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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

March 6, 2012

Karen V. Gregory
Office of the Secretary
Federal Maritime Commission
800 N Capitol Street NW, Room 1046
Washington DC 20573
secretary@fmc.gov

Re: Yakov Kobel and Victor Berkovich
Complainants vs. Hapag-Lloyd America, Inc. et al
FMC Docket No. 10-06

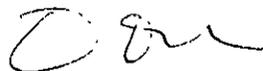
Dear Ms. Gregory:

Please find enclosed for filing an original and fifteen copies of Complainants' Memorandum of Exceptions to Conclusions, Statements, and Findings of Fact in the Initial Decision of the Administrative Law Judge and Brief in Support of Complainants' Memorandum of Exceptions and Certificate of Service by mailing.

These documents have been sent by email to the Court today, as well as to Respondents, in addition to being sent by overnight mail.

If you have any questions, please call me.

Very truly yours,



Donald P. Roach

DPR/ml
Encl.

cc: Wayne Rohde
John Saffner
Aleksandr Barvinenko

CC OS
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ORIGINAL ALJ(2)
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U.S. DEPARTMENT OF JUSTICE
FEDERAL MARITIME COMMISSION

BEFORE THE
FEDERAL MARITIME COMMISSION

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6 YAKOV KOBEL and VICTOR BERKOVICH,)

7 Complainants,)

8 vs.)

Docket No. 10-06

9 HAPAG-LLOYD A.G., HAPAG-LLOYD)

10 AMERICA, INC., LIMCO LOGISTICS, INC.,)

INTERNATIONAL TLC, INC.,)

11 Respondents.)

12
13
14 COMPLAINANTS' MEMORANDUM OF EXCEPTIONS TO
15 CONCLUSIONS, STATEMENTS AND FINDINGS OF FACT IN THE
16 INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE AND
17 BRIEF IN SUPPORT OF COMPLAINANTS' MEMORANDUM OF
18 EXCEPTIONS

19
20
21 REQUEST FOR ORAL ARGUMENT PURSUANT TO 46 CFR
22 SECTION 502.241

23 Submitted By:

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1 I

2 INTRODUCTION

3 Complainants, by and through their attorney Donald P. Roach, hereby file their
4 memorandum excepting to certain conclusions, findings of fact, and statements contained in the
5 initial decision of Administrative Law Judge Erin Masson Wirth, dated February 14, 2012. This
6 memorandum of exceptions is filed pursuant to Rule 227 (46 CFR Section 502.227).

7 II

8 COMPLAINANTS' MEMORANDUM OF EXCEPTIONS

9 **A. Memorandum of exceptions of conclusions rationale and statements**
10 **contained in the initial decisions with respect to Respondent Hapag-Lloyd A.G./Hapag-**
11 **Lloyd America, Inc.**

- 12 1. The accidental damage, inadvertent loading, and delay of one of Complainants'
13 containers does not constitute a violation of the Shipping Act. (Page 2 of the initial
14 decision).
- 15 2. Hapag-Lloyd did not violate Section 10(d)(1) (46 USC Section 41102(c)). (Pages 24-25
16 of the initial decision).
- 17 3. The loading Complainants' damaged container without Complainants' authorization was
18 an aberration from Hapag-Lloyd's normal or customary practice and procedures, and
19 therefore did not violate Section 10(d)(1) of the Act. (Page 24-25 of the initial decision).
- 20 4. Complainants have not demonstrated an unreasonable practice, and Hapag-Lloyd's action
21 was the result of an accident. (Page 24-25 of the initial decision).
- 22 5. Complainants have not demonstrated a pattern or failure to observe reasonable practices
23 in violation of Section 10(d)(1), thereby causing the delay of the container, MOGU
24 2002520, in Germany. (Page 25-26 of the initial decision).

1 6. Complainants contributed to the delay by not having commercial invoices available and
2 not authorizing the transfer of cargo when the container was first damaged in Portland.
3 (Page 26 of the initial decision).

4 **B. Memorandum of exceptions to conclusions, rationale and/or statements**
5 **contained in the initial decision with respect to Respondent Limco Logistics, Inc.**

- 6 1. The sale or liquidation of the three containers was not unreasonable under the
7 circumstances (p. 2-3 of initial decision).
- 8 2. There was no evidence that Limco knew that the containers had been liquidated by
9 International TLC (Int'l TLC) or that Limco acted unreasonably in handling any of these
10 containers. (Page 31 of the initial decision).
- 11 3. With respect to Limco Logistics. Complainants have not demonstrated an unreasonable
12 practice or procedure. (Page 31 of the initial decision).
- 13 4. Limco dealt with and negotiated claimant's damages claim. (Page 32 of initial decision).
- 14 5. The evidence does not support a finding that Limco refused to deal, negotiate or settle
15 Complainants' claim for damages. (Page 32 of the initial decision).

16 **C. Memorandum of exceptions to conclusions, rationale and/or statements**
17 **contained in the initial decision with respect to Int'l TLC.**

- 18 1. The liquidation of three containers was not unreasonable under the circumstances.
19 (Pages 2-3 of the initial decision).
- 20 2. It is not clear that Int'l TLC acted as an ocean transportation intermediary on these
21 shipments. (Page 2 of the initial decision).
- 22 3. Even if Int'l TLC acted as an ocean transportation intermediary, there is no causal
23 relationship to the damages. (Page 3 of the initial decision).
- 24 4. It is not necessary to determine whether Int'l TC acted as an ocean transportation
25 intermediary, as an ocean freight forwarder. (Page 37-38 of the initial decision).

- 1 5. Complainants have not met their burden to demonstrate that Int'l TLC operated as an
2 ocean transportation intermediary. (Page 38 of the initial decision).
- 3 6. The cause of the liquidation and loss of Complainants was Complainants' unreasonable
4 delay in picking up the container and not attributable to whether Int'l TLC was operating
5 as an unlicensed freight forwarder. (Page 38-39 of the initial decision).
- 6 7. In January and February 2009, when container MOGU 2002520, MOGU 2051660, and
7 MOGU 2101987 were liquidated, there was no indication that the Complainants ever
8 intended to pick up the containers or whether the containers would be abandoned. (Page
9 39 of the initial decision).
- 10 8. Complainants have not established that liquidation was unreasonable. (Page 39 of the
11 initial decision).
- 12 9. Complainants have not demonstrated that it was unreasonable to liquidate the containers
13 in an effort to control their financial exposure and stop accrual of demurrage. (Page 39 of
14 the initial decision).
- 15 10. Complainants have not demonstrated a failure to establish, observe and enforce just and
16 reasonable regulations and practices related to Int'l TLC's receiving, handling, storing,
17 and delivery of property. (Page 39 of the initial decision).

