, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, and Daniel B. MAFFEI, *Commissioners*.

ORDER

In *Lucia v. Securities and Exchange Commission*, 585 U.S. ___, 2018 U.S. LEXIS 3836 (June 21, 2018), the U.S. Supreme Court held that administrative law judges serving at the Securities and Exchange Commission (SEC) are subject to the Appointments Clause of the U.S. Constitution. Based on the duties they perform, the Supreme Court determined that SEC administrative law judges are "Officers of the United States"—a class of government officials that must be appointed by the President, a court of law, or the head of a department. *Id*. at *11.

The administrative law judge assigned to Petitioner Raymond Lucia's case at the SEC was appointed by SEC staff, not by the head of the department or the President. For that reason alone, the Supreme Court ruled that the appointment was constitutionally invalid. In a previous case, the Supreme Court held that, for the purposes of the SEC, "the Commission itself counts as a 'Head[] of Department[].'" *Id*. at *9 (citing Art. II, §2, cl. 2, *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 511–513 (2010)).

This Order is issued to avoid any misunderstanding or confusion regarding the appointments and authority of the administrative law judges serving at the Federal Maritime Commission (FMC).

Unlike the SEC, the Federal Maritime Commission's head of department is the Chairman and, as such, he is vested with authority to appoint "Officers" serving at the Commission. 46 U.S.C. § 301(c)(2) and (3). While the SEC's "powers . . . are generally vested in the Commissioners jointly, not the Chairman alone," *see Free Enterprise Fund*, 561 U. S. at 512, the FMC Chairman "is the chief executive and administrative officer of the Commission" and is expressly authorized to "appoint and supervise officers . . . of the Commission." 46 U.S.C. §§ 301(c)(2), 301(c)(3)(A)(i).

Additionally, the FMC Chairman may not only appoint and supervise officers and employees of the FMC, but the Chairman has also been vested with the authority to "assign Commission personnel, *including Commissioners*, to perform duties and powers delegated by the Commission[.]" 46 U.S.C. § 301(c)(3)(A)(v) (emphasis added). This authority contrasts with the SEC Commissioners, who "do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission's policies." *Free Enterprise Fund*, 561 U. S. at 512. The FMC Chairman is bound by the FMC's "policies, regulatory decisions, findings, and determinations of the Commission," but the FMC Chairman is expressly not subject to the policies and determinations of the Commission when exercising the appointment power under 46 U.S.C. § 301(c)(2) (Chairman subject to Commission policies "other than under paragraph (3)" which encompasses appointment authorities).

The FMC's administrative law judges were selected and appointed by the head of the department in compliance with the Appointments Clause. Administrative Law Judge Clay G. Guthridge was appointed by Chairman Steven R. Blust on August 20, 2006. Judge Guthridge was appointed as the Chief Administrative Law Judge by Chairman Richard Lidinsky on February 23, 2010. Administrative Law Judge Erin M. Wirth was appointed by Chairman Lidinsky on January 3, 2010.

While there is no question that the appointment of the Commission's administrative law judges is constitutionally (and statutorily) valid, for the avoidance of doubt, the Commission hereby unanimously affirms the appointments of the Hon. Clay G. Guthridge and Hon. Erin M. Wirth.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF COSCO SHIPPING LINES CO., LTD. (COSCO), ORIENT OVERSEAS CONTAINER LINE LIMITED (OOCL), AND OOCL (EUROPE) LIMITED FOR AN EXEMPTION FROM AGREEMENT FILING

PETITION NO. P2-17

Served: August 8, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, *Commissioner*.

ORDER GRANTING PETITION

On November 8, 2017, Cosco Shipping Lines Co., Ltd. (COSCO), Orient Overseas Container Line Limited (OOCL), and OOCL (Europe) Limited filed a petition with the Federal Maritime Commission (Commission) for an exemption from the requirement that they file agreements between them. The Notice of Filing and Request for Comments was published on November 17, 2017. 82 Fed. Reg. 54341. Comments were due by December 1, 2017, and the Commission received one comment from Ashley Furniture Industries, Inc. (Ashley Furniture).[1]

Because the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, the Commission grants the petition.

I. BACKGROUND

COSCO is a China-based ocean common carrier operating in numerous trades between ports in the United States and ports in other countries. Pet. at 2. OOCL is incorporated in Hong Kong, and OOCL (Europe) is an England and Wales corporation. OOCL operates as an ocean common carrier in numerous trades between the U.S. and foreign ports. Pet. at 2. OOCL and OOCL (Europe) are organized as separate legal entities, but they combine to provide service under the OOCL trade name. Both entities are wholly owned subsidiaries of Orient Overseas (International) Limited (OOIL). Pet. at 2–3. COSCO SHIPPING Holdings Co., Ltd. (CS Holdings), COSCO's parent company, through its wholly owned subsidiary Faulkner Global Holdings Limited, is acquiring OOIL, and thereby acquiring OOCL. OOCL will thereafter be majority—not 100 percent—owned and controlled by CS Holdings. Pet. at 3. COSCO and OOCL will therefore be part of a common business enterprise operated by CS Holdings.

[1] In a brief comment submitted to the Commission on November 22, 2017, Ashley Furniture expressed general support for granting the petition, as the carrier companies will be related, and Ashley Furniture did not believe the exemption would reduce competition or harm their business.

COSCO and OOCL, in their capacities as ocean common carriers, have applied for an exemption akin to 46 C.F.R. § 535.307, which exempts agreements between wholly owned subsidiaries from the Shipping Act's filing requirements, following the consummation of CS Holding's purchase of up to 90.1% and at least 58.5% of OOIL. The exact percentage of CS Holdings' ownership of OOIL is variable because the parties intend to maintain OOIL's public status on the Hong Kong Stock Exchange, which requires that at least 25% of the shares of OOIL be held by the public. Pet. at 3. Ultimately, OOIL's ownership will reflect the following: CS Holdings will hold no less than 58.5% of OOIL's shares, and Shanghai International Port (Group) Co., Ltd (SIPG) will hold 9.9% of the shares. Pet. at 3. In any event, CS Holdings will be the majority shareholder of OOIL. SIPG, a company with "some other shareholding relationships with the Cosco family of companies," is a holding company of port interests and is not an ocean common carrier. Pet. at 4. CS Holdings will continue to hold 100% of COSCO's shares. Pet. at 4. The parties will retain the OOCL brand, management, and employees following the consummation of the transaction. Pet. at 4.

The parties are requesting that the Commission "replicate as to Cosco and OOCL the exemption automatically applicable to wholly-owned subsidiaries pursuant to" 46 C.F.R. § 535.307, applying the exemption to all agreements and activities between COSCO and OOCL so long as both parties are commonly owned and controlled. Pet. at 1. They argue that this is justified by the same policies considered by the Commission when it originally adopted § 535.307.

II. DISCUSSION

The Commission has the authority under 46 U.S.C. § 40103 (section 16 of the Shipping Act of 1984) to grant exemptions for agreements or activities if the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission used this authority to promulgate 46 C.F.R. § 535.307, which provides: (1) that agreements between or among ocean common carriers and/or marine terminal operators are exempt from the Act's filing requirements when the parties are wholly owned subsidiaries of the same parent company or one party is the wholly owned subsidiary of the other; and (2) that concerted activities resulting solely from such agreements are exempt from the prohibitions in 46 U.S.C. § 41105 (section 10(c) of the Shipping Act). *See* § 535.307. COSCO and OOCL have petitioned for an exemption akin to § 535.307. This would thus include an exemption from the agreement filing requirements of the Act and 46 C.F.R. part 535 for agreements between or among COSCO and OOCL, as well as an exemption from the prohibitions in 46 U.S.C. § 41105 for any concerted activities by COSCO and OOCL that result from such agreements. Petitioners assert that while OOCL will be majority, not wholly, owned by COSCO's parent company, the same rationale behind § 535.307 justifies the exemption. Based upon the analysis below, the Commission grants the parties' petition for the requested exemption from the agreement-filing requirements and § 41105.

A. The Origins of Section 535.307

Section 535.307 was promulgated in 1988 after Crowley Maritime Corp. (Crowley) applied for an exemption from section 5 of the Shipping Act's agreement-filing requirements, the prohibitions against operating under unfiled agreements in section 10(a), and the section 10(c) prohibition against certain concerted actions. The Commission published notice of Crowley's

petition in the Federal Register on December 28, 1987. 52 Fed. Reg. 48879. The Commission then published a further notice in the Federal Register on January 28, 1988, seeking comments on whether Crowley's requested exemption should apply on an industry-wide basis to all other ocean common carriers and marine terminal operators under similar terms and conditions. 53 Fed. Reg. 2537. The Commission extended the deadline for submission of comments, but none were received on either Crowley's application or the enlargement of scope.

In its application for the exemption, Crowley stated that "no regulatory interest is furthered by subjecting Crowley and its wholly-owned subsidiaries to statutory requirements intended to impose regulatory oversight on concerted activities engaged in by separate, competing entities, or intended to prevent separate entities from unfairly using their aggregate economic power." Crowley Pet. at 2. Crowley argued that the 1984 Act was not intended to confer Commission jurisdiction over relationships between and among companies sharing the same ownership. Crowley claimed that the legislative history of both the 1916 and 1984 Shipping Acts supported the idea that affiliated companies are not considered competitors and are not intended to be regulated as such, citing to the Alexander Report of 1914 and its incorporation into the Shipping Act of 1916. Crowley Pet. at 11. Crowley read the 1916 Act as "expressly distinguish[ing] between consolidation of control resulting from the bringing of separate lines under common ownership" and "the making of agreements or understandings between carriers that had the effect of limiting competition." Crowley Pet. at 11. Crowley also pointed to the Supreme Court's decision in *Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), in which the Court held that the Commission has jurisdiction over agreements between independently-owned carriers that fall short of actual consolidation, but not over mergers and stock or asset acquisitions. Importantly, Crowley emphasized that it was not seeking an exemption "for agreements or activity involving a Crowley company and another company in which Crowley is a partial owner or stockholder, even if its ownership gives it the power to control the company." Crowley Pet. at 16. Crowley also referenced *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), an antitrust case decided four years earlier that marked the abandonment of the "intra-enterprise conspiracy" doctrine. This outdated doctrine provided that agreements between a parent and its wholly owned subsidiary were potentially subject to Sherman Act § 1 liability.

The Commission considered Crowley's argument and decided to grant Crowley the exemptions requested and apply them on an industry-wide basis to concerted activities between and among certain affiliated entities. 53 Fed. Reg. 11072 (Apr. 5, 1988).[2] The final rule did not discuss the reasons for granting the exemption in any great detail, simply noting that the Commission had found that the exemption would not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.[3] *See id.*

[2] The exemption was originally codified at 46 C.F.R. § 572.308.

[3] Prior to the enactment of the Ocean Shipping Reform Act of 1998 (OSRA), section 16 of the Shipping Act included four criteria for granting an exemption. OSRA deleted the first two criteria (that the exemption would not substantially impair effective regulation by the Commission or be unjustly discriminatory) leaving only the latter two criteria (that the exemption would not result in

B. Applying the Rationale Behind § 535.307 to Majority-Owned Subsidiaries

Section 535.307 is clear in its specific application to agreements between and among wholly owned subsidiaries and/or their parents. The parties are asking the Commission to extend or "replicate" the exemption to a situation in which one subsidiary is only majority-owned. The parties argue that the same considerations that led the Commission to adopt § 535.307 apply in this scenario to justify a similar exemption.

The parties begin their argument by stating that nothing in the order establishing § 535.307 indicates that the Commission considered situations in which ownership of the subsidiary would be less than one hundred percent. This is true, as Crowley only sought an exemption limited to companies in which it held a one hundred percent ownership interest. Crowley Pet. at 16. The parties also argue that the Commission accepted Crowley's argument of the "single business enterprise," that "subsidiaries are not natural competitors," but "are in fact managed to avoid competition, and are legally incapable of combining or conspiring together in restraint of trade or commerce within the meaning of the antitrust laws." Crowley Pet. at 2. This argument by both Crowley and the petitioners is based heavily on the *Copperweld* decision. The Supreme Court stated in *Copperweld* that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. . . . Indeed, the very notion of an 'agreement' in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning." *Copperweld*, 467 U.S. at 771–72.

Copperweld listed several factors that can aid in the determination of whether conduct is unilateral or concerted. The Court stated that "a parent and its wholly owned subsidiary have a complete unity of interest" and one "corporate consciousness." 467 U.S. at 771. The subsidiary "acts for the benefit of the parent, its sole shareholder." *Id*. The parent and subsidiary "share a common purpose whether or not the parent keeps a tight rein over the subsidiary," with the parent able to "assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Id*. at 771–72. "[T]he ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Id*. at 772 n.18. In sum, the Court focused on who benefitted from the subsidiary's activity, how aligned the parent and subsidiary's interests were, and who had control and decision-making authority. The Court argued that, in the case of wholly owned subsidiaries, the initial acquisition of control is subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, and the enterprise is then subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, so it is adequately policed without resort to the "intra-enterprise conspiracy" doctrine. *Id*. at 774–77.

The parties note that, although both § 535.307 and *Copperweld* involve only wholly owned subsidiaries, there are numerous courts that have applied the *Copperweld* rationale to situations in which the subsidiary is less than wholly owned but still under the parent's legal ownership and control. The parties cite to *Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc.*, in which that court held that the 51-percent ownership retained by the parent company over the subsidiary assured it of full control and that "it could intervene at any time that [the subsidiary] ceased to act in its best interests," thus making it "incapable of conspiring for purposes of § 1 of

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substantial reduction in competition or be detrimental to commerce). *See* Pub. L. No. 105-258, § 114; 46 U.S.C. § 40103.

the Sherman Act." 1986 U.S. Dist. LEXIS 16017, at *25–26 (N.D. Ga. 1986). Likewise, the parties point to *Direct Media Corp. v. Camden Tel. & Tel. Co.*, in which that court held that 51 percent ownership was enough to find the conduct in question to be unilateral. 989 F. Supp. 1211, 1216 (S.D. Ga. 1997). The parties then turn to *Coast Cities Truck Sales v. Navistar Int'l Transp. Co.*, in which that court stated that courts should look beyond the mere ownership of the subsidiary and "determine whether the parent and subsidiary are inextricably intertwined in the same corporate mission, are bound by the same interests which are affected by the same occurrences, and exist to accomplish essentially the same objectives." 912 F. Supp. 747, 764 (D. N.J. 1995). The parties conclude their analysis of relevant case law with *Bell Atl. Bus. Sys. Servs. v. Hitachi Data*, in which that court stated that, for the same reasons that a wholly owned subsidiary and its parent are considered the "same entity" because of the parent's power to exercise full control over the subsidiary, "a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade." 849 F. Supp. 702, 706 (N.D. Cal. 1994).

Such analysis of *Copperweld*-related case law is incomplete without mention of the Supreme Court case, *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), which the parties do not reference in their petition. In *American Needle*, the Court expanded on its decision in *Copperweld* while trying to ascertain whether the individual teams of the National Football League were capable of engaging in a "contract, combination, or conspiracy" as defined by § 1 of the Sherman Act, when acting through the National Football League Properties, a joint venture entered into by the teams to develop, license, and market their intellectual property. The Court pointed to its decision in *United States v. Sealy, Inc.*, when it held that members of a single entity violated § 1 as it was "controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *American Needle*, 560 U.S. at 192 (citing *United States v. Sealy, Inc.*, 388 U.S. 350 (1967)). The Court stated that "[t]he key is whether the alleged 'contract, combination, or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers." *American Needle*, 560 U.S. at 195. According to the Court, "[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." *Id*. at 200. The Court thus looked beyond *Copperweld*'s presumption that a single, merged entity can only act unilaterally and took a hard look at the individual interests of the participants of the joint venture to determine the nature of the joint venture's activity—whether it was unilateral or concerted.

American Needle, therefore, built upon the earlier tenets of the *Copperweld* decision—the unity of the parent and subsidiary's interests and the location of control and decision-making authority—to add an additional inquiry into the identities and interests of separate companies with ownership over the subsidiary (or in the case of *American Needle*, participants in the joint venture).

Applying this analysis to the case at hand, we do not believe that agreements between COSCO and OOCL or OOCL (Europe) would constitute concerted action subject to § 1 of the Sherman Act. CS Holdings will hold at least 58.5% of OOIL, giving it clear majority ownership of OOCL's parent company and, significant for *Copperweld* analysis, full control over OOCL and OOCL (Europe). While COSCO and the two OOCL subsidiaries will operate under their respective brands, all will operate in the best interests of CS Holdings. The interests of the subsidiaries are therefore aligned, and if, for some reason, OOCL or OOCL (Europe) stop

operating in the best interests of CS Holdings, CS Holdings can exert power over them through OOIL as majority shareholder.

Likewise, COSCO and OOCL or OOCL (Europe) coming to an agreement is not a "sudden joining of two independent sources of economic power previously pursuing separate interests." *Copperweld*, 467 U.S. at 770. After the deal is consummated, the other shareholders of OOIL will be public shareholders and Shanghai International Port Group, a holding company of port interests. CS Holdings and SIPG are not competitors. The continued operation of OOIL is therefore not a "formalistic shell for ongoing concerted action" between the shareholders and passes *American Needle* muster.

Because agreements between COSCO and OOCL or OOCL (Europe) would not raise implications under § 1 of the Sherman Act, granting petitioners an exemption akin to § 535.307 would not, in this specific instance, result in a substantial reduction in competition or be detrimental to commerce.

III. CONCLUSION

The Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce.

THEREFORE, IT IS ORDERED, that COSCO, OOCL, and OOCL (Europe)'s Petition is GRANTED.

IT IS FURTHER ORDERED, that agreements between or among COSCO and either OOCL or OOCL (Europe), or both, are exempt from the filing requirements of the Shipping Act and 46 C.F.R. part 535,

IT IS FURTHER ORDERED, that the concerted activities of COSCO, OOCL, and OOCL (Europe) are exempt from 46 U.S.C. § 41105 to the extent that those activities result solely from agreements between or among COSCO and either OOCL or OOCL (Europe), or both.

FINALLY, IT IS ORDERED, that this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

JC HORIZON LTD, *Complainant*

v.

CHINA SHIPPING CONTAINER LINES CO. LTD, *Respondent*.

DOCKET NO. 18-03

Served: August 8, 2018

BEFORE: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT AND DISMISSING PROCEEDING WITH PREJUDICE[1]

[Notice Not to Review served 9/10/18, decision administratively final.]

I.

On August 3, 2018, Complainant JC Horizon Ltd. ("JCH") and Respondent China Shipping Container Lines Co. Ltd. ("CSCL") filed a joint motion for approval of settlement and voluntary dismissal ("settlement motion"). The parties attached a copy of the satisfaction of award and release ("settlement agreement"). The parties jointly move for approval of the settlement and voluntary dismissal with prejudice.

II.

On May 15, 2018, a notice of filing of complaint and assignment was issued indicating that JCH filed a complaint against CSCL alleging numerous violations of the Shipping Act of 1984 ("Shipping Act"). On June 25, 2018, CSCL filed its answer denying the allegations.

The parties state that they have "negotiated a settlement which resolves all outstanding disputes regarding the fall 2014 container shipment" and that "the settlement is the result of arms-length negotiations between two sophisticated entities, both of whom were represented by counsel at all times." Motion at 2.

[1] This Initial Decision will become the decision of the Commission absent review by the Commission. 46 C.F.R. § 502.227.

III.

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, inter alia, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (*quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092, *quoting* 15A American Jurisprudence, 2d Ed., 777-778 (1976).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided

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[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (*citing Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel. The proceeding is in an early stage and resolution would require potentially expensive discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

IV.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between JC Horizon Ltd. and China Shipping Container Lines Co. Ltd. be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SANTA FE DISCOUNT CRUISE PARKING, INC. DBA EZ CRUISE PARKING, LIGHTHOUSE PARKING INC., AND SYLVIA ROBLEDO DBA 81ST DOLPHIN PARKING, *Complainants*

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES AND THE GALVESTON PORT FACILITIES CORPORATION, *Respondents*.

DOCKET NO. 14-06

Served: August 9, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, *Commissioner*.

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

This proceeding comes before the Commission on remand from the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court). The D.C. Circuit vacated the Commission's January 13, 2017 Order affirming the Administrative Law Judge's (ALJ) Initial Decision dismissing the complaint, and the Court remanded the case to the Commission for further proceedings consistent with the Court's May 11, 2018 opinion. We therefore remand this proceeding to the ALJ to address all remaining issues.

The Commission's January 13, 2017 Order includes a detailed recitation of the facts of this case, and we only briefly summarize them here. In 2004, the Board of Trustees of the Galveston Wharves (Port) adopted a tariff that imposed access fees on ground transportation companies whose vehicles enter the Galveston cruise terminal. The fee amount varied depending on the type of vehicle entering the cruise terminal. Complainants operate off-port parking lots and primarily transport their customers to the cruise terminal via shuttle bus. Under the Port's original fee schedule, Complainants' shuttle buses were subject to an access fee each time a bus entered the cruise terminal. They challenged the per-trip access fee as unworkable for their business and eventually negotiated a different fee regime under which they were charged based on the number of parking spaces they maintained for customer use and were not charged per shuttle bus trip. Other companies continued operating under the original fee regime and paid an access fee in the form of a per-trip charge or a decal renewed annually, depending on the type of vehicle(s) entering the cruise terminal.

Complainants operated under their negotiated per-space fee regime for almost eight years. When the Port proposed to raise the fees imposed on ground transportation companies

under both fee regimes in May 2014, Complainants filed a complaint with the Commission alleging that the Port's operation of the two regimes violated the Shipping Act. Shortly thereafter, the Port retroactively rescinded the rate increase applicable to Complainants and simultaneously abolished their separate fee regime. Effective October 1, 2014, Complainants were assessed fees under the same regime as other ground transportation companies, and their fees were determined by the type of vehicle they used to transport their customers to the cruise terminal.

Complainants initially alleged that the Port violated 46 U.S.C. §§ 41102(c), 41106(2), and 41106(3). The ALJ dismissed the § 41102(c) and § 41106(3) claims on November 21, 2014.[1] The ALJ dismissed the remaining § 41106(2) claims on December 4, 2015.

In particular, the ALJ found that Complainants failed to meet the first two elements required by the Commission in § 41106(2) cases. *See Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270 (FMC 1997). Specifically, complainants have the initial burden of proving: (1) in certain cases, that the complainant and another person or entity are similarly situated or in a competitive relationship; (2) the respondent treated the complainant and the other person differently; and (3) the different treatment is the proximate cause of injury to the complainant. If the complainant makes such showing, the burden of production shifts to the respondent to justify the different treatment based on valid transportation factors. Although the ALJ determined that the Complainants established that they were treated differently than other ground transportation companies, the ALJ found that they had failed to prove that they were similarly situated or in a competitive relationship with those other companies or that the different treatment caused them injury. On review, the Commission affirmed the determination that although Complainants had been subjected to different treatment, they failed to establish injury.[2]

The D.C. Circuit disagreed with the Commission's injury determination, finding that Complainants "were plainly injured when they were charged more than other commercial passenger vehicles." *Santa Fe Disc. Cruise Parking, Inc. v. Fed. Mar. Comm'n*, 889 F.3d 795, 797 (D.C. Cir. 2018). The Court therefore vacated the Commission's decision and remanded for further proceedings, stating that the Commission could consider on remand the Port's argument that the differential treatment of Complainants' vehicles is justified by legitimate transportation factors. *Id.*

Consistent with the Court's opinion, we are remanding the proceeding to the ALJ to address all remaining issues, including whether the Port's different treatment was justified by valid transportation factors, whether the Shipping Act's statute of limitations bars any of

[1] The ALJ's decision became final on December 23, 2014.

[2] The Commission also determined that the ALJ erred in finding that Complainants were required to establish that they were similarly situated or in a competitive relationship with other ground transportation companies.

Complainants' claims,[3] and whether Complainants are entitled to relief. Additional briefing by the parties may be permitted in the ALJ's discretion.

THEREFORE, IT IS ORDERED, that this proceeding is remanded to the ALJ for further adjudication consistent with this Order and the D.C. Circuit's May 11, 2018 opinion.

By the Commission.

Rachel E. Dickon
Secretary

[3] The Port argued before the ALJ that the Shipping Act's statute of limitations barred Complainants' claim for reparations. The ALJ pretermitted a decision on that question given the finding that Complainants' failed to establish injury.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant* v. RDD FREIGHT INTERNATIONAL INC., *Respondent*.	**DOCKET NO. 17-02**

Served: August 29, 2018

BEFORE: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION[1]

[Notice of Commission Determination to Review served 8/30/18, Commission final decision pending.]

I. INTRODUCTION

A. Overview and Summary of Decision

This is a dispute between a garment manufacturer and an ocean transportation intermediary. Complainant Hangzhou Qianwang Dress Co., Ltd. ("Hangzhou Qianwang") alleges that Respondent RDD Freight International Inc. ("RDD" or "RDD Freight") released cargo in three separate shipments to the consignee without obtaining an original bill of lading in violation of the Shipping Act of 1984 ("Shipping Act"). RDD Freight denies the allegations.

The issues alleged here are very similar to those raised in previous proceedings and the outcome is a straightforward application of settled Commission and Second Circuit case law that a non-vessel-operating common carrier ("NVOCC") which releases cargo without requiring presentation of an original bill of lading has "fail[ed] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" in violation of section 41102(c) of the Shipping Act. This conclusion is not altered by the unprofessional conduct of the consignee who received the cargo without making full payment for it or by the settlement of a related case filed in a court in China.

B. Procedural Background

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

This proceeding began with a complaint filed on February 17, 2017. The complaint included the invoice, packing list, and bills of lading for the three shipments at issue. On March 2, 2017, the notice of filing of complaint and assignment was issued. On March 24, 2017, Respondent filed an answer denying the allegations in the complaint and including a counterclaim. On April 28, 2017, Complainant filed a response to the counterclaim by letter and a telephone conference was held.

On August 23, 2017, an amended complaint was filed, in partial response to a show cause order. On October 11, 2017, an order was issued discharging the show cause order and establishing a schedule. The schedule required the completion of all discovery by December 22, 2017. In January of 2018, the parties both filed motions to compel responses to discovery.

On February 1, 2018, an order compelling responses to discovery was issued, noting that "neither party has fulfilled its discovery obligations." The February 1, 2018, order required additional discovery to be filed, vacated the scheduling order, and required the parties to appear at a telephone conference. Telephone conferences were held on March 15, 2018, and March 21, 2018. On March 21, 2018, an order was issued permitting Respondent to file a motion to compel.

On April 6, 2018, Respondent filed a motion to compel discovery from Complainant. On May 30, 2018, the motion to compel was granted in part and denied in part; discovery was completed; and the parties were ordered to present their cases through written briefs, with Complainant's filings due on June 29, 2018, Respondent's opposition due July 30, 2018; and Complainant's reply due on August 14, 2018.

On June 20, 2018, Complainant filed a motion to add supplemental evidence. On July 28, 2018, Respondent filed a cross-motion to supplement the record. These motions, which were both unopposed, are granted below.

On June 29, 2018, Complainant filed its brief, proposed findings of fact, and an appendix.[2] On July 28, 2018, Respondent filed its brief, proposed findings of fact, response to Complainant's proposed findings of fact, appendix of exhibits, and cross-motion to supplement the record. A notice regarding filing issued July 30, 2018, noted that Respondent's brief was labeled as a "Brief in Opposition to Complainant's Motion for Summary Judgement and in Support of RDD's Cross-motion for Summary Judgement" although it appeared that no motion for summary judgement had been filed and if that was the case, that "the brief will be treated as a

[2] References to the record treat the pages as sequentially numbered and are abbreviated as follows:
CBrief – Complainant's brief
CFF – Complainant's proposed findings of fact
CApp – Complainant's appendix
RBrief – Respondent's opposition brief
RFF – Respondent's proposed findings of fact
RRFF – Respondent's response to Complainant's proposed findings of fact
RApp – Respondent's appendix

brief on the merits as required by the scheduling order." Notice Regarding Filing at 1. The parties did not respond to the notice. Accordingly, the briefs filed by Complainant and Respondent will be accepted as briefs on the merits.

Complainant did not file a reply brief or response to RDD Freight's proposed findings of fact. In an email exchange with the Respondent and this office, Complainant requested an extension to which Respondent objected. Complainant was advised by this office that an extension would need to be requested by a properly filed motion demonstrating good cause. No such motion has been received from the *pro se* Complainant.

C. Arguments of the Parties

Complainant alleges that:

> Defendant, in releasing the goods to the consignee before it had received the original Bill of Lading and permission from Plaintiff to release, violated the Shipping Act and its implementing regulations, in particular, 46 U.S.C. 41102(C), in that it "fail[ed] to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

CBrief at 2. Complainant asserts that as a direct consequence of Respondent's violation, Complainant sustained damages of $134,207.70 which, after a settlement received in a related case in China, is reduced by Complainant to $72,503.70. CBrief at 2.

Respondent asserts that Complainant seeks to recover the value of the goods in question from Respondent RDD Freight but not from the consignee, SWAK Kids; that RDD Freight's employee was "defrauded and misled into releasing the goods to the said consignee – in a good faith and bona fide effort to save the $450.00 per day demurrage;" and that Complainant settled its claims in a proceeding in China. RBrief at 1-2.

D. Motions to Supplement the Record

Complainant filed a motion to add supplemental evidence and included a declaration about the settlement agreement reached in a related proceeding in China. This document was also included in Complainant's appendix. It is essentially additional discovery, provided after the close of discovery. Respondent did not object to Complainant's motion.

Respondent filed a cross-motion to supplement the record with three additional exhibits: (1) declaration of Zhejiang Handsome, (2) RDD employee San's email and letter, and (3) the Chinese settlement agreement. Respondent states that "[w]e submit that the foregoing evidence has been discovered after the Court's Order ending discovery, but it is crucial and probative to the factual background of this case and thus helpful to the Judge's consideration." Cross-Motion to Supplement the Record at 1. Complainant did not object to Respondent's cross-motion.

Good cause exists to include the new documents in the record as they are relevant to the damages calculation. The settlement was not reached until May of 2018 and it appears that the

other documents were not identified until after the close of discovery. Accordingly, both parties' unopposed motions to add supplemental evidence are hereby **GRANTED**.

E. Evidence

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

1. Complainant Hangzhou Qianwang Dress Co., Ltd. manufactures apparel, including hats and gloves, which it sells to retailers in the United States. CFF at 2; RRFF at 1.

2. Respondent RDD Freight International Inc. is an NVOCC and international freight forwarder with an ocean transportation intermediary licence issued by the Federal Maritime Commission. RApp at 2 (Exhibit 1).

3. Complainant and Respondent entered into an agreement in which Respondent agreed to transport apparel from China to New York for Complainant. CFF at 2; RRFF at 1.

4. Respondent contracted with the Complainant for transportation of the goods in question and RDD Freight issued three ocean bills of lading for the shipments: MBE 16081082; MBE 16081477; and MBE 16091121. CApp at 4, 8, 12; RFF at 1.

5. The invoice and packing list for the first shipment, for 947 ctns, are dated Aug. 22, 2016, and show a sale from Hangzhou Qianwang Dress Co., Ltd. to SWAK Kids Inc. for $57,273.48. CApp at 2-3.

6. The bill of lading for the first shipment, MBE 16081082, is dated Aug. 25, 2016; lists the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc. and the forwarding agent as RDD Freight International Inc.; and lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY. CApp at 4.

7. Both Complainant and Respondent submitted copies of the bills of lading. For the first shipment, the Complainant's copy of the bill of lading states "FREIGHT PREPAID," CApp at 4, while the Respondent's copy of the bill of lading states "FREIGHT COLLECT," RApp at 7 (Exhibit 3). In other respects, the bills of lading are identical.

8. The invoice and packing list for the second shipment, for 1095 ctns, are dated Aug. 28, 2016, and show a sale from Hangzhou Qianwang Dress Co., Ltd. to SWAK Kids Inc. for $54,137.40. CApp at 6-7.

9. The bill of lading for the second shipment, MBE 16081477, is dated Aug. 31, 2016; lists the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc., and the forwarding agent as RDD Freight International Inc.; lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY; and states "freight collect." CApp at 8 (all caps omitted).

10. The invoice and packing list for the third shipment, for 579 ctns, are dated Fed. 13, 2016, and show a sale from Hangzhou Qianwang Dress Co., Ltd. to SWAK Kids Inc. for $22,796.82. CApp at 10-11.

11. The bill of lading for the third shipment, MBE 16091121, is dated Sep. 15, 2016; lists the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc., and the forwarding agent as RDD Freight International Inc.; lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY; and states "freight collect." CApp at 12 (all caps omitted).

12. RDD Freight released all three cargo shipments to the consignee, SWAK Kids, without obtaining an original bill of lading or Complainant's consent to release. CApp at 14.

13. For house bill of lading number 16081082, the master bill of lading number is YMLU E232080146. CApp at 14.

14. For house bill of lading number 16081477, the master bill of lading number is KKLUNB3701194. CApp at 14.

15. For house bill of lading number 16091121, the master bill of lading number is YMLU E232081075. CApp at 14.

16. A November 21, 2016, email indicated the value of the containers as follows:

E232080146	:	USD57273
KKLUNB3701194	:	USD53338
E232081075	:	USD22797

CApp at 16.

17. A November 22, 2016, email from the shipper Echo states "I call the buyer today he said he need 18 months to pay off it, it's really crazy, it kill all my business." CApp at 17.

18. An email dated November 28, 2016, from RDD Fright employee Yiwen Hu, states:

> Today, we talked to the shipper, ECHO and explained to him our sincere apology for this mistake of the release of those containers. We will keep tracking with the consignee till all the payments are paid to the shipper. He also met the consignee as he said and he also said he got stuck and how to arrange the 2 containers that are ready to ship. We told him we did not mind to let him file the law suit against us and then we can put the consignee into the court as the defendant as well. . . .
>
> In the meantime, we told him to keep shipping through us for the containers as we need his help in order for him to work with us together to get this problem resolved. We will meet the consignee tomorrow and then we will talk to the shipper again for the solution. At this moment, we want the shipper to work with us is to ship the 2 containers through you/us again, we will hold because we will tell the consignee that we make the payments to the shipper for the last 3 containers and then we have the absolute right to hold later arriving containers. This is what are thinking at this time and have not told the shipper yet. Also we see tomorrow how the shipper wants to solve this problem. Then we can know what we will do next.

CApp at 18.

19. An email dated March 23, 2017, from RDD Freight employee Sangy Nutsuk, on RDD Freight letterhead states:

> Please find attached e-mails that pertain to correspondence between RDD & S.W.A.K KIDS Inc. to prove the consignee begged us to release. Above Cargo was released because Victor of S.W.A.K Indicated he had spoken with Shipper regarding payment. Victor also mentioned that he had taken care of payment with shipper and has known them for over 15 years and tricked me into thinking and believed that he was trust worthy base on previous shipment never missed payment to us, and he confirmed it will be no problem in releasing cargo. I also threatened force over the phone from him by shouted and yelled to get his cargo released from terminal so they wouldn't have to pay approximately $450 per day in demurrage charges. I released a container on three different occasions based on above. Victor created the problem with his words, and lies that he did contacted and cleared with shipper. When I mentioned victor over the phone to clear with his shipper he shout back to me that (this is not your problem just released the cargo because I sent you money already)

> that's the reason why I released cargo to him. And later I found out he did not get the telex released because he failed to make the payment to shipper.
>
> Shipper should to correct money from VICTOR not us, we are just the victim and 3rd person just released cargo with payment customer paid to us. I never have known conversation or agreement between customer and their own shipper at all.
>
> **Shipper should deal with S.W.A.K for outstanding payment and not get RDD involved. RDD spoke with S.W.A.K and they were going to make partial payments but shipper did not want this. **

RApp at 16 (Exhibit 6) (emphasis omitted); *see also* RApp at 14 (Exhibit 5).

20. The Complainant seeks to recover the invoice value of the goods in question – from RDD Freight but not from SWAK Kids, the designated consignee. RFF at 1.

21. While waiting for the Complainant's instructions, RDD Freight's employee released the goods to the said consignee and stated that it was a good faith and bona fide effort to save the $450.00 per day demurrage for the said consignee. RFF at 2; RApp at 14-16 (Exhibits 5-6).

22. The consignee SWAK Kids, after paying the Complainant the sum of $10,000, has failed to pay the balance of $123,408.00. RFF at 2.

23. A screenshot of Microsoft word properties, or digital signature, for the document labeled "Hangzhou2018" lists the title as "Kid Apparel Club" which Respondent argues is the same as the consignee SWAK Kids, as well as listing the "Content created" as "1/7/2018" and "Last printed" as "6/28/17." RFF at 2; RApp at 17-18 (second document labeled Exhibit 6).

24. On or about May 17, 2018, while this case was pending, a related case in China was settled and RDD Freight paid $61,704, representing half of the claim, to Complainant. CFF at 4; RRFF at 2; RFF at 2.

25. Complainant describes the settlement agreement:

> Because the agent of RDD Freight Int'l, Inc. at the port of destination released goods without B/L, which resulted the loss of us in amount of USD123408, we had started a lawsuit against Zhejiang Handsome International Logistics Co., Ltd. in Ningbo and then settled with them through the court on one condition, which is RDD gives us an one-time compensation of 50% of our loss, which means 61704 US dollars in total. Now we confirm that we have received the above compensation from RDD on May []th 2018, and will withdraw the aforementioned lawsuit against Zhejiang Handsome International Logistics Co., Ltd. in Ningbo Maritime Court within 3 days.

CApp at 22.

26. The settlement agreement, as provided by Respondent, states in relevant part:

> Upon completion of performing Articles 1 through 3, all disputes over the released goods without paper under Bills of Lading KKLUN3701194, E232080146, E232081479 relating to the Carriage of Goods by Sea Contract between Party B [RDD Freight] and Party C [Hangzhou Qianwang], and the Marine Agency Contract between Party A [Zhejiang Handsome Int'l Logistics Co.] and Party C [Hangzhou Qianwang] shall be settled once and for all; and there shall be no disputes among the three Parties A, B and C [Zhejiang Handsome, RDD Freight, and Hangzhou Qianwang].

RApp at 23 (Exhibit 7).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the . . . Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000). Complainant alleges a violation of the Shipping Act within the Commission's jurisdiction. Although the Respondent raised lack of personal or subject matter jurisdiction in their answer, they have not made any arguments regarding jurisdiction.

2. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.203; *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-19 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. When the evidence is evenly balanced, the party with the burden of persuasion must lose. *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation.

Waterman S.S. Corp. v. General Foundries Inc., 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Legal Analysis

1. Section 41102(c)

a. Respondent Operated as a Non-Vessel-Operating Common Carrier for the Transportation of the Three Shipments

Section 41102(c), formerly section 10(d)(1), provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Because section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate it, an entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Shipping Act.

The Shipping Act defines two types of ocean transportation intermediaries: "Ocean freight forwarders" and "non-vessel-operating common carriers." 46 U.S.C. § 40102(19). "The term 'ocean freight forwarder' means a person that – (A) in the United States, *dispatches shipments from the United States* via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18) (emphasis added).

There is no claim that RDD Freight acted as a marine terminal operator or a vessel-operating common carrier and an ocean freight forwarder as defined by the Shipping Act dispatches shipments *from* the United States while the shipments at issue came *into* the United States. Therefore, as part of proving that Respondent violated section 41102(c), Hangzhou Qianwang must prove that RDD Freight operated as an NVOCC on the shipments.

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16). To be an NVOCC on a particular shipment, an entity must meet the Shipping Act's definition of "common carrier" on the shipment.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The evidence demonstrates that RDD Freight is licensed by the Commission as an NVOCC. Hangzhou Qianwang established that RDD Freight issued three bills of lading for the shipments: MBE 16081082; MBE 16081477; and MBE 16091121. All three shipments were transported by water from Ningbo, China, to the United States. All three RDD Freight bills of lading list the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc. and the forwarding agent as RDD Freight International Inc.; and lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY. CApp at 4. The evidence supports a finding that RDD Freight, an entity that as an NVOCC licensed by the Commission holds itself out as a common carrier, assumed responsibility for the transportation by water from Ningbo to the United States for the three shipments at issue. Therefore, RDD Freight operated as a non-vessel-operating common carrier for the transportation of the three shipments.

b. Respondent Released Cargo Without a Bill of Lading

There is no disagreement that RDD Freight released the shipments without obtaining an original bill of lading from the consignee or permission from Complainant. CBrief at 2; RBrief at 2. RDD Freight explains that the shipments were released because RDD Freight's employee was "defrauded and misled" and that the employee acted "in a good faith and bona fide effort to save the $450.00 per day demurrage for the said Consignee." RBrief at 2.

The evidence includes the following statement from an RDD Freight employee about why the containers were released:

> Please find attached e-mails that pertain to correspondence between RDD & S.W.A.K KIDS Inc. to prove the consignee begged us to release. Above Cargo was released because Victor of S.W.A.K Indicated he had spoken with Shipper regarding payment. Victor also mentioned that he had taken care of payment with shipper and had known them for over 15 years and tricked me into thinking and believed that he was trust worthy base on previous shipment never missed payment to us, and he confirmed it will be no problem in releasing cargo. I also threatened force over the phone from him by shouted and yelled to get his cargo released from terminal so they wouldn't have to pay approximately $450 per day in demurrage charges. I released a container on three different occasions based on above. Victor created the problem with his words, and lies that he did contacted and cleared with shipper. When I mentioned victor over the phone to clear with his shipper he shout back to me that (this is not your problem just released the cargo because I sent you money already) that's the reason why I released cargo to him. And later I found out he did not get the telex released because he failed to make the payment to shipper.

RApp at 16 (Exhibit 6); *see also* RApp at 14 (Exhibit 5).

The Shipping Act does not require *mens rea*, or intent to violate it. So, even assuming that RDD Freight released the cargo with a sincere goal of helping their clients, that does not determine whether or not the Shipping Act was violated. Moreover, the conduct alleged – begging, tricking, shouting, yelling, and lying – while unprofessional and inappropriate, does not

rise to the level of duress that would demonstrate that Respondent was not in control of or responsible for their actions.

c. The Evidence Does Not Establish Fraud, Collusion, or Conspiracy

RDD Freight relies on two facts to support its argument that "Complainant has colluded with SWAK KIDS to extract monies from RDD" and its counterclaim that Complainant "conspired with the said consignee to make RDD pay out of its surety bonds." RBrief at 2. Complainant did not file a reply brief and as such did not directly contest the Respondent's allegations. However, as explained below, the evidence does not support Respondent's legal conclusion.

First, RDD Freight asserts that "Complainant never tried to collect the said sum of money from the Consignee SWAK KIDS, nor to even contact them to collect the same." RBrief at 2. Assuming this uncontested allegation is true, there may be legitimate reasons that the Complainant would not pursue a claim against the consignee, for example, Complainant may have determined that collecting damages from the consignee would be unlikely.

In addition, the evidence shows that Hangzhou Qianwang did speak with the consignee. A November 22, 2016, email from the shipper Echo states "I call the buyer today he said he need 18 months to pay off it, it's really crazy, it kill all my business." CApp at 17. A November 28, 2016, email from RDD Freight indicates that it was RDD Freight who proposed having Hangzhou Qianwang file a lawsuit against it and then RDD Freight could seek damages from the consignee, stating:

> Today, we talked to the shipper, ECHO and explained to him our sincere apology for this mistake of the release of those containers. We will keep tracking with the consignee till all the payments are paid to the shipper. He also met the consignee as he said and he also said he got stuck and how to arrange the 2 containers that are ready to ship. We told him we did not mind to let him file the law suit against us and then we can put the consignee into the court as the defendant as well.

CApp at 18. It appears that in the third sentence, "he" refers to Echo, who is the shipper. The decision not to pursue other avenues of redress does not establish that Complainant and the consignee were colluding or in a conspiracy.

Second, RDD Freight argues that "In an email letter addressed to the FMC, the digital signature contains 'Kid Apparel Club' which is the same as the Consignee SWAK KIDS!" RBrief at 2. RDD Freight includes a screenshot of Microsoft word properties of a document that was created on "1/7/2018" and last printed on "6/28/17." It is not clear what document is involved and what factors impact the properties listed. For example, the last printed date occurs prior to the content created date. It is possible that rather than creating brand new documents, old documents are modified so that nothing more than the document properties remain. This screenshot of properties is not found to be reliable evidence of who actually wrote the letter at issue. As such, it is not sufficient to support a finding of fraud, collusion, or conspiracy.

d. Respondent Violated Section 41102(c) of the Shipping Act

The facts of this case are very similar to the facts presented in *Bimsha,* where the NVOCC Chief Cargo released shipper Bimsha's cargo to the notify party without requiring the presentation of an original bill of lading three times in three months. *Bimsha Int'l v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 353 (ALJ 2011), *aff'd* 32 S.R.R. 1861 (FMC 2013) ("*FMC Bimsha*"), *aff'd sub nom. Chief Cargo Serv. v. Federal Maritime Commission*, 586 Fed. Appx. 730 (2nd Cir. 2014) ("*2nd Cir. Bimsha*").

The Administrative Law Judge in *Bimsha* found that the "failure by Chief Cargo to establish the practice of requiring an original bill of lading before releasing the cargo was a failure to *establish* just and reasonable practices, and a violation. Alternatively, if Chief Cargo has established the practice or requiring an original bill of lading, then by failing to *observe and enforce* the practice would be a violation of the Act." *FMC Bimsha,* 32 S.R.R. at 1864. The Commission affirmed the ALJ's decision, stating that it "has indeed recognized that NVOCCs violate section 10(d)(1) when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and therefore engage in an unjust and unreasonable practice." *FMC Bimsha*, 32 S.R.R. at 1866. The Commission relied on a long line of Commission cases to find that failing to fulfill NVOCC obligations violates the Shipping Act regardless of the number of shipments involved. *FMC Bimsha*, 32 S.R.R. at 1866-67. The Second Circuit Court of Appeals affirmed the Commission's decision. *2nd Cir. Bimsha*, 686 Fed. Appx. at 732.

In this case, Respondent has not submitted any evidence that it established regulations or practices regarding delivering and releasing cargo. If Respondent had such regulations or practices, they were not observed or enforced. RDD's employee accepted the statement of the consignee about releasing the cargo without confirming with the Complainant or requiring an original bill or lading. There is no mention in the employee's statement of any corporate regulations or practices to ensure proper delivery of cargo.

The parties are entitled to rely on settled Commission precedent in determining whether to undertake the time and expense of filing a complaint before the Commission. For three separate shipments, RDD Freight violated section 41102(c) of the Shipping Act by releasing cargo to the consignee without receiving an original bill of lading. Given the nearly identical fact patterns between *Bimsha* and this proceeding, justice requires that the outcome be equivalent. Accordingly, the evidence shows that Respondent violated section 41102(c) of the Shipping Act.

2. Counterclaim

Respondent's answer includes a counterclaim that "Complainant has conspired with its counterparts in a scheme to defraud the Respondent out of monies bonded with the FMC." Answer at 3. In its brief, RDD Freight asserts that "RDD has counterclaimed that the Complainant had conspired with the said consignee to make RDD pay out of its surety bonds." RBrief at 2.

Pursuant to Commission rules, "a respondent may include in the answer a counterclaim against the complainant. . . . A counterclaim . . . must allege and be limited to violations of the

Shipping Act within the jurisdiction of the Commission." 46 C.F.R. § 502.62(b)(4). It is not clear which Shipping Act provision Respondent believes was violated and the counterclaim could be dismissed on that basis alone.

In addition, Respondent has the burden of proof to establish the counterclaim. *See Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 821, 855 (FMC 2014). As discussed above, however, the evidence does not support RDD Freight's allegation that its employee was defrauded nor that there is a conspiracy between Hangzhou Qianwang and SWAK Kids. The evidence cited by Respondent to support its counterclaim – that Complainant did not file a claim against SWAK Kids and that a letter from Complainant showed document properties that could be related to SWAK Kids – are not sufficient to support a fraud or Shipping Act violation. Accordingly, RDD Freight's counterclaim is dismissed both for lacking factual support and for not establishing a violation of the Shipping Act.

3. Damages

a. Reparations

Hangzhou Qianwang claims that it is entitled to a reparation award in the sum of $72,503.70 plus interest and attorney's fees. CBrief at 2. The Shipping Act provides: "If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a).

> (a) **Definition. –** In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) **Basic amount. –** If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

As the complainant, Hangzhou Qianwang has the burden of proving entitlement to reparations. *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003) ("As the Federal Maritime Board explained long ago: '(a) damages[3] must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'").

> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (FMC 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with

[3] Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

> reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. at 798-99 (ALJ 1992), admin. final (FMC 1993) (footnote omitted).

The bills of lading for the three shipments are dated Aug. 25, 2016; Aug. 31, 2016; and Sept. 15, 2016. CApp at 4, 8, 12. Hangzhou Qianwang filed its complaint on February 17, 2017, within the three-year statute of limitations. Therefore, Hangzhou Qianwang may receive a reparation award for actual injury caused for any Shipping Act violation that is established.

Hangzhou Qianwang claims that because RDD Freight released the cargo to consignee SWAK Kids without requiring presentation of an original bill of lading, Hangzhou Qianwang was not paid the $134,207.70 owed to it by SWAK Kids. The invoices show that the value of the shipments was: $57,273.48, $54,137.40, and $22,796.82, which totals $134,207.70. CApp at 2, 6, 10. However, in Hangzhou Qianwang's declaration regarding the Chinese settlement agreement, the total purchase price for the cargo is listed as $133,408. It is not clear why this amount is approximately $800 less than the amount shown on the invoices and claimed in their complaint. In a November 21, 2016, email, the second shipment was valued at $53,338 instead of $54,137.40. CApp at 16. It is possible that exchange rates or other factors have impacted the amount. However, it is Complainant's burden to establish damages. The lost cargo will be valued at $133,408 as that is the most recent declaration in the record regarding the value of the cargo and the Complainant has not sufficiently established why there are conflicting amounts in the record.

Both parties acknowledged that a settlement agreement was filed in a court in China and they both agree that RDD Freight paid Hangzhou Qianwang $61,704 as part of that settlement. CApp at 21-22; RApp at 19-23 (Exhibit 7). Complainant attaches a declaration from Hangzhou Qianwang Dress Co. Ltd. written in Chinese with English translations throughout. CApp at 21-22. Respondent attaches the settlement agreement in Chinese with an English translation certified by counsel for Respondent. RApp at 19-24 (Exhibit 7).

The declaration from Hangzhou Qianwang states that as of May 17, 2018, "the consignee has only paid us $10,000 for the above three consignments, leaving a total amount of USD123408 unpaid." CApp at 21; *see also* RApp at 13. Subtracting the $10,000 paid by the consignee from the cargo value of $133,408 leaves a balance of $123,408.

In the settlement agreement, the parties agree that Party B, RDD Freight, will pay Party C, Hangzhou Qianwang, fifty percent of its alleged losses and state that: "Within 3 days upon signing this agreement, Party C [Hangzhou Qianwang] shall withdraw and dismiss its complaint

in Ningbo Maritime Court" and "Party A [Zhejiang Handsome Int'l Logistics Co.] shall withdraw and dismiss its complaint in Ningbo Maritime Court." RApp at 22.

The settlement agreement also states that:

> Upon completion of performing Articles 1 thorough 3, all disputes over the released goods without paper under Bills of Lading KKLUNB3701194, E232080146, E232081479 relating to the Carriage of Goods by Sea Contract between Party B [RDD Freight] and Party C [Hangzhou Qianwang], and the Maritime Agency Contract between Party A [Zhejiang Handsome] and Party C [Hangzhou Qianwang] shall be settled once and for all; and there shall be no disputes among the three Parties A, B and C [Zhejiang Handsome, RDD Freight, and Hangzhou Qianwang].

RApp at 23. The parties disagree, however, regarding whether or not the settlement agreement resolved the issues in this proceeding.

In *Anchor Shipping Co. v. Alianca Navegacao E Logistica Ltd.*, 30 S.R.R. 991, 997-98 (FMC 2006) the Commission held that the submission of a controversy to arbitration, with a final award of damages, did not justify the dismissal of a subsequent complaint arising out of the same facts, but based upon alleged violations of the Shipping Act. *Verucci Motorcycles, LLC v. Senator Int'l Ocean, LLC*, 31 S.R.R. 556, 564-65 (ALJ 2009), admin. final (FMC 2009); *see also Cargo One, Inc.*, 28 SRR at 1645. Similarly, the outcome in the related proceeding in the Chinese court does not limit the Commission's ability to resolve the Shipping Act violations alleged.

Although the settlement agreement states that it resolves all disputes, it does not appear to explicitly mention this proceeding or Shipping Act violations. It specifically mentions withdrawing the disputes that were pending in the Ningbo Maritime Court but does not mention the dispute pending before the Federal Maritime Commission. It is therefore not clear whether the settlement was meant to resolve this proceeding. Moreover, the courts in China would have jurisdiction to interpret the settlement agreement filed in their court. Settlement agreements resolving Shipping Act complaints must be reviewed and approved by the Commission. *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978). The court in China does not have jurisdiction to approve Shipping Act settlement agreements.

There is not sufficient evidence to support RDD Freight's assertion that the Chinese settlement agreement terminates Hangzhou Qianwang's ability to obtain reparations for the Shipping Act violations at issue here. Therefore, the settlement agreement will not eliminate Hangzhou Qianwang's ability to recover reparations in this proceeding. Hangzhou Qianwang is not entitled to double damages, however, so that the amount that RDD Freight has already paid for the claim in the Chinese settlement will be subtracted from the amount of the reparations claim.

Accordingly, Hangzhou Qianwang has met its burden of proving damages by a preponderance of the evidence. According to Complainant's recent declaration regarding damages, the original amount was $133,408 minus the $10,000 paid by the consignee and minus

the $61,704 already paid by RDD Freight leaving a balance of $61,704. Accordingly, Hangzhou Qianwang has established that it is entitled to reparations of $61,704 plus interest. No attorney for Complainant entered an appearance in this case so it does not appear that Hangzhou Qianwang would be entitled to attorney fees.

b. Cease and desist order

Hangzhou Qianwang also seeks a cease and desist order. The Commission may issue a cease and desist order when a respondent has been found to have violated the Shipping Act. *Exclusive Tug Franchises*, 29 S.R.R. at 719-20; *Pittston Stevedoring Corp. v. New Haven Terminal, Inc.*, 13 F.M.C. 33, 44 (FMC 1969) (Commission Report incorporating Presiding Examiner Report). "A cease and desist order is generally issued when there is a reasonable likelihood or expectation that the respondent will continue or resume illegal activities. A cease and desist order must be tailored to the needs and facts of the particular case." *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 29 S.R.R. 1381, 1386 (ALJ 2003), admin. final (FMC 2004) (citations omitted). In *Bimsha*, a cease and desist order was issued under circumstances similar to this case. *2nd Cir. Bimsha*, 586 Fed. Appx. at 733 (rejecting "Chief Cargo's challenge to the cease-and-desist order on the merits.").

It has been determined that RDD Freight violated section 41102(c) of the Shipping Act by releasing cargo to SWAK Kids without requiring presentation of an original bill of lading. This occurred on three separate shipments.

Although there is no indication that Hangzhou Qianwang continues to use RDD Freight as an NVOCC for its shipments to the United States, RDD Freight continues to operate as an NVOCC. The three shipments on which RDD Freight released the cargo without presentation of a bill of lading suggest that there is a reasonable likelihood or expectation that RDD Freight will continue or resume this illegal activity. Members of the shipping public must be protected from practices such as RDD Freight engaged in here. Therefore, it is appropriate to enter an order requiring RDD Freight to cease and desist its practice of releasing cargo without requiring presentation of an original bill of lading.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that RDD Freight violated section 41102(c) of the Shipping Act (46 U.S.C. § 41102(c)) by releasing cargo without requiring presentation of an original bill of lading, it is hereby

ORDERED that RDD Freight International Inc. be liable to Hangzhou Qianwang Dress Co., Ltd. for reparations of $61,704 plus interest. It is

FURTHER ORDERED that RDD Freight International Inc. cease and desist from releasing cargo without requiring presentation of an original bill of lading when required by the Shipping Act and Commission regulations.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant*

v.

RDD FREIGHT INTERNATIONAL INC., *Respondent*.

DOCKET NO. 17-02

Served: August 30, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman* and Rebecca F. DYE, *Commissioner*.

NOTICE OF COMMISSION DETERMINATION TO REVIEW

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's August 29, 2018, Initial Decision in this proceeding.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

IN RE: VEHICLE CARRIER SERVICES	**DOCKET NOs. 16-01, 16-07, 16-10, and 16-11**

Served: August 30, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman* and Rebecca F. DYE, *Commissioner.*

ORDER GRANTING MOTION FOR LEAVE TO FILE AMICUS BRIEF

Professors Michael Sant'Ambrogio and Adam Zimmerman (Amici or Professors) move for leave to file an amicus brief pursuant to 46 C.F.R. § 502.73 on the Commission's authority to aggregate claims and adjudicate a class action. Respondents oppose the motion as untimely and argue that the Amici have failed to identify the requisite interest in these proceedings or otherwise comply with § 502.73.

The Commission grants leave to file the amicus brief submitted with the Professors' motion. The amicus motion identifies the Amici's interest in filing and meets the Commission's criteria for amicus filings spelled out in Commission Rule 73. Further, the Amici are uniquely situated to offer a broader perspective on federal agencies' authority to adjudicate class actions. Respondents offer no sound justification for denying leave to file. While Respondents correctly argue that the motion was untimely, it was filed only one day past the August 7 deadline and the delay was minimal. Moreover, to remove any potential prejudice due to the late-filed brief, the Commission grants Respondents 7 days from the date of this order to file a short response limited to the issues addressed in the amicus brief.

I. BACKGROUND

A. Factual Background

In each of these consolidated cases, Complaints allege that Respondents violated the Shipping Act of 1984 by conspiring to fix, raise, maintain and/or stabilize prices, and by rigging bids to allocate the market and customers for shipping new, assembled vehicles to and from the United States. They assert these claims on behalf of themselves and others similarly situated and seek to pursue reparation claims as a class action. Respondents are vessel-operating ocean common carriers engaged in transporting new, assembled motor vehicles using specialized roll-on/roll-off (RoRo) cargo ships.

Complainants claim that since at least 1997, Respondents have secretly and unlawfully engaged in unlawful anticompetitive practices calculated to artificially inflate shipping charges, manipulate shipping capacity, and restrict service by reducing their vessel fleets and improperly allocating the market for shipping vehicles. Complainants seek reparations for inflated shipping costs allegedly passed along to them indirectly when they arranged transportation service or purchased vehicles transported by Respondents to or from the United States. According to Complainants, although Respondents have been secretly engaged in these activities for over a decade, they had no knowledge of Respondents' illegal activities until May 2013 at the earliest.

In 2013, Complainants brought civil actions against Respondents in the United States District Court for the District of New Jersey and alleged violations of state and federal antitrust and consumer protection laws. *In re Vehicle Carrier Servs. Antitrust Litig*., Master Docket No. 13-cv-3306 (ES) (JAD) (MDL No. 2471). In August 2015, the court dismissed Complainants' claims. *In re Vehicle Carrier Servs. Antitrust Litig*., No. 13-3306, 2015 U.S. Dist. LEXIS 114691 (D.N.J. Aug. 28, 2015). The Third Circuit subsequently affirmed the district court. *In re Vehicle Carrier Servs. Antitrust Litig*., 846 F.3d 71 (3d Cir. 2017).

B. Procedural History

While the district court litigation was pending, Complainants filed Shipping Act complaints with the Commission. Five separate cases are consolidated under the caption "In re Vehicle Carrier Services," Docket Nos. 16-01, 16-07, 16-10 16-11 and 17-09. The claims asserted in No. 17-09, *Fiat Chrysler Automobiles NV. v. Wallenius Wilhelmsen Logistics AS*, remain before the Administrative Law Judge (ALJ) for disposition on the merits.

Respondents filed motions to dismiss all five cases. Respondents' Consolidated Mot. to Dismiss, Apr. 26, 2017; Respondents' Supplemental Mot. to Dismiss, Nov. 30, 2017. They argued that the Commission does not have authority to adjudicate class actions and moved to dismiss the reparations claims as time-barred and for lack of standing. Complainants responded by arguing that the Commission has broad authority under its enabling statute to adjudicate class actions. Consolidated Response of Complainants to Respondents' Consolidated Mot. to Dismiss, May 25, 2017; Complainants' Brief in Opp'n. to Respondents' Supplemental Consolidated Mot. to Dismiss, Jan. 11, 2018. Complainants also defended the timeliness of their reparations claims and argued that Respondents' illicit activities tolled the statute of limitations and asserted that their status as indirect purchasers of vehicle transportation services confers standing. *Id*.

In the Initial Decision dated May 7, 2017, the ALJ dismissed the reparations claims asserted by Complainants in 16-01, 16-07, 16-10 and 16-11 as time-barred and for lack of standing. The ALJ denied the motion to dismiss the reparations claims asserted by Fiat in No. 17-09 and determined that Fiat adequately alleged it was a direct purchaser for standing purposes. In ruling on Respondents' consolidated motions, the ALJ also denied Respondents' motion to dismiss claims seeking a cease and desist order in No. 16-01 (asserted by the named parties) and in 17-09. Finally, the ALJ denied without prejudice Respondents' arguments attacking the sufficiency of service and the complaint for allegedly failing to state a claim under the Shipping Act.

The ALJ also provisionally ruled on Complainants' class action complaint. While acknowledging that the claims were subject to dismissal on other grounds, the ALJ also addressed the Commission's authority to hear class action claims and determined that it does not have that authority. I.D. at 18-26. Complainants in 16-01, 16-07, 16-10, and 16-11 filed timely exceptions challenging the ALJ's dismissal of the reparations claims and the ruling on a putative class action. On August 8, 2018, the Amici moved for leave to file the amicus brief submitted with their motion. They address the Commission's authority to hear class actions but take no position on whether the Commission should allow Complainants to pursue reparations claims as a class action. Complainants do not oppose the amicus motion. Respondents opposed the amicus motion on August 14, 2018. On August 21, 2018, Respondents filed their opposition to Complainants' exceptions. Respondents' Consolidated Reply to Complainants' Appeal from the Initial Decision Granting in Part and Denying in Part Respondents' Mot. to Dismiss, Aug. 21, 2018.

II. DISCUSSION

A. Timeliness Issues

Respondents challenge the amicus motion as untimely under 46 C.F.R. § 502.73 which states that motions for leave to file an amicus brief are due within 7 days of the Commission's receipt of the initial brief from the first filing party. Under the Rule, the Amici's motion was due August 7, 2018, but was docketed one day late. The Commission can extend the 7-day filing deadline "for cause shown." § 502.73(c). While the Amici did not offer a justification for their delay in filing, the delay was minimal and did not prejudice Respondents' ability to respond to the arguments asserted in the amicus motion. *See* Opp'n., 3-7. Respondents promptly filed an opposition brief challenging the Professors' qualifications and compliance with § 502.73. *See id.*

Because the Amici's delay was minimal and not materially prejudicial, the Commission grants a one-day extension nunc pro tunc and deems the amicus motion timely filed.

B. Amicus Motion to Brief Class Action Issues

Leave from the Commission or the presiding ALJ is required for any amicus filing unless the filer is the United States or a federal agency. 46 C.F.R. § 502.73(a). "A motion for leave to file an amicus brief must identify the interest of the applicant and must state the reasons why such a brief is desirable." § 502.73(b). Amicus briefs are restricted to addressing "questions of law or policy." § 502.73(a). The Commission has broad discretion in deciding whether to grant leave for an amicus brief. *See Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003) (control over amicus filings is committed to the court's "sole discretion").

Respondents argue that the Amici have failed to identify the requisite reasonable interest in these proceedings. Opp'n., 3-4. They advocate applying a narrowly circumscribed litmus test that essentially restricts qualifying interests for amicus status to regulated entities whose operations or personal or tangible interests will be affected by the Commission's ruling on class action issues. *Id*. Respondents rely on the discussion in *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) as support for their interpretation of the qualifying interest required by § 502.73(b).

The interests that qualify for amicus status are not as narrowly defined, however, as Respondents assert. In fact, in describing scenarios that "normally" qualify for amicus status, the *Ryan* court included the broader category of situations in which "the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan*, 125 F.3d at 1063.

Here, the Amici are clearly in a position to offer a unique perspective on agency class actions and claims aggregation procedures and provide insights beyond what the parties are likely to address in their advocacy briefs. As the authors of several published articles on the topic, the Amici have the benefit of extensive scholarly research and their in-depth study of agencies' varying approaches and combined experience in handling aggregated claims. *See* Mot., 1-2; *see also* https://www.acus.gov/sites/default/files/documents/aggregate-agency-adjudication-final-report.pdf. Finally, while Respondents criticize the Amici's neutrality on whether the Commission should certify a class of Complainants as evidencing their lack of interest (*see* Opp'n.5-6.), that is not the case. The amicus brief properly limits its advocacy to questions of law and policy and does not delve into factual questions or advocate for or against certifying a class in this particular case. *See* 46 C.F.R. § 502.73(a).

Respondents further argue that the Amici have failed to show why filing the amicus brief is "desirable," but that is not the case. *See* Opp'n., 4-6. The Amici's extensive experience and informed perspective will be particularly helpful in this case. Whether Complainants can recover reparations for non-parties through a class action is an issue the Commission has not previously addressed directly.

Finally, Respondents argue that the amicus brief is unnecessarily duplicative because the parties are adequately represented and will fully address the issues raised in Complainants' exceptions in their briefs. Opp'n., 6-7. The Amici are not required to show that the parties' current representation is inadequate. That is just one scenario that justifies granting leave to file an amicus brief. *See Ryan*, 125 F.3d at 1063. Further, as discussed above, because of their academic background, the Amici offer a broader perspective on federal agencies' authority to aggregate claims.

The Commission grants leave to file the amicus brief attached to the motion.

III. CONCLUSION

THEREFORE, IT IS ORDERED:

(1) The Commission grants the Amici a one-day extension nunc pro tunc and deems the amicus motion timely filed;

(2) The Commission grants the motion for leave to file an amicus brief;

(3) The Commission directs the Secretary to docket the amicus brief as a separate filing on Docket Nos. 16-01, 16-07, 16-10 and 16-11; and

(4) The Commission grants Respondents 7 days from the date of this order to file a response to the amicus brief that is no longer than 10 pages and addresses only the issues argued in the amicus brief.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

JC HORIZON LTD, *Complainant*

v.

CHINA SHIPPING CONTAINER LINES CO. LTD, *Respondent*.

DOCKET NO. 18-03

Served: September 10, 2018

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's August 8, 2018, Initial Decision Approving Settlement Agreement and Dismissing Proceeding with Prejudice has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF COSCO SHIPPING LINES CO., LTD., COSCO SHIPPING LINES (EUROPE) GMBH, ORIENT OVERSEAS CONTAINER LINE LIMITED, AND OOCL (EUROPE) LIMITED FOR AN EXEMPTION FROM AGREEMENT FILING

PETITION NO. P1-18

Served: September 25, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, *Commissioner*.

ORDER GRANTING PETITION

On August 16, 2018, Cosco Shipping Lines Co., Ltd. (COSCO), Cosco Shipping Lines (Europe) Gmbh (COSCO (Europe)), Orient Overseas Container Line Limited (OOCL), and OOCL (Europe) Limited (OOCL (Europe)) filed a petition with the Federal Maritime Commission (Commission) for an exemption from the requirement that they file agreements between them. The Notice of Filing and Request for Comments was served on August 20, 2018, and published in the Federal Register on August 23, 2018. 83 Fed. Reg. 42650. Comments were due by September 6, 2018, and the Commission received no comments.

On November 8, 2017, COSCO, OOCL, and OOCL (Europe) petitioned the Commission for an exemption from filing agreements between COSCO and either OOCL or OOCL (Europe), or both, similar to that available to wholly owned subsidiaries under 46 C.F.R. § 535.307, including exemptions from the provisions of 46 U.S.C. § 41105 (section 10(c) of the Shipping Act of 1984). *See* Petition of Cosco Shipping Lines Co., Ltd. (COSCO), Orient Overseas Container Line Limited (OOCL), and OOCL (Europe) Limited for an Exemption from Agreement Filing, Docket No. P2-17 (Nov. 8, 2017) (P2-17 Petition). The Commission granted this petition on August 8, 2018. *Pet. of Cosco Shipping Lines, Co., Ltd. (COSCO), Orient Overseas Container Line Ltd. (OOCL), & OOCL (Europe) Ltd. for an Exemption from Agreement Filing*, Docket No. P2-17, Order Granting Petition (FMC Aug. 8, 2018) (P2-17 Order). The current petition seeks to add agreements and activities concerning COSCO (Europe) to the existing exemption.

Because the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, the Commission grants the petition.

I. BACKGROUND

COSCO is a China-based ocean common carrier, wholly owned by its parent company COSCO Shipping Holdings Co., Ltd. (CS Holdings). In July 2018, CS Holdings, through its

wholly owned subsidiary Faulkner Global Holdings Limited, acquired Orient Overseas (International) Limited (OOIL), the parent company of both OOCL and OOCL (Europe). As a result of that transaction, OOCL became majority-owned and controlled by CS Holdings. While COSCO and OOCL remain separate legal entities, they are part of a single, common business enterprise controlled by CS Holdings.[1]

Before the consummation of this transaction, COSCO, OOCL, and OOCL (Europe) petitioned the Commission for an exemption from the agreement filing requirements of the Shipping Act and 46 C.F.R. part 535, and for an exemption for activities resulting solely from such agreements from the prohibitions in 46 U.S.C. § 41105. The parties argued that, although the exemption from filing requirements in 46 C.F.R. § 535.307 applies only to wholly owned subsidiaries, it should be applied to all agreements and activities between COSCO and OOCL and OOCL (Europe) so long as the parties are commonly owned and controlled. They argued that the exemption was justified by the same policies considered by the Commission when it originally adopted § 535.307.

The Commission granted the P2-17 Petition on August 8, 2018. Petition P2-17 did not include COSCO (Europe) as it was not then operating in the U.S. foreign trades. COSCO (Europe) has since resumed this operation and the parties are requesting that the Commission extend the P2-17 Order to include COSCO (Europe). Pet. at 1. The parties are relying on the same factual and legal bases as those in the P2-17 Petition and Order.

II. DISCUSSION

The Commission has the authority under 46 U.S.C. § 40103 (section 16 of the Shipping Act of 1984) to grant exemptions for agreements or activities if the exemption will not result in a substantial reduction in competition or be detrimental to commerce. The Commission used this authority to promulgate 46 C.F.R. § 535.307, which provides: (1) that agreements between or among ocean common carriers and/or marine terminal operators are exempt from the Act's filing requirements when the parties are wholly owned subsidiaries of the same parent company or one party is the wholly owned subsidiary of the other; and (2) that concerted activities resulting solely from such agreements are exempt from the prohibitions in 46 U.S.C. § 41105. *See* §535.307. The Commission has already granted COSCO, OOCL, and OOCL (Europe) an exemption from the agreement filing requirements of the Act and 46 C.F.R. part 535 for agreements between or among the three parties as well as an exemption from the prohibitions in 46 U.S.C. § 41105 for any concerted activities by the three parties that result from such agreements. The parties now ask that the Commission extend this exemption to COSCO (Europe). Based upon the following analysis, the Commission grants the parties' petition to add COSCO (Europe) to their existing exemption.

A. Brief Overview of the Commission's Decision in P2-17

In the P2-17 Order, the Commission performed a full analysis of the arguments set forth by the parties in their petition. The Commission began by addressing why the exemption from

[1] For more factual background on the original transaction, *see* P2-17 Petition.

agreement filing for wholly owned subsidiaries in 46 C.F.R. § 535.307 was established. P2-17 Order at 4. Section 535.307 was promulgated in 1988 after Crowley Maritime Corp. (Crowley) applied for an exemption from section 5 of the Shipping Act's agreement-filing requirements, the prohibitions against operating under unfiled agreements in section 10(a), and the section 10(c) prohibition against certain concerted actions.[2] Crowley argued that the 1984 Act was not intended to confer Commission jurisdiction over relationships between and among companies sharing the same ownership. Most significantly, in their petition, Crowley pointed to the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), for support for this proposition.

The Commission granted Crowley the exemptions requested and applied them on an industry-wide basis to concerted activities between and among certain affiliated entities. 53 Fed. Reg. 11072 (Apr. 5, 1988).[3] The final rule did not discuss the reasons for granting the exemption in any great detail, simply noting that the Commission had found that the exemption would not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.[4] *See id.*

Next, the Commission discussed the feasibility of applying an exemption like 46 C.F.R. § 535.307 to situations involving majority-owned subsidiaries rather than wholly owned ones. Because Crowley only sought an exemption limited to companies in which it held a one hundred percent ownership interest, the Commission never considered situations in which ownership of the subsidiary would be less than one hundred percent when establishing § 535.307. *See* Crowley Pet. at 16. In assessing whether to extend the exemption to majority-owned subsidiaries, the Commission turned to *Copperweld*, which listed several factors that can aid in the determination of whether conduct is unilateral or concerted. The Court stated that "a parent and its wholly owned subsidiary have a complete unity of interest" and one "corporate consciousness." 467 U.S. at 771. The subsidiary "acts for the benefit of the parent, its sole shareholder." *Id.* The parent and subsidiary "share a common purpose whether or not the parent keeps a tight rein over the subsidiary," with the parent able to "assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Id.* at 771–72. "[T]he ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit." *Id.* at 772 n.18. In sum, the Court focused on who benefitted from the subsidiary's activity, how aligned the parent and subsidiary's interests were, and who had control and decision-making

[2] Petition of Crowley Maritime Corporation, Application for Section 16 Exemption, Docket No. 88-8 (Dec. 14, 1987).

[3] The exemption was originally codified at 46 C.F.R. § 572.308.

[4] Prior to the enactment of the Ocean Shipping Reform Act of 1998 (OSRA), section 16 of the Shipping Act included four criteria for granting an exemption. OSRA deleted the first two criteria (that the exemption would not substantially impair effective regulation by the Commission or be unjustly discriminatory) leaving only the latter two criteria (that the exemption would not result in substantial reduction in competition or be detrimental to commerce). *See* Pub. L. No. 105-258, § 114; 46 U.S.C. § 40103.

authority.

The Commission also considered several cases cited by the parties that have applied the *Copperweld* rationale to situations in which the subsidiary is less than wholly owned but still under the parent's legal ownership and control. In two of those cases, the courts held that a 51 percent ownership stake in the subsidiary was sufficient to find the conduct in question to be unilateral for purposes of § 1 of the Sherman Act. *See Novatel Commc'ns, Inc. v. Cellular Tel. Supply, Inc.*, 1986 U.S. Dist. LEXIS 16017, at *25–26 (N.D. Ga. 1986); *Direct Media Corp. v. Camden Tel. & Tel. Co.*, 989 F. Supp. 1211, 1216 (S.D. Ga. 1997). The two other cases shed more light on when to consider parent and subsidiary conduct unilateral. *See Coast Cities Truck Sales v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 764 (D. N.J. 1995) (stating that courts should "determine whether the parent and subsidiary are inextricably intertwined in the same corporate mission, are bound by the same interests which are affected by the same occurrences, and exist to accomplish essentially the same objectives"); *Bell Atl. Bus. Sys. Servs. v. Hitachi Data*, 849 F. Supp. 702, 706 (N.D. Cal. 1994) (stating that, for the same reasons that a parent and wholly owned subsidiary are considered the "same entity" because of the parent's power to exercise full control, "a parent and a subsidiary over which the parent has legal control cannot conspire to restrain trade").

The Commission also discussed *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010). In *American Needle*, the Court stated that "[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action." 560 U.S. at 200. *American Needle* built upon the earlier tenets of *Copperweld*—the unity of the parent and subsidiary's interests and the location of control and decision-making authority—to add an additional inquiry into the identities and interests of separate companies with ownership in the subsidiary.

Lastly, the Commission applied the *Copperweld* and *American Needle* analyses to future agreements between COSCO and OOCL or OOCL (Europe), and found that such agreements were not likely to constitute concerted action subject to § 1 of the Sherman Act. CS Holdings, owning at least 58.5% of OOIL, has majority ownership of OOIL and, significant for *Copperweld* analysis, full control over OOCL and OOCL (Europe). Though COSCO and the two OOCL subsidiaries operate under their respective brands, all operate in the best interests of CS Holdings. Therefore, because these agreements did not raise implications under § 1 of the Sherman Act, granting the requested exemption did not result in a substantial reduction in competition and was not detrimental to commerce.

B. Extending P2-17 to COSCO (Europe)

Because COSCO (Europe) is a wholly owned subsidiary of COSCO and is under the full control of CS Holdings,[5] COSCO (Europe) is a part of the same business enterprise with OOCL and OOCL (Europe). The same reasoning to allow the petitioned exemption in P2-17, therefore, applies here as well. COSCO (Europe), as a wholly owned subsidiary of COSCO, has unity of

[5] *See* P1-18 Petition at 1–2.

interest with COSCO. Because COSCO (Europe) is under full control of CS Holdings, which also has full control of COSCO and OOCL and OOCL (Europe) through their parent company, OOIL, agreements between or among COSCO, COSCO (Europe), OOCL, and OOCL (Europe) would not be subject to § 1 of the Sherman Act. Therefore, granting petitioners an exemption from the Shipping Act that would extend the P2-17 Order to COSCO (Europe) would not result in a substantial reduction in competition or be detrimental to commerce.

III. CONCLUSION

The Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce.

THEREFORE, IT IS ORDERED, that COSCO, COSCO (Europe), OOCL, and OOCL (Europe)'s Petition is GRANTED.

IT IS FURTHER ORDERED, that agreements between or among COSCO, COSCO (Europe), OOCL, or OOCL (Europe) are exempt from the filing requirements of the Shipping Act and 46 C.F.R. part 535,

IT IS FURTHER ORDERED, that the concerted activities of COSCO, COSCO (Europe), OOCL, and OOCL (Europe) are exempt from 46 U.S.C. § 41105 to the extent that those activities result solely from agreements between or among COSCO, COSCO (Europe), OOCL, or OOCL (Europe).

FINALLY, IT IS ORDERED, that this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

CARLSTAR GROUP LLC F/K/A CARLISLE TRANSPORTATION PRODUCTS, INC. AND CTP TRANSPORTATION PRODUCTS, LLC, *Complainants*

v.

UTI UNITED STATES, INC.; UTI UNITED STATES, LLC; AND DSV AIR & SEA, INC., *Respondents*.

DOCKET NO. 17-08

Served: October 17, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, *Commissioner*.

ORDER GRANTING JOINT PETITION FOR APPROVAL OF SETTLEMENT AGREEMENT, DISMISSAL WITH PREJUDICE, AND CONFIDENTIALITY OF SETTLEMENT AGREEMENT

On September 13, 2018, Carlstar Group, LLC f/k/a Carlisle Transportation Products, Inc., and CTP Transportation Products, LLC (Carlstar) and Uti, United States, LLC and DSV Air & Sea, Inc. (DSV), jointly petitioned for approval of a Settlement Agreement, contingent on dismissal of FMC Docket No. 17-08 and keeping the Settlement Agreement confidential. For the reasons set forth below, the Commission grants the petition.

I. BACKGROUND

On August 31, 2017, Carlstar filed a Shipping Act complaint alleging that DSV violated 46 U.S.C. §§ 41102(c), 41104(2), and 41104(4) by overcharging Carlstar at least $5,155,170.06 for transportation services between 2011-2016. Compl. at 7, 8. DSV moved to dismiss the complaint. On May 18, 2018, the Administrative Law Judge (ALJ) issued an Initial Decision denying in part and granting in part DSV's motion.

On September 13, 2018, the parties jointly petitioned for: (a) approval of a Settlement Agreement; (b) dismissal with prejudice of the 17-08 case and (c) confidential treatment of the Settlement Agreement. Jt. Pet. Settlement for Approval at 3, 4.

II. DISCUSSION

The Commission's regulations allow parties to settle their disputes. 46 C.F.R. § 502.75 (a)-(b). The Commission and courts examine whether a settlement that seeks dismissal of a pending case violates any law or policy as well as to ensure the settlement is free of fraud,

duress, undue influence, mistake, or other defects which might make it non-approvable. *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 315, 317 (5th Cir. 2002); 46 C.F.R. § 502.72(a)(3). As part of this analysis, "the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighted against the risks and costs of continued litigation." *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (FMC 2009) (quoting *Delhi Petroleum Pty. Ltd. v. U.S. Atl. & Gulf/Australia – New Zealand Conference & Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988).

The Settlement Agreement in this matter is not unjust or discriminatory nor will it adversely impact third parties or the shipping public. Jt. Pet. Settlement Approval at 4. Additionally, the Settlement Agreement does not appear to violate any law or policy, nor does the Settlement Agreement remaining confidential. *See D.F. Young, Inc. v. NYK Line (North America) Inc.*, FMC Docket No. 16-02, at *4-*5 (FMC May 22, 2018). The parties' reason to settle the 17-08 case to avoid the uncertainty and cost of litigation appears reasonable. Jt. Pet. Settlement Approval at 3, 4. Finally, there is no evidence of any fraud, duress, undue influence, mistake, or other defects, as both parties are sophisticated, represented by legal counsel, and have prudently considered settling. *Id.* at 4.

III. CONCLUSION

The Commission **GRANTS** the parties' petition and **ORDERS** that: (1) the Settlement Agreement, including all of the terms and conditions set forth therein, is **APPROVED**; (2) the above captioned action is **DISMISSED WITH PREJUDICE**; (3) the settlement agreement attached to the Joint Petition is **CONFIDENTIAL**; and (4) this proceeding is **DISCONTINUED**.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF DOLE OCEAN CARGO EXPRESS, INC. FOR AN EXEMPTION FROM 46 C.F.R. § 530.10

PETITION NO. P4-18

Served: October 26, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, *Commissioner*.

ORDER GRANTING PETITION

I. PETITION

On September 14, 2018, Dole Ocean Cargo Express, Inc. (DOCE) filed with the Federal Maritime Commission (Commission) the above-captioned Petition for exemption from 46 C.F.R. § 530.10, pursuant to the Commission's Rules of Practice and Procedure at 46 C.F.R. § 502.94. The Notice of Filing and Request for Comments with respect to the Petition was published in the *Federal Register* on September 25, 2018, 83 Fed. Reg. 48424, and the comment period ended on October 2, 2018. No comment was filed with the Commission.

DOCE is an ocean common carrier. Pet. at 1. As part of an internal corporate restructuring, the assets of DOCE will be transferred, on or about November 1, 2018, to a new limited liability company, Dole Ocean Cargo Express, LLC. *Id.* Among the assets being transferred are DOCE's service contracts with its customers, which will be assigned to the new company, Dole Ocean Cargo Express, LLC. *Id.*

There are over 200 service contracts that will be assigned to the new limited liability company. *Id.* The assignment of DOCE's service contracts to the new company requires the filing with the Commission of an amendment to each service contract. *Id.* DOCE asserts that "[i]t would be an undue burden on DOCE and the shipper parties to prepare and file an individual amendment for each of these service contracts." *Id.*

Therefore, in lieu of filing an amendment for each service contract as required by 46 C.F.R. § 530.10(b), DOCE requests that the Commission permit a universal notice to the service contract parties and to the Commission, notifying them of the corporate restructuring, filing of the Petition, service contract assignment to the new company, and shippers' right under their service contract to require formal amendments to their service contracts. *Id.* at 1-2.

DOCE further states that "[t]he existing DOCE tariffs will be terminated with a notice that will cross-reference the new Dole Ocean Cargo Express, LLC tariffs, which will govern the assigned service contracts, thereby eliminating the need to amend the service contracts to change the reference to the governing tariffs." *Id.* at 2. The limited liability company's tariffs "will be identical to the existing DOCE tariffs, so this change in governing tariffs will not alter the terms and conditions under which service is provided to service contract signatories." *Id.*

II. DISCUSSION

The Commission's regulations governing service contracts provide that "[s]ervice contracts may be amended by mutual agreement of the parties to the contract." 46 C.F.R. § 530.10(b). Amendments to service contracts must be filed electronically with the Commission in the manner set forth in 46 C.F.R. § 530.8 and appendix A to 46 C.F.R. pt. 530.

Exemptions from the requirements of part 530 are governed by 46 U.S.C. § 40103 and the Commission's Rules of Practice and Procedure. 46 C.F.R. § 530.13(b). Under 46 U.S.C. § 40103(a), the Commission may grant exemptions from the Shipping Act, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." 46 U.S.C. § 40103(a).

DOCE's Petition seeks an exemption from filing service contract amendments, relief that is "purely administrative in nature" necessitated by its internal corporate restructuring. Pet. at 1, 3. The Commission has generally granted exemptions from 46 C.F.R. § 530.10 in similar situations. *See Pet. of COSCO Container Lines Co. Ltd.*, 34 S.R.R. 97 (FMC 2016); *Pet. of Crowley Caribbean Servs., LLC*, 33 S.R.R. 1461 (FMC 2016); *Pet. of Compania Sud Americana de Vapores S.A.*, 33 S.R.R. 934 (FMC 2015); *Pet. of Hanjin Shipping Co., Ltd.*, 31 S.R.R. 1080 (FMC 2009).

The Commission similarly concludes that granting the Petition in this case will not result in a substantial reduction in competition or be detrimental to commerce. As noted in the Petition, the shipper parties to the affected service contracts will receive from the new company, with no or minimal interruption, the same transportation services they presently receive from DOCE. In addition, the Commission believes that DOCE's proposed measures, comparable to conditions imposed on previously granted exemptions from § 530.10, offer adequate protection against any potential harm to competition or commerce. As described in DOCE's proposed notice to shipper parties, formal consents or amendments can be prepared if a party so requests. Additionally, DOCE's tariffs will be terminated with a notice cross-referencing the new Dole Ocean Cargo Express, LLC tariffs that will govern the assigned service contracts.

The Commission is placing an additional condition on the exemption. Specifically, the Commission notes that the text of DOCE's proposed notice regarding the assignment requests that shipper parties notify DOCE by October 1, 2018, if a formal consent or individual amendment is required, and that if the shipper party does not reply by that date or continues to tender cargo after November 1, 2018, DOCE will assume that the shipper party agreed to the assignment and does not require a formal consent or amendment. It is unclear when DOCE anticipated distributing this notice, but, assuming it was not distributed sometime before October 1, 2018, these dates must be updated to allow shipper parties a reasonable amount of time to

consider their options in light of the assignment. The Commission believes that DOCE should provide at least seven days from the date of its notice for shipper parties to request a formal consent or individual amendment.

III. CONCLUSION

For the reasons discussed above, the Commission grants the Petition, subject to the conditions stated below.

THEREFORE, IT IS ORDERED, That DOCE's Petition is GRANTED, provided that:

1. Upon granting of the Petition, DOCE notifies, in the form and manner set forth in the Petition, all affected shippers of the change in carrier parties to the service contracts, and provides at least seven (7) calendar days for shipper parties to request a formal consent or individual amendment to a service contract;

2. As soon as practical but not later than five days after the date of this order, DOCE file a Universal Notice with the Commission through SERVCON, enumerating all affected service contracts; and

3. If any affected shipper opts to file an individual amendment, such amendment shall be promptly filed pursuant to 46 C.F.R. § 530.10(b).

IT IS FURTHER ORDERED, that this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF ORIENT OVERSEAS CONTAINER LINE LIMITED AND OOCL (EUROPE) LIMITED FOR AN EXEMPTION FROM 46 U.S.C. § 40703	**PETITION NO. P2-18**

Served: October 30, 2018

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, *Commissioner*.

ORDER GRANTING PETITION

On August 29, 2018, Orient Overseas Container Line Limited (OOCL) and OOCL (Europe) Limited (OOCL (Europe)), both controlled carriers,[1] submitted a petition to the Federal Maritime Commission (FMC or Commission), pursuant to 46 U.S.C. § 40103 (section 16 of the Shipping Act of 1984) and 46 C.F.R. § 502.94, for an exemption from 46 U.S.C. § 40703. The Notice of Filing and Request for Comments was served on August 30, 2018, and published in the Federal Register on September 6, 2018. 83 Fed. Reg. 45238. Comments were due by September 18, 2018, and the Commission received four comments in support of the petition.[2]

Because the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, the Commission has determined to grant the petition.

[1] 46 U.S.C. § 40102(8) defines a controlled carrier as:

> an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government, with ownership or control by a government being deemed to exist for a carrier if— (A) a majority of the interest in the carrier is owned or controlled in any manner by that government, an agency of that government, or a public or private person controlled by that government; or (B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

[2] The Commission received comments in support of granting the petition from the following parties: Agriculture Transportation Coalition, Sept. 11, 2018; Rohlig Logistics GmbH & Co. KG, Sept. 5, 2018; BSH Hausgerate GmbH, Sept. 4, 2018; and BLG International Forwarding GmbH & Co. KG, Sept. 3, 2018.

I. BACKGROUND

OOCL is a Hong Kong corporation with its head office located in Hong Kong and OOCL (Europe) is an England and Wales corporation with its head office located in England. Pet. at 1. Both OOCL and OOCL (Europe) are wholly owned subsidiaries of Orient Overseas (International) Limited (OOIL), which is ultimately controlled by COSCO SHIPPING Holdings Co., Ltd. (CS Holdings).[3] Cosco Shipping Lines Co. (COSCO), the wholly owned subsidiary of CS Holdings, is a controlled carrier and has been designated as such since 1981. *See* Controlled Carriers Under the Shipping Act, 46 Fed. Reg. 35355 (July 8, 1981). The Commission's General Counsel determined under delegated authority that, following the consummation of the merger, the OOCL entities are now also controlled carriers. *See* 46 C.F.R. §§ 501.23; 565.3. On August 16, 2018, the Office of the General Counsel (OGC) notified the OOCL entities that they met the criteria for classification as controlled carriers and were subject to the requirements of 46 U.S.C. §§ 40701–40706.

OOCL and OOCL (Europe) have petitioned the Commission for an exemption from 46 U.S.C. § 40703, which states that "a rate, charge, classification, rule, or regulation of a controlled carrier may not become effective, without special permission of the [Commission], until the 30th day after publication." Such an exemption would allow the parties to reduce their tariff rates effective upon publication. The parties argue that this exemption is justified as it would neither reduce competition nor be detrimental to commerce. Pet. at 1.

II. DISCUSSION

The Commission has the authority under 46 U.S.C. § 40103 to grant exemptions for agreements or activities if the exemption will not result in a substantial reduction in competition or be detrimental to commerce. The Commission has previously granted exemptions from § 40703. *See Petition of American President Lines, Ltd. and APL Co. PTE. Ltd. for a Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984, as amended*, 30 S.R.R. 517 (FMC 2004); *Petition of China Shipping Container Lines (Hong Kong) Co., Ltd., for an Exemption from the First Sentence of Section 9(c) of the Shipping Act*, 30 S.R.R. 645 (FMC 2004); *Petition of Hainan P.O. Shipping Co., Ltd. for an Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984, as amended*, 31 S.R.R. 1659 (FMC 2010); *Petition of United Arab Shipping Company (S.A.G.) for an Exemption from 46 U.S.C. § 40703*, Pet. No. P1-14, slip op. (FMC July 17, 2015); and *Petition of COSCO Container Lines Europe GmbH for an Exemption from 46 U.S.C. § 40703*, Pet. No. P3-15, slip op. (FMC Nov. 9, 2015).

The parties argue that granting the requested exemption would be procompetitive and beneficial to commerce. They argue that requiring the OOCL entities to wait 30 days for agreed rates to become effective would effectively prevent them from competing for a measurable portion of trade. Pet. at 2. They state that, while most OOCL entities' cargo moves under service

[3] CS Holdings is the majority owner of OOIL. More information on this transaction can be found in Petition of Cosco Shipping Lines Co., Ltd. (COSCO), Orient Overseas Container Line Limited (OOCL), and OOCL (Europe) Limited for an Exemption from Agreement Filing, Pet. No. P2-17 (Nov. 8, 2017).

contract, some still moves under tariffs. Additionally, surcharges, extra charges, and rules tend to be published in governing tariffs. Being allowed to reduce tariff rates and charges and amend rules on immediate notice would allow the OOCL entities to compete more effectively in those areas. Pet. at 2. The parties also argue that "[a]llowing an additional carrier to compete effectively in the market would give customers more choices among carrier options and would thus promote the flow of commerce." Pet. at 2.

Section 40103 provides that if the Commission finds that an exemption will not result in a substantial reduction in competition or be detrimental to commerce, the relief may be granted. By allowing the OOCL entities to reduce tariff rates effective on publication rather than requiring a 30-day waiting period, the carriers will be able to react to market conditions more quickly and remain at a level competitive with other carriers not subject to the statutory strictures imposed by the Shipping Act on controlled carriers. The increased flexibility may also allow importers and exporters to avail themselves of rate reductions sooner. Consequently, the exemption likely would be procompetitive and beneficial to commerce.

Based on the foregoing, granting the petition would be unlikely to cause a reduction in competition or be detrimental to commerce.

III. CONCLUSION

The Commission finds that OOCL and OOCL (Europe)'s petition for exemption from the requirements in 46 U.S.C. § 40703 will not result in substantial reduction in competition or be detrimental to commerce, and the petition is therefore granted. OOCL and OOCL (Europe) will remain subject to all other applicable provisions of the Shipping Act and the Commission's regulations, and the Commission retains full authority to revoke the instant exemption.

THEREFORE, IT IS ORDERED, that Orient Overseas Container Line Limited and OOCL (Europe) Limited are granted an exemption from the requirement of 46 U.S.C. § 40703 that tariff rates of a controlled carrier may not become effective until the 30th day after publication; and

IT IS FURTHER ORDERED, that this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

FALCONE GLOBAL SOLUTIONS, LLC, *Complainant*

v.

MAURICE WARD NETWORKS, LTD. D/B/A MAURICE WARD GROUP; MAURICE WARD & CO., BV.; AND MAURICE WARD & CO. S.R.O., *Respondents*.

DOCKET NO. 18-04

Served: November 7, 2018

NOTICE OF VOLUNTARY DISMISSAL

On October 31, 2018, the parties submitted a Stipulation of Dismissal Without Prejudice pursuant to 46 C.F.R. §502.72(a)(2). The parties certify that no settlement on the merits was reached. Therefore, the above-captioned proceeding is discontinued.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

SANTA FE DISCOUNT CRUISE PARKING, INC. DBA EZ CRUISE PARKING, LIGHTHOUSE PARKING INC., AND SYLVIA ROBLEDO DBA 81ST DOLPHIN PARKING, *Complainants*

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES AND THE GALVESTON PORT FACILITIES CORPORATION, *Respondents*.

DOCKET NO. 14-06

Served: November 16, 2018

BEFORE: Clay G. Guthridge, *Administrative Law Judge*.

INITIAL DECISION ON REMAND[1]

[Exceptions filed by Respondent, 1/30/19, Commission final decision pending]

I. INTRODUCTION, PROCEDURAL HISTORY, AND SUMMARY OF DECISION.

A. Introductory Statement.

As set forth in detail below, the undersigned issued an Initial Decision dismissing the Complaint in this proceeding. The Commission affirmed the decision in most respects. The United States Court of Appeals for the District of Columbia Circuit vacated the Commission's decision and remanded the case to the Commission, and the Commission in turn remanded it to the undersigned for further proceedings.

The undersigned has determined that for the record to be clear, this Initial Decision on Remand should not require reference to the original Initial Decision, but should set forth the holding on this case in its entirety. Therefore, significant portions of this decision repeat findings and holdings from the Initial Decision with little or no change. *See, e.g.*, Part V, finding that Complainants had abandoned some claims; Part VII, dismissing claims against respondent The Galveston Port Facilities Corporation. Other parts have been revised significantly to incorporate comments from the circuit court decision remanding the proceeding, the Commission's order affirming the Initial Decision, and other intervening decisions. *See, e.g.*, Part VIII.C, significantly revising the discussion of Element 3 of *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997), to incorporate circuit court and

[1] The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Commission case law set forth in decisions and orders issued after the Initial Decision. Other portions have less substantial revisions of the Initial Decision, and some new findings of fact have been added.

B. Summary of Factual Background.

Respondents the Board of Trustees of the Galveston Wharves (Board) and the Galveston Port Facilities Corporation (GPFC) (collectively referred to as Respondents or the Port) own and operate the Texas Cruise Ship Terminal at Piers 25 and 27 (cruise terminal) and Terminal parking lots in Galveston, Texas. The cruise terminal is a marine terminal and Respondents are marine terminal operators within the meaning of the Shipping Act of 1984 (Shipping Act or Act). Respondents opened the cruise terminal in 2000. Passenger common carriers such as Royal Caribbean Cruise Lines and Celebrity Cruise Lines call on the cruise terminal.

Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise), Lighthouse Parking, Inc. (Lighthouse), and Sylvia Robledo d/b/a 81st Dolphin Parking (Dolphin) (collectively Complainants) are private companies that own and/or operate parking lots outside the cruise terminal that are located within a few blocks of the terminal. Complainants focus their businesses on providing cruise passengers with convenient and secure parking lot storage for their vehicles while the passengers are on cruises. Each Complainant operates shuttle buses to transport customers with their luggage directly to and from the cruise terminal, allowing passengers to stay with their luggage, keep their families together, and avoid traffic at the port facility entrance otherwise associated with unloading baggage from their cars prior to parking. ALJFF 1-11.[2] The Port calls the owner/operator of a parking lot providing this service an "off-port parking user."

In 2003, the Port established a tariff that included an access fee charged for commercial passenger vehicles entering the port. In January 2005, the Port began enforcing the access fee against Complainants and others for each trip by a commercial passenger vehicle to the cruise terminal. EZ Cruise objected that the access fee imposed on each trip was too high, a position in which Dolphin and Lighthouse joined, and refused to pay. The Port continued to charge access fees for each trip, but Complainants did not pay any access fees while Complainants and the Port negotiated this issue.

