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November 9, 2011

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

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

Re: Yakov Kobel and Victor Berkovich
Complainants vs. Hapag-Lloyd America, Inc. et al
FMC Docket No. 10-06
Hearing Date: August 8, 2011

Dear Ms. Gregory:

Please find enclosed for filing an original and four copies of Complainants' Reply to Respondents' Post-Trial Briefs. I am enclosing a courtesy copy for Judge Wirth.

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

If you have any questions, please call me.

Very truly yours,



Donald P. Roach

DPR/ml
Encl.

cc: Judge Wirth
Wayne Rohde
John Saffner
Aleksandr Barvinenko

cc: OSLOGC
AUS(2)
Puj

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BEFORE THE
FEDERAL MARITIME COMMISSION

1	YAKOV KOBEL and VICTOR BERKOVICH,)	
2)	
3	Complainants,)	Docket No. 10-06
4	vs.)	
5)	
6	HAPAG-LLOYD A.G., HAPAG-LLOYD)	COMPLAINANTS' REPLY TO
7	AMERICA, INC., LIMCO LOGISTICS, INC.,)	RESPONDENTS' POST-TRIAL
8	INTERNATIONAL TLC, INC.,)	BRIEFS
9)	
10	Respondents.)	

I

INTRODUCTION

Complainants filed a post-hearing brief and closing statement, and proposed findings of fact and conclusions of law. Respondents have each filed a post-trial brief and closing statement.

Hapag-Lloyd, AG (hereinafter referred to as "HLAG") and Hapag-Lloyd America, Inc. (hereinafter referred to as "HLAI") and International TLC (hereinafter referred to as Int'l TLC) have both filed proposed findings of fact and conclusions of law.

Complainants' reply will address issues raised by Respondents in their respective briefs in the order set forth in Complainants' post-trial brief.

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II

HLAG AND HLAI'S POST-TRIAL BRIEF

A. LACK OF SUBJECT MATTER JURISDICTION

HLAG/HLAI have raised the defense of subject matter jurisdiction previously in their motion to dismiss and motion for summary judgment. This issue was briefed by the parties and the Court denied Respondents' subject matter jurisdiction defense. Respondents again make similar arguments in support of their subject matter jurisdiction defense. These arguments should likewise be denied.

Respondents argue that Complainants' claims for reparations are governed by the Carriage of Goods by Sea Act (COGSA) 46 USC Section 30701, which allegedly preempts the jurisdiction of the Federal Maritime Commission in the case.

COGSA applies only to the loss or damage of cargo in the transportation of goods, from the loading to the discharge of cargo, or from "tackle to tackle." Section 10(d)(1) of the Shipping Act (now codified as Section 46 USC Section 41102(c)) applies to activities before loading and after discharge of the cargo. Section 10(d)(1) does not apply to the transportation of goods. Kuzella v. AP Moeller-Maersk A/S Docket 1883(F) December 13, 2007 (dismissed on other grounds, June 26, 2008). Section 10(d)(1) of the Shipping Act prohibits the carrier or ocean transportation intermediary from failure to establish, observe or enforce just and reasonable regulations and practices related to or connected with receiving, handling, storing, or delivery of property.

In this case, the facts show the shipping violations resulting in loss of container MOGU 2002520 occurred after it was initially damaged in the loading process, but before it was loaded onto a second vessel and shipped to Poland. This container was shipped without the authority of shipper or his agent, delayed for six months, and then ultimately wrongfully released to a third

1 party, Oleg Remishevskiy. HLAG/HLAI contends that the transportation period is contractually
2 extended beyond “tackle to tackle” by virtue of Paragrah 7(2) of the Seaway bill for container
3 MOGU 2002520 (Ex HL 010, Ex 29 KOB 0033). However, the Seaway bill was issued on May 25,
4 2008 after the container was already damaged and after Complainants had instructed and HLAI had
5 agreed to return the container to Complainants’ yard (TR 80-81, TR 277, 560, HLAG’s PFOF
6 48,49). HLAG did not have any authority, nor did Complainants or any of the parties agree to ship
7 the damaged container on the Helsinki Express on May 26, 2008.

8 The Seaway bill should not have been issued. Provisions of this Seaway bill are
9 unenforceable and HLAG/HLAI cannot now invoke the limitations and defenses of this Seaway bill
10 and COGSA by nevertheless shipping the container to Poland after everyone agreed otherwise.
11

12 Alternatively, the shipment of the damaged container to Gdynia, Poland, rather than
13 returning it to Complainants’ yard, was an unreasonable deviation from the contract of carriage, if
14 any. Further, the diversion of the container in Hamburg, Germany for six months and then
15 shipment via truck over land, with transportation of the cargo separately in another container was
16 also substantial, unreasonable deviation constituting a fundamental breach of any contract of
17 carriage.

18 A carrier may not rely on contractual or statutory limitations on liability where the carrier
19 has voluntarily and unjustifiably deviated from the proscribed or contractual route, Sedco Inc. v.
20 S.S. Strathewe, 1986 AMC 2801, 2806, 800 F 2d 27, 31 (2nd Cir, 1986). Unreasonable deviation is
21 a fundamental breach of the contract of carriage, and ousts the contract of carriage and the
22 provisions limiting liability incorporated therein, thereby rendering the carrier as an “insurer” of the
23 cargo. Mobile Sales and Supply Corpotion v. M.U. Banglar Kakoli, 588 F Supp 1134, 1146-47
24 (S.D. NY 1984).
25
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1 Finally, the Federal Maritime Commission has exclusive jurisdiction over Shipping Act
2 violations and determination of a violation under Section 10(d)(1) rests solely with the Commission.

3 The Court stated in DSW International Inc. v. Commonwealth Shipping, Inc. No. 1898(F) p.12
4 (March 29, 2001) as follows:

5 “A private Complainant may not bring Court action regarding alleged violations of
6 the Shipping Act, as the FMC’s jurisdiction over such alleged violations is
7 exclusive.”

8 Respondents argue that Complainants’ claim is a “thinly veiled cargo loss covered by
9 COGSA.” (HLAG Brief, p. 6). However, FMC has exclusive jurisdiction over the Shipping Act
10 violations, DSW, Inc. v. Commonwealth, supra, and Complainants’ claims do not involve loss
11 during transportation from “tackle to tackle,” which are governed by COGSA.