18 **D. Memorandum of exceptions to conclusions, rationale and/or statements**
19 **contained in the initial decision with respect to damages.**

- 20 1. There is no way to determine exactly what was in each of the containers. (Page 40 of the
21 initial decision).
- 22 2. Determination of the contents of all but the damaged container depends on Complainants'
23 statements. (Page 40 of the initial decision).

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III

MEMORANDUM OF EXCEPTIONS TO FINDINGS OF FACT

Complainants object to the following findings of fact, the reasons of which will be discussed in the following brief under Section IV.

1. F69: Because of the resolution of a dispute such as this is normally routine, Hapag-Lloyd personal expected the dispute to be resolved prior to the arrival of the next Hapag-Lloyd vessel in Portland. (Page 11 of the initial decision).
2. F71: When the next Hapag-Lloyd vessel called Portland, Oregon, the damaged container was inadvertently loaded on that vessel on or before June 2, 2008.
3. F90: Throughout September and into October, 2008. Hapag-Lloyd Worked with Limco to try to deliver the container via alternate means, including delivery by truck to Poland, to delivery by truck directly to the Ukraine, and delivery by rail. (Page 13 of initial decision).
4. F119: Limco notified Hapag-Lloyd of the new shipper/consignee details for containers MOGU 2002520, MOGU 2051660 and MOGU 2101987 on March 2, 2009. (Page 15 of initial decision).

IV

BRIEF IN SUPPORT OF MEMORANDUM OF EXCEPTIONS

A. Hapag-Lloyd

1. Hapag-Lloyd failed to observe reasonable regulations and practices related to or connected with the receiving, handling or delivering property by loading and shipping Complainants' damaged container without authorization in a violation of Section 10(d)(1) of the Act (Section 46 USC § 41102(c)), and was not simply "an accident, inadvertence, or an aberration" of its customary practices and procedures. Exceptions Nos. 1 through 4.

1 The ALJ concluded that loading then shipping Complainants' damaged container without
2 their authorization was accidental and an aberration of Hapag-Lloyd's normal practice, and
3 therefore not a violation of Section 10(d)(1) (Page 24-25 of the initial decision).

4 Complainants object to this conclusion that the loading of the damaged container was an
5 accident or inadvertent, or an aberration from its normal practice or procedures. Hapag-Lloyd's
6 failure to observe its normal procedure or practice for damaged containers or shipper's
7 instructions not to ship a container is a violation of Section 10(d)(1) of the Act.

8 Section 10(d)(1) (46 USC Section 41102(c)) provides that:

9 "A common carrier may not fail to establish, observe, and enforce just and
10 reasonable regulations and practices relating to or connected with receiving,
11 handling, storing, or delivering property."

12 In Bishma International v. Chief Cargo Services, Inc. et al, Docket 10-08, (initial decision
13 December 14, 2011 at p. 34) the court found that a carrier (an NVOCC in that case) violates
14 Section 10(d)(1) by failing to establish just and reasonable regulations or practices or by failing
15 to observe or enforce those regulations or practices.

16 In this case, Hapag-Lloyd admitted that it was not its practice to ship a damaged
17 container or to ship a container when the customer instructed it not to ship the container (Furer,
18 TR 561-562). Therefore, Hapag-Lloyd failed to observe its own practices by shipping a
19 damaged container and against the specific instructions of the shipper.

20 While Complainants surmise that the damage to the container may be accidental (F52),
21 Complainants do not agree that the loading of the damaged and potentially unseaworthy
22 container and then shipping it, contrary to their instructions, was an accident or inadvertent.

23 The initial decision states that because the shipping of the damaged container was not
24 Hapag-Lloyd's normal practice and rather an aberration (Page 23-24 of the initial decision), it

1 did not violate Section 10(d)(1). However, as stated above, a carrier can also violate Section
2 10(d)(1) if it fails to observe and enforce its reasonable practices and regulations.

3 The ALJ made a finding of fact that the damaged container was inadvertently loaded
4 (F71, page 24 of the initial decision). The facts of this case show that the damaged container
5 could only be loaded and shipped on the Helsinki Express on May 26, 2008 through the direct
6 and intentional acts of various Hapag-Lloyd employees and not inadvertently.

7 In the process of loading a container, Hapag-Lloyd has a load planner who designs a plan
8 where a particular container will be stowed and has a list for each stowed container on the ship
9 (Furer, TR 553-554). The stevedore then loads the container onto the vessel according to the
10 load plan. A final load plan is then submitted to the first mate of the ship (Hapag-Lloyd) with
11 the location of the container on the vessel (Furer TR 554). The vessel manifest would then list
12 each container on the ship at or before sailing and is given to the cargo chief and Hapag-Lloyd
13 (Furer, TR 554-555). The vessel manifest with this list of all containers on this ship is necessary
14 to clear customs (Furer, TR 555).

15 Thus, Hapag-Lloyd had custody and control of this container after it was damaged (Furer,
16 TR 553) and was, at the very least, a bailee for the damaged container when it was set aside on
17 the dock after the initial damage. It knew or should have known that this damaged container was
18 stowed on the Helsinki Express before it departed the Port of Portland. A pre-loading bailment
19 between the shipper and the carrier imposes upon the bailee carrier the duty of reasonable care.
20
21 1 Schoenbaum, Admiralty and Maritime Law, § 10-17 (5th Edition 2011).

22
23 Furthermore, HLAI issued a new bill of lading for this damaged container on May 25,
24 2008 for the Helsinki Express the day before it departed Portland (Ex 29) and after it already
25 knew that Complainants wanted it returned to the yard. (F58, F59).

1 Moreover, it was reasonable for Complainants to insist on the return of the container to
2 their yard to inspect the container and cargo, since they were denied inspection at the Port of
3 Portland. (Furer TR 541, 553-554). At that time, no one knew whether or not there was any
4 damage to cargo, contrary to the Court's statement in the initial decision at page 24.

