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FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMM

BALTIC AUTO SHIPPING, INC. v. MICHAEL HITRINOV
a/k/a MICHAEL KHITRINOV AND EMPIRE UNITED LINES
CO., INC.
DOCKET NO. 14-16
ORAL ARGUMENTS

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FRIDAY, JUNE 12, 2015

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The Proceedings convened at 800 North Capitol
Street, NW.; Washington, D.C., pursuant to notice
at 9:56 a.m.

BEFORE:

JUDGE CLAY G. GUTHRIDGE
Administrative Law Judge

ON BEHALF OF PARTIES:

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* * * * *

1 P R O C E E D I N G S

2 JUDGE GUTHRIDGE: This is Federal
3 Maritime Commission Docket No. 14-16, Baltic Auto
4 Shipping, Inc., v. Michael Hitrinov a/k/a Michael
5 Khitrinov. And then Empire United Line Company,
6 Inc. Judge Guthridge presiding. It is right now
7 9:56 on June 12, 2015.

8 Can I have appearances for counsel,
9 please, starting with Complaint's?

10 MR. NUSSBAUM: Good morning, Your Honor.
11 This is Marcus Nussbaum for Complainant, Baltic
12 Auto Shipping, Inc.

13 MR. DOYLE: Good morning, Your Honor.
14 This is Gerard Doyle and David Gabel for the
15 Respondents, Empire United Lines and Michael
16 Hitrinov.

17 JUDGE GUTHRIDGE: Okay. We're here on
18 Respondent's Motion for Partial Primary Decision
19 that was filed March 23, 2015. Response has been
20 filed and supplemental responses. And Empire has
21 filed a reply.

22 Empire -- in its motion, Empire contends

1 that the complaint was filed more than three years
2 after Baltic's claims accrued, and therefore, the
3 claim for reparation must be dismissed as time
4 barred. And Empire also contends that certain
5 elements at least of the complaint for reparations
6 is barred by the settlement agreement and the
7 mutual release the parties entered into in the New
8 Jersey case in 2011.

9 Let me start off by saying for the
10 purposes of this motion, I'm going to assume that
11 Empire violated the Shipping Act as alleged in the
12 complaint. That is, that Empire charged
13 complainant rates greater than those charged other
14 shippers in violation of 46 USC Section
15 41104(2)(a), 41104(4)(a), and 41104(a); and that
16 Empire charged Complainant rates greater than
17 those reflected in its published tariff, in
18 violation of the same three sections; that Empire
19 violated 46 USC 40501(a), by failing to keep open
20 to public inspection tariff systems -- tariffs
21 showing all rates, charges, classifications,
22 rules, and practices between all points or ports

1 on its own routes and not any group transportation
2 routes that had been established; and that Empire
3 violated section 41102(c) by failing to provide
4 Complainant with proper and lawful documents of
5 ownership (bills of lading) shipping invoices, and
6 the terms and submissions of transport, even
7 though Complainant paid Respondent. Respondent
8 failed to deal in good faith and provide proof of
9 ownership with a correct original bill of lading
10 and contracted transport in a timely manner to the
11 Complainant.

12 So do the parties understand? I'm
13 assuming those allegations to be true for the
14 purposes of this motion.

15 MR. NUSSBAUM: Yes, Your Honor.

16 MR. DOYLE: Understood, Your Honor.

17 JUDGE GUTHRIDGE: Okay. So the question
18 raised by Empire's motion is whether based on the
19 material facts as to which there is no genuine
20 dispute Baltic filed its complaint more than three
21 years after the claims accrued. And the second is
22 whether the settlement of the New Jersey case bars

1 any or some role of the claim.

2 Mr. Nussbaum, I want to start by asking
3 you some questions about -- to make sure I
4 understand what actually went on with this
5 relationship. As I understand it, the business
6 relationship began sometime in 2007; is that
7 correct?

8 MR. NUSSBAUM: That's correct, Your
9 Honor.

10 JUDGE GUTHRIDGE: And then there were
11 several years of shipments between 2007 and 2011
12 between the parties.

13 MR. NUSSBAUM: That's --

14 JUDGE GUTHRIDGE: There's a -- the audit
15 that was submitted -- that was prepared by Laura
16 Supranos -- is that how her name is name is
17 pronounced?

18 MR. NUSSBAUM: That's correct, Your
19 Honor.

20 JUDGE GUTHRIDGE: Okay. Exhibit X to
21 the -- how do you pronounce -- is it Presniacova?

22 MR. NUSSBAUM: Presniacova.

1 JUDGE GUTHRIDGE: Yeah. Mr.
2 Presniacova's affidavit or declaration -- I forget
3 what that was -- identifies the shipment or most
4 of the shipment throughout the year. It didn't
5 have any numbers for how many shipments occurred
6 in 2007 or 2008, but then according to her audit,
7 there were 451 containers shipped in 2009, and
8 1,379 containers in 2010, and 650 containers
9 shipped in 2011.

10 MR. NUSSBAUM: That's correct, Your
11 Honor.

12 JUDGE GUTHRIDGE: Okay. Now, then, in
13 2011, as we know from the New Jersey complaint,
14 there are problems, or at least Baltic perceived
15 there were problems with the relationship, and
16 filed suit in the New Jersey District Court.

17 Now, the complaint, the New Jersey
18 District Court complaint, alleges 167 containers
19 were still in transit at that time. Is that
20 correct, Mr. Nussbaum?

21 MR. NUSSBAUM: That's correct, Your
22 Honor.

1 JUDGE GUTHRIDGE: And those were all
2 2011 shipments; is that correct?

3 MR. NUSSBAUM: Bear with me for one
4 second, Your Honor. I just want to --

5 JUDGE GUTHRIDGE: All the shipments that
6 were subject to the New Jersey complaint were
7 shipments that came in in 2011 at some point?

8 MR. NUSSBAUM: Your Honor, if that's
9 what it says in the complaint, then I don't
10 dispute that.

11 JUDGE GUTHRIDGE: Okay. So when Baltic
12 filed that complaint, was its intent to ensure
13 delivery of all the shipments it had -- that were
14 in transit at that time?

15 MR. NUSSBAUM: That's correct, Your
16 Honor, because Baltic's position is that at that
17 point it was, you know, unless it's being held
18 hostage with this containers that were out there
19 or that were already accruing storage or demurrage
20 charges, Baltic's customers were already beating
21 down the doors.

22 JUDGE GUTHRIDGE: Well, let me ask you

1 this. So is it correct to infer that by the time
2 the New Jersey complaint was filed, and probably
3 for several years in advance, that all of the
4 shipments in 2007, 2008, 2009, 2010, had been
5 delivered; is that correct?

6 MR. NUSSBAUM: Correct.

7 JUDGE GUTHRIDGE: Okay. Now, and then
8 there was the allegation of 167 shipments were in
9 transit but the settlement agreement addressed 162
10 shipments. What was the reason for that
11 difference?

12 MR. NUSSBAUM: Your Honor, I don't have
13 the answer for that right now but I can always
14 consult with my client and produce something in
15 writing to that effect to answer that question.

16 JUDGE GUTHRIDGE: Well, let me put it
17 this way. There were 167 -- allegations of 167
18 shipments in transit at the time of the New Jersey
19 complaint, the settlement was 162 shipments, and
20 there's evidence in the record with the emails
21 between -- I think it was Mr. Hitrinov and Ms.
22 Supranos regarding five containers that were

1 removed from the settlement. Is that correct?

2 MR. NUSSBAUM: Bear with me for one
3 second, Your Honor. I'd just like to check my
4 notes.

5 JUDGE GUTHRIDGE: I'm looking at an
6 email that was included in Empire's Reply, email
7 exchanges between Michael Hitrinov and Laura
8 Supranos on November 25, 2011.

9 MR. NUSSBAUM: Your Honor, if I
10 understand correctly, you're referring to those
11 five -- to those five bookings from Long Beach,
12 California.

13 JUDGE GUTHRIDGE: Yes. They are also
14 identified in -- somewhere, as five shipments that
15 were identified in this email. I mean, it's
16 Empire transaction number EUL -- 038EUL, 454229,
17 454218, 455665, 455667, and 486081.

18 MR. NUSSBAUM: Okay. Your Honor.

19 JUDGE GUTHRIDGE: So those five
20 shipments were not included in the settlement; is
21 that correct?

22 MR. NUSSBAUM: Yes, that's correct.

1 They were not included in the settlement
2 agreement. And the reason why --

3 JUDGE GUTHRIDGE: I'm sorry?

4 MR. NUSSBAUM: They were not included in
5 the settlement agreement, Your Honor. The reason
6 why is because Baltic's customer had agreed to --
7 bear with me one second, Your Honor.

8 JUDGE GUTHRIDGE: Well, Mr. Hitrinov's
9 email says that they were request -- these five
10 shipments requested in writing by company M.E.
11 Baltic to be put on their account.

12 What company is M.E. Baltic?

13 MR. NUSSBAUM: Your Honor, I spoke with
14 my client about this, and what my client had
15 explained to me is that those shipments belonged
16 to a client of Baltic's. I -- as part of the
17 subpoenaed documents that we received from the
18 Mediterranean Shipping Company, what I actually
19 have here, and I understand that this is part of
20 the policy and procedures of the Bureau of Customs
21 and Border Protection for export out of the Port
22 of Los Angeles in Long Beach. They require a

1 cover letter that goes along with the validated
2 titles for the automobiles that are being
3 exported. And I have that cover letter, which is
4 validated together with the titles and which
5 actually identify Baltic as the exporter.

6 JUDGE GUTHRIDGE: You're talking about
7 the Complainant, Baltic?

8 MR. NUSSBAUM: That's correct.

9 JUDGE GUTHRIDGE: Okay. Now, why
10 weren't they included in the settlement agreement
11 then if Baltic -- if Baltic was interested in
12 getting all of its containers?

13 MR. NUSSBAUM: They were not included,
14 Your Honor, it's because these were those five
15 bookings from which Empire had collected directly
16 from Baltic's customer, \$175 per container.

17 JUDGE GUTHRIDGE: All right. And so had
18 that transaction taken place before the New Jersey
19 settlement?

20 MR. NUSSBAUM: No, Your Honor. What we
21 discovered is that had taken place -- I believe it
22 was early January of 2012.

1 JUDGE GUTHRIDGE: So why weren't -- then
2 why weren't they included in the settlement
3 agreement?

4 MR. NUSSBAUM: They were not included in
5 the settlement agreement, Your Honor, because --

6 JUDGE GUTHRIDGE: We're talking about a
7 transaction that occurred after the settlement
8 agreement?

9 MR. NUSSBAUM: Your Honor, this
10 transaction occurred -- we understand that it
11 occurred after the settlement agreement was
12 executed, and therefore, they fall outside of the
13 settlement agreement.

14 MR. DOYLE: Your Honor, this is Rod
15 Doyle. May I be heard for a moment?

16 JUDGE GUTHRIDGE: That's not an answer.
17 Please, Mr. Doyle, you'll get your chance.

18 MR. DOYLE: Thank you.

19 JUDGE GUTHRIDGE: Mr. Nussbaum, what my
20 question is, that transaction you're now talking
21 about in January occurred after the settlement
22 agreement; is that correct?

1 MR. NUSSBAUM: That's correct, Your
2 Honor.

3 JUDGE GUTHRIDGE: So my question is, why
4 were not -- if these were Baltic shipments --
5 Complaint Baltic's shipments, why were they not
6 included in the settlement agreement?

7 MR. NUSSBAUM: Bear with me for one
8 second, Your Honor. I just want to check my
9 notes.

10 Okay, Your Honor. The reason they were
11 not included in the settlement agreement is
12 because Baltic's customers agreed to pay the
13 additional charges in order to get the cargo
14 released.