After extensive negotiations, in the summer of 2006, Complainants and the Port agreed that the Port would amend its tariff to provide for a flat monthly access fee calculated at the flat rate of $8.00 per parking space maintained by the off-port parking user per month. Payment of the flat rate would entitle commercial passenger vehicles operated by off-port parking users unlimited access to the cruise terminal. The Port amended the tariff to add the flat rate and agreed to apply the flat rate retroactively to recalculate access fees owed by Complainants beginning January 2005, significantly reducing Complainants' accumulated but unpaid fees. Using the per trip rate, the Port had invoiced EZ Cruise a total of $87,930.00 for access to the port between January 2005 and June 2006. As a result of the application of the $8.00 flat rate, EZ Cruise paid $35,680.00 for access between January 2005 and June 2006, saving $52,250.00, or more than 59%, from what the Port had charged using the per trip method. Using the per trip

[2] ALJFF followed by a number or numbers refers to findings of fact set forth in Part VI.B of this decision.

rate, the Port had invoiced Lighthouse a total of $14,230.00 for access to the port between January 2006 and June 2006. As a result of the application of the $8.00 flat rate, Lighthouse paid $9,120.00 for access between January 2006 and June 2006, saving $5,110.00, or more than 35%. Using the per trip rate, the Port had invoiced Dolphin a total of $25,430.00 for access to the port between July 2005 and June 2006. As a result of the application of the $8.00 flat rate, Dolphin paid $11,520.00 for access between July 2005 and June 2006, saving $13,910.00, or more than 54%. *See* ALJFF 47-49. The Port continued to impose access fees on other commercial passenger vehicles accessing the cruise terminal at the per trip rate.

The Port charged and Complainants paid access fees calculated at the $8.00 per parking place per month rate until 2014, when the Port amended the tariff to increase the $8.00 per space per month fee to $28.88 effective July 1, 2014. The Port also increased per trip access fees for other commercial passenger vehicles.

Faced with the new tariff rate, on June 16, 2014, Complainants filed a complaint with the Commission and paired that complaint with one filed in the United States District Court for the Southern District of Texas seeking to enjoin the new tariff pending a decision on the FMC complaint. *See* 46 U.S.C. § 41306(a). The court entered an Agreed Interim Order requiring Complainants to pay access fees to the Port at the $8.00 rate and deposit the balance into the court registry.

The Port amended the tariff again in September 2014. Pursuant to this amendment, the Port charged Complainants at the $8.00 per space per month rate established by the 2006 amendment to the tariff for July-September 2014. The Port repealed the flat rate for port access after October 1, 2014, and resumed calculating Complainants's access fees using the per trip rate as it had prior to the August 28, 2006, amendment.

C. Procedural Background.

The June 16, 2014, FMC Complaint alleges that the Port violated the Shipping Act, 46 U.S.C. §§ 40101-41309, by charging Complainants at the $8.00 flat rate while continuing to charge access fees for other commercial passenger vehicles at the per trip rate, thereby allegedly giving an undue or unreasonable preference or advantage to the other users and/or imposing an undue or unreasonable prejudice or disadvantage with respect to Complainants in violation of sections 41102(c), 41106(2), and 41106(3) of the Act.

1. Order dismissing claims of violations of sections 41102(c) and 41106(3).

The Complaint alleges that Respondents violated three sections of the Shipping Act: engaging in unjust, unreasonable, and unlawful practices in violation of 46 U.S.C. § 41102(c); giving unreasonable preference or advantage, and/or imposing undue or unreasonable prejudice or disadvantage with respect to persons in violation of 46 U.S.C. § 41106(2); and, unreasonably refusing to deal or negotiate with Complainants in violation of 46 U.S.C. § 41106(3). (Complaint ¶ V.A.) On November 21, 2014, the undersigned granted the Port's motion to dismiss the section 41102(c) and 41106(3) claims. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Nov. 21, 2014) (Order

on Pending Motions and Partial Dismissal). On December 23, 2014, the Commission issued notice "that the time within which the Commission could determine to review the Administrative Law Judge's November 21, 2014 order on pending motions and partial dismissal has expired. Accordingly, the decision has become administratively final." *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (FMC Dec. 23, 2014) (Notice Not to Review).

2. The Initial Decision.

On December 4, 2015, the undersigned issued an Initial Decision dismissing the Complaint. The Initial Decision analyzed Complainants' claim that the Port violated section 41106(2) pursuant to the four elements set forth in *Ceres Marine Terminal, Inc. v. Maryland Port Administration* (*Ceres I*), 27 S.R.R. 1251 (FMC 1997), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Commission*, 164 F.3d 624, 1998 WL 716035 (4th Cir. Oct. 13, 1998) (Table).

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres I, 27 S.R.R. at 1270-1271 (citation omitted). *See Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06, Decision at 9-10 (ALJ Dec. 4, 2015) (Initial Decision) (*Santa Fe Initial Decision*).

The Initial Decision concluded that Complainants had abandoned their claims that other parking lots located adjacent to the Port were not charged for access because their passengers were permitted to walk with their luggage to the Cruise Terminal and that Complainants' shuttles were not permitted to enter the port through a gate that the Port's shuttles were permitted to use. *Santa Fe Initial Decision* at 11. The Initial Decision dismissed the claims against respondent Galveston Port Facilities Corporation because Complainants failed to respond to the Port's argument that Complainants were not subject to any treatment by GPFC. *Santa Fe Initial Decision* at 25.

The Initial Decision found that Complainants had not met their burden of proving by a preponderance of the evidence that the Port violated section 41106(2). *Santa Fe Initial Decision* at 26-36. The Initial Decision concluded that:

- Complainants had not established Ceres I Element 1, that the two parties are similarly situated or in a competitive relationship, because they had not proved by a preponderance of the evidence that they are similarly situated to or in a competitive relationship with hotels that provide parking to cruise passengers or common carriers. Santa Fe Initial Decision at 27-32.

- Complainants had established Ceres I Element 2, that the parties were accorded different treatment, because they had proved that Complainants and the hotels, taxicabs, limousines, and buses were accorded different treatment. Santa Fe Initial Decision at 32.

- Complainants had not established Ceres I Element 3, that the unequal treatment is not justified by differences in transportation factors. (a) Complainants did not prove by a preponderance of the evidence that charging Complainants a monthly flat rate and charging hotels providing cruise parking for each trip is not justified by differences in transportation factors; (b) Complainants did not prove by a preponderance of the evidence that charging Complainants a monthly access fee while it charged common carriers for each trip and did not charge taxicabs an access fee is not justified by differences in transportation factors. Santa Fe Initial Decision at 32-36.

- Even if the Port violated section 41106(2), Complainants had not established Ceres I Element 4, that the resulting prejudice or disadvantage is the proximate cause of the injury, because Complainants did not prove by a preponderance of the evidence that they suffered any damages. Santa Fe Initial Decision at 37-52.

- Complainants had not established that the Commission should enter a cease and desist order. Santa Fe Initial Decision at 52-53.

3. The Commission Order affirming dismissal of the Complaint.

On January 13, 2017, the Commission issued an order affirming the dismissal of the Complaint. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (FMC Jan. 13, 2017) (Order Affirming Initial Decision's Dismissal of Complaint) (*Santa Fe Commission Affirmance*). The Commission denied Complainants' attempt to appeal the dismissal of claims alleging violations of sections 41102(c) and 41106(3) as untimely. *Santa Fe Commission Affirmance* at 13-14. The Commission held that claims against GPFC were correctly dismissed. *Santa Fe Commission Affirmance* at 14. The Commission applied its decision in *Ceres I* to address the claims that the Port violated section 41106(2). *Santa Fe Commission Affirmance* at 15. The Commission concluded that:

- Complainants are not required to prove *Ceres I* Element 1 and therefore vacated the holding in the Initial Decision finding that Complainants failed to prove this element. *Santa Fe Commission Affirmance* at 16-18.

- Complainants proved *Ceres I* Element 2. *Santa Fe Commission Affirmance* at 18.

- Hotels that permit their customers to leave their cars in hotel parking lots while they go on cruises do not meet the Port's definition of "off-port parking user." *Santa Fe Commission Affirmance* at 20-22.

- Even if the Port selectively enforced its tariff in violation of section 41106(2), Complainants failed to show that they would have paid less in fees if the alleged selective enforcement had not occurred or to establish any other injury to them resulting from the alleged selective enforcement. *Santa Fe Commission Affirmance* at 22-26. Therefore,

> the Commission concluded that Complainants failed to prove *Ceres I* Element 4 because "even though Complainants showed that they were accorded different treatment, they failed to demonstrate that they suffered any injury as a result of the different treatment. Therefore, an inquiry into whether the different treatment was justified is unnecessary." *Santa Fe Commission Affirmance* at 27.

The Commission affirmed the Initial Decision except with respect to *Ceres I* Element 1, denied Complainants' section 41106(2) claims, and dismissed the Complaint with prejudice. *Santa Fe Commission Affirmance* at 29. The Commission did not address the claims deemed abandoned by the Initial Decision that other parking lots located adjacent to the Port were not charged for access.

4. The Court of Appeals remand to the Commission.

Complainants sought review of the Commission's decision by the United States Court of Appeals for the District of Columbia Circuit. On May 11, 2018, the court vacated the Commission's decision and remanded the case to the Commission. The court stated:

> Here, Petitioners [FMC Complainants] contend that they met their burden of showing that they were similarly situated to or in a competitive relationship with taxis and limos; that they were accorded different treatment; and that the differential treatment injured Petitioners. Petitioners argue that the burden is therefore on the Galveston Port to justify the differential treatment based on legitimate transportation factors.
>
> The . . . Commission accepted that Petitioners' shuttle buses were treated differently than taxis and limos. But the Commission then strangely concluded that Petitioners were not injured by being charged more. The Commission's conclusion is not sustainable. Petitioners were plainly injured when they were charged more than the other commercial passenger vehicles. To be sure, under the statute and the *Ceres* test, the Galveston Port may be able to show that the differential treatment of Petitioners' shuttle buses is justified by legitimate transportation factors. But the Commission never reached that step of the analysis. On remand, the Commission may consider the Port's argument to that effect.
>
> We grant the petition, vacate the order of the . . . Commission, and remand for further proceedings consistent with this opinion.

Santa Fe Disc. Cruise Parking, Inc. v. Fed. Mar. Comm'n, 889 F.3d 795, 797 (D.C. Cir. 2018).[3]

[3] The court did not discuss the use of the flat rate to calculate Complainants' access fees and the use of the per trip access fee for the hotels.

5. The Commission remand to the Administrative Law Judge.

On August 9, 2018, the Commission remanded the proceeding to the Administrative Law Judge. In its discussion of the Initial Decision, the Commission stated:

> In particular, the ALJ found that Complainants failed to meet the first two elements required by the Commission in § 41106(2) cases. *See* [*Ceres* I]. Specifically, complainants have the initial burden of proving: (1) in certain cases, that the complainant and another person or entity are similarly situated or in a competitive relationship; (2) the respondent treated the complainant and the other person differently; and (3) the different treatment is the proximate cause of injury to the complainant. If the complainant makes such showing, the burden of production shifts to the respondent to justify the different treatment based on valid transportation factors. Although the ALJ determined that the Complainants established that they were treated differently than other ground transportation companies, the ALJ found that they had failed to prove that they were similarly situated or in a competitive relationship with those other companies or that the different treatment caused them injury. On review, the Commission affirmed the determination that although Complainants had been subjected to different treatment, they failed to establish injury.

Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves, FMC No. 14-06, Order at 3 (FMC Aug. 9, 2018) (Order Remanding Proceeding to Administrative Law Judge) (*Commission Remand Order*). The Commission noted that it "also determined that the ALJ erred in finding that Complainants were required to establish that they were similarly situated or in a competitive relationship with other ground transportation companies." *Id*. at 3 n.2. The Commission remanded the proceeding to the undersigned "to address all remaining issues, including whether the Port's different treatment was justified by valid transportation factors, whether the Shipping Act's statute of limitations bars any of Complainants' claims, and whether Complainants are entitled to relief. Additional briefing by the parties may be permitted in the ALJ's discretion." *Commission Remand Order* at 4.

6. Order for parties to identify any necessary additional briefing.

On August 17, 2018, the undersigned issued an order requiring Complainants to serve and file a statement setting forth what, if any, additional issues remain, and what, if any, supplemental briefing they believe is necessary before the undersigned addresses the remaining issues, and for the Port to file a response to Complainants' statement. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Aug. 17, 2018) (Order to Identify Necessary Supplemental Briefing). The parties have filed their responses to this order and do not request additional briefing.

C. Summary of Conclusions.

As explained more fully below, I conclude that Complainants have not proved by a preponderance of the evidence that the Port violated section 41106(2). Specifically, when considering the factors set out by the Commission in its order approving the settlement of

another proceeding alleging a violation of section 41106(2), Complainants have not established *Ceres I* Element 3 when compared to either hotels or taxicabs; that is, Complainants have not proved that the unequal treatment is not justified by differences in transportation factors. *See Maher Terminals, Inc. v. The Port Authority of New York and New Jersey*, FMC No. 08-03, Order at 3-4 (FMC Oct. 26, 2016) (Order Granting Joint Motion for Approval of Settlement Agreement, Dismissal with Prejudice, and Stay). If it were found that the Port violated section 41106(2) by charging Complainants using the $8.00 flat rate and hotels using a per access rate, I conclude that Complainants have not proved by a preponderance of the evidence that they suffered undue or unreasonable prejudice or disadvantage or actual injury from the violation because the evidence shows that Complainants benefitted from the flat rate. If it were found that the Port violated section 41106(2) by not charging taxicabs for access, Complainants have established that they were injured by the violation.

Because I conclude that Complainant did not prove by a preponderance of the evidence that the Port violated section 41106(2), Complainants' Complaint is dismissed with prejudice.

II. FACTUAL BACKGROUND.

This Part of the decision sets forth the salient findings of fact in Part VI.B in narrative form to aid the reader in understanding the sequence of events that led to the commencement of this proceeding.

On October 27, 2003, the Port issued Tariff Circular No. 6, Naming Rules and Regulations Governing Dockage, Shed Hire, and Other Services and Charges Applying at the Facilities of the Galveston Wharves. ALJFF 14. The 2003 Tariff Circular No. 6 defines "commercial passenger vehicle" as:

> [A] motor vehicle while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either:
>
> (A) in exchange for a fare, charge, or other thing of value (paid, demanded, or expected for the transportation service, in whole or in part, directly or indirectly, by the person transported or by another person, or otherwise); or
>
> (B) in connection with the operations of a commercial business entity, regardless of whether a fare, charge, or other thing of value is paid, demanded or expected for the transportation service.
>
> It shall be a presumption that a motor vehicle bearing the name, trade name, common name, emblem, trademark or other identification of a commercial business entity and being used to transport a passenger is a commercial passenger vehicle.

ALJFF 15. The definition of commercial passenger vehicle was amended on December 17, 2007, by changing the opening phrase to read "a motor vehicle not otherwise defined in this Tariff while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land. . . ." ALJFF 16. It has not changed since then. ALJFF 17. Complainants, the hotels, and taxicabs operate commercial passenger vehicles. ALJFF 18.

Tariff Circular No. 6 defines "ground transportation company."

> GROUND TRANSPORTATION COMPANY means any Person (other than the Galveston Wharves of any person or entity under contract to provide transportation services for the Galveston Wharves) owning or operating the following types of vehicles as defined in this section: commercial passenger vehicle, bus, bus service, charter bus, courtesy vehicle, shuttle, limousine, taxi or taxicab service.

ALJFF 19. This definition has not changed. Complainants, the hotels, and taxicabs are ground transportation companies. ALJFF 20-21.

The tariff defines "off-port parking user."

> OFF-PORT PARKING USER means a commercial business entity which provides or arranges for one or more commercial passenger vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.

ALJFF 21. In 2006, the Port amended this definition by inserting the phrase "courtesy vehicles" between "commercial passenger vehicles" and "buses or shuttles," ALJFF 23, but has not changed since then. ALJFF 24. Complainants are off-port parking users. ALJFF 25. The Commission has determined that hotels are not off-port parking users. *Santa Fe Commission Affirmance* at 21-22; ALJFF 26. Taxicabs are not off-port parking users. ALJFF 26A.

The Tariff defines "Courtesy Vehicle" as:

> COURTESY VEHICLE means a commercial passenger vehicle that meets all of the following criteria at all times when it is operated on property owned, leased or controlled by the Galveston Wharves:
>
> > (A) The vehicle is owned or provided by one or more commercial business entities that: (i) arrange for the vehicle to provide transportation only incidentally to the commercial business entities' primary businesses or activities, which may, for example, be off-port car rental user, off-port parking user, lodging, air transportation, special events or medical care; (ii) provide the vehicle, by purchase or lease or by contracting with another party (which party may or may not be primarily in the business of providing ground transportation); and (iii) all sign the application for the Port Use License and/or Port User Permit for Vehicle, as applicants or co-applicants.

ALJFF 18A.

The 2003 Tariff Circular No. 6 required ground transportation companies to obtain a port use permit by paying an initial licensing fee of $250.00 and an annual renewal fee of $50.00 in order to conduct activities on or in connection with the cruise terminal. ALJFF 26. It imposed an access fee on vehicles for each entry onto port property.

> Note C In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle	Decal and access charge
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Bus and Shuttle or Bus [*sic*]	$10.00 per Access/Trip
Limousines	$10.00 per decal per vehicle, annually
Taxi and Taxicab	$7.50 per decal per vehicle, annually

ALJFF 29. The Port did not order collection of the access fees to begin until September 1, 2004, when the Board instructed port staff to fully implement the tariff and begin invoicing port users for the access fee effective January 1, 2005. ALJFF 30. On May 20, 2005, the Port sent notice to port users and included the first invoices for fees that users had incurred since January 1, 2005. ALJFF 31.

Complainant EZ Cruise did not pay the fee. ALJFF 32. On October 15, 2005, EZ Cruise wrote a letter to the Port claiming that the $10.00 fee for each trip[4] was "too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise . . . ." EZ Cruise asked the Port not to charge EZ Cruise on the basis of $10.00 per trip, but to charge it a flat monthly fee that would permit it unlimited access. EZ Cruise proposed:

> [A] flat rate of $1,000.00 per month for all shuttles used by EZ Cruise Parking, beginning January 2005. The flat fee is much easier for a start-up company, such as ours to budget and reflect expenses for reports at our monthly shareholder meetings. Billing 6 or 7 months at a time is extremely burdensome to a small, start-up company.

ALJFF 37.

[4] Tariff Circular No. 6 uses the term "access/trip" for entry by a vehicle on the port. I shorten that to trip in this decision.

Complainants and the Port entered into negotiations to resolve the access fees owed by Complainants and to discuss changing the tariff. By the middle of 2006, EZ Cruise had not paid the Port for access fees charged from January 2005 to June 2006, Lighthouse had not paid for access from January 2006 when it began operations to June 2006, and Dolphin had not paid for access from July 2005 when it began operations to June 2006. ALJFF 32-35. As part of the negotiations, on June 14, 2006, EZ Cruise proposed a payment of $20,000.00 to satisfy all outstanding port access fees for EZ Cruise and for Galveston Limousine Service (not a party in this proceeding) for trips on which Galveston Limousine transported passengers for EZ Cruise for the period January 2005 to March 2006. ALJFF 38. On July 20, 2006, the Port responded, stating that it disagreed with EZ Cruise's characterization of the negotiations, but proposed a flat monthly access fee of $2,500.00. EZ Cruise responded with a proposal for future access with a flat monthly fee of $1,200.00. ALJFF 39-42.

The Port and Complainants eventually agreed to reduce Complainants' future access fees by adding Note D to Tariff Circular No. 6. Note D provides that in lieu of the $10.00 per trip access fee, off-port parking users such as Complainants would pay a flat access fee of $8.00 per month for each parking space in their lots. This payment would permit unlimited access to the cruise terminal for Complainants' shuttles, meaning Complainants could send partially loaded shuttles to the cruise terminal without increasing their access fees. ALJFF 42-43. On August 28, 2006, the Port amended Tariff Circular No. 6 to revise the access fee to be paid by off-site parking users.

> Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The $8.00 Access Fee will be effective on and after August 15, 2006.

ALJFF 44. At times in this decision, the Note D provision is called the $8.00 flat rate or the flat rate. The August 28, 2006, amendment did not change the access fees imposed on commercial passenger vehicles by Note C. ALJFF 45.

Complainants and the Port also agreed to apply the $8.00 flat rate retroactively to January 2005 to recalculate access fees for Complainants that had been incurred at the per trip rate, but that Complainants had not paid. ALJFF 46. The Port had invoiced EZ Cruise a total of $87,930.00 for access to the port between January 2005 and June 2006. As a result of the application of the $8.00 flat rate, EZ Cruise paid $35,680.00 for access between January 2005 and June 2006 (equivalent to $4.06 per trip), saving $52,250.00 from the $10.00 per trip access rate. The Port had invoiced Lighthouse a total of $14,230.00 for access to the port between January 2005 and June 2006. As a result of the application of the flat rate, Lighthouse paid $9,120.00 for access between January 2005 and June 2006 (equivalent to $6.41 per trip), saving $5,110.00. The Port had invoiced Dolphin a total of $25,430.00 for access to the port between

January 2005 and June 2006. As a result of the application of the flat rate, Dolphin paid $11,520.00 for access between January 2005 and June 2006 (equivalent to $4.55 per trip), saving $13,910.00. ALJFF 47-49.

The Port amended some provisions of Tariff Circular No. 6 in 2007, ALJFF 51-54, but did not change the $8.00 flat rate until shortly before Complainants commenced this proceeding in 2014. From 2006 to the date Complainants initiated this proceeding, the Port calculated access fees for Complainants at the $8.00 flat rate while it continued to calculate access fees for all other commercial passenger vehicles at the per trip rate as set forth in Note C. ALJFF 81. At the request of Complainants and when appropriate, the Port adjusted the number of parking spaces used to calculate Complainants' access fees resulting in a decrease or increase in the monthly fee. ALJFF 55-58. Complainants did not object to using the $8.00 flat rate to calculate their access fees until shortly before they commenced this proceeding. ALJFF 59.

In the action that precipitated this proceeding, on May 19, 2014, the Port again amended Tariff Circular No. 6. The amended tariff, effective July 1, 2014, adjusted the decal and per trip access fees imposed on commercial passenger vehicles by Note C of the tariff. ALJFF 65, 67. The Port also significantly increased the flat rate from $8.00 to $28.88 per parking space used to calculate Complainants' fees for unlimited access to the cruise terminal.

> Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $28.88 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The Access Fee will be effective on and after July 1, 2014.

ALJFF 66.

On June 16, 2014, Complainants initiated this proceeding by filing a Complaint alleging that the Port violated the Shipping Act when it calculated Complainants' access fees at the $8.00 flat rate while calculating access fees for other ground transportation companies at the per trip rate. ALJFF 68. Complainants also filed a complaint in the United States District Court for the Southern District of Texas seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and a preliminary injunction pursuant to the Shipping Act that would bar the Port from enforcing the amended tariff. *See* 46 U.S.C. § 41306(a) ("After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part."). On August 5, 2014, the district court entered an agreed order permitting Complainants herein to deposit accruing monthly access fees in excess of $8.00 per parking space per month into the court registry. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order). ALJFF 69-70.

On September 22, 2014, the Port again amended the tariff. ALJFF 71. Fees for charter bus owners and operators, commercial passenger vehicles, courtesy vehicles, shuttles, limousines, and taxicabs were not changed from the May 22, 2014, tariff. ALJFF 72. The amended tariff returned to the rate of $8.00 per parking space per month for unlimited access for off-port parking users (Complainants) prior to October 1, 2014, and rescinded the provision that determined the monthly access fee for off-port parking users as a multiple of the number of parking spaces for access after October 1, 2014.

> Note D: Prior to October, 1, 2014, those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. In addition, Off-Port Parking Users shall pay a decal fee of $15.00 per decal per vehicle annually. This Access Fee and decal fee will be effective until October 1, 2014.
>
> Beginning on October 1, 2014, all Off-Port Parking Users, as defined herein, shall be governed by the Provision of Note C above.

ALJFF 73. The Port assessed Complainants' access fees at the $8.00 flat rate for July-September 2014. ALJFF 74. After October 1, 2014, the Port resumed calculating Complainants's access fees using the per trip rate as it had prior to the August 28, 2006, amendment. ALJFF 75-79.

III. COMPLAINANTS' FMC COMPLAINT.

The June 16, 2014, Complaint alleges that by imposing access fees on them at the rate of $8.00 per parking space per month while at the same time charging other commercial passenger vehicles for each trip, the Port violated three sections of the Act.

> "A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).
>
> "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106.

On October 21, 2014, the Port filed a motion to dismiss the Complaint. Also on October 21, 2014, the Secretary received a "First Amended Verified Complaint" substantially identical to the original Complaint, but adding allegations regarding events subsequent to the filing of the original Complaint. On October 24, 2014, Complainants filed an opposed motion for leave to file the Amended Complaint. The Port filed an opposition to the motion for leave to amend.

On November 21, 2014, the Port's motion to dismiss was granted regarding the claims of violation of sections 41102(c) and 41106(3) and denied regarding the claim of violation of section 41106(2). Leave to file the "First Amended Verified Complaint" was also granted. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Nov. 21, 2014) (Order on Pending Motions and Partial Dismissal), Notice Not to Review, Dec. 23, 2014. The Amended Complaint added a claim that the Port violated the Shipping Act by not charging taxicabs for access. (*Compare* Verified Complaint Paragraph V.D filed June 16, 2014, *with* First Amended Verified Complaint Paragraph V.D.) References to "Complaint" in this decision should be understood as reference to the Complaint as amended. The parties engaged in discovery and filed briefs with proposed findings of fact and supporting documents.

As set fort in Part I.A above, on December 4, 2015, an initial decision was issued dismissing the Complaint. On January 13, 2017, the Commission affirmed the dismissal. On May 11, 2018, the court of appeals vacated the Commission's decision and remanded for further proceedings. On August 9, 2018, the Commission remanded the proceeding to the administrative law judge. The parties did not want to file additional briefs. This proceeding is ripe for decision.

IV. STATUTORY FRAMEWORK AND CONTROLLING CASE LAW.

Complainants filed their Complaint pursuant to section 41301 of the Act.

> A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

The Complaint alleges that Respondents are marine terminal operators within the meaning of the Act.

> The term "marine terminal operator" means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. § 40102(14).

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). A cruise ship is a common carrier within the meaning of the Act. *Lisa Anne Cornell and G. Ware Cornell, Jr. v. Princess Cruise Lines, Ltd. (Corp), Carnival plc, and Carnival Corporation*, 33 S.R.R. 614, 620 (FMC 2014), *pet. for rev. den. sub nom. Cornell v. FMC*, No. 14-1208 (D.C. Cir. Dec. 2, 2015). The Port provides wharfage, dock, warehouse, or other terminal facilities in connection with cruise ships that dock in the port. Therefore, the Port is a marine terminal operator.

As part of its tariff, the Port imposes an access fee on commercial vehicles transporting passengers to the cruise terminal, including Complainants. Complainants allege that because the Port calculated the access fee on Complainants' shuttle buses at the $8.00 flat rate while it calculated access fees for other commercial passenger vehicles at the per trip rate, the Port violated section 41106(2) of the Act: "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106. Complainants also allege that the Port violated and continues to violate section 41106(2) because the Port does not charge taxicabs for access. Complainants are persons within the meaning of the Act. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise – . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."). The Complaint alleges that the Port's tariff affecting passenger access to the cruise terminal violates the Shipping Act. Therefore, the Commission has jurisdiction over this proceeding because its allegations "involve elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000).

> Complainants place primary reliance on the Commission's decision in *Ceres I.*
>
> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of the injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

Ceres I, 27 S.R.R. at 1270-1271 (citation omitted). The Commission further explained the burden on a complainant alleging a section 41106(2) violation in another case alleging that a port violated section 41106(2).

> [Complainants have] the burden of proving, by a preponderance of the evidence, that the Port violated the Shipping Act, and this burden of persuasion does not shift. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Revocation of Ocean Transportation Intermediary License No. 022025 Cargologic USA LLC*, Docket No. 14-01, 2014 FMC LEXIS 18, at *8 (FMC Aug. 28, 2014); *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, 32 S.R.R. 763, 765 (FMC 2012).

> The burden of *production*, however, shifts in two relevant respects. . . . [W]ith respect to [a respondent's] unreasonable preference or prejudice claim, the "complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres I*, 27 S.R.R. 1251, 1270-71. . . . [I]t is the burden of production that shifts, not the burden of persuasion, meaning that although the Port may in some circumstances bear the burden of adducing evidence justifying its conduct, [Complainant] bears the ultimate burden of proving that the Port acted unreasonably. [*Maher v. PANYNJ*, 33 S.R.R 349, 376 (ALJ 2014)] (citing *Maher v. PANYNJ*, 32 S.R.R. 1185, 1193 (FMC 2013)); *West Gulf Maritime Assoc. v. Port of Houston*, 18 S.R.R. 783, 791 (FMC 1978) (noting that "the burden of establishing the unreasonableness of a practice is squarely upon [the complainant]"); *see also* 5 U.S.C. § 556(d) (stating that "the proponent of a rule or order has the burden of proof"); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (holding that "the APA's unadorned reference to 'burden of proof'" refers to the burden of persuasion).

Maher Terminals, Inc. v. The Port Authority of New York and New Jersey, 33 S.R.R. 821, 840-841 (FMC 2014) (*Maher v. PANYNJ*) (emphasis in original), *remanded on grounds unrelated to burden of persuasion sub nom Maher Terminals, Inc. v. FMC*, 816 F.3d 888 (D.C. Cir. 2016), notice of dismissal after settlement (FMC Nov. 18, 2016).

The Act provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). "The . . . Commission shall provide an opportunity for a hearing before issuing an order relating to a violation of this part or a regulation prescribed under this part." 46 U.S.C. 41304(a).

> Until December 18, 2014, the Act defined actual injury as follows:
>
> (a) *Definition*. – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) *Basic amount*. – If the complaint was filed within the [three-year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305. On December 18, 2014, the Act was amended by deleting the phrase "plus reasonable attorney fees" from section 41305(b) and adding a new section 41305(e): "*Attorney Fees*. – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees." Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act) (emphasis added). This amendment did not change the definition of "actual injury." The

Complaint alleges that Complainants have been injured by the Port's alleged violations of the Act and seeks reparation awards for Complainants' claimed actual injuries.

V. ABANDONED CLAIMS.

The Complaint alleges:

> [T]here are two other private parking lots . . ., Galveston Park and Cruise and V.I.P. Parking, which have an estimated 280 parking spaces and pay nothing – *zero* – to the Port of Galveston in the form of Access Fees, because passengers are allowed to walk with their luggage across Harborside Drive through the 25th Street gate into the Cruise Terminal.

(Complaint ¶ IV.Y (emphasis in original). *See also* Complaint ¶ IV.EE.) Complainants do not address this claim in their briefs on the merits. Therefore, it is deemed abandoned. *See, e.g.*, *Palmer v. Marion County*, 327 F.3d 588, 597-598 (7th Cir. 1999) (finding that a plaintiff had abandoned a claim he made in his complaint when the plaintiff failed to address the claim either in his opposition to summary judgment or in his brief to the court). I note that Complainants now complain that charging them on a per parking space rate in lieu of the Access/Trip fee violates the Act. Complainants do not cite any authority that would permit the Port to impose a tariff on an off-site parking lot that does not itself access the cruise terminal with commercial passenger vehicles because the parking lot's customers walk onto the Port to take cruises.

The Complaint alleges that the Port operates its own parking lots and that the shuttles carrying passengers from the Port's lots to the cruise terminal are permitted to enter the port through the back gate at the intersection of 33rd Street and Old Port Industrial Road, while Complainants' shuttles are not permitted to use this gate. (Complaint ¶¶ IV.C-D; Complaint ¶ V.G.5.) Complainants do not address this claim in their briefs on the merits. Therefore, it is also deemed abandoned. *Palmer v. Marion County*, 327 F.3d at 597-598.

VI. EVIDENCE CONSIDERED AND FINDINGS OF FACT.

A. Evidence.

The parties submitted appendices with several thousand pages of documents. The Port objects to admission of a Certification Summary (Comp. App. 044 at 768),[5] a Summary of Access Fees (Comp. App. 045 at 769-770), and transcriptions from audio records of hearings prepared by a legal assistant to Complainant's counsel (Comp. App. 019 at 418-433; 030 at 534 -547). (Port Resp. to Comp. Prop. FF at 1-2.) The parties object to other exhibits in their responses to proposed findings of fact. All objections to admissibility of the exhibits are

[5] Pages in the appendix are numbered sequentially beginning with page 1. Complainants and the Port submitted electronic copies of their appendices. "Comp. App. [document number]" or "Port App. [document number]" refers to an electronic folder in the electronic copy of Complainants' Appendix or the Port Appendix. For example, the citation to Port App. 001 at 1-73 refers to sequential page numbers 1-73 found in the Port's electronic folder 001. Page numbering for Port App. 002 begins at 74.

overruled, but the arguments against admission are considered regarding the weight to be given to an exhibit. All proffered evidence is admitted.

B. Findings of Fact.[6]

The parties submitted proposed findings of fact. This initial decision addresses only material issues of fact and law. It is not necessary to resolve disagreements on matters not material to the outcome of this proceeding. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law.

With a few exceptions, the findings of fact are identical to the findings of fact set forth in the *Santa Fe Initial Decision*. New findings were added setting forth the definition of courtesy vehicles, ALJFF 18A, 18B, and 18C, and a new finding of fact was added that "[t]axicab operators are not off-port parking users." ALJFF 26A. Additional findings were made in findings of fact 47, 48, and 49.

In the order requiring the parties to identify necessary supplemental briefing, the undersigned stated:

> The Commission's order affirming the dismissal of the Complaint states that ". . . Respondents disagree with FF 26 that hotels are off-port parking users. Respondents' Reply at 8." *Santa Fe Commission Affirmance* at 2 n.1." The Commission does not discuss these two findings or conclude that the two findings or any other findings of fact are unsupported.

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[6] The findings of fact are based on and cite to the following documents:

- Complainants' Amended Complaint – cite to Amended Complaint at paragraph (Complaint ¶).
- Port's Answer – cite to Answer at paragraph (Answer ¶).
- Complainants' Appendix – cite to the PDF version of Complainants' appendix by document number (001 through 124) at appendix page number (*e.g.*, Comp. App. 026 at 510-511).
- Complainants' Proposed Findings of Fact – cite to the Port's Corrected Response and Opposition to Complainants' Proposed Findings of Fact as it sets forth each proposed finding followed by Respondents' response (*e.g.*, Port Resp. to Comp. Prop. FF 2-3).
- Port's Appendix – cite to the PDF version of Respondents' appendix by document number (001 through 104) at appendix page number (*e.g.*, Port App. 001 at 19).
- Port's Proposed Finding of Fact – cite to page or paragraph of Complainants' Objections and Responses to Respondents' Proposed Findings of Fact as it sets forth each proposed finding followed by Complainants' response (*e.g.*, Comp. Resp. to Port Prop. FF 1-2).

Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves, FMC No. 14-06 (ALJ Aug. 17, 2018) (Order to Identify Necessary Supplemental Briefing). The Commission did address the finding that hotels are off-port parking users, disagreed, and concluded that hotels are not off-port parking users. *Santa Fe Commission Affirmance* at 21-22. Although the court of appeals vacated the Commission's decision, the Commission's holding that hotels are not off-port parking users, a mixed question of fact and law, is followed in this Initial Decision on Remand. Some findings of fact from the *Santa Fe Initial Decision* were changed to reflect the Commission's holding. The numbering has not been changed.

1. Respondents the Board of Trustees of the Galveston Wharves (the Board) and the Galveston Port Facilities Corporation (GPFC) (collectively referred to as the Port) operate a cruise ship terminal complex (cruise terminal) on Galveston Island, Galveston, TX, that consists of two terminals. (Comp. Resp. to Port Prop. FF 21.)

2. The Port is a marine terminal operator within the meaning of 46 U.S.C. § 40102(14).

3. The cruise ships that call on the cruise terminal are common carriers within the meaning of 46 U.S.C. § 40102(6).

4. The Board manages the Galveston Wharves, a separate utility created by the City of Galveston. (Comp. Resp. Port Prop. FF 1-2.)

5. The Board established and periodically revises the port's tariff. (Port App. 001 at 1; Port App. 002 at 74; Port App. 003 at 149; Port App. 005 at 304; Port App. 006 at 387.)

6. The Board created GPFC to facilitate the financing, construction, and operation of the Galveston Island Cruise Terminals and is entitled to any income generated by GPFC that is not needed to pay GPFC's expenses or obligations. (Comp. Resp. Port Prop. FF 8-9.)

7. GPFC has never billed or collected access fees from Complainants. (Comp. Resp. to Port Prop. FF 12.)

8. Lease agreements between the Wharves Board (as lessor) and GPFC (as lessee) deny GPFC the right to assess and collect fees published in the Tariff for "commodities moving over, or vessels berthing at the Leased Premises . . . ." (Comp. Resp. to Port Prop. FF 11.)

9. Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise), Lighthouse Parking, Inc. (Lighthouse), and Sylvia Robledo d/b/a 81st Dolphin Parking (Dolphin) (collectively Complainants) are private companies that own and/or operate parking lots located outside the port within a few blocks of the cruise terminal. (Port Resp. to Comp. Prop. FF 2-3 (EZ Cruise); FF 10-11 (Lighthouse); FF 18, 20 (Dolphin).)

10. Complainants are in the business of providing parking for passengers who embark on cruises from the cruise terminal. They focus their businesses on providing cruise passengers with convenient and secure parking lot storage for their vehicles while they

are on cruises. Virtually all of Complainants' customers are cruise passengers seeking to park their vehicles for the duration of their cruises. (Comp. Resp. to Port Prop. FF 55.)

11. Each Complainant operates shuttles to transport customers with their luggage directly to and from the cruise terminal, allowing the customers to stay with their luggage, keep their families together, and avoid traffic at the port facility entrance otherwise associated with unloading baggage from their cars prior to parking. (Port Resp. to Comp. Prop. FF 2-3 (EZ Cruise); FF 10-11 (Lighthouse); FF 18, 20 (Dolphin).)

12. Many hotels in and near Galveston offer parking to cruise passengers who stay overnight at the hotel and embark on cruises from the cruise terminal. The terms of parking at hotels vary with the hotel: (1) free parking and free round-trip shuttle to the cruise terminal; (2) free parking without a shuttle to the cruise terminal; (3) free parking and paid round-trip shuttle to the cruise terminal; (4) paid parking and free round-trip shuttle to the cruise terminal; and (5) paid parking and paid round-trip shuttle to the cruise terminal. (Comp. App. 026 at 510-511.)

13. On June 24, 2002, the Port promulgated, but did not enforce, a tariff that included port access fees assessed on commercial passenger vehicles. (Port App. 050 at 1758.)

14. On October 27, 2003, the Port issued Tariff Circular No. 6, Naming Rules and Regulations Governing Dockage, Shed Hire, and Other Services and Charges Applying at the Facilities of the Galveston Wharves. (Port App. 001 at 1; Port App. 050 at 1758.)

15. The 2003 Tariff Circular No. 6 defines "commercial passenger vehicle" as:

> [A] motor vehicle while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land, either:
>
> (A) in exchange for a fare, charge, or other thing of value (paid, demanded, or expected for the transportation service, in whole or in part, directly or indirectly, by the person transported or by another person, or otherwise); or
>
> (B) in connection with the operations of a commercial business entity, regardless of whether a fare, charge, or other thing of value is paid, demanded or expected for the transportation service.
>
> It shall be a presumption that a motor vehicle bearing the name, trade name, common name, emblem, trademark or other identification of a commercial business entity and being used to transport a passenger is a commercial passenger vehicle.

(Port App. 001 at 18-19.)

16. The definition of commercial passenger vehicle in Tariff Circular No. 6 was amended on December 17, 2007, by changing the opening clause to read "a motor vehicle not otherwise defined in this Tariff while it is used, or offered (orally or in a writing or sign) to be used, to transport one or more people, on land. . . ." (Port App. 003 at 169.)

17. The definition of commercial passenger vehicle in Tariff Circular No. 6 has not changed since December 17, 2007. (Port App. 005 at 324; Port App. 006 at 395.)

18. Complainants operate commercial passenger vehicles within the meaning of Tariff Circular No. 6.

18A The 2003 Tariff Circular No. 6 defines "courtesy vehicle" as:

> [A] commercial passenger vehicle that meets all of the following criteria at all times when it is operated on property owned, leased or controlled by the Galveston Wharves:
>
> > (A) The vehicle is owned or provided by one or more commercial business entities that: (i) arrange for the vehicle to provide transportation only incidentally to the commercial business entities' primary businesses or activities, which may, for example, be off-port car rental user, off-port parking user, lodging, air transportation, special events or medical care; (ii) provide the vehicle, by purchase or lease or by contracting with another party (which party may or may not be primarily in the business of providing ground transportation); and (iii) all sign the application for the Port Use License and/or Port User Permit for Vehicle, as applicants or co-applicants.
> >
> > (B) The vehicle is provided for the exclusive use of officers, agents, employees, customers or invitees of any of the commercial business entities.
> >
> > (C) There is no fare, charge or thing of value paid, demanded or expected from the people transported, directly or indirectly, for transportation, and this is effectively communicated to the traveling public. (Example: An increase in the charge for lodging or for an event could be an indirect charge, if related to transportation.)
>
> (Port App. 001 at 19.)

18B The definition of courtesy vehicle in Tariff Circular No. 6 has not changed. (Port App. 002 at 93; Port App. 003 at 170; Port App. 005 at 324-325; Port App. 006 at 395-397.)

18C The shuttle buses operated by Complainants are courtesy vehicles.

19. The 2003 Tariff Circular No. 6 defines "ground transportation company" as "any Person (other than the Galveston Wharves or any person or entity under contract to provide transportation services for the Galveston Wharves) owning or operating the following types of vehicles as defined in this section: commercial passenger vehicle, bus, bus service, charter bus, courtesy vehicle, shuttle, limousine, taxi or taxicab service." (Port App. 001 at 19.)

20. The definition of ground transportation company in Tariff Circular No. 6 has not changed. (Port App. 002 at 93; Port App. 003 at 170; Port App. 005 at 325; Port App. 006 at 397.)

21. Complainants, the hotels, and taxicabs are ground transportation companies within the meaning of Tariff Circular No. 6.

22. The 2003 Tariff Circular No. 6 defines "off-port parking user" as

> a commercial business entity which provides or arranges for one or more commercial passenger vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.

(Port App. 001 at 20.)

23. The 2006 Tariff Circular No. 6 amended the definition of "off-port parking user" by inserting "courtesy vehicles" between "commercial passenger vehicles" and "buses or shuttles." (Port App. 002 at 93.)

24. The definition of off-port parking user in Tariff Circular No. 6 has not changed since 2006. (Port App. 003 at 170; Port App. 005 at 325; Port App. 006 at 397.)

25. Complainants are off-port parking users within the meaning of Tariff Circular No. 6.

26. Hotels that provide parking to cruise passengers in connection with an overnight stay at the hotel and transport the passengers to the cruise terminal in commercial passenger vehicles are not off-port parking users within the meaning of Tariff Circular No. 6. *See Santa Fe Commission Affirmance* at 21-22.

26A. Common carriers such as taxicabs are not off-port parking users.[7]

27. The Port reduced, but did not impose, the access fees in June 2003. (Port App. 050 at 1758.)

28. The 2003 Tariff Circular No. 6 required ground transportation companies to obtain a port use permit by paying an initial licensing fee of $250.00 and an annual renewal fee of $50.00 in order to conduct activities on or in connection with the cruise terminal. (Port App. 001 at 16.)

[7] This finding on a mixed question of fact and law was not in the *Santa Fe Initial Decision*.

29. The 2003 Tariff Circular No. 6 imposed an access fee on commercial passenger vehicles operated by ground transportation companies.

> Note C: In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle	Decal and access charge
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Bus and Shuttle or Bus [*sic*]	$10.00 per Access/Trip
Limousines	$10.00 per decal per vehicle, annually
Taxi and Taxicab	$7.50 per decal per vehicle, annually

(Port App. 001 at 17.)

30. The Port did not initiate collection of the access fees imposed by the tariff until September 1, 2004, when the Board of Trustees of Galveston Wharves instructed port staff to fully implement the tariff and begin invoicing port users for access fees effective January 1, 2005. (Port App. 050 at 1758; Port App. 075 at 2072; Comp. Resp. to Port FF 63.)

31. On or about May 20, 2005, the Port sent a notice to port users and included the first invoices for fees that users had incurred since January 1, 2005. (Port App. 050 at 1758; Port App. 075 at 2072.)

32. Although the Port sent invoices, EZ Cruise did not pay the Port for access fees charged from January 2005 to June 2006. (Port App. 103 at 2773.)

33. Although the Port sent invoices, Lighthouse did not pay the Port for access from January 2006, when it first accessed the port, to June 2006. (Port App. 103 at 2774.)

34. Although the Port sent invoices, Dolphin did not pay the Port for access from July 2005, when it first accessed the port, to June 2006. (Port App. 103 at 2775.)

35. Complainants and the Port entered into negotiations to resolve the access fees owed by Complainants. (Comp. Resp. to Port Prop. FF 72-73; Port App. 075 at 2072.)

36. On October 15, 2005, EZ Cruise wrote a letter to the Port contending that the $10.00 fee for each trip was “too high and would greatly affect our ability to provide a quality

service to the thousands of customers who come to Galveston each year to experience a cruise . . . ." (Port App. 053 at 1773.)

37. EZ Cruise proposed that the Port adjust EZ Cruise's current fees "to a flat rate of $1,000.00 per month for all shuttles used by EZ Cruise Parking, beginning January 2005. The flat fee is much easier for a start-up company, such as ours to budget and reflect expenses for reports at our monthly shareholder meetings" and would permit them unlimited access. (Port App. 053 at 1773; Port App. 075 at 2072.)

38. As part of the negotiations, on June 14, 2006,[8] EZ Cruise proposed a payment of $20,000.00 to satisfy all outstanding port access fees for EZ Cruise and Galveston Limousine Service, not a party in this proceeding but an entity that at the request of EZ Cruise transported some EZ Cruise customers to and from the cruise terminal, for the period January 2005 to March 2006. (Port App. 054 at 1777.)

39. EZ Cruise rejected the Port's proposal of a flat $2,500.00 flat monthly fee for unlimited access and offered a proposed monthly fee of $1,200.00. (Port App. 054 at 1777.)

40. On July 20, 2006, the Port responded that the $20,000.00 figure the parties had discussed would apply only to outstanding access fees for EZ Cruise shuttles, not for access fees for Galveston Limousines providing transportation to EZ Cruise customers in 2005 and 2006. (Port App. 054 at 1774-1775.)

41. The Port rejected the EZ Cruise revised proposal of a flat monthly fee of $1,200.00 and stated that "the Port may be willing to consider a sliding scale that would permit a discount to those heavy users of the Port, like your business, after a certain number of trips during a month and a possible maximum cap on the monthly charge." (Port App. 054 at 1774-1775.)

42. Complainants and the Port agreed on a flat fee of $8.00 per month for each space in their parking lots that would allow unlimited access to the cruise terminal for Complainants' shuttles. (Port App. 075 at 2072.)

43. It was the Port's intention "to have the monthly charges outlined above, $8 per month per parking spaces in the parking operators lots, incorporated into the Port's tariff at the August 28th, 2006 regular Board meeting . . . ." (Port App. 056 at 1787.)

44. On August 28, 2006, as agreed by Complainants and the Port, the Port amended Tariff Circular No. 6 to revise the access fee to be paid by off-site parking users:

> Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu

[8] The letter is dated June 14, 2005. It refers to a meeting May 25, 2006, and proposes a settlement for fees due for the period January 2005 to March 2006. Therefore, I conclude that the 2005 date is a typographical error and that EZ Cruise wrote the letter in 2006.

> of the $10.00 Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The $8.00 Access Fee will be effective on and after August 15, 2006.

(Port App. 002 at 90-91.)

45. The August 28, 2006, amendment did not change the access fees imposed on commercial passenger vehicles by Note C. (Port App. 002 at 90; Port App. 075 at 2073.)

46. The Port agreed to apply the $8.00 per space per month rate retroactively to January 2005 to recalculate access fees that Complainants had incurred, but not paid. (Comp. Resp. to Port Prop. FF 81; Port App. 075 at 2072.)

47. The Port had invoiced EZ Cruise for 8,793 trips at $10.00 per trip, a total of $87,930.00, for access to the port between January 2005 and June 2006. As a result of the application of the $8.00 per space per month access provision, EZ Cruise paid $35,680.00 for access between January 2005 and June 2006 (equivalent to $4.06 per trip), saving $52,250.00. (Port App. 103 at 2773; Comp. Resp. to Port Prop. FF 84.)[9]

48. The Port had invoiced Lighthouse for 1,423 trips at $10.00 per trip, a total of $14,230.00, for access to the port between January 2006 and June 2006. As a result of the application of the $8.00 per space per month access provision, Lighthouse paid $9,120.00 for access between January 2006 and June 2006 (equivalent to $6.41 per trip), saving $5,110.00. (Port App. 103 at 2774; Comp. Resp. to Port Prop. FF 85.)

49. The Port had invoiced Dolphin for 2,530 trips at $10.00 per trip, a total of $25,430.00, for access to the port between July 2005 and June 2006. As a result of the application of the $8.00 per space per month access provision, Dolphin paid $11,520.00 for access between July 2005 and June 2006 (equivalent to $4.55 per trip), saving $13,910.00. (Port App. 103 at 2775; Comp. Resp. to Port Prop. FF 86.)

50. On December 17, 2007, the Port amended Note C of Tariff Circular No. 6 to impose new decal and access charges.

> Note C: In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

[9] The Port proposed findings of fact regarding the amounts saved by EZ Cruise, Lighthouse, and Dolphin found in this and the next two findings of fact. Complainants denied the proposed findings on other grounds, but did not dispute the dollar amounts.

Type of Vehicle and Vehicle Seating Capacity	Decal and Access Charge
Bus, Commercial Passenger Vehicle, Courtesy Vehicle with Seating Capacity of greater than fifteen (15) persons (**Except as noted in Notes D & E, below)	$10.00 per decal per vehicle, annually and $50.00 per Access/Trip
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with Seating Capacity of fifteen (15) persons (**Except as noted in Notes D & E, below)	$10.00 per decal per vehicle annually and $20.00 per Access/Trip
Commercial Passenger Vehicle, Courtesy Vehicle or Shuttle with Seating Capacity of up to fourteen (14) persons (**Except as noted in Notes D & E, below)	$10.00 per decal per vehicle, annually and $10.00 per Access/Trip
Limousine or Taxi and Taxicabs with Seating Capacity of nine (9) to fourteen (14) persons (**Except as noted in Notes D & E, below)	$10.00 per decal per vehicle, annually and $10.00 per Access/Trip
Limousine with Seating Capacity of not more than eight (8) persons	$10.00 per decal per vehicle, annually
Taxi and Taxicabs with Seating Capacity of not more than eight (8) persons	$7.50 per decal per vehicle, annually

(Port App. 003 at 167.)

51. The December 17, 2007, amendment did not change the $8.00 flat rate access fee imposed on off-port parking users by Note D. (Port App. 003 at 167.)

52. The December 17, 2007, amendment added Note E imposing a parking fee of $50.00 on charter bus owners and operators for each use of any bus parking space locate in the

cruise terminal complex in lieu of the payment of initial application and renewal fees for port use permits, decal fees and/or the access/trip fee. (Port App. 003 at 168.)

53. [Intentionally blank]

54. When the Port implemented the $8.00 per space per month access fee, it stopped counting the trips of Complainants' shuttles because the number of trips was not needed to calculate the access fee. (Port Resp. to Comp. Prop. FF 108; Comp. App. 016 at 312.)

55. The Port adjusted the monthly access fees when Complainants reduced or increased the number of parking spaces used for cruise passenger parking. (Port App. 075 at 2073; Comp. Br. at 28-35.)

56. The Port charged EZ Cruise $2,560.00 per month for 320 parking spaces from 2006 through April 2011, $1,760.00 per month for 220 parking spaces from May 2011 through October 2011, $2,560.00 per month for 320 parking spaces from November 2011through October 2012, and $3,040.00 for 380 parking spaces from November 2012 through June 2014. The number of parking spaces remained at 380 until June 2014, with an additional fee of $400.00 for 50 parking spaces at Railroad Museum parking for some months. (Comp. App. 009 at 58-117; Comp. App. 009 at 118-140;[10] Port Resp. to Comp. Prop. FF 3.)

57. The Port charged Dolphin $960.00 per month for 120 parking spaces from 2006 through December 2008, $400.00 per month for fifty parking spaces from September 2009 through December 2013, and $768.00 per month for ninety-six parking spaces from January through June 2014. (Comp. App. 011 at 220-277.)[11]

58. The Port charged Lighthouse $1,520.00 per month for 190 parking spaces from 2006 through December 2013, $1,656.00 per month for 207 parking spaces from January through April 2014, and $1,760.00 per month for 220 parking spaces in May and June 2014. (Comp. App. 010 at 141-219.)

59. Between August 1, 2006, and May 2014, Complainants did not formally complain to the Port regarding the practice of calculating their access fees using the $8.00 per parking space per month formula. (Port App. 075 at 2073; Comp. Resp. to Port Prop. FF 103.)

60. On November 21, 2013, the Board considered a proposal to amend Tariff Circular No. 6 to impose new decal and access charges. (Port App. 004 at 219-303; Port App. 093 at 2702-2708.)

61. The Board voted to defer consideration of the proposed amendments. (Port App. 093 at 2708.)

[10] There are two folders named "009. . ." in Complainants' electronic appendix.

[11] Dolphin did not operate as an off-port parking user from January through August 2009.

62. In 2013, Port employees erroneously posted the proposal to amend Tariff Circular No. 6 that the Board deferred on November 21, 2013. (Port App. 075 at 2073-2074; Port App. 077 at 2085.)

63. The Port continued to calculate access fees for Complainants using the $8.00 flat rate. (Comp. App. 009 at 134-140 (EZ Cruise charged $8.00 per parking place per month for December 2013-June 2014); Comp. App. 010 at 213-219 (Lighthouse charged $8.00 per parking place per month for December 2013-June 2014); Comp. App. 011 at 264-272 (Dolphin charged $8.00 per parking place per month for December 2013-September 2014).)

64. On May 19, 2014, the Port amended Tariff Circular No. 6 and made the amendment effective July 1, 2014. (Port App. 005 at 322.)

65. The May 19, 2014, amendment changed the decal and access fees for ground transportation companies:

> Note C: In addition to the annual Port Use Permit fee, ground transportation companies . . . accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27 (Cruise Ship Terminal Complex), shall be subject to the following decal or access fees for each vehicle that shall have such access:

Type of Vehicle and Vehicle Seating Capacity	Decal and Access Charge
Charter Bus Owners and Operators	$60.00 Parking Fee
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with Seating Capacity of fifteen (15) persons or more	$25.00 per decal per vehicle annually and $30.00 per Access/Trip
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with Seating Capacity of less than fifteen (15) persons	$15.00 per decal per vehicle, annually and $20.00 per Access/Trip
Taxicabs with City of Galveston permit	$7.50 per decal per vehicle, annually

(Port App. 005 at 322.)

66. The May 19, 2014, amendment increased the flat rate access fee for off-port parking users such as Complainants:

> Note D: Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $28.88 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The Access Fee will be effective on and after July 1, 2014.
>
> (Port App. 005 at 322.)

67. The May 19, 2014, amendment amended Note E, effective July 1, 2014, increasing the parking fee for charter bus owners and operators. (Port App. 005 at 323.)

68. On June 16, 2014, Complainants filed their Complaint with the Commission alleging that the Port violated the Shipping Act.

69. On June 26, 2014, Complainants filed a complaint in the United States District Court for the Southern District of Texas seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and a preliminary injunction pursuant to the Shipping Act that would bar the Port from enforcing the amended tariff. *See* 46 U.S.C. § 41306(a) ("After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part."). *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. June 26, 2014) (complaint filed).

70. On August 5, 2014, the district court entered an agreed order permitting Complainants in this proceeding to deposit the new monthly access fee in excess of $8.00 per parking space per month into the court registry. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order).

71. On September 22, 2014, the Port amended Tariff Circular No. 6. (Port App. 006 at 387-400.)

72. The September 22, 2014, amendment did not change the fees for charter bus owners and operators, commercial passenger vehicles, courtesy vehicles, shuttles, limousines, and taxicabs imposed by Note C and Note E of the May 22, 2014, tariff. (First Amended Verified Complaint ¶¶ IV.HH-NN; Port App. 006 at 391 (Note C) and 393 (Note E).)

73. The September 22, 2014, amendment to Tariff Circular No. 6 rescinded the May 19, 2014, Note D increase of the flat rate fee to $28.88 effective July 1, 2014, and returned to the flat rate of $8.00 per parking space per month through September 2014; rescinded effective October 1, 2014, the provision that determined the access fee for off-port parking users as a multiple of the number of parking spaces per month; and imposed on

Complainants the access fee per trip identical to that imposed for other users effective October 1, 2014.

> Note. D: Prior to October 1, 2014, those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. In addition, Off-Port Parking Users shall pay a decal fee of $15.00 per decal per vehicle annually. This Access Fee and decal fee will be effective until October 1, 2014.
>
> Beginning on October 1, 2014, all Off-Port Parking Users, as defined herein, shall be governed by the Provision of Note C above.

(Port App. 006 at 391-393.)

74. Complainants were charged access fees at the rate of $8.00 per space per month for the period prior to October 1, 2014. (Port App. 075 at 2075.)

75. On October 1, 2014, the $8.00 per space per month access rate was eliminated and access fees for commercial passenger vehicles except taxicabs are assessed on a per trip rate. (Port App. 075 at 2075.)

76. Beginning October 1, 2014, the Port calculated Complainants' access fees at the $20.00 per trip rate. (Port App. 063 at 1923-1924 (EZ Cruise); Comp. App. 011 at 276-277 (Dolphin); Port Supp. App. filed Nov. 13, 2015 at 2787 and Port App. 064 at 1925 (Lighthouse).)

77. The Port charged EZ Cruise for 542 trips at $20.00 per trip in October 2014 and 392 trips at $20.00 per trip in November 2014. (Port App. 063 at 1923-1924.)

78. The Port charged Dolphin for 385 trips at $20.00 per trip in October 2014 and for 410 trips at $20.00 per trip in November 2014. (Comp. App. 011 at 276-277.)

79. The Port charged Lighthouse for 319 trips at $20.00 per trip in October 2014 and for 341 trips at $20.00 per trip in November 2014. (Port Supp. App. filed Nov. 13, 2015 at 2787; Port App. 064 at 1925.)

80. Between August 28, 2006, and October 1, 2014, Note D of Tariff Circular No. 6 did not provide a mechanism to determine "billable parking spaces" for hotels providing parking to cruise passengers with transportation to and from the cruise terminal. (Port App. 002 at 90-91; Port App. 003 at 167-168; Port App. 005 at 322; Port App. 006 at 391-393.)

81. Throughout the period from 2005 through July 31, 2014, the Port charged hotels the $10.00 per trip access fee for hotel shuttles accessing the cruise terminal carrying embarking or debarking cruise passengers who parked their cars at the hotels during their cruises, then increased the per trip access fee to $20.00 as established by the May 19, 2014, amendment to Tariff Circular No. 6. (*See* Comp. App. 032 at 549-571 (Holiday Inn); Comp. App. 034 at 573-650 (Moody Gardens); Comp. App. 036 at 653-661 (Comfort Inn & Suites on the Beach); Comp. App. 038 at 663-743 (The San Luis); Comp. App. 046 at 771-800 (Commodore on the Beach); Comp. App. 047 at 801-832 (Country Inn & Suites); Comp. App. 048 at 833-854 (Courtyard Marriott); Comp. App. 049 at 855-894, 049 at 896-909 (Fertitta Hospitality); Comp. App. 050 at 922-932 (Galveston Beach); Comp. App. 051 at 933-980 (Hampton Inn); Comp. App. 052 at 981-1038 (Holiday Inn); Comp. App. 053 at 1039-1100 (Holiday Inn Sunspree Resort); Comp. App. 054 at 1101-1216 (Hotel Galvez); Comp. App. 055 at 1217-1227 (Inn at the Waterpark); Comp. App. 057 at 1239-1345 (La Quinta); Comp. App. 058 at 1346-1464 (Moody Gardens); Comp. App. 059 at 1465-1581 (The San Luis); Comp. App. 060 at 1582-1687 (Tremont House); Comp. App. 061 at 1688-1693 (The Woodlands).)[12]

82. Cruise passengers occupy a very small percentage of the parking spaces at hotels. (Resp. to Port Prop. FF 36 (between April 2013 and April 2014, fewer than 3% of lodgers at Hilton on Galveston Seawall were cruise passengers); Resp. to Port Prop. FF 37 (Complainants have no information to admit or deny estimate of general manager of Hotel Galvez that over his six years of experience, 5% of Galvez guests use parking and shuttle service).)

83. Between 2004 and 2013, the Port experienced the following levels of cruise traffic:

Year	Cruise Ship Calls	Cruise Passengers
2004	219	434,855
2005	233	532,241
2006	253	616,939
2007	207	523,303
2008	133	376,815
2009	139	394,640
2010	152	434,254
2011	152	459,448
2012	174	604,272
2013	179	604,994

(Port App. 100 at 2753.)

[12] The May 19, 2014, amendment states it became effective July 1, 2014. A review of the hotel invoices indicates that the Port continued to charge $10.00 per trip in July 2014 and the new rate in August. I note that some hotels have more than one group of invoices and that there appears to be at least some duplication of these exhibits. *Compare* Comp. App. 034 *with* Comp. App. 058 (Moody Gardens); Comp. App. 038 *with* Comp. App. 059 (San Luis).

84. Without a change to City of Galveston taxicab regulations, an access fee imposed on taxicabs by the Port of Galveston could not be passed on to passengers. (Port App. 075 at 2077-2078; Port App. 089 at 2627.)

VII. CLAIMS AGAINST THE GALVESTON PORT FACILITIES CORPORATION ARE DISMISSED.

Complainants bring this proceeding against two Respondents: the Board and GPFC. The Board manages the Galveston Wharves, a separate utility created by the City of Galveston. The Board established and periodically revises the port's tariff. The Board created GPFC to facilitate the financing, construction, and operation of the Galveston Island Cruise Terminals and is entitled to any income generated by GPFC that is not needed to pay GPFC's expenses or obligations. GPFC has never billed or collected access fees from Complainants. Lease agreements between the Wharves Board (as lessor) and GPFC (as lessee) deny GPFC the right to assess and collect fees published in the Tariff for "commodities moving over, or vessels berthing at the Leased Premises . . . ." ALJFF 4-8.

The Port contends that claims against GPFC should be dismissed.

> Complainants do not identify any specific acts by GPFC which form the basis of its Complaint. As discussed above, GPFC does not submit any charges or invoices to Complainants which they are required to pay. GPFC did not invoice or collect the Access Fees forming the basis of Complainants' claims. GPFC has no tariff. Thus, in terms of [*Ceres I*], Complainants were not subject to any "treatment" by GPFC – prejudicial or otherwise. Thus, their claims against GPFC should be dismissed.

(Port. Opp. Br. at 26.) Complainants do not respond to this argument in their reply brief.

Based on the facts stated above and Complainants' failure to respond to the Port's argument, I conclude that Complainants have not proved by a preponderance of the evidence that GPFC committed a violation or is liable to Complainants for a violation of the Shipping Act. Therefore, the claims against GPFC are dismissed with prejudice.

VIII. COMPLAINANTS HAVE NOT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE PORT VIOLATED SECTION 41106(2).

Complainants contend that by amending Tariff Circular No. 6 on August 28, 2006, to calculate access fees for Complainants at the $8.00 per parking place per month rate instead of the per trip rate and continuing to calculate access fees for hotels and other commercial passenger vehicle operators using the per trip rate, the Port gave an undue or unreasonable preference or advantage to the hotels and other operators and imposed an undue or unreasonable prejudice or disadvantage on Complainants in violation of section 41106(2).

> Until October 1, 2014, the Wharves Board historically has not charged Complainants per-trip Access Fees based upon their proportional volume of traffic in the Cruise Terminal like other Cruise Terminal users. Instead, the Wharves Board has charged Complainants "per-space per-month" based upon the "market

> share" of parking spaces each has in proportion to those contained in the Wharves Board's own parking lots.

(Comp. Br. at 4 (citations omitted).)[13]

> By charging Access Fees based on the total number of parking spaces maintained by Complainants, without regard to Complainants' actual access to the Cruise Terminal, rather than based on the same criteria for which the Access Fees were charged to other Cruise Terminal users who were similarly situated and/or in competitive relationships with Complainants, the Wharves Board violated the Shipping Act.

(Comp. Br. at 17.)

> This is a clear example of disparate treatment between Complainants and local hotels/motels which are similarly situated and/or in a competitive relationship with Complainants. From 2007 through 2014, Complainants should have been charged in the same manner as those hotels/motels; based on their actual access to the Cruise Terminal. Or, in the alternative, those hotels/motels should have been charged in the same manner as Complainants under the Tariff; per parking space.

(Comp. Br. at 18.) "Had the Wharves Board not assessed the Access Fees pursuant to the Tariff upon Complainants in violation of the Act, Complainants would not have been injured." (Comp. Br. at 26.)

Complainants also argue that "[b]y waiving the Access Fee for taxicabs, Complainants are forced to subsidize the benefits received by those taxicabs and the local hotels/motels that utilize the taxicabs for transportation of cruise passengers who park their vehicles in those hotels/motels parking lots." (Comp. Br. at 24.)

Complainants contend that they meet all four of the *Ceres I* elements. The Port has discretion to exercise business judgment when imposing access fees, however.

> It is only undue or unreasonable preferential or prejudicial treatment that violates the Shipping Act. *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993); *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 988 (FMC 1986). Moreover, ports need not apply the same rate to all customers and may consider many factors relevant to negotiating a lease. *Ceres I*, 27 S.R.R. at 1273, 1274; *Ceres Marine Terminals, Inc. v. Maryland Port Admin. (Ceres II)*, 29 S.R.R. 356, 369, 372 (FMC 2001) ("The Commission is not responsible for ensuring that everybody makes a good deal – just that the commercial environment is not hampered by unreasonable or unjustly discriminatory practices.").

[13] "Historically," for the period from January 2005 until August 28, 2006, when the Port agreed to Complainants' request to amend the tariff to establish the $8.00 flat rate, the Port charged Complainants the per trip access fee.

Maher v. PANYNJ, 33 S.R.R. at 841. The Commission may defer to a port's reasonable, discretionary business decisions. *See Maher v. PANYNJ*, 33 S.R.R. at 853 ("Moreover, the Commission may defer to a port's reasonable, discretionary business decisions regarding negotiations."), citing *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. at 899.

A. *Ceres I* Element One – Competitive Relationship.

Ceres I Element 1 requires a complainant to show that "the two parties are similarly situated or in a competitive relationship." *Ceres I*, 27 S.R.R. at 1270. The Commission concluded that Complainants are not required to prove *Ceres I* Element 1 and vacated the Initial Decision finding that Complainants failed to prove this element. *Santa Fe Commission Affirmance* at 16-18. Therefore, this element is not addressed in this Initial Decision on Remand.

B. *Ceres I* Element Two – Different Treatment.[14]

Ceres I Element 2 requires a complainant to show that "the parties were accorded different treatment." *Ceres I*, 27 S.R.R. at 1270. Complainants have proved by a preponderance of the evidence that during the relevant period, they were charged a monthly fee calculated by multiplying the number of parking places in their lots by $8.00. ALJFF 46-49, 53, 56-58, 63, 74. During the same period, the tariff imposed a charge for each access by commercial passenger vehicles operated by hotels, limousines, and buses, and did not impose an access charge on taxicabs and limousines. ALJFF 29, 50, 65, 81. Therefore, Complainants have proved *Ceres I* Element Two, that the parties were accorded different treatment.

C. *Ceres I* Element Three – Transportation Factors.

Ceres I Element 3 requires a complainant to show that "the unequal treatment is not justified by differences in transportation factors." *Ceres I*, 27 S.R.R. at 1270. As noted above, the Port has the burden of justifying the difference in treatment based on differences in transportation factors. "[I]t is the burden of production [of evidence that the Port did not act unreasonably] that shifts, not the burden of persuasion, meaning that although the Port may in some circumstances bear the burden of adducing evidence justifying its conduct, [Complainant] bears the ultimate burden of proving that the Port acted unreasonably." *Maher v. PANYNJ*, 33 S.R.R. at 840-841 (citations omitted). The District of Columbia Circuit reviewed the Commission's decision in *Maher v. PANYNJ* and did not address the Commission's holding that the burden of persuasion is on the complainant in a case alleging a violation of section 41106(2). *Maher Terminals, LLC v. Fed. Mar. Comm'n*, 816 F.3d 888 (D.C. Cir. 2016). The court did review the Commission's application of *Ceres I* Element 3, however. *Id.*, 816 F.3d at 892. "On March 22, 2016 [after the Initial Decision in this proceeding], the court issued an opinion granting Maher's petition [for review] and remanding the case to the Commission for further explanation of its decision and policy [regarding transportation factors]." *Maher Terminals, Inc.*

[14] In its Remand Order, the Commission stated "the ALJ found that Complainants failed to meet the first two elements required by the Commission in § 41106(2) cases," but also stated "the ALJ determined that the Complainants established that they were treated differently than other ground transportation companies." *Commission Remand Order* at 3. The Initial Decision found Complainants did prove *Ceres I* Element 2 – that Complainants and the hotels, taxicabs, limousines, and buses were accorded different treatment. *Santa Fe Initial Decision* at 32.

v. The Port Authority of New York and New Jersey, FMC No. 08-03, Order at 2 (FMC Oct. 26, 2016) (Order Granting Joint Motion for Approval of Settlement Agreement, Dismissal with Prejudice, and Stay).

The parties settled *Maher v. PANYNJ* before the Commission issued a further explanation of its decision or its policy regarding transportation factors. In the October 26, 2016, order approving the *Maher v. PANYNJ* settlement, the Commission stated:

> In light of the settlement, the Commission need not address at this time the D.C. Circuit's comments on "transportation factors" and the appropriate analysis of what constitutes an undue or unreasonable preference or prejudice under 46 U.S.C. § 41106(2). *Maher Terminals*, 816 F.3d at 892. By the same token, the Commission will defer the related questions raised in its June 21, 2016 Order to File Supplemental Briefs.
>
> Nevertheless, to reduce potential confusion, the Commission first notes that it will continue to consider all the relevant factors in its unreasonable preference analysis, including:
>
> (a) the "transportation characteristics of a particular commodity," such as size, weight, or need for special handling, *see Credit Practices of Sea-Land Serv. Inc.*, 25 S.R.R. 1308, 1315 (FMC 1990);
>
> (b) competition from other carriers, the fair interest of carriers, relative quantities of traffic moved, relative costs of services and profit, the convenience of the public, "and the situation and circumstances of the respective customers, as competitive or otherwise," *see N. Atl. Mediterranean Freight Conference – Rates of Household Goods*, 9 S.R.R. 775, 784 (FMC 1967) and *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, 24 S.R.R. 411, 455 (FMC 1987);
>
> (c) in the case of marine terminal leases – market conditions, available locations and facilities, and the nature and character of potential lessees, *see Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251, 1273-74 (FMC 1997); *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993); and
>
> (d) the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic wellbeing, *see Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 990, 994 (FMC 1986).
>
> Second, the Commission's analysis will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions. *See Seacon Terminals*, 26 S.R.R. at 899; *Petchem*, 23 S.R.R. at 993 (noting that the Commission's conclusion "is partially based on appropriate deference to the Port Authority, an entity familiar with business circumstances at Port Canaveral and entitled to a presumption that it is concerned with public and not private interest"). And, third, the Commission will not assume that

> competition between ports is a problem in need of a regulatory fix, as among the purposes of the Shipping Act is promoting competitive and efficient ocean transportation and placing a greater reliance on the marketplace.[15]

Maher v. PANYNJ, Order Approving Settlement at 3-4.

The Commission did not discuss the circuit court's *Maher v. PANYNJ* comments or its own comments in the order approving the *Maher v. PANYNJ* settlement when it affirmed the Initial Decision in this proceeding on January 13, 2017. When it reviewed the Commission's decision in this proceeding, the District of Columbia Circuit remanded for the Commission to consider whether "the differential treatment of Petitioners' shuttle buses is justified by legitimate transportation factors." *Santa Fe Disc. Cruise Parking, Inc. v. Fed. Mar. Comm'n*, 889 F.3d at 797. The Commission did not discuss the court's *Maher v. PANYNJ* comments or the factors that the Commission articulated when it approved the *Maher v. PANYNJ* settlement when it remanded this proceeding to the undersigned on August 9, 2018.

This decision on remand addresses the second and fourth factors related to *Ceres I* Element 3 set forth in the Commission's order approving the *Maher v. PANYNJ* settlement. The first factor articulated by the Commission – "the 'transportation characteristics of a particular commodity,' such as size, weight, or need for special handling" – seems to be the same for all operators of commercial passenger vehicles. Complainants and the hotels and common carriers that Complainants contend received more favorable treatment transport the same "commodity": cruise passengers and their luggage. The third factor – "in the case of marine terminal leases – market conditions, available locations and facilities, and the nature and character of potential lessees" – is not applicable because this proceeding does not involve a marine terminal lease.

1. Complainants have not proved by a preponderance of the evidence that the Port gave an undue or unreasonable preference or advantage to hotels that provide parking to cruise passengers or imposed an undue or unreasonable prejudice or disadvantage on Complainants by charging Complainants a monthly flat rate and charging hotels for each trip.

Complainants contend:

> Significantly, the Chairman of the Wharves Board . . . admitted to preferential treatment of local hotels/motels when he informed Complainants' representatives that "[hotels/motels] help the [Port of Galveston] attract passengers [and he does] not want to charge them like parking lots." In-line with the Chairman's preferences, and despite local hotels/motels meeting the Wharves Board's definition of "Off-Port Parking Users" and the express applicability of the 2006 and 2014 Tariff to them, local hotels/motels have not been charged Access Fees as required of "Off-Port Parking Users."

(Comp. Br. at 17 (citations to record omitted).)

[15] This case does not involve competition between ports.

> Complainants' vehicles access the Cruise Terminal via the same route, in the same manner, and for the same purpose as the other users of the Cruise Terminal identified herein. There is no qualitative difference in access or use of the Cruise Terminal between Complainants and those other users. All herein identified users of the Cruise Terminal, Complainants included, transport only cruise passengers and their luggage from and to the Cruise Terminal, and do so in vehicles meeting the requirements of the Tariff. Accordingly, transportation factors do not exist that justify Respondents' disparate treatment of Complainants.

(Comp. Br. at 25.)

The hotels and Complainants conduct entirely different operations. Hotels compete for cruise passengers who want or need lodging in Galveston prior to or after their cruises and offer free parking and shuttle service as an inducement to their guests. There is no evidence that providing parking to cruise passengers is anything but a small part of the hotels' business. ALJFF 82. Complainants compete with each other for cruise passengers who want to leave their vehicles in secure parking while they cruise. Almost all, if not all, of Complainant's parking customers are going on cruises. ALJFF 10.

Considering "the situation and circumstances of the respective customers, as competitive or otherwise," this analysis must start with the observation that when the Port began to charge commercial vehicles for access to the cruise terminal, it calculated access fees charged to Complainants in exactly the same manner that the Port calculated fees for hotels that offer parking to cruise passengers and for other shuttle operators accessing the port – $10.00 per trip. In 2005, the Port sent the first invoices for access to the port. In response, Complainant EZ Cruise requested that the fees be reduced because they were "too high and would greatly affect our ability to provide a quality service to the thousands of customers who come to Galveston each year to experience a cruise." ALJFF 36. After a year of negotiations, the Port agreed to charge Complainants a flat monthly rate for unlimited access, ALJFF 37, thereby greatly reducing the access fees paid by Complainants for the first 18 months that the Port collected access charges and for the future. ALJFF 47-49.

The unlimited access provision in the $8.00 flat rate provided a significant transportation advantage to Complainants. Under the $10.00 per trip rate, Complainants were charged the same amount for each shuttle trip whether the shuttle carried one passenger or fifteen. The Port would charge a Complainant access fees totaling $10.00 for one port entry by a full shuttle, but $40.00 for four trips by shuttles each one-fourth full. Therefore, when charged on a per trip rate, it was in Complainants' economic interest to send as few shuttles as possible, meaning that cruise passenger likely were required to wait at the parking lot until the shuttle was full or nearly full. With unlimited access, a Complainant's access fees would be the same whether it sent one full shuttle, four shuttles each one-quarter full, or fifteen shuttles each carrying one cruise passenger. Whether a Complainant's shuttles made one hundred trips or one thousand trips in a month, the Complainant would pay the same access fee.

Support for the benefit to Complainants of unlimited access is found in the deposition testimony of Jason Hayes, the son of EZ Cruise owner Cynthia Hayes Tompkins and himself an eight percent owner and EZ Cruise employee. Jason Hayes testified that the flat rate permitted

EZ Cruise to "[run] the buses in as – as freely as the customers wanted to." (Port App. 081 at 2450 (deposition of Jason Hayes).) "[I]f I paid $10 per trip, I would have never ran my buses like that." (Port App. 081 at 2451.) When the Port and EZ Cruise settled the past-due bill for the period January 2005 to June 2006, EZ Cruise paid $4.06 per trip. ALJFF 47. Hotels, on the other hand, were charged an access fee each time their vehicles entered the port. The reduced delay in transporting cruise passengers between Complainants' parking lots and the cruise terminal resulting from the $8.00 per parking place per month access fee is a transportation factor within the meaning of the Shipping Act.

EZ Cruise proposed the flat rate because a "flat fee is much easier for a start-up company, such as [EZ Cruise], to budget." ALJFF 37. Complainants do not identify any contemporary evidence to support a finding that during the negotiations between Complainants and the Port to resolve the access fees invoiced for the period January 2005 through June 2006 and development of the $8.00 flat rate, either Complainants or the Port contemplated applying the flat rate to hotels offering parking for cruise passengers. Complainants do not identify any evidence supporting a finding that the hotels they argue should have been assessed access fees calculated at the $8.00 flat rate – Holiday Inn, Moody Gardens, Comfort Inn & Suites on the Beach, and the other hotels identified in ALJFF 81 – were start-up companies such as EZ Cruise for which the flat rate would be much easier to budget. Complainants do not identify any evidence supporting a finding that when the Port amended the tariff, it intended to apply the flat rate to hotels in lieu of the per trip rate already applicable to hotel shuttles, and as the Commission held, hotels are not off-port parking users. ALJFF 26.

The Port separated statistics for Port access by shuttles from hotels from access by shuttles from parking lot operators providing parking to cruise passengers. (*See* Comp. App. 029 at 532 (Port Tariff Charges for 2006 separating hotels from common carriers and parking lot operators).) The $8.00 flat rate to be paid by off-port parking users in lieu of the $10.00 per trip rate was based on the number of "billable parking spaces" maintained by the off-port parking user. For parking lot operators such as Complainants, virtually all of whose customers are cruise passengers, ALJFF 10, the number of billable parking spaces is easily calculated: How many parking spaces that are used for cruise passengers does the parking lot operator have? There is no mechanism established by the tariff to determine billable parking spaces for hotel operators that provide parking and transportation for the small percentage of their customers who leave their vehicles in hotel lots while they cruise, but occupy only a small portion of the hotel's parking spaces. ALJFF 82.

Complainants bear the ultimate burden of proving that the Port acted unreasonably. A port may take into account "the situation and circumstances of the respective customers, as competitive or otherwise," (*Maher v. PANYNJ* Factor (b)), when setting its tariff. I conclude that:

> (1) The reduced $8.00 flat rate available to off-port parking users reduced delay in transporting cruise passengers between Complainants' parking lots and the cruise terminal;
>
> (2) hotels do not meet the definition of off-port parking users;

(3) the Port may not include parking spaces that are not used in connection with the transportation of cruise ship passengers when charging hotels for access to the port;

(4) the $8.00 flat rate does not provide a mechanism to determine the number of billable parking spaces for these hotels;

(5) most hotel parking places are used for hotel customers who are not cruise passengers and developing a mechanism to determine access fees for determining the billable parking spaces of hotels that use only a small percentage of their parking spaces for cruise passenger is virtually impossible; and

(6) there is no contemporaneous evidence that either the Port or Complainants intended to require these hotels to use the $8.00 flat rate in lieu of the $10.00 per trip access fee when the flat rate was adopted.

Given the deference that the Commission shows to public port authorities, *Maher v. PANYNJ*, I conclude that the Port could take these transportation factors into account without violating section 41106(2). I further conclude that Complainants have not proved by a preponderance of the evidence that the Port gave an undue or unreasonable preference or advantage to hotels that provide parking to cruise passengers or imposed an undue or unreasonable prejudice or disadvantage on Complainants by using the per trip rate instead of the flat rate to calculate access fees for the hotels.[16]

2. Complainants have not proved by a preponderance of the evidence that the Port gave an undue or unreasonable preference or advantage to taxicabs or imposed an undue or unreasonable prejudice or disadvantage on Complainants by charging Complainants a monthly access fee when it did not charge taxicabs.

As noted above, ground common carriers do not operate parking facilities for cruise ship passengers; therefore, they are not off-port parking users. ALJFF 26A. It would not only be difficult – it would be impossible to calculate their monthly port access fees "equal to the amount of $8.00 per parking space located in the [common carrier's] parking facility" because taxicabs and limousines do not have parking facilities ALJFF 44. Therefore, it was not unreasonable for the Port to charge common carriers on a per trip rate.

Complainants argue that the Port imposed an undue or unreasonable prejudice or disadvantage against Complainants by not charging any access fees for limousines and taxicabs.

[16] When the Port settled its claims against Complainants for unpaid access fees for the period through June 2006 by applying the $8.00 flat rate to those accumulated fees, Complainants paid far less than the Port originally charged at the per trip rate. EZ Cruise paid $4.06 per trip, Lighthouse paid $6.41 per trip, and Dolphin paid $4.55 per trip during a period when the Port charged the hotels $10.00 per trip. ALJFF 47-49. This evidence could support a finding that the Port gave a preference or advantage to Complainants and imposed a prejudice or disadvantage on the hotels for the period through June 2006. As set forth in Part IX.B below, the evidence suggests that the Port continued to give this preference or advantage to Complainants and to impose this prejudice or disadvantage against the hotels from 2007 through September 2014. The hotels have not filed a complaint with the Commission making this claim and the statute of limitations has long since run on this claim. Therefore, this question need not be answered as part of this initial decision on remand.

(Comp. Br. at 22-23, 24.) The 2007 Tariff Circular No. 6 did not impose an access fee on either taxicabs or limousines with a seating capacity of not more than eight persons. ALJFF 50. The Port argues that differences in operations and transportation factors justify the exemption of taxicabs. (Port Br. at 36-37.)

The Port presented evidence that getting sufficient taxi service has been a problem at the cruise terminal since at least February 27, 2006. (Port App. 068 at 1943-1945.) The Port Director has studied the issue of taxicabs servicing the cruise terminal.

> 36. The logistics of getting passengers safely and efficiently into and out of the Cruise Terminal is a constant worry for me and my staff. In order to keep the larger cruise ships we have to have to move passengers in and out of the Cruise Terminal safely and efficiently.
>
> 37. For example, every Sunday at the Cruise Terminal we have two Cruise Ships demanding the attention of transportation providers, the Royal Carribean Navigator of the Seas and the Carnival Magic.
>
> 38. The Navigator of the Seas has a total capacity of 5,020, guest and crew members, and the Carnival Magic has a total capacity of 5,057, guest and crew member.
>
> 39. Both of these ships arrive on Sunday morning around 7:00 AM, and begin debarking passengers around 8:00 AM. On those days, the period from around 10:30 AM to 1:30 PM is our busiest time period as passengers are departing, passengers are arriving, crew members from both ships are taking advantage of a few hours off time, and local Galveston residents are going about routine business.
>
> 40. Both ships disembark over 8,000 passengers on a combined basis, take care of reloading supplies and cleaning, check-in a combined 8,000+ arriving passengers, and depart from the docks around 4:30 PM on the same day.
>
> 41. Some passengers use the Complainant's lots, and some use the Port of Galveston's lots. Others come by way of shuttles from hotels, limousines and busses from off the island.
>
> 42. Some cruise passengers get dropped off by friends and family at no charge.
>
> 43. Some passengers walk to the Cruise Terminal with their language. This requires them to cross Harborside Drive where all vehicular cruise passenger traffic is attempting to enter the Cruise Terminal traffic pattern.
>
> 44. Passengers are departing and arriving at the same time, and there is considerable traffic congestion at the Cruise Terminal. In order to move the passengers effectively we have to rely on taxicab services. Without them, passengers who did not pre-arrange transportation would have to

cross Harborside, disrupting traffic, to then try to find transportation in town. This would cause even further delays.

45. From my observations and working with my staff on traffic issues, it has been difficult securing a sufficient number of taxicabs to provide transportation for cruise passengers. I have personally observed instances in which returning cruise passengers have had to wait well over an hour for a taxicab in order to leave. Thus, there is a very limited supply of taxicabs servicing the Cruise terminal. I and my staff have concluded that requiring taxicab companies to also pay Access Fees, or to collect and then remit Access Fees from passengers, would be an additional disincentive to taxicabs servicing the Cruise Terminal and further reduce and already inadequate supply of taxicabs. This would further impede our ability to efficiently move passengers into and out of the Cruise Terminal.

46. Additionally, the Wharves cannot unilaterally choose to impose Access Fees on taxicabs. The City of Galveston sets taxicab rates and charges. The City Council of the City of Galveston would have to amend its current ordinances governing taxicab rates and charges in order to require taxicabs to pay Access Fees.

47. In my meetings over the years with local taxicab companies, their representatives have told me that attempting to charge an access fee would result in a significant reduction in taxicabs serving cruise passengers. I and my staff already have trouble encouraging enough taxicabs on cruise ship days to come to the Terminal to pick up passengers. We absolutely need these taxicabs to move the passengers. A reduction in the supply of available taxicabs would result in increased congestion and hinder traffic flow at the Cruise Terminal.

48. I believe these transportation factors justify not asking the City Council of the City of Galveston to alter its current ordinance to require taxicabs to pay Cruise Terminal Access Fees.

(Port App. 075 at 2077-2078.) The owner of Tropical Taxi, a Galveston taxi service, confirms the impact that an access fee for taxicabs would have on taxi service to the Port.

> The City of Galveston sets and regulates the fares and fees Tropical Taxi can charge its customers. Texas law mandates that taxi vehicles cannot hold more than seven passengers, eight people total with the driver. The Port needs taxis to provide sufficient transportation to cruise terminal customers. However, if my company was charged an access fee, we would not be able to pass that fee onto our customers. Therefore, we would not economically be able to provide transportation to cruise terminal customers as we would lose money rather than make a profit.

(Port App. 089 at 2627.)

Complainants bear the ultimate burden of persuasion that the Port acted unreasonably. A port may take into account "the need to assure adequate and consistent service to a port's carriers" (*Maher v. PANYNJ* Factor (d)) when setting its tariff. The Port has a strong interest in ensuring expeditious transportation service to as many as 16,000 cruise passengers in a day traveling on the cruise ships. The Port determined that it was necessary not to charge taxicabs for access to the port to provide that service.

Complainants' shuttles are limited to carrying cruise ship passengers who parked in Complainants' parking lots to and from the parking lots. Ground common carriers such as taxicabs could carry any cruise ship passenger to any destination or to any destination off the port. I find the Port's evidence about the effect of charging taxicabs for access to be credible. Given the deference that the Commission shows to public port authorities, *Maher v. PANYNJ*, the Port may take transportation factors into account without violating section 41106(2). I conclude that Complainants have not met their burden of proving by a preponderance of the evidence that the Port gave an undue or unreasonable preference or advantage to taxicabs or imposed an undue or unreasonable prejudice or disadvantage on Complainants when it exempted taxicabs and limousines from paying Port access fees.

IX. *CERES I* ELEMENT FOUR – WHETHER THE DIFFERENT TREATMENT RESULTED IN PREJUDICE OR DISADVANTAGE AND ACTUAL INJURY TO COMPLAINANTS.

Ceres I Element 4 requires a complainant to show that "the resulting prejudice or disadvantage is the proximate cause of the injury." *Ceres I*, 27 S.R.R. at 1270. This decision concludes that charging Complainants using the $8.00 flat rate and charging the hotels using the per access rate is justified by transportation factors. The decision also concludes that not charging taxicabs and limousines for access is justified by transportation factors. Therefore, a decision could be rendered without addressing *Ceres I* Element 4. Nevertheless, *Ceres I* Element 4 will be addressed.

Ceres I Element 2 requires a complainant to prove that it was treated differently. Complainants have established that they were treated differently than the hotels and the taxicabs. When two persons are charged different amounts for access, one will be given a preference or advantage and one will receive a prejudice or disadvantage – one will pay more and one will pay less.

The Commission's use of the phrase "the resulting prejudice or disadvantage" in *Ceres I* Element 4 presupposes that a difference in treatment between a complainant and another port user always results in prejudice or disadvantage to the complainant. In this case, however, as set forth more fully below, the evidence supports a finding that when Complainants are compared to the hotels, Complainants *benefitted* from the use of the $8.00 per space per month flat rate and that it gave them a preference or advantage over the hotels. For the period from January 2005 through June 2006, the only months for which there is evidence of the number of times Complainants' shuttles accessed the Port, Complainants saved substantial amounts using the $8.00 flat rate instead of the per trip rate. ALJFF 47-49. The evidence in the record would not support a finding that Complainants were prejudiced or disadvantaged by the flat rate as

compared to the per access rate for the years between 2006 and 2014 when the Port amended the tariff to eliminate the $8.00 per parking place per month charge for off-port parking users.[17]

When compared to taxicabs, however, the evidence supports a finding that Complainants were charged more – Complainants were charged for access while taxicabs were not charged anything at all. Therefore, if the Commission were to find that Complainants proved by a preponderance of the evidence that the Port's decision not to charge taxicabs and limousines is not justified by differences in transportation factors, Complainants would be disadvantaged or prejudice and entitled to a reparation award for their actual injuries.

A. Commission Law on Proof of Damages.

A complainant alleging a 41106(2) violation must not only prove by a preponderance of the evidence that it was subjected to different treatment, but that it was injured as a result of the different treatment. *Ceres I*, 27 S.R.R. at 1270. In this proceeding, Complainants have the burden of proving that they paid more because the Port charged them using the $8.00 flat rate than they would have been paid that they been charged for each access.

Complainants have the burden of proving entitlement to reparations. 5 U.S.C. § 556(d).

> As the Federal Maritime Board explained long ago: "(a) damages[18] must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation."

James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. 8, 13 (FMC 2003).

> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

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[17] When it reviewed the Initial Decision, the Commission stated "even though Complainants showed that they were accorded different treatment, they failed to demonstrate that they suffered any injury as a result of the different treatment. Therefore, an inquiry into whether the different treatment was justified is unnecessary." *Santa Fe Commission Affirmance* at 27.

[18] Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992).

B. Complainants Compared to Hotels.

1. Complainants have not proved that they were prejudiced or disadvantaged and suffered actual injury from the Port's use of the $8.00 flat rate instead of the per trip rate to calculate their access fees.

a. The Shipping Act did not impose a burden on the Port to count visits by Complainants' shuttles.

Complainants contend that they are entitled to a reparation award because the Port overcharged them by using the $8.00 flat rate to calculate Complainants' access fees. Assuming that the Port violated section 41106(2) by charging Complainants at the $8.00 flat rate during a period when it charged hotels a per trip rate, Complainants would only suffer actual injury if they paid more in access fees for a particular month calculated at the $8.00 flat rate than they would have if they were charged at the rate of $10.00 per trip, and the measure of damages would be the difference between the two amounts. *Ceres II* at 374.

Calculating the actual injury, if any, suffered by a Complainant for a particular month should be a simple task: One would divide $10.00 into the amount the Port charged to a Complainant for the month at $8.00 per parking place. This process would determine the break-even point – that is, the number of trips by the Complainant's shuttles at which the $8.00 flat rate with unlimited access benefitted the off-port parking user by becoming cheaper than the per trip rate. If the number of trips exceeds the break-even point, the Complainant paid a lesser amount using the flat rate and did not suffer a disadvantage or prejudice and actual injury. If the shuttles made fewer trips than the break-even point, the Complainant would be injured by the product of $10.00 times the difference between the number of trips and the break-even point. Using EZ Cruise as an example, in June 2008, EZ Cruise was charged a flat rate access fee of $2,560.00 for 320 parking spaces. ALJFF 50. If the Port had charged EZ Cruise $10.00 per trip instead, the break-even point would be $2,560.00 ÷ $10.00 = 256 trips. Assuming the Port violated section 41106(2) by using the flat rate in June 2008, EZ Cruise would have been prejudiced or disadvantaged only if its shuttles had fewer than 256 trips to the cruise terminal in June 2008. The burden is on EZ Cruise to prove that it had fewer than 256 trips in June 2008, not on the Port to prove that it had more than 256 trips. 5 U.S.C. § 556(d); *Maher v. PANYNJ*, 33 S.R.R. at 840-841; *Ceres I*, 27 S.R.R. at 1270-1271.

The Port charged EZ Cruise $2,560.00 per month for 320 parking spaces from 2006 through April 2011 and the break-even point was 256 trips. The Port charged EZ Cruise $1,760.00 per month for 220 parking spaces from May 2011 through October 2011 and the break-even point was 176 trips. The Port charged EZ Cruise $2,560.00 per month for 320 parking spaces from November 2011through October 2012 and the break-even point was 256 trips. The Port charged EZ Cruise $3,040.00 for 380 Parking spaces from November 2012 through June 2014 and the break-even point was 304 trips. The Port charged an additional fee of $400.00 for 50 parking spaces (equals 40 trips) at Railroad Museum parking for some months. ALJFF 56.

The Port charged Dolphin $960.00 per month for 120 parking spaces from 2006 through December 2008 and the break-even point was ninety-six trips. Dolphin did not operate a cruise passenger parking business from January through August 2009. From September 2009 through December 2013, the Port charged Dolphin $400.00 per month for fifty parking spaces and the break-even point was forty trips. From January through June 2014 the Port charged Dolphin $768.00 per month for ninety-six space and the break-even point was seventy-seven trips (rounding up).

The Port charged Lighthouse $1,520.00 per month for 190 parking spaces from 2006 through December 2013 and the break-even point was 152 trips. From January through April 2014, the Port charged Lighthouse $1,656.00 per month for 207 parking spaces and the break-even point was 166 (rounding up) trips. In May and June 2014, the Port charged Lighthouse $1,760.00 per month for 220 parking spaces and the break-even point was 176 trips.

Complainants' problem is that Complainants did not count the number of trips by Complainants' shuttles after the Port adopted the $8.00 flat rate tariff. Therefore, they are not able to provide evidence of the number of trips by their shuttles.

Complainants contend that it is the Port's fault that Complainants are unable to present evidence of the number of trips.

> Complainants have shown the fact of injury with reasonable certainty, and the reparations Complainants seek are, as a result of the nature of Respondents' violations of the Shipping Act of 1984 and their concurrent and associated failure to document the number and passenger capacities of the vehicles accessing the Cruise Terminal, based on allowable "reasonable estimations." See *Bigelow v. RKO Radio Pictures, Inc*., 327 U.S. 251, 265 (1946) (Providing that "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."); *California Shipping Lines, Inc., v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1230 (October 19, 1990) (Providing that "in situations where a wrongdoer has by its own action prevented the precise computation of damages, the [Supreme] Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data.").

(Comp. Reply Br. at 26.) "Respondents here admit that they did not track Complainants' access to the Cruise Terminal after 2006 for the duration of this period for which Complainants seek reparations." (Comp. Br. at 27.)

Once the Port amended the tariff to permit the flat rate, the Port no longer needed to count the number of trips by Complainants' shuttles to determine Complainants' access fees. ALJFF 54. The Port had no reason to keep track of Complainants' shuttles' trips to the cruise terminal – one hundred trips or one thousand, the access fee would be the same.

Complainants' contention that by not counting the number of trips by Complainants' shuttles the Port "by its own action prevented the precise computation of damages" is without merit. It would have been a poor business practice for a Complainant not to keep track of its shuttle trips between January 2005 and June 2006 to make sure that the Port charged it for the correct number of trips. Once the Port implemented the flat rate, it is surprising that Complainants did *not* continue to keep track of the trips as it claims for any number of business reasons, including monitoring whether they were paying less with the $8.00 flat rate than they would with the $10.00 per trip tariff. Complainants' shuttles are used only for transporting their customers between their parking lots and the cruise terminal. Complainants' failure to count their own shuttle trips to the cruise terminal is not the Port's fault and the Port did nothing to prevent Complainants from counting their own shuttle trips. While there may be solid reasons that a port *should* keep track of the commercial vehicles driving onto port property, it was certainly not "misconduct" in violation of the Shipping Act for the Port not to count Complainants' shuttle trips when the number of trips was not necessary to calculate Complainants' access fees, and the Port's decision not to keep track did not interfere with Complainants' ability to count trips by their own shuttles.

Because Complainants did not count the number of trips their shuttles made to the cruise terminal between 2006 and 2014, Complainants attempt to prove damages based on an unsubstantiated claim and by engaging in a series of conjectures.

b. Complainants erroneously contend that the Port based the August 28, 2006, adoption of the $8.00 flat rate on a "study."

Complainants contend:

> The Access Fees charged from December 17, 2007 through June 30, 2014 were established based on average trip counts for individual Cruise Terminal users found in a study conducted by Respondents in 2006. (PFF 17 and 53, Depo. M. Mierzwa at 68:21 - 69:18, 143:25 - 145:5; Port Tariff Charges for the Year 2006 (Access Fee Study).)