12 **B. APPLICATION OF §41102(C), (§10(d)(1))**

13 1. Shipping Activities

14 Respondent raises additional arguments previously made in their motion to dismiss
15 and summary for judgment, which were previously denied. HLAG/HLAI apparently argues
16 that Complainants’ claim for Section 10(d)(1) claim for violations related to the
17 transportation of property. However, Complainants claims, particularly as to HLAG/HLAI,
18 involve mishandling of cargo before loading onto the Helsinki Express on May 26, 2008
19 and after Complainants had instructed HLAG/HLAI to return the damaged container to its
20 yard.
21

22 Further, Complainants claims wrongful release and delivery of the three containers
23 after the three containers were discharged in Gdynia, Poland by all Respondents. Thus,
24 Complainants claims and evidence presented at the hearing do not involve a period during
25 transportation covered by COGSA.
26

1 Finally, Complainants have alleged and proved wrongful delivery of the three
2 containers by an unlawful liquidation and unauthorized changes to the bills of lading
3 (Complainants' post-trial brief, p. 17-25, 33-36). The wrongful delivery of cargo is grounds
4 for a Section 10(d)(1) violation (See DSW International v. Commonwealth supra).

5 2. Conduct required for violation under §41102(C), §10(d)(1)

6 Respondents argue that a "single act or incident, or single shipment" cannot
7 constitute a violation of Section 10(d)(1).

8 The application of this theory is dubious considering the numerous recent cases
9 decided under a Section 10(d)(1) violation based upon a single incident or single shipment.
10 MSW International v. Commonwealth supra (misdelivery of two vehicles, one shipment),
11 Smart Garments v. World Logix Services Docket 10-11, October 31, 2011 (misdelivery of
12 cargo without buyer surrendering original bill of lading, involving one shipment), and
13 Tienshan v. Tianjin Agency Docket 08-04, March 9, 2011 (refusal to release cargo on one
14 shipment).

15 In addition, HLAG/HLAI cites two additional cases in its brief, p. 36, involving a
16 Section 10(d)(1) violation for a single incident: VAZ v. Moving Services, LLC and Global
17 Ocean Freight, Inc. 31 S.R.R. 536 (Settlement officer 2009) Docket 19-02(I) September 6,
18 2011, and Houben v. World Moving Services, 31 S.R.R. 1400 (FMC 2010).

19 Respondent HLAG concedes that the delay involved in one shipment may result in a
20 §10(d)(1) violation when additional factors are present (HLAG Brief p. 36-39) Meyan
21 SA v. International Frontier Forwarder, 30 S.R.R. 1397, 1400 (FMC 2007).

22 In this case, there are multiple violations of §10(d)(1) committed by Respondent
23 HLAG/HLAI regarding handling and shipping container MOGU 2002520 as well as
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1 multiple violations by Limco and Int'l TLC regarding the change in the bills of lading
2 and misdelivery or mishandling of the three unlawfully liquidated containers.

3 3. HLAG/HLAI failed to observe and enforce just and reasonable practices
4 in handling Complainants' property at the Port of Portland

5 HLAG/HLAI violated §10(d)(1) by shipping a damaged container which was not
6 seaworthy, and, further, by loading and shipping this container when instructed by
7 Complainants, Limco and Int'l TLC to return the damaged container to Complainants.
8 HLAG/HLAI even agreed to return the container to Complainants' yard (HLAG's
9 proposed findings of fact, p. 49). HLAG/HLAI's handling of the container after it was
10 damaged was clearly unreasonable and unjust pursuant to the Shipping Act.
11

12 In his testimony, Max Furer admitted that HLAG did not observe or enforce its
13 own practices with regard to shipping damaged containers contrary to the shipper's
14 instructions (Furer, TR 561-562).

15 Respondent HLAG/HLAI attempts to minimize this conduct as simply an
16 "accident" caused when a stevedore mistakenly loaded the container (Ward, TR 578).
17 However, HLAG/HLAI knowingly loaded the damaged container MOGU 2002520 onto
18 the Helsinki Express. HLAG/HLAI's load planner submitted the load plan to the first
19 mate of the vessel. The vessel manifest listed all containers, including the Complainants'
20 damaged container.
21

22 Thereafter, HLAG/HLAI issued a Seaway bill on May 25, 2008, the day prior to
23 sailing. These facts prove that HLAG/HLAI had knowledge and was aware of the
24 loading of the damaged container, contrary to Complainants' instructions and the parties'
25 agreement (See Page 5 of Complainants' brief).
26

1 HLAG/HLAI attempts to justify its conduct through Catherine Ward and their
2 proposed findings of fact 52, 53, 54 (TR 577, lines 1-9). However, Ward's actual
3 testimony does not entirely support these findings. Ward testified that she "rolled the
4 booking" so if the container was repaired it would have guaranteed space. However,
5 Ward did not testify that this dispute would be resolved prior to the arrival of the next
6 vessel, or be resolved quickly. Nor did she testify that the container was placed on a "do
7 not load list for the next vessel."

8 HLAG/HLAI cites two cases for the proposition that failure to follow the
9 shipper's instructions or intentional transportation of damaged cargo is not necessarily
10 unreasonable, or a violation of §10(d)(1) Patricia Eyes v. Wallenius Wilhelmsen Lines,
11 30 S.R.R. 1064 (ALJ 2006) and Pilgrim Furniture Co., Inc. v. American-Hawaiian
12 Steamship, Co., 2 USMC 517 (USMC 1941) (HLAG Brief p. 38-39).
13

14 These cases are clearly distinguishable from the facts of the instant case. Neither
15 case involves a shipper's instruction not to ship a damaged container. Patricia Eyes v.
16 Wallenius Wilhelmsen Lines, supra, involved property that was damaged in transit, not
17 prior to loading, contrary to the instant case. The shipper did not instruct the carrier to
18 return the cargo. The Court held that the carrier had two bad choices and the choice to
19 ship to England was not unreasonable in that case. In this case, there was only one
20 reasonable choice, to return the damaged container to shipper rather than ship to Poland.
21

22 The other case, Pilgrim Furniture supra, did not involve damaged or unseaworthy
23 cargo, but merely shipping a container on the next vessel after the vessel designated by
24 the shipper. That case did not involve the shipment where both the shipper and the
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1 carrier had agreed to return the cargo to the shipper for inspection, repair/replace and
2 reloading, as in the instant case.

3 HLAG/HLAI had control over the container at the Port of Portland, and, at the
4 very least, was a bailee for this damaged container after it had been set aside and isolated
5 on the dock after it was initially damaged. A preloading bailment between a shipper and
6 carrier imposes upon the bailee-carrier the custodial responsibilities of a common law
7 bailee. 1 Schoenbaum Admiralty and Maritime Law §10-17 p857 (5th ed., 2011).
8 HLAG/HLAI had a duty to exercise reasonable care as a bailee.

