

S E R V E D  
September 15, 2015  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14-16**

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**BALTIC AUTO SHIPPING, INC.**

**v.**

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

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**INITIAL DECISION ON  
RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION<sup>1</sup>**

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**I. INTRODUCTION.**

On November 28, 2014, complainant Baltic Auto Shipping, Inc. (Baltic) commenced this proceeding by filing a Complaint verified by Baltic's president with the Secretary alleging that respondents Empire United Lines Co., Inc. (Empire) and Michael Hitrinov a/k/a Michael Khitrinov (Hitrinov) committed violations of the Shipping Act of 1984 (Shipping Act or Act). Complainant Baltic is licensed by the Commission as a non-vessel-operating common carrier (NVOCC) and an ocean freight forwarder. Empire is also licensed by the Commission as an NVOCC. Hitrinov is the sole principal and officer of Empire. Empire and Hitrinov are referred to collectively as Empire or EUL.

The relationship between Baltic and Empire began in November 2007 and ended in January 2012. The material facts as to which there is no genuine dispute demonstrate that every violation of the Shipping Act alleged in the Complaint occurred (if at all) and Baltic's claim for a reparation award accrued more than three years before Baltic filed its Complaint with the Commission.

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<sup>1</sup> The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Therefore, Baltic's claim for a reparation award is barred by the Act's three-year statute of limitations. No other relief is warranted. Therefore, the Complaint is dismissed.

## II. SUMMARY OF PROCEEDING AND DECISION.

Because the original Complaint did not set forth "specific designation[s] of the statutory provisions alleged to have been violated," 46 C.F.R. § 502.62(a)(3)(ii), Baltic was ordered to file an Amended Complaint specifically designating the statutory provisions, including subsections, alleged to have been violated. *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov and Empire United Lines Co., Inc.*, FMC No. 14-16, Order at 6 (ALJ Dec. 22, 2014) (Order on Respondents' Motion for a More Definite Statement).<sup>2</sup> The specific designations of the subsections in Part V are the only differences between the Complaint filed November 28, 2014, and the Amended Complaint filed January 9, 2015. References to the FMC Complaint in this decision should be understood as references to the FMC Complaint as amended.

As explained more fully below, the FMC Complaint alleges that between November 2007 and January 2012, Empire transported by water more than 4000 used automobiles in containers for Baltic from ports in the United States to foreign ports. It further alleges that on those shipments, Empire: (1) violated sections 41104(2)(a), 41104(4)(a), and 41104(8) of the Act by charging Baltic rates greater than those charged other shippers and charging rates greater than those reflected in its published tariff; (2) violated section 40501(a) by failing to keep open a public tariff; and (3) violated section 41102(a) by failing to provide Baltic with proper documentation of the shipments. (FMC Complaint Part V (as amended).)

The Shipping Act provides: "A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an actual injury to the complainant caused by the violation." 46 U.S.C. § 41301(a). Baltic filed its FMC Complaint on November 28, 2014. The FMC Complaint alleges that Baltic's shipments occurred between 2007 and January 2012. Other information in the record suggested that all shipments began and almost all were completed more than three years before Baltic filed its FMC Complaint; therefore, it was determined that the statute of limitations would be a significant issue.

The record contains another verified complaint signed under oath by Baltic's president on November 22, 2011. This complaint is relevant to the statute of limitations issue as a statement of Baltic's knowledge of the facts necessary for an FMC complaint more than three years before Baltic filed its FMC Complaint. On November 23, 2011, Baltic filed this complaint in the federal district court in New Jersey. *Baltic Auto Shipping, Inc. v. Michael Hitrinov a/k/a Michael Khitrinov, Empire United Lines Co., Inc., Mediterranean Shipping Co. (USA), Inc., and John Does 1 through 5,*

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<sup>2</sup> Subsequent citations to orders in the FMC proceeding are to *Baltic v. Empire*.

No. 2:11-cv-06908-FSH (D.N.J. Nov. 23, 2011) (complaint filed)<sup>3</sup> (found in the record at Empire Mot. S/D (3/23/15),<sup>4</sup> Exh. 2). The facts alleged in the 2011 D.N.J. Complaint and the FMC Complaint are substantially identical. If the caption had been changed on the New Jersey complaint to a Federal Maritime Commission caption and the claims for relief set forth on pages ten through seventeen in the New Jersey complaint had been replaced by Part V of the FMC Complaint setting forth the alleged violations of the Shipping Act, Baltic could have commenced this Commission proceeding in 2011, more than three years before it commenced this proceeding. To the extent any additional facts were necessary to file an FMC Complaint in 2011, a reasonably diligent complainant would have discovered those facts.

