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The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the Shipping Act of 1984, as amended, 46 U.S.C. chapters 401-413. 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

Office of Administrative Law Judges

MCS INDUSTRIES, INC., *Complainant*

v.

COSCO SHIPPING LINES CO., LTD. AND MSC MEDITERRANEAN SHIPPING COMPANY SA, *Respondents*.

DOCKET NO. 21-05

Served: January 13, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON DEFAULT[1]

[Exceptions filed by Respondent, 2/6/23, Commission final decision pending.]

I. Introduction

This initial decision on default imposes a default decision against Respondent MSC Mediterranean Shipping Company SA ("MSC Mediterranean Shipping" or "Mediterranean") for failing to produce discovery, including discovery compelled as early as December 8, 2021.

As detailed below, MSC Mediterranean Shipping has been warned multiple times that if it failed to produce the discovery, a default decision would be issued against it. To expedite the proceeding, on May 4, 2022, the undersigned granted the parties' proposal to file a letter of request with authorities in Switzerland pursuant to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"). On June 29, 2022, the Swiss court denied the request as outside the scope of the Hague Convention. MSC Mediterranean Shipping disagrees with the Swiss court's decision and continues to refuse to produce the discovery ordered in this proceeding, despite multiple orders to do so.

As explained more fully below, a default decision is issued against MSC Mediterranean Shipping and it is ordered to pay reparations to Complainant MCS Industries, Inc. ("MCS Industries"). This decision does not reach the merits of the claim but rather imposes default as a procedural consequence.

[1] This 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.

II. Discussion

A. Procedural History

This proceeding began on August 3, 2021, when the Commission issued a Notice of Filing of Complaint and Assignment requiring an initial decision to be issued by August 3, 2022, and stating that MCS Industries had filed a complaint alleging that MSC Mediterranean Shipping and COSCO Shipping Lines Co., Ltd. had violated the Shipping Act.

On August 26, 2021, MSC Mediterranean Shipping filed an answer denying the complaint's allegations and raising numerous defenses.

On September 23, 2021, an initial decision approving confidential settlement agreement was issued, resolving the claims against Respondent COSCO Shipping Lines Co., Ltd.

Also on September 23, 2021, a revised scheduling order was issued, adopting the parties' proposed schedule and requiring discovery to be completed by January 27, 2022.

On December 8, 2021, an order was issued granting MCS Industries' motion to compel discovery ("Order Granting Motion to Compel"). On December 21, 2021, another revised scheduling order was issued requiring discovery to be completed by March 22, 2022, and briefing completed by June 1, 2022.

On February 4, 2022, an order on motion to amend complaint and motion to dismiss ("Order Denying Dismissal") was issued and leave was given to accept the filing of the verified amended complaint.

On March 4, 2022, an order on proposed revised schedule and discovery notice was issued which required the parties, in relevant part: to "provide a joint status report addressing the status of discovery, the issues above, and a proposed request for overseas discovery by April 4, 2022" and to continue to exchange discovery in an expeditious fashion. Order on Proposed Revised Schedule and Discovery Notice at 2. On April 4, 2022, the parties filed a joint status report regarding the status of discovery and Swiss discovery issues.

On May 4, 2022, an order granting request for letter of request under Hague Convention was issued, finding that the letter would be "the most appropriate and efficient process" for obtaining discovery, and attaching the letter of request "with minor modifications from the parties' proposal" for MCS Industries to translate and file with the appropriate Swiss authorities. Order Granting Request for Letter of Request under Hague Convention at 1-2.

On July 8, 2022, MCS Industries filed a notice of decision on the letter of request, with French and English translation of the June 29, 2022, Decision of the Judge in the Republic and Canton of Geneva, civil court, which denied the request on the grounds that the proceeding is administrative and therefore does not fall within the scope of application of the Hague Convention. On July 15, 2022, the parties filed a joint status report.

On July 29, 2022, an order was issued requiring MSC Mediterranean Shipping to produce all outstanding discovery by August 29, 2022, including the discovery ordered to be produced in

the order granting motion to compel issued on December 8, 2021. On August 26, 2022, MSC Mediterranean Shipping filed a motion seeking an extension of time and on September 6, 2022, filed a notice of advice of the Swiss Federal Office of Justice. On September 2, 2022, MCS Industries filed an opposition to the motion for an extension of time.

On September 8, 2022, the extension of time was denied and MSC Mediterranean Shipping was ordered to show cause "why a default decision should not be issued against it for failure to produce discovery." Order Denying Respondent's Motion for an Extension of Time and Order to Show Cause at 1 ("OTSC").

On September 22, 2022, MSC Mediterranean Shipping filed its response to the order to show cause ("OTSC Respondent Response"). On October 6, 2022, MCS Industries filed its response to the order to show cause ("OTSC Complainant Response"). On October 14, 2022, MSC Mediterranean Shipping filed a reply ("OTSC Respondent Reply").

On October 18, 2022, MSC Mediterranean Shipping filed a "Notice of Determination of the Swiss Federal Office of Justice that the Procedures of the Hague Evidence Convention Apply to this Proceeding and Must Be Used" ("Determination Notice"). On October 28, 2022, MCS Industries filed a letter objecting to the unsolicited notice ("Determination Notice Objection").

On November 8, 2022, MSC Mediterranean Shipping filed a "Notice of Issuance of Formal Decision of the Swiss Federal Department of Justice and Police that the Hague Evidence Convention Procedures Apply to this Proceeding and Must Be Used" ("Decision Notice") with a French document and English translation of a decision ("Federal Council Decision") from the "Federal Department of Justice and Police FDJP," signed by a "Member of the Federal Council." Complainant did not respond to the November 8, 2022, filings.

The parties have both had the opportunity to respond to the order to show cause and the subsequent notices filed by MSC Mediterranean Shipping. The arguments are summarized below.

B. Arguments of the Parties

MSC Mediterranean Shipping asserts that further consultation with the Swiss authorities, not a default judgment, is the proper course for addressing its good faith belief that discovery compliance would risk criminal sanctions; relevant precedent of the Commission and the federal courts provides no support for entry of a default judgment in the present circumstances; and the Commission lacks jurisdiction over this proceeding and thus there is no jurisdiction to issue a default order sanction. OTSC Respondent Response at 4-30.

MCS Industries argues that MSC Mediterranean Shipping has violated multiple discovery orders, including in its response to the order to show cause; Mediterranean's conduct triggers all three of the *Webb* conditions, any one of which is sufficient to support a sanction of default judgment; and default is the most appropriate sanction because of the severity of Mediterranean's misconduct and because a lesser sanction would ultimately reach the same result. OTSC Complainant Response at 3-19.

In its reply, MSC Mediterranean Shipping contends that Complainant previously asserted and now effectively concedes that mandatory consultations under 46 U.S.C. § 41108(c) are required; relevant precedent provides no support for entry of a default judgment; and Complainant does not address MSC Mediterranean Shipping's jurisdictional arguments or attempt to show why they should not be certified. OTSC Respondent Reply at 4-15.

MSC Mediterranean Shipping filed two notices after the order to show cause briefing was complete. The October 18, 2022, Determination Notice states that MSC Mediterranean Shipping requested that the Swiss Federal Department of Justice and Police (FDJP) waive enforcement of Article 271 of the Criminal Code and that the Federal Office of Justice in Bern denied the authorization, finding that a letter of request under the Hague Convention could be resubmitted. Determination Notice at 1-2.

MCS Industries filed a Determination Notice Objection on October 28, 2022, stating:

> If anything, MSC's continued efforts with this Submission to relitigate (without appealing) previously decided issues in this case merely serve to reinforce its apparent disregard for, or even contempt of, the Presiding Officer's decisions and, indeed, the FMC's jurisdiction over it. The Submission can and should be disregarded as addressing issues that are already decided and/or moot. Even if considered, nothing in the Submission alters the fact that, for the reasons detailed in Complainant's October 6 response to the Presiding Officer's Order, default judgment against MSC is the appropriate remedy in this case.

Determination Notice Objection at 2.

In the November 8, 2022, Decision Notice, MSC Mediterranean Shipping asserts that "a default judgment remains inappropriate," the proper way forward is to refile the request for mutual legal assistance in an improved form, and attaches the Federal Council Decision, which MSC Mediterranean Shipping says is from the executive branch of Switzerland. Decision Notice at 2-3. MCS Industries did not respond to this second notice.

C. Prior Relevant Orders

A number of prior orders have been issued regarding discovery in this proceeding. Relevant portions of those orders are summarized and quoted below.

1. Motion to Compel

This discovery dispute stems from a December 8, 2021, order granting MCS Industries' motion to compel. The parties' arguments in the motion to compel and opposition were organized by fourteen general topics. Rulings on each of the fourteen topics are quoted below. The Order Granting Motion to Compel was not appealed.

a. General Objections

> MSC Mediterranean Shipping cannot limit its discovery to what it believes are the core issues in this proceeding nor can it require MCS Industries to produce

> evidence that claims are valid before producing discovery. Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense" and the allegations in the complaint extend beyond the specific bookings and attempted bookings identified. 46 C.F.R. § 502.141(e)(1); Complaint at 11-12. While parties cannot go on fishing expeditions and seek irrelevant discovery, they are not required to provide evidence or legal authority for every discovery request, especially when that request is narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe.
>
> MSC Mediterranean Shipping's general objections are not persuasive and the approach to discovery proposed by MSC Mediterranean Shipping will only delay the proceeding. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to respond to relevant discovery requests.

Order Granting Motion to Compel at 4-5.

b. Identifying Individuals with Knowledge

> MCS Industries is entitled to discover information relevant to the pending claims and MSC Mediterranean Shipping, the other party in the proceeding, is the preferred entity to provide that information. Respondent merely refers generally to the parties' respective document productions. While a responding party may answer an interrogatory by producing business records, Respondent must "specify[]the records that must be reviewed, in sufficient detail to enable [Complainant] to locate and identify them as readily as [Respondent] could." 46 CFR § 502.145(d)(1).
>
> Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to: (1) identify all individuals with knowledge of facts relevant to the claims and defenses in this matter, (2) identify with specificity any and all documents that Respondent relied upon in responding to these Interrogatories, and (3) identify with specificity each document that Respondent contends is responsive to each of Complainant's Interrogatories.

Order Granting Motion to Compel at 5.

c. Communications Concerning Complainant

> As discussed above, MSC Mediterranean Shipping cannot limit its discovery to what it believes should be the core issue in this proceeding. MSC Mediterranean Shipping improperly limited its production to only documents concerning "bookings and attempted bookings" which excludes relevant documents. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 5 through 7, subject to the time and geographic limitations proposed by Complainant.

Order Granting Motion to Compel at 5-6.

d. Attempts to Book Cargo Pursuant to the Service Contract

> One of the claims alleged by MCS Industries is a violation of section 41102(c), which requires a showing that the "claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis." 46 C.F.R. §545.4. Thus, MSC Mediterranean Shipping's practices are at issue, not just the actions taken on specific bookings. Moreover, it may be necessary to understand MSC Mediterranean Shipping's actions in a context beyond specific, documented requests for bookings. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 8 through 10 and 13 and Interrogatory 8, with the limitations of time and geography proposed by Complainant.

Order Granting Motion to Compel at 6-7.

e. Successful Carriage of MCS Cargo

> The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.141(e)(1). To understand why there were problems with some bookings it is relevant to understand successful bookings. While parties cannot go on fishing expeditions and seek irrelevant discovery, they are not required to provide evidence or legal authority for every discovery request, especially when that request is narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe.
>
> Accordingly, it is hereby **ORDERD** that MSC Mediterranean Shipping produce all documents and communications responsive to Requests 10 and 11, with the limitations of time, geography, and scope proposed by MCS Industries.

Order Granting Motion to Compel at 7-8.

f. Force Majeure

> MSC Mediterranean Shipping admits that it limited its response to notices to the market of sailings from Tianjin and Qingdao that could not be undertaken due to port congestion or other factors outside MSC's control. The discovery questions ask about notifications of force majeure. If MSC Mediterranean Shipping wants to raise force majeure as a defense, it needs to provide relevant discovery. The timeframe requested, from January 1, 2020, through the present is reasonable and whether such claims were raised against other shippers is relevant. Accordingly MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 14 and 15, and to answer Interrogatories 9 (from January 1, 2020, to the present) and 10.

Order Granting Motion to Compel at 8.

g. Sailings That Did Not Occur and Alternative Sailings

> It appears that MSC Mediterranean Shipping has provided information regarding *what* sailings were voided or cancelled but has not produced the documents and communications that would show *why* sailings were voided or cancelled. There are many factors impacting the current disruptions and it is relevant for MCS Industries to discover which factors impacted MSC Mediterranean Shipping. Accordingly, MSC Mediterranean Shipping is hereby **ORDERED** to produce all documents and communications responsive to Requests 23 and 24, with the limitations of time and geography proposed by Complainant.

Order Granting Motion to Compel at 8-9.

h. Course of Conduct

> The Commission's Rules permit discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense" and the allegations in the complaint extend beyond the specific bookings and attempted bookings identified. 46 C.F.R. § 502.141(e)(1); Complaint at 11-12. While parties cannot go on fishing expeditions and seek irrelevant discovery, they are not required to provide evidence or legal authority for every discovery request, especially when that request is narrowly tailored to conduct between the parties, between California and two ports in China, over a four-month timeframe. Accordingly, it is hereby **ORDERD** that MSC Mediterranean Shipping answer the discovery requests, as limited by the proposals from Complainant.

Order Granting Motion to Compel at 9-10.

i. Identify Potential Witnesses

> As with other discovery, it appears that MSC Mediterranean Shipping limited its discovery responses to a narrow set of people involved with particular bookings. However, MCS Industries' claim goes beyond these particular bookings to MSC Mediterranean Shipping's practices and MCS Industries is entitled to discovery regarding those practices. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping respond to these MCS Discovery Requests sufficiently to identify these individuals as requested

Order Granting Motion to Compel at 10.

j. Capacity, Cost, and Allocation of Cargo on Respondent's Vessels

> MCS Industries offered to limit these requests geographically and has requested additional information about how this information is stored so that it can be obtained in the least burdensome manner. The requests are relevant to MCS Industries' claims and the parties have a protective order in place for confidential material disclosed. Accordingly, MSC Mediterranean Shipping is hereby

> **ORDERED** to respond to Requests 20 through 22 and 25 and Interrogatories 18 and 19, subject to the limitations proposed by Complainant.

Order Granting Motion to Compel at 10-11.

k. Unbooked Space on Relevant Sailings

> MCS Industries' request is narrowly tailored to sailings from the ports at issue during the relevant time frame. This request is relevant to MCS Industries' claims and the parties should work together to ensure that the information is provided in the least burdensome manner. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping answer Requests 17 through 19 in full.

Order Granting Motion to Compel at 11.

l. Relevant Financial Data and Ownership Information

> MCS Industries requests information from January 1, 2019, and the effect of any force majeure event and ownership from January 1, 2020, and acknowledges that the responses would likely be confidential and protected under the protective order. MSC Mediterranean Shipping's argument that the relationship between parties such as handling and booking agents is already known by MCS Industries and also would be highly prejudicial if disclosed, seems contradictory. As has been previously discussed, MCS Industries is entitled to discovery regarding its claims. The requests are relevant to MCS Industries' claims and MSC Mediterranean Shipping's defenses. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping answer Requests 31 through 35 and Interrogatories 13 and 14 in full.

Order Granting Motion to Compel at 11-12.

m. Document Retention Policies

> Discovery of document retention policies does not require Complainant to establish a document retention problem and the request is relevant. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping produce the documents sought in Requests 36 and 37.

Order Granting Motion to Compel at 12.

n. Other Allegations of Shipping Act Violations

> MSC Mediterranean Shipping has responded to these requests for the time period of January 1, 2020, to the present, a time period proposed by MCS Industries in their motion. Accordingly, it is hereby **ORDERED** that MSC Mediterranean Shipping respond to Request 39 and Interrogatory 15 from January 1, 2020, to the present.

Order Granting Motion to Compel at 12.

2. Order Requiring Production of Discovery

As discussed above, with only minor changes from the parties' proposal, a letter of request was sent to Switzerland to ensure that discovery in this proceeding did not contravene Swiss legal requirements. On July 15, 2022, the parties filed a joint status report stating that the request was denied by the Swiss court on the grounds that it did not fall within the scope of application of the Hague Convention.

On July 29, 2022, an order was issued requiring production of discovery, which stated:

> In the joint status report, Complainant asserts that the Department of State should be contacted to request assistance to obtain discovery and Respondent asserts that a new letter of request should be submitted to a different office in Switzerland. July 15, 2022, Joint Status Report. However, the Swiss authorities are in the best position to determine whether their involvement is needed and they have indicated that it is not as the requested discovery is outside the scope of the Hague Convention. Other courts have come to a similar conclusion.
>
> The party seeking to pursue discovery through the Hague Evidence Convention bears the burden of demonstrating that proceeding in that manner is necessary and appropriate. *Luminati Networks v. Code200*, 2021 U.S. Dist. LEXIS 128634, at *10 (E.D. Tex. 2021). A party seeking an order to apply Hague Convention procedures in lieu of the procedures set forth in the Federal Rules of Civil Procedure must demonstrate that a specific foreign law "actually bars the production or testimony at issue." *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993). "In order to meet that burden, the party resisting discovery must provide the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law." *Id.* The Supreme Court has held "that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist.*, 482 U.S. 522, 539-40 (1987).
>
> Here, Respondent asserts that Swiss Article 271 of the Swiss Criminal Code ("SCC") blocks the production of the documents at issue. Jan. 10, 2022, Joint Status Report; February 25, 2022, Respondent's Notice and Update; April 4, 2022, Joint Status Report; July 15, 2022, Joint Status Report. Respondent's Swiss attorney in his February 25, 2022 memorandum asserts that Swiss authorities disagree with the Supreme Court's finding that the Hague procedures are optional; discusses Article 271 to conclude that to "avoid any risk of violating Article 271 SCC, the Swiss party requested to provide evidence must use Swiss-approved procedures before producing documents located in Switzerland to a foreign authority;" and opines that a letter of request under the Hague Convention is the most appropriate way to obtain the discovery. February 25, 2022, Memo on Swiss Law at 4-5.

The Court's ultimate task "is not to definitively determine what Swiss law is, but rather to decide whether the risk of prosecution under Article 271 is so great" as to warrant a protective order. *Microsoft Corp. v. Weidmann Elec. Tech., Inc.*, 2016 U.S. Dist. LEXIS 170325, *34 n.14 (D. Vt. 2016). In *EFG Bank AG v. AXA Equitable Life Ins. Co.*, the federal district court denied a protective order for EFG documents located in Switzerland, finding that EFG failed "to demonstrate with sufficient particularity and specificity that the discovery sought is prohibited by Swiss law," specifically Article 271. 2018 U.S. Dist. LEXIS 67521, *4-5 (S.D.N.Y. 2018). The court cited a number of Swiss cases that found that Article 271 did not apply where there was no threat of criminal sanction.

> Significantly, however, decisions of the Swiss Federal Department of Justice and Police ("FDJP") — an administrative, non-judicial body — indicate that Swiss law does not preclude the *voluntary* production of documents by a private party and that "voluntary" is defined broadly to include the production of discovery so long as the party faces only procedural consequences rather than criminal sanctions for its failure to produce.

EFG Bank, 2018 U.S. Dist. LEXIS 67521, *5 (emphasis in original). The court noted:

> Conspicuously, EFG fails to identify a single case in which a party was found to have violated Article 271 by disclosing its own documents absent a court order threatening criminal sanctions. That is presumably because no such case exists. Indeed, EFG's own expert on Swiss law concedes that no court has held that production by a party in the circumstances presented here violates Article 271.

Id., at *7-8 (footnote omitted). Similarly, another district court recently declined to pursue discovery under the Hague Convention or to issue a letter of request, finding that "although Article 271 might be implicated if the responding party was threatened with criminal sanctions for failure to comply with a discovery order, the statute does not preclude voluntary disclosure in compliance with a civil discovery order if the consequence for noncompliance is procedural only." *Belparts Grp., N.V. v. Belimo Automation AG*, 2022 U.S. Dist. LEXIS 75450, at *15 (D. Ct. 2022).

In Respondent's Swiss counsels' April 4, 2022, Second Memorandum on Swiss Law, they acknowledge that: "It is true that in practice, there are not many prosecutions based on Article 271. This is mainly because it is a norm of behavior." April 4, 2022, Memo on Swiss Law at 4. The memo further asserts that the four-year old *EFG Bank* case "does not and cannot capture more recent evolution of the case law that clearly supports a strengthening of the sensitivity to Article 271 violations." *Id.* Moreover, Respondent's Swiss counsel states that there was a criminal prosecution of a Swiss asset manager for providing data to

American prosecutors on American clients of the asset manager, concluding that the Swiss Supreme Court "specifically noted that the collection and transmission on Swiss territory of *evidence that falls within the scope of international judiciary assistance* is a breach of Article 271." *Id.* (emphasis added).

Commission Rule 150(b) outlines the procedural consequences of failing to provide discovery in Commission proceedings:

> **(b)** ***Failure to comply with order compelling disclosures or discovery.*** If a party or a party's officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just. A motion must include a certification that the moving party has conferred in good faith or attempted to confer with the disobedient party in an effort to obtain compliance without the necessity of a motion. An order of the presiding officer may:
>
> (1) Direct that the matters included in the order or any other designated facts must be taken to be established for the purposes of the action as the party making the motion claims;
>
> (2) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; or
>
> (3) Strike pleadings in whole or in part; staying further proceedings until the order is obeyed; or dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party.

46 C.F.R. 502.150(b).

This proceeding is very different from a non-party providing Swiss banking documents to American prosecutors building a potential criminal case. This proceeding is not a criminal prosecution and the Commission cannot impose criminal penalties. The discovery sought is in relation to shipments from specific ports in China and Indonesia to the United States over a limited timeframe. Evidence is sought by a private party, Complainant MCS Industries, from a private party, Respondent MSC Mediterranean Shipping. Because MSC Mediterranean Shipping is a party, it has been able to negotiate an appropriate protective order. Moreover, the penalty for non-production of discovery is not criminal. Most critically, the Swiss authorities have reviewed the request and determined that it is outside the scope of the Hague Evidence Convention. Therefore, Respondent has not established that any additional actions need to be taken under the Hague convention.

> Respondent MSC Mediterranean Shipping is alleged to be one of the largest container lines in the world. It has voluntarily chosen to conduct business in American ports and is regulated by the Federal Maritime Commission. Respondent has opposed providing relevant discovery which was ordered in the order granting motion to compel. It has delayed the proceeding by insisting that Swiss law prohibits discovery disclosure. But, parties appearing before the Commission are entitled to relevant evidence needed to prosecute their cases. Failure to provide discovery may result in procedural sanctions, from an inference that the discovery would have been adverse to Respondent's interests to a decision on default. *See Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, Docket 11-12, 2014 FMC LEXIS 36, at *14-18 (Order Affirming Dismissal of Complaint for Complainant's failure to provide discovery) (FMC Nov. 20, 2014) *Jamteck Int'l Shipping, Inc. - Possible Violations of the Comm'n's Regulations at 46 C.F.R. Part 515*, Docket No. 07-09, 2009 FMC LEXIS 42, *6-7 (ALJ July 27, 2009) (Admin. final on August 31, 2009) (referencing order that an inference adverse to Respondents be drawn as a consequence of Respondents' failure to respond to discovery).

Order Requiring Production of Discovery at 1-4.

3. Order to Show Cause

On September 8, 2022, an order denied MSC Mediterranean Shipping's motion for an extension of time and ordered that by September 22, 2022, MSC Mediterranean Shipping either provide the required discovery or show cause why default judgment should not be entered against it.

> As explained below, MSC Mediterranean Shipping's motion seeking an extension of time is denied and it is ordered to show cause why a default decision should not be issued against it for failure to produce discovery. COSCO was previously dismissed due to a settlement.
>
> MSC Mediterranean Shipping requested an extension to obtain advice from the Federal Office of Justice in Switzerland and propose a path forward, stating that it "cannot comply" with the July 29, 2022, order requiring production of documents and "that the July 1 ruling of the Geneva Court of First Instance is in error." Motion at 1-2. Complainant asserts that Respondent's failure to comply with its discovery obligations are a crisis of Respondent's own making; Respondent's motion should be denied as both substantively meritless and procedurally inappropriate; and, procedural sanctions are an appropriate remedy for Respondent's noncompliance. Opposition at 1-6.
>
> Essentially, Respondent continues to argue despite rulings to the contrary in this proceeding and in the Republic and Canton of Geneva Court of First Instance, that due to Swiss legal requirements it cannot produce the discovery ordered in the December 8, 2021, motion to compel and the July 29, 2022, order requiring

production of discovery, and that the Swiss court's decision that their intervention is not necessary was in error. Motion at 1-5.

The notice filed by MSC Mediterranean Shipping argues that it contacted the Federal Office of Justice in Switzerland to confirm that the ruling of the Geneva Court of First Instance was in error and the "advice from the Federal Office of Justice directly supports MSC's proposal that the request for judicial assistance should be resubmitted in order to obtain a correct assessment that the procedures are available." Notice at 1. However, it is clear that this "advice" from the Federal Office of Justice in Switzerland merely identifies the process for resubmitting a request and the factors that may be taken into account, without any discussion of the merits of this proceeding. Notice, Exhibit B.

The question of whether Swiss assistance with discovery is required has been answered by the undersigned Administrative Law Judge and by the Court of First Instance in Geneva. MSC Mediterranean Shipping's position did not prevail and now it must produce discovery or face procedural consequences. Relitigation of the same issue will not be permitted and has only delayed this proceeding. Therefore, the motion seeking an extension is denied.

As Respondent was advised previously, pursuant to Commission Rule 150(b), if a party "fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just," including "rendering a decision by default against the disobedient party." 46 C.F.R. 502.150(b).

In multiple filings, MSC Mediterranean Shipping has indicated that it will not produce the discovery that it has been repeatedly ordered to produce. Complainant asserts that "Respondent cannot accept the benefits of shipping cargo to and from U.S. ports while shirking its legal and regulatory obligations before the Commission" and that it would request a decision on default. Opposition at 6. Given MSC Mediterranean Shipping's statements that it will not produce the required discovery, it is appropriate to determine whether a default decision is an appropriate remedy. Accordingly, MSC Mediterranean Shipping is ordered to show cause why a default decision should not be issued against it.

The amended complaint seeks an FMC investigation; a finding of violations of the Shipping Act; a cease and desist order; and an order requiring MSC Mediterranean Shipping to pay an unspecified amount of reparations to Complainant. An FMC investigation cannot be ordered through a formal proceeding. However, the other requested remedies may be ordered. In their response to MSC Mediterranean Shipping's filing, Complainant should identify the dollar amount of reparations that they are seeking. MSC Mediterranean Shipping may file a reply to Complainant's arguments.

> The merits of the proceeding and remedy are not at issue and should not be addressed in these filings—the question is only whether a default decision or other procedural consequence is appropriate for MSC Mediterranean Shipping's failure to produce discovery. If MSC Mediterranean Shipping provides the discovery, the issue will be moot and the case can proceed to a resolution on the merits. The parties may also choose to settle the proceeding and if so, should submit a motion requesting approval of the settlement with a copy of the settlement agreement.

Order Denying Respondent's Motion for an Extension of Time and Order to Show Cause at 1-2.

III. Analysis

A. Standard

As the parties have been advised, Commission Rule 150(b) outlines the procedural consequences of failure to provide discovery in Commission proceedings, including directing that certain matters be taken as established, prohibiting certain claims or defenses, striking pleadings, staying proceedings, or rendering a decision by default. 46 C.F.R. § 502.150(b).

Commission rules have long permitted dismissal of a proceeding as a sanction for failure to comply with discovery orders. The current rules state that "[i]f a party or a party's officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just." 46 C.F.R. § 502.150(b) (previously 46 C.F.R. § 502.210(a) and § 502.210(b)). As a sanction for failure to comply with discovery orders, a presiding officer may issue an order "dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party." 46 C.F.R. § 502.150(b)(3).

The "Commission has upheld dismissal orders under Rule 210(b) [now Rule 150(b)] when complainants fail to respond to discovery orders and the conduct is willful and deliberate." *Kawasaki Kisen Kaisha, Ltd v. The Port Authority of New York and New Jersey*, Docket 11-12, 2014 FMC LEXIS 36, at *17 (FMC Nov. 20, 2014) (Order Affirming Dismissal of Complaint for failure to provide discovery); *see also Interpool, Ltd. v. Pac. Westbound Conf.*, 22 F.M.C. 762 at 764,[2] 19 S.R.R. 1719 (FMC May 15, 1980) (affirming dismissal of proceeding for willful and deliberate failure to respond to discovery).

B. Jurisdiction

MSC Mediterranean Shipping asserts that the Commission lacks jurisdiction over this proceeding, arguing that exercising jurisdiction over this proceeding is inconsistent with Commission precedent; that the matter is in binding arbitration; and that the issue of jurisdiction should be certified to the Commission for determination. OTSC Respondent Response at 26-30.

[2] Available, with other F.M.C. decisions, at www.fmc.gov/wp-content/uploads/2019/04/vol22.pdf.

MCS Industries states:

> In contempt of the Presiding Officer's explicit instructions, Mediterranean's Response strays far beyond the bounds of the Order to Show Cause, devoting fully half its considerable length to arguing that the Commission "lacks jurisdiction over this proceeding to begin with" and that there is no prejudice to Complainant from not receiving the discovery at issue despite the Presiding Officer's clear findings to the contrary over nine months ago in the Order Granting Motion to Compel.

OTSC Complainant Response at 6.

The issue of jurisdiction was adjudicated in the February 4, 2022, Order Denying Dismissal, which was not appealed. That order specifically addressed arbitration and *Cargo One, Inc. v. Cosco Container Lines Co. Ltd*, 28 S.R.R. 1635, 1645, 2000 FMC Lexis 14 (FMC Oct. 31, 2000), stating:

> Relying on the principles stated in *Cargo One*, the Commission has held that jurisdiction over a complaint alleging violations of the Shipping Act exists even though a proceeding in another forum may have resolved some issues between the parties. For instance, prior to filing its complaint with the Commission, one complainant had sought and obtained an arbitration award of several hundred thousand dollars against the Commission respondent. The complainant filed a complaint with the Commission alleging Shipping Act violations and seeking another million dollars. The Commission reversed the order of the administrative law judge dismissing the complaint and remanded for further proceedings on the Shipping Act claims set forth in the complaint. The Commission held that the fact that 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).

Order Denying Dismissal at 6.

Regarding jurisdiction, the Order Denying Dismissal concluded:

> Thus, the Commission has an obligation to determine whether an entity has violated the Shipping Act, even when the facts alleged may give rise to both breach of contract claims and Shipping Act claims. Allegations in the amended complaint extend beyond allegations of breach of the service contract to allege

> practices that violate the Shipping Act, such as failing to maintain or provide booking reports, systematically preferring higher-priced cargo, and coercing surcharges. Establishing a violation of section 41102(c) requires a showing that the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis. It does not require that the acts involved be concerted, collusive, or parallel actions. Additionally, the way that damages are calculated does not determine whether or not the Commission has jurisdiction over a claim. The Commission has an obligation to determine the reasonableness of practices by regulated entities that are alleged to violate the Shipping Act.

Order Denying Dismissal at 6.

MSC Mediterranean Shipping continues to argue that the Commission does not have jurisdiction because the claims are inherently breach of contract claims that should be resolved by arbitration. OTSC Respondent Response at 26-30. In addition, it argues that because MCS Industries has recently asked the arbitration panel to stay the arbitration, Complainant's counsel has conceded that its claims are contractual claims. OTSC Respondent Response at 28.

As discussed in the Order Denying Dismissal, the Commission has stated:

> The arbitration clause in the parties' service contract does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. Although service contracts are between private parties, the Commission regulates the content as well as the conduct under the contracts. The regulation of service contracts is akin to the regulation of agreements, because the Commission is the regulatory body charged with administering the Shipping Act and, therefore, must ensure that service contracts and agreements are filed and implemented pursuant to the statutory requirements and Commission regulations. 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, 30 S.R.R. at 998, 2006 FMC LEXIS 19, at *21-22.

The arbitration provision in the service contract and any request by MCS Industries to stay arbitration does not divest the Commission of jurisdiction over alleged violations of the Shipping Act. Moreover, the question of whether the Commission has jurisdiction over this complaint has already been adjudicated. Respondent may not now seek to relitigate the order finding that the Commission has jurisdiction. Therefore, the finding that the Commission has jurisdiction is reaffirmed on the same basis as in the February 4, 2022, Order Denying Dismissal.

If MSC Mediterranean Shipping wanted the issue of jurisdiction reviewed by the Commission, it should have requested review of the February 4, 2022, Order Denying Dismissal, not refused to provide discovery. The request for certification reiterates arguments previously rejected and is not timely. Therefore the request for certification is hereby **DENIED**.

C. Status of Discovery

MSC Mediterranean Shipping argues that default judgements are disfavored in favor of the policy to decide cases on their merits, it has not acted in bad faith, and there is no actual prejudice to Complainant. OTSC Respondent Response at 7-26.

MCS Industries argues that MSC Mediterranean Shipping has violated multiple discovery orders, including in its response to the order to show cause, and had failed to appeal any of the orders to which it objects. OTSC Complainant Response at 3-7.

Default judgements are disfavored and a last resort, which is why MSC Mediterranean Shipping was provided multiple opportunities to cure their discovery deficiencies. Indeed, to expedite the proceeding, on May 4, 2022, the undersigned agreed to issue a letter of request under the Hague Convention, which the Swiss court responded to on June 29, 2022, finding that this proceeding does not fall within the scope of application of the convention. MSC Mediterranean Shipping refused to follow the rulings of the undersigned Judge or the Swiss Judge and instead filed an *ex parte* request with the executive branch.

As explained in the July 29, 2022, Order Requiring Production of Discovery, the Supreme Court has held "that the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct. for S. Dist.*, 482 U.S. 522, 539-40 (1987). A party seeking an order to apply Hague Convention procedures in lieu of the procedures set forth in the Federal Rules of Civil Procedure must demonstrate that a specific foreign law "actually bars the production or testimony at issue." *Alfadda v. Fenn*, 149 F.R.D. 28, 34 (S.D.N.Y. 1993). "In order to meet that burden, the party resisting discovery must provide the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law." *Id.*

MSC Mediterranean Shipping is alleged to be one of the largest container lines in the world. It has voluntarily chosen to conduct business in United States ports and is regulated by the Federal Maritime Commission. It has not met its burden to show that the discovery sought is prohibited by foreign law and the undersigned is not required to resolve a conflict between the judicial and executive branches in Switzerland. Moreover, the *ex parte* ruling from the Federal Council does not overrule the judicial finding, but rather denies the request for authorization and states that the request for mutual assistance may be refiled with the court. Federal Council Decision at 3-4.

This proceeding is at an impasse as MCS Industries cannot proceed with its case without the discovery and MSC Mediterranean Shipping has refused to provide the discovery despite multiple orders to do so. Therefore, the remaining issue is whether the issuance of a default decision is the appropriate remedy.

D. Default Factors

Both parties refer to the factors identified in *Webb v. District of Columbia*.

> In *Shea v. Donohoe Construction Company*, 254 U.S. App. D.C. 175, 795 F.2d 1071 (D.C. Cir. 1986), we set forth three basic justifications that support the use of dismissal or default judgment as a sanction for misconduct. First, the court may decide that the errant party's behavior has severely hampered the other party's ability to present his case--in other words, that the other party "has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case." Second, the court may take account of the prejudice caused to the judicial system when the party's misconduct has put "an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay." And finally, the court may consider the need "to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future." A sanction imposed pursuant to any of these considerations must be based on findings supported by the record.

Webb v. District of Columbia, 146 F.3d 964, 971 (D.C. Cir. 1999) (citations omitted). Although only one of the *Webb* factors is needed to support a default judgement as a sanction for misconduct, here, all three factors are present.

1. Prejudice to Party

MSC Mediterranean Shipping argues that: "Substantial discovery has already been exchanged among the parties on the core issues of the case" and discusses "the relationship of the discovery already provided to the issues in the case" to demonstrate that there is no potential prejudice from nonproduction that justifies default. OTSC Respondent Response at 12-13.

MCS Industries contends that the "Order Granting Motion to Compel contained over a dozen individual orders requiring Mediterranean to respond to well over a dozen discovery requests. Each of those orders came with a finding that Complainant was entitled to the requested discovery because it was relevant to Complainant's well-pled claims" and that "Mediterranean has not answered any of Complainant's first set of interrogatories or produced any additional documents in response to that Order, leaving both that Order and the more recent Order Requiring Production entirely unfulfilled." OTSC Complainant Response at 8-9.

Here, the dispute is not about a specific piece of evidence in Switzerland, but rather, the order to compel identified over a dozen different categories of information that needed to be disclosed. Order Granting Motion to Compel at 4-13. As has been previously found, Complainant is entitled to this discovery which is relevant to the claims it raised and necessary to establish the elements of the alleged Shipping Act violations. "MSC Mediterranean Shipping cannot limit its discovery to what it believes are the core issues in this proceeding nor can it require MCS Industries to produce evidence that claims are valid before producing discovery." *Id.* at 5. Throughout this proceeding, MSC Mediterranean Shipping has attempted to limit the scope of the claims and discovery to preclude review of its practices. However, it is in part these very practices that the Commission needs to review to determine whether there is a Shipping Act violation. Moreover, if MSC Mediterranean Shipping objected to the rulings in the Order Granting Motion to Compel, it could have sought to appeal that order at that time. Its attempt to relitigate the relevance of the discovery ordered is not timely and not persuasive.

The discovery compelled applied to broad categories of information and would likely have led to additional discovery requests. For example, the questions regarding identifying individuals with knowledge, communications concerning Complainant, and identifying potential witnesses may have led to depositions and additional evidence. Denial of the discovery compelled significantly limited MCS Industries' ability to discover information relevant to its claims and the defenses. Therefore, a lesser sanction such as directing that certain matters be taken as established, prohibiting certain claims or defenses, or striking pleadings would not be effective to remedy the failure to provide such broad discovery. Due to the prejudice to MCS Industries from nonproduction, default is the appropriate sanction.

MSC Mediterranean Shipping's failure to provide discovery, even after the Swiss court ruled on the letter of request in June 29, 2022, significantly delayed this proceeding. This delay further prejudices MCS Industries, which has requested sanctions on a number of occasions. *See, e.g.*, February 28, 2022, joint status report; April 4, 2022, joint status report; September 2, 2022, opposition to motion for extension of time. Indeed, "prejudice resulting from unreasonable delay may be presumed as a matter of law." *Peart v. City of New York*, 992 F.2d 458, 462 (2d Cir. 1993). Over time, witness memories may recede and it may be more difficult to obtain relevant evidence. Moreover, the amended complaint, in part, extended the timeframe at issue, and alleged that the violations were "continuous and ongoing." Amended Complaint at 20, 22, 23. It is therefore reasonable to find that the delays due to Respondent's intransigence exacerbates Complainant's injury. Thus, the delay further prejudices MCS Industries and is an additional basis to find that default is the appropriate sanction.

2. Prejudice to Judicial System

MSC Mediterranean Shipping argues that "the facts present here do not bear any resemblance to those in which a default judgment has been entered to protect a court's docket" and "there is no trial date set, nor any other dates, and there are viable alternatives to resolve the issues in a manner that would allow discovery to move forward." OTSC Respondent Response at 25.

MCS Industries asserts that default is justified because of delay and burden created by MSC Mediterranean Shipping's disregard for its discovery obligations and discovery orders, stating that "Mediterranean's discovery misconduct has dominated this case, occasioning multiple delays and rounds of unnecessary filings—all of which have imposed burdens both on Complainant, a much smaller entity than Mediterranean, and on the Presiding Officer's own docket." OTSC Complainant Response at 10.

The Commission has stated that: "Agencies must protect their integrity and assure the orderly conduct of business in order to maintain their effectiveness. Adherence to agency procedure is necessary to maintain the agency's integrity and to ensure the orderly conduct of agency business in a manner protective of the rights of all parties." *Interpool*, 22 F.M.C. at 767. In *Interpool*, the Commission found that dismissal was "the only appropriate sanction under these circumstances" where the Complainant failed to respond or object to discovery and that conduct was willful and deliberate. *Id.* at 768.

There have been multiple deadlines set in this proceeding, which have not been met due to MSC Mediterranean Shipping's failure to provide discovery. Those deadlines include:

- In the Notice of Filing of Complaint and Assignment, issued August 3, 2021, the Commission required an initial decision to be issued by August 3, 2022.

- The September 23, 2021, scheduling order which adopted the parties' proposed schedule, required discovery to be completed by January 27, 2022.

- The December 21, 2021, revised scheduling order indicated that the "extension proposed by the parties is excessive," and granted the parties "three months to complete all remaining discovery" setting a date of March 22, 2022, for close of discovery and June 1, 2022, for all briefs to be filed.

- The March 4, 2022, order on proposed revised schedule and discovery notice ordered the parties to "continue to exchange discovery in an expeditious fashion."

- The July 29, 2022, order requiring production of discovery denied "MSC Mediterranean Shipping's request to resubmit a request to Swiss authorities for assistance with discovery" and ordered MSC Mediterranean Shipping "to provide any outstanding discovery by August 29, 2022, including the discovery ordered to be produced in the Order Granting Motion to Compel."

- The September 8, 2022, order denying Respondent's motion for an extension of time and order to show cause ordered "that by September 22, 2022, MSC Mediterranean Shipping either provide the required discovery or show cause why default judgment should not be entered against it."

The failure to meet these deadlines has disrupted the orderly conduct of agency business and burdened the Commission's docket, requiring multiple revisions of the schedule to accommodate the delays. The delays caused by the failure to produce discovery have prejudiced MCS Industries, the Commission, and the shipping public. Despite multiple clear warnings that failure to produce discovery could lead to a default judgement, MSC Mediterranean Shipping has continued to assert that it will not produce the discovery ordered. Accordingly, default is appropriate.

3. Deterrence

MSC Mediterranean Shipping argues it has not acted in bad faith, there is no willful misconduct, and that it "continues to work in good faith to try to resolve the impasse created by the Geneva court ruling." OTSC Respondent Response at 2, 9-10.

MCS Industries asserts that default is justified by "Mediterranean's disregard for the jurisdiction of the FMC, the Presiding Officer's Orders, and the requirements of the FMC's Rules [which] fulfills the third *Webb* justification, regarding the need to deter conduct disrespecting the tribunal." OTSC Complainant Response at 12. MCS Industries further states that "Mediterranean and other non-U.S. ocean common carriers, which collectively dominate the

market for global transoceanic shipping, could employ the same tactics to thwart discovery that Mediterranean has employed in this case." OTSC Complainant Response at 13.

The Commission addressed the importance of deterrence, quoting the Supreme Court and stating:

> "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

Interpool, 22 F.M.C. at 766 (quoting *NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976)).

MSC Mediterranean Shipping has not provided a narrow list of documents or witnesses located in Switzerland that it claims are protected. Rather, it asserts that that it "has provided substantial discovery on the core issues in the case" and it "has made substantial document productions, only a subset of discovery items remain outstanding, and those items could be addressed without recourse to a default judgment." OTSC Respondent Response at 10; OTSC Respondent Reply at 13. It is not clear whether the refusal to provide discovery is in fact because information is located in Switzerland or whether MSC Mediterranean Shipping is refusing to provide the discovery because it disagrees with the findings related to the Commission's jurisdiction and scope of these proceedings.

Although MSC Mediterranean Shipping initially requested the letter of request and proposed language for it, MSC Mediterranean Shipping has refused to follow the findings of the Swiss court and instead engaged with Switzerland's executive branch, which did not overrule the Swiss court but rather indicated that a letter of request could be refiled. This suggests that MSC Mediterranean Shipping will not follow rulings of the courts in Switzerland unless those rulings are in its favor. The refusal to abide by the decisions of the Swiss Judge and the undersigned Judge, even after multiple warnings that such refusal could result in a default decision, are therefore willful and deliberate. *See Kawasaki Kisen Kaisha*, 2014 FMC LEXIS 36, at *17.

Given that MSC Mediterranean Shipping has voluntarily chosen to conduct business in United States ports and is regulated by the Federal Maritime Commission, it must abide by Commission orders. And, where appropriate, the undersigned is willing to comply with relevant Hague Convention requirements. However, parties are expected to follow the rulings issued in response to those requests and regulated entities cannot be allowed to hide evidence overseas. MSC Mediterranean Shipping's repeated failure to comply with multiple orders issued in this proceeding, even though it had an opportunity to seek review of the orders and failed to do so, and its failure to abide by the determination of the Swiss court, even though the parties requested a ruling from that court, undermines its position that it acted in good faith. MSC Mediterranean Shipping's refusal to follow judicial orders prevented this proceeding from moving forward on the merits of the case and does not reflect a respect for the judicial process. This type of conduct cannot be permitted in Commission adjudications.

Moreover, the violations alleged in the amended complaint are of national significance, for example, that one of the largest container lines in the world "sought to take advantage of

unprecedented high pricing by forcing shippers with service contracts, like Complainant, to resort to spot market purchases" by the "practice of systematically failing to meet its quantity commitments to Complainant between certain ports." Amended Complaint at 1-2. Resolution of these allegations would provide clarity and guidance in the marketplace and benefit not just these parties, but also the shipping public.

MSC Mediterranean Shipping is a party in a number of other proceedings at the Commission and therefore resolution of this issue is necessary to deter similar conduct from MSC Mediterranean Shipping or other parties in Commission proceedings. Therefore, default is the appropriate remedy.

E. Remedy

MCS Industries seeks reparations for actual damages it incurred in the amount of $480,719 for the 2020-2021 shipping year, plus $463,936 for the first three months of the 2021-2022 shipping year. Complainant thus seeks a total of $944,655 in reparations, plus interest, pursuant to 46 U.S.C. Section 41305(a). OTSC Complainant Response at 19.

MSC Mediterranean Shipping asserts that MCS Industries must prove its damages and argues that there can be no default on the issue of damages because the discovery sought does not relate to that issue. OTSC Respondent Reply at 14-15.

The "general rule when respondents have defaulted is to base findings for complainants on the well-pleaded allegations in their complaints and to award money damages for specified liquidated amounts requiring little or no calculations." *Go/Dan Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, 1998 FMC LEXIS 5, *5-6 (ALJ Dec. 10, 1998) (Adm. final Jan. 27, 1999); *see also Shipco Transport Inc. v. Jem Logistics, Inc.*, 2013 FMC LEXIS 34, *2 (FMC Aug. 21, 2013).

The order to show cause clearly stated that the "merits of the proceeding and remedy are not at issue and should not be addressed in these filings" and indeed, without the evidence MCS Industries is entitled to, the merits cannot be reached at this stage. Order Denying Respondent's Motion for an Extension of Time and Order to Show Cause at 2. Respondent will not be allowed to pick and choose which elements of the merits of this case it wishes to litigate. Therefore, it is necessary and appropriate to utilize the well-pleaded allegations in the amended complaint to determine reparations. Moreover, the Commission's default rule specifically permits submission of additional information regarding reparations, stating: "The presiding officer may require additional information or clarification when needed to issue a decision on default, including a determination of the amount of reparations or civil penalties where applicable." 46 C.F.R. § 502.65(c).

Regarding damages, the amended complaint states:

> 119. During the term of the 2020 Service Contract, Respondent's misconduct alleged herein caused Respondent to carry only 1101 of the 1400 contracted TEUs, forcing Complainant to secure 299 TEUs on the relevant lanes via the spot market or from other carriers at significantly increased prices. In total,

> Respondent paid at least $400,000 more for carriage of those TEUs than the rates set forth in the 2020 Service Contract.
>
> 120. During the first three months of the 2021 Service Contract, prior to the filing of the Verified Complaint in this action, Respondent's misconduct caused Respondent to carry the equivalent of only 59 of the 182 contracted TEUs, forcing Complainant to secure at least 123 TEUs on the relevant lanes via the spot market or from other carriers at significantly increased prices. In total, Respondent paid at least $400,000 more for carriage of those TEUs than the rates set forth in the 2021 Service Contract.

Amended Complaint at 24.

MCS Industries asserts that it "is seeking reparations equaling amounts in excess of its service contract rates with Mediterranean that Complainant had to spend on 'spot market' purchases of ocean carriage in order to ship cargo between port pairs covered by its service contracts with Mediterranean that should have been carried by Mediterranean at service contract rates." OTSC Complainant Response at 19.

MCS Industries seeks $480,719 for the 2020-2021 shipping year plus $463,936 for the first three months of the 2021-2022 shipping year, amounting to a total of $944,655 in reparations. The amount of reparations sought by MCS Industries is consistent with the request in the amended complaint and is the type of damages appropriate for the claimed violation of the Shipping Act. Because no findings are made on the merits, a cease and desist order is not issued. Accordingly, MCS Industries is awarded a total of $944,655 in reparations. Interest shall be computed from the last day for which reparations are sought, July 31, 2021.

MCS Industries also notes that it has incurred a total of $651,304.73 in attorney fees, costs, and expenses through September 30, 2022, and that the "burden of attorney fees on Complainant has been exacerbated by Mediterranean's discovery misconduct." OTSC Complainant Response at 19. Commission Rule 254 states that "to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final." 46 C.F.R § 502.254(c). Therefore, the request for attorney's fees is premature at this point and denied.

IV. Order

Upon consideration of the parties' arguments, the record herein, and for the reasons stated above, it is hereby

ORDERED that a default decision with prejudice be entered against MSC Mediterranean Shipping because of its willful and deliberate failure to provide discovery. It is

FURTHER ORDERED that MSC Mediterranean Shipping pay a total of $944,655, plus interest from July 31, 2021, in reparations to MCS Industries.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Ocean Network Express (North America), Inc. And Ocean Network Express, PTE., Ltd. – Possible Violations of 46 U.S.C. § 41102(C)	**DOCKET NO. 21-17**

Served: January 17, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's December 13, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

B & G FUTURES INC., *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 026512NF*	**DOCKET NO. 22-25**

Served: January 19, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION REVOKING OCEAN TRANSPORTATION LICENSE[1]

I. INTRODUCTION

A. Summary and Background

In this proceeding, the Bureau of Certification and Licensing ("BCL") and the Bureau of Enforcement, Investigations, and Compliance ("BEIC") at the Federal Maritime Commission ("FMC" or "Commission") contend that Respondent B & G Futures Inc. ("B & G") should have its ocean transportation intermediary ("OTI") license revoked. B & G, representing itself, asserts that it has not violated the Commission's regulations, at most there was an honest mistake, and its license should be not be revoked.

Respondent B & G is an Ohio Corporation, licensed by the Commission as an ocean transportation intermediary on October 3, 2017. In the Form FMC-18 submitted by B & G when it applied for an OTI license ("OTI License Application"), B & G listed Robert Waalkes as its secretary and qualifying individual ("QI"), and the Commission approved Mr. Waalkes as its QI. Further, on January 2, 2020, when B & G submitted a Form FMC-18 application to renew its OTI license ("OTI License Renewal Application"), it represented in the application that Mr. Waalkes was still its secretary and QI.

As explained more fully below, BCL alleges that it contacted Mr. Waalkes in October 2021, to verify the information provided by B & G, and Mr. Waalkes stated that he had never worked for B & G and had no knowledge of the company. In addition, BCL asserts that evidence obtained while processing the Form FMC-18 application B & G submitted on November 17, 2021, to replace its QI ("QI Replacement Application"), suggested that B & G had been operating without a QI since June 2017, contrary to the Commission's regulations.

[1] This initial decision will become final within 22 days of service of this decision in the absence of exceptions filed by either party or review by the Commission. 46 C.F.R. § 502.708(c).

As a result, BCL notified B & G on August 24, 2022, that it intended to revoke B & G's OTI license because it had determined that B & G had violated 46 C.F.R. § 515.16(a)(1) of the Commission's regulations by failing to report changes in material fact to the Commission within 30 days, as required; 46 C.F.R. § 515.16(a)(2), by failing to respond to a lawful inquiry by the Commission; and 46 C.F.R. § 515.16(a)(3), by 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. In addition, BCL stated in the letter that B & G's application to replace its QI would be denied because BCL had determined that B & G's owner and president, Mr. Steven DiPietro, did not possess the necessary character to render OTI services because, according to BCL, Mr. DiPietro had made a materially false statement to BCL with regard to BCL's inquiry about Mr. Waalkes' employment status.

B & G requested a hearing in connection with the proposed revocation, and the Secretary of the Commission assigned this proceeding to the Office of Administrative Law Judges for adjudication. All required submissions have been received and the record is now ready for a decision. As discussed below in greater detail, the evidence supports a finding that B & G's OTI license should be revoked and its application for replacement QI denied.

B. Procedural History

On September 16, 2022, the Secretary issued a Notice of Hearing Request and Assignment, stating that on August 24, 2022, BCL had notified B & G by letter that the Commission intended to revoke its OTI license, and that on September 9, 2022, B & G had requested a hearing on the proposed revocation pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, at Subpart X of the Commission's Rules of Practice and Procedure. In addition, the Secretary assigned this proceeding to the Office of Administrative Law Judges for adjudication, pursuant to Rule 702(a) at Subpart X. 46 C.F.R. § 502.702(a).

On September 22, 2022, a Notice and Initial Order ("Notice") was issued pursuant to Rule 702(b), notifying BEIC of B & G's hearing request and instructing BEIC to file a copy of the notice given to B & G and BCL's materials supporting the notice, by October 24, 2022, as well as serve the same documents on B & G pursuant to 46 C.F.R. § 502.702(b). The notice also stated that "BEIC may file a brief with legal arguments, proposed findings of fact, or additional information, including requests for confidential treatment." Notice at 1.

On October 24, 2022, BEIC filed the Notice of Revocation issued to B & G by BCL, and an appendix of materials supporting the Notice ("BEIC Response"). On November 23, 2022, B & G filed a response to BEIC's submissions ("B & G Response") contesting the allegations and providing an affidavit from Mr. Waalkes. On November 28, 2022, a Notice of Right to Respond was issued, in accordance with the requirements under 46 C.F.R. § 502.703, advising BEIC of its right under 46 C.F.R. § 502.704 to file a reply to B & G's response. On December 14, 2022, BEIC submitted a reply to B & G's response ("BEIC Reply").

Pursuant to Subpart X, Rule 708, the initial decision is due within 40 days of BEIC's reply, or by January 23, 2023. 46 C.F.R. § 502.708(a). This initial decision is therefore timely.

C. Argument of the Parties

1. B & G's Arguments

B & G submitted arguments on the proposed revocation and exhibits, including an affidavit by Mr. Waalkes ("Waalkes Aff."). B & G avers that BCL's statement that it filed an application on November 17, 2021, to replace its QI from Mr. Waalkes to Mr. DiPietro is false, and that rather, its tariff publisher Distribution Publications, Inc. ("DPI"), submitted an application to BCL on November 28, 2022, to replace B & G's QI from Mr. Waalkes to Lorie Obrzut, of which BCL staff were aware. B & G Response at 1 (citing Exs. A & B).

In addition, B & G asserts:

> B & G Futures Inc. and Mr. Steven DiPietro are not in violation of 46 CFR § 515.16(a)(3), particularly regarding the employment of Robert Waalkes (Exhibit C). Mr. Waalkes was employed on a commission basis, whereby, should Mr. Waalkes bring revenue generating business opportunity, then Mr. Waalkes would be financially compensated on a deal-by-deal basis. During employment, Robert Waalkes did not generate any business and as such did not receive monetary compensation.

B & G Response at 1 (citing Ex. C).

B & G states that Mr. Waalkes sent an email to BCL staff on August 26, 2022, "confirming [employment] and knowledge of B & G Futures Inc" however, due "to computer issues a copy was not available" and thus "Mr. Waalkes has signed an affidavit . . . reconfirming employment and that due to health issues Mr. Waalkes was not of sound mind and clarity when communicating with BCL staff." B & G Response at 1 (citing Exs. D & E).

In his affidavit, Mr. Waalkes states:

1. My name is Robert Waalkes. I served as Secretary of B&G Futures, Inc. ("B&G") from December 1, 2016, October 25, 2020.

2. During a portion of that period, I was identified as the Qualifying Individual ("QI") for purposes of B&G's ocean transportation intermediary license with the Federal Maritime Commission.

3. In November of 2021, I mistakenly informed representatives of the Federal Maritime Commission that I had never heard of B&G.

4. I have a medical condition, which, when untreated (as it was in November of 2021), can impair my ability to recall past events accurately. When my condition is being properly treated (as it is at present), I have no such impairment.

B & G Response, Ex. F.

Responding to the claim that it violated 46 C.F.R. § 515.16(a)(2), B & G states that it was "under the notion, when hiring the services of DPI that 'ALL' matters related to the Federal Maritime Commission were monitored and addressed by them. As such B & G Futures did not communicate directly with BCL staff under the assumption that DPI was addressing the matters." B & G Response at 1 (citing Ex. G). B & G avers that its failure to follow up with BCL directly "was an honest and sincere mistake as the assumption was DPI would handle all matters." B & G Response at 1.

2. BEIC's Arguments

BEIC submitted proposed findings of fact, legal arguments, and an appendix of exhibits as part of its reply to B & G's response. BEIC contends that B & G and its president and part owner, Mr. DiPietro, made materially false and misleading statements to BCL; B & G failed to respond to BCL's lawful inquiries; and B & G and Mr. DiPietro failed to notify the Commission of changes in material fact, in violation of the Commission's regulations.

BEIC notes that section 515.16(a)(3) of the Commission's regulations provides that an OTI's license may be revoked for making a materially false or misleading statement to the Commission in connection with an application or amendment of a license. BEIC argues that in its application to renew its OTI license, B & G stated that Mr. Waalkes was still employed by B & G while in actuality he was not, and thus by failing to disclose the fact that Mr. Waalkes was no longer its employee, B & G made a materially false and misleading statement to BCL, in violation of section 515.63(a)(3). BEIC Reply at 8-9. BEIC contends that B &G's arguments that Waalkes was employed on a commission basis, that he did not generate any business and thus did not receive monetary compensation, does not "specifically refute" that it made a materially false or misleading statement to the Commission when it failed to disclose the fact that Waalkes was not employed by B & G at the time B & G renewed its license. BEIC Reply at 9.

BEIC argues that evidence submitted by B & G neither demonstrates that Mr. Waalkes was employed by B & G at the time it applied for an OTI license or when it renewed its license, nor provides any information regarding when Mr. Waalkes started or terminated his affiliation with B & G. BEIC contends that a commission-based payment arrangement with Mr. Waalkes does not make him a B & G employee because, according to BEIC, while a commission-based payment structure can demonstrate an independent contractor relationship, it does not demonstrate employment. BEIC Reply at 9-11(citing *Lancaster Symphony Ochestra v. NLRB*, 822 F.3d 563, 568 (D.C. Cir. 2016)). As for Mr. Waalkes' affidavit, BEIC argues that it does not comply with the Commission's requirements at 46 C.F.R. 502.6(c) for verification of documents submitted to show proof of a matter and thus should be disregarded. BOE further notes that Mr. Waalkes states in the affidavit that he was a QI for a "portion" of the period at issue, meaning that there was a time in the period when B & G did not have a QI. BOE notes, in addition, that while Mr. Waalkes states that he has a medical condition that impaired his ability to recall past events accurately, "Waalkes does not elaborate on what medical condition would cause him to confirm on two separate occasions that he had not worked for B & G before and then sign an affidavit saying that he had," and that Mr. Waalkes never explains the nature of his employment with B & G. BEIC Reply at 11-12.

Further, BEIC argues that B & G's failure to respond to BCL's inquiry regarding Mr. Waalkes' employment start and end dates is grounds to revoke B & G's OTI license under section 515.16(a)(2), which provides that a license may be revoked for failure to respond to any lawful order or inquiry by the Commission. BEIC Reply at 13. BEIC argues that B & G's explanation that it believed all matters related to the Commission were monitored and addressed by DPI is not a defense, because, according to BEIC, "B & G cannot claim ignorance when it purposefully ignored BCL's lawful inquiry regarding Waalkes' employment after having responded to BCL days prior." BEIC Reply at 13. BEIC asserts that this "illustrates B & G's inaction, not its attempts to respond to BCL's inquiry." BEIC Reply at 13-14.

In addition, BEIC argues that by failing to notify BCL of its changes in QI, a material fact, B & G violated section 515.16(a)(1), which provides that a license may be revoked for violation of any provision of any Commission order or regulation related to carrying on the business of an ocean transportation intermediary. BEIC Reply at 14-15. BEIC notes that the Commission's regulations require licensees to notify the Commission of any changes in material fact, within 30 days, and that changes in the identity or status of the designated QI require prior approval of the Commission.[2] BEIC Reply at 15. BEIC asserts that moreover, B & G's failure to inform BCL of the changes in QI is a violation of 46 C.F.R. § 515.20(a)(3), which requires that any changes in the identity or status of the designated QI be approved by the Commission prior to taking effect. BEIC Reply at 15. BEIC argues that the above reasons provide justification to revoke B & G's OTI license.

