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October 26, 2011

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VIA COURIER

Ms. Karen V. Gregory
Secretary
Federal Maritime Commission
800 N. Capitol Street, N.W.
Room 1046

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

Dear Ms. Gregory:

Enclosed herewith are an original and fifteen (15) copies of the opening brief of Hapag-Lloyd AG's and Hapag-Lloyd (America), Inc. in the above-captioned proceeding.

A copy of this letter and its enclosure has been provided for your acknowledgement of receipt.

Sincerely,

A handwritten signature in cursive script that reads "Wayne Rohde".

Wayne Rohde

Enclosures

cc: The Honorable Erin M. Worth (w/enclosure)

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BEFORE THE
FEDERAL MARITIME COMMISSION

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH)
)
v.)
)
HAPAG-LLOYD (AMERICA), INC.;)
HAPAG-LLOYD AG; LIMCO LOGISTICS, INC.)
AND INTERNATIONAL TLC, INC.)
)

Docket No.
10-06

**OPENING BRIEF OF RESPONDENTS
HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) INC.**

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October 26, 2011

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BEFORE THE
FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH)
)
 v.)
)
 HAPAG-LLOYD (AMERICA), INC.;)
 HAPAG-LLOYD AG; LIMCO LOGISTICS, INC.)
 AND INTERNATIONAL TLC, INC.)
)

Docket No.
10-06

**OPENING BRIEF OF RESPONDENTS
HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) INC.**

Pursuant to the order of the Presiding Officer and Rule 221 of the Commission's rules of practice and procedure, respondents Hapag-Lloyd AG and Hapag-Lloyd (America) Inc. (hereinafter referred to collectively "Hapag-Lloyd") hereby submit their opening brief in this case.

I. NATURE AND BACKGROUND OF THE CASE

This proceeding was initiated by a complaint filed with the Federal Maritime Commission ("FMC" or "Commission") on July 2, 2010, alleging that Hapag-Lloyd and the other respondents violated various provisions of the Shipping Act in connection with the transportation of three containers of cargo from Portland, OR to Gdynia, Poland in 2008.

Complainants engaged International TLC ("Int'l TLC") to transport a total of five shipper-owned containers of cargo from Portland, OR to Gdynia, Poland. Int'l TLC engaged Limco Logistics, Inc. ("Limco"), a licensed NVOCC, to provide the transportation services. Limco in turn engaged Hapag-Lloyd AG, an ocean common carrier, to physically transport the containers.

Three of the containers were tendered to Hapag-Lloyd by Limco in May of 2008 at the Port of Portland, OR. Two of these (MOGU2112451 and MOGU2003255) were transported to Gdynia without incident, arriving there on or about July 1, 2008. The third container (MOGU2002520) was damaged during the loading process, and was set aside.

Hapag-Lloyd and Limco discussed the disposition of the damaged container. A request by Complainants to inspect the container on the terminal was denied based on federal security regulations. A proposal by Hapag-Lloyd pursuant to which it would have transferred the cargo to another shipper-owned container was rejected. Plans were made to return the container to Complainants so that they could transload the cargo (all at Hapag-Lloyd expense), pending agreement on costs. Before final agreement on costs was reached, the container was accidentally loaded on a vessel and left Portland.

The damaged container arrived in Germany on or about June 24, 2008, after which it was discovered that the feeder operator would not transport it to Poland due to its damaged condition. Hapag-Lloyd was unable to obtain guidance from the consignee, Baltic Sea Logistics, with respect to the damaged container. It sought guidance from Limco, which instructed Hapag-Lloyd to deliver the cargo to Gdynia, Poland. Hapag-Lloyd and Limco explored various means of achieving this, including transporting the cargo by truck or rail, transporting the cargo directly from Hamburg to the final destination in the Ukraine, and terminating the voyage in Hamburg. Eventually, the cargo was transferred into another container, which left Hamburg in mid-November of 2008.

The now-empty damaged container was transported to Poland via truck, and the cargo was then transferred back into the damaged container, which was available for pick-up on or about December 24, 2008.

In the meantime, the final two containers (MOGU2051660 and MOGU2101987) left Portland on or about July 19, 2008 and arrived in Poland without incident on September 1, 2008.

From September 1, 2008 until late November, 2008, four containers (MOGU2112451, MOGU2003255, MOGU2051660 and MOGU2101987) remained in the Port of Gdynia, accruing storage charges. The two containers that arrived on September 1, 2008 (MOGU2051660 and MOGU2101987) were subject to a hold by Limco Logistics, because freight had not been paid on those containers.

Complainants picked up the two containers that had arrived in Gdynia in July of 2008 (MOGU2112451 and MOGU2003255) on or about November 21, 2008, and transported those containers to the Ukraine by truck.

Complainants never picked up the two containers that had arrived in Poland in September, nor did they pick up the damaged container. These three containers (MOGU2002520, MOGU2051660 and MOGU2101987) were sold by Int'l TLC to cover freight and charges not paid by Complainants.

Hapag-Lloyd filed a motion to dismiss the complaint on August 3, 2010. That motion was denied on September 28, 2010. An amended complaint was filed on October 13, 2010, after which the parties engaged in discovery, which consisted of interrogatories, requests for production of documents, and the depositions of both Complainants,

representatives of two of the respondents, and of the individual that purchased the cargo from Int'l TLC.

After completion of discovery, all parties filed dispositive motions in March of 2011. In an order dated May 24, 2011, the Presiding Officer denied Complainants' motion for summary judgment with respect to respondents Int'l TLC and Limco, and also denied the motions filed by all three respondents, except that the Presiding Officer granted a portion of Hapag-Lloyd's motion for summary judgment and held that Complainants were not entitled to double damages under 46 U.S.C. §41305(c).

Following the ruling on dispositive motions, the parties submitted an Initial Stipulation of Facts, and a hearing was scheduled for the week of August 8 in Portland, OR. The hearing was conducted before the Presiding Officer on August 8-11 in Portland, OR.

II. SUMMARY OF HAPAG-LLOYD'S POSITION

It is Hapag-Lloyd's position that it has not violated any of the three provisions of the Shipping Act of 1984, as amended, that Complainants now allege it to have violated. (Complainants have dropped allegations with respect to violations of three other provisions of the Shipping Act set forth in the Amended Complaint.) Complainants, who have the burden of proof to establish violations by a preponderance of the evidence, have not and cannot meet that burden with respect to any of the alleged violations.

A. The Facts

Complainants purchased plywood, oil and ATVs at full retail prices in April and May of 2008. In April of 2008, they obtained used containers (for which they did not pay until December of 2008) and shipped these containers to the Ukraine without having

written contracts for the sale of the goods. The oil cargoes were purchased in April but shipped in July, while some of the ATVs were purchased on the day they were shipped.

Three containers were tendered for shipment in May of 2008. Two arrived in Poland in July of 2008, undamaged and without delay. These two containers were not picked up until November of 2008, and the goods in them have never been sold by Complainants.

The third container was damaged and set aside, but then accidentally loaded on a subsequent vessel. It arrived in Germany in late June of 2008. It was delayed there until November of 2008, when the cargo was transferred to another container and shipped to Poland. The cargo was moved back into the damaged container and was ready for pick-up in December of 2008.

Two other containers were tendered for shipment in July of 2008. One of these was overweight when it arrived at the Port of Portland, and had to be returned to Complainants to have cargo removed. These two containers arrived in Poland without damage or delay on September 1, 2008.

All five containers weighed in excess of 29,000 pounds but Complainants, in violation of 49 U.S.C. §5902, did not notify the trucker to which they were tendered of the weight or contents of the containers. This failure to comply with federal law is representative of Complainants' utter disregard for legal requirements.

Complainants assert that their plan was to move all five containers together from the port of discharge in Poland to the Ukraine via railroad. Notwithstanding the alleged plan, the two containers of motor oil were tendered for shipment two months after the other three containers. This necessarily means Complainants' plan included the payment

of storage for 3 containers in Gdynia from early July to early September, when the last two of the five containers arrived.

Complainants have not provided any written evidence of any rail appointments or the cancellation of same. Complainants were unable to provide even an approximate date for any of the alleged appointments, nor have they produced any credible evidence of the alleged rail policy which requires the shipment of a minimum of five containers.¹ The only “evidence” of these “facts” is the testimony of Complainants themselves, which must be regarded as completely unreliable with respect to anything other than the most basic facts.²

¹ Complainants allege they lost several rail appointments due to the non-arrival of container MOGU2002520. Testimony of Yakov Kobel, Transcript p. 92, Lines 20-22; p. 93, Lines 24-25. However, the earliest date for which the Complainants could have made a rail appointment was September 1, 2008, the date the last two containers arrived in Gdynia. The last date for which they could have made an appointment for five containers was November 20, 2008, the day prior to their removal of two containers from the port. Thus, under Complainants version of events, they made and lost several rail appointments between September 2 and November 21, 2008. This is simply not credible. Moreover, Complainants had an appointment for 3 containers. See, Int'l TLC Exhibit #58, p. 2, paragraph 1.

² The Complainants are not credible witnesses. Aside from their general demeanor and lack of cooperation, both of which the Presiding Officer had ample opportunity to observe, there are many specific examples of less than truthful testimony on the part of both Complainants. Kobel testified that he only learned that the damaged container was in Germany in October or November of 2008. Transcript p. 85, Lines 10-11. However, evidence shows he knew this in August of 2008. Complainants' Exhibit 92. In his deposition, Kobel testified that they always weighed cargo before loading it in a container. Int'l TLC Exhibit #67, p. 25, Lines 20-22. At the hearing, he testified that he did not weigh the cargo. Transcript p. 145, Lines 14-18. Kobel testified that he had no problems with Affordable Storage. Transcript, p. 158, Lines 19-21. Int'l TLC Exhibit #65 tells an entirely different story. Kobel claims to have wanted to transport the containers by rail (Transcript, pp. 89 and 92), but in his deposition he stated that Complainants did not start thinking about inland transport until June, after the first three containers had left Portland. Int'l TLC Exhibit #67, p. 75, Lines 16-19. Kobel testified at the hearing that he purchased the containers. Transcript, p. 72, Lines 20-22. In his deposition, he testified that Mr. Berkovich paid for the containers. Int'l TLC Exhibit #67, p. 13, Lines 15-17. In reality, Emmanuel Logistics paid for the containers. Complainants' Exhibit 123. Mr. Kobel lied in his deposition about declaring bankruptcy. Int'l TLC Exhibit #67, p. 45. Mr. Berkovich has pled guilty to a charge of forgery, which is reflective of his character for truthfulness. In his testimony, Mr. Berkovich testified that he did not discuss the five containers herein at issue with Mr. Barvinenko during a visit to Int'l TLC in October of 2008. Transcript p. 486, Lines 10-18. However, he later testified that did discuss these five containers during that visit. Transcript p. 487, Lines 4-8. In his deposition, he testified he was employed as a mechanic by Mission Trucking. Int'l TLC Exhibit #64, pp. 10-11. In his testimony in this proceeding, he testified he was never employed by Mission Trucking. Transcript, pp. 491-492. In his deposition, he testified he did not know where the containers herein at issue were destined. Int'l TLC Exhibit #64, p. 26, Lines 7-9. Later in his deposition, he testified that he was responsible for getting the

What really happened is that Complainants embarked on an ill-conceived, ill-planned and under-funded business venture of a type with which they had little or no previous experience. They had no buyer for the goods in the first two containers, as witnessed by the fact that, three years later, the goods in those containers are sitting on their relatives' property. They lacked funds to pay the freight charges on the two containers of motor oil, which they may not have been able to import into and sell in the Ukraine due to the packing and labeling of those goods. They had no written contracts for the sale and purchase of any of these goods. They are now using the damage to and delay of container MOGU2002520 in an effort to place the blame for their own failures on someone else and to weave a silk purse of a Shipping Act claim out of the sow's ear of the COGSA claim that they should have asserted.

B. The Law

The Commission lacks subject matter jurisdiction over this case. Although Complainants have couched their grievance against Hapag-Lloyd in Shipping Act terms for purposes of the Amended Complaint, they have revealed the true nature of their allegations elsewhere in the record, and the Commission has no jurisdiction over such claims.

Hapag-Lloyd did not violate Section 41102(c). Four of the five containers transported by Hapag-Lloyd arrived without delay or damage, and thus the allegations made under this section refer to a single container. Under Commission precedent, this section does not apply to single events or occurrences. Similarly, it is not applicable to non-transportation activities, or to a delay that does not involve a demand for payment of

cargo from Poland to the Ukraine. Int'l TLC Exhibit #64, p. 34, Lines 12-22. In light of the foregoing specific examples, and their general demeanor, Complainants cannot be considered credible witnesses.

monies not lawfully due or a pattern of deceit. Since none of these factors are present in this case, this statutory provision is not applicable here.