(Comp. Br. at 27.) The first proposed finding of fact on which Complainants rely (PFF 17) states: "81st Dolphin commenced doing business in May 2009. *Id.*" (Port Resp. Comp. Prop. FF 17.) This proposed finding is not relevant to the genesis of the $8.00 flat rate and provides no support for the claim that the Port established the access fees for the period December 17, 2007, through June 30, 2014, based on average trip counts in 2006.

Complainants' proposed findings of fact 49 through 53 purport to state facts that they contend support Complainants' contention on a study.

> 49. The between 2006 and 2014, the Wharves Board determined the Access Fees to charge by considering the recorded number of accesses to the Cruise Terminal by all vehicles subject to Access Fees under the Tariff, with the exception of "Off-Port Parking Users." (Depo. M. Mierzwa at 68:21 - 69:18, 143:25 - 145:5 (ALJ App. 293).)

50. From that data, the Wharves Board determines the anticipated revenue generated by the Tariff by those users. *Id.*

51. That number was then subtracted from the deficit represented by the difference between GPFC's revenues and the expenses of the Cruise Terminal. *Id.*

52. The Wharves Board then divided the remaining portion of the deficit by the total number of parking spaces operated by the Wharves Board and certain "Off-Port Parking Users," including Complainants. *Id.*

53. The resulting number was the per-space, per-month Access Fee charged to Complainants. *Id.*

(Port Resp. Comp. Prop FF.) Except for non-substantive test and citation changes, the Port's response to each proposed finding is the same.

> Response: Respondents object to this proposed finding because, as originally written, it was uncited. Respondents also object to this proposed finding as it is a mischaracterization of the testimony cited. The discussion with Mr. Mierzwa makes clear that he was discussing a proposal by the study group in May of 2014 and how that group determined to recommend raising the $8 per space per month fee charged to the Complainants and per trip access fees charged to other users based on information available "at that time." Depo. M. Mierzwa at 67:1-25 through 69:1-18, (Resp. App. Tab. No. 78 at p. 002202-002204); 143:25 - 145:5 (Comp. App. 16 at p.00311)). In May of 2014, a study group of Port Staff recommended that the Port use a similar formula to assess the proposed and later rescinded $28.88 fee to Complainants. The time period referenced in the study group documents relates to an analysis and study performed the above referenced analysis every year from in May of 2014 for consideration of the $28.88 per space access fee which was never put into effect. No tariff has been implemented and enforced which relied upon or forms the basis of this study. Complainants then are asking the Judge to retroactively apply this rejected formula to 2006 through 2014 in order to bolster their alleged reparations claims. Subject to and without waiving these objections, Respondents deny conducting the above referenced analysis at any time from 2006 until 2013, but admit to conducting this analysis in 2014. Affidavit of Mark Murchison 17 (Resp. App. Tab. No. 77 at p. 002085); Affidavit of Peter Simons 3 (Resp. App. Tab. No. 76 at p. 002078).

(Port Resp. Comp. Prop FF 53.)

The Port created a spreadsheet entitled Port Tariff Charges for the Year 2006. (Comp. App. 029 at 532-533). This spreadsheet records the number of trips each month during the first six months of 2006 for several entities (including Complainants), the total trips each month, the total trips for each entity for the six month period, and the total trips into the port for those six months. Complainants call the spreadsheet the "Access Fee Study" and contend that the Port based its 2006 adoption of the $8.00 flat rate on this study.

I conclude that the evidence cited by Complainants in support of their proposed findings 49-53 does not support Complainants' contention that the spreadsheet was a study on which the Port based its adoption of $8.00 flat rate. The context of M. Mierzwa's deposition testimony on which Complainants rely leads to this conclusion. Complainants cited to testimony on pages 68 and 69 of the transcript. (Comp. App. 016 at 304.) This testimony is the continuation of a colloquy that began on page 66 of the transcript (Comp. App. 016 at 304) in which Mierzwa states that he was not involved in determining what to charge Complainants in 2006. Mierzwa states that although as port director he commissioned the access fees study two or three years before his January 30, 2015, deposition, he was not involved in the study. (*Id.* 66:11-67:25.) Mierzwa then describes the considerations used in the study two or three years before his deposition to determine the per trip access fee users should pay. This discussion includes the portion of the transcript cited by Complainants to support their contention. (*Id.* 68:1-69:18.)

The second portion of Mierzwa's deposition on which Complainants rely (Comp. App. 016 at 311) is a colloquy regarding the minutes of the May 19, 2014, meeting of the Board of Trustees of the Galveston Wharves (Comp. App. 025 at 481-492). (*See* Comp. App. 016 at 310.) The questioner quotes portions of the minutes, (*id.* 139:18-141:25), and discussion of Port cost and revenue. (*Id.* 142:1-143:5.) Mierzwa responds: "This was a recommendation from the study group." (*Id*. 143:6.) This is soon followed by the discussion of the "delta" determined by the study on which Complainants rely. Although it appears that the study group included in its study a spreadsheet of port tariff charges showing payments by month of a number of entities that accessed the port in 2005 (Port App. 058 at 1790), it is abundantly clear that the study discussed at the May 19, 2014, board meeting was conducted "two or three years" before Mierzwa's deposition, not a study done in 2006 when the Port amended the tariff to provide for the $8.00 flat rate.

The contemporaneous documentary evidence in the record indicates that the Port and Complainants arrived at the flat fee of $8.00 per parking place per month through negotiation, not a "study by the Port." When EZ Cruise did not pay the access fee in 2005, the president/manager of EZ Cruise sent a letter to the Port arguing that the $10.00 per trip fee was too high and proposed that the Port adjust the fee to a flat rate of $1,000.00 per month and permit unlimited access. After more negotiations, EZ Cruise proposed a payment of $20,000.00 to satisfy all outstanding port access fees for EZ Cruise and Galveston Limousine Service. The Port proposed a flat $2,500.00 flat monthly fee that EZ Cruise rejected and proposed a monthly fee of $1,200. The Port rejected this proposal and stated that might consider a sliding scale that would permit a discount to those heavy users of the Port, like EZ Cruise's business. Complainants and the Port eventually agreed on a flat fee of $8.00 per month and unlimited access to be retroactive to January 2005 to recalculate access fees for Complainants that had been incurred, but not paid, and amended the tariff for future access. ALJFF 32-43. Although the Port Staff reviewed Complainants' volume of traffic in the Port Tariff Charges for the Year 2006 during these negotiations (Port Resp. Comp. Prop. FF 91), the fact that the Port may have been aware of Complainants' usage does not support a finding that "[t]he Access Fees charged from December 17, 2007 through June 30, 2014 were established based on average trip counts for individual Cruise Terminal users found in [the Port Tariff Charges for the Year 2006]" as Complainants contend. Complainants do not cite to any contemporaneous evidence proving or

even suggesting that the Port based the $8.00 flat rate figure on the "study" Complainants cite or any other study.[19]

c. Complainants' argument does not prove Complainants were prejudiced or disadvantaged and suffered actual injury.

In their brief, Complainants set forth a purported analysis that they contend establishes that they suffered actual injury from being charged the $8.00 flat rate for access instead of the $10.00 per trip rate that the hotels were charged.

Complainants' analysis for each Complainant begins with factual information about access to the cruise terminal by commercial passenger vehicles the first six months of 2006. In January through June 2006, there were 14,848 total trips to the cruise terminal. (Comp. App. 029 at 533.) During that period, Dolphin maintained 120 parking spaces and made 1304 trips. (Comp. App. 029 at 532 (Dolphin identified as "Aslam Kapadia/Sylvia's shuttle).) Therefore, Dolphin accounted for 8.8% of the trips by commercial passenger vehicles in first six months of 2006.

During January through June 2006, EZ Cruise maintained 320 parking spaces. ALJFF 56. In their opening brief, Complainants contended that EZ Cruise accounted for 11.2% of Cruise Terminal traffic in first six months of 2006. The Port objected because Complainants did not include trips by Galveston Limo on behalf of EZ Cruise. Complainants apparently concede this point and in their reply brief include Galveston Limo trips on behalf of EZ Cruise with EZ Cruise shuttle trips to bring EZ Cruise percentage "from 11.2% to just shy of 20.0%." (Comp. Reply Br. at 28.) This is consistent with the percentage determined by dividing the total number of EZ Cruise trips at issue when the parties settled EZ Cruise access fees for January 2005 to June 2006. (*See* Port App. 007 at 415 (2936 EZ Cruise trips for January 2006 through June 2006: 2936 ÷ 14848 = 0.1977).) Therefore, I assume that this figure is correct.

During January through June 2006, Lighthouse maintained 190 parking spaces and made 1423 trips. Therefore, Lighthouse accounted for 9.6% of Cruise Terminal traffic in the first six months of 2006.

For each Complainant, Complainants then factor in any changes in the number of parking spaces maintained by each Complainant between 2006 and 2014, calculate a claimed percentage reduction or increase from previous parking capacity for that Complainant, calculate the decrease in the number of cruise passengers for each year, "assume that [Complainant's] passenger transportation also fell [or rose] by that same percentage," and contend that this results in an "observed percentage of Cruise Terminal traffic . . . during this period." From this figure, they calculate how much a Complainant's number of trips to the cruise terminal would have been reduced and how much this would have reduced the Complainant's access fees for 2007 through 2014 if the Complainant had been charged at the per trip rate instead of the $8.00 flat rate.

[19] The Port did use the study conducted two or three years before the Mierzwa deposition when it promulgated the May 19, 2014, changes to Tariff Circular No. 6, including the increase of the flat rate to $28.88 that resulted in this proceeding. ALJFF 64-67. This increase was rescinded and the Port calculated Complainants' access fees at the $8.00 flat rate until October 2014 when the Port rescinded the flat rate. ALJFF 71-73.

For example, regarding Dolphin, Complainants contend:

> Pursuant to the above, from January of 2008 through May of 2009, when 81st Dolphin possessed the same number of parking spaces as it did when it accounted for 8.8% of the overall Cruise Terminal traffic, 81st Dolphin paid $16,320.00 – or, 10.3% – of the $158,276.52 total collected by the Wharves Board in Access Fees. Accordingly, 81st Dolphin overpaid by 1.5% – or, $2,374.14 – of the total Access Fees Collected during that time period. 81st Dolphin did not operate a parking lot from June to August of 2009. In the same manner, as provided above, from September of 2009 through December of 2013, 81st Dolphin maintained only 50 parking spaces, and should have represented only 3.7% of the overall Cruise Terminal traffic, and accounted for that same percentage of the overall Access Fees collected during that time period. However, during that time period, 81st Dolphin paid $20,800.00 – or, 4.1% – of the $512,081.06 total collected by the Wharves Board in Access Fees. Accordingly, 81st Dolphin overpaid by 0.4% – or, $2,048.32 – of the total Access Fees collected during that time period. Likewise, and as outlined above, from January of 2014 through June of 2014, 81st Dolphin maintained 96 parking spaces, 80% of what it maintained when it represented 8.8% of the total Cruise Terminal traffic. As such, 81st Dolphin should have represented only 7.0% of the overall Cruise Terminal traffic, and accounted for that same percentage of the overall Access Fees collected during that time period. However, during that time period, 81st Dolphin paid $4,608.00 – or, 4.9% – of the $94,087.00 total collected by the Wharves Board in Access Fees. Accordingly, 81st Dolphin underpaid by 2.1% – or, $1,975.83 – of the total Access Fees collected during that time period. In total, as a result of Respondents' violations of the Shipping Act, 81st Dolphin was overcharged, and overpaid in the amount of $2,446.63, for which 81st Dolphin seeks reparations.

(Comp. Br. at 30-31 (citations to record omitted).) Complainants engage in similar analysis for EZ Cruise (*id.* at 31-34) and Lighthouse. (*Id.* at 34-36.)

Complainants do not state whether they offer their analysis as expert opinion pursuant to Fed. R. Evid. 702, lay opinion pursuant to Fed. R. Evid. 701, or argument of counsel. Complainants do not identify the person who formulated the analysis or that person's qualifications for making the analysis; therefore, the analysis does not have a sponsoring witness to lay a foundation for admission as evidence. The September 30, 2014, scheduling order required Complainants to "designate affirmative expert witnesses and produce expert reports for same" on or before December 1, 2014. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06 (ALJ Sept. 30, 2014) (Order Amending August 11, 2014, Discovery Schedule); 46 C.F.R. § 502.201(d). Nothing in the record indicates that Complainants designated the author of the report as an expert. If offered as lay opinion, Rule 201 required disclosure with Complainants' initial disclosures, 46 C.F.R. § 502.201(b), or a supplement. 46 C.F.R. § 502.201(k). In either case, if the analysis were offered as evidence, the Port would have a right to examine the witness. The Port contends that prior to filing their brief, "Complainants never disclosed their theory supporting reparations, or proffered any details on the amounts they were claiming as injury and how those amounts were determined" and contend that Complainants' argument is made "[w]ithout the use of expert testimony, affidavits or

deposition testimony." (Port Br. at 42.) Therefore, I conclude that the analysis in the brief is not offered as evidence of injury, but argument of counsel.

Complainants do not set forth any rationale for choosing the factors that they include in the analysis. The Port's expert witness, a certified public accountant in Houston, Texas, since 1980, offers a rebuttal questioning most, if not all, of Complainants' analysis. (Port App. 103 at 2756-2784.)

The most glaring omission from Complainants' analysis is that it fails to factor in the transportation benefit to Complainants' customers resulting from Complainants' right to unlimited access to the terminal. It is likely that Complainants minimized their shuttle trips during the first six months of 2006 when they were being charged at the $10.00 per trip rate. With the right to unlimited access that came with the flat rate, Complainants were able to "[run] the buses in as – as freely as the customers wanted to." (Port App. 081 at 2450 (deposition of EZ Cruise employee Jason Hayes).) Complainants could send their shuttles to the cruise terminals without waiting for a full load without having to pay more in access fees. It is likely that even if number of Complainants' cruise passengers remained the same, the number of trips to the cruise terminal by Complainants' shuttle buses increased because they could run buses "as freely as the customers wanted to." Complainants also fail to take into account whether individual hotels implemented or discontinued their offers of parking in connection with a stay at the hotel.

An attorney could conjure up any number of equally valid arguments based on the known facts to argue that Complainants either did or did not pay more using the $8.00 flat rate than they would have paid if charged per access. Some arguments may show that Complainants would have paid less if charged per access than charged at the $8.00 flat rate and some arguments may show that Complainants would have paid more. Each argument could be based on equally valid assumptions, speculation, and conjecture. None would prove by a preponderance of the evidence that Complainants suffered actual injury from use of the flat rate because "[a]rgument of counsel is not evidence." *Morrissey v. William Morrow & Co.*, 739 F.2d 962, 967 (4th Cir. 1984).

An equally valid argument would first assume that a Complainants' number of trips per month to the cruise terminal for in the first six months of 2006 (the year that the Port had 616,939 passengers – its biggest year on record, ALJFF 83) continued for the rest of the year, then assume a Complainant handled the same percentage of cruise passengers as in 2006, ignoring any possible increase in the number of trips permitted by the right of unlimited access. One would reduce that number of trips by the percentage reduction in the number of passengers for the later year, then multiply that number by $10.00 per trip to determine what the Complainant would have paid if charged by the trip. For instance, between January and June 2006, Dolphin operated 120 parking spaces and its shuttles made 1304 trips to the cruise terminal. (Comp. App. 029 at 532; Port App. 103 at 2775.) Assuming Dolphin's percentage of the cruise passenger traffic remained the same for July-December 2006, Dolphin made 2608 trips to the cruise terminal in 2006. In 2008, the Port had its worst year with 376,815 passengers, 61% of the 2006 figure. ALJFF 83. Dolphin maintained the same number of parking spaces in 2008. Assuming Dolphin's percentage of the cruise passenger traffic remained the same as in 2006 and ignoring any increase in number of trips resulting from Dolphin's right to unlimited access to the terminal, Dolphin's number of trips to the cruise terminal would have been reduced to 61% of the 2006 figure, or 1590 (rounding down) trips in 2008. The Port would have charged $10.00

per access; therefore, Dolphin would have paid $15,900.00 in access fees for 2008. Because Dolphin had 120 parking spaces each month in 2008, the Port charged Dolphin $960.00 per month for twelve months, or $11,520.00. Therefore, using this argument, in the year when the Port had its lowest passenger total, Dolphin paid less in access fees at the $8.00 per parking space per month flat rate than it would have paid at $10.00 per trip. There were more cruise passengers in every other year at issue, so every other year at issue, if Dolphin's number of parking spaces remained the same, it would have more trips to the cruise terminal and paid more in access fees using the $10.00 per trip rate.

Similar calculations may be done for EZ Cruise and Lighthouse. Between January and June 2006, EZ Cruise operated 320 parking spaces and its shuttles and Galveston Limo carrying EZ Cruise customers made 2936 trips to the cruise terminal. (Comp. App. 029 at 532; Port App. 103 at 2773.) Assuming EZ Cruise's percentage of the cruise passenger traffic remained the same for July-December 2006, EZ Cruise made 5872 trips to the cruise terminal in 2006. EZ Cruise had the same number of parking spaces in 2008. Assuming EZ Cruise's percentage of the cruise passenger traffic remained the same as in 2006 and ignoring any increase in number of trips resulting from EZ Cruise's right to unlimited access to the terminal, EZ Cruise's number of trips to the cruise terminal would have been reduced to 61% of the 2006 figure, or 3581 (rounding down) trips in 2008. The Port would have charged $10.00 per access; therefore, EZ Cruise would have paid $35,810.00 in access fees for 2008. Because EZ Cruise had 320 parking spaces each month in 2008, the Port charged EZ Cruise $2,560.00 per month for twelve months, or $30,720.00. Therefore, using this argument, in the year when the Port had its lowest passenger total, EZ Cruise paid $5,090.00 less at the $8.00 per parking space per month flat rate than it would have paid at $10.00 per trip. There were more cruise passengers in every other year at issue. In every year from 2006 through 2013, EZ Cruise would have paid more on a per trip rate for each of these years

Between January and June 2006, Lighthouse operated 190 parking spaces and its shuttles made 1423 trips to the cruise terminal. (Comp. App. 029 at 532; Port App. 103 at 2774.) Assuming Lighthouse's percentage of the cruise passenger traffic remained the same for July-December 2006, Lighthouse made 2846 trips to the cruise terminal in 2006. Lighthouse had the same number of parking spaces in 2008. Assuming Lighthouse's percentage of the cruise passenger traffic remained the same as in 2006 and ignoring any increase in number of trips resulting from Lighthouse's right to unlimited access to the terminal, Lighthouse's number of trips to the cruise terminal would have been reduced to 61% of the 2006 figure, or 1736 (rounding down) trips in 2008. The Port would have charged $10.00 per access; therefore, Lighthouse would have paid $17,360.00 in access fees for 2008. Because Lighthouse had 190 parking spaces each month in 2008, the Port charged Lighthouse $1,520.00 per month for twelve months, or $18,240.00. Therefore, using this argument, in 2008, the year when the Port had its lowest passenger total, and assuming that lighthouse did not run more shuttle trips to the cruise terminal because it had a right to unlimited access, Lighthouse paid $880.00 more at the per parking space per month flat rate than it would have paid at $10.00 per trip. If Lighthouse averaged 7.33 additional trips each month because of its right to unlimited access or any other reason, it would equal the amount it paid at the $8.00 flat rate. In 2009, the Port's second worst year, the Port had 394,640 cruise passengers, 64% of the 2006 total. Lighthouse would have had 64% of its 2006 trips, or 1821 (rounding down) trips. The Port would have charged $10.00 per access; therefore, Lighthouse would have paid $18,210.00 in access fees for 2008. Because

Lighthouse had 190 parking spaces each month in 2009, the Port again charged Lighthouse $18,240.00 for the year. Therefore, using this argument, in 2009, the year when the Port had its second lowest passenger total, Lighthouse paid $30.00 more at the $8.00 flat rate than it would have paid at $10.00 per trip. If Lighthouse took three more trips during 2009 because of its right to unlimited access or any other reason, it would equal the amount it paid at the $8.00 flat rate. Lighthouse maintained 190 parking spaces every year through 2013. In every year other than 2008 and 2009, assuming no increase in the number of trips because of its right to unlimited access, Lighthouse would have paid more in access fees at the $10.00 per access rate. The fact that one could fashion an argument showing that for two years out of nine, assuming no increase in the number of trips because of the right to unlimited access and no change in the percentage of cruise passengers parking in Lighthouse's lot, Lighthouse paid more in access fees at the flat rate than at the per trip space rate does not prove by a preponderance of the evidence that the Port gave an undue or unreasonable preference or advantage to the hotels or imposed an undue or unreasonable prejudice or disadvantage on Lighthouse or the other Complainants in violation of section 41106(2) in the years from 2006 through June 2014.

The burden is on Complainants to prove their damages with reasonable certainty. *Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. at 798-799. Assuming that the Port violated section 41106(2) when it calculated Complainants' access fees using the $8.00 flat rate, Complainants' argument does not prove by a preponderance of the evidence that Complainants suffered actual injury from use of the flat rate instead of the per access rate.

d. Circumstantial evidence supports a conclusion that Complainants were not prejudiced or disadvantaged from the Port calculating their access fees at the $8.00 flat rate.

The only direct evidence based on known number of trips of the effect calculating Complainants' access fees at the $8.00 flat rate instead of the $10.00 per trip rate comes from the Port's decision to apply the flat rate retroactively to recalculate Complainants' monthly access fees for the period 2005 through June 2006 and the actual count of Complainants' trips when the Port amended the tariff to delete the $8.00 flat rate beginning October 1, 2014. Comparing the flat rate with the per trip rate for these months when the actual number of trips is known provides circumstantial evidence that Complainants paid less under the flat rate than they would have under the per trip rate for the intervening period.

For the period before adoption of the flat rate, using the $10.00 per trip rate, the Port invoiced EZ Cruise a total of $87,930.00 for access to the port between January 2005 and June 2006. As a result of the application of the $8.00 flat rate, EZ Cruise paid $35,680.00 (equivalent to $4.06 per trip) for access between January 2005 and June 2006, saving $52,250.00, or more than 59%. The Port invoiced Lighthouse a total of $14,230.00 for access to the port between January 2006 and June 2006. As a result of the application of the $8.00 flat rate, Lighthouse paid $9,120.00 (equivalent to $6.41 per trip) for access between January 2006 and June 2006, saving $5,110.00, or more than 35%. The Port invoiced Dolphin a total of $25,430.00 for access to the port between July 2005 and June 2006. As a result of the application of the $8.00 flat rate, Dolphin paid $11,520.00 (equivalent to $4.55 per trip) for access between July 2005 and June 2006, saving $13,910.00, or more than 54%. Therefore, Complainants enjoyed a significant benefit for this period when the Port agreed to charge them the $8.00 flat rate and did not suffer

any actual injury resulting from the Port charging them at the flat rate instead of the $10.00 per trip rate between January 2005 and June 2006.

In September 2014, the last month before rescission of the flat rate, the Port charged EZ Cruise the $8.00 flat rate for 380 parking spaces for unlimited access, a total of $3,040.00. Because the per trip rate for shuttles carrying fewer than fifteen passengers had been raised to $20.00 when Tariff Circular No. 6 was amended May 19, 2014, ALJFF 65, the break-even point for September 2014 was $3040 ÷ $20 = 152 trips. The September EZ Cruise invoices do not record the number of trips. In October 2014, when EZ Cruise had the same number of parking spaces but no longer had unlimited access and could no longer "[run] the buses in as – as freely as the customers wanted to," (Port App. 081 at 2450 (deposition of Jason Hayes)), the Port charged EZ Cruise for 542 trips at $20.00 each for a total charge of $10,840.00 (Port App. 063 at 1923), $7,800.00 more than would have been charged at the $8.00 flat rate. Even if the Port had charged EZ Cruise at the $10.00 per trip rate in effect until July 2014, it would have charged $5,420.00 for October, $2,380.00 more than the flat rate. In November 2014, the Port charged EZ Cruise for 392 trips at $20.00 each for a total of $8,800.00 (Port App. 063 at 1924), $5,780.00 more than the $8.00 flat rate. Even if the Port had charged EZ Cruise at the $10.00 per trip rate, it would have charged $3,920.00 for October, $880.00 more than the flat rate. (See Port App. 103 at 2776.) EZ Cruise averaged 467 trips for October and November when it no longer had unlimited access. EZ Cruise does not identify evidence of the number of trips for September 2014, but because it averaged 467 trips for October and November when it no longer had unlimited access, it is highly unlikely that EZ Cruise had fewer than 152 trips in September when it had a right to unlimited access. Many unknown factors could influence this number, and the burden is on EZ Cruise to prove that it had fewer than 152 trips. If in September EZ Cruise ran the average number of trips for October and November, the Port would have charged EZ Cruise 467 times $20.00, a total of $9,340.00 for access, $6,300.00 more than EZ Cruise paid at the flat rate. Even if the Port charged the old rate of $10.00 per trip for September, the Port would have charged EZ Cruise 467 times $10.00, a total of $4,670.00 for access, $1,630.00 more than EZ Cruise paid at the flat rate.

In September 2014, the Port charged Dolphin the $8.00 flat rate for unlimited access for 135 parking spaces ($1,080.00) (Comp. App. 011 at 274) plus thirty-nine "additional spaces per litigation" ($312.00), a total of $1,392.00. (Comp. App. 011 at 275.) The break-even point for Dolphin for September 2014 was seventy trips ($1,392.00 ÷ $20.00 = 69.9). The September Dolphin invoices do not record the number of trips. In October 2014, when Dolphin had the same number of parking spaces but no longer had unlimited access, the Port charged Dolphin for 385 trips at $20.00 each for a total charge of $7,700.00 (Comp. App. 011 at 276), $6,308.00 more than the $8.00 flat rate. Even if the Port had charged Dolphin at the $10.00 per trip rate in effect until July 2014, it would have charged $3,850.00 for October, $2,458.00 more than the flat rate. In November 2014, the Port charged Dolphin for 410 trips at $20.00 each for a total of $8,200.00, (Comp. App. 011 at 277), $6,808.00 more than the $8.00 flat rate. Even if the Port had charged Dolphin at the old $10.00 per trip rate, it would have charged $4,110.00 for November, $2,718.00 more than the flat rate. Dolphin does not identify evidence of the number of trips for September 2014, but because it averaged 397.5 trips for October and November when it no longer had unlimited access, it is highly unlikely that Dolphin had fewer than seventy trips in September when it had a right to unlimited access. Many unknown factors could influence this number, and the burden is on Dolphin to prove that it had fewer than seventy trips. If in

September Dolphin ran the average number of trips for October and November, the Port would have charged Dolphin 397 (rounding down) times $20.00, a total of $7,940.00 for access, $6,548.00 more than it actually paid for September using the flat rate. Even if the Port charged the old per trip rate of $10.00 per trip for September, the Port would have charged Dolphin 397 (rounding down) times $10.00, a total of $3,970.00 for access, $2,578.00 more than Dolphin paid at the flat rate.

In September 2014, the Port charged Lighthouse the $8.00 flat rate for unlimited access for 220 parking spaces ($1,760.00) (Port Supp. App. filed Nov. 13, 2015 at 2786) plus an additional $80.00 for ten spaces (Port Supp. App. filed Nov. 13, 2015 at 2788), a total of $1,840.00. The break-even point for Lighthouse for September 2014 was ninety-two trips ($1,760.00 ÷ $20.00 = 92). The September Lighthouse invoices do not record the number of trips. In October 2014, when Lighthouse had the same number of parking spaces but no longer had unlimited access, the Port charged Lighthouse for 319 trips at $20.00 each for a total charge of $6,380.00 (Port Supp. App. filed Nov. 13, 2015 at 2787), $4,620.00 more than the flat rate. Even if the Port had charged Lighthouse at the $10.00 per trip rate in effect until July 2014, it would have charged $3,190.00 for October, $1,430.00 more than the flat rate. In November 2014, the Port charged Lighthouse for 341 trips at $20.00 each for a total of $6,820.00 (Port App. 064 at 1925), $4,980.00 more than the flat rate. Even if the Port had charged Lighthouse at the old $10.00 per trip rate, it would have charged $3,410.00 for October, $1,570.00 more than the flat rate. Lighthouse averaged 330 trips for October and November. Lighthouse does not identify evidence of the number of trips for September 2014, but because it averaged 330 trips for October and November when it no longer had unlimited access, it is highly unlikely that Lighthouse had fewer than ninety-two trips in September when it had a right to unlimited access. Many unknown factors could influence this number, and the burden is on Lighthouse to prove that it had fewer than ninety-two trips. If in September Lighthouse ran the average number of trips for October and November, the Port would have charged Lighthouse 330 times $20.00, a total of $6,600.00, for September access, $4,760.00 more than it actually paid for September using the flat rate. Even if the Port charged the old per trip rate of $10.00 per trip for September, the Port would have had charged Lighthouse 330 times $10.00, a total of $3,300.00, for September access, $1,460.00 more than Lighthouse paid at the flat rate.

This circumstantial evidence is bolstered by the analysis at Part IX.B.1.c indicating that assuming Complainants each continued to have provided parking to the same percentage of Galveston cruise passengers adjusted by changes in the number of parking spaces that they maintained, and assuming that Complainants' number of trips to the cruise terminal did not increase because they had unlimited access to the cruise terminal, only Lighthouse, and it only marginally for two years, would have paid less if charged the per trip rate. This circumstantial evidence weighs against a finding that Complainants' trips to the cruise terminal dropped below the break-even point between 2006 and September 2014.

e. Complainants' contention that Complainants were charged for access in May 2008, June 2008, September 2008, November 2008, and February 2009, but that no other operator of commercial passenger vehicles was charged for those months is not supported by the evidence.

Complainants contend:

> While evidence of this disparate treatment is found in each and every month that the Tariff has been enforced against Complainants by way of per-space per-month Access Fees, the starkest examples of same are found in Respondents' Access Fee invoices for the months of (May 2008, June 2008, September 2008, November 2008, and February 2009. During those months, despite Respondents' "Cruise Calls" calendar showing fifty-five (55) cruise ships calling on Respondents' Cruise Terminal, ***not one single entity was charged an Access Fee other than Complainants.*** (PFF 49, Galveston Wharves Historical Detailed Trial Balance, Access Fees (2008); Galveston Wharves Historical Detailed Trial Balance, Access Fees (2009); Port of Galveston Cruise Calls (2006 - 2010).)

(Comp. Br. at 22 (double emphasis in original) (footnote omitted).) The Port responds: "This is simply incorrect. (Compton Affidavit Paragraph 35, Resp. App. Tab 103, p. 2765; Historical Trial Balance, BOT_006375 Resp. App. Tab 66 p. 1929)." (Port Br. at 44-45.) Complainants did not reply to the Port's responses.

Complainants' proposed finding of fact 49 on which Complainants rely states:

> [[B]etween 2006 and 2014, the Wharves Board determined the Access Fees to charge by considering the recorded number of accesses to the Cruise Terminal by all vehicles subject to Access Fees under the Tariff, with the exception of "Off-Port Parking Users." (Depo. M. Mierzwa at 68:21 - 69:18, 143:25 - 145:5 (ALJ App. 293).)

(Comp. Prop. FF 49.) Complainants' proposed finding of fact 49 provides no support for the contention in their brief that "not one single entity was charged an Access Fee other than Complainants" in those five months. Complainants' proposed findings of fact 101 and 102 purport to support Complainants' claim, but those proposed facts are not supported by the evidence.

Regarding access fees for September 2008, Hurricane Ike hit Galveston in September. The Port waived access fees for September and October 2008. Although Complainants paid access fees for September and October, those fees were refunded to Complainants on October 31, 2008. (Comp. App. 002 at 37.) Therefore, the Port did not charge access fees to Complainants for September 2008.

Evidence in Complainants' own appendix regarding the other months proves that Complainants' claim that no other entity was charged access fees for these months is unfounded. The Port charged access fees to several hotels for some or all of these months. (*See* Comp. App. 032 at 554, 555, 558) (Holiday Inn); Comp. App. 034 at 578, 579, 583, 586 (Moody Gardens);

Comp. App. 036 at 657, 658 (Comfort Inn & Suites on the Beach); Comp. App. 038 at 667, 668, 671, 674 (The San Luis); Comp. App. 049 at 889, 890, 893, 897 (Fertitta Hospitality); Comp. App. 052 at 1019, 1020, 1023 (Holiday Inn); Comp. App. 054 at 1138, 1139, 1143, 1146 (Hotel Galvez); Comp. App. 057 at 1270, 1271, 1275 (La Quinta); Comp. App. 060 at 1618, 1619, 1623 (Tremont House).) Complainants' claim that the Port did not charge access fees to any entities other than Complainants in May, June, and November 2008 and February 2009 is contradicted by the evidence in Complainants' appendix. The Commission should not have to spend time considering arguments based on erroneous factual claims.

f. Complainants did not subsidize other users as a result of the May 19, 2014, increase in the flat rate to $28.88.

Complainants seek reparations for injuries that they claim they suffered as a result of the increase in the flat rate access fee to $28.88 per parking space per month promulgated on May 19, 2014, to be effective July 1, 2014, but rescinded on September 22, 2014.

> The Wharves Board justified the increase in Access Fees by stating that same was necessary to satisfy an asserted $1.5M deficit in Respondents' Cruise Terminal operations. This increase subjects Complainants to injury by virtue of the fact that, while Complainants always paid the Access Fees as required by the Tariff, Respondents engaged in routine, long-standing preferential enforcement of the Tariff, exempting some Cruise Terminal users completely, and significantly undercharging a great majority of others. Specific examples of same follow.

(Comp. Br. at 36.) Complainants then identify what they claim are "specific examples" regarding the treatment of limousines (*id.* at 36-37), buses (*id.* at 37-38), taxicabs (*id.* at 38-39), and hotels/motels. (*Id.* at 39-42.)

The record demonstrates that Complainants were permitted to deposit the new monthly access fee in excess of $8.00 per parking space per month into the district court registry, ALJFF 70, the Port rescinded the increase to $28.88 on September 22, 2014, ALJFF 73, and the Port charged the $8.00 flat rate for July-September 2014. ALJFF 74. Complainants did not pay the Port $28.88 for access in those months and did not suffer actual injury from the May 19, 2014, increase.

Therefore, I conclude that Complainants have not proved that they were prejudiced or disadvantaged and suffered actual injury from the Port's use of the $8.00 flat rate instead of the per trip rate to calculate their access fees.

2. The statute of limitations bars claims for damages incurred more than three years before complainants filed their complaint.

Complainants filed their Complaint on June 16, 2014, but allege entitlement to a reparation award for payments made beginning in 2006. If Complainants are found to be entitled to a reparation award because the Port violated section 41106(2) by using the $8.00 flat rate to

determine Complainants' access fees and using the per trip rate to determine the hotels' access fees, the effect of the Act's statute of limitations arises.

a. Controlling law on statute of limitations.

Under the Shipping Act, reparations may only be awarded to a complainant for injury caused by a respondent's violation of the Shipping Act if the complaint is filed within three years after the claim accrues. 46 U.S.C. § 41301(a). "Absent an exception, a claim accrues (and the statute of limitations begins to run) 'when a defendant commits an act that injures a plaintiff's business.'" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185, 1191 (FMC 2013) (citing *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971)). The time to file the complaint begins to run "when a complainant knew, or should have known, that it had a cause of action." *Maher Terminals*, 32 S.R.R. at 1193. The statute of limitations is an affirmative defense. *Maher Terminals*, 32 S.R.R. at 1191.

"The Commission has determined to adopt the discovery rule [for statute of limitations purposes], and to hold that [a complainant's] cause of action accrue[s] when it [knows or should know] that it [has] a case against [a respondent]." *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc. (Inlet Fish)*, 29 S.R.R. 306 (FMC 2001).

> There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations – such adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action. This is, of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.

Id.

> [I]mplementing the rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeals. In *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991), the court held that unless Congress has provided a directive that a cause of action accrues when an injury occurs, the discovery rule should apply. Explaining the practical application of the rule, the court in *Connors* held:
>
> > [I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can

> readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

Id. (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)). The court also noted that this rule has been adopted by "[a]t least eight federal courts of appeals." *Id.*

Inlet Fish at 314.

b. The statute of limitations would bar claims for a reparation award based on the different treatment of hotels.

The Port argues that assuming the hotels are off-port parking users within the meaning of the tariff, Complainants could have discovered that the Port continued to charge the hotels for each access because the Port's records are subject to review under state laws. (Port Br. at 39-40.) Complainants contend that until 2014, even with the exercise of due diligence they could not have known that hotels were not being charged the $8.00 flat rate. (Comp. Rep. Br. at 20-25.)

I find that the Port has the better of this argument. Complainants knew that the Port amended the tariff at their request and after lengthy negotiations that was more favorable to them than the $8.00 flat rate. They knew or should have known that no hotels joined in this request and that most hotel parking places were not used for parking cars belonging to cruise passengers on a cruise and nothing suggests that either the Port or Complainants expected the $8.00 flat rate to apply to hotels. Because the Port records are subject to review under state law, with due diligence they could have discovered that the hotels were charged on a per trip rate, not the $8.00 flat rate. Therefore, the statute of limitations bars a claim for a reparation award for based on the different treatment of hotels for conduct occurring before June 16, 2011.

C. Complainants Compared to Taxicabs and Limousines.

1. Complainants have proved that they suffered actual injury from the Port's failure to charge taxicabs and limousines.

If it were determined that the Port violated section 41106(2) by charging Complainants for access but not charging taxicabs and limousines, Complainants suffered injury from the violation. The Commission has found that

> the appropriate measure of damages for a violation of sections 10(b)(11) and (12) [section 41106(2)], where a party has breached a duty to apply its criteria for granting lower rates in a fair and evenhanded manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference and prejudice.

Ceres Marine Terminals, Inc. v. Maryland Port Admin., 29 S.R.R. 356, 374 (FMC 2001) (*Ceres II*).[20] Because the taxicabs and limousines were not charged for access, that injury would be measured by the difference between the amount charged Complainants and the amount charged taxicabs and limousines – zero. Therefore, Complainants' damages would be all of the access fees that they paid to the Port. *See Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 29 S.R.R. at 374.

2. The statute of limitations would bar recovery for access fees imposed before June 16, 2011.

The Ports tariffs stated that neither limousines nor taxicabs with eight or fewer passengers were charged an access fee. ALJFF 29 (2003 tariff); ALJ 50 (2007 tariff). The tariff put Complainants on notice of this different treatment. Therefore, if it were determined that the Port violated section 41106(2) when it did not charge taxicabs for access and that Complainants were harmed by the violation, the statute of limitations would bar a claim for a reparation award based on the different treatment of taxicabs for payments occurring before June 16, 2011. These amounts are found in Complainants' Appendix, Documents 005-008, pages 045-056.

X. COMPLAINANTS HAVE NOT PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE COMMISSION SHOULD ENTER A CEASE AND DESIST ORDER.

> The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. *See Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997) ("a cease and desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses"); and *Portman Square Ltd. – Possible Violations of Section 10 (a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998) ("the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities"). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

Maher Terminals, LLC v. Port Authority of New York and New Jersey, 32 S.R.R. 1185, 1190 n.8 (FMC 2013).

Complainants contend that because Tariff Circular No. 6 as amended May 19, 2014, permits taxicabs to access the cruise terminal without paying an access fee, the Port is violating section 41106(2); therefore, Complainants seek a cease and desist order.

> Notwithstanding the foregoing, even now, Respondents still seek to impose Access Fees which provide an unreasonable preference and/or advantage on certain Cruise Terminal users, while effecting an unreasonable prejudice and/or

[20] At the time of the *Ceres II* decision, provisions that would become section 41106(2) were found in sections 10(b)(11) and (12) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(b)(11) and (12). *Maher v. PANYNJ*, 32 S.R.R 1185, 1192 (FMC 2014).

> disadvantage against Complainants. To establish a claim of this nature, Complainants are again required to meet the *Ceres* elements outlined above. Complainants reassert and adopt their showing, supra, of the "similarly situated" and/or "competitive relationship" status pertaining to other users of the Cruise Terminal.
>
> The Wharves Board's 2014 amendment to the Tariff, as effective October 1, 2014, is unreasonably prejudicial and discriminatory against Complainants; even as modified it still favors taxicabs over other similarly situated commercial passenger vehicles accessing the Cruise Terminal, like those operated by Complainants. The current Tariff wholly exempts taxicabs from paying per-trip Access Fees, while requiring Complainants to pay an Access Fee of $20.00 to $30.00 per trip.

(Comp. Br. at 42-43.)

As discussed above in Part VIII.C.2, Complainants have not proved by a preponderance of the evidence that the Port acted unreasonably when it exempted taxicabs from paying Port access fees. Therefore, cease and desist relief is not warranted.

XI. ATTORNEY FEES.

In its Answer, the Port asserted a claim for an award of attorney fees. (Answer at 9.) When Complainants filed their FMC Complaint, the Shipping Act provided: "If the complaint was filed within the [three year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees." 46 U.S.C. § 41305(b). Not long thereafter, Congress amended the Act to strike the phrase "plus reasonable attorney fees" from section 41305(b) and add a new section 41305(e): "*Attorney Fees*. – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees." Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act) (emphasis added). Therefore, a prevailing complainant or respondent may be awarded attorney fees.

When controlling law is changed mid-case, the question of retroactivity arises. In one attorney fee case, *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) [*Bradley*], the Court held that a tribunal should "apply the law in effect at the time it renders its decision." *Bradley*, 416 U.S. at 711. In another attorney fee case, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) [*Bowen*], the Court stated "retroactivity is not favored in the law. . . . Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 711. Tension exists between the holdings of the two cases.

For the reasons stated in *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Apr. 15, 2015) (Initial Decision Dismissing Proceeding for Failure to Prosecute), Notice Not to Review, May 18, 2015, I find that because the FMC Complaint has been dismissed, the Port is

the prevailing party in this proceeding and may be awarded reasonable attorney fees for attorney services performed after the effective date of the Coble Act. Determination of the fee awarded, if any, is deferred until the Commission decision is final.

XII. CONCLUSION.

Complainants have not proved by a preponderance of the evidence that the Port has violated section 41106(2) of the Shipping Act by calculating Complainants' access fees at the rate of $8.00 per parking space per month. Therefore, Complainants' Complaint is dismissed with prejudice.

O R D E R

Upon consideration of the record in this proceeding and for the reasons set forth above, complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81st Dolphin Parking have not proved by a preponderance of the evidence that respondent The Galveston Port Facilities Corporation violated section 41106(2) of the Shipping Act of 1984, 46 U.S.C. § 41106(2). Therefore, it is hereby

ORDERED that Complainants' Complaint against respondent The Galveston Port Facilities Corporation be **DISMISSED WITH PREJUDICE**.

Upon consideration of the record in this proceeding and for the reasons set forth above, complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81st Dolphin Parking have not proved by a preponderance of the evidence that respondent The Board of Trustees of the Galveston Wharves violated section 41106(2) of the Shipping Act of 1984, 46 U.S.C. § 41106(2). Therefore, it is hereby

ORDERED that Complainants' Complaint against respondent The Board of Trustees of the Galveston Wharves be **DISMISSED WITH PREJUDICE**.

Clay G. Guthridge
Administrative Law Judge

FEDERAL MARITIME COMMISSION

HANLON SCULPTURE STUDIO, LLC, *Complainant*

v.

SAE WORLDTRANS LOGISTICS F/K/A WORLDTRANS, *Respondent*.

DOCKET NO. 18-09

Served: December 17, 2018

NOTICE OF VOLUNTARY DISMISSAL

On December 11, 2018, the parties submitted a Stipulation of Dismissal pursuant to 46 C.F.R. §502.72(a)(2). The parties certify that no settlement on the merits was reached.

Therefore, the above-captioned proceeding is discontinued.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

APPLICATION OF OTI LOGISTICS, INC. FOR AN OCEAN TRANSPORTATION INTERMEDIARY LICENSE

Served: February 22, 2019

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, and Louis E. SOLA, *Commissioners*.

ORDER DENYING APPLICATION FOR OCEAN TRANSPORTATION INTERMEDIARY LICENSE

On July 24, 2018, OTI Logistics, Inc., applied for an ocean transportation intermediary (OTI) license. Because OTI Logistics lacks the necessary experience and character to be qualified for a license, the Commission denies its application.[1]

I. BACKGROUND

A. Prior OTI License Proceedings

Applicant OTI Logistics' CEO and sole owner is William Onorato, and OTI Logistics is the fourth Onorato-related company with which the Commission has dealt. In 1994, Mr. Onorato established Triton Overseas Transport Inc., which obtained a Commission license in 1999. *Triton Alive* I.D. at 10. Mr. Onorato served as Triton Overseas' president and qualifying individual. *Id.* Angela Onorato, his wife, was also employed by Triton Overseas.[2]

In August 2014, Triton Overseas changed its name to Triton Global, Inc. *Id.* at 10. Mr. Onorato was the president and qualifying individual of the corporation under this new name. *Id.* Triton Global's OTI license was revoked in October 2015 when its bond was terminated. *Id.* at 11.

In August 2017 an Onorato-company called Triton Alive applied for an OTI license. *Id.* at 1. Mr. Onorato was the sole member, CEO, and Secretary of Triton Alive and was listed as the company's proposed qualifying individual. *Id.* at 12. The Commission's Bureau of Certification

[1] The Commission is reviewing OTI Logistics' license application directly under 46 C.F.R. § 515.18 because OTI Logistics is controlled by William Onorato (OTI Logistics' CEO and sole owner), and Mr. Onorato's conduct led to the denial of Triton Alive, LLC' application for an OTI license less than three years before OTI Logistics filed its license application. *See* 46 C.F.R. § 515.18; Initial Decision, *In re Triton Alive, LLC*, OTI Hearing Docket No. 18-01 (Hearing Officer Mar. 28, 2018) (hereinafter *Triton Alive* I.D.).

[2] OTI Logistics' license application states that Angela Onorato was employed by Triton Overseas Transport Inc. from March 2000 until September 2014. *See* FMC Form 18 – Application for a License as an Ocean Transportation Intermediary, OTI Logistics, July 24, 2018.

and Licensing (BCL) notified Triton Alive of its intent to deny the license application, and Triton Alive requested a hearing.

On March 28, 2018, a Commission Hearing Officer affirmed BCL's denial of Triton Alive's license application. In reviewing Mr. Onorato's previous business, the Hearing Officer found, "a history of lax financial practices, lack of payment to creditors, and dishonored checks" and no evidence that this conduct would change. *Id.* at 18. The Hearing Officer thus determined that Triton Alive and Mr. Onorato lacked the necessary character to render OTI services. *Id.* The Commission chose not to review this decision.

B. OTI Logistics

As for the company at issue in this proceeding, OTI Logistics was incorporated in Texas on November 19, 2007. Between its formation and the submission of its OTI license application, OTI Logistics has twice forfeited its certificate pursuant to the Texas Tax Code. The State of Texas – Tax Forfeiture, OTI Logistics Inc., Oct. 16, 2009; The State of Texas – Tax Forfeiture, OTI Logistics Inc., Jan. 27, 2017. On May 24, 2018, having paid all fees, taxes, and penalties due to the state, OTI Logistics had its forfeitures set aside and was reinstated. The State of Texas – Tax Clearance Letter for Reinstatement, OTI Logistics Inc., May 24, 2018. In the eleven-year period between its formation and the submission of its OTI application, OTI Logistics was in good standing with the State of Texas for a total of two years and eleven months. *Id.*

When OTI Logistics was formed, Angela Onorato was listed as its president, sole stockholder, and director, and Mr. Onorato was listed as its secretary. The State of Texas – Certificate of Formation, OTI Logistics Inc., Nov. 19, 2007. OTI Logistics' Form FMC-18 application also indicates that Mrs. Onorato was employed by OTI Logistics from August 2000 (almost seven years before its formation) until July 2018.

On May 30, 2018, the Onoratos' roles changed. Mrs. Onorato became OTI Logistics' secretary and Mr. Onorato became its director and sole stockholder. On July 24, 2018, Mr. Onorato was designated as chief executive officer. The website of OTI Logistics prominently features Mr. Onorato and states "William Onorato of OTI Logistics has excelled in the logistics industry since the early 1990s." OTI Logistics – About Us, https://www.oti-logistics.com/#about-us.

Also on July 24, 2018, three months after the Commission denied Triton Alive's license application, OTI Logistics applied for an OTI license. OTI Logistics' application lists Mr. Onorato as the company's president and 100% owner. Mrs. Onorato is listed as secretary and as the proposed qualifying individual (QI) of OTI Logistics.

In reviewing OTI Logistics' application, BCL contacted Mrs. Onorato's three references to determine whether Mrs. Onorato had the required three years of OTI experience under 46 C.F.R. § 515.11(a). BCL staff conducted telephone interviews with [redacted] and concluded that Mrs. Onorato was not involved in the "day to day" business activities at Triton Overseas. BCL contacted Mrs. Onorato on two occasions and requested additional references, but Mrs. Onorato failed to comply with BCL's request.

II. DISCUSSION

A. Legal Standards

The Shipping Act gives the Commission the authority to issue ocean transportation intermediary licenses. *See* 46 U.S.C. § 40901(a). The Commission only issues such licenses to persons with the requisite experience and character to act as an OTI. *Id.*; 46 C.F.R. § 515.14(a). The Commission will deny a license if the applicant, among other things, lacks this experience or character or fails to respond to any lawful inquiry of the Commission. 46 C.F.R. § 515.15(a), (b). The burden of proof rests on the license applicant. *Falcon Shipping Inc., Abdiel Falcon – Application for a License as an Ocean Transportation Intermediary*, 32 S.R.R. 382, 383 (FMC 2012).

To have the necessary experience, a license applicant's qualifying individual must have a minimum of three years' experience in ocean transportation intermediary activities in the United States. 46 C.F.R. § 515.11(a)(1). In investigating whether an applicant has the necessary character, the Commission considers things such as violations of shipping and other laws, operating without a license, and financial problems (e.g. bankruptcies, tax liens, and judgments). *See* 46 C.F.R. § 515.11(a)(2).

B. Character

Considering the Commission's previous concerns with Mr. Onorato's character and OTI Logistics' financial issues, it is apparent that OTI Logistics lacks the character required for an OTI license. The character of a corporate license applicant is based on that of its proposed qualifying individual and principal owners and officers. 46 C.F.R. §§ 515.11(b)(3); Advanced Notice of Proposed Rulemaking: Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements and General Duties, 78 Fed. Reg. 32946, 32947 (May 31, 2013).

The Commission has already determined, when denying Triton Alive's license application, that William Onorato – OTI Logistics' president and sole owner – lacks the necessary character to render ocean transportation intermediary services. *Triton Alive* I.D. at 12-18. In that proceeding, the Hearing Officer concluded that there was a "pattern of lack of financial responsibility" in Mr. Onorato's previous business and no evidence that this would change. *Id.* at 18. The Hearing Officer noted that Mr. Onorato's previous company, Triton Global, had its credit suspended by MSC for payments outstanding and later defaulted on a payment plan with MSC and stopped payment on current shipments. The same company had a judgement entered against it, and creditors were only able to recover a fraction of debts that amounted to hundreds of thousands of dollars. Triton Global later lost its license for failure to maintain a bond. *See, e.g., id.* at 10-12, 14-19.

The Commission has no cause to reconsider its prior conclusion that Mr. Onorato, and thus OTI Logistics, lacks the character to serve as an OTI. Moreover, OTI Logistics itself twice forfeited its certificate pursuant to the Texas Tax Code. Consequently, OTI Logistics has not established that it has the character to render OTI services.

C. Experience

In addition to lacking the character to render OTI services, OTI Logistics has not established that its proposed qualifying individual, Angela Onorato, has the minimum of three years' experience in ocean transportation intermediary activities in the United States.

OTI Logistics' application states that Mrs. Onorato has nearly fourteen years of experience with Triton Overseas, which was a licensed NVOCC from 1999 to 2014. But the Commission's inquiry involves not just the length of a proposed qualifying individual's experience, but the nature of that experience in handling ocean transportation intermediary duties. 46 C.F.R. § 515.13(d). Information obtained [redacted] suggests that she was not involved in day-to-day business activities of Triton Overseas. Specifically, [redacted] indicated that Mrs. Onorato did not handle day-to-day activities at Triton Overseas and was only involved occasionally or sporadically. [redacted] further said that Mrs. Onorato would never handle any of the technical aspects of the business. [redacted] also said that Mrs. Onorato was seldom in the office, and all stressed that she was not involved in day-to-day activities, if involved with the business at all.

In light of that information, BCL twice requested that OTI Logistics provide two additional references for Mrs. Onorato. *See* 9/5/18 Email from BCL to Angela Onorato; 8/21/18 Email from BCL to Angela Onorato. Mrs. Onorato refused, however, to comply with BCL's requests. *See* 9/5/18 Email from Angela Onorato to BCL; 8/21/2018 Email from Angela Onorato to BCL.

In sum, OTI Logistics did not provide sufficient information for the Commission to determine that OTI Logistics' proposed qualifying individual possesses the required experience to qualify for an OTI license. In the absence of such information, the Commission cannot issue an OTI license.[3]

III. CONCLUSION

OTI Logistics' president and sole owner lacks the requisite character, and its proposed qualifying individual has not demonstrated the requisite experience for OTI Logistics to render ocean transportation intermediary services. We therefore **DENY** OTI Logistics' application to operate as an ocean transportation intermediary.

By the Commission.

Rachel E. Dickon
Secretary

[3] OTI Logistics' failure to comply with the Commission's request for additional references also justifies denying its application for an OTI license. *See* 46 C.F.R. § 515.15(b); *cf.* 46 C.F.R. § 515.16(a)(2).

FEDERAL MARITIME COMMISSION

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant*

v.

RDD FREIGHT INTERNATIONAL INC., *Respondent*.

DOCKET NO. 17-02

Served: March 7, 2019

BY THE COMMISSION: Michael A. KHOURI, *Acting Chairman* and Rebecca F. DYE, Daniel B. MAFFEI, and Louis E. SOLA, *Commissioners*. *Commissioner* MAFFEI filed a concurring opinion.

ORDER VACATING AND REMANDING INITIAL DECISION

On August 29, 2018, the ALJ found that Respondent violated 46 U.S.C. § 41102(c) when it released cargo to the consignee without obtaining an original bill of lading. ALJ I.D. at 1, 13. In so finding, the ALJ relied on the Commission's decision in *Bimsha Int'l v. Chief Cargo Services, Inc.*, 32 S.R.R. 1861, 1866 (FMC 2013), which provides, among other things, that non-vessel- operating common carriers (NVOCCs) violate § 41102(c) "when they fail to fulfill NVOCC obligations, *through single or multiple actions or mistakes*, and therefore engage in an unjust and unreasonable practice." ALJ I.D. at 12-13 (emphasis added).

This interpretation of § 41102(c), however, insofar as it holds that discrete conduct with respect to a single shipment may constitute a violation of the statute, runs contrary to the original intent of Congress, the rules of statutory construction, and Commission precedent. *See, e.g.*, Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45367-45372 (Sept. 7, 2018).

Properly interpreted, and consistent with pre-2010 Commission precedent, § 41102(c) applies to acts or omissions that occur on a normal, customary, and continuous basis. 83 Fed. Reg. at 64479; 83 Fed. Reg. at 45369-70, 45372; *see also* 46 C.F.R. § 545.4(b). Here, while the ALJ noted that Respondent released cargo without receiving an original bill of lading "[f]or three separate shipments," ALJ I.D. at 13, the ALJ did not consider whether Respondent's conduct occurred on a normal, customary, and continuous basis.

Consequently, the Commission **VACATES** the Initial Decision and **REMANDS** this matter to the ALJ for consideration of the § 41102(c) claims in light of the Commission's revised interpretation.

By the Commission.

Rachel E. Dickon
Secretary

***Commissioner* Maffei, concurring:**

I must note that I disagree with the interpretation of 46 U.S.C. § 41102(c) contained in interpretive rule 46 C.F.R. § 545.4 adopted on December 17, 2018. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018). A full discussion of the issues and my reasoning for my interpretation of 46 U.S.C. § 41102(c) are set forth in my concurring opinion in *Gruenberg-Reisner v. Respondent Overseas Moving Specialists*, 34 S.R.R. 613, 626-32 (FMC 2016).

However, unless and until a majority of the Commission chooses to change the interpretive rule, the rule is struck by appellate bodies, or clarifying legislation enacted, I concur with the recommendation.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

PORT ELIZABETH TERMINAL & WAREHOUSE CORP.,
Complainant

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

DOCKET NO. 17-07

Served: March 25, 2019

BEFORE: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION[1]

[Exceptions filed by Complainant, 4/16/19, Commission final decision pending]

I. INTRODUCTION

A. Overview and Summary of Decision

This proceeding is a dispute between Complainant Port Elizabeth Terminal & Warehouse Corp. ("PETW" or "PET&W") and Respondent the Port Authority of New York and New Jersey ("Port Authority" or "PANYNJ") about leasing decisions made by the Port Authority. PETW alleged a number of violations of the Shipping Act of 1984 ("Shipping Act"); however, only a few allegations remain after a prior initial decision, currently being reviewed by the Commission, which granted a motion to partially dismiss the complaint.

In the remaining allegations, PETW alleges that non-party Port Newark Container Terminal ("PNCT") received an unreasonable preference or advantage, or that PETW received an undue or unreasonable prejudice or disadvantage, in violation of the Shipping Act. The Port Authority contends that there was no differential treatment and if there was, that it was justified because PNCT agreed to provide investments, terminal guarantees, and minimum throughput requirements; the Port Authority's business circumstances and needs were different when it negotiated the PETW lease in 2009 and the PNCT lease in 2011; PETW continued to be in arrears even after a payback agreement; and the Port Authority's determinations about the most effective land use planning for limited port facilities.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

This proceeding is similar to a previous case reviewed by the Commission and the factors articulated by the Commission in the *Maher* proceeding are applied to this case. *Maher Terminals, Inc. v. The Port Authority of New York and New Jersey*, 34 S.R.R. 322, 326 (2016) ("*Maher Settlement*"). This case involves not only challenges to leases but also challenges to parcels which were not leased to PETW and on which it was not invited to bid.

As discussed more fully below, the evidence is not sufficient to find that the Port Authority violated the Shipping Act.

B. Procedural Background

On July 26, 2017, the Commission issued a notice of filing of complaint and assignment indicating that Complainant PETW filed a complaint against Respondent Port Authority alleging violations of the Shipping Act.

On August 17, 2017, the Port Authority filed its answer denying the allegations and asserting that its actions were justified because it acted in accordance with the Shipping Act. The Port Authority raised a number of affirmative defenses including failure to state a claim, waiver and estoppel, statute of limitations, and that PETW materially breached its obligations under the lease agreement. Answer at 12-13.

On April 17, 2018, an initial decision granting a motion to partially dismiss the complaint was issued. The partial initial decision found that the Shipping Act's statute of limitations bars reparations for the complaint, although PETW may seek a cease and desist order, and that PETW's complaint does not meet the *Iqbal/Twombly* pleading standard for claims of unreasonable refusal to deal or negotiate and for failing to establish, observe, and enforce just and reasonable regulations and practices. That decision was appealed and is currently being reviewed by the Commission. This decision does not rule on any of the issues addressed in the partial initial decision.

On August 2, 2018, PETW filed its brief, proposed findings of fact, and appendix on the remaining claims. On August 29, 2018, the Port Authority filed its opposition brief, proposed findings of fact, objections to Complainant's proposed findings of fact, and appendix. On September 14, 2018, PETW filed its reply brief and response to Respondent's proposed findings of fact.

C. Pending Motions

1. Amended Complaint

PETW states in its brief that on May 22, 2018, PETW "requested leave to file an Amended Complaint which remains pending today." Brief at 56 n.4. The May 22, 2018, status report filed by the parties included in the proposed schedule a line which stated: "PET&W to submit a First Amended Complaint within _____ days (30 suggested)." Joint Status Report at 1.

The revised scheduling order issued on May 31, 2018, states:

> Complainant requests thirty days to submit an amended complaint. However, no motion to amend the complaint has been filed. It is not clear that the undersigned would have the authority to permit an amended complaint, particularly if it implicated the dismissed claims which are currently under review by the Commission. The joint status report does not indicate any basis for permitting an amended complaint. Therefore, this is not included in the schedule below.

Revised Scheduling Order at 1. To the extent the issue was raised, it was addressed. Moreover, a motion requesting leave to file an amended complaint was never filed by PETW. In addition, Complainant was not prohibited from filing a motion for leave to file an amended complaint that addressed the issues raised in the revised scheduling order and provided a proper basis for an amended complaint. No such motion was ever filed. Given that this initial decision rules on the merits of the remaining issues in the proceeding, a motion for leave to file an amended complaint at this stage would be untimely.

2. Request for Adverse Inference

PETW contends that "an adverse inference should be taken as a result of the PANYNJ's refusal to provide basic discovery." Brief at 57. PETW has been seeking a number of documents including requests for proposals ("RFPs"), inspection sign-in sheets, and RFP responses for the 1400 and LaFarge buildings, lease agreement with Columbia Coastal,[2] monthly reports regarding other tenants in arrears, and settlement agreements with other tenants. Brief at 57. PETW states that the Port Authority "has been requested to produce the above documents but did not do so." Brief at 57.

The Port Authority contends:

> PETW's request for an adverse inference should be denied because the Port Authority provided responses to PETW's post-deposition document production requests and PETW never indicated to the Port Authority that the responses were unsatisfactory. Even if PETW gave the Port Authority such notice, the proper remedy would have been for PETW to file a motion compelling discovery. Accordingly, PETW's request for an adverse inference is wholly inappropriate and should be denied.

Opposition at 37.

PETW never filed a motion to compel this discovery and did not provide a basis for requiring the information. However, these documents were requested in the May 22, 2018, joint status report. Joint Status Report at 2-3. The revised scheduling order states:

> Complainant requests two weeks to file a motion to compel additional discovery. However, the initial decision indicated that the joint status report should "address whether additional discovery is required given this decision limiting the issues in the proceeding." Complainant lists additional discovery that it requests *but does*

[2] Columbia Coastal appears to be one of or related to the Columbia group of companies.

> *not provide any basis for needing the additional discovery*. Extensive discovery has been completed, including "multiple depositions from both sides, thousands of pages of documents exchanged, as well as the exchange of expert reports from both sides." JSR at 3-4. The discovery period has previously been extended. Although a motion to extend discovery was filed on March 1, 2018, a motion to compel was not filed for these documents. Giving consideration to the arguments in the joint status report as well as the status reports and other filings in this proceeding, the discovery period will not be further extended.

Revised Scheduling Order at 1-2 (emphasis added). If PETW believed that these documents were necessary to its case, then it should have filed a motion to compel explaining why they were necessary.

An adverse inference is not appropriate for documents for which a motion to compel was not filed and that were never ordered to be produced. Accordingly, PETW's request for adverse inferences is hereby denied.

D. Evidence

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, testimony, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *Atlantic Shipping Co., Inc. v. Di Nos Shipping, Inc.*, 32 S.R.R. 626, 630 (ALJ 2014) (Notice Not to Review, 5/18/2012). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

The evidentiary record in this proceeding contains thousands of pages and is needlessly long. PETW failed to properly paginate its exhibits making citation to them difficult. The Port Authority's exhibits, although duplicating some of PETW's exhibits, are paginated and will be cited when possible. In the future, only readable, paginated copies of relevant exhibits should be submitted.

PETW frequently cited to its own complaint as evidence of facts and rarely cited to the exhibits that it submitted. Citations to allegations are not as persuasive without evidence

supporting the allegations. PETW did not cite to the majority of its exhibits, leaving one to wonder why they were submitted.

Part two provides specific findings of fact. Part three provides analysis and conclusions of law, dismissing two claims for lack of subject matter jurisdiction before dismissing the final claim for unreasonable preference or prejudice on the merits. Part four provides the Order.

II. FINDINGS OF FACT

A. Parties

1. PETW

1. Complainant PETW is a corporation organized under the laws of the State of New Jersey. Respondent's Responses to Complainant's Findings of Fact ("RRCFF") at 1.

2. PETW has an office and principal place of business at 201A Export Street, Port Newark, New Jersey. RRCFF at 1.

3. PETW has warehouses in Levittown, Pennsylvania, and in Elizabeth, Jersey City, and South Kearny, New Jersey. RX 284-285.

4. PETW provides warehousing and other terminal services and facilities to other marine terminal operators and common carriers handling thousands of shipping containers that enter or depart through the Port of New York and New Jersey. RX 281, RX 298.

5. PETW handles both import and export materials. RX 288. PETW warehouses alcoholic beverages, paper, pulp, wastepaper, food products, metal, nonhazardous products, wood products, and imported water. RX 283-284.

6. PETW primarily handles ocean shipping containers loaded to the rated capacity of the containers, generally 58,800 lbs, too large to be legally shipped on the United States highway system. These containers can be transported via the Port's highway system to PETW which transloads the cargo to legal public highway weights for delivery off-port. RX 337-339.

7. PETW has been a tenant of the Port Authority and doing business in the Port of New York and New Jersey for over forty years. RX 57.

2. Port Authority

8. The Port Authority is a body corporate and politic created by Compact between the States of New York and New Jersey with the consent of the Congress of the United States, existing under the laws of the States of New Jersey and New York, with its principal place of business at 4 World Trade Center, 150 Greenwich Street, New York, New York. RRCFF at 1.

9. The Port Authority operates marine terminal facilities in the New York and New Jersey area, including in Elizabeth, New Jersey. RRCFF at 1.

10. The Port Authority is a marine terminal operator within the meaning of the Shipping Act, 46 U.S.C. § 40102(14), and landlord of the Port of Newark, pursuant to a long-term written agreement entered into in 1947 by the Port Authority and the City of Newark, which owns the Port of Newark. RRCFF at 1-2; RX 1078.

11. When considering whether to enter into a lease with a potential tenant, there are a variety of factors that the Port Authority considers, including jobs, employment, nexus to maritime activities such as vessel calls, and desire for the highest and best use of port space. RX 53-54.

12. There is no policy for when the RFP process is used, although criteria considered includes availability, whether the property has been claimed or incorporated into a lease, and long-term and mid-term land use planning decisions. RX 110-113, RX 203.

13. The questions answered when responding to Port Authority's RFPs include "how your firm will maximize revenue and capital investment" and describe "the capital investments/improvements that you intend to make at the property." Complainant Appendix, Ex. D, at PET&W 721-722.

14. The process of evaluating potential tenants includes a viability analysis which is subjective. RX 206-207.

B. Agreements

1. PETW Lease

15. The Port Authority and PETW are parties to a lease agreement designated as Lease No. LPN-297 ("PETW Lease") which they entered into on November 1, 2009, for building 201 and building 202. RRCFF at 4, 9-10.

16. The PETW Lease is one of multiple leases entered into by the parties as part of their business relationship in the past years. RRCFF at 9; RX 707-839.

17. The PETW Lease commenced on November 1, 2009, and was scheduled to "expire if not sooner terminated" on October 31, 2019 (the "Building 173/201/202 Premises Term)." RRCFF at 10; RX 712, RX 753-755.

18. The "Additional Termination Rights/Recapture Rights" of the PETW lease state: "In addition to all other rights under this Agreement, to the Building 173 Annex Premises, the Building 201 Premises, the Building 202 Premises, and the Open Area, both the Port Authority and the Lessee shall have the right to terminate the letting under the Agreement, without cause, effective at any time from and after October 31, 2015, on one (1) year's prior written notice to the other party." RX 770.

19. Pursuant to section 24 of the PETW Lease, the failure of PETW to duly and punctually pay its rents or make any other payment required under the PETW Lease when due to the Port Authority constitutes an event of default. RX 753-754.

20. The PETW Lease did not require PETW to make any investments. RX 707-839.

21. The PETW Lease did not require PETW to construct any improvements on the leased premises. RX 707-839.

22. The PETW Lease did not impose upon PETW any minimum throughput requirements. RX 707-839.

23. The PETW Lease did not require PETW to provide any terminal guarantees to the Port Authority. RX 707-839.

2. PNCT Agreement

24. Port Newark Container Terminal ("PNCT"), which currently owns the leasehold for buildings 201 and 202, is not a party to this proceeding. *See* RX 62.

25. PNCT is a joint venture with a fifty-fifty split between Ports America and TIL, a wholly owned subsidiary of Mediterranean Shipping Line, an ocean carrier. RX 74-75.

26. The Port Authority and PNCT are registered as marine terminal operators with the FMC. RX 1054.

27. The Port Authority and PNCT are parties to agreement LPN-264 ("PNCT Lease") filed with the Commission and designated as FMC Agreement No. 201132. RRCFF at 4; RX 840.

28. The PNCT Agreement has terminal guarantees, minimum investment requirements, and minimum throughput guarantees of qualified containers. RX 862, RX 890-891, RX 954-955.

29. Pursuant to the PNCT Lease, PNCT is required to invest an aggregate minimum of $500 million "for the construction of capital improvements and acquisition and installation or placement of capital fixtures, equipment or other capital items at the Premises." RX 890-891.

30. At the time the PNCT Lease was signed, PNCT represented to the Port Authority that it intended to invest "Six Hundred Eighteen Million Dollars and No Cents ($618,000,000.00) at and in the Premises in the following amounts and toward the following purposes: Site - $130 million, Wharf - $41 million, Buildings - $11 million, Technology - $16 million, and Equipment - $420 million." RX 891.

31. The PNCT Lease defines the term "Throughput Threshold Number" as "one hundred forty thousand nine hundred and sixty-eight (140,968) Qualified Containers." RX 862.

32. Pursuant to the PNCT Lease, PNCT is required to increase the throughput threshold number by "(1) one thousand seven hundred and five (1,705) Qualified Containers per acre upon the Completion Date with respect to each acre of each of the Development Parcels or any other property added to the Premises that is or becomes contiguous with the Existing Terminal Facility or the Development Parcels, completed by Lessee and (2) eight hundred (800)

Qualified Containers per acre upon the Completion Date with respect to each acre of the Starboard Street Property and the Waterfront Shimizaki Property completed by Lessee." RX 862.

33. The PNCT Lease defines the term "Terminal Guarantee Number" as "the number of Qualified Containers calculated by multiplying the number of acres comprising the Existing Terminal Facility, as increased by each of the Development Parcels or any other property added to the Premises that is or becomes contiguous with the Existing Terminal Facility or the Development Parcels upon the Completion Date for each such Development Parcel or other property (and for so long as each such Development Parcel or other property is included in the Premises), during the applicable Lease Year by 2500. Solely for the purposes of calculating Guarantee Rental as specified in Section 56 of this Agreement, prior to the Rail Fly-over Completion Date, the calculation of the Terminal Guarantee Number shall not include any acres comprising the Phase 1 Development Parcel." RX 862.

34. Section 56 of the PNCT Lease contains the terminal guarantees. RX 954.

35. The terminal guarantees of the PNCT Lease provide that "in the event that the number of Qualified Containers loaded onto or discharged from vessels berthing at the Premises during any such Lease Year shall not exceed the Terminal Guarantee Number for that Lease Year, Lessee shall pay to the Port Authority a Guaranteed Rental equal to the product obtained by multiplying (1) the difference between the Terminal Guarantee Number for that Lease Year and the actual number of Qualified Containers loaded onto or discharged from vessels berthing, at the premises during that Lease Year by (2) the Tier 1 Rental Rate in effect on the last day of that Lease Year pursuant to the provisions hereof. Any Guaranteed Rental owed under this Section shall be paid by Lessee to the Port Authority on the twentieth (20th) day of the month following the last month of the applicable Lease Year." RX 954.

36. Pursuant to the PNCT Lease, the Port Authority agreed to deliver to PNCT possession of certain parcels of land in Port Newark free of all tenants or other occupants (the "Added Parcels"). RX 868.

37. The Added Parcels would be delivered to PNCT in four phases. RX 857, RX 866-867.

38. Phase 3 required the Port Authority to deliver to PNCT no later than October 31, 2017, the parcels of land where buildings 201 and 202 were located, which were being leased to PETW at the time. RX 867, RX 129-130.

39. PNCT, in turn, was required to "develop and construct improvements on the Added Parcels for use as a Marine Container Terminal Facility . . . in accordance with plans and specifications approved by the Port Authority." RX 879.

40. Pursuant to the PNCT Lease, "[i]t is the understanding of the parties hereto that a significant portion of the Lessee's intended capital expenditures shall relate to the Development Parcels and other Added Parcels as part of the Premises and that the timing of such capital expenditures related to such Added Parcels is dependent upon the delivery of such Added Parcels by the Port Authority by the dates projected in Section 3 hereof." RX 891.

41. In order for the Port Authority to deliver possession of the Added Parcels to PNCT in a timely manner, the Port Authority agreed "that it shall use commercially reasonable efforts to cause the current tenants at each of the Added Parcels to comply with the applicable provisions in their lease agreements with respect to vacation and surrender of the relevant Added Parcel . . . . [and] not extend or renew any leases of the current tenants at each of the Added Parcels." RX 868.

42. PETW was aware that PNCT was expanding as early as 2008 or 2009 when it was told by the Port Authority that while they "were signing a ten-year lease, that they weren't sure. . . if we would have the property for the full ten years or not" but that the Port Authority would work with PETW to find space after the PNCT expansion. RX 318-319.

43. The expansion of PNCT's facility in Port Newark was publicly announced shortly after the parties signed the PNCT Lease. RX 1062-1063.

44. According to a June 15, 2011, article titled "Port Newark terminal lease deal to double volume," the "lease deal between the Port Authority of New York and New Jersey and Port Newark Container Terminal, or PNCT, calls for the company to secure $500 million in private investment intended to transform its facility on Newark Bay into a larger, more efficient state-of-the-art terminal, which in turn would help accommodate the increased container volume." RX 1062-1063.

45. The June 2011 article notes that the benefits of PNCT's investment will include the "creation of 1,150 jobs, including 350 construction jobs, resulting in $88 million in annual wages and $630 million in regional economic activity." RX 1062.

46. PETW learned about the PNCT lease when there was a publicity announcement in the press. Prior to that, PETW was just aware that there were negotiations. RX 320-321.

47. The Port Authority designated representative, Mr. Sam Ruda, said "No" when asked "do you have any facts that would justify the Port Authority's failure to allow Port Elizabeth Terminal & Warehouse Corporation to negotiate for the property that was ultimately leased to Port Newark Container Terminal?" RX 77.

3. FAPS Lease and Columbia Space Permit

48. In a meeting on November 19, 2010, and a July 18, 2011, letter, PETW made the CenterPoint proposal to construct a state-of-the-art warehouse facility on an empty lot to make up for part of the space it would lose due to the PNCT expansion. RX 481-483, RX 316-317.

49. The land proposed for the CenterPoint proposal was initially used by Foreign Auto Preparation Services, Inc. ("FAPS"), and then Columbia Container Services, LLC ("Columbia"). RX 431.

50. FAPS imports automobiles. RX 62-63, RX 101-102, RX 311, RX 1196-1197.

51. The Port Authority and FAPS entered into a lease agreement, Lease No. LPN-309 (the "FAPS Lease") effective as of October 1, 2010. RX 1188-1290.

52. The FAPS Lease required FAPS to pay throughput rental fees to the Port Authority for every vehicle handled by FAPS. RX 1197.

53. The FAPS Lease gave the Port Authority "the right, on ninety (90) days' notice, to recapture an aggregate of three (3) acres of the [leased] Premises in any sixty (60) month period of the Term for the purpose of facilitating the efficient movement of vehicles and cargo in and around the Facility, for the purpose of enhancing ingress and egress to adjacent leaseholds and public berths." RX 1245-1246.

54. Columbia "is the equipment repair and storage arm of the Columbia Group of Companies." RX 1290-1291.

55. The Port Authority and Columbia entered into a space permit agreement, Permit No. MNS-341 (the "Columbia Space Permit"), effective as of January 1, 2012. RX 1154-1187.

56. The provisions of the Columbia Space Permit allowed either the Port Authority or Columbia to revoke the permit without cause upon 30 days' notice. RX 1180.

57. The Port Authority designated representative said he was not at the Port Authority and did not know when asked to give "any factual justification for the Port Authority's decision not to allow Port Elizabeth to bid on the property that went from FAPS to [Columbia] Coastal Container." RX 204-206.

C. Arrears

58. PETW started falling behind on its monthly rent payments under the PETW Agreement in August 2014. RX 365-367, RX 696.

59. PETW failed to pay the rent it was required to pay under the PETW Agreement for the months of August 2014 and September 2014. RX 696.

60. As of February 5, 2015, PETW owed the Port Authority a total of $647,103.17. RX 696.

61. On February 5, 2015, the Port Authority and PETW entered into a six-month payback agreement. RX 696.

62. In the payback agreement, PETW acknowledged that it "has failed to pay its August and September 2014 monthly rents for Lease No. LPN-297, totaling $401,560.45; September 2014 monthly rent for Lease No. LPN-320, totaling $49,942.60; May, June, July, August and September monthly rent for Permit No. MNS-330, totaling $166,617, as well as retro billing for Permit No. MNS-330 totaling $13,068; and July, August and September 2014 monthly rents for Permit No. MNS-339 totaling $15,915.12." RX 696.

63. In order to allow PETW to pay back its arrears, the Port Authority authorized "a six-month payback schedule, in which PETW will make 13 bi-weekly payments of $50,923.73, including 8.5% interest charges, totaling $662,008.49." RX 696.

64. PETW failed to pay its arrears pursuant to the terms set forth in the February 5, 2015, payback agreement. RX 700.

65. As of March 16, 2016, PETW owed the Port Authority $1,783,155.24 in unpaid rents and other charges. RX 700.

66. In an email dated March 16, 2016, PETW was advised that its "account remains severely delinquent and continues to draw negative attention within the Port Authority. To avoid this being escalated any further, a substantial payment must be made immediately." RX 700.

67. PETW failed to make any additional payments. RX 1066-1072.

68. Following service of the Notice of Termination, representatives from the Port Authority and PETW met on numerous occasions, including on October 20, 2016; November 30, 2016; March 28, 2017; and June 13, 2017, to discuss PETW's proposals to pay back its outstanding arrears and find alternative warehousing space. RX 701-703 (10/20/16 & 6/13/17), RX 1073 (11/30/16), RX 478-480 (3/28/17), RX 1151(3/28/17).

69. The parties also exchanged proposals for additional space for PETW. RX 485-486, RX 704-705, RX 1150.

70. For instance, in February 2017, PETW submitted a repayment proposal whereby PETW would make an upfront payment of $1.25 million, which was less than half of the amount that PETW owed the Port Authority at the time, while the rest would be paid back in installments; the proposal includes an incremental rate of $0.50 per square foot on two buildings. RX 1150.

71. The Port Authority did not accept PETW's payback proposals because it required the Port Authority to wait over ten years to be paid in full and to lease multiple buildings to PETW, which presented "a significant business risk to the Port Authority based in the current financial condition of the company." RX 1150.

72. On February 23, 2017, PETW revised its proposal to make an initial payment of fifty percent of rent owed, although that did not seem to include late fees, adding 75 cents per square foot to rent new buildings, including buildings 1400, 267/268, and 265, which would have resulted in the rent being paid back in 4.3 years in a new ten-year lease. Complainant Appendix, Ex. D, at PET&W 602.

73. On March 17, 2017, PETW increased its offer to an additional $1.00 per square foot for buildings 1400 and 267/268, for 265 when it becomes available, and increased the initial payment. Complainant Appendix, Ex. D, at PET&W 609-611.

74. PETW, on April 21, 2017, requested an update from the Port Authority regarding its request for suitable alternative space, once again explaining how the lack of progress in negotiations over warehouse space was impacting PETW's business. RX 1064, RX 1150.

75. PETW's payback proposals required the Port Authority to lease several buildings to PETW and wait multiple years to be repaid in full. RX 485-486, RX 1150-1151.

76. The Port Authority's internal assessment on April 21, 2017, states:

> While PETW has proposed multiple options to pay back the arrearage over time, initiating court action may provide additional leverage and does not preclude advancing settlement discussions focused on resolving the arrearage issue and potentially maintaining some operating footprint on Port property, under certain conditions. It should be noted that PETW's operations in Port Newark, and off-port facilities in Jersey City and in Kearny, New Jersey generate approximately 47,000 annual TEU's of import/export containers through the PONYNJ. Industries supporting this maritime activity include paper, scrap paper, agriculture, alcoholic and non-alcoholic beverages. The container activity associated with PETW's operations generates approximately $900,000 per year in container terminal throughput and CFC revenue.

RX 1065.

77. The Port Authority believed that PETW also had "a substantial arrearage with PNCT." RX 1064.

78. On May 1, 2017, the Port Authority drew down $655,000 from PETW's letters of credit, and applied this amount towards PETW's arrears. RX 1064-1065.

79. In September 2017, the Port Authority offered alternative space to PETW if it paid its arrearage of approximately $3 million. But, PETW indicated that this location was not suitable for its business. RX 704-705.

80. Mr. Patrick Wynne, PETW's President, stated about the 150 Pulaski Street offer that:

> I think initially in terms of showing it to us perhaps they thought it was an option, but I think we made it clear that it wasn't at all. So I can only say by continuing to offer that when it's not viable and I think people knew it wasn't viable, I would not call that a good faith.

RX 446-447.

81. By February 23, 2018, PETW owed the Port Authority $3,584,765.85 in back rents, utilities, and late charges. RX 1066-1072.

82. The Port Authority "basically said to [PETW that] they couldn't see their way clear to leasing property to us because of the rent being in arrears." RX 381.

83. PETW's economic expert estimated that PETW had transfer costs of $378,875 to relocate from the buildings at issue here; that the replacement buildings had a higher gross rent; and that PETW moved out of 854,255 square feet and only found replacement space of 687,943 square feet. Complainant's Appendix, Exhibit E.

84. The Port Authority did negotiate with other tenants, even though they were in arrears. RX 85, RX 106.

85. For example, FAPS was in arrears for over two million dollars. As part of a lease supplement, FAPS made a lump sum payment, the balance of the arrearage was incorporated into a monthly payment ending in 2018 or 2019, and the amount of land leased was reduced. RX 176-177.

86. The Port Authority analysis showed that a contributing factor to FAPS's arrearage was a loss of business to the Port of Baltimore, but that other parts of the business were viable. RX 176-177.

87. Mr. Wynne drafted a letter in 2017 which stated that PETW "was most significantly impacted by the disruption of business resulting from the need to vacate three Port Authority buildings in Port Newark for terminal expansion, and Building 1400 for sprinkler repairs." RX 322-323.

88. The letter also stated that a "good deal of the financial challenges we are facing were not of our making. Superstorm Sandy, the bad winters and resulting congestion dropped productivity and increased costs and chased some customers from using the port." RX 327, *see also* RX 187.

89. Mr. Wynne also pointed to 2M, a joint service of MSC and Maersk in 2015, which "created tremendous congestion and inefficiency in the Port at the same time we were in the process of relocating." RX 329, RX 439.

D. Properties

1. Buildings 201 and 202

90. The Port Authority had PETW vacate 312,000 square feet of warehouse space at 201 Export Street and 202 Clipper Street to allow for the PNCT Terminal Expansion as required by the PETW Agreement. RX 564-565, RX 698-699.

91. As buildings 201 and 202 were part of the Added Parcels to be delivered to PNCT free of all occupants and tenants, on April 19, 2016, the Port Authority served upon PETW a Notice of Termination pursuant to section 41(a) of the PETW Agreement (the "Notice of Termination"). RX 698-699.

92. In the Notice of Termination, the Port Authority advised PETW that it was exercising its rights to terminate the letting of buildings 201 and 202 effective May 1, 2017, with the last day of beneficial occupancy being April 30, 2017. RX 698.

93. The Port Authority gave PETW one year's prior written notice to vacate buildings 201 and 202, as required by section 41(a) of the PETW Agreement. RX 698-699.

94. Despite having over one year's written notice, PETW did not vacate buildings 201 or 202. RX 1064; RPFF 32.

95. On May 4, 2017, the Port Authority commenced a landlord/tenant action for a judgment of possession of buildings 201 and 202 in the Superior Court of New Jersey. RX 1074-1079, RX 1064-1065; RPFF 32.

96. On July 21, 2017, four days before the trial date of the landlord/tenant action, PETW filed this complaint with the FMC. RX 1-14.

97. After both sides had the opportunity to be heard, the Judge found that as a matter of law, the Port Authority complied with the provisions of the PETW Agreement and entered a judgment of possession in favor of the Port Authority. RX 1123-1126.

98. As part of his decision, the Judge stated that he suspected that PETW's filing of the FMC action was "simply a ploy" to "delay the eviction process." RX 1109-1110.

99. In its August 7, 2017 decision, the Appellate Division found that "[a]lthough a prior application had been made to the FMC, the trial court reasonably found defendant's filing of a complaint with the FMC was an inappropriate tactic to delay eviction proceedings." RX 1128-1129 (citation excluded).

100. PETW did not vacate these buildings until October 23, 2017. RX 416.

2. Panama Street, Export Street, Marlin Street, and Aruba Street

101. PETW obtained possession of 138,400 square feet of warehouse space at 1400 Aruba Street pursuant to a sublease agreement it entered into with Tyler Distribution ("Tyler") on March 1, 2010. RX 687-695.

102. The sublease of the 1400 Aruba Street building ended on February 28, 2013, and on or about December 31, 2014, PETW vacated the property. RX 59-60, RX 69-70.

103. Mr. Wynne testified that PETW vacated the building at 1400 Aruba Street because it was told by somebody from the Port Authority leasing office that "there was an issue with the sprinkler system and it had to be repaired/replaced and the building needed to be empty to do that." RX 326-327.

104. Mr. Ruda also testified that "my recall is that building 1400 has some sprinkler issues." RX 69.

105. On or about July 18, 2016, PETW sought to negotiate with the Port Authority regarding the leasing of the building at 1400 Aruba Street. RX 687-688.

106. At no time did PETW ever enter into any agreement to lease the building at 1400 Aruba Street from the Port Authority. RX 360.

107. It appears that the warehouse space at 1400 Aruba Street remains vacant and has been the subject of an RFP. RX 69-70.

108. On or about March 31, 2015, PETW vacated 312,000 square feet of warehouse space at 191 Export Street, 194 Panama Street, and 199 Panama Street at the Port Authority's request. RX 346-347, RX 353, RX 506, RX 697, RX 683.

109. PETW vacated the buildings at 194 Panama Street and 199 Panama Street because the letting of those buildings terminated on July 31, 2012, pursuant to the PETW Agreement. RX 346-347, RX 644-645, RX 697.

110. PETW vacated the building at 191 Export Street because the letting of that building terminated on July 31, 2013, pursuant to a different lease agreement that the Port Authority and PETW had entered into on July 31, 2008, titled LPN-286. RX 352-354, RX 644-645, RX 697.

111. On or about November 30, 2015, PETW vacated 91,855 square feet of space at 292 Marlin Street. RX 325-326, RX 686.

112. Mr. Wynne testified that PETW was asked to vacate Marlin Street by the Port Authority, although there are no contemporaneous documents other than PETW's letter giving the Port Authority notice of the date that the property would be vacated. RX 332-333, RX 356-357, RX 686. It is also not clear from the evidence what type of agreement, if any, covered PETW's use of this property.

113. The Port Authority's designated representative agreed that "up until recently, that the Port Authority and Port Elizabeth Terminal & Warehouse have been able to negotiate deals to their mutual satisfaction that accommodates both sides' interests," including "moving the physical location of Port Elizabeth Terminal & Warehouse operation on occasion." RX 58.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-719 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. When the evidence is evenly balanced, the party with the burden of persuasion must lose. *Greenwich Collieries*, 512 U.S. 267, 281 (1994). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), *adopted in relevant part*, 26 S.R.R. 1424 (FMC 1994).

B. Jurisdiction

The Shipping Act provides that a "person may file with the . . . Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-999 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000).

Proper jurisdiction for a federal court is fundamental and necessary before touching the substantive claims of a lawsuit. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223-224 (5th Cir. 2012). "A litigant generally may raise a court's lack of subject matter jurisdiction at anytime in the same civil action, even initially at the highest appellate instance." *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576 (2004) (citations omitted). The party asserting jurisdiction bears the burden of proof if the opposing party raises lack of subject matter jurisdiction. *Branon v. Debus*, 289 Fed. Appx. 181, 183 (9th Cir. 2008); *The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 FMC LEXIS 33, *10 (FMC 2007).

The parties agree that Respondent Port Authority is a marine terminal operator. The question here is whether Complainant PETW must be a marine terminal operator as well.

The Shipping Act defines a marine terminal operator.

> The term 'marine terminal operator' means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. 40102(14).

Marine terminal operators provide terminal facilities in connection with common carriers. A common carrier is also defined by the Shipping Act.

> (6) Common carrier.—The term "common carrier"—
>
> (A) means a person that—
>
> > (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;
> >
> > (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and
> >
> > (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country; but

> (B) does not include a carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker, or by vessel when primarily engaged in the carriage of perishable agricultural commodities--
>
> > (i) if the carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and
> >
> > (ii) only with respect to the carriage of those commodities.

46 U.S.C. § 40102(6); *see also* 46 C.F.R. § 515.2(f).

This argument seems to be about both subject matter and personal jurisdiction. *See R.O. White & Company and Ceres Marine Terminals, Inc. v. Port of Miami Terminal Operating Company,* 31 S.R.R. 783, 808 (ALJ 2009) (Notice Not to Review, Oct. 6, 2009). The evidence clearly demonstrates that the Port Authority is a marine terminal operator and therefore within the personal jurisdiction of the Commission. *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 898 (FMC 1993). To determine subject matter jurisdiction, it is necessary to review each of the alleged violations.

1. Unreasonable Preference or Prejudice by Common Carriers Pursuant to a Tariff or Service Contract; 46 U.S.C. §§ 41104(8), 41104(9).

> Pursuant to 46 U.S.C. § 41104,
>
> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not- . . .
>
> (8) for services pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;
>
> (9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or imposed any undue or unreasonable prejudice or disadvantage with respect to any port.

46 U.S.C. §§ 41104(8), 41104(9).

It is not clear whether PETW meant to plead these sections as violations. When the complaint discusses unreasonable preference or advantage and unreasonable prejudice or disadvantage, these sections are cited. Complaint at 6. However, when the list of Shipping Act violations are summarized, these sections are not included. Complaint at 11. These sections are again cited in Complainant's Brief and Complainant's Reply. Brief at 8, 42; Reply at 9 (discussing the *Maher* case). The Port Authority does not discuss these sections specifically in its Opposition Brief.

This case involves a dispute about a lease agreement, not a tariff or service contract, between two parties, neither of which is a common carrier. Neither party proposed any facts or

provided evidence that the dispute involved a tariff or service contract. Moreover, the Port Authority is agreed by the parties to be a marine terminal operator, not a common carrier.

Sections 41104(8) and 41104(9) apply to common carriers providing services pursuant to a tariff or service contract. 46 U.S.C. §§ 41104(8), 41104(9). Because these two allegations apply to common carrier service pursuant to a tariff or service contract, and because this case does not involve common carriers, tariffs, or service contracts, these allegations will be dismissed. Accordingly, allegations of violations of 46 U.S.C. sections 41104(8) and 41104(9) are dismissed.

2. Unreasonable Preference or Prejudice by Marine Terminal Operators

Pursuant to 46 U.S.C. § 41106(2), a "marine terminal operator may not— . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2). The complaint alleges that the Port Authority gave undue or unreasonable preference or advantage or imposed undue or unreasonable prejudice or disadvantage with respect to PETW. Complaint at 6-8. Therefore, for this provision to apply, the Port Authority must be a marine terminal operator, which it is, and PETW must only be "any person," which it is.

The Port Authority argues that the Commission lacks jurisdiction over this matter because PETW is not a marine terminal operator under the Shipping Act. Opposition at 18. The Port Authority states that in this proceeding "PETW claims that the FMC has jurisdiction over this matter because the Port Authority, PNCT, and PETW are marine terminal operators." Opposition at 20.

PETW asserts that it is a marine terminal operator and "regardless of whether it is a Marine Terminal Operator, PET&W is a 'person' under the Shipping Act and, as such, the PANYNJ, which is indisputably a Marine Terminal Operator, may not impose any undue or unreasonable prejudice or disadvantage or give any undue or unreasonable preference or advantage with respect to PET&W." Reply at 1.

The Commission has subject matter jurisdiction if the Port Authority is a marine terminal operator. 46 U.S.C. 41106 ("A marine terminal operator may not –"). Therefore, to be liable under this section of the Shipping Act, Complainant must show that the Port Authority is a marine terminal operator within the meaning of the Shipping Act.

In *Auction Block*, Complainants were seafood processing, logistics, and leasing firms which filed a complaint against the City of Homer, which operated three docks, alleging that another seafood processing plant was charged lower terminal facility fees at the fish dock. *Auction Block Co. v. City of Homer*, 33 S.R.R. 589, 590 (FMC 2014). The Commission stated:

> The jurisdictional issue in this proceeding is whether the Shipping Act applies to the complaint. Complainant has the burden of demonstrating that the Commission has jurisdiction over the dispute. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201 (ALJ 1998), *aff'd* 28 S.R.R. 751 (FMC 1999).

> A party falls within the definition of an MTO, and therefore the jurisdiction of the Shipping Act, when it provides terminal facilities in connection with a common carrier. 46 U.S.C. § 40102(14). Auction Block concedes it is not a common carrier. Oral Argument Transcript (Transcript) at 9. The parties do not dispute that the Port provides terminal facilities and services common carriers at certain port facilities.

Auction Block, 33 S.R.R. at 591. The Commission found that marine terminal operator status should be determined on a facility-specific basis and complainants had not met their burden to establish jurisdiction over activities at the fish dock because even though respondents served common carriers at other docks, they did not serve common carriers at the fish dock. *Auction Block*, 33 S.R.R. at 593. The Ninth Circuit denied a petition to review the Commission decision, finding that the "facility-specific interpretation adopted by the Commission reasonably limits its jurisdiction to those cases with a connection to international shipping." *Action Block v. FMC*, 606 Fed. Appx. 347, 348 (9th Cir. 2015). In *Auction Block*, the complainants were not marine terminal operators and that did not have an impact on the analysis of jurisdiction.

Here, the parties agree that the Port Authority serves common carriers and is a marine terminal operator. *See* Opposition at 22, Reply at 1. Under this statute and similar to *Auction Block*, a claim alleging that a marine terminal operator gave "undue or unreasonable preference or advantage" to a person or imposed an "undue or unreasonable prejudice or disadvantage" against a person may be filed by "any person." 46 U.S.C. § 41106(2). Accordingly, in this proceeding, PETW, a corporate person, 1 U.S.C. § 1, has made a claim against a marine terminal operator, so that there is subject matter jurisdiction. Section 41106(2) does not require that Complainant establish that it is a marine terminal operator as well as Respondent.

Accordingly, the Commission has jurisdiction to adjudicate PETW's section 41106(2) allegation. The next step is to determine the merits of this remaining Shipping Act allegation regarding unreasonable preference or prejudice by a marine terminal operator.

C. Merits of the Remaining Claim; 46 U.S.C. § 41106(2)

1. Argument of the Parties

PETW contends that:

> 1) PET&W has been in a competitive relationship and similarly situated with other tenants at the Port operated by PANYNJ; 2) PET&W has been treated differently than the other port tenants; 3) the PANYNJ cannot justify the difference in treatment by any valid transportation factors and 4) the disparate treatment caused injury to PET&W.

Brief at 48. Although the complaint only mentions competitor PNCT, PETW's brief and proposed findings of fact also allege unreasonable preference or prejudice in relation to FAPS, Columbia, and any other marine terminal operators. Complaint at 6; Brief at 39, 41, 52-54.

The Port Authority asserts that:

> PETW cannot establish a prima facie case of unreasonable preference or prejudice because it is unable to meet any of the four required elements. PETW cannot meet the first element because it is unable to establish that it is a marine terminal operator under the Shipping Act or that it is similarly situated to PNCT. PETW is unable to meet the second or third elements because it cannot show that the Port Authority unduly or unreasonably favored other marine terminal operators over PETW. Finally, PETW cannot demonstrate that the Port Authority's actions were the proximate cause of its damages.

Opposition Brief at 24. The Port Authority also alleges that FAPS and Columbia are not properly raised as they are not mentioned in the complaint. Opposition at 32.

2. Law

Pursuant to section 41106(2) of the Shipping Act, a "marine terminal operator may not give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2) (formerly Shipping Act § 10(d)(4) (formerly §§ 10(b)(11) & (12))).

In *Ceres*, the Commission established four elements of an unreasonable preference or advantage or unreasonable prejudice or disadvantage claim:

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury.

Ceres Marine Term., Inc. v. Maryland Port Admin., 27 S.R.R. 1251, 1270 (FMC 1997), *aff'd in part, rev'd in part on other grounds sub nom. Maryland Port Admin. v. Federal Maritime Commission*, 164 F.3d 624 (Table), 1998 U.S. App. LEXIS 25733 (4th Cir. 1998) (footnote omitted).

In *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, the Commission found that the Port Authority did not violate the Shipping Act in comparing the Maher lease with the lease of another entity at the port, APM-Maersk, after considering a number of factors including base rent, minimum throughput requirements, terminal guarantees, investment requirements, financing rate and security deposit, and first point of rest requirements. *Maher Terminals*, 33 S.R.R. 821, 841-852 (FMC 2014). The District of Columbia Circuit reviewed the Commission's decision in *Maher Terminals* and issued an opinion granting Maher's petition for review and remanding the case to the Commission "for an adequate explanation of its decision and policy" regarding the application of transportation factors and *Ceres* element three in the context of port leases. *Maher Terminals, LLC v. Federal Maritime Commission*, 816 F.3d 888, 892 (D.C. Cir. 2016).