II. LEGAL AND FACTUAL FINDINGS

A. Controlling Legal Authority

An applicant seeking an OTI license must demonstrate through its qualifying individual that it has the necessary experience by showing that "its qualifying individual has a minimum of three years' experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services." 46 C.F.R. § 515.11(a)(1). If the applicant is a corporation, the qualifying individual for the applicant must be one of the applicant's active corporate officers. 46 C.F.R. § 515.11(b). Licenses must be issued for an initial period of not less than one year and not greater than four years, and thereafter renewed for sequential three-year periods upon successful completion of the renewal process specified under the Commission's rules. 46 C.F.R. § 515.14(c). "Though the [Commission's] license renewal process is not intended to result in a re-evaluation of a licensee's character, the Commission may review a licensee's character at any time, including at the time of renewal, based upon information received from the licensee or other sources." 46 C.F.R. § 515.14(d)(3). A change in the identity or status of the designated QI requires prior approval of the Commission, through a Form FMC-18. 46 C.F.R. § 515.20(a)(5). "When a partnership, LLC,

[2] BEIC also states that B & G failed to notify BCL of three legal proceedings against it, including one bankruptcy proceeding, as required under 46 C.F.R. § 515.20(e), and argues that this an additional basis to revoke B & G's OTI license. BEIC Reply at 15. Because BCL's notification to B & G regarding its intent to revoke B & G's license and the supporting materials provided to B &G did not include these allegations and thus B & G did not have an opportunity to respond to the new allegations, this argument will not be considered.

or corporation has been licensed on the basis of the qualifications of one or more of the partners, members, managers or officers thereof, and the QI no longer serves as a full-time employee with the OTI or is no longer responsible for the licensee's OTI activities, the licensee shall report such change to the Commission within thirty (30) days." 46 C.F.R. § 515.20(c). "Other changes of material fact of a licensee shall be reported within thirty (30) days of such changes, in writing by mail or email" to the Director of BCL. 46 C.F.R. § 515.20(e).

The Shipping Act grants authority to revoke an OTI's license under certain conditions:

> The Federal Maritime Commission, after notice and opportunity for a hearing, shall suspend or revoke an ocean transportation intermediary's license if the Commission finds that the ocean transportation intermediary –
>
> (1) is not qualified to provide intermediary services; or
>
> (2) willfully failed to comply with a provision of this part or with an order or regulation of the Commission.

46 U.S.C. § 40903(a).

The Commission's regulations also address when a license may be revoked or suspended, stating in pertinent part:

> A license may be revoked or suspended for any of the following reasons:
>
> (1) Violation of any provision of the 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) A Commission determination 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).

Rule 502.6's provisions regarding verification of documents state, in pertinent part:

> (b) If a party is not represented by a person admitted or qualified to practice before the Commission, each pleading, document or other paper of such party filed with the Commission shall be signed and verified under oath by the party or by a duly authorized officer or agent of the party, whose address and title shall be stated.

> (c) Wherever, under any rules of this part, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition under § 502.143 or § 502.144), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by such person, as true under penalty of perjury, in substantially the following form: . . .
>
> (2) If executed within the United States, its territories, possessions, or commonwealth: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."

46 C.F.R. § 502.6.

B. Burden of Proof

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 decision is based on the briefs, exhibits, proposed findings of fact and conclusions of law, and replies thereto, filed by the parties.

In addition, this initial decision addresses only material issues of fact and law. BEIC submitted proposed findings of fact in its reply brief. 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.

C. Findings of Fact ("FF")

1. B & G was incorporated in Ohio on May 5, 2016. BEIC Ex. 2, at BEIC8.

2. Steven P. DiPietro was listed as 50% part-owner of B & G and its president and treasurer on B & G's OTI License Application Form. BEIC Ex. 2, at BEIC14, BEIC17, and BEIC Ex. 5 at BEIC37.

3. Ami Vyas was listed as 50% part-owner and vice-president of B & G on its OTI License Application Form. BEIC Ex. 2, at BEIC14, and BEIC Ex. 5 at BEIC37.

4. B & G applied for an OTI license on July 26, 2017. BEIC Ex. 2, at BEIC17.

5. Robert Waalkes was listed as B & G's secretary and QI on B & G's OTI License Application Form. BEIC Ex. 2, at BEIC10 and BEIC14.

6. B & G's OTI License Application Form indicates that Robert Waalkes was self-employed at U.S. Pack Inc from September 2006 to July 2017. BEIC Ex. 2, at BEIC11.

7. On October 3, 2017, Mr. Waalkes was approved as the QI for B & G. BEIC Ex. 2, at BEIC14; Verified Statement of Aline Hull ("Hull V.S.") ¶ 4.

8. B & G was approved for an OTI license and has been licensed to operate as an OTI since October 2017, OTI License No. 026512NF. Hull V.S. ¶ 4; BEIC4; BEIC Ex. 5, at BEIC31.

9. On January 2, 2020, Mr. DiPietro submitted a Form FMC-18 to renew B & G's license. Hull V.S. ¶ 6.

10. B & G's OTI License Renewal Form repeated, without any changes, all information previously submitted by B & G in its application for an OTI license, including the statement that Mr. Waalkes was B & G's QI and secretary. BEIC4; Hull V.S. ¶ 6.

11. Mr. DiPietro certified that all information provided in B & G's OTI License Renewal Form was true, correct, and complete to the best of his knowledge and belief. BEIC Ex. 3, at BEIC21; Hull V.S. ¶ 5.

12. On October 4, 2021, BCL contacted B & G by email, stating that BCL had received notice that B & G's bond would be cancelled effective October 9, 2021, and advising B & G to contact its surety representative to send a rescission of the bond cancelation or a replacement bond if B & G believed the notice of cancellation was an error. BEIC Ex. 4, at BEIC28.

13. On October 4, 2021, B & G responded to BCL's email, attaching proof that its bond had not been canceled, and stating in pertinent part, "[s]hould you have any additional questions; please [feel] free to contact me." BEIC Ex. 4, at BEIC27.

14. On October 8, 2021, BCL contacted Mr. DiPietro by email, stating: "Mr. Dipietro, Please confirm that Mr. Robert Waalkes is a full-time employee and officer of B & G Futures Inc." BEIC Ex. 4, at BEIC27.

15. On October 12, 2021, Mr. DiPietro responded, stating in pertinent part: "We apologize for not answering you sooner. We were under the assumption DPI updated our QI. We will have this updated immediately." BEIC Ex. 4, at BEIC26.

16. On October 12, 2021, BCL again contacted Mr. DiPietro, stating in pertinent part: "Please advise the start and end dates of Mr. Waalkes employment with B & G Futures. In the meantime, please have DPI submit an application proposing a replacement QI as soon as possible, and in no case later than 30 days from the date of this message." BEIC Ex. 4, at BEIC26.

17. On November 15, 2021, BCL again contacted Mr. DiPietro, stating in pertinent part:

> On October 12 the Federal Maritime Commission . . . requested that you provide the start and end dates of Mr. Waalkes employment with B & G Futures. To date you have not responded. Additionally, you indicated your tariff publisher, Distribution Publications Inc. (DPI), would submit an application proposing a replacement Qualifying Individual (QI) – however this has not occurred. B & G Futures Inc. is currently out-of-compliance with Commission regulations . . . . If the application proposing the replacement QI and the dates of Mr. Waalkes employment are not received by Thursday, November 18, 2021 the Bureau of Certification and Licensing will formally notify you of our intent to revoke the license, at which time you will have the opportunity to request a hearing with the Commission or to voluntarily surrender the license.

BEIC Ex. 4, at BEIC25.

18. In addition, BCL contacted Mr. DiPietro by phone. According to the BCL staff who spoke to Mr. DiPietro, "Mr. DiPietro was insistent that DPI had been provided all the information needed to answer our questions and to complete the application. I told him we have not received that information. He was going to call DPI." BEIC Ex. 4, at BEIC24.

19. On November 16, 2021, B & G submitted an application to replace its QI from Mr. Waalkes to Lorie Obrzut. BEIC Ex. 4, at BEIC24; BEIC Ex. 5, at BEIC31, BEIC33 and BEIC48.

20. B & G indicated in its QI Replacement Application that Lorie Obrzut was its secretary and had been employed with B & G since July 2020. BEIC Ex. 5, at BEIC33.

21. B & G's QI Replacement Application was submitted by Steve DiPietro, who certified in the application "under penalties of perjury," that "I have examined this application and to the best of knowledge and belief, it is true, correct and complete." BEIC Ex. 5, at BEIC48.

22. On November 17, 2021, BCL spoke to Mr. Waalkes, who "indicated he never worked for, nor heard of, B & G Futures." BEIC Ex. 4, at BEIC24.

23. On November 17, 2021, Mr. Waalkes sent an email to BCL, stating in pertinent part: "I have not been employed by, nor am I familiar with B & G Futures." BEIC Ex. 6, at BEIC50.

24. On August 24, 2022, BCL sent a Notice of Intent to Revoke to Mr. DiPietro, advising him of BCL's intent to revoke B & G's OTI License No. 026512NF. BEIC Ex. 1 at BEIC4.

25. On August 26, 2022, Aline Hull, Director of Office of OTIs at BCL received an email from Mr. Waalkes regarding the Notice of Intent to Revoke B & G Futures' license which stated:

> I was contacted in November of 2021 and asked if I had any recollection of working with B&G Futures. At the time I stated that I did not. I sincerely apologize for the confusion, but I did indeed execute an agreement in 2017 with B&G Futures as a consultant. . . .
>
> I was introduced to B&G Futures by a close friend and business associate. . . . At that time I was CEO of US Pack, Inc [of] Leominster MA and our organization was primarily in the chemical manufacturing and export business. It was believed that my export experience would be a benefit to his new venture. However, I did not do any work with B&G after this agreement was executed and I ended up moving into another industry.

BEIC Reply Attachment 1 at BEIC67-68; Hull verified statement ("Hull V.S.") ¶¶ 1, 15, FF 25.

26. In an unsworn affidavit by Mr. Waalkes ("Waalkes Aff."), submitted into the record by B & G, Mr. Waalkes states that he served as secretary of B & G from December 1, 2016, to October 25, 2020, and was identified as QI for B & G "[d]uring a portion of that period," but that in "November of 2021, [he] mistakenly informed representatives of the Federal Maritime Commission that [he] had never heard of B&G" and that "[he has] a medical condition which, when untreated (as it was in November of 2021), can impair [his] ability to recall past events accurately. When [his] condition is being properly treated (as it is at present), [he has] no such impairment." Waalkes Aff., B & G Response Ex. F.

27. BCL concluded that after "numerous correspondence, lack of requested information from B & G Futures, and analyzed BCL records on file, evidence indicated that [B & G] had a character issue of misrepresentation." Verified Statement of Cindy Hennigan ("Hennigan V.S.") ¶ 6.

III. DISCUSSION

A. The Evidence Supports a Finding that B & G's OTI License Should be Revoked

Pursuant to section 40903(a) of the Shipping Act, an OTI's license is subject to revocation for willfully failing to comply with a provision of the Shipping Act or any other statute, a Commission order or regulation, or based on a determination by the Commission that the OTI is not qualified to provide intermediary services. 46 U.S.C § 40903(a). In addition, under section 515.16(a) of the Commission's Rules, an OTI's license is subject to revocation for, in pertinent part, a violation of any provision of the Shipping Act or any statute, a Commission order or regulation related to carrying on the business of an ocean transportation intermediary; failure to respond to any lawful order or inquiry by the Commission; making a materially false or misleading statement to the Commission in connection with an application for a license or amendment to an existing license; or, based on a Commission determination that the licensee is

not qualified to render intermediary services. 46 C.F.R § 515.16(a).

1. Robert Waalkes' Employment

The parties devoted a major part of their arguments to the testimony by affidavit of Robert Waalkes, who B & G listed as its QI and secretary in its application for a license, as well as the issue of whether the evidence demonstrates that Robert Waalkes was B & G's employee. Mr. Waalkes states in his affidavit dated November 22, 2022:

> 1. My name is Robert Waalkes. I served as Secretary of B&G Futures, Inc. ("B&G") from December 1, 2016 to October 25, 2020.
>
> 2. During a portion of that period, I was identified as the Qualifying Individual ("QI") for purposes of B&G's ocean transportation intermediary license with the Federal Maritime Commission.
>
> 3. In November of 2021, I mistakenly informed representatives of the Federal Maritime Commission that I had never heard of B&G.
>
> 4. I have a medical condition, which, when untreated (as it was in November of 2021), can impair my ability to recall past events accurately. When my condition is being properly treated (as it is at present), I have no such impairment.

B & G Response, Ex. F.

As an initial matter, Mr. Waalkes' affidavit is unsworn and fails to "declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct," as required. *See* 46 C.F.R. § 502.6 (Verification of documents). Although the statement is unsworn, it will still be admitted into evidence and considered, as Respondent is acting *pro se*.

According to BCL, when contacted on November 17, 2021, to confirm that he was B & G's QI and secretary, Mr. Waalkes stated that he had not been employed by, nor was he familiar with B & G. While Mr. Waalkes blames his failure to recall B & G on a medical condition that was untreated at that time, he does not explain why he wrote to BCL on August 26, 2022, stating in pertinent part:

> I was contacted in November of 2021 and asked if I had any recollection of working with B&G Futures. At the time I stated that I did not. I sincerely apologize for the confusion, but I did indeed execute an agreement in 2017 with B&G Futures as a consultant. . . .
>
> I was introduced to B&G Futures by a close friend and business associate. . . . At that time I was CEO of US Pack, Inc [of] Leominster MA and our organization was primarily in the chemical manufacturing and export business. It was believed that my export experience would be a benefit to his new venture. However, I did not do any work with B&G after this agreement was executed and I ended up moving into another industry.

BEIC Reply Attachment 1 at BEIC67-68; Hull V.S. ¶ 15, FF 25. The above email contradicts Mr. Waalkes' statement in his affidavit regarding serving as a secretary of B & G until 2020. The email is more detailed and more credible than the subsequent affidavit submitted as part of this proceeding. Mr. Waalkes' affidavit is unreliable and is contradicted by statements of Mr. Waalkes, himself.

The evidence submitted by B & G purporting to show that Mr. Waalkes was elected as B & G's secretary by special meeting on December 1, 2016 (B & G Response Ex. C), does not establish that Mr. Waalkes was B & G's employee on July 26, 2017, when it applied for an OTI license. B & G asserts in its response:

> Mr. Waalkes was employed on a commission basis; whereby, should Mr. Waalkes bring revenue generating business opportunity, then Mr. Waalkes would be financially compensated on a deal-by-deal basis. During that employment, Robert Waalkes did not generate any business and as such did not receive monetary compensation.

B & G Response at 1. Any claim that Mr. Waalkes was B & G's employee based on the special meeting reflected in this evidence, electing him as secretary on December 1, 2016, is contradicted by B & G's OTI License Application form, which indicates that Mr. Waalkes was self-employed at U.S. Pack Inc. from September 2006 to July 2017, as well as Mr. Waalkes' statement that he entered into a consultancy agreement with B & G in 2017 but never worked for B & G.

Additionally, the claim that Mr. Waalkes served as secretary for B & G from the period of December 1, 2016, to October 25, 2020, is contradicted by B & G's Application to Replace its QI (B & G, Ex. A; BEIC Ex. 2 at BEIC33), which indicates that B & G's proposed QI, Lorie Obrzut, was its secretary from July 2020 to the present. If B & G's evidence is believed, both Lorie Obrzut and Mr. Waalkes served as B & G's secretary for the period of July 2020 to October 25, 2020. Accordingly, evidence submitted by B & G to demonstrate that Robert Waalkes was B & G's employee is found to be unreliable, self-contradictory, and contradicted by the record.

2. B & G Willfully Failed to Comply with Commission Regulations and Inquiries from BCL

Section 515.11(b) of the Commission's regulations requires the qualifying individual for a corporation applying for an OTI license to be "at least one of the *active* corporate officers" of the corporation. 46 C.F.R. § 515.11(b)(3) (emphasis added). B & G's statement that Robert Waalkes did not receive financial compensation at any time from it (B & G Response at 1), and Mr. Waalkes' statement that he did not do any work for B & G after entering into a consultancy agreement with them (FF 25), demonstrate that Mr. Waalkes was not an active B & G corporate officer. By listing Mr. Waalkes, who was not an active officer as its QI, B & G failed to comply with the requirements of section 515.11(b)(3).

Further, in Mr. Waalkes' affidavit, he states that he was the QI for B & G only "during a portion of that period," that he claims to have served as B & G's secretary. Waalkes Aff. ¶¶ 1-2. A change in the identity or status of the designated QI requires prior approval of the Commission, through a Form FMC-18, *see* 46 C.F.R. § 515.20(a)(5), and, "[w]hen a partnership, LLC, or corporation has been licensed on the basis of the qualifications of one or more of the partners, members, managers or officers thereof, and the QI no longer serves as a full-time employee with the OTI or is no longer responsible for the licensee's OTI activities, the licensee shall report such change to the Commission within thirty (30) days." 46 C.F.R. § 515.20(c). "Other changes of material fact of a licensee shall be reported within thirty (30) days of such changes, in writing by mail or email" to the Director of BCL. 46 C.F.R. § 515.20(e). On January 2, 2020, Mr. DiPietro submitted a Form FMC-18 to renew B & G's license. FF 9; Hull V.S. ¶ 6. B & G's OTI License Renewal Form repeated, without any changes, all information previously submitted by B & G in its application for an OTI license, including the statement that Mr. Waalkes was B & G's QI and secretary. BEIC4; Hull V.S. ¶ 6. FF 10. Accepting for the purpose of this discussion Mr. Waalkes' unreliable affidavit, at the very least, Mr. Waalkes was not B & G's QI for the entire period B & G represented in its license application that he was. By failing to notify the Commission of the change in status of Mr. Waalkes, its QI, B & G failed to comply with the requirements of the above regulations.

Additionally, the evidence demonstrates that B & G failed to comply with inquiries and instructions from the Commission. On October 8, 2021, BCL instructed B & G to confirm that Mr. Waalkes was a full-time employee and officer of B & G. FF 14. When B & G failed to respond, BCL again contacted B & G on October 12, 2021, asking it to provide "the start and end dates of Mr. Waalkes' employment with B & G Futures." FF 16. When B & G again failed to comply, BCL followed up with B & G staff on November 15, 2021, asking them to provide the requested information. FF 17-18. BEIC Ex. 4, at BEIC25-27. To date, B & G has never provided the requested information to BCL.

B & G's assertion that its failure to follow up with BCL directly "was an honest and sincere mistake as the assumption was DPI would handle all matters," BEIC Response at 1, is unpersuasive, given that the evidence shows that B & G had personally responded to inquiries from BCL on previous occasions. As an example, B & G personally responded to an inquiry from BCL on October 4, 2021, informing B & G that its bond issuer had notified BCL that the bond would be canceled, and inquiring whether B & G intended to cancel its bond. B & G provided proof on the same day to BCL, without relying on DPI to respond, that its bond was still effective. Indeed, Mr. DiPietro stated in his response to BCL: "[s]hould you have any additional questions; please [feel] free to contact me." BEIC Ex. 4, at BEIC27. Yet, when contacted on the issue of Mr. Waalkes' employment dates, B & G repeatedly ignored BCL's inquiries, suggesting that it did not provide the requested information because it did not have the information, not because it was relying on DPI to do so. Accordingly, the evidence shows that B & G willfully failed to comply with inquiries from the Commission.

3. B & G and its President, Mr. Steve DiPietro, Made Materially False or Misleading Statements to the Commission in Connection with its Application for an OTI License and Application to Renew its License

According to Mr. Waalkes, he "did not do any work with B&G after his agreement [in 2017 with B & G as a consultant] was executed and [he] ended up moving into another industry." BEIC Reply Attachment 1 at BEIC67-68; Hull V.S. ¶ 15, FF 25. In addition, based on B & G's own evidence, Mr. Waalkes was not an active officer receiving monetary compensation, because Mr. Waalkes never "generate[d] any business and as such did not receive monetary compensation." B & G Response at 1. Also, the record does not show that Mr. Waalkes received any other form of compensation from B & G that would suggest that he was doing any work for B & G.

B & G submitted a document titled "Waiver of Notice of Special Meeting of the Board of Directors of B & G Futures, Inc.," dated December 1, 2016, and another document titled "Action by Written Consent of Special Meeting of the Board of Directors of B & G Futures Inc.," dated December 1, 2016, purporting to show that by special meeting on December 1, 2016, B & G's board of directors elected Mr. Waalkes as B & G's secretary. While these documents may show that Mr. Waalkes was elected to and accepted the position of secretary for B & G on December 1, 2016, they are not evidence that Mr. Waalkes was secretary for B & G, or employed by B & G, at the time it applied for an OTI license on July 26, 2017, or when it applied to renew its license on January 2, 2020. Additionally, the documents do not establish that Mr. Waalkes did not subsequently fall into an inactive status, of which B & G was required to notify the Commission. In Mr. Waalkes' affidavit, he states that he was QI for B & G only "during a portion of that period," he claims to have served as B & G's secretary. Waalkes Aff. ¶¶ 1-2. Even accepting Mr. Waalkes' unreliable affidavit as true, the most that could be said is that the evidence demonstrates that Mr. Waalkes was not B & G's QI for the entire period B & G represented that he was. Mr. DiPietro submitted all of B & G's license applications, and certified that all information provided in B & G's applications was true, correct, and complete to the best of his knowledge and belief. Accordingly, the evidence demonstrates that B & G and Mr. DiPietro made materially false or misleading statements to the Commission in connection with an application for a license and amendment of an existing one.

4. B & G is not Qualified to Render Intermediary Services

A license may be revoked based on a determination by the Commission that the OTI is not qualified to provide intermediary services. 46 U.S.C § 40903(a). *See also* 46 C.F.R § 515.16(a). The Commission issues a license "if it determines as a result of its investigation, that the applicant possesses the necessary experience and *character* to render ocean transportation intermediary services." 46 C.F.R. § 515.14(a)(1) (emphasis added). It stands to reason, therefore, that a determination that an OTI lacks character would render the OTI unqualified to render OTI services. Here, BCL concluded that "[a]fter numerous correspondence, lack of requested information from B & G Futures, and analyzed BCL records on file, evidence indicated that [B & G] had a character issue of misrepresentation." Hennigan V.S. ¶ 6. The evidence demonstrates that B & G provided false information to the Commission in its OTI license applications, supporting BCL's conclusion that B & G "had a character issue of

misrepresentation." Because the evidence shows a lack of character by B & G, it further corroborates BCL's determination that B & G is not qualified to render intermediary services.

B. Conclusion

Based on the foregoing, the evidence supports a finding that B & G failed to comply with the Commission's regulations and BCL's inquiries; that B & G and its president, Mr. DiPietro, made materially false or misleading statements to the Commission in connection with its application for an OTI license and application to renew B & G's license; and that B & G lacks the necessary character to render intermediary services. Accordingly, B & G's OTI license is revoked pursuant to 46 U.S.C § 40903(a) of the Shipping Act and 46 C.F.R § 515.16(a) of the Commission's regulations. Because B & G's OTI license is revoked, B & G's application to replace its QI is denied.

IV. ORDER

Upon consideration of the evidence and arguments in the evidence of record, and for the reasons stated above, it is hereby

ORDERED that B & G's ocean transportation license be **REVOKED**. It is

FURTHER ORDERED that B & G's application to replace its qualifying individual be **DENIED**. It is

FURTHER ORDERED that B & G cease and desist any and all ocean transportation intermediary activities.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

COLOR BRANDS, LLC, *Complainant*

v.

AAF LOGISTICS, INC., *Respondent*.

DOCKET NO. 22-18

Served: January 27, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON DEFAULT[1]

I. INTRODUCTION AND PROCEDURAL HISTORY

In the complaint, Color Brands, LLC ("Color Brands") alleges that Respondent AAF Logistics, Inc. ("AAF") violated the Shipping Act of 1984 ("Shipping Act") by charging for insurance that it did not obtain for maritime shipments. AAF has not responded to the complaint or otherwise participated in this proceeding. Therefore, a default decision is issued against it.

On August 30, 2022, the notice of filing of complaint and assignment for this proceeding and a copy of the complaint were served on Respondent AAF. UPS provided a slightly different, corrected address for AAF from the one listed in the complaint. A UPS delivery notification states that the documents were delivered on August 31, 2022, to AAF Logistics, Inc., 17700 Castleton St., No. 363, City of Industry, CA 91748-1700. Ex. 1; *see also* Order to Respond to Motion for Default (Dec. 6, 2022), attachment 1.

On September 26, 2022, a notice of appearance on behalf of Respondent AAF was received from Attorney Henry Gonzalez and Attorney Peter Herrick. Also on September 26, 2022, Respondent's counsel filed a motion for extension of time to file an answer. On September 27, 2022, the requested extension to October 17, 2022, to respond to the complaint was granted.

On October 17, 2022, Attorneys Gonzalez and Herrick filed a motion to withdraw as counsel for Respondent. The motion stated, in part:

[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.

> On October 17, 2022, Respondent notified undersigned that its services were being terminated and discharged effective immediately. Respondent confirmed it was made aware of the consequences and impact of undersigned counsels' termination and discharge, and which decision could result in a default judgment. Notwithstanding, Respondent acknowledged the consequences as explained, and still desired to terminate and discharge undersigned counsels' representation.

Motion to Withdraw at 1.

On October 18, 2022, an order was issued granting Respondent's counsels' motion to withdraw, ordering AAF to respond to the complaint, and stating that if "Respondent fails to respond to this order by November 18, 2022, a default decision may be entered against it, including awarding reparations to Complainant up to $ 322,624.17, plus attorney's fees if sought, and any other appropriate penalty." Order Granting Motion to Withdraw as Counsel and Order to Show Cause at 2.

On November 28, 2022, Complainant filed a motion seeking default and entry of a default judgment ("Default Motion"). This Default Motion did not include a notice that it was served on Respondent. The Office of Administrative Law Judges ("OALJ") emailed a copy of the Default Motion to Complainant and attorney Charles Pok, who had been identified in the complaint as representing Respondent. Mr. Pok responded that he was "not the attorney of record in this case" and "cannot receive any document on behalf of AAR Logistics," presumably referring to "AAF" Logistics. Ex. 2, *see also* Order to Respond to Motion for Default, attachment 2.

On December 6, 2022, an order to respond to motion for default was issued, serving a copy of Complainant's motion for default, ordering AAF to respond to the complaint by January 5, 2023, and warning that a default decision may be entered against it, including awarding reparations to Complainant up to $ 322,624.17, plus attorney's fees if sought, and any other appropriate penalty. On December 7, 2022, Respondent AAF was served at its UPS updated address of 17800 Castleton St., No. 363, City of Industry, CA 91748-1700. Ex. 3.

II. DISCUSSION

A. AAF is in Default

The Commission's rules require that AAF file its answer or otherwise respond to the complaint within twenty-five days after the date of service of the complaint. 46 C.F.R. § 502.62(b)(1). To date, AAF has failed to respond to the complaint, the initial order, the order to show cause, the motion for default, or the order to respond to the motion for default. AAF has been advised that a default may be entered against it in numerous orders as well as by the attorneys it hired to represent it. The case has been pending for over four months.

Pursuant to Commission Rule 62:

> Failure of a party to file an answer to a complaint, counterclaim, crossclaim, or third-party complaint within the time provided will be deemed to constitute a waiver of that party's right to appear and contest the allegations of the complaint,

> counterclaim, crossclaim, or third-party complaint to which it has not filed an answer and to authorize the presiding officer to enter an initial decision on default as provided for in 46 CFR 502.65. Well pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted.

46 C.F.R. § 502.62(b)(6)(i). Moreover, when "a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, including the complaint." 46 C.F.R. § 502.65(b).

Respondent was served and had notice of this proceeding. Despite multiple warnings that failure to respond would result in a default decision, AAF has failed to respond or participate in this proceeding. In addition, Respondent hired attorneys to represent it but decided to terminate their service. Therefore, a default decision against Respondent is appropriate.

B. Violation of the Shipping Act

The Commission's regulations provide that well-pleaded factual allegations in a complaint will be deemed to be admitted when a respondent fails to answer a complaint within the time provided. *United Logistics (LAX) Inc. – Possible Violations of Sections 10(A)(1) and 10(B)(2)(A) of the Shipping Act of 1984*, Docket No. 13-01, 33 S.R.R. 196, 198 (FMC Feb. 6, 2014); *Century Metal Recycling Pvt. Ltd. v. Dacon Logistics, LLC*, Docket 12-09, 33 S.R.R. 17, 19 (FMC Nov. 12, 2013). When a respondent defaults, the finder of fact accepts as true all well-pleaded facts in the order. 10A Wright & Miller § 2688, pp. 58-61; *Hugh Symington v. Euro Car Transport, Inc.*, Docket No. 92-47, 26 S.R.R. 871, 872 (ALJ Mar. 18, 1993) (adm. final).

In the complaint, Color Brands alleges that AAF is a maritime common carrier subject to regulation by the Commission; that the Commission has jurisdiction over the claim; and that reparations are sought for violations of the Shipping Act, sections 41102 and 41104. Complaint at ¶¶ 2-6, 21. Color Brands alleges that as a result of AAF's violations of the Shipping Act, it has sustained injuries and damages in the amount of $322,624.17. Complaint at ¶ 22; Default Motion at 2.

Specifically, the complaint contends that over the past three years, Color Brands has shipped freight with AAF with a stated value of $37,057,209.14; AAF charged an average rate of .32% of value for the requested insurance coverage; and Color Brands paid AAF $118,583.07 for such coverage. Complaint at ¶ 14. Color Brands states that AAF issued bills of lading for several of its shipments which were received in good order and delivered with physical damage and delay. Complaint at ¶ 15. Color Brands alleges that AAF has engaged in a pattern of improper practices, including failing to provide survey reports of damages, repeatedly demanding claim documentation that has already been provided, and denying claims improperly. Complaint at ¶¶ 16-19.

As a specific example, Color Brands asserts that order 5434 was an export shipment with container DFSU7281114 moving under AAF bill of lading COSU6301553970, dated June 1, 2021, scheduled to move from Long Beach, California, to Karachi, Pakistan. Complaint at ¶ 7. Color Brands changed the consignee and paid AAF for the associated costs to change the final destination from Karachi to Rotterdam, where the container arrived with substantial cargo

damage. Complaint at ¶ 8. On December 17, 2021, Color Brands requested evidence of insurance on orders that were damaged in transit, but AAF provided no documentation and gave no indication that there was an insurance plan in place. Complaint at ¶ 9. On January 13, 2022, Color Brands advised AAF of an insurance claim but AAF "advised that insurance coverage was not available for the leg between Jebel Ali to Rotterdam." Complaint at ¶ 10. AAF did not advise Color Brands, when AAF charged Color Brands an additional $10,087, that cargo insurance coverage was limited or not available. Complaint at ¶ 11. On February 8, 2022, AAF offered a partial settlement after the goods were destroyed and AAF said insurance coverage was not obtained for Color Brands' shipments. Complaint at ¶ 12. Thus, Color Brands concluded that AAF has been charging and been paid for cargo insurance coverage but not, in fact, obtaining such coverage. Complaint at ¶ 12. Attempts to obtain proof of insurance coverage and to resolve this claim have been unsuccessful. Complaint at ¶ 13.

Accepting the factual allegations of the complaint as true, Respondent operated as an ocean transportation intermediary ("OTI"), agreed to transport numerous shipments, billed and received payment for insurance on those shipments, and failed to obtain the appropriate insurance. It is not clear whether AAF is a licensed OTI or whether it is operating as an unlicensed OTI. However, from the factual allegations it appears that AAF holds out that it transports cargo by water between the United States and foreign countries for compensation, assumes responsibility for the transportation from the point of receipt to the point of destination, and uses, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. While it would be helpful to have additional information about the parties and the shipments involved, AAF's failure to participate in the proceeding meant that Complainant was unable to conduct discovery and to identify additional evidence relevant to the allegations.

Complainant alleges violations of the Shipping Act and a pattern of conduct sufficient to demonstrate a violation of the Shipping Act. AAF has not denied the allegations. Respondent chose not to participate in this proceeding, and its failure to participate has deprived Claimant of the opportunity to obtain additional evidence to support its allegations, as Respondent would be most likely to have information pertinent to the allegations against it. Such failure to respond has been found by the Commission to support a default decision. *See, e.g.*, *Century Metal Recycling*, 33 S.R.R. at 19; *Shipco Transport Inc. v. Jem Logistics, Inc., and Andi Georgescu*, Docket No. 12-06, 32 S.R.R. 1855, 1857 (FMC Aug. 21, 2013); *Oceanic Bridge International, Inc. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, Docket No. 14-02, 2014 FMC LEXIS 24, *1 (ALJ Oct. 21, 2014) (adm. final). The conduct alleged in the complaint states a claim for violation of the Shipping Act and AAF has defaulted. Accordingly, Complainant has established that AAF violated the Shipping Act.

C. Reparations

The Complainant seeks $322,624.17 in damages. Complaint at ¶ 22; Default Motion at 2. Pursuant to section 11(g) of the Shipping Act "the Federal Maritime 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). Commission case law states that: "(a) damages 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." *Waterman v. Stockholms Rederiaktiebolag Svea*, Docket No. 638, 3 F.M.B. 248, 249 (FMB Dec. 8, 1950); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, Docket No. 94-32, 30 S.R.R. 8, 13 (FMC Aug. 26, 2003).

The evidence demonstrates that as a consequence of the violations by AAF, Color Brands sustained damages of $322,624.17. Color Brands is also entitled to interest running from December 17, 2021, when it requested evidence of insurance, to be calculated by the Commission when this judgement and decision become administratively final. *See* 46 C.F.R. § 502.253. In addition, Complainant may be eligible for attorney fees, upon petition, pursuant to Commission Rule 254. 46 C.F.R. § 502.254.

III. ORDER

For the reasons stated above, it is hereby

ORDERED that Color Brand's motion for default be **GRANTED** and default be entered against Respondent AAF Logistics. It is

FURTHER ORDERED that Color Brands be awarded $322,624.17, plus interest from December 17, 2021, as reparations for violating the Shipping Act.

Erin M. Wrth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

INTERMODAL MOTOR CARRIERS CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS, INC., *Complainant* v. OCEAN CARRIER EQUIPMENT MANAGEMENT ASSOCIATION INC.; CONSOLIDATED CHASSIS MANAGEMENT, LLC; CMA CGM S.A.; COSCO SHIPPING LINES CO. LTD.; EVERGREEN LINE JOINT SERVICE AGREEMENT, FMC NO. 011982; HAPAG-LLOYD AG; HMM CO. LTD.; MAERSK A/S; MSC MEDITERRANEAN SHIPPING COMPANY S.A.; OCEAN NETWORK EXPRESS PTE. LTD.; WAN HAI LINES LTD.; YANG MING MARINE TRANSPORT CORP.; AND ZIM INTEGRATED SHIPPING SERVICES, *Respondents*.	**DOCKET NO. 20-14**

Served: February 6, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION PARTIALLY GRANTING SUMMARY DECISION[1]

[Exceptions filed by Respondents, 3/7/23, Commission final decision pending.]

I. INTRODUCTION

A. Overview

Complainant Intermodal Motor Carriers Conference, American Trucking Associations, Inc. ("IMCC") filed a complaint alleging violations of the Shipping Act of 1984, as amended ("Shipping Act") by Respondents Ocean Carrier Equipment Management Association Inc. ("OCEMA"), Consolidated Chassis Management, LLC ("CCM"), and eleven different ocean common carriers ("ocean carriers" or "OCCs"). IMCC alleges that Respondents have "adopted and imposed unjust and unreasonable regulations and engaged in unjust and unreasonable practices by requiring the use of OCEMA member default chassis providers, and denying motor carriers their right to select the chassis provider for merchant haulage movements, all in violation of 46 U.S.C. § 41102(c)." Complaint at 2. Each of the thirteen Respondents filed an answer denying the allegations and raising affirmative defenses, including lack of jurisdiction, failure to join indispensable parties, and failure to demonstrate actual injury or causation. This initial decision adjudicates three motions for summary decision filed by the parties.

[1] This initial decision partially granting summary decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

Chassis are the metal frame and wheels upon which intermodal shipping containers are mounted for movement over the road. Chassis are critical to moving intermodal shipping containers throughout the country, as explained by a recent Federal Maritime Commission ("FMC" or "Commission") report.

> Chassis are the wheels of the supply chain. Prior to 2005, intermodal chassis were typically owned and operated by the ocean carriers, which allowed carriers to more accurately deploy sufficient chassis resources to cover intermodal shipping needs. When the carriers made the decision to disinvest in chassis, because of increasing concerns about safety and the imposition of regulatory requirements for safe management of chassis, it created another coordinating point in the supply chain, the intermodal equipment provider.
>
> While the approach has worked and injected higher levels of safety and maintenance in chassis operations there have been other challenges as well. If chassis are not available, then containers do not move. By removing or delaying the use of one component of operational equipment, the entire supply chain will slow down. Movements from marine terminals to inland and destination points in the interior are heavily reliant on chassis for intermodal trucking services.

Final Report, Commissioner Carl W. Bentzel, *Assessment of P.R.C. Control of Container and Intermodal Chassis Manufacturing*, at 5 (released Mar. 30, 2022), available at: www.fmc.gov/wp-content/uploads/2022/03/ContainerandChassisManufacturingFinalReport.pdf.

Chassis are provided for lease by non-party intermodal equipment providers ("IEPs"), also referred to as chassis providers. Chassis may be provided by individual IEPs or competing IEPs may combine their chassis into interoperable pools with various methods for allocating chassis charges. Motor carriers, also referred to as truckers, arriving at a port or intermodal terminal generally pick up a chassis that is already loaded with a container in wheeled operations or pick up a chassis and have a container loaded onto it in grounded operations.

As part of door-to-door service, the ocean carrier is responsible for arranging and obtaining transportation between the port and a customer's location, including payment to a chassis provider for the chassis used during transport. Such container movements are referred to as "carrier haulage" or "CH." For port-to-port service, the ocean carrier's responsibility ends at the port and the customer (such as a beneficial cargo owner ("BCO"), non-vessel-operating common carrier ("NVOCC"), or motor carrier hired by the customer[2]) is responsible for arranging and obtaining transportation between the port and the customer's location, including paying for chassis. Such container movements are classified as "merchant haulage" or "MH." Generally, the ocean carrier is responsible for chassis used in CH, while the motor carrier is responsible for chassis used in MH. MH tends to be a greater percentage of total movements as compared to CH.

[2] The focus of this case is motor carriers, so that term will be used to also include the customer who hired the motor carrier, such as the BCO or NVOCC.

Respondent OCEMA is a non-profit corporation established pursuant to an FMC-filed agreement which has been amended a number of times, including to establish and oversee the operation of chassis pools managed by CCM. Respondent CCM, its affiliates, and its affiliated pools are created by and operate pursuant to an FMC-filed agreement. OCEMA and CCM have rules that impact how individual ocean carriers contract for and utilize chassis. Ocean carriers typically contract with IEPs to provide chassis in both CH and MH moves on an exclusive or preferred/default basis. The motor carriers are not parties to these contracts between the ocean carrier and IEP. This proceeding focuses on MH, in which the motor carriers pay for the chassis but may not freely select the chassis provider of their choice, due to the ocean carriers' designation of exclusive or default chassis providers.

Best practices for chassis pools were addressed in the Ocean Shipping Reform Act of 2022, passed on June 16, 2022, after the motions for summary decision *sub judice* were filed. The new law requires the Commission to enter into an agreement to "carry out a study and develop best practices for on-terminal or near-terminal chassis pools that provide service to marine terminal operators, motor carriers, railroads, and other stakeholders that use the chassis pools, with the goal of optimizing supply chain efficiency and effectiveness." Pub. L. No. 117-146, §19, 136 Stat. 1272, 1283 (2022). In developing best practices, the Transportation Research Board shall: "(1) take into consideration – (A) practical obstacles to the implementation of chassis pools; and (B) potential solutions to those obstacles; and (2) address relevant communication practices, information sharing, and knowledge management." *Id.* On October 3, 2022, the Commission announced that it had awarded a contract to the National Academies of Science Transportation Research Board to conduct a study examining intermodal chassis pools and to provide recommendations on best practices for their management. "Commission Contracts with National Academies for OSRA Mandated Chassis Study," FMC News Release, Oct. 3, 2022, available at: www.fmc.gov/commission-contracts-with-national-academies-for-osra-mandated-chassis-study.

This proceeding raises the issue of whether current chassis practices by Respondents violate the Shipping Act. This decision does not address the broader questions involved in determining best practices for chassis pools. Indeed, as early as January 29, 2021, IMCC was cautioned that while "the Commission may have an interest in efficiency, it will be Complainant's obligation to establish that the regulations and practices are unreasonable, not Respondents' obligation to establish that the practices are the most efficient." Order Denying Respondents' Motion for Leave to File Interlocutory Appeal at 6.

This is a large and complex proceeding with thirteen respondents, discovery from multiple non-parties, and well over a million pages of documents produced in discovery. Given the size of the proceeding, the parties limited the time frame and geographic scope to initially focus their efforts on four geographic regions. Because each geographic area has unique characteristics and the eleven ocean carriers have different regulations and practices in different areas, this decision only addresses the four geographic areas selected and briefed by the parties at this stage.

The parties filed three separate motions for summary decision making novel legal arguments based on complex economic theories and extensive expert economist testimony. The parties also filed corresponding oppositions, replies, and two motions to strike. The parties agreed to 319 jointly stipulated findings of fact; presented 1,048 proposed and disputed facts; and filed

over 9,000 pages of documents. Because there are multiple motions for summary decision,[3] many of the filings have similar names. A chart at Appendix A lists the relevant filings, dates filed, and shorthand references used in this decision. The filings are listed in chronological order and the shorthand references are constructed so that oppositions and replies are associated with the motion to which they refer. Public versions of documents with confidential material were also filed.

Summary decision is appropriate when there is no genuine dispute of material facts and the party is entitled to judgement as a matter of law. Complainant IMCC seeks a summary decision, alleging that the Commission has jurisdiction over the complaint and that a number of specific practices by Respondents are unreasonable and violate the Shipping Act. Respondents seek a summary decision, alleging that the Commission does not have jurisdiction to adjudicate the complaint, the non-party IEPs are necessary and indispensable parties, and the practices at issue are reasonable. Evergreen Line Joint Services Agreement ("Evergreen") joins in Respondents' motion for summary decision but also files a supplementary motion for summary decision, arguing that Evergreen should be dismissed because it has a different chassis provision model.

As discussed more fully below, IMCC's motion for summary decision is granted in part and denied in part. Respondents' motion for summary decision and Evergreen's supplemental motion for summary decision are denied. Understanding the legal requirements of the Shipping Act will assist regulated entities in ensuring that their practices conform to the requirements of the Shipping Act and help focus further proceedings.

To summarize the findings, IMCC establishes that the Commission has jurisdiction over this proceeding. IMCC has also established as a matter of law based on the undisputed material facts that the *exclusive* chassis agreements at issue violate the Shipping Act when the motor carrier is not able to utilize the chassis provider of its choice for MH transportation. As explained in more detail below, the sometimes overlapping unreasonable practices include: CCMP Operating Rules which limit motor carrier choice of chassis providers for MH; the contractual linkage of CH price with MH volume; the designation of IEPs by Respondent ocean carriers for MH when motor carriers cannot unilaterally select a chassis provider of their choice; and ocean carrier designation of an IEP in the "Pool-of-Pools" ("POP") at the ports of Los Angeles and Long Beach, while such designation cannot be altered by motor carriers for MH.

However, IMCC has not established as a matter of law based on the undisputed material facts at this stage that a *default* chassis agreement violates the Shipping Act or that having a default chassis provider is necessarily unreasonable, when the default arrangement does not prevent motor carriers from unilaterally using the chassis provider of their choice. As Respondents assert, chassis must be available and utilized to move containers off the port. The assignment of a default provider where a motor carrier does not have another preference may serve the interests of the shipping public by ensuring that a system is in place to efficiently assign chassis to containers and incentivizing the efficient flow of cargo.

[3] The term "summary decision" may be used in administrative proceedings where initial decisions are issued, while the term "summary judgment" is used in courts where judgements are issued. Both terms are used interchangeably in this decision.

As an overview, relying primarily on Commission case law regarding exclusive agreements, this decision finds that preferred agreements, where a default chassis provider is selected but not required, are not necessarily unreasonable but that exclusive agreements, which prevent motor carriers from using the chassis provider of their choice for MH, are unreasonable and violate the Shipping Act. In addition, the Commission has the authority to prevent regulated entities from withdrawing from interoperable pools, where multiple IEPs contribute chassis, although additional proceedings will be needed to determine any markets where this is appropriate. The parties are given an opportunity to appeal this decision as a whole prior to determining next steps, including final briefing on the remaining issues in these four regions and discovery regarding other geographic regions.

Next, this section summarizes the procedural history, arguments asserted in each motion, and preliminary evidentiary issues. Section two summarizes the legal and factual background. Section three discusses IMCC and Respondents' motions. Section four discusses Evergreen's supplemental motion. Section five provides the order.

B. Procedural History

On August 24, 2020, this proceeding commenced when a notice of filing of complaint and assignment was issued. On November 18, 2020, an order denied Respondents' motion to dismiss on the basis of a lack of subject matter jurisdiction, failure to state a claim for which relief may be granted, failure to state a claim for which relief may be granted as to Respondents OCEMA and CCM, and failure to join necessary parties. On December 3, 2020, Respondents filed a motion seeking leave to file an interlocutory appeal of the denial of the motion to dismiss. On January 29, 2021, an order denying Respondents' motion for leave to file an interlocutory appeal was issued.

On February 18, 2021, Respondents filed answers to the complaint and the case proceeded, with a March 4, 2021, order on confidentiality and a June 9, 2021, amended order of confidentiality. The parties conducted discovery, including from a number of expert witnesses, with orders issued on various motions to compel on June 1, 2021, August 31, 2021, and September 27, 2021. On February 23, 2022, the parties filed a joint stipulation of facts ("JSF"). A number of scheduling orders were issued, concluding with the fourth amended scheduling order which set the final deadline to complete discovery as April 15, 2022.

On April 29, 2022, three motions for summary decision and related documents were filed: (1) Complainant's motion for summary decision ("CMSD"), Complainant's statement of undisputed material facts ("CSUMF"), appendix, and Complainant's motion for confidential treatment, (2) Respondents' motion for summary decision, Respondents' statement of material facts ("RSUMF"), Respondents' memorandum of law in support of motion for summary decision ("RMSD"), and appendix, and (3) Evergreen's supplemental motion for summary decision and memorandum of law in support thereof ("EMSD"), Evergreen's statement of undisputed material facts ("ESUMF"), and Evergreen's appendix.

On May 4, 2022, Complainant filed a supplemental motion for confidential treatment and Respondents also filed a motion for confidential treatment of certain materials.

On May 27, 2022, two oppositions to the three motions for summary decision and related documents were filed: (1) Respondents' memorandum of law in opposition to CMSD ("CMSD/ROpp"), Respondents' supplemental appendix, and Respondents' response to Complainant's SUMF ("CSUMF/RResp"); and (2) Complainant's response to RMSD and EMSD ("RMSD/COpp"), Complainant's response to RSUMF and ESUMF ("RSUMF/CResp") with Complainant's supplemental statement of undisputed material facts beginning on page 69 of RSUMF/CResp ("CSUMF2"), Complainant's supplemental appendix, and Complainant's motion for confidential treatment.

On June 2, 2022, Complainant filed a supplemental motion for confidential treatment and Respondents also filed a motion for confidential treatment.

On June 13, 2022, Respondents filed their reply memorandum of law in support of RMSD ("RMSD/RReply"), Respondents' response to Complainant's supplemental statement of undisputed material facts ("CSUMF2/RResp"), and Respondents' second supplemental appendix, with Respondents' motion for confidential treatment following on June 16, 2022. Also on June 13, 2022, Complainant filed its reply memorandum in support of CMSD ("CMSD/CReply") and reply appendix, Complainant's reply in support of its SUMF ("CSUMF/CReply"), and Complainant's motion for confidential treatment, with Complainant's supplemental motion for confidential treatment following on June 16, 2022.

In addition, on June 13, 2022, Complainant filed a motion to strike untimely expert declarations from Respondents and for sanctions ("CStrike"). On June 21, 2022, Respondents filed an opposition to CStrike ("CStrike/Opp") followed by a motion for confidential treatment on June 24, 2022.

On June 30, 2022, Respondents filed a motion to strike Complainant's reply to Respondents' response to Complainant's statement of undisputed material facts ("RStrike"). On July 1, 2022, Complainant filed its response to RStrike ("RStrike/Opp").

On December 14, 2022, due to over-redacted public filings, IMCC was ordered to file a corrected public version of Complainant's opposition to respondents' motions for summary decision and Respondents were ordered to file a corrected public version of Respondents' response to IMCC's statement of material facts. IMCC submitted its revised public version of RMSD/COpp on December 19, 2022. Respondents submitted their revised public version of CSUMF/RResp on December 21, 2022.

C. Arguments Asserted in Each Motion for Summary Decision

IMCC asserts that the Commission has jurisdiction over all parties and claims; a number of Respondents' practices are unjust and unreasonable; Respondents' practices proximately caused harm to motor carriers and consumers; the remaining section 41102(c) requirements are met; and IMCC is entitled to cease-and-desist relief. CMSD at 17-30. Respondents oppose these arguments. CMSD/ROpp at 3-29.

Respondents argue that the Commission does not have subject matter jurisdiction over intermodal chassis; IMCC failed to establish that the conduct at issue violates section 41102(c); IMCC failed to demonstrate that motor carriers have been harmed; and the complaint must be

dismissed for failure to join necessary and indispensable parties. RMSD at 5-29. IMCC opposes these arguments. RMSD/COpp at 5-24.

Respondent Evergreen filed a separate supplemental motion for summary decision, contending that it is uniquely situated with respect to the provision of chassis and that the undisputed facts do not support IMCC's allegations against Evergreen. EMSD at 4-9. IMCC opposes these arguments in combination with its opposition to Respondents' motion. RMSD/COpp at 21-22.

Because the arguments in IMCC's motion and Respondents' motion overlap, they will be addressed together, followed by a discussion of Evergreen's supplemental motion. Before addressing the legal and factual background and the motions, rulings are made on preliminary evidentiary issues.

D. Preliminary Evidentiary Issues

1. Stipulations of Fact

Because this proceeding is at the motion for summary decision stage, findings will not be made on genuinely disputed facts. The parties submitted a document labeled as joint stipulations of fact ("JSF"), signed by both parties. No objections were raised regarding the facts in the stipulation and the stipulated facts are thorough and helpful to resolving issues in this proceeding. The 319 stipulated facts are hereby admitted into the record as facts to which the parties jointly agree. The findings of fact provided in the JSF are adopted, however, they are not repeated in their entirety in this decision to make this decision more focused and readable.

There also is factual agreement between the parties found outside of the joint stipulations of fact. The parties both submitted proposed statements of material facts, CSUMF and RSUMF, and Evergreen submitted a proposed statement of material facts, ESUMF. IMCC also submitted a supplemental proposed statement of material facts, CSUMF2. The responses to these proposed statements of material facts, as well as statements by the parties in briefing, disclose agreement on some of the material facts. To the extent that there is no genuine dispute about material facts, they may be utilized in this decision. For example, while the parties disagree as to the application and implications of CCM Pools ("CCMP") Rule 5.7, they agree that Rule 5.7 is contained in CCMP Operations Manual Version 4.0, effective October 1, 2019, available at CX2379, and that the text of this rule remains in effect. CSUMF ¶ 84; CSUMF/RResp ¶ 84. Moreover, the parties agree regarding the general methods of allocating chassis, although there are factual disputes about which Respondents utilize which methods and how those methods are applied. This decision is based on the material facts for which there is no genuine dispute. Any remaining disputed facts would need to be determined as this proceeding progresses.

IMCC requests a hearing on their motion. CMSD at 1. The filings submitted by the parties are sufficient to rule on the issues in the motions for summary decision, therefore, it is hereby ordered that the request for a hearing at this point in the proceeding be **DENIED**.

2. Motions to Strike

a. IMCC's Motion to Strike Expert Declarations

On June 16, 2022, IMCC filed a motion to strike declarations from Respondents' experts, Mr. Coates and Dr. Reitzes; to strike references thereto in Respondents' statement of material facts, responses, and briefing; and for attorney's fees and costs. CStrike at 1. IMCC contends that the two declarations, submitted during summary decision briefing, violate the scheduling order; contain supplementary analysis and opinions that were not disclosed in their previous reports; prejudice IMCC by preventing cross-examination and rebuttal expert opinion; Dr. Reitzes's declaration performs new and complex statistical analyses not included in his rebuttal; and Respondents did not submit any of Dr. Reitzes's underlying work papers that would allow for review. CStrike at 1-7. IMCC presents an affidavit from Dr. Langenfeld in support of IMCC's contentions, and asserts that the Langenfeld Affidavit performs no new analysis, but rather articulates broadly what would be required to rebut the untimely Reitzes Declaration. CStrike at 3 n.2.

Respondents argue that IMCC has mischaracterized the declarations; the declarations were submitted to avoid inadmissible hearsay; an expert is permitted to supplement, elaborate on, and explain his report; rather than constituting new reports, the declarations are recitations under oath of the statements and opinions articulated by Mr. Coates and Dr. Reitzes in their respective reports and elaborations of those opinions; and sanctions are neither warranted nor available. CStrike/Opp at 1-3.

It appears that the declarations were not filed timely and Respondents do not contend that the filings were timely. The fourth amended scheduling order, served December 7, 2021, states that the cutoff for expert discovery was April 1, 2022, and the cutoff for all discovery was April 15, 2022. The disputed Coates declaration is dated April 29, 2022, and the disputed Reitzes declaration is dated May 27, 2022, and therefore both were filed after the discovery cut-off. However, because this proceeding is at the summary decision stage, the focus is not on disputed facts nor resolving competing economic theories, but rather on the controlling legal issues. Accordingly, it is hereby ordered that IMCC's motion to strike the disputed declarations be **DENIED**, however, the declarations are given limited weight.

In the future, the parties should note that untimely filed expert reports may be stricken and objecting to a filing in a footnote does not constitute a motion to strike. If this case proceeds to a determination on the merits, IMCC may file a motion requesting underlying work papers and that request will be considered at the appropriate time.

b. Respondents' Motion to Strike IMCC's Reply to CSUMF/RResp

On June 30, 2022, Respondents filed a motion to strike IMCC's reply to Respondents' response to IMCC's statement of undisputed material facts. RStrike at 1. Respondents assert that the August 24, 2020, initial order included detailed pretrial procedure and there is no provision permitting the filing of a reply by a movant to a non-movant's response to a movant's statement of material facts; IMCC's headings are argumentative and numbered paragraphs include more than a single proposed fact, erroneously attempting to persuade the Presiding Officer to weigh

disputed evidence; and Respondents assert that once a challenge to a factual statement has been supported with citations to evidence, that fact has been properly disputed and, if material, then summary judgment must be denied because summary judgment can only be granted if the movant shows that there is no genuine dispute as to any material fact. RStrike at 1-5. Respondents therefore move to strike the reply, CSUMF/CReply; or in the alternative, Respondents request that, if a reply is permissible, they also be allowed to file a reply. RStrike at 5.

IMCC argues in response that there is nothing in the Commission Rules or the Presiding Officer's orders that prohibits a reply statement of material facts; Respondents' motion should additionally be denied because it was not timely filed; IMCC filed its reply to assist the Presiding Officer in determining whether material facts were genuinely in dispute; and IMCC did not ask the Presiding Officer to weigh evidence or evaluate credibility. RStrike/Opp at 1-3.

The scheduling order does not allow time to file replies to oppositions to statements of material facts. Typically, such replies should not be filed. Given the procedural posture of this case, such replies are not particularly useful. Because this proceeding is at the summary decision stage, the focus of this decision is not on disputed facts. Therefore, IMCC's reply to Respondents' opposition to Complainant's statement of undisputed material facts has limited relevance and will be given limited weight. For the same reasons, the record will not benefit from allowing Respondents to file a reply to IMCC's response to Respondents' statement of material facts. Therefore, IMCC's CSUMF/CReply will not be stricken but will be given limited weight and Respondents will not be permitted to file a reply to RSUMF/CResp. Accordingly, it is hereby ordered that Respondents' motion to strike CSUMF/CReply be **DENIED**.

3. Motions for Confidential Treatment

On May 24, 2021, an order entering stipulation and amended order of confidentiality was issued. On June 9, 2021, in response to a joint request by the parties, an order entering stipulation and second amended order of confidentiality ("Second Confidentiality Order") was entered. Subsequently, and pursuant to the Second Confidentiality Order, the following requests for confidential treatment were received: (1) a motion for confidential treatment filed by IMCC on April 29, 2022; (2) a motion for confidential treatment of certain materials filed by Respondents on May 4, 2022; (3) a supplemental motion for confidential treatment filed by IMCC on May 4, 2022; (4) a motion for confidential treatment filed by IMCC on May 27, 2022; (5) a motion for confidential treatment of certain materials filed by Respondents on June 2, 2022; (6) a supplemental motion for confidential treatment filed by IMCC on June 2, 2022; (7) a motion for confidential treatment filed by IMCC on June 13, 2022; (8) a motion for confidential treatment of certain materials filed by Respondents on June 16, 2022; (9) a supplemental motion for confidential treatment filed by IMCC on June 16, 2022; and (10) a motion for confidential treatment of certain materials filed by Respondents on June 24, 2022. None of the ten motions for confidential treatment were contested.

These ten motions request confidential treatment for certain testimony and documents that were designated either as confidential or confidential outside counsel eyes only ("OCEO"). Categories of documents falling under these requests include: deposition transcript excerpts; expert reports; declarations and affidavits based on underlying data and documents designated as

confidential or confidential OCEO; contracts and negotiations between IEPs and ocean carriers or between IEPs and motor carriers regarding chassis terms; internal presentations and communications; and non-public business, financial, research, and marketing data, the disclosure of which, these motions attest, would damage party and non-party commercial interests.

Commission Rule 5 outlines the procedure for filing documents containing confidential information. 46 C.F.R. § 502.5. On August 25, 2020, an initial order was issued which provided detailed information about filing confidential material. If confidential information was filed, a "motion justifying confidential treatment" was required which showed "good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information." Initial Order at 5 (citing 46 C.F.R. § 502.141(j)(1)).

Among the documents for which the parties seek confidential treatment is the CCMP Operations Manual, version 2.9, effective April 1, 2019; and version 4.0, effective October 1, 2019, including what are currently numbered as Rules 5.5 and 5.7 which are directly at issue in this proceeding. CX2170; CX2379; *see also* April 29, 2022, IMCC Motion for Confidential Treatment, Ex. A at 4 (requesting confidential treatment of version 2.9 at CX2170-2220 and version 4.0 at CX2379-2429). However, Respondents did not seek confidential treatment of version 4.5, effective January 26, 2022, APP1799-1848, or quotations of version 4.4, effective July 20, 2020, RSUMF ¶¶ 212-217.

When the complaint was filed, the relevant portion of CCMP Rule 5.7 was included without confidential designation. Complaint ¶ 44. Moreover, the complaint cites the July 20, 2020, version 4.2 of the manual, which was publicly available on the internet. Indeed, the undersigned cited to that version of the manual and downloaded a copy of it from the internet in January 2021. Order Denying Interlocutory Appeal at 5. Version 4.2 of the manual has since been removed from the internet, however, the current CCM website links to CCMP Operations Manual, version 4.6, effective November 25, 2022,[4] which includes Rules 5.5 and 5.7 and has language identical to the language of the rules marked as confidential. Respondents' production of version 4.5 of the manual and inclusion of its Rules 5.5 and 5.7 language in its RSUMF, and the current availability online of a later version than included in the exhibits, with identical relevant rules language, heavily weigh against granting versions 2.9 and 4.0 confidential treatment. However, in version 4.2 (previously on the Internet), version 4.4 (quoted in the record), version 4.5 (in the record), and version 4.6 (available on the internet now) neither exhibits C nor G were included. Therefore exhibits C & G of version 4.0 (CX2423 and CX2428-29) and exhibit C of version 2.7 (CX2218) will be granted confidential treatment. There were no exhibits past D in version 2.7.

There were other instances where the parties over-designated confidential material. For example, the parties designated all of the expert witness reports and testimony as confidential, although not everything in those reports and testimony are entitled to confidential treatment. Where information that is not entitled to confidential treatment has been necessary to include in

[4] Version 4.6 is not part of the record and was not reviewed by the undersigned or considered in this decision, other than to rule on the confidentiality requests. *See*: ccmpool.com/wp-content/uploads/2022/11/CCMP-Ops-Manual-v4.6-change-to-OU-rates-eff-October-1-2022-changes-accepted.pdf.

this decision it has been included, for example: (1) the argument that "CH and MH volumes are not determined by the ocean carriers, but are driven by BCOs," from CMSD/ROpp at 14 (citing Coates reports at CX1533, CX1692); (2) deposition testimony by Respondents' expert Coates that ocean carriers "are trying to do things in their own economic self-interest," from Coates Dep. at CX882; and (3) the statement that: "Without the prospect of losing motor carrier business to a competitor, the default IEP would have no incentive to negotiate a lower rate for MH moves. The fact that IEPs enter into such negotiations and subsequent contracts is evidence that there is competition among the IEPs for the motor carriers' MH business," from Coates Rebuttal Report at CX1691. The requests for confidential treatment of these statements is denied.