5 There is no evidence that this dispute was normal and routine, or would be expected to be
6 resolved before the arrival of the next Hapag-Lloyd vessel in Portland, as stated in Finding of
7 Fact F69, especially since Complainants wanted the container returned to their yard.

8 The Court cites the case of Patricia Eyes v. Wallenius Wilhelmsen Lines, 30 SRR 1064
9 (ALJ 2006) for the proposition that an intentional transportation of damaged goods may be
10 reasonable (page 23 of the initial decision). That case is clearly distinguishable from the instant
11 case. In that case, the cargo (a motorhome) was damaged in transit and the carrier was
12 confronted with a choice of returning it to the port of origin, or shipping it to the port of
13 destination. The ALJ held in that case that the carrier had two bad choices and the choice to ship
14 to the destination was not unreasonable in that case. However, in this case, there was only one
15 reasonable choice, and that was to return the damaged container to the shipper before shipment
16 to Poland. Furthermore, in Patricia Eyes supra the shipper did not demand return of the
17 container after it was damaged during transport, as in the instant case.

18 In short, Hapag-Lloyd has failed to observe and enforce its regulations and practices with
19 respect to damaged container and the instruction of the shipper. Hapag-Lloyd's conduct was
20 certainly not an exercise of reasonable care for a container that was in its custody and control,
21 and for loading, and shipping the damaged container. The loading and shipping of the container
22 and issuance of a new seaway bill on the Helsinki Express were the result of intentional and
23 deliberate acts of its employees.

1 By using the term "accident," "inadvertence," or "aberration," Hapag-Lloyd seeks to
2 escape fault or responsibility for its failure to observe or enforce its own practices and
3 procedures. A 40-foot container cannot mysteriously or accidentally be loaded onto a vessel and
4 be shipped, except for by intentional acts of various Hapag-Lloyd employees.

5 If this case becomes a precedent for the proposition that an accident or an aberration of
6 reasonable regulations or practices is justification for failure to observe or enforce the normal
7 practices and procedures, virtually any act by a carrier, NVOCC or ocean transportation
8 intermediary who fails to observe, comply, and enforce its reasonable procedure or practices
9 could claim an accident or aberration and then be exonerated. Such interpretation would render
10 the purpose of Section 10(d)(1) of the Shipping Act ineffective and thwart the Congressional
11 intent to protect shipping consumers.
12

13 **2. Complainants have proved a failure to observe and enforce reasonable**
14 **practices resulting in the delay of the damaged container MOGU 2002520 in Germany.**
15 **This delay supports a violation of Section 10(d)(1) of the Shipping Act – Exceptions 5**
16 **through 7.**

17 Hapag-Lloyd violated § 10(d)(1) of the Act in its handling, storing and delivering of the
18 damaged container when it was delayed approximately six months in Hamburg, Germany before
19 its delivery in Gdynia, Poland on or about December 23, 2008. (F80, Ex 74). Shipment from
20 Hamburg, Germany to Gdynia, Poland usually takes two days by feeder vessel, or ten to twelve
21 hours by truck. (Ossowska TR 646). The problems and delay to the damaged container
22 encountered in Hamburg, Germany were not surprisingly caused in the first instance by the
23 shipment of the damaged container, against the shipper's instructions. If Hapag-Lloyd had not
24 shipped the damaged container until it was repaired or replaced, it would have passed through
25

1 Hamburg, Germany onto its ultimate destination in Gdynia, Poland uneventfully and without
2 delay as had Complainants' other four containers.

3 The primary reasons for the excessive delay, besides its damaged condition and
4 unauthorized shipment was Hapag-Lloyd's repeated request to terminate the shipment in
5 Hamburg, Baltic Sea Logistics' refusal to accept the container in its damaged condition, and the
6 need for commercial invoices or documents necessary for the container to clear customs for
7 trucking this container rather than shipping it by feeder vessel.

8 Records from Hapag-Lloyd on August 1, 2008, after the damaged container arrived in
9 Hamburg, Germany indicated that the container was heavily damaged and not trustworthy, and
10 that the container would not load onto the feeder vessel to Poland (Ex 93, p. 1,4, Ex 94). An
11 August 1, 2008, email indicates that the consignee on the seaway bill, Baltic Sea Logistics, did
12 not want to accept this container because of its damaged condition (Ex 93, p. 4).

13 Beginning in August, 2008, Hapag-Lloyd sought to terminate this shipment in Hamburg,
14 Germany, through September 23, 2009 (Ex 95, p. 2, 3, 4) but the consignee (Baltic Sea
15 Logistics) refused to pick up this container in Poland (Ex 92). Furthermore, Limco Logistics as
16 early as August 4, 2008 informed Hapag-Lloyd that it would not accept termination in
17 Hamburg, Germany, but demanded that the container be delivered to its ultimate destination in
18 Gdynia, Poland, pursuant to the Seaway bill or returned to the United States (Ex 92, ex 95 p. 1,
19 2, 4).

20 On September 23, 2008, Hapag-Lloyd threatened to begin abandonment proceedings and
21 dispose of the cargo unless Limco arranged for customs clearance within three days (F86, F87,
22 Ex 96).

1 While Complainants do not take exception to findings of fact 82-85, Complainants object
2 to the chronology of these findings. The events in Finding 84 and 85 preceded finding 82.
3 Moreover, contrary to Finding 82, which was based upon Hapag-Lloyd exhibit 68 dated August
4 27, 2008, Ms. Ossowska testified that Baltic Sea Logistics was in touch with the ultimate
5 consignee (TR 671-672).