9 A bailer (shipper) makes out a prima facie case merely by showing delivery of
10 goods and failure to return at the requisite time 1 Schoenbaum Admiralty and Maritime
11 Law §10-17 p. 857. HLAG/HLAI's conduct was unreasonable and contrary to shipper
12 instructions and a violation of §10(d)(1) with respect to the handling and loading of this
13 container onto the Helsinki Express in the Port of Portland.
14

15 4. Handling of the damaged container in Hamburg, Germany and Gdynia,
16 Poland was unreasonable and unjust

17 HLAG/HLAI compounded its unreasonable conduct when the damaged container
18 arrived in Hamburg, Germany on or about June 21, 2008. The problem with loading and
19 shipping the damaged container became more evident when it could not be loaded onto a
20 feeder vessel in Hamburg, Germany.
21

22 HLAG/HLAI argues that they explored all options available and that the delay was
23 caused because "Complainants or its agents failed to provide commercial documents."

24 However, the need for commercial documents was created by HLAG/HLAI the first
25 instance by shipping a damaged container, which could not be shipped by feeder vessel
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1 from Hamburg and thus required land transportation (Complainants' brief, p. 7-9). Further,
2 HLAG/HLAI had all the necessary commercial documents as early as September 8, 2008,
3 but at the latest, October 7, 2008 (Ex 95, KOB 0298; EX 97, KOB 0304, 0304).

4 This container remained in Hamburg until the cargo and container were finally
5 shipped separately in late November, and ready for pick-up in Gdynia, Poland on December
6 23, 2008. HLAG/HLAI's conduct caused the excessive and unreasonable delay, especially
7 considering that a shipment from Hamburg to Gdynia, Poland usually takes only two days
8 by feeder vessel or 10-12 hours by truck. Further, Max Furer testified that HLAG/HLAI
9 could supposedly unload and reload the damaged container in one day (Furer testimony, TR
10 545, lines 4-6). Thus, the evidence shows that this container could have been delivered and
11 ready for pickup within a week rather than six months.

12 Excessive delay coupled with additional factors such as a pattern of deception or
13 misinformation can be a separate violation of §10(d)(1) Meyan SA v. International Frontier
14 Forwarders, Inc. supra p. 1400 n.2.

15 Beside the excessive delay, other factors include not only misinformation but also
16 unjustified and unreasonable attempts to terminate the shipment in Hamburg or treat the
17 damaged container as abandoned. HLAG/HLAI engaged in deception by representing to
18 Complainants and Limco that it would return the damaged container to Complainants' yard
19 for inspection, repair and reloading. Complainants were told then that after the container
20 was shipped, that the problem had been fixed, and everything was fine, just wait. (Kobel,
21 TR 81-82).

22 Complainants object to proposed finding of fact 66. HLAG/HLAI did not explore
23 railroad or truck delivery directly to the Ukraine. Complainants also object to a finding that
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1 HLAG was helpful. Although Lyamport testified that HLAG was very helpful, his
2 testimony is contradicted by his email correspondence, as well as Nadya Li's
3 communication with HLAG/HLAI regarding this container and its delay in Hamburg,
4 Germany (Lyamport TR 731, lines 10-21; Ex 95, KOB 295, 297; Ex 95, KOB 305; Ex 90,
5 KOB 312).

6 Moreover, Lyamport's testimony should be viewed with caution, especially
7 considering that Lyamport testified that the damaged container was held by HLAG/HLAI in
8 Hamburg, Germany for only about one month, when the actual delay in Hamburg, Germany
9 was approximately six months. (Lyamport, TR 730, lines 8-24).

10 5. Wrongful release and damage of container MOGU 2002520

11 With respect to the damaged container, HLAG/HLAI knew that Complainants were
12 the owners of this container based upon previous correspondence with Kobel concerning the
13 damage while the container was still at the Port of Portland, Kobel submitted a claim
14 through Limco to HLAG/HLAI. Furthermore, Complainant also submitted a claim by letter
15 to HLAG/HLAI dated November 15, 2008 (Ex 69). In addition, a pending claim was filed
16 by Limco on October 31, 2008, with supporting documents (Ex 98), which gave notice to
17 HLAG/HLAI of Kobel's ownership of this container.
18

19 HLAG/HLAI knew that Complainants were the primary party in interest and
20 owners of this damaged container, but failed to inquire or exercise reasonable care in
21 releasing it to a third party, Oleg Remishevskiy.
22

23 **C. VIOLATION OF §10(b)(4)(E) AND §10(b)(10)**

24 Complainants maintain that HLAG/HLAI unreasonably refused to deal and
25 negotiate contrary to Section 10(b)(10). The grounds and facts supporting this violation set forth in
26

1 Complainants' post-trial brief, pages 10-12. Although the heading under this Section in
2 Complainants' post-trial brief refers to unreasonably dealing and negotiating, Complainant's claim
3 is for unreasonable refusal to deal and negotiate under §10(b)10

4 In addition, Complainants dispute the narrow application which HLAG advances in its brief
5 that this section applies only to boycotts or refusal to provide service (HLAG Brief, p. 45).

6 **D. CAUSATION**

7 HLAG/HLAI's unauthorized shipment of the damaged container was both the cause in fact
8 and proximate cause for the loss of Complainants' container MOGU 2002520.

9 When Complainants instructed HLAG/HLAI to return the damaged container, HLAG/HLAI
10 was essentially a bailee for Complainants' containers. Failure to return goods when demanded by
11 bailor (Complainants) is conversion or a breach of the bailment contract. Restatement of torts 2d
12 237, Liebrecht v. Hawk, 83 Or App 396, 399, 731 P. 2d 1057 (1987)). Damages are determined at
13 the time and place of the conversion 47 Or App 211, 215, 614 P. 2d 124 (1980). Good faith by the
14 bailee is not a defense in an action for conversion (Am Jur 2d Section 73 (2009)).

15 Respondent HLAG/HLAI's argument of superseding, intervening causes apply only to
16 negligence claims, and are not applicable to a claim for conversion (Restatement of Torts 2d
17 §918(2)). Furthermore, mitigation or avoidable consequences do not apply if the harm was
18 intentional. Likewise, contributory negligence by the Complainant is not a defense to recovery for
19 conversion (Restatement of Torts 2d §481).

20 Even if negligence were applicable to HLAG/HLAI's violation for shipment of the damaged
21 container, their claim of superseding and intervening causation is inapplicable to Complainants'
22 conduct in this case In Exxon v. Sofec, 517 US 830, 116 S. Ct 1813 (1996) cited in HLAG/HLAI's
23 brief at page 52, 54, the Court found extraordinary negligence of the ship captain superseding
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1 intervening cause and the sole proximate cause for the loss (see Reinstatement of Torts 2d §441(b)).