15 JUDGE GUTHRIDGE: So the customer agreed
16 to pay?

17 MR. NUSSBAUM: That's correct..

18 JUDGE GUTHRIDGE: Is that customer M.E.
19 Baltic?

20 MR. NUSSBAUM: No. No, Your Honor.

21 JUDGE GUTHRIDGE: Who was the customer?

22 MR. NUSSBAUM: I have one name on the

1 documents in front of me right now. That's G&G
2 Auto Sales.

3 JUDGE GUTHRIDGE: I'm sorry, what was
4 it?

5 MR. NUSSBAUM: G&G. It's G ampersand G.

6 JUDGE GUTHRIDGE: G&G?

7 MR. NUSSBAUM: Yeah, G&G Auto Sales.

8 JUDGE GUTHRIDGE: Okay. Now, for those
9 167 shipments, Mr. Nussbaum, those shipments all
10 began prior to -- obviously, prior to the time
11 when Baltic filed its New Jersey case; is that
12 correct?

13 MR. NUSSBAUM: That's correct.

14 JUDGE GUTHRIDGE: And with the exception
15 of maybe some extra charges that you're talking
16 about here that G&G agreed to pay, the freight
17 rate was established at the time the -- at or
18 around the time that the shipment began; is that
19 correct?

20 MR. NUSSBAUM: My understanding is that
21 these were the freight rates that were presented
22 to Baltic and which Baltic booked the shipment

1 pursuant to.

2 JUDGE GUTHRIDGE: Okay. So Baltic knew
3 at the commencement of all the shipments what it
4 was going to pay for the shipments; is that right?

5 MR. NUSSBAUM: That's correct, Your
6 Honor, per the -- per the emails containing the
7 rates that Baltic was provided with.

8 JUDGE GUTHRIDGE: Okay. Then, in
9 opposition to the motion, Baltic states that there
10 were shipments that occurred post-settlement,
11 after the New Jersey settlement; is that correct?

12 MR. NUSSBAUM: That's correct, Your
13 Honor.

14 JUDGE GUTHRIDGE: And is that -- are
15 those -- the only shipments I saw or the
16 containers I saw referenced were the -- included
17 in the 21 shipments that were in the end counter
18 of documents that were sent in by the Respondent.

19 MR. NUSSBAUM: That's correct, Your
20 Honor.

21 JUDGE GUTHRIDGE: Is that the only other
22 shipments that there are?

1 MR. NUSSBAUM: That's correct.

2 JUDGE GUTHRIDGE: Okay. And there were
3 21 shipments in those end counter documents, but
4 Baltic lists 18 in the top position; is that
5 correct?

6 MR. NUSSBAUM: Your Honor, I would have
7 to go back and double check.

8 JUDGE GUTHRIDGE: I think it's attached
9 to Mr. Hitrinov's audit.

10 MR. NUSSBAUM: Okay.

11 JUDGE GUTHRIDGE: Freight paid. The
12 very last document, the very last page in Baltic's
13 exhibit that was submitted in opposition. There
14 are 18 containers listed as freight paid in
15 tariffs 2012.

16 MR. NUSSBAUM: That's correct. It does
17 say -- it does say 18, Your Honor.

18 JUDGE GUTHRIDGE: Okay. And then --
19 what happened to the other three, out of
20 curiosity?

21 MR. NUSSBAUM: Bear with me for one
22 second, Your Honor.

1 Your Honor, the other three were in
2 2011.

3 JUDGE GUTHRIDGE: Oh, they're in the
4 2011?

5 MR. NUSSBAUM: That's correct, Your
6 Honor. Three of those are in December of 2011.

7 JUDGE GUTHRIDGE: Okay. Now, as I see
8 it, then there are really three groups of
9 shipments that we can talk about here, and they
10 might get different treatment depending on which
11 group they're in. The shipments that were begun
12 between 2007 and 2011 that had been delivered and
13 shipment completed before Baltic commenced its New
14 Jersey action; there are the 167 or 162, depending
15 on how it's counted, that were -- that were --
16 well, 162 that were involved in the 2011 New
17 Jersey settlement; and then the 18 -- the 21 that
18 were not included in the -- let me back up.

19 Those three shipments that occurred in
20 December -- did they commenced in December 2011;
21 is that correct?

22 MR. NUSSBAUM: That's correct, Your

1 Honor.

2 JUDGE GUTHRIDGE: Okay. And so those 21
3 shipments that were represented by a document that
4 submitted in camera by Empire.

5 Do you understand that is three groups?

6 MR. NUSSBAUM: Yes.

7 JUDGE GUTHRIDGE: Okay. Now, on those
8 21 shipments, what was Baltic's --

9 Those 21 shipments that were
10 post-settlement, what was Baltic's role in those
11 shipments? Complainant Baltic?

12 MR. NUSSBAUM: Okay. Your Honor, I
13 understand that Baltic's role in those shipments
14 was either -- either as the merchant for vehicles
15 that it had owned, or as an NVOCC, where it was
16 shipping the vehicles on behalf of its client.
17 And for those, we have powers of attorney and
18 shipping letters of instruction.

19 JUDGE GUTHRIDGE: You say that for the
20 shipments on which Baltic was acting as NVOCC, are
21 those Baltic's records of that submitted as part
22 of your exhibit?

1 MR. NUSSBAUM: They were not submitted,
2 Your Honor, but we can submit them now if
3 necessary.

4 JUDGE GUTHRIDGE: Why weren't they
5 submitted?

6 MR. NUSSBAUM: My client had an issue
7 due to the confidential nature of these documents.

8 JUDGE GUTHRIDGE: Are you talking about
9 -- so this is the 21 shipments as a result of a
10 ruling April 1st. Do you think they're
11 confidential by that?

12 MR. NUSSBAUM: That's correct, Your
13 Honor.

14 JUDGE GUTHRIDGE: I think I'm going to
15 need to see those documents. If Baltic is
16 claiming that it was the shipper -- that it was
17 involved in those shipments and has a right to
18 bring an action, I'm going to need to see those.

19 MR. NUSSBAUM: Okay. I can FedEx those
20 documents to the Commission right away, Your
21 Honor.

22 JUDGE GUTHRIDGE: Are you claiming --

1 are you claiming they should be filed in camera or
2 sealed?

3 MR. NUSSBAUM: Yes. Yes, we are, Your
4 Honor.

5 JUDGE GUTHRIDGE: And why is that?

6 MR. NUSSBAUM: Because of their
7 confidential nature.

8 JUDGE GUTHRIDGE: Well, they are more
9 than three years old; is that correct?

10 MR. NUSSBAUM: They are.

11 JUDGE GUTHRIDGE: Are they anything
12 other than ordinary business records? Is there
13 some other element of confidentiality in them?

14 MR. NUSSBAUM: Well, Your Honor, they
15 identify my client's customers, and they're still
16 working together. But in some substance, they are
17 the powers of attorney and shipping letters of
18 instruction.

19 JUDGE GUTHRIDGE: No, but I mean what's
20 the business -- why is it a trade secret still or
21 why would it -- you think it would -- those -- I
22 just want to be very cautious in their orders.

1 There were no -- Empire -- rather, Baltic Savannah
2 was authorizing release of shipments which didn't
3 indicate that they were involved in it at all, at
4 least in the shipping records that I got from
5 Empire.

6 But I guess if you're contending -- if
7 Baltic is contending that those records should be
8 confidential, then submit it confidentially, but
9 with an explanation, and I think we have rules
10 that address this, of why they should be
11 confidential.

12 MR. NUSSBAUM: Okay. So I will put
13 something -- I will basically put together an
14 explanation, Your Honor. And I understand, I
15 guess, that the Commission can make a ruling at
16 that point as to whether or not they should be
17 held as confidential.

18 JUDGE GUTHRIDGE: Yeah, because, I mean,
19 the reason I did not divulge -- I didn't release
20 the other ones is because there was nothing
21 connecting them to anybody who appeared -- they
22 were connected to Baltic Savannah but not Baltic

1 Illinois. I think those were the two terms I
2 used.

3 MR. NUSSBAUM: I understand.

4 JUDGE GUTHRIDGE: Okay. So anyway, as I
5 said, I see those as the three groups of shipments
6 then. And I'm not sure where to place those five
7 that were removed from the settlement agreement
8 and then that Baltic is now claiming are part of
9 this case.

10 MR. NUSSBAUM: Well, with respect to the
11 five, Your Honor, together with the powers of
12 attorney and the shipping letter of instructions
13 for the 21 bookings from Savannah, I can -- I can
14 also forward to the Commission the documentation
15 which we received from Mediterranean Shipping
16 Company as part of their production in response to
17 the Commission's subpoena regarding those five
18 bookings from Long Beach.

19 JUDGE GUTHRIDGE: Okay. When you send
20 those to the Commission, are you going to send
21 them to Baltic -- I mean, to Empire? I mean,
22 Empire was allegedly the carrier on it. It

1 certainly should already have them.

2 MR. NUSSBAUM: Yes.

3 JUDGE GUTHRIDGE: So it's not going to
4 be revealing anything to them that they don't
5 already know.

6 MR. NUSSBAUM: Yes. Yes, I can forward
7 a copy to Empire.

8 JUDGE GUTHRIDGE: Okay. All right.
9 Now, Baltic filed its complaint November 28, 2014,
10 and then on my instructions, on my order, filed an
11 amended complaint January 8, 2015. Pursuant to
12 that order, Baltic was ordered to make more
13 explicit which sections of the act it believed
14 were violated.

15 I compared the original complaint and
16 the amended complaint, and I did not note any
17 changes in parts one, two, three, seven, or eight
18 of the -- you know, between the two complaints.
19 There is no part six identified. Am I correct in
20 that? Did I miss something, Mr. Nussbaum?

21 MR. NUSSBAUM: No, that's correct, Your
22 Honor.

1 JUDGE GUTHRIDGE: Actually, there
2 weren't any changes to part four either. All the
3 changes were in part five; is that correct?

4 MR. NUSSBAUM: I believe so, Your Honor.
5 If I recall correctly, the Commission's order
6 directed me to include the subparts of the
7 Shipping Act violations that we were alleging to
8 have been violated by the Respondent.

9 JUDGE GUTHRIDGE: Okay. Okay. So if I
10 say complaint, amended complaint, I'm referring to
11 essentially the same document -- the same
12 information, same allegations except with the
13 differences -- the changes in part five of the
14 two. So just so the record is clear on that.
15 Unless I explicitly say it, I don't intend to
16 imply anything different by saying complaint or
17 amended complaint.

18 I want to start with the amended
19 complaint, part 5D, Mr. Nussbaum. That alleges
20 that Empire violated 41102(c) by failing to
21 provide Complainant with proper and lawful
22 documents of ownership (bills of lading); shipping

1 invoices and the terms and conditions of
2 transport, even though Complainant paid
3 Respondent. Respondent failed to deal in good
4 faith and provide proof of ownership with a
5 correct bill of lading and contract for transport
6 in a timely manner to the Complainant.

7 Now, for all that group of documents we
8 talked about -- I'm sorry, group of shipments --
9 strike that.

10 Okay. Okay, yeah, for the shipments
11 between 2007 and 2011 that had been -- the
12 transportation had been completed and the
13 shipments delivered, Empire's alleged failure to
14 provide those documents occurred at the time of
15 those shipments; didn't it, Mr. Nussbaum?

16 MR. NUSSBAUM: That's correct, Your
17 Honor. However, I just wanted just to note for
18 the record that those same documents were
19 requested repeatedly, even after the time of
20 shipment.

