

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No.: 14-16

BALTIC AUTO SHIPPING, INC.,

Complainant,

– vs. –

**MICHAEL HITRINOV
a/k/a MICHAEL KHITRINOV,
EMPIRE UNITED LINES CO., INC.,**

Respondents.

**COMPLAINANT'S BRIEF IN OPPOSITION TO RESPONDENTS' MOTION FOR PARTIAL
SUMMARY DECISION**

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Pursuant to Rules 69 and 70 of the Federal Maritime Commission's (the "Commission") Rules of Practice and Procedure (46 C.F.R. 502 *et seq.*), Complainant, through its Counsel, Marcus A. Nussbaum, Esq. respectfully submits this brief in opposition to respondents' Motion for Partial Summary Decision.

INTRODUCTION

As set forth in detail below, the respondents have failed to demonstrate the absence of triable issues of material fact, thus warranting that the Commission deny the instant motion in its entirety. Contrary to respondents' erroneous assertions, various acts committed by respondents as alleged by the complainant occurred within the three years of the statute of limitations for reparations under the Shipping Act of 1984, 46 U.S.C. §40101, *et. Seq.* (the "Shipping Act"). These acts also occurred *subsequent to* the execution of that certain settlement agreement and mutual release executed by and between the parties as described herein, and are therefore not covered under the agreement, nor were they released by the mutual release.

Respondents' unlawful activities described herein are violations of the Shipping Act, entitling complainant to proceed with its grievance before the Commission. To the extent that respondents argue that various violations occurred *prior to* the execution of the settlement agreement and outside of the three year time bar, those violations are timely by operation of the discovery rule and/or due to the violations being continuing violations of the Shipping Act.

As set forth in detail below, the respondents have:

- (1) Provided service in the liner trade that is not in accordance with rates, charges, classifications, rules, and practices contained in a tariff published with the Commission;
- (2) Engaged in an unfair and unjust discriminatory practice in the matter of rates or charges by charging the Complainant rates higher than that charged other shippers (and by engaging the services of a company that had acted as an ocean transport intermediary without a license from the Commission);
- (3) Failed, and continue to fail to keep open to public inspection in its tariff system tariffs showing all its rates charges classifications rules and practices between all points or ports on its own route and on any through transportation route that has been established (a continuing violation that falls outside of any settlement agreement executed between the parties, and which also falls within the three year statute of limitations for reparations under the Shipping Act. Notably, aside from respondents' conclusory assertion that tariffs were always on file, the respondents have failed to include with their motion the copies of tariffs supporting such an assertion.
- (4) Failed to deal in good faith and refused to immediately release various cargo containers that were paid for by complainant, causing the complainant to incur storage and demurrage charges, and

legal fees -- these containers arrived and/or were paid for after the execution of the 2011 Settlement Agreement¹, *no earlier than November 30, 2011* and within the three year time bar for reparations under the Shipping Act. – These Shipping Act violations are not covered by the 2011 Settlement Agreement.

An example of respondents' refusal to deal in good faith discussed herein, occurring after the execution of the 2011 Settlement Agreement on November 29, 2011, occurred while various containers booked through respondents *had not yet arrived at the port of destination*.² In response to complainant's attempt to obtain release of the containers, respondents ceased communicating with complainant, requiring intervention by complainant's attorney, and caused complainant to incur storage/demurrage charges and attorneys' fees -- this occurred *no earlier than December 29, 2011* and within the three year time bar for reparations under the Shipping Act.

In addition, discussed herein, respondents directed common carrier Mediterranean Shipping Co. ("MSC) to collect charges from complainant's consignee for a shipment that had been prepaid in full (such prepayment being a condition in the 2011 Settlement Agreement) – this violation of the Shipping Act occurred *no earlier than January 5, 2012* and within the three year time bar for reparations under the Shipping Act. Complainant's written requests to *respondents'* counsel for assistance in resolving this issue (on March 5, 2012 and March 6, 2012) were ignored. The respondents also unilaterally changed the shipping instructions on complainants' dock receipts/masters and ordered that the ocean liner issue an "original" bill of lading. This violation of the Shipping Act was confirmed, for the first time, on May 5, 2015, when the

¹ This Settlement Agreement, executed on November 29, 2011 (the "2011 Settlement Agreement") is discussed in detail herein, but the Commission may already be familiar with the agreement, as it is discussed at length in the respondents' instant motion. As the Commission may recall, paragraph "3" of the agreement called for the respondents to release 138 containers to the complainant "upon arrival and payment" of various sums specified in the spreadsheets attached to the agreement, and also stated that to the extent that respondents caused: "a delay in the release of the containers...and this results in the accrual of **storage and demurrage charges**, [respondents] will be responsible for payment of such charges..." (emphasis added) -- As the Commission may also recall, paragraph "5" the agreement contains a mutual release for claims "growing out of **shipping charges** related to [complainant's] cargo and any claims of damages related to the delay in releasing said cargo **from the beginning of time up to the date of [the] release**" (i.e. the date that the release was signed – November 29, 2011) (emphasis added). As a final note up front for the Commission's reference, paragraph "11" of the agreement called for the parties to "execute and/or deliver any and all documents and give such instructions to their agents, designees and counterparties as may be necessary for the effectuation of the terms and conditions of this agreement." – A copy of this agreement is annexed to the respondents' motion as Exhibit "3" and is incorporated by reference.

² These containers are identified in Exhibit "P" to the accompanying Presniakovas Affidavit, which is further discussed in detail below.

complainant received subpoenaed documents from MSC, which were never previously provided to complainant by the respondents.

A final example discussed herein pertains to the respondents' unlawful contacting of complainant's customer directly regarding five separate shipments³. In addition to this unlawful direct contact with complainant's customer, respondents ultimately collected freight charges and released the shipments without the knowledge of and without the consent of complainant (notwithstanding that the freight charges collected by respondent were an additional \$266.00 per shipment over the rate quoted by respondents to complainant for those shipments). These shipments were released without informing complainant, when respondents surrendered the original bill of lading to common carrier MSC – the Complainant discovered this upon attempting to collect its fee from its customer who advised that he had received a telex release directly from respondents, and that the cargo had been released⁴. Complainant learned of this no earlier than January 5, 2012 and within the three year time bar for reparations under the Shipping Act.

In addition to the foregoing, at all times, the respondents never produced, and continue to refuse to produce the house bills of lading, freight invoices, and other shipping documents⁵, for the shipments at issue herein, both in violation of the Shipping Act and in breach of the 2011 Settlement Agreement (as mandated by paragraph "11" of the agreement). The facts set forth below show that the Shipping Act violations are neither time barred, nor covered under the 2011 Settlement Agreement, warranting that the Commission deny the respondents' instant motion.

³ With regard to respondents' unauthorized contact with complainant's customer, as discussed in detail herein, this issue was brought to the Commission's attention on November 21, 2011 in an email exchange between complainant and Tara E. Nielsen of the Commission's Office of the Managing Director.

⁴ This customer also advised the complainant that the respondents had collected an additional \$1000.00 from the customer, which the respondents promised would be applied as a credit towards future shipments if the customer would use the respondents' services in 2012.

⁵ With regard to respondents' refusal to produce the documents, as discussed in detail in this brief, this issue was brought to the Commission's attention on November 22, 2011 in an email exchange between complainant and Tara E. Nielsen of the Commission's Office of the Managing Director. By way of background, this is not the first time that the Respondents have been brought before this Commission under allegations that they committed the same acts of which Complainants now allege. See, Empire United Lines Co., Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, and Section 10(b)(2)(A) of the Shipping Act of 1984, FMC No. 02-11, Order of Investigation and Hearing (FMC August 1, 2002).

LEGAL BASIS FOR THIS RESPONSE AND BRIEF IN OPPOSITION

Complainant submits this response pursuant to the Shipping Act and the Commission's Rule 62, which mandates that a complaint seeking reparations under the Act must be brought within three years after the accrual of a claim for violations of the Act. The complaint filed by the complainant was clearly filed within three years of various activities described below, many of which occurred subsequent to the execution of the 2011 Settlement agreement and are not covered by the mutual release therein. To the extent that various individual acts may have occurred outside of the three year time bar, complainant relies upon the legal doctrines of the discovery rule and the continuing violation rule, which complainant submits operate to toll the statute of limitations.

