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U.S. DEPARTMENT OF  
COMMERCE  
OFFICE OF THE SECRETARY  
800 NORTH CAPITOL STREET, N.W.  
WASHINGTON, DC 20533

October 2, 2012

**VIA HAND DELIVERY**

Federal Maritime Commission  
Office of the Secretary  
800 North Capitol, Street, N.W.  
Washington, DC 20053

Attention: Karen V. Gregory, Secretary

Re: FMC Docket No. 11-14

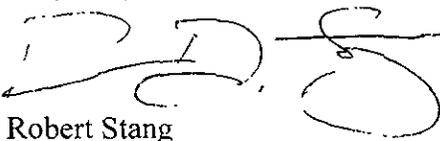
Petra Pet, Inc. (a/k/a Petrapport) v. Panda Logistics Limited,  
Panda Logistics Co., Ltd. (f/k/a PANDA) Int'l Transportation  
Co., Ltd., RDM Solutions, Inc.

Dear Ms. Gregory:

On behalf of Petra Pet, Inc. (a/k/a Petrapport) ("Petra"), enclosed please find an original and five (5) copies of Opposition to 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, for filing in Docket No. 11-14. Also enclosed is an additional copy to be date-stamped and returned to us via our courier.

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,



Robert Stang

cc: Sanford M. Saunders

## Secretary

---

**From:** Secretary  
**Sent:** Wednesday, October 03, 2012 10:57 AM  
**To:** Richard A. Lidinsky; Joseph Brennan; Michael A. Khouri; Rebecca Dye; Mario Cordero  
**Cc:** Michael Gordon; Steven D. Najarian; John Moran; Edward L. Lee Jr.; Mary Thien Hoang; Rebecca Fenneman; Tyler J. Wood; Karen Gregory  
**Subject:** FMC Docket 11-14 Opposition to Exceptions of Respondents to the Administrative Law Judge August 14, 2012 Initial Decision  
**Attachments:** 10-2-12 Petra Pet's Opposition to Panda's Exceptions.pdf

Attached is Complainant's Opposition to Exceptions in Docket No. 11-14. In this docket, a Commissioner asked for review of the decision and exceptions were also filed. We will distribute paper copies shortly as well so that you may add this filing to your package. A memo will be forthcoming from the Office of General Counsel.

Rachel E. Dickon  
Assistant Secretary  
Federal Maritime Commission

(ph) 202-523-5725

**From:** [mcbayerb@gtlaw.com](mailto:mcbayerb@gtlaw.com) [<mailto:mcbayerb@gtlaw.com>]  
**Sent:** Tuesday, October 02, 2012 4:34 PM  
**To:** Secretary  
**Cc:** [saunderss@gtlaw.com](mailto:saunderss@gtlaw.com); [stangr@GTLAW.com](mailto:stangr@GTLAW.com)  
**Subject:** FMC Docket 11-14 Opposition to Exceptions of Respondents to the Administrative Law Judge August 14, 2012 Initial Decision

Secretary,

Please find attached for filing Complainant's Opposition to 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.

Best regards,

Barbara

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BEFORE THE  
FEDERAL MARITIME COMMISSION

PETRA PET, INC. (a/k/a PETRAPPORT), )  
 )  
 ( Complainant, )  
 )  
 vs. )  
 )  
 PANDA LOGISTICS LIMITED, )  
 PANDA LOGISTICS CO., LTD. (f/k/a PANDA )  
 INT'L TRANSPORTATION CO., LTD.), RDM )  
 SOLUTIONS, INC. )  
 )  
 Respondents. )

FMC Docket No. 11-14

**OPPOSITION TO 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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Pursuant to 46 C.F.R. § 502.227 Complainant, Petra Pet, Inc. ("Petra Pet"), hereby files its Opposition to 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 (referred to herein as "Panda's Exceptions"). Respondents Panda Logistics Limited ("Panda Logistics") and Panda Logistics Co., Ltd. (f/k/a Panda Int'l Transportation Co., Ltd. ("Panda Int'l")) are collectively referred to herein as "Panda." Panda's Exceptions were filed on September 5, 2012 in response to the Initial Decision ("ID") served on August 14, 2012, by the Administrative Law Judge ("ALJ") in Docket No. 11-14.

### **MEMORANDUM OF OPPOSITION TO PANDA'S FACT EXCEPTIONS**

Panda's Exceptions cite irrelevant arguments and mischaracterize Petra Pet's Complaint and supporting evidence to attack the ALJ's well reasoned opinion, which is fully supported by the evidence and the law. Panda attempts to convince the Federal Maritime Commission ("FMC" or "Commission") to overrule the ALJ and permit carriers to extort payments, abort shipments, withhold cargo, fail to notify consignees as to the whereabouts of their cargo, and permit cargo to sit indefinitely in foreign ports accruing all manner of administrative charges -- as Panda did in this dispute. As the ALJ properly found, these actions constitute violations of 46 U.S.C. § 41102(c) (formerly section 10(d)(1)) of the Shipping Act of 1984 ("Shipping Act") and form the basis for an award of damages against Panda.

Panda first seeks to evade liability by focusing on the language of a Freight Forwarder's lien rather than Panda's actions that the ALJ found illegal and warranting the award of damages to Petra Pet. In discussing the language of that lien, Panda ignores or dismisses the extensive case law on point and cited by the ALJ in her decision.

Second, Panda seeks to direct the Commission away from Panda's illegal actions by focusing on the business relationship between Panda and RDM Solutions or Petra Pet and RDM

Solutions. However, in accordance with the ID, that business relationship, or lack thereof, is irrelevant to Panda's decision to abort the shipments, withhold the cargo, fail to notify Petra Pet as to the location of its cargo and extort payments from Petra Pet. As the ALJ stated "even if RDM solutions was considered a freight forwarder, it would not alter the analysis of Panda's violations of the Shipping Act." See ID at 20.

Third, Panda seeks to avoid the plain meaning of key terms such as an "aborted" shipment, "diverted" cargo and failure to provide notice.

Fourth, Panda seeks to avoid liability and justify its actions by relying on cases that are inapplicable to the subject dispute and in fact, provide support for the ALJ's decision.

Fifth, many of Panda's "Fact Exceptions" are not exceptions to any factual statements or findings, but are the inappropriate restatement of arguments that the ALJ carefully considered and fully dismissed.

### **OPPOSITION AND RESPONSE TO PANDA'S FACT EXCEPTIONS**

Response to Panda's Exceptions to Findings of Fact Nos. 8, 9 and 10: Findings of Fact Nos. 8, 9 and 10 in the ID read as follows:

8. On or about September 2005, Mario Ruiz left his employer at that time, Amber Worldwide, to run a new logistics company he formed, Worldport Logistics. App. Petra 38.
9. Shortly before Mario Ruiz left Amber Worldwide, Betty Sun, an overseas manager for Panda, became aware that Mario Ruiz had formed his new company and asked Mr. Ruiz "What services can WORLDPORT LOGISTICS offer? Maybe you can send me a profile?" App. Petra 38; Panda Appendix 1 at 1.
10. In response, Mario Ruiz advised Betty Sun that "Worldport will be able to provide you with all of the services expected form [sic] a Freight forwarder and partner in the U.S. \*\*\* Trucking all over the U.S. and count [sic] with agent offices in the U.S. and all over the world. Your company being one of them." App. Petra 38.

Panda claims that these emails in 2006 between Mario Ruiz (the owner of RDM Solutions) and Panda "have little relevance to the dispute." However, these emails establish the

foundation of the relationship between Panda and Mario Ruiz when Mario Ruiz was the owner of the company (Worldport Logistics) providing logistics services to Panda and Petra Pet (as opposed to Mr. Ruiz's previous position when he was merely an employee of a company providing logistics services). As the owner of the company providing logistics services to Panda, Mr. Ruiz stated that his company would be able to provide Panda with all of the services expected from a "partner in the U.S." Consequently, this email establishes that Mr. Ruiz always viewed his company as Panda's U.S. partner and supports the ALJ's conclusion that Mr. Ruiz's companies, including RDM Solutions, always acted as partners with respect to Petra Pet shipments.