The Settlement Agreement and Mutual Release (found at Empire Motion for Summary Decision (3/23/15) (hereinafter Empire Mot. S/D (3/23/15)), Exh. 3) in which the parties released existing claims for damages signed by the parties, and the Stipulation of Dismissal signed by the court resolving the New Jersey case also has an impact on Baltic's claim for a reparation award. *Baltic v. Empire and MSC*, No. 2:11-cv-06908-FSH (D.N.J. Dec. 7, 2011) (Stipulation of Dismissal), found at Baltic Supp. Memo. (7/10/15), Appendix 8.

Therefore, it was determined that the effect on this proceeding of the statute of limitations and the effect of the New Jersey settlement releasing claims should be resolved before fully litigating this proceeding. *Baltic v. Empire*, FMC No. 14-16 (ALJ Feb. 23, 2015) (Briefing Schedule) (ordering Empire to file a motion for partial summary decision on (1) the effect of the statute of limitations; and (2) the effect of the settlement between the parties resolving the 2011 New Jersey case).

On March 23, 2015, Empire filed its motion for partial summary decision. Baltic filed an opposition, and Empire filed a reply. On June 12, 2015, the parties appeared through counsel and by telephone for oral argument on the motion. The transcript has been made part of the record. Citations to this transcript are made to "Transcript at [page]." On July 10, 2015, Baltic filed a supplemental memorandum addressing points raised in the argument. On July 17, 2015, Empire filed a reply to Baltic's supplemental memorandum.

As set forth more fully below, based on the material facts not in dispute, I find that all of the Baltic shipments at issue and Empire's alleged Shipping Act violations (if any) on those shipments occurred more than three years before Baltic filed its FMC Complaint. I also find that Baltic had knowledge of all facts or with due diligence should have known all facts necessary for its claim more than three years before it filed its FMC Complaint. Baltic's claim for actual injury resulting from these alleged violations accrued more than three years before it filed its Complaint. Therefore, Baltic's claim for a reparation award is barred by the Act's statute of limitations.

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<sup>3</sup> Subsequent citations to the Complaint are 2011 D.N.J. Complaint; subsequent citations to orders or other filings are to *Baltic v. Empire and MSC*.

<sup>4</sup> This and other similar dates refer to the date the paper was filed with the Secretary.

The Commission has recognized that there is “no overarching statute of limitations in the Act – that is, parties are not barred from alleging and proving a violation of the Act at any time,” *Maier Terminals, LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03, Order at 16-17 (FMC Jan. 31, 2013) (Order Granting in Part and Denying in Part Respondent’s Motion for Summary Judgment) (*Maier v. PANYNJ*), and that non-monetary relief may be available in a proceeding filed more than three years after the alleged Shipping Act violations occurred. In the circumstance of this case, however, Baltic has not articulated any claim for non-monetary relief that is warranted by the facts of this case. Because without the claim for a reparation award, the FMC Complaint does not set forth a claim for any cognizable relief, the Complaint is dismissed in its entirety.

In its motion, Empire asks for an award of attorney fees. When Baltic filed its FMC Complaint, the Act provided: “If the complaint was filed within the [three year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.” 46 U.S.C. § 41305(b) (repealed Dec. 18, 2014). Shortly after Baltic filed its FMC Complaint, Congress amended the Act to strike the phrase “plus reasonable attorney fees” from section 41305(b) and add a new section 41305(e): “*Attorney Fees.* – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees.” Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act) (emphasis added). I find that Empire is the prevailing party in this proceeding. Therefore, Empire may be awarded reasonable attorney fees for services performed after the effective date of the Coble Act. Determination of an attorney fee award, if any, is deferred.

### **III. BACKGROUND.**

#### **A. The 2011 D.N.J. Complaint.**

The 2011 D.N.J. Complaint, verified by Baltic’s president based on facts known to Baltic more than three years before Baltic filed its FMC Complaint, sets forth the relationship between the parties and the facts on which Baltic based its district court claims. Because of their substantial relevance to the question of whether Baltic knew or should have known of its Shipping Act claims more than three years before it filed its FMC Complaint, these facts are set forth below for the convenience of the reader.

16. Empire, as an NVOCC, sells bookings on vessels operated by MSC, the ocean carrier. MSC, in turn, provides Empire with a breakdown of all charges, such that Empire may charge the shipper one fixed sum for the entire ocean leg of transport. Whatever sums are actually charged by MSC to Empire, are included in the fixed sum negotiated by and between Empire and the shipper, in this case [Baltic]. These charges are presented by MSC to Empire in an invoice which remains in Defendant Hitrinov’s possession, custody and control. Said invoice has not been provided to [Baltic].

