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September 5, 2012

## VIA HAND DELIVERY

Karen V, Gregory, Secretary  
Office of the Secretary  
Federal Maritime Commission  
800 N. Capitol Street, N.W., #900  
Washington, DC 20573

Re: Docket No. 11-07<sup>14</sup>: Petra Pet, Inc. v. Panda Logistics Limited, et al.

Dear Ms. Gregory:

I am enclosing the original and 5 copies of the following document for filing in Docket No. 11-07<sup>14</sup>.

Exceptions of Respondents Panda Logistics Limited and Panda Logistics Co., Ltd. to the Administrative Law Judge's August 14, 2012 Initial Decision

Please also find a CD containing a PDF of the filing in accordance with 46 C.F.R. § 502.2(e). We have also enclosed a copy of the documents for date-stamp and return to us via our messenger.

Should you have any questions, please do not hesitate to contact me at the above direct dial number. Thank you for your assistance.

Very truly yours,

Brendan Collins



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OFFICE OF THE  
FEDERAL MARITIME COMMISSION

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 11-14**

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**PETRA PET, INC. (a/k/a PETRAPPORT),**

**Complainant,**

**v.**

**PANDA LOGISTICS LIMITED; PANDA LOGISTICS CO., LTD. (f/k/a PANDA INT'L  
TRANSPORTATION CO., LTD.); and RDM SOLUTIONS, INC.,**

**Respondents.**

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**EXCEPTIONS OF RESPONDENTS PANDA LOGISTICS LIMITED AND PANDA  
LOGISTICS CO., LTD.'S (f/k/a PANDA INT'L TRANSPORTATION CO., LTD.) TO  
THE ADMINISTRATIVE LAW JUDGE'S AUGUST 14, 2012 INITIAL DECISION**

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Co., Ltd.)***

**DATE: September 5, 2012**

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Respondents, Panda Logistics Limited (“Panda Logistics”) and Panda Logistics Co., Ltd. (f/k/a Panda Int’l Transportation Co., Ltd.) (“Panda Int’l”) (Panda Logistics and Panda Int’l are collectively referred to herein as “Panda”), pursuant to 46 C.F.R. § 502.227, hereby file their Memorandum of Exceptions to the Administrative Law Judge’s (“ALJ”) Initial Decision (“ID”) and their Brief in Support of the Memorandum.

### **MEMORANDUM OF EXCEPTIONS**

The factual predicate of the Complaint filed by Petra Pet is that Petra Pet paid freight charges to RDM for carrier services provided by Panda, but that RDM failed to forward such payments to Panda. See Plaintiff’s Verified Complaint at ¶¶ 11 and 12. The foundational legal question presented then, is whether Petra Pet’s purported payment to an independent third party satisfies its contractual obligation to pay freight and related charges to Panda, a non-vessel operating common carrier (NVOCC) that issued a freight collect bill of lading showing Petra Pet as consignee that was used by Petra Pet to obtain release of its goods. Petra Pet also asserted for the first time in its Reply to Panda’s Opposition Brief, that Panda improperly asserted a lien on goods in its possession for payments due for prior shipments it had made on behalf of Petra Pet.<sup>1</sup>

The ID completely fails to address the primary issue that accounts for the bulk of the reparations sought by Petra Pet, *i.e.*, whether Panda is entitled to collect the freight and related charges due and owing for past services provided to Petra Pet. Indeed, while recognizing that RDM was not acting as Panda’s agent, ID at 20, the ID fails to address the legal significance of that conclusion or the overwhelming weight of legal authority - - fully discussed in Panda’s pleadings - - holding that payment by a shipper or a consignee to a third party who is not acting

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<sup>1</sup> Because this issue was raised by Petra Pet for the first time in its Reply brief to which Panda had no opportunity to respond, Panda requested oral argument to clarify this and other issues. The ALJ denied this request.

as the carrier's agent does not excuse it from its obligation to pay the carrier for transportation services provided, even if that would constitute a double payment by the shipper or consignee.

Moreover, although the ID itself finds that the Panda Int'l conditions of carriage applicable to the shipments at issue provide that it "shall have a lien on the goods and any documents relating thereto *for any amount due at any time* to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit," ID at 14, Finding of Fact No. 74, (emphasis added), the ID ignores this language and finds that Panda violated the Shipping Act by actually asserting this lien.

Finally, the ID improperly accepts Petra Pet's mere assertions that it had paid the Panda freight charges for previous shipments to a third party, RDM Solutions, Inc. ("RDM"), although Petra Pet presented insufficient evidence of such payments. Here, Petra Pet has not complied with well-established Commission requirements regarding the proof necessary to support such a claim.

Panda excepts to each of these legal conclusions in the ID. Panda also excepts to the following findings of fact.

#### **FACT EXCEPTIONS**

Findings of Fact Nos. 8, 9, and 10: These three Findings of Fact are based on an email exchange between Mario Ruiz of Worldport Logistics (the predecessor of RDM) and Betty Sun of Beijing Jaguar, a Panda affiliate. These two emails introduce the ID's description of the background to the dispute between Panda and Petra Pet. These emails, however, have little relevance to the dispute and fail to provide the most relevant and important information concerning the relationships among Panda, Mario Ruiz, RDM, and Petra Pet. In the first place,

these emails fail to even mention that there had been a pre-existing relationship between Mario Ruiz, Petra Pet and Panda, which had been established at least two years earlier when Mr. Ruiz - - who was working for another company named Amber Worldwide Logistics at that time - - contacted Panda on behalf of Petra Pet, identified Petra Pet as his client, and requested the Panda quote rates for Petra Pet's shipments. *See* Declaration of Betty Sun (Panda Appendix 1, Sun Dec. at ¶ 6). Second, the emails in these Findings of Fact do not even concern Petra Pet shipments and, at least insofar as Mr. Ruiz's email is concerned, deal only with export shipments and using Beijing Jaguar (i.e. Panda) as Worldport's agent. ("Trucking all over the U.S. and count with agent offices in the U.S. and all over the world. Your company being one of them.") The Petra Pet shipments were all import shipments. Further, no relationship as discussed in these emails between Panda and Worldport, or RDM, was ever established. The only connection between Mr. Ruiz and any of his companies and Panda was the one established by Mr. Ruiz in 2003; that is, his employment of Panda on behalf of Petra Pet to provide transportation services. Panda Appendix 1, Sun Dec. at ¶¶ 7, 22, 23, 37, 38. These Findings of Fact are, therefore, wholly irrelevant to this proceeding.

Finding of Fact No. 11: The ID quotes from an email from RDM to Panda in regard to a previous instance, in 2006, in which RDM failed to pay a Panda affiliate (Beijing Jaguar) for services it had provided on behalf of Petra Pet, despite the fact that Petra Pet had allegedly paid RDM. The Finding of Fact notes that Petra Pet was not copied on that correspondence. The Finding of Fact is misleading in failing to note that the email in question was in response to a prior email from a Panda affiliate to Petra Pet customer in which the Panda affiliate refused to release goods in its possession until the Panda affiliate was paid freight and related charges. *See* Panda Appendix 17 and 18 (August 22, 2006 email from shipper to Patty De Avila, the Office

Manager of Petra Pet). The Finding of Fact further fails to state that, when informed that the Panda affiliate could not release goods without being paid, Petra Pet instructed RDM to make such a payment. It did not claim to Panda that Petra Pet's payment to RDM satisfied its obligation to pay Panda's freight charges. *Thus, the email correspondence reflects that at least as of 2006, Petra Pet was on notice that Panda would not release goods in its possession until had been paid, regardless of whether or not Petra Pet allegedly had paid RDM.*

Findings of Fact Nos. 13 and 14: These two Findings of Fact highlight that RDM billed Petra Pet's custom's broker, Kuehne + Nagel for the ocean freight charges. They also clearly demonstrate – which the ID does not make clear – that Petra Pet, through Kuehne + Nagel, also received a Panda bill of lading that corresponded to each of the arrival notices. Manifestly, therefore, RDM was not billing Petra Pet for “ocean freight” (as shown on the arrival notices) for its own account, but for the account of Panda, and Petra Pet was aware of that fact. Further, each of the Panda bills of lading clearly stated that: “the goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.” Petra Appendix 0051, 0053, 0180 – 183. Thus, Petra Pet knew, as a matter of law, that it had a series of contracts with Panda that obligated Petra Pet to pay Panda's freight charges. *American Ry. Express Co. v. Lindenburg*, 260 U.S. 584, 591 (1923); *Cau v. Texas & P.R. Co.*, 194 U.S. 427 (1904); *Luckenbach Steamship Co. v. American Mills Co.*, 24 F.2d 704, 705 (5<sup>th</sup> Cir. 1928).