21 JUDGE GUTHRIDGE: All right. But, in
22 fact, I saw -- I think there's a reference where

1 Mr. Presniacova's affidavit, paragraph 10, it
2 talks about in mid-2008 and 2009, Empire would not
3 produce the shipping documents. I did note that.
4 And arguably, there were a number of requests.

5 MR. NUSSBAUM: Yes.

6 JUDGE GUTHRIDGE: All of those shipments
7 had been delivered and the transportation was
8 completed. All those failures to produce occurred
9 more than three years before Baltic filed its
10 complaint, didn't it -- didn't they?

11 MR. NUSSBAUM: Yes, Your Honor. But I
12 just wanted to note one more thing because we have
13 alleged that this failure to provide the shipping
14 documents is a continuing violation, and the
15 argument is that we fixed that last date of the
16 continuing violation to be the date that the 2011
17 settlement agreement was signed, which paragraph
18 11, which we argue calls for the production of
19 those documents.

20 JUDGE GUTHRIDGE: In regards to the
21 first thing -- so, it seems -- are you -- is
22 Baltic claiming that there's a continuing

1 obligation such that if a shipper ships one
2 container, let's say, in 2007, and the carrier
3 fails to provide it with the documents, here in
4 2015, the shipper could file a complaint with the
5 Commission and it would be timely because there's
6 been a continuing failure to provide those
7 documents?

8 MR. NUSSBAUM: So long as the request
9 was made multiple times and within three years of
10 filing the claim.

11 JUDGE GUTHRIDGE: So, a shipper,
12 according to Baltic's theory, a shipper can make a
13 shipment every three years within three years,
14 say, "Hey," to the carrier, "You still haven't
15 given me those documents." And would continue
16 that as a violation ad infinitum. Is that what
17 you're saying?

18 MR. NUSSBAUM: Yes, Your Honor. And
19 again, I just -- I respectfully refer the
20 Commission to paragraph 11 of the 2011 settlement
21 agreement, which actually specifically stated that
22 the parties shall execute, deliver any old

1 documents, and get such instructions that their
2 agents deem may be necessary for effectuation of
3 the terms and conditions of this agreement, which
4 at that point, as I said, that brings it within
5 the three years.

6 JUDGE GUTHRIDGE: So what you're saying
7 though is by -- are you saying that by failing to
8 produce the documents after the settlement
9 agreement, they violated the Shipping Act, or
10 Empire violated the settlement agreement?

11 MR. NUSSBAUM: Both, Your Honor.

12 JUDGE GUTHRIDGE: And what -- was it --
13 is Baltic's contention that it settled an
14 agreement that obligated Empire to produce
15 documents from 2007, 2008, 2009, 2010, and 2011
16 shipments that had already been delivered?

17 MR. NUSSBAUM: Yes, Your Honor.

18 JUDGE GUTHRIDGE: Where does it say --
19 how is that necessary for the effectuation of the
20 terms and conditions of this agreement with 162
21 shipments?

22 MR. NUSSBAUM: Your Honor, it's Baltic's

1 contention that because -- because there was a
2 mutual release -- from the time up until the date
3 of the release, that it covers the time period
4 that you just mentioned.

5 JUDGE GUTHRIDGE: So the settle -- what
6 you're saying is the settlement agreement
7 obligated Empire to produce those documents?

8 MR. NUSSBAUM: Yes, Your Honor.

9 JUDGE GUTHRIDGE: Does the Commission
10 have jurisdiction to interpretate -- interpret
11 this settlement agreement that was entered by a
12 United States District Court? Why isn't that for
13 the court to interpret, especially since the court
14 explicitly -- and in fact, it looks like -- is it
15 Judge Hochberg or Hoch -- Hochberg -- how is that
16 pronounced?

17 MR. NUSSBAUM: I believe it was Judge
18 Hochberg.

19 JUDGE GUTHRIDGE: I know who it was. I
20 was just asking about pronunciation. Is it
21 Hochberg?

22 MR. NUSSBAUM: I think so.

1 JUDGE GUTHRIDGE: Okay.

2 MR. NUSSBAUM: I was not involved in
3 that action, Your Honor.

4 JUDGE GUTHRIDGE: But Baltic was?

5 MR. NUSSBAUM: Yes.

6 JUDGE GUTHRIDGE: If the settlement
7 agreement is not consummated, the court will
8 entertain an application solely to enforce the
9 terms of the settlement agreement. So why -- if
10 it's Baltic's contention that the settlement
11 agreement obligated Empire to produce documents
12 all the way back to 2007 for every, what, 2,000 or
13 3,000 shipments, however many it was, why isn't it
14 up to Baltic to go to Judge Hochberg and say they
15 haven't complied with these agreements?

16 MR. NUSSBAUM: Your Honor, in answer to
17 that question, I again respectfully refer the
18 Commission to the case law in my brief that
19 discusses when there are breach of contract issues
20 that are intertwined with other issues that are
21 inherently Shipping Act violations that they said
22 they must be considered by the Commission.

1 JUDGE GUTHRIDGE: I don't think that's
2 exactly what it says. But what you're saying, and
3 what you said a couple of minutes ago was that
4 this settlement agreement obligated Empire to
5 submit records all the way back to 2007. I'm
6 sorry, to forward shipping documents that had not
7 been -- allegedly had not been sent to Baltic, all
8 the way back to 2007.

9 MR. NUSSBAUM: Right.

10 JUDGE GUTHRIDGE: That was an
11 interpretation of the settlement agreement. I'm
12 asking, why isn't it up to the District Court of
13 New Jersey to interpret that settlement agreement,
14 not the Commission?

15 MR. NUSSBAUM: Well, Your Honor, again,
16 we came to the Commission with Shipping Act
17 violations, one of which was the failure to turn
18 over the -- among other things, was the failure to
19 turn over these documents.

20 JUDGE GUTHRIDGE: But you're saying --
21 you're relying on the settlement agreement as, you
22 say, the request within three years of the filing

1 of the complaint that required Empire to produce
2 the documents back to '07. And what I'm saying to
3 you is, paragraph 11 of that says that Empire was
4 required to produce documents necessary to the
5 evacuation of the terms and conditions of this
6 agreement. And I'm saying, how were those --
7 production of those documents necessary for that
8 evacuation?

9 MR. NUSSBAUM: Your Honor, can I just --
10 in response to that, I also remind the Commission
11 that there was email communication between Baltic
12 and the Commission in November of 2011. I believe
13 it was Tara Nielsen in which Baltic had actually
14 explained to Ms. Nielsen in writing that Empire
15 did not provide --

16 JUDGE GUTHRIDGE: I saw those emails,
17 and as I recall, they occurred around November
18 21st, which was more than three years before
19 Baltic filed its complaint. Is that correct?

20 MR. NUSSBAUM: Yeah. And Your Honor,
21 that's the reason that this paragraph 11 was
22 actually put into the 2011 settlement agreement.

1 JUDGE GUTHRIDGE: You're asking the
2 Commission then to interpret the 2011 New Jersey
3 settlement agreement entered by the court instead
4 of having the court determine it; is that right?

5 MR. NUSSBAUM: Yes, Your Honor.

6 JUDGE GUTHRIDGE: Okay. Now, the
7 complaint, as I read it, the complaint --

8 Part four of the complaint has specific
9 factual allegations, many of them -- most of them
10 related to specific -- or maybe to all of the four
11 violations of the act alleged. But there are some
12 that seem to be specific to the allegation in part
13 five. Actually, the one in part five -- or the
14 one related to part five be as paragraph 21 of
15 your complaint? It says, "At all times alleged
16 herein, EUL and Hitrinov failed to provide
17 complainant with proper and lawful documents," et
18 cetera?

19 MR. NUSSBAUM: Yes, Your Honor.

20 JUDGE GUTHRIDGE: Okay. And I see in
21 the 2011 complaint filed in New Jersey District
22 Court, paragraph 28, 29, and 30, there's

1 information and belief that Empire was required by
2 law to create and deliver a bill of lading and
3 invoice to Plaintiff with respect to ongoing -- to
4 the oceangoing and non-oceangoing transport of
5 Plaintiff's vehicle. At all times relevant
6 hereto, Empire failed and refused to deliver the
7 Plaintiff's HBOLs and invoices for vehicles
8 shipped overseas."

9 Paragraph 30, "In or around September
10 2011, Plaintiff notified Defendants that the
11 business relationship between the parties would be
12 wound down and ultimately discontinued. At or
13 about the same time, Plaintiff also demanded a
14 copy of all HBOLs and invoices related to
15 containers shipped pursuant to the parties'
16 agreement."

17 And that's the New Jersey verified
18 complaint that was signed on November 22, 2011,
19 and filed with the court on November 23, 2011.

20 MR. NUSSBAUM: That's correct, Your
21 Honor.

22 JUDGE GUTHRIDGE: Why couldn't -- those

1 -- that language is very similar to paragraph 21
2 in the Federal Maritime Commission complaint.
3 Baltic knew on November 22nd, when it signed the
4 complaint, that it had a cause of action against
5 Empire, or may have a cause of action, a claim
6 against Empire with the Commission for failing to
7 deliver those documents. Is that right?

8 MR. NUSSBAUM: That's correct, Your
9 Honor.

10 JUDGE GUTHRIDGE: Okay. If your theory,
11 Mr. Nussbaum, is by entering into the settlement
12 agreements or by making demands throughout the
13 2007 to 2011 period, that those demands sort of
14 reacted or reactivated to extended the statute of
15 limitations on the documents, if that's not
16 correct, then all those shipments that Baltic knew
17 on November 22, 2011, had all the facts necessary
18 to file that complaint with the Commission at that
19 time, didn't it?

20 MR. NUSSBAUM: It did, Your Honor, but
21 again, I refer the Commission to paragraph 11,
22 which we say fixes that that actual -- that last

1 date of the continuing violation to be November
2 29th.

3 JUDGE GUTHRIDGE: Okay. Assuming --
4 assuming this is a Shipping Act violation -- or
5 say it is a Shipping Act violation to fail to give
6 Baltic the documents that you say were not given,
7 what's the actual injury that Empire suffered as a
8 result of that? I'm sorry, that Baltic suffered
9 as a result of not getting those documents?

10 MR. NUSSBAUM: Monetary damages, Your
11 Honor, due to the fact that Baltic lost a lot of
12 customers that just walked away because Baltic was
13 unable to provide the shipping documents to their
14 customers.

15 JUDGE GUTHRIDGE: So customers from 2008
16 and 2008 walked away?

17 MR. NUSSBAUM: That's correct, Your
18 Honor. Customers that Baltic was regularly doing
19 business with.

20 JUDGE GUTHRIDGE: And they were walking
21 away because in 2011, Baltic was unable to give
22 them documents for shipments that occurred in

1 2007; is that what you're saying?

2 MR. NUSSBAUM: Different clients, Your
3 Honor.

4 JUDGE GUTHRIDGE: That's not an answer
5 to my question.

6 Are you saying -- is Baltic claiming
7 that shippers it had in 2007 weren't doing
8 business with Baltic because in 2011, Baltic
9 failed to produce documents from 2007?

10 MR. NUSSBAUM: Yes, Your Honor.

11 JUDGE GUTHRIDGE: Okay, fine. So four
12 years -- what you're saying is four years after
13 the shipment, Baltic's customers, who for four
14 years had not been getting those documents,
15 suddenly said, "If you don't give them to us,
16 we're going to stop doing business with you"?

17 MR. NUSSBAUM: That's correct, Your
18 Honor. Some of those customers were doing
19 business for four years. Some of those customers
20 were doing business for a shorter period of time.

21 JUDGE GUTHRIDGE: Okay. Paragraph 5D of
22 the Commission complaint alleges that Empire

1 violated three sections of the act by charging
2 Complainant rates greater than those reflected in
3 its published tariff. And in paragraph 18 of the
4 complaint, Baltic states, "Prior to January 2012,
5 Complainant neither knew nor could have known that
6 Empire was charging it the amount in excess of the
7 published tariff."