17. As an NVOCC, Empire is subject to regulation by the . . . Commission.
18. Pursuant to rules and regulations promulgated by the . . . Commission including, without limitation, regulations implementing the Shipping Act . . ., an NVOCC can only charge a shipper prices disclosed in a published tariff filed with the . . . Commission.
19. An exception exists with regard to NVOCCs that have entered into a negotiated rate arrangement (“NRA”) with a shipper.
20. An NRA is defined as “a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after the receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).<sup>[5]</sup>”
21. Defendant Empire never entered into an NRA with [Baltic] and, consequently, the exemption does not apply.<sup>[5]</sup>
22. At all times relevant hereto, a master service agreement . . . existed between Defendant Empire and shipping giant Defendant MSC.
23. MSC is a Vessel Operating Common Carrier (“VOCC”).
24. Pursuant to the Service Agreement, Empire was able to obtain container space aboard MSC vessels outbound from, *inter alia*, the Port of Elizabeth on favorable terms.
25. From approximately November 2007 up through the present [November 22, 2011], [Baltic] shipped containers with automobiles acquired by [Baltic] on behalf of foreign customers to ports abroad including, without limitation, the port of Klaipeda, Lithuania. During this time period, [Baltic] shipped thousands of containers through Defendant Empire.
26. In many cases, arrangements for the export, shipment and delivery of the aforesaid vehicles were made with Defendant Empire’s facility in Elizabeth, New Jersey.

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<sup>5</sup> The Commission promulgated the rule permitting NRAs in 2011. Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements – Final rule, 76 Fed. Reg. 11351 (Mar. 2, 2011), (effective April 18, 2011). Therefore, only shipments after that date could have been transported pursuant to an NRA.

27. The automobiles were shipped pursuant to an agreement between [Baltic] and Empire that [Baltic] would be charged one flat fee per container, inclusive of all freight charges, which fee was determined by the port of origin and port of destination. Said agreement was memorialized in tariffs included in spreadsheets provided by Empire to [Baltic] from time to time.
28. Upon information and belief, Empire was required by law to create and deliver a Bill of Lading and invoice to [Baltic] with respect to the Oceangoing and non-Oceangoing transport of [Baltic's] vehicles (the "House Bills of Lading" or "HBOLs").
29. At all times relevant hereto, Empire failed and refused to deliver to [Baltic] HBOLs and invoices for vehicles shipped overseas.
30. In or around September 2011, [Baltic] notified Defendants that the business relationship between the parties would be wound down and ultimately discontinued. At or about the same time, [Baltic] also demanded a copy of all [house bills of lading] and invoices related to containers shipped pursuant to the parties' agreement.
31. At the time of notification, [Baltic] had shipped approximately 167 containers loaded with automobiles purchased by [Baltic] for export.
32. Of the 167 containers, approximately 20 containers reached their destination and have been fully paid for by [Baltic]. . . .
33. Of the 167 containers, approximately 50 containers have recently arrived at their intended destination and have not yet been fully paid. . . .
34. The remaining containers remain in transit and payment on said containers is due upon their arrival at the destination port. . . .
35. The containers (both arrived and in transit) contain automobiles purchased by [Baltic] and destined for foreign customers at various foreign ports of call . . . . Said containers consist of approximately 676 used automobiles valued in excess of \$5,000,000.
36. In the course of [Baltic's] business relationship with Defendant Empire, Defendant [and Respondent] Hitrinov would periodically provide [Baltic] with an Excel spreadsheet identifying the containers in transit and verifying that shipping charges had been paid in full. The last spreadsheet prior to the outbreak of hostilities was provided on September 9, 2011 . . . .

37. According to the spreadsheet, as of September 9, 2011, [Baltic] had fully paid all shipping charges presented by Defendant Empire and had a *credit balance* of approximately \$625.00.
38. After Defendants were notified of [Baltic's] intention to wind down its business relationship with Empire, Defendant Empire unilaterally and retroactively increased its shipping chargers.
39. On or about November 14, 2011, [Empire] issued a revised spreadsheet. . . .
40. According to the revised spreadsheet, Defendant Empire demanded that [Baltic] pay an additional sum of approximately \$175,000 over and above the shipping charges that had been agreed to by and between the parties and that had been dutifully paid throughout the parties' relationship.
41. Furthermore, according to the revised spreadsheet, Defendant Empire demanded that [Baltic] pay an additional sum of approximately \$78,000 *retroactively* for containers that had long since been shipped, paid for and released.
42. These charges, which are referred to as the "Extra Charges" consist of: (a) an \$8.00 per container charge for port security; (b) an \$8.00 per container charge for carrier security, (c) a \$25.00 charge for "European Cargo Data Declaration"; (d) a \$25.00 "Export Chassis Usage"; (e) a \$25.00 "Telex Release Fee"; and (f) a \$100.00 "Doc fee".
43. These charges were, in fact, included in the fixed price paid by [Baltic] per container and during the previous four (4) years.
44. At all times relevant hereto, [Baltic's] cargo remained and continues to remain in the possession, custody and control of Defendants Empire and MSC.
45. Inasmuch as the Extra Charges were already included in the price charged by Defendant Empire, [Baltic] refused to pay.
46. In response, Defendants Empire and MSC unlawfully seized [Baltic's] containers and refused to release them to their intended recipients despite the fact that [Baltic] had lived up to its contractual obligations and despite the fact that as of September 9, 2011, the last statement before the outbreak of hostilities, [Baltic] had a *credit balance*.