Even if this section is applicable, Hapag-Lloyd's conduct was at all times just and reasonable. It promptly notified Limco of the damage to the container. It promptly notified Limco of the accidental loading of the container. In accordance with its standard procedures, it sought guidance from the consignee when problems arose moving the container from Germany to Poland. When the consignee was unable to provide guidance, and again in accordance with its standard procedures, Hapag-Lloyd promptly sought the guidance of Limco. At no time did Hapag-Lloyd conceal the status or location of the container, provide false information, or demand monies to which it was not entitled as a condition of delivering the container. Delay, in and of itself, is not a Shipping Act violation. Accordingly, Hapag-Lloyd did not violate Section 41102(c).

Hapag-Lloyd did not violate Section 41104(10) as alleged by Complainants. To the extent Section 41104(10) even applies to this situation (which is questionable), Hapag-Lloyd did not refuse to deal with Complainants, unreasonably or otherwise. Hapag-Lloyd negotiated with Complainants, through Limco, with respect to the return of the damaged container in Portland. The fact that Hapag-Lloyd did not pay Complainants' November 15, 2008 claim was reasonable, given that the claim unreasonably sought unsupported damages for which Hapag-Lloyd was not legally responsible. Moreover, the cargo that was the subject of that claim was, at that very time, en route to Poland.

With respect to alleged violation of Section 41104(4)(E), Complainants have failed to establish that the shipments in question moved under a tariff, the only type of service to which these sections apply. As the record unmistakably shows, the cargo in

question moved under a service contract, and this section of the Shipping Act is inapplicable.

With respect to alleged violations of Sections 41104(11), 41104(12) and 41104(4)(D), Complainants have not briefed these allegations of their Amended Complainant. In any event, as demonstrated herein, insofar as these five containers are concerned, all of Hapag-Lloyd's dealings were with Limco, a bonded and tariffed NVOCC. Thus, there was no violation of Sections 41104(11) or 41104(12). Section 41104(4)(D) does not apply to service contracts shipments such the ones herein at issue, and therefore Hapag-Lloyd did not violate this provision of the Shipping Act.

In the unlikely event the President Officer should determine that Hapag-Lloyd violated the Shipping Act, it would nonetheless be inappropriate to award Complainants reparations.

Complainants failure to pay applicable freight charges and secure the release of the containers was an intervening and superseding cause of any loss suffered by Complainants, which extinguishes any liability which Hapag-Lloyd may have had. This failure by Complainants to secure the release of the three containers also constitutes a failure of Complainants to the mitigate their damages, which is a breach of their legal obligations that precludes an award of reparations. This failure is inexplicable and inexcusable, given that Complainants received warning of the potential liquidation of these containers in the form of a January 9, 2009 letter from Int'l TLC, which Complainant Kobel testified he ignored. Moreover, under the terms of the bills of lading issued by Limco for containers MOGU2051660 and MOGU2101987, Complainants were not entitled to withhold or deduct monies from freight charges payable on those

containers, so any “self-help” asserted by Complainants as a justification for non-payment of freight is without merit.

The sale of the cargo by Int’l TLC, in which Hapag-Lloyd played no part, is also a superseding cause of Complainants’ loss.

Finally, Complainants’ own testimony establishes that other persons paid charges related to the cargo and, as a matter of law, Complainants are not entitled to recover those amounts paid by other persons.

III. PROPOSED FINDINGS OF FACT

The Parties

1. Complainants Yakov Kobel and Victor Berkovich (“Complainants”) were the owners of the following containers and the cargo contained therein at all times relevant to this proceeding: MOGU2002520, MOGU2051660, MOGU2101987, MOGU2112451 and MOGU2003255. June 9, 2011 Initial Statement of Undisputed Facts, ¶ 1 (hereinafter, “Undisputed Facts”). The containers and the cargo contained therein were purchased with financial assistance from family members of Complainants. Testimony of Yakov Kobel, Transcript p. 67, Lines 10-14 and p. 144, Lines 15-17.

2. At all material times, Hapag-Lloyd AG (“HLAG”) was an ocean common carrier that maintained a published tariff in accordance with the Shipping Act of 1984, as amended and FMC regulations. Said tariff contained a sample copy of HLAG’s Bill of Lading and Sea Waybill (Exhibits HL-010 and HL-011), as required by FMC regulations. At all material times, Hapag-Lloyd (America), Inc. (“HLAI”) was a duly designated agent of HLAG. HLAI did not, at any material time, act as an ocean common carrier. Undisputed Facts, ¶ 2.

3. Limco Logistics, Inc. (“Limco”) is, and was at all material times, an ocean transportation intermediary, licensed with the Federal Maritime Commission and operating lawfully as a non-vessel operating common carrier. Undisputed Facts, ¶ 3.

4. International TLC (“Int’l TLC”) is an ocean transportation intermediary licensed with the Federal Maritime Commission effective on July 24, 2008. Int’l TLC was not licensed by the FMC before July 24, 2008. Undisputed Facts, ¶ 4.

Purchase of Containers

5. Complainants purchased the containers herein at issue from Affordable Storage Containers in April of 2008, and Affordable Storage Containers invoiced Int’l TLC for the containers on April 25, 2008. Int’l TLC Exhibit 65; Complainants’ Exhibit 121.

6. The containers were delivered to Complainants on or about April 29, 2008. Complainants’ Exhibits 37, 39 and 41.

7. Complainants did not pay for the containers until December 30, 2008, when a company owned by Complainant Kobel’s sister remitted payment to Affordable Storage Containers. Complainants’ Exhibit 123; Testimony of Yakov Kobel, Transcript p. 231, Lines 16-24.

Purchase of Cargo in Liquidated Containers

8. Complainants purchased most of the oil transported in containers MOGU2051660 and MOGU2101987 in April of 2008. Complainants’ Exhibits 50, 52, and 53.

9. Complainants purchased the Wilderness 250 Camo ATV transported in container MOGU2002520 on May 7, 2008. Complainants’ Exhibits 55 and 64.

10. Complainants paid full retail price for the plywood and oil shipped in the containers herein at issue. Testimony of Yakov Kobel, Transcript p. 215, Lines 17-25.

Booking the Shipments

11. Complainants entered into an oral agreement with Int'l TLC between April 2008 and July 19, 2008 to ship five containers (MOGU2002520, MOGU2051660, MOGU2101987, MOGU2112451 and MOGU2003255) from Portland, Oregon to Gdynia, Poland. Undisputed Facts, ¶ 5.

12. Complainants did not inform Int'l TLC that any of the containers had to arrive by a specified deadline. Testimony of Aleksandr Barvinenko, Transcript p. 360, Lines 7-10; p. 396, Lines 21-25; p. 397, Lines 1-3.

13. Int'l TLC made a booking for each of Complainants' five containers with Limco between April 2008 and July 2008. Limco then made a booking with HLAG through its agent HLAI. Undisputed Facts, ¶ 6.

14. All five containers were booked and moved under Limco's service contract with HLAG. Exhibits HL-013 through HL-042. Testimony of Michael Lyamport, Transcript p. 696, Lines 18-23; Complainants' Exhibit 35; Testimony of Catherine Ward, Transcript p. 574, Lines 10-12.

15. Baltic Sea Logistics was the agent at the destination port in Gdynia, Poland designated by Int'l TLC with respect to all five containers. Undisputed Facts, ¶ 17.

16. Baltic Sea Logistics was named as consignee on bills of lading and sea waybills issued by Hapag-Lloyd based on information provided to Hapag-Lloyd by Limco. Testimony of Catherine Ward, Transcript p. 590, Lines 23-24; Testimony of Aleksandr

Barnvinenko, Transcript p. 355, Lines 16-23; Testimony of Michael Lyamport, Transcript p. 704, Lines 2-9 and 18-25; p 705, Line 1.

Loading the Containers

17. Container MOGU2002520 was loaded by Complainants, with assistance from other individuals. Undisputed Facts, ¶ 35.

18. Prior to the loading and shipping of the containers herein at issue, neither Complainant had any previous experience loading or shipping containers in international commerce. Undisputed Facts, ¶ 36.

Containers MOGU2112451 and MOGU2003255

19. Limco made a booking for containers MOGU2112451 and MOGU2003255 with HLAG through its agent HLA1 on or about April 28, 2008 to ship on a HLAG vessel, the LISBON EXPRESS, leaving Portland, Oregon on or about May 9, 2008. Undisputed Facts, ¶ 7.

20. Complainants hired Western Container Transport to transport containers MOGU2112451 and MOGU203255 from Complainants' lot in Clackamas, Oregon to Terminal 6 at the Port of Portland. Undisputed Facts, ¶ 8.

21. HLAG issued Sea Waybill HLCUATL080515983, dated May 8, 2008, for container MOGU2112451 with Limco listed as shipper and [BA]LTIC Sea Logistics SP Z00 as consignee and notify party. Undisputed Facts, ¶ 11.

22. Container MOGU2112541 departed from Portland, OR on the LISBON EXPRESS on or about May 8, 2008. It arrived in Gydnia, Poland, via transshipment in Hamburg, Germany, on or about July 2, 2008. It was not damaged during loading, transit or discharge. Undisputed Facts, ¶ 12.

23. HLAG issued Bill of Lading HLCUATL080515994 dated May 26, 2008 for container MOGU2003255. Limco was listed as the shipper and [BA]LTIC Sea Logistics SP ZOO as consignee and notify party. Undisputed Facts, ¶ 14.

24. Container MOGU2003255 departed from Portland, OR on the HELSINKI EXPRESS on or about May 25, 2008. It arrived in Gdynia, Poland, via transshipment in Hamburg, Germany, on or about July 2, 2008. It was not damaged during loading, transit or discharge. Undisputed Facts, ¶ 15.

25. Hapag-Lloyd notified Baltic Sea Logistics of the arrival of Containers MOGU2112451 and MOGU2003255 on July 1, 2008. Exhibits HL-0124 through HL-0126.

26. Containers MOGU2112451 and MOGU2003255 were picked up by Complainants on or about November 21, 2008, when they were taken by truck from the port of Gdynia to the Ukraine. Undisputed Facts, ¶ 16.

27. The goods in containers MOGU2112451 and MOGU2003255 have not been sold, either because Complainants have been too busy to sell them (Testimony of Yakov Kobel, Transcript p. 129, Lines 10-12 and p. 219, Lines 20-24) or because they are waiting for the market to improve. Testimony of Victor Berkovich, Transcript p. 526, Lines 21-25 and p. 527, Lines 1-4.

Containers MOGU2051660 and MOGU2101987

28. Int'l TLC booked a reservation with Limco to ship containers MOGU2051660 and MOGU2101987 on the LISBON EXPRESS departing from Portland, Oregon to Gdynia, Poland. Undisputed Facts, ¶ 21.

29. Each of these containers weighed in excess of 29,000 pounds. Complainants' Exhibits 16 and 41. However, Complainants failed to provide the first carrier with a certificate of weight and contents as required by 49 U.S.C. §5902. Testimony of Ramona Johnson, Transcript p. 58, Lines 7-22; Testimony of Yakov Kobel, Transcript p. 148, Lines 15-25; p. 149, Lines 1-10; Testimony of Victor Berkovich, Transcript p. 494, Lines 19-24.

30. HLAG issued Bill of Lading HLCUATL080733786 for container MOGU2101987 on July 19, 2008. The Bill of Lading listed Limco as shipper and [BA]LTIC Sea Logistics as consignee and notify party. Undisputed Facts, ¶ 23.

31. Limco issued house bill of lading LIM16803, dated July 19, 2008, for container MOGU2101987, listing Victor Berkovich as shipper and consignee. Undisputed Facts, ¶ 22.

32. HLAG issued Sea Waybill HLCUATL08733775 for container MOGU2051660 on July 19, 2008. Limco was listed as shipper and [BA]LTIC Sea Logistics SP ZOO was listed as consignee and notify party. Undisputed Facts, ¶ 25.

33. Limco issued house bill of lading LIM16802, dated July 19, 2008, for container MOGU2051660, listing Victor Berkovich as shipper and consignee. Undisputed Facts, ¶ 24.

34. Container MOGU2051660 was overloaded by Complainants and had to be returned to them to have cargo removed in order for the container to reach an acceptable weight. Complainants' Exhibit 39, p. 2.

35. Both containers (MOGU2101987 and MOGU2051660) were shipped from Portland, Oregon on or about July 9, 2008 and arrived in Gdynia, via transshipment in

Hamburg, Germany, on or about September 1, 2008. These two containers were not damaged during loading, transit, or discharge. Undisputed Facts, ¶ 26.