RELEVANT PROCEDURAL HISTORY

On November 28, 2014 Complainant initiated the instant proceeding via the filing of a Verified Complaint with the Commission. On or about December 11, 2014, in lieu of an answer, respondents filed a motion for a more definite statement that was denied by the Commission in an Order dated December 22, 2014. On January 23, 2015, respondents filed their Answer and Counterclaim. In respondents' Answer and Counterclaim, the respondents, *by their own admission*, have already stated that triable issues of fact already exist with respect to this matter and that discovery is necessary, thus warranting that the Commission deny respondents' motion, without the need for any further analysis on the merits of complainant's claims:

“On information and belief, Complainant has failed to pay approximately \$200,000.00 *in freight charges* duly owing to Respondent EUL.” (Respondents' Counterclaim, ¶ “7”); and

“Complainant has unjustly obtained transportation without paying the applicable charges is a violation of the Shipping Act- specifically Section 10(a)(1) (46 USC 41102 (a)(1)) - to the detriment of the Respondent EUL, and damaged the respondent *in an amount that can only be determined after obtaining discovery* in regard to the shipments for which no payment was received.” (Respondents' Counterclaim, ¶ “9” – A courtesy copy of which is provided herewith)

Subsequent thereto, the parties participated in multiple conferences with the Commission regarding discovery and respondents' allegations that complainant's alleged violations of the Shipping Act are time barred and/or covered under a settlement agreement executed by the parties in 2011. On February 23, 2015, the parties participated in a conference with the Commission, and it was agreed that the parties would engage

in limited discovery on thirty six (36) booking and container numbers⁶ provided by complainant to respondent.

During the February 23, 2015 conference, it was agreed that respondents' instant motion would specifically address the thirty six shipments, and this was memorialized in the Commission's Order of February 24, 2015, subsequently amended on March 13, 2015. To avoid confusion, the thirty six booking and container numbers were disclosed to respondents counsel in three separate documents, frequently referred to herein as Attachments "C", "D", and "E", not to be confused with any exhibits referred to herein. Per the March 13, 2015 Order, this brief in opposition addresses the thirty six shipments identified in Attachments "C", "D", and "E".

COUNTER-STATEMENT OF MATERIAL FACTS

The facts set forth below are summarized from the Complaint in this matter, or, as necessary, provided from the accompanying affidavit of Andrejus Presniakovas (the "Presniakovas Affidavit"), who is the principal of complainant Baltic Auto Shipping Inc.

Baltic Auto Shipping, Inc. ("Baltic Chicago", "Baltic" or "complainant") is a licensed freight forwarder and non-vessel operating common carrier ("NVOCC"), registered with the Federal Maritime Commission ("FMC") under license number 21242. (Presniakovas Affidavit ¶ "2"). From approximately November of 2007 through 2012⁷, Baltic, via Empire United Lines Co., Inc., ("EUL") and its principal, Michael Hitrinov, shipped containers with automobiles acquired by Baltic on behalf of foreign customers to ports abroad including, without limitation, the port of Klaipeda, Lithuania. (Presniakovas Affidavit ¶ "3") During that time, Baltic Chicago acted in the capacity of merchant for the various vehicles that it owned, or in the capacity of NVOCC for the vehicles that it was exporting on behalf of its customers. (Presniakovas

⁶ These are the shipments described in Attachments "C", "D", and "E" in the Order of February 24, 2015.

⁷ Page "2" of Respondents' brief incorrectly asserts that paragraph "12" of the FMC Complaint in this matter states that the parties ceased doing business together in November of 2011. – Paragraph "12" of the FMC Complaint clearly makes reference to the parties doing business through approximately January of 2012. Page "3" of Respondents' brief also incorrectly asserts that this allegation can be found in paragraph "10" of the District of New Jersey Complaint.

Page "9" of Respondents' brief also incorrectly asserts that "Complainant did business with Respondent EUL from about 2007 to 2011" and purports to again cite to paragraph "12" of the FMC Complaint for that assertion of fact. – This is misleading because the FMC Complaint makes reference to the parties doing business through approximately January of 2012.

Affidavit ¶ “4”)

During that time, Baltic engaged in a regular course of business with respondents whereby Baltic shipped containers to different destinations from various ports of loading, including the port of Savannah, and paid respondents “tariffs” that were quoted to Baltic from time to time by respondents between 2009 and 2012. (Presniakovas Affidavit ¶ “5”) From time to time, including the time period prior to 2009, the respondents would also provide a spreadsheet for record keeping purposes which listed the various applicable “tariffs” charged by the respondents over the course of approximately one year. – This was only for keeping track of any additional charges, if any, that may have been assessed against specific shipments for various containers that had arrived and/or had been paid for and released. Id.

At no time did Baltic enter into a Negotiated Rate Agreement (“NRA”) with respondents, and at all times, respondents simply presented the rates to Baltic. (Presniakovas Affidavit ¶ “6”) In his correspondence with Baltic where he provided the updated rates from time to time, Hitrinov made it clear that there was *no negotiation*, explaining to Baltic that “your new rates *will be* the following:”. Id. As the Commission may be aware, EUL, as an NVOCC must file its rates with the Commission and update them whenever the rates are changed. (Presniakovas Affidavit ¶ “7”).

A second example of respondents’ unilateral presentation of rates to complainant is shown in an email in which the respondents demanded payment from Baltic, stating that “The payments is due upon the cargo received *as per Empire BOL and Tariff*” thus admitting to the existence of respondents’ house bill of lading and tariff as “Empire BOL and tariff”. (Presniakovas Affidavit ¶ “8”) A third example is in a copy of respondents’ standard invoice and house bill of lading issued to another shipper during the same time period, making specific reference to the charges contained therein as the “published Tariff”. (Presniakovas Affidavit ¶ “9”)

In mid-2008, respondents ignored Baltic’s written request for invoices. (Presniakovas Affidavit ¶ “10”). In early 2009, Mr. Hitrinov assured Baltic that respondents would issue freight invoices and house bills of lading, however, despite repeated requests, the documents were never produced. Id. On November 11, 2011, the respondents continued to refuse to produce the invoices, despite the numerous requests from

Baltic. (Presniakovas Affidavit ¶ “11”) In an email from respondents, Mr. Hitrinov purports to have sent invoices in response to Baltic’s requests. Id. As the Commission may be aware, Hitrinov has now changed that position in his motion papers, claiming that he never sent invoices. Id.

In light of the respondents’ repeated assurances that the documents would be produced, Baltic agreed to continue to do business with respondents. (Presniakovas Affidavit ¶ “12”). However, this failure to produce documents, among other things, ultimately led to Baltic’s decision to *ultimately* discontinue the business relationship, with the sole exception being bookings made with respondents between December 23, 2011 through October 18, 2012, solely with respect to shipments departing from Savannah. Id. The reason that those bookings were made were so that Baltic Chicago could recover overpayments made to the respondents for various containers departing from Savannah. Id.

Based upon the audit described herein, there was never a tariff on file for the port to port shipment of 40’ HC containers for the routes identified in Presniakovas Exhibit “A”. (Presniakovas Affidavit ¶ “13”). The Commodity ID’s and Descriptions/Quantities for the Commodities listed on the tariffs do not coincide with the routes and rates identified in the emails sent from the respondents. Id. Contrary to the assertions made in the respondents’ motion papers, at no time, did the parties ever have a negotiated rate agreement (“NRA”) pertaining to freight rates. (Presniakovas Affidavit ¶ “14”).

Based upon the audit described herein, there is nothing in the tariffs annexed to the audit that display a prominent notice that an NRA was being used, and at no time did the respondents ever provide free access to the tariffs published by respondents on Sumner Tariff as required by the Commission as a prerequisite to using NRA’s. Id. At all times, Baltic paid the respondents the amounts identified by the respondents to be the “tariffs” allegedly applicable for the port to port shipment of 40’ high cube containers. Id. Subsequent to the end of 2008, at no time did Baltic ever receive house bills of lading, nor a single invoice from respondents although such documents were requested from respondents on numerous occasions, both verbally and in writing. (Presniakovas Affidavit ¶ “15”).