47. Of the 167 containers, approximately 22 have arrived and have been paid for by [Baltic]. Although full payment was made, Defendants are now refusing to release the fully paid containers unless [Baltic] immediately pays *new* charges.
48. The remaining 145 containers are either in transit and/or have arrived at their intended destination port. However, Defendants have indicated that these containers will not be released until and unless [Baltic] pays the *new* charges which were imposed, for the first time, on November 14, 2011 and which were applied retroactively to containers shipped and released as far back as June 2011.
49. [Baltic] made demand upon Defendants for the immediate release of containers, which demand was refused by Defendants.
50. In response to the demand, Defendants have taken it upon themselves to contact [Baltic's] customers, the intended recipients of the aforementioned containers, and have offered them the goods shipped by [Baltic] at a radical discount, with the expectation that any money paid by the customers will then be seized and applied by Defendants.
51. In short, Defendants are illegally and unlawfully holding [Baltic's] cargo hostage in exchange for a payment of an artificial and unlawful debt conjured up by Defendants only after [Baltic] decided to sever its business relationship and applied retroactively as to cargo that has long since been shipped and released.

(Empire Mot. S/D (3/23/15), Exh. 2 (hereinafter 2011 D.N.J. Complaint) (emphasis in original) (citations to exhibits omitted).) The 2011 D.N.J. Complaint alleged that “the imposition [by Empire] of false and excessive shipping charges . . . and the unlawful seizure of [Baltic's] cargo is a violation of the Shipping Act of 1984, as amended, as well as rules and regulations promulgated by the Federal Maritime Commission,” (2011 D.N.J. Complaint ¶ 61), and fourteen other causes of action. Baltic sought monetary damages and a writ of replevin for the delivery of the containers. (Hitrinov ¶ 25; 2011 D.N.J. Complaint Count XV ¶¶ 118-119, 120 (f).) The shipments at issue in the 2011 D.N.J. Complaint were loaded “on board” in the period from September 3, 2011, to November 26, 2011. (Hitrinov ¶ 18; Empire Mot. S/D, Exh. 8 (spreadsheet identifying the specific “on board” date for each shipment).) On November 23, 2011, Baltic filed its complaint in the federal district court in New Jersey.

#### **B. The 2011 D.N.J. Settlement Agreement and Mutual Release.**

On November 29, 2011, six days after Baltic filed the 2011 D.N.J. Complaint, the parties entered into a Settlement Agreement and Mutual Release (2011 Settlement) resolving the case.

(Empire Mot. S/D, Exh. 3 (2011 Settlement).) The 2011 Settlement recited that in entering into the agreement the parties had “relied on the legal advice of their respective counsel” (2011 Settlement, Art. 14 “Advice of Counsel.”) The 2011 Settlement further recited that “[t]he parties have had the opportunity to consult with and be advised by counsel, and have done so, and have had the opportunity to make whatever investigation or inquiry each may have deemed necessary or desirable in connection with the subject matter of this Agreement prior to its execution.” (2011 Settlement, Art. 7 (b).)

The 2011 Settlement provided for the release of 162 containers that Empire transported for Baltic – some of which had arrived at the destination port but had not been delivered, others that had not arrived at the destination port – against the payment of freight charges, storage and demurrage charges, “if any.” (2011 Settlement, Art. 2 and Art. 3.) The 2011 Settlement provided for mutual release of claims.

With the exception of any obligation imposed by this Agreement, . . . the parties hereby release . . . 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.

(2011 Settlement, ¶ 5.) All of Baltic’s shipments were delivered, some before and some after the parties entered into the 2011 Settlement. (Hitrinov ¶ 37.)

In its FMC Complaint, Baltic alleges that it became concerned about the rates Empire charged. In 2014, Baltic’s president instructed a Baltic employee [Laura Supronas] to conduct an audit of the shipping documents. (FMC Complaint ¶ 13.) She completed the audit in July 2014. (Baltic Opp. to Empire Motion to Compel (4/3/15), Affidavit of Baltic president Andrejus Presniakovas ¶ 2.)