36. Hapag-Lloyd notified Baltic Sea Logistics of the arrival of Containers MOGU2101987 and MOGU2051660 in Poland on August 21, 2008. Exhibits HL-0127 through HL-0132.

37. Freight charges on these two containers were not paid in full until April of 2009. Complainants' Exhibit 111.

38. Limco placed a hold on these containers due to non-payment of freight. Testimony of Michael Lyamport, Transcript p. 702, Lines 22-25; p. 703, Lines 1-7.

39. Limco had a lien on these containers and was not obligated to release the containers until freight was paid. Limco Exhibit 52, paragraph 11.F; Limco Exhibit 53, paragraph 17.

40. Complainants had no right of set-off or deduction vis-à-vis Limco. Limco Exhibit 52, paragraph 11.A; Limco Exhibit 53, paragraph 16.2.

Container MOGU2002520

41. Limco made a booking for container MOGU2002520 with HLAG through its agent HLAI on or about April 28, 2008 to ship on a HLAG vessel, the LISBON EXPRESS leaving Portland, Oregon on or about May 9, 2008. Undisputed Facts, ¶ 7.

42. Container MOGU2002520 arrived at the Port of Portland on May 7, 2008. Undisputed Facts, ¶ 9.

43. The container weighed in excess of 29,000 pounds, but Complainants failed to provide the first carrier with a certificate of weight and contents as required by 49 U.S.C. §5902. Testimony of Ramona Johnson, Transcript p. 58, Lines 7-22; Testimony of Yakov

Kobel, Transcript p. 148, Lines 15-25; p. 149, Lines 1-10; Testimony of Victor Berkovich, Transcript p. 494, Lines 19-24.

44. Container MOGU2002520 was damaged on May 8, 2008, while being loaded on the vessel at the Port of Portland. Complainants' Exhibit 47.

45. Hapag-Lloyd promptly notified Limco of the damage to Container MOGU2002520 (Complainants' Exhibit 90, p. 6) and set the container aside at the terminal in Portland. Testimony of William Furer, Transcript p. 540, Lines 6-10.

46. Through Limco, Complainants asked to inspect the damaged container, a request that Hapag-Lloyd had to deny based on federal security regulations. Testimony of William Furer, Transcript p. 541, Lines 7-21.

47. Complainants, through Limco, rejected Hapag-Lloyd's offer to transfer the cargo to another shipper-owned container. Complainants' Exhibit 90, pp. 4-5.

48. Through Limco, Complainants requested that the damaged container be returned to them so the cargo could be transloaded to another container. Complainants' Exhibit 90, p. 3.

49. Hapag-Lloyd agreed to this request in principle, and requested documentation of the costs, for which Hapag-Lloyd would bear initial responsibility, and for which the terminal operator would bear ultimate responsibility. Testimony of William Furer, Transcript p. 542, Lines 6-7; p. 544, Lines 10-19; p. 544, Lines 20-23; Complainants' Exhibit 90, pages 2 and 5.

50. The costs submitted by Complainants included a charge of \$4,850 for the damaged container (Complainants' Exhibit 67, p. 8), which had cost Complainants only

\$1,700. Complainants' Exhibits 121 and 123. Hapag-Lloyd considered this expense excessive. Testimony of William Furer, Transcript p. 543, Lines 2-9.

51. Hapag-Lloyd could have transloaded the cargo more quickly and less expensively than Complainants. Testimony of William Furer, Transcript p. 545, Lines 16-21.

52. Because resolution of a dispute such as this is normally routine, Hapag-Lloyd's personnel expected the dispute to be resolved prior to the arrival of the next Hapag-Lloyd vessel in Portland. Testimony of Catherine Ward, Transcript p. 577, Lines 1-11.

53. Hapag-Lloyd's vessels were full at this time, and had the container been placed on the "do not load" list for the next vessel, it may not have been able to secure space for some time. Testimony of Catherine Ward, Transcript p. 577, Lines 1-11.

54. Because Hapag-Lloyd anticipated that the situation would be resolved quickly, and in order not to delay the cargo further, the container was not placed on the "do not load" list for the next Hapag-Lloyd vessel. Testimony of Catherine Ward, Transcript p. 577, Lines 1-11.

55. When the next Hapag-Lloyd vessel called in Portland, the damaged container was accidentally loaded on that vessel. Exhibits HL-062 and HL-066; Testimony of William Furer, Transcript p. 547, Lines 7-9.

56. Hapag-Lloyd promptly notified Limco of the accidental loading of the container. Exhibits HL-062 and HL-066; Testimony of Michael Lyamport, Transcript p. 698, Lines 4-7.

57. There was no financial benefit to Hapag-Lloyd in loading the container as compared to keeping it in Portland. Testimony of William Furer, Transcript p. 547, Lines 10-14.

58. HLAG issued Sea Waybill HLCUATL080515961 for container MOGU 2002520 on May 25, 2008 and named Limco as shipper and [BA]LTIC Sea Logistics SP ZOO as consignee and notify party. Undisputed Facts, ¶ 19.

59. Damaged Container MOGU2002520 arrived in Hamburg, Germany on or about June 24, 2008. Complainants' Exhibit 99, p. 1.

60. The feeder operator that was to transport Container MOGU2002520 from Hamburg to Gdynia, Poland would not accept the container due to the damage it had suffered. Complainants' Exhibit 93, p. 1.

61. Hapag-Lloyd, in accordance with its standard procedures, contacted the consignee Baltic Sea Logistics to obtain instructions about how to deal with the damaged container. Testimony of Catherine Ward, Transcript p. 579, Lines 19-25; p. 580, Lines 1-2.

62. Baltic Sea Logistics was not in touch with the ultimate consignee of the cargo, was unable to provide instructions, and indicated that it did not wish to receive the cargo. Exhibit HL-068.

63. Hapag-Lloyd, in accordance with its standard procedures for situations in which it is unable to obtain instructions from the consignee, then contacted the consignor of the cargo, Limco. Limco instructed Hapag-Lloyd to deliver the cargo to Gdynia, Poland. Testimony of Catherine Ward, Transcript p. 579, Lines 19-25; p. 580, Lines 13-17; p. 582, Lines 3-6.

64. Hapag-Lloyd was receiving conflicting instructions from the consignor and consignee of Container MOGU2002520. Testimony of Catherine Ward, Transcript p. 584, Lines 14-16.

65. During this time, Hapag-Lloyd kept Limco informed as to the status of the damaged container, and Complainants knew the container was in Germany by no later than August 4, 2008. Testimony of Michael Lyamport, Transcript p. 700, Lines 10-18; Complainants' Exhibit 92; Testimony of Yakov Kobel, Transcript p. 162, Lines 3-6.

66. Hapag-Lloyd worked with Limco to try and deliver the container via alternate means, including delivery by truck to Poland, delivery by truck directly to the Ukraine, and delivery by rail. Complainants' Exhibits 95, 96, and 97. Hapag-Lloyd was "helpful." Testimony of Michael Lyamport, Transcript p. 699, Line 14.

67. At no time did Hapag-Lloyd refuse to provide information regarding the status of the container, nor did it provide any false or misleading information regarding the status of the container. Testimony of Michael Lyamport, Transcript p. 699, Lines 4-11.

68. Hapag-Lloyd eventually received assurances from Limco that if the cargo could be delivered to Gdynia, it would be picked up promptly. Complainants' Exhibit 100, p. 2.

69. The cargo in container MOGU2002520 was transferred to another container and left Germany for Poland on or about November 15, 2008. Complainants' Exhibit 100, p. 1.

70. The now empty MOGU2002520 arrived in Gdynia, Poland on or about December 23, 2008. Undisputed Facts, ¶ 20. At that time, the cargo was transferred back

into MOGU2002520. Testimony of Katarzyna Ossowska, Transcript p. 652, Lines 21-25; p. 653, Lines 1-4.

71. Container MOGU2002520 could be transported by truck without difficulty. Complainants Exhibit 93, p. 4 of 4.

72. Transloading of the cargo in Container MOGU2002520 to another container and transport of the replacement container and empty Container MOGU2002520 from Germany to Poland were performed at Hapag-Lloyd's expense. Complainants' Exhibit 94; Testimony of Michael Lyamport, Transcript p. 732, Lines 14-21; p. 738, Lines 22-25 and p. 739, Lines 1-3.

73. On or about November 15, 2008, Complainants prepared a letter setting forth a claim with respect to Container MOGU2002520. Complainants' Exhibit 69.

74. In Complainants' Exhibit 69, Complainants sought compensation for cargo in excess of amounts paid for such cargo. Testimony of Yakov Kobel, Transcript p. 88, Lines 8-11.

75. In Complainants' Exhibit 69, Complainants also sought compensation for cargo in excess of the \$500 per package limitations applicable to the carriage of cargo under the terms and conditions of Hapag-Lloyd's sea waybill. Complainants' Exhibit 29; Exhibit HL-010, paragraph 7(2).

76. In Complainants' Exhibit 69, Complainants also sought compensation for delay, despite never having informed Int'l TLC of any required delivery date. Testimony of Aleksandr Barvinenko, Transcript p. 397, Lines 1-6.

77. Under the terms of Hapag-Lloyd's sea waybill, it is not liable for damages for delay. Exhibit HL-010, paragraph 7(5).

Baltic Sea Logistics

78. By letter dated October 29, 2008, Baltic Sea Logistics advised Hapag-Lloyd that it did not authorize anyone to name it as consignee of these containers and that it could not provide instructions with respect to same. Complainants' Exhibit 101.

79. By e-mail dated November 13, 2008, Baltic Sea Logistics informed Int'l TLC that it had not received any payment for its services and that, due to other problems with the five containers, it would provide no further services in connection with same. Complainants' Exhibit 102.

Liquidation of Containers MOGU2002520, MOGU2051660 and MOGU2101987

80. Despite arriving in Poland on or about September 1, 2008, containers MOGU2051660 and MOGU2101987 had not been picked up by Complainants or anyone else as of January 9, 2009.

81. On January 9, 2009, Int'l TLC sent a letter to Complainants, entitled "Final Notice of Unpaid Balance," advising them that Containers MOGU2051660 and MOGU2101987 remained in the port of Gdynia, that freight on those containers had not been paid, and that unless payment was made within five (5) days, the cargo would be utilized to cover all amounts due. Complainants' Exhibit 79.

82. Complainant Kobel received this letter, but ignored it because "it's an incorrect letter." Testimony of Yakov Kobel, Transcript p. 232, Lines 19-20.

83. Complainants, through the company of Complainant Kobel's sister, paid \$1,500 of the outstanding balance by check dated December 30, 2008 (Complainants' Exhibit 113), which was received by Int'l TLC on or about January 9, 2009. Complainants' Exhibit 111.

84. Complainants thereafter paid Int'l TLC \$7,065.00 on or about March 26, 2009 and \$1,635.00 on or about April 2, 2009. Complainants' Exhibits 111 and 114.

85. In an e-mail dated February 3, 2009, Baltic Sea Logistics threatened to hold Int'l TLC liable for storage costs for the three containers remaining at the Port of Gdynia, and demanded action by February 6, 2009. Complainants' Exhibit 103.

86. After receiving the February 3, 2009 e-mail from Baltic Sea Logistics, Int'l TLC decided it had to take action to liquidate the containers. Testimony of Aleksandr Barvinenko, Transcript p. 400, Lines 20-22.

87. On or about February 23, 2009, Int'l TLC entered into an agreement with Oleg Remishevskiy to sell the containers and their contents to Mr. Remishevskiy. Complainants' Exhibit 82.

88. Int'l TLC notified Limco via email on March 2, 2009 to issue a change to Bill of Lading LIM 16090 for container MOGU2002520, Bill of Lading LIM 16802 for container MOGU2051660, and Bill of Lading LIM 16803 for container MOGU2101987 to change the listed exporter and consignee on each Limco bill of lading from Victor Berkovich to Oleg Remishevskiy. Undisputed Facts, ¶ 27.

89. On March 2, 2009 Limco notified Baltic Sea Logistics in Gdynia, Poland that the shipper/consignee on the Limco bills of lading had been changed to Oleg Remishevskiy for the three containers, MOGU2002520, MOGU2051660, and MOGU2101987. A copy of the new Limco Bills of Lading were attached to the email from Limco. Undisputed Facts, ¶ 29.

90. HLAG and HLAI did not consent to or authorize the change of shipper and consignee of the Limco bills of lading for the above three containers. Undisputed Facts, ¶ 31.

91. HLAG and HLAI were not involved in the liquidation sale of containers MOGU2002520, MOGU2051660 and MOGU2101987, and did not receive any of the proceeds of that liquidation sale. Undisputed Facts, ¶ 34.