Finding of Fact No.15: Although the ID states that there was no business relationship between RDM and Petra Pet outside of the shipments handled by Panda, it fails to state that RDM's principal initiated a business relationship with Panda on behalf of Petra Pet in 2003, identifying Petra Pet as his client and requesting Panda quote rates for Petra Pet's shipments. *See Panda Appendix 1, Sun Dec. at ¶ 6.* Panda had no relationship with Mr. Ruiz of RDM prior

to his contacting Panda on behalf of Petra Pet and no one from Panda has ever met Mr. Ruiz. Panda Appendix 2, Sun Dec. at ¶¶ 7 and 8. Thus, the ID fails to address the fact that Panda's sole interactions with RDM were in RDM's capacity of arranging transportation on behalf of Petra Pet.

Finding of Fact No. 18: While the ID notes that RDM asked whether it could co-load with Panda, the undisputed facts in evidence reflect that RDM has never co-loaded on any shipment handled by Panda. See Panda Appendix 3, Sun Dec. at ¶¶ 18, 22 and 23. RDM never acted as a co-loader on transportation handled by Panda and never issued a bill of lading on shipments handled by Panda. *Id.*

Finding of Fact No. 22: This Finding of Fact is misleading in stating that: "Panda continued to do business with RDM Solutions..." As noted above in the discussion of Findings of Fact Nos. 13 and 14, for each of these shipments Petra Pet – either directly or through its agent Kuehne + Nagel – received a Panda bill of lading, meaning that Petra Pet was clearly aware that Panda was providing the ocean transportation services for Petra Pet as consignee. Therefore, this Finding of Fact more accurately should have stated: "Panda continued to do business with Petra Pet ..." The fact is, Panda billed RDM, which it understood to be Petra Pet's agent, at RDM's request. Panda Appendix 2, Sun Dec. at ¶¶ 16 and 18. This was no more unusual than Petra Pet's requesting Kuehne + Nagel, as its agent, to pay RDM for Panda's services. See Finding of Fact No. 25. Petra Pet was no more "doing business" with Kuehne + Nagel for these shipments than Panda was "doing business" with RDM. In fact, the primary contractual relationship for these shipments was between Panda and Petra Pet, the parties to the bill(s) of lading.

Finding of Fact No. 25: The ID states that Kuehne + Nagel made required ocean freight payments to RDM. As discussed more fully below, the evidence presented by Petra Pet fails to support such a finding.

Finding of Fact No. 26: The ID states that RDM billed Petra Pet directly for certain services and that Petra Pet paid RDM by check for those services. Again, as discussed below, the lone unsubstantiated check in the record (Petra Pet Appendix 0085 for \$2,348), does not establish that Petra Pet paid RDM the hundreds of thousands of dollars that Panda was owed for transportation services provided on behalf of Petra Pet.

Finding of Fact No. 32: The ID neglects to include additional relevant information, including the fact that when informed in July of 2010, that RDM was not making payments to Panda, Patty De Avila, office manager of Petra Pet, instructed RDM to pay Panda. *See* Petra Pet Appendix 0097. Further, in response to that correspondence, Petra Pet did not claim to Panda that it had paid RDM or that RDM was Panda's agent. Panda Appendix 5; Sun Dec. at ¶35. Instead, Petra Pet sent a strongly worded message to RDM that it needed to pay Panda. *See* Petra Pet Appendix 0097 ("PLEASE NEED A REPLY TO THEM WITH A PAYMENT . . . .") This clearly indicates that Petra Pet was fully aware that it had the primary obligation to pay Panda.

Further, the Finding of Fact does not include the fact that even after being informed that Petra Pet had substantial amounts owing in overdue freight invoices, *see* Petra Pet Appendix 0097, Petra Pet continued to make payments to RDM for delivery to Panda. *See, e.g.* Petra Pet Appendix No. 0085 showing a check dated October 4, 2010. Thus, even three months after explicitly being informed that RDM was not paying Panda for transportation services Panda was providing on behalf of Petra Pet, Petra Pet continued to pay RDM, rather than Panda, for freight and related charges, thereby assuming the risk that RDM might not pay Panda.

Finding of Fact No. 40: This Finding of Fact is misleading in that it implies that Panda was only looking to RDM for payment of its charges. The December 13, 2010 email in question is a part of an email dated December 14, 2010 from Patty DeAvila of Petra Pet to Panda in which she is responding to a December 13, 2010 email from Panda to her. Panda's original email is in larger typeface than Ms. DeAvila's response. In that email, Panda is clearly asking Petra Pet to pay the money. It refers to the "attached S[tatement] O[f] A[ccount] for PETRAPPORT." It also states that "we request you to pay totally USD 250330.03 to us immediately. Because we have paid to shipping lines already. Pls arrange wire transfer to our Beijing office. Then you will get all shipments."

Finding of Fact No. 45: The ID asserts a bare legal conclusion without any factual support. The fact that a customs broker, Kuehne + Nagel may have made such an assertion is neither credible nor substantive evidence. There is certainly no support for the assertion that RDM was contracted by Panda as their agent as there is no reason to believe that Kuehne + Nagel would have any information in this regard. Further, the ID should include the following additional Findings of Fact:

Despite the fact that Kuhne + Nagel states "if you have paid RDM and can prove it (we will provide cashed checks)", no such cashed checks were submitted into evidence in the proceeding. Petra Pet therefore has not satisfied its burden of proof in this regard.

Finding of Fact No. 49: The ID's recitation of this email is misleading. It quotes Panda's general manager as telling Petra Pet that: "I totally agree that you do not get involved in the financial problem between Panda and RDM. Neither do I want you to get involved. This problem indeed had nothing to do with you." This implies that Panda agreed that Petra Pet had no formal relationship with RDM. However, later in the same email, Panda's general manager stated to Petra Pet as follows:

You chose RDM. RDM was your partner, he used your biz hurt Panda. Please think over whether you should -- consider your function and value. You did not ask RDM to do bad thing. But you are the origin. Panda has been hurt because you chose RDM. What else do you want PANDA to bear.

As the Finding notes, Panda's general manager also stated at the end of this email: "Pls forgive my words. Your partner may cheat me. Pls ask your partner to talk to us and find out why this happened, and now how to resolve." Fairly read, this email from a non-English speaker expresses Panda's view that, while Petra Pet was not the immediate cause of the financial problems, its choice of RDM as a partner meant that Petra Pet should bear responsibility for RDM's failure to pay Panda.

Finding of Fact No. 55: The ID states that after paying Panda \$94,381.93 in January 2011, Petra Pet believed that it had paid Panda for all but seven containers which shipped from China on or about December 18, 2010. Petra Pet Appendix 0138-141. The pages cited in the Appendix are simply bills of lading, however, and therefore do not support any such conclusion.

Finding of Fact No. 57: The ID's reference to an uncontradicted sworn statement is misleading in that the sworn statement was filed as part of Petra Pet's Reply Brief to which Panda did not have an opportunity to respond.