With respect to the manner in which the parties did business together, initially, it was always the *respondents* that would provide Baltic with form dock receipts/masters on respondents’ letterhead, which

contained the respondents' FMC License Number, MSC Service Contract number, booking numbers, the port of destination, the port of loading, vessel number and other information, and which identified the respondents as the shipper. (Presniakovas Affidavit ¶ "16").⁸ It was then Baltic's responsibility to complete the missing information on the respondents' dock receipt/master by providing container numbers, seal numbers, descriptions of the goods, etc. and then return them to the respondents. (Presniakovas Affidavit ¶ "17").

This procedure was used so that EUL could prepare their house bills of lading and forward the necessary information to the ocean liner, so that it, in turn could prepare the original or sea waybills of lading (depending upon what type of document was requested by the shipper). *Id.* This practice then changed in the end of 2008 when the parties engaged in a high volume of shipments, when at the respondents' request, Baltic provided respondents with shipping instructions, (titled "dock receipts/masters"), used by respondents to prepare their own house bills of lading and forwarded to the ocean liner so that it could prepare original bills of lading or sea waybills. (Presniakovas Affidavit ¶ "18")

The shipping instructions were sent to respondents *solely* for purposes of preparing bills of lading for use by the ocean liner and the respondents. (Presniakovas Affidavit ¶ "19") With respect to respondents' argument (in paragraphs "6" and "7" of the Hitrinov Affidavit) that Baltic provided the respondents with shipping instructions and endorsed the shipping instructions as "Telex Release" or "Express Release", and that these instructions allegedly meant that "no bill of lading is issued to the shipper" is simply untrue. (Presniakovas Affidavit ¶ "20") Respondents are incorrect in this assertion, due to the fact that under a telex release, a bill of lading must always be *issued* to the shipper, but not necessarily *provided* to the shipper if the shipper provides written instructions directing that the original bill of lading is to be kept on file at the

⁸ On this issue, page "4" of respondents' brief makes reference to paragraph "100" of the Hitrinov Certification for the proposition that: "Baltic sent shipping instructions for the shipments identified in Complainant's Exhibits "C" D" and "E" in the period from August 22, 2011 to November 11, 2011." – Again, there is no basis for this assertion of fact because there is no paragraph "100" in the Hitrinov Certification.

In addition, the respondents explain on page "4" in a footnote that: "The actual shipping instructions can be made available upon request of the Tribunal" – This warrants denial of respondents' motion due to their failure to establish *prima facie* entitlement to summary judgment. The shipping instructions are currently in the exclusive custody and control of the respondents and have not been produced by them. Interestingly enough, during discovery, on February 27, 2015, counsel for respondents requested via email that complainant produce these very same shipping instructions which they now purport to have on file for production at the Commission's request.

ocean liner's office. (Presniakovas Affidavit ¶ "21")

With respect to the parties' custom and practice regarding the usage of shipping instructions, on some occasions, the respondents unilaterally changed the terms of the shipping instructions on the "dock receipts/masters" from "Express Release" to "Telex Release". (Presniakovas Affidavit ¶ "22"). A further example of the misrepresentations made in in paragraph "7" of the Hitrinov Affidavit with respect to the issue of telex releases, express releases and the parties custom and practice regarding the issuance of bills of lading, is set forth in various emails and dock receipts. (Presniakovas Affidavit ¶ "23"). As set forth above, Hitrinov argues in paragraph "6" of his affidavit that Baltic provided the respondents with shipping instructions and endorsed the shipping instructions as "Telex Release" or "Express Release", and in paragraph "7" of his affidavit that these instructions allegedly meant that "no bill of lading is issued to the shipper and no bill of lading is to be surrendered at destination as a condition of the consignee receiving the shipment at destination". Id. However, on November 18, 2011, a request was made to the respondents to release two containers for respondents' booking Nos.: 038EUL455783 and 038EUL486018⁹, and in the email respondents were specifically advised to: "*Please overnight original[s] with delivery on Saturday and use receivers fedex account...*" (Presniakovas Affidavit ¶ "24").

The dock receipt/masters for the aforementioned bookings clearly state: "Express Release" as part of the shipping instructions contained therein. Id. Therefore, there is simply no merit to respondents' assertion in paragraph "7" of the Hitrinov certification that a telex release or express release means no bill of lading is issued to the shipper. Id. In this particular case, a request was made to the respondents for the bill of lading. That request was made due to the fact that respondent had unilaterally changed the shipping instructions and ordered that the ocean liner issue a bill of lading, thereby creating the requirement that the consignee surrender the bill of lading at the port of destination in order to receive the cargo. Id. – On May 5, 2015, MSC partially produced the documents requested in the Subpoena signed by the Commission, dated March 17,

⁹ These two bookings were at issue in the 2011 District of New Jersey Action and are part of Attachment "B", which the Commission has not yet allowed the parties to conduct discovery on. However, this information is simply being provided to establish that triable issues of fact exist with respect to the statements made by Mr. Hitrinov in his certification. These two bookings are not currently being discussed with respect to whether or not Hitrinov committed Shipping Act violations regarding these two bookings.

2015. The subpoenaed documents are submitted contemporaneously herewith as **Exhibits “A”, “B”, and “C”** and include copies of the shipping instructions/masters provided to MSC by the respondents. The complainant’s original shipping instructions/dock receipts/masters are also being provided in those exhibits so that the Commission can clearly see that the respondents unilaterally changed the shipping instructions/dock receipts/masters provided to them by complainant. The respondents’ shipping instructions to MSC are being revealed for the first time, due to the fact that they were never provided to complainant during the course of the parties’ relationship. The Commission can see that the respondents altered the instructions by: (1) inserting their names into the Shipper/Exporter identification box; (2) altering the “Onward Inland Routing Box” from “CSC, SEC, PREPAID” to “CSC, SEC, COLLECT”; (3) changing the **Telex Release or Express Release** instructions from Baltic by adding an instruction for MSC to **“PLEASE ISSUE ORIGINALS [BILLS OF LADING] AND KEEP THEM IN OFFICE MSC”**; and (4) deleting “Telex Release” or “Express Release” from the Baltic shipping instructions/dock receipts/masters and adding a request for **“originals”** [bill of lading]. Notwithstanding that respondents’ alterations of the shipping instructions are a violation of the shipping act that could not have possibly been discovered until May 5, 2015, these are simply being provided to show that there is no merit to respondents’ assertion that a telex release or express release means no bill of lading is issued to the shipper. In these documents, it can clearly be seen that Empire directed MSC to issue original bills of lading when complainant’s instructions stated: “Telex Release” or “Express Release”.

In various instances, when the respondents’ shipping instructions for a shipment indicated that it was subject to “Express Release”, the respondents still refused to release the shipment for an extended period of time, and in some instances, not until early 2012. (Presniakovas Affidavit ¶ “25”). Contrary to the respondents’ assertions that it was not the practice for respondent EUL to issue house bills of lading to Baltic, at various times, the respondents even admitted to the existence of and the usage of house bills of lading and freight invoices, even though these documents were never provided to Baltic. (Presniakovas Affidavit ¶ “26”) Respondents’ refusal to produce the bills of lading and any new or old invoices even resulted in Baltic reaching out to this Commission in 2011 and requesting the Commission’s assistance in obtaining the bills

of lading, which, to date, were never produced by the respondents. (Presniakovas Affidavit ¶ “27”).

It is important for the Commission to understand the manner in which the parties did business together. As previously stated, the respondents ultimately refused to issue house bills of lading and invoices to Baltic (despite having previously been promised that they would be provided). (Presniakovas Affidavit ¶ “28”). Contrary to respondents’ stated position on this issue, as late as November 12, 2011, the respondents advised by email that: “if you need separate invoices, we are ready to send it to you”. (Presniakovas Affidavit ¶ “29”) However, the respondents never provided the invoices, house bills of lading, and other shipping documents. *Id.* For the Commission’s reference, the respondents’ written promise to provide the invoices was made in response to Baltic’s email from the day prior, in which Baltic stated that they had requested invoices, and did not receive them for three years. (Presniakovas Affidavit ¶ “30”)

With further respect to the manner in which the parties did business together, MSC or its agent at the port of destination would initially forward an arrival notice directly to Baltic’s consignee. Upon receipt of the arrival notice from the consignee, Baltic would compare the port of loading and port of destination against the spreadsheets containing the “tariffs” quoted by the respondents in order to calculate the appropriate rate to pay to the respondents. (Presniakovas Affidavit ¶ “31”) At that point, Baltic would then wire a sum certain to the respondents, together with an email containing the wire confirmation and identifying the specific booking number and other information identifying what the payment was for. (Presniakovas Affidavit ¶ “32”). If the amount of the wire corresponded with appropriate the “tariff” quoted by the respondent, then the respondent would order MSC to release the shipment at the port of destination. (Presniakovas Affidavit ¶ “33”).