Response to Panda's Exceptions to Finding of Fact No. 11: Finding of Fact No. 11 in the ID reads as follows:

11. The first evidence in the proceeding of payment issues occurred in 2006 when Mario Ruiz sent an email marked "Extremely Urgent !!!" to Betty Sun stating:

Please see the attached mentioned e-mail from my client which is most embarrassing for both our companies. I can not believe that this has happened. I do not understand why you did not mentioned this to me first instead [sic] of the shipper getting and "official notification . . . .

As I mentioned I on my last payment I will get up to date by the end of the month.

I will kee [sic] paying you also the week after. I can not really understand [sic] why you are delaying house bills to them. . . .

Please!!! !!!!! !!!!!!! release the house bill of lading to the shipper and Hold the master if you need I will not let you down.

App. Petra-046; Panda Appendix 3 at 17. Petra Pet was not copied on this correspondence.

This email was cited in the ID as evidence of years of payment disputes between Panda and Mr. Ruiz going back to 2006, wherein the companies discussed and handled the problem

internally without involving Petra Pet in any fashion. The correspondence cited in the ID demonstrates that point.

Panda seeks to contradict the ALJ's finding by claiming that the email quoted in ID Finding of Fact No. 11 put Petra Pet on notice that Panda would not release goods in Panda's possession until Panda had been paid, regardless of whether or not Petra Pet had allegedly paid RDM Solutions. This unsubstantiated conjecture is without merit. Contrary to Panda's assertion, the email in Finding of Fact No. 11 confirms that Mario Ruiz and Panda corresponded only between themselves and sought to exclude Petra Pet from their internal payment disputes and that Mario Ruiz immediately affirmed his direct responsibility for paying Panda. This is consistent with Petra Pet's understanding that paying Mr. Ruiz's company for the freight - which was the company that Panda voluntarily identified as the company for freight charges on the Panda bills of lading - was the proper means for satisfying all freight charges owing as per those Panda bills of lading. Furthermore, the fact that RDM Solutions ultimately paid Panda for the freight charges confirms that Petra Pet did not face a situation where it was asked to pay the freight charges twice and in fact, never believed that RDM Solutions' failure to pay Panda would require Petra Pet to pay the freight twice.

Response to Panda's Exceptions to Findings of Fact Nos. 13 and 14: Findings of Fact Nos. 13 and 14 in the ID read as follows:

13. RDM Solutions charged Petra Pet for ocean freight by billing Petra Pet's customs broker, Kuehne + Nagel, Inc. ("Kuehne + Nagel"). Representative arrival notices confirm that RDM Solutions billed Kuehne + Nagel for ocean freight. App. Petra 50, 52, 202.

14. Petra Pet produced more than 200 arrival notices and corresponding bills of lading reflecting the same consignee (Petra Pet), the same issuer (RDM Solutions) and the same "Bill To" party (Kuehne + Nagel). Replacement Proposed Findings of Fact at 2 n.1.

The document in Finding of Fact No. 13 is a representative RDM Solutions Inc., “Arrival Notice” and “Invoice.” Panda takes the position that this RDM Solutions invoice for ocean freight - which never references Panda, but instead states, “Please Make Check Payable to: RDM Solutions Inc.” and was sent directly to Petra Pet from RDM Solutions - somehow put Petra Pet on notice that RDM Solutions was billing Petra Pet for the account of Panda. Consistent with the ALJ’s decision, this document does not support Panda’s self serving interpretation. During the parties prior course of dealings Panda and RDM Solutions had ample opportunity over hundreds of shipments to inform Petra Pet that RDM Solutions was billing Petra Pet for Panda’s account. They did not do so. To the contrary, the parties actively sought to exclude Petra Pet from knowing what Panda was charging for freight. *See* ID Finding of Fact No. 29; App. Petra-0095. Similarly, the fact that Petra Pet received a Panda bill of lading referencing RDM Solutions as the party for freight charges does not change the fact that Panda voluntarily established an ongoing relationship with a U.S. business partner whereby only that partner, RDM Solutions, was responsible for billing Petra Pet for the freight.

Finally, stating that “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” is misleading. The bills of lading (i.e., the contracts) put Petra Pet on notice that it had to pay certain freight charges. However, the Panda bills of lading never specified *Panda’s* freight charges. Panda and RDM Solutions kept that amount confidential between themselves. Similarly, the confidential billing terms between Panda and RDM Solutions, the Panda bills of lading, and the parties’ well established course of business all worked to prevent Petra Pet from knowing Panda’s freight charges or paying Panda directly. Consequently, Panda’s Exceptions to Findings of Fact Nos. 13

and 14 are contradicted by all available evidence, which cannot be overcome by Panda's bald assertions or three citations to case law.

Response to Panda's Exceptions to Finding of Fact No. 15: Findings of Fact No. 15 in the ID reads as follows:

15. Petra Pet has no business relationship with RDM Solutions outside of these shipments. App. Petra 48-49, 184.

First, Finding of Fact No. 15 addresses the business relationship between Petra Pet and RDM Solutions. However, Panda's exception addresses the business relationship between Panda and RDM Solutions, which is irrelevant. Similarly, Panda's comments that Mario Ruiz was facilitating shipments involving Panda and Petra Pet in 2003 while an employee of a different company is irrelevant to the ID's Finding of Fact No. 15.

Second, Panda's Exception to Finding of Fact No. 15 appears to rest on the claim that "Panda's sole interactions with RDM were in RDM's capacity of arranging transportation on behalf of Petra Pet." This claim, though, is at odds with the documentary record establishing that Panda and RDM Solutions had a business relationship that went far beyond arranging transportation. Rather, as established by the evidence RDM Solutions was responsible for negotiating freight rates acceptable to both Panda and Petra Pet; RDM Solutions was responsible for billing and collecting all amounts owing for freight; Panda was responsible for couriering documents to RDM Solutions; and RDM Solutions was responsible for paying Panda all amounts owing for freight. Moreover, as confirmed by the emails and subsequent documents, RDM Solutions and Panda had a profit sharing relationship, which in and of itself confirms "interactions with RDM" beyond merely arranging transportation as Panda claims.

Response to Panda's Exceptions to Finding of Fact No. 18: Findings of Fact No. 18 in the ID

reads as follows:

18. In March 2008, Mario Ruiz asked "are we going to be able to coload with you on your [H]anjin contract for the dog chews" and Panda responded that "We need handling fee USD80/container, if you coload our contract rates with Hanjin." App. Petra 56.

Based on an uncorroborated and self-serving affidavit from a Panda employee, Panda continues to deny a co-loading relationship with RDM Solutions. Nevertheless, the email correspondence between Panda and RDM Solutions and corresponding shipping documents speak for themselves. RDM Solutions asked Panda "are we going to be able to coload with you on your [H]anjin contract for the dog chews"? See App. Petra-0056. Panda replied "We need handling fee USD80/container, if you coload our contract rates with Hanjin." See App. Petra-0056. Subsequently, the parties negotiated and agreed upon credit terms, document flows and profit sharing. See ID Finding of Fact No. 19, App. Petra-0057.

Moreover, Panda's documents are consistent with the terms of that relationship, particularly as they reference a "Profit Share" or "Handling Charge" on the debit notes to RDM Solutions, but fail to reference those charges on any documents provided to Petra Pet. See App. Petra-0070 - 0075. As such, irrespective of Panda's self-serving assertions, the email traffic, bills of lading, payment invoices and all other documents from the Panda/RDM Solutions team are consistent with a co-loading relationship between the parties. It bears repeating, though, that whether RDM Solutions was a co-loader or a freight forwarder "would not alter the analysis of Panda's violations of the Shipping Act." See ID at 20.

Response to Panda's Exceptions to Finding of Fact No. 22: Finding of Fact No. 22 in the ID

reads as follows:

22. Panda continued to do business with RDM Solutions, issuing bills of lading identifying Petra Pet as the consignee; identifying RDM Solutions in the section on the bills of

loading for freight; and identifying Petra Pet's customs broker, Kuehne + Nagel, as the "Notify" party. App. Petra 63-68.