92. Storage charges on the liquidated containers were paid to Baltic Sea Logistics, not Hapag-Lloyd. Testimony of Oleg Remishevskiy, Transcript p. 329, Lines 1-2 and 14-21.

Resale/Value of Liquidated Goods

93. Complainants had no written contracts for the sale of the goods in MOGU2002520, MOGU2051660 and MOGU2101987. Undisputed Facts, ¶ 33.

94. It is not clear the oil in Containers MOGU2051660 and MOGU2101987 could have been imported into the Ukraine, given its packaging and labeling. Testimony of Yakov Kobel, Transcript p. 250, Line 24 through p. 253, Line 1.

Documentation, Payment and Commercial Practice

95. None of the HLAG Bills of Lading or Sea Waybills issued with respect to the containers herein at issue named either of Complainants in any capacity. Undisputed Facts, ¶ 37.

96. The HLAG Bills of Lading and Sea Waybills expressly incorporated the terms of the U.S. Carriage of Goods by Sea Act (“COGSA”) and the Hague-Visby Rules. Undisputed Facts, ¶ 38.

97. Paragraph 7(2) of Hapag-Lloyd's Sea Waybill limits its liability for cargo loss or damage to \$500 per package or customary freight unit. Exhibit HL-010.

98. Int'l TLC did not have a service contract with Hapag-Lloyd. Testimony of Aleksandr Barvinenko, Transcript p. 401, Lines 11-13.

99. Int'l TLC did not book any of the cargo herein at issue with Hapag-Lloyd. Testimony of Aleksandr Barvinenko, Transcript p. 401, Lines 9-10.

100. Hapag-Lloyd's freight charges for the cargo it transported were paid by Limco. Testimony of Michael Lyamport, Transcript p. 692, Lines 1-4; p. 695, Lines 14-16.

101. It is normal commercial practice for ocean common carriers transporting cargo for NVOCC customers to not deal directly with the customer of the NVOCC. Testimony of Michael Lyamport, Transcript p. 701, Lines 1-18.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Commission lacks subject matter jurisdiction over the Amended Complaint.

2. Hapag-Lloyd did not violate 46 U.S.C. §§41102(c), 41104(4)(D), 41104(4)(E), 41104(10), 41104(11) or 41104(12).

3. Assuming *arguendo* that Hapag-Lloyd did violate one or more provisions of the Shipping Act, it is relieved of liability by the subsequent conduct of Complainants and Int'l TLC.

4. Complainants have not demonstrated the proximate causation necessary to receive reparations.

5. Complainants' failure to mitigate their damages precludes an award of reparations.

6. Complainants are not entitled to reparations because they seek reparations for amounts paid by others or which it would otherwise be improper to award.

V. ARGUMENT

A. BURDEN OF PROOF

Under the Administrative Procedure Act, "the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). "A regulatory order of the [Commission] may be issued only if supported by proof." *Feldman Family, Clothing Export & Shipping Corporation v. Bogarty*, 4 FMB 1, 4 (FMB 1952).

In this case, Complainants are the proponents of a finding of violation, and therefore have the burden of proof. The burden of proof means the burden of persuasion, not merely the burden of production, or coming forward with a prima facie case.

Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 276 (1994); *Kin Bridge Express Inc. -- Possible Violations of Sections 8, 10(a)(1), 10(b)(1) and 23 of the Shipping Act of 1984*, 28 S.R.R. 984, 985 (ALJ 1999). In a case alleging a violation of the Shipping Act, the standard under which Complainants must satisfy their burden of proof is "preponderance of the evidence." See, *Kin Bridge, supra*. This means that the trier of fact must find that the result sought is more likely than not.

Under the "preponderance of the evidence" standard, the burden of proof means that if the evidence is evenly balanced, the party that bears that burden of persuasion, in this case Complainants, must fail. *Director, OWCP, supra*, at 272; *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 138-39 (1997). Thus, Complainants must demonstrate that one conclusion is more likely than the other, i.e., that the evidence showing a violation was committed is more credible than the evidence showing it was

not. If the evidence on each side is comparable, Complainants fail to meet their burden and no violation may be found.

B. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION

Because the Complainants' true grievances are based in tort or cargo loss/damage, the Commission lacks subject matter jurisdiction over their claims.

The Carriage of Goods by Sea Act ("COGSA"), now codified as a note to 46 U.S.C. §30701, establishes the rights and obligations of ocean carriers and shippers with respect to the transportation of goods by water between ports in the United States and ports in a foreign country. *Kawasaki Kisen Kaisha, Ltd. et al. v. Regal-Beloit Corp. et al.*, 561 U.S. ____ , 130 S.Ct. 2433 (2010). COGSA can be extended beyond port-port transportation by contract (see Section 7 thereof), and in this case was so extended by paragraph 7(2) of the terms and conditions of HLAG's bills of lading and sea waybills (Exhibits HL-010 and HL-011), such that COGSA applied to the handling of these containers both prior to loading and after discharge.³

Federal courts have held that claims for cargo loss or damage cloaked in negligence, fraud, conversion and breach of contract theories are pre-empted by COGSA. See, e.g., *Senator Line GmbH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 168 (2nd Cir. 2002); *Polo Ralph Lauren, L.P. et al. v. Tropical Shipping & Construction Co., Ltd.*, 215 F.3d 1217, 1221 (11th Cir. 2000)(COGSA pre-empts claims in bailment and negligence); *Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc.*, 896 F.2d 656, 661 (1st Cir. 1990)(plaintiff could not circumvent COGSA by couching complain in terms of conversion or breach of contract); *Jones v. Compagnie Generale Maritime*, 882 F. Supp.

³ Complainants, as customers of a NVOCC, are bound by the extension of COGSA beyond ship's tackle even though they are not named on HLAG's bill of lading. See, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 32-35 (2004).

1079, 1082-83 (S.D. Ga. 1995)(COGSA provides exclusive remedy for loss of cargo, pre-empts common law in this area, and regulates claims in both tort and contract); *Reisman v. Medafrica Lines, U.S.A.*, 592 F. Supp. 50, 52 (S.D.N.Y. 1984) (“breach of contract, negligence and conversion claims are the common law equivalents of the actions for which COGSA was meant to be an exclusive definition of liability in the shipper-carrier context”); *National Automotive Publications, Inc. v. United States Lines, Inc.*, 486 F. Supp 1094, 1099 (S.D.N.Y. 1980)(plaintiff unable to avoid COGSA by couching claims in terms of negligence, breach of contract and wrongful detention of goods); *B.F. McKernin & Co., Inc. v. United States Lines, Inc.*, 416 F. Supp. 1068, 1070-1071 (S.D.N.Y. 1976)(claims for conversion and breach of contract precluded by COGSA).

In this case, Complainant Kobel referred repeatedly to a “fraud” perpetrated upon him by respondents. See, e.g., Transcript p. 194, Lines 11-16; p. 195, Lines 10-17. Complainants’ counsel characterized the conduct of Hapag-Lloyd as “negligence” and the Complainants’ claim as one for “conversion.” See Int’l TLC Exhibit 58, p. 4. Complainants’ Post-Trial Brief and Closing Statement (“Complainants’ Brief”) also characterizes their claim as “tantamount to conversion at common law.” Complainants’ Brief, p. 13. Thus, it is apparent from Complainants’ own language that they are asserting the types of claims that the courts have consistently held are to be determined in accordance with COGSA.

The Commission, like all administration agencies, is an agency of limited jurisdiction, and COGSA is not a statute which has been delegated to the Commission for its administration. *Definition of “Package” under the Carriage of Goods by Sea Act*, 23

S.R.R. 111, 113 (FMC 1985). Rather, COGSA establishes the courts as the forum for the resolution of claims for cargo loss and damage. *Id.* Consistent with the foregoing, the Commission has repeatedly held that it has no jurisdiction over claims for cargo loss or damage. See, e.g., *Progressive Auto, Inc. v. Marine Transport Logistics, Inc.*, 31 S.R.R. 1354 (Settlement Officer 2010); *Bonafide, Inc. v. O.E.C. Shipping Los Angeles, Inc.*, 31 S.R.R. 1356 (Settlement Officer 2010); *Exportorient Ansari v. American President Lines, Ltd.*, 26 S.R.R. 1414, 1416 (Settlement Officer 1994), administratively final July 28, 1994; *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1277 (Settlement Officer 1990); *J. M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962); *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company*, 2 U.S.M.C. 517, 518 (USMC 1941).

In other words, just as federal courts have held that shippers may not avoid COGSA by invoking common law tort and contract theories, the Commission has effectively held that shippers may not avoid COGSA by invoking the Shipping Act. This is well-summarized in the *A.N. Deringer* decision:

It is clear that COGSA was enacted to clarify the responsibilities as well as the rights and immunities of carrier and ship with respect to loss and damage claims. Consequently, the use of the Shipping Act of 1984 to circumvent COGSA provisions would constitute a wholly unwarranted frustration of Congressional intent. Furthermore, some of the logical conclusions of such a step would be absurd. For example, COGSA provides a one-year period for the filing of suit; after that period, a claim is time-barred. To accept *Deringer's* premise, one would have to conclude that a one-year period exists during which a claimant may file suit, but two additional years exist in which to file with the FMC. Inasmuch as COGSA stipulates that the carrier and ship, in the absence of a suit, are discharged from liability after one year, such a conclusion is unacceptable.

A.N. Deringer at 1277 (footnotes omitted).⁴

Consistent with the approach the Commission has taken to date in keeping COGSA and Shipping Act claims separate, federal courts have also held that torts such as fraud and negligence are not actionable under the Shipping Act. See, *Johnson Products Co., Inc. v. M/V LA MOLINERA*, 619 F. Supp. 764, 766 (S.D.N.Y. 1985).

Just as federal courts do not allow plaintiffs to avoid COGSA by invoking state law, Complainants should not be allowed to avoid COGSA by invoking the Shipping Act.⁵ Hapag-Lloyd urges the Presiding Officer to see through the transparent attempt of Complainants to avoid COGSA's one-year statute of limitations (Section 3(6) of COGSA) and \$500 per package limitation (Section 4(5)) by recasting their tort claims as Shipping Act claims. A finding that the Commission has jurisdiction over the claims in this proceeding would be inconsistent with the previous rulings of the Commission and the federal courts cited above, and contrary to law. In addition, should the Commission find it has jurisdiction over claims such as those being made against Hapag-Lloyd in this case, it risks being inundated with actions by shippers who are seeking to avoid COGSA's one-year statute of limitations and limitation on carrier liability by casting their claims in Shipping Act terms.

Accordingly, all of Complainants' claims should be dismissed for lack of subject matter jurisdiction.

⁴ Of note, COGSA implements the United States' international treaty obligations under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (also known as the Hague Rules). See, I Schoenbaum, *Admiralty and Maritime Law*, §10-15 (4th Ed. 2004). In recent years, the Supreme Court has affirmed that COGSA is the governing law with respect to ocean carrier liability in international ocean transport. See, *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 12, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) and *Kawasaki Kisen Kaisha, Ltd. et al. v. Regal-Beloit Corp. et al.*, 561 U.S. ___ (June 21, 2010). Permitting shippers to circumvent COGSA by bringing Shipping Act claims would be contrary to existing U.S. law.

⁵ This entire proceeding appears to be an attempt by Complainants to avoid the one-year statute of limitation in COGSA by couching their claim in Shipping Act terms. This one-year statute of limitations is, in and of itself, a sufficient basis to dismiss this proceeding in its entirety.

C. HAPAG-LLOYD DID NOT VIOLATE SECTION 41102(C)

Complainants allege a violation of Section 41102(c), which makes it unlawful for a common carrier to:

fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

For the reasons set forth below, Hapag-Lloyd did not violate the foregoing prohibition.

1. Section 41102(c) Is Inapplicable To This Case

As a matter of law, Hapag-Lloyd did not violate Section 41102(c) because the Commission has held that this section does not apply to the type of claims being made in this case.

The Commission has held that Section 41102(c) does not apply to the transportation of property, stating:

Sections 17 and 10(d)(1) do not empower the Commission to address unjust or unreasonable carrier activity that relates to the transportation of property, which is the subject of COGSA. They address only activities which occur before or after the water transportation, the period COGSA does not cover.

(emphasis in original). *Definition of "Package," supra, at 114.* COGSA is applicable from the time the ship's tackle is hooked onto the cargo at the port of loading until the time when cargo is released from the tackle at the port of discharge. See, e.g., *Sony Magnetic Products Inc. of America v. Meriventi O/Y*, 863 F.2d 1537 (11th Cir. 1989); *Pan American World Airways, Inc. v. California Stevedore and Ballast Company*, 559 F.2d 1173 (9th Cir. 1977).

The damage to container MOGU2002520 occurred while the container was being loaded on the vessel. Proposed Finding of Fact #44; Complainants' Exhibit 47.