The parties settled *Maher Terminals* before the Commission issued a further explanation of its decision or its policy regarding transportation factors. In the order approving the settlement of the *Maher Terminals* proceedings, the Commission stated:

> In light of the settlement, the Commission need not address at this time the D.C. Circuit's comments on "transportation factors" and the appropriate analysis of what constitutes an undue or unreasonable preference or prejudice under 46 U.S.C. § 41106(2). *Maher Terminals*, 816 F.3d at 892. By the same token, the Commission will defer the related questions raised in its June 21, 2016 Order to File Supplemental Briefs.
>
> Nevertheless, to reduce potential confusion, the Commission first notes that it will continue to consider all the relevant factors in its unreasonable preference analysis, including:
>
> a) the "transportation characteristics of a particular commodity," such as size, weight, or need for special handling, s*ee Credit Practices of Sea-Land Serv. Inc.*, 25 S.R.R. 1308, 1315 (FMC 1990);
>
> b) competition from other carriers, the fair interest of carriers, relative quantities of traffic moved, relative costs of services and profit, the convenience of the public, "and the situation and circumstances of the respective customers, as competitive or otherwise," s*ee N. Atl. Mediterranean Freight Conference – Rates of Household Goods*, 9 S.R.R. 775, 784 (FMC 1967) and *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, 24 S.R.R. 411, 455 (FMC 1987);
>
> c) in the case of marine terminal leases -- market conditions, available locations and facilities, and the nature and character of potential lessees, *see Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251, 1273-74 (FMC 1997); *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993); and
>
> d) the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being, *see Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 990, 994 (FMC 1986).
>
> Second, the Commission's analysis will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions. *See Seacon*, 26 S.R.R. at 899; *Petchem*, 23 S.R.R. at 993 (noting that the Commission's conclusion "is partially based on appropriate deference to the Port Authority, an entity familiar with business circumstances at Port Canaveral and entitled to a presumption that it is concerned with public and not private interest"). And, third, the Commission will not assume that competition between ports is a

> problem in need of a regulatory fix, as among the purposes of the Shipping Act is promoting competitive and efficient ocean transportation and placing a greater reliance on the marketplace.

Maher Settlement, 34 S.R.R. at 326. The Port Authority corporate representative in this proceeding testified that because of the volume and terminal guarantees, at this point, "the per-acre differential between the APM lease and the Maher lease is fairly nominal." RX 68.

3. Discussion

In the complaint, PETW alleges that the Port Authority gave undue or unreasonable preference to marine terminal operator PNCT, by taking property occupied by PETW and providing it to PNCT, and that because the Port Authority provided PNCT with an undue advantage, it is likely that PETW customers will be forced to seek a new marine terminal operator and PETW will lose business. Complaint at 8. In its brief, PETW asserts that an undue or unreasonable preference or advantage was given to other marine terminal operators, including PNCT, FAPS, and Columbia Coastal. Brief at 41, 48-54.

The Port Authority asserts that it did not impose any undue or unreasonable prejudice or disadvantage upon PETW or give any undue or unreasonable preference or advantage to others. Opposition at 23.

Each of the four *Ceres* elements is discussed in turn.

a. Relationship of Parties

PETW argues that it "has been in a competitive relationship and similarly situated with other tenants at the Port operated by PANYNJ." Brief at 48.

The Port Authority contends that "PETW is not similarly situated to PNCT because it does not qualify as a marine terminal operator" and that "PETW and PNCT do not compete to lease and utilize facilities at the port because they are in different businesses and have different space and location needs." Opposition at 25. In addition, the Port Authority asserts that "PETW's complaint is devoid of any allegations against either" FAPS or Columbia. Opposition at 25, 32.

The first element of a claim of unreasonable preference or prejudice is whether two entities are similarly situated or in a competitive relationship. This allows for an apples to apples comparison. As the Supreme Court described, the Commission has "applied the 'competitive relationship' doctrine which it has developed in cases concerning rates for carriage of goods by sea. But the Commission, in cases not involving freight rates and the particularized economics that result from a vessel's finite cargo capacity, has often found § 16 violations even in the absence of a 'competitive relationship.'" *Volkswagenwerk Aktiengesellschaft v. Federal Maritime* Commission, 390 U.S. 261, 279-280 (1968) (footnotes and citations omitted); *New Orleans Stevedoring Co. v. Bd. of Comm'ners of Port of N.O.*, 29 S.R.R. 1066, 1070 (FMC 2002).

"Traditionally, it was also necessary for the complainant to prove that the parties were similarly situated to prove undue preference or prejudice." *Ceres*, 27 S.R.R. at 1271 (footnote

omitted). However, more recently, "the Commission reaffirmed that a competitive relationship is not always necessary to prove an undue preference or prejudice." *Ceres*, 27 S.R.R. at 1271; *Credit Practices of Sea-Land Service Inc.*, 25 S.R.R. at 1313; *see also Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, 34 S.R.R. 600, 608-609 (FMC 2017), *rev'd on other grounds sub nom. Santa Fe Disc. Cruise Parking, Inc. v. Federal Maritime Commission*, 889 F.3d 795, 797 (D.C. Cir. 2018).

In *Ceres*, the Commission stated:

> We find that the disparate rates assessed Ceres vis-a-vis other port users, in particular Maersk, are more akin to the practices found prejudicial in *Valley Evaporating and Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*, and not to a situation where a competitive relationship would be necessary to challenge disparate commodity rates, and thus find that the parties in this case need not be similarly situated, or in a competitive relationship, to challenge terminal lease rates. The rates in question -- wharfage, dockage, crane rental and land rental -- apply universally and do not vary according to cargo characteristics. Rather, the level of the rate varies according to amount of cargo handled, or with crane service, according to hours of usage.

Ceres, 27 S.R.R. at 1271 (footnote omitted).

The parties in this proceeding agree that, as defined by the Shipping Act, the Port Authority is a marine terminal operator. PETW provides warehousing and other terminal services. PNCT also provides warehousing and other terminal services. PETW and PNCT compete to lease limited land and utilize facilities at the port, although they may serve different clients transporting different cargo. The evidence demonstrates that PETW and PNCT compete to lease warehousing facilities, which is sufficient for section 41106(2) to apply. Accordingly, the first *Ceres* element of similarly situated entities is met.

b. Different Treatment

PETW insists that it was treated differently than the other port tenants. Brief at 48. The Port Authority contests whether there was different treatment due to undue or unreasonable preferences and prejudices, combining the second and third *Ceres* elements. Opposition at 26.

A preference or prejudice is established by showing that a port "charges a different rate to different users for an identical service." *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation Dist.*, 10 S.R.R. 1037, 1042 (FMC 1969); *Chr. Salvesen & Co., Ltd. v. West Michigan Dock & Market Corp.*, 10 S.R.R. 745, 756 (FMC 1968) ("operators of public terminals must afford all customers seeking the same service fair and reasonable treatment").

Mere differences in treatment alone, however, do not violate the Shipping Act. *Petchem, Inc. v. FMC*, 853 F.2d 958, 963 (D.C. Cir. 1988) ("The Act clearly contemplates the existence of permissible preferences or prejudices."). Therefore, only "*undue* or *unreasonable* preferences and prejudices would be violative of the Prohibited Acts." *Seacon*, 26 S.R.R. at 900 (emphasis in original). "Indeed, it would be impossible for the Port to insure that all of its tenants are

identically situated, since each parcel and each operator has geographical and commercial idiosyncrasies." *Seacon*, 26 S.R.R. at 900 (footnote omitted). "The Commission is not required to tally and compare exactly what benefits were received by the relevant parties." *Seacon*, 26 S.R.R. at 900.

The Port Authority acknowledges that the PETW and PNCT agreements "have different terms and conditions" but argues that "one is not unduly preferential over the other" and that "[u]nlike the PNCT Agreement, the PETW Agreement does not require PETW to make any investments, construct any improvements on the leased premises, make any terminal guarantees or be subject [to] minimum throughput requirements." Opposition at 29.

The parties acknowledge that the PETW and PNCT agreements have different terms. PETW and PNCT pay different rates and PNCT is required to invest $500 million, increase the throughput threshold, and make additional payments if the number of qualified containers does not meet the terminal guarantee numbers. *See* Opposition at 29. The Port Authority's leases with PETW and PNCT were negotiated years apart and cover different time periods. The leased properties differ in size, buildings, and access to transportation and infrastructure. Maritime leases are rarely for identical property and some variation in rental terms is to be expected. Moreover, given the limited land available for the Port Authority to lease, there may not be enough land available to meet all the needs of every potential tenant. Accordingly, PETW has established that it and PNCT were treated differently. The next question is whether the differences in lease terms are reasonable and based on valid transportation factors.

c. Justification

PETW asserts that the Port Authority "cannot justify the difference in treatment by any valid transportation factors." Brief at 48. The Port Authority counters that any different treatment was not due to undue or unreasonable preferences and prejudices. Opposition at 26.

PETW asserts that:

> a 'transportation factor' is a tangible characteristic of the transportation service being regulated or charged; it is not an unrelated commercial attribute of the party seeking or providing the transportation service and the PANYNJ has not presented through discovery any valid "transportation factor" under the Shipping Act to justify its treatment of PET&W.

Brief at 44. PETW further contends that the Shipping Act "permits differential treatment among similarly situated parties *only* where valid differences in underlying circumstances actually motivated the decision-maker at the time." Brief at 47 (emphasis in original).

The Port Authority "submits that there are valid transportation factors that justify the differences in lease terms between PETW and PNCT," including "the identities of the lessees and the potential risks and benefits at the time the lease agreements were signed." Opposition at 30. In addition, the Port Authority asserts that the PETW and PNCT agreements were entered into at different times and that the Port Authority's "business circumstances and needs" were

different in November 2009 (PETW agreement) and June 2011 (PNCT agreement). Opposition at 30.

The relevant issue for *Ceres* element three is whether "the unequal treatment is not justified by differences in transportation factors." *Ceres*, 27 S.R.R. at 1270. The burden of production is on the respondent, but the burden of persuasion remains with the complainant. *Maher Terminals,* 33 S.R.R. at 840-841. Evaluating valid transportation factors in leases is more complex than in other areas regulated by the Shipping Act, where specific commodity features such as size, weight, and special handling can be compared. For maritime leases, it would be unusual to have identical features because there are often differences in location, size, buildings, access to transportation, etc. In this context, it is appropriate to consider as valid transportation factors "market conditions, available locations and facilities, and the nature and character of potential lessees." *Maher Settlement,* 34 S.R.R. at 326. In addition, "the Commission's analysis will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions." *Maher Settlement,* 34 S.R.R. at 326.

i. Designated Corporate Representative Testimony

Complainant primarily relies on the deposition of the Port Authority's designated corporate representative.

> Q. Okay. So what I'm trying to get at is, as a corporate representative, do you have any facts that would justify the Port Authority's failure to allow Port Elizabeth Terminal & Warehouse Corporation to negotiate for the property that was ultimately leased to Port Newark Container Terminal?
>
> A. No.

RX 77. Complainant asserts:

> The Shipping Act permits differential treatment among similarly situated parties *only* where valid differences in underlying circumstances actually motivated the decision-maker *at the time*. Further, these attempts at post hoc justifications by the PANYNJ in its proposed Findings of Fact and Conclusions of Law contradict the testimony of its 30(b)(6) designated representative and must be disregarded.

Reply at 8 n.4 (emphasis in original).

Testimony from a Rule 30(b)(6) witness is not binding as to the ultimate legal conclusion in the proceeding.

> Moreover, it is important to distinguish between the use of a Rule 30(b)(6) designee's comments as to ultimate legal conclusions as contrasted with statements to establish background facts: the testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes. The Rule 30(b)(6) testimony also is not binding against the organization in the sense that the testimony can be

> corrected, explained and supplemented, and the entity is not "irrevocably" bound to what the fairly prepared and candid designated deponent happens to remember during the testimony.

7 James Wm. Moore, et al., Moore's Federal Practice§ 30.25[3] (3d ed. 2016). "Finally, a Rule 30(b)(6) deponent's own interpretation of the facts or legal conclusions do not bind the entity." *Id.*

It should be noted that the cited Rule 30(b)(6) witness testimony does not encompass all of the issues raised in this proceeding. It is relevant but is viewed in light of the other evidence. Specifically, there are contemporaneous concerns raised by the Port Authority about PETW's arrears and business risks. These contemporaneous concerns are admissible despite the Rule 30(b)(6) witnesses' failure to mention them in response to this particular question.

ii. Lease Comparison

The Port Authority and PETW are parties to a lease agreement designated as Lease No. LPN-297, the PETW Lease, which they entered into on November 1, 2009, for buildings 201 and 202. RRCFF at 4, 9-10; RX 707-839. The PETW Lease is one of multiple leases entered into by the parties as part of their business relationship in the past years. RRCFF at 9. The PETW Lease was scheduled to "expire if not sooner terminated" on October 31, 2019. RRCFF at 10; RX 712, RX 753-755. The "Additional Termination Rights/Recapture Rights" of the PETW lease state that either the Port Authority or PETW "shall have the right to terminate the letting under the Agreement, without cause, effective at any time from and after October 31, 2015, on one (1) year's prior written notice to the other party." RX 770. Pursuant to section 24 of the PETW Lease, the failure of PETW to duly and punctually pay its rents or make any other payment required under the PETW Lease when due to the Port Authority constitutes an event of default. RX 753-754.

The PETW Lease did not require PETW to make any investments, construct any improvements on the leased premises, require minimum throughput guarantees, or provide any terminal guarantees to the Port Authority. RX 707-839.

PNCT, which currently owns the leasehold for buildings 201 and 202, is not a party to this proceeding. The Port Authority and PNCT are parties to agreement LPN-264, the PNCT Lease, filed with the Commission and designated as FMC Agreement No. 201132. RRCFF at 4; RX 840. The PNCT Agreement has terminal guarantees, minimum investment requirements, and minimum throughput guarantees of qualified containers. RX 862, RX 890-891, RX 954-955. The findings of fact, *supra*, include additional details regarding the terminal guarantees and minimum throughput guarantees.

Pursuant to the PNCT Lease, PNCT is required to invest an aggregate minimum of $500 million "for the construction of capital improvements and acquisition and installation or placement of capital fixtures, equipment or other capital items at the Premises." RX 890-891. At the time the PNCT Lease was signed, PNCT represented to the Port Authority that it intended to invest "Six Hundred Eighteen Million Dollars and No Cents ($618,000,000.00) at and in the Premises in the following amounts and toward the following purposes: Site - $130 million,

Wharf - $41 million, Buildings - $11 million, Technology - $16 million, and Equipment - $420 million." RX 891.

Pursuant to the PNCT Lease, the Port Authority agreed to deliver to PNCT possession of the Added Parcels free of all tenants or other occupants. RX 868. The Added Parcels would be delivered to PNCT in four phases. RX 857, RX 866-867. Phase 3 required the Port Authority to deliver to PNCT no later than October 31, 2017, the parcels of land where buildings 201 and 202 were located, which were being leased to PETW at the time. RX 867, RX 129-130. PNCT, in turn, was required to "develop and construct improvements on the Added Parcels for use as a Marine Container Terminal Facility . . . in accordance with plans and specifications approved by the Port Authority." RX 879. In order for the Port Authority to deliver possession of the Added Parcels to PNCT in a timely manner, the Port Authority agreed "that it shall use commercially reasonable efforts to cause the current tenants at each of the Added Parcels to comply with the applicable provisions in their lease agreements with respect to vacation and surrender of the relevant Added Parcel . . . . [and] not extend or renew any leases of the current tenants at each of the Added Parcels." RX 868.

According to a June 15, 2011, article titled "Port Newark terminal lease deal to double volume," the "lease deal between the Port Authority of New York and New Jersey and Port Newark Container Terminal, or PNCT, calls for the company to secure $500 million in private investment intended to transform its facility on Newark Bay into a larger, more efficient state-of-the-art terminal, which in turn would help accommodate the increased container volume." RX 1062-1063. The June 2011 article notes that the benefits of PNCT's investment will include the "creation of 1,150 jobs, including 350 construction jobs, resulting in $88 million in annual wages and $630 million in regional economic activity." RX 1062.

iii. Arrears

PETW started falling behind on its monthly rent payments under the PETW Agreement in August 2014. RX 365-367, RX 696. PETW failed to pay the rents it was required to pay under the PETW Agreement for the months of August 2014 and September 2014. RX 696. As of February 5, 2015, PETW owed the Port Authority a total of $647,103.17. RX 696.

On February 5, 2015, the Port Authority and PETW entered into a six-month payback agreement. RX 696. In the payback agreement, PETW acknowledged that it "has failed to pay its August and September 2014 monthly rents for Lease No. LPN-297, totaling $401,560.45; September 2014 monthly rent for Lease No. LPN-320, totaling $49,942.60; May, June, July, August and September monthly rent for Permit No. MNS-330, totaling $166,617, as well as retro billing for Permit No. MNS-330 totaling $13,068; and July, August and September 2014 monthly rents for Permit No. MNS-339 totaling $15,915.12." RX 696. In order to allow PETW to pay back its arrears, the Port Authority authorized "a six-month payback schedule, in which PETW will make 13 bi-weekly payments of $50,923.73, including 8.5% interest charges, totaling $662,008.49." RX 696.

PETW failed to pay its arrears pursuant to the terms set forth in the February 5, 2015, payback agreement. RX 700. As of March 16, 2016, PETW owed the Port Authority $1,783,155.24 in unpaid rents and other charges. RX 700. In an email dated March 16, 2016,

PETW was advised that its "account remains severely delinquent and continues to draw negative attention within the Port Authority. To avoid this being escalated any further, a substantial payment must be made immediately." RX 700. PETW failed to make any additional payments. RX 1066-1072.

The Port Authority's internal assessment on April 21, 2017, states:

> While PETW has proposed multiple options to pay back the arrearage over time, initiating court action may provide additional leverage and does not preclude advancing settlement discussions focused on resolving the arrearage issue and potentially maintaining some operating footprint on Port property, under certain conditions. It should be noted that PETW's operations in Port Newark, and off-port facilities in Jersey City and in Kearny, New Jersey generate approximately 47,000 annual TEU's of import/export containers through the PONYNJ. Industries supporting this maritime activity include paper, scrap paper, agriculture, alcoholic and non-alcoholic beverages. The container activity associated with PETW's operations generates approximately $900,000 per year in container terminal throughput and CFC revenue.

RX 1065. The Port Authority believed that PETW also had "a substantial arrearage with PNCT." RX 1064.

Following service of the Notice of Termination, representatives from the Port Authority and PETW met on numerous occasions, including on October 20, 2016; November 30, 2016; March 28, 2017; and June 13, 2017, to discuss PETW's proposals to pay back its outstanding arrears and find alternative warehousing space. RX 701-703, RX 1073, RX 478-480, RX 1151.

The parties also exchanged proposals for additional space for PETW. RX 485-486, RX 704-705, RX 1150. For instance, in February 2017, PETW submitted a repayment proposal whereby PETW would make an upfront payment of $1.25 million, which was less than half of the amount that PETW owed the Port Authority at the time, while the rest would be paid back in installments with an incremental rate of $0.50 per square foot on two buildings. RX 1150. The Port Authority did not accept PETW's payback proposals because it required the Port Authority to wait over ten years to be paid in full and lease multiple buildings to PETW, which presented "a significant business risk to the Port Authority based in the current financial condition of the company." RX 1150.

On February 23, 2017, PETW revised its proposal to make an initial payment of fifty percent of rent owed, although that did not seem to include late fees, adding 75 cents per square foot to rent new buildings, including buildings 1400, 267/268, and 265, which would have resulted in the rent being paid back in 4.3 years in a new ten-year lease. Complainant Appendix, Ex. D, at PET&W 602. On March 17, 2017, PETW increased its offer to an additional $1.00 per square foot for buildings 1400 and 267/268, for 265 when it became available, and increased the initial payment. Complainant Appendix, Ex. D, at PET&W 609-611. PETW, on April 21, 2017, requested an update from the Port Authority regarding its request for suitable alternative space, once again explaining how the lack of progress in negotiations over warehouse space was impacting PETW's business. RX 1064, RX 1150. PETW's payback proposals required the Port

Authority to lease several buildings to PETW and wait multiple years to be repaid in full. RX 485-486, RX 1150-1151.

On May 1, 2017, the Port Authority drew down $655,000 from PETW's letters of credit and applied this amount towards PETW's arrears. RX 1064-1065.

In September of 2017, the Port Authority offered alternative space to PETW if it paid its arrearage of approximately $3 million. But, PETW indicated that this location was not suitable for its business. RX 704-705. Mr. Wynne stated about the 150 Pulaski Street offer that:

> I think initially in terms of showing it to us perhaps they thought it was an option, but I think we made it clear that it wasn't at all. So I can only say by continuing to offer that when it's not viable and I think people knew it wasn't viable, I would not call that a good faith.

RX 446-447.

By February 23, 2018, PETW owed the Port Authority $3,584,765.85 in back rents, utilities, and late charges. RX 1066-1072. The Port Authority "basically said to [PETW that] they couldn't see their way clear to leasing property to us because of the rent being in arrears." RX 381.

The Port Authority did negotiate with other tenants, even though they were in arrears. RX 85, RX 106. For example, FAPS was in arrears for over two million dollars. As part of a lease supplement, FAPS made a lump sum payment, the balance of the arrearage was incorporated into a monthly payment ending in 2018 or 2019, and the amount of land leased was reduced. RX 176-177. The Port Authority analysis showed that a contributing factor to FAPS's arrearage was a loss of business to the Port of Baltimore, but that other parts of the business were viable. RX 176-177.

It is not clear exactly when PETW began having financial challenges. However, Mr. Wynne testified that he drafted a letter in 2017 which stated that "[o]ur company was most significantly impacted by the disruption of business resulting from the need to vacate three Port Authority buildings in Port Newark for terminal expansion, and Building 1400 for sprinkler repairs." RX 322-323. But, the letter also stated that a "good deal of the financial challenges we are facing were not of our making. Superstorm Sandy, the bad winters and resulting congestion dropped productivity and increased costs and chased some customers from using the port." RX 327. Mr. Wynne also pointed to 2M, a joint service of MSC and Maersk, which "created tremendous congestion and inefficiency in the Port at the same time we were in the process of relocating." RX 329. Some of these events, such as Superstorm Sandy in 2012, occurred prior to PETW being asked to vacate any buildings. PETW fell behind in paying rent in August of 2014 and the first building PETW was asked to vacate was 1400 Aruba in December of 2014. RX 59-60, RX 69-70.

The evidence demonstrates that the Port Authority continued to meet and exchange proposals with PETW. Even in 2017, the Port was interested in having PETW "potentially maintaining some operating footprint on Port property, under certain conditions." RX 1065. The

Port Authority had legitimate business concerns about the viability of PETW's business and about PETW's arrears which limited the Port Authority's willingness to lease to it. Commission caselaw permits public port authorities to consider "the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being." *Maher Settlement*, 34 S.R.R. at 326. The Shipping Act does not prohibit consideration of these legitimate business considerations. Thus, to the extent that the Port Authority refused to negotiate with or lease property to PETW, the evidence does not demonstrate that those actions were in bad faith or unreasonable.

iv. Properties

(a) Buildings 201 and 202

The Port Authority had PETW vacate 312,000 square feet of warehouse space at 201 Export Street and 202 Clipper Street to allow for the PNCT Terminal Expansion as required by the PETW Agreement. RX 564-565, RX 698-699.

As buildings 201 and 202 were part of the Added Parcels to be delivered to PNCT free of all occupants and tenants, on April 19, 2016, the Port Authority served upon PETW a Notice of Termination pursuant to section 41(a) of the PETW Agreement. RX 698-699. In the Notice of Termination, the Port Authority advised PETW that it was exercising its rights to terminate the letting of buildings 201 and 202 effective May 1, 2017, with the last day of occupancy being April 30, 2017. RX 698. The Port Authority gave PETW one year's prior written notice to vacate buildings 201 and 202, as required by section 41(a) of the PETW Agreement. RX 698-699.

Despite having over one year's written notice, PETW did not vacate buildings 201 or 202. RX 1064; RPFF 32. On May 4, 2017, the Port Authority commenced a landlord/tenant action for a judgment of possession of buildings 201 and 202 in the Superior Court of New Jersey. RX 1074-1079, RX 1064-1065; RPFF 32. On July 21, 2017, four days before the trial date of the landlord/tenant action, PETW filed a complaint with the FMC. RX 1-14.

The Superior Court found that the Port Authority complied with the provisions of the PETW Lease and entered a judgment of possession in favor of the Port Authority. RX 1123-1126. The court indicated that PETW's filing of the FMC action was merely a ploy to delay the eviction process. RX 1109-1110. In its August 7, 2017, decision, the Appellate Division found that "[a]lthough a prior application had been made to the FMC, the trial court reasonably found defendant's filing of a complaint with the FMC was an inappropriate tactic to delay eviction proceedings." RX 1128-1129 (citation excluded). PETW did not vacate these buildings until October 23, 2017. RX 416.

(b) Panama Street, Export Street, Marlin Street, and Aruba Street

PETW obtained possession of 138,400 square feet of warehouse space at 1400 Aruba Street pursuant to a sublease agreement it entered into with Tyler Distribution on March 1, 2010. RX 687-695. The sublease of the 1400 Aruba Street building ended on February 28, 2013, and on or about December 31, 2014, PETW vacated the property. RX 59-60, RX 69-70.

Mr. Wynne testified that PETW vacated the building at 1400 Aruba Street because it was told by somebody from the Port Authority leasing office that "there was an issue with the sprinkler system and it had to be repaired/replaced and the building needed to be empty to do that." RX 326-327. Mr. Ruda also testified that "my recall is that building 1400 has some sprinkler issues." RX 69. At no time did PETW ever enter into any agreement to lease the building at 1400 Aruba Street from the Port Authority. RX 360. It appears that the warehouse space at 1400 Aruba Street remains vacant and has been the subject of an RFP. RX 69-70.

On or about March 31, 2015, PETW vacated 312,000 square feet of warehouse space at 191 Export Street, 194 Panama Street, and 199 Panama Street at the Port Authority's request. These properties were part of the Added Premises in the PNCT lease.

PETW vacated the buildings at 194 Panama Street and 199 Panama Street because the letting of those buildings terminated on July 31, 2012, pursuant to the PETW Agreement. RX 346-347, RX 644-645, RX 683, RX 697. PETW vacated the building at 191 Export Street because the letting of that building terminated on July 31, 2013, pursuant to a different lease agreement that the Port Authority and PETW had entered into on July 31, 2008, titled LPN-286. RX 352-354, RX 644-645, RX 683, RX 697.

On or about November 30, 2015, PETW vacated 91,855 square feet of space at 292 Marlin Street. RX 686. Mr. Wynne testified that PETW was asked to vacate Marlin Street by the Port Authority, although there are no contemporaneous documents other than PETW's letter giving the Port Authority notice of the date that the property would be vacated. RX 332-333, RX 356-357, RX 686. It is also not clear from the evidence what type of lease, if any, covered PETW's use of this property.

To summarize, the chart below includes the various properties with the date the lease expired, the date that PETW vacated the property, and summary notes about relevant issues regarding why the property was vacated.

Property	Lease Expired	PETW Vacated	Notes
1400 Aruba	Tyler Sublease	12/31/2014	Sprinkler issue, RFP
194 & 199 Panama	10/31/2012	3/31/2015	PNCT Added Premises
191 Export	7/31/2013	3/31/2015	PNCT Added Premises
292 Marlin		11/30/2015	
201 Export & 202 Clipper	10/31/2019	10/23/2017	PA exercised one-year notice; eviction proceeding

v. Analysis

(a) PNCT

The Port Authority asserts that it is "well settled that the Port Authority can consider the identity and status of lessees in negotiating lease terms." Opposition at 30 (citing *Maher Terminals*). This is not entirely accurate. As the Commission in *Ceres* clearly stated, status, alone, is not sufficient to justify lease differences. *Ceres*, 27 S.R.R. at 1273. *Maher Terminals* stands for the proposition that where valid transportation factors are established, even if they relate to status, they may be considered in determining reasonableness.

For example, in *Seacon*, the port's tenant Seacon wanted to extend a lease for property known as T-25 but the port ultimately leased T-25 to Matson, another port tenant. The Commission stated:

> The Port's decision to go forward with negotiations with Matson, instead of trying again with Seacon, was a wholly reasonable exercise of its business discretion. To the Port, an arrangement with Matson appeared both financially attractive and congruent with the Port's long term development strategy. In fact, the lease with Matson has worked out very well for the Port, yielding higher rents, increased volumes, and a ten-year commitment for T-25. Seacon, on the other hand, had a history of inconsistent profitability, pursuit of lease concessions, and a reluctance to enter into a long term commitment.

Seacon, 26 S.R.R. at 899. The Commission found no Shipping Act violation.

The Port Authority also defends by arguing that it did not break any leases or contractual obligations. While true, PETW is not arguing a lease or contractual violation and if it was, it would be in the wrong venue. Instead, PETW alleges a Shipping Act violation regarding the reasonableness of the Port Authority's leasing decisions.

The Port Authority testified that when "considering whether to enter into a lease, there are a variety of factors that the Port Authority considers, including jobs, employment, nexus to maritime activities such as vessel calls, and desire for the highest and best use of port space." RX 53-54. However, there is no written policy for when the RFP process is used, although criteria considered includes availability, whether the property has been claimed or incorporated into a lease, and long-term and mid-term land use planning decisions. RX 110-113, RX 203.

Thus, by its own admission, the Port Authority does not have a transparent and clearly articulated basis for making leasing decisions such as when to issue an RFP. However, while transparent and clearly articulated leasing considerations may be beneficial, they are not required by the Shipping Act. As the Commission stated in *Seacon*, "no FMC precedent suggests that the Port had a duty to set up competitive bidding between Matson and Seacon." *Seacon*, 26 S.R.R. at 899.

The Shipping Act prohibits a marine terminal operator from giving "any undue or unreasonable preference or advantage or impos[ing] any undue or unreasonable prejudice or disadvantage." Reasonableness can be evaluated by considering the transportation factors

outlined by the Commission in the *Maher Settlement*. But, the "Commission is not required to tally and compare exactly what benefits were received by the relevant parties." *Seacon*, 26 S.R.R. at 900. Ports, however, are on stronger footing when they rely on written contemporaneous analysis of costs and benefits of competing leases and when priorities and business needs are well-documented.

The relevant *Maher Settlement* factors for this proceeding include "market conditions, available locations and facilities, and the nature and character of potential lessees," the need "to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being," and to give deference "to public port authorities." *Maher Settlement*, 34 S.R.R. at 326. In addition, "the Commission does not substitute its business judgment for that of the port." *Seacon*, 26 S.R.R. at 898.

In this proceeding, the evidence shows that PNCT offered significant investments, terminal guarantees, and minimum throughput requirements that PETW did not offer; market conditions and the Port Authority's business circumstances and needs changed between when the PETW lease was negotiated in 2009 and the PNCT lease in 2011; PETW continued to be in arrears even after a payback agreement and there were concerns about the viability of PETW's business; and the Port Authority was considering the most effective land use planning for its limited port facilities.

To look at it another way, a port authority generally has a monopoly over the port property. It uses this monopoly to produce income in two ways relevant to this analysis: to lease property for rent and to provide access to the port for fees. In both the *Maher Terminals* case and this proceeding, the Port Authority is tying the lessees' ability to lease property to the lessees' ability to increase port traffic, and presumably, port revenue.

Traditionally, tying arrangements raised antitrust concerns.

> A tying arrangement is an agreement between a seller and a buyer under which the seller agrees to sell a product or service (the tying product) to the buyer only on the condition that the buyer also purchases a different (or tied) product from the seller or the buyer agrees not to purchase the tied product from any other seller. Tying arrangements can be used to tie together not only different products but also services, leases, franchises, licenses to intellectual property, or combinations of any of those things.

Kate Wallace, *The Wonderful World of Tying*.[3] *See also Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, 32 S.R.R. 1133, 1164-1165 (ALJ 2013) (Notice Not to Review, March 20, 2013). Thus, to some extent, the tying of port leases to port traffic seems like it could be an unreasonable restraint of trade.

However, it is not clear that there are two separate products or that the products are unrelated, rather they are not only related to each other but are both inherently related to the

[3] Available at: https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_wonderful_world_of_tying/. Last visited March 20, 2019.

mission of the port. To the extent that public ports exist to increase commerce, increasing port traffic and ensuring sufficient warehouse and ancillary services are both central to a port's mission. Thus, the Commission does not automatically prohibit tying but rather looks to "market conditions, available locations and facilities, and the nature and character of potential lessees," "the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being," and "the deference it shows to public port authorities, especially in the context of their leasing decisions." *Maher Settlement,* 34 S.R.R. at 326.

The Port Authority made a business judgment that the PNCT lease, including significant port investments, minimum throughput requirements, and port guarantees, was a better use of land than the lease options offered by PETW, which was in significant arrears. Given the facts presented in this proceeding, that determination was not unreasonable. The evidence indicates that the Port Authority had a reasonable basis for making these leasing decisions based on legitimate transportation factors. Accordingly, Complainant has not established a violation of the third element of *Ceres,* that the unequal treatment is not justified by differences in transportation factors.

(b) FAPS and Columbia

PETW also claims that the Port Authority gave undue or unreasonable preference to FAPS and Columbia. In a meeting on November 19, 2010, and a July 18, 2011, letter, PETW made the CenterPoint proposal to construct a state-of-the-art warehouse facility on an empty lot to make up for part of the space it would lose due to the PNCT expansion. RX 481-483, RX 316-317. The land proposed for the CenterPoint proposal was initially used by FAPS and then Columbia. RX 431. The complaint does not mention either FAPS or Columbia but it does mention other marine terminal operators. Complaint at 6.

The Port Authority and FAPS entered into a lease agreement, Lease No. LPN-309, effective as of October 1, 2010. RX 1188-1290. The FAPS Lease required FAPS to pay throughput rental fees to the Port Authority for every vehicle handled by FAPS. RX 1197. The FAPS Lease gave the Port Authority "the right, on ninety (90) days' notice, to recapture an aggregate of three (3) acres of the [leased] Premises in any sixty (60) month period of the Term for the purpose of facilitating the efficient movement of vehicles and cargo in and around the Facility, for the purpose of enhancing ingress and egress to adjacent leaseholds and public berths." RX 1245-1246. At some point, this lease ended and Columbia was able to use the lot under a space permit.

Columbia "is the equipment repair and storage arm of the Columbia Group of Companies." RX 1290-1291. The Port Authority and Columbia entered into a space permit agreement, Permit No. MNS-341, effective as of January 1, 2012. RX 1154-1187. The provisions of the Columbia Space Permit allowed either the Port Authority or Columbia to revoke the permit without cause upon 30 days' notice. RX 1180.

The Port Authority designated representative said he was not at the Port Authority and did not know when asked to give "any factual justification for the Port Authority's decision not

to allow Port Elizabeth to bid on the property that went from FAPS to [Columbia] Coastal Container." RX 204-206.

In the complaint, PETW specifically alleges that the Port Authority gave undue or unreasonable prejudice or advantage to other marine terminal operators and imposed an undue or unreasonable prejudice or disadvantage upon PETW "while unduly favoring other Marine Terminal Operators in the Port of New York and New Jersey." Complaint at 6. Although the example provided in the complaint was the example of the PNCT lease, the complaint was not limited to contesting this lease. Therefore, it is appropriate to consider whether the Port Authority's leases with FAPS or Columbia establish a violation of the Shipping Act.

PETW, FAPS, and Columbia are in different businesses. PETW's business is to provide warehousing services for companies, RX 298, while FAPS imports automobiles, RX 1196-1197, and Columbia "is the equipment repair and storage arm of the Columbia Group of Companies," RX 1290-1291. It is not clear that any of them are marine terminal operators as defined by the Shipping Act, although they all compete with each other to lease space at the port.

The evidence shows that the land that PETW wanted to use for its CenterPoint development was occupied by FAPS in 2010. In 2011, PETW made the CenterPoint proposal which the Port Authority did not accept. Columbia started using the land in 2012. The PETW lease is hard to compare with the FAPS Agreement or Columbia Space Permit. They are different types of agreements for different ways to utilize the land. To the extent that PETW's complaint is that it wanted to lease this property instead of FAPS or Columbia, there was no obligation of the port to agree to accept the CenterPoint proposal. The evidence about the proposal consists of a letter from PETW summarizing the proposal but noting limitations as well as next steps including financing which would "take some time." It is not clear from the evidence in the record whether this proposal was viable.

The FAPS Agreement went into effect on October 1, 2010. RX 1188. The evidence does not establish that the terms of the FAPS Agreement are unduly preferential to the terms of the PETW Agreement. The FAPS Agreement imposes several requirements upon FAPS that PETW is not subject to in the PETW Agreement. For instance, the FAPS Agreement requires FAPS to pay throughput rental fees to the Port Authority for every vehicle handled by FAPS. RX 1197. As another example, the FAPS Agreement gave the Port Authority "the right, on ninety (90) days' notice, to recapture an aggregate of three (3) acres of the [leased] Premises in any sixty (60) month period of the Term for the purpose of facilitating the efficient movement of vehicles and cargo in and around the Facility, for the purpose of enhancing ingress and egress to adjacent leaseholds and public berths." RX 1245-1246. Similar to the PNCT lease, the evidence shows that differences between PETW and FAPS are justified by legitimate transportation factors.

The evidence also does not establish that the terms of the Columbia Space Permit are unduly preferential to the terms of the PETW Agreement. RX 1180. The Columbia Space Permit did not go into effect until January 1, 2012, which was after PETW submitted the CenterPoint proposal. RX 1154. The Columbia Space Permit was a different use that the Port Authority selected for the property after not accepting PETW's proposal to utilize the land. Similar to the PNCT lease, the evidence shows that differences between PETW and Columbia are justified by legitimate transportation factors.

vi. Conclusion

As discussed above, the evidence does not demonstrate that the Port Authority gave any undue or unreasonable preference or advantage to other entities nor does the evidence demonstrate that the Port Authority imposed any undue or unreasonable prejudice or disadvantage on PETW. While there are differences in the leases that the Port Authority negotiated with PETW and PNCT, and while other entities had leases for land that PETW wanted, those differences are based upon different risks presented and benefits received by each entity. This conclusion follows the Commission's practice of according deference to public port authorities, "especially in the context of their leasing decisions." *Maher Settlement*, 34 S.R.R. at 326. Given the set of circumstances presented, the Port Authority's leasing decisions were justified by legitimate transportation factors and based upon an analysis of the benefits and risks associated with the various agreements and proposals.

d. Proximate Cause

Because PETW did not establish element three, it is not necessary to evaluate element four regarding whether the resulting prejudice or disadvantage is the proximate cause of injury. However, to ensure a complete record, the parties' arguments regarding proximate cause are discussed.

The complaint and Complainant's briefs do not explicitly address *Ceres* element four regarding causation. However, in the complaint, PETW alleges that it "sustained and continues to sustain injuries and damages, including but not limited to lost profits, damage to its business interests, higher rents, costs, and other undue and unreasonable payments amounting to a sum of millions of dollars." Complaint at 12. In addition, PETW argues that the Port Authority's conduct "increased the cost of PET&W's operation and PANYNJ must be estopped from asserting that PET&W's financial difficulties, which PANYNJ caused is a reason for PANYNJ's further Shipping Act violations." PETW Response to the Port Authority Findings of Fact at 12.

The Port Authority asserts that "PETW cannot demonstrate that the Port Authority's actions were the proximate cause of its damages," arguing that "PETW's financial troubles began long before the Port Authority served it with the Notice of Termination on April 16, 2016," that "PETW was in arrears as of August 2014," and that "the Port Authority had nothing to do with PETW's self-inflicted financial woes." Opposition at 34-35.

The evidence shows that PETW moved out of 1400 Aruba in December of 2014. It appears that PETW did not have a lease with the Port Authority but rather a sublease that was approved by the Port Authority. The evidence does not clearly show why that sublease ended, although PETW claims that they were told that the building needed sprinkler repairs. The building is currently subject to a request for proposals by the Port Authority.

The evidence further shows that although the lease for 194 and 191 Panama ended on October 12, 2012, and the lease for 191 Export ended on July 31, 2013, that PETW was allowed to holdover until March 31, 2015. These three properties were provided to PNCT as part of the PNCT expansion. One other property, 292 Marlin, was vacated on November 30, 2015.

It is clear from the evidence that leases did not necessarily end on the lease termination date. Three holdover leases were not continued and the property was vacated because the Port Authority wanted to lease the property to PNCT. Losing these three buildings likely had a financial impact on PETW and its business. However, the first of these buildings was not vacated until December 2014, and the majority not until 2015, which is after PETW fell into arrears with rental payments to the Port Authority. Reducing the PETW footprint should have reduced the rent due, helping to alleviate the arrears, however, it also limited PETW's ability to generate revenue. It is not clear the extent to which losing some of these properties impacted PETW's ability to make its rental payments.

In addition, Mr. Wynne wrote in 2017 that in addition to the disruption of business resulting from the need to vacate three Port Authority buildings, that a "good deal of the financial challenges" PETW was facing were caused by "Superstorm Sandy, the bad winters and resulting congestion [which] dropped productivity and increased costs and chased some customers from using the port." RX 327. Mr. Wynne also pointed to 2M, a joint service of MSC and Maersk, which "created tremendous congestion and inefficiency in the Port at the same time we were in the process of relocating." RX 329. It is clear that a variety of factors impacted PETW's profitability, ability to make rental payments, and viability as a port tenant.

There is not sufficient evidence to determine that the resulting prejudice or disadvantage, if there was any from the Port Authority's leasing decisions, was the proximate cause of injury to PETW. Because PETW has the burden of proof, they have not established that they would meet this last element of *Ceres*.

4. Conclusion

For the reasons discussed in detail above, elements three and four of *Ceres* are not established by the evidence in this proceeding. Therefore, the evidence does not support finding a violation of the Shipping Act based on 46 U.S.C. section 41106(2).

IV. ORDER

Upon consideration of the findings and conclusions set forth above, and the determination that the Port Authority did not violate the Shipping Act, it is hereby

ORDERED that the remaining claims for violation of 46 U.S.C. §§ 41104(8), 41104(9), and 41106(2) by the Port Authority of New York and New Jersey herein be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC AND FCA ITALY S.P.A., *Complainant*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES, AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: April 2, 2019

NOTICE OF DISMISSAL

On March 21, 2019, Complainant and Respondents Nippon Yusen Kabushiki Kaisha and NYK Line (North America) Inc. submitted a Stipulation of Dismissal pursuant to 46 C.F.R. §502.72(a)(2). The parties certify that no settlement on the merits was reached between the Complainants, Respondent Nippon Yusen Kabushiki Kaisha, and Respondent NYK Line (North America) Inc. The parties also certify that each party will bear their own costs. Therefore, the above action by the Complainants is dismissed as to the Respondent Nippon Yusen Kabushiki Kaisha and Respondent NYK Line (North America) Inc., without prejudice.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

TOYOTA DE PUERTO RICO, CORP., *Complainant*

v.

PUERTO RICO PORTS AUTHORITY, CROWLEY PUERTO RICO SERVICES, INC., AND OCEANIC GENERAL AGENCY INC., *Respondents*.

DOCKET NO. 19-02

Served: April 25, 2019

NOTICE OF DISMISSAL

On March 29, 2019, Complainant and Respondent Oceanic General Agency Inc. submitted a Stipulation of Dismissal pursuant to 46 C.F.R. §502.72(a)(2). The parties certify that no settlement on the merits was reached between the Complainant and Respondent Oceanic General Agency Inc. Therefore, the above action by the Complainant is discontinued without prejudice as to the Respondent Oceanic General Agency Inc.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES, AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: April 29, 2019

NOTICE OF DISMISSAL

On April 25, 2019, Complainants and Respondent EUKOR Car Carriers Inc. submitted a Stipulation of Dismissal pursuant to 46 C.F.R. §502.72(a)(2). The parties certify that no settlement on the merits was reached between the Complainants and Respondent EUKOR Car Carriers Inc. Therefore, the above action by the Complainants is discontinued without prejudice as to the Respondent EUKOR Car Carriers Inc.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

DONNA KATRI WYNDER, *Claimant*

v.

RYAN SIMS; SIMS, WATERS & ASSOCIATES, INC. D/B/A SUNSHINE GLOBAL TRANSPORT; MOHAMMAD MADI; DEBRA CAESH D/B/A SEA & SHORE SHIPPING, INC., *Respondents*.

DOCKET NO. 1962(F)

Served: February 28, 2019

BEFORE: Clay G. GUTHRIDGE, *Administrative Law Judge*.

NOTICE OF VOLUNTARY DISMISSAL

[Notice Not to Review served 4/2/19, decision administratively final.]

On October 25, 2018, the Commission received a complaint from Donna Katri Wynder. The Office of the Secretary docketed the filing as an informal complaint pursuant to 46 C.F.R. Subpart S and issued a Notice of Filing of Small Claims Complaint and Assignment for the proceeding. The Office of the Secretary assigned the proceeding to the Chief Administrative Law Judge for appointment of a Small Claims Officer. 46 C.F.R. § 502.301(b). On November 19, 2018, respondents Ryan Sims and Sims, Waters & Associates, Inc. d/b/a Sunshine Global Transport filed an objection to proceeding informally; therefore, the proceeding was assigned to the undersigned for adjudication as a formal proceeding under 46 C.F.R. Subpart T. 46 C.F.R. § 502.311.

The Complaint alleges that respondents Ryan Sims, Sims, Waters & Associates, Inc., Mohammad Madi, and Debra Caesh d/b/a Sea & Shore Shipping, Inc., violated 46 U.S.C. § 41102(c) of the Shipping Act in connection with the transportation of Wynder's vehicle from the United States to Nigeria. Wynder seeks damages in the amount of $11,600 representing the declared value of the car and the $1,600 ocean freight paid for shipping. (Complaint at 6.)

Ryan Sims and Sims, Waters & Associates, Inc., filed a motion to dismiss and Sea & Shore Shipping, Inc., filed a motion to dismiss through its president and owner, Iman Mustapha Safa. Respondent Mohammad Madi has not answered or otherwise responded to the Complaint.

On February 27, 2019, the parties sent a Stipulation of Dismissal of Complaint to the Small Claims Officer at judges@fmc.gov. Because this case has been converted from a small claims proceeding under Subpart S to a formal proceeding under Subpart T, the Stipulation should have been filed with the Secretary. *Donna Katri Wynder v. Ryan Sims; Sims, Waters & Associates, Inc. d/b/a Sunshine Global Transport; Mohammad Madi; Debra Caesh d/b/a Sea &*

Shore Shipping, Inc., FMC No. 1962(F) (ALJ Nov. 20, 2018) (Notice of Assignment to Administrative Law Judge). This office has forwarded the Stipulation to the Secretary for docketing.

The Stipulation states:

> 1. The parties hereto agree to and stipulate to the dismissal of Claimant's complaint (Docket No. 1962(F)).
>
> 2. All parties hereto certify that no settlement on the merits was reached.
>
> 3. All parties hereto agree and stipulate that this dismissal is final and with prejudice.
>
> 4. All parties hereto agree to bear their own attorneys fees and costs incurred in this matter.

(Stipulation of Dismissal at 1.) The Stipulation is signed by Donna Katri Wynder for herself, Ryan Sims for himself, Myra Sims for Sims, Waters & Associates, Inc., and Iman Safa for Sea & Shore Shipping, Inc. Wynder also sent an email to counsel for Ryan Sims and Sims, Waters & Associates, Inc., stating that she agreed to the terms of the dismissal and had signed it. Respondent Mohammad Madi did not sign the stipulation.

The Commission Rule governing dismissals states:

> (a) *Voluntary dismissal*. (1) *By the complainant.* When no settlement agreement is involved, the complainant may dismiss an action without an order from the presiding officer by filing a notice of dismissal before the opposing party serves either an answer, a motion to dismiss, or a motion for summary decision. Unless the notice or stipulation states otherwise, the dismissal is without prejudice.
>
> (2) *By stipulation of the parties.* The parties may dismiss an action at any point without an order from the presiding officer by filing a stipulation of dismissal signed by all parties who have appeared. In the stipulation the parties must certify that no settlement on the merits was reached. Unless the stipulation states otherwise, the dismissal is without prejudice.

46 C.F.R. § 502.72(a). Although this Rule is not explicitly applicable in Subpart T proceedings, *see* 46 C.F.R. § 502.321, I will consider its provisions when considering how this case should proceed.

Respondent Madi has not served an answer, a motion to dismiss, or a motion for summary decision. By signing the Stipulation, Complainant Wynder has certified that "no settlement on the merits was reached." (Stipulation of Dismissal at 1.) Therefore, the

Stipulation serves to dismiss the case against Madi pursuant to 46 C.F.R. § 502.72(a)(1). The dismissal is with prejudice.

Respondents Ryan Sims, Sims, Waters & Associates, Inc., and Sea & Shore Shipping, Inc., did appear and filed motions to dismiss. They agree to and stipulate to the dismissal and certify that no settlement on the merits was reached. Therefore, the Stipulation serves to dismiss the case against Ryan Sims, Sims, Waters & Associates, Inc., and Sea & Shore Shipping, Inc., pursuant to 46 C.F.R. § 502.72(a)(2). The dismissal is with prejudice.

Therefore, the above-captioned proceeding is discontinued.

Clay G. Guthridge
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DONNA KATRI WYNDER, *Claimant*

v.

RYAN SIMS SIMS, WATERS & ASSOCIATES, INC. DBA SUNSHINE GLOBAL TRANSPORT; MOHAMMAD MADI; DEBRA CAESH DBA SEA & SHORE SHIPPING INC., *Respondents*.

DOCKET NO. 1962(F)

Served: April 2, 2019

NOTICE NOT TO REVIEW

[Correction was served on 4/3/19 adding the word "final" to this notice, decision administratively final.]

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 28, 2019 Notice of Voluntary Dismissal has expired.

Accordingly, the decision has become administratively.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC, AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES S.A., AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: April 2, 2019

ORDER OF: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT WITH MITSUI AND MOL[1]

[Notice Not to Review served 7/2/19, decision administratively final.]

On March 26, 2019, Complainant Fiat Chrysler Automobiles NV; FCA US LLC; and FCA Italy S.p.A., (collectively "Fiat Chrysler") and Respondent Mitsui O.S.K. Lines, Ltd. and MOL (America) Inc. (collectively "MOL"), the Settling Parties, filed a joint motion and memorandum seeking approval of a settlement agreement, dismissal with prejudice of the complaint against MOL, and confidential treatment of the settlement agreement. The Settling Parties provided a copy of the confidential settlement agreement.

II.

On October 17, 2017, a notice of filing of complaint and assignment was issued indicating that Fiat Chrysler filed a complaint against a number of entities, including MOL. Fiat Chrysler alleged that the Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b)(1), 41102(c), 41103(a)(1), 41103(2), 41104(10), 41105(1), 41105(6), and 46 C.F.R. § 535.401, *et seq*., in connection with Fiat Chrysler's purchase of vehicle carrier services from the Respondents.

[1] This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

On November 30, 2017, Respondents filed a joint motion to dismiss this proceeding along with four other related proceedings. On May 7, 2018, an initial decision was issued which granted in part and denied in part the Respondents' motion to dismiss. The claim for reparations was dismissed with prejudice in part and the claims for a cease and desist order and for reparations for violations within three years of filing the complaint were allowed to proceed. Initial Decision at 56. The initial decision was not appealed.

The Settling Parties state that they "have concluded that each stands to face the substantial costs of further litigation" and that that the settlement agreement was "entered into after good-faith negotiations and with the benefit of counsel." Motion at 2. The Settling Parties further state:

> The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval. Indeed, the Presiding Judge has previously approved like settlements for other parties in a matter arising out of the same facts and circumstances as that presented by the Complaint and Settlement Agreement in this case.

Motion at 3.

In addition, the Settling Parties request that the settlement agreement be treated as confidential, contending that "[u]nder the terms of the settlement agreement, the Settling Parties must keep the terms of the settlement agreement confidential. This confidentiality requirement is an important and necessary element of the settlement agreement; it could be compromised by a breach of such confidentiality." Settlement Motion at 4.

III.

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old*

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

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

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092, *quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Id.* However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion, the settlement agreement, and other documents filed in this matter, the Settling Parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The Settling Parties are sophisticated business entities whose counsel engaged in arms-length negotiations. The Settling Parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See, Streak Products, Inc., and SYX Distribution, Inc. v. UTi, United States, Inc.*, 33 S.R.R. 641, 644-45 (2014); *see also, Schoeps v. The Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009), Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV.

Upon consideration of the settlement motion, the confidential settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the confidential settlement agreement between Fiat Chrysler and MOL be **GRANTED**. It is

FURTHER ORDERED that Mitsui O.S.K. Lines, Ltd. and MOL (America) Inc. be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the request for confidential treatment of the settlement agreement be **GRANTED**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

TOYOTA DE PUERTO RICO, CORP., *Complainant*

v.

PUERTO RICO PORTS AUTHORITY, CROWLEY PUERTO RICO SERVICES, INC., AND OCEANIC GENERAL AGENCY INC., *Respondents*.

DOCKET NO. 19-02

Served: May 14, 2019

NOTICE OF DISMISSAL

On May 10, 2019, Complainant and Respondent Crowley Puerto Rico Services, Inc. submitted a Stipulation of Dismissal of the complaint with prejudice pursuant to 46 C.F.R. §502.72(a)(2). The parties certify that no settlement on the merits was reached between the Complainant and Respondent Crowley Puerto Rico Services, Inc. Therefore, the above action by the Complainant is discontinued as to the Respondent Crowley Puerto Rico Services, Inc.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

CMI DISTRIBUTION, INC., *Complainant,*

v.

SERVICE BY AIR, INC., RADIANT CUSTOMS SERVICES INC. (FORMERLY KNOWN AS SBA CONSOLIDATORS, INC.) AND LAS FREIGHT SYSTEMS LTD., *Respondents*.

DOCKET NO. 17-05

Served: May 24, 2019

BEFORE: Clay G. GUTHRIDGE, *Administrative Law Judge*.

INITIAL DECISION[1]

[Exceptions filed by Complainant and Respondents, 7/9/19, Commission final decision pending.]

I. INTRODUCTION AND SUMMARY OF DECISION.

On May 23, 2017, complainant CMI Distribution, Inc. (CMI) commenced this proceeding by filing a Complaint with the Secretary. CMI is a corporation organized and existing under the laws of Illinois with its principal place of business in Wheeling, Illinois. (Complaint ¶ 1.) The Complaint alleges that respondents Service by Air, Inc., Radiant Customs Services, Inc. (formerly known as SBA Consolidators, Inc.), and LAS Freight System Ltd. (LAS Freight) violated the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. §§ 40901, 41102(c), 41104(2)(A),[2] and 40501, and 46 C.F.R. §§ 515.3 and 520.3 of the Commission's Regulations, while transporting cargo by water from China to the United States pursuant to a contract between CMI and Service by Air, Inc.

As explained more fully below, Service by Air concedes that it is not licensed by the Commission to operate as an ocean transportation intermediary, either as a non-vessel-operating common carrier (NVOCC) or as an ocean freight forwarder. Service by Air attempted to create a shipping protocol by which it could transport freight by water between a foreign port and a port

[1] The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service of the decision.

[2] The Complaint cites to section 41104(2)(c). (Complaint Part V.C.) There is no section 41104(2)(c). The language in the Complaint is consistent with section 41104(2)(A).

in the United States while evading the requirements of the Shipping Act of 1984. As this case illustrates, problems may occur when this is done.

At the time of the transportation, Service by Air controlled SBA Consolidators, Inc. (SBA Consolidators) as its wholly-owned subsidiary. SBA Consolidators was licensed by the Commission as an NVOCC. When Service by Air engaged in the discussions with CMI that resulted in the agreement to transport CMI cargo by water from China to points in the United States, Service by Air chose to enter into the agreement as Service by Air instead of as its NVOCC-licensed subsidiary SBA Consolidators. Although SBA Consolidators performed some functions related to the transportation of the cargo, Service by Air contends that SBA Consolidators only processed customs clearance, but otherwise played no other role in the shipments. (Service by Air, Inc. and Radiant Customs Services Inc. Proposed Findings of Fact 11 (Doc. 42)[3] (SBA Prop. FF 11).) Service by Air does not explain why it entered into the arrangement with CMI instead of having its NVOCC-licensed subsidiary enter into the arrangement. Non-party Radiant Global Logistics, Inc., acquired Service by Air and its subsidiary SBA Consolidators in or about June 2015, approximately the time the last shipment at issue took place. (SBA Prop. FF 2.).

If no problems had developed with the shipments and the cargo had been delivered as planned, it is likely that the parties would have gone on their way without controversy, this proceeding would never have been commenced, and the Commission never would have learned of the CMI-Service by Air agreement or Service by Air's participation in the transportation of CMI's cargo. Unfortunately, problems developed with the payment to the sellers of the cargo being transported on many shipments, causing delay in the shipments and additional charges for CMI to secure release of the shipments. CMI filed a complaint with the Commission alleging that Service by Air violated the Shipping Act on the shipments.

Service by Air denies that it operated as an ocean transportation intermediary within the meaning of the Shipping Act on the shipments and asserts that the Commission does not have jurisdiction over its actions. Service by Air suggests that at most it acted in a role similar to that of an ocean freight forwarder, but because the shipments came from outside the United States into the United States, it was not an ocean freight forwarder within the meaning of the Act. *See* 46 U.S.C. § 41102(19) (ocean freight forwarder dispatches shipments *from* the United States).

The Commission is now required to sort through the facts related to the shipments to determine: (1) whether Service by Air operated as an NVOCC within the meaning of the Act; (2) whether Service by Air violated the Act; and (3) whether CMI suffered actual injury as a result of the violations.

Respondent LAS Freight is a foreign NVOCC that was registered with the Commission. After entering into its agreement with CMI, Service by Air engaged LAS Freight to arrange the transportation of the CMI cargo from China to the United States. LAS Freight issued house through bills of lading from China to a facility in the United States designated by Service by Air

[3] "Doc." followed by a number refers to a document listed in the Commission's electronic docket for this proceeding. *See* https://www2.fmc.gov/readingroom/proceeding/17-05/ (last visited May 20, 2019).

and apparently arranged for other NVOCCs to be involved in the transportation. The shipments were then held in the facility in the United States until Service by Air authorized release to CMI or CMI's customer.

LAS Freight has not responded to the Complaint. CMI filed a motion for decision on default that was deferred for consideration with the claims against the other Respondents.

The undersigned concludes that CMI has proved by a preponderance of the evidence that Service by Air operated as an NVOCC on the shipments, that Service by Air violated the Shipping Act by operating as an NVOCC without a Commission license and tariff and by imposing demurrage and detention charges on CMI in excess of that permitted by the Act, and that CMI suffered actual injury because of the unlawful charges.

The undersigned concludes that CMI has not proved that LAS Freight violated the Act.

This decision is divided into nine parts. Part II is a narrative of the factual events. This narrative is based on the findings of fact set forth in Part VII. Part III sets forth the controlling authority. Part IV sets forth the analysis finding that Service by Air operated as an NVOCC on the CMI shipments. Part V sets forth the findings on whether Service by Air violated the Shipping Act. Part VI sets for the findings and holding on whether LAS Freight violated the Shipping Act. Part VIII describes the evidence on which this decision is based and sets forth the findings of fact. The findings are divided into two sections. Section A sets for the findings on the parties and their relationships. Section B sets forth the findings on the twenty-nine shipments at issue. Part VIII sets forth holdings on other outstanding issues. Part IX addresses attorney fees.

II. BACKGROUND.

A. The Parties and Their Relationships

1. Parties and significant non-parties.

Complainant CMI is in the business of importing packaging manufactured in China for sale and distribution to wholesalers and other distribution companies in the United States. At the time the shipments that are the subject of this Complaint took place, respondent Service by Air was licensed as an indirect air carrier[4] by the Transportation Security Administration (TSA) of the United States Department of Homeland Security. Service by Air was not and never has been licensed by the Commission as an ocean transportation intermediary, either as an NVOCC or an ocean freight forwarder. SBA Consolidators is a wholly-owned subsidiary of Service by Air. At the time the shipments took place, SBA Consolidators was licensed by the Commission as an NVOCC. "In or about June 2015, non-party Radiant Global Logistics, Inc. acquired [Service by Air, Inc.], and by extension, SBA Consolidators. [Service by Air, Inc.] still exists as a separate

[4] "*Indirect air carrier* (IAC) means any person or entity within the United States not in possession of an FAA air carrier operating certificate, that undertakes to engage indirectly in air transportation of property, and uses for all or any part of such transportation the services of an air carrier." 49 C.F.R. § 1540.5.

corporate entity wholly owned by Radiant Global Logistics, Inc." (SBA Prop. FF 1.) On May 12, 2017, the Commission approved Radiant Customs Services, Inc.'s request to transfer SBA Consolidators's NVOCC License Number 009688 to Radiant Customs Services, Inc. (Answer ¶ 3; Official notice of Commission records.)

In filings and orders prior to this decision, the parties and the undersigned have referred to respondent Service by Air, Inc., as "SBA." Because of the similarity of the abbreviation "SBA" to the name of Service by Air's subsidiary SBA Consolidators, to reduce the possibility of confusion this decision refers to Service by Air, Inc., as "Service by Air," not SBA, and SBA Consolidators, Inc., as "SBA Consolidators." The decision refers to Radiant Global Logistics, Inc., as Radiant Global and Radiant Customs Services, Inc., as Radiant Customs.

In 2013-2014, CMI used the services of UTi, United States, Inc. (UTi), an NVOCC licensed by the Commission, to transport shipments from China to the United States pursuant to a negotiated rate agreement (NRA). UTi is not a party in this proceeding.

In 2014, CMI and Service by Air entered into a relationship for Service by Air to arrange the transportation by water of CMI cargo from China to the United States. Service by Air in turn arranged with respondent LAS Freight to be involved in the shipments. The shipments at issue were transported by water from China to the United States pursuant to the agreement between CMI and Service by Air. Service by Air based the rate structure in its agreement with CMI on the CMI-UTi NRA.

2. Relationships among the parties.

In 2014, CMI and Service by Air began negotiation for Service by Air to transport the cargo then being transported by UTi. During their negotiations, CMI gave Service by Air a copy of the UTi NRA with the comment that Service by Air's rates would have to match or better UTi's rates. Service by Air, licensed by the TSA as an indirect air carrier, does not explain why it entered into these negotiations and the resulting agreement with CMI instead of it wholly-owned subsidiary, SBA Consolidators, which was licensed by the Commission as an NVOCC.

Service by Air responded by creating an "SBA Global Logistics" document similar to the UTi-CMI NRA. The Service by Air document sets forth charges for Service by Air's ocean freight, AMS (Automated Manifest System), port fee, ISF/ACI fee,[5] destination handling, customs, delivery, and total ocean freight for full container load shipments from three ports in China to five destinations in the United States. The document notes that "[c]hassis usage fee of $25 per day will apply at US origin/destination, when applicable" and "[a]ll FCL rates are subject to change without notice." The document states:

[5] ISF: Importer Security Filing form required by U.S. Customs and Border Protection. *See* https://www.cbp.gov/border-security/ports-entry/cargo-security/importer-security-filing-102 (last visited May 13, 2019). ACI: Advance Commercial Information form required by the Canada Border Services Agency. *See* https://www.cbsa-asfc.gc.ca/eservices/forms-formulaires/aci-ipec-eng.html (last visited May 13, 2019).

> Carrier's Rules Tariff, provided free of charge at www.go2uti.com [*sic*], contains the terms and conditions which are further applicable to this shipment. During the term of this NRA, transportation is subject to applicable surcharges, accessorial charges and/or GRIs published in Carrier's rules tariff and effective at the time of shipment, unless otherwise specified in this NRA.

(CMI's Notice of Filing, June 5, 2018 (document marked Plaintiff's Exhibit 3).)

CMI and Service by Air entered into an agreement and Service by Air began to arrange the transportation of CMI's cargo. Service by Air then engaged LAS Freight to transport the cargo. (Motion to Dismiss at 2.) CMI did not have a direct relationship with LAS Freight.

B. Shipments at Issue.

The Complaint alleges that "[b]etween April 2014 and June 2015, CMI engaged Respondents to provide transportation of more than 60 shipments . . . with Respondents from China to Illinois." (Complaint ¶ 6.) CMI attached Complaint Exhibit 1 to the Complaint listing the shipments it contended were at issue. The line numbering in the left column of Complaint Exhibit 1 ends with FLDR (Folder) 62. FLDR numbers 31, 32, 35, 37, 38, 40, 41, 47, and 48 were not used on Complaint Exhibit 1; therefore, Complaint Exhibit 1 listed fifty-three shipments.

Documents filed by Service by Air in connection with its motion to dismiss suggested that some of the shipments listed in Complaint Exhibit 1 were not transported by water between China and the United States, but were transported by water to Vancouver, Canada, and entered the United States by train, or for one shipment, was transported by air to San Francisco International Airport. A stipulation filed by CMI and Service by Air resulted in dismissal without prejudice of claims regarding the shipments identified in Complaint Exhibit 1 as FLDR numbers 4, 12, 14, 15, 18, 20, 22, 23, 24, 26, 28, 30, 34, 39, 45, 55, 56, and 57 because they were not transported by water from a foreign port to a port in the United States and hence not subject to Commission subject matter jurisdiction. CMI did not make claims for FLDR numbers 1, 5, 6, 7, 8, and 11. *CMI v. Radiant/SBA*, FMC No. 17-05 (ALJ Sept. 21, 2017) (Notice to the Parties and Order to Schedule Conference). The twenty-nine shipments identified in FLDR numbers 2, 3, 9, 10, 13, 16, 17, 19, 21, 25, 27, 29, 33, 36, 42, 43, 44, 46, 49, 50, 51, 52, 53, 54, 58, 59, 60, 61, and 62 remain at issue, *id.*, and are addressed in this decision.

CMI developed cash flow problems related to a number of the shipments and did not pay its suppliers. (FF 61.)[6] Consequently, shipments were not delivered to CMI or its customers, but were held at a storage facility designated by Service by Air after delivery from the carrier pending release to CMI or its customer. The containers at issue incurred charges described in the documents as detention, demurrage, stripping, or storage while being held. Service by Air invoiced CMI for these charges. Toward the end of their relationship, Service by Air refused to deliver some cargo unless CMI also paid charges related to some cargo that had already been delivered. CMI contends that the detention and demurrage charges were imposed in violation of

[6] "FF" followed by a number refers to a finding of fact in Part VII.B.1 of this decision.

the Shipping Act. CMI also contends that Service by Air's refusal to deliver new shipments until CMI paid outstanding charges on other shipments violated the Act.

III. CONTROLLING AUTHORITY.

A. Relevant Statutes and Regulations.

CMI filed its Complaint pursuant to section 41301 of the Act, which provides:

> A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

The Act defines two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20).

> The term "ocean freight forwarder" means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments.

46 U.S.C. § 40102(19). The Complaint alleges that Respondents are NVOCCs. The Act defines NVOCC: "The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16).

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

> The term "shipper" means –
> (A) a cargo owner;
> (B) the person for whose account the ocean transportation of cargo is provided;
> (C) the person to whom delivery is to be made;
> (D) a shippers' association; or
> (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(23).

CMI alleges that Respondents violated these four sections of the Shipping Act and related regulations. Section 40901 provides that "[a] person in the United States may not advertise, hold oneself out, or act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission." 46 U.S.C. § 40901(a). *See also* 46 C.F.R. § 515.3 (2015)[7] ("Except as otherwise provided in this part, no person in the United States may act as an ocean transportation intermediary unless that person holds a valid license issued by the Commission. A separate license is required for each branch office that is separately incorporated. For purposes of this part, a person is considered to be 'in the United States' if such person is resident in, or incorporated or established under, the laws of the United States. Only persons licensed under this part may furnish or contract to furnish ocean transportation intermediary services in the United States on behalf of an unlicensed ocean transportation intermediary.").

Section 40501(a)(1) provides that "[e]ach common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established." 46 U.S.C. § 40501(a)(1). *See also* 46 C.F.R. § 520.3(a) ("Unless otherwise exempted by Sec. 520.13, all common carriers and conferences shall keep open for public inspection, in automated tariff systems, tariffs showing all rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established.").

Section 41102(c) provides "[a] common carrier . . . or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

Section 41104(2)(A) provides:

> A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – . . . (2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

46 U.S.C. § 41104(2)(A).

Section 515.2(*l*) of the Commission's regulations provided:

[7] The Commission amended sections 515.2 (NVOCC services) and 515.3 in 2015 after the shipments at issue. 80 Fed. Reg. 68731 (Nov. 5, 2015). The regulations that were in effect when the shipments were transported control this case.

> Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
> (1) Purchasing transportation services from a VOCC and offering such services for resale to other persons;
> (2) Payment of port-to-port or multimodal transportation charges;
> (3) Entering into affreightment agreements with underlying shippers;
> (4) Issuing bills of lading or equivalent documents;
> (5) Arranging for inland transportation and paying for inland freight charges on through transportation movements;
> (6) Paying lawful compensation to ocean freight forwarders;
> (7) Leasing containers; or
> (8) Entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(*l*) (2015).

Section 532.3(a) of the Commission's regulations provides:

> "NVOCC Negotiated Rate Arrangement" or "NRA" means a written and binding arrangement between an NRA shipper and an *eligible* NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after receipt of the cargo by the NVOCC. For purposes of this part, "receipt of cargo by the NVOCC" includes receipt by the NVOCC's agent, or the originating carrier in the case of through transportation.

46 C.F.R. § 532.3(a) (emphasis added). Only duly licensed NVOCCs may use NRAs. 46 C.F.R. § 532.2.

The Complaint seeks a reparation award for alleged actual injury resulting from unlawful demurrage and detention charges and an award of attorney fees. The Act defines actual injury.

> (a) *Definition*. – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) *Basic amount*. – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part.
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> * * *
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> (e) *Attorney Fees*. – In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees.

46 U.S.C. § 41305.

B. Evidence and Burden of Persuasion.

Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981). All documents provided by the parties in support of their arguments are admitted as evidence. This initial decision is based on the Complaint and Answer, the motions, the parties' briefs, the appendices filed with the briefs, and the supplemental evidence filed by the parties.

This initial decision addresses only material issues of fact and law. It is not necessary to resolve disagreements on matters not material to the outcome of this proceeding. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959).

A complainant alleging a violation of the Shipping Act "has the initial burden of proof to establish the [] violation []. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155. "[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

C. Actual Injury Claimed.

As actual injury, CMI alleges that "[a]s a result of Respondents' violations of the Shipping Act, the Complainant has sustained injuries and damages to the extent it paid fees not reflected in a valid tariff and in excess of remittances for lawful third party demurrage." (Complaint ¶ 43.) CMI has the burden of proving entitlement to reparations. *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003) ("As the Federal Maritime Board explained long ago: '(a) damages[8] must be the proximate result of violations of the statute in question; (b) there is no presumption of damage;

[8] Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'").

IV. SERVICE BY AIR OPERATED AS AN NVOCC ON THE CMI SHIPMENTS.

CMI alleges that Respondents are NVOCCs. (Complaint at 1-2) An NVOCC is a common carrier; that is, it

> (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). "To determine whether an entity is operating as an NVOCC, the Commission must assess whether the entity's operations meet the three elements of common carriage set out in the Act." *Anderson Int'l Transport – Possible Violations of Shipping Act of 1984*, 2013 FMC LEXIS 19 at *22 (FMC 2013) (*Anderson Int'l*) (quoting *Worldwide Relocations, Inc. – Possible Violations of Shipping Act*, 2012 FMC LEXIS 23 at *25 (FMC 2012) (*Worldwide Relocations (FMC)* (footnote omitted)).

Service by Air contends that the evidence "demonstrates Service by Air . . . did not operate, or 'hold itself out to the general public,' as an NVOCC in the shipments at issue," thus is not subject to the Shipping Act and the Commission therefore lacks subject matter jurisdiction over CMI's complaint. (SBA Brief at 1.) Service by Air argues:

> (A) The Shipping Act does not apply if [Service by Air] operated as an ocean freight forwarder for inbound cargo; (B) The statutory definition of "NVOCC" does not encompass [Service by Air]; (C) [Service by Air] did not "hold itself out to the General Public" as an NVOCC; and (D) [Service by Air] did not perform tasks delineated in 46 C.F.R. § 515.2(k) of the Commission's regulations as the tasks performed by an NVOCC.

(SBA Brief at 22-25.)

The Commission has stated:

> [W]hile the question of whether certain conduct violates the Shipping Act is necessarily a fact-intensive inquiry, a finder of fact may draw reasonable evidentiary inferences and employ permissive presumptions in some circumstances in determining where an entity operated as an NVOCC.

Worldwide Relocations (FMC), 2012 FMC LEXIS 23 at *3. In affirming the methodology used by an administrative law judge to determine whether a respondent acted as an NVOCC, the Commission stated:

In the Initial Decision, the ALJ correctly stated the well-established methodology for determining whether an entity is operating as an NVOCC:

> To determine if an entity is a common carrier, it 'is important to consider all the factors present in each case and to determine their combined effect.' *[Activities, Tariff Filing Practices and Carrier Status of] Containerships [Inc.],* 9 F.M.C. [56,] at 65 [F.M.C. 1965)]. The Commission has indicated that it will 'look beyond documentary labels.' [*Id.*] at 66. For example, 'it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents, it not the documentation that determines the carrier status.' [*Id.*] at 66. To determine whether an entity meets this standard, it is necessary to examine the entity's conduct on that shipment. *Bonding of Non-Vessel-Operating Common Carriers*, 25 S.R.R. [1679,] at 1684 (F.M.C. 1991)]; see also *Low Cost Shipping, Inc.*, 27 S.R.R. 686, 687 ([F.M.C.] 1996) (entity found to be operating as an NVOCC on some shipments and as an [Ocean Freight Forwarder] on other shipments. This is a fact intensive inquiry.
>
> . . . Resolution of that factual question requires an examination of each entity's conduct on a particular shipment to determine whether it operated as either an NVOCC or an [Ocean Freight Forwarder] on that shipment. Accordingly, after explaining how the evidence was weighed, each shipment alleged will be reviewed individually. 31 S.R.R. at 1519.

We expressly affirm the ALJ's articulation of the Commission's approach to determining NVOCC status.

Worldwide Relocations (FMC), 2012 FMC LEXIS at *13-14 (quoting *Worldwide Relocations, Inc.*, 31 S.R.R. 1471, 1519 (ALJ 2010) (*Worldwide Relocations (ALJ)*); *accord*, *Anderson Int'l*, 2013 FMC LEXIS 19 at *21-22 (FMC 2013). In *Anderson Int'l*, the Commission stated:

> The pertinent Commission holding in *Worldwide Relocations* concerns the methodology for determining whether an entity operated as an ocean freight forwarder or NVOCC on identified shipments. To determine whether an entity is operating as an NVOCC, the Commission must assess whether the entity's operations meet the three elements of common carriage set out in the Act: (1) holding out to the general public to provide transportation by water between the United States and a foreign country for compensation; (2) assuming responsibility for the transportation from the port or point of receipt to the port or point of destination; and (3) using for all or part of the transportation a vessel operating on the high seas or the Great Lakes, between a port in the United States and a port in a foreign country.
>
> Additionally, the Commission stated in *Worldwide Relocations, Inc.*:

> [O]nce the presiding officer has made a finding that (1) the entity has 'held itself out to the general public,' and (2) that vessels on the high seas or Great Lakes were utilized for part or all of the transportation, then that finding may apply to any and all shipments during the relevant time period. The opposing party would have the right to offer evidence, for example, that a vessel was not involved in a particular shipment. Second, the party with the ultimate burden of proof and persuasion must present evidence on each shipment concerning the 'assumed responsibility' element; however, such party may have the benefit of the above-described permissive presumption. As one example, for a Bill of Lading and invoices with ambiguous identification of the party shippers, with one interpretation being the respondent entity did assume responsibility for the transportation, the operation of the presumption may result in a finding of NVOCC status. As an opposite example, a Bill of Lading with clear and unambiguous identification of the proprietary shipper could possibly result in a finding of no assumption of responsibility by the respondent entity for the shipment in question. The opposing party may then have the duty to produce credible evidence to rebut the presumption concerning the 'assumed responsibility' element on each shipment.

Anderson Int'l, 2013 FMC LEXIS at *21-22 (quoting *Worldwide Relocations (FMC)*, 2012 FMC LEXIS at *23-24 and 46 U.S.C. § 40102(6)).

It is acknowledged that the respondent in *Worldwide Relocations* was involved in shipments originating in the United States, not shipments coming to the United States, so clearly could have been within the statutory definition of ocean freight forwarder, while Service by Air was handling shipments coming into the United States and could not have been an ocean freight forwarder within the meaning of the Act. Nevertheless, because Service by Air claims it was operating as an ocean freight forwarder on the shipments, it is appropriate to use the *Worldwide Relocations* test to determine whether or not it was operating as an NVOCC.

Applying the *Worldwide Relocations (FMC)* methodology, I conclude that Service by Air operated as an NVOCC on the shipments at issue.

A. The Shipments at Issue Were Transported by Water Between Ports in China and Ports in the United States.

Addressing the third and easiest factor, the parties agree and the documents submitted by the parties in Joint Appendix filed June 1, 2018, at the request for the undersigned substantiate that each of the shipments at issue except FLDR 2 were transported by a vessel operating on the high seas between a port in China and discharged in a port in the United States, either Long Beach, CA (FF3/2, FF9/2, FF10/2, FF13/2, FF16/2, FF17/2, FF19/2, FF21/2, FF29/2, FF36/2, FF42/2, FF43/2, FF46/2, FF49/2, FF50/2, FF51/2, FF52/2, FF53/2, FF58/2, FF59/2, FF60-61/2, FF62/2); Tacoma, WA (FF25/2, FF27/2); Philadelphia, PA (FF33/2); or New York FF44/2, FF54/2).[9] Documents submitted in the Joint Appendix show that the shipment in FLDR 2 was

[9] "FF3/2" refers to finding of fact number 2 on the shipment in FLDR 3 in Part VII.B.2. Similarly formatted references refer to findings of fact on other individual shipments in Part

transported by water from a port in China to Vancouver, British Columbia, Canada, not to the United States, and are not within the Commission's jurisdiction. FF2/2. Therefore, claims regarding the shipment in FLDR 2 are dismissed without prejudice.

B. Service by Air Held Itself Out as a Common Carrier.

Before CMI and Service by Air entered into their relationship, UTi transported cargo for CMI pursuant to an NRA. During their negotiations, CMI gave Service by Air a copy of the UTi NRA. Service by Air used the UTi NRA as a model to create its own rates that it used to secure CMI's business. Bryan Tincher, Service by Air's Import/Export Manager, described the document as a "tariff." FF 21-27. The "tariff" sets forth Service by Air's ocean freight rate, AMS, port fee, ISF/ACI fee, destination handling, customs, delivery, and total ocean freight for full container load shipments from three ports in China to five destinations in the United States. Service by Air was not passing on ocean freight charges imposed by a common carrier, but offering freight charges to CMI through its self-described "tariffs." Over time, Service by Air revised the ocean freight rates in additional documents it described as "CMI Packaging and Distribution FOB Tariffs" as the relationship continued, in each case imposing rates that it established, not rates established by other common carriers. FF 33-40. These documents contain the following provision:

> COST IS BASED FOB INCOTERMS. ALL ORIGIN FEES PAID BY SHIPPER. QUOTE INCLUDES CUSTOMS CLEARANCE AND DRAYAGE AT DESTINATION ALL RATES ARE SUBJECT TO SBA GLOBAL TERMS AND CONDITIONS BAF, CAF, IFC ARE SUBJECT TO CHANGE WITHOUT NOTICE. COST DOES NOT INCLUDE DUTIES OR TAXES. QUOTE DOES NOT INCLUDE US CUSTOMS INSPECTION EXAM FEES IF APPLICABLE. QUOTE DOES NOT INCLUDE DEMURRAGE AND/OR DETENTION.

(CMI App. Ex. A-3.)

The Commission has considered the establishment of ocean freight rates an important indicator of whether an entity operated as an NVOCC.

> For that shipment, the invoice submitted by Worldwide Shipping to the proprietary shipper charged a separate, higher freight rate than the downstream NVOCC charged. The charge appears as an ocean freight charge, not as a "fee" that an agent (or Ocean Freight Forwarder) would charge. Pursuant to Commission regulations and caselaw, this indicates that Worldwide Shipping was acting as a carrier rather than an agent, despite the occasional listing of a proprietary shipper as the shipper on a bill of lading.

VII.B.2. "FF" followed by a number without the slash refers to a finding of fact in Part VII.B.1. "CMI App." refers to the appendix filed by CMI with its opening brief.

Worldwide Relocations (FMC), 2012 FMC LEXIS 23 at *25 (FMC 2012) (footnote omitted). In the omitted footnote, the Commission stated:

> *Compare* 46 C.F.R. § 515.2([i])(11) [2011] ("Freight forwarding services . . . may include . . . [h]andling freight or other monies advanced by shippers") with 46 C.F.R. § 515.2([*l*])(3) [2011] ("[NVOCC] services . . . may include . . . [e]ntering into affreightment agreements with underlying shippers," which includes charging a freight rate different than what the VOCC charges). [Ocean freight forwarders] pass along, or "handle" freight charges imposed by carriers, whereas NVOCCs (and VOCCs) determine what those freight charges are.

Worldwide Relocations (FMC), *25 n.3.[10]

The fact that Service by Air determined the ocean freight charges paid by CMI is confirmed by other evidence, including its actual practice on the shipments at issue. Service by Air's corporate department required Service by Air to charge at least a twenty percent mark up of the charges by the drayage companies and ocean freight charges based on the company's guideline. (FF 70.) On every shipment for which the relevant documents are in the record, Service by Air charged CMI an amount for ocean freight that was greater than what the ocean common carrier charged Service by Air.

[10] Title 46 C.F.R. § 515.2(i)(11) (2011) is now codified at 46 C.F.R. § 515.2(h)(11) (2018). Title 46 C.F.R. § 515.2(*l*)(3) (2011) is now codified at 46 C.F.R. § 515.2(k)(3) (2018).

FLDR	Ocean Freight Service charged to Service by Air by carrier	Ocean Freight Service by Air charged CMI or its customer	Evidentiary Support
9	$3,393.00	$4,688.00	FF9/4, 5, 10
10	$4,500.00	$5,537.00	FF10/4, 6, 8
13	$4,680.00	$5,280.00	FF13/3, 4, 8
16	$4,900.00	$5,030.00	FF16/4, 5, 7
17	$3,575.00	$4,050.00	FF17/5, 6, 7
19	$4,120.00	$5,350.00	FF19/4, 8
21	$5,000.00	$5,400.00	FF21/4, 6, 7
27	$4,350.00	$4500.00	FF27/4, 8
29	$3,100.00	$3,470.00 (called "air freight")	FF29/4, 6, 8
33	$3,520.00	$6,134.94 (called "air freight and import duty")	FF33/4, 8
43	$4,150.00	$5,150.00	FF43/4, 8
44	$5,030.00	$5,815.00 (called "air freight")	FF44/4, 7, CMI App. Ex. A-9
46	$8,300.00	$9,650.00	FF46/4, 8
52	$3,750.00	$4,245.00	FF52/4, 8
53	$4,080.00	$8,734.58	FF53/4, 6
58	$3,850.00	$4,895.00	FF58/3, 6
59	$3,000.00	$4,095.00	FF59/4, 11
60-61	$6,000.00	$7,490.00	FF60-61/4, 11
62	$3,800.00	$4,895.00	FF62/4, 7

On each of these shipments, Service by Air did not pass along, or "handle" the freight charges imposed by a carrier, but determined what those freight charges would be for CMI through its self-described "tariffs."

C. Service by Air Assumed Responsibility for Transportation of the Cargo.

The Commission has held that evidence of an entity's routine practice is relevant to a determination of whether that entity assumed responsibility for a shipment. *See Worldwide Relocations (FMC),* 2012 FMC LEXIS at *21, 26; *Anderson Int'l,* 2013 FMC LEXIS at *27. To determine the routine practices of the respondents in *Worldwide Relocations (FMC)* and

Anderson Int'l, the Commission reviewed the shipping documents for the shipments, including the bills of lading issued by the downstream carriers and the invoices for the shipments. The Commission "indicated that it will look beyond documentary labels" in such reviews. *Anderson Int'l*, 2013 FMC LEXIS at *45 n.7. *See also GIC Services, L.L.C. v. FreightPlus USA, Inc.*, 866 F.3d 1817, 1827 (5th Cir. 2017) ("[A]n entity's status as an NVOCC (and as a shipper) depends on its function, not the labels ascribed to it by third parties." (Internal citations omitted)). Thus the shipping documents for the shipments in this case were reviewed to determine whether Service by Air assumed responsibility for the shipments. Such review revealed that while Service by Air denies that it acted as the NVOCC for the shipments, in actuality, Service by Air was listed either as shipper, consignee, notify party, the entity to be billed for the charges, or the entity to contact for their delivery in the shipping documents. Further, the documents showed ambiguity in the identification of the actual shippers as different entities were described as the "shipper" for the same shipment. As an example, for container number "TCKU1771451" (Service by Air invoice to CMI for "Air Bill Number N771018"), Service by Air described the "Shipper" as "Yantai FoodPack" and the "Receiver" as Ulta Dist Center (JA00150). However, for the same shipment, USA Logistic Services Inc., the downstream carrier, describes Service by Air as the "Shipper" and Ultra Dist. Center as the "Consignee." (JA00151-JA00152). Again, for the same shipment, Jewels Transportation, Inc., the drayage company utilized by Service by Air for the shipment, issued its invoice to "SBA Global Logistic Service" (JA00147). For that same shipment, LAS Freight issued a bill of lading (No. QINCHH11411001) describing CMI Distribution LLC as the "shipper" and Ulta Distribution Center as the "consignee." The LAS Freight bill of lading is annotated: "For Delivery of Goods Please Apply To: SBA (Service by Air) Global Logistics/Ord, 811 Thorndale Ave Bensenville, IL 60106, USA." (JA00148-JA00149.). The record for this shipment contains an email from Service by Air to CMI dated October 29, 2014, "FW: Arrival Notice/Freight Invoice (HBL#QD14100115)." In the email, Service by Air Representative, Bryan Tincher, states to CMI: "Can yu [*sic*] send a check for the attached by US Post? SBA N771018" (JA00146). This identification of different entities as shippers for the same shipment serves to obfuscate the role of Service by Air as the shipper of the shipment in relation to these downstream carriers. "Ambiguous identification of party shippers in [the shipping] documents may lead to a finding of NVOCC status." *Anderson Int'l*, 2013 FMC LEXIS at *28.

Moreover, Tincher, the primary contact person for Service by Air in the interactions between CMI and Service by Air, testified that Service by Air assumed responsibility for the delivery of CMI's cargo and that this responsibility continued until the cargo was delivered to the ultimate destination. (FF 53.) UTi, the previous transportation provider whom Service by Air was replacing and on whose NRA Service by Air based its charges, assumed responsibility for the transportation it provided to CMI. Once CMI chose to have Service by Air transport CMI's goods from China to the United States, CMI ceased having any control over the goods or their transportation. (FF 54.) Service by Air, rather than CMI, chose what steamship line would transport CMI's goods. (FF 55.) CMI had no contacts with the steamship lines who transported its goods, LAS Freight, or any other downstream carriers, and solely looked to Service by Air for the provision of services. (FF 56.) Service by Air issued its own bills of lading to CMI for the shipments along with separate invoices. (FF 50.) The bills of lading were annotated: "issued by Service by Air, Inc., 811 Thorndale Ave., Bensenville, IL. 60106" (FF 51.) According to Tincher, Service by Air assumed responsibility for the delivery of the cargo until delivered to the

ultimate destination. (FF 53.) Tincher testified that Service by Air did not inform CMI that Service by Air would not be assuming responsibility for the transportation of CMI's goods. (FF 64.) Tincher stated that if there was damage to CMI's cargo, he would tell CMI to submit a claim to Service by Air to get credit for its damages. (FF 60.)

Further, despite Service by Air's contention that "Service by Air was never in physical possession of the cargo" (SBA Prop FF 12), the record shows that Service by Air had physical control of the shipments and assumed responsibility for holding the shipments until it received payment for them. On occasion, when CMI had paid all charges on the containers, Service by Air refused to release the containers until CMI paid them for past due charges owed on other containers. (FF 66.) The instructions to hold the containers came from SBA's corporate department. (FF 67.) Zasada, SBA's representative, asked SBA's Chief Operating Officer: "Can you do that? I mean you're going to hold onto these containers that are released until we get payment on these? And he said yes." (FF 68.) The evidence thus amply demonstrates that Service by Air assumed responsibility for the transportation of the CMI shipments.

D. Service by Air Performed NVOCC Services Identified by 46 C.F.R. § 515.2(*l*) (2015).

Service by Air denies that it performed any tasks delineated in the Commission's regulations (46 C.F.R. § 512.2(*l*)) as NVOCC tasks. The record shows that Service by Air performed the following duties listed in the Commission's regulations at 46 C.F.R. § 515.2(*l*) (2015) as NVOCC duties.

1. Service by Air purchased transportation services from common carriers and resold them to CMI.

Service by Air paid all carriers who transported the shipments in question, including some ocean common carriers. (*See* findings of fact for shipments in Part VII.B.2.) Service by Air's corporate department required Service by Air to charge at least a twenty percent mark up of the charges by the drayage companies and ocean freight charges based on the company's guideline. (FF 70.) CMI made payments directly to Service by Air for all charges including their ocean transportation for the shipments. (*See* findings of fact for shipments in Part VII.B.2.)

2. Service by Air paid port-to-port multimodal transportation charges.

Service by Air directly paid the carriers hired for the transportation of the shipments. Freight Tech and Jewels, the companies that Service by Air primarily used for drayage of the shipments billed Service by Air for their services. (FF 71.)

3. Service by Air entered into affreightment agreements with the underlying shippers.

Service by Air contracted with CMI to transport the shipments from China into the United States. (FFs 19-35, 81; Ex. A.)

4. Service by Air issued bills of lading or other shipping documents.

Service by Air issued tariffs, bills of lading and separate invoices to CMI for the shipments at issue. (*See* findings of fact for shipments in Part VII.B.2; FF 35-42.)

5. Service by Air arranged for inland transportation and paid the inland freight charges on the through transportation movements.

When one of CMI's shipments would arrive at the port, Service by Air would be responsible for transporting the goods to the ultimate destination and would have one of its drayage companies recover them from the terminal. (*See* findings of fact for shipments in Part VII.B.2; Tincher Dep. at 33:19-34:1; 35:7-13.) Service by Air primarily used Freight Tech for drayage of the shipments but also used a company in New Jersey called Jewels and the drayage companies billed Service by Air for their services. (*See* findings of fact for shipments in Part VII.B.2.)

6. Service by Air entered into arrangements with the origin and destination agents with regard to the delivery of CMI's shipments.

Once CMI chose to have Service by Air transport CMI's goods from China to the United States, CMI ceased having any control over the goods or their transportation. Service by Air, rather than CMI, chose what steamship line would transport CMI's goods. CMI had no contacts with the steamship lines who transported its goods, LAS Freight, or any other downstream carriers and solely looked to Service by Air for the provision of services. (FFs 62-65.) Service by Air assumed responsibility for the shipments from the port or rail terminal to CMI's door. (FF 53.)

V. SERVICE BY AIR VIOLATED THE SHIPPING ACT.

A. Service by Air Operated as an NVOCC Without a License Issued by the Commission and Operated as a Common Carrier Without a Published Tariff.

Service by Air is not licensed by the Commission as an ocean transportation intermediary/NVOCC. Nevertheless, as found above, it operated as an NVOCC on the CMI shipments. Therefore, Service by Air violated section 40901 of the Act by operating as an ocean transportation intermediary without a license issued by the Commission.

Service by Air does not claim that it published a tariff. Only an NVOCC licensed by the Commission may provide service pursuant to a negotiated rate agreement. Therefore, Service by Air violated section 41104(2)(A) by providing service in the liner trade that is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of the Act.

> [T]he remedy of a cease and desist order is available to a complainant who is able to prove a violation of the Act and show that unlawful conduct is ongoing or likely to resume. If [a complainant] is able to prove a violation of the Act and

show that unlawful conduct is ongoing or likely to resume, relief in the form of a cease and desist order could be available.

Maher Terminals, LLC v. Port Authority of New York and New Jersey, FMC No. 08-03, Order at 16-17 (FMC Jan. 31, 2013) (Order granting in part and denying in part Respondent's Motion for Summary Judgment). Despite the evidence to the contrary, Service by Air argues that it did not operate as an NVOCC. I find that without a cease and desist order, it is likely that Service by Air will continue to operate as an NVOCC without a Commission license and as a common carrier without a published tariff. Therefore, entry of a cease and desist order is appropriate in this case.

B. Service by Air Imposed Unlawful Detention and Demurrage Charges on CMI in Violation of Section 41104(2)(A).

1. Liability.

Service by Air could legally pass through detention and demurrage charges that were imposed by downstream carriers. Service by Air added its own charges that were not set forth in a public tariff, however. When Service by Air added its own charges to the detention and demurrage charges imposed on it by other carriers and then invoiced CMI for its charges, Service by Air imposed rates and charges not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. I find that SBA violated section 41104(2)(A) of the Act by charging rates and demurrage that were not in accordance with the rates, charges, classifications, rules, and practices contained in a published tariff.

2. Reparations.

CMI suffered an actual injury when it paid the unlawful charges. The overcharges are found by subtracting the detention or demurrage imposed by another carrier from the amount Service by Air charged CMI.[11] There is insufficient information in the Joint Appendix to determine a reparation award for the shipments in FLDR 3, 9, 10, 13, 16, 17, 21, 51, 53, 54, and 59.

FLDR 19 – container number CLHU8658659.

Freight Tech Cartage, Inc. charged Service by Air $15,980.00 for demurrage for container number CLHU8658659. Service by Air charged CMI $27,100.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $11,120.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF19/7, 9, 10.)

[11] CMI submitted the report of an expert witness with its brief as evidence of its injury from the overcharges. The report has been admitted into the record. Because the "expert's scientific, technical, or other specialized knowledge," Fed. R. Evid. 702(a), is not necessary to help the Commission understand the evidence or to determine the amount of the unlawful charge, I have relied on the shipping documents in the Joint Appendix (which should include all documents on each shipment on which the expert relied), not the expert's report, to determine the amount of the overpayments.

FLDR 25 – container number TCLU4015624.

Freight Tech Cartage, Inc. charged Service by Air $7,300.00 for demurrage for container number TCLU4015624. Service by Air charged CMI $21,900.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $14,600.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF25/7, 8, 9.)

FLDR 27 – container number NYKU3251483.

Freight Tech Cartage, Inc. charged Service by Air $5,200.00 for demurrage for container number NYKU3251483. Service by Air charged CMI $14,300.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $9,100.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF27/7, 9, 10.)

FLDR 29 – container number TGHU1013740.

There is no documentary evidence that Service by Air was charged demurrage for container number TGHU1013740. Service by Air charged CMI $6,650.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $6,650.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF29/8, 9.)

FLDR 33 – container number BMOU2709846.

Holt Logistics charged Service by Air $500.00 for demurrage for container number BMOU2709846. Service by Air charged CMI $9,600.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $9,100.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF33/7, 9, 10.)

FLDR 36 – containers number GLDU9630402 and TEMU5582928.

Freight Tech Cartage, Inc. charged Service by Air $1,000.00 for demurrage for containers number GLDU9630402 and TEMU5582928. Service by Air charged CMI $6,325.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $5,325.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF36/6, 8, 9.)

FLDR 42 – container number TTNU5206116.

Freight Tech Cartage, Inc. charged Service by Air $3,600.00 for demurrage for container number TTNU5206116. Service by Air charged CMI $9,900.00 for demurrage on the container of which CMI paid $9,000.00. Service by Air imposed a charge for demurrage of $5,400.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF42/8, 9, 11.)

FLDR 43 – container number TRIU5347886.

Freight Tech Cartage, Inc. charged Service by Air $575.00 for demurrage for container number TRIU5347886. Service by Air charged CMI $2,700.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $2,125.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF43/7, 9, 10.)

FLDR 44 – container number CAXU4049893.

There is no documentary evidence that Service by Air was charged demurrage for container number CAXU4049893. Service by Air charged CMI $6,650.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $6,650.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF44/8, 9.)

FLDR 46 – containers number MSCU4807147 and MSCU4832324.

Freight Tech Cartage, Inc. charged Service by Air $2,480.00 for demurrage for containers number MSCU4807147 and MSCU4832324. Service by Air charged CMI $8,400.00 for demurrage on the containers. Service by Air imposed a charge for demurrage of $5,920.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF46/7, 9, 10.)

FLDR 49 – container number MSCU5881621.

There is no documentary evidence that Service by Air was charged demurrage for container number MSCU5881621. Service by Air charged CMI $2,700.00 for demurrage on the container. Service by Air imposed a charge for demurrage of $2,700.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF49/9, 10.)

FLDR 50 – container number MSCU4271080.

Freight Tech Cartage, Inc. charged Service by Air $8,330.00 for demurrage for container number MSCU4271080. Service by Air charged CMI $12,250.00 for demurrage on the containers. Service by Air imposed a charge for demurrage of $3,920.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF50/6, 7, 8.)

FLDR 52 – container number TRHU3313918.

Freight Tech Cartage, Inc. charged Service by Air $6,125.00 for demurrage for container number TRHU3313918. Service by Air charged CMI $14,100.00 for demurrage on the containers. Service by Air imposed a charge for demurrage of $7,975.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF52/7, 9, 10.)

FLDR 58 – container number MSCU5670932.

Freight Tech Cartage, Inc. charged Service by Air $6,800.00 for demurrage for container number MSCU5670932. Service by Air charged CMI $12,000.00 for demurrage on the

containers. Service by Air imposed a charge for demurrage of $5,200.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF58/6, 8, 9.)

FLDR 59 – container number KKFU1167644.

The evidence in the Joint Appendix indicates payments by CMI, but it is not clear what amount, if any, CMI paid for demurrage.

FLDR 60-61 – containers number KKFU1363499 and KKFU1614383.