2 In the instant case, with respect to damaged container MOGU 2002520, there was no extraordinary
3 negligence, if any negligence at all, by Complainants regarding the loss of MOGU 2002520.

4 Complainants had paid freight for the damaged container in July of 2008. A delay of two months
5 for picking up the container is not unreasonable considering that HLAG/HLAI had delayed the
6 shipment for approximately six months.

7 Furthermore, a superseding, intervening cause is a later cause of independent origin which
8 prevents the actor from being liable. Restatement of Tort 2d §440. An intervening force is one
9 which actively operates in producing the harm to another after the actor's negligent act or omission
10 has been committed. Restatement of Tort 2d 441(1).

11 In this case, the container was delivered to Gdynia, Poland in its damaged container. It
12 could not be used to transport cargo as evident from HLAG's shipment of the cargo separately from
13 the container which was shipped by truck. The risk from the untrustworthy container continued
14 after delivery. Further, Complainants' alleged failure to pick up was a passive and not active force.

15 Moreover, if the effects of the actor's negligent conduct actively and continuously operate to
16 bring harm to another, the fact that the active and substantially simultaneous operation of the effects
17 of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the
18 harm does not protect the actor from liability. Restatement of Torts 2d §439.

19 In this case, HLAG/HLAI's delivery of a damaged container which could not safely
20 transport cargo continued and any subsequent act by either Limco or Int'l TLC with respect to this
21 container does not relieve HLAG from its negligent conduct. All Respondents are jointly and
22 severally liable for the loss of the damaged container.
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1 As stated in Complainants' post-trial brief, Complainants would not have suffered any loss
2 with respect to the damaged container if HLAG/HLAI had: 1) returned the container to
3 Complainants' yard before shipping on the Helsinki Express on May 26, 2008, or 2) not delayed the
4 container in Hamburg, Germany for six months before delivering it to Gdynia, Poland.

5 Although Complainants' plan was to ship all five containers together, they ultimately altered
6 their plan and shipped the first two containers by truck to the Ukraine on or about November 17,
7 2008, and could have shipped the damaged container, whose freight had already been paid, along
8 with these two containers.

9 **E. MITIGATION OF DAMAGES**

10 Mitigation of damages is not applicable for loss of Complainants' damaged container for
11 reasons set for above in Section (E) of this reply regarding avoidable consequences with respect
12 to containers MOGU 2101987 and MOGU 2051660. Generally, mitigation of damages is not a
13 defense to a claim, but merely a reduction or minimization in the amount of damages in a
14 contract action.
15

16 Even if mitigation were applicable to the damaged container, Complainants' conduct was
17 reasonable as to MOGU 2002520. HLAG/HLAI delayed delivering the container for Gdynia,
18 Poland for six months. Complainants did not ignore Int'l TLC's January 9, 2009 letter (Ex 79)
19 and Complainants object to HLAG/HLAI's proposed finding of fact #82. Kobel called
20 Barvinenko the same day in dispute of the excessive charges (Kobel, TR 105). Complainant
21 Kobel attempted to call Barvinenko subsequently, but Barvinenko refused to communicate
22 (Kobel, TR 101). Kobel and Berkovich then contacted Baltic Sea Logistics directly regarding
23 storage for the containers (Complainants' proposed fact #74). Complainants ultimately paid the
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1 freight for the final two containers MOGU 2101987, and MOGU 2051660 as well as some
2 storage charges in March and April, 2009 (Complainants' proposed finding of fact #73).¹

3 **F. CALCULATION OF DAMAGES AND DUPLICATIVE CLAIMS**

4 Respondent HLAG/HLAI argues that Complainants are not entitled to damages for the
5 three containers because they were paid by Emmanuel Translogistics, Inc. (Complainants' Ex
6 123; HLAG Brief p. 58). However, as Kobel testified, Emmanuel Translogistics, Inc. is owned
7 by Kobel's sister, and she helped make payments for Kobel. (Kobel, TR 231).

8 In addition to the storage charges Complainants incurred for storing the first two
9 containers, MOGU 2112451 and MOGU 2003255, Complainants also incurred additional costs
10 to ship these containers by truck rather than by rail. Complainants paid \$5,600 to ship them to
11 the Ukraine by truck (Ex 124, 125, 126) when they could have been shipped for \$2,000 per
12 container by rail (Kobel, TR 93).

13
14 Kobel borrowed money to make shipping payments and purchase cargo and containers
15 from family members such as his wife, sister, brother-in-law and brother. (TR 263-264). The
16 fact that Complainants may have borrowed from relatives to either purchase some of the cargo or
17 to pay shipping costs and for the containers is not a basis to deny them reparations, any more so
18 than as they purchased plywood on credit from Home Depot. As Kobel testified, he is obligated
19 to repay those persons from whom he borrowed money to make shipping payments (TR 263-
20 264).

21
22 In any event, Complainants have offered a reasonable proposal to preclude the possibility
23 of any duplicative claims, as set forth in Complainants' post-trial brief at pages 37-39. Any party
24

25 ¹ Complainants's proposed finding of fact #73 shows that the payment by Int'l TLC to Limco for the damaged
26 container MOGU 2101987 was paid on March 4, 2009, when in fact it should have shown payment on December
22, 2008. Payment for MOGU 2051660 was made from Int'l TLC to Limco on March 4, 2009 (119; KOB 0339).

1 with a potential duplicative claim can execute an assignment to Complainants, and release
2 HLAG/HLAI from any responsibility or liability. Alternatively, Complainants have no
3 objections to the proposal from HLAG/HLAI requiring Complainants to deliver affidavits
4 identifying and executed by the persons who contributed financially, along with an assignment.

5 III

6 **REPLY TO LIMCO LOGISTICS**

7 **A. OVERVIEW OF LIMCO'S CLOSING ARGUMENT**

8 Limco's closing argument contains a general statement and five specific points to
9 conclude that Complainants failed to prove their claim of Shipping Act violations against Limco.
10 These points will be addressed accordingly.

11
12 Limco initially argues that Complainants' losses were caused by their own inexperience
13 in international shipping, lack of planning and lack of adequate finances (Limco brief p. 1-3).
14 Limco's arguments focus solely on Complainants conduct rather than its own actions concerning
15 its non-compliance with the requirements of the Shipping Act.

16
17 Secondly, Limco essentially argues that it did not violate §10(d)(1) if Int'l TLC had
18 the right to lawfully sell the containers. Limco also argues that if freight and other charges were
19 owed for the containers at the time of sale, then the sale would be lawful. (Limco, p. 5).
20 Contrary to this argument, Int'l TLC did not have any legal right to sell Complainants'
21 containers as explained below.