The foregoing is relevant because, as explained in detail below, subsequent to November 30, 2011, on numerous occasions, the respondents refused to release cargo that had already been paid for, resulting in Baltic incurring storage and demurrage charges, and legal fees.¹⁰ *Id.* Contrary to the allegations in paragraphs “12”, “13”, and “14” of the Hitrinov Certification, it was *not* the practice of respondents to send spreadsheet

¹⁰ On the issue of the parties’ dispute over shipping charges, page “5” of respondents’ brief makes reference to paragraph “20” of the Hitrinov Certification for the proposition that “Baltic disputed the additional charges as already being included in the freight rate charged and refused to pay the charges.” – This allegation is not found in paragraph “20” of the Hitrinov Certification.

statements of account against which Baltic made payment. (Presniakovas Affidavit ¶ “34”). As set forth in the 2011 Complaint, “in the course of Plaintiff’s business relationship with Defendant Empire, Defendant Hitrinov would periodically provide Plaintiff with an Excel spreadsheet identifying the containers in transit and verifying that shipping charges had been paid in full.” Id. – This was for record keeping purposes only and to keep track of any additional charges, if any, that may have been assessed against specific shipments for various containers that had arrived, and/or been paid for and released. Id.

Another example which demonstrates the manner in which the parties did business together is a series of emails in which Baltic provided respondents with the wire confirmation and identifying the specific booking number and other information identifying what the payment was for and requesting that the containers be released. (Presniakovas Affidavit ¶ “35”) Notably, these emails also contain Baltic’s demand for a copy of all bills of lading and invoices related to containers shipped pursuant to the parties’ agreement, which, to date, have not been provided by the respondents. Id.

As the Commission may recall, Baltic subsequently initiated a lawsuit against the respondents in November of 2011 in the U.S. District Court for the District of New Jersey, captioned as *Baltic Auto Shipping Inc., v. Michael Hitrinov et al*, Docket No.: 2:11-cv-06908 (the “2011 Complaint”). (Presniakovas Affidavit ¶ “36”). That action was settled within a matter of days, and resulted in the execution of the settlement agreement and mutual release on November 29, 2011 the (“2011 Settlement Agreement”). (Presniakovas Affidavit ¶ “37”)

The 2011 Settlement Agreement contained two exhibits identified as “A” and “B” respectively and which listed container and booking numbers for a total of 162 shipments that respondents shipped on behalf of Baltic. (Presniakovas Affidavit ¶ “38”) With specific regard to exhibit “B” of the 2011 Settlement Agreement, which contained 138 shipments, paragraph “3” of the agreement specifically stated that:

“Any and all other containers shipped by Baltic through Empire and MSC including, without limitation, the one hundred and thirty-eight (138) containers identified in Exhibit "B", shall be released by Empire to Baltic and/or its designee upon arrival and payment by Baltic of the sums specified in Exhibit "B" and that “To the extent that Empire causes a delay in the release of the containers identified in Exhibit "B" and this results in the accrual of storage or demurrage charges, Empire will be responsible for payment of such charges, otherwise such charges will be the responsibility of Baltic.”

Paragraph “11” of the 2011 Settlement Agreement further provided that:

“The parties shall execute and/or deliver any and all documents and give such instructions to their agents, designees and counterparties as may be necessary for the effectuation of the terms and conditions of this Agreement.”

(Presniakovas Affidavit ¶ “39”)

For the Commission’s reference, the shipments identified in Attachments “C”, “D”, and “E” exchanged between the parties (and which are the subject of this instant motion) are related to the 2011 Complaint and Settlement Agreement, as follows:

Attachment “C”: These containers are identified in Exhibits “A” and “B” of the 2011 Settlement Agreement;

Attachment “D”: These containers were identified in Exhibit “F” to the 2011 Complaint;

Attachment “E”: These containers were identified in Exhibit “B” to the 2011 Settlement Agreement.

(Presniakovas Affidavit ¶ “40”)

The spreadsheets annexed to the Presniakovas Affidavit as Exhibit “P” contain the information regarding the shipments identified in the Attachments “C”, “D”, and “E” (which are the subject of this motion). (Presniakovas Affidavit ¶ “41”) Beginning with the spreadsheet entitled “Empire’s Untimely Release of Containers”, this spreadsheet lists twenty one separate shipments from Attachments “C” and “E”. For each and every one of those shipments, the respondents failed to timely release those shipments to Baltic, causing Baltic to incur storage and demurrage charges and attorneys’ fees. (Presniakovas Affidavit ¶ “42”)

Furthermore, on November 30, 2011, due to respondents’ unreasonable refusal to release thirty four containers, Baltic was caused to involve its attorney, who then contacted respondents’ counsel, Jon Werner, Esq. (who in turn promised to instruct the respondent to release the containers). (Presniakovas Affidavit ¶ “43”) This was a violation of the Shipping Act, which caused Baltic to unnecessarily incur additional attorneys’ fees.

Furthermore, with respect to the final container that the respondents were obligated to release under the 2011 Settlement Agreement, Baltic attempted to obtain the release of container number MEDU8876878 (EUL Booking Number 038EUL451412) on January 26, 2012 (Presniakovas Affidavit ¶ “44”). As a result of respondents’ refusal to release the container, Baltic’s counsel was forced to contact respondents’ counsel in order to resolve this issue. Id. In violation of the Shipping Act, the respondents refused to release that

container, causing Baltic to involve its attorney and unnecessarily incur additional attorneys' fees. Id. This issue dragged on as late as February 6, 2012 until the container was released, due to the delay caused by respondents and their counsel. Id.

With respect to booking for a shipment to Batumi, booking No.: 038EUL489106 described in the Audit, EUL collected funds twice for that booking. (Presniakovas Affidavit ¶ "45") As a result of EUL's refusal to communicate with Baltic as of December 29, 2011 discussed below, and further due to EUL's collection of funds twice for that booking, Baltic was forced to contact respondent's counsel on March 5, 2012 and March 6, 2012, who, to date, has ignored Baltic's requests for assistance. Id. Baltic never received the return of funds for this booking, although duly demanded. Id. In addition, in an email from the respondents dated December 1, 2011, in response to Baltic's request that various containers be released, the respondents accuse Baltic's employee that she "still find[s] something to be [bitching] about." – This is just another example of respondents' abusive practices. (Presniakovas Affidavit ¶ "46")

On December 29, 2011, in response to Baltic's request that the respondents release various containers, the respondent refused to communicate further and stated as follows: "Please do not send us any requests. Send all requests through the attorney. We will take correspondence from our attorney only." (Presniakovas Affidavit ¶ "47") On the following day, on December 30, 2011, in response to Baltic's request that respondents release various containers, the respondents sent a fake email, purportedly from their computer server, claiming that "your message was rejected". (Presniakovas Affidavit ¶ "48") This was nothing more than a game by the respondents and had nothing to do with any technical issues from respondents' email system. The email that purports to be from respondents' email server, contains grammatical errors, misplaced commas, and incorrect spacing in the text, and appears to have been sent directly from respondents' email account. Id.

On February 6, 2012, in response to Baltic's request that respondents release other various containers, the respondents again sent a fake email, purportedly from their computer server, claiming that "your message was rejected". (Presniakovas Affidavit ¶ "49") The email that purports to be from respondents' email server,

contains grammatical errors, misplaced commas, and incorrect spacing in the text, and appears to have been sent directly from respondents' email account. Id.