Accordingly, the damage to this container was covered by COGSA⁶ and this container cannot be the basis for a claim under Section 41102(c).⁷ Moreover, since any delay in Germany occurred during the transportation service being provided by Hapag-Lloyd (i.e., prior to release from tackle at the port of discharge), that delay is also part of the transportation covered by COGSA and cannot be the basis for a claim under Section 41102(c).

The Commission has also held that Section 41102(c) does not apply to activities that are not transportation related. *J.M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962)(refusal to refund overpayment of demurrage did not give rise to Section 17 claim where shipping activities had been completed). Here, by the time the containers were liquidated in February of 2009, the shipping activities in connection with the three containers had long since been completed.

In this regard, HLAG's obligation is to transport and deliver the cargo. Delivery is made when cargo is put at a place of rest on the pier so that it is accessible to the consignee, and the consignee is afforded a reasonable opportunity to come and get it. *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525 (FMC 1966); 1 Schoenbaum, *Admiralty and Maritime Law*, § 10-17 (4th Ed. 2004). Once delivery has been made, shipping activities are completed.

⁶ Even assuming *arguendo* that COGSA does not apply to the loading of the cargo, it would be applicable in this case because it is extended to the time prior to loading by paragraph 7(2) of the HLAG sea waybill issued for this container. See Exhibit HL-010.

⁷ In this regard, the instant proceeding is distinguishable from *Kuzela v. A.P. Moller-Maersk A/S*, Docket 1886(F), (December 13, 2007), in which it could not be determined that the damages occurred during a phase of the transportation covered by COGSA. The *Kuzela* case was subsequently dismissed after a finding was made that there had been no violation of Section 41102(c). See, Initial Decision in Docket 1886(F), June 26, 2008.

There is no dispute that Hapag-Lloyd delivered two of the liquidated containers (MOGU2051660 and MOGU2101987) in Gydnia on September 1, 2008 (Proposed Finding of Fact #35) and that the third (MOGU2002520) was delivered on or about December 23, 2008. These containers were made accessible to the consignee by Hapag-Lloyd as of those dates, but were not picked up. The sale of the containers by Int'l TLC in February of 2009, an event in which Hapag-Lloyd was in no way involved, was not and is not a shipping-related activity. Accordingly, liquidation of the three containers by Int'l TLC cannot constitute a violation of Section 41102(c) by Hapag-Lloyd, which fulfilled its legal obligation by delivering the containers.

2. Complainants Have Failed To Prove Conduct That Is A Prerequisite of A Section 41102(c) Violation

A complainant seeking to establish a violation of Section 41102(c) must show either a course of conduct that is unjust or unreasonable, or a pattern of deceit or an improper demand for payment in connection with a single shipment. Here, Complainants have not and cannot demonstrate either.

The Commission has long held that a single act or incident does not and cannot constitute "regulations and practices" for purposes of Section 41102(c)(formerly section 10(d)(1)). *Kamara v. Honesty Shipping Service and Atlantic Ocean Line*, 29 S.R.R. 321 (Settlement Officer 2001); *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1276 (Settlement Officer 1990); *Investigation of Practices of Stockton Elevators*, 8 F.M.C. 181 (FMC 1964); *J. M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962).

In *Altieri*, a terminal operator refused to refund an overpayment of demurrage on one shipment, and applied the overpayment to monies owed on a subsequent shipment.

The shipper filed an action at the FMC, seeking to recover the overpayment. The ALJ, in denying the shipper's claim, stated:

If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17. However, the action of respondent is an isolated or 'one shot' occurrence. Complainant has alleged and proved only the one instance of such conduct. It can not be found to be a 'practice', within the meaning of the last paragraph of section 17.

7 F.M.C. at 420 (emphasis in original, citations omitted).

In *Stockton*, the FMC investigated a marine terminal operator for allegedly providing discounted wharfage to one customer but not to others. The ALJ found no violation of law and, upon review of exceptions, the FMC affirmed his finding and made the initial decision part of their own ruling. 8 F.M.C. at 182. In the initial decision adopted by the FMC, the ALJ stated:

Similarly, even should it be found that granting allowances in five instances constituted a 'practice,' there is no violation in the absence of a finding that the practice was unjust or unreasonable.

8 F.M.C. at 199. He then went on to state:

It cannot be found that the Elevator engaged in a 'practice' within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity...the usual course of conduct. It is not an occasional transaction such as here shown.

8 F.M.C. at 201-201.

In *Deringer*, the complainant sought to recover \$6,000 for the loss of twelve cartons of cargo alleging, among other things, a violation of section 10(d)(1) of the Shipping Act. Resolution of the dispute turned in part on the fact that the bill of lading issued by respondent listed only the number of skids shipped, not the number of cartons shipped. In considering the section 10(d)(1) issue, the settlement officer wrote:

In any case, the sustaining of an alleged violation of Section 10(d)(1) requires more than the showing of unjust or unreasonable activity. It requires that the complainant prove failure: ‘...to establish, observe, and enforce just and reasonable *regulations and practices*...’ Marlin’s failure to specify on the bill of lading the number of boxes hardly demonstrates any shortcomings in this area. If Marlin did act improperly, only the existence of an isolated error has been demonstrated. Nothing in the records casts light upon its regulations or practices, and this constitutes a fatal flaw in Deringer’s case.

25 S.R.R. at 1276 (emphasis in original, footnote omitted).

The foregoing cases all stand for the proposition that a single act or occurrence cannot constitute a violation of former section 10(d)(1). Indeed, *Stockton* suggests that even a series of five instances may not constitute a practice.

This case involves a single incident or occurrence, whether that single incident is the damage to and delay of container MOGU2002520 or the sale of three containers by Int’l TLC. Just as in *Deringer*, there is nothing in the record to demonstrate that Hapag-Lloyd’s conduct in this case constitutes a regulation or practice. Indeed, Complainants’ Brief, at pages 4-5, acknowledges that this was an isolated incident of the type the foregoing decisions indicate is not a violation of former Section 10(d)(1). Thus, as a matter of law, the facts in this case do not and cannot sustain a finding of a violation of Section 41102(c).

Similarly, Complainants have not proven and cannot prove that Hapag-Lloyd engaged in a pattern of deceit or made an improper demand for payment.

In certain factual situations, the Commission has found violations of Section 41102(c)(former Section 10(d)(1)) in cases involving a single shipment. See, e.g., *Vaz v. Moving Services LLC and Global Ocean Freight, Inc.*, 31 S.R.R. 536 (Settlement Officer 2009). However, in such cases, the Commission has always found that the respondent either (a) demanded payment of amounts not lawfully due (see, e.g., *Total Fitness*

Equipment, Inc. v. Worldlink Logistics, Inc., 28 S.R.R. 534 (FMC 1998)(double billing found to be unreasonable practice); *Bernard & Weldcraft Welding Equipment v. Supertrans International, Inc.*, 29 S.R.R. 1348, 1354-55 (ALJ 2003)(double billing and/or refusal to release cargo without valid reason found to be unreasonable practice) and/or (b) engaged in a pattern of knowingly providing false information about the shipment or refusing to provide information about the shipment. See, e.g., *Miller v. French International Movers, Inc.*, 28 S.R.R. 1495, 1496 (Settlement Officer 2000) (repeated and continued deception constitutes unreasonable practice); *Jordan Valley Agriculture Company v. Africa Mid-East Line*, 28 S.R.R. 1328, 1330 (Settlement Officer 2000)(pattern of knowingly providing false information can constitute unreasonable practice); *Moreka v. Eastern Mediterranean Shipping Corporation*, 28 S.R.R. 1127, 1128 (Settlement Officer 1999)(pattern of deception and misinformation constitutes unreasonable practice); *J&D Services International, Inc. v. Ocean Eagle Container Line, Inc.*, 27 S.R.R. 1062, 1062 (Settlement Officer 1997)(pattern of deliberate misinformation constitutes unreasonable practice). See also, *Meyan SA v. International Freight Forwarders*, 30 S.R.R. 1397 (FMC 2007).

This case can be distinguished from all those where a violation of Section 41102(c) was found based on a single shipment or incident, because none of the necessary criteria for such a finding are present here.⁸

⁸ Recent Commission decisions finding a violation of Section 41102(c) (former 10(d)(1)) based on problems with a single shipment (see, e.g., *Atsitsobui v. Global Freightways*, Docket No. 1902(I), September 6, 2011 and *Houben v. World Moving Services*, 31 S.R.R. 1400 (FMC 2010)) appear to be anomalies and have been criticized (see dissent of Commissioner Khouri in *Atsitsobui*). Moreover, reliance by the Commission on the cases cited in *Houben* as support for the conclusion reached therein appears to be misplaced and does not alter the section 41102(c) analysis set forth above. Two of the cases cited in *Houben* (*Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991) and *Symington v. Euro Car Transport Inc.*, 26 S.R.R. 871 (ALJ 1993)) involved refusals to provide transportation service, which this case does not. *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788 (ALJ 1992) involved

There is nothing in the record to support any allegation that Hapag-Lloyd was demanding any additional payment from Complainants or anyone else, much less payment of amounts already paid or not otherwise due.⁹ Further, the record is clear that Hapag-Lloyd did not refuse to provide information and did not provide false or misleading information. Proposed Finding of Fact #67. Thus, none of the prerequisites for finding a violation of Section 41102(c) based on a single shipment or incident is present here, and the section is inapplicable to this case as a matter of law.

3. Even If Section 41102(c) Applies, All of Hapag-Lloyd's Conduct Was Reasonable

Even if Section 41102(c) is applied to Hapag-Lloyd's conduct with respect to the cargo herein at issue (which, for the reasons set forth in the preceding paragraphs it should not), Hapag-Lloyd's conduct was just and reasonable.

Complainants allege there are five acts or omissions of Hapag-Lloyd which violate Section 41102(c). Each of these is discussed below.

The first act is the damage to Container MOGU2002520 during loading. However, this was clearly an accident and Hapag-Lloyd is unaware of any precedent which would support the proposition that unintentional cargo damage is a violation of

a pattern of conduct, 26 S.R.R. at 795, and thus does not support the "single incident" approach to Section 41102(c) taken in *Houben and Atsitsobui*. In *European Trades Specialists v. Prudential Grace Lines*, 19 S.R.R. 59 (FMC 1979), the Commission found a violation of former Section 18(b)(3), but held there had been no violation of Section 17, the forerunner of current Section 41102(c). 19 S.R.R. at 63. Similarly, in *Maritime Cargo Corporation v. Acme Fast Freight of Puerto Rico*, 18 S.R.R. 853 (FMC 1978), the FMC found no violation of Section 17, 18 S.R.R. at 857, note 8.

⁹ Although one internal Hapag-Lloyd memo did contemplate recovering charges from the Port of Portland as alleged by Complainants (see Complainants' Brief at p. 12), this is irrelevant to Hapag-Lloyd's conduct vis-à-vis Complainants and is intended solely to mislead the Presiding Officer and paint Hapag-Lloyd in an unfavorable light.

Section 41102(c).¹⁰ In any event, as noted above such damage is part of the transport covered by COGSA and is not subject to the Shipping Act. To find that cargo damage is in and of itself a violation of the Shipping Act would eviscerate COGSA by allowing any shipper whose cargo is damaged to avoid limitations on carrier liability established by COGSA simply by filing a complaint with the FMC.

The second and third bases for the alleged violations are the accidental loading of the damaged container and the failure to return the damaged container to Complainants in Portland. The record is clear that this was an accident. Proposed Finding of Fact #55. Hapag-Lloyd has found no precedent supporting the proposition that the accidental loading of damaged cargo constitutes a violation of Section 41102(c), and Complainants cite none. In fact, all of the precedent located by Hapag-Lloyd supports the opposite conclusion.

In *Patricia Eyes v. Wallenius Wilhelmsen Lines*, 30 S.R.R. 1064 (ALJ 2006), administratively final August 11, 2006, a Commission administrative law judge denied a claim for reparations based on damage to a motor home transported by respondent. The motor home was moving from the U.S. West Coast to the United Kingdom, and was damaged in the course of vessel operations during an intermediate port call in Norfolk, VA. Complainant sought reparations in part for losses suffered as a result of the carrier's decision to continue transporting the damaged motor home rather than discharging it in Norfolk. The ALJ held that because the carrier would have been subject to claims whether it discharged the motor home in Norfolk or delivered it to the United Kingdom

¹⁰ The Commission has held that a shipper does not violate the prohibition against use of an "unjust or unfair device or means" in 46 U.S.C. 41102(a) simply by failing to pay freight. *See*, 46 C.F.R. § 545.2. A term appearing in several places in a statute is to be read the same way each time it appears. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). Accordingly, the Commission must find that a service failure such as cargo damage or delay, without more, does not constitute a violation of 46 U.S.C. 41102(c).

and chose the course of conduct which was least disruptive to vessel operations, the decision to transport the damaged motor home to the United Kingdom was not a violation of Section 41102(c). Thus, the intentional transportation of damaged cargo is not necessarily unreasonable.