6 The ALJ found that Hapag-Lloyd worked with Limco to try to deliver the container by
7 alternate means, including delivery by truck to Poland or delivery by truck to the Ukraine or
8 delivery by rail (F90). The Court concluded that Hapag-Lloyd considered a number of
9 alternative modes of transportation to load the damaged container to its final destination (Page 26
10 of initial decision). However, the only option discussed by HLAG up to early September was
11 shipment by feeder vessel or termination of the shipment in Hamburg (Ex 95, Ex 97 p. 2).
12

13 Only after Limco clearly refused to terminate the shipment in Germany did Hapag-Lloyd
14 then begin to explore other means to transport this damaged container in September and October,
15 2008. At that point, Hapag-Lloyd needed commercial invoices to ship the container by truck to
16 Poland for customs clearance (Ex 97, p. 2). These commercial documents were delivered from
17 Limco to Hapag-Lloyd on September 8, 2008, or at the very latest, by October 5, 2008 (F 91, Ex
18 97, KOB 0301, 0304). These documents would not have been necessary if the damaged
19 container had been shipped via feeder vessel as originally planned. (TR 597).
20

21 Hapag-Lloyd did not conduct a survey of the damaged container until November 11-12,
22 2008, nearly two months after Hapag-Lloyd's Catherine Ward had recommended to survey the
23 container on August 22, 2008 (Ex 46, Ex 94). Hapag-Lloyd ultimately shipped the damaged
24 container and its cargo separately to Gdynia, Poland, beginning in mid-November, 2008 (Ex
25 100).

1 The container was not safe to transport with the cargo. Thus, the cargo was transloaded
2 into a Hapag-Lloyd container and then shipped by feeder vessel to Gdynia, Poland (F80). The
3 empty damaged container was shipped by truck to Gdynia, Poland (F80). Once both the
4 container and cargo arrived in Gdynia, Poland, the cargo was transloaded from the Hapag-Lloyd
5 container back to the damaged container (Ossowska, TR 652-653). On or about December 23,
6 2008, the container was available for pick-up in its damaged condition, which Hapag-Lloyd had
7 determined was not safe to transport the cargo.

8 The Court noted in its initial decision that the Complainants somehow contributed in part
9 to this delay because they did not authorize transloading the cargo from the damaged container to
10 another shipper's good order container in Portland, Oregon (p. 26 of the initial decision). This
11 conclusion is based upon hindsight. The Complainants were not allowed to inspect the damage
12 to the container at the Port of Portland (F65). At that time, they did not know the extent of the
13 damage or if the cargo was damaged. Complainants had the right to demand a return of their
14 container for inspection, repair, and/or replacement of this container. Hapag-Lloyd had agreed in
15 principle to return this container to them (F59). The ensuing delay was the inevitable
16 consequence of the shipment of the damaged container.

17 A delay in shipment may result in a violation of § 10(d)(1) of the Act when additional
18 factors are present. Mexan SA v. International Frontier Forwarder, 30 S.R.R. 1397, 1400 (FMC
19 2007). In this case, the six-month delay in Hamburg, together with Hapag-Lloyd's initial refusal
20 to fulfill its obligation to deliver the container to its destination in Gdynia, Poland, and later
21 threat of abandonment support a violation of § 10(d)(1) of the Shipping Act.

22 In sum, Hapag-Lloyd failed to observe its reasonable regulations and practices with
23 respect to the shipment of the damaged container by shipping a container in a damaged condition

1 and further unreasonably attempting to terminate shipment of the container in Germany rather
2 than fulfilling its obligation to transport it to its ultimate destination in Gdynia, Poland.

3 **B. Limco Logistics, Inc.**

4 **1. Limco acted unreasonably in handling Complainants' three containers by**
5 **changing the shipper/consignee from Complainants to Oleg Remishevskiy without**
6 **Complainants' authorization or indorsement, thereby violating Section 10(d)(1) of the Act,**
7 **46 USC § 41102(c). Exceptions Nos. 1 through 5.**

8 The initial decision found that Int'l TLC notified Limco on March 2, 2009 to change the
9 bills of lading from LIM 16090 for container MOGU 2002520, LIM 16802 for container MOGU
10 2051660, and bill of lading LIM 16803 for container MOGU 2101987 from Victor Berkovich
11 (Complainant) to Oleg Remishevskiy (F118, undisputed fact #27). Limco then notified the
12 Baltic Sea Logistics on March 2, 2009 that the shipper/consignee on these three bills of lading
13 had been changed to Oleg Remishevskiy and attached new bills of lading with the email, naming
14 Remishevskiy as shipper and consignee (F122, undisputed fact #29).

15 Limco also notified Hapag-Lloyd on March 20, 2009 to release container MOGU
16 2051660 (Ex 87). There is no evidence that Limco ever notified Hapag-Lloyd of the new
17 shipper/consignee for the other two containers, MOGU 2002520, or MOGU 2101987 on March
18 2, 2009, as stated in Finding of Fact F19. (Page 15 of the initial decision).

19 Limco knew that Complainants were the owners and principal parties of interest for the
20 three liquidated containers based upon billing invoices, customs declarations and admissions of
21 Lyamport, owner of Limco. (F1, Ex 4, 14, 25, 26, 27, Lyamport deposition Ex. 78, p. 84-86).

22 The ALJ states in the initial decision that there is no evidence that Limco knew that the
23 containers had been liquidated by Int'l TLC (Page 31 of the initial decision). However, the
24 testimony of both Lyamport of Limco and Barvinenko of Int'l TLC prove that Limco had the
25

1 knowledge of the liquidation sale and Int'l TLC's plans to liquidate the containers prior to the
2 alleged liquidation sale. Barvinenko gave the following testimony:

3 "Q Did you have discussions with Limco Logistics prior to selling these three
4 containers?

5 A I notified them, and I also asked them if they have somebody over there
6 would be interested just to conduct preliminary research." (TR 387)

7 * * *

8 "Q Did they [Limco] participate with you in planning the sale?

9 A Well, they were notified. They knew that containers would be sold."
10 (TR 389)

11 * * *

12 Barvinenko further testified as follows:

13 "Q So did Limco give you advice as to selling these containers?

14 A They insisted that the containers be moved or they would be
15 liquidated. We really didn't have any choice." (TR 390)

16 * * *

17 Mr. Lyamport admitted in his deposition that he received a copy of the notice of unpaid
18 balance from Int'l TLC to Berkovich dated January 9, 2009 (Complainants' exhibit 79)
19 sometime in January, 2009 before the sale. (Lyamport deposition, exhibit 78, P. 126-127). Both
20 Lyamport and Barvinenko admitted having "big discussions" about these containers almost
21 every day (Barvinenko TR 387-388; Lyamport TR 743-744).