Another example of respondents' refusal to communicate was with respect to Baltic's request on January 3, 2012, which forced Baltic to once again reach out to its attorney and incur additional attorneys' fees. (Presniakovas Affidavit ¶ "50") As the Commission can see, in the emails between Baltic and its counsel, Baltic was attempting to obtain the release of two containers after having made payment, and that the respondents refused to communicate and refused to release the containers. Id. These emails are simply another example of respondents' violations of the shipping act, as illustrated by Baltic's counsel at that time, who explained *on January 3, 2012* (and within three years of the start of this proceeding before the Commission) that: "I am documenting everything in case we decide to file a motion with the court for sanctions and attorneys' fees for violation of the settlement agreement once this entire mess is over. *We will also discuss regulatory filings...*" Id.

The Commission is again respectfully referred to the spreadsheets annexed to the Presniakovas Affidavit as Exhibit "P". For each and every one of the shipments identified therein, the respondents have refused, and continue to refuse to produce for Baltic the freight invoices and house bills of lading and other shipping documents for these shipments. (Presniakovas Affidavit ¶ "51") As set forth above, paragraph "11" of the 2011 Settlement Agreement provided that: "The parties shall execute and/or deliver any and all documents and give such instructions to their agents, designees and counterparties as may be necessary for the effectuation of the terms and conditions of this Agreement."

Respondents' refusal to produce the freight invoices and house bills of lading and other shipping documents is also a violation of the Shipping Act of 1984, and constitutes a continuing violation, which occurred *no earlier than November 30, 2011* and within the three year statute of limitations for reparations under the Shipping Act. This is because the 2011 Settlement Agreement specifically called for the respondents to produce the freight invoices and house bills of lading for these shipments. Baltic made these requests in writing as set forth herein, and verbally subsequent to November 30, 2011.

The Commission is also respectfully referred to the emails between Baltic and the Ms. Tara E. Nielsen of the Commission's Office of the Managing Director from 2011, and the spreadsheet in these emails. (Presniakovas Affidavit ¶ "53") The spreadsheet lists five shipments from California to the port of Klaipeda, Lithuania. Id. With respect to these five shipments, Baltic reached out to Ms. Nielsen again for assistance in preventing the respondents' imminent interference with Baltic's business. (Presniakovas Affidavit ¶ "54") With respect to the shipments, the respondents: (1) ceased communication with Baltic with respect to these shipments; and (2) unlawfully contacted Baltic's customers directly. Id.

Based upon Baltic's contact with the Commission and its subsequent intervention, Baltic reasonably believed that the respondents would not subsequently release the cargo and collect payment from Baltic's customers without notifying Baltic and without Baltic's consent. (Presniakovas Affidavit ¶ "55"). Unfortunately, this was not the case and after respondents ceased all contact with Baltic on December 29, 2011, Baltic discovered on or about January 5, 2012 that the respondents did in fact release Baltic's cargo and collect payment from Baltic's customer (notwithstanding that the freight charges collected by the respondents were an additional \$266.00 per shipment, over and above the rate quoted by respondents to Baltic for those shipments plus an additional \$1000.00). Id. These shipments were released without informing Baltic, when the respondents surrendered the original bill of lading to the common carrier known as Mediterranean Shipping Company. (Presniakovas Affidavit ¶ "56")

Prior to discussing the audit in detail below, a final example regarding respondents' failure to meet their obligations as an NVOCC is with respect to the respondents' failure to pay to MSC the monies which were received by respondents from Baltic for sea freight. (Presniakovas Affidavit ¶ "57"). The documents annexed to the Presniakovas Affidavit show that: (1) on December 30, 2011, Baltic wired \$2,450 to EUL for booking number 038EUL489106; (2) EUL paid \$8.00 to ocean carrier MSC for this booking, as indicated on the MSC freight invoice; (3) on December 31, 2011, MSC's local office in Batumi issued an invoice indicating that \$1908.00 in freight charges were still outstanding; (4) on January 5, 2012, EUL directed MSC to issue a telex release stating that "There are collect charges"; and (5) On March 5, 2012 and March 6, 2012,

due to EUL's continued refusal to resolve this matter, Baltic brought it to the attention of EUL's counsel, Jon Werner, who ignored Baltic's request for assistance. Id. These funds were never repaid to Baltic. Id.

As the Commission may be aware, the names of all applicants for Ocean Transport Intermediary licenses are published in the Federal Register, and on June 27, 2012, a notice was given that a company named Global Atlantic Logistics LLC ("GAL") had applied for an ocean freight forwarder license (the "Notice of 2012"). (Presniakovas Affidavit ¶ "58") As a result of the Notice of 2012, Baltic was able to ascertain that GAL was previously unlicensed. Id

For the Commission's further reference, GAL is the sister company of a company known as Atlantic Global LLC ("ATL"), which, in 2011, was one of the largest exporters of automobiles from the United States to Klaipeda. (Presniakovas Affidavit ¶ "59") As a result of the Notice of 2012, and further due to Baltic's experience in the market for export of automobiles to the port of Klaipeda, Lithuania, Baltic was able to ascertain that its greatest competitors in the market, to wit: GAL and ATL were operating as an ocean transport intermediary without having been licensed by the Commission. Id.

Among other reasons, including concerns regarding ATL and GAL's ability to undercut the market for export of automobiles to Klaipeda, Baltic conducted an audit of the shipping related documents provided to Baltic by for the period from 2007 through 2012 (the "Audit"). (Presniakovas Affidavit ¶ "60") The Audit revealed that: (1) EUL charged Baltic for shipments in excess of the amounts set forth in EUL's published tariffs; (2) that said tariffs did not bear any relevance whatsoever to the various shipments handled by respondents on behalf of Baltic; (3) during the time period from November of 2007 through 2012, EUL billed Baltic in excess of \$200,000.00 for shipments for which it had no tariff on file; (4) during the time period from November of 2007 through 2012, EUL also engaged in an unfair and unjustly discriminatory practice by charging Baltic rates greater than those it charged other shippers; (5) that the respondents had sold bookings to ATL that had acted as an unlicensed Ocean Transport Intermediary, which had allowed respondents and that company to effectively dominate the market by undercutting all other NVOCC's pricing for shipments from the port in New York/New Jersey (due to Atlantic Global LLC's extremely low overhead

in that it was not subject to the same financial responsibilities of all regulated and licensed NVOCC's); and
(6) that respondents collected twice for the same shipment. (Presniakovas Affidavit ¶ "61")

As explained in detail in the Audit:

1. From time to time between 2009 and 2012, the respondents would email Baltic with various advertised rates applicable to the port to port shipment of individual 40' HC containers, which the respondents referred to as "tariffs" and which were updated twice in 2009; seven times in 2010; and six times in 2011.
2. None of the "tariffs" quoted by the respondents bore any relationship whatsoever to the tariffs published online by the respondents.
3. None of the "tariffs" published online by the respondents were applicable to the port to port shipment of individual 40' HC containers.¹¹
4. With respect to booking for a shipment to Batumi, booking No.: 038EUL489106, this shipment was prepaid to Empire in the amount of \$2450 for port to port shipment, and on January 5, 2012, Empire instructed the Mediterranean Shipping Company, via Telex release, to collect charges from the consignee in the amount of \$1908. – This indicates, not only that Empire overcharged for this booking, but also attempted to collect twice for this booking.¹²
5. In 2011, through Empire, Baltic exported 33 containers at a rate of \$1600 per container to the port of Klaipeda from NY/NJ. During this same time period, Empire charged Atlantic Global LLC (a non-OTI) a rate of \$1536 per container for port to port shipment of automobiles to Klaipeda. This discriminatory pricing scheme with an unlicensed Ocean Transport Intermediary, had allowed respondents and that company to effectively dominate the market by undercutting all other NVOCC's pricing for shipments from the port in New York/New Jersey. This information was obtained from the matter of UAB Pamario Dvaras v. Atlantic Global LLC, [and EMPIRE UNITED LINES CO., INC.] et al. (U.S.D.C. – E.D.N.Y. Docket No.: 1:12-cv-01257)¹³

(Presniakovas Affidavit ¶ "62")

ARGUMENT

I. Standard of Review on a Motion for Summary Judgment

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Only when reasonable minds could not differ as to

¹¹ As an aside, respondents have failed to include with their motion copies of the tariffs that they purport to have kept on file, further warranting denial of their motion for summary decision.