8 Is that correct?

9 MR. NUSSBAUM: That's correct, Your
10 Honor. I do not dispute what the complaint says.

11 JUDGE GUTHRIDGE: I beg your pardon?

12 MR. NUSSBAUM: I don't dispute what the
13 2011 complaint says.

14 JUDGE GUTHRIDGE: Now, according to the
15 Supreme Court, both shippers and carriers are
16 charged with constructive notice of tariff
17 filings; isn't that right?

18 MR. NUSSBAUM: That is correct, Your
19 Honor, but it's Baltic's contention that
20 constructive notice does not apply here.

21 JUDGE GUTHRIDGE: Why not?

22 MR. NUSSBAUM: I can explain that quite

1 thoroughly -- just bear with me for a moment -- on
2 the issue of constructive notice.

3 The response is actually cited to the
4 matter of Fry Trucking Corp. v. Shenandoah Quarry,
5 Inc. And I'd like to just sort of explain to the
6 Commission what Baltic's position is here.

7 With respect to that particular case,
8 and I can quote it actually, it says that the rate
9 filed is a matter of public record, of which the
10 shipper must take notice at his peril. The
11 problem is that if the carrier is not authorized
12 on the route, then he has no rate on file with the
13 ITC and the shipper has no way of checking the
14 file for that carrier and discovering what the
15 actual rate is. Therefore, it is impossible to
16 charge the shipper with constructive notice of the
17 rate.

18 And, you know, if I could sum up the --

19 JUDGE GUTHRIDGE: Go ahead.

20 MR. NUSSBAUM: If I could sum up the
21 audit in one sentence, that one sentence would
22 basically be that the Respondents did not have

1 tariffs on file for the port-to-port shipment,
2 40-foot high cube containers for the commodities
3 shipped by Complainant and for the ports of
4 destination and ports of loading that were offered
5 by the Respondent to the Complainant. So those
6 rates never existed. And therefore, there was no
7 constructive notice, just like there -- just the
8 same as explained in the -- in Fry Trucking Corp.

9 And I also respectfully refer the
10 Commission as to -- Your Honor -- to Your Honor's
11 decision from the Matter of Streak Products, Inc.
12 v. UTi United States, Inc., dated October 23,
13 2013, where it begins on page -- on the bottom of
14 page seven, where Your Honor actually talks about
15 an argument made by UTi which -- that it did not
16 publish its tariff rates for shipment and then UTi
17 then argues that if it fails to comply with the
18 Shipping Act and doesn't publish the tariff, that
19 a shipper may not receive a reparation award
20 because there's no measure of damages. And Your
21 Honor found that argument unpersuasive and denied
22 UTi's motion to dismiss the claim of violation of

1 section 41104(2) of the Shipping Act.

2 JUDGE GUTHRIDGE: Well, I think when I
3 wrote that, I think what I was talking about
4 there, what they were claiming was dismissal
5 because there's no measure of damage. That
6 doesn't mean that there's not notice that there
7 was -- that that route wasn't included in the
8 tariff.

9 It was -- in Securities Services, Inc.
10 v. K-Mart Corp, 511 US 431, 1994, the Supreme
11 Court said, "Carriers and shippers alike are
12 charged with constructive notice and tariff
13 filings." Now, if Baltic was on notice of tariff
14 filing, it was also on notice of what is not in
15 the tariff; isn't that correct?

16 MR. NUSSBAUM: Your Honor --

17 JUDGE GUTHRIDGE: And in fact, Mr.
18 Nussbaum, if you -- when Ms. Supranos did her
19 audit, Exhibit X to the opposition of the motion,
20 she relied and attached to that audit tariff --
21 copies of tariff filings; isn't that right?

22 MR. NUSSBAUM: That's correct, Your

1 Honor.

2 JUDGE GUTHRIDGE: And those filings on
3 which she relies -- actually some of them anyway
4 -- have across the top that they were filed in New
5 Jersey District Court in a case involving other
6 parties, November 18, 2009. So, and those are --
7 those were the tariffs, as I understand it, where
8 she was -- that proved or that suggested that
9 Empire did not have tariffs for the particular
10 route of the shipping.

11 MR. NUSSBAUM: Your Honor, with respect
12 to the one from 2009, it was just for that one
13 particular route.

14 JUDGE GUTHRIDGE: And that's the one she
15 relied for showing that Empire did not have a
16 route, wasn't it? It didn't have that route in
17 the tariff?

18 MR. NUSSBAUM: It wasn't.

19 JUDGE GUTHRIDGE: So that could have
20 been for any of them in 2009. In 2009, Empire --
21 I mean, Baltic could have gotten the tariff and
22 seen that there was no -- that Empire was charging

1 -- allegedly charging -- carrying for routes which
2 did not have a tariff, which arguably is a
3 violation of the Shipping Act. And should have
4 known that -- and Baltic could have known that in
5 2009 and filed a case complaint at that time,
6 couldn't it?

7 MR. NUSSBAUM: That's correct. But at
8 the same time, Your Honor, it's Baltic's position
9 that it did not have all the information that it
10 needed to to conduct its audit later on which
11 eventually showed that there was a discriminatory
12 pricing scheme going on.

13 JUDGE GUTHRIDGE: It had constructive
14 notice of the tariff, isn't that correct?

15 MR. NUSSBAUM: Again, Your Honor, we're
16 arguing that there was no constructive notice
17 because those particular routes were never -- were
18 never filed.

19 JUDGE GUTHRIDGE: They had constructive
20 notice that the tariffs did not have those routes,
21 didn't it? Why wouldn't -- if it had constructive
22 notice of a tariff filing, why wouldn't it also

1 have constructive notice of routes that are not
2 included in that tariff filing?

3 MR. NUSSBAUM: Your Honor, I concede to
4 the Commission on that point.

5 JUDGE GUTHRIDGE: Okay. So, you know,
6 if -- when Empire carried those shipments for
7 Baltic in 2007, 2008, 2009, 2010, Baltic knew what
8 it was being charged; right?

9 MR. NUSSBAUM: That's correct.

10 JUDGE GUTHRIDGE: And it had at least
11 constructive notice of the tariff at that time.
12 Had it gone and looked at -- had Baltic looked at
13 the tariff in, let's say 2010, because that would
14 be three years from 2007, it could have -- it
15 could have seen in 2010, that Empire did not have
16 those routes on the tariff -- in its tariff;
17 right?

18 MR. NUSSBAUM: It could have, Your
19 Honor, but Baltic was repeatedly assured that it
20 was being charged according to the tariff. As the
21 Commission may recall, Baltic is an NVOCC and does
22 have experience with service contracts, and in

1 particular, service contracts with Mediterranean
2 Shipping Company, the same which Empire had.

3 JUDGE GUTHRIDGE: Are you saying Baltic
4 or Empire? Do you mean Baltic or Empire?

5 MR. NUSSBAUM: I'm saying Baltic right
6 now, Your Honor.

7 JUDGE GUTHRIDGE: So your client had --

8 MR. NUSSBAUM: I'm actually --

9 JUDGE GUTHRIDGE: I'm sorry?

10 MR. NUSSBAUM: I'm actually sitting with
11 a copy of a service contract in front of me right
12 now between -- this is between Empire and
13 Mediterranean Shipping Company, and there is a
14 certification in which Empire certifies that it
15 has provided Mediterranean Shipping Company -- it
16 certifies that it has a published tariff and has
17 provided evidence of financial security required
18 by the Commission's rules and regulations. So my
19 client, as an NVOCC, and understanding what is
20 contained inside these service contracts, which
21 was assured that due to the fact that Empire had
22 the same type of service contract, that Empire was

1 charging the quotes with the tax.

2 JUDGE GUTHRIDGE: But as an NVOCC
3 itself, Baltic knew that those tariffs were
4 public; right?

5 MR. NUSSBAUM: Yes.

6 JUDGE GUTHRIDGE: And could access those
7 tariffs and verify whether or not it was being
8 charged, either amounts that are consistent with
9 the tariff or for routes for which Empire had a
10 tariff; isn't that right?

11 MR. NUSSBAUM: Yes, Your Honor.

12 JUDGE GUTHRIDGE: Okay. So I think -- I
13 think it would totally eviscerate the requirement
14 to publish a tariff if a shipper could just rely
15 on the fact, well, they told me they were charging
16 the tariff so I didn't have to check, and now
17 seven years later we can bring an action. I mean,
18 that seems to be inconsistent with the whole
19 reason for having a public tariff.

20 But the bottom line is Baltic could have
21 accessed that public tariff at any time between
22 2007 and 2011 and found out what route -- for what

1 route Empire had a tariff and what those tariffs
2 were, couldn't it?

3 MR. NUSSBAUM: That's correct, Your
4 Honor, but it's Baltic's position that at no time
5 did it have any reason to believe, up until a
6 certain point in time, that it was being charged
7 anything other than the tariffs that were on file.

8 JUDGE GUTHRIDGE: Okay. I think I've
9 been sort of focusing -- I meant to focus on those
10 -- all those -- the shipments that were completed
11 before Baltic filed a complaint with the New
12 Jersey District Court.

13 Now, for the 167 or 162 shipments that
14 were the subject of the New Jersey case, and the
15 162 in particular that were included in the
16 settlement, again, those -- Empire notified Baltic
17 of what it was charging for each of those
18 shipments at the time of shipment; is that right?

19 MR. NUSSBAUM: That's correct.

20 JUDGE GUTHRIDGE: Okay. And again, with
21 those shipments, insofar as being charged
22 something other than something in a lawful tariff,

1 Baltic could have found that information at the
2 time of the shipment, couldn't it?

3 MR. NUSSBAUM: Your Honor, I just wanted
4 to draw a distinction between tariffs and rates
5 and what was actually being alleged in the 2011
6 complaint. You know, in the 2011 complaint, it's
7 Baltic's position that this additional \$175,000
8 that was in dispute had nothing to do with ocean
9 freight. These were simply additional charges
10 that were conjured up by the Respondent after the
11 fact and after Baltic had advised the Respondents
12 that it no longer wanted to do business with the
13 Respondents in retaliation for Baltic not wanting
14 to do business with Respondent. Those were some
15 sort of miscellaneous fees, document fees, port
16 security fees. So it's Baltic's position that
17 that had nothing to do with the tariffs.

18 JUDGE GUTHRIDGE: That's still not
19 answering the question.

20 Baltic knew what the tariffs were at
21 that time. They had constructive notice of what
22 the tariffs were at that time; right?

1 MR. NUSSBAUM: That's correct.

2 JUDGE GUTHRIDGE: Okay. And so any time
3 -- and Empire agreed to carry the shipments for
4 the next three years. Baltic should have found
5 out what the tariff was, had constructive notice
6 of what the tariff was. Feel like it could get
7 access to those tariffs but it chose not to check
8 it, check the tariffs. And at any time in the
9 three years after the shipments began. Isn't that
10 right?

11 MR. NUSSBAUM: Yes, Your Honor. That
12 makes logical sense.

13 JUDGE GUTHRIDGE: For the Commission
14 complaint, paragraph 5C alleges -- that's arguably
15 what we've essentially been talking about now --
16 Baltic's contention that Empire violated 40501(a)
17 by failing to keep open the public inspection and
18 its tariff system.

19 What Baltic is claiming there, if I
20 understand you correctly, Mr. Nussbaum, is that
21 you're not contending that Empire had no tariff;
22 what you're contending is it did not have a tariff

1 covering the routes for which it was carrying
2 shipments for Baltic; is that right?