Based on a single uncorroborated and self-serving affidavit from Betty Sun, a Panda employee, Panda attempts to establish a link to Petra Pet by arguing that RDM Solutions was an agent of Petra Pet, even though the evidence establishes without doubt that such was not the case. Moreover, even in the face of email traffic establishing a direct business relationship between Panda and RDM Solutions whereby documents were couriered directly from Panda to RDM Solutions, Panda only billed RDM Solutions for freight, Panda and RDM split profits and RDM Solutions never referenced Panda on the RDM Solutions freight invoices, Panda suggests that its "primary" relationship was not with RDM Solutions, but was with Petra Pet.

If Panda believed that its primary relationship was with Petra Pet then Panda could have ensured that RDM Solutions referenced Panda on the freight invoices to Petra Pet. Panda could have copied Petra Pet on emails to RDM Solutions discussing Petra Pet goods. Panda could have been open with Petra Pet concerning Panda's profit split agreement with RDM Solutions. Panda could have sent documents directly to Petra Pet. Panda, though, took none of these actions. Consequently, the documents and Panda's business dealings point solely to one conclusion: Panda's "primary" relationship was with its U.S. business partner, RDM Solutions.

Response to Panda's Exceptions to Finding of Fact No. 25: Findings of Fact No. 25 in the ID reads as follows:

25. Kuehne + Nagel made the required ocean freight payments to RDM Solutions by check. App. Petra 202.

Panda disputes the fact that Petra Pet's customs broker, Kuehne + Nagel, made the required ocean freight payments to RDM Solutions. First, this finding of fact is supported by an affidavit signed by a vice-president at Kuehne + Nagel with direct first-hand knowledge of the payments. Panda offers no basis to question Kuehne + Nagel's veracity. Nor could it. Kuehne

+ Nagel has no financial interest in the outcome of this litigation. Second, this finding of fact is consistent with freight invoices from RDM Solutions identifying Kuehne + Nagel as the “Bill To” party and corresponding Kuehne + Nagel invoices to Petra Pet identifying the exact same freight amount listed on the RDM Solutions invoice. Third, Panda has not clearly identified the specific group of bills of lading and corresponding freight amounts owing Panda that relate to the extorted payments. Consequently, Kuehne + Nagel cannot be asked to provide proof of payment for an unspecified group of shipments.

Response to Panda’s Exceptions to Finding of Fact No. 26: Finding of Fact No. 26 in the ID reads as follows:

26. RDM Solutions billed Petra Pet directly for logistics and freight forwarding services other than ocean freight (for example, trucking, demurrage, lab tests, etc.) and Petra Pet paid RDM Solutions directly by check for those services. App. Petra 85-87.

Once again, Panda disputes whether Petra Pet in fact paid RDM Solutions for certain services. First, Panda does not specify exactly which invoices or transactions it believes to be in doubt. However, Petra Pet has provided Panda with hundreds of RDM Solutions invoices for services and corresponding checks from Petra Pet.

Response to Panda’s Exceptions to Finding of Fact No. 32: Findings of Fact No. 32 in the ID reads as follows:

32. A year later, on July 26, 2010, Betty Sun at Panda sent Petra Pet an email with the subject line “overdue freight invoices” and stating “I have to ask for your help for a very important issue. . . . As you are our VIP client, we has [sic] agreed with RDM for payment term, which is different from the agreements with other clients. . . . But now we have many overdue freight invoices, total amount is amazing. . . . We can not bear longer credit term. We need money to make business run smoothly. Today our Management Dept. has made decision: if we can not get paid for all overdue freight invoices this week, we will have to hold. Let me know whether you can help us.” App. Petra 97-98.

At the outset, this email confirms that Panda had a direct agreement with RDM Solutions for payment. Panda takes exception to this finding of fact because it includes subsequent

language wherein Petra Pet's office manager states to RDM Solutions "Please need a reply to them (Panda) with a payment ...." See Petra Pet Appendix-0009. Panda believes that instructions from Petra Pet's office manager to RDM Solutions to pay Panda all amounts owing evidences Petra Pet's "primary obligation" to Panda. To the contrary, Petra Pet's office manager was merely urging RDM Solutions to pay whatever it owed Panda so that any dispute between RDM Solutions and Panda delaying Petra Pet's goods could be resolved.

More importantly, we believe, is what the email correspondence referenced in Finding of Fact No. 32 and Panda's exceptions thereto (App. Petra-0097-0098) do not include. For example, the email from Panda to Petra Pet does not state "Petra Pet is responsible for RDM Solutions' failure to pay." Similarly, it does not contain language indicating "Petra Pet has a contractual obligation for freight payments directly with Panda." Rather, Panda merely asked Petra Pet "whether you can help us" and Petra Pet's office manager properly responded by urging RDM Solutions to make any payments owed to Panda.

Response to Panda's Exceptions to Finding of Fact No. 40: Finding of Fact No. 40 in the ID reads as follows:

40. On December 13, 2010, Panda stated to Petra Pet that the total amount owing Panda was USD 250,330.03, including USD 144,455.53 that RDM Solutions owed to Panda in Beijing and USD 29,142.30 that RDM Solutions owed to Panda in Shanghai. App. Petra 79-80.

The email to which Panda takes exception speaks for itself. It references \$144,455.53 "that RDM owe to Panda Beijing" plus \$29,142.30 "that RDM owe to Panda Shanghai." App. Petra-0079-0080. The fact that Panda chose to lump these amounts in a spreadsheet sent to Petra Pet after realizing that its U.S. partner (RDM Solutions) was likely not going to make the payments required does not change the language wherein Panda itself clearly acknowledges that the debts in question are owed to Panda from RDM.

Panda's objections, which reference prior emails in response to prior emails, are confusing and do not change the language cited in the ID. However, we note that in the same email referenced in Finding of Fact No. 40 Petra Pet states directly to Panda:

We won't repay for these cargo's due of are not our responsibility. These were paid to your agent in USA, which was RDM and PETRPPORT is not held responsible for this. It's illegally to hold for our shipments, when we have proofs we paid already. FMC protect our cargo's, and will get involve on this case.

Response to Panda's Exceptions to Finding of Fact No. 45: Findings of Fact No. 45 in the ID reads as follows:

45. On December 16, 2010, Petra Pet received advice from its customs broker, Kuehne + Nagel, which stated "Ok, I see several problems here. First, RDM was contracted by Panda as their agent, therefore, if you Have paid RDM and can prove it (we will provide cashed checks) then Panda needs to go after RDM not Petra. Panda cannot legally hold future shipments against the nonpayment of previous files — they can only hold current shipments which you have not yet paid for." App. Petra 77.

Finding of Fact No. 45 accurately recounts advice that Petra Pet received from its customs broker. As a factual matter, then, there can be no argument with this statement. Moreover, the advice from the customs broker was substantively correct. Irrespective of the legal nature of the relationship between Panda and RDM, Kuehne + Nagel was correct that Panda should seek relief from RDM Solutions, not Petra Pet and that Panda was only entitled to "hold current shipments which you have not yet paid for."

Response to Panda's Exceptions to Finding of Fact No. 49: Finding of Fact No. 49 in the ID reads as follows:

49. On December 24, 2010, Panda's General Manager emailed Petra Pet stating "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 have nothing to do with you." However, a few paragraphs later, Panda said "I can not imagine what I should do now. Is all true? 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." It does not appear that there was ever an agreement for the payment of \$66,156.80 for goods on the water and at port. App. Petra 121-122.

The Panda General Manager who wrote the email Panda believes is being misleadingly quoted may speak English as a second language, but his words are clear:

I totally agree that you do not get involved in the financial problem between Panda and RDM. \*\*\* This problem have nothing to do with you.

Significantly, the email also confirms that Petra Pet and Panda were trying to conduct business according to a new contract. Tellingly, the Panda General Manager states in that email “Before the new contract, I only discuss with RDM for previous things.” As such, this email reinforces the conclusion that Panda and RDM Solutions had a confidential business relationship and purposely excluded Petra Pet from knowledge of the details of that relationship.

Response to Panda’s Exceptions to Finding of Fact No. 55: Finding of Fact No. 55 in the ID reads as follows:

55. 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. App. Petra 138-141.

Support for the statement that after paying Panda \$94,381.93, Petra Pet believed that it had paid Panda all amounts owing with the exception of freight for the seven containers diverted back to China is found in the affidavit of Petra Pet’s president signed under penalty of perjury. See App. Petra-0185 - 0186. As such, this finding of fact in the ID is both accurate and appropriate.