In addition, the parties designated the entirety of other witnesses' deposition transcripts as confidential although not everything in those transcripts is entitled to confidential treatment. The parties also over-redacted material that ought to have been public from the public version of briefs as described in the December 14, 2022, order to correct public filings. This has since been remedied by the parties per their December 19 and 21, 2022, submissions of corrected public filings.

The over-designation of confidential material unnecessarily complicates the proceeding, causes delay, and limits discussion of important issues. For example, the utility of the expert reports in this decision is limited, as the only portions that are public are the portions selectively cited by the parties in their filings without confidentiality requests or statements specifically denied confidential treatment. In the future, confidentiality may be denied to all exhibits if parties have not made a conscientious effort to only seek confidential treatment of appropriate portions of documents or testimony. Entire reports, depositions, or transcripts are generally not going to be granted confidential treatment and it is the parties' responsibility to designate appropriate portions for confidentiality requests.

Commission Rule 5 authorizes confidential treatment for confidential commercial information, such as most of the information identified by the parties. Although not all the information in the confidential exhibits constitutes confidential information, most of the requests are permissible. Further, this decision is readable without the need for significant quotations from material designated as confidential. In the future, the parties must review all exhibits and only mark sections or pages that contain confidential material. Accordingly, it is hereby ordered that these ten motions requesting confidentiality be **GRANTED IN PART AND DENIED IN PART**. The requests for confidentiality of the items noted above and CCMP manual portions at CX2170-2217, CX2219-20, CX2379-2422, and CX2424-27 are **DENIED**.

II. LEGAL AND FACTUAL BACKGROUND

A. Relevant Law

To understand the issues in this case, it is helpful to review the laws governing both motions for summary decision and section 41102(c) claims, before summarizing relevant facts.

1. Summary Decision Standard

Although the Commission's Rules of Practice and Procedure ("Rules") do not explicitly provide for motions for summary decision, 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.

Pursuant to Federal Rule 56, a party is entitled to the entry of summary judgment if "there is no genuine dispute as to any material fact and [the moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Tucker v. Johnson*, 211 F. Supp. 3d 95, 99 (D.D.C. 2016). A material fact is one that is capable of affecting the outcome of litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, "[t]o defeat a motion for summary judgment, the non-moving party must offer more than mere unsupported allegations or denials." *Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 17 (D.D.C. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). If the non-movant's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Tucker*, 211 F. Supp. 3d at 99 (quoting *Anderson*, 477 U.S. at 249-50).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-48. Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). However, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

The Commission has emphasized that:

> At the summary judgment stage, the role of the judge ". . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact.

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., Docket No. 06-06, 31 S.R.R. 540, 545 (FMC Dec. 18, 2008) (citations omitted).

Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 618 (D.D.C. 1984); *see also* Fed. R. Civ. P. 56 advisory committee notes on 2007 amendments ("although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact").

2. Section 41102(c) Elements

IMCC alleges that Respondents violated section 41102(c) of the Shipping Act, previously numbered as section 10(d)(1), which states that 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).

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying five elements for a section 41102(c) claim.

> 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.

Final Rule: Interpretive Rule, Shipping Act of 1984 ("Section 41102(c) Final Rule"), 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); 46 C.F.R. § 545.4.

Although this case is not about demurrage and detention, the Commission's Demurrage and Detention Rule, which discusses the reasonableness requirement, is instructive.

> The main thrust of the rule is that although demurrage and detention are valid charges when they work, when they do not, there is cause to question their reasonableness. This derives from the well-established principle that to pass muster under section 41102(c), a regulation or practice must be tailored to meet its intended purpose, that is, ''fit and appropriate for the end in view.'' The Commission determined that because the purpose of demurrage and detention are to incentivize cargo movement, it will consider in the reasonableness analysis under section 41102(c) the extent to which demurrage and detention are serving their intended purposes as financial incentives to promote freight fluidity.

Final Rule: Interpretive Rule on Demurrage and Detention Under the Shipping Act ("Demurrage and Detention Rule"), Docket No. 19-05, 85 Fed. Reg. 29638, 29651 (May 18, 2020) (citing *Distribution Services Ltd. v. Trans-Pac. Freight Conf. of Japan and its Member Lines*, Docket No. 86-12, 24 S.R.R. 714, 722, 1988 FMC LEXIS 52, at *16-18 (FMC Jan. 6, 1988) (quoting *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525, 547 (FMC May 24, 2966))).[5]

[5] Decisions in F.M.C. and F.M.B. from 1919 to 1987 are available at: www.fmc.gov/fmc-reports.

The Commission has long had the responsibility of ensuring an efficient transportation system for ocean commerce. When this case was filed, one of the purposes of the Shipping Act was to "provide an efficient and economic transportation system." 46 U.S.C. § 40101(2). The Ocean Shipping Reform Act of 2022 modified this to "ensure an efficient, competitive, and economical transportation system." Pub. L. 117-146, §2, 136 Stat. 1272 (June 16, 2022). Thus, consideration of the efficiency of practices is not limited to detention and demurrage cases.

B. Relevant Facts

1. Parties

1. Complainant IMCC is a conference of the American Trucking Associations, Inc. ("ATA") whose membership includes ATA member companies engaged in the intermodal transportation of ocean containers on chassis. JSF ¶¶ 1-2.

2. Respondent OCEMA is a non-profit corporation created and established pursuant to FMC Agreement No. 011284. JSF ¶ 3. The OCEMA Agreement has been amended a number of times, including to establish and oversee the operation of chassis pools managed by CCM. JSF ¶ 6.

3. Respondent CCM, its affiliates, and its affiliated pools are created pursuant to, and have operated pursuant to, the Consolidated Chassis Management Pool Agreement ("CCMP Agreement"), FMC Agreement No. 011962, the current version of which is FMC Agreement No. 011962-018, effective January 30, 2021. JSF ¶ 14.

4. The eleven Respondent ocean common carriers are regulated by the Commission. JSF ¶¶ 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176.

5. Each Respondent engages in international maritime commerce and publishes tariffs for transportation of cargo containers to and from ports in the United States. JSF ¶¶ 28, 29, 45, 46, 61, 62, 75, 76, 90, 91, 105, 106, 120, 121, 136, 137, 150, 151, 165, 166, 179, 180.

6. Each Respondent except Wan Hai and Yang Ming is part of both the OCEMA and CCMP agreements. JSF ¶¶ 26, 27, 43, 44, 59, 60, 73, 74, 88, 89, 103, 104, 118, 119, 134, 135, 164, 177, 178.

7. Wan Hai is not a member of CCM but has been a member of OCEMA since 2016. JSF ¶ 149. Yang Ming is a member of CCM and was a member of OCEMA from 2000-2018. JSF ¶¶ 163-164.

8. Evergreen obtains chassis from IEPs at a single, fixed contractual daily rate for use in both CH and MH. ESUMF ¶ 4; RSUMF ¶ 88; RSUMF/CResp ¶ 88. Evergreen's customers pay a fixed chassis usage charge if they want Evergreen to provide a chassis to the motor carrier for MH. EMSD at 6; ESUMF ¶ 7; RSUMF ¶ 91; RSUMF/CResp ¶ 91. This fee then covers the day of delivery plus four business days, after which time motor carriers pay a per diem of $20 per day. EMSD at 6; ESUMF ¶ 11; RSUMF ¶ 95; RSUMF/CResp ¶ 95.

2. CH and MH Container Movements

9. Ocean carriers generally provide transportation of containers to and from the United States using store-door, port-to-port, and inland intermodal rates. JSF ¶¶ 33, 50, 66, 80, 95, 110, 122, 123, 124, 141, 155, 170, 184.

10. In store-door, also called "through," "door-to-door," or simply "door" moves, the ocean carrier is responsible for arranging and obtaining rail and/or motor carrier transportation between a port or inland intermodal terminal and a customer's location. Such container movements are classified as carrier haulage or "CH." JSF ¶¶ 32, 49, 65, 79, 83, 94, 109, 124, 140, 154, 169, 183.

11. In port-to-port moves, ocean carrier customers (such as BCOs or NVOCCs) are responsible for arranging for and obtaining motor carrier transportation between the port and the customer's location. Such container movements are classified as merchant haulage or "MH." JSF ¶¶ 30, 47, 63, 77, 83, 92, 107, 122, 138, 152, 168, 181.

12. When an ocean carrier's rates are to/from inland intermodal terminals, the ocean carrier is responsible for arranging and obtaining rail and/or motor carrier transportation between the port and the inland intermodal terminal. When the ocean carrier's rates do not include inland transportation, the ocean carrier's customer is responsible for arranging for and obtaining motor carrier transportation between the inland terminal and the final destination. These latter container movements are also classified as MH. *See, e.g.*, JSF ¶¶ 31, 48, 64, 93, 108, 139, 153, 182.

13. Respondents assert that CH "presently constitutes 45% of all cargo movements." CMSD/ROpp at 11 (citing to Coates Rebuttal Report at CX1692). IMCC provides its own assessments broken down by year and by ocean carrier but agrees to the extent that MH tends to be a greater percentage of total movements than CH. Langenfeld Report at CX1309, CX1319.

3. Chassis Pools

14. The concept of a single-provider pool is also known as a "proprietary pool," "private pool," or a "neutral pool" (because it serves multiple ocean carriers). CSUMF ¶ 42; CSUMF/RResp ¶ 42. The major IEPs denominate their single-provider chassis pools as "neutral" pools because the chassis in those pools may be made available to multiple ocean carriers. JSF ¶ 192.

15. In the single-provider model, an individual IEP owns chassis pooled at selected locations, usually in proximity to container yards, and the motor carrier must pick up and drop chassis from selected locations offered by the IEP. The daily charges for chassis used from a private pool are set via negotiated contract or through posted daily rates. CSUMF ¶ 42; CSUMF/RResp ¶ 42.

16. "Fully interoperable" or "gray" chassis pools are chassis pools managed by a single entity in which equipment contributed by multiple equipment providers are commingled. JSF

¶ 193. A gray chassis pool does not require matching a specific equipment provider's chassis with a particular ocean carrier's containers. JSF ¶ 194.

17. According to OCEMA's website, at one point in time CCM had "over 120,000 chassis under management at regional pools in 29 major metropolitan transportation hubs." JSF ¶ 198.

18. According to the October 28, 2020, OCEMA Senior Steering Committee meeting presentation, CCM chassis inventory had reduced in size. JSF ¶ 199.

19. Under the CCM Pools Operations Manual, CCM rules establish a mechanism for the assignment of chassis "usage" to a contributor, which gives that contributor the right to bill its customer for usage of a chassis regardless of the contributor of the chassis the customer physically uses. Tock (CCM) Dep. at CX459; CSUMF ¶ 36; CSUMF/RResp ¶ 36.

20. CCM Pools Operations Manual Version 4.0, effective October 1, 2019, renumbered Rules 8.5 and 8.7 as Rules 5.5 and 5.7. CSUMF ¶ 84; CSUMF/RResp ¶ 84; CX2190 (8.5 and 8.7); CX2398-99 (5.5 and 5.7). The text of Rules 5.5 and 5.7 as of October 1, 2019, remains in effect. CSUMF ¶ 84; CSUMF/RResp ¶ 84.

21. CCMP Section 5.5 ("Rule 5.5") states: "Usage Days will be assigned by default to the User associated with the Container Line Operator for the container loaded on a Chassis, (i.e., to either the User itself or to the User for whom the Container Line Operator is a customer)." CX2398. "User" is defined as "an entity that has entered into a written Master Chassis Use Agreement with a pool" and "Container Line Operator" is defined as "the ocean carrier that is operating the container at the time of usage." CX2390.

22. CCMP Section 5.7 ("Rule 5.7") states:

> Notwithstanding Section 5.5, under the Choice Program, Usage Days may be directed to another User when the Container Line Operator and the User for whom the Container Line Operator is a Customer authorize a deviation from the default assignment. To utilize this program, the Container Line Operator must notify CCM that it allows exceptions: at the shipment level (based on booking or bill of lading reference); upon request and approval; based on the motor carrier (for merchant haulage moves); or for all merchant haulage moves (provided the Container Line Operator provides CCM with access to shipment data sufficient to make such assignments).

CX2398-99.

23. CCM's Gulf Consolidated Chassis Pool closed as of August 2020, which had served ports including Houston, El Paso, and New Orleans. JSF ¶¶ 201-202.

24. CCM's Chicago & Ohio Valley Consolidated Chassis Pool ("COCP") also closed in August 2020, which had served numerous intermodal terminals in the Midwest, including in Illinois, Indiana, and Ohio. JSF ¶¶ 203-204.

25. CCM's pools described as open at the time of briefing included: Denver Consolidated Chassis Pool (serving Denver, CO and Salt Lake City, UT); Mid-South Consolidated Chassis Pool LLC ("MCCP") (serving Memphis, TN and Nashville, TN); Mid-West Consolidated Chassis Pool LLC (serving St. Louis, MO, Kansas City, KS, and Omaha, NE); and South Atlantic Chassis Pool LLC (serving Atlanta, GA, Charleston, SC, Charlotte, NC, Jacksonville, FL, Savannah, GA, and Tampa, FL). JSF ¶¶ 200-206.

26. At the "Pool-of-Pools" ("POP"), established by DCLI, TRAC Intermodal, and Flexi-Van at the ports of Los Angeles and Long Beach ("LA/LB"), chassis owned by those IEPs can be used on an interoperable basis. JSF ¶ 195.

27. As of August 20, 2020, the POP website stated:

> Prior to the POP, the operation of multiple independent chassis pools in Los Angeles and Long Beach created situations where chassis in different pools were segregated at facilities for use only by certain user bases, and returnable only to a fraction of the facilities otherwise available to receive chassis. These inefficiencies often resulted in lost time and revenue to a motor carrier, duplicative repositioning, and confusion on terminals and rail ramps. The "gray fleet" that is the POP has smoothed the impacts to chassis operations that would have otherwise occurred in the ever-changing landscape of ocean carrier alliances and terminal operations, increases overall efficiency and availability, and significantly reduces chassis splits.

Pool of Pools, *About Us*, web.archive.org/web/20200820222149/http://www.pop-lalb.com; JSF ¶ 196.

28. The U.S. Department of Justice issued a business review letter to Flexi-Van Leasing, Inc. and Direct ChassisLink, Inc. with respect to the POP. JSF ¶ 196. Usage of chassis in the POP is assigned to the IEP that has a contractual relationship with the ocean carrier whose container is being moved. JSF ¶ 197.

29. Non-party North American Chassis Pool Cooperative, LLC ("NACPC") was formed by motor carriers and is an enterprise that has leased and rented chassis as an IEP. JSF ¶ 191; RSUMF ¶ 6; RSUMF/CResp ¶ 6.

30. As of August 24, 2020, the three major IEPs – TRAC Intermodal, DCLI, and Flexi-Van – leased chassis to ocean carriers and motor carriers. NACPC and several smaller chassis providers also have leased chassis to ocean carriers and motor carriers. JSF ¶ 207.

31. The Chicago region was previously served by an interoperable CCM pool which collapsed and is now only served by proprietary IEP pools. JSF ¶¶ 200, 203-204; CMSD at 5-6; CMSD/ROpp at 26; Reitzes Report ¶ 120 at CX1675.

32. The Savannah region is served by a CCM interoperable gray pool. JSF ¶¶ 200, 206; Reitzes Report ¶ 123 at CX1676; CMSD at 7.

33. The Memphis region is served by a CCM interoperable gray pool, as well as by proprietary pools from DCLI and TRAC. JSF ¶ 200; CSUMF ¶ 646; CSUMF/RResp ¶ 645 (responding to CSUMF ¶ 646); CMSD at 7.

34. The LA/LB region is served by the POP, which is interoperable, however usage of chassis in the POP is assigned to the IEP that has a contractual relationship with the ocean carrier whose container is being moved, regardless of the IEP whose chassis is physically being used. JSF ¶ 195, 197; CSUMF ¶ 48; CSUMF/RResp ¶ 48; CX1701 at ¶ 6; CX1703 at ¶ 6; CX1705 at ¶ 6; CMSD at 6. These "box rules" remain in force, and motor carriers do not have the ability to select an IEP other than the IEP designated by the ocean carrier. CMSD ¶ 50; CMSD/RResp ¶ 50; Coates Rebuttal Report at CX1693; CMSD at 6.

III. IMCC AND RESPONDENTS' MOTIONS

This section discusses the motions filed by IMCC and Respondents, addressing subject matter jurisdiction, joinder, reasonableness of five practices, other section 41102(c) elements including proximate cause, conclusions and remedy, and exceptions and appeal. Evergreen's motion is addressed in the next section.

A. Subject Matter Jurisdiction

1. Summary

Both parties request summary decision regarding subject matter jurisdiction, with IMCC requesting a decision that the Commission has subject matter jurisdiction and Respondents requesting a decision that the Commission does not have subject matter jurisdiction.

As explained more fully below, taking into consideration the facts not in dispute, the Commission has jurisdiction over Respondents' practices as Respondents are regulated entities alleged to have violated the Shipping Act. Therefore, IMCC's motion for summary decision on the issue of jurisdiction is granted and Respondents' is denied. However, Respondents' arguments that there are limits to the Commission's jurisdiction are well-taken and this decision is limited to ruling on matters within the Commission's jurisdiction.

2. Parties' Arguments

IMCC asserts that the Commission has jurisdiction over all Respondents and claims, arguing that ocean carrier Respondents are common carriers subject to the Commission's jurisdiction; OCEMA and CCM are controlled by Respondent ocean carriers, and have filed governing agreements and minutes with the Commission; the shipping public needs chassis to move containers containing property and the Shipping Act governs ocean carrier practices that affect receiving, handling, storing, or delivering property in containers being transported in connection with common carrier services; chassis are an integral part of through-transportation for shipments in international maritime commerce, and the Commission's jurisdiction extends to domestic portions of that through-transportation; Respondents' practices are related to the cost and access to chassis necessary for receipt or delivery of containers under Respondents' port-to-port and port-to-terminal tariffs and service contacts; and Respondents cannot shield their illegal

conduct behind contracts with unregulated entities, like the IEPs. CMSD at 17-18; RMSD/COpp at 5-7; CMSD/CReply at 4-5.

Respondents allege that the Commission does not have subject matter jurisdiction over intermodal chassis, arguing that the Shipping Act does not regulate the ownership, leasing, and utilization of chassis; the Commission lacks authority to regulate IEPs and motor carriers in connection with chassis; the Commission lacks statutory authority to remedy every allegation of misconduct against unregulated parties; IMCC has failed to substantiate its allegations that Respondents in fact control the provision of chassis to motor carriers for domestic only movements; the Commission does not have subject matter jurisdiction with respect to the MH segment of a transit; and IMCC has not carried its burden of establishing that subject matter jurisdiction exists. RMSD at 5-11; CMSD/ROpp at 3-4; RMSD/RReply at 5-7.

3. Standard

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, e.g., Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC LEXIS 19, at *24 (FMC May 10, 2006) (holding "the Commission is obligated to hear those allegations particular to the Shipping Act"); *Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 FMC LEXIS 14, at *33-34, (FMC Oct. 31, 2000) (affirming that alleged violations of the Shipping Act including claims regarding "just and reasonable regulations and practices, are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission."); *Chief Cargo Services. v. FMC*, 586 Fed. Appx. 730, 731, 2014 U.S. App. LEXIS 18831, at *2 (2d Cir. 2014) ("The FMC's jurisdiction extends to all alleged violations of the Act.").

While the Commission has a limited jurisdiction, it is fully empowered to hear Shipping Act disputes. "Congress specifically authorized the FMC" to review, approve, and police "agreements among ocean common carriers. This delegation of authority by Congress, coupled with the FMC's technical knowledge of the subject matter, cautions us to accord great weight to the agency's judgment." *A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1447, 1990 U.S. App. LEXIS 1687, at *19 (D.C. Cir. 1990). Indeed, the Commission is not only authorized – it is obligated – to hear Shipping Act claims. *See, e.g., Anchor Shipping Co.*, 2006 FMC LEXIS 19, at *24 (finding that the ALJ's determination not to exercise jurisdiction over the complainant's Shipping Act claims was incorrect and explaining "[b]ecause alleged Shipping Act violations are intertwined with breach of contract issues in the present case, such matters must be resolved before the Commission."); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338, 1364, 1371 (D.C. Cir. 1988).

"It is elementary law that a tribunal should determine its jurisdiction before proceeding to the merits of a controversy." *NPR, Inc. v. Board of Comm'rs of the Port of New Orleans*, Docket No. 98-23, 28 S.R.R. 1178 (ALJ Nov. 23, 1999); *see also River Parishes Co. v. Ormet Primary Aluminum Corp.*, Docket No. 96-06, 28 S.R.R 751, 762 (FMC Feb. 3, 1999) ("As the ALJ

correctly held, an agency must reach jurisdictional issues before addressing the merits of a case." (citations omitted)).

4. Analysis

The complaint alleges that "OCEMA members control the operation of chassis pools at ports and intermodal terminals nationwide through the rules and practices they adopt for pool operation, their contracts with equipment providers, and their own rules and practices governing how the cargo containers that they own may be interchanged." Complaint at 2. The complaint further contends:

> The Commission has jurisdiction over this Complaint pursuant to 46 U.S.C. § 41301 because it alleges violations of the Shipping Act of 1984, 46 U.S.C. § 41102(c), by ocean common carriers and their agents engaged in international maritime commerce of the United States at ports and inland intermodal terminals where they engage in the interchange of cargo containers and container chassis moving in such commerce.

Complaint at 11.

The Commission's jurisdiction has been considered at two prior points in this proceeding. First, in the context of a motion to dismiss, it was held:

> Complainant asserts that Respondents are ocean common carriers and their agents engaged in international maritime commerce of the United States at ports and inland intermodal terminals where they engage in the interchange of cargo containers and container chassis moving in such commerce. As the Commission indicated, the chassis situation is "complicated," ocean carriers may "substantially affect chassis availability via chassis pools owned by ocean carrier agreements such as OCEMA," and "'[o]cean carriers also exert control over chassis via ''box rules,'' under which ocean carriers determine which chassis a trucker must use in a carrier haulage situation." 85 FR at 29655 (citations omitted). Complainant makes a plausible claim of jurisdiction by alleging that ocean carriers affect and exert control over chassis availability through their regulations and practices. Accepting the allegations in the complaint as true, subject matter jurisdiction is sufficiently alleged.

Order Denying Motion to Dismiss at 4 (Nov. 18, 2020).

It was later noted in the order denying interlocutory appeal that:

> The complaint *sub judice* does not cite any terms of contracts between ocean carriers and trucking companies, but rather cites terms in FMC agreements among

> ocean carriers, including the OCEMA agreement,[6] CCMP agreement,[7] and CCMP operations manual.[8] It is alleged that through these and related agreements, ocean carriers affect and exert control over chassis availability, implying that they may be effectively functioning as a standard setting organization.[9]
>
> . . . .
>
> In this proceeding, Respondents' arguments focus on whether the Commission has jurisdiction over the relationship between ocean carriers and truckers. This focus is misplaced as the complaint does not object to contracts between specific trucking companies and individual ocean carriers but rather contests industry-wide agreements among regulated entities filed with the FMC. In contrast to *Sea-Land Dominicana*, this complaint objects to regulations and practices regarding the receiving, handling, storing, and delivering of property, subjects specifically regulated by section 41102(c), implemented pursuant to Commission approved agreements, where adverse effects on shippers are alleged.

Order Denying Respondents' Motion for Leave to File Interlocutory Appeal at 4-6 ("Order Denying Interlocutory Appeal") (Jan. 29, 2021). The order thus held:

> Ocean carriers sought the protection and benefits of FMC-approved agreements over the last thirty years and now that regulations and practices adopted pursuant to their authority are contested, the ocean carriers claim that the FMC lacks jurisdiction. This argument is not persuasive. Indeed, it is unlikely that the parties' challenges to these FMC agreements and related regulations could be heard anywhere else.

Order Denying Interlocutory Appeal at 6.

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[6] Ocean Carrier Equipment Management Association, FMC Agreement No. 011284, available at: www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/1560. Complaint at 16.

[7] Consolidated Chassis Management Pool Agreement, FMC Agreement No. 011962-016, available at www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/454. Complaint at 17.

[8] CCMP Operations Manual, Version 4.2 (July 20, 2020), available at www.ccmpool.com/UploadedDocuments/Membership/Resources/LEGAL-45198472v1-CCMP-Ops-Manual-v42.pdf. Complaint at 22.

[9] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988) ("Typically, private standard-setting associations . . . include members having horizontal and vertical business relations. There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.") (citations omitted).

Now considering jurisdiction at the summary decision stage, there continues to be no basis to dismiss this case for lack of subject matter jurisdiction. Rather, as explained below, IMCC presents questions central to the Shipping Act, including allegations and evidence that regulated entities have acted in violation of the Shipping Act, and therefore IMCC has established that the Commission has jurisdiction over this proceeding.

Discussing the issue of section 41102(c) as it relates to chassis providers, the Commission noted in the Section 41102(c) Final Rule that section 41102(c) "does not cover chassis providers who do not otherwise fall within the definition of a regulated entity under the Shipping Act." Section 41102(c) Final Rule, 85 FR 29650 n.185. Therefore, this proceeding does not seek to adjudicate claims against chassis providers that are not FMC-regulated entities.

The eleven ocean common carrier Respondents are regulated entities. JSF ¶¶ 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176. In addition, OCEMA and CCM, as associations of carriers created by FMC agreements, are regulated entities under the Shipping Act. *See Int'l Assoc. of NVOCCs v. Atl. Container Line ("NVOCCs")*, Docket No. 81-5, 25 S.R.R. 734, 743, 1990 FMC LEXIS 37, at *27 (FMC Feb. 5, 1990); *Distribution Services,* 1988 FMC LEXIS 52, at *35. Here, the OCEMA and CCMP agreements were filed with the FMC and conferred benefits and protections onto the signatories, including limited antitrust immunity, concurrently assuring the Commission's jurisdiction over the agreements.

The complaint is focused on the actions of ocean common carriers and their associations, who are regulated entities under the Shipping Act, and whose regulations and practices are at issue. As was stated in the order denying interlocutory appeal:

> The Commission has jurisdiction over Respondents, who are regulated entities. The Commission also has subject matter jurisdiction over the OCEMA and CCMP agreements which authorize the operating rules at issue. Moreover, to the extent that agreements between regulated entities implement regulations and practices regarding the receiving, handling, storing, and delivering of property that are shown to violate the Shipping Act, the Commission has jurisdiction over those claims.

Order Denying Interlocutory Appeal at 6.

As noted above, this case is not about regulating non-FMC-regulated providers of chassis or IEPs, just as the Commission's action in *California Stevedore & Ballast Co. v. Stockton Port District* was not about regulating stevedoring. Docket No. 898, 7 F.M.C. 75, 81 (FMC Jan. 25, 1962) ("Respondents' second claim that section 15 does not apply, and that we lack power to strike down an unjust and unreasonable practice setting up a stevedoring monopoly, because we lack power to regulate the stevedoring business, is also without merit, and a plain *non sequiter*. Our action in condemning and preventing such unjust and unreasonable practices does not constitute regulation of stevedoring."). Respondents' arguments with respect to registration requirements for IEPs is thus beside the point because the Commission does not seek to regulate IEPs.

The Commission may not fail to hear Shipping Act claims because ocean common carriers also have contracts with IEPs, whose conduct may be subject to antitrust regulation under the antitrust laws. *See, e.g., New York Shipping Ass'n,* 854 F.2d at 1364 ("the Commission may not in any event 'abandon an independent inquiry into the requirements of its own statute'") (quoting *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB,* 357 U.S. 93, 111 (1958)). Indeed, even in the case that "an irreconcilable conflict is presented, the agency should not shrink from pursuing its statutory mandate" and would be bound to assess Shipping Act implications, allowing other agencies to perform their statutory responsibilities on their own terms. *New York Shipping Ass'n,* 854 F.2d at 1371. Here, no irreconcilable conflict is present – the Commission has been presented with allegations of Shipping Act violations by regulated entities and it must decide these claims; and IEPs are not parties to this action, neither are their practices under review, but rather, Respondents' practices.

In a recent decision addressing Commission jurisdiction, the Commission stated:

> The Commission can adjudicate allegations that contract terms are violative of the Shipping Act. *See* Final Rule: Interpretive Rule on Demurrage and Detention, Docket No. 19-05, 85 Fed. Reg. 29638 at 29648 (May 18, 2020) ("Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)."); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 FMC LEXIS 14, *32 (FMC Oct. 31, 2000) (the test for the Commission's jurisdiction is whether a Claimant's allegations "also involve elements peculiar to the Shipping Act").

TCW, Inc., v. Evergreen Shipping Agency (Am.) Corp., Docket No. 1966(I), 2022 FMC LEXIS 589, at *6 (FMC Dec. 29, 2022).

Respondents are entirely correct, however, that the Commission's jurisdiction is limited. If this case presented *only* questions concerning chassis usage as between IEPs and motor carriers, then the Commission might not have jurisdiction to resolve those issues. But Respondents, in citing to *American Union Transport v. River Plate & Brazil Conferences,* appear to have focused insufficiently on the latter portion of the guidance: "we wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission, enlarge or divest ourselves of that statutory jurisdiction." Docket No. 758, 5 F.M.B. 216, 224 (FMB Mar. 25, 1957); s*ee also* Demurrage and Detention Rule, 85 F.R. at *29644.

Regarding the Commission's jurisdiction with respect to CH and MH, it is well established that the Commission's jurisdiction does not automatically stop at the port. "Conceptually, so long as a bill of lading requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce – and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land carriage." *Norfolk S. Railway Co. v. Kirby*, 543 U.S. 14, 27 (2004). The Supreme Court explained that the fundamental interest giving rise to maritime jurisdiction is "'the protection of maritime commerce.'" *Kirby,* 543 U.S. at 25 (citations omitted). Thus "[w]hile it may once have seemed natural to think that only contracts embodying commercial obligations between the 'tackles' (i.e.,

from port to port) have maritime objectives, the shore is now an artificial place to draw a line." *Kirby*, 543 U.S. at 25. "Furthermore, to the extent that these lower court decisions fashion a rule for identifying maritime contracts that depends solely on geography, they are inconsistent with the conceptual approach our precedent requires." *Kirby*, 543 U.S. at 27.

Respondents agree that "[s]ubject matter jurisdiction applies to a through bill of lading during the times that a containerized shipment is in transit pursuant to the terms of that bill of lading." RMSD/RReply at 7. They argue, however, that FMC jurisdiction does not apply during the MH segment, which occurs before the ocean carrier takes possession of a shipment or after delivery has been made. RMSD/RReply at 7.

Kirby showed that a through bill of lading can pull domestic transport into the Commission's jurisdiction. The Commission has found that a "port's exclusive tug system '"extend[ed] the . . . [marine terminal operator's] furnishing of terminal facilities from the pier onto the waters of the harbor,'" and had "'an underlying purpose relating to terminal operations and a more than incidental relationship to the receiving and handling of property and cargo.'"" *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, Docket No. 02-02, 2003 FMC LEXIS 28, at *30 (FMC Feb. 24, 2003) (citing *Petchem, Inc. v. Canaveral Port Authority*, Docket No. 84-28, 23 S.R.R. 974, 987 (FMC Mar. 28, 1986)). Similarly, here, the conduct of regulated ocean common carriers pulls the MH segment of transit into the Commission's jurisdiction to the extent that the regulated entities are exerting control over chassis in MH.

IMCC alleges that "chassis are an integral part of through-transportation for shipments in international maritime commerce, and the Commission's jurisdiction extends to domestic portions of that through-transportation" and that "Respondents' practices are 'related to or connected with' the cost of, and access to, chassis necessary to the receipt or delivery of containers under Respondents' port-to-port and port-to-terminal tariffs (and service contracts), putting burdens on shippers, and their motor carrier agents using those tariffs." RMSD/COpp at 5-6. Thus, IMCC alleges that Respondents' practices extend beyond the boundaries of CH into the province of MH and that Respondents' conduct and practices regarding CH tie to and directly and negatively impact MH.

While the Commission generally may not have jurisdiction based on domestic inland movements only, there is no dispute that the Commission has jurisdiction over ocean common carriers and chassis used in CH. To the extent that Respondents have chosen to tie CH to MH, a Shipping Act question is presented which the Commission must resolve. Stated differently, the question is whether Respondents have, through their CH practices, exerted control over MH practices.

Respondents also contend that *McKenna Trucking* supports the proposition that the Commission lacks authority to regulate relationships between ocean carriers and unregulated members of the industry, such as motor carriers, even when there are allegations of unlawful, prejudicial, and discriminatory conduct under the Shipping Act. RMSD at 9-10 (referring to *McKenna Trucking Co. v. A.P. Moller-Maersk Line*, Docket No. 97-02). The *McKenna Trucking* decision is of limited usefulness, however, for a number of reasons. *McKenna Trucking* did not involve a section 41102(c) claim. In addition, the parties in *McKenna Trucking* requested that the

complaint be dismissed, so the decision was not subject to review by the Commission and is not binding. Docket No. 97-02, 27 S.R.R. 1343, 1344, 1997 FMC LEXIS 17, at *1 (ALJ Aug 12, 1997). Further distinguishing *McKenna Trucking*, at issue was an ocean carrier who had signed a contract with a specific trucking company. This is a far jump from alleged industry-wide practices of regulated entities present here.

Moreover, in a recent decision, the Commission concurred with the statement that "during the [demurrage and detention] rulemaking process the Commission made clear that truckers were one of the entities meant to be protected under § 41102(c)." *TCW v. Evergreen*, 2022 FMC LEXIS 589, at *15 (also expressly affirming the rejection of Evergreen's argument that because the claimant was a motor carrier the claim was outside Commission jurisdiction); *see also* "*50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. and Gulf Coast Ports*, Docket No. 81-11, 24 S.R.R. 411, 462, 1987 FMC LEXIS 20, at *167 (FMC Aug. 3, 1987) (*pet. for review denied, sub nom., N.Y. Shipping Ass'n v. FMC*, 854 F.2d 1338, 1377 (DC Cir. 1988)) ("While we need not decide in this case the outer limits of the group entitled to protection under section 10(b)(6)(C), it seems clear that such protection extends at least to those entities seeking containers on behalf of shippers. Thus, truckers, warehousemen, freight forwarders, customs brokers and non-NVO consolidators may not be unjustly discriminated against in the matter of cargo space accommodations or other facilities, to the extent that they are seeking and utilizing such accommodations or facilities as or on behalf of members of the shipping public.")

IMCC posits that if the Commission does not have the power to review whether those practices are just, reasonable, and consistent with the ocean carriers' common carrier obligations under the Shipping Act, then nobody does. RMSD/COpp at 6-7. The assertion that if these claims cannot be reviewed by the Commission, they probably cannot be reviewed by anyone, may be correct.

Therefore, taking into consideration the facts not in dispute, the Commission has jurisdiction over Respondents' practices as Respondents are regulated entities alleged to have violated the Shipping Act. Therefore, IMCC's motion for summary decision on the issue of jurisdiction is **GRANTED** and Respondents' motion for summary decision on the issue of jurisdiction is **DENIED**. However, Respondents' arguments that there are limits to the Commission's jurisdiction are well-taken and this proceeding is limited to ruling on matters within the Commission's jurisdiction.

B. Joinder

1. Parties' Arguments

Respondents allege that the complaint must be dismissed because IMCC has failed to join necessary and indispensable parties without whom relief cannot be granted, arguing that the allegations of IMCC's complaint actually target the IEPs' conduct; the IEPs, not the ocean carriers, contribute chassis to pools; and the IEPs are necessary and indispensable parties to this proceeding. RMSD at 26-29; *see also* RMSD/RReply at 7-9; CMSD/ROpp at 25-26.

IMCC asserts that the IEPs are not necessary parties; the Presiding Officer can tailor relief at the initial decision stage; the IEPs are not ignorant of the proceedings and could have requested intervention but have chosen not to; and Commission precedent establishes that the IEPs are not necessary parties. RMSD/COpp at 22-24; CMSD/CReply at 15.

2. Standard

The Commission's Rules do not explicitly address required joinder of parties. Therefore, as explained *supra*, the Federal Rules will be applied. To determine if a party is "indispensable" under Federal Rules 12(b)(7) and 19, a court must perform a two-step analysis. *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007). First, the court must determine if the absent parties are "necessary" pursuant to Federal Rule 19(a), which provides:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: (A) in that person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. Proc. Rule 19(a)(1).

If a party is necessary under Rule 19(a)(1) but joinder is not feasible, then the court must determine whether the party is indispensable pursuant to Rule 19(b), which provides:

> If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. Proc. Rule 19(b).

Both the term "necessary" and "indispensable" are legal terms of art. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him

puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." *Provident Tradesmens Bank Co. & Trust Co. v. Patterson,* 390 U.S. 102, 119 (1968).

"While the party advocating joinder has the initial burden of demonstrating that a missing party is necessary, after 'an initial appraisal of the facts indicates that a possibly necessary party is absent, the burden of disputing this initial appraisal falls on the party who opposes joinder.'" *Ameriprise Fin., Inc. v. Bailey*, 944 F. Supp. 2d 541 (N.D. Tex. 2013) (quoting *Hood ex rel Mississippi v. City of Memphis*, 570 F.3d 625, 628 (5th Cir. 2009)).

3. Analysis

Applying the two-step analysis discussed *supra*, first as to whether the absent parties are "necessary" pursuant to Federal Rule 19(a), Respondents have not carried their initial burden of demonstrating that IEPs are necessary parties. The complaint's focus is on the OCEMA and CCMP agreements, CCMP Operations Manual, and ocean carrier regulations and practices. Complaint at 16-42; *see also* CMSD at 18-30. The complaint requests relief in the form of an order to remove and to cease and desist enforcement of a section of the CCMP Operations Manual; to cease and desist adopting, maintaining, and/or enforcing any regulation or practice that limits the ability of a motor carrier to select the chassis provider it designates, including default provider designations, for MH movements or other movements for which a motor carrier is billed for usage or per diems; and to cease and desist from utilizing single-provider chassis pools that are not interoperable with pools operated by other IEPs at all ports and intermodal terminals serving more than one Respondent under rules that do not permit effective chassis choice for motor carriers. Complaint at 40-41. Respondents have offered no compelling evidence to suggest that the court would be unable to accord the complete relief requested in the absence of the IEPs. For instance, Respondents' contention that IEPs contribute chassis to pools would not hinder the Commission from providing the relief requested from the existing parties.

It is possible that this proceeding could have an impact on ocean carrier contracts with chassis providers if a violation of the Shipping Act is found. But that possible impact does not equate to them having status as "necessary" parties. *See Provident Tradesmens Bank*, 390 U.S. at 123 (holding "the Court of Appeals' reliance on . . . language to show that in *any* case where an outsider 'may be affected' it is necessarily unjust to proceed [without him], is altogether misplaced." (emphasis in original)). Here, Respondents have not carried their burden of demonstrating IEPs to be necessary parties.

Further, even if chassis providers were necessary parties who could not be joined, the case could nevertheless continue, because the analysis does not stop there. Federal Rule 19(b) provides factors for a court to consider in determining if an action can proceed even if necessary parties cannot be joined.

> The indispensability analysis balances various interests based on the particular facts of each case . . . . The inquiry is flexible and pragmatic. Some courts have voiced the opinion that they prefer not to dismiss for nonjoinder. Any such preference simply recognizes that dismissal is by nature a disruptive event that should not be ordered routinely. Obviously, dismissal should be ordered if the

> court decides that equity and good conscience require it. The issue of whether to proceed or dismiss is vested in the sound discretion of the district judge, whose conclusion will be upheld unless it constitutes an abuse of discretion.

4 Moore's Federal Practice – Civil § 19.05 (2020) (citations omitted).

Applying these factors, even if chassis providers were necessary and their joinder were not feasible, the Federal Rule 19(b) factors – prejudice, shaping relief, adequate relief, and alternative forum – weigh in favor of continuing the proceeding. Because this is a Shipping Act claim, no other venue would be able to adjudicate it. In addition, any prejudice may be lessened or avoided by shaping any relief ordered.

Respondents argue that ocean carriers' relationships with IEPs are governed by separate chassis usage agreements between those parties, that ocean carriers therefore owe legal duties and obligations under those chassis usage agreements, and that in the event that the Commission grants the relief requested the ocean carriers would be in material default under their chassis usage agreements with IEPs; thus, IEPs must be joined but the Commission lacks personal jurisdiction over the IEPs per 46 U.S.C. § 41102(c). But it is circular to argue that contracts derived from practices which may be in violation of the Shipping Act may be used to justify the preservation of those practices.

Entities regulated by the Shipping Act may not be allowed to evade review of their conduct simply by entering into contracts with unregulated third parties. *Sea-Land Serv., Inc. & Gulf Puerto Rico Lines, Inc. – Proposed Rules on Containers*, Docket No. 73-17, 18 S.R.R. 553, 557, 21 F.M.C. 1, 4 (FMC June 14, 1978) (Rejecting respondents' contention, which it characterized as "tantamount to an acknowledgement by us that a common carrier by water or other person subject to our jurisdiction could escape our jurisdiction by the simple device of voluntarily . . . entering into an agreement which obligates the common carrier to take actions which may be or are in clear violation of the Shipping Act.")

Indeed, the necessity of FMC review in exchange for limited antitrust immunity is central to the purpose of the Shipping Act itself. "The scheme of regulation adopted [by the Shipping Act] thus permits the conferences to continue operation but insures that their immunity from the antitrust laws will be subject to careful control." *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 243 (1968); *see also Agreement No. 57-96, Pac. Westbound Conference Extension of Authority for Intermodal Svs.*, 19 F.M.C. 291, 301 (FMC Sept. 15, 1976) (Reviewing conference agreements and asserting that the Commission must "assure that 'the conduct legalized [by such agreements] does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purpose of the regulatory statute.'" (citation omitted)).

Ocean carriers cannot point to IEP contracts to avoid review of their own regulations and practices. The Commission has also demonstrated it is willing and able to provide relief in the form of orders that would necessarily result in the need for the regulated party to alter separate contracts. *50 Mile Container Rules*, 24 S.R.R. at 414-415, 1987 FMC LEXIS 20, at *7, *10-11, *188-189 (ordering that the carriers cease and desist from publishing in their tariffs and enforcing the relevant provisions of the Rules on Containers despite the fact that underlying

agreements between the carrier and the International Longshoremen's Association reflected this same content).

In *50 Mile Container Rules*, the Commission allowed for the effective date of the order to be delayed for 90 days from the date of the decision, "in order to give the carriers a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws." 1987 FMC LEXIS 20, at *10-11. The Commission explained that this "serves the public interest and will avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate the ILA's interests in some manner other than the present Rules on Containers." 1987 FMC LEXIS 20, at *188 (also noting that the delay of the effective date of its order was consistent with the initial decision in *Sea-Land*, Docket No. 73-17, 21 F.M.C. 7, 35 (ALJ Oct. 9, 1975)). However, regarding its decision to delay the order's effective date, the Commission emphasized that it did "not take this step casually, because it requires us to countenance 90 more days of continuing violations of the Intercoastal Act and the 1984 Act with the accompanying burdens upon shippers and other affected persons." *50 Mile Container Rules*, 1987 FMC LEXIS 20, at *10-11. Similar protective measures, allowing for time for certain aspects of an order to take effect, could be taken here.

Respondents' argument that all parties to a contract must be present per *Natural Resources* fails for related reasons. RMSD at 29 (quoting *Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1185 (E.D. Cal. 2013)). The chassis usage agreements are separate contracts entered into by ocean carriers, apart from those identified in the complaint and regulated by the FMC. "It is generally recognized that a person does not become indispensable to an action to determine rights under a contract simply because that person's rights or obligations under an entirely separate contract will be affected by the result of the action." *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1472 (1st Cir. 1992) (citing *Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc.*, 564 F.2d 816, 820 (8th Cir. 1977)); *see also Casas Office Machs. v. Mita Copystar Am.*, 42 F.3d 668, 676 (1st Cir. 1994) ("When a person is not a party to the contract in litigation and has no rights or obligations under that contract, even though he may have obligated himself to abide by the result of the pending action by another contract that is not at issue, he will not be regarded as an indispensable party in a suit to determine obligations under the disputed contract, although he may be a Rule 19(a) party to be joined if feasible." (citing 7 Charles A. Wright, Fed. Prac. & Proc. § 1613, at 199-200 (1986))); *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Resources, Inc.*, 196 F. Supp. 2d 21, 28, 2002 U.S. Dist. LEXIS 7264, at *16 (D.D.C. 2002) ("a third party is not a necessary or indispensable party to an action to determine the rights of other parties under a contract" (citations omitted)).

Respondents have not established that this proceeding should be dismissed for failure to join necessary and indispensable parties. Accordingly, Respondents' motion for summary decision on the issue of failure to join indispensable parties is **DENIED**. IMCC did not move for summary judgement on this issue. Next, the section 41102(c) elements are reviewed, starting with reasonableness.

C. Reasonableness

Of the five elements necessary to establish a violation of section 41102(c), the issue most contested between the parties is the element of the reasonableness of the practices. This section focuses on the element of reasonableness and discusses the parties' arguments, antitrust principles and exclusive arrangements, and analysis of the five specific violations alleged by IMCC: (a) CCMP Rules 5.5 and 5.7, (b) contractual linkage of CH and MH, (c) designation of IEP for MH in chassis usage agreements, (d) designation of proprietary chassis pools and withdrawal from interoperable pools, and (e) MH chassis in the LA/LB Pool of Pools. The other section 41102(c) elements are discussed in the next section.

1. Parties' Arguments

IMCC alleges a number of ways in which Respondents' conduct is unreasonable. Specifically, IMCC argues that CCMP Rules 5.5 and 5.7 unnecessarily restrict chassis choice and are more restrictive than necessary; ocean carriers' contracts that link MH volumes with CH prices are unjust and unreasonable; ocean carrier contracts that designate an IEP for MH movements are unjust and unreasonable; ocean carriers' designation of a proprietary chassis pool and withdrawal from an interoperable chassis pool is unjust and unreasonable; and ocean carriers' contracts and practices to use MH chassis in the Pool of Pools are unjust and unreasonable while they fail to implement chassis choice for motor carriers. CMSD at 18-25. Each of these five reasonableness arguments will be addressed in turn.

Respondents contend that Sections 5.5 and 5.7 of the CCMP Operations Manual are neither unjust nor unreasonable because the sections do not restrict choice, are not unreasonable, and are not more restrictive than necessary; IMCC has not demonstrated that chassis usage agreements unfairly and unjustly link MH volumes with CH prices; designation of an IEP for MH movements in chassis usage agreements is not unjust or unreasonable; IEPs make business decisions about whether to serve their ocean carrier customers at a particular location via an interoperable pool or a proprietary pool and the ocean carrier customer may have input into how it is served, or it may have no choice but to go along with the decisions of the IEP; the withdrawal of IEPs from interoperable pools does not constitute a violation of the Shipping Act by Respondents; and IMCC's argument with respect to the Pool of Pools is flawed. CMSD/ROpp at 4-20. Respondents also raise defenses, such as the deference given to reasonable business discretion, which are also addressed.

2. Antitrust Principles and Exclusive Arrangements

In the Shipping Act, a balance was created whereby limited antitrust immunity was granted to regulated ocean common carriers, with the understanding that effective government supervision would also be required to avoid abuses. *FMC v. Svenska Amerika Linien*, 390 U.S. at 242-43 (1968); *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 218-19 (1966). Discussing the historical background of the Shipping Act, the Supreme Court recounted that the "Congress which enacted the Shipping Act was not hostile to antitrust regulation. On the contrary, the Shipping Act was the end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act." *Carnation*, 383 U.S. at 218 (footnote omitted). This committee remarked: "'While admitting their many

advantages, the Committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective government supervision. To permit such agreements without government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the Committee show that they must be recognized.'" *Carnation*, 383 U.S. at 219 (quoting H. R. Doc. No. 805, 63rd Cong., 2d Sess., pp. 417-18 (1941)). The Supreme Court concluded: "Therefore, it seems likely that the Committee really only wanted to give the shipping industry a limited antitrust exemption." *Carnation*, 383 U.S. at 219; *see also FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *New York Shipping Ass'n v. FMC*, 854 F.2d 1338, 1374 (D.C. Cir. 1988) (citing *FMC v. Svenska Amerika Linien*, 390 U.S. at 243).

The Commission, reviewing allegations of unreasonable preference or disadvantage and unreasonable practices under the Shipping Act of 1984, has recognized the "limited role of the antitrust laws in Shipping Act enforcement" as well as "the usefulness of antitrust principles in analysis of the issues raised by exclusive arrangements or self-preference by marine terminal operators or ports under the Shipping Acts." *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, Docket No. 94-10, 1996 FMC LEXIS 68, at *29 (FMC May 15, 1996). The Commission discussed *Gulf Container Line*, stating:

> In that case, we recognized that it was not necessary to show that a practice would constitute a violation of the antitrust laws in order to establish that it was sufficiently anti-competitive to be found unreasonable under the Shipping Acts. The case did not, however, hold that the antitrust laws or antitrust analysis of relevant market or competitive effects are irrelevant to the reasonableness standard.

All Marine, 1996 FMC LEXIS 68, at *30 (discussing *Gulf Container Line v. Port of Houston Auth.*, Docket No. 89-18, 25 S.R.R. 1454, 1991 FMC LEXIS 107 (FMC May 3, 1991)).

"While no determination of whether a particular practice or action would be considered violative of the antitrust laws is necessary to a determination of reasonableness under the Shipping Act, the concepts, terminology, and framing and analysis of issues involved in antitrust cases are frequently useful in such determinations." *All Marine*, 1996 FMC LEXIS 68, at *31.

Antitrust concepts can help articulate and explain the practices at issue here. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 730 (1988).

The relationships between ocean carriers, IEPs, motor carriers, and BCOs are primarily vertical. "The antitrust laws also affect a variety of 'vertical' relationships – those involving firms at different levels of the supply chain – such as manufacturer-dealer or supplier-manufacturer." FTC, "Dealings in the Supply Chain," available at: www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-supply-chain. Generally, the law considers "most vertical arrangements as beneficial overall because they reduce costs and promote efficient distribution of products. A vertical arrangement may violate the antitrust laws, however, if it reduces competition among firms at the same level (say among retailers or among wholesalers) or prevents new firms from entering the market." *Id.*

The relationship between ocean carriers is horizontal, as well as potentially the relationship of the motor carriers in MH with the ocean carriers in CH. Horizontal relationships refer to relationships among competitors in the relevant market. *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451, 471 n.18 (1992); *see also Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 317-18 (D.D.C. 2011) (explaining "as participants in a number of different markets, wireless carriers are related both horizontally and vertically. In certain markets, the carriers compete with each other to sell outputs, and in other markets, they compete to purchase inputs. Such relationships are deemed horizontal in that they pit carriers against carriers, acting in parallel as either sellers or buyers. . . . In yet other markets, the wireless carriers buy and sell services to and from each other, and are therefore vertically related. In this complex and constantly evolving industry, markets are interconnected and the carriers play multiple roles simultaneously.").

Respondents' practices may be considered akin to exclusive dealing. "The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition." *Sanofi-Aventis U.S., LLC v. Mylan, Inc.*, 44 F.4th 959, 983 (10th Cir. 2022) (citation omitted). Reliance on antitrust principles is not necessary, however. As the Commission has stated:

> The Commission has in the past found unreasonable various terminal practices involving requirements that terminal users purchase related services from certain providers granted exclusive status (*Agreement Nos. 8225 and 8225-1 Between Greater Baton Rouge Port Commission and Cargill Inc.*, 5 F.M.B. 648 (1959) *aff'd sub nom. Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86 (5th Cir. 1961)), or from terminal operators themselves (*Perry's Crane Service v. Port of Houston Authority*, 16 SRR 1459 (I.D. 1976), adopted in part, [19 F.M.C. 548 (FMC Feb. 25, 1977)]) without reliance on the antitrust laws. We do so again here.

Gulf Container Line, 1991 FMC LEXIS 107, at *18.

The Commission has addressed exclusive arrangements, stating: "In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the *St. Philip* and *Agreement No. T-2598* decisions. Such arrangements are generally undesirable and, in the absence of justifications by their proponents, may be unlawful under the Shipping Acts." *Petchem, Inc. v. Canaveral Port Authority*, Docket No. 84-28, 23 S.R.R. 974, 990 (FMC Mar. 28, 1986) (*aff'd, sub nom. Petchem, Inc. v. FMC*, 853 F.2d 958 (D.C. Cir. 1988)). In *Seacon Terminals*, "the Commission again reviewed its doctrine and reconfirmed that proponents of exclusive or monopolistic arrangements at ports had to justify them, although the ultimate burden of proof remained with parties complaining about the arrangement." *All Marine Moorings, Inc. v. ITO Corp. of Baltimore*, Docket No. 94-10, 1995 FMC LEXIS 22, at *39 (ALJ Oct. 6, 1995) (*aff'd, All Marine*, 1996 FMC LEXIS 68 (FMC 1996)) (citing *Seacon Terminals, Inc. v. Port of Seattle*, Docket No. 90-16, 26 S.R.R. 886, 898 (FMC Apr. 14, 1993)).

> However, in certain circumstances, such [exclusive] arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance

> the port's economic well-being. The burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement, both because they are the arrangement's proponents and because evidence of that nature usually lies within their control. Nevertheless, the ultimate burden of proof in any Shipping Act challenge to an exclusive terminal arrangement or franchise rests with the party wishing to overturn the franchise.

Petchem, 23 S.R.R. at 990.

Once a *prima facie* case of unreasonableness is raised, the burden of producing evidence justifying the practices shifts to Respondents. However, the proponent of the proposition that a practice is unreasonable "bears the burden of proving that proposition, including the burden of producing evidence adequate to persuade the Commission. Respondent is not required to show that the practice is reasonable." *All Marine*, 1996 FMC LEXIS 68, at *34 (footnote omitted); *see also Seacon Terminals*, 26 S.R.R. at 898.

In *Perry's Crane*, the complaint alleged that certain tariff rules and related practices gave the Port of Houston's cranes first priority, or "first call" on jobs, even to the extent of displacing, or "bumping" Perry's cranes that were already working. *Perry's Crane Serv., Inc. v. Port of Houston Authority of Harris County, TX*, Docket No. 75-51, 19 F.M.C. 548 ("Perry's Crane FMC") (FMC Feb. 25, 1977). Perry's Crane argued that Houston's practices interfered with the right of the stevedores to hire cranes of their choice; disrupted the proper handling of ships; and increased expenses and financial harm to stevedores as well as private crane owners. *Perry's Crane Serv. v. Port of Houston Authority of Harris County, TX*, Docket No. 75-51, 16 S.R.R. 1459, 1471 ("Perry's Crane ALJ") (ALJ Sept. 28, 1976) (*aff'd in part*, *Perry's Crane FMC*, 19 F.M.C. 548). Houston defended its practices by arguing that "bumping" is a last resort; stevedores decide which private crane to displace; Houston has a heavy investment in its cranes and is a state agency; Houston is losing out in the competitive battle for the crane rental business; and private owners agreed to the conditions. *Perry's Crane ALJ*, 16 S.R.R. at 1472

The ALJ in *Perry's Crane* found the first call and bumping practices to be unjust and unreasonable and held that they should be modified by the Commission "to restore to the stevedores as far as circumstances warrant the right to select the most suitable cranes available to work the ships without interference." *Perry's Crane ALJ*, 16 S.R.R. at 1472. The ALJ further noted that the "right of the stevedore as well as the master of the vessel to select proper equipment and personnel to service the ship is well recognized by this Commission and the courts." *Perry's Crane ALJ*, 16 S.R.R. at 1477.

The ALJ did not find that Houston was seeking to monopolize the crane market "in the sense of seeking an exclusive right to carry on the business" but did find a "limited mini-monopoly" which required justification. *Perry's Crane ALJ*, 16 S.R.R. at 1472, 1476. The ALJ stated, "it is not only private crane owners like Perry who have been affected by these violations of law but also stevedores who must hire cranes and ultimately vessels which may be serviced by cranes which are not the best ones suitable and available for the job." *Perry's Crane ALJ*, 16 S.R.R. at 1479. The ALJ concluded:

> Ultimately vessels, the Port, and the public suffer since the present practices, having curtailed the stevedore's right to choose freely the most suitable and least costly equipment, perpetuate inefficiencies and higher costs. This is a direct violation of respondent's duty to promote efficiencies and facilitate the flow of cargo over its piers.

Perry's Crane ALJ, 16 S.R.R. at 1479 (citing *American Export-Isbrandtsen Lines, Inc. v FMC*, 444 F.2d 824 (D.C. Cir. 1970)).

The Commission adopted the ALJ's initial decision in *Perry's Crane*, except the portion which permitted limited "bumping," finding that "the practice of 'bumping' cannot be justified even as modified by the Presiding Officer." *Perry's Crane FMC*, 19 FMC at 552-53.

In a case just a few years after *Perry's Crane*, the D.C. Circuit set aside violations found by the Commission for failure to condition use of the terminal on, and failure to allow, sharing of high-speed container cranes by a competing carrier. *Puerto Rico Ports Authority v. FMC*, 642 F.2d 471, 473 (D.C. Cir. 1980). The Court found that the Commission's findings were not supported by substantial evidence in the record. Regarding exclusive arrangements, the court stated:

> Commission precedent establishes that the exclusive assignment of public facilities to one carrier does not violate section 16 unless the challenged lease either fails to compensate the port adequately or unreasonably forecloses other carriers from securing adequate facilities. Moreover, the Commission has expressly refused to find discrimination or preference in a situation in which the port indicated willingness to make similar, but not necessarily identical, arrangements available to other carriers.

Puerto Rico Ports Authority, 642 F.2d at 482-83 (footnotes omitted).

This case *sub judice* does not involve an exclusive arrangement provided by a public port or marine terminal operator but rather the practices of regulated ocean common carriers. Moreover, the allegations here involve motor carriers allegedly denied the ability to utilize chassis provider of their choice, resulting in disruption and delays to moving containers, and increasing expenses and financial harm to motor carriers. Although there are differences between the exclusive dealing cases and this proceeding, this line of cases is instructive and provides a useful analytical framework.

3. Analysis

The parties organize their discussion of reasonableness into five specific practices. The first three focus on preferred and exclusive agreements: (a) CCMP Rules 5.5 and 5.7, (b) contractual linkage of CH and MH, and (c) designation of IEP for MH in chassis usage agreements. The last two focus on proprietary and interoperable pools: (d) designation of proprietary chassis pools and withdrawal from interoperable pools, and (e) MH chassis in the LA/LB Pool of Pools.

a. CCMP Rules 5.5 and 5.7

(1) Arguments of the Parties

The complaint alleges that the Respondents violated the Shipping Act by "[a]dopting and enforcing CCM Pool Rule 5.7, giving ocean carriers ultimate control by mandating their power of 'consent' over chassis choice." Complaint ¶ 3a. The complaint further alleges that "the CCMP Operations Manual gives ocean carriers veto power over motor carrier chassis choice and prevents motor carriers from exercising 'the freedom to use the chassis of [their] choice.'" Complaint ¶ 44 (citation omitted).

In its MSD, IMCC begins its reasonableness analysis by arguing that Rules 5.5 and 5.7 of the CCMP Operations Manual violate section 41102(c) "because they give ocean carriers the unfettered right to veto a motor carrier's selection of MH chassis;" the "ocean carrier veto right warps competition because the entity paying for the MH chassis (the motor carrier or BCO) is not the same entity selecting the chassis;" and therefore, that the CCMP operating rules unreasonably restrain competition and increase costs in the market for MH chassis. CMSD at 18-19 (footnote omitted). In addition, IMCC asserts that "CCM's 'Choice Program' is more restrictive than necessary, and thus not 'tailored to meet its intended purpose.'" CMSD at 19.

Respondents contend that a number of ocean carriers grant exceptions or have a policy of allowing choice; Rules 5.5 and 5.7 "do not result in the 'systematic' denial of choice that IMCC has alleged;" the facts do not show that ocean carriers deny choice; and the rules are not more restrictive than necessary and do not apply in geographic regions wherein CCM pools are not present. CMSD/ROpp at 5-13.

In their MSD, Respondents also contend that IMCC fails to establish that Rule 5.7 of the CCMP Operations Manual is unlawful and assert that Respondents have not systematically denied choice requests. RMSD at 15-17. In opposition, IMCC reasserts that the CCMP Operations Manual rules unreasonably restrict chassis choice. RMSD/COpp at 10-12.

(2) CH, MH, and Chassis Choice

IMCC asserts that because "*motor carriers and their customers*, not the Respondents, have the duty and responsibility for chassis supply in MH movements, the proper 'end in view' for this case for ocean carriers is to secure sufficient chassis *only* for CH movements." RMSD/COpp at 10 (emphases in original). Respondents acknowledge that "cargo interests determine whether their shipments move via CH or MH." CMSD/ROpp at 2.

It is agreed that ocean carriers have the responsibility to provide chassis for CH. However, the responsibility for providing chassis for MH rests with the motor carriers. If motor carriers prefer to contract for MH chassis through an IEP other than the IEP selected by the ocean carrier, then ocean carriers should not be able to prevent them from doing so. This finding does not depend on whether or not the price for chassis will be lower or higher. Indeed, it is possible that individual motor carriers will face higher costs for chassis when they are contracting for a limited volume. With freedom to compete, however, the market may freely adjust.