3 MR. NUSSBAUM: That's correct, Your
4 Honor. For the routes and for the specific
5 commodities and 40-foot high cube containers.

6 JUDGE GUTHRIDGE: Okay. And again, for
7 all those, as we've been discussing, it had
8 constructive notice of that.

9 MR. NUSSBAUM: Correct, Your Honor.

10 JUDGE GUTHRIDGE: Okay. And it had
11 constructive notice more than three years before
12 Baltic filed its Commission complaint; is that
13 right?

14 MR. NUSSBAUM: Bear with me for one
15 moment, Your Honor. I just want to check my
16 notes.

17 Correct, Your Honor.

18 JUDGE GUTHRIDGE: Now, paragraph 5A of
19 the Commission complaint alleges that Empire
20 violated the act -- violated the act by charging
21 complainant rates greater than those it charged
22 other shippers.

1 Why aren't those barred by the statute
2 of limitations, Mr. Nussbaum?

3 MR. NUSSBAUM: Because the information
4 that -- regarding the rates that Empire was
5 charging other shippers was not available in
6 certain cases up until 2013. So it's Baltic's
7 contention that the discovery rule applies here.
8 Baltic really had no way of knowing what Empire
9 was charging other shippers until lawsuits were
10 filed and actually, rates were already produced
11 covering those matters.

12 JUDGE GUTHRIDGE: Has the lawsuit I
13 referred to earlier, is that one of the lawsuits
14 that you're talking about, where the tariff came
15 from?

16 MR. NUSSBAUM: I believe it was the 2012
17 lawsuit or the 2013 lawsuit.

18 JUDGE GUTHRIDGE: What was the 2009
19 lawsuit about, the one that I referred to -- or
20 that -- case number 09-DV-04714-ENV-NVG?

21 Mr. Doyle, do you know what that case is
22 about?

1 MR. DOYLE: At this point, Your Honor, I
2 have no idea.

3 JUDGE GUTHRIDGE: Okay. Mr. Nussbaum,
4 you're not sure?

5 MR. NUSSBAUM: I do not, Your Honor.

6 JUDGE GUTHRIDGE: Was the Plaintiff in
7 that suit charged rates different from what Baltic
8 would charge?

9 MR. DOYLE: Your Honor, I was not part
10 of that matter.

11 JUDGE GUTHRIDGE: Okay. Why wouldn't --
12 why isn't -- well, you do agree that a plaintiff
13 or a complainant -- the statute of limitation bars
14 any complainant from what, you know, with due
15 diligence it could have -- it could have gotten
16 the information; is that right?

17 MR. DOYLE: Yes.

18 JUDGE GUTHRIDGE: But, I mean, if a
19 shipper knows or had constructive notice that it
20 is being charged something other than the tariff
21 rate, why wouldn't it be on notice that other
22 shippers could be charged different amounts and

1 that it might be less than it's being charged? Is
2 that something that with due diligence a
3 complainant or plaintiff would realize?

4 MR. DOYLE: I don't dispute that, Your
5 Honor.

6 JUDGE GUTHRIDGE: So -- so for all of
7 those then, all the shipments that were delivered
8 prior to the 2011 New Jersey case, Baltic knew, or
9 with reasonable diligence could have known, that
10 it was being charged different from other
11 shippers; isn't that right?

12 MR. DOYLE: That's correct, Your Honor.

13 JUDGE GUTHRIDGE: And then for all the
14 ones -- that's the same for all the ones that are
15 subject to the settlement agreement; isn't that
16 right?

17 MR. DOYLE: That's correct, Your Honor.

18 JUDGE GUTHRIDGE: Okay. Let me ask you
19 this, Mr. Nussbaum. If the New Jersey 2011 --
20 just your thoughts on this -- had the New Jersey
21 2011 complaint caption been changed to the Federal
22 Maritime Commission caption and the causes of

1 action alleged in the New Jersey case been taken
2 out and part five of Baltic's Federal Maritime
3 Commission complaint been inserted, what would --
4 what would the -- what would that complaint -- the
5 complaint that looked like that -- be lacking that
6 was included in the FMC complaint that was filed
7 in 2014?

8 Do you understand my question? I know
9 it kind of went on for a while there.

10 MR. NUSSBAUM: I understand the
11 question, Your Honor. But I would say that it's
12 Baltic's position that there's much more going on
13 in the instant matter than there was in 2011.

14 JUDGE GUTHRIDGE: I'm talking about the
15 factual allegations. What factual allegations are
16 present in the Federal Maritime Commission
17 complaint that were not included in the New Jersey
18 case for 2011?

19 MR. NUSSBAUM: They are very similar,
20 Your Honor.

21 JUDGE GUTHRIDGE: Had that caption been
22 changed and part 5 put in there, we would have

1 essentially the same case that we had when you
2 filed the Federal Maritime Commission complaint in
3 2014; do you agree with that?

4 MR. NUSSBAUM: Your Honor, can I take a
5 moment to think about that?

6 JUDGE GUTHRIDGE: Okay.

7 MR. NUSSBAUM: Because that's a
8 difficult question.

9 JUDGE GUTHRIDGE: Sure.

10 MR. NUSSBAUM: Your Honor, again, I
11 respectfully submit that there is much more going
12 on in the instant matter regarding individual
13 specific activities that although they may be
14 generally described in the complaint, there's much
15 more going on here.

16 JUDGE GUTHRIDGE: What do you mean by
17 "much more going on"? I mean, that's kind of
18 vague.

19 MR. NUSSBAUM: Okay. Well, for
20 instance, the alteration. The unilateral
21 alteration of the shipping documents, the --

22 JUDGE GUTHRIDGE: What do you mean by

1 that?

2 MR. NUSSBAUM: The shipping instructions
3 that were sent by Baltic to Empire, when we
4 compared those against -- and this is discussed in
5 my brief -- when we compared those against the
6 shipping instructions that were actually set by
7 Empire, Mediterranean Shipping Company, there were
8 numerous instances where my client's instructions
9 for express relief were changed once the telex
10 released. There are other details that are
11 specifically described.

12 JUDGE GUTHRIDGE: Well, let's back up a
13 minute here. What you're talking about there,
14 though, is a whole different business
15 relationship. You're talking about the
16 relationship between Empire and shipper, and MSC
17 as carrier. Isn't that right?

18 MR. NUSSBAUM: That's correct.

19 JUDGE GUTHRIDGE: And I think -- I think
20 I recall reading in your brief something about --
21 they say switch Baltic as the shipper and put
22 Empire as the shipper. Is that what you said you

1 in your brief?

2 MR. NUSSBAUM: It's not only those
3 things, Your Honor. There were other --

4 JUDGE GUTHRIDGE: But wasn't that one of
5 the things you said in your brief? I seem to
6 recall reading that.

7 MR. NUSSBAUM: Yes.

8 JUDGE GUTHRIDGE: Okay. Well, isn't
9 that what an NVOCC is supposed to do? An NVOCC --
10 and I think you said at some point that Empire --
11 that Empire had a service contract with MSC;
12 right?

13 MR. NUSSBAUM: That's correct.

14 JUDGE GUTHRIDGE: If MSC permitted
15 Baltic to be the shipper on Empire's service
16 contract with MSC, Empire would be violating the
17 Shipping Act by doing that. In fact, the other
18 judge in my office said Worth had a case recently
19 where they -- an NVOCC let somebody else use its
20 service contract to be identified as the shipper,
21 and the civil penalty was, I think, in the
22 hundreds of thousands of dollars. I think there

1 are some shipments, or there are some settlements
2 by NVOCCs that were announced on the Commission
3 website right now and I think that was playing
4 there also, that an NVOCC permitted another entity
5 to use its service contract and be identified as
6 the shipper. So that's the way those things work.
7 Of course, Empire was identified as the shipper on
8 the MSC service contract.

9 MR. NUSSBAUM: I understand that, Your
10 Honor, but --

11 JUDGE GUTHRIDGE: How is that a
12 violation of the Shipping Act or something
13 nefarious?

14 MR. NUSSBAUM: It's a violation with
15 regard to the other changes -- changing express
16 relief instructions, the telex instructions.

17 JUDGE GUTHRIDGE: That was for the
18 relationship between Empire -- it seems to me,
19 Empire and MSC; not between Empire and Baltic.
20 Why did those have to be exactly the same? As
21 long as Empire releases to Baltic via telex, what
22 difference does it make how the release occurs

1 between MSC and Empire?

2 MR. NUSSBAUM: Your Honor, it's Baltic's
3 position because those were not the instructions
4 that were provided to Empire.

5 JUDGE GUTHRIDGE: Okay. But again,
6 those instructions occurred for most of the
7 shipments anyway. Let's set aside the ones that
8 are in the settlement agreement for now. To that
9 extent that occurred, it occurred more than three
10 years before Baltic filed the Commission
11 complaint; right?

12 MR. NUSSBAUM: That did occur more than
13 three years, Your Honor, but at no time was Baltic
14 ever provided with the copies of Empire's shipping
15 instructions.

16 JUDGE GUTHRIDGE: I want to go back to
17 clarify the discussion we had quite a while ago
18 about -- that Baltic knew that at the time of each
19 shipment. Isn't that right?

20 MR. NUSSBAUM: I don't understand the
21 question, Your Honor.

22 JUDGE GUTHRIDGE: To the extent Baltic

1 -- Empire was not giving Baltic the documents that
2 it should have for each shipment, it was doing
3 that at the time of those shipments.

4 MR. NUSSBAUM: That's correct, Your
5 Honor.

6 JUDGE GUTHRIDGE: Okay.

7 MR. NUSSBAUM: Your Honor, I just want
8 to note that Empire never, at any time, rejected
9 Baltic's shipping instructions to it as being
10 incorrect or improper. So again, it's Baltic's
11 position that it had no way of knowing shipping
12 instructions were being changed.

13 JUDGE GUTHRIDGE: Again, that's the
14 shipping relationship between Empire as shipper
15 and MSC as carrier, isn't it? So again, I ask why
16 does that have to be exactly the same as the
17 instructions between Baltic and shipper and Empire
18 as carrier? Why do they have to be exactly the
19 same? Or why -- let me ask it a different way.

20 Why is it a violation of the Shipping
21 Act for them not to be exactly the same?

22 MR. NUSSBAUM: Your Honor, I don't have

1 an answer right now.

2 JUDGE GUTHRIDGE: Now, in your -- in
3 your opposition to the motion, Mr. Nussbaum,
4 Baltic contends that Empire delayed releases, I
5 think, of the shipment -- the shipments that were
6 subject, or at least some of the shipments, if not
7 all of it. I mean, I have a document that I'll
8 identify and send him, but Empire delayed the
9 release of the containers in violation of the
10 Shipping Act I guess is what Baltic is contending;
11 is that right?

12 MR. NUSSBAUM: That's correct.

13 JUDGE GUTHRIDGE: And there is --
14 Exhibit P, as in Papa --

15 MR. NUSSBAUM: T?

16 JUDGE GUTHRIDGE: P as in Papa --
17 attached to Mr. Presniacova's affidavit or
18 declaration. There's a couple of pages of
19 shipments identified and the title is "Empire's
20 untimely release of containers."

21 Now, I looked at this. I mean, I think
22 Empire -- I mean, Baltic is contending they were

1 untimely under -- even under the settlement
2 agreement; is that right?

3 MR. NUSSBAUM: Your Honor, can you
4 repeat the question one more time? That they were
5 untimely?

6 JUDGE GUTHRIDGE: I'm identifying the
7 document first, Exhibit Papa, attached to
8 Presniacova's --

9 MR. NUSSBAUM: Yes.

10 JUDGE GUTHRIDGE: -- affidavit.

11 MR. NUSSBAUM: Yes, Your Honor. I
12 understand. Yes, they were untimely under the
13 settlement agreement as well.

14 JUDGE GUTHRIDGE: They were untimely --
15 okay, the ones that the release is here.

16 And I see, for instance, shipment 455664
17 on the first page there says, "Final tariff paid
18 7-30-2011; select release date 12-1-2012." Is
19 that what you mean, it was a year? Okay.

