

**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 SUPPORT OF
ITS' EXCEPTIONS TO INITIAL DECISION**

BALTIC AUTO SHIPPING, INC. ("Baltic"), by and through its Counsel, Marcus A. Nussbaum, Esq., pursuant to Rule 227 of the Federal Maritime Commission's ("FMC" or "Commission") Rules of Practice and Procedure, 46 C.F.R. § 502.227, submits the following Brief and Exceptions to the Initial Decision issued in this proceeding by presiding Administrative Law Judge, Clay G. Guthridge, on September 15, 2015.

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. TIMELINE OF EVENTS AND LITIGATION	4
<i>Brief Background of the History between the Parties and the 2011 Federal Litigation</i>	4
<i>The Settlement of the 2011 Action and the Resultant 2011 Settlement Agreement</i>	6
<i>Respondents' Unlawful Activities Subsequent to the Execution of the 2011 Settlement Agreement</i>	8
A. THE ALJ ERRONEOUSLY FOUND THAT BALTIC DID NOT HAVE STANDING TO PURSUE CLAIMS AS TO THE TWENTY ONE SAVANNAH SHIPMENTS IN GROUP V	10
<i>The ALJ, In Error, Ruled That the Twenty One Savannah Shipments Did Not Belong To Baltic</i>	19
<i>Baltic Savannah Was a Shipper Affiliate for Baltic Chicago</i>	24
B. THE ALJ ERRONEOUSLY CONCLUDED THAT BALTIC'S CLAIMS WITH REGARD TO THE FIVE (GROUP III) LONG BEACH SHIPMENTS WERE TIME BARRED	25
C. THE ID FAILS TO ADDRESS THE ISSUES RAISED REGARDING RESPONDENTS' FAILURE TO FULFILL NVOCC OBLIGATIONS IN VIOLATION OF THE SHIPPING ACT	32
<i>Respondents' Failure to Forward Monies for Ocean Freight to the Ocean Liner and Their Unreasonable Refusal to Communicate With Baltic</i>	32
<i>The Nature of Respondents' Violation of the Shipping Act vis a vis the Batumi Shipment Is Inherently A Shipping Act Violation and Outside the Scope of the 2011 Settlement Agreement</i>	34
D. THE ALJ ERRONEOUSLY CONCLUDED THAT BALTIC'S CLAIMS WITH REGARD TO TEN ADDITIONAL SHIPMENTS IDENTIFIED BY BALTIC WAS TIME BARRED	35
E. THE ID ERRONEOUSLY HOLDS RESPONDENTS TO BE "PREVAILING PARTIES" IN THIS PROCEEDING AND ERRONEOUSLY AWARDS RESPONDENTS ATTORNEYS' FEES	39

<i>Commission Precedent Does Not Warrant a Finding that Respondents Are Prevailing Parties</i>	39
<i>Dismissal of Respondents' Frivolous Counterclaim Further Warrants a Finding That Respondents Are Not "Prevailing Parties"</i>	41
<i>The Respondents Have Not Been Awarded Reparations in This Matter and Therefore an Award of Attorneys' Fees Is Inappropriate</i>	43
<i>Regardless Of Which Standard the Commission Adopts For Exercising Its Discretion in Awarding Attorneys' Fees, an Award of Fees to Respondents Is Not Appropriate In This Matter</i>	44
CONCLUSION	48

TABLE OF CASES

CASE	PAGE
<i>AIS Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro</i> , 25 S.R.R. 1061 (FMC 1990)	3
<i>Nyhus v. Travel Management Corp.</i> , 466 F.2d 440 (D.C.Cir.1972)	13
<i>Yakov Kobel et al v. Hapag-Lloyd A.G et al</i> , 32 S.R.R. 1720 (FMC July 12, 2013)	19
<i>Petra Pet Inc. v. Panda Logistics Ltd.</i> , 33 S.R.R. 4 (FMC 2013)	19
<i>Walters v. City of Ocean Springs</i> , 626 F.2d 1317 (5th Cir.1980)	20
<i>Bimsha International v. Chief Cargo Services, Inc.</i> , 32 S.R.R. 353 (ALJ 2011)	27, 31
<i>Adair v. Penn-Nordic Lines, Inc.</i> , 26 S.R.R. 11 (I.D. 1991)	34
<i>Symington v. Euro Car Transport, Inc.</i> , 26 S.R.R. 871 (I.D. 1993)	34
<i>European Trade Specialists v. Prudential Grace Lines</i> , 19 S.R.R. 59 (FMC 1979)	34
<i>Alexandre Kaminski v. Keystone Limited</i> , (6/23/93, FMC) Informal Docket No. 1739(I)	34
<i>Corpco International, Inc. v. Straightway, Inc.</i> , (6/8/98, FMC) Docket No. 97-05	34
<i>Tadeusz A. Pawlowicz v. William Allen</i> , (6/15/93, FMC) Informal Docket No. 1725(I)	34
<i>Anchor Shipping Co. v. Alianca Navegacao E. Ligistica, Ltda.</i> , FMC Docket No.: 02-04, 2006 WL 3071243 (2006)	35
<i>Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services</i> , FMC No. 14-04 (ALJ Apr. 15, 2015)	39, 40
<i>Tunison v. Continental Airlines Corp.</i> , 162 F.3d 1187 (D.C. Cir. 1998)	43
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1992)	43
<i>AIS Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro</i> , 25 S.R.R. 1061 (FMC 1990)	44
<i>Martin v. Franklin County Capital Corp.</i> , 546 U.S. 132 (2005)	45, 46, 47
<i>Newman v. Piggie Park Enterprises, Inc.</i> , 390 U.S. 400 (1968)	45, 46

<i>Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n</i> , 434 U.S. 412 (1978)	45, 46, 47
<i>Consolo v. Federal Maritime Comm'n</i> , 383 U.S. 607 (1966)	46
<i>Inlet Fish Producers, Inc., Complainant v. Sea-Land Service, Inc., Respondents</i> , 2001 WL 1632551	46
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994)	47, 48

FEDERAL STATUTES CITED HEREIN	PAGE
46 CFR §520.2.	5
19 CFR 192.14.	17
19 CFR 192.2(b)	17
Fed.R.Civ.P. 56(f)	20
46 C.F.R. § 515.11(c)	24
46 C.F.R. 531.3(b)	24
46 U.S.C. § 41103(a)	31
46 U.S.C § 40101(1)	48

I. INTRODUCTION

This case was initiated by Complainant Baltic Auto Shipping Inc. against Respondent non-vessel-operating-common-carrier (“NVOCC”) Empire United Lines Co. Inc. (“EUL”) and its principal Michael Hitrinov a/k/a Michael Khitrinov, who are already well known to this Commission due to EUL’s prior violations of the Shipping Act of 1984, 46 U.S.C. §40101, *et. Seq.* (the “Shipping Act”)¹. The numerous violations of the Shipping Act alleged against respondents in this action include, *inter alia*, with respect to Complainant’s cargo, that the respondents, on numerous occasions directly communicated with Complainant’s customers, thus bypassing Complainant and preventing Complainant from collecting its fee from its customer. Respondents also engaged, and continue to engage in a discriminatory pricing scheme whereby respondents 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. Respondents also 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. Therefore, this is a case with significant impact on the shipping industry.

Preliminarily it should be noted that because this decision was reached upon a motion for summary decision, the motion should be denied to the extent there are any triable questions of fact. The ALJ failed to acknowledge the existence of several such questions of fact. Further, in some instances the ID *reaches conclusions of fact* on key issues *with no factual support whatsoever in the record*. The ID also completely ignores or gives little regard to the material evidence and arguments posited by Complainant as to specific events that occurred within three years of Complainant bringing this action before the Commission with respect to approximately

¹ See, FMC Docket No.: 02-11.

thirty-eight (38) shipments for which the respondents provided services to complainant, both in respondents' capacity as an NVOCC and as an ocean freight forwarder ("OFF").

Additionally, it should further be noted that there were procedural irregularities that severely prejudiced Baltic's substantive rights. Those irregularities included the ALJ's spontaneous expansion of the scope of a motion for *partial summary decision* by granting summary judgment of *the entire matter*. The ALJ also prevented the parties from engaging in full and complete discovery regarding the shipments in which it is alleged that the respondents violated the Shipping Act. Specifically, out of the six hundred and five (605) shipments identified by complainant during discovery (Baltic App. 226-227), and for which complainants requested documents from the respondents, the ALJ limited discovery to thirty eight (38) shipments (ID at 3, Baltic App. 001-002). At that point the ALJ directed the respondents to move for *partial summary decision* at the conclusion of discovery (Id.), and then subsequently disposed of the *entire matter*. By doing so, the ALJ prejudiced Baltic by precluding it from conducting discovery on shipments for which Baltic had viable Shipping Act claims, and preventing Baltic from being able to properly oppose the motion.

The Administrative Law Judge's (ALJ) Initial Decision (ID) granted respondents' motion for *partial summary decision* and dismissed *the entire action* on the grounds that 1) Complainant's Shipping Act claims were time barred under the Act's three (3) year statute of limitations, 2) Complainant lacked standing to pursue some of its claims, and 3) some of Complainant's claims are barred under the terms of a 2011 settlement agreement between the parties in a U.S. District Court action. The ID is incorrect on all three counts.

First, in arriving at its decision, the ALJ fails to address specific instances of respondents' unlawful activity which occurred *within three years of Complainant filing this action*. Secondly, the decision misconstrues the nature of the relationships between the parties to the shipments and

the claims raised within this case by failing to take into account Complainant's rights stemming from its role as an NVOCC with respect to some shipments. Thirdly, the decision improperly interprets the scope and breadth of the 2011 settlement agreement. Based upon respondents' repeated violations and the ongoing nature of some of these allegations, allowing the ID to stand would effectively sanction respondents' actions and allow the respondents to continue to engage in the practice of unlawful practices.

Furthermore, the ID makes a grossly erroneous ruling by declaring the respondents to be "prevailing parties" and awarding them attorneys' fees under the Shipping Act, as now amended by Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014 ("Coble Act") (ID at 4, 57). As the Commission is aware, this action was started by Complainant in November of 2014 (ID at 1), prior to the enactment of the Coble Act, which was enacted on December 18, 2014. Specifically, on the issue of attorneys' fees, this Commission has made it clear that a party must have been awarded reparations in order to be entitled to an award of attorneys' fees. *See, e.g., AIS Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 25 S.R.R. 1061, 1063 (FMC 1990).

Notwithstanding that respondents have *not* been awarded reparations in this action (and therefore *are not* entitled to attorneys' fees), the very question of the effect of the Coble Act on cases started prior to its enactment is currently being decided by the Commission in its Notice of Proposed Rulemaking (FMC Docket 15-06) which seeks to answer the questions of: (a) Who is eligible to recover attorney fees?; (b) How will the Commission exercise its discretion to determine whether to award attorney fees to an eligible party?; and (c) How will the Commission apply the new attorney-fee provision to proceedings that were pending before the Commission when the Coble Act was enacted on December 18, 2014. Therefore, the section of the ID on this issue makes an erroneous ruling on the issue of attorneys' fees, an issue which is currently the

subject of a proposed rulemaking by the Commission, and *which has not yet been decided as of the time of this writing.*

Lastly, the ALJ fails to address the respondents' continued failure to produce the house bills of lading, freight invoices, and other shipping documents², for the shipments at issue herein, in violation of the both the Shipping Act and the rules and regulations governing the duties of NVOCC's and OFF's, which respondents have failed to produce in an effort to conceal their unlawful activities. The facts set forth below demonstrate that the Baltic's claims against respondents for violating the Shipping Act are neither time barred, nor was Baltic required to address its Shipping Act claims in Federal Court, thus warranting that the Commission now reverse the ID and remand the matter for further proceedings.