Finding of Fact No. 63: The ID errs in failing to include the following additional statements of fact. The \$130,526.73 sought was part of the \$173,597.83 owed Panda for prior shipments that Panda had transported on behalf of Petra Pet. See Petra Pet Appendix 0119, 0124-25. When Panda informed Petra Pet that it was owed in excess of \$144,455.33 in past due amounts for shipments that Panda had provided on behalf of Petra Pet (and for which Panda had paid the shipping lines), Petra Pet denied liability stating that it had paid RDM such amounts. Petra Pet Appendix at 0080.

Finding of Fact No 74: The ID should include the following language:

Because Panda International's conditions of carriage allowed Panda to assert a lien "for any amounts due at any time," Panda was entitled to assert a lien on goods in its possession for unpaid charges on prior shipments that it had handled on behalf of Petra Pet.

Finding of Fact No. 75: Rule 2-020 appears in the tariff of Panda Logistics Ltd. (Panda Logistics), a Hong Kong company. *See* Finding of Fact No. 2. The bills of lading for the seven shipments in question that were allegedly diverted were issued by Panda Logistics Co. Ltd. ("Panda Int'l"), a corporation organized and operating under the laws of the Republic of China in Taiwan. *See* Finding of Fact Number 3; Petra Pet Appendix 0180 - 183. Therefore, the Panda Logistics' tariff cited in the Finding of Fact No. 75 does not apply here. The Panda Int'l tariff defines a "diversion" as "[a] change in the original billed destination." All of these shipments were transported to the original billed destination after the lien was satisfied. Moreover, stopping transit of cargo for the purpose of exercising a lien is not a diversion; it is a "stoppage in transit."

Finding of Fact No. 76: This Finding of Fact is incorrect. There is no such thing as a "Freight Amount" party. On some Panda bills of lading RDM Solutions' name and address is stamped over the freight amount box. This box, however, does not identify "a party." Other Panda bills of lading do not show RDM Solutions in the freight amount box or, indeed, anywhere on the bill of lading. Petra Pet Appendix 0180 - 183.

Finding of Fact No. 78: The ID should state that Petra Pet paid Panda \$130,526.73 for freight and related charges associated with prior shipments transported by Panda on behalf of Petra Pet.

The ID also fails to include the additional relevant facts:

- - It was only in December of 2010, after Panda refused to release goods in its possession until it was paid for transportation services provided and after RDM

disappeared, that Petra Pet for the first time asserted that RDM was Panda's agent and that payment by Petra Pet to RDM satisfied its obligations to Panda. Panda Appendix 5, Sun Dec. at ¶ 36. Petra Pet had never previously made such assertion, even in 2006 when Petra Pet had previously made payments to RDM and RDM failed to timely forward such payments to Beijing Jaguar or Panda. *Id.*

-- Panda has never held out RDM as an agent of Panda. Panda Appendix 5, Sun Dec. at ¶ 37.

-- RDM has never acted as an agent for Panda. Panda Appendix 5, Sun Dec. at ¶ 38.

-- There is no evidence in the record that RDM ever issued bills of lading, held itself out to the general public to provide transportation of cargo between the United States and a foreign country for compensation or assumed responsibility for the transportation of cargo from the port or point of receipt to the port or point of destination. *See* 46 U.S.C. § 40102(6).

#### **BRIEF IN SUPPORT OF MEMORANDUM OF EXCEPTIONS**

The basic legal issue presented for the Commission's consideration is whether Petra Pet's purported payments to RDM excused Petra Pet from its obligation as the consignee on Panda's freight collect bills of lading that received delivery of the goods, to pay Panda for the carriage of goods. Without a decision on this issue, there is no logical basis for a finding that Panda violated the Shipping Act. Thus, if Petra Pet owed Panda the freight charges, the award of those freight charges to Petra Pet as reparations -- as the ID did -- is clear error. Moreover, if Petra Pet owed the money, Panda's exercise of the lien -- which is clearly provided for in its bill of lading -- to recover the money cannot be an unreasonable practice in violation of the Shipping Act.

It appears the ID may have treated this issue as a foregone conclusion. The ID states:

The evidence establishes that Panda violated this section [46 U.S.C. §41102(c)] by coercing Petra Pet into paying amounts owed to Panda by RDM.

ID at 20. By stating that RDM owed the freight charges to Panda, the ID seems to have decided the basic issue in the case *sub silentio* because nowhere does it discuss the “evidence” that allegedly “establishes” this fact, much less address any of the factual or legal arguments or precedents submitted by Panda establishing Petra Pet’s liability for paying these charges to Panda – even if they constituted double payments by Petra Pet.

In failing to address the overwhelming weight of authority that payment to a third party who is not the carrier’s agent does not satisfy the shipper’s – or a consignee’s<sup>2</sup> – obligation to pay freight charges, even if that results in a double payment, the ID ignores the reason why Petra Pet’s reparations claims are baseless. The ID also improperly glosses over the fact that Petra Pet failed to come forward with evidence actually establishing that it paid RDM for the transportation services provided by Panda on its behalf. For all of these reasons, the ID must be vacated.

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<sup>2</sup> “[T]he consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier.” *Pittsburgh, C.C. & St. Louis Ry. Co. v. Fink*, 250 U.S. 577, 581, 40 S. Ct. 27 (1919); *States Marine Int., Inc. v. Seattle-First Nat. Bank*, 524 F. 2d 245, 248 (9th Cir. 1975). Here, Panda’s bills of lading were marked “freight collect,” reflecting an understanding between the shippers and Petra Pet that Petra Pet would be responsible for payment of Panda’s freight charges. See *Consolidated Freightways Corp. v. Peacock Eng’g Co.*, 628 N.E. 2d 300 (Ill. App. Ct. 1993).

**A. Payment to RDM Does Not Absolve Petra Pet of Its Obligation to Pay Panda for Transportation Services Rendered**

**1. There is No Support for the ID's Suggestion that RDM Acted as an NVOCC.**

The ID correctly concludes that RDM was not acting as Panda's agent. ID at 20. Indeed, such a conclusion is unavoidable given that there is nothing in the record establishing that RDM was acting as Panda's agent for the shipments at issue. The ID incorrectly assumes, however, without engaging in any meaningful analysis, that RDM was acting as an NVOCC, rather than as a freight forwarder. *Id.* This summary conclusion is incorrect.

As the ID correctly notes, but then ignores, in order to be deemed a common carrier (including an NVOCC), under the Shipping Act, an entity must hold itself out to the general public to provide transportation by water of cargo and assume "responsibility for the transportation from the port or point of receipt to the port or point of destination. . . ." ID at 17, *citing* 46 U.S.C. § 40102(6). Here, the record is devoid of any evidence that RDM ever engaged in these types of activities. Indeed, the record reflects that RDM never issued a bill of lading for Petra Pet's shipments or took any other action assuming responsibility for the transportation of Petra Pet's cargo. *See* Panda Appendix 3, Sun Dec. ¶¶ 22, 23. Thus, the ID's conclusion that, although RDM does not exactly fit the description of an NVOCC, perhaps it could be categorized as one, is baseless.

**2. Petra Pet Acted as a Freight Forwarder.**

Although the Commission's regulations overlap to a certain extent in regard to what type of services constitute freight forwarding as opposed to acting as an NVOCC, one clear line of demarcation is that an NVOCC issues bills of lading while a freight forwarder does not.

Compare, e.g. 46 C.F.R. Section 515.2(l)(4) (NVOCC issues bills of lading or equivalent documentation) with 46 C.F.R. Section 515.2(i).