22 The Federal Bill of Lading Act, also known as the Webb-Pomerene Act, 49 USC §
23 80102 applies to the bills of lading for these three liquidated containers. All three bills of
24 lading issued to Complainants were negotiable bills of lading (Plaintiff's exhibits 1, 12,
25 and 19). Indorsement is required to negotiate a negotiable bill of lading. 49 USC §

1 80103. Complainants never indorsed nor authorized Int'l TLC or Limco to change the
2 bills of lading to Remishevskiy. (F120, undisputed fact 30).

3 The violations of the Webb-Pomerene Act, 49 USC Section 80101 to 80166 by an
4 NVOCC can also be a violation of § 10(d)(1) of the Shipping Act. (See Bimsha International v.
5 Chief Cargo Services et al, Docket No. 10-08, initial decision decided December 14, 2011, pages
6 2, 5, 6 and 34). An NVOCC violates Section 10(d)(1) when it fails to fulfill its NVOCC
7 obligations. Bimsha International v. Chief Cargo Services et al supra p. 34. In that case, the
8 NVOCC released cargo and three containers to the notifying party without first requiring that the
9 presentation or surrender of the original bills of lading from the notifying party before releasing
10 the cargo. The Court found this was a failure to observe just and reasonable practices in
11 violation of Section 10(d)(1) of the Shipping Act.

12
13 Similar to the Bimsha International case. supra, Complainants also claim a violation of the
14 Webb-Pomerene Act under Section 49 USC 80111(a). Limco, in this case, failed to comply and
15 observe the requirements of the Webb-Pomerene Act and has failed to observe or enforce
16 reasonable and just practices in handling, storage or delivering property, thereby violating
17 Section 10(d)(1) of the Shipping Act.

18
19 Limco changed the shipper/consignee on the bills of lading on all three containers, thereby
20 aiding, abetting and enabling Oleg Remishevskiy to unlawfully obtain possession of these
21 containers in Poland. Limco's action resulted in the misdelivery or failure to deliver the
22 containers to the Complainants (the owners of the container). Misdelivery by Limco as an
23 NVOCC can be violation of the Shipping Act. See DSW International v. Commonwealth 1898F
24 p. 21, March 29, 2009, and Bimsha International v. Chief Cargo et al, Docket No. 10-06 p. 34,
25 decided December 14, 2011.

1 A carrier may have an exception to liability for failure to deliver to consignee or owner if
2 the goods have been lawfully sold to satisfy a carrier's lien, 49 USC § 80111(d)(2), however this
3 exception is not applicable in this case for several reasons.

4 First, both Limco and Int'l TLC deny that Limco directed or authorized Int'l TLC to
5 liquidate the containers (Lyamport TR 693-694; Barvinenko TR 389). Limco submits that it did
6 not direct or participate in this liquidation sale (Limco Brief, P. 5-6).

7 Second, Int'l TLC was an unlicensed freight forwarder on these shipments. It was not a
8 carrier and therefore did not have a carrier's lien and did not have any other statutory or
9 possessory lien, because it never had possession of the containers or cargo.

10 Third, the sale was not conducted in a commercially reasonable manner in many respects,
11 as discussed below regarding Int'l TLC in Section IV(C).

12 Although the ALJ found that Limco placed a hold on the two undamaged containers,
13 MOGU 2051660 and MOGU 2101987, for nonpayment of freight (Page 31 of the initial
14 decision), the freight for containers MOGU 2101987 was actually paid to Limco on December
15 22, 2008 before the liquidation sale (F44, Complainants' exhibit 7). The only record of release
16 given to Hapag-Lloyd was for the container MOGU 2051660 on March 20, 2009 (Complainants'
17 Ex 87) and not for all three containers as stated in F119.¹

18 In sum, Limco changed the bills of lading for the liquidated containers knowing that the
19 owner had not authorized a change in the bills of lading. The evidence shows that Limco knew
20
21
22
23

24 ¹ Mr. Lyamport of Limco testified that he placed a hold on all three liquidated container for freight (including the
25 damaged container, MOGU 2002520) despite acknowledging payment for freight charges for both the damaged
26 container and MOGU 2101987 (TR 752, 753, 702-703; Ex. 109, F44, F78). Lyamport further testified that the
container was not picked up in Gydnia because the shipper had not paid the freight and Limco was holding it until it
go paid. (TR 702-703).

1 of the liquidation sale by Int'l TLC prior to their liquidation. Limco at the very least encouraged
2 or advised Int'l TLC regarding the liquidation of these containers.

3 For further discussion regarding Complainants' claim against Limco and its violation of
4 Section 10(d)(1), see pages 14-20 of Complainants' Opening Brief, and pages 19-20 of
5 Complainants' ReplyBbrief.

6 **2. The evidence supports a finding that Limco refused to deal, negotiate or**
7 **settle Complainants' claim for damages -- exception to conclusion and statements No. 5.**

8 The evidence supports a finding that Limco refused to deal, negotiate or settle
9 Complainants' claim for damages to container MOGU 2002520. Lyamport testified that
10 Limco intended to wait until the damaged container was delivered to submit a claim for
11 MOGU 2002520 (Lyamport TR 731). However, after the container MOGU 2002520 and
12 its cargo of MOGU 2002520 ultimately arrived in Gydnia, Poland on or about December
13 23, 2008. Limco did not pursue the claim for the damaged container with Hapag-Lloyd.
14 Lyamport testified that Limco did not pursue the claim because Complainant had not paid
15 the freight for that container to Limco or Int'l TLC (Lyamport TR 734, 736). However,
16 Complainants paid Int'l TLC the freight for the damaged container, MOGU 2002520, on
17 July 25, 2008 (Ex 110, Barvinenko TR 354). Int'l TLC had forwarded the payment to
18 Limco on or about July 30, 2008 (F78, Complainants' Exhibit 117).

19 Limco unreasonably refused to deal with Complainants' claim for the damaged container
20 despite Hapag-Lloyd's acceptance of responsibility and approval of a settlement amount or on
21 about May 30, 2008, which included \$2,200 for the damaged container and a total settlement
22 amount of \$6,250 (Furer TR 557-558; Complainants' exhibit 90), excluding any damage of
23 cargo.

24 Limco was a shipper on the seaway bill with Hapag-Lloyd, and had a duty and
25 responsibility to negotiate and obtain settlement for the damaged container for Complainants, but

1 failed and refused to do so without any reasonable justification. Limco thereby violated Section
2 10(b)(4)(e) of the Act, 46 USC Section 41104(4)(E) and a violation of 10(b)(10) of the Act (49
3 USC § 41104(10)).