On November 28, 2014, more than three years after filing its 2011 D.N.J. Complaint, Baltic filed its FMC Complaint alleging that Empire violated the Shipping Act. Pursuant to the order from the undersigned, on January 9, 2015, Baltic filed an Amended Complaint with a revised Part V specifically designating the statutory provisions alleged to have been violated. The factual allegations in the FMC Complaint and the FMC Amended Complaint are substantially the same as the factual allegations in Baltic’s 2011 D.N.J. Complaint. The Amended Complaint is the operative complaint at this point. Its filing date for statute of limitations purposes is November 28, 2014, the date Baltic filed its original FMC Complaint. Fed. R. Civ. P. 15(c)(1)(B).

The FMC Complaint alleges that the 2014 audit determined that Empire charged rates in excess of the amounts set forth in Empire’s tariff; that Empire did not have tariffs on file for some Baltic shipments; that Baltic did not know and could not have known that Empire charged rates in excess of its public tariff; that Empire charged Baltic rates greater than those it charged other

shippers; that Empire accepted money from Baltic for some shipments, but then refused to release the containers; and that Empire failed to provide bills of lading and other shipping documents. (FMC Complaint ¶¶ 11-21.)

Baltic contends that Empire (EUL) violated the following sections of the Shipping Act:

- A. EUL violated 46 U.S.C. § 41104(2)(a), 41104(4)(a) and 41104(8) by charging Complainant rates greater than those it charged other shippers.
- B. EUL violated 46 U.S.C. § 41104(2)(a), 41104(4)(a) and 41104(8) by charging Complainant rates greater than those reflected in its published tariff.
- C. EUL violated 46 U.S.C. § 40501(a) by failing to keep open to public inspection in its tariff system tariffs showing all its rates charges classifications rules and practice between all points or ports on its own route and on any through transportation route that has been established.
- D. EUL violated 46 U.S.C. § 41102(c) by failing to provide Complainant with: (1) proper and lawful documents of ownership (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport even though Complainant paid respondents. Respondents failed to deal in good faith and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

(FMC Complaint Part V.) The FMC Complaint alleges that Baltic suffered actual injury as a result of the violations, (FMC Complaint Part VII (there is no Part VI in the Complaint)), and seeks a reparation award, attorney fees, and “such other and further order or orders be made as the Commission determines to be proper in the premises.” (FMC Complaint Part VIII.)

#### **IV. SHIPMENTS AT ISSUE.**

The shipments that Baltic contends were affected by Empire’s alleged violations of the Shipping Act are divided into five groups.

##### **Group I**

Group I consists of shipments that Empire delivered before Baltic filed its 2011 D.N.J. Complaint on November 23, 2011. When Baltic’s representative conducted her audit in 2014, she did not determine the number of shipments that Baltic’s records indicate Empire carried in 2007 or 2008. (See Baltic Opposition to Mot. for S/D (5/8/15), Presniakovas Affidavit, Exhibit X (Internal Memorandum dated July 14, 2014) (“In light of the fact that we only have information regarding rates charged by Empire to other shippers for years 2009 through 2012, I have limited my review to that time period.”).) The audit states that Empire carried 451 containers in 2009, 1379 containers in

2010, 650 containers in 2011, and eighteen containers in 2012. (*Id.* at 2.) For the purposes of this decision, it is assumed that these figures are not in dispute. Empire established the rates at the time of the shipments. In the oral argument on Empire's motion, Baltic conceded that it knew Empire's rates at the time of the shipments, each of which originated more than three years before Baltic filed its FMC Complaint. *See* Transcript at 15 ("JUDGE GUTHRIDGE: Okay. So Baltic knew at the commencement of all the shipments what it was going to pay for the shipments; is that right? MR. NUSSBAUM: That's correct, Your Honor, per the – per the emails containing the rates that Baltic was provided with."). Baltic also confirmed that Empire delivered all of the shipments for 2007 through 2010 and all but 167 of the 2011 shipments before Baltic filed its 2011 D.N.J. Complaint. Transcript at 8.<sup>6</sup>

## Group II

Group II consists of 162 shipments that were identified in Exhibits A and B of the 2011 Settlement. When Baltic filed the 2011 D.N.J. Complaint, it alleged that 167 shipments had not yet been delivered to the consignee. (2011 D.N.J. Complaint ¶ 31) Of the 167, Baltic had paid the charges for twenty (2011 D.N.J. Complaint ¶ 32) or twenty-two (*id.* at ¶ 47) shipments and had not paid the charges for 145 shipments. (*Id.* at ¶ 48.)