In the seminal case of *Prima U.S. Inc. v. Panalpina, Inc.*, 223 F.3d 126, 129 (2d Cir. 2000), the Second Circuit drew a clear distinction between NVOCCs and freight forwarders, holding that while an NVOCC “is liable to the shipper because of the bill of lading that it issued . . .” “[a] freight forwarder simply facilitates the movement of cargo. . . .” The court stated:

Freight forwarders generally make arrangements for the movement of cargo at the request of clients and are vitally different from carriers, such as vessels, truckers, stevedores or warehouses, which are directly involved in transporting the cargo. Unlike a carrier, a freight forwarder does *not* issue a bill of lading, and is therefore not liable to a shipper for anything that occurs to the good being shipped.

*Id.* at 129 (emphasis in original).

Thus, in *Prima*, the court recognized that Panalpina was not an NVOCC because it “did not issue a bill of lading and it did not consolidate cargo.” *Id.*, see also, *Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-56 (S.D.N.Y. 2005). (“the most fundamental difference between a freight forwarder and an NVOCC is that an NVOCC issues a bill of lading. . . . It is from the bill of lading -- the NVOCC’s contract with the shipper -- that its liability to the shipper for its cargo derives.” *Id.* at 455-46 (citations omitted); *Strickland v. Evergreen Marine Corp.*, 2007 WL 539424 at \* 4 (D. Or. 2007) (party was an NVOCC in its dealings with the plaintiff because it issued a bill of lading, which a freight forwarder would not do); *Fireman’s Fund American Ins. Co. v. Puerto Rico Forwarding Co.*, 492 F.2d 1294, 1295 (1<sup>st</sup> Cir. 1974) (“As the carrier, an NVOCC issues its own bill of lading to each small shipper that employs its services, describing the goods for whose transportation it will be held responsible); *M. Prusman Ltd. V. M/V Nathaniel*, 670 F. Supp. 1141, 1143 (S.D. N.Y. 1987) (defendant was a common carrier

because it issued a bill of lading which are contracts of carriage). Here the record is devoid of any evidence that RDM ever issued bills of lading for the transportation of Petra Pet's goods or accepted a carrier's responsibility for the transportation of Petra Pet's shipments.

Conversely, the record in this case clearly indicates that RDM was acting as a freight forwarder in regards to the Panda shipments for Petra Pet. It arranged for the bookings with Panda, Petra Pet Appendix 0184 at ¶2, prepared and sent arrival notices to Petra Pet, Petra Pet Appendix 0188-189, processed the Panda bills of lading at destination, Petra Pet Appendix 0107, and handled the freight monies on behalf of Petra Pet, Petra Pet Appendix 0184 at ¶3, 0188-189. *See*, 46 C.F.R. § 515.2(i)(3), (5), (10), (11) (definition of "freight forwarding services"). It also performed other freight forwarding services for Petra Pet, including handling CFS charges, arranging for inland freight and trucking, and co-ordinating with government agencies. Petra Pet Appendix 0184 at ¶ 3. The sole reason offered in the ID as to why RDM was not acting as a freight forwarder is that the shipments in question moved from China to the United States, instead of vice versa. ID at 20. While this means that RDM was not an ocean freight forwarder as defined by the Shipping Act, it clearly does not follow that RDM was not providing freight forwarding activities for Petra Pet. Freight forwarding is conducted throughout the world in all trades. The term ocean freight forwarder is simply a way of designating freight forwarders in the United States that arrange for U.S. exports and are subject to regulation under the Shipping Act. Schoenbaum, *Admiralty and Maritime Law* (2001 Thomson Reuters) Vol. I, p. 801 ("Freight forwarders are intermediaries usually employed by a shipper or exporter to facilitate and handle the details of shipment of goods. Ocean freight forwarders are licensed and regulated by the Federal Maritime Commission.") RDM, therefore, was acting as an unregulated freight forwarder handling inbound shipments from China to the United States.

**3. Payment to Freight Forwarders or other Types of Third Party Intermediaries Does Not Insulate a Shipper or Consignee of Its Obligations to Pay Freight Charges.**

Generally, freight forwarders are deemed agents of the shipper. The Supreme Court in *United States v. American Union Transport*, 327 U.S. 437 (1946) analyzed the type of services provided by a freight forwarder, including arranging for necessary space with a carrier and preparing necessary documentation in regard to the cargo being shipped, and concluded that forwarders “act as agents of the shipper.” *Id.* at 443. More recent cases have reached the same conclusion. Thus, in *Pearson v. Leif Hoegh & Co., A/S*, 953 F.2d 638, 1992 WL5020 at \*5 (4<sup>th</sup> Cir. 1992), the Fourth Circuit analyzed the law in that regard and recognized that the weight of authority indicates that the freight forwarder is properly considered the shipper’s agent. *See also, Ins. Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934, 940 (11<sup>th</sup> Cir. 1990) (freight forwarder is shipper’s agent); *Hoechst Celanese Corp., v. M/V Trident Amber*, 1992 WL 179219 (S.D. Ga. 1992) (weight of authority from federal courts indicates that a freight forwarder is properly considered the agent of the shipper, *citing* Second, Fourth and Eleventh Circuit precedent). Here, RDM clearly performed freight forwarding services on behalf of Petra Pet.<sup>3</sup> Therefore, following these decisions, RDM was Petra Pet’s agent and any Petra Pet payments to RDM were clearly not payments to Panda.

Moreover, even if freight forwarders are not considered agents of the shipper, payments by the shipper to the forwarder do not constitute payments to the carrier. In *Strachan Shipping Co v. Dresser Ind., Inc.*, 701 F.2d. 483 (5<sup>th</sup> Cir. 1983), the Fifth Circuit addressed the very question presented here, *i.e.* whether payment to a freight forwarder excuses a shipper from its

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<sup>3</sup> The fact that Petra Pet was consignee in this case, rather than the shipper, does not diminish the authority of these cases. RDM was performing its freight forwarding services for its client, Petra Pet. (*see, e.g.* Panda Appendix 17, in which RDM refers to Petra Pet as its client). RDM did nothing for Panda, not even preparing Panda’s bills of lading. RDM, therefore, clearly acted as the agent of Petra Pet.

obligation to pay a carrier for transportation service provided. First, the court concluded – as did the ID in this case with respect to RDM – that, because a forwarder in the shipping industry assumes a unique position and performs a variety of functions that benefit both the shipper and carrier, it is neither an agent of the shipper nor the carrier; instead, it is an independent contractor. *Id.* at 487-89. The court, nonetheless, held that payment to the freight forwarder as intermediary did not excuse the shipper from its obligation to pay the carrier even when that meant the shipper would have to pay twice. That determination, the court reasoned, was not dependent upon whether the carrier extended credit to the forwarder or whether the carrier initially sought payment from the forwarder, but instead whether the carrier intended to release the shipper from its obligation and to look solely to the forwarder for payment. *Id.* at 489. If it did not, as was the case there, the shipper remained liable for payment to the carrier. In so holding, the court noted that its conclusion comports with economic reality.

A freight forwarder provides a service. He sells his expertise and experience in booking and preparing cargo for shipment. He depends upon the fees paid by both shipper and carrier. He has few assets, and he books amounts of cargo far exceeding his net worth. Carriers must expect payment will come from the shipper, although it may pass through the forwarder's hands. While the carrier may extend credit to the forwarder, there is no economically rational motive for the carrier to release the shipper. The more parties that are liable, the greater the assurance for the carrier that he will be paid.

*Id.* at 490.

Other “double payment” cases in the federal courts reach the same conclusion. In *National Shipping Company of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544 (11<sup>th</sup> Cir. 1997), the Eleventh Circuit similarly concluded that the shipper is liable unless released by the carrier. *Id.* at 1546-47. There, the shipper defended against the carrier's suit for freight charges by claiming that it had already paid the charges to a freight forwarder. The court recognized that the

weight of authority and the better reasoned authority is that “unless the carrier intends to release the shipper from its duty to pay under the bill of lading, the shipper remains liable to the carrier, irrespective of the shipper’s payment to a freight forwarder.” *Id.* at 1546. Thus, the court concluded that “[s]hould the shipper wish to avoid liability for double payment, it must take precautions to deal with a reputable freight forwarder or contract with the carrier to secure its release.” *Id.* at 1547.