22
23 To summarize Complainants' argument as stated in its post-trial brief (p. 19-20, 31-32),
24 Int'l TLC did not have any lawful authority to sell Complainants' three containers because it did
25 not have any contractual right nor did it have any statutory lien such as a possessory lien or a
26 carrier's lien.

1 Complainants paid the freight for the damaged container MOGU 2002520 on July 25,
2 2008. Although Complainants did not complete payment for the freight for the other two
3 containers, MOGU 2051660, and MOGU 2101987 until March 26, 2009 and April 2, 2009
4 respectively, Limco was actually paid freight for container MOGU 2101987 on December 22,
5 2008.² Thus, Limco had already received payment for freight for two containers, MOGU
6 2002520, and MOGU 2101987 before the liquidation sale.

7 Lyamport testified that Limco placed a hold on all three liquidated containers. (TR 752-
8 753). However, Limco wrongfully continued a hold on MOGU 2002520 and MOGU 2101987
9 after the freight was paid. (Complainants' brief, p. 17-19). Baltic Sea Logistics or Int'l TLC
10 was ultimately responsible for any storage charges of these three containers and not Limco
11 (Ossowska, TR 654-655; Lyamport, TR 740).

12
13 Moreover, Limco further contends that Int'l TLC is solely liable if the liquidation sale
14 was improper. (Limco brief, p. 5). However, Limco played a critical role to aid and facilitate
15 the liquidation sale because it changed the shipper/consignee on the bill of lading to
16 Remishevskiy and instructed Baltic Sea Logistics to release the three containers to
17 Remishevskiy. (Complainants' Ex. 86; KOB 0278).

18 Although both Limco and Int'l TLC argue that Limco did not order or authorize a
19 liquidation sale (Limco TR 693-694; Barvinenko TR 389), Limco knew and was aware of the
20 sale and notice of liquidation (Ex 79), had big discussions with Int'l TLC on a frequent basis and
21 pressured Int'l TLC to sell these containers (Complainant's post-trial brief, p. 16-20). Limco
22 knew that Kobel and Berkovich were the owners and principal parties of interest in the three
23

24
25 ² Complainant's Proposed Finding of Fact #73 mistakenly stated that Int'l TLC paid Limco for MOGU 2101987 on
26 March 4, 2009 when it actually paid Limco for container MOGU 2101987 on December 22, 2008. Int'l TLC paid
Limco for MOGU 2051660 on March 4, 2009. (See Complainants' Ex 119, KOB 0337; Ex 120, KOB 0339).

1 containers of cargo. Furthermore, Limco received and accepted final payment for freight for
2 MOGU 2051660 on March 4, 2009, shortly after the sale (Ex 120).

3 Limco cannot now distance itself and deny any involvement in the unlawful sale, and
4 change of bills of lading. Limco encouraged, advised and facilitated the unlawful sale and
5 delivery of these three containers by changing the bills of lading from Berkovich to
6 Remishevskiy and then instructing Baltic Sea Logistics to release the three containers to
7 Remishevskiy. Both Limco and Int'l TLC should be held jointly and severally liable for the
8 wrongful delivery of these containers.

9 **B. POINT ONE: COMPLAINANTS' CLAIM FOR DAMAGES IS NOT**
10 **ACTIONABLE AND DOES NOT VIOLATE THE SHIPPING ACT**

11 Limco argues that Complainants' claim for reparations for lost cargo is governed by
12 COGSA, and the Federal District Court has exclusive jurisdiction. Complainants have addressed
13 this issue previously in the motion to dismiss and motion for summary judgment, as well as in
14 Section II(A)(1) of this reply. The Federal Maritime Commission has exclusive jurisdiction in
15 the instant case.
16

17 **C. POINT TWO: NO CAUSATION BETWEEN ANY ALLEGED SHIPPING**
18 **ACT VIOLATION OR DAMAGES**

19 Limco's next argument is that there is no causal connection between its action and
20 Complainants' damages. As explained above, Limco's action in changing the bill of lading from
21 Berkovich to Remishevskiy, and instructing Baltic Sea Logistics to release the three liquidated
22 containers to Remishevskiy, and facilitated the unlawful release and wrongful delivery of these
23 containers. "But for" Limco's actions, the wrongful delivery to Remishevskiy could not have
24 been accomplished. Both Limco and Int'l TLC should be held jointly and severally liable for
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1 these losses. Moreover, HLAG/HLAI, Limco and Int'l TLC should be held jointly and severally
2 liable for these losses.

3 **D. POINT THREE: COMPLAINANTS HAVE FAILED TO MITIGATE**
4 **THEIR CLAIM FOR DAMAGES**

5 Limco argues that Complainants failed to mitigate their damages because they failed to
6 pick up their four containers because they did not have the financial resources to pay the freight
7 or other charges. The record does not support this contention.

8 First, mitigation of damages is not a defense to liability, but only deductions to the award
9 of damages.

10 Second, Complainants paid freight for all five of these containers. (Complainants'
11 proposed finding of fact, fact #73). Complainants paid storage charges for the first two
12 containers, picked up on November 17, 2008, for MOGU 2112451 and MOGU 2003255.
13 Complainants also paid the storage charges for MOGU 2101987 and MOGU 2051660 in the
14 amount of \$3,100 (Ex 128, KOB 0347). At most, Limco might be entitled to mitigation of the
15 damages paid for the storage of the liquidated containers (\$3,100) if at all, as a result of any
16 delay in paying storage for these containers.

17 Third, with respect to the damaged container, there should be no mitigation of damages
18 since Complainants' conduct was reasonable given that it was delayed in Hamburg for
19 approximately six months, and was delivered in a damaged condition, and was unlikely to safely
20 transport cargo in its damaged condition.
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1 **E. POINT FOUR: LIMCO IS NOT LIABLE TO COMPLAINANTS AS**
2 **THERE IS NO PRIVITY OF CONTRACT**

3 Limco's claims of a lack of privity as a defense to its statutory obligations as a common
4 carrier and NVOCC under the Shipping Act are unfounded for several reasons.

5 First, Limco has issued at least three bills of lading showing Victor Berkovich as shipper
6 and consignee for the first three containers shipped, container MOGU 2112451 (Ex 8, KOB
7 0010), MOGU 20023255 (Ex 9, KOB 0011), and MOGU 2002520 (Ex 1, KOB 0001). Further,
8 Limco should have issued and delivered bills of lading for the final two containers, but never
9 delivered the bills of lading for the final two containers, MOGU 2051660, and MOGU 2101987.