There is no documentary evidence that Service by Air was charged demurrage for containers number KKFU1363499 and KKFU1614383. Service by Air charged CMI $24,800.00 for demurrage on the containers. Service by Air imposed a charge for demurrage of $24,800.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF60-61/14, 15.)

FLDR 62 – container number MSCU5915505.

Freight Tech Cartage, Inc. charged Service by Air $7,000.00 for demurrage for container number MSCU5915505. Service by Air charged CMI $12,600.00 for demurrage on the containers. Service by Air imposed a charge for demurrage of $5,600.00 not contained in a published tariff or service contract in violation of section 41104(2)(A) of the Act. (FF62/6, 8, 9.)

The amounts awarded total $126,185.00.

C. Service by Air Violated Section 41102(c) of the Act.

CMI alleges that Service by Air violated section 41102(c) of the Act. Section 41102(c) provides that an NVOCC "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

The Complaint alleges:

> 33. [Service by Air] failed to establish, observe, and enforce just and reasonable practices in violation of [section] 41102(c) assessing charges against CMI not in compliance with the charges, rates, charges, classifications, rules and practices contained in a tariff published with the Commission.
>
> 34. [Service by Air] violated 46 U.S.C. § 41102(c) by charging Complainant for storage and demurrage on the Shipments without providing notice of such charges on shipping documentation, bills of lading or published tariff.
>
> 35. [Service by Air] violated 46 U.S.C. § 41102(c) by improperly adding fees to storage and demurrage fees assessed by third parties while indicating to

> Complainant that the storage and demurrage fees were pass-throughs charged solely by those third parties.
>
> 36. [Service by Air] violated 46 U.S.C. § 41102(c) by assessing demurrage charges during free time when no such demurrage were owed.
>
> 37. [Service by Air] violated 46 U.S.C. § 41102(c) by assessing demurrage charges for time periods in excess of the time allowed under applicable tariffs.
>
> 38. [Service by Air] violated 46 U.S.C. § 41102(c) by failing to provide Complainant with: (1) proper and lawful ownership documentation (bills of lading); (2) proper shipping invoices; (3) the terms and conditions of transport even though Complainant paid [Service by Air]; and (4) clean and accurate statements of costs incurred and amounts properly payable for transportation services and related costs
>
> 39. [Service by Air] violated 46 U.S.C. § 41102(c) by refusing to release cargo even after receiving full payment for transportation and related charges until [SBA] received payment for demurrage and other costs associated with the cargo, which charges being assessed were not in compliance with the Shipping Act.
>
> 40. [Service by Air] violated 46 U.S.C. § 41102(c) by failing to obtain or maintain an OTI license with the Federal Maritime Commission while holding itself out and providing OTI services to Complainant.

(CMI Complaint ¶¶ 33-40.)

On December 17, 2018, after the parties had filed their briefs, the Commission issued a new rule regarding the interpretation of section 41102(c). This interpretive rule states:

> Interpretation of Shipping Act of 1984 – Unjust and unreasonable practices. 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
> (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.

Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64480 (Dec. 17, 2018), codified at 46 C.F.R. § 545.4. Both parties filed memoranda addressing the new rule. (Supplementary Memorandum of Respondents Service by Air, Inc. and Radiant Customs Services Inc. Regarding

New Legal Development (filed February 5, 2019); CMI Distribution, Inc.'s Reply to SBA's Supplementary Memorandum (filed February 8, 2019).)

As the Act states and the Commission echoes, section 41102(c) governs receiving, handling, storing, or delivering property. Complaint paragraphs 33-38 concern the requirement that a common carrier impose rates, charges, classifications, rules and practices contained in a tariff rate and is governed by section 40501(a)(1). Complaint paragraph 40 concerns the requirement imposed by section 40901(a) that an NVOCC be licensed by the Commission. Section 41102(c) is not intended to incorporate violations of other sections of the Act as failures "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

Complaint paragraph 39 alleges that Service by Air refused to release cargo after CMI had paid in full in order to coerce other payments not related to the transportation of that cargo. The Commission has found that this violates section 41102(c). *William J. Brewer v. Saeid. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 29 S.R.R. 6 at 6 (FMC 2001) (NVOCC violated section 10(d)(1) (41102(c)) for refusing to release the cargo at destination port unless additional money was paid, and instructing its agent to place the shipment on hold). There were instances when CMI had paid all charges on the containers but Service by Air refused to release the containers until CMI paid them for past due charges owed on other containers. The instructions to hold the containers came from SBA's corporate department. Zasada, SBA's representative, asked SBA's Chief Operating Officer: "Can you do that? I mean you're going to hold onto these containers that are released until we get payment on these? And he said yes." (FF 67-69.)

Consistent with section 545.4 and Commission case law, Service by Air is an NVOCC that articulated a normal, customary, and continuous practice of refusing to deliver cargo on which all transportation charges had been paid on order to coerce payment of charges due on cargo that had been delivered.

The burden is on CMI to establish damages. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. at 13. CMI does not clearly articulate any actual injury it suffered from section 41102(c) violations in addition to the overpayments of detention and demurrage resulting from the violations of section 40501(a)(1).

VI. CLAIMS AGAINST LAS FREIGHT ARE DISMISSED WITH PREJUDICE.

A. LAS Freight Is in Default.

LAS Freight received notice of this proceeding, but did not file an answer or otherwise respond to the Complaint. On July 10, 2017, CMI filed a motion for default against LAS Freight. LAS Freight sent an email to the Secretary, but did not respond to the Complaint or the motion for default. On August 16, 2017, the undersigned entered an order requiring LAS Freight to serve and file its answer to the Complaint and to show cause why an initial decision on default should not be entered against it. *CMI v. Radiant/SBA*, FMC No. 17-05 (ALJ Aug. 16, 2017) (Notice of Default and Order for LAS Freight Systems Ltd. to Show Cause). LAS Freight did not file an answer or respond to the show cause order. On October 30, 2017, the undersigned

issued an order deferring consideration of the motion for default. *CMI v. Radiant/SBA*, FMC No. 17-05 (ALJ Oct. 30, 2017) (Order Deferring Consideration of Motion for Default).

LAS Freight has not answered or otherwise responded to the Complaint and has not appeared to litigate a defense. Therefore, an initial decision on default will be entered on CMI's claims against LAS Freight.

B. CMI Has Not Proved by a Preponderance of the Evidence that LAS Freight Violated the Shipping Act.

A complainant does not necessarily prevail against a respondent who is in default.

> When a defendant is in default, the well pleaded factual allegations in the Complaint, except those relating to damages, are taken as true. *Thomson v. Wooster*, 114 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105, 1885 Dec. Comm'r Pat. 279 (1885); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 110-11 (6th Cir. 1995). Fed. R. Civ. P. 55 does not require a presentation of evidence as a prerequisite to the entry of a default judgment, although it empowers the court to conduct such hearings as it deems necessary and proper to enable it to enter judgment or carry it into effect. *See*: Wright, Miller & Kane, Federal Practice and Procedure, Civil 3rd § 2688.

Ford Motor Co. v. Cross, 441 F. Supp. 2d 837, 848, 2006 U.S. Dist. LEXIS 73944, *14-15, 65 Fed. R. Serv. 3d (Callaghan) 868 (E.D. Mich. May 5, 2006).

> Although a defaulting defendant generally admits to the factual allegations in a complaint, the court may make an investigation into any matter including whether "to determine the amount of damages or to establish the truth of any averment by evidence." Fed. R. Civ. Pro. 55(b)(2)[C]. Such determinations necessarily include whether there are sound legal and factual bases for entry of default judgment for the counts asserted in the plaintiff's complaint. *See, AOL, Inc. v. Hawke*, No. 1:04cv259 (E.D. Va. May 2, 2005) (Ellis, J.) (unpublished disposition).

Sheet Metal Workers' Nat'l Pension Fund v. Frank Torrone & Sons, Inc., Civil Action No. 1:04cv1109, 2005 U.S. Dist. LEXIS 12249, *15-16, 2005 WL 1432786 (E.D. Va. June 1, 2005). An allegation is not well pleaded if it is contrary to uncontroverted material in the file of the case. *Trans World Airlines, Inc. v. Hughes*, 308 F. Supp. 679, 683, 1969 U.S. Dist. LEXIS 12483, *6 (S.D.N.Y. 1969).

As discussed above, CMI alleges that "CMI contracted with [Service by Air] to transport more than 60 containers of plastic bags and vinyl gloves from China into the United States." (CMI Prop. FF v. SBA 1.) CMI claims that Service by Air operated as an NVOCC on the shipments. (CMI Brief v. Service by Air at 5-17.) CMI concedes that "CMI had no contacts with LAS Freight and solely looked to SBA for the provision of services." (CMI Prop. FF SBA 35.) Service by Air then "engaged LAS Freight to arrange the subject ocean transports from China." (SBA/Radiant Prop. FF 8.) Service by Air argued that it did not operate as an NVOCC, but as an agent of sorts for CMI.

The Complaint makes the following specific factual allegations about LAS Freight.

17. LAS Freight is listed as a registered OTI and has a tariff on file with the FMC. LAS Freight's tariff on file with the FMC contains no rules pertaining to demurrage.
18. LAS Freight issued bills of lading for the Shipments.
19. LAS Freight was acting as an NVOCC.
20. In issuing bills of lading for the Shipments, LAS Freight was holding itself out as an NVOCC.

(Complaint.) Complaint paragraphs 17 and 18 are allegations of fact. Complaint paragraphs 19 and 20 are mixed questions of fact and law.

CMI recognizes that LAS Freight is registered as an OTI and that it has a published tariff. Therefore, it is not alleging that LAS Freight violated section 40901 or section 40501(a)(1). LAS Freight operated as an NVOCC on the CMI shipments. The folder for each shipment except FLDR 3 has a bill of lading issued by LAS Freight System Ltd. for transportation of the container or containers.[12]

There is no evidence that any problem occurred with LAS Freight receiving, handling, storing, or delivering CMI's property to Service by Air, the primary NVOCC for CMI's shipments. Although LAS Freight is an NVOCC, CMI has not proven by a preponderance of the evidence that LAS Freight engaged in a normal, customary, and continuous practice of refusing to deliver cargo in violation of section 41102(c).

Regarding the claim that LAS Freight violated section 41104(2)(A) by imposing detention and demurrage charges not set forth in a tariff, as held above, CMI has established that Service by Air operated as an NVOCC on CMI's shipments and assumed responsibility for the transportation of the shipments. Service by Air then arranged with LAS Freight and other NVOCCs and entities for the actual transportation. LAS Freight accomplished the transportation that Service by Air required of it. Service by Air was the primary NVOCC on the shipments and was responsible to CMI. CMI has not offered any evidence that LAS Freight imposed any detention or demurrage charges of its own on Service by Air or CMI or that CMI paid any detention or demurrage charges to LAS Freight. CMI's argument is that Service by Air was the agent of LAS Freight and LAS Freight is liable for the detention and demurrage imposed by its agent Service by Air. Because Service by Air was the primary NVOCC on the shipments, Service by Air was not operating as the agent for LAS Freight when it invoiced CMI for detention and demurrage.

If the Commission were to determine that Service by Air did not operate as an NVOCC, but as CMI's agent – as Service by Air contends, the equivalent of an ocean freight forwarder on

[12] I note that Pan Star Express (Chicago) Corp., an NVOCC licensed by the Commission, identifies LAS-SWEG Logistics (Shanghai) Ltd., Shanghai, China, as the shipper of the container in FLDR 3. (FF3/1.) LAS-SWEG Logistics (Shanghai) Ltd. is identified as a shipper on all of the other shipments also. I do not find where CMI explains whether LAS-SWEG Logistics (Shanghai) Ltd. and respondent LAS Freight System Ltd., Taipei, Taiwan, are related.

a shipment into the United States – then on each of these shipments, LAS Freight delivered the cargo and fulfilled its transportation obligations by delivering the maritime containers to CMI's agent Service by Air as instructed by Service by Air.

CMI has not proved that LAS Freight violated the Shipping Act and the claims against it are dismissed with prejudice.

VII. FINDINGS OF FACT.

A. Evidence.

The parties submitted appendices containing documents relevant to the claims in this proceeding and additional documents as ordered by the undersigned. All documents are admitted as evidence and are given appropriate weight.

It is quite helpful for a party to direct the Commission to a particular page of an appendix rather than require the Commission to search through a number of pages to find the evidence on which a party relies. For this reason, the Scheduling Order instructed the parties to support their proposed finding of fact "by an exact citation to evidence that the party contends will support the proposed finding of fact; *e.g.*, a page number in the appendix," *CMI v. Radiant/SBA*, FMC No. 17-05, Order at 3 (ALJ Oct. 30, 2017) (Scheduling Order), and to put their documentary evidence into an appendix with the "pages . . . numbered sequentially, for example CX 1, CX 2, CX 3 or RX 1, RX 2, RX 3, etc." *Id.* CMI chose not to comply with this order, did not number its pages, and directs the Commission to its evidence with unwieldy references such as "Deposition of Bryan Tincher ('Tincher Dep.') at 18:10-12; 19-22, Exh. B" (CMI Prop. FF SBA 6) instead of "CX [x]." Consequently, finding exhibits to which CMI refers has been a more tedious task than it should be. Service by Air numbered the pages of its appendix as instructed, but then did not use those page numbers in it proposed findings of fact. (*See, e.g.*, SBA Prop. FF 3 and n.3 ("Transcript of Deposition of CMI's FRCP 30(b)(6) Designee Maria T. Vega ('Vega Deposition') at 23-24.")) References by the undersigned to the Service by Air appendix includes the appendix page number (RX [x]).

B. Findings.

1. Findings of fact – the parties and their relationship.

1. Complainant CMI Distribution, lnc. (CMI) is a corporation organized and existing under the laws of Illinois with a principal place of business at 555 Allendale Drive, Wheeling, IL 60090. (Complaint ¶ 1 (Doc. 1).)

2. CMI is in the business of importing packaging for sale and distribution to wholesalers and other distribution companies. (Respondents' Appendix RX 8.)

3. Respondent Service by Air, Inc. (Service by Air) is a corporation organized and existing under the laws of New York with its principal place of business at 222 Crossways Park, Dr., Woodbury, NY 11797. (Answer ¶ 2 (Doc. 27).)

4. At the time the shipments that are the subject of this proceeding took place, Service by Air provided ocean transportation services to CMI. (Respondents' Resp. to CMI Prop FF 6 (Doc. 43); CMI App. Ex. B – Tincher Dep. at 18:3-12; at 16-22.)

5. Service by Air is certified by the Transportation Security Administration to operate as an indirect air carrier. (Radiant/SBA Motion to Dismiss (Doc. 7) at 1.)

6. Service by Air has never been licensed as a non-vessel-operating common carrier (NVOCC). (Answer ¶ 32 (Doc. 27); SBA Prop. FF 1 (Doc. 42).)

7. SBA Consolidators, Inc. (SBA Consolidators) was a wholly-owned subsidiary of Service by Air. (SBA Prop. FF 1 (Doc. 42).)

8. SBA Consolidators was licensed by the Commission as a non-vessel-operating common carrier (NVOCC), OTI License Number 009688 by the Commission. (Answer ¶ 3 (Doc. 27); CMI App. Ex. B – Tincher Dep. at 30:15-24.)

9. Respondent Radiant Customs Services, Inc. (Radiant), formed in 2010, is a corporation organized and existing under the laws of New York with its principal place of business at 405 114th Ave. SE, Third Floor, Bellevue, WA 98004. (Answer ¶ 3 (Doc. 27).)

10. On or about June 2015, Radiant non-party Radiant Global Logistics, Inc. acquired Service by Air, and by extension, Service by Air's subsidiary, SBA Consolidators. (Radiant/SBA Motion to Dismiss (Doc. 7) at 2; SBA Prop FF 1 (Doc. 42).)

11. Service by Air continues to exist as a separate corporate entity wholly owned by Radiant Global Logistics, Inc., not a party to this proceeding. (SBA Prop. FF 1 (Doc. 42).)

12. On May 12, 2017, the Commission approved Radiant Customs Services, Inc.'s request to transfer SBA Consolidators' NVOCC License Number 009688 to Radiant Customs Services, Inc. (Answer ¶ 3 (Doc. 27); Official notice of Commission records.)

13. Respondent LAS Freight System Ltd. (LAS Freight) is a private limited company with its principal place of business at 10/Fl., No. 44 Lane, 11 Kuang Fu N. Road, Taipei, Taiwan. (Complaint ¶ 4 (Doc. 1).)

14. LAS Freight was a foreign NVOCC registered with the Commission, FMC Organization number 13673. (Complaint ¶ 4 (Doc. 1); FMC OTI List, https://www2.fmc.gov/oti/NVOCC.aspx (last visited May 16, 2018).)

15. UTi, United States, Inc. (UTi) was an NVOCC licensed by the Commission, License No. 001792. (Official notice of Commission records; *Carlstar Group LLC f/k/a Carlisle Transportation Products, Inc. and CTP Transportation Products, LLC v. UTi, United States, Inc.; UTi United States, LLC; and DSV Air & Sea, Inc.*, FMC No. 17-08, Decision at 4 (ALJ May 18, 2018) (Initial Decision Partially Dismissing Complaint).)

16. In 2013 to 2014, UTi transported shipments from China to the United States pursuant to a negotiated rate agreement (NRA). (CMI App. Ex. A – Vega Dec. ¶ 6, Exh. A; CMI Notice of Filing (Doc. 51) Exh. 2.)

17. The UTi NRA established rates for transportation by water of plastic deli bags, paper towel, and rubber gloves from ports or points in China through ports in the United States and Canada to points in the United States. (CMI Notice of Filing (Doc. 51) Exh. 2.)

18. The UTi NRA provided "[d]uring the term of this NRA, transportation is subject to applicable surcharges, accessorial charges, and/or GRIs published in Carrier's rules tariff and effective at the time of shipment, unless otherwise specified in this NRA." (CMI Notice of Filing (Doc. 51) Exh. 2.)

19. In 2014, CMI and Service by Air engaged in discussions regarding having Service by Air transport goods from China to the United States on CMI's behalf. (CMI App. Ex. A – Vega Dec. ¶ 8.)

20. In those discussions, Service by Air represented that it could provide the same type of services that UTi had been providing to CMI. (CMI App. Ex. B – Tincher Dep. at 67:8-11, 67:23-68:8; Exh. B.)

21. At the time the shipments took place, respondent Service by Air was a full-service logistics provider that provides both air and ocean services. (CMI App. Ex. B – Tincher Dep. at 18:10-12; 19-22.)

22. CMI provided a copy of its NRA agreement with UTi and told Service by Air that its rates needed to match or beat UTi's rates. (CMI App. Ex. A – Vega Dec. ¶ 10; CMI App. Ex. A-1 at 003084.)

23. On August 27, 2014, Service by Air provided CMI with what a document that it represented was Service by Air's tariff so that CMI could draw a comparison between Service by Air and UTi's services and respective tariff provisions. (CMI App. Ex. A – Vega Dec. ¶ 11; CMI App. Ex. B – Tincher Dep. at 58:13-59:1.)

24. The document that Service by Air provided to CMI stated that it was effective from August 27, 2014 until September 27, 2014. (CMI App. Ex. A – Vega Dec. ¶ 12; CMI App. Ex. A-2.)

25. The document that Service by Air provided to CMI had a reference at the top to its NRA. (CMI App. Ex. A – Vega Dec. ¶ 14; CMI App. Ex. A-2.)

26. The document that Service by Air provided to CMI sets forth Service by Air's ocean freight rate, AMS, port fee, ISF/ACI fee, destination handling, customs, delivery, and total ocean freight for full container load shipments from three ports in China to five destinations in the United States. (CMI App. Ex. A-2.)

27. The Service by Air document provided to CMI stated that: "During the term of the NRA, transportation is subject to applicable surcharges, accessorial charges, and/or GRIs

published in Carrier's tariff and effective at the time of shipment, unless otherwise specified in this NRA (or the originating carrier in the case of through transportation"). (CMI App. Ex. A – Vega Dec. ¶ 14.)

28. Service by Air's representative stated the following about Service by Air's document:

> Jay
>
> You may want to check with UTi. From what I see from the attachment you sent me, it is only good for 30 days and is subject to GRI. It is very unusual for an ocean tariff to be guaranteed for 1 year since the SS Lines constantly publish GRI's and change their BAF. I highlighted the sections in the attachments. Also, tab# 3 of their spreadsheet shows there was a GRI and BAF increase the day after UTi created the tariff. Also attached is my tariff that includes the recent GRI. Let me know if you have any questions.

(CMI App. Ex. A-1 (Email dated August 27, 2014, at 7:44 AM from Service by Air representative Bryan Tincher to Jay Jalowiecki of CMI; Michael Miller of Service by Air, titled "RE: FCL TARIFF).)

29. Service by Air's representative stated the following about Service by Air's document and the UTi NRA:

> I'm looking over the spread sheet from UTi. Their spreadsheet has separate tabs for BAF and a GRI that was effective after this was created. Also, please confirm with UTi if this included the recent GRI that went into effect 15-Aug. If you take this into consideration, I think I am competitive. I will update my spread sheet and sent [*sic*] it this morning.
>
> (CMI App. Ex. A-1 (Email dated August 27, 2014, at 8:32 AM from Service by Air Import/Export Manager Bryan Tincher to Jay Jalowiecki of CMI; Michael Miller of Service by Air, titled "RE: FCL TARIFF).)

30. When providing the document to CMI, Service by Air represented to CMI that it was providing the same type of service as UTi. (CMI App. Ex. B – Tincher Dep. at 67:8-11.)

31. Service by Air did not believe it was necessary to make a distinction between the types of NVOCC services that UTi was providing versus the services Service by Air would be providing. (CMI App. Ex. B – Tincher Dep. at 67:23-68:2.)

32. The document provided to CMI stated that the transportation was subject to applicable surcharges, accessorial charges, and/or GRIs published in Carrier's tariff. (CMI App. Ex. B – Tincher Dep. at 61:21-62:7; 64:24-65:11.)

33. Based in part upon the representations made by Service by Air regarding its document and the rates contained therein, CMI chose to have Service by Air provide it with ocean transportation services instead of UTi. (CMI App. Ex. A – Vega Dec. ¶ 19.)

34. CMI contracted with Service by Air to transport by ocean transportation more than 60 maritime containers of plastic bags and vinyl gloves from China into the United States to be delivered to door locations. (CMI App. Ex. A – Vega Dec. ¶ 2.)

35. On October 13, 2014, Service by Air sent a document titled "CMI Packaging and Distribution FOB Tariff, effective October 31, 2014" (CMI October Tariff) to CMI. (CMI App. Ex. A-3.)

36. The CMI October Tariff established rates for transportation by water of 20 foot, 40 foot, and 40 foot high cube containers from ports or points in China through ports in the United States and Canada to points in the United States. (CMI App. Ex. A-3.)

37. The CMI October Tariff included customs clearance and drayage at destination and was subject to Service by Air terms and conditions. (CMI App. Ex. A-3.)

38. The CMI October Tariff did not include demurrage and/or detention. (CMI App. Ex. A-3.)

39. On February 1, 2015, Service by Air sent a document titled "CMI Packaging and Distribution FOB Tariff, effective February 1, 2015 (CMI February Tariff) to CMI. (CMI App. Ex. A-3.)

40. The CMI February Tariff established rates for transportation by water of 20 foot, 40 foot, and 40 foot high cube containers from ports or points in China through ports in the United States and Canada to points in the United States. (CMI App. Ex. A-3.)

41. The CMI February Tariff included customs clearance and drayage at destination and was subject to Service by Air terms and conditions. (CMI App. Ex. A-3.)

42. The CMI February Tariff did not include demurrage and/or detention. (CMI App. Ex. A-3.)

43. Service by Air was involved in the transportation by water between a port or point in China to a port in the United States in the shipment of twenty-eight maritime containers for which CMI alleges that Service by Air violated the Shipping Act. These shipments are identified in modified Complaint Exhibit 1, FLDR numbers 3, 9, 10, 13, 16, 17, 19, 21, 25, 27, 29, 33, 36, 42, 43, 44, 46, 49, 50, 51, 52, 53, 54, 58, 59, 60, 61, and 62. (Stipulation of CMI and Radiant/SBA (filed Sept. 18, 2017).) *See also CMI v. Radiant/SBA*, FMC No. 17-05, Notice ¶ 4 (ALJ Sept. 21, 2017) (Notice to the Parties and Order to Schedule Conference); Joint Supplemental Appendix (filed June 1, 2018); Part VII.B.2(b) of this Decision.[13]

[13] The September 21, 2017, Notice included the shipment represented by modified Complaint Exhibit 1 FLDR 2. As found in Part VII.B.2(b), documents related to that shipment demonstrate that the container was transported by water from China to Vancouver.

44. LAS Freight issued house through bills of lading from China to Service by Air's facility in Bensenville, IL or other locations for the transports at issue for the vast majority of the shipments. (SBA Prop. FF 9 (Doc. 42).)

45. LAS Freight engaged other Chinese NVOCCs for some shipments, and those other Chinese NVOCCs issued through house bills of lading for the shipments they transported. (SBA Prop. FF 9 (Doc. 42).)

46. LAS Freight and the other Chinese NVOCCs did not issue original bills of lading, thereby protecting the Chinese shippers from CMI obtaining the cargo until the shippers authorized issuance of "telex releases." Thus, unless and until CMI paid invoice costs to its Chinese suppliers, LAS Freight and the other Chinese NVOCCs would not issue telex releases, and transportation service providers down the chain were precluded from releasing the cargo to CMI. (SBA Prop. FF 10 (Doc. 42).)

47. Service by Air engaged motor carrier Freight Tech to dray most of the cargo from the inland rail yards to Freight Tech's yard in Naperville, Illinois, where it would await further delivery instructions. CMI's China-based suppliers instructed LAS Freight, which in turn instructed Service by Air not to release the cargo to CMI unless and until confirmation was received that CMI had paid the suppliers under the commercial invoices for CMI's purchase of the cargo. This would be accomplished by telex releases. (SBA Prop. FF 12 (Doc. 42).)

48. Tincher testified that he was employed by Service by Air as International Manager. (CMI App. Ex. B – Tincher Dep. at 14:14-15:21.)

49. Email correspondence with CMI indicates that Tincher was Import/Export Manager for Service by Air. (CMI App. Ex. A-5.)

50. Service by Air issued its bills of lading to CMI for some of the shipments at issue along with separate invoices. (CMI App. Ex. A – Vega Dec. ¶¶ 23-24; CMI App. Ex. B – Tincher Dep. at 78:9-14.)

51. The bills of lading were "issued by Service by Air, Inc., 811 Thorndale Ave., Bensenville, IL. 60106" and identified CMI as the consignee and CMI's suppliers as the shipper. (CMI App. Ex. A – Vega Dec. ¶¶ 23-24; CMI App. Ex. A-4.)

52. Most of the bills of lading issued by Service by Air provided that the goods could move by any other means than air and by other carriers. (CMI App. Ex. A – Vega Dec. ¶¶ 23-24; CMI App. Ex. A-4.)

53. Bryan Tincher, Service by Air's primary contact person with CMI, testified that Service by Air assumed responsibility for the delivery of CMI's cargo and this responsibility continued until the cargo was delivered to the ultimate destination. (CMI App. Ex. B – Tincher Dep. at 53:22-54:3; 31:15-21; 33:18-22; 35:7-10.)

54. Once CMI chose to have Service by Air transport CMI's goods from China to the United States, CMI ceased having any control over the goods or their transportation. (CMI App. Ex. A – Vega Dec. ¶ 29.)

55. Service by Air, rather than CMI, chose what steamship line would transport CMI's goods. (CMI App. Ex. A – Vega Dec. ¶ 30.)

56. CMI had no contacts with the steamship lines who transported its goods. (CMI App. Ex. A – Vega Dec. ¶ 31.)

57. CMI had no contacts with LAS Freight and solely looked to Service by Air for the provision of services. (CMI App. Ex. A – Vega Dec. ¶ 32.)

58. Service by Air's 30(b)(6) witness, Edward Zasada, testified when goods are moving from a port to the ultimate consignee on a through bill of lading, they remain as ocean transportation. (CMI App. Ex. C – Zasada Dep. at 23:13-18.)

59. As a result, any charges that are assessed, whether deemed demurrage or detention, are part of the ocean transportation until the goods are actually delivered to the ultimate destination pursuant to the bill of lading. (CMI App. Ex. C – Zasada Dep. at 23:20-24:2.)

60. Tincher testified that if there was damage to CMI's cargo, he would tell CMI to submit a claim to Service by Air to get credit for its damages. (CMI App. Ex. B – Tincher Dep. at 28:1-12.)

61. CMI developed cash flow problems related to a number of the shipments and did not pay its suppliers. (RX 26, 34 (Transcript of Deposition of CMI's FRCP 30(b)(6) Designee Maria T. Vega ('Vega Deposition') at 86-89, at 118-121.)

62. When Service by Air invoiced CMI for demurrage imposed by other carriers, Service by Air increased the charges. (CMI App. Ex. B – Tincher Dep. at 119:3-120:4.)

63. Service by Air informed CMI that it was in direct communications with steamship lines regarding the demurrage claims at issue. (CMI App. Ex. A-6.)

64. At no point did Service by Air inform CMI that Service by Air was not assuming responsibility for the transportation at issue. (CMI App. Ex. A – Vega Dec. ¶ 20; CMI App. Ex. B – Tincher Dep. at 66:11-68:8.)

65. Service by Air's actions and practices were consistent with it assuming responsibility for the transportation at issue. (CMI App. Ex. B – Tincher Dep. at 31:15-21.)

66. At all times CMI believed that if its goods were damaged in transit, Service by Air as CMI's carrier would be responsible for such damages. (CMI App. Ex. A – Vega Dec. ¶ 38.)

67. On occasion, when CMI had paid all charges on the containers, Service by Air refused to release the containers until CMI paid them for past due charges owed on other containers.

(CMI App. Ex. B – Tincher Dep. at 111:10-112:9; CMI App. Ex. C – Zasada Dep. 30:14-31:18.)

68. The instructions to hold the containers came from SBA's corporate department. (CMI App. Ex. B – Tincher Dep. at 112:10-113:3; 114:7-22.)

69. Zasada, SBA's representative, asked SBA's Chief Operating Officer: "Can you do that? I mean you're going to hold onto these containers that are released until we get payment on these? And he said yes." (CMI App. Ex. C – Zasada Dep. 30:14-31:18.)

70. Service by Air's corporate department required Service by Air to charge at least a twenty percent mark up of the charges by the drayage companies and ocean freight charges based on the company's guideline. (CMI App. Ex. B – Tincher Dep. at 37:22-38:22, 140:13-140:4, 141:23-142:8.)

71. Service by Air directly paid the carriers hired for the transportation of the shipments. Freight Tech and Jewels, the companies that Service by Air primarily used for drayage of the shipments solely billed Service by Air for their services. (CMI App. Ex. B1-B10; Radiant/SBA Motion to Dismiss (Doc. 7), Affidavit of Edward A. Zasada ¶ 12.)

72. CMI made payments directly to Service by Air for all charges including their ocean transportation for the shipments. (Exhs. A8-A12; A14; A16-A17; B1, JA00217; JA00433; JA00591)

2. Findings of facts for each shipment at issue.

a. Background.

CMI's Complaint alleges that "[b]etween April 2014 and June 2015, CMI engaged Respondents to provide transportation of more than 60 shipments . . . with Respondents from China to Illinois." (Complaint ¶ 6.) CMI attached a document titled "Demurrage, SBA Payments" as Exhibit 1 to its Complaint. Exhibit 1 identifies containers by "FLDR" (folder) number and lists the container number, freight number, invoice, date of arrival, date received, days of claimed demurrage, and "SBA demurrage actual" for the shipment of each container for which CMI claimed violations.

Respondents Service by Air and Radiant filed a motion to dismiss that was opposed by CMI. The parties filed documents related to the shipment of some of the containers listed in Exhibit 1. Those documents, in particular Customs and Border Protection (CBP) Forms 3461 and bills of lading, suggested that several of the shipments identified on Exhibit 1 had been transported by water from a port or point in China to a port in Canada and others were transported by air to a United States airport, then on to their destinations in the United States. Therefore, on August 16, 2017, the undersigned entered an order requiring the parties to respond to several questions and file additional documents. *CMI v. Radiant/SBA*, FMC No. 17-05 (ALJ Aug. 16, 2017) (Order to Supplement the Record).

In response to the order, on September 18, 2017, the parties filed a Modified Complaint Exhibit 1 that identified seventeen shipments of eighteen containers for which the parties agreed

the shipments were not transported to the United States by water. Based on this stipulation, the undersigned issued a notice to the parties characterizing by FLDR number the shipments identified by Modified Complaint Exhibit 1:

- FLDR numbers 4, 12, 14, 15, 18, 20, 22, 23, 24, 26, 28, 30, 34, 39, 45, 55, 56, and 57 – shipments not transported by water from a foreign port to a port in the United States and hence not subject to Commission subject matter jurisdiction.

- FLDR numbers 1, 5, 6, 7, 8, and 11 – are marked "N/A" on Modified Complaint Exhibit 1. The undersigned understands that CMI does not claim to have paid any demurrage on these shipments.

- FLDR numbers 31, 32, 35, 37, 38, 40, 41, 47, and 48 – numbers not used on Complaint Exhibit 1.

- FLDR numbers 2, 3, 9, 10, 13, 16, 17, 19, 21, 25, 27, 29, 33, 36, 42, 43, 44, 46, 49, 50, 51, 52, 53, 54, 58, 59, 60, 61, and 62 – shipments on which CMI alleges Respondents violated the Shipping Act.

- FLDR numbers 1, 2, 17, 36, 44, and 54 – shipments for which the records stored offsite and not submitted to the Commission.

CMI v. Radiant/SBA, FMC No. 17-05 (ALJ Sept. 21, 2017) (Notice to the Parties and Order to Schedule Conference).

With the dismissal of the claims regarding nineteen shipments that were not transported by water between China and a port in the United States, this case involves twenty-nine shipments of cargo by water from China to the United States. What happened on one shipment is not necessarily probative of what happened on another shipment. Therefore, proposed findings of fact such as "SBA normally did not provide CMI with copies of the underlying bills of lading on which its invoices were based," (CMI Prop. Finding 75), are not particularly helpful.

CMI also did not put all documents relating to a particular shipment together to make it easier to understand what occurred on a particular shipment. After CMI filed its opening brief, the undersigned convened a telephone conference to address a number of questions. This conference resulted in an order that required the parties:

> [T]o prepare a joint supplemental appendix containing all of the documents related to the shipping of each container for which CMI seeks a reparation award. The documents will be arranged by shipment and reference the FLDR number for the container in Complaint Exhibit 1 and include, but not be limited to, the following documents:
>
> - VOCC and NVOCC bill of lading or other shipping contract
> - CBP form
> - Dock receipts and chassis contract

- Invoice or other record from VOCC to SBA or CMI for freight charges
- Invoice or other record from LAS Freight to SBA or CMI for freight charges
- Invoice or other record from SBA to CMI for freight charges
- Document issued by VOCC or NVOCC to SBA or CMI tendering container for delivery
- Document showing release of container by VOCC or NVOCC to SBA or any other entity
- Chassis contract and contract for drayage of container from the inland rail yard to Freight Tech's yard
- Invoice from Freight Tech to SBA for drayage of container from the inland rail yard to Freight Tech's yard
- Record of payment from SBA to Freight Tech for drayage from the inland rail yard to Freight Tech's yard
- Invoice or other record from VOCC, LAS Freight, or NVOCC or SBA or CMI for demurrage, detention, or other charges
- Invoice or other record from Freight Tech to LAS Freight, SBA, or CMI for demurrage, detention, or other charges
- Emails related to the shipment of the containers
- Any other shipping records reviewed by the experts

The parties must file the joint supplemental appendix on or before June 1, 2018.

CMI v. Radiant/SBA, FMC No. 17-05 (ALJ May 16, 2018) (Order Amending Scheduling Order).

CMI, Service by Air, and Radiant filed the required Joint Supplemental Appendix on June 1, 2018, containing documents for the shipments identified as FLDR numbers 2, 3, 9, 10, 13, 16, 17, 19, 21, 25, 27, 29, 33, 36, 42, 43, 44, 46, 49, 50, 51, 52, 53, 54, 58, 59, 60 and 61 (combined), and 62. These are the twenty-nine shipments identified in the September 21, 2017, order on which CMI alleges Respondents violated the Shipping Act. The undersigned assumes that copies of all documents in the record related to the shipments and available to CMI, Service by Air, and Radiant are in the Joint Supplemental Appendix.

Although the Complaint alleges the shipments were from China to Illinois, more than half of the twenty-eight shipments for which CMI seeks relief (excluding FLDR 2 that was transported by water to Canada, not the United States) were to other destinations in the United States: Birmingham, AL (FLDR 10, 13, 16); Chicago, IL (FLDR 3, 9, 19, 25, 27, 36, 42, 43, 46, 50, 52, 58, 62); Edison, NJ (FLDR 44, 54); Las Vegas, NV (FLDR 49, 51, 53, 59, 60, 61); Long Beach, CA, (FLDR 17); Philadelphia, PA (FLDR 21, 33); and Phoenix, AZ (FLDR 29).

When they prepared the Joint Appendix, the parties did not organize the documents concerning each shipment, but merely put all the documents (often with duplicates) concerning a shipment into one section.

The findings of fact set forth below for each shipment are based on the documentation in the Joint Appendix.

b. Shipments at Issue – Joint Appendix.

FLDR 2 – JA-2-5.

Joint Appendix FLDR 2 contains documents related to the shipment of container number PCIU8352944 from Shanghai to Chicago.

FF2/1 On 05/07/14, JT Shipping Corporation issued arrival notice/freight notice invoice number LAX-AR068743 for container number PCIU8352944 identifying LAS-SWEG Logistics (Shanghai) Ltd as the shipper, Service by Air as the consignee, and total ocean freight and handling charge of $3,285.00. (JA-2.)

FF2/2 Shanghai, China, was the port of loading, Vancouver the port of discharge, and Chicago, IL as the place of delivery for container number PCIU8352944. (JA-2.)

"[C]ounsel for CMI and Radiant/SBA agree [] that shipments that were transported by water from a foreign port to a port in Canada are not within the subject matter jurisdiction of the Commission." *CMI v. Radiant/SBA*, FMC No. 17-05 (ALJ Oct. 6, 2017) (Order Granting in Part and Denying in Part Motion to Dismiss). CMI has not established that container number PCIU8352944 was transported by water between a port in a foreign country and a port in the United States. The claims related to the shipment of container number PCIU8352944 are dismissed without prejudice for lack of subject matter jurisdiction. *See CMI v. Radiant/SBA*, FMC No. 17-05, Order at 1-3 (ALJ Oct. 6, 2017) (Order Granting in Part and Denying in Part Motion to Dismiss) (claims for shipments that were not transported by water between a foreign port and a port in the United States should be dismissed without prejudice).

FLDR 3 – JA-7-11.

Joint Appendix FLDR 3 contains documents related to the shipment of container number MEDU3113127 from Shanghai to Chicago.

FF3/1 On 05/14/14, Pan Star Express (Chicago) Corp. issued arrival notice/freight notice invoice number 258968, Ref N612525, for container number MEDU3113127 identifying LAS-SWEG Logistics as the shipper, Service by Air as the consignee, and total ocean freight charge of $3,028.00. (JA-7.)

FF3/2 Dairen, China, was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL the place of delivery for container number MEDU3113127. (JA-7.)

FF3/3 On 05/22/14, Service by Air issued a check in the amount of $3,028.00 to vendor Pan Star Express (Chicago) Corp. for invoice number 258968, Ref N612525. (JA-8.)

FF3/4 On May 22, 2014, Service by Air representative Bryan Tincher sent an email to Doreen Anderson and others requesting payment for Ref N612525. (JA-9.)

FF3/4 On June 11, 2014, Freight Tech Cartage, Inc., issued invoice number 17791 to SBA Consolidators, Inc., indicating charges for container number MEDU3113127 including BNSF Harvey to LPC CMI, Wheeling ($350.00), fuel surcharge ($112.00), prepull ($125.00); chassis charges ($325.00), "container demerge" [*sic*] (total $1,455), total $2,367.00. (JA-11.)

FF3/6 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MEDU3113127.

FF3/7 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MEDU3113127.

FLDR 9 – JA-13-27.

Joint Appendix FLDR 9 contains documents related to the shipment of container number MEDU2212151 from Qingdao to Chicago, IL.

FF9/1 LAS Freight System Ltd. issued bill of lading number QINCHI1408008 for container number MEDU2212151 identifying Yantai Foodpack Packaging Products Co., Ltd as the shipper, CMI as the consignee, indicating shipped on board 20140815. (JA-23.)

FF9/2 Qingdao China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL the place of delivery for container number MEDU2212151. (JA-23, 26, 15.)

FF9/3 Weida Freight System Co., Ltd issued bill of lading number TAOWD035226, container number MEDU2212151, identifying LAS-SWEG Logistics as the shipper, Service by Air as the consignee, shipped on board 2014/8/15. (JA-26.)

FF9/4 On September 2, 2014, Weida Freight System, Inc (ORD) issued an arrival notice/freight invoice for Ref No. WDORDOI14090004, HB/L number TAOWD038228, container number MEDU2212151, identifying LAS-SWEG Logistics as the shipper, Service by Air as the consignee, and total ocean freight charge of $3,393.00. (JA-15.)

FF9/5 On 09/03/14, Service by Air issued a check in the amount of $3393.00 to vendor Weida Freight System, Inc (ORD) for arrival notice/freight invoice WDORDOI14090004 for Ref N770553. (JA-19.)

FF9/6 On September 3, 2014, Service by Air representative Bryan Tincher sent an email to Doreen Anderson and others requesting payment for Ref N770553. (JA-20.)

FF9/7 On 09/04/14, Department of Homeland Security CBP Form 3461, Entry/Immediate Delivery, Entry No. 671-0142225-0, was created for container number MEDU2212151 for delivery to SBA Consolidators, Inc., with ultimate consignee identified as CMI. (JA-17.)

FF9/8 On 9/19/14, Freight Tech Cartage, Inc., issued a document with the notation "drop for Bryan Tincher Import Manager" for container number MEDU2212151 and chassis number MSCZ260650 to consignee CMI indicating time in of 705 and time out as 720. (JA-21.)

FF9/9 On October 1, 2014, Freight Tech Cartage, Inc., issued invoice number 19403 to SBA Consolidators, Inc., indicating delivery charges for container number MEDU2212151, including BNSF Harvey to LPC CMI, Wheeling ($350.00), fuel surcharge ($133.00), chassis charges ($300.00), prepull ($125.00); demurrage (total $1,010.00), total $1,918.00. (JA-22.)

FF9/10 Service by Air issued an invoice to CMI for container number MEDU2212151, reference N770553, including ocean freight ($4,688.00), import duty/tax ($896.28), and detention charge ($1,535.00), total $7,119.28. (JA-25.)

FF9/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MEDU2212151.

FF9/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MEDU2212151.

FLDR 10 JA-29-44.

Joint Appendix FLDR 10 contains documents related to the shipment of container number MSCU5926290 from Qingdao to Birmingham, Alabama.

FF10/1 LAS Freight System Ltd. issued bill of lading number QINCH11408007 identifying CMI Distribution LLC as the shipper and Hercules Poly Inc as the consignee for container number MSCU5926290, shipped on board Aug 22, 2014. (JA-43.)

FF10/2 Qingdao, China was the port of loading in China, Long Beach, CA, the port of discharge, and Birmingham, AL the place of delivery of container number MSCU5926290. (JA-31, 43.)

FF10/3 Acme Freight Services Corp. issued bill of lading number QD14080123 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee, of container number MSCU5926290, shipped on board Aug 22, 2014. (JA-31.)

FF10/4 Acme Freight Services Corp. issued arrival notice/freight invoice number 024858 indicating that the ocean freight due for container number MSCU5926290 was $4,500.00. (JA-33.)

FF10/5 Service by Air issued air waybill N770552 identifying [illegible] as the shipper, Hercules Poly as the consignee, Hong Kong as the airport of departure, and [illegible] as the airport of destination of container number MSCU5926290. (JA-32.)

FF10/6 On 09/10/14, Service by Air issued a check to Acme Freight Services Corp. for $4,500.00 for invoice number 024858, reference N770552. (JA-38.)

FF10/7 On 09/26/14, Intermodal Cartage Company issued invoice number 10-112513 to Service by Air for round trip service ($335.00), fuel surcharge ($100.50), yard pull ($75.00), and detention ($187.50), total $698.00, for container number MSCU5926290, reference number N770552. (JA-42.)

FF10/8 Service by Air issued an invoice to CMI for ocean freight ($5,537.00), storage ($250.00), and import duty/tax ($1,399.85), total $7,186.85, for container number MSCU5926290, reference number N770552. (JA-44.)

FF10/9 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU5926290.

FF10/10 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU5926290.

FLDR 13 JA-46-69.

Joint Appendix FLDR 13 contains documents related to the shipment of container number TTNU5524101 from Qingdao to Birmingham, Alabama.

FF13/1 LAS Freight System Ltd. issued bill of lading number QINCHI1408011 identifying CMI as the shipper, Hercules Poly Inc as the consignee, Qingdao, China as the port of loading, Long Beach, CA, as the port of discharge, and Birmingham, Alabama, as the place of delivery of container number TTNU5524101, shipped on board Aug 29, 2014. (JA-64.)

FF13/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Birmingham, Alabama, the place of delivery of container number TTNU5524101. (JA-64, 49.)

FF13/2 On August 25, 2014, Service by Air issued air waybill N770647 identifying Changle Huakin Plastic as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare Int'l as the airport of destination of container number TTNU5524101. (JA-47.)

FF13/3 On 9/5/14 Acme Freight Services Corp. issued arrival notice/freight invoice number INV-024873 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TTNU5524101 indicating that the ocean freight due for was $4,680.00. (JA-49.)

FF13/4 On 09/15/14 Service by Air issued a check in the amount of $4,680.00 to Acme Freight Services Corp. for invoice INV-024873 reference number N770647. (JA-51.)

FF13/5 Service by Air representative Bryan Tincher responded by email to a September 12, 2014, email from Richard Sturm, regional vice president for Intermodal Cartage Company, by identifying container number TTNU5524101 and stating: "This container is arriving tomorrow. I need it pulled before the last free day and held in your yard until I get the telex release. For this and the container you already have, I understand that there will be storage and that is not a problem. I just pass it down to my customer." (JA-53.)

FF13/6 On October 13, 2014, Service by Air representative Bryan Tincher approved detention charges totaling $206.25 for container number TTNU5524101. (JA-55.)

FF13/7 On October 18, 2014, Intermodal Cartage Company created invoice 10-112572 for Service by Air listing charges for round trip service ($355.00), fuel surcharge ($106.50), yard pull ($75.00), detention ($206.25), and chassis ($960.00), total $1,702.75 for container number TTNU5524101 reference number N770647. (JA-61.)

FF13/8 On October 22, 2014, Service by Air created an invoice for Hercules Poly Inc listing charges for ocean freight ($5,280.00), import duty/tax ($1,263.97), and storage ($1,781.25), total $8,325.22 for container number TTNU5524101 reference number N770647. (JA-67.)

FF13/9 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TTNU5524101.

FF13/10 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TTNU5524101.

FLDR 16 JA-72-83.

Joint Appendix FLDR 16 contains documents related to the shipment of container number TTNU4343813 from Qingdao, China, to Birmingham, Alabama.

FF16/1 LAS Freight System Ltd. issued bill of lading number QINCHI1409006 identifying CMI Distribution LLC as the shipper, Hercules Poly Inc as the consignee of container number TTNU4343813, shipped on board September 26, 2014. (JA-82.)

FF16/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Birmingham, Alabama, the place of delivery of container number TTNU4343813. (JA-72, 82.)

FF16/3 Acme Freight Services Corp. issued bill of lading number QD14090117 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TTNU4343813 indicating that the cargo was shipped on board Sep 26, 2014. (JA-72.)

FF16/4 On 10/6/14, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-025200 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TTNU4343813 indicating that the ocean freight due for was $4,900.00. (JA-74.)

FF16/5 On 10/06/14 Service by Air issued a check in the amount of $4,900.00 to Acme Freight Services Corp. for invoice INV-025200 reference number N770856. (JA-77.)

FF16/6 On November 15, 2014, Intermodal Cartage Company created invoice 10-113528 for Acme Freight Services listing charges for round trip service ($355.00), fuel surcharge ($106.50), yard pull ($75.00), per diem charges ($1,100.00), and per diem charges ($206.25), total $1,842.75 for container number TTNU4343813 reference number IMP023051. (JA-80.)

FF16/7 On November 26, 2014, Service by Air created an invoice for CMI for container number TTNU4343813 air bill number N770856 for ocean freight ($5,030.xx),[14] import duty/tax ($1,518.xx), and container demurrage ($2,200.xx) total $8,774.26. (JA-83.)

FF16/8 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TTNU4343813.

FF16/9 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TTNU4343813.

FLDR 17 JA-85-114.

Joint Appendix FLDR 17 contains documents related to the shipment of container number MATU2315044 from Shanghai, China, to Long Beach, California.

FF17/1 LAS Freight System Ltd. issued bill of lading number SCHCHI1409009 identifying CMI as the shipper and ULTA Distribution Center as the consignee of delivery of container number MATU2315044. (JA-103.)

FF17/2 Shanghai, China was the port of loading, Long Beach, CA, the port of discharge, and Long Beach, CA, the place of delivery of container number MATU2315044. (JA-103, 112-113.)

FF17/3 Sino Crown Transportation Ltd. issued bill of lading number SCCE14A019 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MATU2315044. (JA-112-113.)

FF17/4 On September 29, 2014, Service by Air issued air waybill N770915 identifying Yantai Foodpack as the shipper, ULTA Dist as the consignee, Shanghai as the

[14] The dollar amount is not completely legible.

airport of departure, and Phoenix as the airport of destination of container number MATU2315044. (JA-91.)

FF17/5 On October 8, 2014, Continental Logistics Service, Inc., issued arrival notice/freight invoice number 105468 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper, Service by Air as the consignee, Shanghai, China as the port of loading, Long Beach, CA, as the port of discharge, and Long Beach, CA, as the place of delivery of container number MATU2315044, stating ocean freight and handling charge of $3,575.00. (JA-93-94.)

FF17/6 On October 8, 2014, Service by Air issued a check for $3,575.00 to Continental Logistics Service, Inc., for arrival notice/freight invoice number 105468, reference number N770915. (JA-96.)

FF17/5 Service by Air issued an invoice for air bill number N770915 to CMI for air freight ($4,050.00), import duty/tax ($2,171.81), cartage ($2,850.00), sort and segregate ($827.25), container stripping ($460.00), and container demurrage ($3,740.00), total $14,099.06 for container number MATU2315044. (JA-107.)

FF17/8 On November 11, 2014, Matson Navigation Company, Inc., issued a notice of private lien sale to Continental Logistics Svc stating that storage charges for container number MATU2315044 totaled $2,900 and stating that unless the charges were paid within twenty days, the goods would be sold to enforce Matson's carrier lien. (JA-104.)

FF17/9 On November 11, 2014, Service by Air issued a check for $3,140.00 to Matson Navigation for arrival notice/freight invoice number MATU2315044, reference number N770915. (JA-95.)

FF17/10 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MATU2315044.

FF17/11 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MATU2315044.

FLDR 19 JA-116-135.

Joint Appendix FLDR 19 contains documents related to the shipment of container number CLHU8658659 from Qingdao, China, to Chicago, IL.

FF19/1 LAS Freight System Ltd. issued bill of lading number QINCHI1410004 identifying Zibo Hongyeshangqin Plastic and Rubber Co., Ltd as the shipper and CMI as the consignee of container number CLHU8658659, shipped on board 20141009. (JA-130.)

FF19/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of container number CLHU8658659. (JA-116, 118, 121, 130.)

FF19/3 Acme Freight Services Corp. issued bill of lading number QD14100110 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number CLHU8658659, shipped on board October 9, 2014. (JA-118.)

FF19/4 On 10/20/14, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-025409 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number CLHU8658659 indicating that the ocean freight due was $4,120.00. (JA-121.)

FF19/5 On 11/6/14, Acme Freight Services Corp. issued a second arrival notice/freight invoice for container number CLHU8658659. (JA-116.)

FF19/6 Service by Air issued air waybill N770924 identifying [illegible] as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare Int'l as the airport of destination of container number CLHU8658659. (JA-119.)

FF19/7 On February 19, 2015, Freight Tech Cartage, Inc., issued invoice number 21201 to SBA Global indicating charges for container number CLHU8658659, reference number N770924, including CN Harvey to CMI, Wheeling ($350.00), fuel surcharge ($133.00), chassis charges ($2,450.00), demurrage ($15,980.00), and yard storage ($2,425.00), total $21,338.00. (JA-127.)

FF19/8 Service by Air charged CMI $5,350.00 for ocean freight for container number CLHU8658659. (JA-126.)

FF19/9 Service by Air issued an invoice for air bill number B770924 to CMI for container demurrage of $27,100.00 for container number CLHU8658659. (JA-133.)

FF19/10 CMI paid Service by Air the demurrage charges on air bill number B770924. (CMI App. Exh A-17.)

FF19/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number CLHU8658659.

FF19/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number CLHU8658659.

FLDR 21 JA-137-157.

Joint Appendix FLDR 21 contains documents related to the shipment of container number TCKU1771451 from Qingdao, China, to Philadelphia, Pennsylvania.

FF21/1 LAS Freight System Ltd. issued bill of lading number QINCHI1410001 identifying CMI as the shipper and ULTA Distribution Center as the consignee of container number TCKU1771451, shipped on board 20141019. (JA-149.)

FF/21/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Philadelphia, PA, the place of delivery of container number TCKU1771451. (JA-138, 140, 149.)

FF21/3 Acme Freight Services Corp. issued bill of lading number QD14100115 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TCKU1771451 indicating that the cargo was shipped on board October 19, 2014. (JA-138.)

FF21/4 On 10/29/14, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-025454 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TCKU1771451 indicating that the ocean freight due for was $5,000.00. (JA-140.)

FF21/5 Service by Air issued air waybill N771018 identifying Yantai Foodpack Packaging Products Co., Ltd as the shipper, ULTA Dist as the consignee, Shanghai as the airport of departure, and Philadelphia as the airport of destination of container number TCKU1771451. (JA-139.)

FF21/6 On October 29, 2014, Service by Air issued a check for $5,000.00 to Acme Freight Services Corp. for arrival notice/freight invoice number INV-025454, reference number N771018. (JA-145.)

FF21/7 Service by Air issued an invoice for air bill number N771018 to CMI for air freight ($5,400.00), import duty/tax ($1,712.93), container stripping ($1,123.00), and appointment delivery ($950.00), total $9,185.93 for container number TCKU1771451. (JA-150.)

FF21/8 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TCKU1771451.

FF21/9 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TCKU1771451.

FLDR 25 JA-159-171.

Joint Appendix FLDR 25 contains documents related to the shipment of container number TCLU4015624 from Qingdao, China, to Chicago, IL.

FF25/1 LAS Freight System Ltd. issued bill of lading number QINCHI1410003 identifying Changle Plastics Products Co., Ltd as the shipper, CMI as the consignee of container number TCLU4015624, shipped on board 20141021. (JA-168.)

FF25/2 Qingdao, China was the port of loading, Tacoma, WA, the port of discharge, and Chicago, IL, the final destination of container number TCLU4015624. (JA-162, 168, 169.)

FF25/3 Pacific Star Express (China) Co. Ltd. issued a bill of lading identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TCLU4015624. (JA-169.)

FF25/4 On November 12, 2014, Pan Star Express (Chicago) Corp. issued arrival notice/freight invoice number 281387 for container number TCLU4015624 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee indicating that the ocean freight due for was $3,820.00. (JA-162.)

FF25/5 Service by Air issued air waybill B771043 identifying [illegible] as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare Int'l as the airport of destination of container number TCLU4015624. (JA-161.)

FF25/6 On December 9, 2014, Pan Star Express (Chicago) Corp. issued a 2nd arrival notice for container number TCLU4015624 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee. (JA-159.)

FF25/7 On March 2, 2015, Freight Tech Cartage, Inc., issued invoice number 21374 to SBA Global indicating charges for container number TCLU4015624, reference number N771043, including CN Harvey to CMI, Wheeling ($350.00), fuel surcharge ($133.00), chassis charges ($2,025.00), demurrage ($7,300.00), and yard storage ($1,950.00), total $11,758.00. (JA-167.)

FF25/8 Service by Air issued an invoice for air bill number B771043 to CMI for container demurrage of $21,900.00 for container number TCLU4015624. (JA-171.)

FF25/9 CMI paid Service by Air the demurrage charges on air bill number B771043. (CMI App. Exh A-17.)

FF25/10 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TCLU4015624.

FF25/11 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TCLU4015624.

FLDR 27 JA-173-197.

Joint Appendix FLDR 27 contains documents related to the shipment of container number NYKU3251483 from Qingdao, China, to Chicago, IL.

FF27/1 LAS Freight System Ltd. issued bill of lading number QINCHI1410013 identifying Yantai Foodpack Packaging Products Co., Ltd as the shipper and CMI as the consignee for container number NYKU3251483. (JA-190.)

FF27/2 Qingdao, China was the port of loading, Tacoma, WA, the port of discharge, and Chicago, IL, the final destination of container number NYKU3251483, shipped on board 20141028. (JA-173, 177, 190, 191.)

FF27/3 Pacific Star Express (China) Co. Ltd. issued a bill of lading identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number NYKU3251483. (JA-191.)

FF27/4 On November 18, 2014, Pan Star Express (Chicago) Corp. issued arrival notice/freight invoice number 261469 for container number NYKU3251483 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee indicating that the ocean freight due was $4,350.00. (JA-177.)

FF27/5 Service by Air issued air waybill N771104 identifying Yantai Foodpack as the shipper, CMI as the consignee, Shanghai as the airport of departure, and O'Hare Int'l as the airport of destination of container number NYKU3251483. (JA-176.)

FF27/6 On December 22, 2014, Pan Star Express (Chicago) Corp. issued a 2nd arrival notice for container number NYKU3251483 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee. (JA-173.)

FF27/7 On February 20, 2015, Freight Tech Cartage, Inc., issued invoice number 21212 to SBA Global indicating charges for container number NYKU3251483, reference number N771104, including CN Harvey to CMI, Wheeling ($350.00), fuel surcharge ($133.00), chassis charges ($1,475.00), demurrage ($5,200.00), and yard storage ($1,400.00), total $8,558.00. (JA-187.)

FF27/8 Service by Air charged CMI $4,500.00 for ocean freight for container number NYKU3251483. (JA-181.)

FF27/9 Service by Air issued an invoice for air bill number B771044 to CMI for container demurrage of $14,300.00 for container number NYKU3251483. (JA-193.)

FF27/10 CMI paid Service by Air the demurrage charges on air bill number B771104. (CMI App. Exh A-17; JA-180.)

FF27/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number NYKU3251483.

FF27/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number NYKU3251483.

FLDR 29 JA-199-221.

Joint Appendix FLDR 29 contains documents related to the shipment of container number TGHU1013740 from Qingdao, China, to Phoenix, AZ.

FF29/1 LAS Freight System Ltd. issued bill of lading number QINCHI1411001 identifying CMI as the shipper and ULTA Distribution Center as the consignee of container number TGHU1013740. (JA-215.)

FF29/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Phoenix, AZ, the place of delivery of container number TGHU1013740, shipped on board 20141108. (JA-200, 207, 215.)

FF29/3 Acme Freight Services Corp. issued bill of lading number QD14110104 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TGHU1013740. (JA-200.)

FF29/4 On 11/19/14, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-025845 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TGHU1013740 indicating that the ocean freight due for was $3,100.00. (JA-207.)

FF29/5 Service by Air issued air waybill N771189 identifying [illegible] as the shipper, ULTA Dist as the consignee, Shanghai as the airport of departure, and Phoenix as the airport of destination of container number TGHU1013740. (JA-205.)

FF29/6 On November 20, 2014, Service by Air issued a check for $3,100.00 to Acme Freight Services Corp. for arrival notice/freight invoice number INV-025845, reference number N771189. (JA-211.)

FF29/7 On January 14, 2015, Service by Air issued a check for $200.00 to MSCI/Mediterranean Shipping Co. (USA), Inc., for invoice number SMCUQY075882, reference number N771189. (JA-210.)

FF29/8 Service by Air issued an invoice for air bill number N771189 to CMI for air freight ($3,470.00), import duty/tax ($1,634.96), container stripping ($720.00), and container demurrage ($6,650.00), a total of $12,474.96, for container number TGHU1013740. (JA-216.)

FF29/9 CMI paid Service by Air the charges including demurrage on air bill number N771189. (CMI App. Exh B-1; JA00217.)

FF29/10 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TGHU1013740.

FF29/11 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TGHU1013740.

FLDR 33 JA-223-246.

Joint Appendix FLDR 33 contains documents related to the shipment of container number BMOU2709846 from Qingdao, China, to Philadelphia, PA.

FF33/1 LAS Freight System Ltd. issued bill of lading number QINCHI1411009 identifying CMI as the shipper and ULTA Distribution Center as the consignee of container number BMOU2709846. (JA-237.)

FF33/2 Qingdao, China was the port of loading, Philadelphia, PA, the port of discharge, and Philadelphia, PA, the place of delivery of container number BMOU2709846, shipped on board 20141203. (JA-224, 226, 237.)

FF33/3 Acme Freight Services Corp. issued bill of lading number QD14120102 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number BMOU2709846. (JA-224.)

FF33/4 On 2/2/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-026166 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number BMOU2709846 indicating that the ocean freight due was $3,520.00. (JA-226.)

FF33/5 On March 2, 2015, Service by Air issued air waybill B771383 identifying [illegible] as the shipper, ULTA Dist as the consignee, Shanghai as the airport of departure, and Philadelphia as the airport of destination of container number BMOU2709846. (JA-225.)

FF33/6 On February 03, 2015, Service by Air issued a check for $7,771.41 to Acme Freight Services Corp., including $3,621.41 for arrival notice/freight invoice number INV-026166, reference number N771383. (JA-230.)

FF33/7 On February 19, 2015, Holt Logistics issued a document for container number BMOU2709846 stating that as of the date of the document, demurrage of $500.00 had accrued on the container. (JA-235.)

FF33/8 Service by Air issued an invoice to CMI for air freight and import duty totaling $6,134.94 due on air bill number N771383. (JA-239.)

FF33/9 Service by Air issued an invoice to CMI for air freight of $9,600.00 due on air bill number B771383. (JA-238.)

FF33/10 CMI paid Service by Air the demurrage charges on air bill number B771383. (CMI Exh. A-17.)

FF33/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number BMOU2709846.

FF33/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number BMOU2709846.

FLDR 36 JA-248-267.

Joint Appendix FLDR 36 contains documents related to the shipment of containers number GLDU9630402 and TEMU5582928 from Qingdao, China, to Chicago, IL.

FF36/1 LAS Freight System Ltd. issued bill of lading number QINCHI1412006 identifying Yantai Foodpack Packaging Products Co., Ltd as the shipper and CMI as the consignee of containers number GLDU9630402 and TEMU5582928.[15] (JA-261.)

FF36/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of containers number GLDU9630402 and TEMU5582928, shipped on board 20141222. (JA-248, 251, 261.)

FF36/3 Acme Freight Services Corp. issued bill of lading number QD14120134 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number GLDU9630402 and TEMU5582928. (JA-248.)

FF36/4 On 1/5/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-026345 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number GLDU9630402 and TEMU5582928 indicating that the ocean freight due for was $7,700.00. (JA-251.)

FF36/5 On [date illegible], Service by Air issued air waybill B771501 identifying Yantai Foodpack as the shipper, CMI as the consignee, Shanghai as the airport of departure, and O'Hare as the airport of destination of containers number GLDU9630402 and TEMU5582928. (JA-250.)

FF36/6 On February 13, 2015, Freight Tech Cartage, Inc., issued invoice number 21140 to SBA Global indicating charges for container number GLDU9630402, reference number N771501, including CN Harvey to CMI, Wheeling ($350.00), fuel surcharge ($133.00), chassis charges ($425.00), demurrage ($1,000.00), and yard storage ($375.00), total $2,283.00. (JA-257.)

FF36/7 Service by Air issued an invoice to CMI with charges described only as "E" totaling $6,325.00 due on air bill number B771501, containers number GLDU9630402 and TEMU5582928. (JA-265.)

FF36/8 Service by Air issued an invoice to CMI for demurrage of $6,325.00 due on air bill number B771501. (CMI App. Ex. A-10, RADIANT002593; CMI App. Ex. A-17.)

[15] Revised Complaint Exhibit 1 does not list container number TEMU5582928 as being part of this shipment.

FF36/9 CMI paid Service by Air the charges due on air bill number B771501. (CMI App. Exh A-17.)

FF36/10 No document indicates that LAS Freight imposed any detention or demurrage charges for containers number GLDU9630402 and TEMU5582928.

FF36/11 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for containers number GLDU9630402 and TEMU5582928.

FLDR 42 JA-269-291.

Joint Appendix FLDR 42 contains documents related to the shipment of container number TTNU5206116 from Qingdao, China, to Chicago, IL.

FF42/1 LAS Freight System Ltd. issued bill of lading number QINCHI1501001 identifying Weifang Chenxi Plastic Products Co., Ltd as the shipper and CMI as the consignee of container number TTNU5206116. (JA-286.)

FF42/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of container number TTNU5206116, shipped on board 20150109. (JA-269, 271, 275, 286.)

FF42/3 Acme Freight Services Corp. issued bill of lading number QD15010101 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TTNU5206116. (JA-271.)

FF42/4 On 1/29/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-026479 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TTNU5206116 indicating that the ocean freight due for was $4,150.00. (JA-275.)

FF42/5 On 2/23/15, Acme Freight Services Corp. issued a 2nd arrival notice identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TTNU5206116. (JA-269.)

FF42/6 On [date illegible], Service by Air issued air waybill N771584 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination of container number TTNU5206116. (JA-273.)

FF42/7 On February 03, 2015, Service by Air issued a check for $7,771.41 to Acme Freight Services Corp., including $4,150.00 for arrival notice/freight invoice number INV-026479, reference number N771584. (JA-280.)

FF42/8 On April 6, 2015, Freight Tech Cartage, Inc., issued invoice number 21779 to SBA Global indicating charges for container number TTNU5206116, reference number N771584, including CN Harvey to CMI, Wheeling ($350.00), fuel

surcharge ($133.00), chassis charges ($900.00), demurrage ($3,600.00), and yard storage ($775.00), total $5,758.00). (JA-284.)

FF42/9 Service by Air issued an invoice to CMI for air bill number B771584 with charges for container demurrage of $9,900.00 for container number TTNU5206116. (JA-289.)

FF42/10 CMI paid Service by Air $6,399.96 for the invoice for air bill number N771584. (JA-279.)

FF42/11 CMI paid Service by Air $9,000 for the demurrage charges on air bill number B771584. (CMI App. Exh A-8, CMI00560; CMI App. Exh A-17.)

FF42/12 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TTNU5206116.

FF42/13 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TTNU5206116.

FLDR 43 JA-293-312.

Joint Appendix FLDR 43 contains documents related to the shipment of container number TRIU5347886 from Qingdao, China, to Chicago, IL.

FF43/1 LAS Freight System Ltd. issued bill of lading number QINCHI1501007 identifying Weifang Chenxi Plastic Products Co., Ltd as the shipper and CMI as the consignee of container number TRIU5347886. (JA-307.)

FF43/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of container number TRIU5347886, shipped on board 20150117. (JA-294, 297, 307.)

FF43/3 Acme Freight Services Corp. issued bill of lading number QD15010128 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TRIU5347886. (JA-294.)

FF43/4 On 1/29/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-026660 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TRIU5347886 indicating that the ocean freight due was $4,150.00. (JA-297.)

FF43/5 Service by Air issued air waybill N771645 identifying no shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination stating "import duty/tax" for container number TRIU5347886. (JA-295.)

FF43/6 Service by Air issued air waybill B771645 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and

O'Hare as the airport of destination stating "container demurrage" for container number TRIU5347886. (JA-296.)

FF43/7 On March 31, 2015, Freight Tech Cartage, Inc., issued invoice number 21702 to SBA Global indicating charges for container number TRIU5347886, reference number N771645, including BNSF Logistics Park to CMI, Wheeling ($350.00), fuel surcharge ($133.00), chassis charges ($300.00), demurrage – MSC container ($400.00), demurrage – MSC container ($175.00), and yard storage ($175.00), total $1,658.00). (JA-303.)

FF43/8 Service by Air issued an invoice to CMI for air bill number N771645 with charges for ocean freight ($5,150.00) and import duty/tax ($1,052.95) total of $6,202.95 for container number TRIU5347886. (JA-311.)

FF43/9 Service by Air issued an invoice to CMI for air bill number B771645 with charges of $2,700.00 for container demurrage for container number TRIU5347886. (JA-310.)

FF43/10 CMI paid Service by Air the demurrage charges on air bill number B771645. (CMI App. Exh A-8, CMI00560; CMI App. Exh. A-17.)

FF43/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TRIU5347886.

FF43/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TRIU5347886.

FLDR 44 JA-314-348.

Joint Appendix FLDR 44 contains documents related to the shipment of container number CAXU4049893 from Qingdao, China, to Edison, NJ.

FF44/1 LAS Freight System Ltd. issued bill of lading number QINCHI1501008 identifying CMI as the shipper and Joshen Paper & Packing as the consignee of container number CAXU4049893. (JA-322.)

FF44/2 Qingdao, China was the port of loading, New York USA, the port of discharge, and Edison, NJ, the place of delivery of container number CAXU4049893, shipped on board 20150126. (JA-318, 321, 322.)

FF44/3 Global Links Express Inc. issued bill of lading number QD15010113 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number CAXU4049893. (JA-321.)

FF44/4 On 3/12/15, Global Links Express Inc. issued arrival notice/freight invoice number 11005252 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number CAXU4049893 indicating that the ocean freight due was $5,030.00. (JA-318.)

FF44/5 Service by Air issued air waybill N771678 identifying CMI as the shipper, Joshen Paper & Packing as the consignee, Shanghai as the airport of departure, and Newark as the airport of destination of a shipment, but did not state a container number. (JA-316.)

FF44/6 On 4/16/15, Service by Air issued air waybill B771678 identifying CMI as the shipper, Joshen Paper & Packing as the consignee, Shanghai as the airport of departure, and Newark as the airport of destination of container number CAXU4049893. (JA-315.)

FF44/7 Service by Air issued an invoice to CMI for air bill number N771678 with air freight charges ($5,815.00) and import duty/tax ($1,878.65), total of $7,693.65. (CMI App. Ex. A-9.)

FF44/8 With no document showing a charge for demurrage, Service by Air issued an invoice to CMI for air bill number B771678 with charges of $6,650.00 for demurrage for container number CAXU4049893. (JA-330; JA-344.)

FF44/9 CMI paid Service by Air the demurrage charges on air bill number B771678. (CMI App. Ex. A-17.)

FF44/10 No document indicates that LAS Freight imposed any detention or demurrage charges for container number CAXU4049893.

FF44/11 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number CAXU4049893.

FLDR 46 JA-350-367.

Joint Appendix FLDR 46 contains documents related to the shipment of containers number MSCU4807147 and MSCU4832324 from Qingdao, China, to Chicago, IL.

FF46/1 LAS Freight System Ltd. issued bill of lading number QINCHI1502004 identifying Weifang Sunshine Plastic Co., Ltd as the shipper and CMI as the consignee of containers number MSCU4807147 and MSCU4832324. (JA-363.)

FF46/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of containers number MSCU4807147 and MSCU4832324, shipped on board 20150201. (JA-351, 354, 363.)

FF46/3 Acme Freight Services Corp. issued bill of lading number QD15020108 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number MSCU4807147 and MSCU4832324. (JA-351.)

FF46/4 On 3/11/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027241 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number MSCU4807147

and MSCU4832324 indicating that the ocean freight due was $8,300.00. (JA-354.)

FF46/5 Service by Air issued air waybill N771716 identifying [illegible] as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination of containers number MSCU4807147 and MSCU4832324. (JA-353.)

FF46/6 Service by Air issued air waybill B771716 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination of containers number MSCU4807147 and MSCU4832324 and stating container demurrage is $8,400.00. (JA-352.)

FF46/7 On April 17, 2015, Freight Tech Cartage, Inc., issued invoice number 21894 to SBA Global indicating charges for container number MSCU4807147, reference number N771716, including CN Harvey to CMI, Wheeling ($350.00), fuel surcharge ($133.00), pre pull ($125.00), demurrage – MSC container ($1,120.00), demurrage – MSC container ($1,360.00), and yard storage ($475.00), total $3,563.00). (JA-361.)

FF46/8 Service by Air issued an invoice to CMI for air bill number N771716 with charges for ocean freight ($9,650.00) and import duty/tax ($2,085.52) totaling of $11,735.52 for storage for containers number MSCU4807147 and MSCU48322324 [*sic*]. (JA-365.)

FF46/9 Service by Air issued an invoice to CMI for air bill number B771716 with charges for demurrage of $8,400.00 for containers number MSCU4807147 and MSCU4832324. (JA-366.)

FF46/10 CMI paid Service by Air the charges on air bill number B771716. (CMI App. A-8.)

FF46/11 No document indicates that LAS Freight imposed any detention or demurrage charges for containers number MSCU4807147 and MSCU4832324.

FF46/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for containers number MSCU4807147 and MSCU4832324.

FLDR 49 JA-369-385.

Joint Appendix FLDR 49 contains documents related to the shipment of container number MSCU5881621 from Qingdao, China, to Las Vegas, NV.

FF49/1 LAS Freight System Ltd. issued bill of lading number QINCHI1502002 identifying CMI as the shipper and Dynamex as the consignee of container number MSCU5881621. (JA-380.)

FF49/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Las Vegas, NV, the place of delivery of container number MSCU5881621, shipped on board 20150201. (JA-370, 372, 380.)

FF49/3 Acme Freight Services Corp. issued bill of lading number QD15020112 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU5881621. (JA-370.)

FF49/4 On 3/12/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027243 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU5881621 indicating that the ocean freight due was $3,780.00. (JA-372.)

FF49/5 Service by Air issued air waybill N771756 identifying Weifang Chenxi as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of container number MSCU5881621. (JA-371.)

FF49/6 Service by Air issued air waybill B771756 identifying Weifang Chenxi as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of container number MSCU5881621 and stating container demurrage is $2,700.00 and container stripping is $1,500.00. (JA-371.)

FF49/7 On April 1, 2015,[16] Mediterranean Shipping Company (USA) Inc. issued invoice number MSCUQY456082 to Service by Air for rework ($1,200.00), dray ($150.00), and storage ($400.00) totaling $1,750.00 for container number MSCU5881621. (JA-381.)

FF49/8 On April 1, 2015, Mediterranean Shipping Company (USA) Inc. issued pro forma invoice number MSCUQY456082 to Service by Air for logistic and management fee ($1,200.00, $150.00, and $550.00) totaling $1,900.00 for container number MSCU5881621. (JA-382.)

FF49/9 With no document showing a charge for demurrage, Service by Air issued an invoice to CMI for air bill number B771756 with charges for container demurrage ($2,700.00) and container stripping ($1,500.00) total of $4,200.00 for container number MSCU5881621. (JA-383.)

FF49/10 CMI paid Service by Air the demurrage charges on air bill number B771756. (CMI Exh A-8; CMI00554.)

[16] The invoice states "04/01/2014." Because the pro forma invoice (JA-382) was printed 04/01/2015 and container number MSCU5881621 to which it refers was shipped on board February 1, 2015, I find the correct year to be 2015.

FF49/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU5881621.

FF49/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU5881621.

FLDR 50 JA-387-399.

Joint Appendix FLDR 50 contains documents related to the shipment of container number MSCU4271080 from Qingdao, China, to Chicago, IL.

FF50/1 LAS Freight System Ltd. issued bill of lading number QINCHI1502006 identifying Weifang Sunshine Plastic Co., Ltd as the shipper and CMI as the consignee of container number MSCU4271080. (JA-396.)

FF50/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of container number MSCU4271080, shipped on board 20150208. (JA-388, 391, 396.)

FF50/3 Acme Freight Services Corp. issued bill of lading number QD15020101 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU4271080. (JA-388.)

FF50/4 On 3/4/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027235 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU4271080 indicating that the ocean freight due was $4,150.00. (JA-391.)

FF50/5 Service by Air issued air waybill N771762 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination of container number MSCU4271080 with charges for import duty/tax. (JA-389.)

FF50/5 Service by Air issued air waybill B771762 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination of container number MSCU4271080 with charges for container demurrage. (JA-390.)

FF50/6 On May 22, 2015, Freight Tech Cartage, Inc., issued invoice number 22280 to SBA Global indicating charges for container number MSCU4271080, reference number N771762, including CN Harvey to CMI, Wheeling ($350.00), fuel surcharge ($133.00), pre pull ($125.00), storage at rail ($100.00), credit card fee for storage at rail ($25.00), demurrage – MSC container ($8,330.00), and yard storage ($1,200.00), total $10,263.00). (JA-394.)

FF50/7 Service by Air issued an invoice to CMI for demurrage of $12,250.00 due on air bill number B771762. (CMI Exh A-10.)

FF50/8 CMI paid Service by Air the demurrage charges on air bill number B771762. (CMI App. A-17.)

FF50/9 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU4271080.

FF50/10 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU4271080.

FLDR 51 JA-401-420.

Joint Appendix FLDR 51 contains documents related to the shipment of container number MSCU4867660 from Qingdao, China, to Las Vegas, NV.

FF51/1 LAS Freight System Ltd. issued bill of lading number QINCHI1502007 identifying CMI as the shipper and Dynamex as the consignee of container number MSCU4867660. (JA-416.)

FF51/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Las Vegas, NV, the place of delivery of container number MSCU4867660, shipped on board 20150208. (JA-402, 404, 416.)

FF51/3 Acme Freight Services Corp. issued bill of lading number QD15020104 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU4867660. (JA-402.)

FF51/4 On 3/4/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027237 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU4867660 indicating that the ocean freight due was $3,781.00. (JA-404.)

FF51/5 Service by Air issued air waybill N771763 identifying CMI as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of container number [illegible]. (JA-403.)

FF51/6 On April 1, 2015, Mediterranean Shipping Company (USA) Inc. representative Colin Freeman sent an email to tonyshih@acmefreight.com stating that container number MSCU4867660 accumulated storage and detention charges of $1,340.00 by 4/8/15. (JA-408.)

FF51/7 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU4867660.

FF51/8 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU4867660.

FLDR 52 JA-422-438.

Joint Appendix FLDR 52 contains documents related to the shipment of container number TRHU3313918 from Qingdao, China, to Chicago, IL.

FF52/1 LAS Freight System Ltd. issued bill of lading number QINCHI1502003 identifying Yantai Foodpack Packaging Products Co., Ltd as the shipper and CMI as the consignee of container number TRHU3313918. (JA-432.)

FF52/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of container number TRHU3313918, shipped on board 20150213. (JA-432.)

FF52/3 Acme Freight Services Corp. issued bill of lading number QD15020138 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TRHU3313918. (JA-424.)

FF52/4 On 3/1/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027254 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TRHU3313918 indicating that the ocean freight due was $3,750.00. (JA-427.)

FF52/5 Service by Air issued air waybill N771769 identifying Yantai Foodpack as the shipper, CMI as the consignee, Shanghai as the airport of departure, and O'Hare as the airport of destination of container number TRHU3313918. (JA-426.)

FF52/6 Service by Air issued air waybill B771769 identifying Yantai Foodpack as the shipper, CMI as the consignee, Shanghai as the airport of departure, and O'Hare as the airport of destination of container number TRHU3313918. (JA-425.)

FF52/7 On May 14, 2015, Freight Tech Cartage, Inc., issued invoice number 22164 to SBA Global indicating charges for container number TRHU3313918, reference number N771769, including BNSF LPC to CMI, Wheeling ($350.00), fuel surcharge ($133.00), pre pull ($125.00), chassis charges ($1,225.00), demurrage ($6,125.00), and yard storage ($1,200.00), total $9,158.00). (JA-431.)

FF52/8 Service by Air issued an invoice to CMI for air bill number N771769 with charges for air freight ($4,245.00) and import duty/tax ($947.76) total of $5,192.76 for container number TRHU3313918. (JA-436.)

FF52/9 Service by Air issued an invoice to CMI for air bill number B771769 with charges for container demurrage of $14,100.00 for container number TRHU3313918. (JA-435.)

FF52/10 CMI paid Service by Air the demurrage charges on air bill number B771769. (CMI Exh B-1; JA00433.)

FF52/11 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TRHU3313918.

FF52/12 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TRHU3313918.

FLDR 53 JA-440-455.

Joint Appendix FLDR 53 contains documents related to the shipment of container number TRLU4651517 from Qingdao, China, to Las Vegas, NV.

FF53/1 LAS Freight System Ltd. issued bill of lading number QINCHI1502008 identifying CMI as the shipper and Dynamex as the consignee of container number TRLU4651517. (JA-450.)

FF53/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Las Vegas, NV, the place of delivery of container number TRLU4651517, shipped on board 20150215. (JA-441, 443, 450.)

FF53/3 Acme Freight Services Corp. issued bill of lading number QD15020303 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TRLU4651517. (JA-441.)

FF53/4 On 3/12/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027260 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number TRLU4651517 indicating that the ocean freight due was $4,080.00. (JA-443.)

FF53/5 Service by Air issued air waybill B771807 identifying CMI as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of container number TRLU4651517. (JA-442.)

FF53/6 Service by Air issued an invoice to CMI for air bill number B771807 with charges for ocean freight of $8,734.58 with no container number listed. (JA-453.)

FF53/7 No document indicates that LAS Freight imposed any detention or demurrage charges for container number TRLU4651517.

FF53/8 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number TRLU4651517.

FLDR 54 JA-457-478.

Joint Appendix FLDR 54 contains documents related to the shipment of container number MSCU4337608 from Qingdao, China, to Edison, NJ.

FF54/1 LAS Freight System Ltd. issued bill of lading number QINCHI1503001 identifying CMI as the shipper and Joshen Paper & Packing as the consignee of container number MSCU4337608. (JA-480.)

FF54/2 Qingdao, China was the port of loading, New York USA, the port of discharge, and Edison, NJ, the place of delivery of container number MSCU4337608, shipped on board 20150302. (JA-459, 469, 480.)

FF54/3 Global Links Express Inc. issued bill of lading number QD15030101 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU4337608. (JA-469.)

FF54/4 On 04/08/15, Global Links Express Inc. issued arrival notice/freight invoice number 11005370 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU4337608 indicating that the ocean freight due was $5,150.00. (JA-459.)

FF54/5 Service by Air issued air waybill B771910 identifying CMI as the shipper, Joshen Paper & Packing as the consignee, Shanghai as the airport of departure, and Newark as the airport of destination of a shipment, but did not state a container number stating storage $7,154.50. (JA-457.)

FF54/6 Service by Air issued an invoice to CMI for air bill number B771910 with charges for storage of $7,154.50 for container number MSCU4337608. (JA-485.)

FF54/7 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU4337608.

FF54/8 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU4337608.

FLDR 58 JA-488-505.

Joint Appendix FLDR 58 contains documents related to the shipment of container number MSCU5670932 from Qingdao, China, to Chicago, IL.

FF58/1 LAS Freight System Ltd. issued bill of lading number QINCHI1503007 identifying Weifang Sunshine Plastic Co., Ltd as the shipper and CMI as the consignee of container number MSCU5670932. (JA-500.)

FF58/2 Qingdao, China as the port of loading, Long Beach, CA, as the port of discharge, and Chicago, IL, as the place of delivery of container number MSCU5670932, shipped on board 20150402. (JA-489, 491, 500.)

FF58/3 Acme Freight Services Corp. issued bill of lading number QD15030134 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU5670932. (JA-489.)

FF58/4 On 4/9/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027567 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air of container number MSCU5670932 indicating that the ocean freight due was $3,850.00. (JA-491.)

FF58/5 Service by Air issued air waybill B852111 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination of container number MSCU5670932 stating container demurrage of $12,000.00. (JA-490.)

FF58/6 On June 9, 2015, Freight Tech Cartage, Inc., issued invoice number 22477 to SBA Global indicating charges for container number MSCU5670932, reference number N852111, including BNSF, LPC to CMI, Wheeling ($350.00), fuel surcharge ($133.00), pre pull ($125.00), chassis charges ($1,000.00), demurrage ($6,800.00), and yard storage ($975.00), total $9,383.00). (JA-497.)

FF58/7 Service by Air issued an invoice to CMI for air bill number N852111 with charges for ocean freight ($4,895.00), import duty/tax ($1,045.93), total of $5,940.93 for container number MSCU5670932. (JA-503.)

FF58/8 Service by Air issued an invoice to CMI for air bill number B852111 with charges for container demurrage of $12,000.00 for container number MSCU5670932. (JA-502.)

FF58/9 CMI paid Service by Air the demurrage charges on air bill number B852111. (CMI App. Ex. A-8.)

FF58/9 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU5670932.

FF58/10 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU5670932.

FLDR 59 JA-507-551.

Joint Appendix FLDR 59 contains documents related to the shipment of container number KKFU1167644 from Qingdao, China, to Las Vegas, NV.

FF59/1 LAS Freight System Ltd. issued bill of lading number QINCHI1504002 identifying CMI as the shipper and Dynamex as the consignee of container number KKFU1167644. (JA-545.)

FF59/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Las Vegas, NV, the place of delivery of container number KKFU1167644, shipped on board 20150411. (JA-513, 514, 515, 516, 545.)

FF59/3 On April 11, 2015, Anchor Logistics issued bill of lading number EWCL0008616 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number KKFU1167644. (JA-511.)

FF59/4 On April 24, 2015, Anchor Logistics issued arrival notice/freight invoice number ANCH10410 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number KKFU1167644 indicating that the ocean freight due was $3,000.00. (JA-515.)

FF59/5 Anchor Logistics issued arrival notice/freight invoice number ANCH10410, revised May 12, 2015, identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number KKFU1167644 indicating that the ocean freight and pier pass due totaled $3,133.00. (JA-512.)

FF59/6 Anchor Logistics issued arrival notice/freight invoice number ANCH10410, revised June 19, 2015, identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number KKFU1167644 indicating that an additional storage fee of $5,075.00 was due for the period May 15, 2015, to June 18, 2015. (JA-514.)

FF59/7 Anchor Logistics issued arrival notice/freight invoice number ANCH10410, revised July 27, 2015, identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number KKFU1167644 indicating that an additional per diem fee of $4,505.00 was due for the period May 15, 2015, to July 13, 2015. (JA-516.)

FF59/8 Service by Air issued air waybill N852232 identifying CMI as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of container number KKFU1167644. (JA-509.)

FF59/9 On May 13, 2015, Service by Air issued a check for $399.00 to Anchor Logistics, including $133.00 for arrival notice/freight invoice number ANCH10410A, reference number B852232. (JA-521.)

FF59/10 On June 19, 2015, Service by Air issued a check for $15,650.00 to Anchor Logistics, including for $5,075.00 for arrival notice/freight invoice number ANCH10410B, reference number B852232. (JA-520.)

FF59/11 Service by Air issued an invoice to CMI for air bill number N852232 with charges for ocean freight ($4,095.00), import duty/tax ($1,005.32), total of $5,100.32 for container number KKFU1167644. (JA-546.)

FF59/12 With no document showing a charge for demurrage, Service by Air issued an invoice to CMI for air bill number C852232 with charges for container demurrage of $6,300.00 for container number KKFU1167644. (JA-547.)

FF59/13 With no document showing a charge for demurrage, Service by Air issued an invoice to CMI for air bill number B852232 with charges for container demurrage of $12,250.00 for container number KKFU1167644 (JA-538.)

FF59/14 No document indicates that LAS Freight imposed any detention or demurrage charges for container number KKFU1167644.

FF59/15 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number KKFU1167644.

FLDR 60 and 61 JA-507-551.

Joint Appendix FLDR 60 and 61 contains documents related to the shipment of containers number KKFU1363499 and KKFU1614383 from Qingdao, China, to Las Vegas, NV. These two containers were included on one bill of lading by some carriers and other documents treat them together.

FF60-61/1 LAS Freight System Ltd. issued bill of lading number QINCHI1504004A identifying CMI as the shipper and Dynamex as the consignee of container number KKFU1614383. (JA-590.)[17]

FF60-61/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Las Vegas, NV, the place of delivery of containers number KKFU1363499 and KKFU1614383, shipped on board 20150411. (JA-558, 559, 560, 590.)

FF60-61/3 On April 11, 2015, Anchor Logistics issued bill of lading number EWCL0008617 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number KKFU1363499 and KKFU1614383. (JA-557.)

FF60-61/4 On April 24, 2015, Anchor Logistics issued arrival notice/freight invoice number ANCH10409 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number KKFU1363499 and KKFU1614383 indicating that the ocean freight due was $6,000.00. (JA-562.)

FF60-61/5 Anchor Logistics issued arrival notice/freight invoice number ANCH10409, revised May 12, 2015, identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number KKFU1363499 and KKFU1614383 indicating that the ocean freight and pier pass due totaled $6,266.00. (JA-563.)

FF60-61/6 Anchor Logistics issued arrival notice/freight invoice number ANCH10409, revised June 19, 2015, identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number KKFU1363499 and KKFU1614383 indicating that an additional storage fee of $5,075.00 was due

[17] FLDR 60-61 does not have an LAS Freight bill of lading for container number KKFU1363499.

for container number KKFU1363499 for the period May 15, 2015, to June 18, 2015, and $5,600.00 for KKFU1614383 for the period May 12, 2015, to June 18, 2015. (JA-561.)

FF60-61/7 Anchor Logistics issued arrival notice/freight invoice number ANCH10409, revised July 27, 2015, identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of containers number KKFU1363499 and KKFU1614383 indicating that an additional per diem fee of $4,250.00 was due container number KKFU1363499 for the period May 15, 2015, to July 10, 2015, and $4,420.00 for container number KKFU1614383 for the period May 12, 2015, to July 9, 2015. (JA-560.)

FF60-61/8 Service by Air issued air waybill D852230 identifying CMI as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of containers number KKFU1363499 and KKFU1614383 for import duty/tax. (JA-555.)

FF60-61/9 Service by Air issued air waybill B852230 identifying CMI as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of containers number KKFU1363499 and KKFU1614383 for import duty/tax. (JA-556.)

FF60-61/10 Service by Air issued air waybill D852230 identifying CMI as the shipper, Dynamex as the consignee, Shanghai as the airport of departure, and Las Vegas as the airport of destination of containers number KKFU1363499 and KKFU1614383 for container stripping. (JA-554.)

FF60-61/11 On May 13, 2015, Service by Air issued a check for $399.00 to Anchor Logistics, including $266.00 for arrival notice/freight invoice number ANCH10409A, reference number B852230. (JA-567.)

FF60-61/12 On June 19, 2015, Service by Air issued a check for $15,650.00 to Anchor Logistics, including $10,575.00 for arrival notice/freight invoice number ANCH10409B, reference number B852230. (JA-568.)

FF60-61/13 Service by Air issued an invoice to CMI for air bill number N852230 with charges for ocean freight ($7,490.00), import duty/tax ($1,575.92), total of $9,065.95 for containers number KKFU1363499 and KKFU1614383. (JA-592.)

FF60-61/14 With no document showing a charge for demurrage, Service by Air issued an invoice to CMI for air bill number B852230 with charges for container demurrage of $12,400.00 for container number KKFU1363499 and container demurrage of $12,400.00 for container number KKFU1614383. (JA-538.)

FF60-61/15 CMI paid Service by Air the charges on containers number KKFU1363499 and KKFU1614383. (CMI App. Exh. B-1; JA-591.)

FF60-61/16 No document indicates that LAS Freight imposed any detention or demurrage charges for containers number KKFU1363499 and KKFU1614383.

FF60-61/17 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for containers number KKFU1363499 and KKFU1614383.

FLDR 62 JA-507-551.

Joint Appendix FLDR 62 contains documents related to the shipment of container number MSCU5915505 from Qingdao, China, to Chicago, IL.

FF62/1 LAS Freight System Ltd. issued bill of lading number QINCHI1504003 identifying Weifang Sunshine Plastic Co., Ltd as the shipper and CMI as the consignee of delivery of container number MSCU5915505. (JA-615.)

FF62/2 Qingdao, China was the port of loading, Long Beach, CA, the port of discharge, and Chicago, IL, the place of delivery of container number MSCU5915505, shipped on board 20150412. (JA-599, 601, 615.)

FF62/3 Acme Freight Services Corp. issued bill of lading number QD15040139 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU5915505. (JA-599.)

FF62/4 On 4/20/15, Acme Freight Services Corp. issued arrival notice/freight invoice number INV-027690 identifying LAS-SWEG Logistics (Shanghai) Ltd. as the shipper and Service by Air as the consignee of container number MSCU5915505 indicating that the ocean freight due was $3,800.00. (JA-601.)

FF62/5 Service by Air issued air waybill B852231 identifying Weifang Chenxi as the shipper, CMI as the consignee, Hong Kong as the airport of departure, and O'Hare as the airport of destination but container number listed stating container demurrage of $12,600.00. (JA-600.)

FF62/6 On June 18, 2015, Freight Tech Cartage, Inc., issued invoice number 22604 to SBA Global indicating charges for container number MSCU5915505, reference number N852231, including BNSF, LPC to CMI, Wheeling ($350.00), fuel surcharge ($133.00), pre pull ($125.00), chassis charges ($1,075.00), demurrage ($7,000.00), and yard storage ($1,050.00), total $9,733.00. (JA-614.)

FF62/7 Service by Air issued an invoice to CMI for air bill number N852231 with charges for ocean freight ($4,895.00), import duty/tax ($1,043.46), total of $5,938.46 for container number MSCU5915505. (JA-628.)

FF62/8 Service by Air issued an invoice to CMI for air bill number B852231 with charges container demurrage of $12,600.00 for container number MSCU5915505. (JA-629.)

FF62/9 CMI paid SBA the demurrage charges on air bill number B852231. (CMI App. Exh A-10; JA-629.)

FF62/10 No document indicates that LAS Freight imposed any detention or demurrage charges for container number MSCU5915505.

FF62/11 No document indicates that either CMI or Service by Air paid LAS Freight any detention or demurrage charges for container number MSCU5915505.

VIII. OTHER OUTSTANDING ISSUES.

A. CMI's Allegations Against Radiant Are Deemed Abandoned.

CMI alleges that respondent Radiant violated the Shipping Act. SBA contends: "CMI has abandoned its claims against Respondent Radiant Customs Services, Inc. as successor of SBA Consolidators, Inc., as CMI does not address that respondent's alleged liability in either of its two briefs." (SBA Brief at 1.) CMI did not discuss its allegations against Radiant in any of the briefs it filed. Also, in its Reply Brief, CMI did not respond to SBA's contention that CMI abandoned its claims against Radiant. Therefore, CMI's claims against Radiant are deemed abandoned and dismissed with prejudice.

B. SBA's Statute of Limitations Defense is Deemed Abandoned.

In its answer, Service by Air states as an affirmative defense that "CMI's claims are time barred, wholly or partially, by the applicable statute of limitations." (SBA Answer at 5.) Service by Air does not argue in its briefs that claims about any shipments at issue are barred by the statute of limitations. Therefore, Service by Air's statute of limitations defense is deemed abandoned.

IX. ATTORNEY FEES.

"In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees." 46 U.S.C. § 41305. "In order to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final. For purposes of this section, a decision is considered final when the time for seeking judicial review has expired or when a court appeal has terminated." 46 C.F.R. § 502.254(c). *See also Organization and Functions; Rules of Practice and Procedure; Attorney Fees, Final rule,* 81 Fed. Reg. 10508 (Mar. 1, 2016). CMI has proven by a preponderance of the evidence that Service by Air violated the Shipping Act and that it suffered actual injury as a result of the violations. Therefore, CMI is the prevailing party.

O R D E R

Upon consideration of the record in this proceeding and for the reasons set forth above, complainant CMI Distribution, Inc., has established by a preponderance of the evidence that respondent Service by Air, Inc. violated the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. §§ 40501(a)(1), 40901(a), 41102(c), and 41104(2)(A), and Commission regulations promulgated pursuant to the Act. 46 C.F.R. §§ 515.3 and 520.3. Therefore, it is hereby

ORDERED that claims regarding the shipment of maritime container number PCIU8352944 (FLDR 2) be **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that respondent Service by Air, Inc., **CEASE AND DESIST** from operating as a non-vessel-operating common carrier without a license in violation of 46 U.S.C. § 40901(a) and operating without a published tariff in violation of 46 U.S.C. § 40501(a)(1). It is

FURTHER ORDERED that respondent Service by Air, Inc., pay reparations to complainant CMI Distribution, Inc. in the amount of $126,185.00 for actual injury caused by violations of 46 U.S.C. § 41104(2)(A). It is

FURTHER ORDERED that claims against respondents Radiant Customs Services Inc. (formerly known as SBA Consolidators, Inc.), and LAS Freight Systems Ltd. be **DISMISSED WITH PREJUDICE**.

Clay G. Guthridge
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC, AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES S.A., AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: May 31, 2019

ORDER OF: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT WITH WALLENIUS WILHELMSEN LOGISTICS AS AND WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC [1]

[Notice Not to Review served 7/2/19, decision administratively final.]

I. Filings

On May 13, 2019, Complainant Fiat Chrysler Automobiles NV; FCA US LLC; and FCA Italy S.p.A., (collectively "FCA") and Respondents Wallenius Wilhelmsen Ocean AS (formerly known as Wallenius Wilhelmsen Logistics AS) and Wallenius Wilhelmsen Logistics Americas LLC ("WWL"), the Settling Parties, filed a joint motion and memorandum seeking approval of a settlement agreement, dismissal with prejudice of the complaint against WWL, and confidential treatment of the settlement agreement.