II. TIMELINE OF EVENTS AND LITIGATION

Brief Background of the History between the Parties and the 2011 Federal Litigation

As discussed in the underlying briefs on respondents' motion for summary decision and in the ID, there was a prior lawsuit between the parties in 2011 whereby Complainant Baltic Auto Shipping Inc. sued respondents EUL and Hitrinov in the U.S. District Court for the District of New Jersey, captioned as *Baltic Auto Shipping, Inc. v. Hitrinov et al.*, U.S.D.C. - D.N.J., 11 Civ. 6908 (FSH) (PS) (referred to herein as the "2011 Action" or the "2011 Complaint") (ID at 4-8). As alleged in the 2011 Complaint, Baltic had decided to discontinue its business relationship with the respondents after having done business for a number of years. Baltic App. 125-126. At the time that Baltic had decided to discontinue the relationship, it had in transit *approximately* 167 containers loaded with cars purchased by Baltic for export. Id. Said

² The ID incorrectly explains that "Baltic has not articulated a claim for non-monetary relief that is warranted by the facts of this case..." (ID at 4). This is incorrect as counsel for Baltic has explained, during oral argument that the non-monetary relief requested is order from the Commission directing respondents to provide the house bills of lading, freight invoices, and other shipping documents for the shipments at issue herein. See, p. 77, ln. 8-22 of the Oral Argument Transcript which can be found at Baltic App. 058.

containers contained approximately 676 used automobiles valued in excess of \$5,000,000.00. Baltic App. 127. After respondents were notified of Baltic's intention to wind down its business relationship with respondents, the respondents held Baltic's cargo hostage by unilaterally and retroactively increased their "shipping charges" which were referred to by respondents as "Extra Charges", consisting 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". Baltic App. 127-128. These Extra Charges totaled approximately \$175,000.00. Id.

As further alleged in the 2011 Complaint, respondents demanded that Baltic pay this sum of approximately \$175,000 over and above the shipping charges that had been paid throughout the parties' relationship, and that respondents demanded that Baltic pay an additional sum of approximately \$78,000 retroactively for containers that had long since been shipped, paid for and released. Baltic App. 127. As an aside, it should be noted that the focus of the 2011 action were these shipping charges (or Extra Charges) which are completely separate and apart from the *rates* for ocean freight charged by respondents for ocean freight for the shipment of forty foot (40') HC containers shipped by Baltic through respondents³. This is notable due to the fact that the ALJ also erroneously determined that the allegations in the 2011 Complaint are the same as the allegations in Baltic's FMC complaint. (ID at 3, 32) In other words, the 2011 Complaint was about *shipping charges* and the FMC complaint in this matter speaks solely about *rates* and activities engaged in by respondents which were inherently Shipping Act violations.

The 2011 Complaint explained that in response to Baltic's refusal to pay such new "shipping charges", the respondents unlawfully seized Baltic's containers and refused to release

³ As the Commission is aware, the term "rate", which is used extensively throughout Baltic's FMC complaint, is a term that is defined by the code of Federal Regulations as: "a price stated in a tariff for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated effective date or within a defined time frame." 46 CFR §520.2.

them to their intended recipients until and unless Baltic paid the newly imposed charges, including retroactive charges to be applied to containers already shipped and released. Baltic App. 128-129. In sum and substance, the crux of the 2011 Action was that respondents were “illegally and unlawfully holding [Baltic’s] cargo hostage in exchange for a payment of an artificial and unlawful debt conjured up by [respondents] only after [Baltic] decided to sever its business relationship and applied retroactively as to cargo that has long since been shipped and released.” Id.

The 2011 Complaint also explained that due to Empire’s past attempts to collect money for fraudulently fabricated fees: “On August 1, 2002, the Federal Maritime Commission published an Order of Investigation and Hearing alleging that Empire knowingly and willfully provided false information on its bills of lading that enabled Empire to collect unwarranted compensation from ocean carriers.” Baltic App. 129. It should also be noted that respondents have recently been sued for similar allegations relating to respondent’s conversion of automobiles, failure to produce the house bills of lading, freight invoices, and other shipping documents, and unlawfully exercising a maritime lien in two additional new actions before this Commission, captioned as *Igor Ovchinnikov, Irina Rzaeva, and Denis Nekipelov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and Carcont, Ltd.*, (FMC Docket No.: 15-11) and *Kairat Nurgazinov v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., and Carcont, Ltd.*, (FMC Informal Docket No.: 19531).

The Settlement of the 2011 Action and the Resultant 2011 Settlement Agreement

As discussed in the ID, the 2011 action settled within a matter of days⁴ (ID at 8), and resulted in the execution of a Settlement Agreement and Mutual Release (the “2011 Settlement

⁴ As explained by the ALJ in an Order dated May 12, 2015, Denying Complainant’s Motion for Leave to Amend its Complaint, “The litigation ended in a settlement that required Baltic to pay \$8000 to Empire for transportation of twenty three specifically identified containers...”

Agreement”) Id. That agreement was strictly centered upon the cargo then being held hostage by respondents.

In that agreement, respondents agreed to release twenty three (23) containers⁵ identified therein in exchange for a payment of \$8000.00. Baltic App. 141-149. The agreement also called for the release of an additional one hundred thirty eight (138) containers “upon arrival and payment by Baltic of the sums specified in Exhibit ‘B’ [to the agreement]”. Id. Additionally, the agreement contained a Mutual General Release that was limited to the cargo being held hostage:

“[The parties] release, remise, and discharge each other...from any and all manner of claims...of any nature whatsoever that each party now has or may have had on account of or in any way *growing out of shipping charges related to Baltic'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 this release.” (Emphasis added). Id.

Lastly, the agreement contained a clause obligating 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.” Id.

Contemporaneously with the execution of the 2011 Settlement Agreement, the parties also executed a Stipulation of Dismissal of the 2011 Action. Baltic App. 175-176. The Honorable Faith S. Hochberg executed an order of dismissal based upon that stipulation which unequivocally limited the scope of any further action within that case and the specific circumstances in which that case could be reopened. Id. Specifically, the District Court Judge included handwritten language into the order specifying as follows:

“Failure to consummate the settlement agreement will not result in the reopening of this matter by the Court to address the merits of the case; rather, if the settlement is not consummated, the Court will entertain an application solely to enforce the terms of the settlement agreement.” Id.

⁵ For which ocean freight had *already* been prepaid.

The foregoing language limiting the scope of any further action within that District Court case specifically excludes any possibility of raising any of the issues at issue in this current action within that District Court case. This point is significant due to the fact that the ALJ erroneously argued that Baltic should have gone back to the District Court to address respondents' Shipping Act violations rather than filing this current claim with the Commission. (ID at 37).

Respondents' Unlawful Activities Subsequent to the Execution of the 2011 Settlement Agreement

The ID breaks the shipments at issue in this matter down into five (5) separate groups (ID at 10-14), to wit: (1) "Group I", which consisted of shipments that Empire delivered before Baltic filed its 2011 D.N.J. Complaint on November 23, 2011; (2) "Group II", which consisted of 162 shipments that were identified in Exhibits A and B of the 2011 Settlement Agreement; (3) "Group III", which consisted of five shipments that were included in the 167 shipments alleged in the 2011 D.N.J. Complaint, but not included in the 2011 Settlement Agreement, and which Baltic refers to herein as the "Long Beach Shipments"; (4) "Group IV", which consisted of ten additional shipments that fall within the Group III description (which the ALJ erroneously claimed to be "ten newly identified shipments"); and (5) "Group V", which consisted of twenty-one shipments that Empire transported between December 2011 and October 2012 after the 2011 settlement (for which the ALJ erroneously found that Baltic was not the shipper and therefore allegedly had no standing to bring shipping act claims with respect to same), and are also the subject of Baltic's Motion for Reconsideration, a decision on which is made part of the ID. (ID at 14-19).

With respect to the "Group IV" shipments referred to above, consisting of ten additional shipments that fall within the Group III description (ID at 12), it is important to explain to the

Commission why these shipments were given separate treatment, instead of including them within Group III. As explained below, the details regarding the Group IV shipments are discussed in Baltic's post hearing submissions (ID at 177-189), where Baltic explains that these ten shipments were contained within a class of shipments wherein the ALJ did not allow the parties to conduct discovery prior to respondents' Motion for partial summary decision. Specifically, these shipments were contained within a spreadsheet that listed five hundred forty six shipments, which is identified in Baltic's motion underlying brief in opposition to respondents' motion as "Attachment "B"⁶. (Footnote in Baltic App. 017). The ALJ prejudiced Baltic by not allowing discovery regarding these shipments and then states in the ID that: "Baltic makes no attempt to further identify by booking number or container number which of the 546 entries in the spreadsheet relate to the ten newly identified shipments." (ID at 14).

While Baltic concedes that the ALJ's rulings regarding Groups I and II are correct (with the exception of an inconsistency in the ID discussed below regarding Group I, and further with the exception of one shipment discussed herein and identified as the "Batumi" shipment where the respondents cut off communications with Baltic and failed to forward monies for ocean freight to the ocean liner), it is submitted that the ALJ erroneously dismissed this action in failing to understand that the respondents violated the Shipping Act with respect to Groups III, IV, and V *subsequent* to the execution of the 2011 Settlement Agreement, and *within three years* of Baltic filing its complaint with the Commission. With respect to Groups III and IV, these are shipments whereby the respondents unlawfully contacted Baltic's customers and/or third-parties directly and then subsequently collected ocean freight and additional charges directly from those

⁶ As explained below, during the course of discovery, the parties exchanged five spreadsheets identified by the parties as "Attachments" "A" (21 Shipments), "B" (546 Shipments), "C" (25 shipments), "D" (5 shipments), and "E" (8 shipments). Baltic App. 226-227. The ALJ limited discovery to Attachments "C", "D", and "E" prior to respondents' moving for partial summary decision (Baltic App. 001-002), and then spontaneously expanded the scope of the motion for *partial* summary decision by granting summary judgment of the *entire matter*.

customers and/or third-parties and released the cargo to the customers and/or a third-party without Baltic's knowledge or permission. (Baltic App. 11, 24, 31, 179-182) The ALJ erroneously concluded that the respondents did not violate the Shipping Act by circumventing Baltic and releasing the cargo without Baltic's knowledge and permission. The ALJ erroneously based its decision on the issue of rates, overcharges, and tariffs. (ID at 12-14)

The Group V shipments consisted of twenty one shipments booked by Baltic through the respondents which shipped from the Port of Savannah, Georgia. Baltic App. (ID at 14). These were shipments in which respondents dealt directly with Baltic's loading and trucking facilities prior to shipment and in which the respondents argued had nothing to do with Baltic. Baltic App. 003-006. With respect to these shipments, the ALJ erroneously ignored *sworn testimony* from third parties involved in the trucking and loading of these shipments, as well as admissible documentary evidence from the U.S. Census Bureau indicating that these shipments were indeed associated with Baltic. Baltic App. 69-70, 95-111. Additionally, the ALJ ignored issues raised by Baltic with respect to one shipment booked by Baltic through the respondents which shipped to Batumi, in the country of Georgia⁷.

As explained in detail below, with regard to all of these specific shipments, the respondents' violations of the Shipping Act took place *within three years of Baltic filing the complaint in this action* on November 28, 2014, and *all are outside the scope of the 2011 Settlement Agreement*.

A. THE ALJ ERRONEOUSLY FOUND THAT BALTIC DID NOT HAVE STANDING TO PURSUE CLAIMS AS TO THE TWENTY ONE SAVANNAH SHIPMENTS IN GROUP V

⁷ This shipment is not specifically discussed in the ID. While the shipment arguably would have been part of the "Group II" shipments discussed in the ID, as explained below, the Shipping Act violation related to this shipment is respondents' failure to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property, and is *not* related to the respondents' overcharging of rates for ocean freight, which were the issues raised in the 2011 Action. Baltic App. 22, 24-26, 30.