Response to Panda’s Exceptions to Finding of Fact No. 57: Finding of Fact No. 57 in the ID reads as follows:

57. Pursuant to an uncontradicted sworn statement, the vessel carrying the seven containers stopped for a scheduled transshipment in Pusan, Korea, whereupon, at the instruction of the shipper identified on the Hanjin bills of lading, which is a different party than the shipper identified on the Panda bills of lading, the seven containers were taken off of the vessel, held in Korea, and then returned to Shanghai, China, where they were

held under the control of the shipper identified on the Hanjin bills of lading. App. Petra 177.

The uncontradicted sworn statement of which Panda complains comes from the Deputy General Manager at Hanjin Shipping (the ocean carrier and a disinterested party) with first-hand personal knowledge of the facts in question. The Hanjin Shipping General Manager made this statement in an affidavit signed under penalty of perjury. *See* App. Petra-0177. In fact, then, all indications point to the accuracy and veracity of this statement.

Response to Panda's Exceptions to Finding of Fact No. 63: Finding of Fact No. 63 in the ID reads as follows:

63. Panda refused to permit those seven containers to ship until Petra Pet paid \$130,526.73 in addition to the \$23,400 freight charges for the seven containers, for a total of \$153,926.73. app. Petra 147 - 178; App. Petra 152 - 153.

Panda does not take exception to any of the statements in Finding of Fact No. 63, but rather believes that the Findings of Fact should have included a statement that the \$130,526.73, that Petra Pet paid Panda as extortion to obtain release of the goods "was part of the \$173,597.83, owed Panda for prior shipments that Panda transported on behalf of Petra Pet." First, Panda never provided Petra Pet with a schedule detailing the exact shipments and associated freight charges covered under the \$130,526.73. Rather, Panda simply extorted the money as a lump sum payment and cannot now attempt to expand the factual record through an exception to a finding of fact in the ID.

Response to Panda's Exceptions to Finding of Fact No. 74: Finding of Fact No. 74 in the ID reads as follows:

74. Panda International's conditions of carriage state:

14. Lien 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 such lien in any reasonable manner which he may think fit.

Panda Appendix 2(B) at 15.

Panda does not take exception to any of the statements in Finding of Fact No. 74, but rather believes that the Findings of Fact should have included additional language. Petra Pet objects to the proposed language in Panda's Exceptions to Finding of Fact No. 74. First, Panda's proposed language does not constitute an exception to any of the Findings of Fact in the ID.

Second, as confirmed by extensive case law cited in the ID, the lien language cited in Finding of Fact No. 74 should be properly interpreted to mean that the Freight Forwarder has a lien on the goods and any documents in the Freight Forwarder's possession for amounts owing on those goods and no more. *See* ID at 20 - 26. Contrary to Panda's proposed language, then, this Freight Forwarder's lien language should not be expanded to become a vehicle for amounts owing on any and all past shipments wherein Panda merely asserts that it is owed freight irrespective of any business relationships or facts leading to a different result. What Panda is asserting would permit Panda to exercise claims in an unlimited and unilateral manner with no restraints.

Third, the language of the lien requires that Panda enforce it "in any reasonable manner;" however, Panda's proposed language omits any requirement to act reasonably. Clandestinely aborting shipments with no notice; diverting the shipments back to China; and permitting the cargo to sit indefinitely in China accruing demurrage and a variety of port fees, all to extort money from the consignee, cannot be considered "reasonable" under any interpretation of what might be permitted. For all of the above reasons, then, Panda's proposed language should be rejected

Response to Panda's Exceptions to Finding of Fact No. 75: Finding of Fact No. 75 in the ID reads as follows:

75. The note to rule 2-020 in Panda's tariff states: "In no event shall any such transfer or arrangements under which it is performed by such as to result directly or indirectly in any lessening or increasing of the cost or expense which the shipper would have borne had the shipment cleared through the port originally intended." App. Petra 187.

Respondent points out that the language cited in Finding of Fact No. 75 applied to a tariff issued by Panda Logistics Ltd., rather than Panda Logistics Co., Ltd. In that regard, Respondent points out that the seven containers that Panda diverted were covered under bills of lading issued by Panda Int'l (currently known as Panda Logistics Co. Ltd.). A number of the shipments for which Panda claims it was not paid were covered under bills of lading issued by Panda Logistics Ltd. or Panda Int'l. If Respondent is correct and the bills of lading issued by Panda Logistics Co., Ltd. or Panda Int'l do not apply to shipments involving bills of lading issued by Panda Logistics Ltd., then Panda Logistics Co. Ltd. is currently claiming a lien on goods covered under a different company's bills of lading (*i.e.*, bills of lading covering shipments by Panda Logistics Ltd.). This merely highlights the egregiousness of the violations and emphasizes that both Panda companies appear to be conducting business in an extremely casual manner based on whatever happens to be convenient, irrespective of the bills of lading or the law.

As a practical matter, Panda Logistics Ltd. and Panda Logistics Co., Ltd. operated as a single entity with respect to Petra Pet shipments. For example, when Panda's General Manager corresponded with Petra Pet he did not distinguish between the two companies. *See* Petra Pet Appendix 0116. Moreover, Panda conflates all of the Panda entities throughout its submissions. Consequently, the language cited in Finding of Fact No. 75 should not be dismissed because it comes from the Panda Logistics tariff rather than the Panda Int'l or Panda Logistics Co. Ltd. tariff.

Response to Panda's Exceptions to Finding of Fact No. 76: Finding of Fact No. 76 in the ID

reads as follows:

76. Bills of lading issued by Panda acting in its capacity as an NVOCC for Petra state "freight collect" and identify RDM Solutions as the "Freight amount" party. App. Petra 17, 23, 51, 53.

The description of RDM Solutions as a "Freight amount" party in Finding of Fact No. 76 is accurate. The Panda bills of lading have a box for "Freight amount." Panda chose not to identify a dollar amount in that box, but instead chose to identify a party for those freight amounts, specifically, RDM Solutions. Whether RDM Solutions should be identified as the "Freight Amount party" or as the "party identified in the Freight Amount block on the Panda bills of lading" is not important. What is important is that Panda was the party creating the bills of lading; pursuant to its agreement with RDM Solutions; Panda refused to identify any actual freight amounts on the bills of lading; and Panda voluntarily chose to identify RDM Solutions in the Freight Amount box on the Panda bills of lading.

Response to Panda's Exceptions to Finding of Fact No. 78: Findings of Fact No. 78 in the ID

reads as follows:

78. Through a second wire transfer covering containers diverted back to China, Petra Pet paid Panda \$130,526.73 in excess of the shipping costs for those seven containers. App. Petra 147, 152- 1 53.

Panda believes that 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." Panda, though, never provided Petra Pet with a list of bills of lading covered by the \$130,526.73 or a breakdown of the "freight and related charges" associated with this amount. Rather, Panda simply demanded this lump sum payment to release the seven containers diverted back to China indefinitely.

Panda also raises a number of objections to the ALJ's Findings of Fact, not because of what the Findings of Fact include but because of what Panda believes the Findings of Fact should have included, specifically:

-- 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 par. 36. Petra Pet had never previously made such assertion, even in 206 when Petra Pet ad 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 par. 37.

-- RDM has never acted as an agent for Panda. Panda Appendix 5, Sun Dec. at par. 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. sec. 40102(6).

In response to these assertions we note as follows:

- It was only in December of 2010 that Panda falsely asserted to Petra Pet that RDM Solutions was Petra Pet's agent. Prior to this time, Petra Pet was never forced to address the legalities of the relationship between RDM Solutions and any other party. This explains why Petra Pet never addressed the legal relationship between Panda and RDM Solutions prior to December 2010.

- Panda's bills of lading identifying RDM Solutions as the party for freight charges, the correspondence and documents between Panda and RDM Solutions concerning their business relationship, and the course of dealing between these parties established over hundreds of shipments make it clear that whether RDM Solutions was Panda's business partner or merely Panda's U.S. agent, responsibility for collecting freight charges from Petra Pet and paying Panda was solely the responsibility of RDM Solutions.