¹² This issue was brought to the attention of respondents' counsel, Mr. Jon Werner, via email and these written requests to him for assistance in resolving this issue (on March 5, 2012 and March 6, 2012) were wholly ignored. Copies of those emails are annexed hereto as **Exhibit "S-1"**.

¹³ Respondents' counsel may be familiar with this matter due to the fact that the undersigned represented the plaintiff in that matter and respondents' counsel represented a defendant in that matter.

the import of the evidence is summary judgment proper.” *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991). The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.*, 664 F.2d 348, 351 (2d Cir.1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See, Anderson, supra*. If there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the non-moving party, then summary judgment should not be granted. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d. Cir.1994).

On a motion for summary judgment, the Court **cannot deny the existence of disputes over material facts by making findings of fact and then labelling them “undisputed.” Nor is the trial court free to make critical findings of fact in deciding a motion for summary judgment.** In acting on a motion for summary judgment, “[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists; **it does not extend to resolution of any such issue.**” *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 442 (D.C.Cir.1972) (footnote omitted) (emphasis added).

Pursuant to this standard of review, it is respectfully submitted that the Presniakovas Affidavit and the arguments below warrant the denial of respondents’ instant motion. At the minimum, the facts presented by the complainant create issues of fact as to the dates that the Shipping Act violations occurred and whether or not those violations are time barred. These facts also create triable issues with respect to the effect of the 2011 Settlement Agreement and mutual release on the shipments at issue. Furthermore, as explained below, the discovery rule and respondents’ fraudulent concealment of information operate to toll the statute of limitations with respect to complainant’s allegations that: (1) the respondents engaged in discriminatory pricing; (2) that the respondents failed to keep a tariff on file showing all its rates charges classifications rules and practices between all points or ports on its own route and on any through transportation route that has been established; and (3) the respondents unilaterally changed complainant’s shipping instructions on

documents that were never provided to complainant and which were produced for the first time, in response to the Commission's subpoena to MSC. In addition, as explained below, the continuing violation rule is applicable to both respondents' failure to keep a tariff on file and with respect to respondents' continued failure to produce the shipping documents.

II. The Shipping Act Violations Alleged in the Complaint are Timely

The doctrines regarding the accrual of a cause of action and what constitutes a continuing injury are well known to this Commission. Generally a cause of action accrues and the statute of limitations begins to run when there is the commission of an act which causes injury. *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079 (ALJ 1979).¹⁴ Under the discovery rule, adopted by the Commission in *Inlet Fish Prod., Inc. v. SeaLand Serv., Inc.*, a statute of limitations period will not begin to run until "a party knew or with reasonable diligence should have known that it had a claim." *Inlet Fish Prod., Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 306, 314 (FMC 2001), (emphasis added) (citing *Connors v. Hallmark & Son Coal Co.*, 935 F.3d 336, 342 (D.C. Cir. 1991)).¹⁵

In the case of a continuing injury, each time a party is injured by an act of another, a new cause of action accrues to recover the damages caused by that act, and with regard to such damages, the statute of limitations runs from the commission of the new (continuing) act. *Seatrain, supra*. As a preliminary matter, *Seatrain, supra*, also makes clear that the continuing violation doctrine is applicable for causes of action for reparations under the Shipping Act, and that the doctrine is not limited solely to the Commission's own enforcement proceedings.¹⁶ As set forth below, the Shipping Act Violations committed by the respondents either occurred

¹⁴ Page "10" of respondents' brief relies upon *Gabelli v. Securities and Exchange Commission* regarding the rule for accrual of causes of action, but respondents fail to include a citation for that case. That same page incorrectly asserts that "...the FMC Complaint was filed on November 28, 2014. Accordingly, any right of the Complainant that accrued prior to November 29, 2011 is now time-barred." – It seems as though the respondents have stated that the three year statute of limitations has been shortened by one day.

¹⁵ The question in *Inlet Fish* was whether the cause of action accrued on the dates that shipments were made or on a later date when *Inlet Fish* obtained knowledge that freight rates for those shipments were calculated without subtracting the tare weight from the cargo weight while other customers' rates were calculated by subtracting the tare weight from the cargo. In *Inlet Fish*, the Commission found that "[i]mplementing a rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeal." *Id.*

¹⁶ As the Commission may recall, in retaliation for the Complainant having filed an action before this Commission, the respondents filed an action in the U.S. District Court for the District of New Jersey, captioned as *Empire United Lines Co., Inc. et al. v. Baltic Auto Shipping, Inc.* (U.S.D.C. – D.N.J. Docket No. 2:15-cv-00355-CCC-MF). In further retaliation against

subsequent to the signing of the 2011 Settlement Agreement and mutual release and within the three year statute of limitations, or, to the extent that they occurred prior thereto, are timely by operation of the discovery rule and continuing violation doctrine.

A. Empire's Untimely Release of Containers Occurred *After* The Mutual Release And Settlement Agreement Was Signed

The Complaint in this matter alleges that Baltic is:

“seeking reparations for injuries caused to it by EUL and Hitrinov as a result of their violation of 46 U.S.C. §§ 41102, 41104, 40501 and the FMC's regulations at 46 C.F.R. Part 515, by: (1) **failing to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property;** (2) **by resorting to unfair and unjust discriminatory methods because the Complainants have patronized another carrier...**” (Complaint ¶ 9)

The Complaint also alleges that:

“During the time period alleged herein, EUL accepted money from the Complainant for the shipment of various shipping containers, then subsequently refused to release these containers.” (Complaint ¶ 20)

It is well settled that an NVOCC has violated section 10(d)(1) of the Shipping Act¹⁷ with respect to a shipment when it unreasonably refused to release the cargo at destination port and instructs its agent to place the shipment on hold and it is further well settled that an NVOCC violates section 10(d)(1) when it fails to fulfill NVOCC obligations. *Bimsha International v. Chief Cargo Services, Inc.*, 32 S.R.R. 353 (ALJ 2011). It is further well settled that an NVOCC's failure to pay applicable demurrage charges is a violation of section 10(d)(1). *Bimsha, supra* (citing to *Maritime Service Corp. v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655, 1656 (ALJ 1978)).

The facts set forth above establish that these particular violations of the Shipping Act occurred subsequent to the execution of the 2011 Settlement Agreement and that they occurred no earlier than

the Complainant and the undersigned, respondents' counsel in that matter, Mr. Jon Werner, Esq., recently filed a motion for sanctions against the undersigned, pursuant to Federal Rules of Civil Procedure Rule 11, in which he incorrectly asserts that: “The Shipping Act of 1984 by its own terms makes it clear that the principle that “each day of a continuing violation is a separate violation” only applies to the FMC's own enforcement proceedings, not a private party's civil claims for reparations for alleged violations of the Shipping Act of 1984.” – This is not the first time that the respondents' attorneys have misstated the facts and misstated the law, and the undersigned identifies these misstatements of fact and law in opposition to that motion, which will be returnable before the Court on June 1, 2015.

¹⁷ On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 10(d)(1) is now codified at 46 U.S.C. § 41102(c). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. See, e.g., *Worldwide Logistics Co., Ltd. - Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 11-04 (Mar. 30, 2011) (Order of Investigation and Hearing).

November 30, 2011. Therefore there is no merit to respondents' assertion that this claim is time barred or somehow precluded under the 2011 Settlement Agreement. Furthermore, to the extent that the 2011 Settlement Agreement and mutual release operates as a waiver of claims, the release specifically pertains to claims growing out of *shipping charges* up to the date of the release. The release does not operate as a waiver of claims for *storage and demurrage charges* subsequent to the date of the release, thus warranting denial of respondents' motion.