On May 14, 2019, a notice of WWL's withdrawal or forbearance of oppositions was filed, withdrawing its requests to disclose the confidential settlement agreements with other Respondents, upon approval of the WWL confidential settlement agreement. As this decision approves the WWL settlement agreement, WWL's pending motions and partial objections to the other settlement agreements are hereby withdrawn.

[1] This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

II. Procedural History

On October 17, 2017, a notice of filing of complaint and assignment was issued indicating that Fiat Chrysler filed a complaint against a number of entities, including WWL. Fiat Chrysler alleged that the Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b)(1), 41102(c), 41103(a)(1), 41103(2), 41104(10), 41105(1), 41105(6), and 46 C.F.R. § 535.401, *et seq*., in connection with Fiat Chrysler's purchase of vehicle carrier services from the Respondents.

On November 30, 2017, Respondents filed a joint motion to dismiss this proceeding along with four other related proceedings. On May 7, 2018, an initial decision was issued which granted in part and denied in part the Respondents' motion to dismiss. The claim for reparations was dismissed with prejudice in part and the claims for a cease and desist order and for reparations for violations within three years of filing the complaint were allowed to proceed. Initial Decision at 56. The initial decision was not appealed.

The Settling Parties state that they "have concluded that each faces the substantial costs of further litigation" and that that the settlement agreement was "entered into after good-faith negotiations and with the benefit of legal counsel." Motion at 2. The Settling Parties further state:

> The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval. Indeed, the presiding officer previously has approved like settlements for other parties in a matter arising out of the same facts and circumstances as that presented by the Complaint and Settlement Agreement in this case.

Motion at 3.

In addition, the Settling Parties request that the settlement agreement be treated as confidential, contending that under the terms of the settlement agreement, the Settling Parties must keep the terms of the settlement agreement confidential. "This confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality." Settlement Motion at 4.

III. Discussion

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

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[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion, the settlement agreement, and other documents filed in this matter, the Settling Parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The Settling Parties are sophisticated business entities whose counsel engaged in arms-length negotiations. The Settling Parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See Streak Products, Inc., and SYX Distribution, Inc. v. UTi, United States, Inc.*, 33 S.R.R. 641, 644-45 (ALJ 2014); *see also Schoeps v. The Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009), Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV. Order

Upon consideration of the settlement motion, the confidential settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the confidential settlement agreement between Fiat Chrysler and Wallenius Wilhelmsen Ocean AS (formerly known as Wallenius Wilhelmsen Logistics AS) and Wallenius Wilhelmsen Logistics Americas LLC be **GRANTED**. It is

FURTHER ORDERED that all pending motions and oppositions be **WITHDRAWN**. It is

FURTHER ORDERED that Wallenius Wilhelmsen Ocean AS (formerly known as Wallenius Wilhelmsen Logistics AS) and Wallenius Wilhelmsen Logistics Americas LLC be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the request for confidential treatment of the settlement agreement be **GRANTED**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC, AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES S.A., AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: May 31, 2019

ORDER OF: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT WITH CSAV[1]

[Notice Not to Review served 7/2/19, decision administratively final.]

I. Filings

On April 10, 2019, Complainant Fiat Chrysler Automobiles NV; FCA US LLC; and FCA Italy S.p.A., (collectively "FCA") and Respondent Compañia Sud Americana de Vapores S.A. ("CSAV"), the Settling Parties, filed a joint motion and memorandum seeking approval of a settlement agreement, dismissal with prejudice of the complaint against CSAV, and confidential treatment of the settlement agreement.

On April 11, 2019, Respondents Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics Americas LLC (collectively "WWL"), and EUKOR Car Carriers Inc. ("EUKOR") filed a motion partially opposing the confidential settlement agreement ("Opposition to CSAV Settlement"). On April 18, 2019, FCA filed a reply to the partial opposition ("FCA Reply to CSAV Opposition").

On April 25, 2019, a stipulation of dismissal was filed by FCA and EUKOR. On May 13, 2019, a joint motion and memorandum seeking approval of a settlement agreement, dismissal with prejudice of the complaint against WWL, and confidential treatment of the

[1] This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

settlement agreement was filed. On May 14, 2019, a notice of WWL's withdrawal or forbearance of oppositions was filed.

To the extent that WWL objected to the settlement agreement, WWL lacked standing. Non-settling defendants, in general, lack standing to object to a settlement, because they are ordinarily not affected by such a settlement. *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995); *see also Zupnick v. Fogel*, 989 F.2d 93, 98 (2d Cir.); *Waller v. Financial Corp. of America*, 828 F.2d 579, 582-83 (9th Cir. 1987). "However, there is a recognized exception to this general rule which permits a non-settling defendant to object where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014); *see also Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 262 F.3d 1089, 1102 (10th Cir. 2001); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000); *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247-48 (7th Cir. 1992). WWL's concerns regarding the settlement's impact on its own liability, including whether a set-off would be permitted, do not rise to the level of formal legal prejudice necessary for standing to object to a settlement. To the extent that WWL was seeking to obtain information about the settlement, that is a discovery issue more properly raised in a motion to compel.

The WWL Settlement motion states: "Subject to the approval of this motion, WWL will withdraw its request to disclose the settlement agreements with the other Respondents." WWL Settlement at 4 n.1. Moreover, the parties state that "upon approval" of the WWL settlement, WWL withdraws its opposition to the CSAV settlement. WWL Notice of Withdrawal of Oppositions at 1-2.

In a separate decision issued today, the WWL confidential settlement agreement has been approved. Accordingly, WWL's objection to the "K" Line settlement is withdrawn.

II. Procedural History

On October 17, 2017, a notice of filing of complaint and assignment was issued indicating that Fiat Chrysler filed a complaint against a number of entities, including CSAV. Fiat Chrysler alleged that the Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b)(1), 41102(c), 41103(a)(1), 41103(2), 41104(10), 41105(1), 41105(6), and 46 C.F.R. § 535.401, *et seq*., in connection with Fiat Chrysler's purchase of vehicle carrier services from the Respondents.

On November 30, 2017, Respondents filed a joint motion to dismiss this proceeding along with four other related proceedings. On May 7, 2018, an initial decision was issued which granted in part and denied in part the Respondents' motion to dismiss. The claim for reparations was dismissed with prejudice in part and the claims for a cease and desist order and for reparations for violations within three years of filing the complaint were allowed to proceed. Initial Decision at 56. The initial decision was not appealed.

The Settling Parties state that they "have concluded that each faces the substantial costs of further litigation" and that that the settlement agreement was "entered into after good-faith

negotiations and with the benefit of legal counsel." Motion at 2. The Settling Parties further state:

> The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval. Indeed, the Presiding Judge has previously approved like settlements for other parties in a matter arising out of the same facts and circumstances as that presented by the Complaint and Settlement Agreement in this case.

Motion at 3.

In addition, the Settling Parties request that the settlement agreement be treated as confidential, contending that under the terms of the settlement agreement, the Settling Parties must keep the terms of the settlement agreement confidential. "This confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality." Settlement Motion at 4.

III. Discussion

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

> settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion, the settlement agreement, and other documents filed in this matter, the Settling Parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The Settling Parties are sophisticated business entities whose counsel engaged in arms-length negotiations. The Settling Parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See Streak Products, Inc., and SYX Distribution, Inc. v. UTi, United States, Inc.*, 33 S.R.R. 641, 644-45 (ALJ 2014); *see also Schoeps v. Museum*

of Modern Art, 603 F. Supp. 2d 673 (S.D.N.Y. 2009), Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV. Order

Upon consideration of the settlement motion, the confidential settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the confidential settlement agreement between Fiat Chrysler and Compañia Sud Americana de Vapores S.A. be **GRANTED**. It is

FURTHER ORDERED that the complaint against Compañia Sud Americana de Vapores S.A. be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the request for confidential treatment of the settlement agreement be **GRANTED**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC, AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES S.A., AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: May 31, 2019

ORDER OF: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT WITH KAWASAKI KISEN KAISHA, LTD. AND "K" LINE AMERICA, INC. [1]

[Notice Not to Review served 7/2/19, decision administratively final.]

I. Filings

On April 23, 2019, Complainant Fiat Chrysler Automobiles NV; FCA US LLC; and FCA Italy S.p.A., (collectively "FCA") and Respondents Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. ("'K' Line"), the Settling Parties, filed a joint motion and memorandum seeking approval of a settlement agreement, dismissal with prejudice of the complaint against "K" Line, and confidential treatment of the settlement agreement.

Also on April 23, 2019, Respondents Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics Americas LLC (collectively "WWL"), and EUKOR Car Carriers Inc. ("EUKOR") filed a motion partially opposing the confidential settlement agreement ("Opposition to "K" Line Settlement"). On April 18, 2019, FCA filed a reply to the partial opposition ("FCA Reply to "K" Line Opposition").

On April 25, 2019, a stipulation of dismissal was filed by FCA and EUKOR. On May 13, 2019, a joint motion and memorandum seeking approval of a settlement agreement,

[1] This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

dismissal with prejudice of the complaint against WWL, and confidential treatment of the settlement agreement was filed. On May 14, 2019, a notice of WWL's withdrawal or forbearance of oppositions was filed.

To the extent that WWL objected to the settlement agreement, WWL lacked standing. Non-settling defendants, in general, lack standing to object to a settlement, because they are ordinarily not affected by such a settlement. *Eichenholtz v. Brennan*, 52 F.3d 478, 482 (3d Cir. 1995); *see also Zupnick v. Fogel*, 989 F.2d 93, 98 (2d Cir.); *Waller v. Financial Corp. of America*, 828 F.2d 579, 582-83 (9th Cir. 1987). "However, there is a recognized exception to this general rule which permits a non-settling defendant to object where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014); *see also Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005); *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 262 F.3d 1089, 1102 (10th Cir. 2001); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000); *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247-48 (7th Cir. 1992). WWL's concerns regarding the settlement's impact on its own liability, including whether a set-off would be permitted, do not rise to the level of formal legal prejudice necessary for standing to object to a settlement. To the extent that WWL was seeking to obtain information about the settlement, that is a discovery issue more properly raised in a motion to compel.

The WWL Settlement motion states: "Subject to the approval of this motion, WWL will withdraw its request to disclose the settlement agreements with the other Respondents." WWL Settlement at 4 n.1. Moreover, the parties state that "upon approval" of the WWL settlement, WWL withdraws its opposition to the CSAV settlement. WWL Notice of Withdrawal of Oppositions at 1-2.

In a separate decision issued today, the WWL confidential settlement agreement has been approved. Accordingly, WWL's objection to the "K" Line settlement is withdrawn.

II. Procedural History

On October 17, 2017, a notice of filing of complaint and assignment was issued indicating that Fiat Chrysler filed a complaint against a number of entities, including "K" Line. Fiat Chrysler alleged that the Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b)(1), 41102(c), 41103(a)(1), 41103(2), 41104(10), 41105(1), 41105(6), and 46 C.F.R. § 535.401, *et seq*., in connection with Fiat Chrysler's purchase of vehicle carrier services from the Respondents.

On November 30, 2017, Respondents filed a joint motion to dismiss this proceeding along with four other related proceedings. On May 7, 2018, an initial decision was issued which granted in part and denied in part the Respondents' motion to dismiss. The claim for reparations was dismissed with prejudice in part and the claims for a cease and desist order and for reparations for violations within three years of filing the complaint were allowed to proceed. Initial Decision at 56. The initial decision was not appealed.

The Settling Parties state that they "have concluded that each faces the substantial costs of further litigation" and that that the settlement agreement was "entered into after good-faith negotiations and with the benefit of legal counsel." Motion at 2. The Settling Parties further state:

> The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval. Indeed, the Presiding Judge has previously approved like settlements for other parties in a matter arising out of the same facts and circumstances as that presented by the Complaint and Settlement Agreement in this case.

Motion at 3.

In addition, the Settling Parties request that the settlement agreement be treated as confidential, contending that under the terms of the settlement agreement, the Settling Parties must keep the terms of the settlement agreement confidential. "This confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality." Settlement Motion at 4.

III. Discussion

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

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> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

> compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion, the settlement agreement, and other documents filed in this matter, the Settling Parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The Settling Parties are sophisticated business entities whose counsel engaged in arms-length negotiations. The Settling Parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public

interest is undermined in certain circumstances. *See Streak Products, Inc., and SYX Distribution, Inc. v. UTi, United States, Inc.*, 33 S.R.R. 641, 644-45 (ALJ 2014); *see also Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009), Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV. Order

Upon consideration of the settlement motion, the confidential settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the confidential settlement agreement between Fiat Chrysler and Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. be **GRANTED**. It is

FURTHER ORDERED that the complaint against Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc. be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the request for confidential treatment of the settlement agreement be **GRANTED**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC, AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES S.A., AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: May 31, 2019

ORDER OF: Erin M. WIRTH, *Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT WITH HOËGH AUTOLINERS [1]

[Notice Not to Review served 7/2/19, decision administratively final.]

I. Filing

On May 13, 2019, Complainant Fiat Chrysler Automobiles NV; FCA US LLC; and FCA Italy S.p.A., (collectively "FCA") and Respondent Hoëgh Autoliners AS ("Hoëgh"), the Settling Parties, filed a joint motion and memorandum seeking approval of a settlement agreement, dismissal with prejudice of the complaint against Hoëgh, and confidential treatment of the settlement agreement.

II. Procedural History

On October 17, 2017, a notice of filing of complaint and assignment was issued indicating that Fiat Chrysler filed a complaint against a number of entities, including Hoëgh. Fiat Chrysler alleged that the Respondents violated the Shipping Act of 1984 ("Shipping Act"), including 46 U.S.C. §§ 40302(a), 41102(b)(1), 41102(c), 41103(a)(1), 41103(2), 41104(10), 41105(1), 41105(6), and 46 C.F.R. § 535.401, *et seq*., in connection with Fiat Chrysler's purchase of vehicle carrier services from the Respondents.

[1] This Initial Decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

On November 30, 2017, Respondents filed a joint motion to dismiss this proceeding along with four other related proceedings. On May 7, 2018, an initial decision was issued which granted in part and denied in part the Respondents' motion to dismiss. The claim for reparations was dismissed with prejudice in part and the claims for a cease and desist order and for reparations for violations within three years of filing the complaint were allowed to proceed. Initial Decision at 56. The initial decision was not appealed.

The Settling Parties state that they "have concluded that each faces the substantial costs of further litigation" and that that the settlement agreement was "entered into after good-faith negotiations and with the benefit of legal counsel." Motion at 2. The Settling Parties further state:

> The Settlement Agreement negotiated by the Settling Parties, with the advice and assistance of their counsel, is reasonable and not inconsistent with any law or policy. The Settling Parties have carefully considered the costs, benefits, and risks of further litigation, and have concluded that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached in good faith and is free of fraud, duress, undue influence, mistake, or any other defect that would bar its approval. Indeed, the Presiding Judge has previously approved like settlements for other parties in a matter arising out of the same facts and circumstances as that presented by the Complaint and Settlement Agreement in this case.

Motion at 3.

In addition, the Settling Parties request that the settlement agreement be treated as confidential, contending that under the terms of the settlement agreement, the Settling Parties must keep the terms of the settlement agreement confidential. "This confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality." Settlement Motion at 4.

III. Discussion

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 91 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement "where time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.91(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002), *quoting Old*

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

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

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (*quoting* 15A American Jurisprudence, 2d Edition, pp. 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

Based on the representations in the settlement motion, the settlement agreement, and other documents filed in this matter, the Settling Parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The Settling Parties are sophisticated business entities whose counsel engaged in arms-length negotiations. The Settling Parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly litigation. There is no evidence of fraud, duress, undue influence, or mistake nor harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 119, parties may request confidentiality. 46 C.F.R. § 502.119. "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991). Similarly, federal courts frequently maintain the confidentiality of settlement agreements, although some have questioned whether the public interest is undermined in certain circumstances. *See Streak Products, Inc., and SYX Distribution, Inc. v. UTi, United States, Inc.*, 33 S.R.R. 641, 644-45 (ALJ 2014); *see also Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673 (S.D.N.Y. 2009), Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 484-487 (1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

IV. Order

Upon consideration of the settlement motion, the confidential settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the confidential settlement agreement between Fiat Chrysler and Hoëgh Autoliners AS be **GRANTED**. It is

FURTHER ORDERED that the complaint against Hoëgh Autoliners AS be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the request for confidential treatment of the settlement agreement be **GRANTED**.

Erin M. Wirth
Administrative Law Judge

FEDERAL MARITIME COMMISSION

ANTONIO EGBERTO CARNEIRO LIMA, *Complainant*

v.

FASTWAY MOVING AND STORAGE, INC., D/B/A DREAM CARGO, D/B/A FASTWAY, D/B/A FASTWAY MOVING, ET AL., *Respondents*.

DOCKET NO. 17-03

Served: June 24, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman* and Rebecca F. DYE, Daniel B. MAFFEI, and Louis E. SOLA, *Commissioners*.

ORDER AFFIRMING-IN-PART AND VACATING-IN-PART INITIAL DECISION

On January 16, 2018, the ALJ issued an Initial Decision on Default finding that Respondents violated 46 U.S.C. §§ 41102(c), 41104(a)(1), 41104(a)(2)(A), and 41104(a)(11), and awarding Complainant reparations.

In finding a § 41102(c) violation, the ALJ relied on a Commission interpretation of the statute that has since been abrogated. *See, e.g.*, Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45367-45372 (Sept. 7, 2018). Consequently, the Commission vacates the Initial Decision on Default with respect to 46 U.S.C. § 41102(c).

The Commission affirms the Initial Decision on Default in all other respects and awards reparations to Complainant in the amount of $37,190.74 and interest in the amount of $1,850.64, totaling $39,041.38, for which Respondents shall be jointly and severally liable. Respondents must pay this total by July 9, 2019.

In light of the default nature of this case, the Commission will not consider this order or the Initial Decision on Default as having any precedential effect, and they should not be cited as such.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

FIAT CHRYSLER AUTOMOBILES NV, FCA US LLC AND FCA ITALY S.P.A., *Complainants*

v.

WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MOL (AMERICA) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., COMPAÑÍA SUD AMERICANA DE VAPORES, AND HOËGH AUTOLINERS AS, *Respondents*.

DOCKET NO. 17-09

Served: July 2, 2019

NOTICE NOT TO REVIEW

Notice is given that the time has expired within which the Commission could determine to review the Administrative Law Judge's:

- April 2, 2019 Initial Decision Approving Confidential Settlement With Mitsui And MOL;
- May 31, 2019 Initial Decision Approving Confidential Settlement with Wallenius Wilhelmsen Logistics AS and Wallenius Wilhelmsen Logistics Americas LLC;
- May 31, 2019 Initial Decision Approving Confidential Settlement with CSAV;
- May 31, 2019 Initial Decision Approving Confidential Settlement with Kawasaki Kisen Kaisha, Ltd. and "K" Line America, Inc.; and
- May 31, 2019 Initial Decision Approving Confidential Settlement with Hoegh Autoliners.

Accordingly, these decisions have become administratively final, and this proceeding is now discontinued.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

CROCUS INVESTMENTS, LLC AND CROCUS, FZE,
Complainants

v.

MARINE TRANSPORT LOGISTICS, INC. AND ALEKSANDR SOLOVYEV A/K/A ROYAL FINANCE GROUP INC.,
Respondents.

DOCKET NO. 15-04

Served: July 16, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, and Daniel B. MAFFEI, *Commissioners*.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Commission are: (1) Complainants' exceptions to the Administrative Law Judge's (ALJ's) June 17, 2016, Initial Decision, which dismissed with prejudice Complainants' claims, and (2) Complainants' second petition to reopen the proceedings, remand the entire case, and join the Commission's Bureau of Enforcement (BOE) as a party.

The Commission affirms the Initial Decision in all respects except for the 46 U.S.C. § 41102(c) claim against Respondent Marine Transport Logistics (Marine Transport) regarding the storing or handling of the Formula boat from August 2013 through February 14, 2014. The Commission vacates the Initial Decision as to that claim and remands for further consideration. The Commission denies Complainants' petition.

A. Factual Background

1. Crocus-Solovyev Business Arrangements

Complainants Crocus Investments, LLC, and Crocus, FZE (collectively, Crocus) are in the business of buying boats that they repair and resell overseas through an affiliated company, Middle East Asia Alfa, FZE (Middle East), which has facilities in Dubai, United Arab Emirates. Initial Decision (I.D.) at 2-3.[1] Complainants are owned by Alexander Safonov. *Id.* at 10. Mr. Safonov retained the services of Respondent Aleksandr Solovyev, acting on behalf of his companies and Respondent Marine Transport, to make arrangements to purchase, store, and

[1]The facts recited here are based on the ALJ's 103 detailed findings, which the Commissions adopts. I.D. at 10-19.

transport boats that Crocus intended to resell overseas. *Id*. at 12. Mr. Solovyev owns Car Express & Import, Inc. (Car Express), a company that buys vehicles and boats for its customers and arranges to have them transported overseas. *Id*. at 3, 12.

Under their arrangement, Mr. Safonov and Mr. Solovyev would typically "view boats online and [Mr.] Safonov would decide which boats to purchase." *Id.* at 3. Mr. Solovyev would then arrange for the purchase of the boats, and, prior to overseas shipment, their storage in a New Jersey warehouse operated by World Express & Connection, Inc. (World Express), a company which Mr. Solovyev also owns. *Id*. at 3, 11-12. Billing and financial arrangements were made through another Solovyev-owned business, Respondent Royal Finance Group, Inc. (Royal Finance). *Id*. at 3. Royal Finance advanced payments on its customers' behalf to make purchases and pay transportation charges. *Id.*

Transportation of Crocus's boats to Dubai was arranged by Mr. Solovyev acting as an agent for Marine Transport, a licensed non-vessel operating common carrier (NVOCC) owned solely by Mr. Solovyev's estranged wife, Alla Solovyeva. *Id*. at 3, 12. Despite these distinct corporate entities, both Mr. Safonov and Mr. Solovyev did not consistently adhere to corporate formalities. *Id*. at 3. For example, it was not unusual for financial obligations owed by one entity to be paid by another. *See id*.

2. Monterey and Chaparral Transported to Dubai and Back to the United States

This case arises from a falling out between Crocus and Respondents over fees for storage and transportation services related to three boats: a Monterey, a Chaparral, and a Formula. *Id.* at 3-7. The Monterey and Chaparral boats were purchased in the spring of 2013 and initially stored at the World Express warehouse. *Id*. at 3-6. Using Marine Transport's NVOCC services, Mr. Safonov had the Monterey and Chaparral shipped to Dubai in May 2013. *Id.* at 3-4.

When Middle East was unable to sell those two boats, it had them shipped back to the United States in May/June 2014. *Id*. at 6. At Mr. Safonov's suggestion, Middle East obtained rate quotes from Mr. Solovyev. *Id*. Mr. Solovyev provided Middle East with quotes from two vessel-operating common carriers (VOCCs)–Hapag-Lloyd and MSC. *Id*. Middle East did not book the boats' return transportation with either of those carriers. Instead Middle East secured return transportation with APL, another VOCC. *Id*.

APL's bill of lading identified Middle East as the shipper and AEC Cargo Services LLC of Dubai as the forwarding agent. *Id*. It listed Marine Transport only as the consignee, meaning it was responsible for accepting delivery when the boats arrived in New Jersey, their final destination. *Id*. APL's notice of arrival addressed to Marine Transport accurately estimated that the boats would arrive on July 12, 2014. *Id*. Marine Transport accepted delivery of the Monterey and Chaparral, paid customs charges and other fees, and had the boats moved to the World Express warehouse so that Crocus would not incur demurrage fees. *Id*.

3. Formula Not Transported Overseas

In August 2013, Mr. Safonov instructed Mr. Solovyev to purchase a Formula boat with the intent of sending it to Dubai for repair and resale. *Id.* at 5. The boat was purchased, and

Royal Finance billed Crocus for the Formula's purchase price ($56,280), delivery of the boat to the intended port of loading ($3,500), loading/shipping the boat to Dubai ($12,000), commission ($500), documentation ($500), and a trailer ($4,500). *Id*. at 5, 16-17. Crocus paid Royal Finance for the boat's purchase price and for delivery of the boat to the port of loading, but did not remit the shipping/loading fee, the commission, the documentation fee, or the cost of a trailer. *Id*. at 5, 17. After the Formula was purchased, it was transported to a facility at the port in New Jersey. Hr'g Tr., 96:8-20, May 13, 2016.

Over the next few months, Mr. Solovyev located two different trailers. I.D. at 5. Mr. Safonov did not approve of or pay for the first boat trailer, but found the second trailer suitable and paid the invoiced amount ($4,950) for it. I.D. at 5, 17. In December 2013, Royal Finance reissued the bill for the shipping/loading of the boat to Dubai, the documentation, and the commission, but there is no evidence that Crocus ever paid these fees. *Id*. at 5.

In early 2014, Mr. Safonov changed his mind about sending the Formula to Dubai because he no longer trusted his business partner at Middle East. *Id*. In an email to Mr. Solovyev dated February 14, 2014, Mr. Safonov expressed his relief that they did not "have time" to ship the Formula to Dubai. *Id*. In that same email, Mr. Safonov inquired about the documentation needed to ship the Formula to Florida. *Id*. Despite Mr. Safonov's inquiry about domestic shipment, the Formula remained at the World Express warehouse. *Id.* Apparently, there were no further discussions after February 2014 about shipping the Formula overseas, and the boat was not transported to Dubai or any other overseas location. *See id.* at 5-6.

4. Breakdown of Business Relationship

After the Monterey and Chaparral arrived back from Dubai in July 2014, Mr. Safonov sent several emails asking Mr. Solovyev how much it would cost to ship all three boats from New Jersey to Florida. *Id*. at 6. In emails dated July 24, 2014, and August 3, 2014, Mr. Safonov asked Mr. Solovyev to ship the three boats to Florida. *Id.* Mr. Solovyev replied in an email dated August 13, 2014, in which he demanded payment for storing the three boats and for taking delivery of the Monterey and Chaparral. *Id*. According to the invoice, Crocus owed Solovyev/Royal Finance $38,859 for 369 days of storage for the Formula and various other fees for customs clearance, loading/unloading and storing the other two boats. *Id*. Mr. Safonov responded by demanding custody of the boats and threatening legal action. *Id*. Their business arrangement deteriorated over the fee dispute and ultimately led to Crocus filing this action seeking reparations. *Id*. at 6-7. World Express, Mr. Solovyev's facility, sued Crocus in federal district court for non-payment of fees. *World Express & Connection, Inc. v. Crocus Investments, LLC (World Express*), No. 2:15-CV-08126-KM (D.N.J. Nov. 18, 2015).[2] Crocus later joined Marine Transport, Mr. Solovyev and Royal Finance as third-party defendants in the federal action. Third-Party Compl., *World Express*, (D.N.J. Sept. 21, 2016).

[2]As of the date of this Order, that case is still pending in the United States District Court for the District of New Jersey on cross-motions for summary judgment.

B. Procedural History

Crocus filed this action in May 2015 seeking $416,739 in reparations for Respondents' alleged violations of 46 U.S.C. §§ 41102(c) and 40901(a). Compl. ¶¶ 28-31. The only monetary harm specifically alleged is $5,500 as overcharges for port fees, customs fees, and other expenses. *See id.* ¶ 22. After completing discovery, the parties briefed their respective positions. The ALJ heard closing arguments in May 2016 and, one month later, issued the Initial Decision dismissing the complaint with prejudice. I.D. at 19-27. All claims related to the Formula were dismissed on jurisdictional grounds, because the ALJ found that the Formula never entered into international commerce and the parties never entered into an agreement to transport the Formula by water from the United States to a foreign port. *Id*. at 1-2, 26. The ALJ also dismissed the § 40901(a) claim and § 41102(c) claims related to the Monterey and Chaparral and to Crocus's inquiries about shipping all three boats from New Jersey to Florida. *Id.* at 24-27.

Late in June 2016, Crocus's counsel was granted leave to withdraw from the case, and its current counsel entered his appearance. In October 2016, Crocus petitioned to reopen the proceedings to submit further evidence and sought additional time to file exceptions. The Commission denied the petition to reopen but extended the exceptions deadline. Crocus filed timely exceptions challenging the ALJ's dismissal of its claims, and Respondents filed a timely response.

Crocus later filed a second petition to reopen the proceedings and also sought to join BOE as a party. Respondents opposed these requests. Several months later, Respondents' counsel moved to withdraw from the case. Crocus did not oppose counsel withdrawing, but moved for sanctions. The Commission granted Respondents' counsel leave to withdraw and denied the request for sanctions. Respondents' current counsel then entered his appearance. Most recently, Crocus filed status reports reasserting certain arguments and referencing filings in *World Express*.

II. DISCUSSION

A. Standard of Review and Burden of Proof

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). It reviews the ALJ's findings de novo, and the Commission can make additional findings. *Id.* The Commission can rely on circumstantial evidence if there is no direct evidence as long as its findings are based on more than speculation. *See Waterman Steamship Corp. v. Gen. Foundries, Inc*., 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, *40 (ALJ 1993), *adopted in relevant part*, 26 S.R.R. 1424, 1994 FMC LEXIS *19 (FMC 1994).

Complainants bear the burden of demonstrating that the Commission has jurisdiction to adjudicate their claims. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp*., 28 S.R.R. 188, 201, 1998 FMC LEXIS 16, *7 (ALJ 1998), *aff'd* 28 S.R.R. 751, 1999 FMC LEXIS 32 (FMC 1999). Complainants also bear the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth of N.Y. & N.J.*, 33 S.R.R. 821, 841, 2014 FMC LEXIS 35, *41 (FMC 2014). Meeting that burden

requires complainants to show that their allegations are more probable than not. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc*., 32 S.R.R. 763, 765, 2012 FMC LEXIS 32, *3 (FMC 2012) (citing *Hale v. Dep't. of Transp.*, 772 F.2d 882, 885 (Fed. Cir. 1985)). The burden of proof never shifts to the respondents, and if the evidence is evenly balanced, complainants do not prevail. *Maher Terminals*, 33 S.R.R. at 841, 2014 FMC LEXIS at *42.

B. Agency and 46 U.S.C. § 40901(a)

1. Actions Attributable to Marine Transport

Because Crocus dealt exclusively with Mr. Solovyev in making arrangements for the boats' transportation and storage, and apparently had no direct dealings with other agents, representatives, or employees of Respondent Marine Transport, *see* I.D. at 3-6, before the Commission can determine whether Marine Transport violated the Shipping Act, we first must determine whether Mr. Solovyev was acting as Marine Transport's agent in his dealings with Crocus/Mr. Safonov. *See generally Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc*., 33 S.R.R. 543, 559-60, 2014 FMC LEXIS 1, *30-31 (FMC 2014).

"Agency" is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* §§ 1.01 (Am. Law Inst. 2006). Agents can act under actual or apparent authority. *Id*. §§ 3.01 and 3.03 (Am. Law Inst. 2006). "Apparent authority" is:

> the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

Mitsui O.S.K. Lines Ltd., 33 S.R.R. at 559-60, 2014 FMC LEXIS at *31 (quoting *Restatement (Third) of Agency* § 2.03)). An agent's status and authority to act can be proven by direct or circumstantial evidence. *Lopez v. Council on American-Islamic Rels. Action Network*, 826 F.3d 492, 497 (D.C. Cir. 2016) (applying Virginia law).

The ALJ's finding that Mr. Solovyev acted as Marine Transport's agent is soundly supported by Mrs. Solovyeva's testimony, the parties' email correspondence, and shipping documents. I.D. at 13-14, 20-21. Crocus has not pointed to any countervailing evidence. *See* Complainants' Br. in Support of Its Exceptions to Initial Decision (Exceptions) at 14, 19-21, Mar. 13, 2017. Instead, Crocus asserts that Mr. Solovyev acted as an ocean freight forwarder (OFF), and not merely as Marine Transport's agent in arranging transportation for the Monterey and Chaparral to and from Dubai. Crocus does not, however, cite any evidence showing, or explain how, Mr. Solovyev acted in his individual capacity and not as Marine Transport's agent in arranging transportation. *See id*. at 15-18. Also, as discussed in further detail below, Crocus's arguments about "ocean freight forwarder" status ignore the Shipping Act's definition of the term.

The evidence shows that Mr. Solovyev had apparent authority to act as Marine Transport's agent and acted in that capacity when arranging for NVOCC services. Marine Transport's owner, Alla Solovyeva, confirmed that her estranged husband, Mr. Solovyev, acted as Marine Transport's agent. Alla Solovyeva Dep., Tr. 18:13-16. [3] Mrs. Solovyeva also explained that "any person can act on behalf of my company as a broker." *Id*., Tr. 18:17-23. Mrs. Solovyeva described Mr. Solovyev as "selling his companies services" and her company's services as well when his clients requested what she termed "ocean freight." *Id*., Tr. 19:19-25. She also testified that Marine Transport provided Andrey Tretyikov (the principal of Middle East, Crocus's former business associate) with transportation and loading for his boats. *Id.,* Tr. 29:5-6.

Mrs. Solovyeva's testimony is consistent with Mr. Solovyev's description of his role in offering Marine Transport's services. When asked, he admitted that he held himself out as Marine Transport's agent or representative. Alexander Solovyev Dep., Tr. 37:24-38:3. Mr. Solovyev explained that he acted as an agent in arranging transportation for cars, boats, and other commodities shipped overseas. *Id*., Tr. 38:4-9. Mr. Solovyev also testified that in his emails to Mr. Safonov/Crocus, he was communicating in his capacity as Marine Transport's agent. *Id.*, Tr. 40:2-5, 48-50.

Email communications also indicate that Mr. Solovyev acted with Marine Transport's apparent authority and held himself out as its representative. In his communications with Mr. Safonov, Mr. Solovyev used the email address mtlworld@mtlworld.com. "MTL" is an acronym for Marine Transport Logistics, and others affiliated with Marine Transport used the same email address/account. I.D. at 11. Mrs. Solovyeva's email account, alla@mtlworld.com, includes the same acronym as do the email addresses of other Marine Transport employees. Alla Solovyeva Dep., Tr. 30:19-20.

The shipping documents for transporting the Monterey and Chaparral to Dubai also indicate that Marine Transport was the principal, not Mr. Solovyev acting independently. Maersk was the VOCC hired to ship the two boats to Dubai, and its master bill of lading lists Marine Transport as the shipper. *See* I.D. at 14, ¶¶ 48, 49, 54-55.

Moreover, it appears that Mr. Safonov understood that Mr. Solovyev was acting for Marine Transport. He stated that he agreed to a proposal "made by Alexander Solovyev with the understanding that Marine Transport . . . will arrange for the shipment of the boats from Dubai . . . and the boats will be picked up and held by [Marine Transport] in the USA." A. Safonov Decl. at ¶¶ 4-5.[4] It appears, then, that Mr. Safonov presumed that Mr. Solovyev was speaking on Marine Transport's behalf, not in his individual capacity, and understood that services offered would be provided by Marine Transport, not by Mr. Solovyev individually. *See id.*

[3]Ms. Solovyeva's and Mr. Solovyev's depositions are found at Tab 5 of the Appendix to Complainants' Br. in Support of Its Exceptions to Initial Decision (Complainants' App.), Dec. 5, 2016. Further citations to these transcripts include only the document title and page or line reference.

[4]Mr. Safonov's declaration is found at Complainants' App., tab 9.

Because Mr. Solovyev was acting with Marine Transport's apparent authority and acquiescence, his actions and communications in dealings with Crocus about NVOCC services related to its three boats are attributable to Marine Transport.

2. Section 40901(a) Claim Against Mr. Solovyev

This agency relationship is fatal to Crocus's 46 U.S.C. § 40901(a) claim against Mr. Solovyev. Section 40901(a) provides that: "A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission." 46 U.S.C. § 40901(a); *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 497 (D.C. Cir. 2009). An agent openly representing a licensed OTI, however, does not have to be separately licensed. *Landstar*, 569 F.3d. at 499.

Crocus alleged that Mr. Solovyev acted as an unlicensed OFF in violation of § 40901(a) and sought payment for those OFF services through Royal Finance. Compl. ¶ 29. The ALJ found that Mr. Solovyev did not operate as an unlicensed OTI because Crocus did not prove that he was acting as anything other than Marine Transport's agent when the Monterey and Chaparral boats were shipped to Dubai. I.D. at 21.

Crocus's exceptions do not identify any legal or factual errors in this determination. *See* Exceptions, 14-17. Adding to the confusion, Crocus does not specify at what point in its dealings with Mr. Solovyev he was allegedly acting as an unlicensed OTI. *See* Exceptions at 14-15; Compl. ¶ 6. At most, Crocus insists that Mr. Solovyev was acting as an unlicensed OFF, and that he had a fiduciary duty to oversee Crocus's interests.

These arguments are unpersuasive. As the ALJ pointed out, under *Landstar*, insofar as Mr. Solovyev was acting as an agent for Marine Transport (a licensed NVOCC) when the latter was acting as an NVOCC, he was not required to have a license and thus did not violate § 40901(a). Moreover, insofar as Mr. Solovyev was acting as an agent for Marine Transport when it was not acting as an OTI, such as when Marine Transport was acting as a consignee for the shipment of the Monterey and Chaparral from Dubai to the United States, Mr. Solovyev was not acting as an OTI within the scope of § 40901(a). As noted above, Mr. Solovyev *did* act as Marine Transport's agent with respect to arranging transportation and other services for the three boats at issue, and did so openly. Crocus's exceptions do not engage with the ALJ's reasoning regarding agency or otherwise discuss principles of agency vis-à-vis Mr. Solovyev and Marine Transport.

Rather, Crocus focuses on Mr. Solovyev's alleged performance of OFF duties. Exceptions at 15-19. This focus misses the mark for two reasons. First, it does not address the agency-principal relationship between Mr. Solovyev and Marine Transport: the evidence shows that if Mr. Solovyev performed OTI duties, he was doing it as an agent. If the principal was a licensed OTI, the agent did not need a license under § 40901(a). Second, Crocus does not address the statutory definition of ocean freight forwarder, which applies only to those who dispatch shipments from the United States to foreign locations. *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd*., 31 S.R.R. 1831, 1843, 2011 FMC 9, *39-42 (ALJ 2011).

Further, Crocus's argument that Mr. Solovyev had a duty to oversee its interests is irrelevant to whether he had, or was required to have, an OTI license under § 40901(a).

Finally, although neither Mr. Solovyev or Marine Transport are licensed as OFFs, Crocus did not demonstrate that any of the services that Marine Transport or Mr. Solovyev provided to Crocus were distinctly freight forwarder services as opposed to services that may be provided by an NVOCC. For instance, Crocus does not challenge the ALJ's finding that Marine Transport operated as an NVOCC when the Monterey and Chaparral were transported from the U.S. to Dubai. I.D. at 4.

Because Crocus has not shown that the ALJ erred, we affirm the ALJ's dismissal with prejudice of Crocus's § 40901(a) claim against Mr. Solovyev.

C. Section 41102(c) claims

Crocus also alleged that much of Respondents' conduct regarding the three boats violates 46 U.S.C. § 41102(c). Under 46 U.S.C. § 41102(c), "a common carrier, marine terminal operator, or [OTI] may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." The central question in this case is whether, and when, Marine Transport was a regulated entity – common carrier, marine terminal operator, or OTI – with respect to the conduct at issue. *See Petchem, Inc. v. Canaveral Port Auth.*, 28 F.M.C 281, 287-88 (1986), *aff'd sub nom. Petchem, Inc. v. Fed. Mar. Comm'n.*, 853 F.2d 958 (D.C. Cir. 1988).

Here, Marine Transport has an OTI license from the Commission, specifically, it has an NVOCC license. I.D. at 11. But the fact that Marine Transport is licensed as a regulated entity does not mean that everything it does is subject to § 41102(c). *See Auction Block Co. v. City of Homer* (*Auction Block I)*, 33 S.R.R. 589, 2014 FMC LEXIS 16 (FMC 2014), *aff'd sub nom. Auction Block Co. v. Fed. Mar. Comm'n* (*Auction Block II)*, 606 Fed. Appx. 347 (9th Cir. 2015); *see also Petchem*, 28 F.M.C at 290 (publishing a tariff rate does not guarantee the Commission's jurisdiction). There must also be a link between the respondents' regulated status and the conduct that allegedly violates the Shipping Act. *See Auction Block II*, 606 Fed. Appx. at 347-48. That is, the inquiry is whether a respondent was acting as regulated entity with respect to the conduct at issue. When, as here, the regulated status at issue is that of an OTI, the Commission typically looks at whether the respondent acted as such in handling the particular cargo or shipment involved in the alleged Shipping Act violation. *See Century Metal Recycling PVT Ltd. v. Dacon Logistics, LLC*, 32 S.R.R. 1763, 1773, 2013 FMC LEXIS 18 (ALJ 2013), *aff'd* 33 S.R.R. 17, 2013 FMC LEXIS 40 (FMC 2013); *Tienshan* 31 S.R.R. at 1843, 2011 FMC at *39-42.

1. Monterey and Chaparral Boats

Crocus's claims related to the Monterey and Chaparral boats involve: (1) transporting the boats from Dubai to the United States; (2) receiving and storing the boats once they reached the

United States; and (3) arranging for transporting the boats to Florida.[5] As described below, we affirm the ALJ's dismissal of these claims.

a. Transporting the Monterey and Chaparral from Dubai to the United States

Crocus alleged that Marine Transport violated § 41102(c) in arranging transportation for the Monterey and Chaparral from Dubai back to the United States. The ALJ dismissed this claim as factually unsupported because Marine Transport was not the NVOCC that handled this transportation, but rather acted as consignee. I.D. at 1, 15-16, 21-24. Because Marine Transport did not act as an OTI during this leg of the transportation, the ALJ held, it did not fall within the ambit of § 41102(c). *Id.*

Crocus challenges the ALJ's dismissal without clearly articulating grounds for overturning the ALJ's decision. *See* Exceptions at 19-20. And the lack of specified error is compounded by Crocus's use of the term "freight forwarder" in a manner that is inconsistent with the Shipping Act definition. While Crocus argues that Marine Transport acted as an OFF for the Dubai-to-U.S. transportation, the statute provides that an OFF is a person who "in the United States, dispatches shipments *from the United States*." 46 U.S.C. § 40102(18) (emphasis added). The Monterey and Chaparral were *dispatched from Dubai* to the United State, so Marine Transport could not have been retained as the OFF for that shipment.

On appeal, Crocus also argues that the ALJ failed to consider that Respondent acted as a "local or regional" freight forwarder. Exceptions at 7, 19-21. But the Shipping Act prohibition at issue, § 41102(c), only applies to OTIs, and thus to freight forwarders as defined by Shipping Act. The statutory definition makes no mention of "local or regional" freight forwarders. 46 U.S.C. § 40102(18), and Crocus has cited no authority that would allow the Commission to supplant the statutory definition with one of Crocus's devising.

Assuming that Crocus is arguing that Marine Transport was an NVOCC on the Dubai-to-U.S. shipment, its only evidence on that point is a declaration from Mr. Safonov. Complainants' App., Tab 9 (A. Safonov Decl.). Mr. Safonov's declaration offers his account of information allegedly relayed to him by Middle East. Mr. Safonov states that in April 2014, he told his assistant, Andrey Tretyakov, "to arrange delivery" of the Monterey and Chaparral to the U.S. A. Safonov Decl. at ¶ 2. According to Mr. Safonov, his assistant reported that two companies could deliver the boats "for approximately $4,000," but Mr. Solovyev offered "the same delivery" service for only $1,500. *Id.* Unsurprisingly, Mr. Safonov states that he "agreed" to Mr. Solovyev's lower price and understood that "Marine Transport . . . w[ould] arrange for the shipment of the boats from Dubai" and pick up the boats in the United States. *Id.*

This declaration is not enough to tip the evidentiary scales in Crocus's favor. Crocus cites no corroborating evidence that supports Mr. Safonov's secondhand account of these communications between Middle East and Mr. Solovyev. *See* Exceptions at 19-20. There are no citations to supporting emails, house bills of lading, or other documents showing that Marine

[5]The Monterey and Chaparral boats were first shipped from the United States to Dubai, with Marine Transport operating as the NVOCC, before being transported in the opposite direction. I.D. at 21. But as the ALJ noted, Crocus did not (and does not in its exceptions) argue that Respondents violated § 41102(c) with respect to the United States to Dubai transportation. ALJ I.D. at 1, 21 (citing Hr'g Tr. at 52-54, May 13, 2016).

Transport actually assumed any responsibility beyond accepting delivery once the boats arrived at the New Jersey port. *See id.* Further, Marine Transport and Mr. Solovyev deny extending any offer to arrange return transportation. *See* Respondents' Reply to Complainants' Exceptions (Reply) at 13-14, Apr. 4, 2017. Mr. Solovyev states that he relayed offers from two vessel operating common carriers--neither of which Crocus or Middle East retained. *See id*.

Mr. Safonov's account also lacks critical details. *See* A. Safonov Decl. While he states that he made up his mind to accept the offer relayed to Middle East, he does not state whether he or Middle East conveyed their acceptance to Mr. Solovyev or Marine Transport. Mr. Safonov's statement also does not specify terms the parties would have agreed upon had the offer been extended and accepted. Nothing in Mr. Safonov's declaration or anywhere else in the record addresses the shipment date, estimated date of arrival, port or point of departure or arrival, or any other arrangements made for the boats' return. The only concrete term mentioned in Mr. Safonov's statement is the fee Marine Transport purportedly quoted to Middle East. At most, Mr. Safonov's statement could be considered as evidence that Marine Transport/Mr. Solovyev made an offer, but that falls well short of proving that Marine Transport acted as an NVOCC for the boats' return transportation.

Importantly, the bill of lading contradicts Mr. Safonov's statement by listing APL as the VOCC responsible for the boats' return. Middle East is identified as the shipper. The bill of lading mentions Marine Transport only as the consignee, meaning it would accept delivery once the boats reached New Jersey, their final destination. I.D. at 15; *see also* Reply at 14-15. It identifies a different entity – AEC Cargo Services LLC, as "forwarding agent." I.D. at 15. Crocus argues that the bill of lading is not conclusive evidence and there might be a plausible explanation for the documents' failure to name Marine Transport as the NVOCC.

There are two reasons why this argument is not persuasive.

First, Crocus's argument reverses the burden of proof. As the complainant, Crocus has the burden of proving that Marine Transport was acting as a regulated entity. *River Parishes*, 28 S.R.R. at 201, 1998 FMC LEXIS at *7. And that burden does not shift to the respondents. *Maher Terminals*, 33 S.R.R. at 841, 2014 FMC LEXIS at *42. Crocus cannot meet its burden of proof solely by challenging the strength of Respondents' rebuttal evidence.

Second, Crocus's challenge to the bill of lading is premised on testimony about practices that shippers and carriers could follow--not on any actual communications or actions in this case. Marine Transport's owner, Alla Solovyeva testified that local freight forwarders "*can act* as the regional shipper when the cargo is coming back." *Id.* (emphasis added). Crocus argues that this is the reason why Marine Transport/Mr. Solovyev were not listed on the bill of lading. Exceptions, 21-22. But Ms. Solovyeva was speaking about her general understanding of possible practices– not the arrangements that Crocus actually made here. A. Solovyeva Dep., Tr. 28:18-25. Tr: 71:11-25. Ms. Solovyeva testified that she had no firsthand information about Crocus, the arrangements it may have made for the boats' return, or offer(s) Mr. Solovyev may have extended. *Id*., Tr: 31: 9-18, Tr. 23:2-10, Tr. 40:21-23. As she explained, she was not involved in Marine Transport's day-to-day dealings. At most, Mrs. Solovyeva's testimony allows for the possibility that Marine Transport could have taken a hand in arranging the return transportation,

but provides no evidence that it actually did so. Speculation about what might have occurred does not prove what actually occurred between the parties.

Because Crocus has not proved that Marine Transport was the NVOCC responsible for the Monterey's and Chaparral's return transportation, we affirm the ALJ's dismissal of Crocus's § 41102(c) claim related to that transportation.

b. Receiving and Storing the Monterey and Chaparral after Transport from Dubai

Crocus also alleged that Marine Transport violated § 41102(c) by: (1) failing to notify Crocus when the two smaller boats (Monterey and Chaparral) arrived in New Jersey from Dubai; (2) releasing the boats to a non-party (World Express) owned by Mr. Solovyev; and (3) overcharging Crocus for port, storage, and other fees. I.D. at 24, 26. The ALJ dismissed these claims as meritless. *Id.* The ALJ found that Mr. Safonov's emails plainly show that Crocus knew the boats had arrived within five days of their reaching the New Jersey port. *Id.* at 24. The ALJ also found that Marine Transport acted reasonably in moving the boats to avoid demurrage charges. *Id.* at 23-24. As consignee, the ALJ noted, Marine Transport "was potentially liable for demurrage charges that would accrue if the boats were not picked up within the free time allotted by the VOCC." *Id*. at 24. As to storage charges for the Monterey and Chaparral, the ALJ reasoned that [w]hen the Monterey and Chaparral returned to the United States, even if [Marine Transport]" were operating as an NVOCC, the boats were not 'received for US export shipment' and the tariff does not apply." *Id.* at 26.

Crocus does not directly challenge the findings regarding notice of boat arrival and release of the boats to World Express. Instead Crocus focuses on Marine Transport and Mr. Solovyev's alleged status as "local or regional" freight forwarders. Exceptions at 3, 19-23, 32-33. But, as already noted, a "local or regional" freight forwarder does not fall within the scope of § 41102(c) unless it meets the definition of OTI in the Shipping Act. Moreover, Crocus cites no support for its argument that because Marine Transport and AEC (the forwarding agent on the bill of lading) had "overlapping responsibility" for the transport of the Monterey and Chaparral, Marine Transport somehow falls within the statutory definition of freight forwarder.

To the extent Crocus is indirectly challenging the ALJ's findings about the reasonableness of Respondents' taking custody of the Monterey and Chaparral and moving them to the World Express facility, that challenge is without merit. Even if Marine Transport was acting as a regulated entity in that regard, and assuming the conduct amounted to a regulation or practice under § 41102(c), as the ALJ noted, as consignee, Marine Transport accepted delivery of the Monterey and Chaparral when APL delivered them to New Jersey. I.D. at 24. If Marine Transport had not taken custody of the boats within the VOCC's specified time limits, it was potentially liable for demurrage charges. *Id.* (citing *Capitol Transportation, Inc. v. United States*, 612 F.3d 1312, 1319-21 (1st Cir. 1979). Demurrage charges would have far exceeded the $615.70 that Marine Transport paid to secure the release of the container holding Crocus's boats. I.D. at 24. Thus, Marine Transport acted reasonably in taking custody of the boats and moving them to World Express warehouse.

As for the alleged overcharge for storage and other fees, Crocus argues that "the sums set forth in the RFG invoices for the services provided by Solovyev were in excess of the amounts

that [Marine Transport] could lawfully charge for such services in its published tariff, as no such evidence exists on the record to the contrary." Exceptions at 3, 22-23, 32. Assuming that this claim is properly brought under § 41102(c), as opposed to other sections of the Shipping Act, it fails for the same reasons as other claims related to the Monterey and Chaparral: Crocus has not met its burden of showing that, once the boats returned from Dubai, Marine Transport was acting as a regulated entity as opposed to acting as a consignee or in some other capacity.

Moreover, as to storage charges in particular, the ALJ pointed out that the tariff rate was the wrong basis for assessing an alleged overcharge, because the tariff only applied to boats received for U.S. export shipment, and the Monterey and Chaparral were not so received. I.D. at 26. Crocus does not appear to challenge this holding on appeal, and it thus has not met its burden of showing an overcharge based on an applicable tariff.

For these reasons, we affirm the ALJ's dismissal of Crocus's § 41102(c) claim related to the receipt and storage of the Monterey and Chaparral.

c. Arranging for transporting the Monterey and Chaparral to Florida

The ALJ dismissed the § 41102(c) claim based on Crocus's July 2014 inquiry about transporting all three boats from New Jersey to Florida for lack of jurisdiction. The ALJ found that any international transportation from Dubai to the United States ended when the Monterey and Chaparral were delivered to Marine Transport in New Jersey. *Id.* at 25. The ALJ pointed out that the contemplated further transportation between New Jersey and Florida was purely domestic and reasoned it was outside the Commission's jurisdiction. *Id.* at 25-26. As support, the ALJ noted that common carriers (of which an NVOCC is a type) for purposes of the Shipping Act must deal with transportation between the United States and a foreign country. *Id*. at 24-25 (citing 46 U.S.C. § 4102(6)).

Crocus does not challenge the ALJ's well-supported findings, and we affirm the dismissal of this claim for the reasons stated by the ALJ.

2. Formula Boat

With respect to the Formula boat, Crocus's claims relate to arrangements regarding: (1) the Formula prior to intended Florida transportation in February 2014; and (2) transporting the boat to Florida. With a limited exception with respect to (1), we affirm the ALJ's dismissal of Crocus's § 41102(c) claims regarding the Formula.

a. Arrangements regarding the Formula prior to February 2014

Crocus alleged that Marine Transport violated § 41102(c) by mishandling its responsibilities and overcharging it for arrangements related to the Formula. *See* Exceptions at 1-2, 6-10. The Formula was stored in a New Jersey warehouse from August 2013 through at least July 2014. I.D. at 17-18. The ALJ dismissed this claim because "[t]he evidence establishes that the third boat never left the United States; therefore, the third boat never entered into international commerce, the Shipping Act does not apply, and the Commission does not have jurisdiction to resolve disputes regarding its handling." *Id.* at 1-2. The ALJ further found that the parties "never entered into an agreement to transport the Formula by water from the United

States to a foreign port." *Id.* at 26. The ALJ did not otherwise address the merits of Crocus's claims about the Formula. *See id.*

The parties' arguments before the ALJ, and on appeal, focused on whether there was an express or implied contract to transport the Formula overseas. In particular, in its exceptions, Crocus argues that there was an implied contract, and Respondents dispute that assertion. Exceptions at 2, 7-13; Reply at 3-12. The parties thus assume (and the I.D. could be read to hold) that the existence of a contract is critical to § 41102(c) liability.

The relevant inquiry here is not, however, limited to whether there was a contract for overseas shipment. Nor was the ALJ's focus on whether the Formula left the United States or had an agreement for overseas shipment clearly linked to the Shipping Act or precedent, and it unduly narrows the scope of the inquiry to two factors. The approach supported by the text of § 41102(c) and Commission caselaw asks: was the respondent acting as a regulated entity with respect to the conduct at issue? *See supra* at 13-14.

The inquiry here should have been: was Marine Transport acting as an OTI with respect to the Formula boat from August 2013 (when it was purchased) to February 2014 (when Crocus began to inquire about domestic transportation of the boat). This fact-intensive analysis takes into account the statutory definition of OTI (and in particular, NVOCC), and evidence about the parties' conduct during that time frame. *See, e.g.*, *Worldwide Relocations—Possible Violations of the Shipping Act*, 32 S.R.R. 495, 503, 2012 FMC LEXIS 23, *23-27 (FMC 2012); *Tienshan*, 31 S.R.R. at 1842-43, 2011 FMC LEXIS at *39-42.

Whether the Formula was actually transported to a foreign port or the subject of a contract to do so are highly relevant to this analysis, but not necessarily determinative. For instance, the Commission has determined that a broad swath of conduct falls within the scope of NVOCC activities. *See* 46 C.F.R. § 515.2(k). This determination is made more difficult where, as here, the parties seem to operate without much documentation and/or respect for corporate or other formalities.

Because the ALJ did not clearly apply this analytical approach, the Commission vacates the ALJ's dismissal of the § 41102(c) claim regarding the Formula boat with respect to the time period from August 2013 to February 14, 2014, and remands so that the ALJ can determine whether Marine Transport was acting as an OTI or otherwise address the elements of § 41102(c).

b. Arrangements for transporting the Formula to Florida

Additionally, the ALJ noted that in February 2014, Crocus instructed Respondents to make arrangements for shipping the Formula to Florida. I.D. at 17-18, 26. The ALJ found that any agreement to transport the Formula from New Jersey to Florida was not an agreement to provide transportation between the United States and a foreign country, and that any controversy about that transportation was outside the Commission's jurisdiction. *Id.* at 26.

Crocus's exceptions refer to the requested shipment to Florida but do not take issue with the ALJ's finding. *See* Exceptions at 5.[6] That finding is well-supported. By February 14, 2014, Mr. Safonov had admittedly lost faith in his Dubai employee, and instructed Mr. Solovyev to arrange transportation of the Formula to Florida. I.D. at 17-18. And in July 2014, Crocus instructed Solovyev to send all three boats to Florida. *Id.* at 18. Consequently, any dealings between Crocus and Marine Transport regarding the Formula boat after February 14, 2014, do not involve transportation between the United States and a foreign country, and Marine Transport could not have been acting as an OTI so as to trigger liability under § 41102(c). 46 U.S.C. § 40102.

Accordingly, the Commission affirms the ALJ's dismissal of Crocus's § 41102(c) claim regarding the Formula boat as it relates to any conduct that occurred after February 14, 2014.

A. Crocus's Second Petition to Reopen the Proceedings

1. Standard for Reopening the Proceedings

The Commission has "clear authority" and broad discretion under Commission Rule 230 "to reopen a proceeding for the purpose of taking additional evidence." *Anderson Int'l Transp.--Possible Violations of Sections 8(a) & 19 of the Shipping Act of 1984*, 31 S.R.R. 1091, 1093, 2009 FMC LEXIS 33, *7 (FMC 2009); 46 C.F.R. § 502.230(d). Commission precedent favors making decisions on the "most complete record available." *Anderson*, 31 S.R.R. at 1093, 2009 FMC LEXIS at *7 (citation omitted). This preference is grounded in the Commission's responsibility to "inquire into and consider all relevant facts." *See Michigan Consolidated Gas Co. v. Fed. Power Comm'n*, 283 F.2d 204, 226 (D.C. Cir. 1960).

The moving party must explain "the grounds [that] require[d] reopening the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing." 46 C.F.R. § 502.230(a). Submitting evidence previously available to the moving party is not grounds for reopening the proceedings. *See Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd*., 29 S.R.R. 119, 159-60, 2001 FMC LEXIS 39, *125 (FMC 2001). If complainants knew about the evidence before the record closed and have not shown any material changes of fact or law after the record closed, their petition to reopen the proceeding "must fail." *Id.*

2. Crocus has not established a basis for reopening the record.

Crocus seeks to reopen the record so it can offer additional evidence allegedly showing: (1) that it had a contract to ship the Formula overseas and, (2) that Mr. Solovyev was acting as an unlicensed OFF in arranging to ship the Monterey and Chaparral from the U.S. to Dubai. Complainants' Second Pet. to Reopen the Proceedings (Pet.) at 1-2, Sept. 27, 2017. Crocus claims that this additional evidence also shows that Respondents are not credible, altered or falsified evidence and withheld relevant documents. *Id.*

[6]Although Crocus asserts that the ALJ "penalize[d]" Crocus for eventually concluding that its business associate was a "crook" and deciding to send the Formula to Florida, Exceptions at 12, Crocus does not argue that the Commission has jurisdiction over domestic shipping arrangements.

The new evidence proffered includes bank statements and cancelled checks from Royal Finance's account with Citibank and records from the New York Department of Motor Vehicles (NYDMV). *Id.* at 2. Crocus claims that it first obtained these documents in July 2017. *Id.* The bank records allegedly came into Crocus's possession through a subpoena served on Citibank in the *World Express* federal court case, and the NYDMV records were produced under a Freedom of Information law request to New York State seeking records on Car Express. *Id*. Car Express is owned by Mr. Solovyev but it is not named as a party to this action.

Respondents dispute Crocus's allegations about what the new evidence will allegedly show and specifically deny as "completely false" the allegations that they altered evidence, withheld relevant documents, or have misrepresented material facts. Respondents' Reply to Complainants' Second Pet. to Reopen Proceedings (Pet. Reply) at 7-8, Oct. 10, 2017. Respondents also explain that Crocus is misreading notations on cancelled checks and relying on that misinterpretation to erroneously link checks to the wrong transaction. *Id.* at 10-14. Finally, Respondents explain that the NYDMV records proffered relate to claims that are not in this case. *Id.*

Crocus fails to point any intervening change in the law or material facts that warrant reopening the proceedings. Rule 230 requires the petitioning party to explain "the grounds requiring reopening of the proceeding, including material changes of fact or law alleged to have occurred since the conclusion of the hearing." *Rose Int'l,* 29 S.R.R. at 159-60, 2001 FMC LEXIS at *125. *Compare Anderson,* 31 S.R.R. at 1093 (granting Rule 230 petition proffering "directly relevant and material" evidence that "addresses a key finding which the ALJ was otherwise unable to make given the evidence then available").

Even if the Commission looks beyond that critical omission, there is no valid basis for allowing additional evidence as to § 40901(a). Crocus asserts that Royal Finance bank records show that Royal Finance acted as an unlicensed OFF in billing or processing payments for the U.S. to Dubai shipment. But, as explained above, the weight of evidence establishes that Mr. Solovyev openly acted as Marine Transport's agent, and Crocus acknowledges that he acted in that capacity in arranging the U.S. to Dubai transportation for the Monterey and Chaparral. Because Mr. Solovyev, even if acting via Royal Finance, acted as Marine Transport's agent and did not perform services outside the purview of an NVOCC, he did not need a license from the Commission. Crocus's proffered evidence is not material to the § 40901(a) claim.

The Commission also need not reopen the record to allow evidence purportedly showing Crocus had a contract to ship the Formula overseas. Pet., 1-2. Because the Commission is vacating and remanding the § 41102(c) claim regarding the Formula with respect to August 2013-February 2014, the Commission denies the petition to reopen in this regard as moot. The ALJ may consider the propriety of considering this evidence on remand.

Finally, there is no reason to join BOE as a party to this case. It can monitor the proceedings and intervene of its own accord if it decides that doing so is appropriate. And the request to remand the entire case for consideration of new evidence is now moot.

III. CONCLUSION

The Commission hereby:

(1) vacates the ALJ's dismissal of Crocus's 46 U.S.C. § 41102(c) claim with respect to storage or other arrangements for the Formula from August 2013 to February 14, 2014 and remands that claim to the ALJ for further consideration consistent with the Final Rule issued by the Commission on December 12, 2018;

(2) affirms the Initial Decision in all other respects and dismisses all other claims against Respondents with prejudice; and

(3) denies Crocus's petition to reopen the proceedings and all relief requested in that petition.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

LOGFRET, INC., *Complainant*

v.

KIRSHA, B.V., LEENDERT JOHANNESS BERGWERFF A/K/A HANS BERGWERFF, AND LINDA SIEVAL, *Respondents*.

DOCKET NO. 18-10

Served: September 17, 2019

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION GRANTING MOTION TO DISMISS[1]

[Notice not to Review served 10/21/19, decision administratively final.]

I. Introduction

A. Summary

Complainant Logfret, Inc. ("Logfret") is a non-vessel-operating common carrier ("NVOCC") that provides transport, logistics, and related shipping services to customers in the United States and worldwide. Complainant Logfret is an affiliate of Logfret B.V.,[2] a common carrier based in The Netherlands.

Respondents are two individuals and a corporation. According to the amended complaint, Mr. Bergwerff, a Dutch national, was Managing Director of Logfret B.V., and Ms. Sieval, a Dutch national, was a sales manager for Logfret B.V. Amended complaint at 2. Thus, both individual Respondents were employees of Logfret B.V., Complainant's affiliate in The Netherlands. The corporate Respondent, Kirsha B.V.,[3] is a corporation in The Netherlands

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227(c). An appeal by a party must be filed with the Commission's Office of the Secretary within twenty-two days from the date of service of the decision. 46 C.F.R. § 502.227(b)(1).

[2] The filings identify Logfret B.V. both with and without a comma. For consistency, no comma is used.

[3] The filings identify Kirsha B.V. both with and without a comma. For consistency, no comma is used.

whose owner and managing director is Mr. Bergwerff, one of the individual Respondents. Amended complaint at 2-3.

Respondents assert that this is "an internal disagreement among Logfret entities, employees and former management of Logret, B.V.," the Logret affiliate in The Netherlands. Respondents' opposition to the motion to amend complaint and statement of impact of proposed amendment ("Impact Statement") at 4. Indeed, the amended complaint alleges that Respondents "committed numerous unethical and illegal activities with respect to the management and governance of Logfret B.V., including but not limited to improper leasing and refurbishment of new offices, improper accession to a new management agreement, and misappropriation of Logfret B.V. assets." Amended complaint at 4.

The amended complaint also asserts violations of the Shipping Act of 1984 ("Shipping Act."). The amended complaint states that "Mr. Bergwerff, with the help of Ms. Sieval, directed the staff of Logfret B.V. to handle inbound shipments to the United States through Delmar USA rather than Logfret, for at least two accounts" and that for "months thereafter, Mr. Bergwerff and Ms. Sieval knowingly received information about the nature, kind, quantity, and destination of cargo tendered or delivered to Logfret B.V. with the intent to be shipped to the United States on Logfret bills of lading." Amended complaint at 5-6. Rather than using a related Logfret company, Respondents allegedly used non-party Delmar USA for some shipments to the United States to the detriment of Complainant Logfret.

For the reasons set forth below, Respondents' motion to dismiss is **GRANTED**.

B. Procedural History

This proceeding began with a complaint filed on November 14, 2018. The time to respond to the complaint was extended to January 2019. On January 28, 2019, Respondents Kirsha B.V., Leendert Johanness Bergwerff a/k/a Hans Bergwerff, and Linda Sieval filed a motion to dismiss the complaint and memorandum in support of the motion ("Motion").

On February 7, 2019, Complainant Logfret filed a motion to amend the complaint. In response to an order, on February 21, 2019, Complainant filed a memorandum in support of the motion to amend the complaint and attached the proposed amended complaint. On March 7, 2019, Respondents filed an opposition to the motion to amend the complaint and statement of impact of the proposed amendment on their motion to dismiss. On April 24, 2019, an order was issued granting the motion to amend the complaint and allowing the parties additional time to brief the motion to dismiss as applied to the amended complaint.

On May 8, 2019, Complainant filed a memorandum in opposition to Respondents' motion to dismiss ("Opposition"). On May 20, 2019, Respondents filed a reply to Complainant's opposition to the motion to dismiss ("Reply"). The issue is now ripe for decision.

II. Arguments of the Parties

Respondents contend that the proceeding should be dismissed for lack of subject matter jurisdiction and lack of personal jurisdiction over Respondents, asserting that it "can be ascertained from the pleadings that the natural person Respondents, during the pertinent time

period, were acting as managers, and employees of Logfret B.V., a company affiliated with Complainant;" that none of the Respondents were "acting as common carriers, marine terminal operators, and/or ocean freight forwarders;" and that the pleadings fail to allege facts that state a claim for relief that is plausible on their face. Motion at 1-2.

Complainant asserts that the motion to dismiss should be denied, the amended complaint describes a clear violation of the Shipping Act, and the Commission has jurisdiction over Respondents. Opposition at 4.

III. Analysis

A. Motion to Dismiss Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions to dismiss, Rule 12 of the Commission's Rules states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules 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.*, 33 S.R.R. 614, 620 (FMC 2014) (citing *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011)).

Federal Rule of Civil Procedure 12(b) permits a party to raise, by motion, lack of subject matter jurisdiction (12(b)(1)), lack of personal jurisdiction (12(b)(2)), and failure to state a claim (12(b)(6)). F.R.C.P. 12; *see also Mitsui O.S.K. Lines Ltd.*, 32 S.R.R. at 136. "Proper jurisdiction for a federal court is fundamental and necessary before touching the substantive claims of a lawsuit." *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012). The "party asserting subject-matter jurisdiction, has the burden of proving its existence by a preponderance of the evidence." *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc.*, 697 F.3d 59, 65 (2d Cir. 2012).

Pursuant to Federal Rule 10(c), exhibits attached to a complaint are considered part of the complaint for all purposes. F.R.C.P. 10(c). When deciding a facial jurisdictional attack, courts "accept the well-pleaded factual allegations in the complaint as true." Courts, however, "are not required to accept mere conclusory allegations as true, nor are we required to accept as true allegations in the complaint that are contrary to factual details presented in the exhibits. Rather, 'when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern.'" *Lawrence v. United States*, 597 F. App'x 599, 602 (11th Cir. 2015).

At this stage, "Rule 12(b)(6) does not require 'the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.'" *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 34 S.R.R. 35, 58 (FMC 2015) (quoting *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120-21 (2d Cir. 2010)). Instead, the "complaint's factual allegations 'must be enough to raise a right to relief above the speculative level' and must 'nudge claims across the line from conceivable to plausible.'" *Maher*, 34 S.R.R. at 57-58 (quoting *Cornell*, 33 S.R.R. at 620). However, "[m]ere labels and conclusions or a 'formulaic recitation of the

elements of a cause of action' will not suffice, nor will 'naked assertions devoid of further factual enhancement.'" *Maher*, 34 S.R.R. at 58. The Commission explained:

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 663] (2009).

Mitsui O.S.K. Lines Ltd., 32 S.R.R. at 136.

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 678. The Commission explained:

> 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, 33 S.R.R. at 620-621 (citations omitted).

B. Special Appearance

Complainant asserts that the notices of special appearance by Respondents' counsel in this proceeding discuss motions to dismiss for personal and subject matter jurisdiction but not for failure to state a claim and that the motion to dismiss mentions Federal Rules 12(b)(1), 12(b)(2), and 8 but not 12(b)(6). Opposition at 15.

Commission Rule 21(c) permits special appearances. 46 C.F.R. § 502.21(c). The appearance by counsel for Respondents states: "Respondents dispute the Federal Maritime Commission's . . . personal jurisdiction over Respondents, and the Commission's subject-matter jurisdiction over the matters pleaded in subject complaint" and that "Respondents have authorized undersigned counsel to make a special appearance on behalf of Respondents solely to address jurisdiction questions or issues pursuant to the Federal Rules of Civil Procedure 12(b)(1) and (2)." Respondents' notice of special appearance at 1.

While the motion to dismiss refers only to personal and subject matter jurisdiction, the attached memorandum in support of the motion to dismiss discusses failure to state a claim under *Iqbal* and *Twombly*. Motion at 2, 9-11. In addition, the Complainant was allowed to amend the complaint after the special appearance and motion were filed, which may have altered the analysis. However, Complainant had sufficient notice of Respondents' arguments. In addition,

judicial efficiency is enhanced when both challenges to jurisdiction and failure to state a claim are raised concurrently. Complainant's request to find the Rule 12(b)(6) arguments improper and not consider them is hereby **DENIED**.

C. Facts

For purposes of evaluating the motion to dismiss, the facts presented by Logfret are presumed to be true. Logfret states in the amended complaint:

> **NAMED PARTIES AND OTHER ENTITIES**
>
> 3. Complainant Logfret is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 6801 Westside Avenue, North Bergen, New Jersey 07047.
>
> 4. Logfret is a non-vessel-operating common carrier ("NVOCC") that provides transport, logistics and related shipping services to customers in the United States and worldwide. Logfret is licensed by the FMC as an NVOCC and freight forwarder, *i.e.* as an Ocean Transportation Intermediary ("OTI"), under license no. 007636, pursuant to 46 C.F.R. Part 520 of the Federal Maritime Commission Regulations.
>
> 5. Logfret is a wholly-owned subsidiary of Logfret Group, a non-US company whose sole non-US parent is Logistique Holding SAS.
>
> 6. Complainant Logfret is an affiliate of Logfret B.V., a company organized under the laws of The Netherlands and headquartered at Ringdijk 366, 2983 GR Ridderkerk, The Netherlands. Logfret B.V. is a Dutch common carrier that is not registered with the FMC and is not intended to or authorized to operate in the foreign commerce of the United States.
>
> 7. Mr. Bergwerff, a Dutch national, was Managing Director of Logfret B.V. from March 28, 2006 until the termination of his employment on May 12, 2017.
>
> 8. The physical address for Mr. Bergwerff is . . . Barendrecht, The Netherlands. . . .
>
> 9. Ms. Sieval, a Dutch national, was a sales manager for Logfret B.V. until the termination of her employment on March 1, 2018.
>
> 10. The physical address for Ms. Sieval is . . . Leiden, The Netherlands. . . .
>
> 11. Kirsha, B.V. is a corporation organized and existing under the laws of The Netherlands, with its principal place of business at Noordersingel 78, 2993 TA Barendrecht, The Netherlands.
>
> 12. The owner and managing director of Kirsha, B.V. is Mr. Bergwerff, who exercises signatory authority and direct control over Kirsha, B.V.

13. Mr. Bergwerff is also Country Manager for BeNeLux at Visa Global Logistics B.V., a Dutch company headquartered at Deventerseweg 6, 2994 LD Barendrecht, The Netherlands.

14. Delmar International Inc. is a Canadian NVOCC and logistics company headquartered at 10636 Chemin de la Côte-de-Liesse, Montreal, QC H8T 1A5, Canada. Delmar International Inc. is not registered with the FMC as a foreign NVOCC.

15. Delmar International (N.Y.) Inc. d/b/a Delmar International (USA) ("Delmar USA") is a U.S. subsidiary of Delmar International Inc. Delmar USA is organized under the laws of the State of New Jersey and is headquartered at One Cross Island Plaza, Suite 227, Rosedale, New Jersey 11422.

16. Delmar USA has offices at, among other places, 1691 Phoenix Boulevard, Suite 300, Atlanta, GA 30349 USA.

17. Delmar USA is licensed by the FMC as an NVOCC and freight forwarder under FMC License No. 004031, pursuant to 46 C.F.R. Part 520 of the Federal Maritime Commission Regulations.

JURISDICTION

18. The FMC has subject matter jurisdiction over this action pursuant to the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.*

19. The FMC has personal jurisdiction over Mr. Bergwerff as a "common carrier" defined at 46 U.S.C. § 40101.

20. The FMC has personal jurisdiction over Ms. Sieval as a "common carrier" defined at 46 U.S.C. § 40101.

21. The FMC has personal jurisdiction over Respondent Kirsha B.V. as a "common carrier" defined at 46 U.S.C. § 40101.

22. The FMC may award payment of reparations for actual injury caused by a violation of the Shipping Act, pursuant to the filing of a sworn complaint alleging same and filed within three (3) years of accrual of the claim. 46 U.S.C. §§ 41301, 41305.

MEMORANDUM OF THE FACTS

23. On or about March 28, 2006, Mr. Bergwerff assumed day-to-day responsibility and control of Logfret B.V. as Managing Director of Logfret B.V.

24. As part of his becoming Managing Director of Logfret B.V., Mr. Bergwerff negotiated that his salary be paid directly to Kirsha B.V.

25. During Mr. Bergwerff's tenure at Logfret B.V., Mr. Bergwerff, Ms. Sieval, and Kirsha B.V. committed numerous unethical and illegal activities with respect to the management and governance of Logfret B.V., including but not limited to improper leasing and refurbishment of new offices, improper accession to a new management agreement, and misappropriation of Logfret B.V. assets. *See* Ex. 1 (February 20, 2019 Declaration of Jean Francois Millet).

26. Among the many illegal acts committed by Respondents were a number of violations of the Shipping Act, as amended, to the irreparable detriment and prejudice of Logfret.

27. On at least one occasion, on January 5, 2017, Mr. Bergwerff and Ms. Sieval used a fictitious entity, "Logfret Cargo Line," to issue a fraudulent bill of lading for a shipment from The Netherlands to the United States. Mr. Bergwerff and Ms. Sieval used as delivery agent for the shipment Deltrans International Shipping Corp., c/o Delmar USA. *See* Ex. 1 and Ex. 2 ("Logfret Cargo Line" bill of lading, dated January 5, 2017).

28. "Logfret Cargo Line" is not an existing entity, and is not licensed or registered with the FMC. *See* Ex. 1.

29. Mr. Bergwerff, Ms. Sieval, and Krisha B.V. fraudulently used Logfret B.V. as a means of handling logistics and administration of the aforementioned shipment, including invoicing and personnel support.

30. In arranging and benefiting from the provision of ocean transportation of cargo from The Netherlands to the United States via the fictitious and unregistered entity "Logfret Cargo Line," Mr. Bergwerff, Ms. Sieval, and Kirsha B.V. acted as *de facto* "common carriers" within the definition at 46 U.S.C. § 40101 and "non-vessel-operating common carriers" within the definition at 46 U.S.C. § 40101.

31. On or about February 4, 2017 to February 6, 2017, Mr. Bergwerff and Ms. Sieval traveled to Montreal, Canada, to meet with executives at Delmar International Inc. to discuss the ongoing business relationship between Logfret B.V., Delmar International Inc. and the branch offices of its subsidiary, Delmar USA. In particular, Mr. Bergwerff and Ms. Sieval discussed a plan with Delmar International Inc. whereby Mr. Bergwerff and Ms. Sieval would use the infrastructure, employees, and resources of Logfret B.V., in coordination with Delmar USA branch offices, to issue Delmar USA bills of lading for inbound shipments to the United States. *See* Ex. 3 (Montreal plane fare receipt and Montreal hotel receipt for Mr. Bergwerff and Ms. Sieval).

32. On or about February 28, 2017, Mr. Bergwerff, with the help of Ms. Sieval, directed the staff of Logfret B.V. to handle inbound shipments to the United States through Delmar USA rather than Logfret, for at least two accounts. *See, e.g.*, Ex. 4 (Meeting Notes for February 28, 2017 sales meeting – Dutch original) (highlights

added for emphasis); Ex. 5 (Meeting Notes for February 28, 2017 sales meeting – English translation) (highlights added for emphasis).

33. For months thereafter, Mr. Bergwerff and Ms. Sieval knowingly received information about the nature, kind, quantity, and destination of cargo tendered or delivered to Logfret B.V. with the intent to be shipped to the United States on Logfret bills of lading.

34. Mr. Bergwerff and Ms. Sieval used this information to unlawfully route inbound shipments away from Logfret toward Delmar USA, a competing common carrier and NVOCC. As part of these unlawful activities, Mr. Bergwerff and Ms. Sieval unlawfully and improperly disclosed the same information regarding these inbound shipments to Delmar USA.

35. On April 14, 2017, Mr. Marc Millet, Président du directoire of Logistique Holding SAS, issued a letter to Logfret B.V. (Attn: Hans Bergwerff) and Kirsha B.V. (Attn: Hans Bergwerff), which among other things, set forth an understanding that Mr. Bergwerff had directed employees of Logfret B.V. to enter into transportation arrangements with competitors of the Logfret Group's companies and affiliates. *See* Ex. 6 (April 14, 2017 Letter from Logistique Holding SAS to Logfret B.V. and Kirsha B.V. (Attn: Hans Bergwerff)).

36. On April 24, 2017, the Atlanta Branch Manager for Logfret sent an email to the Chief Financial Officer (CFO) of Logfret, confirming that Mr. Bergwerff and Ms. Sieval had completely stopped sending a high-volume account to Logfret, along with "all other NL [Netherlands] business." *See* Ex. 7 (April 24, 2017 email from K. Memmler to K. Mistri).

37. On or about April 25, 2017, the Atlanta Branch Manager for Logfret sent a follow-up email to the CFO of Logfret, confirming that Mr. Bergwerff and Ms. Sieval had moved another inbound shipment to the United States via Delmar USA. *See* Ex. 8 (April 25, 2017 email from K. Memmler to K. Mistri).

38. During the course of their improper activities, Mr. Bergwerff, Ms. Sieval, and Kirsha B.V. continued to make improper and fraudulent use of a "Logfret Cargo Lines" bill of lading to provide transportation of cargo from The Netherlands to the United States.

39. Respondents' unlawful activities continued until at least May 12, 2017, when Mr. Bergwerff was dismissed by the Logfret Group general meeting as Managing Director of Logfret B.V. *See* Ex. 1.

40. As a direct consequence of the unlawful conduct in which Respondents engaged, Logfret has been harmed and prejudiced in a number of ways, including suffering the loss of past and current revenue as well as loss of reputation, all of which has caused Logfret significant damages of at least $2,000,000.

Amended complaint at 1-7.

D. Discussion

1. Jurisdiction Over the Respondents

a. Argument of the Parties

Respondents argue that they are not alleged to be common carriers, marine terminal operators, or ocean freight forwarders and that therefore, there is no jurisdiction. Motion at 12-15. In their opposition to the motion to amend the complaint, Respondents contend that the amended allegations that Respondents are common carriers are legal conclusions and that Complainant fails to state a plausible claim. Respondents' impact statement at 2. In their reply, Respondents claim that Complainant's assertion of jurisdiction as "other persons" acting in conjunction with a common carrier is not supported by applicable law, and that conclusory allegations that Respondents acted as common carriers are not plausible. Reply at 1-3.

Complainant contends that the Commission has personal jurisdiction over the Respondents because Kirsha B.V. was holding out and assuming responsibility for the transportation at issue and therefore acted as an NVOCC; and Delmar USA participated in the violation with Kirsha B.V., Mr. Bergwerff, and Ms. Sieval. Opposition at 6-8. Complainant further asserts that non-party Delmar USA participated in the violation of section 41103(a) in conjunction with other persons indirectly and the other persons were the Respondents. Opposition at 8-10.

b. Relevant Law

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). To be an NVOCC, the entity must meet the Shipping Act's definition of "common carrier."

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term
>
> (1) *Ocean freight forwarder (OFF)* means a person that –
>
> (i) In the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and
>
> (ii) Processes the documentation or performs related activities incident to those shipments; and
>
> (2) *Non-vessel-operating common carrier (NVOCC)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(m).

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Commission promulgated regulations providing examples of NVOCC services performed by OTIs.

> *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
>
> (1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;
>
> (2) Payment of port-to-port or multimodal transportation charges;
>
> (3) Entering into affreightment agreements with underlying shippers;
>
> (4) Issuing bills of lading or other shipping documents;

(5) Assisting with clearing shipments in accordance with U.S. government regulations;

(6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;

(7) Paying lawful compensation to ocean freight forwarders;

(8) Coordinating the movement of shipments between origin or destination and vessel;

(9) Leasing containers;

(10) Entering into arrangements with origin or destination agents;

(11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

The amended complaint alleges that Respondents violated section 41103(a) of the Shipping Act, which states:

> A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information – (1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or (2) may improperly disclose its business transaction to a competitor.

46 U.S.C. § 41103(a). As the Commission explained:

> In order to establish a violation of section 10(b)(13), the following elements must be shown: (1) disclosure of information concerning the nature, kind, quantity, destination, consignee or routing of property tendered or delivered to a common carrier; (2) that such disclosure was knowingly made by a common carrier or ocean freight forwarder, either alone or in conjunction with any other person; and (3) that the information disclosed is of the type that could be used to the detriment or prejudice of the shipper, consignee, or any common carrier, or could improperly disclose its business transaction to a competitor. In order to receive reparations for a violation of section 10(b)(13), a complainant must show that disclosure of information caused actual injury.

DNB Exports LLC. v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S., 33 S.R.R. 670, 679 (FMC 2014) (footnote omitted).

The amended complaint also alleges a violation of section 41104.

> (a) In General. – A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – (1) allow a person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or any other unjust or unfair device or means;

46 U.S.C. § 41104(a)(1).

c. Analysis

i. Whether Respondents are Common Carriers

Complainant alleges that Respondents "issued one or more fraudulent bills of lading under Complainant's name, without authorization, for inbound shipments to the United States. Cargo rates and charges for these shipments relied on figures negotiated between Complainant and the underlying carrier, meant solely for Complainant's use" and that "in arranging and benefiting from the provision of the ocean transportation," Respondents "acted as *de facto* 'common carriers' within the definition at 26 U.S.C. § 40101 and 'non-vessel-operating common carriers' within the meaning of 46 U.S.C. § 40101, by 'holding themselves out' to the public as NVOCCs and also 'assuming responsibility for the transportation of goods' in their capacity as unlicensed NVOCCs." Opposition at 13-14. Although not entirely clear, it seems that Complainant equates "de facto" with "unlicensed." Complainant further asserts that the Respondents, "acting completely independently, and outside of their authorized capacity as employees of Logfret B.V., did act as common carriers." Opposition at 14.

Respondents assert that they disagree with the legal standards proposed by Complainant; there are not sufficient averments that Respondents acted as common carriers; conclusory allegations are not sufficient; and it is not plausible to conclude that there is personal or subject matter jurisdiction. Reply at 1-13.

The Commission has personal and subject matter jurisdiction over the violations alleged by Complainant if Respondents are common carriers, marine terminal operators, or ocean freight forwarders. 46 U.S.C. § 41103(a) ("A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not . . . ."); 46 U.S.C. § 41104 ("A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . ."). *See Auction Block Co. v. FMC*, 606 Fed. Appx. 347, 347 n.1 (9th Cir. 2015). The motion to dismiss was filed prior to the amended complaint, which alleges that the "FMC has subject matter jurisdiction over this action" and that the "FMC has personal jurisdiction over" each Respondent as a "common carrier." Amended complaint at 3-4.

The amended complaint clearly indicates that all three Respondents are located in The Netherlands and that the acts alleged to be Shipping Act violations all occurred in The Netherlands for shipments that were going from The Netherlands to the United States. Because the shipments were entering the United States, Respondents could not be ocean freight forwarders, as OFFs, by definition, handle shipments leaving the United States. Similarly,

Respondents are clearly not marine terminal operators in the United States. There are no allegations in the amended complaint that Respondents are marine terminal operators or ocean freight forwarders. In addition, there are no allegations that Respondents operated vessels, rather, they are alleged to be NVOCCs.

To conclude that an entity operated as an NVOCC, the entity must meet the Shipping Act's definition of common carrier; that is, it must hold itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation, assume responsibility for the transportation from the port or point of receipt to the port or point of destination, and use for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(7).

The Commission has long relied on these three factors – holding itself out, assuming responsibility, and transportation by water – to identify a common carrier:

> As a "common carrier" is defined in the Shipping Act, an NVOCC "holds out" to the "general public to provide transportation by water" and "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. §1702(6). The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. [*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC 1999); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC 1965) ("*Containerships*")]. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.*

Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., 29 S.R.R. 119, 162 (FMC 2001).

In addressing whether agents of OTIs, who are not themselves OTIs, need be licensed, the D.C. Circuit focused on which entity was holding out and assuming responsibility, stating that an "agent acting on behalf of a disclosed NVOCC principal does not hold *itself* out to the general public to provide transportation because it holds out only *in the name of the NVOCC*, subject to that NVOCC's control" and that an "agent of a disclosed principal also does not ordinarily assume responsibility for the transportation of the cargo as the principal bears the burdens of liability." *Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 497 (D.C. Cir. 2009) (emphasis in original). Each of these three factors will be discussed in turn.

(a) Holding Itself Out

The first factor is whether the entity "holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." 46 U.S.C. § 40102(7)(A)(i). The Commission explained:

> The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates.

Rose Int'l, Inc., 29 S.R.R. at 162 (citation omitted).

"The absence of solicitation does not determine that a carrier is not a common carrier." *Transp. by Mendez & Co., Inc.*, 2 U.S.M.C. 717, 720 (1944). Holding out can also be demonstrated by a course of conduct. *Containerships*, 9 F.M.C. at 62. It is sufficient if an entity "held out, by a course of conduct, that they would accept goods from whomever offered to the extent of their ability to carry." *Transp. by Southeastern Terminal & S.S. Co.*, 2 U.S.M.C. 795, 796-797 (1946). Moreover, "the common carrier status depends on the nature of what the carrier undertakes or holds itself out to undertake to the general public rather than on the nature of the arrangements which it may make for the performance of its undertaken duty." *Bernhard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 778 (1952).

> Addressing the element of holding out to provide transportation by water between the United States and a foreign country for compensation, the Commission stated in *Worldwide Relocations (FMC 2012)* that an entity may hold out to the public "'by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise.'" *Worldwide Relocations [– Possible Violations of Shipping Act*, 32 S.R.R. 495, 503 (FMC 2012) (citing *Common Carriers by Water – Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 1 S.R.R. 292 (FMC 1961))]. The Commission noted that it "has previously found that advertising and solicitations to the public are important factors in determining the issue of 'holding out' by an entity." *Id*.

EuroUSA Shipping, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations, 32 S.R.R. 1906, 1913 (FMC 2013).

In this case, Complainant does not make a plausible allegation that Respondents held out in their names. Rather, the amended complaint alleges that Respondents:

- "used a fictitious entity, 'Logfret Cargo Line,' to issue a fraudulent bill of lading for a shipment," amended complaint at 4;

- "fraudulently used Logfret B.V. as a means of handling logistics and administration of the aforementioned shipment, including invoicing and personnel support," amended complaint at 5;

- met with Delmar executives "to discuss the ongoing business relationship between Logfret B.V., Delmar International Inc. and the branch offices of its subsidiary, Delmar USA," amended complaint at 5;

- discussed a plan with Delmar to "use the infrastructure, employees, and resources of Logfret B.V., in coordination with Delmar USA branch offices, to issue Delmar USA bills of lading for inbound shipments to the United States," amended complaint at 5;

- "directed the staff of Logfret B.V. to handle inbound shipments to the United States through Delmar USA rather than Logfret, for at least two accounts," amended complaint at 5;

- "received information about the nature, kind, quantity, and destination of cargo tendered or delivered to Logfret, B.V. with the intent to be shipped to the United States on Logfret bills of lading," amended complaint at 6; and

- the President of Logistique Holding SAS "issued a letter to Logfret B.V. (Attn: Hans Bergwerff) and Kirsha B.V. (Attn: Hans Bergwerff), which among other things, set forth an understanding that Mr. Bergwerff had directed employees of Logfret B.V. to enter into transportation arrangements with competitors of the Logfret Group's companies and affiliates," amended complaint at 6.

Complainant further asserts that Respondents "continued to make improper and fraudulent use of a 'Logfret Cargo Lines' bill of lading to provide transportation of cargo from The Netherlands to the United States." Amended complaint at 7. The Logfret Cargo bill of lading attached to the amended complaint as exhibit 2 states "Logfret Cargo Lines" at top, lists "Logfret" as the carrier, and lists an address in France ("Z.I. du Coudray – 2 rue Copernic- 93605 AULNAY-SOUS-BOIS cedex- France") under the name "Logfret." Amended complaint, exhibit 2. In exhibit 6 of the amended complaint, a letter from Logistique Holding, Complainant's parent corporation, is listed as a nearly identical address ("Z.I. du Condrey – 2 nte Nicolas Copernic 93605 AULNAY SOUS BOIS CEDEX"). Amended complaint, exhibit 6. Additionally, the bill of lading attached to the amended complaint was issued by "Andre Conrads" who is identified in exhibit 8 as a Logfret "Coördinator Ocean Freight" with an email address that includes the word "logfret." Amended complaint, exhibit 8. The bill of lading attached to the amended complaint does not include the names Mr. Bergwerff, Ms. Sieval, or Kirsha B.V. Amended complaint, exhibit 2. Thus, the exhibits attached to the amended complaint also do not support Complainant's contention that Respondents held out as required by the Shipping Act.

Complainant further explained that it "is Complainant's understanding that Kirsha B.V. *did* in fact function as an NVOCC—in practice, *if not necessarily in name*—and operated in the U.S. trades." Opposition at 7 (first emphasis in original, second emphasis added). At no point does Complainant allege that Respondents held out in their personal names or in the name of Kirsha B.V. The allegations that Respondents acted "independently" or not within their scope of employment are legal conclusions not supported by the factual allegations. While the allegations plausibly allege that Respondents held Logfret B.V. out, Logfret B.V. is not a respondent in this proceeding.

Complainant's opposition brief lists activities which the Commission has found as evidence that an entity is holding itself out to the public as an NVOCC, such as maintaining an internet website, paying third parties for business leads, etc. There are no allegations in the amended complaint, however, that Respondents engaged in these activities. Instead, the amended complaint alleges that Respondents held out in the name "Logfret Cargo Lines" which does not plausibly suggest that Respondents held out in their own names.

The amended complaint alleges that Logfret B.V. was a licensed NVOCC which issued bills of lading under the name of "Logfret Cargo Lines," utilizing rates negotiated by Logfret, Inc., which were handled by Logfret B.V. employees. Amended complaint at 7-9. Accepting the factual allegations of the amended complaint as true, while Logfret B.V. may have acted as an NVOCC, there are no plausible allegations that Mr. Bergwerff, Ms. Sieval, or Kirsha B.V. were NVOCCs. While Complainant may object to Respondents' management practices and commercial decisions, such as the choice of destination agent, these disagreements do not alter the legal analysis. There is no plausible factual allegation that Mr. Bergwerff, Ms. Sieval, or Kirsha B.V. held themselves out as NVOCCs and conclusory allegations to the contrary are not sufficient under *Iqbal* and *Twombly* to defeat the motion to dismiss.

(b) Assumes Responsibility

The second factor is whether the entity "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(7)(A)(ii).

> In *Common Carriers by Water*, [6 F.M.B. 245, 250 (1961)], the Federal Maritime Board noted that an entity may be considered a common carrier even if it attempts to disclaim liability because liability may be imposed by operation of law. 6 F.M.B. at 256. However, "[a]ctual liability as a common carrier over the entire journey including the water portion is essential" to determine NVOCC status. *Id.* Although the Commission has not focused on this aspect of common carrier status, favoring the "holding out" analysis, it remains an essential element of the "common carrier" definition in the Shipping Act. 46 U.S.C. § 40102([7])(A)(ii).

In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transp. Intermediaries, 31 S.R.R. 185, 199 (FMC 2008) (Dye, dissent (favorably cited by reversing court)) (*rev'd Landstar*, 569 F.3d 493).

Issuing bills of lading may demonstrate a course of conduct sufficient to establish assumption of responsibility.

> Barbour's course of conduct of issuing the seventy-four bills of lading to his customers proves that he held out to members of the general public that he provides transportation of cargo by water between the United States and foreign countries for compensation. The Barbour Shipping bills of lading also prove that Barbour assumed responsibility for the transportation of the cargo, and with the Liberty Global bills of lading, prove that the shipments were transported by water between the United States and a foreign port.

Barbour – Possible Violations of Sections 8 and 19, 34 S.R.R. 959, 972 (ALJ 2016).

The amended complaint does not make a plausible allegation that Respondents assumed responsibility. Complainant asserts that Respondents "continued to make improper and fraudulent use of a 'Logfret Cargo Lines' bill of lading to provide transportation of cargo from The Netherlands to the United States." Amended complaint at 7. There are no allegations that bills of lading were issued under the names of Mr. Bergwerff, Ms. Sieval, or Kirsha B.V., or that the Respondents personally profited from the transactions, other than as employees of Logfret B.V. The amended complaint does not allege that Mr. Bergwerff, Ms. Sieval, or Kirsha B.V. assumed responsibility for shipments other than on behalf of Logfret B.V., their employer, which is a licensed NVOCC. There is no plausible allegation that the Respondents assumed responsibility for shipments in their own name.

In the course of arranging transportation, an NVOCC may communicate with a destination agent. *See* 46 C.F.R. § 515.2(k)(10). Complainant Logfret does not appear to object to the sharing of information about shipments when that information was shared with Logfret affiliates. Rather, the issue seems to be *with whom* the information was shared (Delmar USA instead of Logfret) rather than *what* was shared. There is no Shipping Act requirement that a particular destination agent be used. If there is such a requirement between these parties, that requirement is likely in internal Logfret documents or agreements. Such internal agreements, particularly ones which restrain trade, are not required by the Shipping Act. Moreover, the selection of *who* to use as the destination agent is not an action which would be determinative of whether or not an entity was acting as an NVOCC.

(c) International Transportation by Water

As required by the Shipping Act, the shipments at issue involved international transportation by water from The Netherlands to the United States. This element is plausibly alleged and supported by the bill of lading attached to the amended complaint as exhibit 2. However, there is no allegation that Respondents, themselves, provided the international transportation by water of the shipments in question. Amended complaint, exhibit 2.

ii. In Conjunction with Any Other Person

Complainant argues that the Commission's jurisdiction extends to cover "other persons," such as Respondents, who act in conjunction with NVOCCs. Complainant asserts:

> Complainant's allegations recognize that Delmar USA participated in the violation of 46 U.S.C. § 41103(a) "in conjunction with . . . other person[s] . . . indirectly." These other persons were Respondents, Kirsha B.V., Mr. Bergwerff, and Ms. Sieval, who are named parties in this proceeding. The Commission's jurisdiction extends to such persons—a position supported by a plain reading of 46 U.S.C. § 41103(a).

Opposition at 8-9.

Respondents contend that Complainant's assertion that Respondents are subject to the jurisdiction of the Shipping Act in violation of 46 U.S.C. § 41103(a) as "other persons" acting in conjunction with a common carrier is not supported by applicable law. Reply at 1-6.

The amended complaint alleges that Delmar USA was "used as delivery agent" and that Logfret B.V. staff was directed "to handle inbound shipments to the United States through Delmar USA rather than Logfret." Amended complaint at 4-5. Delmar, USA, is listed as the destination agent on the bill of lading attached to the amended complaint. Amended complaint at exhibit 2. While it is alleged that Respondents and Delmar "discussed a plan" for Delmar "to issue Delmar USA bills of lading for inbound shipments to the United States" there is no allegation that such bills of lading were ever issued. *See* amended complaint at 5. Regardless, Delmar USA was not named as a party to this proceeding.

Complainant has not cited to case law that would support such a broad reading of the "other person" language. The alleged violations apply by their explicit language to "a common carrier, marine terminal operator, or ocean freight forwarder . . . ." (46 U.S.C. § 41103(a)) and to "a common carrier . . . ." (46 U.S.C. § 41104). While the Commission has jurisdiction over unlicensed entities, its jurisdiction does not extend under these allegations to entities who are not acting as common carriers, marine terminal operators, or ocean freight forwarders. As discussed above, there are no allegations that Mr. Bergwerff, Ms. Sieval, or Kirsha B.V. held themselves out or assumed responsibility for shipments.