A purpose of CCMP Rules 5.5 and 5.7 is to establish who may determine the allocation of charges to entities for chassis, which are an integral part of the international transportation of containerized cargo. To be tailored to meet its intended purpose, these charges should incentivize the efficient flow of cargo, whether the chassis is used for CH or MH. To determine whether the rules are more restrictive than necessary, it is important to understand the limitations on chassis choice under these rules.

In the few locations where CCM pools are present, CCMP Rule 5.5 assigns chassis charges to the ocean carriers' preferred provider while Rule 5.7 allows choice, i.e. another provider to be utilized, but only if ocean carriers and IEPs permit the exception. CX2398-99; JSF ¶¶ 200-206. There are a number of ways the ocean carrier can permit exceptions and different carriers have utilized different approaches. For example, Respondents assert that Hapag Lloyd, Yang Ming, ZIM, and Wan Hai grant choice when requested. CMSD/ROpp at 5. Respondents also contend that chassis choice is moot in some situations, for example, when the shipper accepts Evergreen or MSC's offer to provide a chassis at the discharge port. CMSD/ROpp at 7. The parties dispute, as a factual matter, the extent to which various ocean carriers permit or deny exception requests. Resolving this issue would require a factual determination not appropriate at the summary decision stage of the proceeding.

The contractual framework that permits ocean carriers to exert control over how chassis are charged for MH is not disputed. CCMP Rule 5.5 assigns charges for chassis based on the ocean carriers' preferred provider, including for MH moves which are paid for by motor carriers. CX2398. Respondents do not dispute the clear language of Rule 5.5, but rather point to the ability to obtain exceptions under Rule 5.7 to argue that choice is not restricted. CMSD/ROpp at 4-5.

IMCC describes the choice program as follows:

> CCM Pools offer a "Choice Program" using a "choice by exception" model, under which every ocean carrier is both permitted and presumed to assign both CH and MH chassis usage to its "default" IEP with which it has a contractual relationship. Thus, for MH movements, current Rule 5.5 permits the ocean carrier to require that a motor carrier or BCO must use that default IEP. Current Rule 5.7 permits, but does not require, the ocean carrier to allow the motor carrier or BCO to request an exception in favor of an alternative IEP in the pool. Thus the Rules give ocean carriers a final veto right over MH chassis choice.

RMSD/COpp at 10 (citations omitted); *see also* CX2160 ("Chassis 'Choice' Dilemma" presentation); CSUMF ¶ 86 (referencing CCM *Choice Program* webpage, CX1992).

Respondents agree that both the ocean carrier and the IEP must approve choice. *See, e.g.*, CSUMF/RResp ¶ 87 (responding in part that the "language listed on CCM's website is handled by both the IEP and ocean carrier after 'both parties sign off'" (citations omitted)). For purposes of the present analysis, what is relevant is not whether an IEP may *also* act to block a choice request, but that an ocean carrier, acting on its own, retains the ability to block a motor carrier choice request under the present rules.

Thus, there is no genuine dispute that although Rule 5.7 allows a motor carrier to request a different chassis provider, the ocean carrier can block such a request. Moreover, the language of Rule 5.7 on its face supports IMCC's assertion that ocean carriers have the power to veto a motor carrier's choice of an alternate chassis provider. Thus, the ocean carriers are giving the selected IEP an exclusive right to provide chassis, or a de facto mini-monopoly.

Respondents argue that there is no evidence that a number of ocean carriers, including CMA-CGM, COSCO, Hapag-Lloyd, Yang Ming, Wan Hai, and ZIM, deny choice requests. CMSD/ROpp at 5. Respondents further assert that HMM and Maersk support chassis choice but confer with their chassis provider in response to choice requests, while ONE's policy is to grant requests for choice. CMSD/ROpp at 6 (also acknowledging an example of "choice requests that were initially deferred because ONE was in the process of re-negotiating its contract with TRAC"). Respondents state that "Evergreen and MSC have unique business models which give the shipper, at the time that a shipment is booked, the option to allow Evergreen/MSC to provide the chassis at the discharge port." CMSD/ROpp at 7 (footnote omitted). IMCC agrees that "ocean carrier policies differ significantly with respect to allowing MH chassis choice, reflecting the discretion granted to ocean carriers and their IEPs by the Rules." RMSD/COpp at 11.

Respondents assert that choice requests are not common and that "choice is usually granted when requested." CMSD/ROpp at 10-11; *see also* RMSD at 12. IMCC responds that MH choice requests are routine and that "many choice requests would be futile because ocean carriers automatically deny choice, or impose burdensome procedures." CMSD/CReply at 7.

Respondents' assertions that exceptions under Rule 5.7 are often granted argues against the necessity for this rule in the first instance and support IMCC's arguments that the rule unduly restricts motor carriers' ability to choose their own IEPs for MH. If, as Respondents argue, chassis choice requests are frequently approved, then there is no need for a clause in the CCMP operating manual allowing ocean carriers to restrict chassis choice. But the inclusion of such a clause, and all of the argument concerning the clause's preservation in the instant proceeding, suggests that ocean carriers are concerned about motor carriers choosing chassis providers other than that which the ocean carrier would prefer, in the absence of compulsion. In *Transshipment*, the Commission identified a similar inconsistency of sorts, noting "if JNYRA now enjoys a *de facto* monopoly of the transshipment cargo originating in Indonesia, there is no need for an exclusive arrangement clause in their contract with Pelni. But the inclusion of such a clause leads inescapably to the conclusion that the JNYRA members are concerned that some independent competition may be inaugurated." *Transshipment and Apportionment Agreements from Indonesian Ports to U.S. Atl. and Gulf Ports*, Docket No. 65-17, 10 F.M.C. 183, 195 (FMC Oct. 13, 1966).

It is also somewhat confusing that Respondents insist on preserving their right to deny chassis choice when such chassis would be provided by an alternate IEP, and yet simultaneously assert that a motor carrier can always bring its own chassis. *See, e.g.*, CMSD/ROpp at 8 (asserting that IMCC's argument "ignores both the availability of choice and *the ability of motor carriers to provide their own chassis (via ownership or long term lease*)." (emphasis added)); *see also* CMSD/ROpp at 8 ("no motor carrier is required to use a CCM pool chassis to perform an MH move."). If it is acceptable to ocean carriers, with no additional reservations or terms specified, for motor carriers to utilize a self-owned chassis, this suggests a lack of actual

transportation or functional reasons underlying exercises of denial of choice to use an alternate chassis provider.

At this point, it is more appropriate to focus on the policy rather than specific instances of particular choice requests. The parties agree that requests for choice under Rule 5.7 are made; those requests are sometimes granted and sometimes denied; and different ocean carriers impose different requirements to process such requests. It is not necessary to determine the precise number of requests that are made or that would be made if requests for exceptions were not required. Also, given the current Rule 5.7, even if an ocean carrier were to grant a request for an exception today, it would be free to deny a similar request tomorrow, with no recourse available to motor carriers.

Essentially, the ocean carriers have given the IEPs a mini-monopoly over chassis that can move their containers. At this stage, it is not necessary to determine the factual questions regarding the extent to which each specific ocean carrier permits or denies requests for choice. Rather, the legal issue is whether it is reasonable for ocean carriers to designate default chassis providers and to require approval for motor carriers to utilize the chassis provider they prefer for MH. As these practices are exclusive or monopolistic, restricting the motor carriers' right to select the chassis provider of their choice, the Respondents must justify them.

(3) Justifications

Respondents raise a number of justifications for their practices, including ensuring a supply of safe chassis, IEP veto, and deference to business decisions. They are addressed below.

(a) Supply of Safe Chassis

Respondents argue that contracts with IEPs are necessary to ensure the supply of chassis, stating that "unless entities such as local port authorities step up to ensure chassis are made available, the burden to ensure adequate supplies has by default landed on the shoulders of the ocean carriers." CMSD/ROpp at 12. IMCC responds that "there is not a single piece of record evidence demonstrating that MH chassis choice has any negative effect on the supply [of] chassis." CMSD/CReply at 7 (emphasis omitted). IMCC also points to deposition testimony by Respondents' expert, where Coates acknowledges that ocean carriers "are trying to do things in their own economic self-interest."[10] CMSD/CReply at 2-3 (citing Coates Dep. at CX882).

Sufficient supply of safe chassis is a legitimate concern. However, Respondents do not sufficiently explain how ocean carrier control over chassis will ensure sufficient and safe supply. Respondents assert as well that "the ocean carrier Respondents own or lease the containers in which international cargo is transported and have a legitimate interest in ensuring the safe and reliable delivery of those containers. This is true for CH movements for which the carrier bears responsibility for the inland move as well as MH moves for which it does not, because the customer experience with both types of moves impacts the reputation of the ocean carrier in the eyes of the customer." CMSD/ROpp at 16. But here again, motor carriers' interests are well

[10] This quote does not disclose confidential material and is not entitled to confidential treatment.

aligned, as their reputation is similarly on the line where they have been hired to complete the delivery.

In *California Stevedore*, the Commission evaluated the reasonableness of a "practice relating to and connected with the receiving, handling, storing, or delivering of property" – an arrangement by which the Port of Stockton, a public corporation, paid certain sums of money for the exclusive right to stevedore bulk grain cargoes. 7 F.M.C. at 76, 79, 82. They found the arrangement to be "both unjust and unreasonable" and also commented on the lack of evidence concerning the justification offered by Respondents, writing: "We have as is our duty weighed and considered the meager argument offered to justify this monopolistic practice, and find it singularly lacking in weight. It seems to be primarily that the terminal facilities would be safer in hands selected by respondents (there is no *proof* of this) . . . ." 7 F.M.C. at 82-83. Commenting on the evils "likely to accompany monopoly, such as poor service and excessive costs," the Commission continued, in an accompanying footnote: "It is not significant that these evils have not been proved to actually exist yet at Stockton. Healthy competition for business which is the best known insurance against such evils has been destroyed." 7 F.M.C. at 83 & n.5. Here, the motor carrier being a captive audience for the IEP selected by the ocean carrier, rendered unable to select another chassis provider, may similarly result in the destruction of healthy competition for business.

There may be motor carriers who do not have a preference for which chassis provider is used and, in those cases, it would be reasonable and efficient to allow the ocean carriers to identify a default chassis provider. Respondents assert that ocean carriers "have a significant interest in ensuring that their customers' containers arrive timely and safely at their destination . . . even those moving under MH." CMSD/ROpp at 13. It should also be reiterated, however, that in terms of ensuring an available supply of safe chassis, motor carrier incentives would seem to be well aligned with those of ocean carriers. A motor carrier who cannot obtain a chassis cannot deliver the container to the end destination, as every container ultimately needs a chassis. *See* Coates Report at CX1542. Thus, if a motor carrier desires to use a different chassis provider, it stands to reason that this decision would be based on an assessment of chassis availability and safety in addition to other factors it sees as beneficial. Therefore, ensuring a sufficient supply of safe chassis does not justify the restraints on competition.

(b) IEPs Can Veto Choice Requests

Respondents contend that they do not control chassis choice because IEPs may separately veto choice requests. Yet, any veto right that IEPs may also possess (in addition to the ocean carriers' veto right) is an ability that the ocean carriers have provided contractually or by other agreement. The IEPs have no pre-existing right or ability to contractually bind MH truckers when those motor carriers are not themselves a party to the contract and have not consented to be bound.

Respondents argue that "the terms of chassis usage agreements which provide favorable rates to ocean carriers for chassis utilized in CH moves are the lawful result of the ocean carriers' commitment to long-term leases and usage volumes." RMSD at 12-13. But Respondents fail to reasonably explain by what right ocean carriers utilize MH volume to negotiate prices and then do not pass on to truckers the negotiated prices premised in part upon their captive volume. That

ocean carriers utilize chassis choice denials to enhance their negotiating position is acknowledged by their expert. Coates Report at CX1550. To the extent that ocean carriers are binding not only themselves, but also motor carriers – with ocean carriers passing on an obligation to use a particular IEP, yet withholding the deal's volume discount – this impacts the reasonableness of the arrangement.

The Commission has expressed concern regarding restraints placed on third parties. "If we are to discharge our regulatory obligations under section 15, we must be especially wary of any agreement which places restraints upon third parties." *Transshipment*, 10 FMC at 194. The Commission also cited to the Supreme Court's admonition that "[f]reedom allowed conference members to agree upon terms of competition subject to Board approval is limited to freedom to agree upon terms regulating competition *among themselves*." *Transshipment*, 10 FMC at 194 (emphasis added) (citing *FMB v. Isbrandtsen Co.*, 356 U.S. 481, 491, 493 (1958)).

Thus, the concern is allowing Respondents to alter the rights of motor carriers through contracts or agreements to which the motor carriers are not parties, thereby giving IEPs the right to veto motor carriers' MH choice requests. Therefore, that IEPs can also veto chassis choice requests does not justify the restraints on competition.

(c) Deference to Business Decisions

Respondents assert that the Commission should defer to commercial parties' reasonable, discretionary business decisions. CMSD/ROpp at 5 (citing *Maher Terminals, LLC v. Port Authority of New York and New Jersey* , Docket No. 08-03, 33 S.R.R. 821, 853 (FMC Dec. 17, 2014)). IMCC contends in response that Respondents have erroneously interpreted their obligations under the Shipping Act and that regulated carriers "must adopt policies that are least intrusive for the shipping public, not themselves" and that "the Commission evaluates whether the challenged conduct is 'excessive and thus unreasonable,' including by whether 'less intrusive methods' exist to satisfy a 'worthy objective' – not merely an ocean carrier's financial self-interest." CMSD/CReply at 6 (emphasis omitted) (citing *Distribution Services*, 1988 FMC LEXIS 52, at *17-18).

The Commission has given deference to the managerial decision of public ports, explaining:

> We are of the opinion that under such circumstances as currently prevail at Port Canaveral, the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of this Port, nor would it be appropriate for us to do so. . . . Clearly it is not the function of this agency to substitute its judgment for that of the Port. It is, however, our duty to direct appropriate changes upon finding that the Port's action or inaction based on its own judgment is contrary to the statutes we administer.

Agreement No. T-2598 – Port Canaveral and Luckenbach S.S., Docket No. 72-24, 17 F.M.C. 286, 297 (FMC Mar. 20, 1974).

Such deference to business decisions does not extend to permitting conduct that violates the Shipping Act. As discussed previously, this case is about whether the practices at issue violate the Shipping Act. Thus, any deference to business decisions does not justify unreasonable practices. Moreover, unlike in the *Maher* case cited or the *Port Canaveral* case above, this proceeding does not involve a public port authority. Respondents are making decisions based on their economic self-interest, which is not improper, but where those decisions harm the supply chain and violate the Shipping Act, the case law does not support finding that they are entitled to deference.

(4) More Restrictive than Necessary

Respondents do not articulate a legitimate reason why it is necessary for ocean carriers to review motor carrier requests to use other chassis providers or to have the power to prohibit motor carriers from using the chassis provider of their choice. Respondents also do not explain when or why it would be necessary and appropriate for ocean carriers to deny motor carriers the ability to utilize the chassis provider of their choice for MH.

IMCC relies on *Distribution Services* to argue that the rules are more restrictive than necessary. In *Distribution Services*, the rules at issue provided for reimbursement of the costs of transloading cargo from an ocean container into containers/trailers provided by inland carriers but stated that such costs would not be reimbursed if the transloading services were performed at the facilities of a shipper, consignee, freight forwarder, NVOCC, or ocean carrier. *Distribution Services*, 1988 FMC LEXIS 52, at *4-8. The Commission found that prevention of rebates and false billing, asserted by Respondents as justification for the rules at issue, was a "worthy objective," but held that there was insufficient proof to find that the "more intrusive" methods required by the challenged rule were necessary. *Distribution Services*, 1988 FMC LEXIS 52, at *17-18. "In order to pass muster under section 10(d)(1), a regulation or practice must be tailored to meet its intended purpose. A regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose." *Distribution Services*, 1988 FMC LEXIS 52, at *17. Respondents assert that reliance on this case is misplaced.

Respondents assert that "OCEMA and CCM's current policy is as unrestrictive as possible since it allows the ocean carrier Respondents, which are members of OCEMA, to decide what their policy as to chassis choice is to be." CMSD/ROpp at 10. But by agreeing amongst themselves that ocean carriers must approve choice requests by motor carriers, the policy is not as unrestrictive as possible for motor carriers. Respondents assert further that ocean carrier Respondents' conduct "was neither 'systematic' nor was it impermissible, insofar as sections 5.5 and 5.7 were intended to allow flexibility, a principle the Commission has emphasized when evaluating commercial relationships." CMSD/ROpp at 7. This perspective is self-focused, providing flexibility for ocean carriers but denying choice to motor carriers.

Neither IMCC nor any individual motor carrier is a party to the CCMP agreement. In the context of billing, the Commission clarified that a goal for the Detention and Demurrage Rule "'was to emphasize the importance of ocean carriers and marine terminal operator bills aligning with contractual responsibilities'" and stating that "[g]eneral contract law principles provide that one party cannot enforce a contract against another who did not assent to be bound by its terms

and conditions. This can include situations where one party attempts to bind another party with unilaterally defined terms." Notice of Inquiry – Vessel-Operating Common Carrier Definition & Application of the Term 'Merchant' in Bills of Lading, Docket No. 20-16 at 4 (Oct. 7, 2020) (citing Demurrage and Detention Rule, 85 Fed. Reg. at 29662). Although this is not a demurrage and detention case, the general principle of having contracts align with contractual responsibilities applies.

IMCC has established that Rules 5.5 and 5.7 limit the ability of motor carriers to utilize the chassis provider they prefer for MH, because their requests must be approved. If choice is denied, then motor carriers are required to use the IEP selected by the ocean carrier. This essentially makes the motor carrier a captive audience for the IEP selected by the ocean carrier and creates a mini-monopoly. In addition, this restrains competition in the IEP market, as motor carriers are limited in their ability to select other chassis providers. These rules are not narrowly tailored to ensure an efficient transportation system. By permitting the ocean carriers to veto a motor carrier's choice of chassis provider for MH, the rules go beyond what is necessary.

(5) Conclusion

IMCC has not established as a matter of law, based on the uncontested facts at this stage, that the default provision in Rule 5.5 violates the Shipping Act if the motor carrier is able to freely select the chassis provider of its choice for MH. IMCC has not established that having a default IEP, in and of itself, creates anticompetitive harm or is otherwise unreasonable. As Respondents assert, chassis must be available and utilized to move containers off the port. The assignment of a default provider where a motor carrier does not have another preference serves the interests of the shipping public by ensuring that a system is in place to efficiently assign chassis to containers. Further development of the facts could change the analysis.

The record does, however, establish that the limitations on motor carriers' ability to choose their own chassis provider for MH is unreasonable. And, the evidence from the ocean carriers who allow choice demonstrates that a less restrictive alternative is available.

Accordingly, based on the uncontested facts in the record, IMCC has established that the choice program in CCMP Rule 5.7 is more restrictive than necessary and therefore unreasonable, because it places the final decision on MH chassis provider in the hands of the regulated ocean common carrier rather than in the hands of the motor carrier who is responsible for arranging and paying for the chassis. Moreover, Respondents have not produced evidence of a legitimate justification for requiring approval of choice requests. Therefore, IMCC has met its burden of persuasion that the choice requests in Rule 5.7 for MH is unreasonable as a matter of law, based on the facts not in dispute. The next issue raised is the contractual linkage of CH and MH.

b. Contractual Linkage of CH and MH

(1) Arguments of the Parties

IMCC asserts that each "ocean carrier unjustly and unreasonably benefits from contracts with IEPs that trade lower CH rates to the ocean carrier in exchange for provisions that enhance the ability of IEPs to obtain higher MH rates and reduced MH price [competition]." CMSD at 20. IMCC contends that "the contracts award *lower* CH pricing for *lower* CH volume" so that "the

linkages are the *opposite* of 'volume discounts' by which one typically receives a lower price in exchange for more volume" to argue that "the contracts are not volume discounts, but rather cross-subsidization: ocean carriers fund undercharges for CH chassis using the overcharges for MH chassis." RMSD/COpp at 12 (emphasis in original) (footnote omitted). Stated another way, IMCC contends that "through their contracts, ocean carriers agree to restraints on competition that enhance IEPs' pricing power to increase MH rates, in exchange for lower CH rates or direct payments." RMSD/COpp at 13.

Respondents acknowledge that ocean carriers enter into a "chassis usage agreement, typically after engaging in an extensive [request for proposal ("RFP")] process with multiple IEPs, which contains language that designates the counter-party IEP as an exclusive or preferred provider of chassis under that agreement." CMSD/ROpp at 13. Respondents add that if "ocean carriers did not make contractual commitments to utilize the chassis of a particular IEP, that IEP would be less likely to provide chassis at the location in question." CMSD/ROpp at 13-14. Respondents further argue that ocean carriers "ensure adequate supplies of chassis;" have "a significant interest in ensuring that their customers' containers arrive timely and safely at their destination;" that "CH and MH volumes are not determined by the ocean carriers, but are driven by BCOs;"[11] and "MH rates are determined by the IEPs." CMSD/ROpp at 13-15.

(2) Market Impacts

There is no genuine dispute that Respondent ocean common carriers entered into chassis usage agreements providing for total chassis volumes, including both CH and MH, with CH rates calculated based on these total volumes. CSUMF ¶ 497; CSUMF/RResp ¶ 496 (responding to CSUMF ¶ 497). When Respondents structure contracts with IEPs providing for a total chassis volume, including MH volumes, and calculate CH rates based on these total volumes – or otherwise integrate or incorporate MH volumes in the course of structuring pricing with IEPs – this constitutes a contractual linkage of CH and MH. IMCC has pointed to numerous ways that such linkages may be created. CSUMF ¶ 497; *see also* CMSD at 21. The relevant market will be discussed before addressing chassis rates.

(a) Relevant Market Definition

The "definition of the appropriate market for consideration of the effect on competition of a challenged practice is the kind of antitrust-type analysis which is appropriate to cases arising under the Shipping Act standards of 'undue' preference or 'unreasonable' practice." *All Marine*, 1996 FMC LEXIS 68, at *31-32. Relevant markets require determination of the relevant geographic market and the relevant product market.

IMCC notes that at "the Presiding Officer's suggestion, the parties focused discovery on four geographic regions, Chicago, Los Angeles/Long Beach, Memphis, and Savannah" and resulting from that, "analysis of the Respondents' conduct with respect to participation in interoperable pools primarily concerns these four areas." CMSD at 5. IMCC identifies, as relevant geographic markets: (1) the region surrounding the intermodal rail facilities of Chicago, Illinois, (2) the region surrounding the port facilities at Los Angeles/Long Beach, California,

[11] This quote does not disclose confidential material and is not entitled to confidential treatment.

(3) the region surrounding the intermodal rail facilities of Memphis, Tennessee; and (4) the region surrounding the port facilities at Savannah, Georgia. CMSD at 6-7.

Regarding the relevant product market, IMCC asserts that "[i]n each of the four geographies, ocean carriers and motor carriers (and their customers) obtain chassis on a daily usage basis from pools under contracts with IEPs or at their posted rates." CMSD at 7. IMCC contends that the relevant market should be defined as daily chassis usage, and notes that it has provided two reports from an expert economist, Dr. Langenfeld, on product market definition from an antitrust perspective. CMSD at 8 n.5. IMCC adds "[a]lthough defining a market is not strictly necessary to evaluate the effects of Respondents' conduct under the Shipping Act, Dr. Langenfeld has confirmed the appropriateness of daily usage chassis as a relevant product market and the provision of daily-rate chassis for MH movements as a relevant submarket." CMSD at 8 n.5. IMCC further asserts in its proposed statement of facts that chassis "supplied by IEPs on a daily usage basis is a relevant product market because that is the basis by which both ocean carriers and motor carriers (and their customers) obtain chassis from chassis pools. Chassis at daily usage prices are obtained either through contracts with IEPs or at the IEP's posted daily prices. CSUMF ¶ 682.

Respondents contend that the "fact that discovery was ultimately limited to certain locations – at IMCC's vehement insistence – does not mean those locations are appropriate proxies for every port and location in the United States" and further that "the record plainly establishes that there are significant geographic and market differences in the many different chassis supply regions in the United States." CMSD/ROpp at 28. Thus, Respondents do not contest these four geographic markets but rather assert that the four markets may not be indicative of other geographic locations. This decision focuses only on these four geographic markets, so if other markets have other relevant justifications or factors, those can be raised at a later date.

Respondents do not directly address the relevant product market in their motion for summary decision briefing, nor in their proposed statements of material facts. Respondents, however, assert in their response to IMCC's proposed material facts that the relevant product market is in dispute, citing to the May 27, 2022, Reitzes Declaration. CSUMF/RResp ¶ 681 (responding to CSUMF ¶ 682). IMCC asserts in response that there is no dispute of material fact regarding the relevant product market, adding that "Respondents cite solely to an untimely expert declaration as support for their contention that 'the relevant product market is in dispute.'" CSUMF/CReply ¶ 682. It is not necessary at this stage, however, to make a determination regarding the relevant product market. This issue can be further developed by the parties when appropriate.

(b) Chassis Rates

IMCC asserts that "each ocean carrier has contracts whereby the ocean carrier receives lower CH rates in exchange for higher or more predictable MH volumes" and that ocean carriers' linkage of MH volumes with CH prices unreasonably restrains competition. CMSD at 20-21. Respondents, in contrast, contend that this "is not an issue of cross-subsidizing as alleged by Complainant. Rather, it is a pragmatic system of securing sufficient chassis to meet the needs of ocean carrier Respondents' customers" and arguing that "any price differentials between CH and

MH chassis usage rates are attributable to long term lease commitments and volume discounts." CMSD/ROpp at 8, 13 n.7. Whether it is labeled as cross-subsidizing or "loss of volume" discounts, the chassis usage agreements between ocean carriers and IEPs set CH rates based on total chassis volume, including both CH and MH. This ensures that any benefits of long term lease commitments and volume discounts go to the ocean carrier and not the motor carrier paying for the MH shipments.

Ocean carriers assert that they enter into "a chassis usage agreement, typically after engaging in an extensive RFP process with multiple IEPs, which contains language that designates the counter-party IEP as an exclusive or preferred provider of chassis under that agreement." CMSD/ROpp at 13. Yet after such lengthy RFPs, Respondents claim that any "incentives are largely ignored by and do not influence the behavior of the ocean carrier Respondents." CMSD/ROpp at 2, *see also* CMSD/ROpp at 14.

IMCC does not allege that ocean carriers set MH prices, but rather that "ocean carriers restrict MH chassis choice, which gives pricing power to IEPs because motor carriers and BCOs have no reasonable alternatives to which to turn." CMSD/CReply at 9. Respondents argue that they "play no role in establishing the charges assessed for chassis used in MH moves;" that there "is no dispute that MH rates are determined by the IEPs;" and that "ocean carrier Respondents do not establish, discuss, or agree on chassis usage charges for MH moves – that is done exclusively by the IEPs without ocean carrier involvement." CMSD/ROpp at 2, 15, 24. To the extent that ocean carriers are binding motor carriers to a particular IEP, and yet are playing no role in establishing the chassis charges to be assessed, motor carriers have little hope of any negotiating power, and likewise would be unable to commit to the same "long-term leases and usage volumes," to which Respondents contend they owe their "favorable rates." *See* RMSD at 12-13; *see also* CMSD/ROpp at 8 (referring to "Respondents' evidence that any price differentials between CH and MH chassis usage rates are attributable to long term lease commitments and volume discounts.")

Respondents conclude this section by arguing that "motor carriers can purchase chassis, enter into long term leases of chassis and/or can negotiate chassis usage agreements with IEPs providing for lower daily rates based on volume usage." CMSD/ROpp at 15-16; Coates Report at CX1538; Coates Rebuttal Report at CX1690-91. However, it is not cost effective for motor carriers to own or long-term lease chassis if they pick up a mix of CH and MH shipments as ocean carriers may not compensate them for the chassis for CH containers and there may be additional costs and delays, for example from flips. And, without bargaining power, motor carriers are unlikely to be able to negotiate volume discounts from IEPs.

Respondents cite to their expert's rebuttal report, which argues that IEPs compete for MH business, relying on the increasing number of choice requests, and asserts: "Without the prospect of losing motor carrier business to a competitor, the default IEP would have no incentive to negotiate a lower rate for MH moves. The fact that IEPs enter into such negotiations and subsequent contracts is evidence that there is competition among the IEPs for the motor carriers'

MH business."[12] Coates Rebuttal Report at CX1691. This logic supports IMCC's argument that the ability to select a different chassis provider is critical to ensure price competition.

Thus, based on the undisputed evidence in the record, when ocean carriers link CH to MH, often linking CH price in part to MH volume, this limits the motor carriers' ability to negotiate volume discounts for itself and therefore must be justified by Respondents.

(3) Justifications

There is no genuine dispute that ocean carrier contracts, which set CH pricing, also include MH volumes, with Respondents admitting that ocean carriers typically enter into a chassis usage agreement which designates IEPs as exclusive or preferred providers of chassis. CMSD/ROpp at 13. To the extent that ocean carriers choose to link CH with MH, thereby limiting the ability of motor carriers to select the chassis of their choice and impacting the market for MH chassis, those practices must be justified. It is noted that Evergreen has a different model which is addressed separately below.

Respondents justify these practices by arguing that ocean carriers "ensure adequate supplies of chassis" and have "a significant interest in ensuring that their customers' containers arrive timely and safely at their destination." CMSD/ROpp at 13. However, as previously discussed, motor carriers also have an interest in ensuring a sufficient supply of safe chassis. Moreover, motor carriers have the responsibility to arrange for MH chassis under port-to-port movements. In addition, contractually linking CH with MH is not narrowly tailored to ensure a sufficient supply of safe chassis.

Respondents also contend that "CH and MH volumes are not determined by the ocean carriers, but are driven by BCOs," that "MH rates are determined by the IEPs," and that any incentives in chassis usage agreements do not influence the behavior of the ocean carriers. CMSD/ROpp at 2, 14 n.9, 14-15. However, the fact that MH volumes are driven by beneficial cargo owners similarly argues against permitting a contractual linkage as it denies beneficial cargo owners the financial benefit of higher potential volumes. Moreover, by contracting for an exclusive chassis provider, the ocean carrier is financially rewarded for creating and providing to its selected IEP a captive, monopolistic market and the motor carrier is denied the opportunity to utilize the chassis provider of its choice for MH. In situations where the ocean carrier only contracts for a preferred provider but allows the motor carrier to opt-out and select a different chassis provider, without limitations, the market impacts are more limited.

(4) Conclusion

Based on the facts not in dispute, IMCC has established that typically, an ocean carrier contract links CH prices with MH volume to establish an exclusive or preferred/default chassis provider, creating a mini-monopoly. Respondents have not provided sufficient justification for contractually obligating motor carriers, who have the responsibility for arranging and paying for MH movements, to utilize the IEP selected by the ocean carrier for MH, especially as the motor carrier is not a party to that agreement. Where an exclusive IEP arrangement has been

[12] This quote does not disclose confidential material and is not entitled to confidential treatment.

contractually created by the ocean carrier, and where this prevents a motor carrier from using a chassis at a lower rate from an alternate chassis provider of its choice, the motor carrier is financially harmed and the market for chassis is restrained. Motor carriers are responsible for arranging and paying for chassis in MH, and motor carriers should derive any benefit from MH volume. However, where the motor carrier does not have a preference for the MH chassis provider, contracts which only set up a preferred, or default, provider may not be unreasonable, as long as there is an option exclusively within the control of the motor carrier to opt-out of using the default IEP. Therefore, IMCC has established that linking CH to MH is unreasonable where the contract creates an exclusive arrangement limiting the motor carrier's ability to use the chassis provider of its choice for MH.

At this stage of the proceeding, it cannot be determined which Respondents may have violated this provision in particular markets as the factual basis for these determinations is disputed. However, it appears that the Respondent ocean carriers regularly link CH with MH. IMCC has established as a matter of law, based on the facts not in dispute, that the contractual linkage of CH prices and MH volume is unreasonable in the four markets currently at issue. The next argument raised, which is related to this issue, is the designation of an IEP for MH in chassis usage agreements.

c. Designation of IEP for MH in Chassis Usage Agreements

The parties' arguments in this section overlap significantly with their arguments in the previous section. IMCC asserts that ocean carriers "steer MH chassis usage to the IEP supplying chassis for CH movements by designating that IEP for MH movements" which results in going beyond what is necessary to ensure the supply chain has sufficient MH chassis. CMSD at 22.

Respondents contend that ocean carriers "have a legitimate interest in ensuring the safe and reliable delivery of those containers" because they "own or lease the containers in which international cargo is transported," and because MH moves impact "the reputation of the ocean carrier in the eyes of the customer." CMSD/ROpp at 16. Respondents argue that the Commission "gives deference to the parties' exercise of reasonable business discretion" and that "IMCC has failed to meet its burden of proof and to overcome this deference." CMSD/ROpp at 17.

As established in the section above, ocean common carriers enter into chassis usage agreements which frequently identify an exclusive or preferred/default chassis provider. This section focuses on the designation of an IEP as opposed to the linkage of CH and MH. Similar to the analysis in the section on CCM pools, such exclusive or preferred designations limit competition and must be justified by Respondents.

Respondents contend that they have safety and reputational interests that justify these provisions. CMSD/ROpp at 16. While ocean carriers may have an interest in safe and reliable delivery of containers, motor carriers also have an interest in safe chassis. Moreover, that interest could be addressed in other ways, for example by limiting use of chassis in disrepair. It is also not clear that ocean carriers would have a reputational interest in the chassis utilized in MH movements if motor carriers were able to freely select the chassis.

Ocean carriers cannot require motor carriers to utilize specific chassis providers for MH, where the motor carrier is responsible for arranging and paying for the MH shipment, especially as the motor carrier is not a party to the agreement between the ocean carrier and IEP. Agreements for a default provider may be acceptable, however, as long as the alternate chassis provider of the motor carrier's choice can be utilized without limitation or approval when desired by the motor carrier.

As discussed earlier, based on the uncontested facts in the record, IMCC has not established that having a preferred or default chassis provider is unreasonable as long as the motor carrier is not required to use the preferred IEP (i.e. the motor carrier can select from any available pools or chassis providers with no restrictions imposed by virtue of elections made by the ocean carrier). Therefore, IMCC's motion for summary decision that preferred or default IEPs for MH movements are unreasonable is denied. As discussed above, however, exclusive arrangements or limitations that prevent motor carriers from selecting the chassis provider of their choice for MH are unreasonable and violate that element of section 41102(c).

d. Designation of Proprietary Chassis Pools and Withdrawal from Interoperable Chassis Pools

IMCC alleges that interoperable pools avoid significant hidden costs including: chassis splits, chassis flips, additional demurrage and detention, longer terminal wait times, repositioning, additional equipment inventory needs, limits on motor carrier paid trips and efficiency, reduced rail efficiency, and increased BCO inventory needs. CMSD at 8-9. IMCC argues that decisions to withdraw from existing interoperable chassis pools are unjust and unreasonable and that by designating a proprietary pool for MH movements, the ocean carrier grants the IEP pricing power for that ocean carrier's MH movements. CMSD at 22. IMCC contends, as well, that because proprietary pools are inherently non-interoperable, none of the benefits of interoperability accrue to the supply chain. CMSD at 22-25. IMCC adds that these "arrangements not only prevent chassis interoperability and choice, but also reduce the number of interoperable chassis available in CCM pools in their regions. When an ocean carrier signs a contract to use the proprietary pool, the IEP then withdraws those respective chassis from the CCM pool. When a CCM pool no longer contains sufficient chassis to service the remaining ocean carriers using the pool, the pool collapses. This dynamic caused the COCP to cease operations in 2020." CMSD at 12.

Respondents contend that IEPs, not ocean carriers, join or withdraw from interoperable pools; IMCC must establish that the chassis provision regulations and practices are unreasonable; and, the Commission cannot require IEPs, over which it has no jurisdiction, to contribute their assets to interoperable chassis pools to benefit motor carriers. CMSD/ROpp at 18-20.

The parties agree that "fully interoperable" or "gray" chassis pools are chassis pools managed by a single entity in which equipment contributed by multiple equipment providers are commingled and a "gray chassis pool does not require matching a specific equipment provider's chassis with a particular ocean carrier's containers." JSF ¶¶ 193-194. Another business model is a proprietary pool, a single-provider pool which is not interoperable with other pools, therefore allowing for negotiation only with one proprietary vendor, versus the possibility of negotiating with multiple vendors in a gray pool like CCM. CX1155 (CMA Dep.); CSUMF ¶ 525.

Regarding interoperability, Commissioner Dye noted in a May 22, 2019, statement: "Today, shipping lines, cargo owners or trucking companies rent the equipment – often obtaining it through chassis pools of various types – including, for example, 'interoperable' or gray pools that offer chassis from multiple providers." *See* www.fmc.gov/statement-of-dye-stb-demurrage. IMCC in its complaint referred to "chassis pools that are interoperable (from the standpoint of usage with the containers of multiple ocean carriers)" and point to the Memphis Team conclusion that the essential qualities of a high performing gray chassis pool include: "1. Adequate supply of interoperable chassis . . . ." Complaint at 19-20. Respondents have also referred to interoperability as meaning that a motor carrier can use any chassis in the pool to transport the container of any container line. *See, e.g.*, Coates Rebuttal at CX1693; JSF ¶ 193.

As discussed above, based on facts not in dispute, Respondents violate the Shipping Act when they restrict the ability of motor carriers to utilize the chassis provider of their choice for MH, when the motor carrier is paying. Therefore, the remaining issue here is whether it is unreasonable for ocean carriers to benefit from IEPs withdrawing from interoperable pools for CH. Because ocean carriers are responsible for obtaining and paying for chassis for CH, they have greater latitude to determine the best business model to utilize. Moreover, the evidence shows that ocean carriers utilize different business models in different geographic regions and at different times, adjusting to changing market conditions. There is value in allowing ocean carriers to innovate and allow market forces to guide their approach, as long as unreasonable practices are not adopted.

Respondents do not assert that non-interoperable pools are more efficient than interoperable pools, although they do state that "there are 'different operational situations where the actual dynamics are going to either favor or not favor interoperable pools.'" CMSD/ROpp at 19 (citing Coates Dep, APP2136-37). However, the focus of this proceeding is not determining the most efficient model of chassis provision but rather whether the Respondents' conduct is unreasonable and violates the Shipping Act.

"IMCC seeks an order for ocean carriers to cease and desist from ongoing withdrawals from interoperable CCM pools, such as the MCCP," which, it argues, is different from requiring ocean carriers, or IEPs, to construct and operate interoperable pools. CMSD/CReply at 12 (emphasis omitted). The Commission could order Respondents to cease and desist withdrawing from interoperable CCM pools if such withdrawals violate the Shipping Act. Respondents are correct that IMCC has the burden of proof to establish that withdrawing from interoperable pools violates the Shipping Act.

In its motion for summary decision, IMCC asserts that the supply chain benefits from interoperability are being lost, stating that "in pursuit of lower CH chassis pricing, Respondents have willingly agreed to their IEPs' withdrawal of chassis from interoperable pools – depriving the American supply chain of the benefits of those gray pools and limiting the throughput of containers moving along the supply chain." CMSD at 2. IMCC asserts that the benefits of interoperability include: fewer chassis splits, fewer chassis flips, reduced demurrage and detention, shorter terminal wait times, less repositioning, less equipment inventory needed, increased motor carrier and rail efficiency, and less BCO inventory needed. CMSD at 8-9. The Memphis Supply Chain Innovation Team White Paper similarly identified that, due to non-interoperability, the "result is handcuffed chassis usage, which requires shippers and truckers to

use a specific color chassis when the train arrives" such that "[s]upply is restricted and held captive to ocean carrier alignments with chassis providers that they have no part in the selection process, yet pay the cost. The result is rising costs and wasted time. Access is limited and supply is an on-going problem." White Paper, *A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chain Velocity*, ("Memphis White Paper"), at 3.[13]

IMCC argues that in the Chicago region, the interoperable COCP collapsed, depriving the entire region of the benefits of the interoperable pool. CMSD at 2, 22-23. IMCC contends that the Memphis geographic region could be next. CMSD at 2, 23. IMCC asserts that "these withdrawal decisions achieve short-term reductions in CH chassis prices and shift the burden of non-interoperability to others in the supply chain." CMSD at 24. Indeed, IMCC presents compelling evidence that ocean carriers receive discounted rates in return for withdrawing from interoperative pools and entering proprietary pools. This is rational and in the economic self-interest of both the ocean carrier, which receives a discounted rate, and the IEP, which ensures greater utilizations of their chassis. However, it may have a negative impact on competition and potentially on prices for motor carriers and the shipping public.

Essentially, interoperable pools are joint ventures between competing IEPs authorized by competing ocean carriers. The Supreme Court has found that withdrawing from a cooperative joint venture may violate antitrust laws. In *Aspen Skiing*, the Court upheld a jury verdict for the plaintiff that a dominant firm operating three of four mountain ski areas in Aspen, Colorado, had violated the Sherman Act by refusing to continue cooperating with its smaller rival in offering a combined four-mountain ski pass. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603-04, 608-611 (1985). The Supreme Court explained in *Trinko* that the *Aspen Skiing* Court "found significance in the defendant's decision to cease participation in a cooperative venture," particularly where the defendant's "unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Verizon Communications, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (emphasis in original) (citing *Aspen Skiing*, 472 U.S. at 608, 610-11)). Moreover, "the defendant's unwillingness to renew the [joint] ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Verizon Communications*, 540 U.S. at 409. The *Aspen Skiing* court considered the impact on consumers and competition and noted that in other markets, the defendant participated in interchangeable lift tickets, undermining the stated justifications. *Aspen Skiing*, 472 U.S. at 605, 608-09. The United States Department of Justice ("DOJ"), in a recent filing, similarly stated that "under certain circumstances, ceasing a profitable prior course of dealing with a shipper could be an indicator of unreasonableness." NPR – Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-24, Comments of the DOJ at 5 (Oct. 21, 2022).

As discussed above, the Commission has long had the responsibility of ensuring an efficient transportation system for ocean commerce. When this case was filed, one of the purposes of the Shipping Act was to "provide an efficient and economic transportation system." 46 U.S.C. § 40101(2). The Ocean Shipping Reform Act of 2022 modified this to "ensure an efficient, competitive, and economical transportation system." Pub. L. 117-146, §2, 136 Stat.

[13] Available at: www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf.

1272 (June 16, 2022). The D.C. Circuit recognized the Commission's power to reject unreasonable practices in upholding the Commission's truck detention rule at the Port of New York and New Jersey. "Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned." *American Export-Isbrandtsen Lines*, 444 F.2d at 828. The power conferred "is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system." *American Export-Isbrandtsen Lines*, 444 F.2d at 829.

In *Puerto Rico Port Authority*, where the D.C. Circuit set aside two Commission decisions that had found Shipping Act violations with respect to crane-sharing agreements, the Court considered the requirements of efficient port management, noting that they may change over time.

> As we noted above, in early years, when adequate facilities were limited, efficient port management, in the Ports Authority's judgment, required crane sharing. Now, with a number of berths at Puerto Nuevo remaining under-developed and unprofitable despite huge investments, that sharing is no longer necessary. Indeed, by minimizing the carrier's incentive to improve a berth suitable for its own operations, the continued requirement of crane sharing may inhibit the development of the Port of San Juan.

Puerto Rico Port Authority, 642 F.2d at 485.

It is therefore clear that while the Commission may require the sharing of facilities, those decisions are heavily fact dependent. IMCC presents a strong argument that interoperable chassis pools are more efficient and that ocean carriers agree to withdraw from interoperable chassis pools in exchange for their own financial benefits. *See, e.g.*, CSUMF ¶¶ 563-66, 569-577, 598-605.[14]

In this proceeding, the facts necessary to determine the reasonableness of decisions to withdraw from interoperable pools are disputed. Therefore, it cannot be determined by summary decision whether the decisions to withdraw from interoperable pools in the four geographic regions at issue are unreasonable. However, one of the regions at issue here is the Memphis area, and IMCC points specifically to this region, asserting that a "collapse of the MCCP would increase costs for all supply chain stakeholders in the region." CMSD at 23.

The Commission's Memphis Supply Chain Innovation Team found that the "current chassis provisioning model is broken and needs immediate address to improve supply chain velocity" and recommended a "gray chassis pool with the following critical elements to improve velocity and fluidity in moving international containers in Memphis and the Mid-south: 1. Adequate supply of chassis/Interoperability; 2. Quality and Safe chassis; 3. Fair Access to

[14] Respondents' argument that, to the extent an agreement was executed, the "discussions and negotiations are merged in the agreement and are not admissible," *see, e.g.*, CSUMF/RResp ¶¶ 562-564, is not supported by legal argument and is not adopted. Both the negotiations and the agreement are relevant and admissible.

chassis (Choice!); [and] 4. Accountability of chassis supply by a single manager." Memphis White Paper at 1. If this case progresses at this level, the parties may be required to submit final briefing on Memphis as the next step, prior to conducting any additional discovery on other geographic regions.

Respondents also assert that IMCC must establish that the chassis provision model is unreasonable and the Commission cannot require IEPs, over which it has no jurisdiction, to contribute their assets to interoperable chassis pools to benefit a second unregulated entity, motor carriers. CMSD/ROpp at 18-20. It appears that IMCC may have sufficient evidence to establish that withdrawing from interoperable pools is unreasonable. The Commission can require conduct that conforms to the Shipping Act from regulated entities, such as Respondents. Moreover, the decision in this proceeding is not based on motive but rather whether specific practices violate the Shipping Act.

Accordingly, at this stage of the proceeding, IMCC's motion for summary decision that withdrawing from interoperable pools is unreasonable cannot be granted. However, as a matter of law, the Commission has the power to make such a determination, may consider what chassis system would be most efficient, and could require Respondents to continue to participate in interoperable chassis pools if there is sufficient evidence in the record. Because the factual basis for these determinations is disputed, such a decision would be premature at this stage. The next question raised is about how IEPs are utilized at one of the geographic regions at issue, the ports of Los Angeles and Long Beach.

e. MH Chassis in the Pool of Pools

At the Pool of Pools ("POP"), established by DCLI, TRAC Intermodal, and Flexi-Van at the California ports at Los Angeles and Long Beach, chassis owned by the three IEPs can be used on an interoperable basis. JSF ¶ 195. Usage of chassis in the POP is assigned to the IEP that has a contractual relationship with the ocean carrier whose container, or "box," is being moved. JSF ¶ 197; CX1700 ¶ 6; CX1702 ¶ 6; CX1704 ¶ 6.

IMCC asserts that "current POP rules do not allow the motor carrier or BCO to exercise chassis choice in MH movements" so that "ocean carrier agreements to obtain chassis from the POP IEPs are unjust and unreasonable because ocean carriers are taking advantage of lower CH rates and the benefits of interoperability in a more restrictive manner than is necessary." CMSD at 25-26.

Respondents contend that "rules governing the operation of the Pool of Pools are established and enforced by the IEPs that operate the Pools of Pools;" that "when performing MH moves, no motor carrier is required to use a chassis from the Pool of Pools;" and that "IEPs secured a Business [R]eview Letter from the DOJ with respect to the operation of the Pool of Pools prior to initiating operations." CMSD/ROpp at 20-21. Respondents further contend that ocean carriers have "rightly prioritized their interests in securing an adequate chassis supply from the Pool of Pools at competitive prices in order to support the interests of the shipping public and legitimate business interests that have been historically recognized by the FMC" and the "IMCC has not met its burden here because it has failed to demonstrate – and has not even

alleged – that any particular ocean carrier conduct is unreasonable or unjust as it relates to the Pool of Pools." CMSD/ROpp at 22.

As of August 20, 2020, the POP website stated the following:

> Prior to the POP, the operation of multiple independent chassis pools in Los Angeles and Long Beach created situations where chassis in different pools were segregated at facilities for use only by certain user bases, and returnable only to a fraction of the facilities otherwise available to receive chassis. These inefficiencies often resulted in lost time and revenue to a motor carrier, duplicative repositioning, and confusion on terminals and rail ramps. The "gray fleet" that is the POP has smoothed the impacts to chassis operations that would have otherwise occurred in the ever-changing landscape of ocean carrier alliances and terminal operations, increases overall efficiency and availability, and significantly reduces chassis splits.

Pool of Pools, About Us, available at: web.archive.org/web/20200820222149/http://www.pop-lalb.com; JSF ¶ 196.

The impact of the business review letter and the box rules will each be discussed.

(1) Business Review Letter

The DOJ issued a business review letter to Flexi-Van Leasing, Inc. ("FVLI") and Direct Chassis-Link, Inc. ("DCLI") with respect to the POP. JSF ¶ 196. The 2014 DOJ business review letter states that it is based upon the following representations made by FVLI and DCLI to the DOJ:

> The parties propose to enter into the Chassis Use Agreement in order to establish a "gray" chassis concept. The gray chassis concept extends benefits associated with individual pools by allowing the interchange of chassis across multiple pools, which encompasses several terminals, container yards, rail ramps and other locations within the greater LA/LB port complex. You represent that the increased flexibility created by the interchangeability will enhance customer service, improve chassis productivity and respond to the desire of LA/LB port authorities to achieve better overall utilization of the region's chassis fleets. **You represent that after a period of initial implementation, the parties intend to permit open participation by any other pools and third parties in the LA/LB port complex**.
>
> The proposed agreement would allow users of any of the pools managed by FVLI or DCLI to interchange chassis among each others' pools. Pursuant to this arrangement, a chassis user could pick up a chassis from one of the DCLI-managed pool start/stop locations and eventually return it to one of the FVLI-managed start/stop locations, and vice versa.
>
> You represent that the parties will continue to (a) manage their respective pools; (b) independently establish their published merchant haulage rates for motor

> carriers in the region; (c) compete openly with one another and other chassis providers for steamship line customers that desire to participate in the gray chassis pool; and (d) negotiate independently with other users in the region for access to chassis.

DOJ BRL, available at: www.justice.gov/atr/response-flexi-van-leasing-inc-and-direct-chassislink-inc-request-business-review (emphasis added) (cited in Complainant's Memorandum of Law in Opposition to Motion to Dismiss at 27 n.9); JSF ¶ 196.

The parties represented to the DOJ that the POP would have "open participation by any other pools and third parties in the LA/LB port complex;" would "compete openly with one another and other chassis providers;" and would "negotiate independently with other users in the region for access to chassis." DOJ BRL at 2. If these policies were in place, IMCC's allegations regarding the POP may not have been brought. Because this is not the policy, the DOJ business review letter does not apply to the POP as implemented in the eight years since DOJ issued its business review letter. *See, e.g.*, CX461-62 (Tock/CCM depo). Moreover, the DOJ was addressing individual IEPs whereas this decision is focused on the practices of Respondents which are entities regulated by the Commission and bound by the Shipping Act.

(2) POP Box Rules

The parties do not sufficiently explain how the POP box rules work in their briefs. However, from reviewing the evidence presented, it appears that in the LA/LB region, the POP is the exclusive chassis provider, which bills MH at the rates set by the IEP selected by the ocean carrier's container, or "box," which is being transported. Therefore, if a motor carrier is using a POP chassis, the motor carrier does not have a choice of which chassis provider will bill it and the motor carrier must ultimately accede to the rate imposed by whichever IEP has contracted with the ocean carrier. CX663; APP1085; CX4102; CX1540-43.

The parties agree on how the POP operates. JSF ¶¶ 195-197. Pursuant to the undisputed facts, motor carriers are required to pay the IEP selected by the ocean carrier, even for MH shipments where the motor carrier is being billed. CX1701 ¶ 6; CX1703 ¶ 6; CX1705 ¶ 6. Moreover, common carriers receive discounts based on the volume of MH shipments, but those discounts are not passed on to the motor carrier. CX1540-43. Rather, the motor carrier is a captive audience which must pay the rate determined by the IEP selected by the ocean carrier, even though the motor carrier is not a party to that agreement. CX1701 ¶ 6; CX1703 ¶ 6; CX1705 ¶ 6.

Respondents contend that the POP establishes and enforces its own rules. However, ocean carriers select an IEP with full knowledge that the motor carrier will not be able to change that election, and therefore ocean carriers are explicitly committing both MH volumes and CH volumes, resulting in their ultimate CH pricing. They are thus benefiting from lower CH prices due, in part, to MH volumes.

Because the POP does not allow choice and is not operating consistent with the "open participation" it promised to the DOJ, it is restricting competition for MH. The POP is only able to operate in this manner because of the consent of ocean carriers and the contracts that ocean

carriers sign with it. The Commission may require ocean carriers, as regulated entities, not to participate in contracts which undermine the efficient flow of international ocean commerce. Ocean carriers, through selecting an IEP for themselves in the POP, may not obligate motor carriers to utilize the same IEP for MH shipments. Motor carriers transporting MH shipments in LA/LB should have the right to select the chassis provider of their choice.

That is not to say that the ocean carriers may not participate in the POP at all. But ocean carriers may not deny, or benefit from an IEP denying, motor carriers the free choice of chassis provider that ocean carriers themselves have available – and thereby obtain the benefits from that captive MH volume in the contracts that they sign, while motor carriers are left with no ability to select the chassis provider of their choice from within the POP, and no real negotiating leverage, when all involved understand that motor carriers are bound by the ocean carriers' selected IEP even though the motor carriers are not party to the ocean carriers' contracts with the POP IEPs.

Respondents may address this through working with the POP to allow for motor carrier selection of an IEP, as is allowed for ocean carriers. But this is not the only path open to Respondents. Respondents could themselves not make an election of an IEP in the POP, while it remains impossible to sever the ocean carrier's election in CH from the motor carrier's election in MH. Or, Respondents could consider seeking a contractual arrangement that fully includes both the motor carrier and the IEP. Or, in the vein of Respondents' own argument, if "no motor carrier is required to use a chassis from the Pool of Pools" then it would seem to follow that no ocean carrier is required to use a chassis from the Pool of Pools. CMSD/ROpp at 20.

Respondents also contend that under the POP rules, motor carriers could bring their own chassis, in which case they would not be charged by the ocean carrier's IEP when picking up the MH container. CMSD/ROpp at 20-21. In addition to all of the factors addressed earlier in this decision, there are a range of logistical considerations making this a sub-optimal choice for motor carriers. As one example, if the motor carrier brings its own chassis and then ends up picking up a CH container, the ocean carrier generally will not pay the motor carrier for the chassis, as ocean carriers typically contract away their ability to pay for chassis from any providers other than the exclusive IEP. *See, e.g.,* CX4103; CX1286-87. For motor carriers, therefore, it is typically not cost effective to bring one's own chassis, because they may end up picking up a CH container or may want to pick up a CH container after delivering a container, among other logistical inefficiencies resulting from a motor carrier bringing its own chassis. CX251-53.

Accordingly, IMCC's motion for summary decision that ocean carrier practices regarding the Pool of Pools are unjust and unreasonable is granted. Ocean carrier agreements to obtain chassis from the POP IEPs are unjust and unreasonable to the extent that ocean carriers are taking advantage of lower CH rates and the benefits of interoperability in a more restrictive manner than is necessary. Respondent ocean carriers shall not take any action which limits a motor carriers' ability to utilize the chassis provider of their choice for MH. As requested by IMCC, Respondent ocean carriers shall not extend or continue their contracts with an IEP in the POP while motor carriers cannot unilaterally elect a different IEP of their choice for MH. Having addressed the parties' reasonableness arguments, the other elements of a section 41102(c) claim are addressed next.

D. Other Section 41102(c) Elements, including Proximate Cause

The parties' arguments regarding proximate cause overlap with their arguments regarding the appropriate remedy. This section will address the 41102(c) elements, including proximate cause. The separate issue of remedy will be addressed later.

Section 41102(c) requires the following elements: (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.

Respondents are ocean common carriers or associations of common carriers which are regulated entities. JSF ¶¶ 3, 14, 25, 42, 58, 72, 87, 102, 117, 132, 148, 162, 176. The practices at issue are occurring on a normal, customary, and continuous basis for the vast majority of shipments which arrive on container ships. *See, e.g.*, JSF ¶¶ 14, 16, 20, 24, 27, 41, 44, 57, 60, 71, 74, 86, 89, 101, 104, 116, 119, 133, 135, 147, 161 164, 175, 178, 195-197, 207-319. The practices are related to the receiving and delivering of property as chassis are used to transport shipments to and from United States ports. *See, e.g.*, JSF ¶¶ 45-50, 61-66, 75-81, 90-95, 105-110, 120-126, 136-141, 150-156, 165-170, 179-184. These three elements are not contested on the basis of facts genuinely in dispute. The issue of whether specific practices are unjust or unreasonable has been addressed above and some of the practices at issue are found to be unreasonable. The final element, then, is whether the practice or regulations at issue are the proximate cause of the claimed loss.

IMCC alleges that Respondents' conduct forces motor carriers and their customers to pay higher prices for MH chassis; Respondents' conduct harms the prompt handling of cargo; and Respondents' violations proximately caused motor carriers harm, and are occurring on a normal, customary, and continuous basis. CMSD at 26, 28, 29; *see also* RMSD/COpp at 19-21. Respondents contend that IMCC failed to provide evidence that any cargo owner or other motor carrier customer has suffered economic harm; IMCC failed to carry its burden to show that Respondents' practices have proximately caused harm to motor carriers or to the shipping public; IMCC offers no evidence of any causal relationship between the CH usage rates and the MH usage rates; and by focusing solely on MH, IMCC neglects to consider the benefit of the highly competitive CH market to transport users. RMSD at 25-26; CMSD/ROpp at 10, 22-25.

"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." *TCW v. Evergreen*, 2022 FMC LEXIS 589, at *16 (citing *In Re Vehicle Carrier Services*, Docket No. 16-01, 1 F.M.C. 2d 440, 446 (FMC Oct. 21, 2019)). Therefore, if motor carriers paid for MH chassis, even if that cost was passed on to the shipping public, proximate cause is established.

Moreover, as discussed above, the practices found to be unreasonable are CCMP Operating Rules which limit motor carrier choice of chassis providers for MH; the contractual linkage of CH price with MH volume; the designation of IEPs by Respondent ocean carriers for MH when motor carriers cannot unilaterally select a chassis provider of their choice; and ocean

carrier designation of an IEP in the POP at the ports of Los Angeles and Long Beach, while such designation cannot be altered by motor carriers for MH. The harm is not merely the financial impacts on IMCC members, which have not been quantified and are disputed at this point, but also harms to competition in the chassis market and harms to the efficiency of the transportation system – harms caused by the practices at issue. Therefore, for these practices, IMCC has established proximate cause.

E. Conclusions and Remedy

Based on legal precedent and the material facts not in dispute, IMCC's motion for summary decision is **GRANTED IN PART AND DENIED IN PART**. Respondents' motion for summary decision is **DENIED**. Issues that could not be determined by summary decision will be resolved as this case proceeds. However, the parties will be given an opportunity to appeal this decision as a whole prior to determining next steps.

IMCC asserts that at the "relief phase, IMCC will seek to tailor the injunction to allow all parties enough time to construct a POP that allows MH chassis choice;" that a "cease-and-desist order will be necessary to prevent Respondents' ongoing violations of the Shipping Act, even if they voluntarily cease particular acts because 'there is a reasonable likelihood that [Respondents] would continue to violate the Shipping Act without' one;" and that on this motion, "the Presiding Officer is not required to determine specific relief. Rather, if the Presiding Officer finds liability, the parties will brief the proper remedy for the Initial Decision." CMSD at 26 n. 18, 30. IMCC states in its opposition to Respondents' motion that it "seeks only cease-and-desist relief, and so the Presiding Officer need not resolve any factual disputes as to the amount of damages." RMSD/COpp at 20; *see also* CMSD/CReply at 4.

Respondents contend that IMCC seeks relief that cannot be granted and/or is unjustified, arguing that requiring ocean carriers and IEPs to provide chassis through interoperable pools that offer choice for MH movements is beyond the authority of the Commission; Congress "eliminated the Commission's authority to determine, prescribe, and order enforcement of a just and reasonable regulation or practice;" the Commission lacks authority to require such practices from entities that are not subject to the Shipping Act; IMCC's requested relief goes beyond the scope of the record and these four geographic regions; and bifurcation of the remedy is not appropriate in this case. CMSD/ROpp at 26-29; *see also* RMSD/RReply at 10-11.

It is not clear whether IMCC intends to seek reparations at a later date or if all it would be seeking in this proceeding is a cease-and-desist order. There is not sufficient evidence in the record to award reparations at this stage of the proceeding. Whether reparations are appropriate can be addressed later if the issue is properly raised. At a later date, the parties can further address the relevant arguments, including Respondents' assertion that there is no financial harm as the motor carriers mark up the chassis charges to customers.

"Under Commission precedent, a cease-and-desist order may be issued where there is a violation of the Shipping Act." *TCW v. Evergreen*, 2022 FMC LEXIS 589, at *17. The Commission explained:

> 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*, [Docket No. 97-01,] 27 SRR 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*, [Docket No. 96-17,] 28 SRR 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 ("PANYNJ"), Docket No. 08-03, 32 S.R.R. 1185, 1190 n.8 (FMC Jan. 31, 2013).