4 **C. Int'l TLC**

5 **1. Complainants met their burden to demonstrate that Int'l TLC operated as**
6 **an ocean transportation intermediary, and specifically as an ocean freight forwarder.**

7 **Exceptions Nos. 2, 3, 4, 5.**

8 “No person in the United States may act as an ocean transportation intermediary unless
9 that person holds a license issued from the Commission.” Section 19(a) of the Shipping Act, 46
10 USC Section 40901(a). The ALJ stated in the initial decision that it was not necessary to
11 determine whether Int'l TLC operated as an ocean freight forwarder for these shipments. (Page
12 37 of the initial decision).

13 However, the status of Int'l TLC is crucial to determine whether or not it has committed a
14 violation of the Shipping Act. Only those parties acting as common carriers, ocean
15 transportation intermediaries, or marine terminal operators may violate Section 10(d)(1) of the
16 Act. Bimsha International v. Chief Cargo et al., Docket No. 10-06. (initial decision dated
17 December 14, 2011, P. 22), and Houben v. Worldwide Moving Services, Inc., 1887(I), (FMC
18 July 6, 2010). The ALJ found that Int'l TLC made bookings for each of the Complainants' five
19 containers with Limco Logistics (F7). Int'l TLC collected payments from Complainants and
20 paid Limco for freight damage and kept the leftover money as profit (Barvinenko TR 354; F32,
21 F44, F78). Int'l TLC designated Baltic Sea Logistics as the agent at the destination port in
22 Gdynia, Poland (F18).

23 In addition, Int'l TLC admitted that it probably prepared the packing list for all five
24 containers (Barvinenko TR 357). Int'l TLC investigated shipping the containers by rail from
25 Poland to the Ukraine (Barvinenko TR 362). The bills of lading for containers MOGU 2002520,

1 MOGU 2112451 and MOGU 2003255 showed Int'l TLC as the freight forwarder in the freight
2 forwarder box (Complainants' Exhibits 1, 8, 9). Michael Lyamport of Limco testified that Int'l
3 TLC was acting as ocean freight forwarder for all five containers (Lyamport TR 677-707).
4 Barvinenko testified that Int'l TLC organized the entire shipment (Barvinenko TR 362).

5 Int'l TLC became an NVOCC effective July 24, 2008, but was not licensed with the
6 Federal Maritime Commission before July 24, 2008 (F4). Int'l TLC has never been licensed as
7 an ocean freight forwarder (Barvinenko TR 340).

8 Complainants have presented evidence of at least three factors listed for a freight
9 forwarder, 46 C.F.R. Section 515.2(i)(2)(3) and (11). Complainants have met their burden by a
10 preponderance of evidence that Int'l TLC acted as an unlicensed freight forwarder for the
11 shipment of the three liquidated containers and cargo belonging to Complainants.

12 The ALJ states that even if Int'l TLC was operating as an unlicensed ocean transportation
13 intermediary, Complainants have not established a causal relationship to the loss. (Page 38 of
14 initial decision). However, assuming that Complainants have proven that Int'l TLC violated
15 Section 10(d)(1) of the Act, Int'l TLC's failure to be licensed and bonded would result in a
16 potential loss of reparations without indemnification from a bond, which is a requirement for
17 licensing as an ocean transportation intermediary under the Shipping Act.

18 **2. Complainants proved that International TLC failed to establish, observe,**
19 **and enforce just and reasonable regulations and practices relating to or connected with the**
20 **receiving, handling, storing, and delivering property by liquidating Complainants' three**
21 **containers and cargo with a value exceeding \$120,000 – Exceptions 6, 7, 8, 9, 10.**

22 The initial decision states that Complainants have not established that the liquidation sale
23 was unreasonable. (Page 39 of initial decision). However, the decision does not address the
24 critical issue with respect to the liquidation, namely whether or not Int'l TLC, ever had a lawful
25 right to sell Complainants' three containers and cargo in the first instance. Complainants'

1 maintain that Int'l TLC had no lawful title to nor right to sell Complainants' containers and
2 cargo. An unlawful sale or liquidation cannot be deemed a reasonable sale under the Shipping
3 Act.

4 The Commission must determine 1) what was Int'l TLC's status with respect to these
5 three containers? 2) what lawful right did Int'l TLC to sell these containers and cargo valued at
6 over \$120,000?

7 First, the evidence supports a conclusion that Int'l TLC acted as an ocean freight
8 forwarder in connection with the shipment of these three containers. Secondly, this sale was
9 unlawful and prejudicial to Complainants' interests for several reasons.

10 First, Int'l TLC did not have any contractual right or security interest in the containers or
11 cargo to allow it to sell Complainants' property. Complainants and Int'l TLC had only an oral
12 agreement to ship Complainants' five loaded containers from Portland to Gdynia, Poland. (F5).
13 At the time of shipment of these five containers, Int'l TLC was not an NVOCC and therefore did
14 not have any effective tariff which would apply to the shipment of these containers (F4, Exhibit
15 75). As stated above, Int'l TLC has never been licensed with the Federal Maritime Commission
16 as an ocean freight forwarder. (F4)

17 Second, Int'l TLC does not have a statutory lien, such as a carrier's lien or a possessory
18 lien upon the containers and cargo. Int'l TLC did not act as either a carrier or an NVOCC for the
19 shipment of these containers. Int'l TLC never had possession of the cargo or the containers, and
20 therefore did not have any statutory possessory lien. These loaded containers were at the port in
21 Gdynia, Poland at the time they were unlawfully liquidated.

22 Third, Int'l TLC had nothing to sell to Oleg Remishevskiy or anyone else. It did not own
23 the cargo in the containers (F1). It was not a shipper or consignee, or title holder of the bills of
24 lading. It did not have a power of attorney nor any authorization from Complainants to sell or
25

1 charge the shipper/consignee on the bills of lading for the three containers and cargo with a value
2 exceeding \$120,000 (F 120; Barvinenko 393, 394).

3 In short, Int'l TLC had no legal interest or right to the containers and could not lawfully
4 transfer ownership of these containers to Remishevskiy in its purported liquidation sale.