The Commission has also held that claims for loss of or damage to cargo or for damages due to failure to follow instructions to ship on a particular voyage do not fall within the Shipping Act. See, *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company*, 2 U.S.M.C. 517 (USMC 1941), cited in *Altieri, supra*.

If failure to follow instructions and intentional transportation of damaged cargo do not constitute violations of the Shipping Act, then the accidental shipment of damaged cargo contrary to shipper instructions herein at issue should not give rise to a claim under Section 41102(c) of the Shipping Act.¹¹

The fourth basis is the delay of the cargo in Germany. However, the Commission's own precedent under Section 41102(c) indicates that mere delay does not constitute a violation of this prohibition. The Commission stated in *Meyan SA v. International Frontier Forwarders, supra*, that:

We note that even if a delay of two months did occur, it is unlikely that mere delay in shipping the cargo would amount to a violation of section 10(d)(1) of the Shipping Act, 46 U.S.C. §41102(c). Previous cases have found a Shipping Act violation for prolonged delay only when additional factors are present, such as a pattern of deception.

¹¹ Complainants are arguing, without legal support, that accidental loading of cargo is *per se* unreasonable. However, in other contexts, agencies recognize that the accidental loading and discharge of cargo is a sufficiently common occurrence that exceptions to otherwise strict regulatory requirements have been adopted to deal with cargo that is not loaded or discharged at the appropriate time and/or place. See, e.g., 19 C.F.R. §4.34.

30 S.R.R. 1397, 1400, n. 2 (FMC 2007). There are no such additional factors present here, and thus no violation of Section 41102(c).¹²

Complainants attribute the delay of container MOGU2002520 in Germany to: (i) the possible termination of the voyage in Hamburg; (ii) the customs requirements applicable to transporting the container by truck; and (iii) the reluctance of the consignee to receive the container. Complainants' Brief, p. 9. None of these constitutes a pattern of deception or other egregious conduct on the part of Hapag-Lloyd that Complainants' must show in order to prevail on a claim of a violation of Section 41102(c).

Complainants' attempt to demonstrate egregious conduct on the part of Hapag-Lloyd by referring to the possible termination of the voyage. Their theory seems to be that the cargo was delayed because Hapag-Lloyd was fixated on terminating the voyage and failed to do anything to facilitate movement of container MOGU2002520. This position is not supported by the facts.

While Hapag-Lloyd considered terminating the voyage in Hamburg, the evidence shows that this was just one of many options considered for dealing with the damaged container. See, e.g., Proposed Finding of Fact #66. Indeed, correspondence subsequent to the early September, 2008 correspondence cited by Complainants shows that termination of the voyage was far from the only option under consideration. In an e-mail dated September 23, 2008 (Complainants' Exhibit 96), Hapag-Lloyd is seeking customs documents to permit delivery of the container. On September 29, 2008, Hapag-Lloyd is seeking to truck the container from Hamburg to Gdynia. Complainants' Exhibit 97, p. 2 of 4. On October 14, 2008, Hapag-Lloyd is still working on facilitating transport to

¹² See Footnote #10.

Gdynia. Complainants' Exhibit 97 p. 3 of 4. Thus, any argument that Hapag-Lloyd determined in early September of 2008 to terminate the voyage and refused to consider other possibilities is simply not accurate. Moreover, the fact that Hapag-Lloyd never terminated the voyage (which it may have been entitled to do under Paragraph 16(3) of its sea waybill, see Exhibit HL-010) conclusively shows that Complainants' attempt to create a pattern of deception or other egregious conduct out of the consideration of a termination of the voyage fails.

Similarly, the customs requirements applicable to the possible movement of the damaged container by land, and Hapag-Lloyd's attempts to comply with those requirements, do not constitute a pattern of deception or other egregious conduct on the part of Hapag-Lloyd. A closer examination of the facts relating to the documentation for the damaged container shows that the delay was in fact due primarily to the failure of the Complainants and their agents/contractors.

The documents necessary for the customs clearance of a land move were a packing list and a commercial invoice. See Complainants' Exhibit 97. These documents appear to be the same "commercial documents" that would have been necessary to obtain the release of the container from the port of Gdynia. See, Testimony of Katarzyna Ossowska, Transcript pp. 633-635 and 639. In other words, even if the container could have been moved to Gdynia sooner, Complainants could not have obtained its release, since the documents necessary for it to clear customs were not in the possession of the destination agent, Baltic Sea Logistics. Thus, Complainants did not suffer any harm due to the delay in obtaining these documents, since without them the container would have merely been stuck in Gdynia, rather than in Germany.

Complainants argue that the consignee, Baltic Sea Logistics, had all of the required documents on or about September 8, 2008. Complainants' Brief, p. 8. However, the September 8 e-mail from Limco to Hapag-Lloyd upon which this contention is based states: "As per my customer, everything is OK. The agent got the documents they were waiting for." Complainants' Exhibit 95, p. 4 of 5. It is not clear from this e-mail what documents were sent to the agent, or by whom. Further, since Limco is merely relating what it was told by its customer, the document does not reflect the first-hand knowledge of the writer. In short, Complainants have not proven that Baltic Sea Logistics received the necessary commercial documents in early September of 2008.

More reliable evidence in the record contradicts Complainants' contention with respect to the documentation. On November 13, 2008, Baltic Sea Logistics wrote an e-mail referring to "failings and other problems with releasement of the cargo." Complainants' Exhibit 102. Moreover, Ms. Ossowska testified that the cargo was loaded into a different container only when the consignor sent the commercial documents. Testimony of Katarzyna Ossowska, Transcript pp. 638-639. From these two separate pieces of evidence, it must be concluded that the necessary documents were not provided until November of 2008, rather than in early September.

Moreover, it is reasonable to conclude that the lack of written contracts for the sale of the goods in container MOGU2002520 was the reason that no commercial invoice was provided to Baltic Sea Logistics (or anyone else) early in the process. In the absence of a written contract for the sale of the goods, there would be no need to create a commercial invoice. Thus, it was Complainants preference for conducting business in an

informal manner that created the problem on which Complainants now seek to blame the delay in the handling of the container.

The last factor that Complainants allege contributed to the delay was the unwillingness of the consignee, Baltic Sea Logistics, to receive the damaged container. Since Baltic Sea Logistics was not the agent of Hapag-Lloyd (Proposed Finding of Fact #15), this unwillingness does not constitute a pattern of deception or egregious conduct on the part of Hapag-Lloyd. In any event, the delay is once again attributable to Complainants and their agents.

While it is true that the consignee, Baltic Sea Logistics, did not wish to receive the damaged container (see Complainants' Exhibit 93, p. 4 of 4), the primary reason Baltic Sea Logistics did not want to receive this container is that it had no information relating to the destination of the container, was not in contact with the ultimate consignee, and had none of the commercial documents required for the container to clear customs. See Complainants' Exhibit 97, p. 2 of 4; Complainants' Exhibits 101 and 102; Exhibit HL-068.

In any event, the argument regarding the delay of the container in Germany is a red herring. Even if container MOGU2002520 had arrived in Gydnia prior to November 21, 2008, Complainants could not have shipped all five containers together because they had not paid the freight on containers MOGU2051660 and MOGU2101987 at that time. On November 21, 2008, Complainants picked up two containers from the port of Gydnia. Thus, after that date, prompt arrival of MOGU2002520 was not urgent since Complainants could no longer move all five containers together, and there was no market

for the plywood in container MOGU2002520 (as evidenced by the non-sale of the plywood in the two containers picked up on November 21, 2008).

The final basis upon which Complainants allege a violation of Section 41102(c) is the alleged misdelivery of the three liquidated containers. There are two fatal flaws in this argument.

First, like conversion, negligence and fraud, misdelivery is an issue governed by COGSA, and not the Shipping Act. Federal courts have repeatedly held that misdelivery is not a deviation from the contract of carriage within the meaning of COGSA, and that misdelivery does not deprive a carrier of its defenses to or limitations on liability under that statute. See, *Unimac Company Inc. v. Ocean Service, Inc.*, 43 F.3d 1434 (11th Cir. 1995); *B.M.A. Industries, Ltd. v. Nigerian Star Line, Ltd.*, 786 F.2d 90 (2nd Cir. 1986). If the FMC were to find that misdelivery constitutes a Shipping Act violation, it would be doing what federal courts have concluded they cannot and should not do. Moreover, such a decision would deprive Hapag-Lloyd of the statutory rights it has been granted by Congress under COGSA, a statute under which the Commission has held it has no authority.

Second, even if the Presiding Officer entertains this argument, there has been no misdelivery here. The consignee named on the Hapag-Lloyd sea waybills and bills of lading covering the three liquidated containers was Baltic Sea Logistics. Proposed Findings of Fact #30, #32 and #58. As noted above, delivery is made when cargo is put at a place of rest on the pier so that it is accessible to the consignee, and the consignee is afforded a reasonable opportunity to come and get it. *Investigation of Free Time Practices – Port of San Diego*, 9 F.M.C. 525 (FMC 1966); 1 Schoenbaum, *Admiralty*

and Maritime Law, §10-17 (4th Ed. 2004). Here, the cargo was delivered to Baltic Sea Logistics, which was notified of its arrival. See, e.g., Exhibits HL-0128 through HL-0132. The fact that the cargo was subsequently released by Baltic Sea Logistics, who was not employed by or acting for Hapag-Lloyd, does not and cannot constitute misdelivery on the part of Hapag-Lloyd.¹³

In light of the foregoing, the Presiding Officer must find that there has been no violation of Section 41102(c) by Hapag-Lloyd.

D. HAPAG-LLOYD DID NOT ENGAGE IN AN UNREASONABLE REFUSAL TO DEAL OR NEGOTIATE, AND THUS DID NOT VIOLATE SECTION 41104(10) OF THE ACT

Complainants attempt to allege a violation of Section 41104(10), which prohibits an unreasonable refusal to deal or negotiate. As explained in greater detail below, because Hapag-Lloyd did not engage in an unreasonable refusal to deal or negotiate, it did not violate Section 41104(10).

As an initial matter, Section 41104(10) does not apply to the settlement of claims. The prohibited acts set forth in the Shipping Act are intended to preserve common carriage, that is, to preserve the right of all shippers to receive the services that an ocean common carrier holds out to the public. See, e.g., *Report of The Advisory Commission on Conference in Ocean Shipping*, p. 14 (April, 1992). In adopting the prohibition against an unreasonable refusal to deal, Congress was mainly concerned with boycotts and refusals to provide service. *Consumer Electronics Shippers' Association, Inc. v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 85, 93 (ALJ 1991). Thus, former

¹³ This case is distinguishable from *DSW International, Inc. v. Commonwealth Shipping, Inc.*, 31 S.R.R. 1850 (ALJ 2011), relied on by Complainants. In that case, cargo was delivered by the carrier to its agent, who did not deliver it to the consignee. Thus, the carrier was held liable for the actions of its agent. Here, Baltic Sea Logistics was not the agent of Hapag-Lloyd, and Hapag-Lloyd is not liable for BSL's actions.

Section 10(b)(10) was not intended to apply to the circumstances of this case, i.e., the settlement of a specific cargo claim. To hold otherwise would place the FMC in the position of regulating every contentious negotiation of a cargo claim in U.S. ocean liner commerce.

Interestingly, Complainants do not allege an unreasonable refusal to deal or negotiate, but rather that Hapag-Lloyd engaged in “unreasonable dealing or negotiation.” Complainants’ Brief, p. 10. Thus, it is questionable whether they are actually alleging a violation of Section 41104(10). However, even if Section 41104(10) does apply to this case and Complainants’ allegations are interpreted as being based on this section, Hapag-Lloyd has not violated this prohibition.

Much of Complainants’ argument on this issue is devoted to the delay of container MOGU2002520 in Germany and Hapag-Lloyd’s threat to begin abandonment of the cargo. Complainants Brief, pp. 11-12. These factual allegations are irrelevant to the issue of whether Hapag-Lloyd violated Section 41104(10), and are intended solely to paint Hapag-Lloyd in a negative light.¹⁴ An examination of the relevant facts demonstrates that Complainants’ allegations are without merit.