The Fourth Circuit reached the same conclusion in *Hawkspere Shipping Co. Ltd. v. Intamex, S.A.*, 330 F.3d 225 (4<sup>th</sup> Cir. 2003). There, again, the court addressed a dispute between a carrier that asserted a maritime lien based upon the shipper’s failure to pay freight charges. Just as here, the shipper defended against the seizure on the grounds that it had paid a third party consolidator (ICTS), which it asserted, was acting as the carrier’s agent. In rejecting the defense, the court recognized that the shipper has the burden of proof in establishing that there is a principal-agent relationship between the carrier and a third party intermediary. *Id.* at 235. Absent a formalized agency relationship between the parties, the shipper has to establish that the carrier has held out the third party as someone authorized to act on its behalf. *Id.* at 235-36. The mere fact that the carrier looked to the third party for payment falls far short of such a showing.

That [the carrier] did so so, though, demonstrates nothing more remarkable than the fact that the fielding of payments was one of the services that ICTS chose to provide to the shippers for whom it consolidated. Its provision of that service in no way indicates that it was acting as [the carrier’s] collection agent.

*Id.* at 236. The court further rejected the shippers’ testimony as to its belief that the consolidator was acting for the carrier and that it relied upon that belief: “Under United States law, however, the Shippers’ subjective beliefs are irrelevant to the inquiry: only evidence of [the carrier’s] conduct can prove agency.” *Id.*

After weighing the authority, the court concluded that shippers assume the risk that they may have to pay twice for transportation services when they choose to pay a third party rather than pay the carrier directly. “[W]e here adopt the assumption of risk approach. Shippers . . . can always avoid the loss simply by paying their carrier directly. When, as here, they choose not to do so, it is they who appropriately bear the risk that such a choice creates.” *Id.* at 237.

In *Oak Harbor Freight Lines Inc. v. Sears Roebuck & Co.*, 513 F.3d 949 (9<sup>th</sup> Cir. 2008), the Ninth Circuit found, in a case with facts very similar to the ones present here, that Sears Roebuck, which was the shipper on some bills of lading and the consignee on others, could not avoid its obligations to pay the carrier’s freight charges simply because it had already paid those freight charges to a third party broker. In that case, there was a written contract between the carrier and the third party broker in which the third party broker agreed “to pay CARRIER within a predetermined time from the date of receipt regardless whether or not BROKER/SHIPPER has been paid for movement.” *Id.* at 952. In addition, the carrier’s bills of lading instructed the carrier to send freight bills to [the third party broker]. *Id.* at 953. Moreover, for a period of twelve years, the carrier billed the third party broker for the freight charges to the third party broker. *Id.* at 952-953. After the twelve years of this arrangement, Sears Roebuck terminated the third party broker. The carrier tried to collect \$227,202.50 in freight charges from the third party broker and, when the third party broker failed to pay, from Sears Roebuck, which refused to pay because it had already paid the charges to the third party broker. *Id.* at 953-954.

In its decision on the carrier’s claim against Sears Roebuck, the Ninth Circuit held that, notwithstanding the agreement between the carrier and third party broker, and notwithstanding the legend on the bills of lading instructing the carrier to bill the third party broker, and notwithstanding the twelve year payment history, Sears Roebuck’s obligations under the carrier’s

bills of lading required it to make payment to the carrier. *Id.* at 954-955, 960. The court reviewed the decisions in other double payment cases and agreed with the Fourth, Fifth and Eleventh Circuits that “a shipper should bear the risk when it chooses to pay for freight charges through a broker rather than directly to the carrier.” *Id.* at 959. The court further noted that “the shipper, and not the carrier, is in the best position to avoid liability for double payment by dealing with a reputable freight forwarder, by contracting with the carrier to eliminate the shipper’s liability, or by simply paying the carrier directly.” *Id.* The court also addressed Sears Roebuck’s position as a consignee on some of the contested shipments and found:

With respect to the return shipments, Sears was not “an innocent consignee.” The bills of lading were clearly marked, “collect,” which put Sears on notice that payment was due. In addition, Sears undertook no action to limit its liability. In particular, Sears could have elected to pay [the carrier] directly, but did not, and thereby assumed the risk that [the third party broker] would fail to forward payment.

*Id.* at 960. The court concluded: “we hold that equitable estoppel does not bar [the carrier’s] recovery of freight charges from Sears, notwithstanding Sears’s payment of a portion of those freight charges to [the third party broker].” *Id.*

In this case, there was no written agreement between Panda and RDM in which RDM specifically agreed to pay the freight charges to Panda. Nor was there an explicit legend on the Panda bills of lading that RDM should be billed for the freight charges. There was merely a placing of RDM’s name and address in the box labeled, “Freight Charges,” on some of the Panda bills of lading, which is ambiguous at best. Therefore, in all respects, the facts here are much weaker than those that led the court in the *Oak Harbor Freight Lines* case to hold Sears Roebuck liable for paying freight charges to the carrier even when it meant that Sears was making a double payment. For the same reasons, the Commission should hold Petra Pet liable for the payment of Panda’s freight charges. *See also Mo. Pac R.R. Co. v. Cent. Plains Indus., Inc.*, 720

F.2d 818, 819 (5<sup>th</sup> Cir. 1983) (fact that bill of lading states “Send Freight Bill To” third party is insufficient to relieve shipper or consignee from liability for freight charges); *Dare v. New York Cent. R.R.*, 20 F.2d 379, 380 (2d Cir. 1927) (mere fact that the bill of lading directs that freight charges be billed to a third party is insufficient to excuse the consignee from its obligation to pay applicable freight charges); *Shipco Transport, Inc. v. Cyclo Ind., LLC*, 2007 WL 988884 (S.D. Fla. 2007) \* 3 (equitable estoppel not valid defense to double payment obligation of shipper to NVOCC).<sup>4</sup>

**4. Petra’s Alleged Payments to RDM Do Not Excuse its Obligation to Pay Panda’s Freight Charges**

The same conclusion drawn by the Fourth, Fifth, Ninth, and Eleventh Circuits, that a shipper’s payment to a third party does not absolve it of its obligation to pay a carrier for freight charges, is warranted here. RDM and Petra Pet had a longstanding relationship in which RDM arranged for transportation on Petra Pet’s behalf. Panda Appendix 1, 2, Sun Dec. at ¶¶ 6, 11, 12, Petra Pet Appendix 0184 at ¶2. RDM approached Panda and asked it to quote rates on behalf of its client, Petra Pet. *Id.* Included among the duties that Petra Pet delegated to RDM, was handling the freight monies due to carriers, which is a typical forwarder function. 46 C.F.R. §515.2(i)(11). Under these circumstances, as the ID recognizes, Petra Pet simply cannot meet its burden of proof in establishing that RDM was Panda’s agent. ID at 20.