B. Respondents Caused Complainant to Pay Twice for the Same Booking Due to Respondents Failure to Forward the Funds Already Paid to them for Shipment to the Ocean Liner and This Occurred After The Mutual Release and Settlement Agreement Was Signed

In addition to the allegations in the complaint set forth above, the complainants also allege that respondents violated the Shipping Act:

“by engaging in unfair and unjust discriminatory practice in the matter of the loading and landing of freight and adjustment and settlement of claims”; (Complaint ¶ 9) and that the

“Respondents failed to deal in good faith...” (Complaint ¶ 21)

With respect to the booking for a shipment to Batumi, booking No.: 038EUL489106, as explained above, this shipment was prepaid to Empire in the amount of \$2450 for port to port shipment, and on January 5, 2012, Empire instructed the Mediterranean Shipping Company, via Telex release, to collect charges from the consignee. The consignee was forced to pay at the port of delivery at MSC's local office, ocean freight in the amount of \$1908. It is well settled that an NVOCC's failure to fulfill NVOCC obligations, as here, failing to pay the ocean liner monies which have been received by the NVOCC for such services, is an unjust and unreasonable practice in violation of Section 10(d)(1). *See, Bishma, supra; see also, Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (I.D. 1991); *Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871, 873 (I.D. 1993); *European Trade Specialists v. Prudential Grace Lines*, 19 S.R.R. 59, 62-63 (FMC 1979). Therefore there is no merit to respondents' assertion that this claim is time barred or somehow precluded under the 2011 Settlement Agreement.

C. Complainants' Claim For Reparations Due to Respondents' Unlawful Release of Cargo Are Not Time Barred and Are Not Covered Under the 2011 Settlement Agreement

As previously set forth above, the complainant explains that with respect to five particular shipments, Baltic reached out to Ms. Tara Nielsen of the Commission when the respondents: (1) ceased communication with Baltic with respect to these shipments; and (2) unlawfully contacted Baltic's customers directly.

Based upon Baltic's contact with the Commission and its subsequent intervention, Baltic reasonably believed that the respondents would not subsequently release the cargo and collect payment from Baltic's customers without notifying Baltic and without Baltic's consent. Unfortunately, this was not the case and after respondents ceased all contact with complainant on December 29, 2011, Baltic discovered on or about January 5, 2012 that the respondents did in fact release Baltic's cargo and collect payment from Baltic's customer. These shipments were released without informing Baltic, when the respondents surrendered the original bill of lading to the common carrier known as MSC.

The complainant has alleged that the respondents violated the Shipping Act by failing to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property (Complaint ¶ 9). With respect to this violation, respondents' act in releasing cargo to a third party without notifying the complainant is a failure to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property" in violation of section 10(d)(1). *See, Bimsha, supra*. In light of: (1) the complainant's contact with the Commission and its subsequent reasonable belief that the cargo would not be released without its permission; and (2) respondents' refusal to communicate with complainant after December 29, 2011, it is submitted that under the discovery rule, this claim is timely, or at the minimum, creates issues of fact regarding how this claim is affected by the three year statute of limitations and the 2011 Settlement Agreement, further warranting denial of respondents' motion at this time. The Complainant did not learn that the cargo was actually released until January 5, 2012. (Presniakovas Affidavit ¶ "55").

D. The Respondents' Unilateral Alteration of Shipping Documents is a Violation of the Shipping Act Which is Not Time Barred

As set forth above, the respondents unilaterally changed the shipping instructions on complainants' dock receipts/masters and ordered that the ocean liner issue an "original" bill of lading, thereby creating the

requirement that the consignee surrender the bill of lading at the port of destination in order to receive the cargo. On May 5, 2015, MSC partially produced the documents requested in the Subpoena signed by the Commission, dated March 17, 2015. The subpoenaed documents include copies of the shipping instructions/masters provided to MSC by the respondents. A comparison of complainant's original shipping instructions against the respondents' instructions to MSC show that the respondents unilaterally changed the shipping instructions provided to them by complainant. The respondents' shipping instructions to MSC are being revealed for the first time, due to the fact that they were never provided to complainant during the course of the parties' relationship.

Respondents' alterations of the shipping instructions are a violation of the Shipping Act that could not have possibly been discovered until May 5, 2015, when the documents were produced by MSC. *See, e.g., Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., et al*, (FMC Docket 10-06) 2014 WL 5316331 (respondent failed to establish, observe, and enforce just and reasonable regulations and practices by changing the bills of lading at co-respondent's request, when it knew, or should have known, that co-respondent was acting adversely to Complainants' interests. Accordingly, Complainants have met their burden to demonstrate a violation section 10(d)(1) of the act). With respect to this newly discovered violation, it is also submitted that the statute of limitations began to run on May 5, 2015.

E. The Respondents' Continued Refusal to Turn Over House Bills of Lading, Freight Invoices and Other Shipping Documents is a Continuing Violation

With respect to this violation, which is discussed at length in the complaint and in this brief, the respondents have continually refused the complainant's demand that they produce the house bills of lading, freight invoices and other shipping documents, although duly demanded. With respect to this violation, the Commission has indeed recognized that NVOCCs violate section 10(d)(1) when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and therefore engage in an unjust and unreasonable practice. *See, Yakov Kobel et al v. Hapag-Lloyd A.G et al*, 32 S.R.R. 1720, 1730 (FMC July 12, 2013). *See, also, Petra Pet Inc. v. Panda Logistics Ltd.*, 33 S.R.R. 4 (FMC 2013). On this issue, the respondents incorrectly argue that "there is no requirement in the Shipping Act or the Federal Maritime

Commission's regulations requiring a carrier to issue a bill of lading" (Respondents' Brief, p.4). Indeed, as the Commission may be aware, the duties and responsibilities of Ocean Transportation Intermediaries are governed by 46 CFR Part 515, Subpart D, and section 46 CFR 515.32 of that Subpart, which governs Freight forwarder duties, states as follows:

"Upon the request of its principal(s), each licensed freight forwarder shall provide a complete breakout of its charges and a true copy of any underlying document or bill of charges pertaining to the licensed freight forwarder's invoice"

To the extent that respondents may argue that the foregoing statute is inapplicable, it is nevertheless well settled that an unreasonable refusal to release documents is a violation of section 10(d)(1) of the Shipping Act. *See, Petra Pet, supra*. With respect to the case law cited above on the continuing violation doctrine, it is significant that the respondents' refusal to produce the documents is not an isolated incident. Indeed, the record demonstrates that these requests were made numerous times, both verbally and in writing, and both prior to and subsequent to the execution of the 2011 Settlement Agreement. As explained in *Seatrain Gitmo, supra*, "any unlawful act, however, which continues becomes not one act but a series of individual acts each time it is enforced, and the statute of limitations is to be measured against each act giving rise to an alleged new injury." *Seatrain Gitmo, supra* at 1082. To the extent that any specific overt acts were made by the respondents, or to the extent that the individual refusals by respondents to produce the requested documents took place, as stated above, these acts took place both prior to and subsequent to the execution of the 2011 Settlement Agreement. To the extent that the Commission agrees that these documents should have been produced pursuant to paragraph "11" of the 2011 Settlement Agreement, then this violation of the Shipping Act could not have occurred any earlier than November 30, 2011 (when the 2011 Settlement Agreement called for the production of these documents), and within the three year statute of limitations.

III. The Shipping Act Violations Arising From the Audit Are Timely By Operation of the Discovery Rule, Which Tolls The Statute Of Limitations, and Due to Their Nature As "Continuing Violations"

As set forth above, the Audit revealed, among other things that: (1) EUL charged Baltic for shipments in excess of the amounts set forth in EUL's published tariffs; (2) that said tariffs did not bear any relevance whatsoever to the various shipments handled by respondents on behalf of Baltic; (3) EUL collected payment from Baltic in excess of \$200,000.00 for shipments for which it had no tariff on file; (4) EUL also engaged

in an unfair and unjustly discriminatory practice by charging Baltic rates greater than those it charged other shippers; (5) that the respondents had sold bookings to an unlicensed Ocean Transport Intermediary, which had allowed respondents and that company to effectively dominate the market.

With respect to the foregoing, it bears noting that at all times, the respondents constantly told the complainants that the rates being charged for the bookings at issue were “tariffs”. It also bears noting that the entire record in this matter makes it clear that the complainant did not have any reason to believe that there was no tariff on file for the routes handled by respondents on behalf of Baltic. Indeed, there is nothing in the 2011 District of New Jersey Complaint which gives rise to any allegations regarding the respondents’ failure to charge complainant in accordance with its published tariffs, or that the respondents had failed to keep a tariff on file. The crux of the complainant’s claims in the 2011 action were that the respondents demanded that complainant pay an additional \$175,000.00 over and above the shipping charges that complainant had already paid to respondents for shipment of cargo (such payments having been made in full for the cargo that was shipped), and that the respondents threatened to hold complainant’s cargo hostage until the additional \$175,000.00 in extra charges were paid. (See, DNJ Complaint annexed to respondents’ motion, ¶ “40”).