The record is clear, and Complainants concede, that Hapag-Lloyd negotiated, through Limco, for the return of the container while it remained in Portland. Proposed Finding of Fact #49; Complainants’ Brief, p. 11. These negotiations focused on the cost of returning the container to Complainants and transloading the cargo into another container, and were terminated by the accidental loading of the damaged container. Even if Section 41104(10) applies to claims (which, as noted above, it does not), it was hardly

¹⁴ In any event,, as noted above abandonment was merely one of many options considered with respect to container MOGU2002520, and was not carried out.

unreasonable for Hapag-Lloyd to cease negotiations about the cost of a returning a container once it became impossible to return the container.¹⁵ The accidental loading of the container is also not a refusal to deal or negotiate.

Hapag-Lloyd did decline to let Complainants inspect the damaged container on the terminal, but that refusal was based on federally imposed security requirements not within the control of Hapag-Lloyd (Proposed Finding of Fact #46) and was therefore not unreasonable, particularly since Hapag-Lloyd did negotiate with Limco concerning the return of the container.

Although Hapag-Lloyd did not engage in direct contact with Complainants, the record reflects that it is customary for ocean common carriers not to deal directly with the underlying clients of their NVOCC customers. Proposed Finding of Fact #101. Thus, it cannot be said that Hapag-Lloyd communicating with the Complainants through Limco was an unreasonable refusal to deal or negotiate.

Finally, it was also reasonable for Hapag-Lloyd not to affirmatively respond to the November 15, 2008 claim from Complainants. The record shows that, at the time that claim was written, Hapag-Lloyd was in possession of the following information which made it reasonable for Hapag-Lloyd not to respond to that claim:

(i) The November 15 claim shows the price of container MOGU2002520 as \$4,800. Hapag-Lloyd knew that price was inflated. Proposed Finding of Fact #50.

(ii) The November 15 claim seeks \$4,800 and \$3,500, respectively, for the two types of ATVs in container MOGU2002520. Under the terms of Hapag-Lloyd's sea waybill of lading, its maximum liability for cargo loss or damage is \$500 per package or customary freight unit. Proposed Finding of Fact #97.¹⁶

¹⁵ The record reflects that loading of the container was accidental (Proposed Finding of Fact #55) and that there was no financial benefit to Hapag-Lloyd in loading the container, since the cost of returning it would have been borne by the terminal operator. Proposed Finding of Fact #57.

¹⁶ Since the ATVs were listed separately on the sea waybill, each is a package for purposes of COGSA. 1 Schoenbaum, *Admiralty and Maritime Law*, § 10-34 (4th Ed. 2004).

(iii) The November 15 claim seeks \$23,600 for delay and interest, but cites no basis whatsoever in contract or otherwise for that recovery. Paragraph 7(5) of the terms and conditions of HLAG's sea waybill issued for Container MOGU2002520 absolves it of liability for delay. Exhibit HL-010, paragraph 7(5); Proposed Finding of Fact #77.¹⁷

(iv) The November 15 claim assumes the container and its contents to be a total loss but, at that very time, the cargo was en route from Germany to Poland, having been transloaded into another container provided by Hapag-Lloyd, with the cost of the transloading and the other container being absorbed by Hapag-Lloyd. Complainants' Exhibit 100, p. 1 of 2.

In light of the foregoing, it was reasonable for Hapag-Lloyd not to pay the November 15 claim of Complainants. Moreover, as a legal matter, a refusal by one party to accede to every demand of another does not constitute an unreasonable refusal to deal. *Consumer Electronics Shippers Association, supra.*, citing *Trace X Chemical, Inc. v. Canadian Industries Ltd., et al.*, 738 F.2d 261, 267 (8th Cir. 1984); *Fairdale Farms v. Yankee Milk, Inc.*, 715 F.2d 30, 34 (2nd Cir. 1983).

E. HAPAG-LLOYD DID NOT VIOLATE SECTION 41104(4)(E), WHICH IS INAPPLICABLE TO THIS PROCEEDING

Because the shipments in question were transported under the terms of a service contract between Hapag-Lloyd and Limco, and Section 41104(4)(E) of the Act applies only to service pursuant to a tariff, Hapag-Lloyd did not violate this section of the Shipping Act.

Section 41104(4) provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not --

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—

¹⁷ Complainants, as the customer of the NVOCC to whom the Hapag-Lloyd sea waybill was issued, are bound by the terms of that sea waybill. *Norfolk Southern Railway v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 32-35 (2004).

(emphasis added).

Under the plain language of the statute, the prohibition of Section 41104(4) does not apply to service under a service contract. This is confirmed by the legislative history of the Ocean Shipping Reform Act of 1998, which states:

Current section 10(b)(6), to be redesignated as section 10(b)(4), would be amended to clarify that it applies only to service pursuant to a tariff and includes charges as well as rates.

S. Rep. No. 61, 105th Cong., 1st Sess., p. 27 (1997). See also *Consumer Electronics Shippers Association v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 85, 92 (ALJ 1991)(former 10(b)(6), now 10(b)(4), did not apply to service contracts).

It is undisputed that the shipments at issue in this case were transported pursuant to the terms of a service contract between Hapag-Lloyd and Limco. Proposed Finding of Fact #14. Accordingly, as a matter of law, Section 41104 does not apply to this case and the Presiding Officer must find that Hapag-Lloyd did not violate Section 41104(4)(E).¹⁸

F. HAPAG-LLOYD DID NOT VIOLATE SECTIONS 41104(11), 41104(12) OR 41104(4)(D) OF THE SHIPPING ACT

1. Hapag-Lloyd Did Not Accept Cargo From, Transport Cargo For The Account Of, Or Enter Into A Service Contract With, An Unbonded, Untariffed NVOCC

Hapag-Lloyd did not accept cargo from, transport cargo for the account of, or enter into a service contract with an unbonded, untariffed NVOCC. Accordingly, it did not violate Sections 41104(11) or 41104(12) of the Shipping Act.

¹⁸ Even if these provisions of the Act apply to the shipments hereunder which, as noted above they do not, the Presiding Officer should find for Hapag-Lloyd. Section 41104(4)(E) is intended to apply to situations in which persons suffering similar harm are treated in a dissimilar fashion. See, e.g., *DelMonte Corp. v. Matson Navigation Co.*, 19 S.R.R. 1037 (ALJ 1979)(disparate treatment of different shippers whose cargo was damaged in same incident violated Section 14 Fourth (c)), the predecessor of 41104(4)(E)). This is not such a situation and no such allegation has been made by Complainants in this case.

Sections 41104(11) and 41104(12) make it unlawful for an ocean common carrier, either alone or in conjunction with any other person, directly or indirectly to:

(11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title; or

(12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title, or with an affiliate of such an ocean transportation intermediary.

The parties to this proceeding have stipulated that Limco is, and was at all material times, an ocean transportation intermediary, licensed with the Federal Maritime Commission and operating lawfully as a non-vessel operating common carrier. Undisputed Facts, ¶ 3.

Accordingly, the only basis upon which Hapag-Lloyd could have violated Sections 41104(11) and/or (12) would be through dealings with Int'l TLC.

Hapag-Lloyd does not concede that Int'l TLC was acting as a NVOCC with respect to the shipments herein at issue. Indeed, it is unclear to Hapag-Lloyd whether Complainants have met their burden of proof in establishing that Int'l TLC was acting as a NVOCC with respect to these shipments. Fortunately, a resolution of the allegations against Hapag-Lloyd under Sections 41104(11) and (12) do not require a lengthy discussion of the status of Int'l TLC because, even if one assumes that Int'l TLC was acting as a NVOCC without publishing a tariff and posting financial security with the Commission, the fact is that Hapag-Lloyd did not engage in any prohibited conduct with Int'l TLC, either knowingly or otherwise.

The record in this proceeding reflects that Hapag-Lloyd had a service contract with Limco and that it did not have a service contract with Int'l TLC. Proposed Findings of Fact

#14 and #96. The record also reflects that the cargo was booked by Limco and not Int'l TLC, and that Limco paid Hapag-Lloyd's freight charges on all of the cargo. Proposed Findings of Fact #99 and #100. Thus, Hapag-Lloyd did not accept cargo from or transport cargo for the account of Int'l TLC, nor did Hapag-Lloyd have a service contract with Int'l TLC.

On the basis of the foregoing facts, the Presiding Officer must find that Hapag-Lloyd did not violate Sections 41104(11) or 41104(12) of the Shipping Act.

2. Hapag-Lloyd Did Not Violate Section 41104(4)(D)

As noted above in the discussion of Section 41104(4)(E), the entirety of Section 41104(4) deals only with tariff shipments, and the shipments herein at issue are service contract shipments. Accordingly, section 41104(4)(D) does not apply to this case. Even if it did apply, section 41104(4)(D) deals with the condition of the cargo, and no claim is made hereunder with respect to the condition of the cargo. See, *Joseph and Sibyl James v. South Atlantic & Caribbean Line, Inc.*, 11 S.R.R. 639 (ALJ 1970). Accordingly, the Presiding Officer must find that Hapag-Lloyd did not violate Section 41104(4)(D) of the Shipping Act.

G. COMPLAINTANTS ARE NOT ENTITLED TO REPARATIONS

Assuming *arguendo*, and in the unlikely event Hapag-Lloyd is found to have violated one or more provisions of the Shipping Act, for the reasons set forth below Complainants are not entitled to an award of reparations from Hapag-Lloyd.

1. Applicable Legal Standards

Under 46 U.S.C. §41305(b), a complainant is entitled to reparations for "...actual injury caused by a violation of this part...". In order to recover reparations, a complainant must show with reasonable certainty that the violation of law is the

proximate cause of the loss or injury. See, *Rose International, Inc. v. Overseas Moving Network International, Ltd.*, 29 S.R.R. 119, 187 (FMC 2001); *Rose v. Koach International, Inc.*, 26 S.R.R. 920 (Settlement Officer 1993) (“In order to win an award of reparation, one must do more than demonstrate a statutory violation. It is necessary also to prove that the established violation caused the pecuniary injury at issue.”) Proximate cause is defined as “a cause that directly produces an event and without which the event would not have occurred.” *Black’s Law Dictionary*, 8th ed., p. 234.

A defendant whose conduct is determined to have been a proximate cause of harm can be relieved of liability by establishing that a superseding cause has occurred. A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about. *Restatement (Second) Of Torts*, § 440. Put another way, “a later cause of independent origin that was not foreseeable cuts off the proximate causation of defendant’s negligence.” *Farr v. NC Machinery Co.*, 186 F.3d 1165 (9th Cir. 1999), citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996).

2. Complainants Cannot Demonstrate Proximate Causation

Even if the Presiding Officer should determine that Hapag-Lloyd violated one or more provisions of the Act, such violation(s) were not the proximate cause of any pecuniary damage suffered by Complainants and/or Hapag-Lloyd is relieved of liability by superseding causes.

Complainants’ case, distilled to its essence, is that but for the loading of damaged MOGU2002520 in Portland and the delay to that container in Germany, they would not have suffered the loss of the three containers liquidated by Int’l TLC. This is patently false, is not supported by the record, and is an attempt by Complainants to use the

problems with Container MOGU2002520 to avoid responsibility for their own failures. The reality is that numerous failures on the part of Complainants and acts on the part of Int'l TLC constitute intervening and superseding causes that relieve Hapag-Lloyd of any liability.

(a) Actions by Complainants, Container MOGU2002520

As Complainants point out, the freight on this container was paid prior to the scheduled arrival of the container in Poland. Complainants' Brief, p. 11. Thus, Complainants could have picked up this container at any time after its arrival in December of 2008. However, for reasons that remain unclear, Complainants failed to do so. This failure of Complainants to pick up a container for which they had paid freight was unforeseeable to Hapag-Lloyd (particularly in light of the repeated demands for delivery of the container), and occurred after the damage to the container in Portland and the delay of the container in Germany. But for Complainants inexplicable failure to pick up this container, it would not have remained in the Port of Gdynia and would not have been sold by Int'l TLC in late February of 2009, approximately 2 months after its arrival in Poland. Thus, Complainants' failure to pick up the container constitutes a superseding cause which relieves Hapag-Lloyd of any liability with respect to container MOGU2002520.

(b) Actions by Complainants, Containers MOGU2051660 and MOGU2101987

Similarly, Complainants' own failure to act is the proximate cause of their loss of these two containers.

These two containers arrived in Poland in September of 2008. Complainants did not pay freight on these two containers until March/April of 2009. Complainants' Brief,

p. 11; Proposed Finding of Fact #37. As a result of the failure of Complainants to pay the freight due on these last two containers, Limco placed a hold on them. Proposed Finding of Fact #38. It was Complainants' failure to pay the freight on containers MOGU2051660 and MOGU2101987, and the resulting hold placed on them by Limco, not any damage or delay to MOGU2002520, which was the proximate cause of the loss of these two containers to Complainants. Had Complainants paid the freight in a timely manner, they could have picked up these containers any time after September 1, 2008.