20 MR. NUSSBAUM: Bear with me for one
21 moment, Your Honor. I just want to double check
22 that.

1 Your Honor, can you repeat the last four
2 digits of the booking at issue?

3 JUDGE GUTHRIDGE: 455664.

4 MR. NUSSBAUM: Okay.

5 JUDGE GUTHRIDGE: And it says the final
6 tariff was paid 11-30-2011. Select release date
7 was 12-1-2012, a year and a day later. Is that
8 what Baltic is contending?

9 MR. NUSSBAUM: Your Honor, it's -- I
10 would have to go back and double check the
11 specific telex release for this particular
12 shipment. I believe they were provided to the
13 Commission as well, as part of an exhibit to the
14 Presniacova affidavit.

15 JUDGE GUTHRIDGE: Are you suggesting
16 that that might not be a typo, a year and a day?

17 MR. NUSSBAUM: It may or may not be a
18 typo. But I'll go with whatever date is actually
19 listed on the telex release.

20 JUDGE GUTHRIDGE: Then below that is
21 final tariff paid 11-30-2011, and on another date,
22 12-1-2011.

1 MR. NUSSBAUM: It may have been a typo,
2 Your Honor.

3 JUDGE GUTHRIDGE: Okay. The one below,
4 we'll put aside that 455664, for the one below
5 that -- 079, tariff was paid on 11-30 and the
6 release date was one day later.

7 Are you contending -- is it Baltic's
8 position that that violates the Shipping Act?

9 MR. NUSSBAUM: Yes, Your Honor.

10 JUDGE GUTHRIDGE: A one-day delay? The
11 agreement between the parties?

12 MR. NUSSBAUM: Your Honor, I'm actually
13 referring to the settlement agreement right now.

14 I just need a moment, Your Honor. I'm
15 trying to --

16 JUDGE GUTHRIDGE: Yeah.

17 MR. NUSSBAUM: Okay.

18 JUDGE GUTHRIDGE: Okay.

19 MR. NUSSBAUM: Okay, Your Honor, I just
20 note that paragraph 2 of the 2011 settlement
21 agreement states that Empire shall immediately
22 release 23 containers identified in Exhibit A,

1 Baltic.

2 JUDGE GUTHRIDGE: Well, my records, when
3 I went through this, indicate that 4556 -- I mean,
4 the one where we don't have -- 486079 was in
5 Exhibit B, as in Bravo. It was Exhibit B, Bravo
6 71.

7 MR. NUSSBAUM: Okay.

8 JUDGE GUTHRIDGE: It was payments -- it
9 was one for which it had to make the payment.

10 MR. NUSSBAUM: Okay.

11 JUDGE GUTHRIDGE: It's not one of the 23
12 that had already been paid.

13 MR. NUSSBAUM: Okay. So if that's the
14 case, then that would fall under paragraph 3 of
15 the 2011 settlement agreement. It states that the
16 container shall be released by Empire to Baltic
17 upon arrival and payment by Baltic.

18 JUDGE GUTHRIDGE: So it's Baltic's
19 contention that a one-day delay between payment
20 and release violates the settlement agreement?

21 MR. NUSSBAUM: Yes, Your Honor.

22 JUDGE GUTHRIDGE: And why isn't that for

1 the court to consider, the Commission? The court
2 entered this settlement agreement. That, indeed,
3 is what was meant. A one-day delay was a
4 violation of the settlement agreement. This
5 should be in front of the court, shouldn't it?

6 MR. NUSSBAUM: Your Honor, it's Baltic's
7 position, again, that this is a violation of the
8 Shipping Act.

9 JUDGE GUTHRIDGE: You said it was a
10 violation of the settlement agreement. Now you're
11 saying that a one-day delay, one day between
12 payment and release is a violation of the Shipping
13 Act?

14 MR. NUSSBAUM: Yes, Your Honor, because
15 this was retaliation that was done on purpose of
16 Baltic's accrued storage charges.

17 JUDGE GUTHRIDGE: Well, the settlement
18 agreement which you've been referring to says in
19 paragraph three, "To the extent that Empire causes
20 a delay in the release of the containers
21 identified in Exhibit C, if this results in the
22 accrual of storage or demurrage charges, Empire

1 will be responsible for payment of such charges.
2 Otherwise, such charges will be the responsibility
3 of Baltic."

4 Are you saying that Baltic accrued
5 demurrage charges or storage charges by that
6 one-day delay?

7 MR. NUSSBAUM: That's correct, Your
8 Honor.

9 JUDGE GUTHRIDGE: And so under the
10 settlement agreement, Empire is liable for that;
11 is that right? Is that what you're saying?

12 MR. NUSSBAUM: That's correct, Your
13 Honor.

14 JUDGE GUTHRIDGE: Paragraph 10 says --
15 provides for attorney's fees for violation. And
16 says, "In addition, the court will retain
17 jurisdiction over the enforcement of this
18 settlement."

19 So the court is retaining enforcement of
20 the settlement. Why does the Commission have the
21 right to get in there and enforce the settlement?

22 MR. NUSSBAUM: Well, it says, Your

1 Honor, it says, "In addition to any other remedies
2 available at law or inequity." And again, it's
3 Baltic's position that these acts are -- they're
4 inherent violations of the Shipping Act. And
5 again, I refer to --

6 JUDGE GUTHRIDGE: But you're saying that
7 a one-day delay in the release of a shipment is an
8 inherent violation of the Shipping Act. Is that
9 what you're saying?

10 MR. NUSSBAUM: Your Honor, it's not just
11 the one-day delay though. There were other things
12 that were happening.

13 JUDGE GUTHRIDGE: I'm talking about
14 shipment. Is that what Baltic is saying, is that
15 a one-day delay in release of a container is in
16 violation of the Shipping Act?

17 MR. NUSSBAUM: Yes, Your Honor.

18 JUDGE GUTHRIDGE: And what -- on this
19 particular shipment, 486079, what charges is
20 Baltic -- is there any evidence in the record that
21 Baltic incurred storage or demurrage charges on
22 that shipment as a result of that one --

1 MR. NUSSBAUM: No, Your Honor. We
2 haven't exchanged that in discovery yet.

3 JUDGE GUTHRIDGE: Baltic knows whether
4 it had to pay demurrage, doesn't it?

5 MR. NUSSBAUM: It does, but that was not
6 part of the discovery exchanged between the
7 parties.

8 JUDGE GUTHRIDGE: And actually, come to
9 think of it, the settlement was signed on the 29th
10 but not entered by the court until the 7th of
11 December; isn't that right?

12 MR. NUSSBAUM: Your Honor, I do not have
13 that court document in front of me, but to the
14 extent --

15 JUDGE GUTHRIDGE: I wrote it down.
16 That's what I have as the date.

17 MR. NUSSBAUM: Okay. Okay, I won't
18 dispute that.

19 JUDGE GUTHRIDGE: I was looking at the
20 stipulation earlier. Judge Hochberg signed the
21 order 7-20-11. Most -- the first two pages on
22 most of the shipments were actually released

1 according to Baltic's records prior to the time
2 that the settlement was entered, prior to the time
3 that the parties signed the settlement it looks
4 like. The second page, November 9, November 25.
5 This was all before the settlement was even
6 signed. Is it Baltic's contention, for instance,
7 on -- I'm sorry, I was looking at the containment
8 date. I was looking at the wrong date.

9 Until that issue date for -- on the
10 second page, Empire's shipment 475739, the issue
11 date was November 28, 2011.

12 MR. NUSSBAUM: I see that.

13 JUDGE GUTHRIDGE: And the next day the
14 parties signed the agreement. It was signed on
15 the 29th. So 475739 was released on the 28th of
16 November, the day before the parties filed the
17 settlement agreement. Are you contending that
18 that was a violation of the settlement agreement?

19 MR. NUSSBAUM: Yes, Your Honor. And
20 just to putt a little context on these things,
21 even in the matters where there was a one-day
22 difference between the date that the payment was

1 made and the release was issued, these containers
2 -- the reason why this is a violation of the
3 Shipping Act is because these containers were, in
4 some cases, on hold for approximately one month
5 while, you know, this dispute was ongoing, which
6 again caused Baltic's customers to walk away.

7 JUDGE GUTHRIDGE: So the telex release
8 date on that shipment, it's still Baltic's -- it's
9 Baltic's contention that 475739 violated the
10 settlement agreement. The container was released
11 before the settlement was signed. Is that right?

12 MR. NUSSBAUM: Yes, Your Honor, because
13 it was on hold for one month because the
14 Respondent failed to release it.

15 JUDGE GUTHRIDGE: Okay. Well, let's
16 assume that Baltic can still file a complaint for
17 a violation of the Shipping Act for that delay;
18 all right? We'll assume that.

19 MR. NUSSBAUM: Yes.

20 JUDGE GUTHRIDGE: Paragraph 5 of the
21 settlement agreement, did Baltic release any
22 claims for damages related to the delay in

1 releasing said cargo from the beginning of the
2 time up to the date of the release?

3 MR. NUSSBAUM: Up to the date of the
4 release, Your Honor.

5 JUDGE GUTHRIDGE: That container was
6 released before the settlement agreement.

7 MR. NUSSBAUM: No, Your Honor. Just to
8 clarify, we're talking about two different types
9 of releases. One is the release of the container,
10 and the other release -- it's Baltic's contention
11 that the release discussed in paragraph 5, we're
12 talking about the date of this mutual general
13 release, which was November 29.

14 JUDGE GUTHRIDGE: Again, on 475739, the
15 telex release date was November 28, 2011.

16 MR. NUSSBAUM: That's correct.

17 JUDGE GUTHRIDGE: So Baltic had the
18 telex release of its container; right? So how
19 could -- even if it's assumed that Baltic -- that
20 Empire violated the Shipping Act, why hasn't
21 Baltic released any claims for damages relating to
22 the delay when the container was released to

1 Baltic per the settlement agreement?

2 MR. NUSSBAUM: Bear with me for one
3 second, Your Honor.

4 Your Honor, just to clarify, the time
5 they released the containers was just limited to
6 that first page of Exhibit P. If I recall, it's
7 Attachment C, which is the one we're talking about
8 right now.

9 JUDGE GUTHRIDGE: So that's not part of
10 the page that begins before Empire's untimely
11 releases?

12 MR. NUSSBAUM: It's not. It's not, Your
13 Honor. The untimely release issue was just
14 limited to that first page.

15 JUDGE GUTHRIDGE: I do not see it.

16 MR. NUSSBAUM: Yeah. I just further
17 note for your reference, Your Honor, the remaining
18 pages actually talk about this. At the bottom of
19 the page, you'll note that it says Attachment C or
20 Attachment D or Attachment E. And those are being
21 discussed for other various reasons.

22 JUDGE GUTHRIDGE: What are they being

1 discussed for? What are they being discussed for?

2 MR. NUSSBAUM: They were being referred
3 to regarding other Shipping Act violations,
4 whether it had something to do with the tariffs or
5 some other issue -- double paying and those sorts
6 of issues.

7 Your Honor, I just wanted to ask, is it
8 possible just to take a five-minute break for the
9 restroom?

10 JUDGE GUTHRIDGE: Is Mr. Nussbaum asking
11 that?

12 MR. NUSSBAUM: Yes.

13 JUDGE GUTHRIDGE: Any objection, Mr.
14 Doyle?

15 MR. NUSSBAUM: No, Your Honor.

16 JUDGE GUTHRIDGE: Okay. But I don't
17 want to lose the connection. We'll just stay on
18 the line and we promise not to talk.