5 The initial decision states that it was not unreasonable for Int'l TLC to liquidate
6 containers in an effort to control their financial exposure and to stop accrual of additional
7 demurrage. (p. 39 of the initial decision). However, Int'l TLC, like any other creditor, does not
8 have a right to sell another party's property without a security interest or contractual right,
9 statutory lien, or by obtaining a judgment or order from a court simply because it is owed money
10 from the other party.

11 Moreover, Int'l TLC as a fiduciary for Complainants, purportedly sold these three
12 containers to pay \$9,900 for unpaid freight owed to Int'l TLC for container MOGU 2101987 and
13 MOGU 2051660 to the detriment of its customer who made a documented investment of over
14 \$120,000 in these three containers and cargo. A more complete the discussion of Int'l TLC's
15 unlawful sale of these three containers is set forth on page 31-33 of Complainants' Opening
16 Brief, and page 23-25 of their Reply Brief.

17 Furthermore, not only did Int'l TLC sell the two containers and cargo, but it also sold the
18 damaged container MOGU 2002520 and its cargo, for which Complainants had already paid Int'l
19 TLC for the freight on July 25, 2008. At the time Int'l TLC sent its false notice of liquidation for
20 unpaid freight and other purported charges to Berkovich on January 9, 2009, the notice did not
21 refer in any way whatsoever to the damaged container MOGU 2002520, or any claim for storage
22 charges for this damaged container. (Complainants Exhibit 79 and 80).

1 The ALJ also errs in favor of Int'l TLC's sale of the damaged container (MOGU 2002520)
2 because of perceived accruing storage charges and for Complainants' failure to pick up the
3 damaged container as promised. (Page 39 of the initial decision).

4 Int'l TLC was not the shipper or consignee, and thus did not have any obligation to pay
5 Baltic Sea Logistics for any storage for the damaged container. Further, Int'l TLC denied any
6 specific contractual agreement with Baltic Sea Logistics for these containers, and did not pay
7 Baltic Sea Logistics for its service (Barvinenko, TR 356-357). The consignee (Baltic Sea
8 Logistics) on the Seaway Bill was responsible for storage charges (Ossowska TR 654-655).

9 Although the consignee Baltic Sea Logistics or GCT Gdynia terminal where the damaged
10 container was located may arguably have had authority to liquidate this container for storage
11 charges or failure to pick up in accordance with the Polish law, Int'l TLC did not have legal
12 authority to liquidate the damaged container, let alone the other two containers, as discussed
13 above.

14 The damaged container MOGU 2002520 was delivered to Gdynia, Poland in a condition
15 which Hapag-Lloyd deemed unsafe to transport and thus shipped the cargo and container
16 separately. The delay in pick-up by Complainants was reasonable considering the damaged
17 condition of the container and considering that Hapag-Lloyd failed to transport the container
18 from Hamburg to Gdynia, Poland for nearly six months.

19 Furthermore the evidence does not show any intent by Complainants to abandon the
20 damaged container and the other two containers. Complainants paid \$1,500 to International TLC
21 on January 9, 2009 (F112). Complainants also emailed Baltic Sea Logistics on February 3,
22 2009, inquiring about the storage charges (F115, Ex 104). Complainants paid the remaining
23 freight charges for container MOGU 2101987 and MOGU 2051660 on March 26, 2009 and

1 April 2, 2009 (F125; Ex. 113, 114) and went to pick up the containers on April 6, 2009 in
2 Gdynia, Poland (F126).

3 Not only was the liquidation unauthorized and unlawful, but the liquidation sale was not
4 performed in a commercially reasonable manner. The ALJ states that she has concerns about the
5 manner in which the liquidation was completed, but then concludes that Complainants did not
6 establish that it was unreasonable. (Page 39 of the initial decision). Complainants have cited
7 various reasons why the sale was not performed in a commercially reasonable manner for the
8 below reasons and as more fully set forth in pages 33-35 of its opening brief, and page 24-26 of
9 its reply brief.

10 Int'l TLC's sale of these three containers was not reasonable and did not comply with the
11 requirements for a sale of personal property under the Uniform Commercial Code for a security
12 interest or statutory lien, or the corresponding Washington State Statutes. See UCC 9-609, 9-
13 613, UCC 7-308(1), RCW 62A7-308(1)

14 First, the written notice of unpaid balance does not mention or ever refer to the damaged
15 container MOGU 2002520, nor any accruing storage charges on that container (Ex 79, Ex 80)
16 which was ultimately liquidated with the other two containers.

17 Second, the notice does not state whether the sale will be public or private, nor does it give
18 a date or time. This notice indicates that the two containers, MOGU 2101987, and MOGU
19 2051660 will be utilized if full payment is not made within five days (January 14, 2008). This
20 time is less than the minimum requirements under the UCC or Washington State statute.

21 Third, the final notice of unpaid balance falsely demanded full payment of \$43,727 (Ex
22 79, 80). Complainants did not owe Affordable Storage \$14,987, which Int'l TLC had never paid
23 (Barvinenko, TR 380). Complainants paid Affordable Storage \$8,500 on December 30, 2008

1 (Ex 123). The false charges of \$8,000 for border standby and \$4,400 for alleged overweight
2 cargo related to containers MOGU 2112451 and MOGU 2003255, which had been released to
3 Complainants on November 21, 2008 (F33). Int'l TLC did not pay any of these storage fees (TR
4 380-381). Instead, Int'l TLC was essentially attempting to collect funds for Baltic Sea Logistics
5 and other contractors (TR 380). Furthermore, Barvinenko testified that Int'l TLC did not agree
6 to provide services from the time the containers arrived in Poland to their ultimate destination in
7 the Ukraine (Barvinenko TR 362, p. 37 of the initial decision).

8 Fourth, Int'l TLC did not advertise in any newspaper or journal, but simply posted a sign
9 in its office, which did not disclose the purchase price. (Remishevskiy TR 305-306, TR 383).
10 There was never a marine survey of the cargo in these containers (Barvinenko TR 383) and there
11 is no evidence that a cargo liquidator was ever used or consulted.