- RDM Solutions unquestionably held itself out to the general public as an entity to provide transportation of cargo between the United States and a foreign country for compensation and/or assumed responsibility for the transportation of cargo from a port or point of receipt to a port or point of destination. This fact can be readily confirmed by the fact that even to this date RDM Solutions is identified on the FMC website as an (inactive) Ocean Transportation Intermediary as well as RDM Solutions' FMC tariff (Tariff No. 001), which also remains readily accessible to the general public.

More specifically, with respect to Petra Pet it was clear that Petra Pet was to deal solely with RDM Solutions as the party responsible for arranging and transporting the cargo to the U.S. The correspondence from RDM Solutions is clear. Mario Ruiz established the company to act as an NVOCC. *See* App. Petra-0047. RDM Solutions was licensed by the FMC. *See* FMC Org. No. 021562. RDM Solutions asked Panda if RDM Solutions could co-load with Panda on Panda's Hanjin contract. *See* App. Petra-0056. Panda agreed to that relationship with RDM Solutions in exchange for a profit split. *See* App. Petra-0057. Panda issued debit notes to RDM Solutions referencing profit sharing. *See* App. Petra-0070. Consequently, all correspondence and documents confirm that RDM Solutions and Panda intended to jointly act as co-loaders according to the terms of their agreement.

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

The basic legal issue in this dispute is whether Panda's actions in secretly aborting the shipment of Petra Pet's cargo, diverting the cargo back to China, and permitting the cargo to sit in China indefinitely with the possibility of being sold, all for the purpose of extorting payments based on amounts claimed owing on different prior shipments, amounted to a violation of section 41102(c) of the Shipping Act. We emphasize that these actions by Panda had absolutely nothing to do with Panda's or Petra Pet's relationship with RDM Solutions and reiterate the

ALJ's finding that whether RDM solutions was an NVOCC or a freight forwarder the company's actions would still have violated section 41102(c) of the Shipping Act. *See* ID at 20. Consistent with that conclusion we note that when Panda took these illegal actions, RDM Solutions was no longer in business and its owner could not be reached.

Similarly, Panda's actions should not be confused with any issues involved in Panda's claimed right to assert a lien on the goods for amounts owing in prior shipments. If Panda was merely seeking to assert a lien, then there was no need to have the cargo diverted back to China. Panda could just as easily have permitted the goods to arrive at their U.S. destination in accordance with the bills of lading and asserted any claimed lien when the cargo arrived in the United States. As noted in the *Bird of Paradise*, 72 U.S. (5 Wall.) 545, 554 (1866) *quoted in Hawkspere Shipping Co. Ltd. v. Intamex, S.A.*, 330 F.3d 225, 230 (4<sup>th</sup> Cir. 2003) fn 3:

Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods *after the arrival of the ship at the port of destination* until the payment is made. (Emphasis added.)

Additionally, if Panda was merely asserting a lien then there was no need to do so secretly. Panda could have informed Petra Pet at any time of the claimed lien, even prior to shipment. However, Panda chose not to do so and instead chose to act clandestinely.

As discussed in more detail below, aborting the shipments, diverting the cargo and withholding the goods form the basis of the ALJ's ID which rests on solid factual and legal grounds. Consequently, the ID must be upheld, both to compensate Petra Pet for Panda's egregious violations and as a warning to other parties contemplating such outrageous conduct.

**A. Panda mischaracterizes the evidence and the law in an attempt to divert attention from the ID's primary point: Panda "aborted shipments, withheld cargo, and failed to provide notice" thereby violating section 41102(c) of the Shipping Act.**

Panda mischaracterizes the evidence and the law in an effort to direct the FMC's attention away from the primary issue leading to damages in this dispute. Specifically, Panda frames the central issue as "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." See Panda's Brief in Support of Memorandum of Exceptions at 10. Contrary to Panda's assertion, the Legal Analysis section of the ID, after establishing that Panda operated as an ocean transportation intermediary, immediately focused on evidence establishing that Panda violated section 41102(c) of the Shipping Act by extorting payments from Petra Pet, aborting the shipments, withholding the cargo, and failing to provide notice. See ID at 20.

The ID also specifically addressed the question of whether Panda's lien permitted the company to coerce the payments in question and noted:

A maritime lien secures money lawfully owed for the carriage of that particular shipment. The lien only secures payment for the shipment of the cargo subject to that lien, however. As summarized by Judge Kline:

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. See *Johnson Products Co., Inc. v. M/V Molinera*, 628 F. Supp. 1240, 1248 (S.D. N.Y. 1986); Gilmore and Black, *The Law of Admiralty* (2d ed.) sec. 3-45; 70 Am Jur 2d, Shipping, sec. 793. Conversely, if a shipper or consignee induces the carrier to surrender the cargo and thus lose its lien, and thereafter refuses to pay the lawful freight money owed because the shipper or consignee has outstanding disputes with the carrier on earlier unrelated shipments, and withholds payment of the lawful freight as a means to coerce the carrier to settle the disputes on earlier unrelated shipments, the shipper or consignee has acted unlawfully, in violation of section 10(a)(1) of the 1984 Act. See *Waterman Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173 (I.D.), affirmed with slight modifications, 26 S.R.R. 1424 (1994). Thus,

disputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money.

*Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. 1348, 1356 n.14 (ALJ 2003), admin. final Feb. 12, 2003; *see also American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669, 672 (1st Cir. 1902) (a lien against cargo "cannot be applied . . . beyond the amount of freight stipulated in the bill of lading"); *The Albert Dumois*, 54 F. 529, 530 (E.D.N.Y. 1893) ("By virtue of this provision the shipowner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more."). *See ID at 21.*

Thereafter, the ID cited extensive case law specifically dealing with section 10(d)(1) of the Shipping Act, all of which confirmed that holding cargo hostage while demanding additional payments from an innocent cargo owner is a violation of section 10(d)(1). *See ID at 21* citing to *Total Fitness Equip., Inc. v. Worldlink Logistics, Inc.*, 28 S.R.R. 534, 542 (FMC 1998), *aff'd sub nom, Worldlink Logistics, Inc. v. Federal Maritime Comm'n*, 203 F.3d 54 (D.C. Cir. 1999) (citing *Corpco Int'l Inc. v. Straightway, Inc.*, 28 S.R.R. 296, 299-300 (FMC 1998); *Brewer v. Maralan & World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (FMC 2001); *Houben v. World Moving Services, Inc. & Cross Country Van Lines, LLC*, 31 S.R.R. 1400, 1405 (FMC 2010). The ID even cited to a line of cases going back over 100 years in support of the conclusion that a lien against cargo is limited to the freight stipulated in the bill of lading. *See ID at 21* citing to *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669, 672 (1st Cir. 1902) (a lien against cargo "cannot be applied . . . beyond the amount of freight stipulated in the bill of lading"); *The Albert Dumois*, 54 F. 529, 530 (E.D.N.Y. 1893) ("By virtue of this provision the ship owner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more.').

Panda takes several avenues in an attempt to overcome the ID's conclusions concerning Panda's illegal actions and associated liability. First, Panda attempts to dismiss the ID's extensive case law on point by claiming that these cases do not address (1) whether a party

contractually can obtain a lien “for charges associated with prior shipments;” (2) “contractual liens for monies owed on previous shipments” or (3) “the right to assert a lien on cargo for past due charges on previous shipments.” See Panda’s Brief in Support of Memorandum of Exceptions at 27. As confirmed by the language quoted above, though, these claims are nonsense. The case law cited in the ID goes precisely to liens for amounts owing on prior shipments and establishes unequivocally that a maritime lien is limited to money owing for the carriage of that particular shipment. Nothing more. “[D]isputes over earlier unrelated shipments cannot be used by ... a carrier ... as justification for refusing to release the cargo... 29 S.R.R. 1348, 1356 n.14

Panda’s second avenue in an attempt to avoid liability involves redefining its actions with respect to aborting the shipment and diverting the cargo. Panda contends that it did not “abort” the shipment because the cargo ultimately reached its destination. Panda directed that the cargo be taken off of the vessel in Korea and stopped transportation of the goods to the United States. Thereafter, Panda directed that the goods sit in China indefinitely with no assurances that the goods would ever reach the United States. We contend that terminating a shipment of goods en route to the U.S. and sending the cargo to an unnamed foreign destination where it sits indefinitely qualifies as “aborting” the shipment. As the ALJ held:

Panda had a duty, under its bill of lading, to arrange transportation of the seven containers from China to the United States. Panda breached that duty by terminating the shipments and arranging for the goods to be returned to China. See ID at 24.