On November 29, 2011, the parties entered into the 2011 Settlement. 2011 Settlement Exhibit A identified twenty-three undelivered shipments for which the parties agreed that Baltic had already paid. The Agreement required Empire to release these shipments immediately. (2011 Settlement, ¶ 2 and Exhibit A.) Exhibit B identified 139 undelivered shipments that:

shall be released by Empire to Baltic . . . 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.

(2011 Settlement, ¶ 3 and Exhibit B.) It should be noted that the undersigned was unable to find Exhibit B, shipment 162, Booking No. 493883, container MEDU8353250, listed either by booking number or container number in the spreadsheet of the 2011 shipments. (Baltic Opp. to Mot. for S/D (5/8/15), Presniakovas Affidavit, Exhibit X (Internal Memorandum dated July 14, 2014) Exhibit G.) For the purposes of this decision, it is assumed that this shipment was subject to the same treatment as the other 138 shipments identified in Exhibit B to the 2011 Settlement.

As with the Group I shipments, Empire established the original rates and Baltic knew Empire's rates at the time of the shipments, each of which originated more than three years before

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<sup>6</sup> An admission by counsel during oral argument may support summary judgment. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure 3d* § 2722 (1998).

Baltic filed its FMC Complaint. 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. *See* 2011 D.N.J. Complaint ¶¶ 39 and 48, above. *See also* 2011 D.N.J. Complaint ¶ 61 (“the imposition of false and excessive shipping charges, both prospectively and retroactively, and the unlawful seizure of [Baltic’s] cargo is a violation of the Shipping Act of 1984”).

### **Group III**

Group III consists 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. Baltic refers to them as the “Long Beach Shipments.” As with the Groups I and II shipments, Empire established the original rates and Baltic knew Empire’s rates at the time of the shipments, each of which originated more than three years before Baltic filed its FMC Complaint. As with the Group II 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 charges more than three years before Baltic filed its FMC Complaint. According to Baltic, these five shipments were not included in the Agreement “because these were those five bookings from which Empire had collected directly from Baltic’s customer, \$175 per container.” Transcript at 11. (*See also* Baltic Supp. Memo. (7/10/15) at 4 (“Before signing the 2011 Settlement Agreement, [Empire] demanded that the [five] Long Beach Shipments (and ten shipments mentioned above) be excluded from the agreement because [Baltic’s] customers agreed to pay the extra shipping charges of approximately \$175.00 per container demanded by [Empire].”).) 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.” (Empire Reply to Baltic Opp. to Mot. For S/D (5/26/15), Exhibit 1 (Email dated November 25, 2011, from respondent Hitrinov to Baltic representative Supronas).) On November 18 and 22, 2011, Baltic customers made payments for the five shipments not included in the 2011 Settlement, (Baltic Supp. Memo. (7/10/15), 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.

### **Group IV**

Group IV consists of ten newly identified shipments, the “ten shipments mentioned above” in the Group III description. The 2011 D.N.J. Complaint alleged that Empire refused to release 167 shipments and the parties settled that case for release of 162 of the shipments, omitting the five Long Beach shipments in Group III. There was extensive discussion of these 167 shipments during the hearing on Empire’s motion. Transcript at 6-8, 14, 17, 47. Baltic stated that its intent in filing the 2011 D.N.J. Complaint was to make sure that Empire delivered all of Baltic’s shipments then in transit.

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

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

Transcript at 7.

JUDGE GUTHRIDGE: And is that – are those – the only shipments I saw or the containers I saw referenced were the – included in the 21 shipments<sup>7</sup> that were in the end counter of [should be *in camera*] documents that were sent in by the Respondent.

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

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

MR. NUSSBAUM: That's correct.

Transcript at 15-16. No claim was made at that hearing that the number of shipments at issue in the 2011 D.N.J. Complaint was anything other than 167. 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.” (Baltic Supp. Memo. (7/10/15) at 6 n.8.) Baltic states that the shipments are included in the spreadsheet found at Exhibit N-1 to the Presniakovas Affidavit filed May 7, 2015, with Baltic's opposition to the motion.

As explained above, that exhibit is identical to Exhibit “F” to the 2011 DNJ Complaint, which lists a total of 546 containers. The notations in the ninth column of that spreadsheet indicate that of the 546 containers, 369 had already arrived and had been released. The remaining 177 containers were the very same containers at issue in the 2011 lawsuit and had either arrived and had not been released, or were in transit. Of those 177 shipments, 5 were the Long Beach Shipments, 162 were addressed in the settlement agreement, leaving ten containers that were not addressed by the parties during this motion, all ten of which were not covered under the settlement agreement, or form the basis for a continuing violation as discussed below.