The record shows that the sale of these containers resulted from inaction on the part of Complainants, rather than anything Hapag-Lloyd did or did not do with respect to container MOGU2002520. Although Complainants allege that they were withholding payment of freight on these two containers as a result of the problems with Container MOGU2002520, as a matter of law, Complainants were not entitled to withhold payment on these containers. Proposed Finding of Fact #40.¹⁹ Moreover, the record shows that Complainants were having financial difficulties in September of 2008 (Testimony of Yakov Kobel, Transcript pp. 266-268), and this lack of funds was the real reason for non-payment. Regardless of whether non-payment was the result of a wrongful form of self-help or a lack of funds, it is this subsequent and unforeseeable act on the part of Complainants that was the proximate cause of their loss.

Where loss is due to an unforeseeable act on the part of the plaintiff done after the act of the defendant, the defendant is relieved of liability. In *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996), the U.S. Supreme Court considered a claim by a tanker operator against the operator and designer of a mooring system for loss of one of its

¹⁹ See also, *Bernard & Weldcraft Welding Equipment v. Supertrans International, Inc.*, 29 S.R.R. 1348, 1356, n. 14 (ALJ 2003).

vessels that broke away from its mooring during a storm and subsequently ran aground on a reef. The court found that the captain of the vessel did not determine his position prior to maneuvering the vessel after control had been reestablished following the breakaway from the mooring. The court thus found that the captain's negligence, which came after the conduct of the mooring operator and designer, and which was unforeseeable to them, was the proximate cause of the loss of the vessel. On that basis, the court found that the mooring operator and designer could not be held liable for loss of the vessel, stating:

The legal question that we took this case to address is whether a plaintiff in admiralty that is the superseding and thus the sole proximate cause of its own injury can recover part of its damages from tortfeasors or contracting partners whose blameworthy actions or breaches were causes in fact of the plaintiff's injury. As we have held above, the answer is that it may not.

517 U.S. at 840. While Hapag-Lloyd does not concede that its actions were blameworthy or breaches, even if they were, it is not liable given the subsequent actions of Complainants.

(c) Actions of Int'l TLC

The record also reflects that the three liquidated containers were sold by Int'l TLC without any knowledge or involvement by Hapag-Lloyd. Proposed Finding of Fact #91. It was this act, unforeseeable by Hapag-Lloyd and performed by a third party subsequent to the conduct of Hapag-Lloyd, that is the proximate cause of Complainants' loss.

It was the failure to act on the part of Complainants, and the resulting sale of the containers by Int'l TLC, not any conduct on the part of Hapag-Lloyd, that deprived Complainants of their property and caused them whatever damage they may have suffered. Thus, there are at least two intervening and superseding causes which relieve

Hapag-Lloyd of any liability which might otherwise arise from the damage to and delay of container MOGU2002520:

- (i) The failure of Complainants and/or their consignees to pay freight charges and pick up the cargo between arrival in Gdynia in September and December of 2008 and February 23, 2009 (when it was sold by Int'l TLC); and
- (ii) The independent act of Int'l TLC in selling the containers and their contents.

Under the foregoing circumstances, Complainants, as a matter of law, cannot demonstrate that any act or omission of Hapag-Lloyd was the proximate cause of their loss.

3. Complainants' Failure To Mitigate Their Damages Relieves Hapag-Lloyd Of Liability

Even if Hapag-Lloyd could otherwise be held liable for any damage suffered by Complainants, Complainants' failure to mitigate their damages relieves Hapag-Lloyd of any such liability.

It is well-established law that a party injured by the conduct of another must take reasonable actions to minimize, i.e., mitigate, the damages it has suffered. The Commission has applied this principle to cases involving claims for reparations made under the Shipping Act. *Rose International, Inc. v. Overseas Moving Network International, Inc.*, 29 S.R.R. 119, 191 (FMC 2001); *California Shipping Line, Inc. v. YangMing Marine Transport Corp.*, 25 S.R.R. 1213, 1231 (FMC 1990). In *Rose*, the Commission stated:

Mitigation 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.

Here, Complainants failed to mitigate their damages and thus may not recover for losses which they could have reasonably avoided without an undue risk or burden.

As noted above, Complainants could have picked up container MOGU2002520 any time after its arrival in Poland in December of 2008. They could have paid the freight due on containers MOGU20151660 and MOGU2101987 and picked up those containers at any time after their arrival in early September of 2008. By paying \$10,200 in freight charges due on containers MOGU20151660 and MOGU2101987, and several thousand dollars extra to transport all three containers by truck rather than rail, Complainants could have avoided the sale of what they assert is cargo valued at over \$114,000. It certainly would not be an unreasonable burden to spend \$15,000 or \$20,000 to protect cargo valued at over five times that amount.

This failure to mitigate is particularly egregious given the January 9, 2009 letter from Int'l TLC to Complainants, warning them that their cargo was at risk of liquidation. Complainants' Exhibit 79. Complainant Kobel testified that he received this letter, but ignored it because it contained some factual inaccuracies. Proposed Finding of Fact #82.

Under these facts, it would be inequitable and contrary to law for the Federal Maritime Commission to hold that Hapag-Lloyd is liable for losses allegedly suffered by Complainants when, subsequent to the alleged acts/omission of Hapag-Lloyd, the cargo was sold by Int'l TLC with no involvement by Hapag-Lloyd, and the sale itself could have been avoided if Complainants had not ignored the warning they admittedly received from Int'l TLC and simply picked up their containers.

4. Complainants' Calculation of Damages Is Improper

Although, for the reasons set forth above, Hapag-Lloyd should not be held liable to Complainants for any reparations, it must also be noted that Complainants have included in their claim for reparations certain amounts which are improper.

Complainants are not entitled to damages for the three containers, since the purchase price for these containers was paid by Emmanuel Logistics. Complainants' Exhibit 123. The Commission has held that only the party that suffered actual financial injury may receive reparations. See, *Tradecheck, LLC v. Sea-Land Service, Inc.*, 27 S.R.R. 334 (Settlement Officer 1995); *Procter & Gamble Manufacturing Co. v. Lykes Bros. Steamship Co., Inc.*, 25 S.R.R. 1370 (Settlement Officer 1991). Since Complainants did not pay for the containers, they did not suffer a financial injury from the sale of the containers, and are not entitled to reparations with respect to the containers themselves.

Complainants seek \$4,875 in storage charges for container MOGU2112451 and MOGU2003255, which were the two containers delivered to Poland on July 2, 2008. These two containers were picked up on November 21, 2008, meaning they were stored for 142 days. This equals a storage charge of \$17.17 per day per container ($4,875/142 = 34.33$; $34.33/2 = 17.77$). However, as noted earlier in this brief, these two containers would have had to have been stored until at least September 1, 2008, when the last two containers that made up the group of 5 containers that were to have been shipped together by rail arrived in Poland. Thus, as a theoretical maximum, Complainants would be entitled to storage charges of \$2,747.21 (\$17.17 per day per container from September 1 to November 21).

However, even that amount overstates Complainants damages for storage charges. Freight on containers MOGU2051660 and MOGU2101987 was not paid as of September 2, 2008, and there is no evidence in the record to support a conclusion that freight would have been paid on MOGU2051660 and MOGU2101987 had MOGU2002520 not been

delayed. Accordingly, the time that containers MOGU2003255 and MOGU2112451 spent in storage after September 1, 2008 resulted from the failure of Complainants to pay the freight on the last two containers to arrive, is the responsibility of Complainants, and does not constitute damages for which they are entitled to reparations.

5. Awarding Complainants Reparations Would Be Contrary To Law
And Expose Hapag-Lloyd To Duplicative Claims

Complainants seek reparations for amounts paid by other persons. Awarding Complainants reparations for amounts paid by others is contrary to the Shipping Act and would expose Hapag-Lloyd to duplicative claims.

At the hearing, Complainants testified that the cargo herein at issue was purchased with financial assistance from various family members. Proposed Finding of Fact #1. Certain costs were also paid by family members or entities owned or controlled by them, such as the payment for the containers made by Emmanuel Logistics. See, e.g., Complainants' Exhibit 123.

The Shipping Act authorizes the Federal Maritime Commission to award reparations only for "actual injury." As noted above, while any party may file a complaint alleging a violation of the Shipping Act, only a party that actually suffered financial injury may be awarded reparations. Commission precedent holds that persons who have not paid freight or charges have not suffered financial injury. See, *Tradecheck, LLC v. Sea-Land Service, Inc.* and *Procter & Gamble Manufacturing Co. v. Lykes Bros. Steamship Co., Inc., supra*. Since Complainants did not pay for the containers and at least some of the cargo therein, awarding them reparations would constitute unjust enrichment and be contrary to the Shipping Act, because they did not suffer a financial

injury from the sale of the containers or the cargo to the extent others paid for these items.

Although it has been stipulated for purposes of this proceeding that Complainants are the owners of the containers and the cargo shipped therein, that stipulation would not preclude persons who contributed financially to the purchase of the cargo or its transportation from seeking to recover the amounts they paid from one or more of the respondents in a proceeding at the FMC or in another forum. If Complainants are awarded reparations in this proceeding, respondents will necessarily be exposed to potentially duplicative claims from those other entities. Even if they are not, any award of reparations would, absent documentation of the precise amounts paid by other persons, award Complainants reparations for financial losses that were actually suffered by other persons.

In light of the foregoing, Complainants should be required to either (1) document the precise amount paid by all persons for the cargo, containers and transportation so that amounts paid by other persons can be excluded from any award of reparations; or (2) deliver signed affidavits identifying the persons that contributed financially to the shipments herein at issue, accompanied by assignments executed by those persons that irrevocably assign any and all claims arising out of those financial contributions to Complainants for resolution in this proceeding.

VI. CONCLUSION

Complainants seek reparations for three containers sold by Int'l TLC. They allege that damage to/delay of one of the three containers by Hapag-Lloyd violated the Shipping Act and was the proximate cause of their loss.

The Presiding Officer, for the reasons set forth above, should find that the Commission has no jurisdiction over this thinly veiled cargo loss/conversion claim that is covered by COGSA and falls outside its jurisdiction.

In the event she does not, Complainants do not allege a Shipping Act violation with respect to containers MOGU2051660 and MOGU2101987, categorizing their loss as “consequential damage.” Thus, there is no violation with respect to these two containers. There is also no causal link between Hapag-Lloyd’s conduct and the loss of these two containers, which were not delayed or damaged, and sat in Poland with the freight charges unpaid from September 1, 2008 until February 23, 2009. Complainants were warned on January 9, 2009 by Int’l TLC that the containers might be sold, but did nothing to avert this possibility until March/April of 2009, when they began paying the freight charges on these containers after the containers had been sold by Int’l TLC without the knowledge, consent or cooperation of Hapag-Lloyd. Given the superseding acts of Complainants and Int’l TLC, as well as Complainants failure to mitigate their damages, no Shipping Act violation or proximate causation can be found with respect to these containers.

With respect to container MOGU2002520, Hapag-Lloyd has demonstrated in the preceding pages that, as a matter of both law and fact, it did not violate the three provisions of the Shipping Act that Complainants allege it to have violated with respect to this container. Section 41104(4)(E) does not apply to this proceeding, as the shipments herein at issue were service contract shipments and that provision applies only to service under a tariff. Section 41104(10) does not apply to this proceeding and, even if it does, it was perfectly reasonable for Hapag-Lloyd to refuse to pay Complainants’ inflated claim

for total cargo loss when the cargo was en route to Poland at the time that claim was written and Hapag-Lloyd had valid COGSA defenses to and limits on liability with respect to Complainants' claim.

Finally, with respect to Section 41102(c) of the Shipping Act, Hapag-Lloyd has demonstrated that this section is also inapplicable to this case on several different grounds. Even if Section 41102(c) is applicable, Hapag-Lloyd's conduct, while admittedly not the apotheosis of ocean transportation service, did not involve the repetitive conduct, deception or improper demands for payment that must be shown to sustain a violation of this section. In other words, Hapag-Lloyd's conduct simply does not rise to the level of a violation of law.

For the foregoing reasons, and because the superseding actions of Int'l TLC and Complainants (including their failure to mitigate damages) relieve Hapag-Lloyd of any liability which it might have otherwise had, the Presiding Officer must find that Hapag-Lloyd has not violated the Shipping Act and that Complainants are not entitled to reparations from Hapag-Lloyd.

Respectfully submitted,



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October 26, 2011

Certificate of Service

I hereby certify that I have this 25th day of October, 2011, served a copy of the foregoing Opening Brief of Respondents Hapag-Lloyd AG and Hapag-Lloyd (America), Inc. on all parties of record in this proceeding as follows:

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