Significantly, Panda also conveniently fails to note one important fact pertinent to this discussion. As per the Carrier’s lien in the Panda Logistics bill of lading:

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and for general average contributions to whosoever due and for the cost of recovering the same, and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant. See Panda App. 2A, par. 14.

In other words, by asserting a lien on the seven containers in question Panda was similarly asserting its “right to sell the Goods.” Consequently, when Panda diverted the goods back to China there was no certainty that Panda would permit the goods to reach their intended destination and there was every concern that Panda would sell the goods in China for some fraction of their worth as self-help for amounts claimed owing. Should there be any question that diverting the cargo back to China contrary to the bill of lading was tantamount to aborting the shipment, then we note that even after the goods shipped from China a second time in May 2011, Panda threatened again to stop the goods stating, “I can move the containers back to Shanghai port tomorrow.” ID Finding of Fact No. 69.

As for the ID’s conclusion that Panda diverted the cargo, Panda cites to the Panda Int’l tariff, which defines a “diversion” as “[a] change in the original billed destination,” and then notes that the cargo was ultimately transported to its original billed destination. Consequently, Panda believes that its actions are more accurately characterized as a “stoppage in transit.” See Panda Exception to Finding of Fact No. 75. With all due respect, rerouting cargo destined for New York to China and holding the cargo *indefinitely* to coerce a payment qualifies as a diversion. The goods were not “temporarily” stopped. Panda had every intention of keeping the goods in China and very likely selling the goods in order to satisfy its improperly claimed lien.

With respect to the ID’s conclusion that Panda aborted the shipment and diverted the cargo without notice, Panda further mischaracterizes the facts by claiming that Petra Pet “had actual notice that the seven containers were being held by Panda within a very short time.” See Panda Brief in Support of Memorandum of Exceptions at 29. Petra Pet had notice that the containers were diverted after searching fruitlessly for the cargo and then being informed by a

party *other than Panda* that cargo expected in the U.S. to fulfill orders was sitting in China. As a result of Panda's failure to provide notice Petra Pet had to reschedule and reconfigure deliveries to accommodate this unexpected shortage and disruption in its supply chain. Claiming that Petra Pet learned of the clandestine diversion within weeks does not change the fact that Panda took its actions secretly and without notice.

The ID discussed this point at length and noted that as in *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. at 19 (another case involving violations of the Shipping Act for aborting cargo) "Panda 'did not make any effort to notify the consignee' that the shipment had been aborted." *See* ID at 27. Panda could have been transparent and forthcoming concerning its actions, but failed completely. In that regard, Panda's failure to provide Petra Pet with notice of the diversion is consistent with Panda's unilateral self-help and total disregard for any sense of fairness in this dispute. As noted by the ALJ "the evidence shows that rather than compromise or allow the issues to be resolved in court, Panda took matters into its own hands." *See* ID at 2.

Should there be any doubt that Panda engaged in these illegal acts in order to extort payments from Petra Pet then we note the ALJ's findings that:

Without informing Petra Pat (sic), Panda returned the shipments to China and held them until it received a payment of over \$153,000 from Petra Pet. Given that the shipping charges for these seven containers were under \$24,000, the only plausible reason for the diversion was to extract additional payments from Petra Pet. *Panda held these seven containers in China until it extracted over six times the cost of shipping the containers. See* ID at 23. (Emphasis added.)

It also bears repeating that RDM Solutions played no part in Panda's actions detailed above. RDM Solutions did not abort the shipment, withhold the cargo or fail to provide Petra Pet with notice as to the whereabouts of the goods. Moreover, RDM Solutions did not influence Panda to take these actions. All of these actions were solely the responsibility of Panda and in fact occurred well after Panda's relationship with RDM Solutions was dead.

Similarly, these illegal actions had nothing to do with asserting a lien since Panda could just as easily have asserted a lien on the goods when they arrived in the United States.

Panda's third avenue in an attempt to overcome the ID's decision involves citations to inapplicable or irrelevant case law. For example, Panda cites extensively to the case of *Oak Harbor Freight Lines Inc. v. Sears Roebuck & Co.*, 513 F.3d 949 (9<sup>th</sup> Cir. 2008) for the proposition that freight payments to a third party broker do not absolve the consignee from an obligation to pay the carrier. In *Oak Harbor*, though, the consignee, Sears, issued a number of the bills of lading in question and as such "was not 'an innocent consignee.'" *Id.* at 960. In the instant case, though, Petra Pet played absolutely no part in issuing the bills of lading or creating the language therein. Equally important, all of the evidence - including Panda's own admissions - firmly establishes that Petra Pet was an innocent consignee. *See* Finding of Fact No. 46 wherein Panda's General Manager states to Petra Pet "we all know you are victim, you are innocent." This factor becomes especially pertinent when viewed against Panda's extortion and similar illegal practices.

*Oak Harbor's* conclusions also rested on the court's understanding 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.* at 959. In the instant dispute, though, the evidence leads to exactly the opposite result. The carrier (Panda) actively sought business from and cooperated with a third party (RDM Solutions) known to have a poor financial record. Similarly, the carrier (Panda) and RDM Solutions actively cooperated to ensure that the Petra Pet would not know the amounts owing Panda and would not be able to pay Panda directly. "Sears could have elected to pay Oak Harbor directly, but did not." *Id.* at 960. Petra Pet had no

means of paying Panda directly and was prevented from doing so by Panda's own business practices and documents. Consequently, on its facts and its law, *Oak Harbor* is inapplicable to the current dispute.

Similarly, Panda cites to *Mo. Pac R.R. Co v. Cent. Plains Indus., Inc.*, 720 F.2d 818 (5<sup>th</sup> Cir. 1983) for the proposition that listing RDM Solutions on the Panda bills of lading does not excuse the consignee from a responsibility for paying the carrier directly. In fact, though, *Mo. Pac R.R. Co.* holds that the parties to a contract for carriage of goods may transfer responsibility for payment by an "agreement between the parties or the circumstances surrounding the receipt and transportation of the goods" *Id.* at 819. The facts at hand demonstrate that since at least 2006, Petra Pet never paid Panda directly; Petra Pet always paid the party that Panda designated for payment on the Panda bills of lading; and that Panda cooperated with RDM Solutions to ensure that payment was only made and could only be made through RDM Solutions. These facts constitute "circumstances surrounding the receipt and transportation of the goods" demonstrating that the carrier (Panda) recognized and agreed to a course of business wherein RDM Solutions rather than Petra Pet was responsible to Panda for paying the freight. Once again, then, on its facts and the law this case is inapplicable.

Panda also cites extensively to the case of *Hawkspere Shipping Co. Ltd. v. Intamex, S.A.*, for the proposition that freight payments to a third party do not necessarily excuse a shipper from having to make the payments again directly to the carrier. *Hawkspere*, of course, does not involve aborting shipments, withholding cargo or extorting payments. In fact, in this case and in many others cited by Panda, the party claiming the freight charges did not engage in self-help, but properly filed a claim in court. To that point, the ALJ in this dispute found that:

Panda's own bills of lading state that disputes arising under a bill of lading "may only be instituted in the country where the carrier has his principal place of business ad shall be

decided according to the law of such country.” F. 73. This provision does to permit Panda to exercise self-help and unilaterally re-route the cargo. See ID at 23 - 24.

*Hawkspere*, then, (and other cases cited for the same proposition) is largely irrelevant to the instant dispute. It bears noting, though, that in *Hawkspere* the court also based its conclusions on the “undisputed” finding “that (the third party) never had actual authority to act as *Hawkspere*’s collection agent.” *Id.* at 235. In the instant dispute, Panda identified RDM Solutions as the party for freight charges on the Panda bills of lading and actively cooperated with RDM Solutions over hundreds of shipments to ensure that only RDM Solutions collected the freight charges. Consequently, whether or not RDM Solutions had a signed agency agreement with Panda, these parties created a course of dealing over more than five years and hundreds of shipments whereby in fact, RDM Solutions - with Panda’s approval - collected freight charges on behalf of Panda and paid Panda amounts agreed owing pursuant to the confidential business relationship between those parties. All of these actions are consistent with the fact that RDM Solutions was Panda’s U.S. business partner whether or not that business relationship amounted to an agency or some other legal standard.