10 Second, Limco claims that Int'l TLC acted as a freight forwarder for Complainants. A
11 freight forwarder is an agent of the shipper, and therefore Limco would have had a contractual
12 obligation to this agent's principal, in this case Complainants. Limco issued bills of lading
13 naming Int'l TLC as shipper for containers MOGU 2051660 (Ex 11, KOB 0014) and MOGU
14 2101987 (Ex 12, KOB 0015).

15 Third, an NVOCC, in this case Limco, has obligations independent of any contract to any
16 person for a violation of the Shipping Act. Section 19(a) of the Shipping Act provides that "any
17 person may bring an action for a violation of the shipping code." Thus, whether or not there is
18 privity of contract, Limco is liable to Complainants for damages caused by any violation of the
19 Shipping Act which it committed.
20

21 **F. POINT FIVE: LIMCO ARGUES THAT IT HAS NOT VIOLATED THE**
22 **SHIPPING ACT**

23 Limco raises an additional argument that it changed the bills of lading merely to reflect
24 the new owner of the cargo as of the date of the liquidation sale pursuant to instructions from its
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1 customer, Int'l TLC. (Limco brief, p. 11-12). Complainants have addressed this issue above in
2 Section III(A) of this Reply, as well as Section IV, p. 19-25 of Complainants' post-trial brief.

3 Remishevskiy was not a new or bona fide owner, and Int'l TLC's unlawful sale did not
4 confer title of the cargo to the three liquidated containers. These bills of lading are negotiable
5 instruments and cannot be negotiated or changed without the indorsement of the owner. The
6 Pomerene Act provides that the rights to the bill of lading or ownership may be negotiated by
7 indorsement only by a person who has the right to convey title. 49 USC §80104(1)(a).
8 Berkovich was listed as shipper and consignee on the bills of lading of the damaged container,
9 and was the only person who had the right to change the bills of lading. Limco could not change
10 or issue new bills of lading for these three containers without Complainants' consent or
11 indorsement. 49 USC §80116(2)(A)(B).
12

13 A common carrier is strictly liable for the damages to a person having title to or right to
14 possession of goods when the carrier delivers goods to a person not entitled. 49 USC §80111(a).
15 C-Art LTD v. Hong Kong Islands Line America, S.A. 940 F. 2d 530 532 (9th Circ, 1991) cert
16 den. 503 US 1005. The carrier is strictly liable for misdelivery of goods. 1 Schoenbaum
17 Admiralty and Maritime Law §10-18 supra 860 (5th ed, 2011), Velco Enterprises, LTD v. S.S.
18 Zim Kingston 858 F. Supp 36 (S.D. NY, 1994). A carrier is not liable for failure to deliver goods
19 to a consignee or owner of the goods or holder of the bill of lading if the goods are sold lawfully
20 to satisfy a carrier's lien 49 UCS §80111(d)(2).³ However, Limco does not fall under this
21 exception because the sale was not lawful. (See Complainants' brief p. 19-20, 31-35 and IV
22 (C)(1) of the Reply).
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26 ³ This statute was miscited in Complainants' post-trial brief as 49 USC §80111(b)(2) instead of 49 USC
§80111(d)(2) (Complainants' post-trial brief, p. 19).

1 Furthermore, Limco issued multiple bills of lading for each of the three liquidated
2 containers. Multiple bills of lading for a single shipment describing the same cargo creates a
3 presumption of fraud. Rainly Equipos de Riego, S.R.I v. Pentagon Freight Services, Inc. 979 F.
4 Supp 1079, 1085 (S.D. Tex 1997).

5 With respect to Complainants' claim for violation of Section 10(b)(4)(E) and Section
6 10(b)(10), Limco claims it had no duty to negotiate. However, as NVOCC and the only party to
7 a Seaway bill of lading with Hapag-Lloyd, Limco's refusal to deal or negotiate with
8 HLAG/HLAI after the damaged container arrived in Gdynia, Poland violated the Shipping Act
9 for reasons more fully set forth in Complainant's post-trial brief at pages 25-26.

10 Finally, Limco knowingly and willfully accepted cargo from Int'l TLC, an unlicensed
11 freight forwarder and unlicensed NVOCC at the time of shipment. Consequently, Int'l TLC
12 violated Section 10(D)(11) of the Shipping Act, as more fully described in Complainants' post-
13 trial brief, pp. 26-28.

14 IV

15 **REPLY TO INT'L TLC'S POST-TRIAL BRIEF AND CLOSING STATEMENT**

16 **A. OVERVIEW**

17 Int'l TLC's closing argument, as stated in the conclusion to its closing statement,
18 essentially makes the same arguments raised by Limco against Complainants. In particular, Int'l
19 TLC points to Complainants' inexperience in international shipment, lack of planning, the
20 economic viability of Complainants' venture, and their lack of finances.
21

22 Int'l TLC further refers to Complainants' multiple bankruptcy filings, foreclosures and
23 other financial difficulties. Int'l TLC contends that it did not conduct business as an unlicensed
24

1 entity and did not violate the Shipping Act in its liquidation sale of Complainant's containers.

2 These issues will be addressed accordingly.

3 **B. INT'L TLC CONDUCTED BUSINESS AS AN UNLICENSED OCEAN**
4 **TRANSPORTATION INTERMEDIARY IN VIOLATION OF 19(a) OF THE SHIPPING**
5 **ACT**

6 Int'l TLC argues that it acted as a loading and consulting company, and not as an ocean
7 transportation intermediary, with respect to shipment of Complainants' containers (Int'l TLC's
8 brief, p. 2-3).

9 Complainants maintain that Int'l TLC served as an unlicensed ocean transportation
10 intermediary in violation of Section 19(a) by performing activities as either an ocean freight
11 forwarder or an NVOCC for the shipment of Complainants' containers. The law and facts
12 supporting Complainant's claims are stated in Complainants' post-trial brief, pp. 28-30.

13
14 Complainant's closing brief lists at least seven factors showing that Int'l TLC acted as an
15 ocean freight forwarder (Complainants' brief, p. 30). These facts are uncontroverted by Int'l
16 TLC. Although Int'l TLC claims it was a loading and consulting company, it never loaded any
17 cargo for Complainants' containers. In addition to these seven factors, Barvinenko testified that
18 Int'l TLC organized the entire shipment (Barvinenko, TR 362).

19 In Worldwide Relocation, Inc. et al, Docket 06-01 (August 16, 2010), seven international
20 moving companies who specialized in moving household goods and furniture that represented
21 themselves as consultants or coordinators and hired NVOCCs to ship the goods were deemed by
22 the Court to be non-vessel common carriers under the facts of that case.