The ALJ prevented the parties from engaging in full and complete discovery regarding the shipments in which it is alleged that the respondents violated the Shipping Act. During the course of discovery, the parties exchanged five spreadsheets identified by the parties as “Attachments” “A”, “B”, “C”, “D”, and “E” (Baltic App. 226-227).⁸ As discussed in detail below, the Group V shipments (i.e. the twenty one Savannah shipments) were identified in Attachment “A” and are addressed in the section of the ID that denies Baltic’s Motion for Reconsideration of the ALJ’s April 1, 2015 Order Releasing Documents Submitted *In Camera*. (ID at 14-19). This motion remained pending throughout the limited discovery period prior to respondents moving for summary decision. While the twenty one (21) Savannah shipments in attachment “A” were addressed as part of the motion for reconsideration, and while the thirty eight shipments in attachments “C”, “D”, and “E” were the subject of the respondents’ motion for partial summary decision, the ALJ did not allow discovery on the remaining five hundred and forty six (546) shipments in Attachment “B”, in which Baltic alleges that the respondents violated the Shipping Act. In other words, the ALJ granted summary decision as to over 500 shipments without allowing any discovery into those shipments.

The ALJ’s April 1, 2015 Order Releasing Documents Submitted *In Camera* (the “Order”) breaks down the twenty-one Savannah shipments into two sub-groups, to wit: eight shipments which the ALJ improperly concluded were shipped by an entity known as Baltic Auto Shipping Corp. (identified herein as “Baltic Savannah” which was Baltic’s loading and trucking facility in Savannah and partially owned by the same owner as Baltic), and thirteen shipments for which another entity was identified as the shipper. Baltic App. 004.

⁸ As set forth in detail in the underlying motion papers, Baltic explains that ALJ Guthridge directed that the parties engage in limited discovery in this matter, and specifically, discovery on only thirty eight (38) shipments (discussed in the underlying motion papers as “Attachments C, D, and E”), prior to respondents filing their motion for summary decision on the issue of the three year time bar and the effect of the 2011 Settlement Agreement on Baltic’s claims herein. Baltic App. 001-002, 21.

These twenty one shipments all shipped between December of 2011 and late October of 2012, subsequent to the execution of the 2011 Settlement Agreement (ID at 16), and these are shipments for which the respondents charged Baltic rates for ocean freight that had no bearing or connection to any tariffs which the respondents had published for the shipment of forty foot HC containers from port to port. Baltic App. 14, 25-26, 33-34. With respect to these shipments, it is alleged, *inter alia*, that respondents violated 46 U.S.C. §§ 41104(2)(a), 41104(4)(a), 41104(8), and 41102(c) by charging Baltic rates greater than those reflected in its published tariff, and by failing to provide Baltic with: (1) proper and lawful documents of ownership (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport. *Id.*, Baltic App. 113-118.

The ALJ's errors with respect to these shipments arose when the parties were conducting discovery in this matter. Because these shipments were unquestionably not time barred (ID at 16) the respondents argued that these shipments had nothing to do with Baltic, and had been booked through the respondents by third parties unrelated to Baltic. (ID at 14). Respondents refused, however, to produce certain documents related to these shipments that would have established that *they had indeed been shipped by Baltic*, but rather argued that these were shipments booked through respondents by Baltic Savannah, who was not a complainant in this action. *Id.* Respondents specifically argued that Baltic Savannah or other entities were the shippers of record on the shipping documents in their possession. *Id.*

At that point in time, the ALJ directed respondents to submit the documents for review *in camera* (ID at 15), and did not advise the parties that he would make any formal findings of fact at that time (Baltic App. 001-002) (i.e. it was understood that the ALJ would simply either allow Baltic access to the documents, or not). The ALJ subsequently issued a formal Order, dated April 1, 2015 on the issue of whether or not the shipments belonged to Baltic and, *without giving Baltic the opportunity to brief the issue*, the Order made a finding of fact *that the shipments did*

not belong to Baltic. Baltic App. 003-006. Notably, the ALJ admits in the Order that he initially believed that the issue could be resolved informally via the exchange of letters between the parties and the Commission, but then decided, *post facto*, that the letters would be treated as motions and made part of the record. Baltic App. 005.

The April 1, 2015 Order prejudiced Baltic in that it did not have the opportunity to provide documents and information it normally would have if the Commission had, from the start, directed the parties to resolve the issue of the twenty one shipments via motion practice. As a result thereof, Baltic then filed a Motion for Reconsideration of the April 1, 2015 Order. Baltic App. 228-244. The ALJ's decision on the Motion for Reconsideration is made part of the ID, and the ALJ denied Baltic's Motion for Reconsideration, erroneously finding that Baltic failed to establish that it was the shipper *for any* of the twenty one Savannah shipments (ID 14-19). In ruling that the shipments did not belong to Baltic, the ALJ wholly ignored sworn testimony from a principal of Baltic Savannah that she was communicating directly with the respondents on Baltic's behalf, and that Baltic Savannah is a trucking and loading facility only. Baltic App. 220-221. The ALJ also ignored sworn testimony from an employee of the other trucking and loading facility, in which he explained that he completed the dock receipts at the time that the cargo was loaded, and that he used the booking numbers provided to him by "Andrejus Presniakovas from [Baltic]" (i.e. complainant Baltic Auto Shipping Inc.). Baltic App. 72-94. Additionally, the ALJ, (in violation of legal precedent which requires the ALJ to be the *finder* of fact, and not the *trier* of fact during a motion for summary decision⁹) ignored the written correspondence between Baltic's counsel and the U.S. Census Bureau which confirmed that for at least three of the twenty

⁹ 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).

one shipments, that Baltic was the shipper of record.¹⁰ That correspondence identifies Baltic by name, address, Federal Tax ID number, and identifies the shipments by AES ITN number. Baltic App. 69-70.

Lastly, as explained below, the rulings in the ID on this issue are further in error due to the fact that Baltic Savannah is an affiliated company of complainant Baltic (i.e. “Affiliate” or “Shipper Affiliate”) as defined by the Commission, which allowed Baltic Savannah to deal with respondents on behalf of complainant Baltic. In the ID, the ALJ determined that Baltic was not the shipper of the twenty one shipments and therefore did not have standing to pursue a claim against respondents, specifically stating that:

“The twenty-one Group V shipments occurred between December 2011 and October 2012. Baltic's FMC Complaint alleges that Empire transported cargo for Baltic from November 2007 through January 2012. (FMC Complaint ¶¶ 12-17.) This indicates that when it drafted its FMC Complaint, Baltic, an NVOCC licensed by the Commission, did not consider itself to be the shipper on the Group V shipments and these shipments are beyond the scope of the FMC Complaint. *The motion for reconsideration is denied for that reason.*” (ID at 18)

Thus, the ALJ extrapolates from the timeframes in the complaint as to Baltic’s beliefs and intentions. In doing so, the ALJ misinterpreted the pleading and ignored evidence to the contrary. Furthermore, and as explained below, the ALJ misunderstood the evidence presented regarding Baltic’s role as owner of some of the cargo, and its role as NVOCC where Baltic did not own the cargo and was shipping on behalf of its own clients. As a preliminary issue, it is notable that the ALJ’s citation to Baltic’s FMC complaint is incorrect, as Baltic alleges in the complaint that: “From *approximately* November of 2007 through January of 2012, Complainants, via EUL, shipped containers with automobiles...to ports abroad including...” Baltic App. 115. This is significant in that three of the twenty one Savannah shipments departed

¹⁰ With respect to that correspondence, the ALJ erroneously states that: “Baltic submitted an email purportedly from a representative of the U.S. Census Bureau stating that Baltic Auto Shipping was the principal on at least some of the shipments. Baltic Supp. Memo. (7/10/15) Certification of Nussbaum Exhibit A. The Census Bureau statement does not state whether it was Baltic Auto Shipping, Inc., or Baltic Auto Shipping Corp.” (ID at 19).

from the port of loading in December of 2011, and another two of those shipments departed in January of 2012. (ID at 16). Therefore the ALJ's statement that Baltic "did not consider itself to be the shipper on the Group V shipments" (ID at 18) is incorrect.

Additionally, there is a substantial and material inconsistency in the ID which must be addressed by the Commission, and which further warrants reversal of the ID regarding the Savannah shipments. In the ALJ's discussion regarding the Group I shipments, the ALJ makes reference to an audit conducted by Baltic which states that respondents carried "eighteen containers [for Baltic] in 2012" (ID at 11), and the ALJ further explains that "For the purposes of this decision, it is assumed that these figures are not in dispute." *Id.* This language by the ALJ creates a substantial and material inconsistency in the ID for the following reason: As explained herein with respect to twenty one shipments that departed from the port of Savannah, the ALJ found that these shipments were not associated with Baltic and were outside of the scope of the complaint (ID at 18). In making this finding, the ALJ specifically relied upon an allegation in the complaint where Baltic alleges that: "From *approximately* November of 2007 through January of 2012, Complainants, via EUL, shipped containers with automobiles...to ports abroad..." Baltic App. 115. This begs the question of how can these twenty one Savannah shipments possibly be outside of the scope of the complaint when the ALJ previously assumes that it is undisputed that respondents carried eighteen containers for Baltic in 2012? The answer is simple, as it is not possible for the twenty one shipments to be outside of the scope of the Complaint when these were the only additional shipments that Baltic booked through respondents beginning in late December of 2011 and continuing into 2012. To the extent that the allegations in the complaint were unclear as to when the parties did business, Baltic should have been granted leave to amend the complaint.

Therefore, the ALJ erred by declaring the twenty one Savannah shipments to be outside of the scope of the complaint when, for the purposes of this motion, it is “undisputed” that respondents carried eighteen containers for Baltic in 2012. Furthermore, the ALJ ignored the specific words used by Baltic regarding the timeframe in which the parties did business, wherein Baltic alleges that: From *approximately* November of 2007 through January of 2012, Complainants, via EUL, shipped containers with automobiles...to ports abroad...” It is respectfully submitted, that these issues, *at a minimum*, create triable issues of fact which warrant reversal of the ID.

Additionally, Baltic respectfully submits that the ALJ failed to take into account Baltic’s role as an NVOCC with respect to the twenty one Savannah shipments. Specifically, although Baltic did not hold title to the automobiles within some of the twenty one shipments, Baltic was acting as an NVOCC for those shipments and consequently, Baltic had the rights and protections of the Shipping Act with respect to those shipments. Therefore Baltic had the legal authority to pursue respondents for their breaches of that Act to the extent they damaged Baltic. Those violations, among others, consisted of respondents’ violation 46 U.S.C. §§ 41104(2)(a), 41104(4)(a) and 41104(8) by charging Baltic rates greater than those reflected in respondents’ published tariff.. These acts are violations of the Shipping Act, yet were never addressed by the ID.

As explained throughout the record in this matter, Baltic is engaged in the business of shipping containers with automobiles to ports abroad. In Baltic’s brief in opposition to the motion and during oral argument, counsel for Baltic explained that Baltic either acted in the capacity of merchant for the various vehicles that it owned (i.e. Baltic shipping its own cargo through respondents), or in the capacity of NVOCC for the vehicles that it was exporting on behalf of its own customers (and thereby booking space on the ocean liners through the

respondents). Baltic App. 013-014, (See, also Transcript of Oral Argument, p. 18, ln. 7-16 which can be found at Baltic App. 044).

Without regard to Baltic's role in a particular transaction, the documents that Baltic needed to present to respondents for the export of an automobile (or that respondents needed to present elsewhere), were always the same. The automobile export industry is heavily regulated, and that in addition to complying with the rules and regulations of this Commission, an OTI engaging in the automobile export business must also comply with the regulations of the U.S. Department of Commerce, Census Bureau, and those of the Department of Homeland Security, U.S. Customs and Border Protection ("CBP"). With respect to the requirements of the Census Bureau and CBP, this Commission is aware that exporters of automobiles overseas are required to file what is known as Shippers Export Declaration¹¹, identifying the U.S. Principal Party in Interest ("USPPI") for the shipments. 19 CFR 192.14. As set forth above, for three of those Shippers Export Declarations, the Census Bureau confirmed in writing that Baltic indeed was the USPPI and this fact was ignored by the ALJ.