*Hawspere* is also significant because it noted that “There exists a split among the circuits on the question of which party, the shipper or the carrier, bears the risk that the cargo consolidator might, as here, fail to forward the freight payment to the carrier.” *Id.* at 236. In support of the point of view that a shipper paying a third party (*e.g.*, a consolidator) does not necessarily remain liable to the shipper, *Hawkspere* noted the case of *Olson Distributing Systems v. Glasurit America, Inc.*, 850 F.2d 295 (6<sup>th</sup> Cir. 1988).

In *Olson Distributing* the court pointed to four facts in reaching its holding: First, the carrier provided the shipper with freight bills stating that the freight charges were to be paid to the freight forwarder. Second, the carrier did not diligently bill the freight forwarder for

shipments. Third, the carrier violated certain credit regulations that would have allowed the carrier to identify that the freight forwarder was absconding with the money. Fourth, the carrier could have limited its losses by notifying the shipper sooner. *Id.* at 295 - 297. Based on these factors, the Sixth Circuit concluded that:

[T]he doctrine of equitable estoppel requires that the loss fall on the carrier because its actions had the effect of lulling the shipper into believing that it was expecting and receiving payment from the freight forwarder. *Id.* at 296.

In the instant dispute Panda provided Petra Pet with Panda bills of lading identifying RDM solutions as the party for freight charges and Panda voluntarily engaged in an extensive course of dealing leading Petra Pet to understand that freight bills were only to be paid to RDM Solutions. Panda further engaged in a confidential business relationship with RDM Solutions whereby only those parties were privy to their internal billing arrangements. Panda also recognized early in its relationship with Mario Ruiz that transactions involving Mr. Ruiz's companies posed significant credit risks. Nevertheless, Panda chose to extend Mr. Ruiz an enormous amount of credit in violation of sound business judgment, if not any government regulations. Finally, as noted by the ALJ "By not notifying Petra Pet of the problem promptly, Panda allowed the amount due to escalate. *See ID* at 27. Consequently, based on the factors identified in *Olson Distributing* the doctrine of equitable estoppel suggests that Petra Pet should not be held responsible for Panda's poor business judgment or the failure of Panda's U.S. business partner.

As a final point, irrespective of the law on liens for amounts owing on prior shipments, the definition an "aborted" or "diverted" shipment or the relevance of certain case law, Panda's methods of enforcing its claim must not be permitted. If Panda is to be believed, its claim permitted unilateral self-help involving all shipments past or present: extortion, coercion, threats, inventing fictitious relationships, and mischaracterizing facts. If this behavior is permitted, then

nothing would be considered “unreasonable” for purposes of section 41102(c) of the Shipping Act and this statutory provision would lose all meaning. Panda had numerous opportunities to settle this dispute in a fair manner before any number of objective parties. However as the ALJ noted “Panda took matters into its own hands.” ID at 2. Aborting shipments, diverting cargo, extorting payments and similarly egregious self-help must not be permitted.

**B. Panda did not have a valid lien on cargo in prior shipments already released.**

As noted above, any discussion concerning Panda’s claimed lien is largely irrelevant since whether or not Panda had a lien on amounts claimed owing on prior shipments, the claimed lien does not justify Panda’s extortion and similar egregious behavior violating section 41102(c) of the Shipping Act. Nevertheless, Panda persists in mischaracterizing the lien and misstating the law concerning Panda’s rights thereunder. As such, for purposes of accuracy and completeness these points must be addressed.

1. Panda’s liens on freight are limited to amounts owing on cargo covered under the bills of lading and no more.
  - a. The Commission should use the Carrier’s lien in the Panda Logistics bills of lading to determine the liabilities and responsibilities of Panda and Petra Pet for freight charges.

Panda’s brief discusses at length the difference between freight forwarders and carriers. See Panda Brief in Support of Memorandum of Exceptions at 12 - 14. While Panda was unquestionably a carrier in these shipments and not a freight forwarder, it included in its Appendix terms and conditions applicable to both carriers (Panda Appendix 2a) and Freight Forwarders (Panda Appendix 2b). Panda has based its claimed lien on an interpretation of the Freight Forwarder’s lien in Appendix 2b, Par. 14 stating:

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 the same, and may enforce such lien in any reasonable manner which he may think fit.

However, since Panda was always a carrier, we believe that it would be more appropriate to use the language in the Carrier's lien referenced above. *See Panda Appendix 2a, Par. 14.*

With respect to which lien should be evaluated, Panda points out that some of the bills of lading in question were issued by Panda Logistics and other bills of lading were issued by Panda Int'l. *See Panda Fact Exceptions, Finding of Fact No. 75.* Nevertheless, Panda never distinguished between these two companies when dealing with RDM Solutions or Petra Pet. Sometimes Panda issued a bill of lading from Panda Logistics covering Petra Pet goods and other times Panda issued a bill of lading from Panda Int'l or Panda Logistics Co. Ltd. covering Petra Pet goods. In fact, we understand that Panda Int'l, the predecessor to Panda Logistics Co., Ltd., was not even in existence when the Panda Int'l bills of lading covering the seven diverted containers were issued in December 2010, thereby emphasizing the casualness that Panda attached to the particular Panda company name appearing on the bills of lading.

When communicating with RDM Solutions or Petra Pet, Panda personnel did not identify themselves with one company or the other. For example, Panda's General Manager, Frank Guo identified himself to Petra Pet as the General Manager of Panda Global Co., Ltd. (*see App. Petra-0116*). Similarly, Panda's Findings of Fact conflate these two companies numerous times throughout its submissions as "Panda." Consequently, it would be appropriate to use the lien language for Carriers in the Panda Logistics bills of lading to establish the liabilities and responsibilities of Petra Pet and Panda, irrespective of the particular Panda company. For purposes of this dispute, if Panda Int'l was a carrier then it should be held to the language of Panda's Carrier's lien, not a freight forwarder's lien.

The language in the Carrier's lien is clear. It is limited to amounts owing under the particular "contract;" that is, the particular bill of lading and as such does not extend to other

“contracts” or bills of lading. Based simply on the language of Panda’s Carrier’s lien, then, Panda’s claim for freight does not extend to prior shipments.

Of course, if Panda persists in claiming that the two Panda companies should be treated separately for purposes of the lien then this would also mean that for certain shipments Panda Logistics is basing its freight claims upon a lien arising under a Panda Int’l or Panda Logistics Co. Ltd. bill of lading. We believe that using a lien in Company A’s bill of lading to claim freight amounts applicable to cargo covered under Company B’s bill of lading is impermissible.

- b. Even if the Freight Forwarder liens in the Panda Int’l bills of lading are applicable, the liens only extend to amounts owing on the cargo covered thereunder and no more.

Even if the Freight Forwarder’s lien in the Panda Int’l bills of lading is controlling then Panda’s lien is still limited to freight charges applicable to the seven containers covered under those four Panda Int’l bills of lading and no more. The extensive case law on this point going back over 100 years discussed above and cited in the ID cannot be ignored. “[D]isputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo ...” *Bernard & Weldcraft Welding Equip.*, 1356 n. 14; A lien against cargo “cannot be applied . . . beyond the amount of freight stipulated in the bill of lading.” *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 672; “By virtue of this provision the ship owner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more.” *See The Albert Dumois*, 530.

The latter two cases are especially pertinent since they involved claims by carriers for freight charges based on expansive liens. In *American Steel Barge Co.* the lien applied to “all cargoes and all subfreight for charter money due under this charter.” 115 F. 669 at 671. Nevertheless, the First Circuit held that “this clause cannot be applied, as against the cargo owner, beyond the amount of freight stipulated in the bill of lading.” 115 F. 669 at 672. In *The Albert*

*Dumois* the lien was placed “upon all cargoes and upon all subfreights for any amount due under this charter.” Once again, though, the court limited the lien to amounts owing on the cargo covered under the bills of lading “but for no more.” 54 F. 529. As applied to Panda’s liens (Freight Forwarder or Carrier), then, the case law is clear. It permits Panda to withhold delivery of cargo for freight amounts owing on the cargo covered by applicable bills of lading, “but for no more.”