A cease-and-desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, Docket No. 85-13, 23 S.R.R. 857, 871-72 (ALJ Feb. 13, 1986). In addition to protecting the shipping public, a cease-and-desist order will alert the shipping industry, forestall future violations, and facilitate injunctions against possible unlawful activity in the future. *Pac. Champion Express Co. – Possible Violations of Section 10(b)(1) of the Shipping Act of 1984*, Docket No. 99-02, 28 S.R.R. 1185, 1190-91 (ALJ Nov. 17, 1999). Once a practice has been found to be unreasonable, the Commission can "determine, prescribe, and order" a reasonable rule. "Inherent in our authority to prescribe a reasonable rule or practice is the authority to set aside any rule or practice which would interfere with this authority." *American Export-Isbrandtsen Lines*, 444 F.2d at 828 (citation omitted). The "language used in cease-and-desist orders generally mirrors the violations committed coupled with the statutory language." *Universal Logistic Forwarding Co. – Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, Docket No. 00-10, 29 S.R.R. 474, 476 (FMC Jan. 18, 2002).

IMCC asserts that a cease-and-desist order will be necessary and that without such an order, the Shipping Act may continue to be violated. Respondents, however, properly contend that only four regions have been investigated and briefed so far in this proceeding. Therefore, an appropriate cease-and-desist order may only be directed at the Respondents' conduct in the four regions briefed. However, the legal analysis may apply to other regions and the shipping industry is on notice of the type of conduct that violates the Shipping Act. If such conduct continues in other regions, that may be the basis not only for a cease-and-desist order directed to those regions but also for reparations. Moreover, as discussed earlier, the cease-and-desist order is only addressed to the regulated parties in this proceeding. As to bifurcation of the remedy, because this decision does not address all of the allegations in the complaint, it will be necessary to revisit a number of issues, including the issue of reparation and any other remedies, at a later date.

The cease-and-desist order imposed closely tracks a portion of the language requested in the complaint's request for relief at ¶ 3(c), which should be sufficient to address the violations of the Shipping Act found here. Complaint at 41. Respondents are ordered to cease and desist from violating the Shipping Act in Chicago, Los Angeles/Long Beach, Memphis, and Savannah by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for MH.

Therefore, Respondents shall cease and desist from those practices found unlawful in this decision in the relevant regions. Balancing the need to expedite resolution of these violations with the need for orderly implementation, the cease-and-desist order shall be effective thirty days after the date this decision becomes final. *See 50 Mile Container Rules*, 1987 FMC LEXIS 20, at *10-11 (90 days to revise tariffs); *Sea-Land Serv.*, 21 F.M.C. at 6 ("30 days is sufficient time to allow Respondent to order its affairs and conform its tariffs, if necessary"). The case may continue to adjudicate remaining practices not resolved through summary decision and other geographic regions.

F. Exceptions and Appeal

IMCC's motion for summary decision is granted in part and certain practices of Respondents are found to violate the Shipping Act. Other practices at issue in the complaint cannot be decided at this stage of the proceeding. Respondents' motion for summary decision is denied and Evergreen's supplemental motion for summary decision is also denied. Therefore, the claims that remain are the allegations relating to whether withdrawal from an interoperable chassis pool violates section 41102(c). Typically, a grant of summary decision is appealable while a denial of summary decision is not appealable as the case continues to a decision on the merits.

Pursuant to Commission Rule 227, Respondents may file exceptions as a matter of right to the granting of summary decision and pursuant to Commission Rule 227(d), the Commission may choose to review this decision. 46 C.F.R. § 502.227. Because some claims, such as those relating to withdrawal from interoperable pools, are not dismissed, those portions of this ruling would not be reviewed at this time pursuant to Rule 227.

Commission Rule 221, previously Rule 153, provides that the presiding officer may allow an interlocutory appeal to the Commission if she finds it necessary "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 Terminals, LLC v. PANYNJ*, Docket No. 08-03, 32 S.R.R. 1, 33 (ALJ May 16, 2011) (*aff'd in part*, 32 S.R.R. 1185 (FMC Jan. 31, 2013)). Permitting an interlocutory appeal of the denial of Respondents' motion, denial of Evergreen's supplemental motion, and for the partial denial of IMCC's motion would allow the Commission to review novel legal issues before the parties engage in additional expensive and time-consuming discovery and briefing. In addition, efficiency is enhanced by maintaining the proceeding in a consolidated state. Accordingly, *sua sponte*, the parties are granted leave to appeal the denial of all or part of the motions for summary decision. If a party chooses to appeal, their brief is due twenty-two days after this decision and the response is due twenty-two days after the appeal, unless the Commission directs otherwise. 46 C.F.R. § 502.227.

The remaining issues are intertwined with the issues decided. Therefore, if any portion of this proceeding is reviewed by the Commission, either by request of the parties or the Commission itself, the Commission will have the entire proceeding before it. If the proceeding is not heard by the Commission, the parties shall file a joint status report with proposed schedule within forty-five days of the date of this decision. The parties should address whether any discovery is needed before briefing the remaining issues in these four geographic regions.

IV. EVERGREEN'S MOTION

Evergreen fully adopted the Respondents' MSD and also filed its own MSD arguing that Evergreen provides chassis to motor carriers free of charge; motor carriers are not overcharged for Evergreen MH chassis; there is no difference in Evergreen's daily usage fees for CH and MH; choice is moot for Evergreen MH moves; and Evergreen nonetheless allows choice. EMSD at 5-9.

IMCC contends that Evergreen's business model does not absolve its harm to the shipping public, asserting that Evergreen does not provide chassis free of charge because its customers pay a chassis usage charge, and that Evergreen's model is harmful to MH carriage because it denies motor carriers chassis choice in MH movements, thus restricting the ability of motor carriers to switch away from chassis per diems. RMSD/COpp at 21-22.

Evergreen obtains chassis from IEPs at a single, fixed contractual daily rate for the transport of shipments on both a CH and MH basis. RSUMF ¶ 88; RSUMF/CResp ¶ 88. Evergreen's customers pay a fixed chassis usage charge ("CUC") if they want Evergreen to provide a chassis to the motor carrier for MH. EMSD at 6; ESUMF ¶ 6; RSUMF ¶ 91; RSUMF/CResp ¶ 91. Evergreen asserts that motor carriers then receive use of these chassis for MH "free of charge" for the day of delivery plus four business days; but if the motor carrier does not return the chassis within the free time period, it must pay Evergreen a per diem rate of $20 per day, commencing the day after "free time" expired and running until the chassis is returned. EMSD at 6; RUSMF ¶¶ 92, 95; ESUMF ¶¶ 8, 11. IMCC notes that the initial five days are neither "free time" nor "free of charge" as those days are covered by the $80 CUC paid by the BCO. RSUMF/CResp ¶¶ 93, 95.

By obtaining chassis from exclusive chassis providers at a single, fixed contractual daily rate for use in both CH and MH moves, Evergreen is presumably benefitting from volume discounts as well as profiting from any upcharges on chassis daily late fees. The undisputed evidence shows that the IEP charges Evergreen at the same rate, whether the shipment is CH or MH. However, Evergreen is not passing these same charges on to the motor carrier. Rather, Evergreen is linking MH volumes to obtain discounted prices for MH and CH chassis and instituting a separate pricing system for motor carriers, including that after the five initial days, motor carriers must pay a daily late fee, with any profits over the amount Evergreen is being charged going to Evergreen.

By designating an IEP as the preferred and exclusive chassis provider for Evergreen's CH and MH moves, Evergreen is exerting an influence over competition in the market. The harm from this may include less competition for chassis and potentially higher prices for motor carriers and/or for shipping consumers. In a sense, Evergreen itself has become the exclusive IEP in this model, in that Evergreen determines the per diem charge for motor carriers and the motor carrier has no ability to substitute away, if the end shipper has selected this arrangement. Evergreen also does not address the situation when an end shipper does not elect for Evergreen to provide a chassis, in which case Evergreen would be in the position of any other Respondent ocean carrier in handling an MH shipment. Thus, while Evergreen's shipping model may have some competitive benefits, it also has competitive harms. Therefore, a summary decision in favor of Evergreen is not appropriate.

IMCC did not move for summary decision against Evergreen separately from the other Respondents. Evergreen's practices violate the Shipping Act to the extent that Evergreen engages in the practices found above to violate the Shipping Act.

Evergreen has not established that it is entitled to summary decision on the basis of its model for providing chassis in the regions of Chicago, Los Angeles/Long Beach, Memphis, and Savannah. Therefore, Evergreen's motion for summary decision is **DENIED**.

V. ORDER

Upon consideration of IMCC's motion for summary decision; Respondents' motion for summary decision; Evergreen's motion for summary decision; the related filings including the oppositions, replies, motions, joint statement of facts, and exhibits; and the record herein, for the reasons stated above and the determination that Respondents violated the Shipping Act, it is hereby

ORDERED that the ten Motions for Confidential Treatment be **GRANTED IN PART AND DENIED IN PART**. Confidentiality is granted as requested with the exception of the non-confidential CCMP manual portions at CX2170-2217, CX2219-20, CX2379-2422 and CX2424-27, the selected statements used in this decision, and the corrected public filings. It is

FURTHER ORDERED that IMCC's Motion to Strike Declarations and Respondents' Motion to Strike both be **DENIED**. It is

FURTHER ORDERED that IMCC's Motion for Summary Judgment be **GRANTED IN PART AND DENIED IN PART**. Within thirty days of the date this decision becomes final, Respondents shall cease and desist from violating the Shipping Act in Chicago, Los Angeles/ Long Beach, Memphis, and Savannah by ceasing and desisting adopting, maintaining, and/or enforcing any regulations or practices that limit the ability of a motor carrier to select the chassis provider of its choice for merchant haulage. It is

FURTHER ORDERED that Respondents' Motion for Summary Decision be **DENIED**. It is

FURTHER ORDERED that Evergreen's Supplemental Motion for Summary Decision be **DENIED**. It is

FURTHER ORDERED that the parties are granted leave to file an interlocutory appeal of the denial of all or part of the motions for summary decision. If a party chooses to appeal, their brief is due twenty-two days after this decision and the response is due twenty-two days after the appeal, unless the Commission directs otherwise. It is

FURTHER ORDERED that if the Commission does not review this proceeding, by exceptions, appeal, or its own request, that the parties shall file a joint status report with proposed schedule within forty-five days of the date of this decision.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

IGOR OVCHINNIKOV, IRINA RZAEVA, AND DENIS NEKIPELOV, *Complainants,* KAIRAT NURGAZINOV, *Claimant,* v. MICHAEL HITRINOV A/K/A MICHAEL KHITRINOV, AND EMPIRE UNITED LINES CO. INC., *Respondents.*	Consolidated Docket Nos. 15-11 & 1953(I)

Served: February 8, 2023

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, Commissioners.

Order Affirming the Initial Decision on Different Grounds

Before the Commission in this consolidated action are Complainants' Exceptions to the Initial Decision ("I.D.") granting

Respondents' Motion for Judgment on the Pleadings and dismissing with prejudice Complainants' claims. Although the Commission has determined to dismiss with prejudice Complainants' claims, we must also address our concerns that the I.D.'s reasoning is at odds with Commission precedent and policy. Specifically, the I.D. finds that Complainants lack standing to bring their claims and that the Commission lacks subject matter jurisdiction to hear them. The I.D. is mistaken on both points. To the extent that standing is required to bring an action before the Commission, a complainant need only allege a violation of the Shipping Act to meet that requirement. Here, Complainants allege that Respondents violated 46 U.S.C. § 41102(c); thus, they have standing to bring their claims. Complainants further allege that Respondents are subject to § 41102(c); thus, the Commission has the authority to adjudicate Complainants' claims.

However, even with standing, Complainants' claims are not viable. Complainants seek "direct damages" corresponding to the relevant "purchase" price of four vehicles that they allegedly purchased in the United States to be shipped to them via ocean freight, which Complainants never received. The problem with Complainants' request is that Complainants did not actually "purchase" the vehicles from Respondents. By their own account, each Complainant "purchased" one vehicle from an entirely different company, which was never named as a respondent and is unaffiliated with Respondents. Notably, Complainants do not allege that they paid *anything at all* to Respondents; instead, Complainants assert that the ocean freight charges for the relevant cargo was paid by the third-party company to Respondents. Because Complainants did not purchase the vehicles from Respondents, they do not properly state, and could never prove, their claims for damages because there is no alleged causal link between any complained of

conduct and the monetary relief sought. Accordingly, as explained below, the I.D.'s dismissal with prejudice is the correct outcome, as Complainants have failed to state a claim upon which relief could be granted, and amendment of their claims would be futile. For these reasons, the Commission will affirm on different grounds the I.D.'s dismissal of these actions with prejudice.

Respondents' Counsel additionally maintains that this matter is before the Commission on what he characterized as exceptions to the Administrative Law Judge's denial of his motion for an order to show cause why the Commission should not revoke the privilege of Complainants' Counsel, Marcus Nussbaum, to practice before the agency. Respondents' Counsel is incorrect. The Commission's Rules of Practice and Procedure do not contemplate exceptions to such rulings. Exceptions are reserved for initial decisions and other orders of dismissal, and counsel also did not seek (let alone receive) leave to appeal the ruling. To be sure, the Commission has the authority to act on the serious allegations of misconduct against Mr. Nussbaum. The Commission could, for example, issue an order to show cause initiating a *new* proceeding aimed at addressing not only Mr. Nussbaum's alleged misconduct in this action, but also his conduct in other Commission matters, about which the Commission has repeatedly warned him. The Commission is choosing not to proceed in that fashion *at this time*, but may do so in the future.

I. BACKGROUND

A. Facts as Alleged

Dkt. 15-11 Complainants Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipolev, and Dkt. 1953(I) Claimant Kairat Nurgazinov (collectively "Complainants") are residents of Russia and

Kazakhstan. 15-11 Compl., Doc. 1 ¶¶ 1-3.[1] Complainants allege that in mid- to late-2012, they each "purchased" one U.S.-based vehicle from a non-party company called G-Auto Sales, Inc. ("G-Auto") and/or its supposedly affiliated entity, non-party Effect Auto Sales Inc. ("Effect"), both of which sell used vehicles. *See id.* ¶¶ 26, 35, 38, 51, 66.

"G-Auto/Effect," Complainants continue, contracted with Respondent Michael Hitrinov, a New York resident and alleged owner of Respondent Empire United Lines Co., Inc. ("Empire"), a Commission-licensed non-vessel-operating common carrier ("NVOCC") and warehouse operator, "to secure shipping and warehouse services related to [the] vehicles sold by G-Auto/Effect[.]" *Id.* ¶¶ 4, 6, 36. According to the Hitrinov/Empire-G-Auto/Effect arrangement, Complainants allege, the four vehicles were, at some point, stored in Empire's New Jersey warehouse, and, in November and December 2012, shipped by Empire from the Port of Elizabeth, New Jersey, to a customs bonded warehouse in Kotka, Finland, operated by former Respondent CarCont, which, "upon [Complainants'] information and belief, is [also] owned by Hitrinov." *See id.* ¶¶ 9, 26, 34. G-Auto paid Empire for each vehicle's "[o]cean freight and related charges," and the vehicles were shipped on a Mediterranean Shipping Company ("MSC") vessel pursuant to a service contract between Empire and MSC. *See id.* ¶¶ 33-34, 45, 59, 71. Each corresponding bill of lading designated Empire as the shipper and CarCont as the consignee. *See* Compl. ¶ 36.

The Complaints are unclear as to what, if anything, was supposed to happen with the vehicles after they arrived at CarCont's warehouse in Kotka, Finland. *See generally id.* Nevertheless, Complainants assert, in early 2013 and within days of the vehicles' arrival at CarCont's warehouse, they each "contacted CarCont regarding the release of" the vehicles, and were told that the vehicles

[1] Unless otherwise indicated, the 1953(I) Claim is identical to the 15-11 Complaint. Thus, only the relevant sections of the Complaint are cited herein.

"would not be released" to Complainants. *Id.* ¶¶ 43, 57, 70. Despite Complainants' "multiple requests that CarCont release" the vehicles to them, CarCont told Complainants that "[Empire] would not authorize the release of the [relevant vehicles] because there was an unpaid loan due and owing to [Empire] by the principal of G-Auto/Effect." *Id.* ¶¶ 44, 47, 58. At some point thereafter, Complainants maintain, Respondents Empire and Hitrinov (and former Respondent CarCont)[2] simply converted the vehicles "and have sold [them] to [various] third part[ies] in order to satisfy a loan allegedly due and owing from the principal of Effect/G-Auto to [Empire] and Hitrinov." *Id.* ¶¶ 49, 64, 74.

Nearly three years later, Complainants filed a complaint against Hitrinov and Empire, but not against G-Auto, Effect, or their principal(s). *See* 15-11 Compl. (filed Nov. 12, 2015); 1953(I) Claim (filed Jan. 11, 2016). According to Complainants, Empire violated 46 U.S.C. § 41102(c) in two ways: first, "by failing to provide Complainants and any other necessary parties with: (1) proper and lawful documents of ownership; (2) shipping invoices and house bills of lading; . . . (3) the terms and conditions of transport; [and] (4) failing to deal in good faith and further failing to provide proof of ownership;" and second, "by detaining and converting Complainants' automobiles on the grounds that the principal of G-Auto/Effect owed monies to [R]espondents for reasons not related to the instant shipments."[3]

[2] Complainants never served former Respondent CarCont and, therefore, the Administrative Law Judge ("ALJ") dismissed CarCont from the action. Complainants do not except to the ALJ's dismissal, nor did they ever serve CarCont.

[3] Complainants initially also alleged claims under 46 U.S.C. §§ 40301, 40302, 40501, 40701(a), 41104(2), 41104(3), 41104(4), 41104(8), 41104(9), 41104(10), 41106(2), and 41106(3), and 46 C.F.R. Part 515. Compl. ¶¶ 24, V(A)-(D). In the I.D., however, the ALJ found that Complainants had abandoned all but their § 41102(c) claims, and, therefore, dismissed them. *See* I.D., Doc. 152 at 68. Complainants do not challenge the dismissal of any of these claims. *See* Complainants' Exceptions, Doc. 173.

As relief, Complainants request "direct damages" corresponding to the "amounts paid for the purchase" of each vehicle, "additional consequential damages," plus, for two Complainants, "additional damages for sums" related to loans obtained to finance the purchase of the vehicle. Compl. ¶¶ VII(A), VIII(B).

B. Procedural History

Much of the tortured procedural history of this proceeding is irrelevant to the issues currently before the Commission. Indeed, the parties filed over 100 motions before the ALJ, all of which were opposed. Accordingly, the Commission recounts here only those motions and orders that bear on the matters at hand.

1. Motions and Orders Below

Respondents filed several early motions in which they explained that G-Auto, the company from which Complainants allegedly purchased the vehicles, is, along with Effect Auto Sales, Inc., and Global Auto, Inc., one of several "related companies owned and/or controlled by a Mr. [Sergey] Kapustin," which Respondents (and, later, Complainants and the ALJ) sometimes collectively refer to as "Kapustin Global Auto Group," "Group," or "Global." *See, e.g.*, Resp'ts' Mot. to Stay, Doc. 13 at 2.

Respondents accept as true that Complainants purchased a vehicle from the Group and acknowledge that per the Empire-Group usual business arrangement, the Group "contracted with Empire to transport [these and other] cars in containers from the United States to a facility in Kotka, Finland operated by CarCont, where the containers were opened and the cars and other cargo de-vanned." *E.g.*, Respt's' Mot. for Additional Time, Doc. 10 at 4. "The vehicles," Respondents continue, "were then picked up by a member of the Kapustin Global Auto Group ([a company called] Global Cargo Oy), after a request for release was made by the Group. This

arrangement existed for years, and involved many cars beyond the few at issue [here]." *Id.*

Further, Respondents assert:

> Empire never dealt with individual customers of the Kapustin Global Auto Group; and had no knowledge as to their identity. This was true as a general matter, and is true here. Neither Complainants nor the Group ever requested Empire to release the vehicles in question and . . . Empire did not know who the individual customers were until well after the cars were sold.

Doc. 13 at 2-3.

Although Complainants objected to the various forms of relief sought in Respondents' corresponding motions, they never took issue with the above explanation of the relevant parties, or the general business relationship described above.

At the ALJ's direction, the parties subsequently filed the shipping documents "related to the transportation by water of the vehicles," and identified, among other things, the relevant common carrier, shipper, consignee(s), port or point of origin, date of shipment, port or point of delivery, and payor for the transportation by water, for each of the four vehicles and pursuant to any bill of lading issued regarding the transportation. *See* Order to File Shipping Documents, Doc. 17; 1953(I) Order to File Shipping Documents (Apr. 27, 2016); Order to Supplement, Doc. 67. The parties' responsive submissions confirmed what was alleged in the Complaint: the only relevant bills of lading are those issued by MSC, and all four of the bills of lading list Empire as the shipper and CarCont as the consignee. *See, e.g.*, Doc. 78; Doc. 79.

After the actions were consolidated, Respondents moved to dismiss the Complaints, arguing that the Commission lacked subject

matter jurisdiction to adjudicate the claims, and, therefore, that they were entitled to judgment on the pleadings, and/or that Complainants had failed to state a claim for relief (reparations). Order of Consolidation, Doc. 43; Respt's' Mot., Doc. 49. Respondents advance several arguments. First, Respondents maintain that Empire was not acting as an NVOCC for the shipments at issue because it "had a 60 percent ownership interest in each vehicle being transported" and "the arrangement between [Empire] and Global Auto Enterprise was a joint investment agreement." *Id.* at 8. Because Empire was not acting as a Commission-regulated entity in connection with the relevant shipments, Respondents claim, the Commission lacks subject matter jurisdiction over those shipments. *See id.* at 8-9. Additionally, or alternatively, Respondents aver the Commission lacks jurisdiction because Complainants were not shippers or consignees of the vehicles, and because Complainants "lack standing to seek reparations" since if they were harmed, it would only be "as an indirect result of [any] alleged violations." *Id.* at 9-14. Even if the Commission has subject matter jurisdiction, Respondents next argue Complainants fail to state a claim for reparations because they are "strangers to the transaction," and, separately, because the Complaints do not allege sufficient facts to make out a claim. *Id.* at 14-18. Complainants opposed Respondents' Motion. Doc. 60.

2. The Initial Decision

The ALJ granted Respondents' Motion for Judgment on the Pleadings and dismissed the Complaints with prejudice. I.D. Doc. 152. In so doing, the ALJ did not make a finding as to Respondents' first jurisdictional argument, that Empire was not acting as an NVOCC for the shipments at issue. *Id.* at 50. While the Commission has the authority to resolve disputes of fact when subject matter jurisdiction is challenged, the resolution would, according to the ALJ, involve legal questions related to the business relationship between Empire and Mr. Kapustin (Global Auto Group's principal), including resolving who among these entities had the right to sell these and similarly situated vehicles. *Id.* Further, the ALJ wrote,

those matters were then-pending before a federal district court. *Id.* The ALJ did not stay his ruling until the relevant district court decided those issues; instead, he assumed for the purposes of the I.D. that Empire acted as an NVOCC for the shipments at issue. *Id.* at 51.

The ALJ then effectively compressed Respondents' remaining jurisdictional arguments, finding, in relevant part, that because Complainants were not consignees on the shipments, "Complainants do not have standing to challenge Empire's refusal to deliver the cars to them or Empire's ultimate sale of the cars before the Commission. [Thus,] Complainants have failed to establish that the Commission has subject matter jurisdiction over their complaints." *Id.* at 6, 60-67.

The ALJ next analyzed the merits the Complaints' claims. Assuming that the Commission had jurisdiction, the ALJ summarily concluded that: "If it were determined that Complainants were consignees on the shipments, the complaints state claims of violation of [§] 41102(c)." *Id.* at 73.

3. Complainants' Exceptions

Complainants maintain that the ALJ erred by: (1) considering Respondents' motion for judgment on the pleadings as a factual, as opposed to facial, attack "in the absence of permitting Complainants to conduct necessary discovery;" and (2) finding that Complainants lacked standing to bring their claims. *See id.* at 22-30. In support of their Exceptions, Complainants filed 23 appendices spanning 553 pages. Docs. 174, 175.

II. DISCUSSION

A. Standard of Review and Burden of Proof

When the Commission reviews exceptions to an I.D., it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission reviews the ALJ's findings de novo and can make additional findings where, as here, the ALJ dismissed claims for lack of subject matter jurisdiction or failure to state a claim. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Dkt. No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC Dec. 18, 2015).

The I.D. granted Respondents' motion for judgment on the pleadings, which was brought alongside Respondents' motion to dismiss for failure to state a claim. Motions for judgment on the pleadings are brought under Federal Rule of Civil Procedure 12(c), and motions to dismiss for failure to state a claim are brought under Rule 12(b)(6). The standard of review under these motions "is essentially the same." *See Schuchart v. La Taberna Del Alabardero, Inc.*, 365 F.3d 33, 35 (D.C. Cir. 2004); *see also Samuels v. Safeway, Inc.*, 391 F. Supp. 3d 1, 2 (D.D.C. 2019) (noting that while the standards of review are basically the same, "a Rule 12(b) motion may be based on procedural failures, including lack of subject-matter jurisdiction or a lack of factual allegations to support a claim, [and] a Rule 12(c) motion centers upon the substantive merits of the parties' dispute") (internal quotation and alterations omitted).

On either motion, fact finders are to construe claims liberally, accept as true all well-pleaded facts, and draw all reasonable inferences in the complainant's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although a fact finder "generally may not rely on facts 'outside' the pleadings in deciding [either] motion, . . . it may consider matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record." *United States v. All Assets Held at Bank Julius Baer & Co.*, 772 F.

Supp. 2d 191, 197 (D.D.C. 2011) (internal citations and alterations omitted).

Challenges to subject matter jurisdiction are made under Rule 12(b)(1), and complainants bear the burden of proving by a preponderance of the evidence that the Commission has subject matter jurisdiction to adjudicate their claims. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201, 1998 FMC Lexis 16, *66-67 (ALJ 1998), *aff'd* 28 S.R.R. 751, 1999 FMC Lexis 32, *67 (FMC 1999); *see also* 5 U.S.C. § 556(d); 46 C.F.R. § 502.155.

B. Complainants Have Standing and the Commission Has Subject Matter Jurisdiction to Adjudicate Complainants' Claims

In their Exceptions, Complainants first maintain that the ALJ erred in finding that they lack standing to bring their claims. Doc. 173 at 27-30. Specifically, Complainants argue, the ALJ "erred in delimiting Complainants' standing to sue, by imposing requirements that Complainants (1) demonstrate that they were consignees [on the shipments], and (2) demonstrate that Respondents had a duty to deliver the subject vehicles to Complainants." *Id.* at 27. Complainants are essentially correct.

In the I.D., the ALJ found that "[b]ecause they were not consignees on the shipments, Complainants do not have standing to challenge Empire's refusal to deliver the cars to them or Empire's ultimate sale of the cars before the Commission." Doc. 152 at 6; *see also id.* at 67 ("Complainants have not identified evidence that would support a finding that shipper Kapustin [as principal for Global Auto] intended that they be identified as consignees or that Empire, operating as an NVOCC, agreed to deliver the cars to Complainants. Complainants have not established that they have standing to bring their complaints before the Commission.").

1. Article III Standing Requirements Do Not Apply to Commission Proceedings

It is not clear what the ALJ meant by "standing"—a term that can be used loosely by litigants and tribunals alike. Generally, when used in the context of subject matter jurisdiction, "standing" refers to constitutional standing: the threshold concern for all federal Article III courts, as to whether a case or controversy comprises an actual injury, suffered by the complainant and caused by the complained of conduct, which can be redressed by a favorable ruling. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also* Doc. 152 at 29 (quoting the D.C. Circuit for the proposition that Article III courts lack subject matter jurisdiction when claimants lack standing to pursue their claims).

As the Commission recently explained, however, the standing requirements of Article III "are not directly applicable to agency proceedings." *See Stmt. of the Commission on Representative Complaints*, Dkt. 21-13 at 2 n.9 (citing cases). And as to Commission actions specifically, "any person may file a complaint alleging a violation [of Chapter 411 of Title 46]." *Id.* at 1 (emphasis omitted) (citing 46 U.S.C. § 41301(a)); *see also id.* at 2 ("the Commission has long interpreted § 41301(a) to allow any person to file a complaint, even if that person does not allege that it was injured by the alleged violation") (citing, *e.g.*, *Cargill, Inc. v. Waterman Steamship Corp.*, FMC Dkt. No. 79-72, 1981 FMC LEXIS 34, *39 (FMC Nov. 30, 1981) (Complainant "clearly has standing to prosecute a complaint under section 22 of the Shipping Act [of 1916] even if it were not alleging injuries to itself."); *Fed. Mar. Comm'n v. Zim Israel Navigation*, 263 F. Supp. 618, 621 (SDNY 1967) ("Whether or not [Complainants] are entitled to reparations in the proceedings before the Commission . . . they have standing to file the complaint and the Commission has jurisdiction to entertain it."). In other words, to the extent that standing is required to bring a Commission action, a complainant need only allege a violation of the Shipping Act to meet that requirement.

Here, Complainants allege that Respondents violated 46 U.S.C. § 41102(c); thus, they have standing to bring their claims. Complainants are correct that they did not have to establish, or even allege, that they were the consignees on the shipments for them to have standing or for the Commission to have subject matter jurisdiction to adjudicate their claims.[4] *See* Dkt. 21-13; Complainants' Exceptions, Doc. 152 at 27-30.[5]

[4] To be clear—and given Complainants' incorrect assertions to the contrary—neither the ALJ nor the Commission in this Order makes any finding as to whether Empire was acting as an NVOCC for the purposes of the shipments at issue. Because the Commission finds that the Complaints should be dismissed for failure to state a claim, it need not determine Empire's NVOCC status as to these shipments, and, indeed, Respondents request as much. *See* Doc. 49 at 2 ("Respondents would not object if the Presiding Officer were to dismiss for failure to state a claim without addressing the jurisdictional issues" raised in Respondents' motion for judgment on the pleadings) (citing *Inlet Fish Producers, Inc. v Sea-Land Service, Inc*., 28 S.R.R. 1631, 1632 (ALJ 2000) ("The general rule is that an agency must first find that it has jurisdiction over the parties and the subject matter of the proceeding before it addresses the merits, unless the facts necessary to resolve the issue of jurisdiction are the same as the facts bearing on the merits").

[5] If the ALJ instead used standing to mean that Complainants lack statutory standing, even if the ALJ were right, statutory standing is not jurisdictional. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (statutory standing goes to whether Congress has accorded a particular complainant the right to sue under a statute, but it does not limit the power of the tribunal to adjudicate the case). "As a result, a dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim, and a motion to dismiss on this ground is [properly] brought pursuant to [Federal] Rule 12(b)(6) [for failure to state a claim upon which relief can be granted], rather than Rule 12(b)(1) [for lack of jurisdiction]." *Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015) (internal quotations, citations, and alterations omitted). The same result would be true if the ALJ used standing to mean that Complainants were not the proper parties to bring these claims; that is: if Empire committed a Shipping Act violation with respect to the shipments at issue, it did so to the detriment, if any, to Global (for whom it arguably shipped the cargo) and/or CarCont (the consignee), and, therefore, any claims should have been brought by those parties and are not properly brought by Complainants. *See* Doc. 152 at 60-62 (discussing, in the context of the finding that Complainants lacked standing, the contractual relationship between Kapustin, Empire, and CarCont); *see also* Resp'ts' Mot., Doc. 49 at 12-13 ("If anyone has a conceivable Shipping Act claim against [Empire] it is Global Auto Enterprise.").

C. Complainants Have Failed to State A Claim For Reparations or For Which Relief Can be Granted

Complainants allege violations of 46 U.S.C. § 41102(c), which prohibits common carriers, marine terminal operators, and ocean transportation intermediaries from "fail[ing] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." Specifically, Complainants allege that Respondents violated § 41102(c) by (1) "failing to provide Complainants and any other necessary parties with certain shipping documents including "shipping invoices and house bills of lading" and (2) detaining and otherwise refusing to release to Complainants the vehicles that Complainants allegedly bought from G-Auto/Effect. *See* Compl. ¶¶ V(B), V(E).

Respondents moved to dismiss Complainants' claims arguing, in relevant part, that Complainants failed to state a claim for reparations and/or claims for which relief may be granted for two reasons. Respt's' Mot. for J. on the Pleadings, Doc. 49 at 14-16, 17-18. First, Respondents assert, "as their own documents show, Complainants are total strangers to the shipping transactions alleged in the Complaint, and so can have no claim for relief." *Id.* at 14. Second, Respondents continue, "Complainants fail to allege [basic] facts that would entitle them to relief." *Id.*

As an initial matter, Complainants seek "direct damages" corresponding to the relevant vehicle's "purchase" price plus, when incurred, additional damages for sums "arising out of" bank loans taken to pay for the vehicle(s), plus, in the case of Complainant Rzaeva, damages relating to her travel to Kotka, Finland, to try to find "her" vehicle. Compl. ¶ VII(A). A complaint, however, only properly seeks reparations "for an injury to the complainant caused by the [alleged] violation" of Chapter 411 of Title 46. 46 U.S.C. § 41310(a); *see also id.* § 41305(b) (reparations are appropriate only

for "actual injury" to the complainant and "caused by a violation of this part"). The Complaints here seek no such relief.

The problem with Complainants' request is that Complainants did not actually purchase the vehicles from Respondents. By their own account, each Complainant purchased one vehicle "from G-Auto," which was never named as a Respondent and is, by all accounts, unaffiliated with Respondents. Compl. ¶¶ 31, 58, 65. In fact, Complainants do not allege that they paid anything at all to Respondents; instead, Complainants assert, "ocean freight and related charges [were] paid to [Empire] by G-Auto." *Id.* ¶¶ 45, 59, 71. Because Complainants did not purchase the vehicles from Respondents, they do not properly state—and could never prove—their claims for damages as there is no alleged causal link between any complained-of conduct and the monetary relief sought. *See* 46 U.S.C. § 41310; *see also, e.g.*, *Iqbal*, 556 U.S. at 663.

There is similarly no causal connection between any alleged violation of the Shipping Act and Complainants' purported injuries, as required to maintain reparations claims. Specifically, Complainants first allege that Respondents violated § 41102(c) by failing to provide various shipping documents. Compl. ¶ V(B). Even assuming (i) that Empire did, in fact, fail to provide this paperwork (which Empire maintains never existed because, according to Empire, it was not acting as an NVOCC), and (ii) that such a failure constitutes a § 41102(c) violation (a proposition for which Complainants cite no authority), this failure is entirely separate from Complainants' having paid for the vehicles, which, again, is what Complainants request reparations for. In other words, even had Empire issued and provided house bills of lading and other now-sought shipping documentation, Complainants would still be out the respective vehicles' purchase prices.

In any event, the Complaints do not include any allegation that the cars were actually meant to be delivered, let alone shipped or released, to Complainants. *See generally* Compl.; Claim. As Respondents point out in their Motion, "the Complaint[s] fail[] to

assert any basis in law or reason why [Empire] (or CarCont) was obligated to release the vehicles or provide the requested shipping documents to Complainants." Doc. 49 at 17; *see also id.* at 17-18 (asserting that had Empire released the vehicles to Complainants, doing so may have actually constituted a § 41102(c) violation since Complainants were not designated as someone to whom the vehicles should be released) (citing *Bimsha International v. Chief Cargo Services, Inc.*, 2013 WL 9808692, at *7 (FMC 2013) (finding that an NVOCC violated § 41102(c) when it released cargo "without the presentation of the original bills of lading," even to the proper "notify party").

Indeed, it is unclear what, if anything, was supposed to happen to the vehicles after their arrival in CarCont's warehouse. Complainants have failed to assert what went wrong here, including as it relates to the receiving, handling, storing, or delivering of the vehicles. As Complainants allege: "G-Auto/Effect contracted with [R]espondents Hitrinov and Empire to secure shipping and warehouse services related to vehicles sold by G-Auto/Effect and destined for Kotka, Finland, with the consignee on each shipping bill of lading designated as . . . CarCont." Compl. ¶ 36. Assuming Complainants refer here to the vehicles at issue (in addition to explaining the parties' general arrangement), the vehicles were to be stored in Empire's New Jersey warehouse until they would be trucked to the Port Elizabeth and shipped via vessel to Kotka, Finland, where they would be unloaded and stored by CarCont. This is exactly what Complainants maintain happened. *See generally* Compl.; Claim.

For these reasons, Complainants have failed to state a claim upon which relief can be granted, and the Complaints should be dismissed. *See* 46 U.S.C. § 41305(b); *Twombly*, 550 U.S. at 555 (claims are only viable when they "raise a right to relief above the speculative level"). Moreover, dismissal with prejudice is appropriate because any amendment to the complaint would be futile. Complainants have produced thousands of pages of exhibits in support of their claims, and not a single page connects the

vehicles' shipment by water from the U.S. to Complainants, let alone evinces that Respondents knew who Complainants were when Complainants requested release of the vehicles.

Accordingly, the Commission upholds the I.D.'s dismissal with prejudice.

D. Complainants' Contention that the ALJ Improperly Construed Respondents' Motion as a Factual Attack on Subject Matter Jurisdiction

Complainants additionally argue that the ALJ "erred in construing [R]espondents' motion to dismiss as a 'factual' attack upon subject matter jurisdiction in the absence of allowing [C]omplainants to conduct the very discovery necessary to obtain evidence and facts to fully oppose defendants' [sic] motion." Doc. 152 at 26. Complainants' argument makes little sense.

To be sure, and as the Commission has previously explained, there is a difference between a factual attack and facial attack to a tribunal's subject matter jurisdiction, the latter of which involves accepting as true all well-pleaded facts. *See, e.g.*, *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 2011 WL 7144008, at *11-12 (FMC 2011) (citing *Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009)). Here, however, the ALJ's conclusion regarding subject matter jurisdiction was grounded in the ALJ's finding that Complainants are not the consignees of the relevant cargo, which is *exactly what Complainants allege in their Complaints*. *Compare* Doc. 152 at 6, 60-67 *with* Compl. ¶ 36 ("At all times mentioned herein, G-Auto/Effect contracted with [R]espondents . . . to secure shipping and warehouse services related to vehicles sold by G-Auto/Effect and destined for Kotka, Finland, *with the consignee on each shipping bill of lading designated as Defendant [sic] CarCont*.") (emphasis supplied). In other words, even if the ALJ considered matters outside of the pleadings such that Respondents' attack was construed as a factual one, any error was harmless: Complainants' allegations regarding the identity of the

consignee(s) were accepted as true, which would have been the case if Respondents' motion were instead treated as a facial attack.

Accordingly, although Complainants are correct that the Commission has subject matter jurisdiction, their exceptions here are without merit.

E. Complainants' Remaining Exceptions

Complainants additionally argue that "as a licensed ocean transportation intermediary, Respondents had a statutory duty to know, and in fact did know, that Complainants were the ultimate consignees for the subject vehicles." Doc. 173 at 30.

As an initial matter, although Complainants maintain that Respondents were under some "statutory duty," they fail to cite the statute from which this supposed duty arises. *See id.* at 30-44. More importantly, Complainants discuss at length regulations administered by agencies other than the Commission, with no explanation of how any supposed failure to comply with these other agencies' regulations constitutes a violation of 46 U.S.C. § 41102(c) (or any other provision of the Shipping Act). *See id.* (detailing regulations enforced by the Bureau of Industry and Security and U.S. Customs and Border Patrol, respectively). In other words, even if Complainants are correct that Respondents were under some duty to know who (or what) the ultimate consignee is or was, their efforts here are wasted as the relevant question is whether Respondents violated the Shipping Act or the Commission's implementing regulations.

Complainants' contentions that the ALJ made several "material errors" and "omitted certain material facts" are similarly misguided. Doc. 173 at 50-56. Even assuming that Complainants accurately stated certain facts that the ALJ supposedly got wrong (and they did not), nothing listed in these pages was material to the ALJ's findings. *See, e.g.*, *id.* at 50 (maintaining that an obvious typographical error is a material error); *id.* at 50 n.15 (same); *id.* at

49 (falsely, or at least misleadingly, asserting that there was no formal discovery before the ALJ rendered his opinion); *id.* at 50-52 (maintaining that Respondents were deliberately misrepresenting information to the U.S. Census Bureau).

III. Respondents' Counsel's Motion For An Order To Show Cause Is Not Before The Commission

When the action was still pending before the ALJ, Respondents' Counsel moved for an order to show cause as to why Complainants' Counsels' privilege of practicing before the Commission should not be revoked. Doc. 112. The next day, Complainants' Counsel, Mr. Nussbaum, opposed the motion and, in the same filing, cross-moved for an order to show cause as to why Respondents' Counsel should not be suspended from practicing before the Commission for at least six months and why he should not be "personally removed" as Respondents' Counsel. Doc. 114.

The ALJ summarily denied both motions, finding that because each counsel had other matters pending before an ALJ and/or the Commission itself, the claims "should be directed to the Commission, not to an administrative law judge in an individual case." Doc. 124 at 4. The ALJ therefore "denied [the motions] without prejudice to the parties presenting the arguments to the Commission in a more appropriate manner." *Id.*

Respondents' Counsel filed what they characterize as exceptions to the ALJ's decision. Doc. 128. This filing, however, does not cite to any Commission regulation allowing for exceptions to such a ruling. *See id.* Indeed, exceptions are reserved for initial decisions and other orders of dismissal of the proceeding in whole or in part. 46 C.F.R. § 502.227; *see also id.* § 502.221 (governing appeals from a ruling of presiding officer "other than orders of dismissal in whole or in part," and requiring that "any party seeking to appeal [such an order] must file [with the presiding officer] a motion for leave to appeal"); *accord id.* § 502.94 ("all claims for relief or other affirmative action by the Commission . . . must be by

written petition"). Respondents' Counsel did not seek leave from the ALJ to appeal the ruling. Accordingly, these so-called exceptions, and Respondents' Counsel's underlying motion, are not properly before the Commission.[6]

That is not to say, however, that the Commission is without authority to address the serious allegations of misconduct lodged against Mr. Nussbaum, which center on Mr. Nussbaum having allegedly: (1) falsified evidence in an attempt to support Complainants' claims; (2) gotten the template for these documents only as a result of his having previously represented Mr. Kapustin and his criminal enterprises; (3) used these and other confidentially-gotten documents from, and to the detriment of, Mr. Kapustin; (4) misrepresented facts and the parties' arguments; and (5) acted extremely uncivilly. *See* Doc. 112; *see also* Doc. 145.

The Commission takes seriously these grave accusations, and has already warned Mr. Nussbaum about similar behavior. Most recently, for example, in now-closed Dkt. 20-12, Mr. Nussbaum, among other things, repeatedly misquoted the record to support his client's claims and attacked the ALJ as advocating for the opposing side. *See Andrew v. Marine Transport Logistics*, FMC Dkt. 20-12, Complainants' Exceptions, Doc. 38; *see also id.* Complainants' Proposed Findings of Fact, Doc. 31. Some three years before that, the Commission was compelled to direct Mr. Nussbaum "not to file any pleading, motion or other document that does not meet the [46 C.F.R.] § 502.6 verification requirements or fails to comply with the ABA Model Rules," after it found that "Mr. Nussbaum c[ame] close to admitting that nothing more than speculation underlies [his] motion when he argues that the Commission should decide [a] seminal issue by speculating that one of Respondents' attorneys altered evidence but has no evidence that either attorney added information to the document or did so with intent to mislead

[6] Neither did Respondents' Counsel file a petition for the same relief with the Commission, despite the ALJ's having written that such requests for relief should not be brought "in an individual case."

anyone." *Crocus Investments, LLC v. Marine Transport Logistics, Inc.*, FMC Dkt. 15-04, 2018 WL 2113084, at *1, *8 (FMC 2018). Indeed, the Commission noted that such conduct "bears the unmistakable hallmarks of other pleadings filed by Mr. Nussbaum in this case and other proceedings before the Commission," and warned him that, "[f]urther violation of these rules may result in sanctions by the Commission." *Id.* *1, *8. So too here is the record replete with possibly inappropriate conduct. *See, e.g.*, Complainants' Opp'n and Cross-Motion, Doc. 114 (nominally opposing Respondents' Counsel's motion before the ALJ, but dedicating the entirety of that filing to Mr. Nussbaum's own cross-motion); Complainants' Resp. to Order to Supplement, Doc. 218 (similarly failing to deny this and other serious alleged misconduct); *accord id.* at 3 (incorrectly maintaining that the ALJ "finally and conclusively resolved" the issues raised by Respondents' Counsel's motion, and, therefore "relitigation of [these] issues would be barred by res judicata"); *id.* at 5 (failing to deny the allegations of forgery and (perhaps correctly) maintaining that such allegations "should . . . be supported by a credible forensic examiner"); *id.* at 9-10 (continuing to rely on an asserted waiver of attorney-client privilege supposedly executed by Mr. Kapustin, Mr. Nussbaum's former client, which was written (and signed) in English despite elsewhere maintaining that Kapustin cannot speak (or write) in English).

Although Respondents' Counsel's underlying motion is not properly before the Commission, we note that the agency has the authority to act on Mr. Nussbaum's apparent misconduct in this and all actions before the Commission. It could, for example, initiate a new proceeding that addresses Mr. Nussbaum's concerning conduct across of all of his Commission actions. *See* 46 C.F.R. § 502.91 ("The Commission may institute a proceeding by order to show cause."); *id.* § 502.26 ("An attorney practicing before the Commission is expected to conform to the standards of conduct set forth in the American Bar Association's Model Rules of Professional Conduct in addition to the specific requirements of this chapter."); *Polydoroff v. I.C.C.*, 773 F.2d 372, 374 (D.C. Cir. 1985) ("There can be little doubt that the [Interstate Commerce]

Commission, like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it.").

As noted, however, Respondents' Counsel's underlying motion is not properly before the Commission. The Commission cannot emphasize strongly enough, however, that it retains the option to exercise all lawful authority with respect to Mr. Nussbaum's conduct.

IV. CONCLUSION

Accordingly, the Commission **AFFIRMS ON DIFFERENT GROUNDS** the Initial Decision.

THEREFORE, IT IS ORDERED that Complainants' Complaint and Claim be **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that this proceeding be **DISCONTINUED**.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

GOFORTH & MARTI D/B/A GM BUSINESS INTERIORS,
Complainant

v.

HSIN SILK ROAD SHIPPING LTD., *Respondent*.

DOCKET NO. 22-16

Served: February 15, 2023

OPINION OF: Linda S. Harris CROVELLA, Administrative Law Judge.

Initial Decision on Default

I. INTRODUCTION AND BACKGROUND

On July 11, 2022, the Commission issued a Notice of Filing of Complaint and Assignment ("Notice") advising that complainant Goforth & Marti D/B/A GM Business Interiors ("Goforth & Marti"), commenced this proceeding by filing a Verified Complaint with the Secretary pursuant to section 11 of the Shipping Act of 1984, 46 U.S.C. §41301, alleging that respondent HSIN Silk Road Shipping LTD. ("HSIN") violated the Act. As discussed more fully below, HSIN has not answered the Complaint or responded to an order requiring it to do so by October 3, 2022. Order to Respond to Complaint at 1. Accordingly, HSIN is (1) found to be in default; (2) is found to have violated the Act; (3) is found to have caused actual injury to Goforth & Marti by its violations; and (4) is ordered to pay a reparation award to Goforth & Marti.

A. Goforth & Marti's Complaint

Goforth & Marti filed its Complaint on July 11, 2022,[1] alleging that HSIN, a non-vessel-operating common carrier ("NVOCC") subject to regulation by the Federal Maritime Commission ("Commission"), issued a bill of lading on about October 7, 2021, to carry four containers of adjustable desk frames and table parts from Ningbo, PRC, to Los Angeles, California. Complaint at 2. It is further alleged that Goforth & Marti d/b/a GM Business Interiors was the owner of the cargo, had prepaid the freight, and was listed on the bill of lading as the consignee and notify party. Complaint at 2. Complainant alleges that it received an "Arrival Notice/Freight Invoice" from Respondent notifying it that the Nomadic Milde, the vessel which transported the four containers, had an estimated time of arrival (ETA) of November 6, 2021. Complaint at 3. Complainant alleges that after it paid the accompanying invoice for "berthing fees," "DTHC," and a "delivery order fee," it received a second "Arrival

[1] The Complaint is dated June 17, 2022, but pursuant to § 502.62(a)(7), "[a] complaint is deemed filed on the date it is received by the Commission," which was July 11, 2022.

Notice/Freight Invoice" in 2022 notifying it that the ETA of the Nomadic Milde "was revised to March 10, 2022." Complaint at 3. Accompanying the notice was another invoice for berthing fees, DTHC, and a storage fee, which when contacted, Respondent attributed to additional costs the vessel incurred related to the pandemic and long-term berthing at the Los Angeles terminal that it did not anticipate. Complaint at 3.

Goforth & Marti alleges that HSIN violated § 41102(c) of the Shipping Act by assessing additional fees in both November 2021 and March 2022 that are "unjust, unlawful, unfounded and excessive," and it seeks reparations for those amounts it was compelled to pay Respondent "related to receiving, handling, storing or delivering property." Complaint at 4.

I take official notice under 46 C.F.R. § 502.226 of Commission records showing that the Secretary served the Notice to HSIN by FedEx at the business address in the Complaint: RM2902 29/F Ho King Comm CTR 2-16, Fa Yuen St. Mongkok Kin Hong Kong, 31500 Hong Kong. The tracking number shows that the envelope was delivered on July 18, 2022, to the receptionist/front desk and was signed for by R. Chop. Attachment A. In addition, the Office of the Secretary reported that it emailed the Notice to Respondent on July 11, 2022. HSIN has not answered or otherwise responded to the Complaint.

B. Order to Respond to Complaint

On July 13, 2022, an Initial Order was issued, explaining the parties' obligations to participate in a preliminary conference and confer on a joint status report and proposed schedule and noted the 150-day timeline for completion of discovery. The order reiterated the Commission's requirement that the initial decision in this case must issue within one year from filing of the Complaint. Initial Order at 1.

On September 16, 2022, an Order to Respond to the Complaint was issued and sent to Respondent by FedEx at the same business address to which the Notice was sent in July 2022, but it was returned as "undeliverable." Attachment B. On September 21, 2022, the Order to Respond was sent by email to Respondent at info@hsinship.com and copied to Complainant.

The Order to Respond noted that a response to the Complaint was due 25-days after the Commission issued the Notice. See § 502.62(b). The Order to Respond again notified the parties that if Respondent failed to respond to the Complaint, a default judgment may be issued against it for the full amount that the Complainant is seeking, which is $74,000, and Respondent HSIN was ordered to respond to the Complaint by October 3, 2022.

On November 10, 2022, an email was sent to both parties requesting an update on the case; Complainant responded that it had not heard from Respondent and Respondent did not reply to the email. To date, no response to the Complaint has been filed and no request for an extension of time has been received.

Respondent HSIN was a Commission-bonded non-vessel operating cargo carrier ("NVOCC") at the time the transportation at issue occurred, but its NVOCC bond was cancelled on June 5, 2022, and revoked on June 6, 2022. It is unclear if HSIN has ceased operations. Official notice is taken of the Commission's records showing that HSIN's registered address was

the address to which the Complaint was successfully served, and to which the Order to Respond was sent.

For the reasons discussed below, I find that Complainant is entitled to a default decision and reparations from Respondent in the amount of $74,000.

II. DISCUSSION

A. Respondent is in Default

Pursuant to Commission Rule 62:

> Failure of a party to file an answer to a complaint, counterclaim, crossclaim, or third-party complaint within the time provided will be deemed to constitute a waiver of that party's right to appear and contest the allegations of the complaint, counterclaim, crossclaim, or third-party complaint to which it has not filed an answer and to authorize the presiding officer to enter an initial decision on default as provided for in 46 CFR 502.65. Well pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted.

46 C.F.R. § 502.62(b)(6)(i). "All parties and representatives are under a continuing obligation to provide the Commission and all other parties in a proceeding with accurate and current contact information including a street address, telephone number, and e-mail address." 46 C.F.R. § 502.2(h)(1). Moreover, when "a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, including the complaint." 46 C.F.R. § 502.65(b).

Respondent was served and had notice of this proceeding. If Respondent's address changed, it failed to notify the Commission as required by Commission Rules. Because Respondent accepted service of the Complaint at its Commission-registered place of business but then failed to file a response or participate further in the proceeding with no explanation or request for extensions, a default decision against Respondent is appropriate.

B. Complainant Establishes that Respondent Violated Section 41102(c)

Complainant must establish that Respondent's conduct gives rise to a section 41102(c) violation. Commission Rule 203 provides that, "[i]n all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order." 46 C.F.R. § 502.203. The Supreme Court in *Director, OCWP v. Greenwich Collieries*, 512 U.S. 267, 276 (1994), found that the "burden of proof" under the Administrative Procedure Act (APA) means "the burden of persuasion." Here, the Complainant bears the burden of persuasion to prove its case by a preponderance of the evidence. *See Steadman v. SEC,* 450 U.S. 91, 102 (1981). Finally, while an administrative law judge cannot rely on mere speculation, inferences may be drawn from certain facts and circumstantial evidence may be considered. *Waterman S.S. Corp v General Foundries, Inc.,* 26 S. R.R. 1173, 1180 (ALJ 1993).

The Commission's regulations provide that well-pleaded factual allegations in a complaint will be deemed to be admitted when a respondent fails to answer a complaint within the time provided. *United Logistics (LAX) Inc. – Possible Violations of Sections 10(A)(1) and 10(B)(2)(A) of the Shipping Act of 1984*, Docket No. 13-01, 33 S.R.R. 196, 198 (FMC Feb. 6, 2014); *Century Metal Recycling Pvt. Ltd. v. Dacon Logistics, LLC*, Docket 12-09, 33 S.R.R. 17, 19 (FMC Nov. 12, 2013). When a respondent defaults, the finder of fact accepts as true all well-pleaded facts in the order. 10A Wright & Miller § 2688, pp. 58-61; *Hugh Symington v. Euro Car Transport, Inc.*, Docket No. 92-47, 26 S.R.R. 871, 872 (ALJ Mar. 18, 1993) (adm. final).

Complainant alleges that "practices and regulations" by Respondent with regard to its imposition of berthing fees, storage fees and other fees in its arrival notices and freight invoices related to the receiving, handling, storing or delivering of property and are "unjust, unlawful, unreasonable and unfounded." Complaint at 4. Complainant further alleges that as a result of Respondent's alleged conduct Complainant suffered financial injury. Complaint at 4. Complainant alleges violations of the Shipping Act and a pattern of conduct sufficient to demonstrate a violation of the Shipping Act. Respondent has not denied the allegations. Respondent chose not to participate in this proceeding, and its failure to participate has deprived Claimant of the opportunity to obtain additional evidence to support its allegations, as Respondent would be most likely to have information pertinent to the allegations against it. Such failure to respond has been found by the Commission to support a default decision. *See, e.g., Century Metal Recycling,* 33 S.R.R. at 19; *Shipco Transport Inc. v. Jem Logistics, Inc., and Andi Georgescu*, Docket No. 12-06, 32 S.R.R. 1855, 1857 (FMC Aug. 21, 2013); *Oceanic Bridge International, Inc. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, Docket No. 14-02, 2014 FMC LEXIS 24, *1 (ALJ Oct. 21, 2014) (adm. final). The conduct alleged in the complaint states a claim for violation of the Shipping Act and Respondent has defaulted. Accordingly, Complainant has established that Respondent violated the Shipping Act.

C. Reparations

Complainant seeks $74,000 in damages. Complaint at 4. Pursuant to section 11(g) of the Shipping Act "the Federal Maritime 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). Commission case law states that: "(a) damages 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." *Waterman v. Stockholms Rederiaktiebolag Svea*, Docket No. 638, 3 F.M.B. 248, 249 (FMB Dec. 8, 1950); *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, Docket No. 94-32, 30 S.R.R. 8, 13 (FMC Aug. 26, 2003).

The evidence demonstrates that as a consequence of the violations by Respondent, Complainant sustained damages of $74,000. Goforth & Marti is also entitled to interest running from March 23, 2022, when it paid the second invoice to obtain the release of its cargo, to be calculated by the Commission when this judgement and decision become final. *See* 46 C.F.R. § 502.253. In addition, Complainant may be eligible for attorney fees, upon petition, pursuant to Commission Rule 254. 46 C.F.R. § 502.254.

III. ORDER

For the reasons stated above, it is hereby

ORDERED that default be entered against Respondent HSIN Silk Road Shipping Limited. It is

FURTHER ORDERED that Goforth & Marti be awarded $74,000, plus interest from March 23, 2022, from Respondent HSIN Silk Road Shipping Limited as reparations for violating the Shipping Act.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

B & G FUTURES INC, *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 026512NF*

DOCKET NO. 22-25

Served: February 22, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's January 19, 2023, Initial Decision Revoking Ocean Transportation License, in this docket has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

SANTA FE DISCOUNT CRUISE PARKING, INC., D/B/A EZ CRUISE PARKING; LIGHTHOUSE PARKING INC; AND SYLVIA ROBLEDO D/B/A 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: February 23, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

I. INTRODUCTION

On February 7, 2023, remaining Complainant Sylvia Robledo d/b/a 81st Dolphin Parking ("81st Dolphin") and Respondents The Board of Trustee of the Galveston Wharves ("Board") and the Galveston Port Facilities Corporation ("GPFC"), filed a document labeled as a Joint Petition for Approval of Partial Settlement ("Motion"). This filing is a joint motion to approve a settlement between the remaining parties, which would conclude this proceeding in its entirety.

As discussed in greater detail below in the procedural history section, Respondent GPFC was dismissed as a party and Complainants EZ Cruise and Lighthouse entered into a settlement with Respondents. Therefore, the remaining parties in this proceeding are Complainant 81st Dolphin and Respondent Board. The parties are also engaged in litigation before the United States District Court for the Southern District of Texas, Houston Division (the "Federal District Court Lawsuit") which is also resolved as part of this settlement agreement.

This proceeding has been extensively litigated and has a lengthy procedural history. Pertinent portions of the procedural history are summarized below to provide context for this initial decision. For the reasons discussed below, the settlement agreement of the few remaining issues is approved. Although the motion mentioned confidential treatment, the Office of the Secretary confirmed with the parties that they are not seeking confidentiality for the motion or 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.

II. PROCEDURAL HISTORY

On June 16, 2014, Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking ("EZ Cruise"), Lighthouse Parking, Inc. ("Lighthouse"), and 81st Dolphin, private owners or operators of parking lots located outside the Port of Galveston, commenced this proceeding by filing a complaint with the Commission, alleging that the Board and GPFC, operators of a cruise ship terminal complex in Galveston Island, Texas, violated 46 U.S.C. §§ 41102(c), 41106(2) and 41106(3) of the Shipping Act of 1984 regarding parking fees charged by the terminal. On October 21, 2014, Complainants filed an Amended Complaint, adding paragraphs regarding a September 22, 2014, amended tariff. Leave to file the amended complaint was granted on November 21, 2014.

On October 21, 2014, Respondents moved to dismiss the complaint and the ALJ granted in part and denied in part Respondents' motion. *Santa Fe Discount Cruise Parking, Inc. v. The Bd. of Trustees of the Galveston Wharves*, Docket No. 14-06, 33 S.R.R. 1283, 2014 FMC LEXIS 31 (ALJ Nov. 21, 2014). The ALJ dismissed with prejudice Complainants' § 41102(c) and § 41106(3) claims but allowed the § 41106(2) claims to proceed. 2014 FMC LEXIS 31 at *26-*32, *37-*38. Neither party filed exceptions to the ALJ's order, which then became administratively final, and the parties subsequently filed briefs on the § 41106(2) claims. On December 4, 2015, the ALJ dismissed the claims against Respondent GPFC as well as the § 41106(2) claims. 2015 FMC LEXIS 44 at *3-*4 (ALJ Dec. 4, 2015).

On January 13, 2017, the Commission issued an order affirming the dismissal of the Complaint and the claims against GPFC. 2017 FMC LEXIS 1 (FMC Jan. 13, 2017) (Order Affirming Initial Decision's Dismissal of Complaint). Complainants EZ Cruise and 81st Dolphin sought review of the Commission's decision by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). On May 11, 2018, the D.C. Circuit granted their petition for review, vacated the FMC Order, and remanded the case to the Commission for further proceedings consistent with the court's opinion. *Santa Fe Discount Cruise Parking, Inc. v. Fed. Mar. Comm'n*, 889 F.3d 795, 797 (D.C. Cir. 2018).

On August 9, 2018, the Commission remanded the proceeding to the ALJ. *Santa Fe Discount Cruise Parking, Inc. v. The Bd. of Trustees of the Galveston Wharves*, 1 F.M.C. 2d 155 (FMC Aug. 9, 2018) (Order Remanding Proceeding to Administrative Law Judge). On November 16, 2018, the ALJ issued an Initial Decision on Remand ("I.D.R."). 2018 FMC LEXIS 55 (FMC Nov. 16, 2018). The ALJ found that Complainants had not proven by a preponderance of the evidence that the Port violated section 41106(2), and again dismissed the Complaint with prejudice. 2018 FMC LEXIS 55 at *14-*15. Complainants filed exceptions to the I.D.R.