In *DNB Exports*, the Administrative Law Judge found that the Commission did not have jurisdiction over respondent Impexia, a procurement firm, under the theory that Impexia was liable as an "other person" under section 10(b)(13), the former version of section 41103(a), stating:

> Section 10(b)(13) is written to govern the activities of entities regulated by the Commission: Common carriers, marine terminal operators, and ocean freight forwarders. Congress recognized that it is likely these regulated entities would receive information from shippers that the shippers would not want the entity to share. Section 10(b)(13) prohibits common carriers, marine terminal operators, and ocean freight forwarders from disclosing, offering, soliciting, or receiving the information in certain circumstances. The Act governs activities of an entity operating as a common carrier or ocean freight forwarder as defined by the Act whether or not the entity is licensed by the Commission. Section 10(b)(13) does not govern the activities of entities not operating as common carriers, marine terminal operators, or ocean freight forwarders.

DNB Exports LLC v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S., 33 S.R.R. 133, 163 (ALJ 2014) (*rev'd in part,* 33 S.R.R. 670 (FMC 2014)). No exceptions were filed to this finding. *DNB Exports LLC,* 33 S.R.R. at 680 n.6.

There is no legal basis to expand the Commission's jurisdiction to "other people" who are alleged to assist common carriers, marine terminal operators, and ocean freight forwards who violate 46 U.S.C. § 41103(a). Similarly, if Respondents are not common carriers, there is no legal basis for the Commission to extend jurisdiction to Respondents for alleged violations of section 41104.

It is alleged that the managers and employees of Logfret B.V. were acting in a manner inconsistent with the expectations and financial benefit of Logfret, Inc. However, the amended

complaint does not state facts that would support piercing the corporate veil to reach the managers, employees, or Kirsha B.V. individually, and no attempt to do so is made. As Respondents suggest, this appears to be an employment dispute between affiliates, not a Shipping Act violation.

d. Conclusions

The amended complaint does not make a plausible claim that the Respondents were NVOCCs as they did not hold themselves out or assume responsibility as required by the Shipping Act. Therefore, both personal and subject matter jurisdiction are lacking. *See Canaveral Port Authority – Possible Violations of Section 10(b)(10),* 29 S.R.R. 1436, 1446 (FMC 2003); *Burlington Northern Railroad Co. v. M.C. Terminals, Inc.*, 26 S.R.R. 934, 948-49 (FMC 1993). In addition, there is no basis to assert jurisdiction based on Respondents being "other persons" and no attempt is made to pierce the corporate veil.

Complainant suggests that discovery is required to develop additional evidence. However, if Respondents held out and offered services to the general public, that information should be generally available. It also appears that the parties have been engaged in litigation in another proceeding. Amended complaint, exhibit 6, at 2-3 (referring to "the court hearing of 10 April 2017" and "writ of summons and pleading"). Without making a plausible claim of a Shipping Act violation, it would not be appropriate to require potentially costly and time-consuming discovery.

The amended complaint does not make a plausible claim that Respondents were common carriers subject to the jurisdiction of the Federal Maritime Commission. Complainant was provided an opportunity to amend the complaint after the motion was filed. Complainant has not asked for any additional amendments and it appears that additional amendments would be futile. Accordingly, the amended complaint will be dismissed with prejudice and the proceeding discontinued.

Because the motion is decided on the basis of a lack of personal and subject matter jurisdiction based upon the allegations in the amended complaint and exhibits, it is not necessary to consider the exhibits attached to the Respondents' impact statement. It is also not necessary to reach the other issues raised by the parties.

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Respondents' motion to dismiss be **GRANTED**. The amended complaint is hereby **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

LOGFRET, INC., *Complainant*

v.

KIRSHA, B. V., LEENDERT JOHANNESS BERGWERFF A/K/A HANS BERGWERFF, LINDA SIEVAL, *Respondents*.

DOCKET NO. 18-10

Served: October 21, 2019

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 17, 2019, Initial Decision Granting Motion To Dismiss has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

IN RE: VEHICLE CARRIER SERVICES	**DOCKET NOs. 16-01, 16-07, 16-10, and 16-11**

Served: October 21, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, and Louis E. SOLA, *Commissioners*. *Commissioner* MAFFEI concurring in part and dissenting in part.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Commission are four class action complaints alleging that Respondent vessel operating common carriers (VOCCs) violated the Shipping Act by engaging in a decade-long conspiracy to fix rates, reduce fleet capacity, and manipulate market share for transporting new, assembled vehicles aboard vessels specially adapted for that purpose (i.e., roll-on/roll-off (RoRo) vessels). Complainants fall into two groups: shippers or ocean transportation intermediaries (OTIs) who allegedly paid Respondents directly at artificially inflated rates, and consumers or vehicle dealers who allegedly paid the inflated rates indirectly, as they were passed along to them in the cost of buying or leasing a vehicle. Complainants appeal the Administrative Law Judge's (ALJ) Initial Decision dismissing all Complainants' reparations claims as time-barred and dismissing the indirect purchasers' claims for lack of standing.

The Commission affirms in part and reverses in part the Initial Decision. The Commission affirms the dismissal of the complaints in Docket Nos. 16-07, 16-10 and 16-11 because those Complainants lack standing to sue for reparations under the Commission's direct purchaser rule. The Commission also affirms the dismissal of the claims in Docket No. 16-01, insofar as they seek reparations, as time-barred. The Commission reverses the Initial Decision insofar as it allowed the Docket No. 16-01 claims to proceed as to cease-and-desist relief and dismisses the Docket No. 16-01 claims in their entirety. Because all of the claims are dismissed, the Commission does not reach the question of whether the Commission can or should adjudicate class actions.

II. BACKGROUND

A. Factual Background

Complainants in all four consolidated cases allege that for over a decade Respondents violated the Shipping Act and the Commission's regulations by secretly operating under unfiled

agreements to fix rates and prices and reduce fleet capacity for vehicle carrier services (provided by RoRo vessels) to and from U.S. ports. 16-01 Compl. ¶¶ 1-2, 47-57.[1] Complainants are OTIs (Docket No. 16-01), automobile dealers (Docket No. 16-11), a truck wholesaler (Docket No. 16-10), and vehicle purchasers or lessees, i.e. consumers (Docket No. 16-07). I.D. at 3.[2]

All Respondents provide vehicle carrier services to and from United States ports. Numerous VOCCs and their parent companies and subsidiaries are named as Respondents in the Complaints: Nippon Yusen Kabushiki Keisha (NYK); NYK Line (North America), Inc.; Mitsui O.S.K. Lines, Ltd. (Mitsui); Mitsui O.S.K. Bulk Shipping (USA) Inc.; Kawasaki Kisen Keisha, Ltd. ("K" Line); K Line America, Inc.; Wallenius Wilhelmsen Logistics AS (WWL); Wallenius Wilhelmsen Logistics Americas LLC; Hoegh Autoliners Holdings AS; Hoegh Autoliners AS; Hoegh Autoliners, Inc.; EUKOR Car Carriers Inc. (EUKOR); Compania Sud Americana de Vapores S.A. (CSAV); CSAV Agency North America, LLC; World Logistics Service (USA) Inc.; Autotrans AS; Alliance Navigation LLC; and Nissan Motor Car Carrier Co., Ltd. (Nissan).

The Complaints describe RoRo service and its advantages. *See* 16-01 Compl. ¶¶ 20-25. RoRo vessels, Complainants allege, are specially configured to conveniently transport all types of motorized vehicles and equipment ("wheeled freight"). *Id*. ¶¶ 20-25. Shipping wheeled freight aboard RoRo vessels is more economical and practical than containerized shipping. *Id*. ¶ 23. Wheeled freight can simply be driven on and off the vessel and is much less likely to suffer damage during loading, unloading, or shipment. *Id.* Those attributes allegedly make it the preferred mode for transporting new assembled vehicles to and from U.S. ports. *Id*. ¶¶ 24-25.

Respondents' market manipulation efforts succeeded, Complainants allege, and they dominate the vehicle carrier service market and their customers have few good alternatives. *See id.* ¶¶ 26-33. Collectively, Respondents allegedly "account for roughly two-thirds or more of the global capacity" for vehicle carrier services. *Id*. ¶ 27. That market dominance allegedly gave them the leverage to raise rates and manipulate prices with scant risk that their customers would shift their allegiance to other carriers. *Id*. ¶¶ 28-33. Even when faced with higher rates, Complainants allege, customers were unlikely to shift their business to containerized vessels because of the added complications and risk that the vehicles might be damaged during loading, unloading, or shipment. *Id*. ¶¶ 23-24, 32-33. According to Complainants, steep start-up costs and the arduous process of building a loyal customer base also insulated Respondents from the threat that new competitors might enter the vehicle carrier market and disrupt their scheme through increased competition or lower prices. *Id*. ¶¶ 30-31.

When demand for vehicle carrier service plummeted following the 2008 global financial crisis, Respondents allegedly renewed and expanded their scheme by coordinating efforts to reduce fleet capacity. Id. ¶¶ 54-55. Allegedly, they scrapped RoRo vessels, cancelled orders for

[1]Unless otherwise stated, Complainants in each case allege similar core facts and Shipping Act violations so we typically only cite pleadings from one case.

[2] By convention, the Commission cites the decision on appeal as "I.D." and uses the original pagination. The Initial Decision can also be found in the Commission's *Decisions of the Federal Maritime Commission, Second Series*. *See In re: Vehicle Carrier Services*, 1 F.M.C.2d 45, 2018 FMC LEXIS 40 (ALJ 2018).

new vessels, caused delays by "slowing-steaming," and used similar tactics to artificially reduce supply and increase demand. *Id.*

In September 2012, law enforcement authorities in the United States and abroad conducted what later became known as the "dawn raids" I.D. at 7.; 16-01 Comp. ¶ 65. In these "raids," officials across the globe conducted surprise inspections and searches at the offices of vehicle carriers suspected of engaging in illegal practices. I.D. at 7. These investigations by U.S., Canadian, Japanese and European Union (EU) authorities ultimately led to criminal charges and civil penalties against several Respondents for price fixing, bid rigging, and other anticompetitive practices. 16-01 Compl. ¶¶ 3, 69, 74; 16-07 Compl. ¶¶ 10-12.[3]

Initially, several Complainants brought federal antitrust and state law claims against Respondents in federal court for their alleged conspiracy and illegal practices. The cases were consolidated in the United States District Court for the District of New Jersey. *See In re Vehicle Carrier Servs. Antitrust Litig*. (*Antitrust Litig. I*), No. 13-3306, 2015 U.S. Dist. LEXIS 114691 (D.N.J. Aug. 28, 2015).

Respondents moved to dismiss the federal antitrust claims under 46 U.S.C. § 40307(d), which bars Clayton Act claims for conduct prohibited by the Shipping Act. *Id.* at *19-20, *30. Respondents also moved to dismiss the state law claims as preempted by the Shipping Act. *Id.* at *47-67. The district court agreed with both arguments, and, on August 28, 2015, dismissed the Complainants' federal antitrust and state law claims. *Id.* at *67. The Third Circuit affirmed the district court in January 2017. *In re Vehicle Carrier Servs. Antitrust Litig.* (*Antitrust Litig. II*), 846 F.3d 71, 82-88 (3d Cir. 2017). Plaintiffs' petition for panel and en banc rehearing was denied, as was their petition for writ of certiorari to the Supreme Court. *Alban v. Nippon Yusen Kabushiki Kaisha*, 138 S. Ct. 114 (2017).

B. Procedural History

After the district court dismissed the federal antitrust and state law claims, and while the appeal before the Third Circuit was pending, Complainants filed the four class actions now before the Commission:[4]

1. Docket No. 16-01, *Cargo Agents, Inc., International Transport Management Corp., and RCL Agencies, Inc., on behalf of themselves and all others*

[3]The Commission, too, entered into settlements with seven ocean carriers to resolve allegations that they violated 46 U.S.C. § 41102(b) by providing RoRo services under agreements that had not become effective or were never filed with the Commission. Br. for the Fed. Mar. Comm'n and United States as Amici Curiae (Amicus Br.) at 10-11 and n. 7, *In re Vehicle Carrier Servs. Antitrust Litig.*, No. 15-3353 (3d Cir. Nov. 30, 2016).

[4]Soon after the district court decision, and months prior to the filing of the class actions, General Motors LLC (GM) brought reparations claims against three Respondent carriers but settled with them in October 2016. *Gen. Motors LLC v. Nippon Yusen Kabushiki Kaisha*, Docket No. 15-08. The ALJ's Initial Decision approving GM's settlement agreement, 34 S.R.R. 390, 2016 FMC LEXIS 66 (ALJ 2016), became administratively final in November 2016.

similarly situated v. Nippon Yusen Kabushiki Kaisha, et al., filed December 29, 2015 (docketed in January 2016);

2. Docket No. 16-07, *Jill M. Alban, et al. v. Nippon Yusen Kabushiki Kaisha, et al.*, filed March 18, 2016;

3. Docket No. 16-10, *Rush Truck Centers of Arizona, Inc., et al v. Nippon Yusen Kabushiki Kaisha, et al,* filed April 21, 2016; and

4. Docket No. 16-11, *Landers Brothers Auto Group, Inc. dba Landers Honda (Jonesboro), et al v. Nippon Yusen Kabushiki Kaisha, et al,* filed April 21. 2016.[5]

The OTI Complainants in Docket No. 16-01 claim that they paid Respondents directly for vehicle carrier service.16-01 Compl. ¶ 1. All other Complainants claim that Respondents' artificially inflated charges were passed along to them. *See* 16-07 Compl. ¶¶ 1-3, 186, 189; 16-10 Compl. ¶¶ 2, 27, 165, 168; 16-11 Compl. ¶¶ 3, 19, 151, 54. All Complainants allege multiple Shipping Act violations. *E.g.*, 16-01 Compl. ¶ 1. Specifically, they claim that Respondents violated 46 U.S.C. § 40302(a) (filing requirements), § 41102(b)(1) (operating under an agreement not yet effective), § 41102(c) (unreasonable regulations and practices); § 41104(a)(10) (unreasonable refusal to deal), and § 41105 (prohibiting a conference or group of two or more carriers from engaged in specified conduct). *Id*.; 16-07 Compl. ¶ 71.

Respondents filed a consolidated motion to dismiss the Shipping Act claims as time-barred by the three-year statute of limitations and precluded by the direct purchaser rule. Respondents also challenged the request for class action relief as outside the Commission's statutory authority and sought dismissal for failure to state a claim and improper service. Complainants opposed the motion, arguing, among other things, that the "discovery rule" tolled the statute of limitations and that the Commission should not apply direct purchaser rule to their claims.

The ALJ granted Respondents' motion to dismiss in part. I.D. at 2. The ALJ ruled that the claims seeking reparations were time-barred because Complainants had constructive notice of potential Shipping Act claims when authorities conducted the dawn raids in September 2012. *Id*. at 46-48. The ALJ also dismissed the indirect purchasers' reparations claims on standing grounds. *Id*. at 35-38. Although the request for class action relief became moot when the underlying claims were dismissed, the ALJ also provisionally ruled that the Commission does not have class action authority. *Id.* at 26. Finally, the ALJ denied the motion to dismiss with respect to improper service and failure to state a claim without prejudice. *Id*. at 53-55. This left only the Docket No. 16-01 claims for cease and desist relief and the Docket No. 17-09

[5] Originally, the consolidated cases included a later-filed fifth case, *Fiat Chrysler Automobiles NV. v. Wallenius Wilhelmsen Logistics AS, et al*., Docket No. 17-09. This case was not a class action. After the ALJ issued its Initial Decision, Fiat settled with or voluntarily dismissed all the respondents in its case. The ALJ's Initial Decisions Approving Confidential Settlements became administratively final on July 2, 2019.

reparations claims surviving before the ALJ. *Id.* at 39-40, 48-50, the latter of which later settled or were voluntarily dismissed.

Complainants filed a timely appeal challenging the dismissal of their claims and the ALJ's determination that the Commission does not have class action authority. Professors Michael Sant'Ambrogio and Adam Zimmerman filed an amicus brief on the latter issue. In their opposition, Respondents urged the Commission to affirm the Initial Decision in its entirety.

III. DISCUSSION

Complainants argue that the ALJ erred in finding that: (1) the indirect purchaser Complainants lack standing to sue for reparations under the direct purchaser rule; (2) Complainants' reparation claims are untimely; and (3) the Commission does not have authority to hear a class action. Complainants' Appeal; *see also* I.D. at 2, 26, 38, 40, 50. We affirm the ALJ as to the first two issues in most respects and therefore do not reach the third.

A. Standard of Review

The Commission's rules do not specify a standard for reviewing an ALJ's decision granting a motion to dismiss. *See* 46 C.F.R. § 502.227(b)-(e). The Commission therefore follows the standard applied by the Courts of Appeal and reviews the ALJ's decision de novo. *Maher*, 2015 FMC LEXIS 43, at *12-13; *Kawasaki Kisen Kaisha Ltd. v. The Port Auth. of N.Y. & N.J.*, 33 S.R.R. 746, 753, 2014 FMC LEXIS 36, *19-20 (FMC 2014); *SSA Terminals, LLC v. City of Oakland*, 32 S.R.R. 325, 328, 2011 FMC LEXIS 11, 3 (FMC 2011).

Additionally, because this matter is before the Commission on a motion to dismiss, the Commission reviews it under the standards of Federal Rule of Civil Procedure 12. The Commission's Rules of Practice and Procedure do not provide for motions to dismiss, so the Commission exercises its gap-filling authority under 46 C.F.R. § 502.12 and applies Federal Rule of Civil Procedure 12(b) and the federal caselaw interpreting it. *Cornell v. Princess Cruise Lines, Ltd.*, 33 S.R.R. 614, 620, 2014 FMC LEXIS 17, *17-19 (FMC 2014); *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136, 2011 FMC LEXIS 12, *30-32 (FMC 2011).[6] As the ALJ correctly noted, the appropriate standard here is that of Rule 12(b)(6). *See* I.D. at 8-9.[7] Under Rule 12(b)(6), the Commission must accept as true all factual allegations in

[6]Commission Rule 12 provides that: "In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12.

[7]Although Respondents' "direct purchaser" arguments are couched in terms of "standing," the "direct purchaser rule" is related to antitrust standing, not constitutional or Article III standing (the lack of which is challenged under Fed. R. Civ. P. 12(b)(1)). *See, e.g.*, *Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 269-71 (3d Cir. 2016) (distinguishing Article III standing to sue in federal court from "the subsequent question of whether a purchaser has standing to recover" for alleged antitrust violations under the *Illinois Brick* direct purchaser rule). Rule 12(b)(6) standards likewise apply to timeliness challenges. *Maher Terminals, LLC v. The Port Auth. of N.Y. & N.J.*, 2015 FMC LEXIS 43, at *110-11 (FMC 2015).

the complaint. *Maher*, 2015 FMC LEXIS 43 at *36. The Commission may also consider documents attached to the complaint, documents incorporated by reference in, or integral, to the complaint, and matters subject to official notice. *Id.* at *2 n.1. The Commission must draw all reasonable inferences from the allegations in the complainant's favor. *Id.* at *36.

B. "Standing" – the Direct Purchaser Rule

Complainants argue that the ALJ erred in finding that the Complainants in Docket Nos. 16-07 (vehicle purchasers or lessees), 16-10 (truck wholesalers), and 16-11 (automobile dealers) lack standing to sue for reparations under the Commission's direct purchaser rule.[8] Complainants' Appeal at ii-iii; I.D. at 23-38. This rule limits recovery of reparations to direct purchasers of transportation services. I.D. at 27. It mirrors the "direct purchaser" rule courts apply in the federal antitrust context. *Id.* at 31-34.

Complainants contend that: (1) Respondents waived the standing argument; (2) Respondents should be judicially estopped from making the standing argument; (3) the ALJ failed to recognize the "developed law of equitable standing;" (4) the Commission should reject a "rigid" direct purchaser rule; and (5) Respondents "cannot show from the face of the complaints that Indirect Purchaser Complainants, as 'shippers,' fail to satisfy the rule." Appeal at ii-iii. None of these arguments are persuasive, and the Commission affirms the ALJ's dismissal of the 16-07, 16-10, and 16-11 complaints for lack of standing.

1. Direct Purchaser Rule

Under Commission caselaw, parties suing for alleged overcharges can only recover reparations if they actually paid the carrier or received an assignment from the direct purchaser. *Gov't. of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 902, 2002 FMC LEXIS 16, *4 (ALJ 2002), admin. final, 2002 FMC LEXIS 25 (FMC 2002). The basis for this rule first arose in 1934, when the Commission's predecessor, the United States Shipping Board Bureau, held that the entity that paid the illegal overcharges was the person "directly damaged" by the illegal rates and "[h]is claim accrued at once" and the law "does not inquire into later events." *Oakland Motor Car Co. v. Great Lakes Transit Corp*., 1 U.S.S.B.B. 308, 310-311 (1934). The Shipping Board rejected the argument that "it has not been proved that complainants bore the charges on the shipments involved," as "a showing of payment of the charges by complainants is sufficient." *Id.* at 311.

In reaching this conclusion, the Shipping Board relied on *Southern Pacific Co. v. Darnell Taenzer Lumber Co*., 245 U.S. 531 (1918). There, Darnell sought to recover overcharges from Southern Pacific railroad for transporting its lumber. *Id*. at 533. The Court held that as the party that paid the railroad directly, Darnell could sue for the overcharges. *Id.* at 534-35. The Court rejected the railroad's argument that Darnell should be disqualified because it could pass the alleged overcharges along to its customers. *Id*. The Court explained that the law does not inquire

[8]The ALJ found that the Complainants in Docket No. 16-01 (OTIs) adequately alleged standing and denied Respondents' motion to dismiss on this ground without prejudice. I.D. at 39. Respondents did not challenge the denial of their motion on this ground and that finding is not before the Commission on appeal.

beyond the "first step" of the parties' transaction in arranging for transportation. *Id*. at 534. Just as defendants are not held accountable for the "remote consequences" of their actions, the Court reasoned, they are not excused from liability for harm they proximately caused to the plaintiff. *Id.* at 533-34. Inquiring into further transactions after the point of payment would be legally pointless, the Court reasoned, because parties farther along in the chain of transactions are not in "privity with the carrier" and therefore have no cause of action against the carrier for alleged overcharges. *Id.* at 534.

In the 80 years since the Shipping Board held that a respondent could not rely on a pass-on theory to avoid liability to a complainant for reparations, the Commission has repeatedly found that a complainant cannot rely on a pass-on theory to recover reparations for overcharges. In numerous decisions, the Commission has ruled that only the party who actually paid the carrier (or the valid assignee of the payor) can sue for reparations. *Gov't. of Guam*, 29 S.R.R. at 902, 908-09, 2002 FMC LEXIS 16 at *58-59 (striking consignee's reparations claim because it was not the direct payor or assignee); *Cal. Cartage v. Pac. Mar. Ass'n*, 23 S.R.R. 420, 427 (FMC 1985); *Sanrio, Inc. v. Maersk Line*, 19 S.R.R. 907 (ALJ 1979) (denying consignee's claim for overcharges allegedly passed along to it); *Trane Co. v. South African Marine*, 19 F.M.C. 375, 378 (ALJ 1976); *Carton-Print v. Austasia Container Express*, 17 S.R.R. 571, 575 (ALJ 1977).

Even in applying the direct purchaser rule, the Commission follows strict proof requirements. Complainants can recover only if they introduce evidence that they actually paid the carrier or received an assignment from someone who did. *Gov't. of Guam*, 29 S.R.R. at 908-09, 2002 FMC LEXIS at *36-42. Incomplete records, mere allegations, or general business practices or relationships are not sufficient proof. *See id.* Consistent with the direct purchaser rule, the Commission's regulations require reparation statements to identify "the person paying charges in the first instance." 46 C.F.R. § 502.252 Ex. No. 1.

The Commission's direct purchaser rule is also consistent with the direct purchaser rule the Supreme Court developed in the antitrust context in *Illinois Brick v. Illinois*, 431 U.S. 720, 726 (1977). In *Illinois Brick*, the Court rejected the State of Illinois's price-fixing claim against a brick manufacturer/distributor for lack of standing. *Id.* at 726-27, 735. The Court cited policy concerns in ruling that indirect purchasers cannot recover damages under § 4 of the Clayton Act. The rule was necessary, the Court explained, to prevent multiple judgments (by various parties in the distribution chain) and to avoid the complex task of accurately and fairly apportioning damages among various parties along the distribution chain. *Id.* at 730-33, 737. While recognizing that "these difficulties and uncertainties will be less substantial in some contexts than in others," the Court refused to create exceptions to the rule for particular types of markets. *Id.* at 743-44. The Court also reiterated concerns, voiced initially in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), that indirect purchasers would be less likely to sue and fulfill the Clayton Act's objective of encouraging private attorneys' general to enforce federal antitrust law. *Id.* at 745-46*; see also Kansas v. UtiliCorp United Inc*., 497 U.S. 199, 217 (1990) (reaffirming that direct purchaser rule strictly applies to antitrust claims while again declining to carve out exceptions for a particular cost/pricing structure); *California v. ARC America Corp*., 490 U.S. 93, 96, 100 (1989).

The Court most recently applied the direct purchaser rule in May 2019, finding that the plaintiffs in that case were direct purchasers and therefore were not barred from suing the

defendant under the antitrust laws. *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019). The Court described the rule as follows:

> For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*.

Id. at 1521. In light of its ruling in favor of the plaintiffs, the Court declined to consider arguments for overruling *Illinois Brick* to allow C to sue A. *Id*. at 1521 n.2.

2. Application of the Direct Purchaser Rule

As the ALJ pointed out, the Complainants in Docket Nos. 16-07, 16-10, and 16-11 did not allege that they directly purchased services from Respondents. Rather, they alleged the opposite. I.D. at 13. The 16-07 Complainants allege that they "are consumers who had no direct contact or interaction with Respondents" and had "no means of obtaining any facts or information concerning any aspect of Respondents' dealings with [Original Equipment Manufacturers] *or other direct purchasers*." 16-07 Compl. ¶¶ 197-98 (emphasis added). The Complainants in Docket No. 16-10 allege that they "indirectly" paid for vehicle transportation service aboard Respondents' RoRo vessels. 16-10 Compl. ¶¶ 27, 55. And the Complainants in Docket No. 16-11 allege that they "indirectly paid Respondents for Vehicle Carrier Services," whereas Respondents' "direct transactional contacts are original equipment manufacturers." 16-11 Compl. ¶¶ 19, 47.

Accepting these allegations as true, the 16-07, 16-10, and 16-11 Complainants cannot recover reparations under the Commission's longstanding direct purchaser rule. *See*, *e.g.*, *Gov't. of Guam*, 29 S.R.R. at 902, 908-09, 2002 FMC LEXIS 16 at *58-59, *Cohen v. GMC* (*In re New Motor Vehicles Canadian Exp. Antitrust Litig*.), 533 F.3d 1, 2 (1st Cir. 2008) (automobile lessees lacked standing to sue car manufacturers and leasing companies for antitrust violations in preventing cheaper Canadian cars from entering the U.S. market because plaintiffs were not the direct purchasers); *Warren Gen. Hosp. v. Amgen Inc.*,, 643 F.3d 77, 91 (3d Cir. 2011); *McCarthy v. Recordex*, 80 F.3d 842, 852 (3d Cir. 2011*); Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 929-33 (3d Cir. 1986) (customers of dealerships who alleged that Mercedes-Benz had forced its dealers to purchase parts for repairing vehicle at fixed prices were indirect purchasers of Mercedes-Benz parts).

3. Waiver

To counter the straightforward application of the direct purchaser rule, the Complainants first argue that "[g]iven Respondents' prior arguments in the federal courts, Respondents have waived any right to argue that Indirect Purchaser Complainants lack standing before the Commission." Appeal at 14. In response, Respondents argue that: (a) "standing" cannot be waived; and (b) there was no waiver because they expressly reserved their "standing" argument when arguing before federal courts. Resp. Reply at 25-36.

Regardless of whether the "direct purchaser rule" is waivable, Respondents did not waive it in this case.[9] Waiver is the voluntary relinquishment or abandonment, either express or implied, of a "legal right or advantage." *Mawakana v. Bd. of Trs.*, 113 F. Supp. 3d 340 (D.D.C. 2015) (quoting Black's Law Dictionary (10th ed. 2014)). Waiver requires both "knowledge of the existing right and the intention of forgoing it" based on "firm facts." *Id.* Intent to waive can be demonstrated by an express statement to that effect or through conduct that can only reasonably be interpreted as consistent with relinquishing a known right or advantage. *The Port Auth. of New York & New Jersey v. New York Shipping Ass'n*, 22 S.R.R. 1329, 1346 (ALJ 1984), adopted as modified, 23 S.R.R. 21 (FMC 1985).

Complainants argue that Respondents waived their direct purchaser rule "standing" defense because, before the district court, Respondents asserted that "[a]ny person can file a complaint before the FMC and obtain reparations for injuries caused by violations of the Act." Appeal at 16; *id.*, Ex. C at 16. But that general statement is not an express waiver, nor is it only consistent with waiver. In context, Respondents were explaining their view that Congress intended to put all issues involving ocean freight before one administrative body and that the Shipping Act established an administrative complaint procedure in lieu of private antitrust actions. *Id.*, Ex. C. at 16. As the ALJ noted, Respondents' statement was not "about whether Respondents believe that all of these particular Complainants would ultimately be entitled to reparations." I.D. at 31.

Complainants also contend that Respondents waived standing in their brief before the Third Circuit, where Respondents: (a) pointed out that district court stated "putative class members can seek relief before the [Commission]," and (b) asserted that the Shipping Act provides a clear private remedy for operating under an agreement that has not become effective or for other violations of the Shipping Act. Appeal at 15-16; *id.*, Ex. D at 9, 20. But neither of the statements have anything to do with the direct purchaser rule or "antitrust standing" or any of the issues that Complainants insist were waived. The context is important--the issue there was whether the Shipping Act preempted state law causes of action, not the applicability of the direct purchaser rule before the Commission.

Complainants further argue that Respondents waived the direct purchaser rule defense based on statements that Respondents made at oral argument before the Third Circuit. Appeal at 14-15; *id.*, Ex. B. According to Complainants, Respondents told the court that Congress created a

[9]Federal courts appear split on whether "antitrust standing" is subject to waiver. *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 961 (10th Cir. 1990); *compare Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 n.4 (9th Cir. 1999) (stating that the issue of antitrust standing can be raised at any time); *with Hammes v. AAMCO Transmissions*, 44 F.3d 774, (7th Cir. 1994) (Posner, J.) ("[D]espite the suggestive terminology, 'antitrust standing' is not a jurisdictional requirement and is therefore waivable."); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 154 (9th Cir. 1988) (Norris, et al., dissenting) ("Antitrust standing is not a jurisdictional prerequisite and thus is subject to waiver."). Given that the direct purchaser rule is not synonymous with subject matter jurisdiction, *supra* note 10, the Shipping Act does not mention the rule, and the Commission cases cited by Respondents do not involve waiver or the direct purchaser rule, the Commission declines to treat the direct purchaser rule as "jurisdictional," and assumes it is subject to waiver.

place where Complainants could go – an action for reparations before the Commission. Appeal at 14. This statement was made, however, in the context of Respondents arguing that allowing state law claims to proceed would conflict with the specific forum and remedies created in the Shipping Act. *Id*., Ex. B at 41. Respondents did not imply that every complainant could successfully bring a reparations claim. *See* I.D. at 31.

Moreover, Complainants emphasize that Respondents told the Third Circuit that they were "not going to suggest that [the FMC] lack[s] the authority to adjudicate disputes of the type alleged in the complaint." Appeal at 15, *id.*, Ex. B at 31. But as the ALJ pointed out, Complainants ignore Respondents' full statement, which reserved the "standing" argument. I.D. at 31. Specifically:

> The Court: Are you going to suggest the FMC lacks the authority to adjudicate the dispute? You may have other grounds, but are you going to make a claim?
>
> Mr. Nelson: No, we're not going to suggest that they lack the authority to adjudicate disputes of the type alleged in the complaint. *We may challenge standing* and we have some other claims below here in District Court, challenging whether the named plaintiffs are appropriate, whether there's any injury. So we have other defenses, but that will not be one of them.

Appeal, Ex. B. at 31 (emphasis added). Counsel's reference to "disputes of the type alleged in the complaint" concerned allegations that Respondents violated the Sherman Act, 15 U.S.C. § 1, by conspiring to fix and manipulate prices and fleet capacity.

Complainants now argue that, by stating that Respondents would not challenge the Commission's "authority," Respondents necessarily waived the "standing" defense. Appeal at 15. According to Complainants, "standing" is part of the Commission's authority. *Id*. But the quotation Complainants rely on about standing being part of "authority" deals with Article III standing, not the antitrust standing of the direct purchaser rule. As noted above, direct purchaser standing goes to the merits of the claim, not subject matter jurisdiction to adjudicate the claim. *Hartig*, 836 F.3d at 270-71.

In sum, Respondents clearly conveyed that while they would not challenge the Commission's authority generally to adjudicate alleged Shipping Act violations, they reserved the right to challenge Complainants' right to pursue those claims, whether for lack of standing, failure to show compensable injury, or other grounds specific to Complainants or their claims. Respondents therefore did not waive or abandon their right to challenge Complainants' direct purchaser standing or raise other defenses to Shipping Act claims now before the Commission.

4. Judicial Estoppel

In addition to waiver, Complainants argue that judicial estoppel precludes Respondents from arguing that the indirect purchaser Complainants lack standing. Appeal at 17-18; *see also* I.D. at 28-31. Judicial estoppel "precludes a party from asserting a position in one legal proceeding which is contrary to a position that it has already asserted in another." *James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 1997 FMC LEXIS 20, at *42 (FMC 1997) (quoting *Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1st

Cir. 1987)); *see also id.* at *43 ("The rule is that a party may not take inconsistent positions before different tribunals."); *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp*., 337 F.3d 314, 319 (3d Cir. 2003) (holding that parties cannot litigate under one theory then switch to "an incompatible theory" when it suits their interests) (citation omitted). Judicial estoppel protects the integrity of the judicial system by preventing parties from switching sides on an issue after a court adopts their position. *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001); *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 419 (3d Cir. 1988).

Because estoppel is an extraordinary remedy, it only applies when it is necessary to prevent a miscarriage of justice. *Montrose Med. Group Participating Sav. Plan v. Bulger,* 243 F.3d 773, 779-80, 784 (3d Cir. 2001). Courts typically consider several factors in deciding whether judicial estopped applies, including whether: (1) the current and former positions are "irreconcilably inconsistent;" (2) the party acted in bad faith which implicates tribunal's integrity or authority; and (3) blocking the party from changing positions will remedy the "affront to the [tribunal's] authority or integrity." *Id.*

Complainants argue that "Respondents' about-face arguments cry out for the application of judicial estoppel." Appeal at 17. Complainants assert that Respondents' argument that the indirect purchasers lack standing is inconsistent with their statement before the Third Circuit that they were not going to suggest that the Commission lacks authority to hear the claims. *Id.* They further argue that the federal courts "believed sending the matter to the Commission would not bar Complainants from relief," thus showing that the federal courts were misled. *Id.* at 18. And Complainants assert that Respondents' "gamesmanship" is manifestly unfair, because Respondents convinced the courts that the state-law claims were preempted and now attempt to also prevent Complainants from demonstrating before the Commission that they have been harmed from admitted criminal conduct. *Id.*

Complainants have not established judicial estoppel. As noted above, Respondents' direct purchaser standing argument is not inconsistent with their arguments before the Third Circuit or the assurances they provided at oral argument. Before the federal courts, they argued for dismissal based on 46 U.S.C. § 40307 and preemption of the state law claims. They have not changed those positions before the Commission. Instead, they are now arguing that certain complainants lack direct purchaser standing–a different argument altogether. Complainants' interpretation of Respondents' earlier stance is overly broad.

Respondents did not in bad faith mislead the Commission or the courts about their intent to challenge standing or raise other defenses to Complainants' Shipping Act claims. While both the district court and Third Circuit believed that Complainants' claims belonged before the Commission, the courts were not acting under the misapprehension that Complainants would face no other obstacles to recovery. That is clear from the remarks of one appellate judge who heard Plaintiffs' argument before the Third Circuit Court of Appeals. Appeal Ex. B at 31 ("Are you going to suggest the FMC lacks the authority to adjudicate the dispute? *You may have other grounds*, but are you going to make a claim?") (emphasis added). Nor did Respondents impugn the federal court's or Commission's integrity or threaten either's authority. Respondents did not take unfair advantage of the Commission or courts and are not judicially estopped from challenging the indirect purchasers' standing to pursue claims for reparations.

5. Equitable Standing

Complainants also argue that the direct purchaser rule conflicts with the "developed law of equitable standing." Appeal at 19. This section of their appeal encompasses several arguments. First, they attempt to distinguish *Gov't of Guam*. *Id.* at 19-20. Then they argue that *Gov't of Guam* conflicts with the law of "standing," that is, it conflicts with the language in the Shipping Act that allows "any person" to file a complaint. *Id.* at 20. Complainants also maintain that the "remedial nature" of the Shipping Act should trump the "direct purchaser" rule. *Id*. at 21. Finally, they imply that the ALJ erred by conflating the "direct purchaser rule" with the notion of actual injury and policy concerns about class actions. *Id*. at 18. None of these arguments are persuasive.

Starting with *Gov't of Guam*, the distinctions Complainants point out between that case and this one do not suggest that the direct purchaser rule is inapplicable in this case. According to Complainants, in that case, the "Commission rejected a party's attempt to take one position before the federal courts and a later, conflicting position before the Commission." *Id.* at 19. The ALJ in *Gov't of Guam* indeed noted that the complainants' argument before the Commission blatantly conflicted with their earlier argument that "reparations may be awarded only to shippers who have *personally* paid unreasonable rates." *Gov't of Guam*, 29 S.R.R. at 902-903, 2002 FMC LEXIS 16 at *58-59. But the ALJ's holding in *Gov't of Guam* does not rest on the complainants' about-face, rather it was reason to discount complainants' new argument, which was not only inconsistent with, but conflicted with "the established case law" on the direct purchaser rule. *Id*. at 902, 2002 FMC LEXIS 16 at *58-59.

Similarly, while the ALJ in *Gov't of Guam* pointed out that the complainants there had stipulated that they had passed on the shipping costs and had not suffered economic harm, and that respondent's rates were not unlawful, *id*. at 901, the ALJ did not cite those facts in explaining the direct purchaser rule, which turns on who incurred the overcharge in the first instance. *Id.* at 902. Moreover, Complainants' singular focus on *Gov't of Guam* ignores that the Commission has applied its direct purchaser rule in other cases. *See, e.g., Sanrio,* 19 S.R.R. at 908 ("There are other cases in which the Commission or its predecessors have followed the principle that reparation awards in overcharge-type cases go to persons who paid the freight initially under the *Darnell-Taenzer* principle that the cause of action accrued at the time the person paid the charges.").

As for the statutory principle that "any person" may file a complaint,[10] and the "remedial nature of the Shipping Act," Appeal at 20-21, the Commission's direct purchaser rule has coexisted with both for decades, and neither present any reason to deviate from our established precedent. As to the "any person," argument in particular, even when that language was present in the statute, the Commission noted that "[w]hile any person may file a complaint under Section 22 of the Act alleging a violation of the Act," the "law is that the person who paid the freight to the carrier has standing to recover reparation for injury." *Sanrio*, 19 S.R.R. at 906. And, as noted

[10]Although the statute currently states that "a person" may file a Shipping Act complaint rather than "any person," 46 U.S.C. § 410301(a), the Commission has interpreted this to mean, consistent with the 1916 Act, that "broad filings of complaints" are permitted. *Adenariwo v. BDP Int'l*, 33 S.R.R. 503, 505 2013 FMC LEXIS 49, at *4 n.8 (Settlement Officer 2013).

above, the Commission has consistently interpreted § 41301(a) as requiring complainants to establish that they have "paid the freight or succeeded to the claim in a valid fashion such as by assignment," consistent with the direct purchaser rule. *California Cartage Co.*, 23 S.R.R. at 427; *Trane Co.*, 19 F.M.C. at 378 n.9; *Carton-Print,* 17 S.R.R. at 581; *3M v. Hapag Lloyd*, 20 S.R.R. 1020, 1021 n.3 (FMC 1981).

The Commission's interpretation of § 41301(a) is consistent with the federal courts' interpretation of markedly similar language in 15 U.S.C. § 15. Section 4 of the Clayton Act provides that "any person injured by a violation of the antitrust laws" can sue for treble damages and other relief. *Id.* Notwithstanding this inclusive language, the direct purchaser rules applies to Clayton Act claims and allows only those who qualify under it to sue for damages. *See*, *e.g.*, *California v. ARC America Corp*., 490 U.S. at 96; *Utilicorp*, 497 U.S. at 203-04; *Warren Gen. Hosp.*, 643 F.3d at 84.

Finally, Complainants emphasize that they are seeking to recover for their own injuries, not someone else's, and that the ALJ's analysis of the direct purchaser rule "is really a discussion of the policy concerns regarding adjudication of claims by persons who suffered actual injury on a representative (class) basis." Appeal at 18; *see also id*. at 13, 20. Complainants are right that the Initial Decision commingled the concepts notions of "actual injury" and class actions with the direct purchaser rule. I.D. at 37. But this is not grounds for reversing the ALJ's ruling on the indirect purchasers' lack of standing. Although Complainants alleged that they suffered injury due to Respondents' conduct, the direct purchaser rule does not depend on the presence or absence of "actual injury" to Complainants. *See Sanrio*, 19 S.R.R. at 908. Rather, the direct purchaser rule says that the only injury that is eligible for recovery is that incurred by the direct purchasers. *Cf. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc*., 424 F.3d 363, 366 n.2 (3d Cir. 2005) (*Illinois Brick* determined that direct purchasers are the only parties 'injured' in a manner that permits them to recover damages."). In other words, even if the Commission accepts that the 16-07, 16-10, and 16-11 Complainants were seeking to recover their own actual injuries, that does not cure their lack of standing under the direct purchaser rule.

6. Rejection of the Direct Purchaser Rule

Complainants additionally argue that the Commission should reject a "rigid" direct purchaser rule "in light of modern realities in the shipping industry" and to protect Complainants who are injured by "blatant" violations of the Shipping Act. Appeal at 21. But Complainants do not specify what these "modern realities are." *See id*. Rather, they argue that application of the rule in this case leads to "manifestly unjust" results because "Indirect Purchaser Complainants, who bore the costs of Respondents' violations of the Shipping Act and suffered actual injury would be barred from recovery while Respondents would be granted an unjust windfall," which would "cut to the core of the Commission's ability to police the industry it regulates and to encourage competition." *Id*. at 21.

Complainants have not, however, shown how they are any different than any other indirect purchaser barred from recovery by the direct purchaser rule. The rule will always result in indirect purchasers being unable to recover. *See Illinois Brick*, 431 U.S. at 746 ("It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by

antitrust violations."). Nor is it clear how the direct purchaser hampers the Commission's ability to police the shipping industry – the direct purchaser rule applies to complaints for reparations, not Commission enforcement actions. And the Commission entered compromise agreements with several of the Respondents.[11] Moreover, Complainant has not justified tying application of the direct purchaser rule to the unrelated notion of how "blatant" the offense was or how "culpable" the respondent is.

Complainants also argue that the rationales underlying *Illinois Brick* do not apply here because: (a) the risk of duplicative recovery is slight because the claims of the groups do not overlap; (b) shipping records demonstrate that the majority of the transactions involved full and immediate pass-on of total shipping costs to the dealers or consumers and the Commission can modify damages accordingly, and (c) very few of the car manufacturers brought claims in federal court or before the Commission. Appeal at 23.

But the facts of this case present a classic *Illinois Brick* fact pattern and the rationales under the doctrine are at full force. As an initial matter, bright-line nature of the direct purchaser rule "means that there is no reason to ask whether the rationales of *Illinois Brick* 'apply with equal force' in every individual case." *Apple*, 139 S. Ct. at 1524 (quoting *Utilicorp*, 497 U.S. at 216). *Illinois Brick* and the cases that followed it are concerned about three potential repercussions of allowing indirect purchasers to sue antitrust violators: (1) the risk of duplicative recovery (by both direct and indirect purchasers); (2) the "evidentiary complexities and uncertainties involved in ascertaining the portion of the overcharge that the direct purchasers had passed on to the various levels of indirect purchasers;" *Howard Hess*, 424 F.3d at 369-70; and (3) the need for effective enforcement of antitrust law. *Illinois Brick*, at 733-34.

Here, there is a risk of duplicative recovery if the Commission rules that the vehicle manufacturers, OTIs, automobile dealers, vehicle purchasers, and lessees can all sue Respondents for reparations. Complainants' claim that the "risk of duplicative recovery is slight because the claims of the various groups generally do not overlap" rings hollow. Appeal at 23. At least two vehicle manufacturers have sued, and settled claims, for reparations. In any event, the number of direct purchasers (in this case the vehicle manufacturers) who actually sue is beside the point. There is a real risk of duplicative recoveries by manufacturers and intermediaries and end consumers in the distribution chain (if the Commission adopted Complainants' position and allowed indirect purchasers to sue). *See Warren Gen. Hosp.*, 643 F.3d at 92. Various complainants all seeking to recover an overcharge that was passed down a distribution chain is the type of multiple liability the direct purchaser rule was designed to

[11]Complainants claim that denying indirect purchasers the ability to present their claims would be particularly galling when "many of the Respondents successfully convinced the Department of Justice (DOJ) to forego any claim for reparations in sentencing the Respondents because their victims could be compensated through the class actions now before the Commission." Appeal at 22. But the plea agreement they cite says only that "in light of the civil [antitrust] cases filed against the defendant, which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include a restitution order for the offense charged in the Information." Appeal, Ex. E at 7. In other words, no one guaranteed the Respondents could succeed before the Commission. Nor does the DOJ's understanding of remedies and exclusions impact whether the Commission should ignore its own precedent.

prevent. *Cf. Apple*, 139 S. Ct. at 1524-25 ("This [*Apple*] is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain.").

Moreover, determining reparations could easily involve complicated calculations. Disentangling overcharges actually passed along to each entity in the distribution chain for purchased and leased vehicles would undoubtedly be a labor-intensive and costly process for the parties and the Commission. *See Illinois Brick*, 431 U.S. at 743-45. The Complainants underestimate the potential "evidentiary complexities and uncertainties" inherent in examining what would likely be thousands of transactional documents and data to understand first, the amount of overcharges attributable to Respondents' Shipping Act violations, and second what amount or percentage of the overcharge was passed along to each Complainant (or group of Complainants) in the distribution chain. *See* Appeal at 23-24.

Complainants assert that shipping records will show that "the majority of these transactions and shipments" involved "an immediate and full pass-on of total shipping costs." *Id.* at 23. Complainants do not cite any authority for this sweeping assertion, and even if it is accurate, it ignores the forensic work that would still have to be done by the parties and the Commission to sort and analyze the payments and charges shown in the transactional documents and data and determine the exact overcharges attributable to Shipping Act violations that were passed along to the dealers, vehicle purchasers, and lessees. For indirect purchasers (like the truck or automobile dealers) who were intermediaries in the distribution chain, the Commission would also have to determine how much of the overcharges they recouped by passing them along to their buyer. *Cf. Apple*, 139 S. Ct. at 1531 (Gorsuch, J., dissenting) ("[I]f we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why not)?").

Figuring all of this out would likely be an enormously complex and likely paper-or data-intensive undertaking – which was exactly the concern identified in *Illinois Brick* and *UtiliCorp*. *Illinois Brick*, 431 U.S. at 730-32, 737 (a bright-line rule is necessary to prevent multiple recoveries (by both direct and indirect purchasers and to avoid the complexity and difficulty of apportioning damages); *Utilicorp*, 497 U.S. at 210. It would also be inconsistent with the fact that direct purchaser status is not determined based on which party sustained the harm. *Warren Gen. Hosp*., 643 F.3d at 92. In fact, the Supreme Court's rationale in *Hanover Shoe* and *Illinois Brick* "manifests the Court's intent to avoid linking direct purchaser status to injury calculations and determinations." *Id.* Moreover, Commission rules do not provide for the apportionment of reparations between direct purchasers and indirect purchasers but focus on the former. 46 C.F.R. § 502.252.

Aside from the task of sorting and analyzing the data, the final calculations still may not accurately reflect the actual monetary impact on the various parties in the distribution chain. That was the Supreme Court's related concern in *Illinois Brick* and *UtiliCorp,* that "market forces make it exceedingly difficult to accurately determine the monetary impact on "different purchasers and sellers in an economic system." *Warren Gen. Hosp*., 643 F.3d at 93. "The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties

and difficulties in analyzing price and out-put decisions in the real economic world rather than an economist's hypothetical model, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom." *Illinois Brick*, 431 U.S. at 731-32 (internal citations and quotation marks omitted).

As for need for effective enforcement of the law, as noted above, nothing about the direct purchaser rule precludes the Commission from enforcing the Shipping Act. And here, direct purchasers such as GM and Fiat have brought claims, as have alleged direct purchasers like the 16-01 Complainants.

As a further reason to abandon the direct purchaser rule, Complainants point out that a majority of states have repealed the direct purchaser rule by statute or judicial decision. Appeal at 23. But these state-specific decisions do not justify modifying or reversing the Commission's own caselaw especially given that the Supreme Court declined to overrule *Illinois Brick* in *Apple* (though it explained that it could find for plaintiffs without addressing that issue). *Apple*, 139 S. Ct. at 1521 n.2.

Complainants' arguments and the particulars of this case provide no basis for overruling decades of Commission precedent. As the Supreme Court recently emphasized, "[o]verruling precedent is never a small matter," and "any departure from the doctrine [of stare decisis] demands 'special justification' – something more than 'an argument that the precedent was wrongly decided.'" *Kisor v. Wilkie*, 2019 U.S. LEXIS 4397, *42-43 (June 26, 2019). Here, Complainants have not shown that *Gov't of Guam* was wrongly decided, let alone established a "special justification" for overruling it.

7. Shipper Status

The 16-07, 16-10, and 16-11 Complainants further assert that the Commission should decline to dismiss their claims because many of them might qualify as "shippers" under the definitions in the Shipping Act and Commission regulations. Appeal at 24. Complainants do not, however, cite any support for the proposition that a shipper who is not a direct purchaser has standing under the direct purchaser rule. Qualifying as a shipper does not confer standing—shippers must still be direct purchasers to sue for reparations. The same holds true for cargo owners—cargo owners have standing to sue only if they directly paid the carrier or OTI who allegedly violated the Shipping Act. *See Gov't. of Guam*, 29 S.R.R. at 908-09, 2002 FMC LEXIS 16 at *54-59. As Respondents point out, the Commission has rejected under the direct purchaser rule the claims of shippers and those who could be deemed shippers (consignees) under the Shipping Act when they were not direct purchasers. See *Sanrio*, 19 S.R.R. at 907 (consignee); *see also id.* (citing *Carton-Print*, 17 S.R.R. at 581).

C. Statute of Limitations

The ALJ dismissed the 16-01 Complainants' claims as to reparations as untimely under the Commission's statute of limitations. *See* I.D. at 38-39, 40, 50.[12] The ALJ allowed these claims to proceed, however, insofar as cease-and-desist relief was sought. *Id.* at 50, 56.

Complainants challenge the ALJ's ruling on procedural grounds and as legally unsupportable. They first argue that the ALJ improperly relied on and weighed evidence extrinsic to the complaints. Second, Complainants contend that, even if one considers the extrinsic evidence, the allegations and evidence do not show that the September 2012 "dawn raids" triggered the limitations period. Appeal at 31-30. Third, Complainants assert that filing antitrust suits in federal court tolled the statute of limitations until at least May 2013. *Id.* at 27-30.

Respondents counter that the Commission may consider matters outside the complaint in ruling on a motion to dismiss, and that "reasonably diligent complainants 'should have known' of potential Shipping Act claims no later than September 6, 2012, when widespread news publications reported on the 'dawn raids' of respondents' offices and the accompanying global antitrust investigations." Resp. Reply at 47-48. They also argue that the Shipping Act's statute of limitations is jurisdictional and not subject to class action tolling, which is inapplicable in any event. *Id.* at 37.

The ALJ correctly found that the 16-01 Complainants' claims accrued in September 2012, rendering the claims untimely, and that the statute of limitations is not subject to class action tolling or other forms of tolling. The ALJ erred, however, in allowing the claims to proceed as to cease-and-desist relief. The Commission affirms the ALJ's dismissal of the 16-01 claims as to reparations, reverses the ALJ as to cease-and-desist relief, and dismisses the 16-01 claims in their entirety.

1. Matters Outside the Complaint

Complainants first assert that the ALJ improperly weighed the allegations in the Complaints against extrinsic evidence at the motion to dismiss stage. Appeal at 31. They argue that a time bar must be apparent from the face of the Complaints, and here, the Complaints alleged that Complainants and class members "did not know, and with reasonable diligence could not have known, that they had claims against Respondents until May 2013 at the earliest." Appeal at 31-32. According to Complainants, these allegations are factual, not conclusory, must be taken as true, and can be tested on a motion for summary judgment. *Id.* at 32. Complainants maintain that the ALJ pointed to no factual allegations in the Complainants that unequivocally establish that the claims are time barred. *Id.* In contrast, Respondents argue that nothing

[12] The ALJ could not rule out the possibility that as OTIs, the 16-01 Complainants may have purchased transportation services directly from Respondents, and thus the ALJ did not dismiss the 16-01 claims for lack of standing. *See id.* The ALJ also determined that all claims were time barred. Because the 16-07, 16-10, and 16-11 claims fail for lack of standing, the Commission need not address their timeliness, though they would be untimely for the same reasons the 16-10 claims are.

precluded the ALJ from considering matters subject to official notice, such as widespread media reports. Resp. Reply at 47.

The ALJ did not improperly consider "extrinsic evidence" when relying on articles about the "dawn raids," nor did the ALJ impermissibly weigh evidence at the motion to dismiss stage. Although the Commission has stated that for a claim to be dismissed on timeliness grounds at a motion to dismiss stage one looks to the face of the complaint, *Maher*, 2015 FMC LEXIS 43 at *110-*111; *Streak Products v. UTi*, 32 S.R.R. 1959, 1966 (ALJ 2013); the Commission has not limited its analysis solely to the complaint. In *Maher*, the Commission held that the standards of Rule 12(b)(6) apply to a motion to dismiss based on a statute of limitations. *Maher*, 2015 FMC LEXIS 43 at *111. Under those standards, the Commission may consider not only the complaint, but also "documents attached to the complaint, documents incorporated by reference in, or integral to, the complaint, and matter subject to official notice." *Id.* at 2 n.1. Moreover, in rejecting the statute of limitations argument in *Maher*, the Commission considered the complaint and these other materials. *Id*. at *111 ("The Port Authority has not met its burden of proving that Counts I and VIII are time-barred based on the face of the complaint *and other facts properly considered by the Commission*.") (emphasis added).

Here, the ALJ implicitly and properly took official notice of five news articles about the September 6, 2012, dawn raids of vehicle carriers, and Complainants do not argue on appeal that these articles were not the proper subject of official notice. I.D. at 46. "Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission." 46 C.F.R.§ 502.226(a). This includes news articles for the purpose of establishing what information was in the public realm at the relevant time. I.D. at 46; *Sandza v. Barclays Bank PLC*, 151 F. Supp. 3d 94, 113 (D.D.C. 2015); *Benak v. Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006); *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991); *Hourani v. Psybersolutions*, LLC, 164 F. Supp. 3d 128, 136 (D.D.C. 2016); *In re Lorazepam & Clorazepate Antitrust Litig*., No. 03-1650, 2004 U.S. Dist. LEXIS 32268, at *22-23 n.3 (D.D.C. May 18, 2004); *Stevens Shipping & Terminal Co. v. S.C. State Ports Auth.*, 23 S.R.R. 267, 299 n.25 (ALJ 1985).

Nor did the ALJ improperly weigh conflicting evidence. Focusing on the 16-01 Complaint, Complainants are correct that there are no allegations that on their face establish that the claims were untimely. The 16-01 Complainants allege that they "did not discover and could not have discovered the alleged contract, conspiracy, or combination at an earlier date by the exercise of reasonable diligence." 16-01 Compl. ¶ 95. Similarly, they allege that "[n]one of the facts or information available to Complainants and members of the Class, if investigated with reasonable diligence, would have led to the discovery of hard facts clearly demonstrating the existence and effects of the conspiracy alleged in this Complaint during the Class period." *Id.* ¶ 97.

But these are not all factual allegations that the Commission must accept. The only factual allegation is that Complainants did not discover the alleged conspiracy at an "earlier date." Whether or not they *could have* discovered the alleged conspiracy with the exercise of reasonable diligence is a legal question, not a factual one, and the Commission need not accept allegations as to legal conclusions as true. *Maher*, 2015 FMC LEXIS 43 at *36; *Cornell*, 33 S.R.R. at 620-621 (citations omitted). That is, the ALJ did not weigh conflicting evidence and

find that Complainants actually knew sufficient facts to have a claim in September 2012, nor did the ALJ weigh the news articles against the factual allegations and find that Complainants were aware of the dawn raids. Rather, the ALJ found that there was sufficient information available that Complainants could have discovered their claim, a legal determination. I.D. at 47.

2. Shipping Act Statute of Limitations

Turning to the statute of limitations itself, Complainants suing for reparations must file their complaint within 3 years of the date their cause of action accrued. 46 U.S.C. § 41301(a) ("If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation."); 46 C.F.R. § 502.62(a)(4)(iii) ("A complaint seeking reparation must be filed within three years after the claim accrues. Notification to the Commission that a complaint may or will be filed for the recovery of reparations will not constitute a filing within the applicable statutory period.").

In general, a claim accrues, and the statute of limitations begins to run, when the respondent commits an act that injures the complainant's business. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185, 1191, 2013 FMC LEXIS 5, *12 (FMC 2013) (quoting *Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321,338 (1971)). But the Commission has interpreted claim accrual to be when a complainant knew or should have known of facts giving rise to a cause of action. *Maher*, 32 S.R.R. at 1193, 2013 FMC LEXIS 5 at *17-18 ("We agree that claim accrual occurs when a complainant knew or should have known that it had a cause of action as opposed to a *prima facie* case."); *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 314 (FMC 2001); (characterizing the rule as that "a cause of action accrues when a party knew or should have known that it had a claim"); *see also Momenian v. Davidson*, 878 F.3d 381, 388 (D.C. Cir. 2017); *Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) ("'[A] cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured'") (quoting *Nat'l Treasury Emps. Union v. FLRA*, 392 F.3d 498, 501 (D.C. 2004)). In other words, a cause of action accrues when the complainant has either "actual notice of the cause of action or is deemed to be on inquiry notice." *C.B. Harris & Co., Inc. v. Wells Fargo & Co.*, 113 F. Supp. 3d 166 (D.D.C. July 6, 2015).[13]

Respondents bear the burden of proving that a claim is untimely, and, as noted above, on a motion to dismiss the scope of the Commission's inquiry is limited. *Maher*, 2015 FMC LEXIS

[13]Although the Initial Decision referred to the discovery rule as "tolling" the statute of limitations, it is better viewed as a method of determining claim accrual as opposed to a way to toll a statute of limitations that has already run. *See, e.g.*, *Inlet Fish*, 29 S.R.R. at 313, 315. Accrual of a claim is different from the tolling of a statute of limitation. *Cf. Cada v. Baxter Healthcare Corp.*, 902 F.2d 446, 450 (7th Cir. 1990) ("Tolling doctrines stop the statute of limitations from running even if the accrual date as passed"); *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 801 (2d Cir. 2014) ("The distinction is that the diligence-discovery rule delays the date of accrual where the plaintiff 'is blamelessly ignorant of the existence or cause of his injury,' while the doctrine of equitable tolling applies after the claim has already accrued, suspending the statute of limitations to 'prevent unfairness to a diligent plaintiff.'" (internal citations omitted).

43 at *110; *Campbell v. Grand Trunk W.R R. Co*., 238 F.3d 772, 775 (6th Cir. 2001). If a respondent meets its burden, the burden shifts to the complainant to establish that an exception to the statute of limitations applies and renders the claims timely. *Maher Terminal*, 32 S.R.R. 1192; *Inlet Fish*, 29 S.R.R. at 314; *Campbell*, 238 F.3d at 775.

Here, the ALJ found that the public reporting about September 6, 2012, raids on Respondents was sufficient to allow the Complainants to have discovered with the exercise of due diligence that they had Shipping Act claims more than three years before the 16-01 Complaint was filed in on December 29, 2015. I.D. at 47. Complainants argue that the news articles about the "dawn raids" on September 6, 2012, are an insufficient basis for dismissing their claims. They argue that "the mere existence of investigations has little probative value in the pleading context because the outcome of those investigations cannot be predicted and because the fact that a government enforcer seeks information from a company does not imply that company's participation in a conspiracy." Appeal at 33 (citing cases). They further contend that additional factual investigation and economic analysis was necessary as of September 2012. *Id.* at 34. According to Complainants, application of the discovery rule is highly fact specific and limitations questions should be resolved after development of a full factual record. *Id*. Complainants also assert that "[I]f the Commission accepts the ALJ's standard, that every time any investigation is announced any person who may have been injured by the actions under investigation must rush to file any claim they might have (depending what the investigation ultimately uncovers), the Commission's docket would be flooded." *Id.*

Respondents counter that under the discovery rule, a complainant need not have actual knowledge of a cause of action; rather the question is when a party objectively was on inquiry notice. Resp. Reply at 48. Respondents further argue that Complainants do nothing to rebut the ALJ's conclusion that they could have discovered their claim with reasonable diligence. Respondents also assert that complainants had all the information they needed to bring antitrust claims in federal court long before the Commission's statute of limitations expired:

> For strategic reasons, complainants chose not to use those alleged facts to bring Shipping Act claims and ignored respondents' – and the U.S. District Court's – admonitions that the claims were in the wrong forum. They intentionally chose what they perceived as more attractive claims and a more attractive forum, and allowed the Shipping Act limitations period slip through their hands.

Resp. Reply at 48-49.

The ALJ did not err in applying the discovery rule here to find the claims accrued in early September 2012. The critical question is when Complainants "knew or with reasonable diligence should have known" they had a claim against Respondents based on their alleged conspiracy. *Inlet Fish.*, 29 S.R.R. at 314. Their claim accrued when Complainants discovered or "with due diligence should have discovered" they had a claim against Respondents for an injury to their business. *Inlet Fish*, 29 S.R.R. at 314 (citing *In Connors v. Hallmark & Son Coal Co*., 935 F.2d 336, 342 (D.C. Cir. 1991)). "The statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Loughlin v. United States*, 230 F. Supp. 2d 26, 40 (D.D.C. 2002). (quoting *Zeleznik v. United States*, 770

F.2d 20, 23 (3d Cir. 1985)); *McIntyre*, 367 F.3d at 52 (duty of inquiry charges plaintiff with knowledge of what diligent inquiry would have revealed); *Litif v. United States*, 670 F.3d 39, 44 (1st Cir. 2012) (plaintiff is charged with actual knowledge and "what a reasonable person, once fairly prompted to investigate, would have discovered by diligent investigation").

The news reports about the September 2012 raids, published on September 6 or 7, 2012, specifically referred to suspicions of illegal price-fixing on a global scale in the vehicle carrier market. As the ALJ described in the Initial Decision, news articles about the September 6, 2012, dawn raids describe the coordinated investigation by several countries into suspected illegal price-fixing scheme. I.D. at 47. The ALJ described five articles in the record specifically linking the raids to suspected price-fixing and anticompetitive practices by vehicle carriers. *Id.* A report from Reuters addressed the coordinated efforts of Japanese, European Union (EU) and U.S. authorities in conducting "unannounced inspections of several maritime shipping companies" suspected of operating a cartel for vehicle carrier service. *Id.* As the ALJ also noted, a U.S. Department of Justice's (DOJ) spokesperson confirmed that DOJ's Antirust Division was "'investigating the possibility of anticompetitive practices involving the ocean shipping of cars, trucks, construction equipment and other products.'" *Id.(citation omitted).* Articles likewise referred specifically to raids on Japan's top three shipping companies suspected of violating antitrust law in shipping vehicles. *Id.* Although the articles mentioned potential antitrust violations, rather than Shipping Act claims, the alleged price-fixing and other anticompetitive conduct is the same type of conduct the 16-01 Complainants allege state Shipping Act violations. 16-01 Complainant ¶¶ 112-121.

The well-publicized information about raids based on suspected illegal price-fixing and other anticompetitive conduct provided notice and triggered an obligation on the part of the 16-01 Complainants to make further inquiries. *See Donahue v. United States*, 634 F.3d at 625-27 (news reports triggered a duty "undertake a diligent investigation"); *McIntyre v United States*, 367 F.3d 38, 59 (1st Cir. 2004). These Complainants are ocean transportation intermediaries who allege that they directly purchased services from Respondents. I.D. at 3;16-01 Compl. ¶ 4. Moreover, all three named complainants are either currently licensed by the Commission (International Transport Management Corp. and RCL Agencies, Inc.) or were previously licensed by the Commission (Cargo Agents).[14] So they cannot claim to be a stranger to the Federal Maritime Commission or the Shipping Act.

In other words, as of as late as September 7, 2012, the 16-01 Complainants, all of whom were licensed OTIs, were on constructive notice that several nations' competition authorities were investigating many of the Respondents for engaging in price-fixing and cartel activities. This was much more than a simple government inquiry or routine investigation. *See* I.D. at 46-48. And the news articles clearly conveyed as much in describing a coordinated investigation on a global scale based on suspected price-fixing and an illegal cartel operating in the vehicle carrier service market. *Id.* The ALJ correctly determined that this was enough to put Complainants on notice that they may have been overcharged for vehicle carrier services due to potentially illegal conduct by Respondents.

[14] The Commission takes official notice from its files of the licensing status of the 16-01 Complainants.

Importantly, Complainants did not allege and do not argue on appeal that they were unaware of the dawn raids in September 2012. Rather, they alleged that statute of limitations did not begin to run until they had the "hard facts necessary to be fully aware of the conspiracy alleged herein and its negative effects on their businesses." 16-01 Compl. ¶ 101. On appeal, Complainants argue that the articles announcing the dawn raid are not enough because "[a]dditional factual investigation – coupled with economic analysis – was necessary at that point." Appeal at 34. But the lack of "hard facts" and the need for investigation does not prevent the statute of limitation from starting. "[T]he discovery rule . . . provides that the statute of limitations begins when the plaintiff discovers, or with due diligence should have discovered, the injury supporting the legal claim." *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 729 (D.C. Cir. 2012). Complainants' "awareness of the harm itself—and not [their] full appreciation of the impact of the injury—[is what] matters for purposes of the discovery rule." *Lattisaw v. District of Columbia*, 118 F. Supp. 3d 142, 157 (D.D.C. 2015).[15]

Further, as the ALJ pointed out that "[i]f Complainants had sufficient information to file the federal class actions in June of 2014, within *two* years of the dawn raids, then they had sufficient information to file the Shipping Act complaints within *three* years of the dawn raids." I.D. at 48. Complainants have yet to respond to this argument. Rather, they insist that they could not have known they were injured until May 2013, when the first indirect purchaser class action was filed in federal court. Appeal at 32. But they do not explain how the filing of a federal court complaint relates to claim accrual.[16]

Moreover, while the ALJ found that the allegations in Complainants' previous federal court complainants were not admissions that they knew of the dawn raids and investigations as of September 6, 2012, I.D. at 46, those allegations are potentially relevant to what the Complainants should have known. That is, two of the three 16-01 Complainants alleged in federal court that "[b]efore September 6, 2012, when the global investigation of Defendants'

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[15] New Jersey state court reached a similar conclusion in a recent unpublished decision. *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, No. BER-L-6325-18, slip. op. at 15 (N.J. Super. Ct. Mar. 1, 2019). The court found that Mercedes-Benz's state law antitrust claims against many of the Respondents here were barred by New Jersey's four-year statute of limitations. The court found that plaintiff "would have or should have known that it may have been injured by Defendants on September 6, 2012, the date of the highly-publicized dawn raids of Defendants' offices, and high-profile investigations by antitrust authorities around the world." *Id.* at 16 ("Many news reports were widely circulated internationally, and were detailed and specific, identifying Defendants by name and highlighting that the government investigations concerned alleged price fixing and other alleged anticompetitive conduct by Defendants.") The court also noted that as a significant automotive equipment manufacturer, the plaintiff has close, substantial involvement in the vehicle carrier services market on a day-to-day basis. *Id*. at 15.

We do not rely on the state court decision but merely note that its finding on constructive notice is consistent with ours.

[16] The relevant date for the 16-01 Complainants would be August 9, 2013, when the first direct purchaser class action was filed. 16-01 Compl. ¶ 102. But the Complainants do not explain how it is that their Shipping Act cause of action did not accrue until the filing of a federal court cause of action based on the same conduct.

misconduct was first publicly reported, a reasonable person under the circumstances . . . would not have been alerted to begin to investigate the legitimacy of Defendant's prices for Vehicle Carrier Services before that time." Resp. App. at RA0027. They further alleged in court that "Defendants' agreements, understandings, or conspiracies were kept secret until September 6, 2012" and that "[n]one of the facts or information available to Plaintiffs and members of the Class, if investigated with reasonable diligence, would have led to the discovery of the conspiracy alleged in this Complaint prior to September 6, 2012." *Id.*

In addition to arguing unpersuasively that they could not have known enough to have a claim in September 2012, and that they did not know enough to have a claim until 2013, Complainants aver that the existence of investigations has little probative value "in the pleading context," citing three cases. Appeal at 33-34. But, as Respondents point out, the plaintiffs in those cases pointed to investigations or subpoenas to argue that they had stated plausible claims for relief; "[n]one of those cases involve a statute of limitations issue, nor did any address the more relevant question of whether notice of a governmental investigation suffices to place a party on inquiry notice of a potential cause of action." Resp. Reply at 49 n.52.

Complainants argue that statute of limitations issues often are not amenable to early dismissal because discovery may be required to flesh out pertinent facts. Appeal at 43. But this is not true of this case. Here, the relevant facts are known and largely undisputed: On September 6 and September 7, 2012, multiple news outlets, including trade publications (Journal of Commerce) and a wire service (Reuters) announced coordinated, multinational investigations into alleged cartel price fixing in the market for shipping vehicles. It is not unreasonable to conclude that Commission-licensed ocean transportation intermediaries who allegedly directly contracted with the purported cartel members for those very services were on inquiry notice that they might have a Shipping Act claim.

Further, contrary to Complainant's argument, the "ALJ's standard" for claim accrual does not mean that potential complainants have to "rush" to the Commission, flooding the docket, when "any investigation" is announced. Appeal at 34. This was not "any investigation." It was a multi-national focused inquiry. Nor does the Commission's holding require a complainant to rush out and immediately file a reparations claims. Rather, potential complainants have *three years* from the accrual date to file a Shipping Act complaint with the Commission.

The 16-01 Complainants' were on notice of potential Shipping Act claims by early September 2012 when authorities' suspicions about Respondents engaging in illegal practices became public knowledge. Despite that knowledge, Complainants waited more than three years to bring their claims before the Commission--taking them outside the Shipping Act's statute of limitations.

3. Tolling of the Statute of Limitations

In addition, to dispute the ALJ's finding as to claim accrual, Complainants argue that the Shipping Act statute of limitations was tolled under *American Pipe & Construction Co. v. Utah*,

414 U.S. 538, 554 (1974) by the filing of the federal antitrust actions in 2013. Appeal at 28-30. [17] The ALJ found *American Pipe*, or "class action," tolling inapplicable because "[n]o party suggests that Congress or the Shipping Act have authorized such tolling in Commission proceedings," and "*American Pipe* tolling does not apply to this situation where the previously filed claims were filed in different courts, alleged different causes of action, and sought different remedies." I.D. at 44.

On appeal, Complainants do not cite any error in the ALJ's analysis. Rather, they reiterate that *American Pipe* tolling applies. Appeal at 29. Complainants argue that under *American Pipe*, or "class action tolling," their antitrust suits in federal court, first filed on May 24, 2013, which are based on the same facts as their Shipping Act allegations, tolled the statute of limitations. Complainants do not say so expressly, but they appear to be arguing that their Shipping Act complaints should "relate back" to this May 24, 2013, date, which is less than three years after September 2012. In other words, if *American Pipe* applies, they would be entitled to an earlier filing date that would render their Shipping Act complaints timely. Respondents argue that the Shipping Act's statute of limitations is jurisdictional and not subject to tolling and that "*American Pipe*" and its progeny do not toll different causes of action under different statutes, with different remedies, and in different forums." Resp. Reply at 38.

Regardless of whether the Commission's statute of limitations is properly deemed jurisdictional or not subject to tolling,[18] Complainants' arguments fail because they have not established that class action tolling or other doctrines apply to toll the statute of limitations in this case. Class action tolling suspends the statute of limitations on class members' individual claims, so those claims are not time-barred if a class action does not proceed as such. *American Pipe*, 414 U.S. at 550-51. *American Pipe* established that filing a class action "tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 553. *Crown, Cork &*

[17]The Complainants focus on May 2013 because that is when the first indirect purchaser antitrust class action was filed in federal court. With respect to the Docket No. 16-01 Complainants, the relevant date is August 9, 2013, when the first direct purchaser class action was filed. 16-01 Compl. ¶ 102.

[18]The Commission has long treated its statute of limitations as jurisdictional. *See*, *e.g.*, *W. Overseas Trade & Dev. Corp. v. ANERA*, 26 S.R.R. 874, 885 (FMC 1993) ("The Commission has consistently held that [the] statute of limitation contained in section 22 of the Shipping Act, 1916 ('1916 Act') is jurisdictional and cannot be waived."); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.B. 602, 604 (FMB 1959) ("Implicit in complaint's argument is the assumption that the parties may agree to waive or postpone the running of the statute. This cannot be done since the expiration of the time limit not only bars the remedy but also extinguishes the right, thereby nullifying the jurisdiction of the Board over the claims.") (internal citations omitted). This is in tension with the general rule that statutes of limitations are not jurisdictional and typically may be equitably tolled. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *Holland v. Florida*, 560 U.S. 631, 645-46 (2010); *Day v. McDonough*, 547 U.S. 198, 205 (2006). And it is not clear that the Commission's statute of limitations would qualify as a "jurisdictional" statute of limitations based on its text, context, and relevant historical treatment. *Menominee Indian Tribe of Wis. V. United States*, 614 F.3d 519, 524 (D.C. Cir. 2010).

Seal Co. v. Parker extended class action tolling to separate suits brought by individuals after class action efforts failed. 462 U.S. 345, 350-51 (1983).

Class action tolling suspends the statute of limitations on class members' individual claims until there is a ruling denying or revoking class certification. *American Pipe*, 414 U.S. at 553. The rule ensures that class members are not unfairly deprived of an opportunity for individual relief for claims litigated as part of the class action because the limitations period expired while the class action was pending. *Id.* at 553-54; *Barryman-Turner v. District of Columbia*, 115 F. Supp. 3d 126, 131-34 (D.D.C. 2015). It also protects the courts from multiple individual lawsuits filed as insurance against the possibility that class action relief may be denied. *American Pipe*, 414 U.S. at 551.

Two restrictions on class action tolling are pertinent here. First, class action tolling only suspends the limitations period for claims asserted in the original class action. *Johnson v. Railway Express Agency, Inc*., 421 U.S. 454, 467 (1975). It does not suspend the limitations period for new or different causes of action not before the court in the class action. *Id.* The subsequently filed case must assert "exactly the same cause of action" as the earlier class action that tolled the limitations period. *Id*.; *Weston v. AmeriBank*, 265 F.3d 366, 368-69 (6th Cir. 2001) (citing *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring)); *Zarecor v. Morgan Keegan & Co. Inc.*, 801 F.3d 882, 887-89 (8th Cir. 2015); *In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig*., 995 F. Supp. 2d 291, 303 (S.D.N.Y. 2014); *Raie v. Cheminova, Inc.*, 336 F.3d 1278, 1282-83 (11th Cir. 2003) (per curiam) (holding that class action asserting product liability claims did not toll statute of limitations for subsequent wrongful death action).

Second, class action tolling only applies to individual claims – it does not stop the limitations period from running on successive class actions. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1809-11 (2018). Before the Supreme Court's 2018 ruling in *China Agritech*, federal courts differed on whether tolling might apply to successive class actions. But the consensus now appears that *China Agritech* settled that issue when the Court ruled that "*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action." *Id.* at 1806. The Court explained that the federal rules "do not offer . . . a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims." *Id*. at 1811. The Court's ruling in *China Agritech* makes clear that litigants cannot rely on class action tolling to bring successive class actions. *See Blake v. JP Morgan Chase Bank N.A.*, 927 F.3d 701, 708-10 (3d Cir. 2019);*Painters & Allied Trades Dist. Council 82 Health Care Fund v. Forest Pharms., Inc*., 915 F.3d 1, 16-17 (1st Cir. 2019); *Weitzner v. Sanofi Pasteur Inc*., 909 F.3d 604, 609-10 (3d Cir. 2018).

These restrictions render class action tolling inapplicable to revive the untimely16-01 Complaint. The Shipping Act claims that Complainants allege before the Commission are not the same as the Sherman/Clayton Act and state law antitrust claims the plaintiffs asserted in the antitrust litigation, despite them relying on the same alleged facts. Here, Complainants allege that Respondents: (1) operated as common carriers under secret, unfiled agreements prohibited by 46 U.S.C. §§ 40301-40302; (2) failed to establish and follow "just and reasonable regulations and practices" for "receiving, handling, storing, or delivering property" as required by 46 U.S.C. § 41102(c); (3) "unreasonably refused to deal or negotiate as required by 46 U.S.C. § 41104(10); and (4) engaged in anticompetitive practices prohibited by 46 U.S.C. § 41105. None of these

claims match the Sherman/Clayton Act or state law claims asserted in the antitrust litigation. *See Antitrust Litig. II*, 846 F.3d at 78; *In re Copper Antitrust Litigation*, 436 F.3d 782 (7th Cir. 2006) (state and federal antitrust claims not the same for *American Pipe* tolling purposes). That alone precludes Complainants from relying on class action tolling to make their Shipping Act claims timely.

In addition, Complainants are not individual litigants trying to preserve their claims for relief after class certification was denied. Rather, they are trying to relate their class actions back to previous class actions. Not only does *American Pipe* not on its face apply, but, as noted above, courts have rejected this sort of stacking. *See Blake*, 927 F.3d at 708-10.

Rather than address these issues, Complainants assert that class action tolling is consistent with "sound administrative practice" under the gap-filling provision of 46 C.F.R. § 502.12. Appeal at 28-29. They also argue that class action tolling is consistent with the Commission's limitations precedent, the Federal Rules of Civil Procedure, and the interests of economy and efficiency. *Id*. at 29. But this is beside the point: even if the Commission adopted class action tolling under *American Pipe* as consistent with sound administrative practice, Complainants would not be eligible.

Simply put, despite referring to *American Pipe*, Complainants are not really asking the Commission to apply class action tolling and have not shown that it applies. Rather, they are essentially asking the Commission to create a new form of tolling that is similar to, and broader than, *American Pipe,* and that is specific to the facts of this case. Complainants have not, however, justified this request. Complainants have not shown that the class action tolling that they ask for would rescue their claims, let alone justify adopting a new type of tolling specific to the facts of this case.

Further, Complainants' appeal to equitable considerations does not change the result. Although Complainants do not argue that they are entitled to equitable tolling of the statute of limitations, the tenor of their arguments focuses on the alleged unfairness of allowing Respondents' to evade financial responsibility for allegedly egregious conduct. Equitable tolling only applies if party can show that: (1) it diligently pursued its rights; and (2) extraordinary circumstance beyond its control stood in the way of timely filing.[19] *Menominee Indian Tribe v. United States*, 136 S. Ct 750, 752 (2016) (citing *Holland*, 560 U.S. at 649). Equitable tolling is granted sparingly and only if the court finds that its "carefully circumscribed" criteria apply. *Norman v. United States*, 467 F.3d 773, 776 (D.C. Cir. 2006); *Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011). The doctrine applies to those "rare instances" where "due to circumstances external to the party's own conduct" enforcing the limitations period would be unconscionable and result in "gross injustice." *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (en banc) (internal quotation marks omitted).

Complainants cannot show that they diligently pursued their Shipping Act claims, which alone forecloses the 16-01 Complainants from relying on equitable tolling. They had

[19] Equitable tolling hinges on the filing party's conduct. *Plummer v. Warren*, 463 F. App'x 501, 504 (6th Cir. 2012). In that respect, it differs from fraudulent concealment and equitable estoppel—both of which depend on actions taken by the respondents. *See id.*

constructive notice of potential Shipping Act claims by September 2012 from widely published news accounts of the raids. And to the extent that they were confused about where to assert their claims or which claims to pursue, they were on notice of the potential statutory bar to their antitrust claims by January 2015 when the parties briefed the motions to dismiss filed in the district court action.[20] Despite signals that their antitrust claims were in jeopardy of being dismissed as legally barred, they waited another 12 months before filing with the Commission. Given these further delays, the 16-01 Complainants would not meet the "diligent pursuit" element of equitable tolling. *See generally Brookens v. Acosta*, 297 F. Supp. 3d 40, 50 (D.D.C. 2018) (plaintiff claiming confusion over which forum to file in did not diligently pursue his rights).[21]

Complainants would also fail the "extraordinary circumstance" requirement. Extraordinary circumstances require an "external obstacle" beyond complainants' control that blocked their path and caused the delay. *Menominee*, 136 S. Ct. at 659. Whatever obstacle allegedly blocked the way, it cannot be the result of complainants' "own misunderstanding of the law or tactical mistakes in litigation." *Menominee*, 764 F.3d 51, 58 (D.C. Cir. 2014) (citing *Holland*, 560 U.S. at 651). Tactical litigation errors or misunderstanding applicable law are per se "insufficient to toll the statute of limitations." *Menominee*, 764 F.3d at 58; *Brookens*, 297 F. Supp. 3d at 50. For example, mistakenly relying on a putative class action as tolling the limitations period is not a circumstance beyond complainants' control that can justify equitable tolling. *Menominee*, 136 S. Ct. at 659.

D. Cease-and-Desist Relief

Despite finding the 16-01 claims time-barred as to reparations, the ALJ allowed "the claim for a cease and desist order for named parties" to proceed." I.D. at 56. As the ALJ noted, the Shipping Act's three-year statute of limitations does not apply to complainants seeking non-reparation orders, such as an order to cease-and-desist. *Maher*, 32 S.R.R. at 1190 ("The language of the Act is clear that the three-year statute of limitations applies only to claims for reparations."); *Inlet Fish*, 29 S.R.R. at 313.

The Commission reverses the Initial Decision in this regard because Complainants do not allege that Respondents continued to violate the Shipping Act after 2012, nor do they allege that Respondents are likely to resume violating their alleged unlawful conduct. "[I]imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume." *Maher*, 32 S.R.R. at 1190 n.8. Here, the ALJ found that "[t]he 2016 Complainants do not contend that the violations went beyond 2012, identifying the proposed class period as

[20] By January 25, 2015, the parties had fully briefed motions to dismiss on which Respondents ultimately prevailed. *Antitrust Litig.*, 2015 U.S. Dist. LEXIS 114691, *28. The district court heard oral argument on the motions to dismiss on July 23, 2015, and supplemental briefing on the preemption issue followed.

[21] In contrast, soon after the district court dismissed the antitrust claims on August 28, 2015, and months prior to the filing of the class actions, General Motors LLC (GM) brought reparations claims against three Respondent carriers but settled with them in October 2016. Gen. Motors LLC v. Nippon Yusen Kabushiki Kaisha, Docket No. 15-08 (complaint filed Sept. 2, 2015).

February 1997 to as late as December 31, 2012." I.D. at 48. That Complainants mentioned a cease-and-desist order in their prayer for relief in their complaint is insufficient to make up for the absence of any allegations of ongoing unlawful conduct, especially when Complainants themselves characterize their case as one for reparations. 16-01 Compl. ¶ 1 (noting that they bring their complaint "to recover reparations and the costs of suit, including reasonable attorneys' fees). As a consequence of the Commission's partial reversal of the Initial Decision as to statute of limitations, the 16-01 claims are dismissed in their entirety.

E. Class Action Authority

The Complainants brought their cases as class actions, and Respondents' challenged whether the Commission could and should hear class actions. The ALJ conditionally declined to permit the cases to proceed on a class basis. I.D. at 26. Complainants appeal that ruling.[22]

The parties' arguments for and against the Commission exercising class action authority raise complex issues of first impression. Because all claims have been dismissed, the Commission need not address these issues and declines to do so.

IV. CONCLUSION

THEREFORE IT IS ORDERED, That the Initial Decision's dismissal of the Docket No. 16-07, Docket No. 16-10, and Docket No. 16-11 Complainants with prejudice for lack of standing under the direct purchaser rule is affirmed.

IT IS FURTHER ORDERED, That the Initial Decision's dismissal of the Docket No. 16-01 Complaint as to reparations as untimely is affirmed.

IT IS FURTHER ORDERED, That the Initial Decision is reversed insofar as it allowed the Docket No. 16-01 claims to proceed for a cease-and-desist order, and those claims are dismissed in their entirety with prejudice.

[22]Two law professors filed an amicus brief in support of Complainants, arguing that: (a) "Congress generally grants non-Article III courts broad discretion to adopt their own procedures;" (b) "Non-Article III courts use their statutory authority to aggregate claims and cases in a variety of ways;" and (c) "aggregation is an indispensable tool for improving the efficiency, consistency, and fairness of adjudication." Amicus Br. at 3, 6, 16.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

Commissioner Maffei, concurring in part and dissenting in part:

I concur with the majority in affirming the dismissal of the Docket No. 16-07, Docket No. 16-10, and Docket No. 16-11 Complainants with prejudice, and dissent from the majority in dismissing the Docket No. 16-01 claims in their entirety and discontinuing the proceeding.

I. Standing

I concur with the majority's decision to affirm the ALJ's motion to dismiss the indirect purchaser claims in Docket Nos. 16-07, 16-10, and 16-11 claims for lack of standing. The end-payor, truck center, and auto dealer Complainants in this case admit they are indirect purchasers. *See Complainants' Appeal from the Initial Decision Granting in Part and Denying in Part and Denying in Part Respondents' Motion to Dismiss and Supplemental Motion to Dismiss*, July 30, 2018, at 5 (Appeal). However, they make reasonable arguments concerning the modern realities of the shipping industry in attempting to justify their ability to pursue a remedy at the Federal Maritime Commission notwithstanding the Commission's long-standing precedent and analogous precedents. *See id.* at 21-24; Majority Opinion at 11-13 (discussing Commission precedent on the direct purchaser rule). As the Complainants note, in the shipping industry, it is customary for the total shipping cost to be fully passed downstream to indirect purchasers, and shipping records would illustrate the pass-through of the costs. Appeal at 23. Although the majority makes valid points that determining the actual overcharges that were passed along to each entity in the distribution chain would be complicated, and that this complicated process is a precise concern that instructed the creation of the direct purchaser rule in *Illinois Brick*, I acknowledge that the indirect purchasers may have suffered an actual injury that will go unremedied in this case. Majority Opinion at 25-26; *accord Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

That said, I do believe it would be inappropriate for the Commission to overrule existing Commission and Supreme Court precedent based on the particulars of this case. Indeed, since federal antitrust decisions establish such clear precedent that only direct purchasers have standing to seek reparations for claims of damages, it may require statutory changes to address the issue in order to ensure that such injuries can be remedied in future cases.

Therefore, I must, regrettably, concur with the majority's decision to affirm the ALJ's dismissal of the Docket Nos. 16-07, 16-10, and 16-11 Complainants with prejudice for lack of standing under the direct purchaser rule.

II. Statute of Limitations

I dissent from the majority's decision to dismiss the claims of the remaining Complainants in Docket No. 16-01. The majority opinion dismisses too easily an important question in this case: is the statute of limitations established in § 41301(a) jurisdictional or is it subject to waiver? As the majority notes, Commission precedent has generally treated the statute of limitations as a jurisdictional requirement not subject to waiver or tolling, but it is not clear that it should be so treated based on text, context, and relevant historical treatment. *See* Majority Opinion at 41 n. 18. In my view, this case presents an opportunity for the Commission to reevaluate whether its precedent determining the statute of limitations is jurisdictional is still applicable.[23]

The majority concludes that it is not necessary to reach a resolution regarding the jurisdictional question because the Complainant's would not prevail under either *American Pipe* or "class action tolling," or equitable tolling under federal court precedent, but it does not consider prior Commission dicta regarding tolling, which tends to indicate the statute of limitations should be tolled in this case. In *Military Sealift Command, Dep't of the Navy v. Matson Navigation Co.*, the Commission indicated that the running of the statute of limitations period could be tolled pending the disposition of related proceedings if the purpose of the statute of limitations was not defeated. *See Mil. Sealift Command, Dep't of the Navy v. Matson Navigation Co.*, 21 S.R.R. 459, 1982 FMC LEXIS 29, at *7, 10-11 (FMC 1982).

The stated purpose of statutes of limitations in *Military Sealift* "is to prevent stale claims of which the defendant had no prior notice and the facts and merits of which become less susceptible of determination due to the fading of memories and loss of records and evidence." *Id.* at *8. In this case, like in *Military Sealift*, the claims of the Complainants are not stale, and the Respondents have been aware of the claims since the original court case was filed. Moreover, there is minimal risk of loss of records and evidence, because this case was filed shortly after the corresponding court case was dismissed and it was clear from the Third Circuit's ruling that the case should be brought before the Commission. *See Antitrust Litig. II*, 846 F.3d at 77-78.

The majority overlooks the Commission's prior statements rejecting "rigid theories" concerning the statute of limitations in favor of considering "the facts of a particular case in light of the purposes of the statute of limitations." *Mil. Sealift, 21 S.R.R.* at *7. In light of these statements, it is premature to dismiss this case at this juncture. Because the claims in this case could possibly be eligible for tolling under the approach suggested in *Military Sealift*, the Commission should address the jurisdictional question and whether this case meets the requirements.

For these reasons, I dissent from the majority's decision to dismiss the Docket No. 16-01 claims in their entirety.

[23]Additionally, this issue was raised in the Respondents reply in support of their motion to dismiss and was raised again in response to the Complainant's appeal, but because the ALJ did not directly address the issue, the Complainants have never had the opportunity to respond in briefs. Dismissing the case without allowing the Complainants this opportunity is problematic.

III. Class Action Authority

Finally, this case brings up a challenging issue for the Commission which remains unaddressed by the majority: does the Commission have jurisdiction over class action suits involving alleged violations of the Shipping Act? On this matter, I concur with the ALJ's conclusion that the Commission's general enabling statute and existing regulations do not explicitly authorize class action suits. I.D. at 26. However, given that the Third Circuit implied the Commission would be the proper venue for the Complainants' claims when dismissing their federal and state court claims, it seems an open question whether the Commission must allow such class action suits given that it seems there is no other venue for them. *Antitrust Litig. II*, 846 F.3d at 77-78. Again, the guidance of Congress may be required to determine where similarly situated plaintiffs should bring their class action claims, so that injuries that occur against class action litigants may be adjudicated on their merits.

IV. Conclusion

It is regrettable that the merits of this case will not be considered by the Commission. I hope that this case brings to light some areas of the Shipping Act and the Commission's jurisprudence that are ripe for clarification so that future parties do not find themselves in the unfortunate position of not having a venue for their potentially valid complaints.

Issued: October 31, 2019

FEDERAL MARITIME COMMISSION

POSSIBLE REVOCATION OF PASSENGER VESSEL OPERATOR PERFORMANCE CERTIFICATE NO. P1397 GREAT NORTHERN & SOUTHERN NAVIGATION CO., LLC DBA FRENCH AMERICA LINE	**DOCKET NO. 19-08**

ORDER GRANTING HEARING AND DIRECTING GREAT NORTHERN & SOUTHERN NAVIGATION CO. LLC DBA FRENCH AMERICA LINE TO SHOW CAUSE

Pursuant to 46 C.F.R. § 540.8(c) the Federal Maritime Commission grants a hearing and directs respondent Great Northern & Southern Navigation Co., LLC DBA French America Line, a certified passenger vessel operator, to show cause why its Performance Certificate should not be revoked for cause.

Based on information provided to it, the Commission's Bureau of Enforcement makes the following allegations:

STATEMENT OF FACTS CONSTITUTING BASIS FOR COMMISSION ACTION

1. Great Northern & Southern Navigation Co., LLC dba French America Line (French America Line or FAL) is a Louisiana Limited Liability Company.

2. According to records submitted to the Commission's Bureau of Certification and Licensing (BCL), French America Line is said to maintain its principal offices at 700 Churchill Parkway, Avondale, LA 70094.

3. BCL records identify the principal of French America Line as Christopher Kyte, Chairman, and Manager Duane Kendall Grigsby (Ken Grigsby) as Chief Operating Officer.

4. Christopher Kyte has provided BCL with his address as 883 Island Drive, Suite 214, Alameda, CA 94502.

5. BCL records identify David Christopher Tidmore as Registered Agent for service of process for FAL.

6. Louisiana Secretary of State records also identify David Christopher Tidmore as Registered Agent for service of process for FAL, located at 3104 Roberta St. Metarie, LA 70003.

7. On October 4, 2016, FAL entered into an Escrow Agreement with KeyBank, N.A. for the purposes of providing proof of Financial Responsibility for Indemnification of Passengers in the Event of Nonperformance.

8. Upon receipt of the escrow agreement, BCL issued Performance Certificate No. P-1397 effective October 5, 2016.

9. French America Line is a Certificant operating as a passenger vessel operator (PVO) pursuant to Certificate (Performance) No. P-1397 since October 2016.

10. On October 26, 2016, FAL's sole vessel, the LOUISIANE, suffered a sanitary system failure, requiring FAL to cancel multiple sailings.

11. The escrow agreement requires FAL to submit weekly recomputations of unearned passenger revenue and refunds, and are used to adjust the amount in the escrow account accordingly.

12. The escrow agreement requires FAL submit audit reports that attest to the veracity of unearned passenger revenue recomputations on a quarterly basis.

13. The 2016 4th Quarter Independent Audit for October, November, and December was not received on or before the due date of February 14, 2017.

14. The 2017 1st, 2nd, and 3rd Quarter Independent Audits were not received on or before the due dates of May 15, 2017, August 14, 2017, and November 14, 2017, respectively.

15. The Louisiana Secretary of State webpage indicates that, on September 21, 2017, FAL changed its name to "Great Northern & Southern Navigation Co LLC French America Line" from "Great Northern & Southern Navigation Co., LLC". FAL failed to notify the Commission of this change.

16. By email correspondence dated December 22, 2017 to Tajuanda Singletary, Ken Grigsby requested information about the audit process and what FAL needed to provide.

17. Tajuanda Singletary responded to Ken Grigsby by email January 3, 2018 with paragraph 8 of the escrow agreement which detailed the requirements for the independent audit.

18. By correspondence emailed January 25, 2018 to FAL, BCL sent a notification letter to FAL of the Commission's intent to conduct a review of Unearned Passenger Revenue pursuant to 46 C.F.R. Part 540.

19. In the January 25, 2018 letter to FAL, BCL requested various financial documents to be submitted by February 1, 2018.

20. By correspondence emailed January 29, 2018 to BCL, Christopher Kyte requested a two-week extension to provide the documents. BCL granted extension to February 9, 2018.

21. The documents requested in the notice of review letter were not received by February 9, 2018. On February 12, 2018 BCL emailed Christopher Kyte, again requesting the

documents.

22. The 2017 4th Quarter Independent Audit for October, November, and December was not received on or before the due date of February 14, 2018.

23. By correspondence emailed February 21, 2018 to FAL, BCL again requested the documentation named in the January 25, 2018 notice of review letter that was not submitted by the February 9, 2018 extended deadline.

24. The 2018 1st Quarter Independent Audit for January, February, and March was not received on or before the due date of May 15, 2018.

25. By correspondence emailed May 18, 2018 to FAL, BCL notified FAL that it was not in compliance with the escrow agreement and gave a deadline of June 1, 2018 to come into compliance with the escrow agreement and provide BCL with the required reports, weekly recomputation certificates, statement of good standing with the state of Louisiana, and provide the current operating address of FAL.

26. By correspondence emailed May 31, 2018 to BCL, FAL responded to the May 18, 2018 notification stating that FAL remained at the same operating address of 700 Churchill Parkway, Avondale, LA 70094. FAL also requested an extension to submit the requested documents.

27. On June 6, 2018, BCL granted FAL's request for a deadline extension until June 30, 2018.

28. BCL did not receive the required recomputation certificates, requested documents, or independent reports by June 30, 2018.

29. On July 12, 2018, a conference call was held between BCL and FAL during which FAL agreed it would report to the FMC the progress of its independent auditor no later than the morning of Wednesday, July 18, 2018. The parties agreed that a final audit report would be made available to the FMC no later than Friday, July 27, 2018. BCL sent a follow-up email to FAL memorializing the conference call.

30. On July 16, 2018, Area Representative Eric Mintz visited the principal address of FAL at 700 Churchill Parkway, Avondale, LA 70094. FAL was not located at that address.

31. By correspondence emailed July 17, 2018, Mr. Scott Rojas, Director of Facilities and IT at the building located at 700 Churchill Parkway, Avondale, LA 70094 confirmed French America Line/Great Northern & Southern Navigation Co., LLC vacated that location the week of November 27, 2017.

32. BCL did not receive a final audit report on July 27, 2018 as agreed during the July 12, 2018 call.

33. The 2018 2nd Quarter Independent Audit for April, May, and June was not received on or before the due date of August 14, 2018.

34. By correspondence emailed August 27, 2018 to FAL, BCL informed FAL that it was still not in compliance with the escrow agreement and that the outstanding reports continued to be past due.

35. The 2018 3rd Quarter Independent Audit for July, August, and September was not received on or before the due date of November 14, 2018.