23
24 In the instant case, Int'l TLC represented to Complainants that it could ship its containers
25 to the Ukraine and hired a secondary NVOCC (Limco). Int'l TLC may have served as an

1 NVOCC in addition to serving as an ocean freight forwarder for the shipment of these
2 containers.

3 In any event, Int'l TLC has never been licensed as an ocean freight forwarder. Only
4 became an NVOCC effective July 24, 2009, after all of Complainants' containers were already
5 shipped from Portland.

6 **C. INT'L TLC'S VIOLATIONS OF §10(d)(1) OF THE SHIPPING ACT**

7 1. Int'l TLC did not have authority to instruct Limco to change bills of
8 lading.

9 Int'l TLC did not have authority to instruct Limco to change the bills of lading to
10 Remishevskiy. Similar to the argument made by Limco in its brief, Int'l TLC also argues
11 that it instructed Limco to change the bills of lading to Oleg Remishevskiy after the
12 liquidation sale, and therefore somehow this sale validates the change of shipper on these
13 bills of lading. However, this argument is predicated on the premise that the liquidation
14 sale conducted by Int'l TLC was lawful. Int'l TLC had no legal authority to sell these
15 containers and therefore could not pass title to the bills of lading to Oleg Remishevskiy.

16 The evidence is uncontroverted that Complainants never consented to nor
17 authorized Int'l TLC or Limco to change the bills of lading from Victor Berkovich as
18 shipper/consignee to Oleg Remishevskiy. As set forth in Complainants' reply to Limco's
19 argument, the Pomerene Act, or Federal Bill of Lading Act, 49 USC §80111(a) imposes a
20 strict liability for damages when a common carrier fails to deliver cargo to the person
21 entitled to possession. C-Art LTD v. Hong Kong Islands Lines America, S.A. supra p.
22 532, 1 Schoenbaum Admiralty and Maritime Law §10-17 p. 857 (5th ed, 2011). A carrier
23 may have an exception to liability if the goods have been lawfully sold to satisfy a
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1 carrier's lien 49 USC §80111(d)(2), Respondents Limco and Int'l TLC do not fall within
2 this exception.

3 As more fully set forth in Complainants' post-trial brief, p. 31-34, and Section III
4 of this Reply. This sale was unlawful for the following reasons: 1) no legal authority,
5 and 2) not sold in a commercially reasonable manner.

6 First, Int'l TLC did not have any written contractual agreement with
7 Complainants granting it any security interest in the cargo, which would permit it to sell
8 the cargo and containers for nonpayment of freight or other charges related to shipment.

9 In addition, Int'l TLC did not have any statutory lien. Int'l TLC was not a carrier
10 and therefore did not have a carrier's lien. Int'l TLC's liquidation sale for the three
11 containers was to reimburse Int'l TLC for its expenses as either a freight forwarder or a
12 loader or consultant, and not to satisfy a carrier's lien. Furthermore, Int'l TLC never had
13 an possessory liens, as it never had possession of the cargo.
14

15 Absent a contractual right or statutory lien, Int'l TLC had no right to sell
16 Complainants' cargo without a Court order or judgment. Int'l TLC has no legal authority
17 to exercise a "self help" remedy to collect unpaid freight or other charges.

18 Second, the sale of Complainants' containers and cargo was not conducted in a
19 commercially reasonable manner pursuant to UCC 7-308(1) RCW(A) or UCC, 7-308(1)
20 in virtually every aspect. The purported notice was defective, there was no reasonable
21 advertisement of sale, the goods were not sold in any recognized market or in conformity
22 with any reasonable practice among dealers of the type of goods sold, and the sale of
23 goods was more than necessary to satisfy the obligation (Complainants' brief p. 33-35).
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1 Moreover, any sale of damaged container MOGU 2002520 was unlawful because
2 all freight had already been paid in July, 2008 and was omitted from the notice of
3 liquidation sale in Int'l TLC's January 9, 2009 letter to Complainants (Ex 79, 80)
4 (Barvinenko, TR 385).

5 Int'l TLC attempts to further justify its liquidation sale, claiming that the
6 Complainants somehow did not respond or contact Int'l TLC in response to its January 9,
7 2009 liquidation notice (TR 79), and therefore Int'l TLC had a right to sell these
8 containers. This contention does not have any legal merit, nor is it substantiated by the
9 evidence in the entire record.

10 Kobel called Barvinenko the same day he received this notice (Ex 79, 80), and
11 objected to the notice (TR 105-106). Kobel objected to the amount claimed owed of
12 \$43,727. Barvinenko acknowledges that Kobel called him on January 9, 2009
13 (Barvinenko, TR 381-382). Kobel called Int'l TLC many times thereafter, but Int'l TLC
14 would not respond or tell him anything (TR 107-108). Likewise, Kobel also called
15 Limco concerning this notice (TR 108).
16

17 As a result of Int'l TLC's refusal to discuss this matter further with Complainants,
18 Kobel contacted Baltic Sea Logistics directly about storage fees on or about February 16,
19 2009 (Ex 104, 105). Complainants thereafter paid the remaining freight charges to Int'l
20 TLC on January 9, 2009, March 26, 2009, and April 2, 2009. Complainants also sent an
21 email to Barvinenko on March 26, 2009 indicating they wished to pick up the containers.
22 Int'l TLC never responded to this email.
23

24 Int'l TLC retained the freight paid by Complainants of \$10,200 but did not return
25 it to Int'l TLC and to Complainants until May 12, 2009, after Kobel confronted
26

1 Barvinenko at Int'l TLC's office. Int'l TLC did not give Complainants an accounting for
2 the sale of the liquidating containers until May 2009. (Barvinenko, TR 385).

3 Int'l TLC's actions to sell these containers and instruct Limco to change the name
4 of the shipper/consignee to Remishevskiy on the bills of lading and to release the three
5 containers to Remishevskiy violates §10(d)(1) and resulted in the non-delivery of these
6 containers to Complainants and wrongful delivery to an unauthorized third party.

7 2. Int'l TLC violated §10(d)(1) by misleading Complainants and failing to
8 provide accurate information regarding Complainants' containers.