19 MR. DOYLE: Will do.

20 MR. NUSSBAUM: Thank you.

21 JUDGE GUTHRIDGE: And let us know when
22 you get back, Mr. Nussbaum.

1 MR. NUSSBAUM: Thank you.

2 (Recess)

3 MR. NUSSBAUM: Your Honor, I'm back.
4 Thank you.

5 JUDGE GUTHRIDGE: All right. Regarding
6 the shipments that are included in the 21 that
7 were counter documents, what did you say was
8 Baltic's status on those shipments -- role in
9 those shipments?

10 MR. NUSSBAUM: Baltic's role in those
11 shipments, Your Honor, was either as the merchant
12 or as the NVOCC.

13 JUDGE GUTHRIDGE: What do you mean by
14 "the merchant"?

15 MR. NUSSBAUM: The merchant as in it
16 owns the vehicle itself outright or it was
17 shipping those vehicles on behalf of one of its
18 customers.

19 JUDGE GUTHRIDGE: And you have documents
20 that will show what those relationships were?

21 MR. NUSSBAUM: That's correct, Your
22 Honor. We will send those out by FedEx.

1 JUDGE GUTHRIDGE: And copies to
2 Respondent?

3 MR. NUSSBAUM: That's correct, Your
4 Honor. We did have that discussion earlier on
5 this morning about the --

6 JUDGE GUTHRIDGE: Yes. Okay.

7 MR. NUSSBAUM: -- confidentiality of the
8 documents.

9 JUDGE GUTHRIDGE: Okay. Mr. Nussbaum,
10 Baltic hasn't shipped with Empire since -- when is
11 the last time it shipped -- had anything to do
12 with a shipment with Empire?

13 MR. NUSSBAUM: Well, Your Honor, we're
14 arguing that those 21 bookings that came from
15 Savannah belonged to Baltic. Those went into --
16 if I recall correctly, those went into 2012.

17 JUDGE GUTHRIDGE: Okay. So that was the
18 last time? There were no shipments in 2013, no
19 shipments in 2014?

20 MR. NUSSBAUM: No.

21 JUDGE GUTHRIDGE: No shipments in 2015?

22 MR. NUSSBAUM: Those 21 were the last.

1 JUDGE GUTHRIDGE: Okay. The only
2 release that Baltic explicitly prays for in its
3 complaint is a reparation award. Is that right?

4 MR. NUSSBAUM: Yes.

5 JUDGE GUTHRIDGE: Looking at paragraph
6 7B of the complaint.

7 MR. NUSSBAUM: Yes.

8 JUDGE GUTHRIDGE: And then it says, "In
9 such other and further orders -- order or orders
10 be made as the Commission determines to be
11 proper."

12 What other relief, if any, should the
13 Commission be entering if this case were to go
14 forward and Baltic were to prevail?

15 MR. NUSSBAUM: Your Honor, the other
16 relief that we're requesting would be that the
17 Respondent be ordered to turn over the shipping
18 documents that we had requested. This way there's
19 no more question as to which shipments belong to
20 whom.

21 JUDGE GUTHRIDGE: And is that all?

22 MR. NUSSBAUM: Yes, Your Honor.

1 JUDGE GUTHRIDGE: Okay.

2 MR. NUSSBAUM: Shipping documents,
3 invoices, house bills of lading.

4 JUDGE GUTHRIDGE: For the primary relief
5 though that Baltic is seeking is the reparation
6 award, isn't it?

7 MR. NUSSBAUM: Yes, it is.

8 JUDGE GUTHRIDGE: All right. Mr. Doyle,
9 I told you a long time ago that you'd have an
10 opportunity to speak. Your turn. Mr. Doyle, does
11 Baltic have tariffs on file during this whole
12 time? I see some documents that look like tariffs
13 go back as far as 1999.

14 MR. DOYLE: Yes, I understand they had
15 tariffs on file.

16 JUDGE GUTHRIDGE: Okay. All right. So,
17 all right. Mr. Doyle, what do you have to say?

18 MR. DOYLE: Well, I learned a lot more
19 facts this morning that I didn't know about
20 before. But I think it's clear that any
21 complaints or claims that Baltic may have had were
22 certainly outside the statute of limitations

1 period. I think we see no evidence to rebut the
2 in camera submission about the 21 shipments not
3 being Baltic's, and it seems like they ought to be
4 time barred. And Baltic knew everything it knows
5 now back at the time of the filing of the New
6 Jersey lawsuit. Nothing is new here.

7 And in addition, I think it's further
8 quite clear that subsequent to the settlement
9 agreement, all the deliveries were made in an
10 orderly fashion. Notice of arrival was given.
11 Payments were wired. I don't know what time of
12 the day they were wired, but these had to do with
13 release of the shipments over in the Baltic. So
14 it's highly conceivable that the confirmation of
15 payment was not received during business hours
16 over in Europe, and I think delivery the next day
17 sounds like proper behavior in any trade lane of
18 the world. So since nothing happened after --
19 nothing happened untoward after the settlement
20 agreement was entered into, and the settlement
21 agreement was more than three years ago, we go
22 home.

1 JUDGE GUTHRIDGE: Well, actually, the
2 settlement agreement was less than three years
3 after the -- after the Commission complaint was
4 filed.

5 MR. DOYLE: I stand corrected. The
6 settlement agreement was executed. Then, clearly,
7 the settlement was reached. Nothing untoward
8 happened within three years of the filing of the
9 complaint. And certainly, we don't see any
10 Shipping Act violations really even alleged.

11 And I apologize, Your Honor, that having
12 known more facts at the time of making this
13 motion, it might have been a three-part motion.
14 Not only should the complaint be dismissed because
15 it's time barred; not only should this complaint
16 be dismissed because it's been settled and
17 released; but also, it fails to state Shipping Act
18 violations. But we lost that opportunity and I
19 regret that.

20 Other than that, I've got nothing more
21 to say, Your Honor.

22 JUDGE GUTHRIDGE: At least the Complaint

1 does allege Shipping Act violations.

2 MR. DOYLE: Oh, no. I'm saying it
3 alleges that there were Shipping Act violations;
4 it doesn't allege sufficient facts to make one
5 out.

6 JUDGE GUTHRIDGE: I think --

7 MR. DOYLE: This motion is limited -- I
8 can see this motion is limited to the statute of
9 limitations and settlement agreement.

10 JUDGE GUTHRIDGE: Okay.

11 MR. DOYLE: Which is venting. I
12 apologize.

13 JUDGE GUTHRIDGE: Okay. Now, the 21
14 shipments that Mr. Nussbaum talked about, the ones
15 that were subject to the earlier order --

16 MR. DOYLE: Yes, sir.

17 JUDGE GUTHRIDGE: -- those are shipments
18 that began at some point after -- as I recall,
19 they all were after -- well, after -- strike that
20 -- less than three years after Baltic filed its
21 complaint; is that right?

22 MR. DOYLE: Less than three years before

1 it filed a complaint? I believe so, Your Honor.

2 JUDGE GUTHRIDGE: Okay. Hold on a
3 second. I'm looking at -- the first one I have is
4 a Baltic Auto Shipping -- it says Baltic Savannah
5 listed as -- identified as the shipper. And it
6 has date of sailing, 12-16- 2011.

7 MR. DOYLE: Yes, Your Honor.

8 JUDGE GUTHRIDGE: What is -- what is
9 Empire's position if it turns out that Baltic is
10 somehow connected with those shipments -- Baltic,
11 the Complainant, is connected to those shipments?
12 Mr. Nussbaum says there were either the NVOCC or
13 the owner of the cargo.

14 MR. DOYLE: I don't believe we're
15 sitting on any allegations with respect to those
16 shipments. There are no allegations of improper
17 delay in deliver. There's no allegations of some
18 demand and refusal to provide documents. We've
19 seen nothing in the record --

20 JUDGE GUTHRIDGE: Wouldn't they be built
21 into the allegation of charging rates other than
22 those in a tariff?

1 MR. DOYLE: Well, I think the discussion
2 is on constructive notice, and Baltic's own
3 practice of negotiating rates indicates that those
4 aren't violations, I don't think.

5 JUDGE GUTHRIDGE: Well, let me ask it
6 this way, Mr. Doyle. The December 16 shipment,
7 December 16, 2012 shipment I just referenced, it's
8 within three years of the filing of the complaint.

9 MR. DOYLE: Yes, Your Honor.

10 JUDGE GUTHRIDGE: If -- if, you know,
11 I'm not sure that -- I guess that Baltic would
12 have to show that it -- Baltic, the complainant,
13 not Baltic Savannah -- would have to show that it
14 is somehow connected to the shipment. I'm not
15 sure how that works. But suppose it could show
16 that. And if on that December 16th shipment
17 Baltic charged for carrying the shipment on a
18 route for which it did not have a tariff, would
19 that be a Shipping Act violation, within the last
20 three years?

21 MR. DOYLE: It sounds like a Shipping
22 Act violation, but I don't see what the damages

1 are. I don't see any right to reparation, because
2 as I understand it, the actual published tariff
3 was a weight measurement tariff, and if that had
4 been applied to these shipments, Empire would have
5 paid far more in freight charges.

6 JUDGE GUTHRIDGE: Because you had a
7 weight measurement, not a by auto, not by car?

8 MR. DOYLE: Per container; correct.

9 JUDGE GUTHRIDGE: If that's the
10 allegation, that might have to go forward. I'm
11 not sure at this point. I'm not making a ruling.
12 I'm not making a ruling on anything right now.

13 MR. DOYLE: I understand, Your Honor.

14 JUDGE GUTHRIDGE: But what -- does
15 Baltic know at this point whether -- I'm sorry, I
16 mean, does Empire know what Baltic's involvement
17 in those shipments were?

18 MR. DOYLE: Baltic Chicago, the
19 Complainant?

20 JUDGE GUTHRIDGE: Baltic --

21 MR. DOYLE: We have no idea. We dealt
22 strictly with Savannah. We -- Empire dealt with

1 Baltic Savannah, Baltic -- when there was a doubt
2 of who it was dealing with, they tried to clear it
3 up at that time, and Baltic Savannah was quite
4 adamant that we have nothing to do with Baltic
5 Chicago. It was entirely different. And from
6 that point on, Empire treated Baltic Savannah in
7 that manner. But so far as Empire is concerned,
8 it was always dealing with an entirely separate
9 entity.

10 JUDGE GUTHRIDGE: Okay. Some of the --
11 some of those 21 bills of lading -- not -- the
12 shipping documents -- I forget what they were --
13 identified an entity other than Baltic Savannah as
14 the shipper. Who was Empire dealing with on those
15 shipments? Was it dealing with Baltic Savannah on
16 those shipments even though some other entity was
17 identified as the shipper?

18 MR. DOYLE: Yes, Your Honor. To my
19 knowledge, that's exactly what happened.

20 JUDGE GUTHRIDGE: Okay. Do you have
21 anything else right now, Mr. Doyle?

22 MR. DOYLE: No. No, I don't, Your

1 Honor.

2 JUDGE GUTHRIDGE: Okay. Mr. Nussbaum,
3 let me -- there's something I forgot to ask you
4 about. You say in your papers, in your
5 observations of the motion, reference arguments
6 about these being continuing violations. What did
7 you mean by that?