On April 16, 2021, the Commission issued an Order on Initial Decision on Remand ("Order on I.D.R."), partially reversing the I.D.R. and remanding the case to the ALJ for further proceedings. 2021 FMC LEXIS 56 at *59-*60 (FMC Apr. 16, 2021). The Order on I.D.R. found that Respondent Board violated 46 U.S.C. § 41106(2) with respect to EZ Cruise and 81st Dolphin; vacated the I.D.R. with respect to attorney fees; affirmed the dismissal of all other claims, including the dismissal of GPFC in the I.D.; and, remanded the case to the ALJ to determine an appropriate reparations award. 2021 FMC LEXIS 56 at *82.

On April 20, 2021, a Notice was issued, reassigning this proceeding to the undersigned due to the retirement of the ALJ previously adjudicating this proceeding. In addition, an Order Requiring Joint Status Report ("April 20, 2021, Order for JSR") was issued the same day, instructing the parties to file a joint status report with proposed schedule. Order Requiring Joint Status Report (ALJ April 20, 2021).

On May 17, 2021, prior to the filing of the joint status report, Respondent Board filed a Petition for Reconsideration and Unopposed Motion for Stay of Proceedings ("Petition for Reconsideration"). The Petition for Reconsideration effectively stayed the proceeding before the ALJ. However, while the Petition for Reconsideration was pending before the Commission, the parties filed their joint status report with proposed schedule on May 24, 2021, and then filed their briefs in conformity with their proposed schedule on June 30, 2021 (Complainants), and July 30, 2021 (Respondent).

On July 26, 2021, Complainants EZ Cruise and Lighthouse and Respondents filed a Joint Petition for Approval of Partial Settlement, requesting approval of a settlement of this proceeding as well as the Federal District Court Lawsuit. On September 10, 2021, the Commission approved the settlement, which left only the claim by Complainant 81st Dolphin remaining.

On June 2, 2022, the Commission issued an Order Granting in Part and Denying in Part Petition for Reconsideration ("Commission Remand Reconsideration Order"). The Commission granted Respondent's petition on the issue of the correct end-date for recovering reparations and amended the Order on I.D.R. to allow the parties to submit arguments on the correct end-date for calculating reparations on the selective enforcement claim; granted the Board's request to address the method for calculating reparations on remand; and denied Respondent's petition as to all other issues. Commission Remand Reconsideration Order at 14-19.

Following service of the Commission Remand Reconsideration Order, [2] on August 8, 2022, another Order Requiring Joint Status Report ("August 8, 2022, Order for JSR") was issued to the parties, directing them to discuss whether this proceeding could be settled, and instructing them to file a joint status report with a proposed schedule for briefing the remaining two issues in the proceeding: the correct end-date for calculating reparations on the selective enforcement claim and the method for calculating reparations on remand. August 8, 2022, Order for JSR at 2. On August 23, 2022, the parties submitted a joint status report. On August 30, 2022, a Remand Reconsideration Scheduling Order was issued.

On September 30, 2022, Complainant filed its brief and supporting materials. On October 31, 2022, Respondent filed, together with its brief and supporting materials, an opposed motion seeking leave to include supplemental records regarding decal fees. On November 1, 2022, Complainant filed a response to the motion and an Emergency Motion for Enlargement of Time to File Reply to Respondents' Reply Brief on Remand. On November 7, 2022, an Order on Supplemental Evidence and Extension of Time was issued, granting Respondent leave to enter supplemental documents regarding decal fees into the record and granting Complainant

[2] The Commission Remand Reconsideration Order was not served on OALJ until August 4, 2022.

additional time to respond. Order on Supplemental Evidence and Extension of Time at 4-5. On November 22, 2022, Complainant submitted its reply brief on reparations.

On January 9, 2023, an order was issued granting an unopposed motion for a temporary stay while the parties mediated the dispute. On February 7, 2023, remaining Complainant 81st Dolphin and Respondents filed a motion seeking approval of the settlement agreement.

III. DISCUSSION

Using language borrowed in part from the Administrative Procedure Act,[3] 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). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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 AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

[3] "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).

"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)).

The parties jointly request approval of the settlement agreement, stating:

> In the instant case, the settlement is the result of arm's-length negotiations between sophisticated Parties, all of whom have been represented by counsel during the negotiation process. The proposed agreement does not contravene any law or public policy, nor is it unjust or discriminatory in any way. Additionally, this agreement will not result in any adverse effects to any third parties or on the shipping public. Indeed, the Parties' disputes concern "access fees" assessed under Tariff provisions which no longer exist. The proposed settlement is fair and reasonable and reflects the Parties' desire to resolve their issues without the need for costly and uncertain litigation.

Motion at 5-6.

This proceeding has been pending for an extended period of time and has been the subject of multiple appeals, including to the D.C. Court of Appeals. All of the Complainants have settled except for Complainant 81st Dolphin. The Commission issued an Order on Initial Decision on Remand on April 15, 2021, and an Order Granting in Part and Denying in Part Petition for Reconsideration on June 2, 2022. These Commission orders have narrowed the remaining issue to specific questions with regard to calculating reparations. This settlement agreement is nearly identical to a request approved previously by the Commission with other Complainants in this proceeding.

Based on the representations in the joint 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 and have engaged in arms-length settlement discussions. The parties have determined

that the settlement reasonably resolves the issues raised in the complaint without the need for additional costly and uncertain litigation. Accordingly, the settlement agreement is approved.

IV. ORDER

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

ORDERED that the request to approve the settlement between 81st Dolphin Parking and The Board of Trustee of the Galveston Wharves be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITHOUT PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

COLOR BRANDS, LLC, *Complainant.*

v.

AAF LOGISTICS, INC., *Respondent*.

DOCKET NO. 22-18

Served: February 23, 2023

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 January 27, 2023, Initial Decision on Default in this proceeding.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

WAN HAI LINES, LTD. AND WAN HAI LINES (USA) LTD. - POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)	**DOCKET NO. 21-16**

Served: March 13, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING REMAND SETTLEMENT AGREEMENT[1]

I. BACKGROUND AND HISTORY

On February 24, 2022, the Bureau of Enforcement, Investigations, and Compliance ("BEIC") and Respondents Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. (collectively "Wan Hai") filed a motion and joint memorandum in support of proposed settlement ("Motion"), together with a copy of the proposed settlement agreement. The parties seek approval of the settlement agreement and dismissal of this proceeding with prejudice.

The Federal Maritime Commission ("Commission") initiated this proceeding on December 30, 2021, by issuing an Order of Investigation and Hearing ("OIH") to determine whether Respondents violated section 41102(c) of the Shipping Act regarding Respondents' charges relating to empty container returns. OIH at 1. In addition, the Commission ordered the proceeding to be expedited. OIH at 9.

The parties reached a previous settlement agreement. On June 7, 2022, an order was issued denying the previous joint settlement motion. The parties filed a joint appeal of the order denying the joint settlement motion. On December 15, 2022, the Commission issued an order affirming the denial of the joint settlement motion and returning the proceeding for further proceedings and resolution within four months.

On December 16, 2022, the parties were ordered to file a joint status report with proposed schedule. On December 27, 2022, a remand scheduling order was issued. The parties filed a joint petition for stay and revision of the schedule. On February 9, 2023, the Commission served an order denying the joint petition for stay. Earlier on February 9, 2023, the parties had filed a joint motion for stay of deadlines pending settlement. On February 10, 2023, an order was issued granting a two-week extension of deadlines as the parties finalized the settlement.

[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.

II. LEGAL STANDARD

Using language borrowed in part from the Administrative Procedure Act, 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); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a long history of approving settlement agreements that meet the required criteria, including in enforcement proceedings.

> The Commission's decisions and regulations have long indicated a broad policy favoring settlement. In reviewing a proposed settlement, the Commission evaluates whether it would contravene any law or public policy, and whether it is "fair, reasonable, and adequate." As the parties note, the Commission weighs enforcement policy in terms of deterrence and compliance, likely costs and delay, and "pragmatic litigative possibilities" regarding the proceeding's potential outcomes.

Possible Unfiled Agreement Between Hyundai Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A., Docket No. 97-07, 2000 FMC LEXIS 2 at *4 (FMC May 2, 2000) (citing *Old Ben Coal Co. v. Sea-Land Serv.*, 21 F.M.C. 506, 512-513; 18 S.R.R. 1085, 1091 (ALJ Nov. 29, 1978); *Far Eastern Shipping Co. – Possible Violations of Sections 16, Second Paragraph 18(b)(3) and 18(c), Shipping Act, 1916*, 21 S.R.R. 743, 1014 (ALJ Mar. 25, 1982)).

> The Commission has routinely held that negotiated settlement agreements should be approved unless the agreements present one of a few defects requiring disapproval. The Commission has consistently adhered to a policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid. Despite the general preference for approval of settlement agreements, the Commission does not merely rubber stamp any proffered settlement. Instead, the Commission typically reviews a settlement agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake. The Commission also reviews the terms of settlement agreements to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment.

World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, a.k.a. Johnny Yu – Possible Violations of Section 10 of the Shipping Act of 1984, Docket No. 09-07, 2010 FMC LEXIS 27 at *5, 31 S.R.R. 1346, 1350 (FMC May 20, 2010) (internal citations omitted).

This is an enforcement proceeding and Commission Rules require consideration of the Subpart W factors. Under Subpart W, Commission Rule 603(b), in "determining the amount of any penalties assessed," the Commission is required to "take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." 46 C.F.R. § 502.603(b). These factors have since been codified in 46 U.S.C. § 41109 by the passage of the Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272.

In addition, Commission Rule 603(a), governing the assessment of civil penalties in Commission-instituted proceedings, states that the "full text of any settlement must be included in the final order of the Commission." 46 C.F.R. § 502.603(a); *see also* Remand Order at 6.

III. SETTLEMENT AGREEMENT ANALYSIS

A. Settlement Terms

The parties state that the "revised Settlement Agreement addresses the purpose the Commission articulated in its OIH and Order Reversing the Initial Decision and Remand; specifically, the rules in Subpart W, which govern, among other things, the assessment of civil penalties 46 C.F.R. §§ 502.601-502.605." Motion at 2 (footnote omitted). In addition, the parties state:

> The Parties agree to resolve their legal dispute in the Settlement Agreement and agree that settlement is in the interest of both parties, as it conserves litigative and administrative resources. Furthermore, the Settlement Agreement addresses the Commission's enforcement interests of deterrence and compliance. A summary of terms of the Settlement Agreement are as follows:
>
> > 1. Within ten (10) calendar days after a decision approving this Settlement Agreement becomes administratively final, Wan Hai shall make monetary payment of civil penalties to the Commission, by cashier's or certified check or by online payment, in the total amount of $950,000.00.
> >
> > 2. Within fifteen (15) calendar days after a decision approving this Settlement Agreement becomes administratively final, Wan Hai shall refund to the underlying parties charges collected under the twenty-one (21) invoices at issue in this proceeding as listed in Attachment A to the Order of Investigation and Hearing).
> >
> > 3. Upon submission of this Settlement Agreement to the Administrative Law Judge, Wan Hai agrees to cease and desist from knowingly assessing detention charges where: (a) Wan Hai failed to provide an equipment return location; (b) where Wan Hai identified an equipment return location that was not accepting the container chassis; or (c) where appointments were unavailable for equipment return, so as to comply hereafter with the Interpretive Rule regarding Detention and Demurrage, 46 C.F.R. § 545.5(c)(1); 85 FR 29638 (May 18, 2020).

> 4. BEIC and Wan Hai shall jointly submit to the Administrative Law Judge a motion seeking approval of this Settlement Agreement.
>
> 5. Wan Hai hereby waives all rights now and, in the future, to seek judicial review or otherwise challenge or contest the validity of the order entered pursuant to this Agreement.
>
> 6. Upon a decision of the Administrative Law Judge or the Commission approving this Settlement Agreement becomes administratively final, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claim for recovery of civil penalties from Wan Hai arising from the alleged violations set forth above as related to the twenty-one (21) invoices identified in Attachment A to the Order of Investigation and Hearing.
>
> 7. It is expressly understood and agreed that this Agreement is not, and is not to be construed as, an admission by Wan Hai to the alleged violations set forth above.
>
> 8. This agreement is subject to approval by the Commission in accordance with 46 C.F.R. § 502.603. If the agreement is not approved, all Wan Hai's obligations hereunder shall cease.

Motion at 2-3.

Consistent with Commission Rule 603(a), the full text of the settlement agreement is attached to this order. 46 C.F.R. § 502.603(a). In addition, the settlement agreement has been posted on the docket on the Commission website.

B. Criteria

1. Rule 72 Factors

Commission Rule 72 requires consideration of "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).

The parties assert that the agreement is public and therefore "the agreement will inform other carriers and the shipping public so they may take note of its terms and conform their conduct thereto." Motion at 5. The parties further contend that the settlement agreement "is free of fraud, duress, undue influence, mistake, or other defects which would otherwise result in its disapproval" and that "the settlement is the result of arms-length, good-faith negotiations conducted with the advice of counsel." Motion at 5-6.

Both parties are represented by counsel who have engaged in arm's length negotiation and there is no indication of fraud, duress, undue influence, mistake, or other defects. The settlement promptly resolves an issue important to the shipping industry and avoids the potential costs and uncertain outcome inherent in litigation. Moreover, the agreement does not appear to violate any law or policy and is consistent with Commission requirements as outlined below.

2. Rule 603 Factors

Commission Rule 603(b) requires consideration of "the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." 46 C.F.R. § 502.603(b). The parties have different positions regarding a number of these factors.

Regarding the nature, circumstances, extent, and gravity of the violation, Wan Hai indicates that it has evidence that "contradicts the position taken in the OIH and by BEIC in this proceeding and supports the reasonableness of its conduct" and asserts that it "would vigorously argue that the nature, circumstances, extent and gravity of the alleged violations do not warrant imposition of a significant penalty." Motion at 6-7.

BEIC contends that "the violations are serious, and that the nature, circumstance, extent, and gravity are all aggravating factors that compel a commensurate civil penalty" and that "this penalty amount will serve as a deterrent against future violations." Motion at 7. BEIC further asserts that:

> Beyond the dollar amount of the civil penalty, the Settlement Agreement importantly provides for Wan Hai's agreement to immediately comply with the Interpretive Rule and related statutory and regulatory requirements in the U.S. foreign trades. The Settlement Agreement coupled with the issuance of a cease-and-desist order will deter future similar violative acts by Wan Hai. Moreover, it will serve as notice to other VOCCs that violative acts in contravention of the Interpretive Rule, 46 C.F.R. § 545.5(c)(1) run afoul of the Shipping Act.

Motion at 7.

Unlike the prior settlement agreement, this settlement agreement is clear, narrowly tailored to the specific facts of this case, and does not contain prescriptive measures which may or may not be reasonable as applied to future litigants. The civil penalty is significant and is consistent with the nature, circumstances, extent, and gravity of the 21 violations alleged. Moreover, there is a benefit to the shipping public in having an expeditious resolution which imposes a clear cease and desist order. While it is difficult to determine the degree of culpability at this stage of the proceeding, the civil penalty is significant and the cease and desist order ensures that further violations do not occur. Therefore, the proposed settlement is reasonable.

Regarding the enforcement policy of deterrence and compliance, the parties assert:

> With respect to the policy of enforcement, BEIC stresses the importance of ensuring compliance with the law. Wan Hai supports the Commission's objectives and has, in addition to payment of a civil penalty, agreed to comply with the Interpretive Rule, 46 C.F.R. § 545.5(c)(1) for all shipments within the jurisdiction of the Commission. The relief agreed to by Wan Hai provides assurances of deterrence and future compliance. Wan Hai's commitment to these changes is reflected in its agreement to a cease-and-desist order. The agreed civil penalty adds further weight to the deterrent effect. Wan Hai also recognizes that

> its failure to comply with the cease-and-desist order may result in much higher penalties being demanded by the Commission in any enforcement action resulting from such failure. Additionally, approval of the Settlement Agreement would put other ocean common carriers on notice and is likely to deter them from engaging in similar practices.

Motion at 7-8. These factors also significantly weigh in favor of approving the proposed settlement agreement.

Regarding litigative realities, the parties assert that the "litigative realities and cost of continued litigation weigh in favor of approving the Settlement Agreement" and that the "decision to settle reflects the consideration that, if the matter were not settled, both parties would be expected to vigorously defend their respective positions." Motion at 11. The parties state:

> The litigative realities and cost of continued litigation weigh in favor of approving the Settlement Agreement. The decision to settle reflects the consideration that, if the matter were not settled, both parties would be expected to vigorously defend their respective positions and incur substantial administrative and financial costs based on the fact that several procedural steps remain in this proceeding. Acknowledging the Parties remain divergent on the merits of the case, they have carefully considered the costs, benefits, and risks of further litigation, and determined that settlement is in their mutual interests, as well as that of the shipping public. Both sides recognize the litigation reality that resolution of the proceeding by trial would be an expensive undertaking that would divert resources from each of the Parties. Moreover, it is likely that, even with the expedited schedule required by the Remand Order, as implemented by the ALJ's Remand Scheduling Order issued on December 27, 2022, the likelihood of appeal to the Commission and the courts, the matter would take significant time to reach a final resolution. The Settlement Agreement by contrast, would resolve the matter without extended litigation thereby bringing substantial, valuable, and immediate relief to the shipping public, including refunds of charges on the 21 invoices at issue in this proceeding. Accordingly, consideration of these benefits along with the risks, costs, and uncertainties of continued litigation weighs in favor of approval of the Settlement Agreement.

Motion at 8. The prompt settlement of this proceeding benefits the parties as well as the shipping public and therefore is a reasonable balance of the relevant factors.

Regarding history of prior offenses and ability to pay, the parties state that "Wan Hai has no recent history of prior offenses" and "Wan Hai is one of the smaller ocean common carriers serving the U.S. Transpacific trade." Motion at 8-9. These factors are consistent with the proposed penalty.

A review of the settlement agreement and the relevant factors indicates that it satisfies the criteria for approval. Therefore, the settlement agreement is reasonable and will be approved, including imposition of civil penalties and a cease and desist order.

IV. ORDER

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

ORDERED that the motion to approve the settlement agreement between the Bureau of Enforcement, Investigations, and Compliance and Wan Hai Lines, Ltd. and Wan Hai Lines (USA) Ltd. be **GRANTED**. It is

FURTHER ORDERED that Wan Hai is hereby **ORDERED** to refund the underlying parties for charges collected under the twenty-one (21) invoices at issue in this proceeding as listed in Attachment A to the Order of Investigation and Hearing. It is

FURTHER ORDERED that the request for a cease and desist order be **GRANTED**. Wan Hai is hereby **ORDERED** to cease and desist from knowingly assessing detention charges where: (a) Wan Hai failed to provide an equipment return location; (b) where Wan Hai identified an equipment return location that was not accepting the container chassis; or (c) where appointments were unavailable for equipment return, so as to comply hereafter with the Interpretive Rule regarding Detention and Demurrage, 46 C.F.R. § 545.5(c)(1); 85 FR 29638 (May 18, 2020). It is

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

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

GoForth & Marti D/B/A GM Business Interiors.,
Complainant

v.

HSIN Silk Road Shipping LTD., *Respondents*

DOCKET NO. 22-16

Served: March 21, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 15, 2023, Initial Decision has expired. Accordingly, the decision has become administratively final.

Pursuant to 46 C.F.R. §502.253, respondent HSIN Silk Road Shipping LTD shall pay to Claimant by April 5, 2023, reparations ($74,000) and interest ($2,361.41), totaling, $76,361.41.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

PHILIP REINISCH CO. LLC, *Complainant*

v.

FLEXPORT INTERNATIONAL LLC, *Respondent*.

DOCKET NO. 22-26

Served: March 24, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On March 9, 2023, Complainant Philip Reinisch Co. LLC ("Philip Reinisch") and Respondent Flexport International LLC ("Flexport") filed a joint motion seeking approval of a settlement, confidential treatment of the settlement agreement, and voluntary dismissal of the complaint ("Motion") with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, 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); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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

[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.

> 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 AM. JUR. 2D *Compromise and Settlement* § 3 (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)).

The parties state:

> In this action, the Parties, both sophisticated corporate entities, and represented by counsel, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential Settlement Agreement does not contravene any law or public policy and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the disputes between the Parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, the Parties respectfully request that the Confidential Settlement Agreement be approved and, on that basis, the Complaint in this matter be dismissed with prejudice.

Motion at 3.

Based on the representations in the joint 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 and have engaged in arms-length settlement discussions. The proceeding 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. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "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).

The confidential 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.

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 Complainant Philip Reinisch and Respondent Flexport be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

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

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-06

**SANTA FE DISCOUNT CRUISE PARKING, INC., d/b/a EZ CRUISE PARKING;
LIGHTHOUSE PARKING INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

v.

**THE BOARD OF TRUSTEES OF THE GALVESTON WARVES;
and THE GALVESTON PORT FACILITIES CORPORATION**

Served: March 28, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's February 23, 2023, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

WAN HAI LINES, LTD. AND WAN HAI LINES (USA) LTD.–	)	**DOCKET NO. 21-16**
POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)	)	

Served: April 13, 2023

Notice Not to Review

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's March 13, 2023, Initial Decision Approving Remand Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

U SHIPPERS GROUP INC., *Complainant*

v.

MAERSK A/S DBA MAERSK, *Respondent*.

DOCKET NO. 22-22

Served: April 17, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On March 31, 2023, Complainant U Shippers Group, Inc. ("U Shippers"), and Respondent Maersk A/S DBA Maersk ("Maersk"), filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, 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); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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

[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.

> 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 AM. JUR. 2D *Compromise and Settlement* § 3 (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)).

The parties state:

> In this action, the parties, both sophisticated corporate entities represented by counsel, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential Settlement Agreement does not contravene any law or public policy, and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the dispute between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, the parties respectfully request that the Confidential Settlement Agreement be approved and, on that basis, the complaint in this matter be dismissed with prejudice.

Motion at 3.

Based on the representations in the joint 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 and have engaged in arms-length settlement discussions. The proceeding 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. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "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).

The confidential 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.

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 Complainant U Shippers and Respondent Maersk be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

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

_____

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

PHILIP REINISCH CO. LLC, *Complainant*

v.

FLEXPORT INTERNATIONAL LLC, *Respondent.*

DOCKET NO. 22-26

Served: April 25, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's March 24, 2023, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

DOKA U.S.A. LTD., *Complainant*

v.

MSC MEDITERRANEAN SHIPPING COMPANY (USA) INC., *Respondent*.

DOCKET NO. 22-32

Served: May 12, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On April 27, 2023, Complainant Doka U.S.A. Ltd. ("Doka") and Respondent MSC Mediterranean Shipping Company (USA) Inc. ("MSC Mediterranean") filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, 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); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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

[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.

> 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 AM. JUR. 2D *Compromise and Settlement* § 3 (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)).

The parties, "both sophisticated corporate entities," state that they "arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks." Motion at 3. The parties state:

> The Confidential Settlement Agreement does not contravene any law or public policy and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the disputes between the parties and reflects their desire to resolve their issues with the need for costly and uncertain litigation.

Id.

Based on the representations in the joint 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 and have engaged in arms-length settlement discussions. The proceeding 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. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "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).

The confidential 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.

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 Complainant Doka and Respondent MSC Mediterranean be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

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

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

U SHIPPERS GROUP INC., *COMPLAINANT*

v.

MAERSK A/S DBA MAERSK, *Respondent*

DOCKET NO. 22-22

Served: May 19, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's April 17, 2023, Initial Decision Approving Settlement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

CCMA, LLC, *Complainant*

v.

MEDITERRANEAN SHIPPING COMPANY S.A. AND MEDITERRANEAN SHIPPING COMPANY (USA) INC., *Respondents*.

DOCKET NO. 22-33

Served: May 26, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On May 12, 2023, Complainant CCMA, LLC ("CCMA") and Respondents Mediterranean Shipping Company S.A. ("MSC S.A.") and Mediterranean Shipping Company (USA) Inc. ("MSC USA"), filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

Using language borrowed in part from the Administrative Procedure Act, 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); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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).

[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.

> 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 AM. JUR. 2D *Compromise and Settlement* § 3 (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)).

The parties, "both sophisticated corporate entities," state that they "arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks." Motion at 3. The parties state:

> The Confidential Settlement Agreement does not contravene any law or public policy and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Confidential Settlement Agreement is a fair and reasonable resolution of the disputes between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation.

Id.

Based on the representations in the joint 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 and have engaged in arms-length settlement discussions. The proceeding 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. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "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).

The confidential 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.

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 Complainant CCMA and Respondents MSC S.A. and MSC USA be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

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

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

OJ COMMERCE, LLC, *Complainant*

v.

HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO. KG AND HAMBURG SUD NORTH AMERICA, INC., *Respondents*.

DOCKET NO. 21-11

Served: June 7, 2023

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

[Exceptions filed by Complainant and a Respondent, 6/29/23, Commission final decision pending.]

I. INTRODUCTION

A. Overview

This proceeding began on December 13, 2021, when the Federal Maritime Commission ("Commission" or "FMC") issued a notice of filing of complaint and assignment, indicating that Complainant OJ Commerce, LLC ("OJC") had filed a complaint against Respondents Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & CO. KG ("HSDG") and Hamburg Sud North America, Inc. ("HSNA"). As the decision shows, much of the conduct at issue was performed by HSNA employees acting as agents for HSDG, therefore, this decision will refer to "Hamburg," in the singular, to include both entities.

An amended complaint, entered on February 18, 2022, alleges that Hamburg violated the Shipping Act of 1984 ("Shipping Act") at 46 U.S.C. §§ 41102(b)(2), 41102(c), 41104(a)(3), 41104(a)(5), 41104(a)(9), and 41104(a)(10). On August 31, 2022, OJC's claims under sections 41102(b)(2), 41104(a)(5), and 41104(a)(9) were dismissed. In addition, OJC's claim of unreasonable practices under section 41102(c) is resolved, as Hamburg refunded the full amount of the demurrage charges at issue. Brief at 9 n.15.[2] Therefore, the remaining claims are sections 41104(a)(3) (retaliation), and 41104(a)(10) (refusal to deal).

[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.

[2] The parties' filings are abbreviated as follows: Complainant's brief ("Brief"), Complainant's proposed findings of fact ("CPFF"), Respondents' reply brief ("Opposition"), Respondents' proposed findings of fact ("RPFF"), Respondents' response to Complainant's proposed findings

This case raises novel legal issues about refusal to deal claims, retaliation claims, and calculation of reparations. In addition, the parties disagree about many of the factual allegations. The parties heavily litigated this proceeding, with multiple motions to compel evidence filed. Indeed, both parties allege that the other party violated discovery requirements.

OJC asserts that after receiving a demand letter on April 28, 2021, from OJC's attorneys threatening to file an FMC complaint, Hamburg refused to deal and retaliated both by refusing to fulfill existing contractual obligations under the 2020-21 service contract and by refusing to renew or negotiate a 2021-22 service contract. Hamburg contends that it did not retaliate or refuse to deal or negotiate, that OJC fails to prove damages with reasonable certainty, and that an adverse decision would require it to consent to any terms demanded by a shipper.

Commission case law is clear that an ocean common carrier does not have a duty to grant a contract to every potential party. However, long-standing Commission precedent prohibits common carriers from shutting out any person for reasons having no relation to legitimate transportation-related factors and from retaliating against shippers. As outlined in detail below, the evidence shows that here, Hamburg's decision on April 29, 2021, to "disengage" from fulfilling the 2020-21 service contract and negotiating a 2021-22 service contract was made due to the "litigation risk" posed by OJC, which under these facts is not a legitimate transportation-related factor. The specific conduct in the record here establishes both the refusal to deal and retaliation claims.

The parties also contest how damages should be determined. OJC seeks lost profit damages for failure to meet the service contract's minimum quantity commitment ("MQC"), also referred to as minimum volume commitment ("MVC"), by 15 containers[3] in 2020-21; failure to meet weekly allocation by 105 containers in 2020-21; extra shipping charges for 143 containers shipped on the spot market in 2021-22; and loss from refusal to renew the contract in 2021-22 for up to 4,700 containers, equaling a total damages claim of over 100 million dollars. Hamburg asserts that OJC is not entitled to any damages because of contractual limitations, damages being speculative and based on insufficient data, and OJC failing to prove damages with reasonable certainty, for example, the projected 4,700 containers including trade routes and volumes beyond what is included in the 2020-21 service contract.

As explained below, OJC has established that HSDG violated the Shipping Act by refusing to deal and by retaliating against OJC. However, OJC does not establish that it is entitled to the over $100 million in damages that it seeks. OJC establishes that 15 of the contracted 200 containers were not shipped in 2020-21 and taking this shortfall of 15 times the average profit per container of $22,892.48 measures its 2020-21 actual injury as $343,387.20. OJC does not establish that Hamburg failed to meet the 2020-21 weekly allocation, nor that 2021-22 damages should be calculated based on up to 4,700 containers. Rather, the damages for 2021-22 are calculated based on the trade routes and volume in the 2020-21 contract, resulting in actual injury of $4,578,496.

of fact ("RRPFF"), Complainant's reply brief ("Reply"), and Complainant's response to Respondents' proposed findings of fact ("CRPFF").

[3] This decision will use "container" to refer to forty-foot equivalent units ("FFEs"), as OJC's expert did. RX 1032-1033. One FFE equals 2 twenty-foot equivalent units ("TEUs").

Therefore, OJC establishes that it sustained a total actual injury in the amount of $4,921,883.20. Moreover, because OJC establishes a violation of the anti-retaliation provision, additional damages may be awarded. Given that the violation was knowing and willful, double damages are found to be appropriate. Accordingly, OJC is awarded reparations of $9,843,766.40 from HSDG.

B. Procedural History

On December 13, 2021, the Commission issued a notice of filing of complaint and assignment, initiating this proceeding. On January 18, 2022, Hamburg filed a partial answer and a motion to dismiss and/or for summary judgment. On February 2, 2022, OJC filed a motion for leave to file an amended complaint ("Amended Complaint"). On February 18, 2022, an order was issued allowing the entry of the amended complaint and dismissing as moot Hamburg's motion to dismiss and/or for summary judgment. On March 1, 2022, HSDG and HSNA filed answers to the amended complaint.

On March 10, 2022, a scheduling order was issued. On April 26, 2022, and June 22, 2022, confidentiality stipulations and protective orders were issued. On June 29, 2022, OJC's motion to compel and the joint motion to modify the scheduling order were granted in part and denied in part.

On July 26, 2022, Hamburg filed a partial motion to dismiss and/or for summary judgment. On August 31, 2022, Hamburg's partial motion to dismiss and/or for summary judgment was granted in part and denied in part, dismissing OJC's claims under sections 41102(b)(2), 41104(a)(5), and 41104(a)(9); OJC's motion for expedited relief was granted in part; and Hamburg's motion for a protective order was denied.

On September 30, 2022, an order was issued denying Hamburg's motion to compel, denying OJC's motion for clarification, and granting in part and denying in part OJC's motion for an extension of time for limited discovery.

On November 9, 2022, OJC filed its brief, proposed findings of fact, and appendix (exhibits labeled as CX). On December 8, 2022, Hamburg filed its reply brief, proposed findings of fact, appendix (exhibits labeled as RX), response to OJC's proposed findings of fact, and request for confidential treatment. On December 23, 2022, OJC filed its reply brief, response to Hamburg's proposed findings of fact, and supplemental appendix (exhibits labeled as SCX).

On January 31, 2023, the parties were ordered to resubmit confidential versions of filings in order to properly indicate confidential material and to submit clarifying information concerning requests for confidential treatment of appendix material. On February 6, 2023, OJC submitted the requested information and corrected filings, along with a motion justifying confidential treatment. On February 8, 2023, Hamburg submitted the requested information and corrected filings.

On February 24, 2023, the parties were ordered to review confidentiality requests for deposition testimony in the appendices. On March 10, 2023, OJC responded with a list of de-designations and provided updated materials. On March 14, 2023, OJC filed a supplement to its motion for confidential treatment incorporating Hamburg's updates. On March 14, 2023,

Hamburg provided its updated materials, including a revised motion for confidential treatment of certain materials.

C. Arguments of the Parties

OJC argues that Hamburg retaliated against OJC by unreasonably refusing to renew or even negotiate a service contract with OJC, and by refusing to fulfill Hamburg's existing contractual obligations; Hamburg should be sanctioned and precluded from challenging OJC's damages based on Hamburg's repeated violations of court orders and FMC Rules; and OJC is entitled to reparations for the actual injury it sustained as a result of Hamburg's violations of the Shipping Act with damages doubled due to Hamburg's willful violation of section 41104(a)(3). Brief at 16-49; Reply at 8-52.

Hamburg asserts that OJC has the burden of proof; Hamburg did not refuse to deal or negotiate with OJC; Hamburg did not retaliate against OJC; OJC fails to prove damages with reasonable certainty; and Hamburg complied with its discovery obligations. Opposition at 7-49.

D. Motions for Confidential Treatment

On April 26, 2022, an order entering confidentiality stipulation and protective order was issued as requested by the parties. On June 22, 2022, in response to a joint request by the parties, an amended confidentiality stipulation and protective order was entered.

On December 8, 2022, Hamburg filed a motion for confidential treatment of certain materials included or referred to in Respondents' filings. On January 31, 2023, the parties were ordered to resubmit confidential versions of filings in order to properly indicate confidential material and to submit clarifying information concerning requests for confidential treatment of appendix material. On February 6, 2023, OJC filed a motion justifying confidential treatment of certain material and corrected filings. On February 8, 2023, Hamburg submitted the requested information and corrected filings.

On February 24, 2023, the parties were ordered to review their confidentiality requests for deposition testimony included in their appendices. On March 10, 2023, OJC filed a supplement to its motion for confidential treatment, stating that it "removed 95% of its deposition designations and the vast majority of its designations on its damages reports," and requested confidentiality for OJC annual sales revenues and OJC company valuations. On March 14, 2023, Hamburg filed a revised motion for confidential treatment of certain materials which limited the confidentiality requests, updated deposition transcripts in the appendix to reflect line-by-line redactions as ordered, and noted no objection to OJC's requests. Also on March 14, 2023, OJC filed a notice of its compliance with order on motions for confidential treatment which included objections to Hamburg's confidentiality designations.

Commission Rule 5 authorizes confidential treatment for confidential commercial information. The revised requests for confidential treatment significantly limit the amount of information for which confidential treatment is sought. Confidential treatment is sought for annual sales revenues; company valuations; non-public financial, marketing, and business activities; and non-public, commercially sensitive information about prices, pricing policies and strategies, marketing strategy, and customer relations. As narrowed, the requests are reasonable.

Further, this decision is readable without the need for quotations from material designated as confidential. In the future, the parties must review all exhibits and only mark sections or pages that contain confidential material and depositions should be conducted with confidential material covered separately from non-confidential material. Accordingly, it is hereby ordered that as revised and supplemented, the motions requesting confidentiality be **GRANTED**.

E. Evidence

Under the Administrative Procedure Act, 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, 98-102 (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 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 in 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 part two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

A. Relevant Entities

1. Complainant OJC is a limited liability company organized and existing under the law of the State of Delaware, with a principal place of business in Miramar, Florida. Amended Complaint at ¶ 1; Brief at 10.

2. OJC is an e-commerce retailer that sells "dropship products" from domestic inventory of hundreds of brands. OJC also has a direct import program where OJC buys household goods, including a wide variety of furniture and office products globally for sale in the United States. OJC's imports come from Asia and Brazil and are delivered to California or Kentucky. CX 467.

3. Respondent HSDG was previously a corporation organized and existing under the laws of Germany, with a principal place of business in Hamburg, Germany. Amended Complaint at ¶ 2.

4. HSDG was merged into its former parent company, Maersk A/S, on November 1, 2021. HSDG Answer at 1 n.1.

5. HSDG was a common carrier as defined by the Shipping Act, 46 U.S.C. §40102(7), through October 31, 2021. Amended Complaint at ¶ 2; HSDG Answer at ¶ 2.

6. Respondent HSNA is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business in Morristown, New Jersey. HSNA Answer at ¶ 3; Amended Complaint at ¶ 3.

7. HSNA was a wholly-owned subsidiary of HSDG that acted as the United States general agent of HSDG until November 1, 2021, when it became a wholly-owned, indirect subsidiary of Maersk A/S. CX 101.

8. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the United States subsidiary and general agent of Maersk A/S. CX 101; HSNA Answer at 1 n.1; Brief at 10 n.18.

9. HSDG became a wholly owned subsidiary of Maersk A/S, although HSDG did not cease to exist as a separate legal entity until late 2021. RX 1120 at ¶ 4.

10. Maersk continues to operate the "Hamburg Sud" brand, which offers different services than Maersk A/S. Opposition at 1 n.1; RX 1120 at ¶ 4.

B. Relevant Contracts and Communications

11. Fiscal year 2020 is defined as June 1, 2020, through May 31, 2021, and fiscal year 2021 is defined as June 1, 2021, through May 31, 2022. CX 423.

12. In June 2020, OJC and HSDG "c/o" HSNA entered a service contract numbered AECC0000291 ("2020-21 service contract"), effective June 23, 2020, to May 31, 2021. CX 119; CX 467 at ¶ 5.

13. The 2020-21 service contract had signature lines for OJC President Jacob Weiss as well as Pestana Rodrigo and Serena Cheung, both listed as signing for HSNA. CX 120.

14. The copy of the service contract in the record is not signed, however, according to internal Hamburg emails, there may not be "a version of this contract which has been formally executed by both parties" as the record contains "the page of the contract signed by the customer. Carrier signed page was not provided to the customer." CX 155.

15. The 2020-21 service contract was for the shipment of goods by sea from foreign countries to the United States and for the delivery to warehouse facilities within the United States via truck. CX 467 at ¶ 5.

16. In the 2020-21 service contract, OJC agreed to tender, and Hamburg agreed to transport, a minimum volume/quantity commitment of 400 TEUs (equal to 200 FFEs) from Asia to California at specified rates. CX 125-126 (noting as trade/shipping lane: East Asia – North America West Coast); CX 467 at ¶ 5.

17. Among other provisions, the 2020-21 service contract indicated that "Shipper agrees . . . that the tender of cargo under this Contract shall be reasonably spaced throughout the term hereof." CX 125.

18. The service contract includes a liquidated damages provision stating in relevant part:

> In the event that the Minimum Volume Commitment of this Contract is reduced by 10% or more as a result of Carrier's failure to provide space, Carrier agrees to pay, and Shipper agrees to accept, in lieu of other damages from Carrier, liquidated damages calculated by subtracting the number of TEUs actually shipped under the Contract from 90% of the MVC and multiplying the TEU deficit, if any, by USD250 per TEU.

CX 125.

19. Hamburg initially referenced OJC as being allocated 8 TEU/week under the 2020-21 service contract. *See, e.g.,* CX 147 (July 13, 2020, internal Hamburg email stating, "Based on signed MQC (400 TEU) they would have 8 TEU/wk to USWC. Anything above this number we can only accept if customers pays [sic] a premium . . . ."); *see also* RX 794 (July 13, 2020, email from Ms. Casanova to Mr. Weiss, stating "Based on signed MQC (400 TEU) OJ Commerce would have 8 TEU/wk to USWC, The only way we can provide space to USWC is if customer accepts an extra fee of $800/40'hc (this amount we have agreed with other BCOs).").

20. On August 3, 2020, OJC was informed by email that space protection ("SP") was increased to 10 TEU per week. CX 156. Internal Hamburg emails afterwards referred to OJC as being allocated 10 TEUs per week. *See, e.g.*, CX 153 (September 22, 2020, internal Hamburg email stating "Customer OJ Commerce reported we are not confirming bookings to their agent Syntrans. Please note that there is a MQC of 10 TEUS per week under agreement # AECC0000291. I appreciate you confirm them at least to meet the MQC . . . ."); *see also* CX 206.

21. On October 16, 2020, OJC sent a demand letter to HSNA and HSDG, which stated in part:

> Pursuant to the "Minimum Volume Commitment" clause of the agreement, [Page 7], HAMBURG SÜD committed to a minimum of 400 TEU between June 23, 2020 and May 31, 2021. Since June 23, 2020, HAMBURG SÜD refused to accept the agreed upon 10 TEUs per week.
>
> **OJC hereby provides HAMBURG SÜD notice of breach of the Service Agreement, which has caused significant economic harm to OJC. I hereby demand that HAMBURG SÜD immediately honor the Service Agreement rates and minimum TEU quantities. Failure to cure the breach by October 22, 2020, may result in legal action against you and your affiliates.**

CX 159 (bold in original) ("OJC first demand letter").

22. HSNA Risk Management Michael Gast sent an email on October 19, 2020, discussing OJC's first demand letter and asking whether there was "any formal documentation confirming our obligation to carry the additional 2 TEUs a week or does this fall under the terms of the contract which stipulate we can accept more cargo at our discretion" and Ms. Casanova responded that there "was not a formal documentation" but that "Customer was informed by email that SP was increased to 10 TEU per week on 08/03/2020." CX 155-157; *see also* CX 208.

23. On October 21, 2020, Mr. Gast emailed HSNA Product Management Rodrigo Pestana, cc'ing other Hamburg employees and RNA-claims, writing:

> I just spoke with Andrea about this situation. What can we do to provide at least space for 8-10TEU per week for this account? I understand space is limited and other customers are paying a premium for space presently but any additional profit gained from those premiums is going to quickly go out the window if this matter goes to trial. I can tell you that based on the tone of the lawyer's initial email and their response they are quite confident in their ability to recover significant damages from us and that they are more than ready to pursue this course of action on an immediate basis if we do not fix the space issue.
>
> Per the response I received they are confident that [their] liquidated damages of $250/TEU will not apply and be considered invalid based on a case precedent set by the US Supreme Court. They indicate that such a limitation is only admissible in the case that actual losses cannot be reasonably substantiated however, they have indicated they are able to easily and clearly [substantiate] losses in the thousands of dollars for each TEU we have failed to carry. While our contract states we are only liable for any short shipments in excess of 40TEU I would not be surprised if they attempt to recover their losses for 56TEUs. With a weekly average of 8 calculated by the MVC and number of weeks in the contract term we are indeed behind by 56.
>
> This is a very bad case for us which we will likely lose so I must ask that special dispensation be granted for this customer and they be treated with hyper care for the immediate future until such time that things have stabilized and they have backed off their threats of formal lawsuit. If we can at least establish we are working to uphold our contractual obligations I would feel much more comfortable about this case. At present based on the emails I have seen I do not have confidence in our ability to establish that we are doing our part under these terms. It also sounds like they have a lot of emails showing we have canceled their bookings [which] will only serve to make us look bad in front of a judge and jury.
>
> Should there be any questions please do let me know but again we must please take into account that our losses could easily exceed US$100,000 between our lawyer fees and any final judgment which may be awarded to them by a court. If

> the customer does not know the services or vessels on which they are entitled to have space it would be Risk Management's recommendation that we provide a clear overview of the services they are entitled to book against and the vessels which operate under those services. Also, if the customer makes a booking against the wrong service we should assist them to correct the issue.
>
> We hope it is understood that even if it is outside the standard procedures we need to make every reasonable effort to pacify this customer and their lawyer in the short term so that we can correct this shortfall over the course of the contract term and avoid an unnecessary lawsuit.

CX 161.

24. The 2020-21 service contract was set to expire May 31, 2021. CX 120.

25. Throughout the 2020-21 service contract, OJC repeatedly asked for more space per week. *See, e.g.*, CX 206-208 ("Q: Did Jacob Weiss ask you to increase to a lot more than 10 TEUs per week? A. Yes. He did request to have more space per week. . . . A. He was usually saying to me I remember, if I remember correctly, you can give me 15, 20, 30, like, whatever more you can provide to us, we will – we can provide with shipments. . . . A. Okay. And you indicated later today in your testimony that Mr. Weiss frequently came to you on a – repeatedly on – he repeatedly came to you seeking more and more space. I think you said at some point, it was like 15, 30, whatever you can give me he wanted. Is that right? A. Yes. That is correct."); RX 622 (July 15, 2020, email from Ms. Casanova to Mr. Pestana and Mr. Maldonado, writing "The customer requests any additional space that we can accommodate beyond the MQC and assures that its volume is constantly peaking and that anything we can offer today they can compromise to us for the months when we would need cargo, their projection is growing."); RX 638 (May 26, 2020, email from Ms. Casanova to Mr. Li, Mr. Gonzalo, and Mr. Pestana stating "According to the customer, online furniture purchases in the USA increased by more than 200% due to Covid-19 measures and OJ Commerce grew nearly 400% in sales compared to the initial year's forecast and the trend is estimated to continue. Due to the above, they trust that they have and will have volume to meet the amount committed to each carrier. Price is very important for this product as it is a low value product.").

26. OJC also expressed frustration on multiple occasions regarding space cancellations by Hamburg and falling behind on bookings for the 2020-21 service contract. *See, e.g.*, RX 823 (OJC arguing that the parties agreed to 10 TEUs per week, but that Hamburg had not even honored 8); RX 647 (October 15, 2020, email from Ms. Casanova stating "It is worth mentioning, that the customer is no [sic] happy that we were unable to accommodate additional space to cover the rejected and canceled spaces from the previous weeks, resulting in not meeting with the SP per week provided to the customer."); RX 653 (October 13, 2020, email from Mr. Pestana stating "Dear allocation team, pls note customer complaint about SPL not being honored. any particular issue resulting on bookings being cancelled/rejected? We must honor the SPL."); RX 685; RX 688; RX 687; RX 787; RX 695; RX 693; RX 817.

27. OJC began negotiations for a 2021-22 service contract with Hamburg in early 2021, with OJC President Weiss as lead negotiator for OJC and HSNA Account Executive Andrea Casanova as lead negotiator for Hamburg. CX 466-467; CX 203; RX 799 (showing Jan. 2021 discussions regarding a renewal with increased allocation).

28. HSNA Cargo Flow Specialist Kevin Li testified that the majority of contracts will be negotiated and entered in the first quarter of the year, through April, or possibly May. RX 977; *see also* RX 988A (generally contracts for Asia to North America run starting May 1 for 12 months).

29. OJC did not renew its service contracts with other carriers it had been using in 2020-21 and focused on consolidating all of its imports with Hamburg. CX 467. OJC based this decision on interactions with Ms. Casanova, which OJC interpreted as a promise that in return for OJC consolidating all of its imports with Hamburg, Hamburg would make OJC a priority customer with benefits including supplying more containers, dedicated space protection, and committed personnel to ensure better service for OJC's shipments. CX 467; RX 1010-1011; RX 1017-1018; RX 1024.

30. On January 11, 2021, Ms. Casanova emailed Ivan Cheung of Maersk[4] and HSNA Manager East Coast Sales Gonzalo Maldonado writing:

> We are moving regularly shipments with furniture for [Trans-Pacific Eastbound ("TPEB")] through the account OJ COMMERCE - NAOMI HOME to PLD City of Industry CA and customer is looking for an increase in their allocation since last year their business grew by 20% this trend seems to continue this year due to the increase in online shopping as consequence of the pandemic.
>
> In addition, we would to revisit another route to PLD Louisville KY, similar volume to CA. Unfortunately, last year, this business was turned down due to lack space to this destination point.

RX 799-800 (wording as in original); CX 410.

31. On February 9, 2021, Ms. Casanova declined Mr. Weiss's request to re-route OJC's cargo because OJC had run out of space in its City of Industry, California warehouse. RX 747-751. Ms. Casanova stated: "Due to the current situation in Asia with lack of equipment and space and the shortage of truck power and port Congestion in Los Angeles/Long Beach terminals, we are not negotiating new lanes in the trade since we cannot guarantee service due to the reasons mentioned above." RX 747.

32. Hamburg provided OJC a short-term spot rate quote valid from March 3, 2021, to April 30, 2021, for Brazil to the United States, Quotation No. NOAQ1006436, dated March 3, 2021. RX 768-774; CX 136-146. The record shows that OJC shipped at least 3

[4] Mr. Cheung's email address ends in @maersk.com, unlike the majority of Respondents' emails, which end in @hamburgsud.com. RX 799. Mr. Cheung works in Hong Kong. Opposition at 47. References to Mr. Cheung in this decision are to Mr. Ivan Cheung.

FFEs pursuant to this quotation. RX 16-17 (dated April 22, 2021); RX 18-19 (dated April 30, 2021); RX 6-7 (dated May 4, 2021); *see also* CX 467 at ¶ 5.

33. During March and April 2021, the parties engaged in discussions about renewing the service contract. Throughout those discussions, there were conversations about the minimum quantity commitment of the renewal, but never about there being no renewal at all. Amended Complaint 14 at ¶ 41; HSNA Answer at ¶ 41; HSDG Answer at ¶ 41.

34. On March 2, 2021, Mr. Weiss received an email from Hamburg Sud (China) key account manager stating "Checked with concern party, and learn that no SPL for this account on UPAS1 (Ningbo and Qingdao). Pls ask contract holder to further communicate with HSDG concern sales." RX 688. On March 4, 2021, Mr. Weiss forwarded this email to Ms. Casanova, writing "Andrea, any update? This is again cauing [sic] a major backlog as for many weeks we haven't been able to secure the contracted space." RX 688.

35. On March 4, 2021, Ms. Casanova responded to Mr. Weiss, writing "The Space Protection (SP) expired at the end of December. We are working with our Origin office to reinstate the SP who are reviewing the performance to make a decision." RX 687.

36. Later on March 4, 2021, Mr. Weiss emailed Ms. Casanova, writing "Our team in china keeps working locally and escalates only after they keep hitting a brick wall. Do u want me to tell them to email you every attempt for space?" RX 685. Ms. Casanova replied, also on March 4, "If your team in China were not getting space as per SP we should have been informed as they did now so we can address the situation with our Trade Manager otherwise we are not able to know and seems that we did not get the participation as agreed. I will inform the below to our Trade Manager and revert back to you." RX 684.

37. On April 12, 2021, Mr. Weiss sent an email to Ms. Casanova stating: "Please advise what time today we can get on a call to discuss the current situation with us not getting our contracted space for many weeks. I urgently need to get this resolved today." RX 787.

38. On April 13, 2021, Mr. Weiss sent an email to Ms. Casanova stating: "Please advise when u have a few minutes for a call. Urgently need your help resolving the space issue." RX 787.

39. On April 13, 2021, Ms. Cananova responded to Mr. Weiss, stating: "I was out office Friday and Monday and today I was catching up emails including your request. I will call you tomorrow at 10 am so it will give me time to collect information about your cases/requests." RX 786.

40. On April 15, 2021, Ms. Casanova emailed Mr. Cheung and Mr. Maldonado, writing "Customer OJ Commerce insists that we have declined space in the past weeks and months. I spoke with customer and advised that the first time we received this type of information was on March and it was immediately addressed with our team in origin. However, customer is asking for our support with space in next weeks to catch up all the backlog for the weeks of no space releases." RX 695 (spelling in original).

41. On April 19, 2021, Mr. Weiss emailed Ms. Casanova, stating: "Haven't heard back from you on a plan for our backed up containers? Also are we going to meet up this week in Miramar?" RX 786.

42. On April 20, 2021, Ms. Casanova emailed Mr. Weiss, stating: "I have not received response from our team in Asia. We have followed up with them. We will be back with response about the space and meeting as soon as possible." RX 785-786.

43. On April 24, 2021, Ms. Casanova emailed Mr. Cheung and Mr. Maldonado, writing that OJC "claims for the space that has been declined during these weeks, since March according to the customer. Could you please advise how we are going to fulfill the declined space plus current SP with this account? . . . Customer told us yesterday that we continue declining space." RX 693.

44. On April 27, 2021, Mr. Weiss emailed Ms. Casanova, stating: "At this point I have run out of options, Hamburg's ignoring this dire situation at the detriment of OJC. Unless I hear back from you by noon today I will turn it over to legal." RX 785.

45. On April 27, 2021, Ms. Casanova emailed Mr. Weiss, stating: "We received from our office in Asia that due to the existing situation of lack of capabilities/space in this market, we are not able to compensate space at this time, but we are trying to be flexible when the situation allows it. It was been [sic] approved to release 2x40' additional at POL Ningbo on top of ex PINE (area) regular SPL (2teu), on UPAS1-vessel GEMSK 113N." She provided a list with the confirmed bookings for the next weeks. RX 784-785.

46. In an internal Hamburg email on April 27, 2021, Ms. Casanova conveyed that OJC planned to move between 4,200 to 4,700 FFE in 2021:

> Customer OJ Commerce contract is expiring on May 31, 2021, and the customer wants to renew the contract and if possible to increase the MQC and add the route to Louisville KY.
>
> The current contract AECC0000291 has a validity of year and contains routes to City of Industry CA and MQC of 400 TEUs
>
> According to the customer, they moved 3500x40HC in 2020 and plans to move between 4200 to 4700 FFE in 2021. 70% of this volume is to Kentucky and the remaining is to California
>
> If we are interested in KY business, their warehouse if very close to the CSX Rail Yard for the drop and pull moves.
>
> Attached is the contract with lanes and current rates and below is the customer's performance from Tableau.
>
> Appreciate any advice and if there are any new guideline regarding TPEB contracts so we can start working on this contract renewal.

CX 203.

47. Later on April 27, 2021, HSNA Manager East Coast Sales Gonzalo Maldonado emailed Mr. Li, Mr. Cheung, and Ms. Casanova, writing: "Hi Kevin, This is the account that we spoke [about] during the TPEB account review that you need to add to our list." CX 218. Mr. Li replied on April 27, 2021, asking "What's the MQC for this account?" CX 218.

48. Ms. Casanova replied to the same group on April 28, 2021, at 1:14 PM, writing: "Hi Kevin, Thank you, the client did not mention a specific MQC target but he mentioned the projected volume and is open to our proposal. They are willing to give us also KY business if we can carry it. In the past, it was declined since were [sic] not pursuing business to this IPI." CX 217.

49. Mr. Li replied to the same group on April 28, 2021, at 4:32 PM, writing: "Hi Andrea, We will need a clear target in order to put it on target list. They signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business? I do suggest to maintain focus on local destination only." CX 217.

50. Ms. Casanova emailed Mr. Weiss on April 28, 20921, at 4:25 PM: "I did not receive a response from our office in Asia regarding the additional space and contract renewal. Please allow us to follow up with them again today." RX 784.

51. Ms. Casanova reached out to OJC on April 28, 2021, at 6:04 PM, to confirm an exact MQC OJC was willing to sign to continue with process renewal, considering place of delivery as City of Industry CA only. RX 808-809 ("As we spoke yesterday, we are working on your contract renewal so we would like to know an exact minimum quantity commitment you are willing to sign to continue with process renewal.").

52. On April 28, 2021, at 10:27 AM, an attorney representing OJC emailed a demand letter to Respondents, copying Mr. Weiss, asserting that failure to cure the described breach of the service agreement may result in the "filing of a petition to the Federal Maritime Commission to seek relief." CX 209. This demand letter read in part:

> Please be advised that the undersigned represents OJ COMMERCE, LLC ("OJC") against [Hamburg] in connection with a breach of Service Contract that was executed between HAMBURG SÜD and OJC. A copy of the agreement is hereby attached.
>
> Pursuant to the "Minimum Volume Commitment" clause of the agreement, [Page 7], HAMBURG SÜD committed to a minimum of 400 TEU between June 23, 2020 and May 31, 2021. Over the last few months, HAMBURG SÜD refused to accept the agreed upon 10 TEUs per week, as a result OJC has accumulated over 40 containers waiting for shipment, causing significant economic harm and interruption of business.
>
> **OJC hereby provides HAMBURG SÜD notice of breach of the Service Agreement, which has caused significant economic harm to**

> **OJC. I hereby demand that HAMBURG SÜD immediately honor the Service Agreement rates and minimum TEU quantities. Failure to cure the breach by May 3, 2021, may result in legal action against you and your affiliates, as well as the filing of a petition to the Federal Maritime Commission to seek relief.**

CX 209 (bold in original) ("OJC second demand letter").

53. April 28, 2021, is the first time in the record that a threat to complain to the FMC is explicitly conveyed from OJC to Respondents. CX 209.

54. Ms. Casanova continued to work on a contract renewal with OJC, creating a contract template in Hamburg's computer system with a 400 FFE MVC (double the MVC from 2020-21). She "picked this MVC as a way of potentially offsetting the anticipated deficit in 2020-21 and showing an interest in handling more of OJC's volume." RX 1139 at ¶ 44. This template existed only within HSDG's computer system, was not provided to OJC contemporaneously, and contained the same rates as 2020-21 because those were the rates in the system from the prior contract. RX 1139 at ¶ 45; RX 963.

55. Ms. Casanova sent an internal Hamburg email on April 29, 2021, at 10:16 AM, stating: "I created the new SVC NOAC1000728 Effective June 1, 2021, until May 31, 2022. The new contract contains the same lanes, rates, and conditions of the current contract AECC0000291 and an increased MQC 400 FFE." CX 214.

56. There are no contemporaneous emails from Hamburg suggesting they are willing to ship 4,200 to 4,700 containers in a 2021-22 service contract with OJC; rather Ms. Casanova's 400 FFE MQC was the largest volume incorporated into a draft 2021-22 service contract with OJC. CX 214.

57. On April 29, 2021, at 10:38 AM, Ms. Casanova emailed Mr. Li, Mr. Cheung, Mr. Gast, and Mr. Maldonado, presumably attaching OJC's attorney's letters, stating:

> Regarding the current contract that will expire on May 31, 2021, as of today, we are short to satisfy the MQC of 200 FFE by 18 FFE since space has been declined since last month, according to the customer. This situation has been addressed with our team at origin but at this time we are not able to commit with additional space on top of the current SP 4 TEU a week until the end of the contract. The customer is claiming for this space and we received a letter from his lawyer about this. Attached are the emails (1st and 2nd attachments), you were not in copy.
>
> I have spoken with the customer and he has stated that he does not want to end the relationship with us and just look for the fair that we promised. He is open to any solution that can offset this deficit.
>
> Therefore, based on the above and since we are working to renew the contract, I want to ask if it is possible to Increase MQC by 200 FFE giving a total of $400 [sic] FFE, that will not only cover the deficit by also show

> our interest to participate more of their volume, of course, if we truly can satisfy this volume.
>
> This is not a short term account and the customer has been constant in his volumes and is willing to commit to much more of the current MQC.

CX 215 (wording as in original).

58. On April 29, 2021, at 2:04 PM, Mr. Li emailed HSNA Senior Vice President Juergen Pump:

> Sorry to trouble you but I need your executive decision on this account, it was the one being mentioned in our call with AEC this Tuesday. I was completing unaware of the legal action they put against us during the time I left the TPEB team, and I don't believe it was shared in our call as well.
>
> Long story short, they are threatening us on liquidated damage against the space that we couldn't provide under committed 200 FFE MQC, which so far we already fulfilled 182 FFE and their contract will only expire by end of May. Meanwhile, they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract.
>
> In my opinion this is pathetic and unacceptable, it will be a risk to continue work with this account especially considering our space situation this coming year. I can work with APAROM to ensure they will get the remaining 18 FFE before end of May. But let me know if you still want to engage this account with contract renewal, we can setup a call to discuss if needed.

CX 220-221 (spelling in original); CX 89.

59. In his deposition, Mr. Li was asked: "So, when you gave your opinion of this was pathetic and unacceptable. What were you attempting to convey to Mr. Pump in this email?" Mr. Li responded: "That was a comment that I make to the fact that we did not know about all this potential litigation during our call with Seth." RX 981.

60. On April 29, 2021, at 1:13 PM,[5] Mr. Pump emailed: "Fully agree. We should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract. The shortfall will be compensated as per contract terms." CX 220.

61. Mr. Li responded on April 29, 2021, at 4:52 PM to Ms. Casanova's 10:38 AM email, directing her to disengage on renewal negotiations with the OJC account, writing in part:

> Hi Andrea,

[5] Because of different time zones, times listed on emails may not be consistent.

> As you mentioned, I was completely unaware of their legal action against us since I left the TPEB team. I consulted with Juergen and the executive decision is that we should not engage in any renewal discussion with customer in light of potential litigation. Please disengage on renewal negotiation with this account, thanks.
>
> Hi Ivan,
>
> Please reject the new agreement mentioned below. Meanwhile, we will leave it up to APAROM's decision to handle the remaining 18 FFE that required to fulfill the 200 FFE MQC on current contract. But just to express our position on this, we should also consider not to provide them with space under existing contract. The shortfall will be compensated as per contract terms, considering we already fulfilled over 90% of the MQC agreement. Thanks.

CX 213 (also asking Mr. Gast "if it is definitely required to provide the remaining 18 FFE from your prospective.").

62. On May 4, 2021, Mr. Maldonado emailed Hamburg ("HS") employees including Mr. Li, Ms. Casanova, and Mr. Cheung stating: "Please note we were advise from customer in case that HS will not fulfill its contractual volume, it will proceed with legal actions against HS. We believe due to the small volume remaining to fulfil MQC of 200 FFE; this could be avoid it. I would appreciate please your feedback and authorization to grant space for this month of May for those 18 FFE's needed." CX 227.