The most that Petra Pet can show is that RDM was acting as an intermediary on the shipments in question, providing services that benefited both the shipper and the carrier. At no point did Panda hold RDM out as its agent. Panda Appendix 5, Sun Dec. ¶ 37 Thus, Petra Pet

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<sup>4</sup> Some courts have held that a carrier is estopped from seeking payment from a shipper that has already paid the freight charges to a third party (usually the seller of the goods) in reliance on a bill of lading that states that freight has been prepaid. *e.g. Mediterranean Shipping v. Etof Hansson, Inc.*, 693 F.Supp. 80, 84-85 (S.D.N.Y. 1988). Here, no such reliance would be justified given that the bills of lading stated “freight collect.” *See, e.g.* Panda bills of lading at Petra Pet Appendix 19, 20, 21, 22 and 23.

simply cannot establish that it was justified in believing that payments to RDM satisfied its contractual obligation to pay Panda for transportation services provided. Moreover, Petra Pet received the Panda bills of lading for every shipment along with the RDM arrival notices. *See, e.g.,* Petra Pet Appendix 0016 – 17, 0022-23, 0050-51, 0052-53, 0107-108. Thus, Petra Pet knew that it was a party to those bills of lading and was therefore legally bound by their terms and conditions. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2439 (2010). Petra Pet is presumed to know those terms and conditions. *Usinor Steel Corp. v. Norfolk Southern Corp.* 308 F. Supp. 2d 510, 518 (D.N.J 2004) (Parties to a bill of lading are presumed to know its provisions, *citing*, 80 C.J.S. Shipping 263 (2004)); *A.P. Moller-Maersk v. Taiwan Glass USA Sales Corp.*, 663 F. Supp. 2d 1011, 1015 (D. Or. 2009) (Party to bill of lading bound by its terms); *American Ry. Express Co. v. Lindenburg*, 260 U.S. 584, 591 (1923); *Cau v. Texas & P.R. Co.*, 194 U.S. 427 (1904); *Luckenbach Steamship Co. v. American Mills Co.*, 24 F.2d 704, 705 (5<sup>th</sup> Cir. 1928). Petra Pet knew, therefore, that it was obligated to pay Panda's freight charges.<sup>5</sup>

Indeed, for the last five years Petra Pet was on express notice that Panda and its affiliated companies would not release Petra Pet cargo in its possession until payments made to RDM were actually received by Panda. *See* Panda Appendix 17, 18. Further, Petra Pet simply cannot establish it justifiably believed that payments made to RDM were being treated as the equivalent of payments to Panda. When Panda expressly informed Petra Pet in July of 2010 that payments for transportation services had not been received and payment terms would no longer be

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<sup>5</sup> Section 13.6 of Panda Int'l's bill of lading's terms and conditions clearly states:

"Despite the acceptance by the Freight Forwarder of instruction to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason." *See Sea-Land Service, Inc. v. Amstar Corp.*, 690 F. Supp 246 (S D.N.Y. 1988).

advanced, Petra Pet continued to make payments to RDM rather than making such payments directly to Panda. *See* Petra Pet Appendix 0085. In so doing, Petra Pet clearly assumed the risk that it might be liable for double payments should RDM fail to forward such payments to Panda.

#### **5. The ID Ignores the Relevant Case Law and the Relevant Facts**

The ID simply ignores the case law cited above. It also ignores the undisputed fact that, as of at least 2006, Petra Pet was aware that Panda and its affiliated companies would not release goods in their possession until their freight charges were paid, even if such payments had purportedly been made to RDM. *See* Panda Appendix at 17, 18. While the ID disregards the significance of that event, it was clearly something of which Petra Pet was acutely aware and concerned. In 2006 when a Panda affiliate (Beijing Jaguar)<sup>6</sup> refused to release bills of lading until it was paid by Petra Pet, Patty DeAvila, Office Manager of Petra Pet, Panda Appendix 17, Petra Pet sent an email to RDM referencing the fact that its goods were not being released and stating “I NEED AN EXPLANATION AND A CALL TO ME ASAP. THIS IS NOT GOOD, I AM NOT GOING TO LOSE MY JOB BECAUSE THIS PROBLEM.” *See* Panda Appendix 17. (All capitals in the original email.) This is hardly the response of somebody who was unconcerned about the problem or would be likely to dismiss it as of no consequence.

The ID also suggests that the July 26, 2010 email in which Panda informed Petra Pet that it was going to withhold cargo until its freight charges were paid did not put Petra Pet on notice of Panda’s position because the issue was of little consequence -- “from Petra Pet’s perspective, a one-time event that resolved quickly.” ID at 26. There is, however, no evidence for such a conclusion. Indeed, the ID fails to cite anything in the record to justify such a conclusion. In fact, it is contradicted by the email itself which Panda sent to Petra Pet stating that it was “a very

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<sup>6</sup> Beijing Jaguar was a Panda affiliate in China. *See* Panda Appendix at 3, Sun Dec. ¶ 25.

important issue” and that Panda had “many overdue freight invoices, total amount is amazing.” Further, upon receiving the email, Petra immediately wrote to RDM, stating, in caps, PLEASE NEED A REPLY TO THEM WITH A PAYMENT, IF U CAN NOT CONTINUE LET ME KNOW BUT I CAN’T SUFFER WITH FREIGHT WITHOUT KNOWING.” Petra Pet Appendix 0097. In the face of this contemporaneous documentation, for the ID to suggest that Petra Pet was not fully aware that payments to RDM did not satisfy its obligations to pay Panda’s freight charges simply defies rational explanation.<sup>7</sup>

The best argument the ID can muster in response to this evidence is that Petra Pet was not as knowledgeable of the shipping industry as Panda and therefore Petra Pet may not have understood the role that RDM was playing. ID at 20. This conclusion, however, has no basis in fact. Petra Pet is an experienced international shipper that has been importing its products from China since 2001. Complaint at ¶¶ 8, 9. Moreover, it is irrelevant. As the Fourth Circuit observed in *Hawkspere Shipping Co. Ltd. v. Intamex, S.A.*, 330 F.3d 225 (4<sup>th</sup> Cir. 2003), a shipper’s purported belief that the forwarder was acting for the carrier and its misplaced reliance upon that belief does not excuse its obligation to pay the carrier for its freight charges. “Under United States law, however, the Shippers’ subjective beliefs are irrelevant to the inquiry; only evidence of [the carrier’s] conduct can prove agency.” *Id.*

The ID also appears to place weight upon the fact that Panda sought payment directly from RDM and listed RDM as the billing party on its bills of lading. *See, e.g.*, ID Finding of Fact 22. Again, however, as reflected above, the mere fact that a bill of lading directs that bills be sent to a third party – which Panda’s bills of lading did not – does not excuse Petra Pet from

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<sup>7</sup> The ID also ignores the fact that even after being told that RDM was not forwarding payment to Panda of the freight charges, and that Panda would therefore not release Petra Pet’s goods in its possession, Petra Pet continued to make payments to RDM. *See* Petra Pet Appendix at 0085. Given Petra Pet’s payment obligations under the bill of lading contracts it was receiving from Panda for every shipment, this was clearly negligent behavior on the part of Petra Pet.

the payment obligations it assumed as a party to the panda bills of lading. *See, e.g., Oak Harbor Freight Lines Inc. v. Sears Roebuck & Co.*, 513 F.3d 949, 953, 956-57 (9<sup>th</sup> Cir. 2008); *Mo. Pac. R.R. Co. v. Cent. Plans Indus., Inc.*, 720 F.2d 818, 819 (5<sup>th</sup> Cir. 1983); *Dare v. New York Cent. R.R.*, 20 F.2d 379, 380 (2d Cir. 1927); *Shipco Transport, Inc. v. Cyclo Ind., LLC*, 2007 WL 988884 (S.D. Fla. 2007) \* 3.

In sum, for all of the reasons stated above, Petra Pet was liable to Panda for the freight charges Panda collected from Petra Pet through assertion of its lien on the seven containers at issue. Therefore, even if Panda improperly exercised its lien – which it did not, as demonstrated below – the payment of freight charges that Petra Pet owed cannot be considered “actual injury” under Section 41305(b) of the Shipping Act and cannot be awarded as reparations as the ID has ordered. ID at 28-29. This portion of the ID, therefore, must be reversed and vacated.

**B. Panda Had Valid Liens on Goods in Its Possession for Amounts Owed on Prior Shipments**

The ID holds that Panda cannot assert liens on goods in its possession for past due amounts owed by Petra Pet. This holding ignores the plain language of the Panda bills of lading applicable to the seven shipments at issue, which explicitly provides for such a lien, and the cases that uphold such contractual liens. The bills of lading for the seven containers at issue belonged to Panda International. Petra Pet Complaint, Ex. 11; ID. Finding of Fact No. 56, Petra Pet Appendix 0180-183. As the ID has found, the lien provision in the Panda International bills of lading states:

The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the freight forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce the lien in any reasonable manner which he may think fit.