Specifically, paragraph “42” of the 2011 Complaint breaks down what this \$175,000.00 in “shipping charges” were: “These charges, which are referred to as the ‘Extra Charges’ consist of: (a) an \$8.00 per container charge for port security; (b) an \$8.00 per container charge for carrier security; (c) a \$25.00 charge for ‘European Cargo Data Declaration’; (d) a \$25.00 ‘Export Chasis Usage’; (e) a \$25.00 ‘Telex Release Fee’; and (f) a \$100.00 ‘Doc fee’.” (See, DNJ Complaint annexed to respondents’ motion, ¶ “42”). – That lawsuit was a dispute over imaginary shipping charges conjured up by the respondents and applied retroactively to shipments booked by complainant through the respondent.¹⁸ Those shipping charges and that dispute have absolutely nothing to do with the matters at hand, which, among other things, are the respondent’s violations of the Shipping Act in failing to charge the complainant in accordance with published tariffs for the port to port shipment of 40 foot HC containers. To be clear, among other things, this proceeding

¹⁸ The Commission is respectfully referred to the spreadsheet in Presniakovas Exhibit “N-1” which shows that respondents retroactively added additional charges in the amount of approximately \$191 per container for containers shipped between June 2, 2011 and November 14, 2011 for a total amount of \$175,000.00.

is about the fact that the respondents' tariffs listed online in Sumner Tariff do not coincide with the amounts quoted by the respondents in Exhibit "A" to the Presniakovas Affidavit.

As explained by the complainant, it was discovered that respondents had failed to keep a tariff on file applicable to the shipments, and that respondents had engaged in discriminatory pricing only *after* Global Atlantic Logistics LLC ("GAL") had applied for an ocean freight forwarder license (the "Notice of 2012" described herein). Prior to that time, complainant had no reason to believe that respondents had engaged in discriminatory pricing, and absolutely no way of knowing what the respondents were charging their other customers for the export of automobiles overseas for the routes offered by respondents to complainant. The information regarding ocean freight charged by respondents to other customers was concealed by the respondents, and to the extent that respondents may argue that these were negotiated rates, the respondents failed to comply with the Commission's rules regarding publication of a prominent notice in their tariffs that an NRA was being used, and failed to provide free access to those tariffs.

Notwithstanding the foregoing, the respondents continued failure to keep a tariff on file for the port to port shipment of individual 40' HC containers for routes offered by it is a continuing violation of the Shipping Act within the meaning of the case law set forth above.

IV. The 2011 Settlement Agreement and Mutual Release Do Not Preclude Complainant From Seeking Relief Before This Commission

Notwithstanding that the various Shipping Act violations alleged above occurred *subsequent to* the execution of the 2011 Settlement Agreement and mutual release, and to the extent that this Commission finds that various violations occurred *prior thereto*, it is submitted that the agreement and mutual release do not preclude complainant from seeking relief before this Commission.

Up front, to the extent that the respondents may argue that complainant's alleged grievances towards respondents are merely a breach of the 2011 Settlement Agreement (and that complainant should have pursued an action in Federal Court for breach of the settlement agreement) that argument would be legally flawed. As set forth above, complainant's alleged grievances are inherently shipping act claims, which must be heard before the Commission. *See, Anchor Shipping Co. v. Alianca Navegacao E. Ligistica, Ltda.*, FMC Docket No.: 02-04, 2006 WL 3071243 (2006). Furthermore, if the Commission finds that the "Shipping Act

violations are intertwined with breach of contract issues in the present case, *such matters must be resolved before the Commission.*” *Anchor Shipping Co., supra* (emphasis added). *Anchor Shipping Co.* is further instructive on the issue that private parties “cannot contract away their access to Commission adjudication of Shipping Act claims...” *Id.* While the contract in *Anchor Shipping Co.* was a service contract subject to the Commission’s jurisdiction, the rule to be gleaned from *Anchor Shipping Co.* is that: “the Commission would still retain jurisdiction over a complaint [in the case of *Anchor*, following private arbitration between the parties] if that complaint alleges violations that are particular to the Shipping Act.....*it is the Commission's unique obligation to adjudicate Shipping Act claims.*” *Id.* (Concurring Opinion, emphasis added).

As explained above, the 2011 lawsuit was a dispute over imaginary shipping charges conjured up by respondents and applied retroactively to shipments booked by complainant. Those charges and that dispute have nothing to do with the matters at hand, which, among other things, are respondents’ violations of the Shipping Act in failing to charge complainant in accordance with published tariffs for port to port shipment of 40 foot HC containers. To be clear, among other things, this proceeding is about the fact that respondents’ tariffs listed online in Sumner Tariff do not coincide with the amounts quoted by respondents in Exhibit “A” to the Presniakovas Affidavit. Paragraph “5” of the 2011 Settlement Agreement and Mutual release pertains to “...shipping charges related to Baltic’s Cargo...” and, as explained above, paragraph “42” of the 2011 Complaint breaks down what these shipping charges were (imaginary shipping charges conjured up by respondents). Therefore, by signing the mutual release, the complainant did not waive its right to file a claim against respondents for violating the Shipping Act (in failing to charge complainant according to published tariffs for the port to port shipment of 40 foot HC containers, or for failing to keep a tariff on file at all for routes/commodities offered by respondents). The only rights released under the mutual release pertained to a dispute over imaginary shipping charges of the type described in paragraph “42” of the 2011 Complaint.

Notwithstanding the foregoing, it is well settled that “no doctrine of res judicata or estoppel precludes complainant from having its day in court on the issue of damages.” *Seatrain, supra*. The Commission is further respectfully referred to the matter of *Ceres Marine Terminal v. Md. Port Admin.*, 29 S.R.R. 356, 372 (FMC 2001), which explains that the common law doctrines of waiver and estoppel may not be invoked to

prohibit a complaint alleging a violation of the Shipping Act. While the agreement at issue in *Ceres, supra* was a lease agreement subject to the Commission's jurisdiction, the principal rule that can be gleaned from *Ceres* is that a party can *never* waive its statutorily granted rights to bring a grievance before the Commission. *Ceres, supra* at 44 ("the Commission...has never determined that by simply entering an agreement a party has waived any statutorily granted rights..."); *Ceres, supra* at 47 ("to permit [a party] to invoke the principals of waiver and estoppel in this situation would allow it to avoid responsibility for violating the Act and would contravene the statutory policy of curbing undue and unreasonable preference and prejudice and unjust discrimination"); *Ceres, supra* at 48 ("waiver and estoppel are not designed to destroy rights conferred by Congress"); *Ceres, supra* at 51 ("estoppel should not become the means by which to avoid the statutory prohibition against discrimination"); *Ceres, supra* at 52 ("The Shipping Act provides that "any person" may file a complaint, and this right is independent of the terms and conditions set forth in the agreement. [Respondent] should not be permitted to use estoppel as a shield by which to insulate itself from the legal consequences of its conduct which has been found to violate the Shipping Act."); *Ceres, supra* at 54 ("To hold otherwise would abrogate the Commission's statutory duty to promote a transportation and marine terminal system free from undue and unreasonable discrimination."). Therefore the 2011 Settlement Agreement and Mutual release do not preclude complainant from pursuing its claims before the Commission.

CONCLUSION

Accordingly, for the reasons set forth above, complainant requests that the instant motion be denied in its entirety.

Dated: May 8, 2015
Brooklyn, NY

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANT'S BRIEF IN OPPOSITION TO RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION with EXHIBITS, and AFFIDAVIT OF ANDREJUS PRESNIAKOVAS with EXHIBITS** upon Respondents' Counsel, The Law Office of Doyle & Doyle, with the address of 636 Morris Turnpike, Short Hills, NJ 07078 by first class mail, postage prepaid, and by email (gdoyle@doyelaw.net).



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Dated: May 8, 2015 in Brooklyn, New York.