(Baltic Supp. Memo. (7/10/15), at 6 (footnotes omitted).) Baltic states that Empire demanded that these ten shipments “be excluded from the agreement because [Baltic's] customers agreed to pay the extra shipping charges . . . demanded by [Empire],” (*id.* at 4), which raises the question of why

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<sup>7</sup> These twenty-one shipments are in Group V below.

Empire would demand that shipments that were not recognized as being *included* in the lawsuit be *excluded* from the settlement. Baltic does not cite to contemporaneous evidence in the record demonstrating Baltic's demand.

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. Parties must designate specific facts and provide the court with their location in the record. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002). "General references [to evidence] without page . . . numbers are not sufficiently specific." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003). 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.

### **Group V**

Group V consists of twenty-one shipments that Empire transported for Baltic Auto Shipping Corp., Savannah, Georgia (Baltic Savannah), another corporate entity, and other shippers between December 2011 and October 2012 after settlement of the 2011 D.N.J. Complaint. These shipments were discussed in an earlier order in which it was found that "the twenty-one shipments do not relate to Baltic Illinois or shipments at issue in this proceeding." *Baltic v. Empire*, FMC No. 14-16, Order at 2 (ALJ Apr. 1, 2015) (Order Releasing Documents Submitted *In Camera*). In a motion for reconsideration, Baltic contends that these twenty-one shipments were carried for complainant Baltic. This motion is addressed in the next section of this decision.

## **V. COMPLAINANT'S MOTION FOR RECONSIDERATION OF ORDER RELEASING DOCUMENTS SUBMITTED *IN CAMERA* IS DENIED.**

### **A. The April 1, 2015, Order Releasing Documents Submitted *In Camera*.**

During informal discovery early in this proceeding, Baltic sought records of twenty-one shipments Empire carried for a shipper named Baltic Auto Shipping Corp. (Baltic Savannah), a Georgia corporation. These are the shipments identified above as Group V.

Empire resisted providing copies of the documents to Baltic Illinois [complainant Baltic in this proceeding] based on the claim that because Empire had carried the cargo for Baltic Savannah, not Baltic Illinois, the documents are not relevant in a proceeding alleging Empire violated the Shipping Act transporting cargo for Baltic Illinois. Furthermore, at the time of the shipments, Baltic Savannah represented to Empire that Baltic Savannah was not related to Baltic Illinois. Because Empire had reason to believe that Baltic Savannah was not related to Baltic Illinois, Empire

feared that release of the documents to Baltic Illinois might risk a violation of the Shipping Act.

*Baltic v. Empire*, FMC No. 14-16, Order at 1 (ALJ Apr. 1, 2015) (Order Releasing Documents Submitted *In Camera*). After an earlier telephone conference, Empire had been required to submit the shipping documents for *in camera* review. *Baltic v. Empire*, FMC No. 14-16 (ALJ Feb. 24, 2015) (Briefing Schedule). Empire complied with this requirement.

On March 17, 2015, counsel for Baltic sent a letter to the undersigned requesting release of the shipping documents for the twenty-one shipments submitted *in camera*. Counsel's letter included a letter on Baltic Savannah letterhead dated March 12, 2015, from Alla Kotova, president of Baltic Savannah, to the undersigned authorizing release of the documents for the twenty-one shipments to Andrejus Presniakovas, president of complainant Baltic, and to the attorney for complainant Baltic. Empire responded with a letter opposing release, and complainant Baltic replied with a letter noting *inter alia* that its counsel had been retained by Baltic Savannah to represent it on this issue. The request and response prompted a determination by the undersigned that the records of the twenty-one shipments and the letters requesting and opposing release should be made part of the record of this proceeding, and Baltic's request for release should be treated as a motion. *Baltic v. Empire*, FMC No. 14-16, Order at 2-3 (ALJ Apr. 1, 2015) (Order Releasing Documents Submitted *In Camera*). Because the shipping records contained information that arguably is confidential and concerned persons that are strangers to this proceeding, the Order asked the Secretary to treat the shipping documents as confidential. *Id.* at 3.

The Order noted:

The purpose of the *in camera* review was to determine whether the Baltic Savannah shipments were related to the Baltic Illinois shipments at issue in this proceeding.

On February 23, 2015, Empire sent the records [of the shipments] to the undersigned by overnight delivery. Empire also included a report from the Illinois Secretary of State indicating the [complainant] Baltic Illinois is an Illinois corporation whose president is Andrejus Presniakovas, a report from the Georgia Secretary of State indicating that Baltic Savannah is a Georgia corporation located in Savannah, Georgia, whose president is Alla Kotova, and email exchanges from Baltic Savannah to Empire denying Baltic Savannah is related to Baltic Illinois.