As a result of the CBP export control regulations requiring the presentation of ownership documents to CPB prior to export (19 CFR 192 *et seq.*), the respondents always knew what role Baltic was playing in a particular transaction, whether it be that of merchant/owner, or NVOCC. In the course of processing the shipments for export, per export control regulations, respondents would receive the copies of certificates of title for a vehicle (which respondents necessarily provided to the ocean liner in order to comply with CBP regulations such as 19 CFR 192.2(b)), which would identify the owner of that vehicle as Baltic or someone else. This also placed

¹¹ Indeed, respondents admit in their brief in support of the motion for summary decision that: "Baltic provided EUL with shipping instructions (titled "Dock Receipts" as they were also used for that purpose - as delivery receipts between the party delivering cargo to the terminal, and the terminal operator) that: described the shipment; identified the origin and destination points/ports: *contained Automated Export System ("AES") numbers (for U.S. Customs' purposes)*". Baltic App. 152, 196.

respondents in the unique position of knowing whom, if not Baltic, was the U.S. Principal Party in Interest for the vehicles being exported.

In this proceeding, the respondents never produced copies of the titles (which they were required to provide to the ocean liner) in support of their assertion that shipments did not belong to Baltic, rather, they only produced the dock receipts (as noted by the ALJ at Baltic App. 004) prepared by Baltic and the loading and trucking facilities at Baltic's direction and request (as explained by Baltic at Baltic App. 073, 220-221). Respondents relied upon the fact that the dock receipts do not contain Baltic's name on them¹², and that respondents communicated directly with Baltic's loading and trucking facilities. As explained by personnel at both of Baltic's trucking and loading facilities, to wit: in the Affidavit of Alla Kotova (submitted in support of Baltic's Motion for Reconsideration) and the Certification of Darius Varzinskas (submitted as part of Baltic's post hearing submissions), between 2009 through 2012, the parties engaged in a regular course of business whereby Baltic shipped containers through respondents from the Port of Savannah. (Kotova Affidavit ¶5 at Baltic App. 220). With respect to eight of the twenty one shipments, Ms. Kotova explained that Baltic prepared the dock receipts. (Kotova Affidavit ¶9 at Baltic App. 220-221). Mr. Varzinskas explained that he personally prepared the other thirteen dock receipts at Baltic's direction and request in his capacity as supervisor of the warehouse where the vehicles were loaded for export, when he "completed the dock receipts/masters for these shipments and utilized the bookings numbers provided to [him] by Andrejus Presniakovas from Baltic Chicago". (Varzinskas Affidavit ¶4 at Baltic App. 73).

In essence, the respondents were able to mislead the ALJ by providing the dock receipts (which were prepared by Baltic or at its direction and request but did not have a Baltic letterhead on them) and which *appeared* to support respondents' argument that the shipments did not

¹² Respondents have annexed a "specimen" Baltic dock receipt to the affidavit of Michael Hitrinov. As the Commission can see, this dock receipt does not contain a letterhead with Baltic's name on it. Baltic App. 164.

belong to Baltic. At the same time, respondents omitted other documents (which respondents necessarily provided to the ocean liner) which would have established that the shipments belonged to Baltic. Consequently, the ALJ's failure to afford the parties the opportunity to conduct discovery with respect to these shipments prior to the respondents moving for summary decision severely prejudiced Baltic's ability to oppose respondents' motion.

The ALJ, In Error, Ruled That the Twenty One Savannah Shipments Did Not Belong To Baltic

The ALJ erroneously found that Baltic failed to establish that it was the shipper *for any* of the twenty one Savannah shipments. (ID at 18) Part of this erroneous ruling was due to the fact that the respondents *refused to produce its house bills of lading in this matter*. (Presniakovas Affidavit ¶44 at Baltic App. 255). Such house bills of lading *would have had to have identified Baltic as the shipper of record* for the twenty one Savannah Shipments, and respondents deliberately refused to produce these documents in an effort to mislead the ALJ on this issue. This is the reason that the respondents provided "dock receipts" to the ALJ for in camera review, and which were not prepared by respondents, but rather by Baltic. The ALJ was misled by the fact that the dock receipts did not have Baltic's letterhead on them¹³. Notwithstanding that respondents' failure to produce the house bills of lading constitutes a Shipping Act Violation in and of itself, it is submitted that the respondents should not be permitted to benefit from such a violation.¹⁴ Indeed, because this issue was being raised in respondents' motion for summary decision, there should have been a presumption against respondents as to the contents of

¹³ See, Footnotes "11" and "12".

¹⁴ 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).

documents that they were improperly withholding¹⁵. Additionally, the facts in the record explained below, together with the documentary evidence submitted to the ALJ, *at the minimum*, created additional triable issues of fact which warranted denial of respondents' motion for summary decision.

By way of background, Mr. Andrejus Presniakovas is the owner of complainant, Baltic Auto Shipping Inc., based in Chicago ("Baltic" or "Baltic Chicago"), and is also an owner of an affiliated company known as Baltic Auto Shipping Corp., based in Savannah Georgia ("Baltic Savannah") Baltic App. 245. Mr. Presniakovas co-owns Baltic Savannah together with Ms. Alla Kotova (alternatively identified herein as "Alla Lina") who is the President of Baltic Savannah. Baltic App. 219. Baltic Savannah is not an NVOCC, and is a loading and trucking facility only. Kotova Affidavit ¶4 at Baltic App. 220. In ruling that the shipments did not belong to Baltic, the ALJ wholly ignored sworn testimony from Alla Kotova, principal of Baltic Savannah, that she was communicating directly with the respondents on Baltic's behalf (Kotova Affidavit ¶11 at Baltic App. 221), and that Baltic Savannah is a trucking and loading facility only.

The ALJ erroneously failed to consider that Baltic's Motion for Reconsideration also explained, *inter alia*, that: (1) Baltic Chicago and Baltic Savannah have common ownership (Baltic App. 241); (2) Baltic Savannah was a loading and trucking facility only, that was used by Baltic Chicago for shipments leaving from the port of Savannah (*Id.*); (3) the respondents always knew that Baltic Savannah was a loading and trucking facility only, and that all of the bookings belonged to Baltic Chicago (*Id.*); (4) due to the course of conduct engaged in between the parties, Baltic Chicago authorized Alla Kotova, as agent, to speak on Baltic Chicago's behalf (*Id.*); (5)

¹⁵ The rule that granting summary judgment is improper before a party has had an adequate opportunity to take discovery applies in cases where the evidence necessary to respond to the summary judgment motion is not within the non-moving party's possession, custody or control. See, Fed.R.Civ.P. 56(f); see also, *Walters v. City of Ocean Springs*, 626 F.2d 1317, 1321 (5th Cir.1980) (a Rule 56(f) motion is more likely to be granted when relevant facts are in exclusive control of the opposing party).

the respondents had a practice of forwarding via email the booking confirmations for the various bookings made through respondents by Baltic Chicago and which were addressed simultaneously to Baltic Chicago and Baltic Savannah (Kotova Affidavit ¶6 at Baltic App. 220); and (6) the dock receipts/masters provided to the ALJ for *in camera* review were all prepared by Baltic Chicago, who obtained the booking numbers for the shipments from the respondents (Kotova Affidavit ¶9 at Baltic App. 220-221). It is submitted that all of the foregoing created triable issues of fact with respect to Baltic's standing to bring Shipping Act claims regarding the twenty one Savannah Shipments as a shipper either through its role as an NVOCC and/or owner of the cargo.

Additionally, during oral argument on June 12, 2015, Baltic's counsel explained to the ALJ that for these twenty-one Savannah shipments, Baltic either acted in the capacity of NVOCC or as merchant (owner of the cars):

“JUDGE GUTHRIDGE: Okay. Now, on those 21 shipments, what was Baltic's -- Those 21 shipments that were post-settlement, what was Baltic's role in those shipments? Complainant Baltic?”

MR. NUSSBAUM: Okay. Your Honor, I understand that Baltic's role in those shipments was either -- either as the merchant for vehicles that it had owned, or as an NVOCC, where it was shipping the vehicles on behalf of its client.”

(June 12, 2015 Transcript of Oral Argument, p. 18, ln. 7-16 which can be found at Baltic App. 044).

The ALJ then subsequently directed Baltic to supplement the record and submit additional documents post hearing, establishing that Baltic Chicago was involved in the shipments. (June 12, 2015 Transcript of Oral Argument, p. 19, ln. 14-21 which can be found at Baltic App. 044). In accordance with that directive, counsel for Baltic provided a Supplemental Certification, which contained a letter request from Baltic's counsel to the U.S. Department of Commerce, Census Bureau, containing a request for confirmation that Export Information was filed through

the Bureau's Automated Export System identifying Baltic as the U.S. Principal Party of Interest for three of the twenty-one Savannah Shipments. The request identified Baltic by address, Federal Tax ID number, and made reference to the AES ITN numbers, and booking and container numbers for the shipments. The Supplemental Certification also contained an email response from the Census Bureau confirming that for the three shipments identified by Baltic that "All of these shipments were reported by Baltic Auto Shipping and they show Baltic as the US Principal Party in Interest." Baltic App. 069-070.

Notably, there is a footnote on page "19" of the ID (footnote #8), explaining that:

"Baltic submitted an email purportedly from a representative of the U.S. Census Bureau stating that Baltic Auto Shipping was the principal on at least some of the shipments. Baltic Supp. Memo. (7/10/15) Certification of Nussbaum Exhibit A. The Census Bureau statement does not state whether it was Baltic Auto Shipping, Inc., or Baltic Auto Shipping Corp."

The ALJ, in error, neglected the fact that the correspondence from Baltic's counsel to the Census Bureau clearly states that counsel is asking for confirmation that the shipments belong to Baltic Auto Shipping Inc. (Baltic Chicago), which counsel identified by address and tax identification number, and that the email response from the Census Bureau is in the affirmative.

It is respectfully submitted that in light of the correspondence between Baltic's counsel and the Census Bureau, if there was any doubt or question as to whether or not the shipments belonged to Baltic Chicago, such question was a material issue of fact which should have warranted denial of respondents' motion for summary decision. It is additionally submitted that Baltic should have been given leave to amend the complaint to add Baltic Savannah as a complainant, to the extent that any shipments were determined not to belong to Baltic Chicago.

The ALJ also ignored sworn testimony from an employee of the other trucking and loading facility that loaded thirteen of the twenty one shipments, in which the employee explained that he completed the dock receipts at the time that the cargo was loaded, and that he used the booking

numbers provided to him by “Andrejus Presniakovas from Baltic Chicago” (i.e. complainant Baltic Auto Shipping Inc.).

Per the ALJ’s instructions that Baltic supplement the record after oral argument on June 12, 2015, Baltic provided a Certification from third-party Mr. Darius Varzinskas, who supervised the warehouse/loading facility in Savannah where thirteen of the twenty one shipments were presented for export by the shippers. In that certification, Mr. Varzinskas annexes the dock receipts/masters for thirteen shipments which are identified on page “19” the ID as “shipments for which an entity other than Baltic Savannah was identified as the shipper...” In that certification, Mr. Varzinskas explains the following two critical points:

“The containers connected to these [thirteen] booking numbers were delivered to my loading facility by the above referenced shippers/exporters of record...”