36. By correspondence mailed and emailed February 6, 2019 to FAL, BCL informed FAL it was not in compliance with the escrow agreement and requested FAL provide the necessary documentation to comply with the agreement, the FMC's regulations, and the requirements of the Louisiana Accountancy Act no later than April 9, 2019.

37. The 2018 4th Quarter Independent Audit for October, November, and December was not received on or before the due date of February 14, 2019.

38. BCL did not receive the correct requested documents due April 9, 2019 per BCL's letter dated February 6, 2019.

39. By correspondence mailed and emailed April 10, 2019 to FAL, BCL provided notice to FAL of BCL's intent to revoke FAL's Performance Certificate.

40. The 2019 1st Quarter Independent Audit for January, February, and March was not received on or before the due date of May 15, 2019.

41. As of October 9, 2019, FAL was not in good standing with the Louisiana Secretary of State.

THE COMMISSION'S JURISDICTION AND REQUIREMENTS OF LAW

42. Under 46 U.S.C. § 41302(a), the Commission is empowered to investigate any conduct that the Commission believes to be in violation of Part A of Subtitle IV of Title 46 U.S. Code, 46 U.S.C. §§ 40101-44101.

43. Through 46 U.S.C. § 44106, 46 U.S.C. § 41302(a) also applies to proceedings conducted by the Commission under Part C, 46 U.S.C. §§ 44101-44106.

44. 46 U.S.C. § 44102 provides:

> (a) Filing requirement. A person in the United States may not arrange, offer, advertise, or provide transportation on a vessel to which this chapter applies unless the person has filed with the Federal Maritime Commission evidence of financial responsibility to indemnify passengers for nonperformance of the transportation.
>
> (b) Satisfactory evidence. To satisfy subsection (a), a person must file–
>
> (1) Information the Commission considers necessary; or
>
> (2) A copy of the bond or other security, in such form as the Commission by regulation may require.

45. The Commission's regulations at 46 C.F.R. § 540.8 provide:

> (c) If the applicant, within 20 days after notice of the proposed denial, revocation, suspension, or modification under paragraph (b) of this section, requests a hearing to show that such denial, revocation, suspension, or modification should not take place, such hearing shall be granted by the Commission.

46. The Commission's implementing regulations at 46 C.F.R. §540.3 provide:

> No person in the United States may arrange, offer, advertise, or provide passage on a vessel unless a Certificate (Performance) has been issued to or covers such person.

47. The Commission's regulations at 46 C.F.R. §540.8(b) provide that a Certificate

(Performance) be denied, revoked, suspended, or modified for any of the following reasons:

> (1) Making any willfully false statement to the Commission in connection with an application for a Certificate (Performance)
>
> (2) Circumstances whereby the party does not qualify as financially responsible in accordance with the requirements of the Commission;
>
> (3) Failure to comply with or respond to lawful inquiries, requests for information, rules, regulations, or orders of the Commission pursuant to the rules of this subpart.

BASIS FOR REVOCATION OR SUSPENSION OF RESPONDENT'S CERTIFICATE (PERFORMANCE)

48. The Commission has previously found that passenger vessel operators are not entitled to a Certificate where an operator misled Commission staff and failed to respond to lawful inquiries. *Royal Venture Cruise Line, Inc. and Anastassios Kiriakidis–Possible Violations of Passenger Vessel Certification Requirements*, 27 S.R.R. 1069 (FMC 1997).

49. The Commission will also issue cease and desist orders based on a vessel operator's inability to establish its financial responsibility. *Royal Venture Cruise Line, Inc. and Anastassios Kiriakidis–Possible Violations of Passenger Vessel Certification Requirements*, 27 S.R.R. 1069 (FMC 1997); *American Star Lines, Inc., National Transatlantic Lines of Greece S.A. and Dimitri Anninos–Possible Violations of Passenger Vessel Certification Requirements*, 25 S.R.R. 1153 (FMC 1990).

50. FAL's false statements regarding its office address establish that revocation is proper under 46 C.F.R. § 540.8(b)(1).

51. FAL's failure to timely submit quarterly independent audits for the past three years, as required by the terms of its escrow agreement, establish that FAL is no longer qualified to hold a Certificate within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2).

52. FAL's failure to remain a Limited Liability Company in good standing with its state's

authority, as warranted in its escrow agreement, establish that FAL is no longer qualified to hold a Certificate within the meaning of 46 U.S.C. § 44102 and 46 C.F.R. § 540.8(b)(2).

53. FAL's failure to comply with information and document requests by Commission staff establish that revocation is proper under 46 C.F.R. § 540.8(b)(3).

ORDER

NOW THEREFORE, IT IS ORDERED That, pursuant to 46 U.S.C. §§ 41302, 41304, 44106, and 46 C.F.R. § 540.8(c), Great Northern & Southern Navigation Co., LLC DBA French America Line is directed to show cause, within 25 days of publication of this Order in the Federal Register, why the Commission should not revoke its Certificate (Performance) inasmuch as the Certificant is otherwise not qualified to render passenger vessel services;

IT IS FURTHER ORDERED That this proceeding be limited to the submission of affidavits of fact, memoranda of law, and documentary evidence;

IT IS FURTHER ORDERED That any person having an interest and desiring to intervene in this proceeding shall file a petition for leave to intervene in accordance with Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68. Such petition shall be accompanied by the petitioner's memorandum of law, affidavit of fact, and documentary evidence, if any, and shall be filed no later than the date fixed below;

IT IS FURTHER ORDERED That Great Northern & Southern Navigation Co., LLC DBA French America Line be named as Respondent in this proceeding. Affidavits of fact, memoranda of law, and documentary evidence shall be filed by Respondent and any intervenors in support of Respondent no later than November 26, 2019;

IT IS FURTHER ORDERED That the Commission's Bureau of Enforcement (BOE) be made a party to this proceeding;

IT IS FURTHER ORDERED That reply affidavits, memoranda of law, and documentary evidence shall be filed by BOE and intervenors in opposition to Respondent no later than December 11, 2019;

IT IS FURTHER ORDERED That:

(a) Should any party believe that the submission of testimony or additional evidence is required, that party must submit a request together with a statement setting forth in detail the facts to be proved, the relevance of those facts to the issues in this proceeding, a description of the evidence which would be adduced, and why such testimony or other evidence cannot be submitted by affidavit; and

(b) Any request for submission of testimony or additional evidence shall be filed no later than December 11, 2019;

IT IS FURTHER ORDERED That notice of this Order to Show Cause be published in the Federal Register, and that a copy thereof be served upon Respondent at its last known address;

IT IS FURTHER ORDERED That all documents submitted by any party of record in this proceeding shall be filed in accordance with Rule 2 of the Commission's Rules of Practice and Procedure, 46 C.F.R § 502.2, as well as mailed directly to all parties of record;

FINALLY, IT IS ORDERED That pursuant to the terms of Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, the final decision of the Commission in this proceeding shall be issued no later than February 27, 2020.

By the Commission.

Rachel Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant*

v.

RDD FREIGHT INTERNATIONAL INC., *Respondent*.

DOCKET NO. 17-02

Served: November 7, 2019

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON REMAND[1]

[Notice of Commission Determination to Review served 12/9/19, Commission final decision pending.]

I. INTRODUCTION

A. Overview and Summary of Decision

This is a dispute between a garment manufacturer and an ocean transportation intermediary. Complainant Hangzhou Qianwang Dress Co., Ltd. ("Hangzhou Qianwang") alleges that Respondent RDD Freight International Inc. ("RDD" or "RDD Freight") released cargo in three separate shipments to the consignee without obtaining original bills of lading in violation of the Shipping Act of 1984 ("Shipping Act"). RDD Freight denies the allegations.

On August 29, 2018, an initial decision was issued in this proceeding finding that RDD Freight violated section 41102(c) of the Shipping Act (46 U.S.C. § 41102(c)) by releasing cargo to the consignee without requiring presentation of original bills of lading and awarding reparations to Hangzhou Qianwang. *Hangzhou Qianwang Dress Co., Ltd, v. RDD Freight International Inc.*, 1 F.M.C.2d 158 (ALJ 2018) ("Initial decision" or "I.D.").

After the initial decision was issued, the Commission promulgated an interpretive rule on the scope of section 41102(c), stating that it "is revising its interpretation of the scope of the Shipping Act prohibition against failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" to require "that a regulated entity engage in a practice or regulation on a *normal*, *customary*, and *continuous* basis." Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed.

[1] This initial decision on remand will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Reg. 64478, 64479 (Dec. 17, 2018) ("Final Rule"); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45367-45372 (Sept. 7, 2018) ("NPRM").

On March 7, 2019, the Commission issued an order vacating the initial decision and remanding this proceeding "for consideration of the § 41102(c) claims in light of the Commission's revised interpretation." *Hangzhou Qianwang Dress Co., Ltd., v. RDD Freight International Inc.*, 1 F.M.C.2d 262 (FMC 2019) (Order Vacating and Remanding Initial Decision) ("Remand order"). This initial decision on remand rules on issues addressed in the initial decision as well as issues raised by the Commission's remand.

The Commission's interpretive rule adds an element that was not considered in the initial decision. Although Hangzhou Qianwang establishes the other elements required for a section 41102(c) violation, it is unable to establish this new element – that the conduct in question occurred on a normal, customary, and continuous basis. As explained more fully below, the complaint must therefore be dismissed.

B. Background

1. Initial Filings

This proceeding began with a complaint filed on February 17, 2017. The complaint included the invoice, packing list, and bills of lading for the three shipments at issue. On March 2, 2017, the notice of filing of complaint and assignment was issued. On March 24, 2017, Respondent filed an answer denying the allegations in the complaint and including a counterclaim. On April 27, 2017, a telephone conference was held. On April 28, 2017, Complainant filed a response to the counterclaim by letter.

On August 23, 2017, an amended complaint was filed in partial response to a show cause order. On October 11, 2017, an order was issued discharging the show cause order and establishing a schedule. The schedule required the completion of all discovery by December 22, 2017. In January 2018, both parties filed motions to compel responses to discovery.

On February 1, 2018, an order compelling responses to discovery was issued, noting that "neither party has fulfilled its discovery obligations." The February 1, 2018, order required additional discovery to be filed, vacated the scheduling order, and required the parties to appear at a telephone conference. Telephone conferences were held on March 15, 2018, and March 21, 2018. On March 21, 2018, an order was issued permitting Respondent to file a motion to compel.

On April 6, 2018, Respondent filed a motion to compel discovery from Complainant. On May 30, 2018, the motion to compel was granted in part and denied in part; discovery was completed; and the parties were ordered to present their cases through written briefs, with Complainant's filings due on June 29, 2018; Respondent's opposition due July 30, 2018; and Complainant's reply due on August 14, 2018.

On June 20, 2018, Complainant filed a motion to add supplemental evidence. On July 28, 2018, Respondent filed a cross-motion to supplement the record. Both motions, which were unopposed, were granted.

On June 29, 2018, Complainant filed its brief, proposed findings of fact, and an appendix.[2] On July 28, 2018, Respondent filed its opposition brief, proposed findings of fact, response to Complainant's proposed findings of fact, appendix of exhibits, and cross-motion to supplement the record. A notice regarding filing issued July 30, 2018, noted that Respondent's brief was labeled as a "Brief in Opposition to Complainant's Motion for Summary Judgment and in Support of RDD's Cross-motion for Summary Judgment" although it appeared that no motion for summary judgment had been filed and if that was the case, that "the brief will be treated as a brief on the merits as required by the scheduling order." Notice Regarding Filing at 1. The parties did not respond to the notice. Accordingly, the briefs filed by Complainant and Respondent were accepted as briefs on the merits.

Complainant did not file a reply brief or response to RDD Freight's proposed findings of fact. In an email exchange with the Respondent and this office, Complainant requested an extension to which Respondent objected. Complainant was advised by this office that an extension would need to be requested by a properly filed motion demonstrating good cause. No such motion was received from the *pro se* Complainant.

2. Initial Decision

On August 29, 2018, the initial decision was issued finding that RDD Freight had violated section 41102(c) of the Shipping Act by releasing three separate shipments to the consignee without obtaining the original bills of lading for the shipments and awarding Hangzou Qianwang reparations of $61,704 plus interest. I.D. at 17, 1 F.M.C.2d 158, 173 (ALJ 2018). The initial decision stated:

> The facts of this case are very similar to the facts presented in *Bimsha,* where the [non-vessel-operating common carrier ("NVOCC")] Chief Cargo released shipper Bimsha's cargo to the notify party without requiring the presentation of an original bill of lading three times in three months. *Bimsha Int'l v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 353 (ALJ 2011), *aff'd* 32 S.R.R. 1861 (FMC 2013) ("*FMC Bimsha*"), *aff'd sub nom. Chief Cargo Serv. v. Federal Maritime Commission*, 586 Fed. Appx. 730 (2nd Cir. 2014) ("*2nd Cir. Bimsha*").

[2] References to the record treat the pages as sequentially numbered and are abbreviated as:

CBrief – Complainant's brief
CFF – Complainant's proposed findings of fact
CApp – Complainant's appendix
RBrief – Respondent's opposition brief
RFF – Respondent's proposed findings of fact
RRFF – Respondent's response to Complainant's proposed findings of fact
RApp – Respondent's appendix

> The Administrative Law Judge in *Bimsha* found that the "failure by Chief Cargo to establish the practice of requiring an original bill of lading before releasing the cargo was a failure to *establish* just and reasonable practices, and a violation. Alternatively, if Chief Cargo had established the practice of requiring an original bill of lading, then by failing to *observe and enforce* the practice would be a violation of the Act." *FMC Bimsha*, 32 S.R.R. at 1864. The Commission affirmed the ALJ's decision, stating that it "has indeed recognized that NVOCCs violate section 10(d)(1) when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and therefore engage in an unjust and unreasonable practice." *FMC Bimsha,* 32 S.R.R. at 1866. The Commission relied on a long line of Commission cases to find that failing to fulfill NVOCC obligations violates the Shipping Act regardless of the number of shipments involved. *FMC Bimsha*, 32 S.R.R. at 1866-67. The Second Circuit Court of Appeals affirmed the Commission's decision. *2nd Cir. Bimsha,* 686 Fed. Appx. at 732.
>
> In this case, Respondent has not submitted any evidence that it established regulations or practices regarding delivering and releasing cargo. If Respondent had such regulations or practices, they were not observed or enforced. RDD's employee accepted the statement of the consignee about releasing the cargo without confirming with the Complainant or requiring an original bill [of] lading. There is no mention in the employee's statement of any corporate regulations or practices to ensure proper delivery of cargo.
>
> The parties are entitled to rely on settled Commission precedent in determining whether to undertake the time and expense of filing a complaint before the Commission. For three separate shipments, RDD Freight violated section 41102(c) of the Shipping Act by releasing cargo to the consignee without receiving an original bill of lading. Given the nearly identical fact patterns between *Bimsha* and this proceeding, justice requires that the outcome be equivalent. Accordingly, the evidence shows that Respondent violated section 41102(c) of the Shipping Act.

I.D. at 12-13, 1 F.M.C.2d at 168.

3. Commission's Interpretive Rule Revising the Elements Required for a Section 41102(c) Violation

On September 7, 2018, the Commission issued a notice of proposed rulemaking "to obtain public comments on clarification and guidance regarding the Commission's interpretation of the scope of 46 U.S.C. 41102(c) (section 10(d)(1) of the Shipping Act of 1984)." NPRM, 83 FR 45367. In the notice of proposed rulemaking, the Commission stated *inter alia*:

> Specifically, the Commission is considering an interpretive rule consistent with Commission precedent . . . that would restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices* and *regulations*. These decisions require that a regulated entity engage in a practice or regulation on a *normal, customary,* and

> *continuous* basis and a finding that such practice or regulation is unjust or unreasonable to violate that section of the Shipping Act.

NPRM, 83 FR at 45368 (emphasis in original, internal citations omitted).

On December 17, 2018, the Commission issued a final rule adopting the September 7, 2018, notice of proposed rulemaking without change. Final Rule, 83 FR 64478. New Rule 545.4, states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (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.

46 C.F.R. § 545.4.

4. Commission Remand Order

On March 7, 2019, the Commission issued the remand order in this proceeding. The Commission stated:

> [The initial decision's] interpretation of § 41102(c), however, insofar as it holds that discrete conduct with respect to a single shipment may constitute a violation of the statute, runs contrary to the original intent of Congress, the rules of statutory construction, and Commission precedent. *See*, *e.g.*, Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45367-45372 (Sept. 7, 2018).
>
> Properly interpreted, and consistent with pre-2010 Commission precedent, § 41102(c) applies to acts or omissions that occur on a normal, customary, and continuous basis. 83 Fed. Reg. at 64479; 83 Fed. Reg. at 45369-70, 45372; *see also* 46 C.F.R. § 545.4(b). Here, while the ALJ noted that Respondent released cargo without receiving an original bill of lading "[f]or three separate shipments" ALJ I.D. at 13, the ALJ did not consider whether Respondent's conduct occurred on a normal, customary, and continuous basis.

> Consequently, the Commission **VACATES** the Initial Decision and **REMANDS** this matter to the ALJ for consideration of the § 41102(c) claims in light of the Commission's revised interpretation.

Remand Order at 1-2, 1 F.M.C.2d at 262-63.

On March 26, 2019, an order was issued requiring the parties to meet and confer by April 17, 2019, and to file by April 26, 2019, a joint status report ("JSR") stating whether additional discovery would be required and if so, to "exchange relevant documents in a timely fashion," and discuss when voluntary disclosures could be made. Order Requiring JSR at 1-2. The parties were also advised that they would be given an opportunity after completion of discovery to file briefs "focus[ing] on the legal and factual issues necessary to establish that the alleged violation occurred on a normal, customary, and continuous basis." Order Requiring JSR at 2. The parties were instructed to include a proposed schedule for the submission of their remand briefs in the joint status report. Order Requiring JSR at 2.

Complainant filed a letter dated April 11, 2019, in response to the order requiring a joint status report ("Complainant's Remand Status Report"). Respondent similarly filed a letter on April 30, 2019, in response ("Respondent's Remand Status Report"). The parties did not request further discovery, nor did they provide a proposed schedule for additional briefing.

On May 15, 2019, a remand briefing schedule was issued instructing the parties to file any additional evidence with Complainant's remand brief or Respondent's remand opposition brief. Remand Briefing Schedule at 1. The schedule further noted that "[a]s the person who filed this complaint, Complainant has the burden of proof and will need to establish that any alleged section 41102(c) violation occurred on a normal, customary, and continuous basis or otherwise address the Commission's interpretive rule." Remand Briefing Schedule at 2.

On May 29, 2019, Hangzhou Qianwang filed another letter, with exhibits attached ("Complainant's Remand Brief"). No submission was received from Respondent and the deadline to file briefs has passed. Although letters are disfavored in Commission proceedings, these letters will be accepted to avoid the additional time and expense of revised filings.

C. Arguments of the Parties

Complainant alleges that:

> Defendant, in releasing the goods to the consignee before it had received the original Bill of Lading and permission from Plaintiff to release, violated the Shipping Act and its implementing regulations, in particular, 46 U.S.C. 41102(c), in that it "fail[ed] to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

CBrief at 2. Complainant asserts that as a direct consequence of Respondent's violation, Complainant sustained damages of $134,207.70 which, after a settlement received in a related case in China, is reduced by Complainant to $72,503.70. CBrief at 2. Complainant contends that Respondent violated section 41102(c) even under the interpretive rule, stating:

> Their action of releasing our containers on 3 separate occasions indicates that RDD Freight International releases freight without original Bill of Ladings on a regular basis. Attached are the 3 containers of ours that were released 3 separate times in the month of September and October 2016. They were not released together as a group which would indicate 1 action. They were released separately, 3 separate times. Although we have no access to their books and records, there is nothing to indicate they have not done it for other clients past and present. . . .
>
> The fact that they released three of our shipments on different dates from different vessels without our knowledge should speak for itself.

Complainant's Remand Brief at 1.

Respondent asserts that Complainant seeks to recover the value of the goods in question from Respondent RDD Freight but not from the consignee, SWAK Kids; that RDD Freight's employee was "defrauded and misled into releasing the goods to the said consignee – in a good faith and bona fide effort to save the $450.00 per day demurrage;" and that Complainant settled its claims in a proceeding in China. RBrief at 1-2. Respondent further asserts that Complainant "has the prima facie burden of proving that the alleged violation committed by RDD 'occurred on a normal, customary and continuous basis' under the new interpretive Rules." Respondent's Remand Status Report at 1.

D. Evidence

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision on remand is based on the pleadings, exhibits, letter briefs, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision on remand addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT[3]

1. Complainant Hangzhou Qianwang Dress Co., Ltd. manufactures apparel, including hats and gloves, which it sells to retailers in the United States. CFF at 2; RRFF at 1.

2. Respondent RDD Freight International Inc. is an NVOCC and international freight forwarder with an ocean transportation intermediary license issued by the Federal Maritime Commission. RApp at 2 (Exhibit 1).

3. Complainant and Respondent entered into an agreement in which Respondent agreed to transport apparel from China to New York for Complainant. CFF at 2; RRFF at 1.

4. Respondent contracted with the Complainant for transportation of the goods in question and RDD Freight issued three ocean bills of lading for the shipments: MBE 16081082; MBE 16081477; and MBE 16091121. CApp at 4, 8, 12; RFF at 1.

5. The invoice and packing list for the first shipment, for 947 ctns, are dated Aug. 22, 2016, and show a sale from Hangzhou Qianwang Dress Co., Ltd. to SWAK Kids Inc. for $57,273.48. CApp at 2-3.

6. The bill of lading for the first shipment, MBE 16081082, is dated Aug. 25, 2016; lists the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc. and the forwarding agent as RDD Freight International Inc.; and lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY. CApp at 4.

7. Both Complainant and Respondent submitted copies of the bills of lading. For the first shipment, the Complainant's copy of the bill of lading states "FREIGHT PREPAID," CApp at 4, while the Respondent's copy of the bill of lading states "FREIGHT COLLECT," RApp at 7 (Exhibit 3). In other respects, the bills of lading are identical.

8. The invoice and packing list for the second shipment, for 1095 ctns, are dated Aug. 28, 2016, and show a sale from Hangzhou Qianwang Dress Co., Ltd. to SWAK Kids Inc. for $54,137.40. CApp at 6-7.

9. The bill of lading for the second shipment, MBE 16081477, is dated Aug. 31, 2016; lists the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc., and the forwarding agent as RDD Freight International Inc.; lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY; and states "freight collect." CApp at 8 (all caps omitted).

10. The invoice and packing list for the third shipment, for 579 ctns, are dated Fed. 13, 2016, and show a sale from Hangzhou Qianwang Dress Co., Ltd. to SWAK Kids Inc. for $22,796.82. CApp at 10-11.

[3] The parties did not submit any new evidence, therefore, the findings of fact in this initial decision on remand remain the same as those in the initial decision.

11. The bill of lading for the third shipment, MBE 16091121, is dated Sep. 15, 2016; lists the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc., and the forwarding agent as RDD Freight International Inc.; lists the port of loadings as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY; and states "freight collect." CApp at 12 (all caps omitted).

12. RDD Freight released all three cargo shipments to the consignee, SWAK Kids, without obtaining an original bill of lading or Complainant's consent to release. CApp at 14.

13. For house bill of lading number 16081082, the master bill of lading number is YMLU E232080146. CApp at 14.

14. For house bill of lading number 16081477, the master bill of lading number is KKLUNB3701194. CApp at 14.

15. For house bill of lading number 16091121, the master bill of lading number is YMLU E232081075. CApp at 14.

16. A November 21, 2016, email indicated the value of the containers as follows:

    E232080146 : USD57273
    KKLUNB3701194: USD53338
    E232081075 : USD22797

    CApp at 16.

17. A November 22, 2016, email from the shipper Echo states "I call the buyer today he said he need 18 months to pay off it, it's really crazy, it kill all my business." CApp at 17.

18. An email dated November 28, 2016, from RDD Fright employee Yiwen Hu, states:

> Today, we talked to the shipper, ECHO and explained to him our sincere apology for this mistake of the release of those containers. We will keep tracking with the consignee till all the payments are paid to the shipper. He also met the consignee as he said and he also said he got stuck and how to arrange the 2 containers that are ready to ship. We told him we did not mind to let him file the law suit against us and then we can put the consignee into the court as the defendant as well. . . .
>
> In the meantime, we told him to keep shipping through us for the containers as we need his help in order for him to work with us together to get this problem resolved. We will meet the consignee tomorrow and then we will talk to the shipper again for the solution. At this moment, we want the shipper to work with us is to ship the 2 containers through you/us again, we will hold because we will tell the consignee that we make the payments to the shipper for the last 3 containers and then we have the absolute right to hold later arriving containers. This is what are thinking at this time and have not told the shipper yet. Also we see tomorrow how the

> shipper wants to solve this problem. Then we can know what we will do next.

CApp at 18.

19. An email dated March 23, 2017, from RDD Freight employee Sangy Nutsuk, on RDD Freight letterhead states:

> Please find attached e-mails that pertain to correspondence between RDD & S.W.A.K KIDS Inc. to prove the consignee begged us to release. Above Cargo was released because Victor of S.W.A.K Indicated he had spoken with Shipper regarding payment. Victor also mentioned that he had taken care of payment with shipper and has known them for over 15 years and tricked me into thinking and believed that he was trust worthy base on previous shipment never missed payment to us, and he confirmed it will be no problem in releasing cargo. I also threatened force over the phone from him by shouted and yelled to get his cargo released from terminal so they wouldn't have to pay approximately $450 per day in demurrage charges. I released a container on three different occasions based on above. Victor created the problem with his words, and lies that he did contacted and cleared with shipper. When I mentioned victor over the phone to clear with his shipper he shout back to me that (this is not your problem just released the cargo because I sent you money already) that's the reason why I released cargo to him. And later I found out he did not get the telex released because he failed to make the payment to shipper.
>
> Shipper should to correct money from VICTOR not us, we are just the victim and 3rd person just released cargo with payment customer paid to us. I never have known conversation or agreement between customer and their own shipper at all.
>
> **Shipper should deal with S.W.A.K for outstanding payment and not get RDD involved. RDD spoke with S.W.A.K and they were going to make partial payments but shipper did not want this. **

RApp at 16 (Exhibit 6) (emphasis omitted); *see also* RApp at 14 (Exhibit 5).

20. The Complainant seeks to recover the invoice value of the goods in question – from RDD Freight but not from SWAK Kids, the designated consignee. RFF at 1.

21. While waiting for the Complainant's instructions, RDD Freight's employee released the goods to the said consignee and stated that it was a good faith and bona fide effort to save the $450.00 per day demurrage for the said consignee. RFF at 2; RApp at 14-16 (Exhibits 5-6).

22. The consignee SWAK Kids, after paying the Complainant the sum of $10,000, has failed to pay the balance of $123,408.00. RFF at 2.

23. A screenshot of Microsoft word properties, or digital signature, for the document labeled "Hangzhou2018" lists the title as "Kid Apparel Club" which Respondent argues is the same as the consignee SWAK Kids, as well as listing the "Content created" as "1/7/2018" and "Last printed" as "6/28/17." RFF at 2; RApp at 17-18 (second document labeled Exhibit 6).

24. On or about May 17, 2018, while this case was pending, a related case in China was settled and RDD Freight paid $61,704, representing half of the claim, to Complainant. CFF at 4; RRFF at 2; RFF at 2.

25. Complainant describes the settlement agreement:

> Because the agent of RDD Freight Int'l, Inc. at the port of destination released goods without B/L, which resulted the loss of us in amount of USD123408, we had started a lawsuit against Zhejiang Handsome International Logistics Co., Ltd. in Ningbo and then settled with them through the court on one condition, which is RDD gives us an one-time compensation of 50% of our loss, which means 61704 US dollars in total. Now we confirm that we have received the above compensation from RDD on May []th 2018, and will withdraw the aforementioned lawsuit against Zhejiang Handsome International Logistics Co., Ltd. in Ningbo Maritime Court within 3 days.

CApp at 22.

26. The settlement agreement, as provided by Respondent, states in relevant part:

> Upon completion of performing Articles 1 through 3, all disputes over the released goods without paper under Bills of Lading KKLUN3701194, E232080146, E232081479 relating to the Carriage of Goods by Sea Contract between Party B [RDD Freight] and Party C [Hangzhou Qianwang], and the Marine Agency Contract between Party A [Zhejiang Handsome Int'l Logistics Co.] and Party C [Hangzhou Qianwang] shall be settled once and for all; and there shall be no disputes among the three Parties A, B and C [Zhejiang Handsome, RDD Freight, and Hangzhou Qianwang].

RApp at 23 (Exhibit 7).

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that "A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent

committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997-99 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000). Complainant alleges a violation of the Shipping Act within the Commission's jurisdiction. Although the Respondent raised lack of personal or subject matter jurisdiction in their answer, they have not made any arguments regarding jurisdiction.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.203; *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 718-19 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. When the evidence is evenly balanced, the party with the burden of persuasion must lose. *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Legal Analysis

1. Section 41102(c) Elements

Section 41102(c), formerly section 10(d)(1), provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

a. Respondent Operated as an Ocean Transportation Intermediary

Because section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate it, an entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Shipping Act. There is no claim that RDD Freight acted as a marine terminal operator or a vessel-operating common carrier. Therefore, as part of proving that Respondent violated section 41102(c), Hangzhou Qianwang must prove that RDD Freight operated as an ocean transportation intermediary on these shipments.

The Shipping Act defines two types of ocean transportation intermediaries: ocean freight forwarders and non-vessel-operating common carriers. 46 U.S.C. § 40102(20). "The term 'ocean freight forwarder' means a person that – (A) in the United States, *dispatches shipments from the*

United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19) (emphasis added).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). To be an NVOCC on a particular shipment, an entity must meet the Shipping Act's definition of "common carrier" on the shipment.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The evidence demonstrates that RDD Freight is licensed by the Commission as an NVOCC. Hangzhou Qianwang established that RDD Freight issued three bills of lading for the shipments: MBE 16081082, MBE 16081477, and MBE 16091121. All three shipments were transported by water from Ningbo, China, to the United States. All three RDD Freight bills of lading list the shipper as Hangzhou Qianwang Dress Co., Ltd., the consignee as SWAK Kids Inc., and the forwarding agent as RDD Freight International Inc.; and list the port of loading as Ningbo, the port of discharge as New York, NY, and the place of delivery as New York, NY. CApp at 4. The evidence supports a finding that RDD Freight, an entity licensed by the Commission as an NVOCC, held itself out as a common carrier, and assumed responsibility for the transportation by water from Ningbo to the United States for the three shipments at issue. Therefore, RDD Freight operated as an NVOCC – a type of ocean transportation intermediary – for the transportation of the three shipments, a required element to demonstrate a section 41102(c) violation.

b. Complainant Fails to Establish that Respondent's Release of Cargo Without Obtaining Original Bills of Lading Occurred on a Normal, Customary, and Continuous Basis

In explaining what constitutes "regulations and practice," the Commission stated in the final rule adopting the interpretive rule:

> In drafting the 1916 Act, and through its revisions and reenactment in 1984, Congress chose the word 'practice' and the phrase, 'establish, observe, and enforce just and reasonable regulations and practices,' to describe actions or omissions engaged in on a normal, customary, and continuous basis. From its origin and as recently as 2001, § 41102(c) was interpreted in line with this understanding. To find a violation of § 41102(c), the Commission consistently

> required that the unreasonable regulation or practice was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business. This understanding as to what constitutes 'regulations and practice' under the Shipping Act is supported by multiple accepted rules of statutory construction.

Final Rule, 83 FR at 64479 (internal citations omitted).

Hangzhou Qianwang contends that RDD Freight's "action of releasing our containers on 3 separate occasions indicates that RDD Freight International releases freight without original Bill of Ladings on a regular basis," and that "[a]lthough we have no access to their books and records, there is nothing to indicate they have not done it for other clients past and present." Complainant's Remand Brief at 1.

As the entity who filed this complaint, Hangzhou Qianwang has the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus was a "regulation or practice" by RDD Freight. However, the record does not support a finding that RDD "releases freight without original bills of ladings on a regular basis," as alleged by Hangzhou Qianwang. The evidence shows that Hangzhou Qianwang entered into a contract with RDD Freight calling for RDD Freight to transport cargo to an identified consignee in three separate shipments and that RDD Freight unjustly and unreasonably delivered the cargo to that consignee without obtaining the original bills of lading for the cargo or Hangzhou Qianwang's permission to do so. As such, the evidence solely demonstrates unjust and unreasonable actions by RDD Freight with regard to the delivery of the cargo in these three shipments, not unjust and unreasonable acts on other occasions involving different transportation agreements, shippers, or consignees. Thus, the evidence of unjust and unreasonable acts by RDD does not rise to a level constituting a "regulation and practice" as described by the Commission.

Hangzhou Qianwang's speculation that RDD Freight may have acted similarly with regard to "other clients past and present" does not suffice as proof that RDD Freight engaged in the conduct on a normal, customary, and continuous basis. The parties were given an opportunity to conduct discovery but declined to do so. There is no evidence of other instances in which cargo was released without the original bill of lading or consent of the shipper. Although there is not a specific number of violations required, in this case, Hangzhou Qianwang has not established that there was a practice as opposed to an incident limited to these particular shipments between this shipper and this consignee. In addition, there is no evidence that the practice continued once RDD Freight was alerted to the problem. Therefore, the evidence of record does not support a finding that the unjust and unreasonable acts by RDD Freight extended beyond the transportation at issue in this proceeding. Accordingly, Hangzhou Qianwang fails to meet its burden of proof to demonstrate that the unjust and unreasonable acts by RDD Freight occurred on a normal, customary, and continuous basis, a prerequisite for a successful claim for reparations under the new section 41102(c) interpretive rule. 46 C.F.R. § 545.4; Final Rule, 83 FR at 64479.

c. Release of Cargo Without Obtaining Original Bills of Lading Relates to and is Connected with Receiving, Handling, Storing, or Delivering Property

The evidence shows that Hangzhou Qianwang and RDD Freight entered into an agreement in which RDD Freight agreed to transport goods from China to New York for Hangzhou Qianwang, the three containers were shipped to the United States, and RDD Freight released the cargo to the consignee without obtaining the original bills of lading for the cargo or permission from Hangzhou Qianwang to release the goods. CApp at 4, 8, 12, 14. The third element is therefore also demonstrated as the conduct relates to and is connected with receiving, handling, storing, and delivering property.

d. Release of Cargo Without Obtaining Original Bills of Lading was Unjust and Unreasonable

There is no disagreement that RDD Freight released the shipments without obtaining original bills of lading from the consignee or permission from Hangzhou Qianwang. CBrief at 2; RBrief at 2. Similarly, in *Bimsha*, the NVOCC, Chief Cargo, was found to have violated section 41102(c) of the Shipping Act when it released shipper Bimsha's cargo to the notify party without requiring the presentation of original bills of lading three times in three months. *Bimsha Int'l v. Chief Cargo Services, Inc.*, 32 S.R.R. 353 (ALJ 2011), *aff'd* 32 S.R.R. 1861 (FMC 2013) ("*FMC Bimsha*"), *aff'd sub nom. Chief Cargo Serv. v. Federal Maritime Commission*, 586 Fed. Appx. 730 (2nd Cir. 2014) ("*2nd Cir. Bimsha*").

RDD Freight explains that the shipments were released because RDD Freight's employee was "defrauded and misled" and that the employee acted "in a good faith and bona fide effort to save the $450.00 per day demurrage for the said Consignee." RBrief at 2. The evidence includes the following statement from an RDD Freight employee about why the containers were released:

> Please find attached e-mails that pertain to correspondence between RDD & S.W.A.K KIDS Inc. to prove the consignee begged us to release. Above Cargo was released because Victor of S.W.A.K Indicated he had spoken with Shipper regarding payment. Victor also mentioned that he had taken care of payment with shipper and had known them for over 15 years and tricked me into thinking and believed that he was trust worthy base on previous shipment never missed payment to us, and he confirmed it will be no problem in releasing cargo. I also threatened force over the phone from him by shouted and yelled to get his cargo released from terminal so they wouldn't have to pay approximately $450 per day in demurrage charges. I released a container on three different occasions based on above. Victor created the problem with his words, and lies that he did contacted and cleared with shipper. When I mentioned victor over the phone to clear with his shipper he shout back to me that (this is not your problem just released the cargo because I sent you money already) that's the reason why I released cargo to him. And later I found out he did not get the telex released because he failed to make the payment to shipper.

RApp at 16 (Exhibit 6); *see also* RApp at 14 (Exhibit 5).

In this case, Respondent has not submitted any evidence that it established regulations or practices regarding delivering and releasing cargo. If Respondent had such regulations or practices, they were not observed or enforced. RDD Freight's employee accepted the statement of the consignee demanding the release the cargo without confirming with Hangzhou Qianwang or requiring original bills of lading. There is no mention in the employee's statement of any corporate regulations or practices to ensure proper delivery of cargo. *See* RApp at 16 (Exhibit 6).

For three separate shipments, RDD Freight released Hangzhou Qianwang's cargo to the consignee without obtaining the original bills of lading for the cargo from the consignee or permission from Hangzhou Qianwang to do so. Accordingly, the evidence supports a finding that Respondent failed to establish, observe, and enforce just and reasonable regulations and practices when it released Hangzhou Qianwang's cargo to the consignee without obtaining the original bills of lading from the consignee, the fourth required element under the interpretive rule.

e. Release of Cargo Without Obtaining Original Bills of Lading was the Proximate Cause of Loss

Hangzhou Qianwang states that it would not have agreed to release the goods to SWAK Kids before receiving full payment for the cargo and asserts that because RDD Freight released the cargo to consignee SWAK Kids without requiring presentation of original bills of lading, Hangzhou Qianwang was not paid the $134,207.70 owed to it by SWAK Kids. CApp at 18; RFF at 2. Hangzhou Qianwang has established that RDD Freight's release of the cargo to SWAK Kids without obtaining the original bills of lading for the cargo and Hangzhou Qianwang's consent was the proximate cause of the loss claimed by Hangzhou Qianwang, so this element is met.

The loss suffered by Hangzhou Qianwang is reduced by a settlement agreement filed in a court in China. The parties agree that RDD Freight paid Hangzhou Qianwang $61,704 as part of that settlement. CApp at 21-22; RApp at 19-23 (Exhibit 7). Although the settlement agreement states that it resolves all disputes, it does not appear to explicitly mention this proceeding or Shipping Act violations. It is therefore not clear whether the settlement was meant to resolve this proceeding. Moreover, the courts in China would have jurisdiction to interpret the settlement agreement filed in their court. Settlement agreements resolving Shipping Act complaints must be reviewed and approved by the Commission. *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978). The court in China does not have jurisdiction to approve Shipping Act settlement agreements. Accordingly, there is not sufficient evidence to support RDD Freight's assertion that the Chinese settlement agreement terminates Hangzhou Qianwang's claim here, although the settlement payment reduces the amount of the loss.

However, because Hangzhou Qianwang fails to demonstrate all of the interpretive rules' required elements for successfully establishing a section 41102(c) claim for reparations, Hangzhou Qianwang's claim for reparations must be denied and dismissed. After successfully presenting his claim initially, in reliance on Commission caselaw which was nearly identical to this fact pattern, the outcome has changed due to the Commission's interpretive rule issued after this claim was filed and after Complainant prevailed in the initial decision.

2. Cease and Desist Order

Hangzhou Qianwang also seeks a cease and desist order. The Commission may issue a cease and desist order when a respondent has been found to have violated the Shipping Act. *Exclusive Tug Franchises*, 29 S.R.R. at 719-20; *Pittston Stevedoring Corp. v. New Haven Terminal, Inc.*, 13 F.M.C. 33, 34 (FMC 1969). "'[I]mposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume.'" *In Re: Vehicle Carrier Services*, Docket No 16-01, Memorandum Opinion and Order at 46-47 (FMC Oct. 21, 2019) (quoting *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 32 S.R.R. 1185, 1190 n.8 (FMC 2013)). In *Bimsha*, a cease and desist order was issued under circumstances similar to this case. *2nd Cir. Bimsha*, 586 Fed. Appx. at 733 (rejecting "Chief Cargo's challenge to the cease-and-desist order on the merits.").

The Commission's new Rule 545.4 states that the five elements discussed above must be demonstrated in order to "establish a successful claim for reparations." 83 FR 64480. Normally, the failure to establish entitlement to receive reparations would not automatically bar a complainant from obtaining a cease and desist order. However, the Commission states in the discussion of the interpretive rule that the rule addresses the requirements "to violate section 41102(c)." *Compare* 46 C.F.R. § 545.4 ("46 U.S.C. 41102(c) is interpreted to require the following elements in order *to establish a successful claim for reparations*") *with* Final Rule, 83 FR at 64479 (the "interpretive rule clarifies that in order *to violate section 41102(c)* a regulated entity must engage in an unjust or unreasonable practice or regulation on a normal, customary and continuous basis") (emphasis added).

Here, there is no evidence that Respondents are continuing to release cargo without obtaining original bills of lading or consent of the shipper. Therefore, Complainant has not demonstrated that a cease and desist order would be appropriate under these facts. Accordingly, Hangzhou Qianwang's request for a cease and desist order against RDD Freight is denied.

3. The Evidence Does Not Establish Respondent's Counterclaim of Fraud, Collusion, and Conspiracy

RDD Freight's answer includes a counterclaim that "Complainant has conspired with its counterparts in a scheme to defraud the Respondent out of monies bonded with the FMC." Answer at 3. In its brief, RDD Freight asserts that "RDD has counterclaimed that the Complainant had conspired with the said consignee to make RDD pay out of its surety bonds." RBrief at 2. Pursuant to Commission rules, "a respondent may include in the answer a counterclaim against the complainant. . . . A counterclaim . . . must allege and be limited to violations of the Shipping Act within the jurisdiction of the Commission." 46 C.F.R. § 502.62(b)(4). It is not clear which Shipping Act provision Respondent believes was violated and the counterclaim could be dismissed on that basis alone.

RDD Freight relies on two facts to support its argument that "Complainant has colluded with SWAK KIDS to extract monies from RDD" and its counterclaim that Complainant "conspired with the said consignee to make RDD pay out of its surety bonds." RBrief at 2. Complainant did not file a reply brief and as such did not directly contest Respondent's

allegations. However, as explained below, the evidence does not support Respondent's legal conclusion.

First, RDD Freight asserts that "Complainant never tried to collect the said sum of money from the Consignee SWAK KIDS, nor to even contact them to collect the same." RBrief at 2. Assuming this allegation is true, there may be legitimate reasons that the Complainant would not pursue a claim against the consignee, for example, Complainant may have determined that collecting damages from the consignee would be unlikely.

In addition, the evidence shows that Hangzhou Qianwang did speak with the consignee. An email from the shipper, Echo, on November 22, 2016, states "I call the buyer today he said he need 18 months to pay off it, it's really crazy, it kill all my business." CApp at 17. An email from RDD Freight on November 28, 2016, indicates that it was RDD Freight who proposed having Hangzhou Qianwang file a lawsuit against it so that RDD Freight could seek damages from the consignee. RDD Freight stated:

> Today, we talked to the shipper, ECHO and explained to him our sincere apology for this mistake of the release of those containers. We will keep tracking with the consignee till all the payments are paid to the shipper. He also met the consignee as he said and he also said he got stuck and how to arrange the 2 containers that are ready to ship. We told him we did not mind to let him file the law suit against us and then we can put the consignee into the court as the defendant as well.

CApp at 18. It appears that in the third sentence, "he" refers to Echo, who is the shipper. The decision not to pursue other avenues of redress does not establish that Complainant and the consignee were colluding or in a conspiracy.

Second, RDD Freight argues that "[i]n an email letter addressed to the FMC, the digital signature contains 'Kid Apparel Club' which is the same as the Consignee SWAK KIDS!" RBrief at 2. RDD Freight includes a screenshot of Microsoft word properties of a document that was created on "1/7/2018" and last printed on "6/28/17." It is not clear what document is involved and what factors impact the properties listed. For example, the last printed date occurs prior to the content created date. It is possible that rather than creating brand new documents, old documents were modified so that nothing more than the document properties remained. This screenshot of properties is not found to be reliable evidence of who actually wrote the letter at issue. As such, it is not sufficient to support a finding of fraud, collusion, or conspiracy.

Respondent has the burden of proof to establish the counterclaim. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 821, 855 (FMC 2014). As discussed above, however, the evidence does not support RDD Freight's allegation that its employee was defrauded nor that there is a conspiracy between Hangzhou Qianwang and SWAK Kids. The evidence cited by Respondent to support its counterclaim – that Complainant did not file a claim against SWAK Kids and that a letter from Complainant showed document properties that could be related to SWAK Kids – are not sufficient to support a fraud or Shipping Act violation. Accordingly, RDD Freight's counterclaim is dismissed both for lacking factual support and for not establishing a violation of the Shipping Act.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Hangzhou Qianwang did not establish that RDD Freight International Inc. violated the Shipping Act, 46 U.S.C. § 41102(c), it is hereby,

ORDERED that Hangzhou Qianwang Dress Co., Ltd.'s complaint against RDD Freight International Inc. be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant*

v.

RDD FREIGHT INTERNATIONAL INC., *Respondent*.

DOCKET NO. 17-02

Served: December 9, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, and Louis E. SOLA, *Commissioners*.

NOTICE OF COMMISSION DETERMINATION TO REVIEW

Notice is given that, pursuant to 46 C.F.R. § 502.227, the Commission has determined to review the Administrative Law Judge's November 7, 2019, Initial Decision on Remand in this proceeding.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

NGOBROS AND COMPANY NIGERIA LIMITED, *Complainant*

v.

OCEANE CARGO LINK, LLC, AND KINGSTON ANSAH, INDIVIDUALLY, *Respondents*.

DOCKET NO. 14-15

Served: December 17, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL, *Commissioners*.

ORDER VACATING INITIAL DECISION AND REMANDING-IN-PART

I. INTRODUCTION

On November 10, 2015, the Administrative Law Judge (ALJ) issued an Initial Decision (I.D.) finding that Respondents Oceane Cargo Link, LLC (OCL), and Kingston Ansah violated 46 U.S.C. § 41102(c). The ALJ accordingly awarded reparations to Complainant Ngobros and Company Nigeria Limited. For the reasons set forth below, the Commission vacates the Initial Decision. The Commission remands this matter as to OCL so that the ALJ can consider whether the alleged acts or omissions occurred on a normal, customary, and continuous basis. The Commission dismisses the claims as to Mr. Ansah as moot.

II. BACKGROUND

Complainant is a Nigerian company with a principal place of business in Anambra State, Nigeria. Compl. at 1. Respondent OCL was, during the relevant time period, a licensed ocean freight forwarder and a non-vessel-operating common carrier, with a principal place of business in Forest Park, Georgia. *Id.* at 2. Respondent Kingston Ansah is the sole member of OCL and resides in Atlanta, Georgia. *Id.* Mr. Ansah is also OCL's president, secretary, and CFO. I.D. at 13. According to Complainant, Mr. Ansah "has utilized OCL as his alter egos [sic] and alter egos for one another." Compl. at 2.

On June 28, 2012, Complainant purchased three vehicles and paid Respondents to transport the vehicles from Georgia to Tincan/Lagos, Nigeria. *Id.* at 3. Complainant received bills of lading issued by an ocean common carrier, Mediterranean Shipping Company (MSC), which is not a party in this proceeding. When the container arrived in Nigeria in September 2012, Complainant discovered that the container contained "some used goods which did not belong to Complainant" and "refused to take delivery of the goods." *Id.* at 4. When Complainant

contacted Respondents, they informed Complainant that the vehicles had been mistakenly shipped to Tema, Ghana. *Id.* According to Mr. Ansah, while he was traveling, an OCL employee mistakenly switched and shipped two containers to the wrong destinations at the time of loading, resulting in the vehicles going to the wrong location. Respondents' Resp. to Notice of Default at 1.

MSC emailed Respondents and Complainant on November 28, 2012, and "requested payment of $8,108 for storage and other charges to secure the release of Complainant's container and for re-export from Tema, Ghana, to Tincan/Lagos, Nigeria." Compl. at 4. Complainant paid the additional freight to MSC "on behalf of Mr. Ansah who was reluctant to make the payments." *Id.* at 5.

On July 3, 2013, Mr. Ansah demanded an additional fee of $18,000 to re-export the vehicles to Tincan/Lagos, Nigeria. Complainant agreed to pay $5,000 "with a written agreement from Respondent that once paid, [Complainant] would receive [the vehicles]." *Id.* When Complainant followed up with Respondents on September 9, 2013, Complainant was informed that MSC had lost the vehicles to Ghana customs.

Respondents attempted to reimburse Complainant by issuing it a check for $20,000, but the check bounced. Respondents also gave Complainant two other checks for $20,000 and $25,000, respectively. Complainant did not deposit the checks, however, because it discovered that Respondents had closed their bank account. Complainant subsequently recovered $37,681.14 against OCL's surety bond, and Respondents made payments of $12,508.00 to Complainant. I.D. at 8, 12.

On November 24, 2014, Complainant filed a Shipping Act complaint against OCL and Mr. Ansah. Complainant alleged that Respondents violated 46 U.S.C. § 41102(c) with respect to the transportation of Complainant's three vehicles from Savannah, Georgia, to Tincan/Lagos, Nigeria. Respondents did not file an answer but responded to an order to show cause. Respondents did not contest the Complainant's factual allegations. Instead, they provided additional factual context. Mr. Ansah, "as the owner of the company," took "full responsibility" for the problems alleged. Resp'ts' Resp., Apr. 17, 2015, at 1.

The ALJ issued an Initial Decision on November 10, 2015, finding that Respondents violated § 41102(c). I.D. at 9-10. In addition to finding that Respondents violated the Shipping Act, the ALJ pierced the corporate veil to find Mr. Ansah personally liable for the acts of OCL. *Id.* at 12-13. The ALJ awarded Complainant reparations of $162,266.04. *Id.* at 12. The Commission determined to review the Initial Decision on November 24, 2015.

While review was pending. Mr. Ansah filed for bankruptcy. As a result, the Commission stayed this case through October 3, 2017, when it learned that Mr. Ansah had received a discharge under Chapter 7 of the Bankruptcy Code. *In re: Kingston Ansah Debtor*, Case No. 16-51822-lrc (Bankr. N.D. Ga.), ECF No. 68. Meanwhile, in 2017, Mr. Ansah was charged with several federal crimes. *United States v. Ansah*, 17-cr-381 (N.D. Ga. Nov. 29, 2017), ECF No. 11. In May 2019, Mr. Ansah pleaded guilty to one count of Conspiracy to Commit Wire Fraud and one count of Aggravated Identity Theft. *Ansah*, 17-cr-381 (N.D. Ga. May 13, 2019), ECF No. 84. He was sentenced to fifty-seven months in prison on October 2, 2019. *Ansah*, 17-cr-381

(N.D. Ga. Oct. 3, 2019), ECF No. 92; *see also Ansah*, 17-cr-381 (N.D. Ga. Oct. 11, 2019), ECF No. 93; *Ansah*, 17-cr-381 (N.D. Ga. Oct. 16, 2019), ECF No. 94.[1]

III. DISCUSSION

A. Standard of Review

In proceedings "[w]here exceptions are filed to, or the Commission reviews, an initial decision, the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). Thus, when the Commission reviews a decision *de novo* it may enter its own findings. *Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 746, 753 (FMC 2014) (citing *OC Int'l Freight, Inc.*, 33 S.R.R. 566, 570 (FMC 2014)).

B. Respondent OCL

The ALJ found that OCL violated 46 U.S.C. § 41102(c) by not fulfilling its ocean transportation intermediary (OTI) obligations. I.D. at 9. Section 41102(c) prohibits a common carrier, marine terminal operator, or OTI from "fail[ing] to establish, observe, and enforce just and reasonable regulations and practices related to or connected with receiving, handling, storing, or delivering property."

The ALJ found it undisputed that: (a) OCL is a licensed OTI; (b) "Complainant's cargo was delivered to the wrong port and that Respondents sought additional payments, promising to deliver the cargo to the correct port;" and (c) Respondents failed to deliver the cargo, which never arrived at the destination port. I.D. at 10. The ALJ cited Commission caselaw for the proposition that § 41102(c) is violated when OTIs "fail, through single or multiple actions or omissions, to fulfill obligations." *Id.* at 9. According to the ALJ, given this caselaw and the undisputed facts, Respondents had violated § 41102(c). The ALJ awarded Complainant reparations of $162,266.04.

Although many of the ALJ's findings are supported, the § 41102(c) standard it applied, which permits finding a violation based on a single act or omission, is inconsistent with the original intent of Congress, the rules of statutory construction, and Commission precedent. *See, e.g.*, Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45367-45372 (Sept. 7, 2018). Properly interpreted, § 41102(c) applies to acts or omissions that occur on a normal, customary, and continuous basis. 83 Fed. Reg. at 64479; 83 Fed. Reg. at 45369-70, 45372; *see also* 46 C.F.R. § 545.4(b).

Because the ALJ did not consider whether OCL's conduct occurred on a normal, customary, and continuous basis, the Commission vacates the Initial Decision as to OCL and remands this matter for application of this standard. *See Hangzhou Qianwang Dress Co. v. RDD*

[1] OCL's OTI licenses were revoked for failure to maintain valid OTI bonds in May 2018.

Freight Int'l, Inc., 1 F.M.C.2d 262-263 (FMC 2019).[2] On remand, and at the ALJ's direction, the parties will have the opportunity to take discovery and present evidence and argument relevant to the normal, customary, and continuous standard.[3]

C. Respondent Ansah

As for Mr. Ansah, the ALJ appeared to find him directly in violation of § 41102(c) and personally liable for OCL's conduct via a piercing-the-corporate veil theory. I.D. at 9-10, 12-13. The liability of Mr. Ansah, however, was discharged by bankruptcy. *In re: Kingston Ansah Debtor*, Case No. 16-51822-lrc (Bankr. N.D. Ga. Nov. 21, 2016), ECF No. 55 (listing Complainant as creditor and reparations award as unsecured claim); *In re: Kingston Ansah Debtor*, Case No. 16-51822-lrc (Bankr. N.D. Ga. Mar. 5, 2017), ECF No. 68 (granting discharge).[4] Consequently, the Commission vacates the Initial Decision as to Mr. Ansah and dismisses Complainant's claims against him as moot.

IV. CONCLUSION

The Commission **VACATES** the Initial Decision, **REMANDS** this matter as to OCL to the ALJ for consideration of the § 41102(c) claims in light of the Commission's revised interpretation of the statute; and **DISMISSES** the claims as to Kingston Ansah.

By the Commission.

Rachel E. Dickon
Secretary

[2] Although the Commission revised its interpretation of § 41102(c) after the ALJ issued its Initial Decision, any retroactive effect of the Commission's interpretive rule is subsumed in the permissible retroactivity of agency adjudication. *See, e.g.*, *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 424 (D.C. Cir. 1994); *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 907 (D.C. Cir. 2010); *Providence Health Sys. – Washington v. Thompson*, 353 F.3d 661, 667 (9th Cir. 2003). Nor would applying the normal, customary, and continuous standard in this case work a manifest injustice. *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc). While this is not the first case in which the revised interpretation of § 41102(c) was announced, and the revised interpretation departs from a line of Commission caselaw, there is no indication that the parties conformed their conduct in reliance on the prior interpretation of § 41102(c), the revised standard is not imposing new liability on anyone, and applying the standard is consistent with the Commission's approach in other cases. *E.g.*, *Hangzhou*, 1 F.M.C.2d at 262.

[3] Failure to defend or prosecute this action or to otherwise comply with ALJ orders may result in default judgment, involuntary dismissal, or other sanction. 46 C.F.R. §§ 502.65(a)(2), 502.72(b), 502.150(b).

[4] The bankruptcy trustee filed a report of no distribution, meaning that Mr. Ansah had no non-exempt assets to liquidate for payment of creditors. *Id.*, ECF No. 68.

FEDERAL MARITIME COMMISSION

PORT ELIZABETH TERMINAL & WAREHOUSE CORP.,
Complainant

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
Respondent.

DOCKET NO. 17-07

Served: December 19, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, and Carl W. BENTZEL, *Commissioners*.

ORDER GRANTING MOTION TO DISMISS

On November 20, 2019, Respondent the Port Authority of New York and New Jersey (Port Authority) filed an unopposed motion to dismiss this case due to a settlement under 46 C.F.R. § 502.72(a)(3). For the reasons set forth below, the Commission grants the motion.

I. BACKGROUND

In July 2017, Complainant Port Elizabeth Terminal & Warehouse Corp. (PETW) filed a complaint against the Port Authority alleging violations of 46 U.S.C. §§ 41102(c), 41106(2), 41106(3), 41104(8), and 41104(9). The Port Authority moved partially to dismiss the complaint, and, in April 2018, the ALJ found that the Shipping Act's statute of limitations bars reparations as to all claims. The ALJ also found that PETW's § 41102(c) and § 41106(3) allegations failed to state a claim. The ALJ permitted the case to proceed as to cease-and-desist relief for PETW's allegations of unreasonable preference or prejudice under §§ 41106(2), 41104(8), and 41104(9). PETW appealed. While the appeal was pending, the ALJ dismissed the remaining claims on the merits in March 2019. PETW excepted to this decision as well.

On November 20, 2019, the Port Authority filed a motion requesting dismissal of this case with prejudice under 46 C.F.R. § 502.72(a)(3). PETW did not oppose this motion.

II. DISCUSSION

The Commission's regulations allow parties to settle their disputes. 46 C.F.R. § 502.75(a), (b). When parties seek dismissal of a case pursuant to a settlement agreement, the Commission reviews the settlement to determine whether it "appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). As part of this analysis, "the

Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighted against the risks and costs of continued litigation." *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (FMC 2009) (quoting *Delhi Petroleum Pty. Ltd. v. U.S. Atl. & Gulf/Australia – New Zealand Conference & Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988)).

Here, the Mutual General Release attached to the motion reflects a considered decision of sophisticated parties to settle this case and related disputes. It does not appear to violate any law or policy and there is no evidence of fraud, duress, undue influence, mistake, or other defects that might make the settlement unapprovable.

III. CONCLUSION

The Commission therefore **GRANTS** the Port Authority's motion, **APPROVES** the settlement, **DISMISSES** the above captioned action with prejudice, and **DISCONTINUES** this proceeding.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

PETITION OF THE WORLD SHIPPING COUNCIL FOR AN EXEMPTION FROM CERTAIN PROVISIONS OF THE SHIPPING ACT OF 1984, AS AMENDED, FOR A RULEMAKING PROCEEDING

PETITION NO. P3-18

Served: December 20, 2019

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Daniel B. MAFFEI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. Rebecca F. DYE, *Commissioner*, dissenting.

ORDER DENYING IN PART AND GRANTING IN PART PETITION FOR EXEMPTION AND RULEMAKING

On September 11, 2018, the World Shipping Council (WSC) filed a petition with the Federal Maritime Commission (Commission) for an exemption from the service contract filing and concise statement of essential terms (ET) publication requirements of 46 U.S.C. § 40502(b) and (d), and for a rulemaking proceeding to amend the Commission's service contract regulations as set forth in 46 C.F.R. part 530 in a manner consistent with the requested exemption. The Notice of Filing and Request for Comments was published on September 18, 2018. 83 Fed. Reg. 47123. Comments were due by November 19, 2018, and the Commission received three comments in support of the petition and two comments in opposition to the petition.[1]

For the following reasons, the Commission has determined to deny in part and grant in part the petition and will be proceeding with a rulemaking accordingly. The Commission is denying WSC's request for an exemption from 46 U.S.C. § 40502(b)'s requirement that ocean common carriers file service contracts with the Commission. After considering WSC's arguments, the comments, and Commission experience, the Commission is unable to find that an exemption from § 40502(b) will not be detrimental to commerce. The Commission will therefore be retaining the requirement in 46 C.F.R. part 530 that carriers confidentially file service contracts and amendments in the Commission's SERVCON system. In contrast, the Commission is granting WSC's request for an exemption from § 40502(d)'s requirement that carriers publish

[1] The Commission received supportive comments from Atlantic Container Line AB, Caribbean Shipowners Association, and the National Industrial Transportation League. The Commission received comments in opposition to the petition from Wheaton Grain Inc. and Frankford Candy LLC.

ETs with each service contract and will initiate a rulemaking proceeding to eliminate this requirement. The Commission has determined that an exemption from § 40502(d) will not result in a substantial reduction in competition or be detrimental to commerce.

I. BACKGROUND

WSC is a trade association comprising 20 vessel operating common carriers (VOCCs) that make up approximately 90 percent of the global liner vessel capacity.[2] WSC has petitioned the Commission for an exemption from 46 U.S.C. § 40502(b), which requires VOCCs to file confidentially each service contract entered into by that VOCC, with exceptions for contracts concerning bulk cargo, forest products, recycled scrap metal, new assembled motor vehicles, waste paper, or paper waste. WSC has also petitioned the Commission for an exemption from § 40502(d), which requires that VOCCs file a concise statement of certain ETs in tariff format when they file each service contract with the Commission. Lastly, WSC is seeking initiation of a rulemaking that would make changes to the Commission's service contract regulations set forth in 46 C.F.R. part 530 in accordance with their requested exemptions.

The Commission has the authority under 46 U.S.C. § 40103(a) to grant exemptions for any specified activity of persons subject to the Shipping Act from any requirement of the Act if the Commission finds that the exemption will not result in a substantial reduction in competition or be detrimental to commerce. In the past several years, the Commission has used this exemption authority to provide regulatory relief, not only for NVOCCs, but also for VOCCs by eliminating substantial regulatory burdens. For example, in the Commission's decision concerning Docket No. 16-05, VOCCs were provided significant relief in the service contract filing context by allowing up to 30 days to file service contract amendments after execution by the VOCC and shipper, along with expanded timelines for correcting service contracts. Further, VOCCs were allowed to batch file their service contract amendments so as to reduce the regulatory cost and burden.

This order begins by summarizing WSC's argument and providing an overview of comments and response to those comments as necessary, before assessing the two requested exemptions (service contract filing and ET publication) to determine whether allowing such exemptions would be detrimental to commerce or cause a substantial reduction in competition.

A. Summary of Petitioner's Argument

WSC argues that exempting service contracts from the Shipping Act's filing requirements will not result in a substantial reduction in competition or be detrimental to commerce. First, WSC argues that the filing of service contracts with the Commission "has no bearing whatsoever on the functioning of the competitive commercial marketplace" and that

[2] WSC's members include large VOCCs such as Maersk, COSCO, CMA CGM, Evergreen, Hapag-Lloyd, Hyundai Merchant Marine, Mediterranean Shipping Company, Ocean Network Express, Orient Overseas Container Line, and Yang Ming Marine Transport Corporation, among others.

exempting VOCCs from the duty to file them with the Commission will not reduce competition between VOCCs or between VOCCs and non-vessel operating common carriers (NVOCCs). Pet. at 4. Similarly, WSC argues that exempting VOCCs from the duty to publish service contract ETs will not reduce competition, "since those essential terms which are made public do not include the most competitively relevant terms, i.e., the contract rates." *Id.* Further, WSC argues, granting this petition would put VOCCs on equal footing with NVOCCs "by relieving VOCCs of the same regulatory and administrative burdens that NVOCCs have been permitted to shed." *Id.* WSC also argues that the requested relief is vital "in order to give full effect to the NVOCC NSA and NRA regulatory relief that the Commission recently granted in Docket No. 17-10"[3] because the transportation offered by NVOCCs is physically provided by VOCCs, meaning that NVOCCs cannot make use of expedited contract acceptance until the VOCC files the underlying service contract. Pet. at 4–5. WSC argues that, because service contracts will continue to be negotiated on a confidential basis, granting this petition would not reduce competition between shippers. *Id.* at 5.

Next, WSC argues that granting the petition would not result in a detriment to commerce, because no economic harm would result to shippers if the petition is granted. According to WSC, few, if any, other countries require the filing of contractual arrangements between VOCCs and shippers, and there has been no indication that the lack of a filing requirement has been detrimental to shippers or to the commerce of those other countries. *Id.* WSC points to the commodities exempted in 46 U.S.C. § 40502(b)(2) and states that "[t]here is no indication that this exemption has been detrimental to commerce insofar as these exempt commodities are concerned," and that these commodities were exempted to benefit commerce. Pet. at 5–6. WSC also points to the Commission's year of experience with the rules adopted in Docket No. 16-05,[4] which permitted VOCCs to file amendments to service contracts up to 30 days after cargo moves under the subject amendment. WSC argues that it is unaware of any problems arising from the delayed filing of amendments, and this "strongly suggests that filing is not critical to competition, commerce, or regulatory oversight." Pet. at 6.

Lastly, WSC argues that granting the petition would relieve the VOCC industry of a substantial regulatory burden. WSC cites to Docket No. 17-10, in which the Commission found

[3] "Docket No. 17-10" refers to the Commission's rulemaking, completed in 2018, that amended the regulations in 46 C.F.R. parts 531 and 532 governing NVOCC negotiated rate arrangement (NRAs) and NVOCC service arrangements (NSAs). Of relevance to the petition currently before the Commission, the rulemaking in Docket No. 17-10 removed the NSA filing and publication requirements. *See* Final Rule: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 Fed. Reg. 34780 (July 23, 2018).

[4] "Docket 16-05" refers to the Commission's rulemaking, finalized in 2017, in which the Commission made amendments to its rules governing service contracts and NSAs—namely, permitting the filing of service contract and NSA amendments up to 30 days after the effective date of the amendment. *See* Final Rule: Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements, 82 Fed. Reg. 16288 (Apr. 4, 2017).

that relieving NVOCCs of the obligation to file NSAs and publish NSA ETs would reduce the regulatory burden on these NVOCCs by 162 hours, or approximately $10,728. WSC states that, due to the magnitude of service contracts and amendments, the burden reduction for VOCCs if the exemption were granted would be much larger than that of NVOCCs and their customers. WSC states that "[t]hese savings are particularly important in light of the Commission's determination that retaining the filing and essential terms publication requirements for NSAs provides little or no regulatory benefit." *Id.* at 7. WSC argues that the same is true for service contracts, and that exempting them from filing would not impair any Commission monitoring functions because: (1) the use of service contracts to monitor trade conditions is unclear; and (2) the Commission can impose alternative requirements on VOCCs to get more concise and usable information.

Finally, WSC argues that the service contract filing and service contract ET publication requirements "are vestiges of a much more rigid system of economic regulation that no longer exists" following passage of the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998, which moved regulation of the industry toward "a market-based, confidential contract-based structure." *Id.* at 8. WSC concludes that "[s]ervice contract filing and essential terms publication no longer serve a purpose" in the ocean liner shipping marketplace. *Id.*

B. Overview of Comments

1. Atlantic Container Line AB (ACL)

ACL is an independent VOCC headquartered in Westfield, New Jersey. ACL is not a member of WSC but supports the elimination of service contract filing. ACL claims that the exemption would eliminate a significant cost to every stakeholder in ocean transportation due to the administrative cost of preparing and filing huge amounts of data that, according to ACL, has no use. ACL argues that these data compilation costs are enormous for the Commission and its stakeholders, and that eliminating this requirement would allow for the Commission "to focus more attention on proactively regulating ocean commerce." ACL lists several "factors" behind their reasoning. First, as service contracts are now confidential, public information on the FMC rate and contract database is now commercially meaningless. Second, the filing requirement has a disparate impact on U.S. shippers importing through U.S. ports versus U.S. shippers importing via Canadian ports. Third, ACL provides a number of "examples of frequent problems caused by the filing requirement," which include difficulty in resolving issues related to the re-rating of cargo, incorrect rate charges, missing signatures, the assessment of liquidated damages, and changes of destination.

ACL states that carriers would save "a huge amount of money in personnel costs and filing costs" if service contract filing were eliminated. Without these filing requirements, ACL believes that "most cargo would move under a simple one-page contract with service and volume commitments." Carriers would maintain this data, and an "FMC auditor" could conduct carrier audits to review incidences of shipper complaints.

2. Caribbean Shipowners Association (CSO)

CSO (FMC Agreement No. 010979) is a forum wherein its members can "discuss and agree, on a voluntary basis, on rates, charges, rules, classifications, and practices governing the transportation of cargo" in the subject trade. CSO members (one of which is a WSC member) support the petition because, in addition to the reasoning listed in the petition itself, CSO argues that granting the petition and revising Commission regulations accordingly "would be entirely consistent with, and greatly further, the FMC's voluntary effort to provide regulatory reform consistent with Executive Order 13771" and "would advance the work of the FMC's Regulatory Reform Task Force."

3. National Industrial Transportation League (NITL)

NITL, a national organization of shippers and other companies engaged in freight transportation throughout the United States and internationally, submitted a comment in support of WSC's petition because granting the petition "would benefit the ocean transportation industry by eliminating unnecessary and costly regulatory burdens on ocean carriers" and "would promote competition between ocean carriers and non-vessel operating common carriers." NITL Comment at 1. NITL believes that the service contract filing and ET publication requirements "impose regulatory costs and burdens without any meaningful corresponding benefit." *Id.* at 2. NITL also argues that granting the exemption would increase flexibility and responsiveness to the market by allowing shippers to start shipping without waiting for the service contracts to be filed. The exemption would also level the playing field between VOCCs and NVOCCs, which "are no longer burdened by contract-filing and essential-terms publication requirements." *Id.* Therefore, according to NITL, the Commission should find that eliminating these requirements would not substantially reduce competition or be detrimental to commerce.

NITL also argues that the Commission can obtain service contracts through its existing recordkeeping rules, and that therefore continuing to require service contract filing and service contract ET publication is unnecessary. NITL states that the Commission should ensure that the existing service contract recordkeeping and audit rule at 46 C.F.R. § 530.15 be retained, as this "will be a critical mechanism for the Commission to compel disclosure of service contracts in response to an industry issue or a shipper complaint" if the petition is granted. NITL Comment at 2.

4. Wheaton Grain Inc.

Wheaton Grain Inc., a small-medium shipper in the agricultural industry, submitted a comment in opposition to the petition. In their comment, Wheaton Grain states that service contracts are their main tool to ensure that they are treated fairly by carriers. The company asserts that service contracts are useful in disputing charges and fees levied by the carriers.

5. Frankford Candy LLC

Frankford Candy LLC, an importer, filed a comment in opposition to WSC's petition. Frankford Candy argues that they have benefitted from the Commission's oversight of service contracts, which they feel provide a level of cost certainty. Frankford Candy worries that, without the service contract filing requirement, they may be subject to potentially arbitrary charges that would result in additional costs without the ability to dispute or negotiate them. Frankford Candy proposed the establishment of a stakeholder committee to review and make recommendations providing more data.

II. DISCUSSION

The Commission has the authority under 46 U.S.C. § 40103 to grant exemptions for "any specified activity of those persons [subject to the Shipping Act] from any requirement of [the Act] if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." Through this provision, Congress granted the Commission broad authority to determine whether to provide regulatory relief under certain conditions.[5]

A. Mandatory Service Contract Filing

WSC requests an exemption from 46 U.S.C. § 40502(b), which requires that "[e]ach service contract entered into under [§ 40502] by an individual ocean common carrier or an agreement shall be filed confidentially with the Federal Maritime Commission," unless that contract pertains to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste. WSC is also seeking amendments that would make corresponding changes to the Commission's regulations at 46 C.F.R. part 530 to remove the requirement that VOCCs file service contracts with the Commission. For the following reasons, the Commission is unable to find that an exemption from the filing requirements of 46 U.S.C. § 40502(b) would not be detrimental to commerce and is therefore denying this portion of WSC's petition.

1. Detriment to Commerce

WSC argues that exempting service contracts from the Shipping Act's filing requirements will not be detrimental to commerce because the Commission has previously "held that an exemption would not be detrimental where no shipper alleged that the exemption would

[5] *See* S. Rep. No. 105-61, at 30 (1997). Prior to the enactment of the Ocean Shipping Reform Act of 1998 (OSRA), section 16 of the Shipping Act (codified at 46 U.S.C. § 40103) included four criteria for granting a statutory exemption. OSRA deleted the first two criteria (that the exemption would not substantially impair effective regulation by the Commission or be unjustly discriminatory), leaving only the latter two criteria (that the exemption would not result in substantial reduction in competition or be detrimental to commerce). *See* Pub. L. No. 105-258, § 114.

result in economic harm and where the exemption would reduce operating costs and increase competition." Pet. at 5. While we agree that the Commission looks to the potential harm to shippers and the potential positive effects on competition resulting from an exemption, the Commission does not require that shippers allege these potential harms themselves. *See* Final Rule: Non-Vessel-Operating Common Carrier Service Arrangements, 69 Fed. Reg. 63981, 63987-88 (Nov. 3, 2004); Final Rule: Non-Vessel-Operating Common Carrier Negotiated Rate Agreements, 76 Fed. Reg. 11351, 11353 (Mar. 2, 2011) (NRA Rulemaking). In the 2011 NRA Rulemaking, for instance, the Commission noted that it was "significant" that no shipper or carrier (NVOCC or VOCC) had filed a comment opposing the requested exemption or alleging economic harm that would result from providing NVOCCs the option of entering into NRAs. NRA Rulemaking, 76 Fed. Reg. at 11353. The Commission did not state, however, that the lack of comments was dispositive of there being no detriment to commerce. Moreover, the Commission has, in fact, received two comments from shippers alleging that harm *will* result from granting the requested exemption. Indeed, were the Commission to view the presence or absence of shipper allegations of economic harm from an exemption as dispositive of that harm, then in the present case the Commission would not need to look any further than the two comments making such allegations.

While WSC goes on to argue that no economic harm would result to shippers if the Commission were to grant their requested exemption, commenters have indicated and Commission experience has shown that shippers view service contract filing with the Commission as discouraging VOCCs from engaging in conduct that would be harmful to shippers. In particular, shippers view the filing requirement as encouraging VOCCs to adhere to contract terms and deterring VOCCs from introducing unreasonable terms into service contract boilerplate language. *See, e.g.*, ANPRM: Service Contracts and NVOCC Service Arrangements, 81 Fed. Reg. 10198, 10201 (Feb. 29, 2016) ("Shippers advised the Commission that carriers were responsive to their rate requests and the shippers were confident that VOCCs would honor the rates and contract commitments *knowing their contracts were being filed with the Commission*.") (emphasis added). Without the mandatory filing of service contracts acting as a deterrent, shippers fear, and the Commission recognizes, the risk that VOCCs may attempt to include unreasonable surcharges or unfair or unreasonable terms in their service contracts. The shipper commenters on this petition noted this as well.

Furthermore, although WSC alleges that "few, if any, other countries require the filing of contractual arrangements between VOCCs and shippers," this point is both irrelevant and inaccurate. Pet. at 5. The People's Republic of China, for instance, requires similar filings to those required by the Shipping Act. China requires VOCCs to file with the Shanghai Shipping Exchange both tariff rates and negotiated rates, including the ocean freight and maritime-related surcharges, for transport from Chinese to foreign ports.[6] Additionally, China has investigated

[6] Circular No. 64 (2013) on the Implementing Rules of the International Container Liner Precise Freight Filing, Issued by the Ministry of Transport of People's Republic of China, available at http://en.sse.net.cn/filingen/aboutfiling.jsp.

VOCC rate practices in the recent past. The National Development and Reform Commission and the Ministry of Transport investigated surcharges, most notably terminal handling charges, on the grounds that the charges were potentially "arbitrary," and these agencies were successful in negotiating rate reductions from a number of VOCCs.[7] Thus, such filing requirements do exist elsewhere in the world, where they have potentially played a role in enforcement actions against VOCCs.

In addition to stemming from a faulty premise, WSC provides no basis for its statement that there is no indication that the lack of service contract filing requirements elsewhere in the world has caused harm to shippers or the commerce of those countries. WSC has provided no evidence that shippers are not harmed in other countries that lack service contract filing requirements. Ultimately, the Commission finds this argument to be unpersuasive.

For further support, WSC then turns to the Shipping Act's exclusion from filing service contracts that cover a number of commodities. *See* 46 U.S.C. § 40502(b)(2) (exempting contracts regarding bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste from the service contract filing requirements of § 40502(b)(1)). WSC states that there is no indication of harm stemming from exempting these commodities, which WSC argues were exempted by Congress to promote competition in their transportation "and hence to benefit commerce." Pet. at 5–6.

We disagree with WSC's assertion that the existing statutory exemption supports the petition. As discussed below, Congress determined that these commodities had distinguishing characteristics that justified their exemption from the service contract filing requirements. The statutory exemption does not, therefore, support exempting all other commodities from the current requirements.

The legislative history behind the 1961 Amendment to the Shipping Act of 1916 addressed what Congress viewed as the distinction between so-called "general cargo" and bulk cargo, the first commodity type to be excluded from what was then the dual-rate contract filing requirements. Congress noted that the inherent difference between packaged or general cargo and bulk cargo was that "bulk cargoes such as coal, ore, and fertilizer are often carried by a contract carrier in full shipload lots for a shipper who hires the vessel for a single trip" whereas "conference liner cargoes range from bobbypins to electric generators and are carried for hundreds of shippers, many of whom ship regularly in the trade but seldom, if ever, in shipload lots." S. Rep. No. 87-860, at 4 (1961). Importantly, Congress noted that "[t]he needs of the

[7] *See* Chris Dupin, *China Investigating Shipping Companies for 'Arbitrary Charges,'* AMERICAN SHIPPER, Sept. 25, 2015, https://www.freightwaves.com/news/china-investigating-shipping-companies-for-arbitrary-charges; *see also* Lee Hong Liang, *Eleven Major Lines Lower Terminal Handling Charges in China,* SEATRADE MARITIME NEWS, Mar. 3, 2017, https://www.seatrade-maritime.com/news/asia/eleven-major-lines-lower-terminal-handling-charges-in-china/.

businessmen who import and export general cargo are worlds apart from the needs of those who import and export bulk cargo." *Id.*

The Shipping Act of 1984 allowed carriage by service contracts and, in addition to exempting bulk cargo from the service contract and tariff filing requirements, included additional exempted commodities, i.e., forest products, recycled metal scrap, waste paper, or paper waste). Pub. L. No. 98-237, § 8(c), 98 Stat. 75 (1984). The legislative history makes clear that Congress's intent was to ensure that competing goods, i.e., new and recycled bulk cargoes, were treated the same. H.R. Rep. No. 98-600, at 38 (1984) (Conf. Rep.).

The 1998 Ocean Shipping Reform Act amendments added "new, assembled motor vehicles" to the list of exempted commodities because the common carriage of these vehicles is conducted by specialized roll-on roll-off vessels, typically in large quantity, single shipment lots under a service contract that more closely resembles unregulated contract carriage. S. Rep. No. 105-61, at 22 (1997). Because the new, assembled automobile shipper market is concentrated and employs unique shipping practices, and because common carriage requirements are intended to protect shipper interests, Congress did not believe it was appropriate to apply common carriage requirements to this market. *Id.*[8]

The relevant legislative history thus establishes that the exempted commodities in § 40502(b)(2) are conceptually distinct from traditional containerized cargo that moves by common carriage. Therefore, WSC's reference to these commodities does not justify exempting other types of cargo from the service contract filing requirements.

A final note on exempt commodities: the Commission addressed the expansion of the list of exempt commodities briefly in Docket No. 16-05. In that rulemaking, WSC and Crowley filed comments that supported expanding the list of exempt commodities, and the Commission expressly noted "[c]oncerns regarding expansion of the list of exempt commodities centered

[8] In 2014, the Department of Justice (DOJ) prosecuted vessel operators engaged in the carriage of new, assembled automobiles for conspiring to suppress and eliminate competition by allocating customers and routes, rigging bids, and fixing prices for the international ocean shipments of roll-on, roll-off (RO/RO) cargo to and from the United States and elsewhere. Contemporaneously, the Commission pursued some of these same ocean carriers under section 10(a) of the Shipping Act, 46 U.S.C. §41102, for acting in concert with respect to the transportation of automobile and other motorized vehicles by RO/RO or specialized car carrier vessels, where such agreements had not been filed with the Commission or become effective under the Shipping Act. While, as noted above, "new assembled motor vehicles" are included in the list of commodities exempted from the service contract filing requirement, one could consider whether the Commission might, if provided the reasonable opportunity, have detected market anomalies in the pricing and the servicing of customers by particular carriers in the assembled automobile shipper market earlier if these service contracts had been filed at the Commission.

around shipper experiences pertaining to *currently exempt commodities*." Service Contracts and NSAs Final Rule, 82 Fed. Reg. at 16294. These concerns were described as follows:

> Exporters of currently exempt commodities have expressed frustration regarding the ocean carrier practice of offering exempt commodity tariff rates with periods of limited duration, in some cases for only 30 to 60 days, rather than for the longer periods that are customary in service contracts. Further, exempt commodity tariffs are not published and do not provide shippers with 30 days' notice prior to implementation of rate increases. Whereas service contracts allow shippers to negotiate rates and terms with carriers to tailor services and terms to the shipper's specific needs, many exporters advise that shippers of exempt commodities are not afforded this opportunity.

Id. Thus, contrary to WSC's assertion in their petition, the experience with commodities exempt from the service contract filing requirements indicates that the *lack* of such a requirement may be detrimental to shippers of those commodities.

Finally, WSC discusses the Commission's allowance of service contract and NSA amendments up to 30 days after cargo moves under the subject amendments. The Commission disagrees with WSC's contention that allowing the delayed filing of amendments to service contracts and NSAs by VOCCs and NVOCCs suggests that this filing is not critical to competition or commerce. In the final rule making these changes, the Commission expressly stated that allowing delayed filings "reduce[d] the filing burdens on the shipping industry while maintaining the Commission's ability to protect the shipping public." *Id.* at 16290. The Commission continues to view the filing of service contracts and amendments as a critical way of preventing harm to the shipping public.

ACL raises several issues that have already been addressed by the Commission. The Commission amended its regulations in 2017 so that carriers no longer need wait until amendments to contracts are filed before moving the cargo. A carrier now has up to 30 days to process a contract amendment pursuant to regulatory changes by the Commission in 2017. So long as the parties agree to extend a contract prior to expiration, a carrier has up to 30 days to process that amendment. In addition, many standard terms are included most every service contract, whether inside or outside of the United States.

Based on the foregoing, the Commission is unable to find that the requested exemption will not be detrimental to commerce. After reviewing WSC's arguments and other's comments, and the concerns put forth by shippers, both as part of this proceeding and in other interactions with the Commission, the Commission has determined that granting this exemption could potentially result in a detriment to commerce. Accordingly, the Commission is denying WSC's request for an exemption from 46 U.S.C. § 40502(b), the requirement to file service contracts with the Commission.

2. Substantial Reduction in Competition

Because the Commission is unable to find that the requested exemption will not be detrimental to commerce, the Commission need not consider whether granting WSC an exemption from 46 U.S.C. § 40502(b) would result in a substantial reduction in competition.

The Commission will, however, address WSC and NITL's argument that the requested exemption is procompetitive with respect to competition between VOCCs and NVOCCs. WSC and NITL argue that granting this exemption puts VOCCs on a level playing field with NVOCCs, who are no longer required to file NSAs and publish NSA ETs. The Commission disagrees with this blanket contention because there are a number of factors that place VOCCs at an advantage when compared to NVOCCs. VOCCs hold market power through the antitrust immunity secured pursuant to their filed agreements as well as their ability to discuss and coordinate freight rates and/or vessel capacity and services. This is relevant because all members of WSC, with the exception of Tote, participate in agreements on file with the Commission, and many are members of the global alliances. Because VOCCs have stronger negotiating positions, they are able to set service contract terms and conditions with NVOCCs; indeed, the majority of service contracts on file with the Commission use boilerplate terms and conditions written by the VOCC.

It must be noted that the number of major global liner shipping companies decreased over the last several years from 21 to 12. At the end of 2018, the nine VOCCs that participate in the three global alliances controlled 86% of vessel capacity in the primary transatlantic and transpacific U.S. trades. By contrast, there are over 4,800 NVOCCs licensed and/or registered with the Commission. None of these NVOCCs have significant market share or significant market influence. These NVOCCs compete vigorously without benefit of the limited antitrust immunity enjoyed by VOCCs under cooperative agreements filed at the Commission.

In addition, there are significant differences between VOCC service contracts and NSAs. VOCC service contracts for major shippers have global rate matrices and minimum quantity requirements that cover thousands or tens of thousands of TEUs annually, while NSAs are typically limited to smaller cargo volumes and specific trade lanes. Further, the VOCC is the seller of space, whereas the NVOCC is the buyer of space. While VOCCs and NVOCCs may compete to some degree, the Commission views them as competitively separate. In other words, the continued scrutiny of VOCCs through confidentially filed service contracts does not put VOCCs at a competitive disadvantage to NVOCCs.

WSC also makes the argument that eliminating the service contract filing requirement is necessary "to give full effect" to the Commission's decision in Docket No. 17-10, in which the Commission removed NSA filing and publication requirements. Pet. at 4. WSC argues that the ocean transportation offered by NVOCCs is physically provided by VOCCs, requiring a service contract between the NVOCC and VOCC. "If VOCCs must file their contracts before they can provide transportation to NVOCCs under those service contracts, then NVOCCs cannot in turn provide service to their customers or make use of the expedited contract acceptance and effective date provisions now applicable to NSAs and NRAs until the underlying VOCC service contract is filed." Pet. at 4–5. But WSC's argument is flawed, as it relies upon the premise that the service

contract filing requirement delays the effectiveness of service contracts. WSC does not allege that this delay exists, nor has Commission experience shown that there is such a delay. If a service contract is filed on its effective date, then there can be no delay between the filing and effectiveness of the service contract. In the absence of any showing that there is a delay caused by the filing itself, the Commission does not believe that granting WSC's petition is necessary to give any further effectiveness to the outcome of Docket No. 17-10.

B. Mandatory Publication of Essential Terms Tariff

WSC is also petitioning for an exemption from 46 U.S.C. § 40502(d), which requires publishing a concise statement of essential terms (as defined in § 40502(c)(1), (3), (4), and (6)) in tariff format when a service contract is filed confidentially with the Commission. WSC, and commenters in support of their petition, argue that eradicating the mandatory publication of the ETs would not result in a substantial reduction in competition, would not cause a detriment to commerce, and would relieve the industry of a substantial regulatory burden. Because the Commission has found that eliminating the ET publication requirement will not be detrimental to commerce or result in a substantial reduction in competition, the Commission is granting this request.

1. Detriment to Commerce

At the time of the formulation of the Shipping Act of 1984, Congress voiced concerns over the potential for service contracts to "be employed so as to discriminate against all who rely upon the common carriage tradition of the liner system." H.R. Rep. No. 98-53 pt. 1 at 17. Congress "hoped that the requirement that a service contract's essential terms be filed publicly so that those terms are available to all other shippers who may wish to use them, will preserve an important element of the common-carriage concept" upon which the 1984 Act was based. *Id.*

Fourteen years later, OSRA reduced the scope of service contract essential terms required to be made public to protect U.S. exporters who were "disadvantaged in the world market because their foreign competitors [were] able to ascertain proprietary business information from their published service contract essential terms." S. Rep. No. 105-61, at 24 (1997). At the same time, however, Congress retained the requirement to publish some essential terms because the publication "provides U.S. ports, longshore labor, ocean transportation intermediaries, and others useful information for determining cargo flows and facilitat[ing] strategic planning and marketing efforts." *Id.* Congress also stated that the ET publication requirement would help "ensure that antitrust immunity is not abused." *Id.*

The past 20 years of Commission experience indicates that the ET publication requirement corresponding to individual service contracts is of questionable value. Commission staff has the ability to access complete service contracts, including rate matrices and contract terms, through SERVCON. This allows the Commission to review service contracts for the potential abuse identified by Congress while drafting the 1984 Act and OSRA. And while the Commission received comments in Docket No. 16-05 that indicated that ETs are relied upon "for

various purposes, such as during a grievance proceeding under collective bargaining agreements," no such comments have been submitted in response to this petition, and the Commission therefore does not view this as an ongoing concern. Service Contracts and NSAs Final Rule, 82 Fed. Reg. at 16293–94. Further, no commenters have claimed any other use for these publications or argued that the loss of the service contract ET publication requirement would harm the industry in any way. Removing the requirement to publish service contract ETs would cause no economic harm to fall upon shippers or any other participants in the industry. The Commission therefore finds that no detriment to commerce will result from eliminating the requirement that VOCCs publish concise statements of essential terms with the filing of each confidential service contract.

2. Substantial Reduction in Competition

Removing the service contract ET publication requirement will not cause a substantial reduction in competition. The Commission agrees with WSC's argument that "essential terms which are made public do not include the most competitively relevant terms, i.e., the contract rates." Pet. at 4. Further, no commenters have argued that removing the service contract ET publication requirement will have a negative competitive impact. There is no change to competition between and among VOCCs that results from eliminating this requirement. For that reason, the Commission finds that granting an exemption from the requirement to publish service contract ETs will not result in a substantial reduction in competition.

C. Rulemaking

As the Commission has determined to grant the petitioners' requested exemption from the requirements of 46 U.S.C. § 40502(d), it is necessary to amend the Commission's service contract essential terms regulations accordingly. The Commission will make those changes in a forthcoming rulemaking.

III. CONCLUSION

The Commission is unable to find that WSC's petition for an exemption from the requirements in 46 U.S.C. § 40502(b) would not be detrimental to commerce, and that portion of the petition is therefore denied. The Commission has found, however, that WSC's petition for an exemption from the requirements in § 40502(d) will not result in a substantial reduction in competition or be detrimental to commerce, and that portion of the petition is therefore granted. The Commission will initiate a rulemaking proceeding to eliminate the requirement that a vessel operating common carrier publish a concise statement of essential terms corresponding to each filed service contract or amendment.

THEREFORE, IT IS ORDERED, that WSC's request that vessel operating common carriers be exempted from the requirement of 46 U.S.C. § 40502(b) that they must file each service contract confidentially with the Commission is DENIED.

IT IS FURTHER ORDERED, WSC's request that vessel operating common carriers be exempted from the requirement of 46 U.S.C. § 40502(d) that they must file a concise statement of essential terms when confidentially filing service contracts with the Commission is GRANTED.

IT IS FURTHER ORDERED, that the Commission will initiate a rulemaking to implement the exemption from 46 U.S.C. § 40502(d) where relevant in Commission regulations.

FINALLY, IT IS ORDERED, that this proceeding is discontinued.

By the Commission.

Rachel E. Dickon
Secretary

Commissioner Dye, concurring in part and dissenting in part:

I concur in the finding of the Majority's Order that eliminating the requirement under 46 U.S.C. § 40502(d) that VOCC's publish concise statements of essential terms with the filing of each confidential service contract will not result in a substantial reduction in competition or be detrimental to commerce. I dissent from the Order's finding that the Commission is unable to find that the World Shipping Council's petition for an exemption from the service contract filing requirements under 46 U.S.C. § 40502(d) would not be detrimental to commerce.

Shipper Harm and Existing VOCC Service Contract Record Keeping and Audit Requirements

After reviewing the World Shipping Council's arguments and the concerns put forth by shippers, both as part of this proceeding and in other interactions with the Commission, the Majority has determined that granting the requested exemption could *potentially* result in a detriment to commerce. Order at 16. Because the Majority continues to view the filing of service contracts and amendments as a critical way of preventing harm to the shipping public, the Majority has determined that it is *unable to find* that the requested exemption will not be detrimental to commerce. Order at 16.

The Majority, "continues to view the filing of service contracts as a critical way of preventing harm to the shipping public." Order at 16. The Order describes the "*potential* for harm," such as "the risk that VOCCs may attempt to include unreasonable surcharges or unfair or unreasonable terms in their service contracts." (Order at 11, emphasis added). The Majority also refers to "Commission experience" that shippers view service contract filing with the Commission as discouraging VOCCs from engaging in conduct that would be harmful to shippers. Order at 11.

In making this determination, the Majority ignores the ability of the Commission to use existing ocean common carrier service contract record keeping and audit requirements to exercise adequate Commission oversight and prevent harm to shippers. Under 46 C.F.R. § 530.15, every common carrier, conference, or agreement shall maintain original signed service

contracts, amendments, and their associated records in an organized, readily accessible or retrievable manner for a period of five years from the termination of each contract. Every carrier or agreement shall, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative, or the Director, Bureau of Economics and Agreements Analysis (Bureau of Transportation Analysis), submit copies of requested original service contracts or their associated record within thirty days of the date of the request.

The Majority implies that, absent mass filing of service contract information, the Commission cannot protect shippers from harm and for that reason, is unable to find that the requested exemption will not be detrimental to commerce. In fact, the service contracts maintained under Commission record keeping and audit regulations are signed, organized, and retrievable in a readily accessible manner, and are thus in a more useful condition to respond to shipper complaints than the contract information mass-filed in the Commission database. If these record keeping requirements are insufficient to protect shippers from harm, the Commission should revise the carrier record keeping and audit requirements, rather than insist on a continuation of mass service contract filing with the Commission.

Most importantly, the Commission recently found with respect to the elimination of the requirement for Non-Vessel Operating Common Carriers to file Negotiated Service Arrangements (NSAs, contracts with their shipper customers) that the Commission's recordkeeping requirements "will ensure adequate Commission oversight." NVOCCs must continue to retain NSAs, amendments, and associated records for five years from the termination of an NSA and must provide them to Commission staff within 30 days of a request. The Commission stated that, "[t]hese requirements will permit the Commission to investigate any disputes or issues with respect to particular NSAs." Final Rule: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, 83 Fed. Reg. 34780, 34785 (July 23, 2018).

There is no difference in the ability of the Commission to protect shippers from harm with respect to NVOCC Negotiated Service Agreements or Ocean Common Carrier Service Contracts. The Majority's attempt to distinguish between VOCCs and NVOCCs on grounds of availability of antitrust immunity is not persuasive. If there are competition concerns raised involving concerted behavior of VOCCs, the Commission should investigate. The fact that VOCCs have limited antitrust immunity, however, is irrelevant to whether the Commission must maintain a database of tens of thousands of filed contracts and amendments to protect shippers from harm.

I would find that the exemption will not be detrimental to commerce because existing record keeping and audit requirements for ocean carrier service contracts will permit the Commission to investigate any alleged harm to shippers, with respect to particular service contracts, as the Commission found with NVOCC Negotiated Service Arrangements.

Exemption from Service Contract Filing is Not Detrimental to Commerce

The Commission has developed no standard as to how the Commission would determine whether a requested exemption is not detrimental to commerce under 46 U.S.C. § 40103. Without an articulable standard fully explaining the Commission's approach to "detrimental to

commerce", any reason, including those involving incidental Commission regulatory convenience, can be used to defeat the benefits of Shipping Act deregulation to international ocean commerce.

I believe as part of evaluating whether an exemption is "detrimental to commerce," the Commission should balance the known regulatory costs and burdens, and the harm that would be experienced by shippers and consumers if it relieved an identified regulatory burden.

The following arguments of the World Shipping Council and the comments in this proceeding properly focus on the effect of the regulatory requirement to file contracts on international commerce, including the economic benefits of regulatory deregulation.

World Shipping Council Petition

The most compelling argument in favor of granting the World Shipping Council's petition is that the service contract filing requirements are vestiges of a much more rigid system of economic regulation that no longer exists. Beginning with the Shipping Act of 1984 and continuing with the Ocean Shipping Reform Act, Congress moved regulation of international liner shipping away from a highly structured tariff-based common carriage system to a market-based, confidential contract structure. Along with those legislative changes, the industry itself has evolved into a highly competitive global marketplace in which rates and service terms are set by supply and demand and negotiations among commercial parties. The WSC petition concludes that service contract filing and essential terms publication no longer serve a purpose in that marketplace, and the Commission should remove those outdated requirements.

Atlantic Container Line

The comments of Atlantic Container Line (ACL) emphasize that granting the petition would eliminate a significant cost to every stakeholder engaged in ocean transportation, including ocean carriers, shippers, freight forwarders, NVOCCs and the FMC. The ACL comments also explain the competitive complications that the service contract filing regime create for U.S. cross border cargo movements via Canada versus U.S. cargo movements via U.S. ports; explain why stakeholders did not mind tariff and contract filing before 1999; and offer examples of frequent problems caused by the U.S. service contract filing system. Finally, ACL offers that it would be more productive for all stakeholders and for the Commission to engage in an active ocean carrier auditing process that would allow the Commission to review any shipper complaints and review each carrier's ratemaking practices.

The Caribbean Shipowners Association

The Caribbean Shipowners Association (CSA) supports the petition in full for the reasons articulated in the petition, but specifically, because the CSA members believe that granting the petition and revising the Commission's regulations as suggested would be entirely consistent with and greatly further, the Commission's voluntary effort to provide regulatory reform consistent with Executive Order 13771, Reducing Regulations and Controlling Regulatory Costs and Executive Order 13777, Enforcing the Regulatory Reform Agenda. The CSA recognizes that granting the petition would advance the work of the FMC's Regulatory Reform Task Force.

The National Industrial Transportation League

Founded in 1907, the League is a national organization of shippers and other companies engaged in freight transportation throughout the United States and the world.

The League believes that granting the requested exemption would benefit the ocean transportation industry by eliminating unnecessary and costly regulatory burdens on ocean carriers. If the exemption is granted, the League also believes that Commission oversight of ocean carrier contracting activities can and should continue under the Commission's complaint and recordkeeping procedures.

The League supports eliminating the service contract filing and essential terms publication requirements because they impose regulatory costs and burdens without any meaningful corresponding benefit.

Conclusion

The mass service contract filing requirement is burdensome, unnecessary, and represents the worst of an ocean shipping regulatory regime that has outlived its usefulness. In today's freight delivery system, contract filing increases ocean carrier personnel expenses that could be devoted to other operational priorities and impedes dynamic carrier service offerings by VOCCs to American exporters and importers.

I would find that the requested exemption will not "potentially" result in a detriment to commerce because current Commission service contract record keeping and audit requirements allow the Commission to exercise adequate oversight over individual service contracts, provide deterrence from carrier misconduct, and protect shippers from harm.

For the reasons explained, I dissent from the Majority's Order. I would grant the petition and amend the accompanying rulemaking accordingly.