63. On May 4, 2021, Mr. Cheung responded to Mr. Maldonado and other Hamburg recipients, writing:

> Hi Gonzalo and Andrea, I've been working with the area here at APA for additional volume acceptance, and now we have found a space ex YTN for customer as below:
> UPAS2 Maersk Eindhoven 120N – 12FFE (ex YTN)
> This is already confirmed and our local booking desk will release the additional volume on above sailing to customer.

RX 755; RX 728; *see also* RX 725 (email from Mr. Cheung to Ms. Casanova identifying 12FFE (ex YTN) and another 6 FFE (ex NGB)); RX 726 (Ms. Casanova responding "With this space (18FFE), we should fulfill MQC of 200FFE"). But ultimately Hamburg only fulfilled 185 FFE. CX 212.

64. On May 5, 2021, Ms. Casanova responded to Mr. Cheung's email, writing "Good Morning Ivan – That is great news and our effort to fulfill the contract. I have shared this information with the customer," and Mr. Maldonado replied to Ms. Casanova, writing "Despite the fact that we will lose this volume for next term. Nice job handling this account to avoid conflict with them." RX 728; RX 754-755.

65. On May 4, 2021, Ms. Casanova emailed Mr. Weiss, stating:

> As per our conversation, we are not able to renew the contract at this time due to the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing. This situation does not allow us to commit with space for another period, however, we can work case by case. We deeply apologize contract cannot be renewed and thank you for your support and understanding.

RX 808.

66. Hamburg admitted that "Out of the blue and with no prior notice, on May 4, 2021, Respondents unilaterally notified Complainant that there would be no service contract renewal under **any terms**, but instead that Respondents would 'work case by case' with Complainant using spot market rates. Thereafter, Complainant attempted to negotiate a contract with an even more limited scope – such as a port-to-port only contract – but Respondents rejected Complainant's proposal out of hand within hours, leaving Complainant entirely without a shipping service contract of any sort past May 31, 2021." Amended Complaint at ¶ 42 (bold in original); HSNA Answer at ¶ 42 (admitted); HSDG Answer at ¶ 42 (admitted); *see also* CPFF at ¶ 42; RRPFF at ¶ 42; RX 529; RX 568; RX 593.

67. On May 5, 2021, OJC responded to Ms. Casanova, stating: "I am super disappointed to learn that after all these conversations we've had over the last few weeks on size of renewal, were now told NO renewal at all. Will you be able to offer a contract for PORT to PORT so chassis and truckers are not HAMBURG's concern?" RX 811.

68. Casanova replied to OJC later on May 5, stating: "Unfortunately, we are no in the position to provide a contract primarily due to the space situation in Asia more than truck power and chassis availability in the US. Nevertheless, I am going to check with our Trade team again and let you know if there is any change." RX 811 (spelling in original).

69. In a separate email chain, on April 29, 2021, an email from "Customer Claims, Maersk Legal" to Mr. Gast stated: "just noted this in the general claims mailbox, trust you have seen it already… Looking forward to further comments / background info from your side in due course." CX 230.

70. On April 29, 2021, Mr. Gast replied, copying additional internal Hamburg emails:

> As background this is the second time we have received such a threat of suit for this same reason and I believe the third time this customer has threatened to sue us this year. I believe the other time was related to demurrage charges.
>
> As it stands I believe we are unlikely to meet our duties under these contract terms. I have raised this issue to both commercial teams here and colleagues at origin responsible for accepting these bookings. The first time this occurred I stressed the financial impact such a lawsuit could carry and I have done so again. It appears our local sales colleagues had

> tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer.
>
> The contract stipulates the merchant can request to reduce the minimum volume commitment under the terms however I believe they are unlikely to do so and instead would pursue commercial damages for any shortfall under this contract citing that the shortfall is our fault due to a failure to provide proper weekly space.
>
> The first time this came up I engaged with the lawyer and can advise he seems to be on the aggressive side and seemingly would prefer to sue us rather than discuss amicable resolutions. Further while the contract contains a provision for consolidated damages at a rate of $250/TEU he has indicated that he would waive the consolidated damages and instead pursue actual damages which would of course be a significantly higher amount.
>
> It also seems we are considering signing another contract with this customer with an increased capacity. I understand sales needs to meet certain quotas and more business is always great but personally I would not want to do business with someone who repeatedly jumps to threat of lawsuit such as this. Should such a lawsuit occur I can easily imagine the cost would easily wipe out any profits gained from the commercial relationship due to potential breach of contract judgements against us and the cost of our own legal representation.
>
> At this point I do not know what more could be done from my side other than to wait for May 31 to see how bad the shortfall is and perhaps hope that due to the customer wanting to sign a renewal contract that they would choose to not pursuit this breach of contract suit for minor shortfalls under the present agreement.

CX 229.

71. OJC's second demand letter was sent to Hamburg on April 28, 2021, and one day later, on April 29, 2021, Hamburg made the "executive decision" to "disengage on renewal negotiation" and "consider not to provide them with space under existing contract." CX 209; CX 220; CX 213.

72. No contract was ultimately concluded between OJC and HSDG for 2021-22. Opposition at 2-3; CX 212 (the "contract expired on May 31st and renewal was not approved by Upper Management.").

73. HSDG did not provide all of the space it had committed under the 2020-21 service contract, moving 185 of the 200 FFEs from June 23, 2020, to May 31, 2021. Opposition at 2; CX 212.

74. An email from Ms. Casanova to Mr. Li, Mr. Gast, Mr. Cheung, and others at Hamburg on June 10, 2021, stated: "The MQC was not fulfilled, we closed with 185 out 200 FFE and the customer is claiming the remaining 15 FFE. The contract expired on May 31st and renewal was not approved by Upper Management. Please advise how we are going to proceed with this claim. Thank you." CX 212.

75. The 15 FFE shortfall under the 2020-21 service contract was not a result of space being unavailable, rather these final containers were not shipped due to the "potential litigation." CX 220; CX 213.

76. After April 29, 2021, Hamburg entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting. CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286.

77. Hamburg transported shipments for OJC after April 29, 2021, including shipments that were already scheduled, obtained via third-party freight forwarder such as United Shippers Association, or obtained via limited spot quotes. SCX 509 at ¶ 3.

78. Hamburg provided short-term spot rate quotes to OJC prior to April 29, 2021, including from Brazil, RX 768-774 (Quotation No. NOAQ1006436, dated March 3, 2021), and RX 673-678 (Quotation No. NOAQ1009430, dated March 31, 2021).

79. Hamburg also provided short-term spot rate quotes to OJC after April 29, 2021, including from Asia, RX 608-618 (Quotation No. NOAQ1020050, dated July 20, 2021), and from Brazil, RX 596-601 (Quotation No. NOAQ1014177, dated July 20, 2021), and RX 741-745 (Quotation No. NOAQ1028947, dated October 28, 2021).

80. OJC shipped a small number of containers with Hamburg from Brazil to the United States under these short-term spot rate quotes including in April and May 2021 under Quotation No. NOAQ1006436; May and June 2021 under Quotation No. NOAQ1009430; and in August and September 2021 under Quotation No. NOAQ1014177. RX 2-21; RX 45-56.

81. "While HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract." RRPFF No. 87 (citing to NOAQ1006436, NOAQ1009430, NOAQ1014177, and NOAQ1028947).

C. Reparations

1. Pricing

82. Mr. Pump testified that from 2019 to 2021, contract rates doubled or more and spot rates tripled if not more. RX 989; *see also* RX 577; RX 913.

83. Mr. Pump testified:

> Our biggest challenge in 2021 was capacity, as the existing customers, all asked, with very few exceptions, all asked for higher MQC, more capacity commitments, that was the overriding objective. And that was our biggest single challenge. Because we could not get a firm handle on the capacity that we would be able to sell in 2021. And then we had the challenge of who do we give more capacity to where, where does it come from.

RX 993.

84. After Respondents cut off 2021-22 service contract negotiations, OJC could not obtain a shipping contract with any other carrier. CX 469.

85. Because OJC did not obtain a contract with Respondents for 2021-22, OJC obtained what limited space it could on the spot market at extremely high rates. But often OJC was unable to secure shipments, and in most cases was forced to forgo making shipments of goods to the United States altogether because the spot rates became too expensive to justify the cost of container freight. CX 468.

86. OJC shipped 143 containers in 2021-22 on the spot market and/or through freight-forwarders. SCX 511; Brief at 21. OJC described that these 143 FFEs were lower than regular spot market rates at the time, "as they were through a shipping organization or the result of last-minute fill-ins when other companies could not take the space." SCX 511 at ¶ 8.

87. Mr. Berning testified that when he referred to a "container," he meant a standard 40-foot container. RX 1032-1033.

88. Mr. Weiss computed, and Mr. Berning validated, average gross revenue per container of $60,250.30 and average gross profit for container of $22,892.48 for the time period of June 1, 2020, through July 16, 2022. CX 423; CX 470; RX 1033-1034.

89. Mr. Berning and Mr. Weiss stated that gross profit "is revenue less the costs of the product" and that OJC "captured all the costs including the purchase cost, sales commissions, fulfillment center costs, shipping costs and any other costs directly associated with the product. OJC utilizes third parties for shipping, fulfillment, warehousing and other needed tasks to sell the product. All of these costs have been captured." CX 423; CX 470.

90. Mr. Berning and Mr. Weiss calculated average net profit per container to also be equal to $22,892.48, explaining that due to the structure of the company, the direct variable costs included produce the net profit per container. CX 423; CX 470.

2. Routes

91. On July 8, 2020, Ms. Casanova emailed Mr. Pestana concerning OJC, writing "I Want to revisit the Kentucky business. If we are not able to offer inland ramp and ramp/door business to this interior point, Can we offer port-to-port service to the nearest port of

discharge, either Charleston to Norfolk? There is potential with this account and client is interested in our service." CX 243.

92. Later on July 8, 2020, Ms. Casanova emailed a larger group of Hamburg recipients regarding OJC, writing:

> Is there anything we can do to obtain this business for Louisville KY?
> Port to port alone does not work for the customer, as a ramp needs to be involved for delivery to Louisville KY (door) and all motor movement will be very costly for this product.
> The original volume was 1266x40hc per year (pls see attached), but the customer had already signed a contract with other carriers since we rejected it initially.
> The customer has offered their overflow volume that is expected to be 300x40'hc for the rest of the year and possibly more, since the online furniture retailer business has increased due to the pandemic. There is also the possibility of obtaining the full volume next year or a significant percentage. The main POLs are Ningbo, Xiamen, Yantian and Ho chi Minh.
> Please note that we closed the California business for this account.

CX 242-243.

93. On July 8, 2020, HSNA Logistics and Services Manager Dennis Seeraj replied to Ms. Casanova and others, writing: "If they already booked with another carrier via Louisville Rail they will not pay a much higher cost for us to arrange direct trucking from CHS or SAV port. Trucking cost will be approximately $2400. @ Tawab, do we have a running list of rail ramps which we don't want to service perhaps I can look into cross dock options. Especially for this kind of volume, I would have love to take a look before we declined 2500TEU." CX 242. Mr. Maldonado replied later on July 8, 2020, noting in part "Louisville is one of the ramps with negative impact in our PnL." CX 242.

94. On October 9, 2020, Mr. Weiss emailed Ms. Casanova, writing "Wondering if you would be open to entertain a 6 month (Oct- March) contract for 60 40' HQ containers monthly from the below listed ports to our KY warehouse . . . .We are experiencing a spike way above our original projections and can award additional containers to carrier." RX 803.

95. On October 13, 2020, Ms. Casanova replied to Mr. Weiss regarding the opportunity, writing "we have to respectfully decline our participation, as our volume will continue on demand as it is now until the Chinese New Year, which does not allow us to have more space to sign a new long term contract and no additional volume for interior point intermodal shipments." RX 802.

96. Hamburg transported cargo to inland destinations, including Kentucky, from Brazil and other South American ports. RPFF at ¶ 25; CRPFF at ¶ 25; *see also* CX 287 (During 2021 and during 2022 HSDG shipped cargo from Brazil to Kentucky).

D. Knowledge

97. Mr. Pump testified that he did not "receive or review copies of any correspondence from OJ Commerce or any representative of OJ Commerce threatening legal action against Hamburg Sud" but rather made his decision based on the emails he received from Mr. Li and conversation with Mr. Li. RX 994-995.

98. In the deposition of Mr. Pump, the following was discussed:

> Q But complaining to the FMC could not be a reason not to negotiate with customers. Correct?
>
> A That is right.
>
> Q That was part of the compliance training?
>
> A Yes.

CX 96.

99. Mr. Pump also stated:

> Q Was there -- during this compliance training was there any discussion about if a customer threatened to or actually filed a lawsuit as opposed to a FMC complaint, whether or not that would be allowed in that situation to retaliate or refuse to deal with that customer?
>
> A I do not remember whether we had that specific example, meaning, a lawsuit. But it is clearly understood in the organization that this is not a factor in the decision whether or not to negotiate a service contract.

CX 96.

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.*, Docket No. 02-04, 30 S.R.R. 991, 2006 WL 2007808, at *11 (FMC May 10, 2006); *see also Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000). OJC alleges violations of the Shipping Act within the Commission's jurisdiction by both HSNA and HSDG.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 WL 9966245, at *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics, Inc.,* Docket No. 15-04, 2021 WL 3732849, at *3-4 (FMC Aug. 18, 2021) (Order Affirming Initial Decision on Remand). 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.*, Docket No. 93-15, 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994).

B. Relevant Law

The remaining two claims in the proceeding both involve section 41104(a), which, as of the filing of this complaint, stated:

> (a) In general. – A common carrier, either alone or in conjunction with any other person, directly or indirectly, shall not – …
>
> > (3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason; . . .
> >
> > (10) unreasonably refuse to deal or negotiate.

46 U.S.C. §§ 41104(a)(3), (10). Section 41104(a)(3) was previously section 10(b)(3). Section 41104(a)(10) was previously section 10(b)(10), and before OSRA-1999, section 10(b)(12). *See Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, Docket No. 02-02, 29 S.R.R. 1436, 2003 WL 723336, at *5 n.6 (FMC Feb. 24, 2003).

OJC filed the amended complaint prior to the June 16, 2022, changes to the Shipping Act. In the Ocean Shipping Reform Act of 2022 ("OSRA 2022"), Congress modified section 41104(a) to: "(3) unreasonably refuse cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods;" and "(10) unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations provided by an ocean common carrier." OSRA 2022, Pub. L. No. 117-146, §7, 136 Stat. 1272, 1274 (2022). These changes do not apply to this proceeding and are not discussed. In addition, in September of 2022, the Commission issued a refusal to deal Notice of Proposed Rulemaking. Notice of Proposed Rulemaking, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier, Docket No. 22-25, 87 Fed. Reg. 57674, 2022 WL 4356068 (Sept. 21, 2022) ("NPRM Refusal to Deal"). The proposed rule is not binding and it has not been adopted.

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 common carriers, which are subject to sections 41104(a)(3) and (10) at issue in this proceeding. The Shipping Act defines the term 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:

> *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 Shipping Act provides for reparations "for actual injury caused by a violation." 46 U.S.C. § 41305(b). In addition, double damages are available for certain claims, including violations of section 41104(a)(3), the anti-retaliation provision. The additional reparations provision applicable to this proceeding states:

> On a showing that the injury was caused by an activity prohibited by section 41102(b), 41104(3) or (6), or 41105(1) or (3) of this title, the Commission may order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury.

46 U.S.C. § 41305(c). OSRA-22 changed "41104(3) or (6)" to "paragraph (3) or (6) of section 41104(a)," which appears to have clarified, but not changed, the citation. 46 U.S.C. § 41305(c).

C. Discussion

This section will address the 41104(a)(10) allegations of refusal to deal before addressing the section 41104(a)(3) allegations of retaliation. At times, the parties' arguments conflate the

two, but they are separate statutory provisions. Each section will discuss the legal framework before addressing the necessary elements.

1. Section 41104(a)(10): Refusal to Deal

OJC asserts that Hamburg unlawfully refused to deal and negotiate with OJC and that Hamburg's after-the-fact pretexts for its retaliation and refusal to deal are all baseless. Brief at 21-26; Reply at 18-22. Hamburg contends that it did not refuse to deal and that it did not refuse to negotiate, asserting that there was never a meeting of the minds on the material terms of a new contract. Opposition at 7-14.

Section 41104(a)(10) prohibits a common carrier from unreasonably refusing to deal or negotiate. 46 U.S.C. § 41104(a)(10). The Commission has found that a common carrier should "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*, Docket No. 00-11, 29 S.R.R. 1066, 1070, 2002 WL 33836158 (FMC June 28, 2002), *aff'd sub nom. New Orleans Stevedoring Co. v.* FMC, 80 Fed. Appx. 681 (D.C. Cir. 2003). The Commission has stated that "in determining reasonableness, the agency will look to whether a marine terminal operator gave actual consideration to an entity's efforts at negotiation." *Canaveral Port Authority*, 2003 WL 723336, at *18. "Refusals to deal or negotiate are factually driven and determined on a case-by-case basis," although the ultimate burden of persuasion remains with the complainant to show that the refusal to deal or negotiate was unreasonable. *Canaveral Port Authority*, 2003 WL 723336, at *13, *18. To establish a violation of section 41104(a)(10), the Complainant must establish that (a) Respondents are common carriers, (b) Respondents refused to deal or negotiate, and (c) such refusal was unreasonable. Each element is discussed below.

a. Common Carrier

Because section 41102(a) only governs the activities of common carriers, to violate it an entity must be a common carrier within the meaning of the Shipping Act. Each Respondent is discussed below.

i. HSDG

The parties agree that HSDG was a common carrier as defined by the Shipping Act, 46 U.S.C. §40102(7), through October 31, 2021. Amended Complaint at ¶ 2; HSDG Answer at ¶ 2. HSDG became a wholly owned subsidiary of Maersk A/S, although HSDG did not cease to exist as a separate legal entity until late 2021. RX 1120 at ¶ 4. Maersk continues to operate the "Hamburg Sud" brand, which offers different services than Maersk A/S. Opposition at 1 n.1; RX 1120 at ¶ 4. This element is not in dispute and the evidence establishes that HSDG operated as a common carrier during the timeframe at issue in this proceeding.

ii. HSNA

OJC asserts that the FMC has jurisdiction over HSNA because it is a "person" subject to regulation by the FMC based on its acts in conjunction with HSDG; HSNA is a party to the

service contract with OJC and both Respondents; and HSNA and its employees were part and parcel of the decision to retaliate and refuse to deal with OJC. Brief at 10 n.17.

Respondents assert that HSNA should be dismissed, stating:

> HSNA should be dismissed. In two verified complaints, OJC alleged that HSNA is either a marine terminal operator (Complaint ¶ 3) or an ocean transportation intermediary (Amended Complaint ¶ 3). OJC offers no evidence to support either categorization. Instead, it offers an argument—unsupported by facts or precedent—that HSNA is subject to regulation without falling into one of the categories of persons subject to regulation under the Act. OJC Brief at 10, n.17. OJC fails to meet its burden of proof with respect to the existence of FMC jurisdiction over HSNA.

Opposition at 7 n.2.

OJC argues that HSNA is an "other person" under section 41104(a), which begins: "A common carrier, either alone *or in conjunction with any other person*, directly or indirectly, may not . . . ." 46 U.S.C. § 41104(a)(10) (emphasis added). Commission decisions considering the "other person" language have found that the language "either alone or in conjunction with any other person" does not extend section 41104's prohibitions to new classes of persons, rather it clarifies that an ocean carrier cannot excuse its prohibited conduct on the basis that it did not commit the conduct alone. The Commission explained:

> Section 10(b) forbids carriers from certain practices undertaken by the carriers alone or with other persons. It does not provide that if a carrier engages in one of the condemned activities 'in conjunction with' someone else, that other person has violated the statute as well and is equally liable for reparations to an injured party. As section 10(a) shows, Congress did make all 'persons' liable for some Shipping Act violations. In enforcing section 10(a), the Commission may reach any U.S. or foreign individual or enterprise. If Congress had wished to make a similar choice with respect to the practices covered by section 10(b), the statutory language would have so indicated. The legislative history of the 1984 Act reflects awareness on Congress's part that section 10(b) was more restricted in coverage than section 10(a).

Int'l Assoc. of NVOCC's v. Atlantic Container Line, Docket No. 81-5, 1990 WL 427461, at *12 (FMC Feb. 5, 1990) (citations omitted).

The evidence shows that HSNA was a wholly-owned subsidiary of HSDG that acted as the United States general agent of HSDG until November 1, 2021, when it became a wholly-owned, indirect subsidiary of Maersk A/S. CX 101. On January 1, 2022, HSNA was merged into Maersk Agencies USA, Inc., the U.S. subsidiary and general agent of Maersk A/S. CX 101.

The evidence further shows that the 2020-21 service contract names OJC and HSDG, identified as carrier, "c/o" HSNA as parties. CX 119. The contract has signature lines for OJC President Jacob Weiss and two employees of HSNA. CX 120. HSNA employees were integral to

the conduct at issue here. Although the contract does not explicitly identify HSNA as the agent of HSDG, the evidence establishes that HSDG was the "carrier;" HSNA was holding out HSDG to provide transportation by water of cargo between the United States and foreign countries; HSDG assumed responsibility for the transportation; and HSDG vessels were operating on the high seas. Therefore, the actions of HSNA employees discussed herein are found to be within the scope of their authority as agent for HSDG and attributable to HSDG.

Based on the facts in this proceeding, HSNA is not a regulated entity under this section, but rather is an "other person" with whom HSDG operated. Moreover, here, HSNA was acting as an agent of a disclosed principal, and such agents are typically not liable for the acts of their principal. 12 Williston on Contracts § 35:34 (4th ed.); *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 497 (D.C. Cir. 2009). Accordingly, OJC has not established that HSNA is an entity regulated by section 41104(a)(10). Therefore, the allegations against HSNA are denied.

b. Refusal to Deal or Negotiate

Because OJC's refusal to deal arguments are intertwined with its retaliation claim, it is sometimes difficult to determine which arguments correspond with which claim. However, OJC asserts that after the April 28, 2021, demand letter, Hamburg responded by "immediately and abruptly cutting off (i) all renewal negotiations and (ii) all shipping under the Parties' existing service contract." Brief at 7.

Hamburg contends that they did not "shut out" OJC, but rather transported 185 of the 200 FFEs they committed to transport during the term of the 2020-21 service contract; the mere fact of not entering into a service contract does not constitute a refusal to deal; and Hamburg continued to transport significant amounts of OJC's cargo throughout 2021 and 2022. Opposition at 8-10. Moreover, Hamburg contends that they did not refuse to negotiate; their actions were reasonable; there is no evidence that HSDG refused to communicate with OJC during the contract term; there was no agreement on minimum volume commitment, trade lanes, and rates; and parties agreed on rates and HSDG transported OJC's cargo from Asia and Brazil in 2021-22 after OJC threatened to sue. Opposition at 10-14.

In *Canaveral Port Authority*, the Commission found a refusal to deal where the Port set up a procedure that would only award a tug franchise by a public hearing of convenience and necessity, and the Port refused to hold such a hearing to consider a request for a tug franchise. 2003 WL 723336, at *16.

In *Global Link*, the ALJ dismissed a refusal to deal claim, finding that Hapag-Lloyd did not unreasonably refuse to deal or negotiate by refusing to reduce service contract rates when market shipping rates declined during the life of the contract. *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, Docket No. 13-07, 33 S.R.R. 512, 2014 WL 5316345, at *18 (ALJ April 17, 2014), proceeding dismissed due to settlement, 2015 WL 3955128 (FMC April 14, 2015). The *Global Link* decision enforced the terms of the parties' contract, stating:

> Focusing on Global Link's claim that Hapag-Lloyd unreasonably refused to deal or negotiate on Global Link's request to reduce the 2012 Service Contract rates, the question in this proceeding becomes: When an ocean common carrier has

> negotiated with a shipper and entered into a service contract, does that carrier unreasonably refuse to deal or negotiate with the shipper in violation of section 41104(10) if the carrier will not *renegotiate* the terms of the exiting service contract when the shipper so demands? In other words, when a shipper states it is no longer satisfied with the terms of an existing contract - in this case, by claiming that the rates set forth in the service contract are too high because market shipping rates declined after the parties signed the contract and the shipper wants to renegotiate for lower rates - does section 41104(10) require the carrier to abandon its rights established by the contract and agree to lower rates? I conclude that the answer is no.

Global Link, 2014 WL 5316345, at *18 (emphasis in original). This case involves OJC seeking to enforce the terms of the 2020-21 service contract and to negotiate a 2021-22 service contract.

Hamburg asserts that it did not refuse to negotiate with OJC and that "[c]ommunications between parties constitute 'negotiation' even if no agreement is reached." Opposition at 10-11 (citing *Global Link*, 33 S.R.R. at 527).

In reply, OJC states:

> OJC has presented ample smoking-gun emails and testimony showing that Maersk refused OJC available cargo space during the contract term, in retaliation for threatening to air its grievances with the Commission:
>
> ● On April 29, 2021, Pump made the "executive decision" "in light of the potential litigation" to "*not provide [OJC] with space under the existing contract*." (CX 220 (emphasis added).)
>
> ● That same day, Li disseminated Pump's "executive decision" that "*we should also consider not to provide them with space under existing contract*." (CX 227 (emphasis added).)
>
> ● Maersk's acknowledgement that its local sales team "*were advised that no additional space would be granted for this customer*." (CX 229 (emphasis added).)
>
> ● On June 10, 2021, Maersk reiterated that "[t]he MQC [of the 2020-2021 Service Contract] was not fulfilled" as ordered. (SCX 515.)

Reply at 10 (emphasis and changes in original) (OJC referred to Hamburg as Maersk).

Before the afternoon of April 29, 2021, the evidence demonstrates that Hamburg was negotiating in good faith with OJC, including regarding the minimum quantity commitment. For example, on April 27, 2021, HSNA Account Executive Andrea Casanova sent an internal email stating that OJC wanted "to increase the MQC and add the route to Louisville KY." CX 203. HSNA Cargo Flow Specialist Kevin Li then sent an email stating that OJC "signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business? I do suggest to maintain focus on local

destination only." CX 217. The hesitation to include the Kentucky route is consistent with Hamburg's decision in October 2020 to decline to bid on the Asia to Kentucky route. RX 802-803.

The morning of April 29, 2021, Ms. Casanova continued to work on a contract renewal with OJC, starting with a draft contract with "the same lanes, rates, and conditions of the current contract" and "an increased MQC 400 FFE." CX 214. Also on April 29, 2021, at 10:38 AM, Ms. Casanova emailed Mr. Li and Mr. Cheung, asking: "if it is possible to Increase MQC by 200 FFE giving a total of $400 FFE, that will not only cover the deficit by also show our interest to participate more of their volume, of course, if we truly can satisfy this volume." CX 215. This email also discussed and attached the two OJC demand letters from October 16, 2020, and April 28, 2021. CX 215.

After Ms. Casanova's April 29, 2021, 10:38 AM email, Hamburg's willingness to negotiate a service contract with OJC ended and Hamburg frankly identified the reason. On the afternoon of April 29, 2021, Mr. Li emailed HSNA Senior Vice President Juergen Pump, stating:

> Sorry to trouble you but I need your executive decision on this account, it was the one being mentioned in our call with AEC this Tuesday. I was completing [sic] unaware of the legal action they put against us during the time I left the TPEB team, and I don't believe it was shared in our call as well.
>
> Long story short, they are threatening us on liquidated damage against the space that we couldn't provide under committed 200 FFE MQC, which so far we already fulfilled 182 FFE and their contract will only expire by end of May. Meanwhile, they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract.
>
> In my opinion this is pathetic and unacceptable, it will be a risk to continue work with this account especially considering our space situation this coming year. I can work with APAROM to ensure they will get the remaining 18 FFE before end of May. But let me know if you still want to engage this account with contract renewal, we can setup a call to discuss if needed.

CX 220-221 (spelling in original).

Mr. Pump replied on the afternoon of April 29, 2021, writing: "Fully agree. *We should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract.* The shortfall will be compensated as per contract terms." CX 220 (emphasis added).

Mr. Li responded on April 29, 2021 at 4:52 PM, to Ms. Casanova's 10:38 AM email, directing Ms. Casanova and Mr. Cheung to disengage on renewal negotiations, writing:

> Hi Andrea,
> As you mentioned, I was completely unaware of their legal action against us since I left the TPEB team. *I consulted with Juergen and the executive decision is that*

> *we should not engage in any renewal discussion with customer in light of potential litigation. Please disengage on renewal negotiation with this account*, thanks.
>
> Hi Ivan,
> Please *reject the new agreement mentioned below*. Meanwhile, we will leave it up to APAROM's decision to handle the remaining 18 FFE that required to fulfill the 200 FFE MQC on current contract. But just to express our position on this, *we should also consider not to provide them with space under existing contract*. The shortfall will be compensated as per contract terms, considering we already fulfilled over 90% of the MQC agreement. Thanks.

CX 213 (emphasis added).

On May 4, 2021, HSNA Manager of East Coast Sales Gonzalo Maldonado emailed Mr. Li, Ms. Casanova, Mr. Cheung, and Mr. Gast about Hamburg ("HS") stating:

> Please note we were advise from customer in case that HS will not fulfill its contractual volume, it will proceed with legal actions against HS. We believe due to the small volume remaining to fulfil MQC of 200 FFE; this could be avoid it. I would appreciate please your feedback and authorization to grant space for this month of May for those 18 FFE's needed.

CX 227. The response by Mr. Cheung that "we have found a space," RX 755, and his later identification of 18 FFE supposedly available for OJC, RX 725, suggest that Hamburg had the ability to fulfill the entire 200 FFE MQC. *See also* CX 221; RX 725-726. But, the evidence shows that the remaining volume requirements were not fulfilled by Hamburg, leaving a 15 container shortfall.

The evidence shows that under the 2020-21 service contract, Hamburg agreed to transport a minimum commitment of 200 FFEs. CX 125; CX 467 at ¶ 5. OJC was initially allocated 8 TEU/week, however, OJC was told that that number was increased to 10 TEUs/week in August of 2020. CX 147, CX 156, CX 206. By April 29, 2021, Hamburg had fulfilled 182 FFEs. CX 220-221. Ultimately, Hamburg moved 185 of the 200 FFEs during the June 23, 2020, to May 31, 2021, contract period. Opposition at 2; CX 212. Regarding the 2021-22 contract, no contract was ultimately concluded between OJC and HSDG for 2021-22. CX 212 (the "contract expired on May 31st and renewal was not approved by Upper Management.").

Hamburg contends that communication between the parties constitutes negotiation even if no agreement is reached. Opposition at 10. After April 29, 2021, the parties continued to communicate. For example, Ms. Casanova emailed Mr. Weiss stating that "we are not able to renew the contract at this time due to the lack of space and equipment in Asia and the shortage of truck power in the US that we and the entire industry are facing. This situation does not allow us to commit with space for another period, however, we can work case by case" and "[w]e deeply apologize contract cannot be renewed and thank you for your support and understanding." SCX 513. The reasons provided by Hamburg to OJC did not match the reasons Hamburg discussed internally. This does not constitute the good faith communication required by the Shipping Act.

Hamburg contends that they shipped OJC containers after April 28, 2021, including during what would have been the 2021-22 contract year. Opposition at 9-10. The evidence shows that Hamburg provided short-term spot rate quotes to OJC after April 29, 2021, for cargo moving from Asia and Brazil to the United States. RX 608-618, RX 596-601, RX 741-745. Moreover, OJC shipped a small number of containers with Hamburg from Brazil to the United States under these and earlier-provided short-term spot rate quotes after April 29, 2021. RX 2-21, RX 45-56.

OJC testified that Hamburg's transportation of containers after April 29, 2021, included shipments that were already scheduled prior to that date, shipped from Asia via a third-party freight forwarder, or shipped from Brazil via limited spot quotes. SCX 509 at ¶ 3. This testimony is credible, especially in light of the agreed fact that Hamburg did not ship all of the containers contracted for in 2020-21 and there was no renewal of the 2020-21 service contract. Indeed, Respondents clarify that while "HSDG did handle some shipments for OJC from Brazil to the U.S., it did so on a case-by-case basis through rate quotations that were typically valid only for 60 days. None of these quotes constitute a service contract." RRPFF No. 87. Moreover, offering higher spot market rates does not ameliorate the problems caused by not having a predictable, year-long service contract.

Hamburg also contends that there was no meeting of the minds regarding the contractual terms for the 2021-22 service contract. Opposition at 11. While this is true, the evidence shows that the terms were not reached because an "executive decision" was made that Hamburg would "not engage in any renewal discussion with customer in light of potential litigation." CX 213. At that point, staff was instructed to "disengage on renewal negotiations with this account" and "also consider not to provide them with space under existing contract." CX 213. Thus, Hamburg made a decision on April 29, 2021, not to further negotiate any terms for a 2021-22 service contract and to consider not providing additional space under the 2020-21 contract. The lack of a meeting of the minds, therefore, was directly related to Hamburg's decision to disengage from negotiations.

The preponderance of the evidence establishes that as of the afternoon of April 29, 2021, Hamburg stopped dealing or negotiating in good faith with OJC regarding both meeting its remaining 2020-21 contractual commitment and negotiating a service contract for the following year. This constitutes a refusal to deal or negotiate. The next issue is whether or not that refusal was unreasonable.

c. Whether the Refusal was Unreasonable

OJC asserts that the refusal to deal was unreasonable and was retaliation for OJC's threat to file a complaint. Brief at 16-21. Hamburg, however, asserts that its actions were reasonable because there is no evidence that Hamburg failed to ship containers for OJC when they had available space and because there were legitimate reasons not to enter into a new contract with OJC. Opposition at 15-18.

The Commission "recognizes that an ocean common carrier does not have a duty to grant a contract to every potential party." NPRM Refusal to Deal, 87 Fed. Reg. at 57677. "The Act does not guarantee the right to enter into a contract, much less a contract with any specific

terms." *Global Link,* 2014 WL 5316345, at *18 (citation omitted). In a case affirmed by the Commission and DC Circuit, Administrative Law Judge Lang explained:

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of the OSRA [1999]. 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, Docket No. 00-11, 29 S.R.R. 345, 351 (ALJ June 27, 2001), *aff'd* 29 S.R.R. 1066, 2002 WL 33836158 (FMC June 28, 2002), *aff'd sub nom New Orleans Stevedoring Co. v. FMC*, 80 Fed. Appx. 681 (D.C. Cir. 2003).

The Commission recently discussed its prior application of the term "reasonableness" with regard to a refusal to deal or negotiate claim, stating:

> Case law indicates that "reasonableness" of the refusal to deal or negotiate has historically been interpreted broadly in this context, with courts deferring to the Commission's reading of that term in administering its statutes and regulations. The Commission has previously found reasonable those decisions that are connected to a legitimate business decision or motivated by legitimate transportation factors. "Reasonableness" can be given its dictionary definition but is judged on a case-by-case basis, with particular attention paid to the relevant circumstances; the Commission has said that a just and reasonable practice is one otherwise lawful but not excessive and suited to the end in view.
>
> Transportation-related factors can include, without limitation, the character of the cargo, vessel safety and stability, operational schedules, and the adequacy of facilities. Generally, however, transportation-related factors relate to the characteristics of the cargo or vessel, not the status of the shipper.
>
> The Commission has found various situations that inform what refusal to deal entails. It has found that a common carrier must avoid shutting out any person or party for reasons not connected to legitimate transportation-related factors. A common carrier must therefore give actual consideration to the other party's efforts or attempts at negotiation. For example, a common carrier's repeated refusal to respond to email or telephone requests for negotiations over an extended period of time may be viewed as an unreasonable method of shutting another party out. Similarly, there must be an affirmative act by a party to deal or engage in negotiations with the common carrier. Commercial convenience alone is not a reasonable basis for a common carrier's refusal to deal or negotiate. A common carrier granting special treatment to one party over another because that party is a regular customer is likewise likely to be viewed as unreasonable.
>
> The Commission also has a history of recognizing that it is appropriate to defer to a party's reasonable business decisions and not to substitute its business

> judgement for that of an entity conducting negotiations. However, this precedent does not eliminate the Commission's responsibility to evaluate whether a party's decision-making practices resulted in a violation of the Shipping Act.
>
> The Commission continues to acknowledge that its "role is not to ensure that all interested parties get the same deal or make a certain profit. Rather, the Commission's role is to ensure that parties are not precluded from obtaining preferential treatment due to unreasonable or unjustly discriminatory reasons." The Commission further recognizes that an ocean common carrier does not have a duty to grant a contract to every potential party. However, upon establishing its criteria for granting preferential terms to parties who are able to meet those specified terms, the ocean common carrier then has a duty under the Shipping Act to apply such criteria in a consistent and fair manner without differentiating based on illegitimate transportation factors. An ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with its business development strategy.

NPRM Refusal to Deal, 87 Fed. Reg. at 57676-57677 (footnotes omitted).

OJC asserts that the refusal to deal was unreasonable because it was retaliation for threatened litigation, which is discussed more below. The question in this section is whether or not Hamburg's conduct was unreasonable. The emails stating that an "executive decision" was made that Hamburg would "not engage in any renewal discussion with customer in light of potential litigation" – combined with the instruction to "disengage on renewal negotiations with this account" and "also consider not to provide them with space under existing contract" – establish that the refusal to deal or negotiate was based on potential litigation. CX 213. Moreover, there is no suggestion in these communications that the litigation was unwarranted or that OJC was demanding more than they were entitled to under the existing contract and Shipping Act regulations.

Hamburg asserts that its decision not to enter a service contract with OJC in 2021-22 was reasonable for numerous reasons, including: (1) the pandemic continued to cause supply chain congestion, especially at West Coast ports, (2) HSDG missed the 2020-21 MVC by 15 FFE and it was not clear that they could perform, (3) HSDG believed that OJC wanted the new contract to have the same rates, (4) HSDG was reducing the Asia to Kentucky trade lanes dues to increased inland transport costs as well as operational issues such as trucker and chassis shortages, and (5) "OJC's disputatious manner of doing business—including almost daily demands for additional container space—also contributed to HSDG's decision." Opposition at 16-18.

Many of the reasons identified by Hamburg as reasons for not entering a service contract may be legitimate, transportation-related factors that could reasonably justify a common carrier's decision not to enter into a service contract. However, the facts do not support Hamburg's assertion that *in this particular case*, any of those five factors was the actual reason that *this particular service contract* was declined. Rather, the evidence shows that this particular service contract negotiation ended because an "executive decision" was made that Hamburg would "not engage in any renewal discussion with customer in light of potential litigation." CX 213. Indeed,

the timing of the decision on April 29, 2021, one day after OJC sent the second demand letter, for the first time mentioning the Federal Maritime Commission, further supports the finding that the decision was based on OJC's demand letters and not on legitimate transportation factors.

An allegation of refusal to deal due to litigious behavior has been previously raised in a Commission proceeding. The Commission found a cognizable claim had not been raised and dismissed a refusal to deal claim where one party "made the decision not to engage in any more transactions with a party who had filed what appeared to be a baseless claim against its related company." *Cornell v. Princess Cruise Lines, Ltd.*, Docket No. 13-02, 2014 WL 5316340, at *8 (FMC Aug. 28, 2014). On appeal, the D.C. Circuit "expresse[d] no view as to whether the FMC engaged in reasoned decision-making by giving deference to 'discretionary business decisions' without assessing whether there are 'legitimate transportation-related factors' for the refusal to deal or whether the FMC's position was otherwise an unexplained departure from precedent and past practice." *Cornell v. FMC*, 634 Fed. Appx. 795, 797-98 (D.C. Cir. Dec. 2, 2015).

It is not necessary to reach the issue of whether a common carrier can consider litigiousness or a "disputatious manner of doing business" in determining whether or not to contract with an entity because that issue is not raised by these facts. Rather, here, the evidence shows that OJC sought to obtain transportation to which it was entitled under the existing service contract, objected to demurrage fees that have since been refunded, and otherwise raised legitimate concerns regarding whether Hamburg was meeting its contractual and Shipping Act obligations. Thus, deference to legitimate business decisions would not extend to the conduct at issue here. Refusing service based on these facts is not related to legitimate business decisions or transportation factors and is therefore unreasonable.

Hamburg also asserts that Mr. Pump's email was based on an internal misunderstanding, stating:

> While OJC focuses on Mr. Pump's response—the so called "smoking gun"—it is important to consider the information he received from Mr. Li before providing his response. Mr. Li noted that OJC was "threatening us on liquidated damage against the space that we couldn't provide." CX 220. Mr. Pump had not seen the threats that OJC's counsel sent HSDG. RX 994-RX995. The primary focus of these threats was a breach of contract claim, which is precisely what Mr. Li described in his email. CX 220. Thus, on April 29, 2021, Mr. Pump had no indication that OJC was threatening action before the FMC. Moreover, the April 29, 2021 email from Mr. Li to Mr. Pump reflects Mr. Li's mistaken understanding that what Ms. Casanova sent him was a *proposal from OJC*: "they are proposing a renewal contract with 400 FFE MQC but all rates remain the same from last year contract." CX 220; *see also* RX981.
>
> As a result, Mr. Pump was being asked if HSDG should enter a 400 FFE contract at the same rates as 2020-21 with a customer that was threatening legal action for breach of contract. It is highly unlikely that any carrier would have agreed to a 400 FFE service contract for 2021-22 at the same rates as a 200 FFE service contract for 2020-21. As OJC itself acknowledges, the market rates increased substantially from June 2020 to May 2021. OJC Brief at 41-46; CX435. It is

> perfectly predictable and reasonable that Mr. Pump, when presented with what Mr. Li portrayed as a proposal from OJC for such a contract, combined with a threat of litigation, would decline to offer a service contract based on reasonable business considerations. The fact that Mr. Li and Mr. Pump misunderstood the source and nature of the proposal they were evaluating does not detract from the reasonableness of their actions based on their subjective understanding. Indeed, the FMC has historically deferred to a party's reasonable business decisions in the context of an unreasonable refusal to deal. 87 *Fed. Reg.* 57674, 57677 (September 21, 2022) (citations omitted). Finally, the record clarifies that Mr. Pump's suggestion that HSDG decline to provide space under the Service Contract was not adopted by HSDG in any event. *See* RX 726-28. As noted above, after Mr. Pump sent his email, HSDG and Maersk continued to transport cargo for OJC, accounting for 24% of OJC's volume after May 31, 2021. *Supra* at 4-5, 13-14.

Opposition at 19-20 (citations shortened) (footnotes omitted).

Unlike the retaliation claim, for a refusal to deal claim there is no requirement that the unreasonable conduct be limited to or related to filing of a complaint before the Commission. Whether Mr. Pump decided not to pursue a new service contract due to a threat to file contractual arbitration, a Commission proceeding, or litigation in some other venue is not determinative. The decision made in this case to "disengage on renewal negotiations with this account" and "also consider not to provide them with space under existing contract," CX 213, *see also* RX 981, was explicitly articulated as being based on "potential litigation" – not based on perceived unreasonable contractual requests or any other legitimate business decision or transportation factors – and is therefore unreasonable.

Based on the totality of the evidence, Hamburg's failure to negotiate or deal was unreasonable, and its justifications are not consistent with the facts as established by the evidence in the record, including the contemporaneous emails identifying the reason as "potential litigation." Accordingly, OJC has established that HSDG violated section 41104(a)(10)'s prohibition against refusals to deal.

2. Section 41104(a)(3): Retaliation

Section 41104(a)(3) provides that: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. § 41104(3). Therefore, common carriers are prohibited from retaliating against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resorting to other unfair or unjustly discriminatory methods, because: the shipper has patronized another carrier, the shipper has filed a complaint, or for any other reason. Statement of the Commission on Retaliation, Docket No. 21-15, 3 F.M.C.2d 201, 207, 2021 WL 9204128 (FMC Dec. 28, 2021) ("Statement on Retaliation"). Double damages may be available for a violation of the anti-retaliation provision. 46 U.S.C. § 41305(c).

OJC asserts that Hamburg retaliated against OJC by unreasonably refusing to renew or even negotiate a service contract with OJC, and by refusing to fulfill Hamburg's existing contractual obligations and that Hamburg's after-the-fact pretexts for its retaliation are all baseless. Brief at 16-26. In its reply, OJC asserts that Hamburg unlawfully retaliated against OJC by refusing to ship any more containers under the 2020-21 service contract and by refusing to renew and enter into the 2021-22 contract. Reply at 8-18.

Hamburg contends that they did not retaliate against OJC, arguing that Hamburg did not refuse, or threaten to refuse, cargo space accommodations when available; HSDG's decision not to enter a service contract in 2021-22 is not retaliation under the statute and was reasonable; HSDG's internal emails do not establish that Hamburg retaliated against OJC; the alleged retaliation is not actionable because it occurred before OJC filed its complaint with the FMC; and finding retaliation here would create unworkable precedent. Opposition at 15-23.

Retaliation in the shipping industry has long been a concern. The Report of the Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade under H. Res. 587 (1914) ("Alexander Report") investigated foreign and domestic shipping lines, proposing that among other things, Congress empower the Interstate Commerce Commission to "[a]dopt whatever measures it may deem necessary to protect the complainant against retaliation," and prohibit carriers from "retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, or has filed a complaint charging unfair treatment, or for any other reason." Alexander Report at 421 (cited in Statement on Retaliation, 3 F.M.C.2d at 202).

"In passing the Shipping Act of 1916 . . . Congress followed the basic recommendations of the Alexander Committee." *Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 490 (1958).

> Section 14 of the 1916 Act prohibited deferred rebates, fighting ships, making discriminatory shipping contracts and "retaliat[ing] against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason." This language was carried forward with little change as section 10(b)(5) in the Shipping Act of 1984 and its codification as 46 U.S.C. § 41104(a)(3).

Statement on Retaliation, 3 F.M.C.2d at 202-203.

The Commission recently issued the Statement on Retaliation "to clarify that it will interpret 46 U.S.C. § 41104(a)(3) – the anti-retaliation provision – broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation." Statement on Retaliation, 3 F.M.C.2d at 201. The Commission concluded the policy statement with an example, stating:

> A complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods),

> with respect to a protected entity (shipper), because the protected entity engaged in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class).

Statement on Retaliation, 3 F.M.C.2d at 209. This section will address the retaliation arguments in this proceeding by discussing whether (a) each Respondent is a common carrier, (b) Respondents engaged in prohibited conduct by refusing, or threatening to refuse, cargo space accommodations when available, or resorting to other unfair or unjustly discriminatory methods, (c) Complainant is a shipper, and (d) Complainant engaged in protected activity by patronizing another carrier, or filing a complaint, or for any other reason. The first two elements focus on Respondents while the last two elements focus on Complainant. Each element is discussed below.

a. Respondent HSDG is a Common Carrier

Section 41104(a)(3) applies to common carriers, either alone or in conjunction with any other person. 46 U.S.C. § 41104(a)(3). Therefore, the first question is whether Respondents are common carriers. As discussed above, the evidence shows that HSDG was a common carrier and that HSNA was acting as its disclosed agent here. Therefore, the entity to which this section applies is HSDG, as HSNA was the agent and not the common carrier. This element is therefore met with regard to HSDG and the claim against HSNA is denied.

b. Respondents Engaged in Prohibited Conduct

Section 41104(a)(3) begins by prohibiting a common carrier from "refusing, or threatening to refuse, cargo space accommodations when available," or resorting "to other unfair or unjustly discriminatory methods." 46 U.S.C. § 41104(a)(3). Here, the first part prohibiting refusing or threatening to refuse cargo space accommodations when available is most relevant. However, the second part prohibiting resorting to other unfair or discriminatory methods could also apply to these facts and is helpful to understand.

The Commission recently explained the "resort to other unfair or unjustly discriminatory methods" clause.

> The "other unfair or unjustly discriminatory" language is a "catchall clause by which Congress meant to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by § 14 First, Second, and the 'retaliate' clause of § 14 Third." The Court in *Isbrandtsen* held that only conduct "designed to stifle outside competition" fell within this catchall. But it is not hard to envision situations where a carrier might engage in retaliatory conduct that has nothing to do with competition with other carriers. A carrier might engage in conduct detrimental to a shipper (e.g., refusing to enter into, renew, or amend a service contract) to "get even" with or deter that shipper and other shippers from complaining to the Commission. Under a broad reading of *Isbrandtsen*, this type of carrier conduct would not violate § 41104(a)(3) because it would not involve conduct designed to stifle outside competition.

> While the Commission is bound by *Isbrandtsen*, the Commission does not believe it requires such a result and interprets it as not applying where a retaliation claim is based on complaint-related activity (filing a complaint, participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or bringing a dispute to CADRS). *Isbrandtsen* did not involve allegations that a carrier retaliated against a shipper because it "filed a complaint charging unfair treatment." Rather, at issue was a dual rate contract system designed to protect a conference from an independent carrier. Consequently, the Court had no reason to address, and did not purport to address, the language in the statute that protects shippers who file a complaint. Further, the Court deemed the purpose of section 14 Third was to outlaw practices used to stifle the competition of independent carriers but did not discuss the portions of the Alexander Report that referred to protecting complaining shippers.

Statement on Retaliation, 3 F.M.C.2d at 208 (footnotes omitted).

OJC alleges both that Hamburg refused cargo space accommodations when available and that Hamburg resorted to other unfair or unjustly discriminatory methods. Brief at 18-19. The refusal to provide cargo space accommodations when available, at issue here, is similar to the refusal to deal found above. By refusing to deal or negotiate, Hamburg effectively refused cargo space accommodations. Respondent's prohibited conduct is discussed first in regard to the 2020-21 service contract and then in regard to the decision not to enter into a 2021-22 service contract.

i. Prohibited Conduct 2020-21

OJC argues that Hamburg engaged in prohibited conduct for the 2020-21 contract year by refusing to transport additional containers after the April 28, 2021, second demand letter. Brief at 16. Hamburg contends that it "continued to transport OJC's cargo after OJC threatened litigation on October 16, 2020 and again on April 28, 2021," and that declining to enter a service contract is not a form of retaliation recognized under the Shipping Act. Opposition at 15. OJC replies that "those shipments (1) were already scheduled prior to the retaliation date, and (2) were obtained on the spot market by OJC using third-party freight forwarders—not Maersk." Reply at 11.

The facts show that Hamburg did not meet the minimum volume commitment in the 2020-21 service contract, only moving 185 of the 200 FFEs from June 23, 2020, to May 31, 2021. CX 212. Hamburg's transportation of additional shipments for OJC after April 28, 2021, included shipments that were already scheduled or were obtained via a third-party freight forwarder via limited spot quotes. SCX 509-512 at ¶¶ 3, 8. Moreover, the up to three containers that were shipped under the contract after April 29, 2021, do not absolve Hamburg of its decision not to meet its contractual commitment, but only shows a delay in implementing that policy. Therefore, the evidence establishes that Hamburg failed to transport 15 of the 200 FFE containers required by the 2020-21 service contract.

Hamburg committed to transport these 15 containers as part of the service contract. And, with a month left on the contract and an allocation of 8-10 TEUs (or 4-5 FFEs) a week, this minimum commitment should have been within reach. Indeed, Mr. Li's April 29, 2021, email to Mr. Pump offered "I can work with APAROM to ensure they will get the remaining 18 FFE

before end of May." CX 220-221. But instead, Mr. Pump said "I would also not provide them with space under existing contract" and then said "to express our position on this, we should also consider not to provide them with space under existing contract." CX 220, CX 213. The contemporaneous emails do not demonstrate that space was not available but rather that these final containers were not shipped due to the "potential litigation." CX 213. The evidence establishes a refusal to provide cargo space accommodations when available for fifteen containers in the 2020-21 service contract year.

ii. Prohibited Conduct 2021-22

OJC argues that Hamburg engaged in prohibited conduct for the 2021-22 contract year by disengaging from negotiations after the April 28, 2021, second demand letter. Brief at 7-8. Hamburg contends that declining to enter a service contract is not a form of retaliation recognized under the Shipping Act and asserts that other reasons justify the decision not to enter into a new contract. Opposition at 16-18. OJC replies that Hamburg "retaliated against OJC based solely on its threat to complain to the Commission" and attempted to conceal the unlawful retaliation with pretexts which it alleges it disproved. Reply at 12-14.

An ocean common carrier does not have a duty to grant a contract to every potential party, however, ocean common carriers' decisions must be based on legitimate transportation factors or legitimate business decisions. NPRM Refusal to Deal, 87 Fed. Reg. at 57676 (citing *Ceres Marine Terminals v. Maryland Port Administration*, Docket 94-01, 29 S.R.R. 356, 370 (FMC Aug. 15, 2001)). As discussed above in the refusal to deal section, here, the evidence shows that the decision to "disengage" from negotiations for a renewed service contract was made due to the "litigation risk" posed by OJC and not for the reasons argued by Hamburg in this proceeding, as the facts do not support Hamburg's assertion that *in this particular case*, any of those five factors were the actual reason that *this particular service contract* was declined.

Regarding whether space was available, the evidence shows that after April 29, 2021, HSDG entered into service contracts with other shippers for a significantly higher amount of space than OJC was requesting. CX 469 at ¶ 16; CX 283-284; *see also* CX 285-286, HSDG's Resp. to OJC RFA 1-4. Ms. Casanova's question regarding whether the new contract could be increased from 200 to 400 FFE further suggests that HSDG had space available to enter into a contract of at least 200 FFE, the same as the previous year, and that whether space was available for 400 FFE had not been determined. Therefore, the evidence shows that Hamburg had at least 200 FFE available space for 2021-22, the same minimum volume commitment and routes as the prior contract.

The record does not allow a determination as to whether 400 FFE or more were available in the 2021-22 contract year. Mr. Pump testified that:

> Our biggest challenge in 2021 was capacity, as the existing customers, all asked, with very few exceptions, all asked for higher MQC, more capacity commitments, that was the overriding objective. And that was our biggest single challenge. Because we could not get a firm handle on the capacity that we would be able to sell in 2021. And then we had the challenge of who do we give more capacity to where, where does it come from.

RX 993. This is consistent with Hamburg's emails prior to April 29, 2021, for example when Ms. Casanova asked whether it would be possible to increase the MQC from 200 to 400 FFE, suggesting that it was not clear that an increased capacity would be available. CX 215.

The statements made by Ms. Casanova to OJC that Hamburg could not provide a new contract "due to the lack of space and equipment in Asia and the shortage of truck power in the US" and "due to the space situation in Asia more than truck power and chassis availability in the US" (SCX 481, RX 811) are not credible as they are not consistent with internal Hamburg emails. Indeed, that Hamburg did not communicate to OJC that the contract negotiations were terminated due to a concern about potential litigation suggests that Hamburg knew the real reason was not appropriate. Accordingly, the evidence establishes a refusal to provide cargo space accommodations when available for 200 FFE for the 2021-22 contract year.

c. OJC is a Shipper

The Commission has indicated that "although § 41104(a)(3) protects 'shippers,' that term includes more than just cargo owners." Statement on Retaliation, 3 F.M.C.2d at 201. In this case, the parties do not contest that OJC was a shipper. The facts establish that OJC is an e-commerce retailer that sells "dropship products" from domestic inventory of hundreds of brands, has a direct import program where OJC buys household goods, and OJC's imports come from Asia and Brazil and are delivered to California or Kentucky. CX 467. Therefore, OJC is a shipper and this element is met.

d. OJC Engaged in Protected Activity

OJC contends that Hamburg retaliated against it because OJC threatened to file a complaint with the FMC. Brief at 19. Hamburg argues that its emails do not establish retaliation but rather a reasonable business decision based on a misunderstanding; the alleged retaliation is not actionable because it occurred before OJC filed its complaint with the FMC; and finding retaliation here would create unworkable precedent because "every shipper would file, or threaten to file, claims with the FMC against ocean carriers during contract negotiations." Opposition at 18-23.

OJC asserts that not finding retaliation here "would essentially *encourage* carriers to retaliate if a dispute arose before the shipper could file its complaint, as a loophole to avoid liability," which would be contrary to the Commission's policy to interpret anti-retaliation provisions broadly. Reply at 16-17 (emphasis in original). OJC asserts that its claim is "consistent with the Shipping Act, the intent of Congress, and the Statement of the Commission on Retaliation." Reply at 18.

Section 41104(a)(3) states that a common carrier may not retaliate against a shipper "because the shipper has patronized another carrier, or *has filed a complaint, or for any other reason*." 46 U.S.C. § 41104(a)(3) (emphasis added). The Commission described this type of protected activity as "patronizing other carriers, filing a complaint, or other activities of the same class." Statement on Retaliation, 3 F.M.C.2d at 209. The Commission has indicated that "protected activity includes not only filing a complaint with the Commission but also

participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures." Statement on Retaliation, 3 F.M.C.2d at 201.

The complaint in this proceeding was filed on December 13, 2021. Thus, the FMC complaint was filed after the conduct at issue, which began the afternoon of April 29, 2021. Therefore, Hamburg's actions after April 29, 2021, were not because OJC had "filed a complaint" as no complaint had yet been filed. Rather, the argument is that "for any other reason" includes OJC's threat to file a petition with the FMC.

The first time in the record that a threat to complain to the FMC is conveyed by OJC to Hamburg is April 28, 2021, when an attorney representing OJC emailed the second demand letter to Hamburg, stating: "Failure to cure the breach by May 3, 2021, may result in legal action against you and your affiliates, as well as the filing of a petition to the Federal Maritime Commission to seek relief." CX 210 (emphasis omitted). OJC contends that this threat to file a petition, presumably meaning a complaint, with the Commission constitutes a protected activity. Therefore, the primary issue here is whether under these facts, the "for any other reason" statutory language includes threats to file a complaint with the FMC.

Hamburg states:

> OJC did not file a complaint before the FMC or commence any other FMC activities covered by the statute before the alleged retaliation. OJC fails to cite any precedent—and Respondents are not aware of any—that threatening to file a complaint before the FMC is covered by Section 41104(a)(3), as in effect at the time of the conduct at issue.

Opposition at 21 n.10. Further, Hamburg asserts that the "any other reason" language applies only to other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts. Opposition at 21 n.10.

Hamburg is correct that this is a novel issue and the parties have not identified any case law that addresses whether or not "any other reason" in the Shipping Act's anti-retaliation provision applies to threats to file an FMC complaint. In *California Shipping*, where Complainant had filed a complaint against another carrier, Korea Shipping Line, but was alleging retaliation by Yangming Marine Transport Corporation, the Commission found that although "section 10(b)(5) does prohibit retaliation against a shipper because the shipper has filed a complaint, we believe that this provision is limited to situations where the shipper has filed a complaint against the carrier who is allegedly retaliating against it." *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, Docket No. 88-15, 25 S.R.R. 1213, 1990 WL 427466, at *16 (FMC Oct. 19, 1990). Here, OJC threatened to file a complaint about Respondent, not some other carrier.

The statutory language, by including the phrase "or for any other reason" explicitly applies this section beyond cases where the shipper has patronized another carrier or has filed a complaint. The extent of that expansion is not unlimited, however, and the closeness of the alleged misconduct to the other items listed is relevant. Here, the action alleged to constitute an "other reason" is the threat to file a complaint with the Commission. This conduct is closely

related to the listed violations without being one of the listed violations. It is reasonable to anticipate that threats of prohibited conduct would be encompassed under the "for any other reason" language, and so finding is consistent with the Commissions' Policy Statement regarding interpreting the anti-retaliation provision broadly.

That this "any other reason" language may also apply to other conduct – such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS's dispute resolution procedures – does not mean that "any other reason" may not also apply to threats to file an FMC complaint.

Hamburg also asserts that the threats here would not fall under this section because they related to alleged breaches of the service contract, which typically would not be heard by the Commission, and because the service contract contained arbitration and liquidated damages provisions. Opposition at 21. However, service contracts do not deprive the Commission of jurisdiction to hear allegations of Shipping Act violations. The anti-retaliation provision is not so limited, and Hamburg does not provide any legal support for this argument.

From a policy perspective, OJC contends that not including "threats" in "any other reason" could motivate carriers to retaliate quickly, before a complaint can be filed. Reply at 16-17. Hamburg, on the other hand, contends that "every shipper would file, or threaten to file, claims with the FMC against ocean carriers during contract negotiations." Opposition at 22-23.

Ideally, parties should be able to discuss what they think could be Shipping Act violations as soon as possible, so the parties can work toward resolving them before they become violations or lead to litigation. These conversations may be limited if "threats" to file a complaint are not included in the anti-retaliation provisions as shippers may hesitate to raise issues without the protection of the anti-retaliation provision. Moreover, just because a party threatens to file a complaint does not mean that the complaint is valid or would be successful. It simply advises the carrier that the shipper believes there may be a violation so that the carrier can ensure that their conduct conforms to the requirements of the Shipping Act. As long as carriers have a legitimate, transportation-related basis for their decisions and comply with the requirements of the Shipping Act, they will not face liability. Moreover, including "threats" to file a complaint as an "any other reason" is consistent with the Commission's statement that this section should be read broadly. Therefore, a threat to file a Commission complaint constitutes "for any other reason" in the anti-retaliation provision.

For the reasons discussed above, OJC's threat to file a complaint with the Commission establishes that OJC engaged in protected activity and this element is met. Therefore, all four factors are met. OJC has established that common carrier HSDG retaliated against shipper OJC by refusing cargo space accommodations when available or resorting to other unfair or unjustly discriminatory methods because OJC had filed a complaint or for any other reason, which includes the threat to file a Commission proceeding. 46 U.S.C. § 41104(a)(3). The next issue is what reparations, commonly referred to as damages, are appropriate.