“After the containers connected to these booking numbers were delivered to my loading facility by the above referenced shippers/exporters of record, I completed the dock receipts/masters for these shipments and utilized the booking numbers that *were provided to me by Andrejus Presniakovas from Baltic Chicago.*” (emphasis added)

(Varzinskas Affidavit ¶¶2, 4 at Baltic App. 072-073) (Dock receipts/masters for the thirteen shipments are at Baltic App. 075-094)

The ID, in error, makes no mention of the Varzinskas certification, which contains affirmative testimony that Baltic Chicago was the NVOCC for thirteen shipments. In light of the foregoing, and in light of the explanation: (1) set forth in detail in Baltic’s Motion for Reconsideration regarding the parties’ mutual understanding that Baltic Savannah was a trucking and loading facility only (with Alla Lina acting on behalf of Baltic Chicago when corresponding with respondents); (2) the requirements placed upon respondents by U.S. Customs and Border Protection (as described above) for the export of automobiles overseas, which establishes that respondents knew that they were providing NVOCC services *solely* on behalf of Baltic Chicago; and (3) the affirmative statement of Darius Varzinskas that for thirteen of the twenty one shipments, that he prepared the dock receipts under the direction and control of Baltic Chicago;

and (4) the written confirmation from the U.S. Census Bureau that Baltic was the USPPI for three of the twenty one shipments, it is respectfully submitted that the ID erroneously concludes that “Baltic has not set forth grounds to reconsider the Order entered April 1, 2015.” (ID at 19).

As explained above, while Baltic agrees with the ALJ’s finding that it was not the *shipper* for thirteen of the twenty one shipments, the ID erroneously fails to find that for those shipments, *Baltic was acting in the capacity of NVOCC*. Additionally, with respect to the remaining eight shipments which the ID held Baltic Savannah to be the shipper of record, the ID erroneously fails to consider the correspondence from the U.S. Census Bureau affirmatively stating that Baltic Chicago was the USPPI for three of the eight shipments. It is respectfully submitted that at a minimum, the foregoing points further serve to create triable issues of fact warranting denial of respondents’ motion for summary decision.

Baltic Savannah Was a Shipper Affiliate for Baltic Chicago

The Commission’s website on “Questions, Answers, and Helpful Information”¹⁶ explains that:

“Although ‘affiliate’ is not defined by the Commission’s rules governing service contracts, the Commission is guided by this commonly-accepted definition, such as that included in its licensing and NSA regulations: associated with, under common control with, or otherwise related through stock ownership or common directors or officers. 46 C.F.R. § 515.11(c); 46 C.F.R. 531.3(b).”

On this issue the ID acknowledges the possibility of Baltic Chicago and Baltic Savannah having common ownership. (ID at 18) If the two entities have common ownership, then *a fortiori*, it stands that as a “shipper affiliate” that Baltic Savannah had every right to deal directly with the respondents on behalf of Baltic Chicago, including: receiving the booking numbers from respondents and forwarding the dock receipts/masters and certificates of title to the respondents at the direction and request of Baltic Chicago. Baltic Savannah’s status as a shipper affiliate of

¹⁶ <http://www.fmc.gov/questions/#408>

Baltic Chicago demonstrates that the ID erroneously found Baltic Savannah to be the shipper of record for eight of the twenty one Savannah shipments.

Lastly, the ALJ's findings of fact regarding the twenty one Savannah shipments create an additional material inconsistency in the ID regarding respondents' violations of the Shipping Act for the ten additional shipments (Group IV) discussed below. The ALJ ruled that Baltic Chicago and Baltic Savannah are separate corporate entities and that to the extent that Baltic Savannah was determined to be a shipper of cargo, that Baltic Chicago had no standing to allege Shipping Act claims for those shipments. (ID at 18). If that ruling stands (i.e. that Baltic Savannah is unrelated to Baltic Chicago) then the Commission must find that respondents violated the Shipping Act with respect to these ten additional shipments. As explained below, the facts on the record demonstrate that complainant Baltic was the NVOCC for these ten shipments, some of which were released directly to: (1) Baltic Savannah at its direction and request; or (2) to other consignees after contacting Baltic Savannah. If Baltic Savannah is determined to be an entity unrelated to complainant Baltic, then the respondents had no right to release said shipments to complainant Baltic without informing Baltic and obtaining its consent to do so, and therefore violated the Shipping Act in the process.

B. THE ALJ ERRONEOUSLY CONCLUDED THAT BALTIC'S CLAIMS WITH REGARD TO THE FIVE (GROUP III) LONG BEACH SHIPMENTS WERE TIME BARRED

The five shipments departing from the port of Long Beach, California were addressed in the ID and were identified by the ALJ as the "Group III" shipments (ID at 12). By way of background, with regard to these shipments, the respondents' unlawfully contacted Baltic's customer directly regarding the shipments¹⁷. (Baltic App. 024, 031). *Subsequent to* this unlawful

¹⁷ 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. Baltic App. 511.

direct contact with Baltic's customer, respondents ultimately collected freight and extra charges directly from a third-party known as "M&E Baltic LLC" (hereinafter "M&E")¹⁸ and released the shipments to that third-party without the knowledge, and without the consent of Baltic. *Id.*, Baltic App. 179-181, Presniakovas Affidavit ¶¶53-56 at Baltic App. 362-363.

Respondents have argued that these shipments belong to M&E.¹⁹ Respondents have further admitted that they released the shipments to third-party M&E, all the while knowing that the shipments belonged to Baltic.²⁰

While the respondents may argue that they provided correspondence to Baltic on November 25, 2011 that: "Those 5 shipments [were] requested in writing by [the] company ME Baltic to be put on their account" (Baltic Baltic App. 540-541), it is submitted that this correspondence *does not constitute notice* that respondents were planning on bypassing Baltic, and subsequently releasing said cargo to the third party in violation of the Shipping Act.

In the certification of Michael Hitrinov, submitted in support of respondents' motion for summary decision, the respondents admit to receiving shipping instructions for these five shipments directly from Baltic²¹, therefore, these are Baltic's shipments wherein Baltic was acting as NVOCC with respect to its own clients. As explained herein, those shipping instructions identified the shipper of record, as well as the consignee²². It is therefore notable that

¹⁸ M&E is also erroneously referred to by the respondents as "ME Baltic". Baltic App. 179, 538.

¹⁹ See, ¶5 Affidavit of Michael Hitrinov, dated May 26, 2015. Baltic App. 538.

²⁰ See Certification of Michael Hitrinov dated March 23, 2015, paragraph "10" and Appendix "7" to respondents' motion for partial summary decision. Baltic App. 153, 171. This certification admits to having received shipping instructions "for the shipments identified in Complainant's Exhibit... 'D'"

²¹ See footnote "20".

²² See also, Certification of Michael Hitrinov dated March 23, 2015, paragraph "6", and the "specimen" dock receipt identified in Respondents' Memorandum in Support of their Motion for Partial Summary Decision, which confirm this fact. Baltic App. 152, 162-164.

the shipping documents on the record demonstrate that M&E was neither the shipper nor the consignee for those five shipments²³, and that respondents knowingly released the shipments to that third-party, thus constituting a misdelivery that is a violation of the Shipping Act. *See, Bimsha International v. Chief Cargo Services, Inc.*, 32 S.R.R. 353 (ALJ 2011).

Respondents' unlawful contact and release of the cargo effectively cut Baltic out of the picture, harming Baltic by leaving it unable to collect monies from its client for other services rendered by Baltic with respect to that cargo. These shipments were released without informing Baltic, when respondents surrendered the original bill of lading to common carrier MSC – and Baltic discovered this upon attempting to collect its fee from its customer. (Baltic App. 011, 024, 031). Baltic learned of this no earlier than January 5, 2012 and within the three year time bar for reparations under the Shipping Act. (Baltic App. 010, 011, 024, 031). As explained below, while the cargo may have been released outside of the statute of limitations, Baltic was not a party to any communications between M&E and respondents, and therefore the discovery rule acts to toll the statute of limitations.

As part of Baltic's post hearing submissions, the ALJ was provided with two sworn certifications, the first was from the employee at M&E (identified as "Kamil Sawon") that was personally in direct contact with the respondents, and in which Mr. Sawon attaches email correspondence between M&E and respondents, indicating that M&E paid the respondents for the release of the cargo. As explained herein, Baltic was at that time unaware of this correspondence as it was solely between M&E and respondents. Mr. Sawon further explains that: "During [his] tenure at [M&E], and with regard to the five above referenced booking numbers, neither [M&E] nor [Mr. Sawon] ever requested that [respondents] book these shipments on behalf of [M&E] or on behalf of G&G Auto Sales" and that "[d]uring [his] tenure at [M&E], and

²³ See Certifications of Kamil Sawon from third-party M&E (Baltic App. 095-097) and Gediminas Garmus (shipper of record for the five shipments) together with the dock receipts for said shipments (Baltic App. 104-111).

with regard to the five [booking numbers for the Long Beach shipments], neither [M&E] nor [Mr. Sawon] ever received nor used these bookings from [respondents]. These bookings do not belong to [M&E] nor [Mr. Sawon] and are not for shipments from [M&E]. Neither [M&E] nor [Sawon] ever forwarded shipping instructions or dock receipts/masters to [respondents] for these five bookings.” (Certification of Kamil Sawon ¶¶6-7 at Baltic App. 096).

The second certification provided to the ALJ was from G&G Auto Sales Inc. (“G&G”), which was the shipper/exporter of these five shipments. That Certification explains that it was being provided because the respondents: “have stated under penalty of perjury, that these bookings do not belong to the complainant, [Baltic] and that they instead belong to [M&E]...” and that the purpose of the certification was to explain “...to the Commission why the statements of [respondents] are false.” (Certification of Gediminas Garmus ¶3 at Baltic App. 104-105). In that certification, the principal of G&G, Gediminas Garmus explains that: “[w]ith respect to the five [Long Beach] bookings, G&G Auto Sales retained the services of Baltic Auto Shipping Inc. to export those five containers.” (Certification of Gediminas Garmus ¶4 at Baltic App. 105) Mr. Garmus also explains that in early 2012 (and within the three year statute of limitations), when Baltic contacted G&G for payment of the shipment of the five containers, that G&G informed Baltic that the containers had already been released:

“In early 2012, when Baltic Auto Shipping Inc. contacted me regarding payment for the shipment of the five containers, I notified them that the containers had been released directly by EUL.” (Certification of Gediminas Garmus ¶10 at Baltic App. 105)

In erroneously ruling that Baltic’s claims were time barred with respect to these shipments, the ALJ demonstrated a misunderstanding of three key points: (1) that the cargo was unlawfully released by respondents in violation of the Shipping Act; (2) that the cargo was released to third-party M&E that had no relationship with Baltic; and (3) that, as explained below, while Baltic was aware that respondents were *attempting* to contact its customers regarding the release of the

cargo in late November of 2011, and further while the cargo was released without Baltic's knowledge, *Baltic was only informed by its customer that the cargo had actually been released in January of 2012.*

The ALJ's misunderstanding of these issues are evident on page "12" of the ID wherein the ALJ discusses the Group III shipments and erroneously focuses on the issue of extra charges imposed by respondents, instead of focusing on the unlawful release of the cargo, wherein the ALJ explains, in relevant part, as follows:

"...to the extent that the new charges that Empire allegedly imposed may have violated the Shipping Act, the new charges were imposed on November 14, 2011, and Baltic knew of these charges more than three years before Baltic filed its FMC Complaint...The documents memorializing the settlement negotiations between Baltic and Empire indicate that '[t]hose 5 shipments requested in writing by company ME Baltic to be put on their account. I suggest to keep those containers out of the settlement statement to avoid confusion.'... On November 18 and 22, 2011, Baltic customers made payments for the five shipments not included in the 2011 Settlement, (Baltic Supp. Memo. (7/10115), Appendix 3 (Certification of Kamil Sawon) Exhibit A (Email dated 22 Nov 2011 from mebaltic at hotmail.com to michael at eulines.com).), and those shipments were released directly to the customers; therefore, any extra charges were imposed and paid more than three years before Baltic filed its FMC Complaint." (ID at 12)

As explained above, Baltic was unaware of the November 22, 2011 correspondence between M&E and Mr. Hitrinov, referred to by the ALJ, indicating that Baltic's customers made payments for the five containers (as such correspondence, as noted in the ID was solely between M&E and respondents: "*from mebaltic at hotmail.com to michael at eulines.com...*" (ID at 12) (emphasis added).