12 Fifth, Oleg Remishevskiy, a customer of Int'l TLC also from Bonny Lake, Washington
13 (TR 298-301), allegedly purchased the three containers from Int'l TLC without any negotiation
14 of the purchase price of \$9,900 owed to Int'l TLC for freight charges for MOGU 2101987 and
15 MOGU 2051660. Remishevskiy never paid Int'l TLC the \$5,600 which Int'l TLC demanded
16 from Complainants for storage charges for the two liquidated containers, as stated in its false
17 invoice (Ex 80). (Remishevskiy, TR 321).

18 Finally, the sale of more goods than necessary to be offered to ensure satisfaction of an
19 obligation is not commercially reasonable. UCC 7-308, RCW 62A7-308(1). In this case, the
20 containers and the cargo had a documented value exceeding \$120,000. Valeriy Stuchkov, a
21 Valvoline dealer in the Ukraine, testified that there is a high demand for good motor oil from the
22 United States (TR 442-445). A sale for \$15,000 for freight (\$9,900 and purported storage of
23 \$5,600) clearly does not warrant selling all three containers and their cargo when each had more
24

1 than enough value to cover the freight and storage charges, when the total documented value of
2 the cargo alone was over \$114,000 (Ex 516, 22, 50-62, 64, 65).

3 In sum, the circumstances of the unlawful liquidation sale by Int'l TLC were clearly
4 unreasonable under both the Uniform Commercial Code and Washington State law, not to
5 mention highly suspicious. Int'l TLC, by selling all of the containers and cargo valued at over
6 \$120,000 for only the amount that it claimed owed to it for freight, without making any effort to
7 obtain a higher price, clearly breached its fiduciary duty with respect to the customers' interest in
8 the property.

9
10 **D. Damages**

11 **1. Complainants have proved by a preponderance of evidence that they**
12 **suffered damages as a proximate result of Respondents' violations of Section 10(d)(1) of the**
13 **Shipping Act and are entitled to reparations under 46 USC § 41305(b).**

14 The ALJ stated that damages would be difficult to establish even if a violation of the
15 Shipping Act were found. Because the ALJ did not find any violations, the ALJ did not reach a
16 conclusion on the issue of damages.

17 Nevertheless, Complainants take exception to certain statements made by the ALJ
18 concerning damages.

19 First, the ALJ stated that there was no way to determine what was in each of the
20 containers. However, with respect to the damaged container, in addition to the Complainants'
21 own testimony, Hapag-Lloyd conducted a survey of the damaged container and its cargo,
22 consisting of plywood and four all-terrain vehicles on or about November 11-12, 2008 in
23 Germany. This survey confirmed that the container had the cargo as listed in the bill of lading
24 and packing list. (Ex 46, p. 2-3; Ex 1, Ex 5, KOB 0068-0069). Oleg Remishevskiy inspected all

1 three containers in Gdynia, Poland, in March, 2009 and confirmed that all three containers had
2 the cargo as listed in the respective bills of lading and packing lists. (Remishevskiy, TR 315).

3 In addition, Remishevskiy testified that he sold the cargo in the damaged container in the
4 Ukraine (MOGU 2002520). He sold the plywood for \$10,000, and two ATV vehicles for \$1,000
5 each, for a total of \$12,000 (Remishevskiy TR 323-324). The price for the plywood actually
6 exceeded the amount paid by Complainants in Oregon.

7 Second, in addition to Complainants' testimony concerning the amount paid for the
8 cargo, and the containers themselves, documentary evidence received in evidence corroborates
9 the amount paid (Ex 50-62, 64-65). In particular, evidence received includes invoices from
10 Home Depot for plywood, invoices from Joe's for all-terrain vehicles, and invoices from
11 Walmart for motor oil. In addition, there is evidence of invoices from Affordable Storage for
12 payment for the three containers and transportation in the sum of \$7,146. A copy of a check
13 from Complainants to Affordable Storage in the sum of \$8,500, dated December 30, 2008, was
14 also received as evidence. (Ex 121-123). Complainants paid \$4,600 for freight charges for the
15 damaged container (MOGU 2002520), which was received by Int'l TLC on July 25, 2008, and
16 then forwarded to Limco Logistics. (Ex 110).

17 Evidence submitted in the record clearly supports a finding of damaged suffered by
18 Complainants from Respondents' conduct. Complainants gave estimated values of the cargo,
19 which they expected to earn from sales of cargo in the Ukraine (Ex 135). Although there was no
20 written contract for the sale of goods in the Ukraine, Complainants are nevertheless entitled to
21 their investment costs for the cargo and containers. In DSW International v. Commonwealth,
22 No. 1898F (March 29, 2009) p. 24, the Commission allowed reparations in the amount of
23 Complainant's proven investment in the cars and shipping them when the market value of cars in
24 Nigeria could not be proven. The market value test may be discarded and a more accurate means
25 resorted to, if for special reasons, it is not exact or is otherwise not applicable. DSW

1 International v. Commonwealth supra p. 22 and Illinois Central Railroad v. Crail, 281 US 57, 64-
2 65 (1930). In short, Complainants are entitled to recover their documented investment of over
3 \$120,000 in three liquidated containers and cargo under the Shipping Act.

4 V

5 CONCLUSION

6 Based upon the above reasons, the initial decision should be set aside and modified
7 consistent with the Commission's conclusions and findings based upon these exceptions
8 discussed herein Complainants requests reparations for the injury pursuant to § 11(g) of the
9 Shipping Act and Rule 251 as supported by evidence admitted in this case.

10 VI

11 REQUEST FOR ORAL ARGUMENT

12 Complainants respectfully request oral argument on their exceptions to the initial
13 decision. Complainants, through their counsel, propose to address issues raised in their
14 exceptions and this brief. This request is made pursuant to Rule 241, 46 CFR § 502.241.

15 DATED this 6 day of March, 2012.

16 Respectfully submitted by:

17
18
19 

20 Donald P. Roach
21 Attorney for Complainants

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct:

1. I am over the age of eighteen years and I am not a party to this action.
2. On March 6, 2012, I served a complete copy of **COMPLAINANTS' MEMORANDUM OF EXCEPTIONS TO CONCLUSIONS, STATEMENTS AND FINDINGS OF FACT IN THE INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE AND BRIEF IN SUPPORT OF COMPLAINANTS' MEMORANDUM OF EXCEPTIONS**

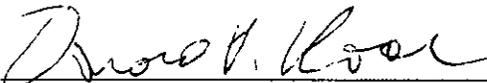
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DATED: March 5, 2012.

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