3. Reparations

OJC alleges that it is entitled to reparations for the actual injury it sustained as a result of Hamburg's violations of the Shipping Act; Hamburg's criticisms of OJC's damages are just as baseless as its liability pretexts; and OJC's damages should be doubled due to Hamburg's willful violation of section 41104(a)(3). Brief at 33-49; Reply at 32-52.

Hamburg asserts that OJC failed to prove damages with reasonable certainty, arguing that OJC's expert is unqualified to offer opinions on damages and contesting OJC's alleged lost profits, "Shipping Rate Differentials" method, evidence of causation, and mitigation of alleged damages. Opposition at 23-42.

The Shipping Act requires that the "Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation" of the Act. 46 U.S.C. § 41305(b). Complainants bear the burden of proving that they are entitled to reparations. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Docket No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022). "As the Commission has explained: '(a) damages 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.'" *MAVL Capital*, 2022 WL 2209421, at *3 (citations omitted). Reparations will only be awarded based on actual damages. *MAVL Capital*, 2022 WL 2209421, at *3. "Actual damages means 'compensation for the actual loss or injuries sustained by reason of the wrongdoing' which complainants must show to a reasonable degree of certainty." *MAVL Capital*, 2022 WL 2209421, at *3 (quoting *California Shipping,* 1990 WL 427466, at *23). "That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3.

> The statements of the Commission in *California Shipping Line Inc.* and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principle 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.

Tractors & Farm Equipment Ltd. v. Cosmos Shipping Co., Docket No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992), admin. final, Dec. 31, 1992. The parties agree that reasonable certainty is the appropriate standard. Reply at 33 n.146; Opposition at 23-24.

Both parties present experts, and the status of those experts and their reports will be addressed first. The specific damages calculations presented by OJC will then be evaluated, followed by an assessment of causation, mitigation, and additional damages.

a. Experts

The report of OJC's expert witness, Richard Berning, includes alternative calculations of damages based on either lost profits or shipping rate differentials. Brief at 33-49; CX 415 (Berning Report); CX 460 (Berning Supp. Report). The report and declaration of Hamburg's expert, Ricardo Zayas, dispute OJC's damages calculations. RX 1180 (Zayas Report); RX 1145 (Zayas Declaration).

Hamburg contends that Mr. Berning is unqualified, arguing that he did not obtain "sufficient relevant data" or verify the data provided to him; the assumptions underlying his opinions are not reasonable; and his opinions are insufficient as a matter of law. Opposition at 25-36. OJC asserts that all of these objections are unfounded. Reply at 43-52. Both parties also contest the timeliness of each other's expert reports.

i. Expert Qualification

"Qualifying an expert . . . requires only that the witness possess the 'knowledge, skill, experience, training, or education' necessary to assist the trier of fact. As the Supreme Court stated in the seminal opinion of [*Daubert*], the trial court must determine whether the proposed expert possesses 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Robinson v. D.C.*, 75 F. Supp. 3d 190, 197 (D.D.C. 2014) (citing to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). "It is not necessary that an expert possess the highest possible or most appropriate qualifications." *Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC*, Docket No. 11-11, 2013 WL 9808672, at *23 (ALJ Jan. 10, 2013), admin. final Mar. 20, 2013.

Mr. Berning is a Certified Public Accountant, a Certified Valuation Analyst, and Certified in Financial Forensics, with an education in accounting and economics, and decades of experience in accounting and business valuations. CX 438, CX 449-459. Mr. Berning is qualified as an expert, and the criticisms offered will be considered in the weight given to his opinion. Hamburg's other arguments, regarding Mr. Berning's data, assumptions, and the sufficiency of his opinions are not a reason to disqualify Mr. Berning, but these will be considered in the evaluation of OJC's damage calculations below.

ii. Legal Sufficiency

Hamburg argues that Mr. Berning's opinions are insufficient as a matter of law because they merely parrot Mr. Weiss's calculations. Opposition at 36. OJC indicates that Mr. Berning did not rubber stamp OJC's prior figures but rather came up with his own independent opinion. Reply at 44; Brief at 33-34; RX 1044; *see also* CX 448; CX 469.

As the Commission observed in *Sea-Land Service, Inc.*: "Ordinarily, the fact that a party in interest has tendered an analysis does not automatically disqualify the analysis on the grounds of bias. However, bias is properly a factor to be considered in determining weight to be accorded any testimony." *Sea-Land Service Inc. - Proposed General Rates Increases in the Puerto Rico and Virgin Islands Trades*, Docket No. 81-10, 20 S.R.R. 1627, 1633 (FMC Sept. 25, 1981), *aff'd sub nom*, *Puerto Rico Maritime Shipping Auth. v. FMC*, 678 F.2d 327 (D.C. Cir. 1982). Mr. Weiss performing certain analyses does not disqualify the analyses; however, the source of

calculations will be taken into account in terms of weight. Differences in the total damages calculations before and after Mr. Berning's involvement, which Hamburg has highlighted, support the impact of Mr. Berning's participation. Opposition at 31-32.

iii. Timeliness

Both parties contest the timeliness of each other's expert reports. Hamburg asserts that Mr. Berning's two expert reports were served after the deadline for expert reports and are thus untimely. Opposition at 25. OJC contends that Mr. Zayas's declaration, constituting a rebuttal expert report, was served nearly two months after the close of all discovery in violation of the rules and is "trial by ambush." Reply at 28.

It appears that all three submissions were not timely filed. The Order on Respondents' Motion to Compel and Revised Schedule, served June 29, 2022, states that the cut-off for disclosure of initial expert reports was August 5, 2022, and the cut-off for all discovery was September 16, 2022. Mr. Berning's initial expert report is dated September 2, 2022, his supplemental report is dated October 17, 2022, and Mr. Zayas's Declaration is dated December 8, 2022. CX 415; CX 460; RX 1145.

The status of Mr. Berning's initial report was addressed in an earlier order in this proceeding, which held that the "expert report submitted by Complainant on September 2, 2022, was not filed timely. However, striking the report or not permitting Complainant to present a damages expert would be an extreme remedy. Rather, the discovery deadline will be extended briefly." Order on Respondents' Motion to Compel and Complainant's Motions for Extension of Time and for Clarification at 5. It is preferable to resolve this proceeding on the merits. Therefore, all three expert reports will be entered into the record and given the weight they are due. In the future, the parties should note that untimely expert reports may be stricken.

iv. Other Critiques

Hamburg offers a number of critiques, many based on its expert's reports at RX 1180 and RX 1145, which it argues apply across more than one damage calculation. These will be summarized here and are considered as they become relevant in evaluating OJC's specific damage calculations.

Hamburg argues that Mr. Berning failed to verify OJC's data and calculations using source documents and the "lack of sufficient relevant data is obvious in eight respects": average revenue per container; average profit per container; containers OJC shipped in 2020-21; containers OJC would have shipped in 2021-22; products OJC would have sold in 2021-22; HSDG's alleged refusal to deal; OJC's alleged lost profits; and OJC's failure to mitigate. Opposition at 27-31.

Hamburg also argues that Mr. Berning's opinions depend upon six unreasonable assumptions, that: Hamburg was required to enter a service contract for 2021-22; the hypothetical service contract for 2021-22 would have had the same rates as 2020-21; Hamburg would have agreed to increase the MVC from 200 FFEs in 2020-21 to 4,700 FFEs in 2021-22; OJC would have been able to fill 4,700 containers with products and sell all those products in 2021-22; Hamburg would have agreed in the hypothetical 2021-22 contract to transport

containers from Asia to OJC's warehouse in Kentucky; and the hypothetical 2021-22 contract would have included trade lanes from Brazil to the U.S., even though the service contract for 2020-21 covered only Asia to California trade lanes. Opposition at 32-35 (emphases omitted).

Hamburg's argument that they were not required to enter into a service contract for 2021-22 goes to the merits, while this section addresses what reparations are appropriate for the Shipping Act violations established above. The other critiques offered by Hamburg are considered in evaluating OJC's damage calculations below.

Mr. Berning calculates average *gross* profit per container as revenue less the costs, including the purchase cost, sales commissions, fulfillment center costs, shipping costs, and any other costs directly associated with the product. CX 423. Mr. Berning also states that OJC utilizes third parties for shipping, fulfillment warehousing, and other needed tasks to sell the product, and that all of these costs have been captured and deducted. CX 423. He finds average *net* profit per container to be equal to *gross* profit per container, noting that due to the structure of the company, the direct variable costs included produce the net profit per container. CX 423. Because the numbers presented are the same and the costs deducted appropriately reflect OJC's variable costs, this decision simply refers to average profit per container. *See, e.g., Flota Mercante Grancolombiana v. Consolo v. FMC*, 373 F.2d 674, 677, 681 (D.C. Cir. 1967) (discussing and affirming reparations figure set by the Commission after *Consolo v. FMC*, 383 U.S. 607, 626 (Mar. 22, 1966)); *Rose Int'l Inc. v. Overseas Moving Network Int'l*, Docket No. 96-05, 29 S.R.R. 119, 2001 WL 865708, at *77-78 (FMC June 1, 2001).

b. Damages Calculation

OJC presents its expert's analysis of the injurious effects of Hamburg's Shipping Act violations under two alternate methodologies: (1) lost profits or (2) shipping rate differentials, each addressed separately below. Shipping rate differentials will be addressed only briefly, because the lost profits method more accurately measures OJC's actual injury.

i. Lost Profits

In assessing lost profit damages, the same damages standard elaborated above applies. Reparations will only be awarded based on actual damages which "does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3. The Supreme Court has affirmed that lost profits from being "unjustly and illegally denied shipping space" is a loss that "is real and it is certainly compensable under the Shipping Act." *Consolo v. FMC*, 383 U.S. 607, 626 (1966) (holding it was error on the part of the Court of Appeals to reverse the Commission's award of reparations).

The "goal of awarding damages is to make the injured party whole," thus, the "proper measure of damages is not reduced to one simple formula, but must be evaluated on the individual facts of the case and calculated in order to make the injured party whole." *Kobel v. Hapag-Lloyd A.G.*, Docket No. 10-06, 2014 WL 5316331, at *14 (ALJ July 30, 2014) (Remand Initial Decision), *aff'd* 2015 WL 3465821 (FMC May 26, 2015) ("*Kobel Remand ID*"); *see also* 22 Am. Jur. 2d Damages § 25. Therefore, regarding calculation methods for reparations claims

before the Commission, "[t]he method chosen depends on the evidence available and which calculation more accurately measures the actual loss." *MAVL Capital*, 2022 WL 2209421, at *3.

OJC presents four categories of lost profit damages: (1) loss for failure to meet minimum TEU during 2020-21, (2) loss due to failure to provide the regular weekly shipments during 2020-21, (3) freight charges above contract rates during 2021-22, and (4) loss due to refusal to renew contract during 2021-22. CX 422. OJC adds these four categories of lost profits to establish a total lost profits claim. Each of these four categories of lost profit damages requested will be assessed below. However, two sections have been reordered, to allow for more logical analysis: what OJC labels as "lost profit damage category #4" (loss due to refusal to renew contract) will be addressed third in the discussion below, followed by what OJC labels as "lost profit damage category #3" (freight charges above contract rates during 2021-22).

(a) Minimum TEU 2020-21

OJC contends that Hamburg was required by the 2020-21 service contract to provide a minimum of 200 containers and only produced 185, or a deficit of 15 containers; and proposes this loss be computed by taking the deficit of 15 containers, multiplied by the anticipated average net profit per container of $22,892.48, resulting in a loss of $343,387.18. Brief at 38; CX 424.

Hamburg acknowledges that it shipped only 185 out of the contracted 200 FFE. Opposition at 2; CX 212. But, Hamburg disputes OJC's calculation, asserting that section 3(c) of the service contract provides for liquidated damages of $250 per TEU "[i]n the event that the Minimum Volume Commitment of this Contract is reduced by 10% or more as a result of carrier's failure to provide space;" such provisions are valid and can negate claims for damages under the Shipping Act; the contract obviates any claim for damages arising from Hamburg's failure to meet the 200 FFE minimum, because the actual containers shipped by Hamburg (185 FFEs) were within ten percent of the MVC (200 FFEs); and even setting aside the ten percent threshold, the maximum damages OJC could receive under the service contract for a 15-container shortfall would be $7,500 (30 TEUs multiplied by $250 per TEU). Opposition at 37.

Many of the points made by Hamburg may be relevant were this a breach of contract claim, but this is not. This proceeding addresses violations of the Shipping Act. Thus, it is not contractual terms or liquidated damages, but rather OJC's actual injury that must be assessed. 46 U.S.C. § 41305(b). While *California Shipping* considered contract provisions, that was in the context of evaluating complainant's actual injury. 1990 WL 427466, at *25 (referencing contracts with clauses that lowered the minimum quantity commitment if the shipper was unable to secure space from the carrier; thus, the contracts alleged to have been owed to complainant were "much less valuable"). Indeed, Hamburg was well aware, as they made the decision to refuse to deal and to retaliate against OJC, that actual damages "would of course be a significantly higher amount" than $250/TEU. CX 229.

Here, there is no question concerning Hamburg's obligation to fulfill 200 FFE and the shortfall of 15 FFE, rather, the challenge is in evaluating OJC's calculation of damages, including average revenue per container and average profit per container. As explained below, the record demonstrates that both are calculated with reasonable certainty.

(1) Average Revenue and Profit per Container

OJC presents two averages, upon which several of its lost profit category calculations depend: average revenue per container of $60,250.30 and average profit per container of $22,892.48. OJC states that it compiled an average revenue per container shipped during the period June 1, 2020, through July 16, 2022, based on actual products shipped and the selling price of the products; and average profit per container based on the same containers used that that were used for the average revenue calculation, and taking revenue less costs of the product. Brief at 35.

Mr. Berning's report indicates that to compute the cost of the product, OJC captured "all the costs including the purchase cost, sales commissions, fulfillment center costs, shipping costs and any other direct costs directly associated with the product." CX 423; *see also* CX 470. OJC added that it "utilizes third parties for shipping, fulfillment, warehousing and other needed tasks to sell the product" and that all these costs were captured and deducted. *Id.* OJC explained as well that "[e]ven though OJC was projecting [a] significant increase in sales in fiscal 2021 (and resulting need for additional containers), their increase in fixed costs would be nominal due to the structure of the company." *Id.*

Hamburg disputes both averages and contends that Mr. Berning did not do anything to substantiate these numbers - he did not review, and OJC refused to produce - the shipping records, sales records, financial statements, and other documentation from which the calculation might be verified; OJC's use of these numbers is without evidentiary support; an earlier spreadsheet provided by Mr. Weiss calculated different numbers for each calculation, which Mr. Berning was not aware of, and OJC has not explained why the calculations changed; Mr. Berning's report does not address whether certain costs OJC characterized as fixed were, under applicable accounting standards, actually variable; and both OJC and Mr. Berning concede average profit per container may not have included all variable costs. Opposition at 28-29.

Mr. Berning's report indicates that OJC compiled an average revenue per container and computed the average profit per container. CX 423; *see also* RX 1041. Thus, these they will be evaluated, and any possible bias considered, in light of their being offered by OJC's President. Mr. Berning's level of review was appropriate for his use of these averages in subsequent calculations. While Mr. Berning did not calculate these numbers, he examined the methodology utilized by OJC, the data from OJC's accounting systems, and OJC's costs in light of the company's operational structure. RX 1082-1083 (noting "the way they operated is almost as . . . a virtual company. So their costs, overhead and stuff, are very limited because they outsource pretty much everything" and that "We did look to . . . the Excel spreadsheets which have the company data . . . that comes directly from the company's accounting and other systems . . . . [B]ecause it's Excel-based, we can see where the calculations are made to see what they're doing."). This was a reasonable level of review by Mr. Berning to support their inclusion in his calculations.

For both averages, Hamburg charges that OJC refused to produce the "shipping records, sales records, financial statements, and other documentation from which these calculations might be verified." Opposition at 28-29 (citing to RX 1121, RX 1033, RX 1034). Much of this

underlying data was the subject of an earlier motion to compel and subsequent order denying that motion to compel. As recounted in the September 30, 2022 Order:

> Respondents argue that OJC has provided a spreadsheet supporting its alleged damages but that OJC has not provided any of the documentation upon which the spreadsheet is based, and that lost sales or profits should be reflected in financial statements or some sort of financial reports.
>
> Complainant asserts that OJC is a private company which does not generate or possess any audited financials; overall company financials would not be relevant as the only line of business at issue is the import of house-brand products; OJC specifically generated the sales history of the house-brand products for Respondents; and OJC does not generate quarterly or annual profit and loss statements. . . .
>
> Respondents have not identified specific problems with the detailed information provided in this spreadsheet. In addition, Complainant's arguments are persuasive that certain financial reports are not available or would not be probative because other product lines are included.

Order on Respondents' Motion to Compel and Complainant's Motions for Extension of Time and for Clarification at 4 (citations omitted). The above has not changed – Hamburg still has not identified specific problems with the detailed information provided in the spreadsheet. Indeed, OJC has presented a wealth of rich actuals data (data about financials that have already occurred as opposed to what was forecast). OJC claims that it provided the following data to Hamburg:

- Produced data in spreadsheets on the 737 containers shipped by OJC from June 1, 2020, around when the parties' Service Contract started, until July 2022. For each container, OJC provided Maersk with 13 points of data, including but not limited to the exact origin, destination, shipping carrier, ship date, arrival date, container value, and the exact price paid.

- Provided Maersk a total of 2,830 records of all the contents in the 737 containers. For each line item, OJC provided 12 points of data, including but not limited to the product descriptions, total units, unit cost, profits, revenue, and pricing.

- Provided a total of 366,709 records of sales history on all those products, starting from January 1, 2020, to August 17, 2022. For each sales transaction, OJC provided 12 points of data, including the order number, order date, order source, price paid, item ordered, quantity ordered, cost of shipping, cost of fulfillment, commissions, marketing, discounts, sales, and gross revenue, all from OJC's internal database.

- All in all, in addition to the other documents and emails that OJC has produced, OJC provided Maersk a total of 370,276 records, with 4,444,049 points of data, encapsulating all shipping containers during the relationship

> between the parties, and all sales records of products associated with those shipping containers.

Reply at 33 (citations omitted). Hamburg nevertheless argues that OJC's "refusal to produce supporting documentation . . . casts significant doubt on Mr. Weiss's estimates," pointing to *California Shipping*, which Hamburg summarizes as "rejecting damages supported solely by summary exhibit that 'was entirely the work of [complainant's president].'" Opposition at 28 (citing 1990 WL 427466, at *24).

But the underlying data in *California Shipping* was vastly different than OJC's data. In *California Shipping*, the complainant's President was offering "estimates of the amounts and types of cargoes he could have generated if given access to the three contracts." 1990 WL 427466, at *24. He offered these projections based on "his experience in the industry, his knowledge of [complainant/CSL's] operations and customer base, and his knowledge of the market for service contract and tariff rates during the relevant time periods." *California Shipping*, 1990 WL 427466, at *23. The lists of "potential customers" CSL submitted were generated by CSL's salesmen, "included many customers that were not strictly CSL's," and showed "only a limited potential, as opposed to a probable commitment" causing the Commission to conclude there was "no convincing evidence, therefore, that CSL had a sufficient customer base to satisfy the particular volumes required by each contract." *California Shipping*, 1990 WL 427466, at *12. The Commission also noted there was "no indication in the damages summary as to what proportion of CSL's cargo estimate would have been its own and what would have been cargo supplied by its 'agents'" relevant because CSL "permitted, if not relied upon, certain foreign NVOCCs to move their cargo under CSL's contracts" and CSL acknowledged that "a 'good portion' of cargo moving to the East Coast would have been that of [its] 'agents.'" *California Shipping*, 1990 WL 427466, at *11, *24.

By contrast, OJC's average revenue and average profit per container calculations are based not on projections but on actuals data, providing an inherently more fact-based and reliable foundation. OJC also took care to exclude non-relevant shipments, providing data for the 737 containers shipped in the relevant time period corresponding to OJC's house-brand products line of business. While audited financials are not available, this was detailed data, and Hamburg still does not assert the data to be problematic in and of itself. If earlier preliminary calculations (which have not been presented in briefing by OJC) were different from OJC's final calculations, this is neither troubling nor surprising, and may be a consequence of OJC's efforts to provide as much actuals data as possible.[6]

OJC's average revenues per container and average profits per container, based on actuals data over the time period June 2020 through July 2022, is therefore found to be well supported. The variable costs taken into account by OJC were appropriate. OJC's acknowledgement that it has captured "the vast majority, if not all of the costs relating to the sale of products," and Mr. Berning's statement to the same effect, does not impugn the reasonableness of this number,

[6] Demonstrating OJC's efforts to provide comprehensive actuals data, OJC noted that it produced data supporting its damages claims on July 15, 2022, (including data from June 1, 2020, through March 24, 2022) and supplemented this on September 2, 2022, with additional shipments made since that time (through July 2022). OJC Counterstatement Brief, September 8, 2022.

where there is no indication of anything but good faith efforts from OJC to capture all relevant costs. For Complainant to show actual damages "does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained." *MAVL Capital*, 2022 WL 2209421, at *3; *see also Tractors & Farm*, 26 S.R.R. at 798-99 ("the amount [of damages] can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences.").

OJC has sufficiently established its average revenue per container of $60,250.30 and average profit per container of $22,892.48 as reasonably certain, and these averages will be utilized in the damages calculations below.

(2) Final Calculation for 2020-21

With average profit per container of $22,892.48 established, damages are calculated by multiplying this profit by the remaining 15 containers that OJC was owed under the 2020-21 service contract, in order to obtain OJC's actual injury of $343,387.20. Therefore, for Hamburg's failure to meet its minimum TEU by 15 FFEs (30 TEUs) in 2020-21, actual injury of $343,387.20 has been shown with reasonable certainty.

(b) Regular Weekly Shipments 2020-21

OJC claims that Hamburg was required to provide a minimum number of weekly shipments during 2020-21; this weekly minimum was confirmed in an email between Mr. Gast and Ms. Casanova; Hamburg repeatedly missed the weekly minimum and by end of the year the weekly shortfalls totaled 105 containers; and Hamburg has not compensated OJC for these shortfalls. Brief at 38-39. To compute this loss, OJC takes a deficit of 105 containers multiplied by the anticipated average profit per container of $22,892.48, resulting in a loss of $2,403,710.25. CX 424.

Hamburg contends that this damage claim is inconsistent with the terms of the service contract; there is no contractual requirement that Hamburg provide "regular weekly shipments" to OJC; the service contract merely imposes a 200 FFE MVC during the contract term; in arguing that OJC was entitled to 8 TEUs or 10 TEUs per week, OJC refers not to the terms of the contract, but to emails to OJC or internal Hamburg emails; these communications refer to "SP" or "space protection" that Hamburg allocated internally in an effort to meet OJC's weekly container requests and stay on track to meet the 200 FFE MVC for the contract term; these communications did not amend the contract to require regular weekly shipments; and in seeking damages for a weekly shortfall of 105 FFEs in addition to damages for failing to meet the 200 FFE MVC, OJC argues that Hamburg was contractually required to ship 305 FFEs during the contract term, which is inconsistent with the contract, which states that Hamburg has the "option," not the contractual requirement, to ship additional cargo beyond the MVC of 200 FFE. Opposition at 38 (citations omitted; emphases omitted).

This category of lost profit damages presented by OJC is not supported by the record. There is no enforceable commitment by Hamburg to provide a minimum number of weekly shipments. As Hamburg noted, the service contract refers to a minimum volume commitment of 400 TEUs (200 FFEs). CX 125. Regarding spacing of cargo, the most relevant contract term

binds OJC, not Hamburg. CX 125 ("Shipper agrees . . . that the tender of cargo under this Contract shall be reasonably spaced throughout the term hereof.").

It is not surprising that OJC might have been confused regarding a weekly allocation. Hamburg says it referred to SP, but the emails show the terms SP and MQC to have been used sometimes interchangeably by Hamburg. *See, e.g.*, CX 153 (internal Hamburg email indicating "Please note that there is a MQC of 10 TEUS per week under agreement # AECC0000291. . . . I appreciate that you confirm them at least to meet the MQC."). The emails cited by OJC, however, do not suffice to establish an enforceable commitment, in place of contract terms.

In any case, if OJC was to be compensated for its actual injury of $343,387.20 from loss for Hamburg's failure to meet minimum TEU during the service contract (discussed above), then OJC would already be made whole for 2020-21. "The basic objective of the law of damages in such cases as the instant one is to make a person who has suffered injury whole." *Adair v. Penn-Nordic Lines, Inc.*, Docket No. 1695(F), 26 S.R.R. 11, 26, 1991 WL 383091, at *24 (ALJ Sept. 24, 1991), admin. final Oct. 24, 1991. If OJC was additionally compensated for regular weekly shipments during 2020-21, OJC would be made more than whole for the 2020-21 service contract. This category of lost profit damages claimed by OJC is therefore denied.

(c) Refusal to Renew Contract 2021-22

OJC asserts that Hamburg refused to renew the shipping contract with OJC for 2021-22; the parties agreed to between 4,200 and 4,700 containers; by unlawfully refusing to renew the contract, Hamburg forced OJC into a position where it could not profitably operate its business because shipping the containers would cost more than the goods in the containers were worth; and Hamburg made record-breaking multi-billion dollar profits but was doing so at the expense of OJC's business. Brief at 40. OJC offers alternate calculations based on the assumption of either 4,200 or 4,700 total containers expected for 2021-22, minus the 143 containers actually shipped, for a shortfall of 4,057 or 4,557 containers. OJC multiples this shortfall by the average profit per container of $22,892.48, for a total loss sustained of $92,874,785.49 or $104,321,024.77. Brief at 41; CX 425-426.

Hamburg contends that OJC's projection of 4,200 to 4,700 FFEs in 2021-22, a 767% increase over its container volume in 2020-21, is unsupported and unreasonable; and OJC's claim for $92,874,785.49 or $104,321,024.77 is pure speculation and must be rejected. Opposition at 41.

Actual damages must be proved by the party seeking them and to "warrant recovery, the actual detriment must be shown by competent evidence and with reasonable certainty." *California Shipping*, 1990 WL 427266, at *23. Here, a 2021-22 container volume assumption of either 4,200 or 4,700 has not been demonstrated with reasonable certainty. This would have constituted a markedly different scale of relationship between OJC and Hamburg, equating to more than a 21-fold increase over the MQC established by the 2020-21 contract. This volume proposal by OJC also included new routes, which had not been a part of the 2020-21 relationship (discussed further below). OJC has demonstrated that it communicated to Hamburg its plans to move between 4,200 to 4,700 FFE in 2021, and Hamburg had begun to discuss this volume and its associated routes internally; but negotiations had not advanced to the point where this increase

in volume can be reasonably assumed to have been contracted for in 2021-22. CX 203; CX 217-218; RX 809. As a result, OJC's calculation of actual injury predicated on volumes of either 4,200 or 4,700 is not supported by the record.

That does not mean OJC was not harmed in 2020-21. Mr. Pump emailed Mr. Li on April 29, 2021, that Hamburg "should not engage in any renewal discussions" with OJC, nor "provide them with space under the existing contract." CX 220. But right up until that point, contract negotiations had been proceeding for closing a 2021-22 contract. *See, e.g.*, CX 218-219 (April 27, 2021, Hamburg email discussing OJC's plans to move 4,200 to 4,700 FFE in 2021 and seeking to confirm the actual MQC target for a 2021-22 contract); CX 217 (On April 28, 2021, Mr. Li stated Hamburg would "need a clear target in order to put it on target list" adding they "signed 200 FFE last year for City of Industry, CA and almost fulfilled that this year. Based on that what would be the MQC target for next year with and without KY business?"); CX 215 (April 29, 2021, Ms. Casanova's email stating "since we are working to renew the contract, I want to ask if it is possible to Increase MQC by 200 FFE giving a total of $400 FFE" adding "the customer has been constant in his volumes and is willing to commit to much more of the current MQC."). Throughout those discussions, there were conversations about the MQC of the renewal, but never about there being no renewal at all. Amended Complaint at ¶ 41; HSNA Answer at ¶ 41; HSDG Answer at ¶ 41.

To determine damages for 2021-22, it is next necessary to discuss: (1) container volume; (2) routes; (3) use of average profit per container; and (4) the containers actually shipped by OJC in 2021-22.

(1) Container Volume

OJC asserts that it would have shipped 4,200 to 4,700 FFE in 2021-22. Brief at 39-41. Hamburg contends that this volume is speculative and not supported by the record, particularly where the previous contract was only for 200 FFEs. Opposition at 41.

To assess 2021-22 volume, it is first relevant that OJC shipped 185 containers and was prepared to meet its contractual commitment of 200 FFEs with Hamburg in 2020-21. CX 212. It is reasonably certain that OJC would have shipped at least that same 200 FFE in 2021-22, given OJC's actual performance in 2020-21, OJC's constant requests for even higher volumes throughout 2020-21, OJC's internal projection of and request for a significantly higher 2021-22 volume, and the increased demand for consumer goods that even Hamburg recognized. *See, e.g.*, CX 212; CX 217; CX 206-208; RX 622; RX 638; RX 823; CX 475; CX 203; CX 475; RX 1024; Opposition at 1 ("In 2020 and 2021, consumers spent more time at home due to the pandemic, resulting in increased spending on consumer goods. Increased demand for consumer goods led to increased imports from Asia, where many goods are manufactured.").

Moreover, the evidence supports a finding that until April 29, 2021, Hamburg was interested in contracting with OJC for 2021-22 for at least the same contract volume, 200 FFE, if not more. The evidence shows that on the morning of April 29, 2021, Ms. Casanova asked whether Hamburg could "[i]ncrease MQC by 200 FFE giving a total of $400 FFE, that will not only cover the deficit by also show our interest to participate more of their volume" if Hamburg

could achieve that. CX 214; CX 213. This question suggests that it was not clear whether or not Hamburg could handle a higher volume.

Mr. Pump testified:

> Our biggest challenge in 2021 was capacity, as the existing customers, all asked, with very few exceptions, all asked for higher MQC, more capacity commitments, that was the overriding objective. And that was our biggest single challenge. Because we could not get a firm handle on the capacity that we would be able to sell in 2021. And then we had the challenge of who do we give more capacity to where, where does it come from.

RX 993. This testimony is consistent with Ms. Casanova's question about whether or not the volume could be increased – a question asked prior to the afternoon of April 29, 2021. Therefore, the evidence does not support a finding that Hamburg would have agreed to a higher volume than the previous year.

OJC asserts that it would have been able to ship 4,200 to 4,700 FFE. However, it was not clear that even before April 29, 2021, Hamburg had sufficient capacity to meet this higher volume request. Therefore, OJC's request for damages based on up to 4,700 FFEs is overly speculative. The evidence does not support a finding that Hamburg would have agreed to a 2021-22 contract of that volume. Therefore, although it is possible the parties would have contracted for 400 FFEs or more, the most reasonable estimate, backed by solid evidence and reasonable certainty, is 200 FFE. The next question is whether any adjustment needs to be made to account for routes, and as explained below, it does not.

(2) Routes

OJC's desired volume of 4,200 to 4,700 containers included routes that were not a part of the 2020-21 contract. Specifically, as part of OJC's projected volume of 4,200 to 4,700, OJC initially requested that seventy percent of containers be shipped to Kentucky, and the remaining thirty percent to California. CX 203; *see also* CRPFF No. 73 ("Admitted that OJC initially requested 70% containers to KY" although OJC insists that it "informed [Hamburg] that if Kentucky was again an issue, OJC could ship all [containers] through California.").

Based on the evidence, it is not reasonably certain that the route to Kentucky would have been included in a 2021-22 contract between the parties. Hamburg internally communicated possible interest in this route at points; Hamburg handled some shipments for OJC from Brazil to the United States on a case-by-case basis; and Hamburg acknowledged actually shipping some quantity of containers from Brazil to Kentucky, even in 2021 and 2022. CX 242; CPFF No. 87; RRPFF No. 87; CX 287; *see also* RPFF No. 25; CRPFF No. 25. However, the clearest evidence on this point is Hamburg's declination of this route twice prior to April 29, 2021. Indeed, the last position communicated internally at Hamburg, before disengaging from negotiations, was that the Kentucky route would not be included in a 2021-2 contract. *See, e.g.*, CX 217 ("I do suggest to maintain focus on local destination only."). Thus, if OJC's actual injury were being calculated based on an initial container volume of 4,200 or 4,700 FFE in 2021-22, that volume would have to have been adjusted downward, removing the container volume bound for Kentucky.

However, as already discussed, neither 4,200 nor 4,700 were accepted as a reasonably certain container volume for 2021-22. Just as 200 FFE is the reasonably certain container volume for 2021-22, so too is it reasonably certain to utilize the same routes from the 2020-21 contract (which did not include Kentucky). In effect, the route to Kentucky was already removed from the calculation of volume because the calculation of volume above does not include the Kentucky route. Therefore, while routes to Kentucky are not reasonably certain for 2021-22, this does not change the findings above.

As a calculation of actual injury to OJC then, it remains reasonable to take 200 FFE and multiply this by the average profit OJC would have achieved in 2021-22, but for Hamburg's retaliation and refusal to deal. But, prior to finalizing this calculation, two further questions must be addressed: whether it is appropriate to take average profit per container of $22,892.48 and to utilize this number for 2021-22 calculated losses; and whether an adjustment is necessary to account for the 143 containers actually shipped by OJC without the benefit of a contract with Hamburg. As elaborated below, OJC's calculated average profit per container is determined to be sufficiently accurate; and, it is not appropriate to subtract from the 200 containers for 2021-22, because the evidence establishes that OJC would have shipped these 143 containers on the spot market through alternate carriers, even if it had a contract with Hamburg for 200 FFE.

(3) Average Profit per Container

One of Hamburg's assertions is that it is an unreasonable assumption to think contract prices in 2021-22 would have been the same as contract prices in 2020-21, thereby lowering OJC's profits per container. The main question that must be answered regarding the appropriateness of using average profits calculated by OJC for 2021-22 is whether this reasonably accounts for changes in contract prices that likely would have occurred. Both facts and case law support that it does.

As described above, OJC calculated average profits per container of $22,892.48 by compiling the average revenue per container shipped during the period June 1, 2020, through July 16, 2022, based on actual products shipped and the selling price of the products. So, this average already includes actuals throughout the relevant timeframe for both 2020-21 and 2021-22, taking into account higher spot market rates paid by OJC in 2021-22.

The parties did not reach the point of exchanging 2021-22 contract rates before Hamburg disengaged from negotiations. OJC argues it can assume the same contract rates as 2020-21, citing to Hamburg's internal communication referring to the new contract containing the "same rates" as in 2020-21. CX 214. But this was not an offer presented to OJC. It is clear in context that Ms. Casanova was providing information internally to begin the contract renewal process. *See, e.g.*, CX 203 ("Appreciate any advice and if there are any new guideline regarding TPEB contracts so we can start working on this contract renewal.").

The evidence does not show precisely what 2021-22 contract rates would have been between the parties. But, this lack of information was caused by Hamburg's retaliation and refusal to deal. As already described, Hamburg was negotiating the 2021-22 contract, until the decision was made "in light of potential litigation" to "disengage on renewal negotiation with this account." CX 213. "[W]hen precise evidence measuring financial injury is unavailable

because of the nature of the violation, the Commission will rely on reasonable estimations, as do the courts, so that the wrongdoer does not benefit from its misconduct." *Adair,* 1991 WL 383091, at *23. The Commission has stated that "in situations where a wrongdoer has by its own action prevented the precise computation of damages, the 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." *California Shipping*, 1990 WL 427266, at *23 (*citing Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946)). The average profit per container calculated based on 2020-21 and 2021-22 actuals is sufficiently supported to utilize in calculating 2021-22 injuries, especially as the profit per container includes the spot rates that OJC utilized in 2021-22.

Therefore, the profit per container of $22,892.48 is reasonable to utilize to calculate the actual damages sustained by OJC due to Hamburg's violations for 2021-22. The next question is whether the containers actually shipped by OJC impact the calculations.

(4) Containers Actually Shipped by OJC

OJC subtracts the 143 containers it was able to ship from its expected shipment of 4,200 to 4,700 containers in its calculation of damages. Brief at 41. Hamburg asserts that "lost profits in 2021-22 is pure speculation and must be rejected." Opposition at 41.

To put the 143 containers actually shipped by OJC in 2021-22 in context, it is helpful to begin with an examination of OJC's recent shipping history. OJC shipped 185 out of its 2020-21 volume commitment of 200 FFE, and the evidence indicates that it would have shipped the final 15 FFE had OJC been so allowed. OJC shipped additional containers with carriers other than Hamburg. *See, e.g.*, CRPFF No. 40. As also demonstrated earlier, OJC also frequently sought more container space from Hamburg in 2020-21; and OJC's projection of, and request for, a volume of 4,200 to 4,700 FFE in 2021-22 highlights that its desire for more containers was only intensifying. The consistent theme is that OJC was trying to ship as much as it could and was attempting to secure the container space to keep up with its projected demand.

Thus, the evidence establishes that if OJC had a 2021-22 contract with Hamburg for only 200 FFE that OJC would have continued to try to secure additional shipping space. This is what these 143 containers actually shipped by OJC in 2021-22 represent: those containers it was able to ship profitably outside of a carrier contact, through spot rates. Had OJC obtained a 200 FFE 2021-22 contract with Hamburg, and also shipped an additional 143 FFE on the spot rate market, that would still have been significantly below its volume projection. Further confirming that OJC would have shipped 143 containers in addition to, not instead of, 200 FFE with Hamburg, Hamburg themselves point out that the 143 containers actually shipped by OJC in 2021-22 included shipments from Brazil to the United States and from Asia to Kentucky, trade lanes which were not a part of the 2020-21 contract. Opposition at 40; *see also* CX 442-444; CX 425.

Hamburg points out that some of the spot market transportation that OJC obtained was ultimately shipped by Hamburg. Opposition at 15. Indeed, the evidence shows that Hamburg transported shipments for OJC after April 28, 2021, including shipments that were already scheduled, obtained via third-party freight forwarder United Shippers Association, or obtained via limited spot quotes. SCX 509. But, as Hamburg acknowledges, these short-term spot market

shipments were not part of a service contract between the parties, rather they were shipments made on a "case-by-case basis through rate quotations that were typically valid only for 60 days," RRPFF No. 87, therefore being of a kind that would have occurred in addition to a 200 FFE 2021-22 contract. Thus, these spot market shipments do not change the calculation of OJC's injury.

Therefore, it is reasonably certain that had OJC shipped 200 FFE with Hamburg in 2021-22, it nevertheless would also have sought out the spot markets to try to accommodate additional shipments. OJC's total injury in 2021-22 may therefore appropriately be calculated by looking at the injury resulting from 200 FFE without subtracting the 143 containers OJC was able to ship on the spot market. Accordingly, damages for 2021-22 are calculated by multiplying 200 FFE times the average profit per container of $22,892.48, which equals a total 2021-22 injury of $4,578,496.

(d) Freight Charges Above Contract Rates 2021-22

The final category of lost profit damages to be considered is freight charges above contract rates during 2021-22. OJC contends it was forced to pay spot rates for containers during 2021-22 because of Hamburg's retaliation and not renewing their shipping contract; during this time, OJC could only ship 143 containers because the prices greatly exceeded the contract rates; in most cases, OJC was either unable to procure shipments, or was forced to not ship product at all because the containers would cost more than the goods in the containers; and had Hamburg not retaliated, OJC would have shipped 4,200 to 4,700 containers as projected given the enormous demand for home goods during 2021-22. Brief at 39. OJC therefore assessed "expected contract rates" for each of the 143 shipments, and calculated excess shipping charges, by comparing the actual less expected contract rates for each shipment. Brief at 39-40.

Hamburg claims this damage claim is flawed in several respects, including that OJC did not provide any documents to verify the 143 FFEs it claims to have shipped or the spot rates it allegedly paid; OJC's assumption that Hamburg would have agreed to the same rates in 2021-22 is unsupported and unreasonable; OJC incorrectly includes shipments from Brazil to the U.S. even though these trade lanes were not a part of the 2020-21 contract; and OJC incorrectly includes shipments from Asia to Kentucky even though these trade lanes were not a part of the 2020-21 contract. Opposition at 40.

As described above, this category is no longer needed. It is not necessary to assess charges over contract prices, because the lost profit calculations above account for the entirety of the actual injury OJC has demonstrated with reasonable certainty for 2021-22.

(e) Total Lost Profits

As explained above, OJC's actual injury includes $343,387.20 for Hamburg's failure to meet its minimum commitment for the 2020-21 contract by 15 FFE (30 TEU) plus $4,578,496 for 200 FFE in 2021-22 which equals a total lost profits of $4,921,883.20. In holding lost profits to be real and compensable under the Shipping Act, the Supreme Court asserted "we think the court below wrongly minimized the sting of losing expected profits resulting from being unjustly

and illegally denied shipping space." *Consolo*, 383 U.S. at 626. Compensating OJC with $4,921,883.20 would acknowledge the sting of lost profits and make OJC whole.

Shipping rate differentials will be briefly addressed next, however, that method does not provide as accurate of a measure of OJC's actual injury. Injury alone does not guarantee reparations, *MAVL Capital Inc.*, 2022 WL 2209421, at *3, therefore, causation must be shown. The Commission has also indicated that mitigation of losses may be a factor to consider. As elaborated below, causation is confirmed, and OJC acted reasonably in attempting to mitigate damages. Therefore, actual damages are established. One final issue will be whether or not additional damages are appropriate in this proceeding.

ii. Shipping Rate Differentials

As an alternative to damages calculated based on lost profits for 2021-22, OJC also presents damage calculations based on shipping rate differentials. OJC describes that it computed the difference between the contract cost (that OJC would have had but for Hamburg's retaliation) to ship either 4,200 or 4,700 containers versus the spot market cost to ship the same number of containers, which required OJC to project how many containers it would have shipped on each route, to determine contract rates for each route, and to multiple those rates by the number of containers to be shipped in each of those routes. Brief at 41-42. To determine spot prices, OJC used sources including Xenta and Drewry or made specified assumptions, in the absence of spot rates from Hamburg. Brief at 42-43.

Hamburg contends that there are multiple problems with this method, including that it assumes Hamburg would have agreed to a new contract in 2021-22 with the same rates as 2020-21; it assumes the new contract would have included the Asia to Kentucky lanes; contract rates used by OJC for Asia to Kentucky are not sourced and are inapplicable; OJC improperly included the Brazil to US trade lanes even though those trade lanes were not part of the 2020-21 contract; OJC's projection that it would have shipped 4,200 to 4,700 FFEs in 2021-22 is unreasonable and unsupported; OJC incorrectly uses spot market rates for 2021-22 from third party sources; and there is no reason to use third-party sources when OJC knows the precise rates it paid to ship 143 FFEs in 2021-22.

The goal of awarding damages is to make the injured party whole. Therefore, regarding calculation methods for reparations claims that come before the Commission "[t]he method chosen depends on the evidence available and which calculation more accurately measures the actual loss." *MAVL Capital*, 2022 WL 2209421, at *3. Here, assessing injury through calculating lost profits most accurately measures OJC's actual loss. Therefore, there is no need to consider shipping rate differentials damages in further detail. Instead, causation, mitigation, and additional damages can now be considered, premised on the total lost profits already established.

c. Causation

OJC contends that Hamburg's illegal cutting OJC off from a service contract caused OJC tremendous harm, because, as a result, OJC did not have the reliability and consistency of stable rates and volume commitments that are the great benefit of a service contract over the spot market; Hamburg inappropriately uses of out-of-context quotes from Weiss's deposition about

his regret in trusting Hamburg and working with Casanova to consolidate all OJC's shipping business with Hamburg as a basis to find that it was Mr. Weiss himself who caused OJC's harm; and Weiss had no way of knowing that Hamburg would retaliate and cut off OJC from all further service contract shipments. Reply at 51.

Hamburg asserts that OJC offers no evidence of causation; Mr. Berning simply assumed it; his assumption is unreasonable given Mr. Weiss's testimony that 'OJC did not renew its service contracts with other carriers it had been using in 2020-21 and agreed to consolidate all its imports with Hamburg; Mr. Weiss decided to seek a single service contract with a single carrier for 2021-22, but the carrier he chose - HSDG - was the only carrier that failed to meet its MVC in 2020-21 and the only carrier OJC repeatedly threatened to sue; Mr. Weiss also made his decision to break off negotiations with other carriers before he had even started to negotiate in earnest with Hamburg; any damages OJC suffered in 2021-22 were caused by this decision and Weiss appeared to concede as much during his deposition stating "you know in hindsight, I felt, wow, what a big mistake to put all my eggs in one basket . . . . it made absolutely no sense what I did." Opposition at 42 (citations and emphases omitted).

In order to be awarded reparations, Complainant must not only prove a violation of the Shipping Act, but also a causal relationship between that violation and any actual injury. *Prudential Lines, Inc. v. Farrell Lines, Inc.*, 1984 WL 136266, at *6 (FMC June 15, 1984); *see also MAVL Capital Inc.*, 2022 WL 2209421, at *3 ("damages must be the proximate result of violations of the statute in question." (citation omitted)).

Here, Hamburg violated the Shipping Act through refusal to deal and retaliation against OJC. The decision not to provide space under the existing contract and not to renew the contract caused the damages identified above. Just as "Complainants' losses were the direct result of the improper liquidation of their containers" in *Kobel*, OJC's losses here were the direct result of Hamburg's illegal retaliation and refusal to deal. *Kobel Remand ID*, 2014 WL 5316331, at *12. Therefore, OJC has established causation. Hamburg's arguments about OJC's negotiations with other carriers is more appropriately considered below, regarding mitigation.

d. Mitigation

OJC asserts that it could not obtain a shipping contract with any other carrier, because Hamburg retaliated against OJC so late in the contract season; nonetheless, Mr. Weiss tried to obtain a service contract with another carrier, to no avail; OJC obtained what limited space it could on the spot market at extremely high rates; but often OJC was unable to secure shipments, and in most cases was forced to forgo making shipments of goods to the United States altogether because the spot rates became too expensive to justify the cost of container freight. Reply at 51; Brief at 21.

Hamburg contends Mr. Berning's damage analysis is flawed because counsel instructed him not to assess mitigation; OJC failed to mitigate its alleged damages; and OJC failed to produce any emails or documentation showing that it made any effort to secure space or transport cargo with any other carrier, NVOCC, or forwarder. Opposition at 42-43.

As explained in *Rose Int'l Inc.*, "[m]itigation is a principle used in damages analysis to prevent a party from recovering damages for losses it could have reasonably avoided without an undue risk or burden, and is one applied by the Commission." 29 S.R.R. at 162, 2001 WL 865708, at *81; *see also* Restatement (Second) of Contracts § 350 (1981) ("As a general rule, a party cannot recover damages for loss that he could have avoided by reasonable efforts.")

The "mitigation principle only applies to mitigation actions the injured party takes *after* a breach, not to actions taken prior to a breach in order to prevent damages." *Kobel Remand ID*, 2014 WL 5316331, at *13 (emphasis added). *Kobel* applied this principle, stating "Respondents have not identified any actions that Complainants could have taken to mitigate the damages after the liquidation of their containers. To the extent that Respondents are arguing that Complainants' failure to timely pick up the containers caused the liquidation and loss, this delay did not justify the improper liquidation" and holding "Respondents [had] not established that the Complainants failed to mitigate their damages." 2014 WL 5316331, at *13.

Applied here, Hamburg's arguments concerning what OJC might have done prior to the afternoon of April 29, 2021, refer to actions taken before the violation, which are not relevant to mitigation. In any case, OJC's actions in focusing only on Hamburg for a 2021-22 contract, while not ideal in hindsight, were not unreasonable at the time. OJC believed, based on communications with Hamburg, that Hamburg would make OJC a priority customer, providing benefits such as supplying more containers, dedicated space protection, and committed personnel to ensure better service for OJC's shipments, in return for OJC consolidating all of its imports with Hamburg. CX 467; RX 1024. In other circumstances, this may have resulted in better rates and a stronger long-term relationship between OJC and Hamburg.

Subsequent to April 29, 2021, Mr. Weiss testified that he attempted to negotiate with other carriers but was unsuccessful, noting the difficulty of attempting to close a contract so late in the season. CX 468-469. While there is no contemporaneous evidence of Mr. Weiss's inquiries with other carriers, Mr. Weiss's testimony on this point is credible. This is consistent with Mr. Li's testimony that the majority of contracts will be negotiated and entered into in the first quarter of the year, through April, or possibly May. RX 977; *see also* RX 988A. Indeed, OJC's shipment of 143 containers on the spot market in 2021-22, even though spot market rates were generally higher than service contract rates, is strong evidence of OJC's attempts to mitigate damages through shipping as much as it could ship profitably in 2021-22. It would be unlikely that OJC would work so hard to reach out to entities to secure space on the spot market without first (or simultaneously) attempting to secure a 2021-22 service contract elsewhere. As Hamburg also noted, OJC's other contracts had ended before May 2021. Opposition at 42 (summarizing that OJC's OOCL contract ended March 2021 and its COSCO contract ended a "month or two" before Hamburg's contract).

Overall, the circumstances in terms of mitigation here are not very different from *Consolo*, wherein the Commission explained:

> In mitigation of the Board's award Flota also urges upon us Consolo's failure to charter vessels and his failure to use space available on the Chilean Line. These points are not tenable. We agree with Consolo that it would have been a hardship for him to charter ships in order to ply his trade, and we think it unreasonable to

> contend he should have done so in the circumstances. Flota does not make clear what ships were a vailable for charter; or that Consolo could have used them; and if he could, on what terms. As to the Chilean Line, it has been shown, to our satisfaction, that Consolo did exert efforts to ship thereon and did, in fact, make several such shipments late in 1958.

Consolo v. Flota Mercante Grancolombianan, S.A., 7 F.M.C. 635, 643 (FMC Sept. 16, 1963), validity of Commission's reparations award *aff'd sub nom. Consolo v. FMC*, 383 U.S. 607 (1966).

Similarly here, Hamburg's points are not tenable. There was nothing further that OJC could reasonably have done, as of April 29, 2021, beyond what OJC actually did. OJC exerted efforts both to obtain an alternate 2021-22 contract, and to continue to ship on the spot market as many containers as it could manage to ship profitably in the absence of a service contract. OJC thus was reasonable in mitigating its losses, and there were no losses that OJC reasonably could have avoided without an undue risk or burden.

e. Additional damages

OJC asserts that it "has shown that its injuries were caused by Maersk's violation of 46 U.S.C. § 41104(a)(3) (retaliation)," which "warrants the payment of additional damage amounts to OJC up to 'twice the amount of the actual injury.'" Brief at 49, Reply at 53. Hamburg does not directly address this argument, although they assert that OJC fails to prove damages with reasonable certainty. Opposition at 23-41.

The Shipping Act provides that where the injury was caused by retaliation, "the Commission *may* order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury." 46 U.S.C. § 41305(c) (emphasis added). The parties do not cite any cases discussing this provision.

The use of the word "may" indicates that awarding additional damage amounts is discretionary. *American President Lines, Ltd. v. Cyprus Mines Corp.*, Docket No. 91-27, 1994 WL 33488, at *14 (FMC Jan. 31, 1994) (Order on Review of Summary Judgment). The Commission recently made a statement suggesting that there is no guidance regarding when additional amounts would be appropriate. Fact Finding 29 recommended adding section 41102(c) to the list of violations for which additional damages are available and if enacted, recommended that "the Commission should then develop guidance about under what circumstances it would order 'additional amounts' for violations of § 41102(c) [e.g., for certain types of cases (demurrage and detention only or other types of cases), or based on certain conduct (bad faith, willfulness)]." FMC Fact Finding No. 29, 2021 WL 3367606, at *2 (Jan. 1, 2021) (brackets in original).

The question is what factors are appropriate to consider when determining whether additional damages amounts are appropriate for the retaliation. It is clear that retaliation is among the types of cases for which additional damages are available. The additional damages do not appear to be compensation for actual damages nor for attorney fees, as both of those categories of damages are already available. Rather, it appears that the additional damages are

meant to be akin to a penalty. In Commission enforcement proceedings, enhanced civil penalties are awarded "if the violation was willfully and knowingly committed." 46 U.S.C. § 41107(a). This standard is consistent with the recommendation in Fact Finding 29, which suggests consideration of bad faith or willfulness. Therefore, a standard of knowing and willful will be used to determine whether or not additional damages are appropriate here.

The Commission has addressed the knowing and willful factor in the civil penalties context, stating:

> In order to prove that a person acted "knowingly and willfully," it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence. The Commission has further held that a person's "'persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.'"

Rose Int'l, 29 S.R.R. at 164-165, 2001 WL 865708, at *47 (citations omitted); *see also Pacific Champion Express Co., Ltd. – Possible Violations of Section 10(b)(1)*, Docket No. 99-02, 28 S.R.R. 1397, 1403, 2000 WL 534633, at *10 (FMC April 21, 2000) (similar language).

Here, the evidence shows that Hamburg was aware for months that it was not meeting its contractual commitment and that litigation was possible. As early as October 21, 2020, Mr. Gast, in risk management, stated:

> This is a very bad case for us which we will likely lose . . . . If we can at least establish we are working to uphold our contractual obligations I would feel much more comfortable about this case. At present based on the emails I have seen I do not have confidence in our ability to establish that we are doing our part under these terms.

CX 161.

On April 29, 2021, Mr. Gast emailed that "I believe we are unlikely to meet our duties under these contract terms" and it "appears our local sales colleagues had tried to address the capacity issue with origin but were advised that no additional space would be granted for this customer." CX 229. He further stated that "actual damages . . . would of course be a significantly higher amount" and that "[s]hould such a lawsuit occur I can easily imagine the cost would easily wipe out any profits gained from the commercial relationship due to potential breach of contract judgements against us and the cost of our own legal representation." This does not suggest that the legal claims were not well-founded. Rather, Mr. Gast "hope[d] that due to the customer wanting to sign a renewal contract that they would choose to not pursuit this breach of contract suit for minor shortfalls under the present agreement." CX 229.

Hamburg was aware that they had not provided the space required by the 2020-21 contract and made a knowing decision not to provide that space, or to engage in further negotiations for the next contract year, due to "potential litigation." CX 220, CX 213. Initially, on April 29, 2021, Mr. Li emailed Mr. Pump and suggested that he would "ensure they will get

the remaining 18 FFE before the end of May." CX 220-221. However, Mr. Pump responded stating that "[w]e should not engage in any renewal discussions with customer in light of the potential litigation, I would also not provide them with space under the existing contract. The shortfall will be compensated as per contract terms." CX 220. Mr. Li then passed those instructions along, stating that they should "not engage in any renewal discussion with customer in light of potential litigation" and:

> Meanwhile, we will leave it up to APAROM's decision to handle the remaining 18 FFE that required to fulfill the 200 FFE MQC on current contract. But just to express our position on this, we should also consider not to provide them with space under existing contract. The shortfall will be compensated as per contract terms, considering we already fulfilled over 90% of the MQC agreement.

CX 213. OJC clearly explained why Hamburg's conduct violated the service contract and Shipping Act, but rather than resolve the issue, Hamburg committed an additional violation.

Hamburg knew that OJC would seek compensation for the failure to transport containers but nevertheless decided to "disengage." On May 4, 2021, Mr. Maldonado requested authorization to ship the remaining FFEs, stating:

> Please note we were advise from customer in case that HS will not fulfill its contractual volume, it will proceed with legal actions against HS. We believe due to the small volume remaining to fulfil MQC of 200 FFE; this could be avoid it. I would appreciate please your feedback and authorization to grant space for this month of May for those 18 FFE's needed.

CX 227. Hamburg's own employees were suggesting how to avoid legal liability but Hamburg still did not provide the last 15 FFE it had committed under the contract and the "contract expired on May 31st and renewal was not approved by Upper Management." CX 212; Opposition at 2.

The evidence establishes that Hamburg's executive, Mr. Pump, knew that his executive decision violated the Shipping Act. In his deposition, Mr. Pump was asked: "Would a customer who had threatened to file a lawsuit or FMC complaint, or actually filed a lawsuit or FMC complaint, would that also be off limits with respect to discriminating against that client?" He responded "Yeah." When asked whether "during this compliance training was there any discussion about if a customer threatened to or actually filed a lawsuit as opposed to a FMC complaint, whether or not that would be allowed in that situation to retaliate or refuse to deal with that customer?" Mr. Pump responded in relevant part that "it is clearly understood in the organization that this is not a factor in the decision whether or not to negotiate a service contract." CX 95-96. Therefore, the decision was knowing and willful.

These facts support finding that the violation was knowing and willful. Hamburg was aware that OJC threatened litigation and instead of resolving OJC's legitimate concerns, Hamburg retaliated by not transporting containers under the service contract and ending negotiations for a new contract. This knowing and willful behavior supports ordering payment of the maximum amount of additional damage amounts, which is twice the amount of the actual injury.

As discussed above, the amount of actual injury is $4,921,883.20. The maximum award is no more than twice the amount of actual injury, or $9,843,766.40. Given the knowing and willful violation of the Shipping Act's prohibition on retaliation, the maximum amount of damages is appropriate in this proceeding.

4. Discovery violations

OJC asserts that Hamburg should be sanctioned and precluded from challenging OJC's damages based on Hamburg's repeated violations of court orders and FMC Rules and requests an adverse evidentiary determination that OJC's damages be conclusively established. Brief at 26-33; Reply at 22-32. Hamburg asserts that sanctions are not appropriate as it complied with discovery obligations; and, rather than seek sanctions for OJC's refusal to produce relevant information, Hamburg explains why the withheld information was necessary and why its absence shows a lack of support for OJC's expert's damage calculations. Opposition at 43-49.

This proceeding has been litigated thoroughly by the parties, including multiple motions to compel. It is not necessary to determine whether or not discovery violations occurred as the evidence that the parties are disputing was not necessary to resolving the proceeding. Hamburg's spot market rates, blank sailings, and other issues raised by OJC were not necessary to a determination of damages and additional discovery would not have impacted the findings. Therefore, because the evidence does not support finding that failure to provide discovery impacted the determination, OJC's request for sanctions is hereby **DENIED**.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that OJ Commerce has established that Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft A/S & CO. KG, which is now part of Maersk A/S, violated the Shipping Act, 46 U.S.C. §§ 41104(a)(3) (retaliation), and 41104(a)(10) (refusal to deal), it is hereby

ORDERED that OJC's Amended Complaint against HSDG be **GRANTED**. It is

FURTHER ORDERED that OJC's Amended Complaint against HSNA be **DENIED**. It is

FURTHER ORDERED that HSDG is ordered to pay OJC reparations in the amount of $9,843,766.40, with interest on the reparations award running from April 29, 2021. 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

DOKA U.S.A. LTD., *Complainant*

V.

MSC MEDITERRANEAN SHIPPING COMPANY (USA) INC, *Respondent*

DOCKET NO. 22-32

Served: June 15, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's May 12, 2023, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

CCMA, LLC, *COMPLAINANT*

v.

MEDITERRANEAN SHIPPING COMPANY S.A. AND MEDITERRANEAN SHIPPING COMPANY (USA) INC., *RESPONDENTS.*

DOCKET NO. 22-33

Served: June 27, 2023

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's May 26, 2023, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

GLOBERUNNERS, INC., *Complainant*

v.

HOYER GLOBAL (USA), INC., *Respondent*.

DOCKET NO. 22-27

Served: June 28, 2023

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On June 14, 2023, Complainant Globerunners, Inc. ("Globerunners") filed a Motion for Voluntary Dismissal by Complainant ("Motion for Dismissal"), "based on settlement by the parties submitted hereto as Exhibit A." Motion for Dismissal at 2. Respondent Hoyer Global (USA), Inc. ("Hoyer") did not join in the motion, but it executed the confidential settlement agreement which references the parties' intention to seek "Discontinuance/Dismissal with prejudice" of the instant Federal Maritime Commission ("FMC") complaint and the related District Court action. Exhibit A Settlement Agreement at 4, ¶ 11. No opposition has been filed.

Using language borrowed in part from the Administrative Procedure Act, 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); *see* 5. U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to 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). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

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).

[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.

> 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 AM. JUR. 2D *Compromise and Settlement* § 3 (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)).

Globerunners asserts that the parties are "two sophisticated entities, both of whom have been represented by counsel during the settlement process." Globerunners further states that "the settlement is the result of arm's-length negotiations" and it fully resolves the issues between the parties. Motion for Dismissal at 3. Globerunners states, and Hoyer does not dispute or oppose:

> The proposed agreement does not contravene any law or public policy, nor is it unjust or discriminatory in any way. Additionally, this agreement will not result in any adverse effects to any third parties or on the shipping public. The proposed settlement is fair and reasonable and reflects the Parties' desire to resolve their issues without the need for costly and uncertain litigation.

Id.

Based on the representations in Globerunners' motion, the lack of opposition by Hoyer, 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 and have engaged in arms-length settlement discussions. The proceeding 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. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "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).

The confidential 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.

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 Complainant Globerunners and Respondent Hoyer be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

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

Linda S. Harris Crovella
Administrative Law Judge