The ALJ also demonstrably misunderstood the nature of Baltics claims as can be seen by the ALJ's focus, on pages "44" and "45" of the ID, solely on the issues of charges collected by respondents for these shipments:

"Because the customers made the extra payments, not Baltic, Baltic does not have a claim for the extra payments - Baltic does not have a right for reparation for an injury that its customers suffered, not Baltic." (ID at 44).

With respect to these shipments, complainant's underlying brief in opposition to the motion for summary decision referred the ALJ to a series of 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 listing five shipments from California to the port of Klaipeda, Lithuania. (Baltic App. 011, 024, 031, 511). With respect to these five shipments, Baltic reached out to Ms. Nielsen for assistance in preventing the respondents' imminent interference with Baltic's business. With respect to the shipments, the respondents: (1) ceased communicating with Baltic refused to answer Baltic's inquiries; and (2) unlawfully contacted Baltic's customers directly without Baltic's consent; and (3) subsequently released the cargo to M&E *which is a third-party which was not a customer of Baltic*.

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. (Baltic App. 024, 031). 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 to a third-party and collected payment directly from that third-party (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). 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.

In the underlying motion papers, Baltic explained that the respondents violated the Shipping Act by failing to observe regulations connected with receiving, handling, storing, and delivering of the Complainants property (Baltic App. 024, 114). 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 International v. Chief Cargo Services, Inc.*, 32 S.R.R. 353 (ALJ 2011). Furthermore, Section 10(b)(13) of the Shipping Act prohibits disclosure of information, by a regulated entity, related to “the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier,” without the consent of the shipper or consignee, if the information “may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier,” or if the information “may improperly disclose its business transaction to a competitor.” 46 U.S.C. § 41103(a). Respondents’ contact with M&E Baltic resulted in the disclosure of prohibited information and resultant harm that are addressed by § 41103(a) of the Shipping Act.

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; (2) respondents’ refusal to communicate with complainant after December 29, 2011; and (3) respondents’ communication with M&E without including Baltic in said communication, Baltic argued 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. Baltic did not learn that the cargo was actually released until January 5, 2012.

As set forth above, in error, the ID disposes of this group of shipments as time barred by addressing only the Shipping Act violations related to the overcharging of rates, and the ALJ fails to address and discuss respondents’ violation of the Shipping Act (*vis a vis* releasing the cargo to the third-party) for failing to “establish, observe, and enforce just and reasonable

regulations and practices relating to or connected with receiving, handling, storing, or delivering property”.

Additionally, the ID explains that:

“On November 18 and 22, 2011, Baltic customers²⁴ made payments for the five shipments not included in the 2011 Settlement...and those shipments were released directly to the customers; therefore, any extra charges were imposed and paid more than three years before Baltic filed its FMC Complaint.” (ID at 12).

As set forth above, the ID, in error, focuses solely on the issue of rates and charges, and wholly omits any discussion with respect to respondents’ unlawful release of the cargo to a third party in violation of the Shipping Act, thus warranting that the Commission reverse the ID and remand the matter to the ALJ for further proceedings.

C. THE ID FAILS TO ADDRESS THE ISSUES RAISED REGARDING RESPONDENTS’ FAILURE TO FULFILL NVOCC OBLIGATIONS IN VIOLATION OF THE SHIPPING ACT

In opposition to respondents’ motion for summary decision, Baltic raised issues pertaining to respondents’ violation of the Shipping Act with respect to one shipment booked through respondents and destined for the port of Batumi, Georgia. This one specific shipment is not discussed at all in the ID, and the complainants respectfully maintain that the ALJ, in error, omitted discussion regarding the shipment. This one specific shipment is identified as shipment number 158 in the 2011 Settlement Agreement (Baltic App. 149). In light of the fact that the shipment was listed in the settlement agreement, and assuming arguendo, that the ALJ may have intended to address this shipment as part of the Group II shipments discussed in the ID, then it is submitted that the ID erroneously disposes of this shipment, as the Shipping Act violation pertaining to that shipment has nothing to do with issues regarding rates and tariffs.

Respondents’ Failure to Forward Monies for Ocean Freight to the Ocean Liner and Their Unreasonable Refusal to Communicate With Baltic

²⁴ The ALJ’s statement here further demonstrates a misunderstanding of certain material facts, to wit: The payments were made by M&E, which, as explained above was a third-party and was *not* a customer of Baltic.

With respect to the shipment to Batumi, the respondents failed to meet their obligations as an NVOCC (and additionally as a freight forwarder) in violation of the Shipping Act. That specific violation is the respondents' failure to pay to MSC the monies which were received by respondents from Baltic for ocean freight. Up front, this shipment was a freight prepaid shipment for which the respondents collected money up front and the subsequently instructed the ocean liner that this was a "freight collect" shipment. As the Commission is aware, Baltic's underlying motion papers explained that on December 29, 2011, in response to Baltic's request that the respondents release various containers, the respondents cut off all communications with Baltic and refused to further communicate. Baltic App. 022. This is significant, in that subsequent to respondents "failure to deal in good faith" (as alleged in the complaint, Baltic App. 117) by refusing to communicate with Baltic regarding this shipment: (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; (5) on January 5, 2012, EUL directed MSC to issue a telex release stating that "There are collect charges"; and (6) 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. These funds were never repaid to Baltic. Baltic App. 024-025, 030.

The consignee was forced to pay at the port of delivery at MSC's local office, ocean freight in the amount of \$1908, as a result of respondents' failure to forward the monies for ocean freight to MSC²⁵ Baltic App. 024-025, 030. It is well settled that an NVOCC's failure to

²⁵ As set forth above, this shipment was a freight prepaid shipment for which the respondents collected money up front and the subsequently instructed the ocean liner that this was a "freight collect" shipment.

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). *See also, Alexandre Kaminski v. Keystone Limited*, (6/23/93, FMC) Informal Docket No. 1739(I) (shipping company that collected money from customer but failed to provide any services in return violated former 46 USCS Appx § 1709(d)(1); customer is entitled to reparation award which includes amount he paid for shipment, as well as amount he spent on telephone calls to explain situation to individual to whom the merchandise was to have been shipped); *Corpco International, Inc. v. Straightway, Inc.*, (6/8/98, FMC) Docket No. 97-05 (violation of former 46 USCS Appx § 1709(d)(1) may be found where non-vessel-operating common carrier (NVOCC) has agreed to ship cargo and has been paid to do so, but cargo cannot be delivered because NVOCC's agents refuse to issue negotiable bill of lading required to secure delivery); *Tadeusz A. Pawlowicz v. William Allen*, (6/15/93, FMC) Informal Docket No. 1725(I) (shipping company's handling of customer's shipment of antique maps constituted violation of former 46 USCS Appx § 1709(b)(6)(E) where invoice received by customer was more than twice amount stated on bill of lading²⁶ (most of which was attributable to higher crating costs), and customer repeatedly tried to contact company and was either ignored or told to contact crating company directly).

The Nature of Respondents' Violation of the Shipping Act vis a vis the Batumi Shipment Is Inherently A Shipping Act Violation and Outside the Scope of the 2011 Settlement Agreement

It is additionally submitted that the specific issues raised as a result of respondents' failure to fulfill NVOCC obligations were not issues that could have been addressed by the

²⁶ In the instant matter the amount charged by respondents for ocean freight was almost 250 times the amount listed on the bill of lading.

Federal Court by way of an application to enforce the 2011 Settlement Agreement. The reason for this is that the operative language in paragraph “3” the 2011 Settlement Agreement which addresses this shipment is as follows:

“Release of Remaining Containers. 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". 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.” (Baltic App.142) (emphasis added)

The foregoing language of the 2011 Settlement Agreement makes it clear that the parties only contemplated a possible breach of the settlement agreement due to respondents causing “a delay in the release of the containers identified in Exhibit ‘B’...” in the agreement, resulting in “the accrual of storage or demurrage charges...” Therefore, a failure by respondents to forward the monies for ocean freight to the ocean liner, which is inherently a Shipping Act violation, necessarily falls outside of the 2011 Settlement Agreement and outside of the jurisdiction of the Federal Court for enforcement purposes. *A fortiori*, this grievance 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). In light of the foregoing, it is respectfully requested that the Commission reverse the ID and remand the matter to the ALJ for further proceedings.

D. THE ALJ ERRONEOUSLY CONCLUDED THAT BALTIC’S CLAIMS WITH REGARD TO TEN ADDITIONAL SHIPMENTS IDENTIFIED BY BALTIC WAS TIME BARRED

This section of the exceptions deals with ten additional shipments that the ALJ erroneously disposed of in the ID, and which were identified therein as the “Group IV Shipments”. Baltic’s

post hearing brief explained that similar to the Long Beach shipments described above, that these were ten shipments where respondents: (1) unlawfully contacted complainants' customers directly; (2) collected payment directly from those customers or neutrals/third-parties; and (3) issued telex releases for the cargo without informing complainant, without obtaining complainant's consent, and leaving complainant unable to collect payment from its customers for services rendered to the shipper. Baltic App. 178-182.

Baltic's post hearing brief also explained that "the specific booking numbers for the shipments have not been provided now, but the booking numbers can be provided upon request of the tribunal." (Footnote "5" Baltic App. 179-180). Additionally, Baltic explained that the booking numbers for the ten shipments were listed in Exhibit "N-1" to the Presniakovas Affidavit in opposition to respondents' motion for partial summary decision, which was also Exhibit "F" to the 2011 Complaint. *Id.* Lastly, Baltic explained that the specific bookings numbers were not being provided at this time because: (1) as explained above, the ALJ ordered that the parties engage in limited discovery in this matter prior to respondents motion for summary decision (on the thirty eight shipments identified in Attachments "C", "D", and "E"); and (2) the booking numbers were actually contained in the five hundred forty six (546) shipments in Attachment "B", which is not currently the subject of this motion. *Id.* Therefore, it is submitted that the ID erroneously holds that Baltic had never previously identified these shipments, with the ALJ's statement that:

"Now, three and one-half years after filing and settling its 2011 D.N.J. Complaint, Baltic contends that "[p]aragraphs "31" through "33" of the 2011 DNJ Complaint incorrectly made reference to there being 167 containers at issue in the lawsuit when there were actually 177 containers identified in the spreadsheet." (ID at 13)

The ID further states that:

"Baltic makes no attempt to further identify by booking number or container number which of the 546 entries in the spreadsheet relate to the ten newly identified shipments." (ID at 14)

The ID disregards Baltic's explanation that the nature of the Shipping Act violation committed by respondents regarding the ten shipments is similar to that of the Long Beach shipments (i.e. release to a third-party without Baltic's knowledge or consent). In error, and in disregard to the crux of Baltic's claims regarding the shipments, the ALJ argues that any issues pertaining to rates and tariffs related to these shipments were time barred, explaining as follows:

"As with the Groups I, II, and III shipments, Empire established the original rates and Baltic knew Empire's rates at the time the shipments, each of which originated more than three years before Baltic filed its FMC Complaint. As with the Groups II and III shipments, to the extent that the new charges that Empire allegedly imposed may have violated the Shipping Act, the new charges were imposed on November 14, 2011, and Baltic knew of these new charges more than three years before Baltic filed its FMC Complaint." (ID at 14)

The ALJ's errors with respect to these ten shipments are twofold: (1) the ALJ is penalizing Baltic for failing to specifically identify booking numbers for shipments which the ALJ instructed that the parties not cover in discovery; and (2) the ALJ applied the wrong Shipping Act violation to these shipments, as the issues regarding the shipments pertained to respondents' unlawful release of the shipments to third-parties, and *not* the issues discussed by the ALJ regarding rates and tariffs.