- c. Panda’s actions were not reasonable and as such were not permitted under the terms of the Panda Int’l Freight Forwarder’s lien.

The Panda Int’l Freight Forwarder’s lien states that it may be enforced “in any reasonable manner.” We submit that enforcing a lien by aborting shipments, diverting cargo indefinitely and extorting payments is not “reasonable.” Consequently, even if the FMC applies the language in the Panda Int’l Freight Forwarder’s lien or some combination of liens to this dispute, the facts and the law simply do not permit the egregious self-help that Panda unilaterally exercised.

**C. Whether RDM Solutions was an NVOCC or a freight forwarder is irrelevant to Panda’s liability for aborting the shipments, diverting the cargo, failing to provide notice and extorting payments.**

The first points in Panda’s Brief in Support of Memorandum of Exceptions are that RDM Solutions was not an NVOCC and that RDM Solutions instead acted as a freight forwarder.<sup>1</sup> Whether RDM Solutions was an NVOCC, a freight forwarder or some other party is irrelevant to Panda’s illegal actions. RDM Solutions played no part in Panda’s decisions to abort the shipments, divert the cargo, not give notice and extort payments. When Panda took these illegal actions its relationship with RDM Solutions was dead. Even if RDM Solutions was considered a freight forwarder, this conclusion “would not alter the analysis of Panda’s violations of the

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<sup>1</sup> Point A.2 in Panda’s Brief is titled “Petra Pet Acted as a Freight Forwarder.” We understand that this title is an inadvertent error by Panda and should have read “RDM Acted as a Freight Forwarder.”

shipping Act.” *See* ID at 20.<sup>2</sup> As discussed at length above, this issue (whether RDM Solutions was an NVOCC or freight forwarder) appears to be an attempt by Panda to divert attention from Panda’s liability for aborting the shipments, diverting the cargo, failing to provide notice and extorting payments.

**D. Petra Pet paid the party that Panda identified for freight charges under the Panda bills of lading.**

Having discussed whether RDM Solutions was an NVOCC or a freight forwarder, Panda discusses at length its contention that paying a third party does not insulate a consignee of its obligations to pay freight charges. The extensive case law on his point is discussed at length above and need not be repeated.

However, with respect to the evidence in the record on this point we note that Panda never billed Petra Pet for freight. Only RDM Solutions billed Petra Pet for freight charges. *See* App. Petra-0016 - 0022. Panda specifically chose not to identify the freight charges on its bills of lading issued to Petra Pet choosing instead to identify RDM Solutions in the “Freight amount” or “Freight & Charge” sections. This further evidences the fact that Panda never claimed or believed that Petra Pet was directly responsible to Panda for freight charges and undercuts any argument that Petra Pet could or should have paid Panda directly for freight. Panda could have identified the actual amount owed to Panda on the bills of lading, freight invoices or any other document provided to Petra Pet, but chose not to do so.

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<sup>2</sup> While we do not believe that the legal status of RDM Solutions in this case is irrelevant to Panda’s violations, we also note that the email correspondence between those parties is clear. RDM Solutions asked if it could “coload” on Panda’s Hanjin contract. *See* App. Petra-0056. Panda agreed to this arrangement in exchange for a fee. *See* App. Petra-0056, 0057. Panda and RDM Solutions conducted their business according to that agreement and Panda charged RDM Solutions the agreed upon fee. *See* App. Petra-0070, 0075.

The record also confirms that Panda occasionally asked Petra Pet for help in getting RDM Solutions to catch up on its payments, but that is a far cry from asserting that Petra Pet was responsible for paying Panda directly. To the contrary, Panda's General Manager acknowledged 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 have nothing to do with you. *See* ID Finding of Fact No. 49, App. Petra-0122.

The record also confirms that Petra Pet paid RDM Solutions as per the RDM Solutions freight invoices. Panda agreed to this course of dealing for billing Petra Pet and collecting freight charges over hundreds of shipments. Panda cannot escape a relationship and business dealings of its own creation because Panda's business partner was irresponsible. Panda cites extensive case law in a vain attempt to create an obligation for Petra Pet to indemnify Panda against wrongdoing by Panda's business partner. Case law, though, cannot compensate Panda for poor business judgment. Panda must take responsibility for its own poor decisions.

Finally, as discussed in detail above, Petra Pet's payments to RDM Solutions had nothing to do with Panda's illegal actions. Even if Petra Pet was directly liable to Panda - which it was not - Panda was not entitled to engage in extortion and other illegal actions in violation of section 41102(c) of the Shipping Act.

**E. Petra Pet has properly established that it paid RDM Solutions all amounts properly owing for freight.**

When Panda extorted its payment of \$130,526.73 from Petra Pet Panda did not identify to Petra Pet the shipments covered by that amount. Panda seeks to remedy this deficiency by explaining that the \$130,526.73 was "part of the \$173,597.83 owed Panda for prior shipments that Panda had transported on behalf of Petra Pet." *See* Panda Exception to Finding of Fact No. 63. In support of its statement that the \$130,536.73 was part of the larger amount of

\$173,597.83 claimed owing, Panda cites to a letter in App. Petra-0119. However, that letter does not indicate that Petra Pet owed Panda \$173,597.83 for prior shipments. Rather, in discussing an overall settlement with Panda that letter from Petra Pet references:

Freight owing Panda Global (China) for other shipments (possibly, but not necessarily involving Petra Pet shipments) where Petra Pet or some other company paid Panda Global's designated agent (RDM) for the freight: \$173,597.83

In short, then, even when referencing the larger number (\$173,597.83) that Panda claims includes the \$130,536.73 Petra Pet was clear that this larger amount did "not necessarily (involve) Petra Pet shipments." Consequently, Panda has never identified to Petra Pet exactly which shipments were covered under the \$130,526.73. Absent a clear schedule of the bills of lading and freight amounts owing, Petra Pet should not be forced to guess exactly which shipments were covered under the \$130,526.73 payment that Panda extorted.

We also reiterate that Panda and RDM Solutions had a confidential profit sharing arrangement to split the amount charged Petra Pet. *See* ID Findings of Fact Nos. 19, 23, 27. Consequently, identifying Petra Pet's total freight charges for each bill of lading might identify the amount owing both RDM Solutions and Panda, but would not identify amounts owing Panda individually.

Despite Panda's deficiencies Petra Pet produced an affidavit signed under penalty of perjury by a Vice-President at Kuehne + Nagel with first-hand knowledge of the payments. As per that affidavit "Kuehne + Nagel always paid RDM by check for the freight charges billed." App. Petra-0202. Equally important, producing Kuehne + Nagel's checks for payments to RDM Solutions would not have changed Panda's illegal actions. Even if Panda had those checks it still would have aborted the shipments, withheld the cargo, failed to notify Petra Pet

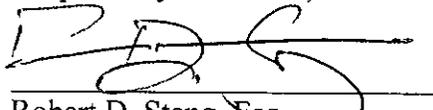
and extorted the payments. Consequently, this issue appears to be one more attempt to direct the Commission's attention from the primary issue leading the ALJ to award Petra Pet damages.

### CONCLUSIONS

Panda aborted Petra Pet's shipments, withheld Petra Pet's cargo, failed to notify Petra Pet of Panda's actions and extorted payments from Petra Pet. Consequently, Panda violated section 41102(c) of the Shipping Act and must be held liable for the consequent damages to Petra Pet of \$177,229.38 as detailed in the ID.

Dated October 2, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'RDS', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have delivered a true and correct copy of the foregoing document to the following addresses at the addresses stated via email transmission and/or by overnight mail on the 2<sup>nd</sup> day of October 2012.

Counsel for Panda Logistics Limited and Panda Logistics Co., Ltd.

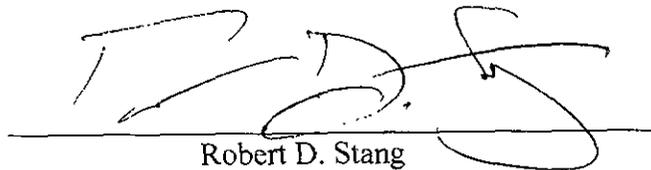
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