ID at 14 (Finding of Fact No. 74). As the ID recognizes, the Panda bills of lading constituted contracts between Petra Pet and Panda. ID at 23. Panda, therefore, had a contractual right to exercise a lien to hold the seven containers to secure payment of the past due freight charges from Petra Pet.

Courts construing bills of lading, tariffs and contract provisions providing that a carrier has a lien on goods in its possession not only for the costs associated with transporting those goods but for costs associated with prior shipments, have enforced them according to their terms. In *In re: Colortran, Inc. (Expeditors Internat'l of Washington v. Citicorp North America, Inc.)*, 218 B.R. 507 (9th Cir. BAP 1997), the Ninth Circuit Bankruptcy Appellate Panel considered this issue in determining the enforceability of a lien on goods in the carrier's possession for past due bills from a prior shipment. Although the bankruptcy court held that the carrier did not have a valid lien, and found the carrier in contempt for failing to turn over the goods in its possession, the Bankruptcy Appellate Panel reversed the decision, recognizing that pursuant to the express terms of the contractual agreement between the parties, the shippers had granted the carrier a security interest to the carrier based not only upon costs associated with the shipments involving the goods being held but also based upon prior shipments. The court held that such an agreement was enforceable according to its plain terms. *Id.* at 512.

Similarly, in *Paul Harris Stores Inc. v. Expeditors Internat'l of Washington, Inc.* 342 B.R. 290 (S.D. Ind. 2006), the court recognized that pursuant to the terms of the contract between the carrier and the shipper, the carrier had a continuing lien on all property of the shippers in its possession "for all claims for charges, expenses or advances incurred in connection with any shipments of the Customer ...." *Id.* at 294. Thus, the court held that "at the time the challenged payments, were made, [the carrier had] a contractual general lien which

granted it a continuing lien on any goods in its possession.” *Id.*; see also, *In re: WCI Steel, Inc.*, 344 B.R.838, 847-48 n.10 (Bankr. N.D. Ohio 2005) (term of bill of lading granting a carrier a lien on cargo for any amount due from merchant “whether in respect of the cargo or in respect of other cargos shipped by the merchant” must be given its literal meaning; “[t]he literal meaning of this provision is that Seaway maintained a possessory lien for freight, salvage, general salvage or special charges, on the pellets aboard the M/V Algosteel and M/V Jean Parisien and with respect to any unpaid charges relating to other shipments”).

Indeed, U.S. courts since the earliest days have recognized that contractual lien clauses are presumptively valid and must be enforced according to their terms. As the Court in *Logistics Management v. One (1) Pyramid Tent Arena*, 86 F. 3d 908 (9<sup>th</sup> Cir. 1996) stated:

Moreover, we note that TWI specifically reserved a lien on the Pyramid in its contract of carriage with Diamond. Contractual provisions regarding liens on cargo for freight are enforceable in admiralty. *The Bird of Paradise*, 72 U.S. at 555 (“Parties ... may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it.... [A]nd where they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien.”); *Melwire*, 830 F.2d at 1083 (citations omitted) (“It is well-established that breach of a shipping contract may give rise to a maritime lien.”); Eric M. Danoff, *Provisional Remedies in Admiralty United States*, 4 U.S.F. Mar. L.J. 293, 299 (1992) (“[A] lien on the cargo is normally expressly granted in the bills of lading and charter parties. If so, the extent of the relevant lien is governed by the terms of the lien clause.”).

*Id.* at 914.

Thus, Panda had the right pursuant to its bill of lading contract with Petra Pet, to hold the Petra Pet shipments until Petra Pet paid the past due freight charges it owed. The ID denies Panda’s right to do this, relying on several cases decided by the Commission and the courts. None of these cases, however, supports the ID’s position.

The Commission case of *Bernard & Weldcraft Welding Equipment v. Supertrans International, Inc.*, 29 S.R.R. 1340 (ALJ Decision 2002), never addressed the lien language in

the carrier's bill of lading. Further, that case involved an attempt to assert a lien on goods for freight charges owed by an unrelated party. *Id.* at 1354. It does not address whether a party contractually can obtain a lien for charges associated with prior shipments transported by the carrier. It also does not address the issue of whether a carrier can assert such a lien against a party that owes the prior freight charges at issue as Petra Pet did in this case. Indeed, the actual language from the case quoted by the ID tends to support Panda's position.

A carrier can withhold delivery of cargo to compel the shipper to pay freight money that is *lawfully* owed and has a cargo lien which the carrier can assert if necessary, which lien the carrier loses if it surrenders the cargo.

*Id.* at 1356, 14. In this case, as Panda has demonstrated above, the money was lawfully owed by Petra Pet and Panda had a cargo lien on the goods through its bill of lading.

The two federal cases cited in the ID, *American Steel Barge Co. v. Chesapeake & O Agency Co.*, 115 F. 669, 672 (1st Cir. 1902) and the *Albert Dumois*, 54 F. 529, 530 (E.D.N.Y. 1893), both involved a shipper owner's rights to assert a lien on subfreight owed by shippers to the charter of a vessel. These cases do not involve contractual liens for monies owed on previous shipments and are wholly inapposite to this proceeding. It is not clear whether the ID is relying on the other cases cited on pages 21 and 22 for this proposition, but if it was, they are likewise wholly irrelevant to this issue.<sup>8</sup>

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<sup>8</sup> For example, *Total Fitness Equip., Inc. v. Worldlink Logistics, Inc.*, 28 S.R.R. 534 (FMC 1998), *aff'd sub nom., Worldlink Logistics Inc. v. Federal Maritime Comm'n.* 203 F.3d 54 (D.C. Circuit 1999)(table), involved an NVOCC's assertion of a lien on cargo for charges allegedly due on that same cargo. The case of *Brewer v. Maralan (a/k/a Sam Bustant) and Worldline Shipping, Inc.* 29 S.R.R. 6 (FMC 2001) similarly involved a carrier's withholding delivery of cargo for payments allegedly due on that same shipment. *Houben v. World Moving Services, Inc. & Cross Country Van Lines, LLC*, 31 S.R.R. 1400 (FMC 2010) and *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991)(Notice of Finality October 24, 1991) also involved situations where the carrier withheld delivery of cargo for charges owed on that same shipment. None of these cases address the issue of whether contractual language giving the carrier the right to assert a lien on cargo for past due charges on previous shipments is valid.

### **C. Panda's Exercise of its Lien Did Not Violate the Shipping Act**

The ID's conclusions that Panda violated Section 41102(c) of the Shipping Act by "aborting shipments," "withholding cargo," and "failing to provide notice," ID at 23-27, cannot withstand scrutiny. Panda's actions in refusing to deliver cargo to Petra Pet until Petra Pet met its past due freight obligations was a completely lawful and justified exercise of a maritime lien.

The ID correctly notes that the Panda bills of lading constituted a contract between Panda and Petra Pet. ID at 23. The terms and condition of Panda's bill of lading provide that Panda had a lien on the seven containers at issue "for any amount due at any time" for Petra Pet. ID, Finding of Fact No. 74; Panda Appendix 2 (b) at 14. It is hornbook admiralty law that a carrier's lien on cargo for unpaid freight entitles the carrier to withhold delivery of cargo, and is lost if the carrier releases the cargo from its possession. *Beverly Hills Nat. Bk. & Tr. v. Compania de Nav. Almirante*, 437 F.2d 301, 304 (9<sup>th</sup> Cir. 1971); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 555 18 L. Ed. 662 (1866) ("Legal effect of such a lien is, that the shipowner, as carrier by water, may retain the goods until the freight is paid, or he may enforce the same by a proceeding *in rem* in the District Court.") The whole purpose of a lien is to force payment of freight charges that are due, without resort to instituting a legal proceeding. Thus, Panda's actions in withholding delivery of the seven containers until it was paid was fully justified. *See e.g., Gilbert Imp. Hard., Inc. v. 245 Packages of Guatambu Sq.*, 508 F.2d 1116, 1122 (9<sup>th</sup> Cir. 1974) (carrier justified in withholding cargo to collect freight charges owed.)