Three of these ten shipments were identified in Baltic's Motion for Reconsideration, and specifically, in the Affidavit of Alla Kotova. Specifically, the Kotova Affidavit makes reference to three containers, to wit: TRLU5819375, CRXU936559, and GLDU7634796 (Affidavit of Alla Kotova, ¶27 at Baltic App. 224). Baltic With respect to these three containers, Alla Kotova explains that: "the respondents refused to release them until I agreed to wire an additional \$500 per container and state in writing that these containers belonged to Baltic Savannah, which I did on November 28, 2011." *Id.* In light of the fact that these shipments were listed on the spreadsheet exchanged between the parties during their regular course of business (Baltic App.

315, 318), and pursuant to which, Empire billed Baltic for ocean freight (and “extra charges”), it is undisputed that Baltic was acting in the capacity as NVOCC for those shipments on behalf of its own clients, and in the capacity as shipper with respect to the respondents.

Baltic has explained herein that at all times during the course of the parties’ business relationship, that it was always understood that Baltic Savannah was communicating with respondents on behalf of Baltic and that respondents were providing Baltic Savannah (which is *not* an NVOCC) with booking numbers for shipments that belonged to Baltic, which either owned the cargo being shipped, or in which Baltic was acting in capacity as NVOCC with respect to its own clients (who were shipping cargo not owned by Baltic). On this issue, Alla Kotova’s affidavit even explained that: “...the respondents never objected to the fact that Baltic Savannah was never added as a party to the 2011 Settlement Agreement. The reason that the respondents never objected is that they were aware of the fact that Baltic Savannah was a loading and trucking facility, and that all of the bookings belonged to Baltic Chicago”. (Affidavit of Alla Kotova, ¶31 at Baltic App. 225)

It is submitted that in error, the ALJ has agreed with the respondents’ argument that Baltic Savannah is not related to complainant Baltic (and that Baltic had no standing to bring Shipping Act claims with respect to the twenty one Savannah shipments described above). Assuming *arguendo*, if that be the case, then it would mean that in releasing (at least three of) these ten shipments to Baltic Savannah, without Baltic’s permission, then the respondents violated the Shipping Act. As set forth above, three of these ten shipments were not released by respondents to Baltic Savannah until at least November 28, 2011, and within three years of Baltic filing its complaint. It is submitted that if this Commission is going to affirm the ALJ’s ruling that Baltic

Savannah is not related to complainant Baltic, then it stands that the respondents had no right to release the shipments to Baltic Savannah with first obtaining the consent of complainant Baltic.

E. THE ID ERRONEOUSLY HOLDS RESPONDENTS TO BE “PREVAILING PARTIES” IN THIS PROCEEDING AND ERRONEOUSLY AWARDS RESPONDENTS ATTORNEYS’ FEES

Commission Precedent Does Not Warrant a Finding that Respondents Are Prevailing Parties

The ID erroneously declares the respondents to be “prevailing parties” and awards attorneys’ fees under the Shipping Act, as now amended by Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014. The ALJ explains as follows:

“For the reasons stated in *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services*, FMC No. 14-04 (ALJ Apr. 15, 2015) (Initial Decision Dismissing Proceeding for Failure to Prosecute), Notice Not to Review, May 18, 2015, I find that because the FMC Complaint has been dismissed, Empire is the prevailing party in this proceeding. Therefore, Empire may be awarded reasonable attorney fees for service performed after the effective date of the Coble Act.” (ID at 58)

It is respectfully submitted that the reasons stated in *Edaf Antillas, Inc., supra*, do not warrant a finding that “Empire is a prevailing party in this proceeding” nor does said decision warrant a finding that “Empire may be awarded reasonable attorney fees...” as stated in the ID. The ALJ’s decision dismissing the complaint in *Edaf Antillas, Inc., supra*, was based upon the complainant’s failure to prosecute the action, and sought to punish the complainant for its dilatory and bad-faith conduct, which included, *inter alia*: multiple failures to comply with the Orders of the Commission regarding briefing schedules and the submission of documents; discovery/depositions, and failure to respond to the ALJ’s Order to Show Cause why the complaint should not be dismissed for failure to prosecute. It was for these reasons that the ALJ dismissed the complaint and sanctioned the extra punishment of an award of attorneys’ fees in favor of the respondent, explaining that “... *if a complainant fails to prosecute its complaint,*

continually ignores rulings, or is otherwise guilty of unexcused dilatoriness in lengthy cases, dismissal of the complaint with prejudice is an accepted sanction.” Id. at 4. (emphasis added).

As part of the ALJ’s reasoning in awarding attorneys’ fees in *Edaf Antillas, Inc., supra*, the ALJ acknowledges that the “the conduct underlying that dismissal and qualifying [the respondent] *as a prevailing party* [was complainant’s] failure to file the brief required by the January 14, 2015, Briefing Schedule and failure to respond [to] the March 2 Order to show cause...”. Id. at 12 (emphasis added). The ALJ’s reasoning in finding the respondents to be prevailing parties in *Edaf Antillas, Inc., supra* based upon the complainant’s bad-faith conduct in that case, does not apply to the case at bar, and therefore *Edaf Antillas, Inc., supra* is distinguishable. There is no conduct by Baltic herein of the type of bad faith, dilatory, and/or vexatious conduct (of which the complainant was guilty in *Edaf Antillas, Inc., supra*) which would warrant a finding that the respondents should be deemed “prevailing parties” under the Shipping Act as amended.

Quite the contrary, in the instant action, the record demonstrates that Baltic complied with each and every Order of the ALJ regarding deadlines for discovery and briefing schedules, and that the parties engaged in brief and limited discovery in this matter as directed by the ALJ. Therefore, there is no basis for any argument that Baltic’s conduct herein demonstrates unexcused dilatoriness or an ignorance of the Commission’s rulings or any other vexatious conduct. Additionally, the record demonstrates that Baltic’s complaint was brought in good faith with, *at the minimum*, a colorable basis for alleging that the respondents had violated the Shipping Act and that Baltic was entitled to reparations. Furthermore, as demonstrated throughout the record in this matter and as argued below in Baltic’s brief in opposition to respondents’ Motion for Summary Decision, Baltic identified numerous individual instances in

which the respondents violated the Shipping Act which had *nothing to do with rates and/or tariffs* (as the issue of rates and tariffs is one in which constructive notice was imputed to Baltic). *A fortiori*, there was nothing frivolous about Baltic having started the instant proceeding, and no basis for finding that respondents were “prevailing parties” for the reasons stated in *Edaf Antillas, Inc., supra*.

Dismissal of Respondents’ Frivolous Counterclaim Further Warrants a Finding That Respondents Are Not “Prevailing Parties”

Contemporaneously with the filing of their Answer in this matter (Baltic App. 551-560), the respondents filed a frivolous counterclaim in the amount for \$200,000 for alleged unpaid freight charges, purportedly due and owing from Baltic, in violation of the shipping act. 46 USC 41102 (a) (1) section 10 (a) (1). Baltic App. With respect to the counterclaim, the ALJ did not afford the parties the opportunity to conduct discovery. This issue was also brought to the attention of the Commission on or about March 18, 2015, as part of Baltic’s motion for an order precluding respondents from producing documents in support of their counterclaims (Baltic App. 561-564), which was never addressed by the ALJ prior to the issuance of the ID.

After Baltic filed its complaint on November 28, 2014 with the Commission, Baltic’s counsel was contacted by respondents’ counsel on December 8, 2014, and prior to the time that respondents were required to file their answer in this matter. Baltic App. 565. At that time, respondents’ attorney advised that Baltic allegedly failed to repay a loan to respondents in the amount of \$200,000.00, which in fact, was actually repaid by Baltic years ago. *Id.* On December 8, 2014, respondents’ counsel never raised any issues regarding any alleged unpaid freight due and owing to Empire. Again on December 19, 2014 and January 12, 2015, respondents’ counsel contacted Baltic’s counsel again regarding the \$200,000.00 loan and again, during these

communications, no issues were raised by respondents' counsel regarding any alleged unpaid freight due and owing to respondents. Baltic App. 567.

When respondents filed their answer on or about January 23, 2015, they asserted a counterclaim for the first time, for \$200,000.00 for alleged unpaid freight, and not the loan. Baltic App. 557-559. This frivolous counterclaim is without any basis in fact and was asserted in retaliation for Baltic filing the FMC action. Notably, this amount of \$200,000.00 is the same amount claimed by respondents in a frivolous lawsuit filed by respondents against Baltic on February 4, 2015 in the U.S. District Court for the Eastern District of New York (captioned as *Empire United Lines Co., Inc. v. Presniakovas et al.* U.S.D.C. -- EDNY Docket No.: 1:15-cv-00557-DLI-RER), also filed by respondents subsequent to the FMC action and also asserted in retaliation for Baltic filing the FMC action. The EDNY lawsuit was about Baltic's alleged failure to repay the loan of \$200,000.00.²⁷

It is also notable that the ID spontaneously expanded the scope of respondents' motion for *partial* summary decision, and dismissed the *entire* action, including the respondents' frivolous Counterclaim. Assuming arguendo that this was not the case, and that Baltic was afforded the opportunity to complete discovery on respondents' counterclaim and then establish that it was frivolous, then in accordance with the case law cited herein, it follows that *Baltic should be a prevailing party and be awarded attorneys' fees.*

On April 27, 2015, Baltic moved to amend its complaint herein on the theory that respondents' filing of the frivolous EDNY action constituted "retaliation" in violation of the Shipping Act of 1984. Baltic App. 571-572. The ALJ denied that motion, but specifically explained that section 41104(3) of the Shipping Act "does not grant power to the commission to

²⁷ In that matter, Baltic has made a request for leave to file a motion for sanctions against respondents and their counsel pursuant to FRCP Rule 11. Baltic has also moved for attorneys' fees in that action due to respondents' continued refusal to stipulate to withdraw their action with prejudice.

police the litigation tactics of common carriers or OTI's in federal courts." Baltic App. 618-619. It is submitted that by *sua sponte* dismissing the entire FMC action, the ALJ declined the opportunity to police the litigation tactics of respondents in the instant action before the Commission (for having filed a frivolous counterclaim). In light of the foregoing, it is submitted that the ALJ erroneously declared the respondents to be prevailing parties entitled to an award of attorneys' fees in this matter, particularly when respondents' counterclaim was dismissed.

The Respondents Have Not Been Awarded Reparations in This Matter and Therefore an Award of Attorneys' Fees Is Inappropriate

This Commission published a Notice of Proposed Rulemaking under FMC Docket No: 15-06 on July 2, 2015, 127 Fed. Reg. 38153 (the "Notice"), which sought public comment on, among other issues, the question of: when will a party be considered to have 'prevailed' in a covered action? On this issue, this Commission has a long standing rule requiring an award of reparations as a prerequisite to an award of attorneys' fees.

As the Commission notes (Notice at 38155), "there is abundant case law interpreting the term [prevailing party]." Much of that case law arises from application of Rule 54(d)(1) of the Federal Rules of Civil Procedure, which governs the award of costs. The D.C. Circuit has held that the standard for determining status as a "prevailing party" is "generally the same" under Rule 54(d)(1) and under discretionary statutory attorney fee provisions. *Tunison v. Continental Airlines Corp.*, 162 F.3d 1187, 1189 (D.C. Cir. 1998) (cited cases omitted). Under that standard, in order to be a prevailing party, the party seeking an attorney fee award "must obtain an enforceable judgment against the [party] from whom fees are sought. . . ." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The Commission should apply that standard.

Although new subsection 41305(e) refers to "any action brought under section 41301," it is respectfully submitted the Commission need not read too much into the fact that the attorney

fee provision was moved from subsection 41305(b) (which addresses reparations awards) to a new subsection 41305(e) (which addresses only attorney fees). There is nothing in the placement of the new language that would compel or support a wholesale abandonment of the Commission's existing determination that the award of reparations is a prerequisite for the grant of attorney's fees. Under the previously-applicable attorney-fee provision, a complainant in a reparation action was entitled to an award of attorney's fees when: (1) proving a violation of the Shipping Act; (2) actual injury is caused by such violation; and (3) *payment of reparations to compensate for such injury*. See *AIS Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 25 S.R.R. 1061, 1063 (FMC 1990) (emphasis added).