9 Complainants' post-trial brief outlines the facts supporting the allegation of
10 misleading and false/inaccurate information to Complainants (p. 22, 25, 30-32). Int'l
11 TLC as a freight forwarder, or even as an unlicensed agent providing loading and
12 consulting as it claims it was performing, has a fiduciary duty to its principal, namely
13 Complainants. Int'l TLC breached its fiduciary duty from the outset when it represented
14 that it could transport their containers from Portland to Poland by conducting activities as
15 an ocean transportation intermediary when not licensed by the Federal Maritime
16 Commission.
17

18 Int'l TLC continued to mislead Complainants by inserting its name on the house
19 bills of lading issued by Limco rather than the true owner, Berkovich. Complainants
20 never authorized or instructed Barvinenko to list himself as the shipper on any of the bills
21 of lading (Kobel, TR 123-125; Berkovich TR 483).

22 After a six-month delay shipping the damaged container, Int'l TLC then presented
23 Complainants with a false statement for \$43,270 on January 9, 2009 (Ex 79, 80). Many
24 of the charges were not owed to Int'l TLC, as some bills had already been paid by Kobel,
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1 such as the Affordable Storage Containers charge of \$14,987 (Int'l TLC Ex. 55;
2 Complainants' Ex 121, 122, 123; KOB 0340, 0342). Other charges were related to the
3 two earlier containers already released to Complainants in November 2008.

4 Int'l TLC and Limco concealed even the sale itself and the wrongful delivery of
5 the containers to Remishevskiy (Kobel, TR 103, 106, 110, 111, 117). Int'l TLC told
6 Kobel that Baltic Sea logistics took the containers (TR 103, 106, 111, 112, 117).
7 Disclosure as to the sale price and the proceeds were not sent to Kobel until May, 2009
8 (Barvinenko, TR 385) (Kobel, TR 119).

9 Int'l TLC argues that Berkovich was in the United States until April, 2009.
10 However, Berkovich testified that he was in the Ukraine in January, 2009 (Berkovich, TR
11 478), and he was constantly checking Gdynia, Poland's computer system. His name was
12 not shown as the owner of the three containers (Berkovich, TR 484).

13 Int'l TLC's records does not show any other written correspondence sent by Int'l
14 TLC to Complainants for payment or to pick up the cargo, except for the January 9, 2009
15 letter (Ex 79) and accompanying invoice (Ex 80).

16 Finally, all three Respondents have asserted that two containers with motor oil
17 that could not have been imported into the Ukraine. However, Respondents have not
18 offered any competent and reliable evidence for this assertion.

19 Barvinenko testified that "I learned information fairly recently before the Court
20 and I made some inquiries." (Barvinenko, TR 408). Barvinenko admitted that he did not
21 have this information at the time of this shipment. (Barvinenko, TR 408).

22 On the contrary, Valeriy Struchkov, a Valvoline dealer in the Ukraine was willing
23 to purchase motor oil from Mr. Berkovich (Struchkov, TR 443-444). When asked if he's
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1 allowed to sell oil that comes packaged from the United States in the Ukraine, he stated,
2 “Of course, it clear customs, it’s the law.” (Struchkov, TR 445).

3 Int’l TLC now raises this issue as a defense. However, Int’l TLC, as
4 Complainants’ agent had a fiduciary duty and should have either advised Complainants
5 on this issue, or investigated this issue prior to shipment, rather than accepting the cargo,
6 shipping it, then charging Complainants freight if they suspected that such cargo could
7 not have been imported into the Ukraine.

8 IV

9 CONCLUSION

10 Complainants shipped five containers, employing and depending upon the professional
11 services of HLAG/HLAI, Limco, and Int’l TLC. Despite paying \$24,000 in shipping fees and
12 more in storage fees for the five containers, Complainants have lost a total of \$134,459.72 for
13 their investment in the cargo, containers, and shipping costs (Ex 132, 133, 134 and 136).

14 All three containers were mishandled in some way contrary to the requirements of the
15 Shipping Act, especially MOGU 2002520. This container was mishandled at virtually every
16 stage of the shipment, from the loading, the diversion of shipment, to the excessive delays in
17 Hamburg, and finally to the failure/wrongful delivery of the container in Gdynia, Poland. This
18 mishandling of container MOGU 2002520 occurred despite the fact that Complainants paid the
19 full freight charges on the container, and fulfilled all of its obligations pursuant to its shipment.

20 The six-month delay in the arrival of the damaged container thwarted Complainants’ plan
21 to ship this container along with the other four containers by rail to the Ukraine to save expenses.
22 Because of the delay, Complainants incurred an additional cost of storage for two other
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1 containers in the sum of \$4,875, as well as an increased cost to ship these two containers by truck
2 as opposed to rail.

3 Int'l TLC's sale of the three containers and cargo after the arrival of the damaged
4 container in Gdynia, Poland was clearly unlawful without any legal authority and not conducted
5 in a commercially reasonable manner. By exercising this self-help remedy, Int'l TLC
6 circumvented and disregarded the proper legal process of filing an action in Court to prove its
7 claim and allowing Complainants an opportunity to raise any counterclaims and defenses.

8 All three Respondents blame Complainants rather than themselves for Complainants'
9 total loss. Respondents criticize Complainants' inexperience, lack of planning or economic
10 viability, and their financial resources. Complainants raised numerous issues regarding
11 inconsistencies and other dealings such as bankruptcies, foreclosures and Berkovich's other
12 transactions with Int'l TLC rather than focusing directly on the issues related to the shipment of
13 these containers. These personal attacks on Complainants do not absolve Respondents from their
14 obligations to comply with the requirements of the Shipping Act, especially §10(d)(1).
15

16 Respondents are obligated to comply with the terms of the Shipping Act whether a
17 shipper is experienced or inexperienced, and whether they have a viable economic plan or not.
18 On the contrary, Respondents took advantage of Complainants' inexperience, lack of
19 sophistication and vulnerability. Respondents have sought to trivialize their own conduct and
20 obligations as a licensed carrier, NVOCC, or unlicensed ocean freight forwarder under the
21 Shipping Act.
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23 In short. Respondents have been fully compensated despite their utter disregard for the
24 reasonable and just practices under the Shipping Act, while Complainants have been left with
25 nothing for their three containers and investment of \$134,459.72. Complainants should be
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1 awarded reparations for the damages resulting from the violations to the Shipping Act committed
2 with respect to each Respondent.
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8 DATED this 9 day of November, 2011.
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12 Donald P. Roach
13 Attorney for Complainants
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CERTIFICATE OF SERVICE

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

1. I am over the age of eighteen years and I am not a party to this action.
2. On November 9, 2011, I served a complete copy of COMPLAINANTS' REPLY

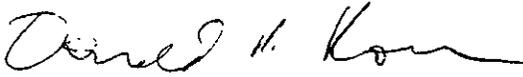
TO RESPONDENTS' POST-TRIAL BRIEFS to the following parties at the following addresses, postage prepaid by first class mail and email:

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DATED: November 9, 2011.

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