8 MR. NUSSBAUM: One moment, Your Honor.
9 I'm just going to open up my brief.

10 JUDGE GUTHRIDGE: You make references to
11 the Seatrain --

12 MR. NUSSBAUM: Bear with me for just a
13 moment, Your Honor.

14 Okay. I see what you're talking about,
15 Your Honor. I'm making reference to page 21 of my
16 brief in opposition. I was setting forth just the
17 general case law and the standard regarding what
18 constitutes, you know, when a cause of action
19 accrues. And I cited Seatrain for that, for the
20 general proposition that the cause of action
21 accrues and the statute of limitations begins to
22 run when the act -- the actual act that causes the

1 injury happens. But then I refer to the discovery
2 rule. So I'm -- I talk about the -- I rely upon
3 Seatrain for the instances alleged elsewhere in
4 the complaint where we're talking about continuing
5 violations. And off the top of my head, we had
6 alleged that the Respondents' continued refusal to
7 turn over the shipping documents is a continuing
8 violation. The continued failure to keep a tariff
9 on file for routes being serviced by the
10 Respondent is a continuing violation. That was
11 the --

12 JUDGE GUTHRIDGE: Say that second one
13 again.

14 MR. NUSSBAUM: The Respondent's
15 continued failure to keep a tariff on file for the
16 -- for instance, for the route serviced by it for
17 the port-to-port shipment of 40-foot high cube
18 containers containing the commodities shipped by
19 my client. That's a continuing violation. So
20 that's, you know, whether it was that --

21 JUDGE GUTHRIDGE: What is the effect --
22 what does Baltic contend is the effect of that --

1 I mean, because to me, continuing violations in at
2 least one sense means that something started and
3 continues, and in some situations, one can go back
4 for claims for damages to the time it began, the
5 first one happened. But I don't see that -- I
6 don't see Seatrain standing for that. That's the
7 reason I'm bringing this up now.

8 MR. NUSSBAUM: Sure. Sure, Your Honor.
9 Just to clarify, and this is something that was
10 referred to in the audit. The continuing
11 violation allows the Respondent to basically
12 manipulate the market and engage in it in a
13 discriminatory pricing scheme. If they're not
14 keeping tariffs on file, nobody knows what they're
15 supposed to be charging.

16 JUDGE GUTHRIDGE: But all that occurred
17 more than three years before the complaint was
18 filed?

19 MR. NUSSBAUM: It continues to occur,
20 Your Honor. That's why we had asserted that
21 doctrine. Basically, Empire still allows at this
22 point to manipulate the market and charge whatever

1 it wants.

2 JUDGE GUTHRIDGE: Do you have evidence
3 of that? There's no evidence of that in the
4 record. Are you contending that Baltic has
5 evidence that at this time Empire does not have a
6 tariff on file?

7 MR. NUSSBAUM: Your Honor, the evidence
8 that we're relying on is the evidence that was in
9 the audit. And the only other thing --

10 JUDGE GUTHRIDGE: I'm talking about
11 today.

12 MR. NUSSBAUM: Today, Your Honor, the
13 only response that I have to your question is that
14 Empire has not produced copies of tariffs in
15 opposition, you know, in support of its motion for
16 summary judgment.

17 JUDGE GUTHRIDGE: Okay. By using
18 continuing violations, is Baltic contending, like,
19 for instance, if within the three-year period,
20 Empire charged -- or let's use the greater than
21 that reflected in its tariffs. Three years is the
22 complaint, Empire charged Baltic amounts greater

1 than its tariff, does that mean that all 2,000 or
2 3,000 shipments before that, the statute of
3 limitations does not bar recovery?

4 MR. NUSSBAUM: That's my understanding
5 of the violation doctrine, Your Honor.

6 JUDGE GUTHRIDGE: That's what -- and you
7 base that on the Seatrain?

8 MR. NUSSBAUM: I do not have Seatrain in
9 front of me right now, so I don't want to
10 misspeak.

11 JUDGE GUTHRIDGE: Because Seatrain is
12 what you cited. Let me see if I can -- what page
13 of your brief was that on?

14 MR. NUSSBAUM: It's page 21, Your Honor.
15 And I think I had also cited that just for the
16 proposition that continuing violation is
17 applicable to causes of action for reparations
18 under the Shipping Act because in the -- on the
19 other form in the District -- it was in the
20 District of New Jersey, I had a difference of
21 opinion as to -- with Respondent's other counsel,
22 Mr. Warner, as to whether or not continuing

1 doctrine was applicable to reparations because in
2 that form, he made the legal argument that
3 continuing injury was only applicable to the
4 Commission's own enforcement proceedings.

5 JUDGE GUTHRIDGE: Okay. Well, what
6 Seatrain does say insofar as continuing
7 violations, I mean, Seatrain was a case where the
8 Complainant filed a complaint on the 31st of July
9 of 1976. I mean, at that time there was a
10 two-year statute of limitations. And what the
11 decision said -- the violations had begun like six
12 or seven years before that. So what they said --
13 what the judge said in that case is damages for
14 unlawful acts prior to July 26 -- 29, 1976, but
15 because of Saturday-Sunday kind of stuff, damages
16 for unlawful acts prior to July 29, 1976, are, of
17 course, barred by the statute of limitations.

18 So I do not read Seatrain as being a
19 case that stands for the proposition that if
20 there's one violation within the statute of
21 limitations, the statute of limitations does not
22 bar claims for all the violations occurring

1 outside the statute of limitations period.

2 MR. NUSSBAUM: I understand, Your Honor.

3 JUDGE GUTHRIDGE: Okay. So where are we
4 here? You have some documents, Mr. Nussbaum, that
5 you're going to submit to us dealing with the 21
6 shipments.

7 MR. NUSSBAUM: Yes.

8 JUDGE GUTHRIDGE: All right. Do you
9 have any intention or any interest in filing a
10 post-hearing supplemental brief?

11 MR. NUSSBAUM: Your Honor, that's
12 something that I said I would like the opportunity
13 just to discuss with my client. The answer is
14 maybe at this point.

15 JUDGE GUTHRIDGE: All right. Why don't
16 you let me know within -- how long will it take
17 you to find out?

18 MR. NUSSBAUM: I guess one business day.
19 Can I let you know by Monday?

20 JUDGE GUTHRIDGE: Sure. Okay. But with
21 this caveat, that it would be limited to 3,500
22 words -- 3,500 words.

1 MR. NUSSBAUM: Okay.

2 JUDGE GUTHRIDGE: Because you would need
3 to focus on it and not repeat a lot of the facts,
4 only, you know, certain facts as may be necessary
5 for your argument.

6 MR. NUSSBAUM: Your Honor, I didn't want
7 to ask --

8 JUDGE GUTHRIDGE: I beg your pardon?

9 MR. NUSSBAUM: I just didn't want to ask
10 how much time we would actually have to actually
11 submit such a brief.

12 JUDGE GUTHRIDGE: Well, that's -- it may
13 very well be that you would want a copy of the
14 transcript before doing that; is that correct?

15 MR. NUSSBAUM: Absolutely.

16 JUDGE GUTHRIDGE: Is the court reporter
17 available?

18 THE REPORTER: Yes. Yes, Your Honor.

19 JUDGE GUTHRIDGE: Okay. How long will
20 -- is it going to -- for cheapest service, because
21 that's all I can pay for -- how long is it going
22 to take to get a transcript?

1 THE REPORTER: Regular delivery is 10
2 business days, so it would be on June 26th.

3 JUDGE GUTHRIDGE: Okay. And I guess
4 Baltic would have to arrange with you about
5 getting a copy of the transcript. I'm not sure
6 how those relationships work.

7 So how long would you need after that?
8 It shouldn't be very long because I think, you
9 know, you know basically what we talked about, you
10 were part of it. And so how long would you need
11 -- if the transcript is the 26th -- actually, I'll
12 be gone. The 10th of July?

13 MR. NUSSBAUM: That's enough time, Your
14 Honor.

15 JUDGE GUTHRIDGE: Mr. Doyle, I suppose
16 you're going to respond?

17 MR. DOYLE: I hope not, Your Honor. If
18 it is, it couldn't possibly be very long. I don't
19 think I'll need much time.

20 JUDGE GUTHRIDGE: A week?

21 MR. DOYLE: Sure.

22 JUDGE GUTHRIDGE: Okay. All right.

1 Then Mr. Nussbaum, you'll let me know Monday
2 whether you want to file a brief. If you want to
3 file a brief, it'll be due, let's say July 10.

4 MR. NUSSBAUM: Yes, Your Honor.

5 JUDGE GUTHRIDGE: And reply July 17th.
6 Okay? All right. Is there anything else counsel,
7 either side? Mr. Nussbaum? No, Your Honor.

8 JUDGE GUTHRIDGE: Mr. Doyle?

9 MR. DOYLE: Yeah. On this briefing
10 schedule, that's it; right? One shot each? Or
11 other replies or what?

12 JUDGE GUTHRIDGE: One shot each.

13 MR. DOYLE: Excellent.

14 JUDGE GUTHRIDGE: And Mr. Doyle, you
15 also will be limited to 3,500 words.

16 MR. DOYLE: Thank you, Your Honor.

17 JUDGE GUTHRIDGE: Okay? Anything else?

18 MR. NUSSBAUM: I guess, Your Honor, I'm
19 not sure this is a proper question until we go any
20 further, but at this point is it possible for us
21 to request copies of the bills of lading and
22 invoices for this attachment -- for Attachment B?

1 JUDGE GUTHRIDGE: I'm not following you.

2 MR. NUSSBAUM: For the other -- for the
3 other -- for the other shipments at issue.

4 JUDGE GUTHRIDGE: The 21 shipments? I
5 thought you said you already had those documents.
6 Doesn't your client have those documents? I mean,
7 they were involved in the shipments, the 21
8 shipments, how could it have been involved without
9 its own documents?

10 MR. NUSSBAUM: Your Honor, I'm
11 specifically referring to Empire's house bills of
12 lading and invoices.

13 MR. DOYLE: I believe we've gone on
14 record -- this is Doyle -- several times saying
15 (a) there are no invoices, if we're talking about
16 an individual piece of paper per shipment. That
17 was never, ever created. They don't exist.
18 Insofar as house bills of lading were concerned,
19 they were never issued. This was all done
20 electronically. It's the beauty of modern
21 commerce. They don't need a lot of paper anymore.

22 JUDGE GUTHRIDGE: I think, Mr. Nussbaum,

1 you'll have to rely on your documents for that --
2 your client's documents.

3 MR. NUSSBAUM: Understood, Your Honor.

4 JUDGE GUTHRIDGE: Okay. Anything else,
5 counsel?

6 MR. NUSSBAUM: No.

7 MR. DOYLE: No, Your Honor.

8 JUDGE GUTHRIDGE: Okay. Well, then this
9 hearing is adjourned at 12:10. Thank you for
10 calling in.

11 MR. DOYLE: Thank you very much, Your
12 Honor.

13 MR. NUSSBAUM: Thank you.

14 (Whereupon, at 12:10 p.m., the
15 PROCEEDINGS were adjourned.)

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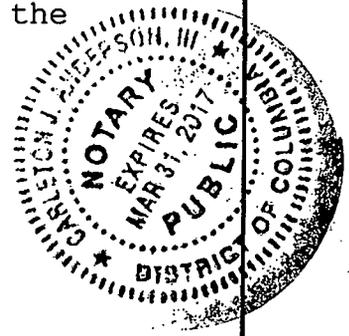
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CERTIFICATE OF NOTARY PUBLIC

DISTRICT OF COLUMBIA

I, Carleton J. Anderson, III, notary public in and for the District of Columbia, do hereby certify that the forgoing PROCEEDING was duly recorded and thereafter reduced to print under my direction; that the witnesses were sworn to tell the truth under penalty of perjury; that said transcript is a true record of the testimony given by witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was called; and, furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



(Signature and Seal on File)

C. J. Anderson

Notary Public, in and for the District of Columbia

My Commission Expires: March 31, 2017