The practical fact is that the vast majority of private cases before the Commission seek monetary reparations, and the award of compensatory damages is a critical touchstone in judicial precedent both for determining who is a "prevailing party" and also for determining what fee (if any) is "reasonable." Thus, even if the Commission determines that the award of reparations is not a *sine qua non* for an attorney fee award to a prevailing party, the presence or absence of such of a reparations award – and its amount – remains relevant to the exercise of the Commission's discretion in deciding whether and in what amount to award fees to a prevailing party. It is respectfully submitted that respondents herein have *not* been awarded reparations in this action, and in view of the foregoing should *not* be entitled to an award of attorneys' fees.

Regardless Of Which Standard the Commission Adopts For Exercising Its Discretion in Awarding Attorneys' Fees, an Award of Fees to Respondents Is Not Appropriate In This Matter

The Commission's Notice of Proposed Rulemaking also seeks to answer the question of: what standard should be applied in deciding whether to award attorney fees? The Notice

specifically makes reference to two separate standards.²⁸ As explained below, regardless of which of the foregoing standards the Commission ultimately adopts (or chooses to apply to the case at bar to the extent it is determined that the ALJ awarded the respondents attorneys' fees in error), that neither standard supports an award of attorneys' fees for the respondents. Whether it be the "Civil Rights Act" or "Copyright Act" standards identified herein, neither warrants an award of attorneys' fees for respondents.

The "Civil Rights Act" Standard

The Supreme Court explained in *Martin v. Franklin County Capital Corp.*, 546 U.S. 132 (2005), that to distinguish the applicable standard under a given statute, the court looks to "the large objectives of the relevant Act, which embrace certain equitable considerations" of Congressional purposes in the statutes at issue. *Id.* at 139-140. Therefore, the relevant analysis to determine the most appropriate standard to use in applying the new attorney-fees provision in Shipping Act complaint proceedings, is to look to the comparative Congressional "large objectives" and "equitable considerations" pertaining to private party proceedings under the Shipping Act.

In support of the Civil Rights Act standard, one would argue that the standard most applicable to the new "prevailing party" attorney-fee provision under Section 41305(e) of the Shipping Act is the standard as interpreted in other federal remedial statutes with "prevailing party" language, such as *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) and *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978). The Supreme Court in *Martin* highlighted two particularly distinguishing statutory factors warranting the "ordinary recovery" standard for plaintiffs: (1) complainants vindicating

²⁸ The first standard identified by the Commission is "the standard used by federal courts applying the fee shifting provision in the Copyright Act, 17 U.S.C. 505" and the "second standard identified by the Commission is used in determining entitlement to attorney fees under the Civil Rights Act, e.g., 42 U.S.C 2000a-3(b), 42 U.S.C. 2000e-5(k)."

public rights and acting as "private attorneys general" in private party rights of action and (2) statutes where a defendant that is required to pay attorney's fees violates federal law. 546 U.S. at 137.

The ultimate conclusion of this line of reasoning is that the "large objectives" of the Shipping Act more closely embrace the "equitable considerations" of the nature addressed in *Piggie Park*, and *Christiansburg*, - not the unique goals and objectives of the Copyright Act. This is because the Shipping Act regulates the common carriage of goods by water in interstate and foreign commerce, granting immunity from otherwise applicable antitrust statutes, with a primary purpose to foster and maintain a non-discriminatory transportation system. See, *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 622-23 (1966). Private-party complaints under Section 41301 can be brought by any person-including persons without any actual injury or damages-seeking enforcement of the anti-discrimination and antitrust public protections of the Shipping Act. Like other remedial statutes, complainants in Section 41301 proceedings function as "private attorneys general," bringing complaints vindicating their own rights as well as those of the public interest against alleged violators of federal law. See, e.g., *Inlet Fish Producers, Inc., Complainant v. Sea-Land Service, Inc., Respondents*, 2001 WL 1632551, at *10. When a private-party complainant establishes a violation of the Shipping Act, the respondent is necessarily a violator of the Shipping Act, and accordingly, any attorney fees awarded to a prevailing complainant are awarded against the violator of the Shipping Act.

Additionally, under the line of reasoning supporting the Civil Rights Act Standard, prevailing respondents and parties in the nature of respondents should be awarded attorney fees only "upon a finding that the plaintiffs action was frivolous, unreasonable, or without foundation." See, *Christiansburg Garment Co., supra*. Although different standards are applied to prevailing plaintiffs and prevailing defendants, the standards fairly effectuate the objectives of

the statutes at issue. *See Martin*, 546 U.S. at 140, quoting *Christiansburg*, 434 U.S. at 422 (awarding fees simply because the party did not prevail "could discourage all but the most airtight claims, for seldom can a [party] be sure of ultimate success"). To the extent that inferences are drawn from the text of the Coble Act amendment, the change from mandatory to discretionary awards in reparations proceedings, in concert with the expansion of attorney fee award availability to injunction proceedings, provides no basis to infer an intent "to discourage all but the most airtight claims" by complainants.

Under the foregoing Civil Rights Act Standard, there is no basis for awarding attorneys' fees, as it cannot be said that Baltic's action was frivolous, unreasonable, or without foundation. As explained above, the record demonstrates that Baltic's complaint was brought in good faith with, *at the minimum*, a colorable basis for alleging that the respondents had violated the Shipping Act and that Baltic was entitled to reparations. There is nothing frivolous about Baltic's allegations that the respondents violated the Shipping Act with respect to the specific shipments identified herein.

The "Copyright Act" Standard

One arguing in favor of the application of the Copyright Act Standard would explain that this standard is in line with Congress' intent and is closer to the default well known American Rule that presumptively applies under U.S. law: to wit: that our legal system generally requires each party to bear his or her own litigation expenses. The key element of the Copyright Act standard warranting its adoption by the Commission is that it requires courts to use the same standard for prevailing plaintiffs and prevailing defendants when making such determinations. *See, Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534–35 (1994). This is consistent with the purposes of the recent legislation, and also with the purposes of the Shipping Act. Congress thus replaced an asymmetrical standard with a symmetrical one.

Adoption of the standard the Supreme Court has directed under Copyright Act, under which the same Adoption of a symmetrical standard is also consistent with the purposes of the Shipping Act. Rather, the Shipping Act is intended to provide a “non-discriminatory regulatory process.” 46 U.S.C § 40101(1)(emphasis added). Neither this purpose nor any of the Act’s other purposes are served by a rule that favors complainants over respondents as to attorneys’ fees awards. One following this line of reason would also argue that the specific factors listed in the *Fogerty* case, namely “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence,” are useful guideposts for the exercise of discretion. 510 U.S. at 535. Under the foregoing Copyright Act Standard, there is no basis for awarding attorneys’ fees, as it cannot be said that Baltic’s action was frivolous, objectively unreasonable, or brought with a bad-faith motivation. In conclusion, under either standard that the Commission decides to adopt, an award of attorneys’ fees for respondents is not warranted, and was made in error by the ALJ.

CONCLUSION

Wherefore, for the reasons set forth above, Complainant Baltic requests that the Commission reverse the challenged findings of the Initial Decision in this proceeding as identified herein in Attachment “A”, and adopt Complainant’s recommended findings and analysis as set forth in these exceptions.

Dated: January 15, 2016
Brooklyn, New York

Respectfully Submitted,



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ATTACHMENT A
COMPLAINANT'S EXCEPTIONS TO INITIAL DECISION

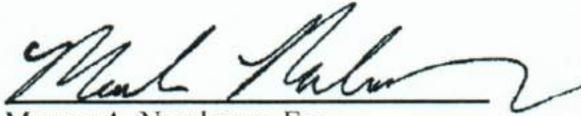
- I. The Initial Decision ("ID") is in error because it gives the sense of advocacy on the part of the ALJ rather than impartial even-handed adjudication which is required by the Administrative Procedure Act; among its many shortcomings, the ID is arbitrary and capricious; it makes ultimate conclusions of fact which do not rationally flow from the Findings of Fact; it blatantly fails to consider at all evidence in the record on central issues which is contrary to Respondents' positions; in some instances, the ID reaches conclusions of fact on key issues with no factual support whatsoever in the record. Furthermore, the ID blatantly and repeatedly ignores established Federal Maritime Commission regulations and law in its legal conclusions.
- II. The ID is in error because the ALJ *sua sponte* expanded the scope of respondents' *partial* motion for summary decision and granted summary decision on the *entire* matter. ID at 59.
- III. The ID is in error because it completely ignores or gives little regard to the material evidence and arguments posited by Complainant as to specific events that occurred within three years of Complainant bringing this action before the Commission with respect to approximately thirty-eight (38) shipments for which the respondents provided services to complainant, both in respondents' capacity as an NVOCC. ID at 10-19, 31-46.
- IV. The ID is in error because it misconstrues the nature of the relationships between the parties to the shipments and the claims raised within this case by failing to take into account Complainant's rights stemming from its role as an NVOCC with respect to some shipments. ID at 14-19.
- V. The ID is in error because it improperly interprets the scope and breadth of the 2011 Settlement Agreement discussed herein, erroneously finding that complainant should have addressed respondents' unlawful acts (which are inherently Shipping Act violations), in Federal Court. ID at 37, 49, 50, 52.
- VI. The ID is in error because it makes a grossly erroneous ruling by declaring the respondents to be "prevailing parties" and awarding them attorneys' fees under the Shipping Act, as now amended by Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014 ("Coble Act"). ID at 57-58. The ID dismisses respondents' frivolous counterclaim while still declaring respondents to be prevailing parties.
- VII. The ID is in error because it fails to address the respondents' continued failure to produce the house bills of lading, freight invoices, and other shipping documents for the shipments at issue

herein, in violation of the both the Shipping Act and the rules and regulations governing the duties of NVOCC's and OFF's, which respondents have failed to produce in an effort to conceal their unlawful activities. ID at 53-57.

- VIII. The ID is in error because it faults the complainant for not identifying specific booking numbers for ten shipments certain discussed herein, when it was the ALJ that had precluded complainant from conducting discovery on said shipments. ID at 12-14.
- IX. The ID is in error because it wholly omits any discussion with regard to one shipment certain booked by the complainant through respondents to the port of Batumi, Republic of Georgia, wherein respondents failed to perform their duties as an NVOCC. ID at 11-12.
- X. The ID is in error because it mistakenly determines that complainant has not set forth grounds to reconsider the ALJ's Order entered April 1, 2015. ID at 19 and that complainant failed to establish that it was the shipper of record or NVOCC for any of the twenty one shipments discussed herein, departing from the port of Savannah, Georgia. ID at 15-19. The ID erroneously finds that these shipments were beyond the scope of the complaint. ID at 14-19. Furthermore, the ALJ ignored sworn testimony from third parties involved in the trucking and loading of these shipments indicating that these shipments were indeed associated with complainant.
- XI. The ID is in error because it contains a material inconsistency by finding that for purposes of this motion, it is undisputed that respondents carried shipments for complainant in late December of 2011 and early 2012 (ID at 11), yet declares these shipments to be outside of the scope of the complaint. ID at 18.
- XII. The ID is in error because it wholly omits any discussion with regard to complainant's allegations that the respondents unlawfully contacted complainant's customers and/or third-parties directly and then subsequently collected ocean freight and additional charges directly from those customers and/or third-parties and released the cargo to the customers and/or a third-party without complainant's knowledge or permission. ID at 10-19, 31-46. The ID fails to address respondents' unlawful release of cargo without complainant's permission with respect to five shipments departing from the port of Long Beach, California, and for ten shipments certain discussed herein. ID at 10-19, 31-46.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the **COMPLAINANT'S BRIEF IN SUPPORT OF ITS' EXCEPTIONS TO INITIAL DECISION and APPENDIX TO COMPLAINANT'S BRIEF AND EXCEPTIONS TO THE INITIAL DECISION** 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: January 15, 2016 in Brooklyn, New York.