The ID, however, appears not to grasp the purpose and function of a carrier's possessory lien. A carrier's lien operates as an *extrajudicial remedy* to collect freight charges. *See, e.g., Younger v. Plunkett*, 395 F. Supp. 702, 707-08 (E.D. Pa. 1975) (since early common law, possessory lien provided extrajudicial remedy to collected unliquidated debt.) The ID, however,

concludes that Panda's exercise of its extrajudicial remedy of withholding cargo constitutes a Shipping Act violation. Specifically, it concluded that Panda engaged in an unreasonable practice by failing to "compromise" in regard to the freight charges it was due and in not "allow[ing] the issues to be resolved in court." ID. at 2; *see also* ID at 26 (stating that even if Petra Pet owed Panda for freight charges, "this issue should have been resolved following lawful procedures, not by withholding cargo.") Such a holding is inconsistent with centuries of admiralty law. Accordingly, the ID's claim that Panda violated the Shipping Act by withholding Petra Pet's cargo must be rejected.

Similarly, the ID's claim that Panda unlawfully (a) "aborted" the shipments or (b) failed to give Petra Pet notice that the shipments were diverted are baseless. In the first place, the shipments were not "aborted." The record is clear that Panda delivered the shipments in New York – their intended destination – after Petra Pet paid Panda what it was owed. ID Finding of Fact No. 71. Further, it is clear from Petra Pet's own pleading that it had actual notice that the seven containers were being held by Panda within a very short time. *Compare* Petra Pet Appendix 0177 (the seven containers sailed from China on or about December 18, 2010) *with* Petra Pet Appendix 0186 (Petra Pet was aware that Panda was withholding the containers in January 2011). Moreover, Panda had no obligation to provide Petra Pet with advance notice of its actions and, in fact, the bill of lading contract authorizes Panda to divert cargo without notice.<sup>9</sup>

None of the cases discussed in the section of the ID involved a carrier exercising a valid lien for past due freight charges, as is the case in this proceeding. Therefore, these cases have

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<sup>9</sup> Section 11 of Panda International's bill of lading terms and conditions permitted Panda "without notice to the Merchant . . . to choose or substitute the means, route and procedure to be followed . . . in the transportation of the goods."

little or no relevance to this matter. Panda's actions to enforce its lien were fully justified and lawful.

**D. Petra Pet Failed to Establish that It Paid RDM for the Freight Charges Provided by Panda**

In addition to the legal defects in Petra Pet's submission, its claim for reparations fails due to inadequate, or nonexistent, evidentiary support. Even if Petra Pet was able to establish that RDM was Panda's agent, Petra Pet still would have to establish that it paid RDM and that RDM then failed to pay Panda. It has failed to make any such showing, however.

In order to satisfy its burden of evidentiary proof, Petra Pet must show by a preponderance of the evidence, *i.e.*, more probably than not, that it paid RDM. *See, e.g., Rose Int'l Inc. v. Overseas Moving Network*, 29 S.R.R. 119, 158 (2001); 2001 WL 865708 at \*39 (2001); *Portman Square Ltd.- Possible Violation of Section 10(a)(1) of the Shipping Act of 1984*, 25 S.R.R. 80, 84 (I.D.), finalized, March 16, 1988.

In *Gov't of Territory of Guam v. Sea-Land Service Inc.*, 29 S.R.R. 894 (ALJ 2002) administratively made final May 22, 2002; 2002 WL 535945 (2002), the Commission addressed the type of proof needed in order to satisfy a complainant's claim for reparations. There, the complainant requested a "presumption" from the Commission that the shippers had paid the carrier for 399 shipments despite its failure to present cancelled checks showing that payment had actually been made. In denying the reparations claim, the Commission held that it is incumbent upon the complainant to document that the carrier was in fact paid (as well as by whom), and that, even when a complainant has submitted some payment-related documentation, a presumption will not be used to fill the evidentiary gap where the documentation is lacking in some respect that renders it less than fully probative. *Id.* at 29 S.R.R. at 905-906; \*15. Thus, despite the fact that the complainants had submitted some documentation suggesting that the

forwarder had been paid, the Commission was unwilling to “presume” that payment had been made *absent the submission of the front and back of the check and in order to establish endorsement by the recipient and payment by the bank.* *Id.* (emphasis supplied).<sup>10</sup>

Here, far from satisfying that evidentiary hurdle, Petra Pet has submitted an undifferentiated and largely unsubstantiated mass of emails, bills of lading and other shipping documents that fail to prove any payments were made to RDM by Petra Pet. In reviewing Petra Pet’s Appendix, there is one check in the amount of \$2,348 from Petra Pet to RDM. *See* Petra Pet Appendix 0085. Even this check, however, does not meet the requirements imposed by the Commission in *Sea-Land Services* which requires the submission of the front and back of the check in order to establish endorsement by the recipient and payment by the bank. *Id.* at 905; \*15. Thus, there is simply no evidence for the Commission to conclude that payments were made by Petra Pet or its agents to RDM.<sup>11</sup>

The lone piece of “evidence” of payment cited by the ID is one sentence in a Declaration from a representative of Kuehne + Nagel, Petra Pet’s customs broker, that when Panda identified RDM on a Panda bill of lading, RDM billed Kuehne+ Nagel for the freight charges and Kuehne + Nagel then paid RDM by check for the freight charges billed. *See* Petra Pet Appendix 0202. Neither Petra Pet nor Kuehne + Nagel have provided any documentation supporting this generic

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<sup>10</sup>The Commission further emphasized that complainants can only be awarded reparations “where they have proof that they paid the freight or if a forwarder paid the freight and that the complainant has proof that it reimbursed the forwarder. In the complex shipping industry, in the absence of actual documentation, no one has explained how it would be possible to know whether a particular shipment was paid for by the shipper, the shipper’s freight forwarder, by the consignee, by the consignee’s freight forwarder, by some other party, or not at all.” *Id.* at 906; \*16.

<sup>11</sup>Indeed, there is also no evidence that relevant payments were made to Panda. The sole piece of evidence introduced by Petra Pet is a purported wire transfer in the amount of \$94,381.93 from Petra Pet to Panda. *See* Petra Pet Appendix 0128. Petra Pet is not even asserting a claim for this payment, however, so it is of no relevance. *See* ID at 28.

assertion, however. Thus, even if one were to accept this statement as valid, there would be no way to know how much Kuehne+ Nagel supposedly paid RDM. There is certainly nothing in such an assertion that would support a finding that RDM was paid \$207,000, or any other amount Petra Pet seeks in reparations. Quite simply, such “evidence” falls woefully short of the type of evidence required under Commission precedent.<sup>12</sup>

### CONCLUSION

For the reasons set forth above, the ID’s determination that Panda improperly asserted a lien on goods in its possession for which Petra Pet is entitled to reparations is erroneous and must be vacated.

Respectfully submitted,



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<sup>12</sup> It is ironic that even Kuehne+ Nagel recognized that Petra Pet could not establish a basis for reparations without submitting cashed checks as evidence. See Findings of Fact No. 45. Here, of course, Petra Pet failed to do so.

**CERTIFICATE OF SERVICE**

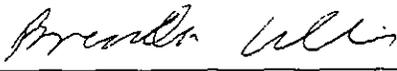
I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by U.S. Mail and/or via email transmission, this 5<sup>th</sup> day of September 2012:

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