The record for each of the twenty-one shipments consists of an email sent to Empire from "Alla Lina" at Baltic Savannah and a dock receipt for the shipment identifying the booking number, shipper, consignee, vessel, port of loading, date of sailing, and port of discharge for the shipment. The dock receipts also identify the container number, and, in the case of vehicles, identify each vehicle by manufacturer and vehicle identification number. The dock receipts identify Baltic Savannah as the shipper on eight of the shipments. (Attachment A Shipments 1, 10-15, and 20.)

Other entities are identified as the shipper on the remaining thirteen shipments. Although the dock receipts are attached to emails sent from “Alla Lina” to Empire, Baltic Savannah’s role in these shipments is not clear. Commission records do not list Baltic Savannah as an ocean transportation intermediary licensed by the Commission, either as an NVOCC or an ocean freight forwarder. There is no reference to Baltic Illinois in the “Alla Lina” emails or the dock receipts. Therefore, I find that the twenty-one shipments do not relate to [complainant] Baltic Illinois or shipments at issue in this proceeding.

*Id.* at 2. In a footnote, the Order noted that “[the] dock receipts do not appear to indicate who issued them and it is not clear who issued the booking numbers.” *Id.* at 2 n.1. The first of the twenty-one shipments occurred on December 16, 2011, after settlement of the 2011 D.N.J. Complaint, with three more shipments occurring in December 2011. The rest of the shipments occurred between January 13, 2012, and October 18, 2012. *Id.* at 3. All occurred less than three years before Baltic filed its FMC Complaint.

Addressing complainant Baltic’s request to release the records and Baltic Savannah’s letter authorizing release, the Order found that records of eight of the twenty-one shipments identified Baltic Savannah as the shipper, but other shippers who are strangers to this proceeding were identified on thirteen of the shipments. Based on the letter from Baltic Savannah, records of the eight Baltic Savannah shipments were released to complainant Baltic, but records of the other thirteen shipments were not released. *Id.* at 4. The order required Baltic Savannah to file a motion if it wanted the Secretary to keep records of the Baltic Savannah shipments confidential.

**B. Complainant’s Motion for Reconsideration of Order Releasing Documents Submitted *In Camera*.**

On April 30, 2015, complainant Baltic filed a motion for reconsideration of the Order “insofar as the Order makes a finding of fact that the twenty one (21) bookings do not relate to the Complainant or to the shipments at issue in this proceeding.” (Complainant’s Motion for Reconsideration of Order Releasing Documents Submitted *In Camera*.)

In Baltic’s 2011 D.N.J. Complaint, verified by its president Andrejus Presniakovas, Baltic stated: “In or around September 2011, [Baltic] notified [Empire] that the business relationship between the parties would be wound down and ultimately discontinued.” 2011 D.N.J. Complaint ¶ 30. In Baltic’s FMC Complaint filed November 28, 2014, also verified by Presniakovas, Baltic states: “From approximately November of 2007 through January of 2012, [Baltic], via [Empire], shipped containers with automobiles acquired by [Baltic] on behalf of foreign customers to ports abroad . . . . Said containers contained in excess of 4000 used automobiles valued in excess of \$5,000,000.” (FMC Complaint ¶ 12.)

Presniakovas now contends that the FMC Complaint that he verified is wrong and that the relationship between complainant Baltic and Empire continued through October 2012.

Beginning in 2009 and continuing through 2012, Baltic Chicago engaged in a regular course of business with [Empire] whereby Baltic Chicago shipped containers to different ports of destination from various ports of loading, including the port of Savannah (where Baltic Savannah performed the loading and trucking), and paid [Empire] the rates in emails such as those in Exhibit “1” that were quoted to us from time to time by Mr. Hitrinov between 2009 and 2012. During that time period, [Empire] would email rates for shipping to an employee of Baltic Chicago . . . and would copy Alla Kotova . . . on those emails, addressing those emails with the introduction: “Dear Baltic Auto” because [Empire] knew that Baltic Chicago and Alla Kotova were related.

(Complainant’s Motion for Reconsideration (4/30/15), Presniakovas Affidavit ¶ 6.) The Presniafovas affidavit then sets forth thirty-seven paragraphs of events regarding shipments that occurred *before* Baltic filed the 2011 D.N.J. Complaint and predate the twenty-one shipments in Group V. (*Id.* ¶¶ 7-43.) The motion for reconsideration echoes this affidavit. (Motion for Reconsideration (4/30/15) at 6-14.) Baltic contends that:

The foregoing makes it very clear that: (1) Baltic Chicago and Baltic Savannah have common ownership; (2) Baltic Savannah was a loading and trucking facility only, that was used by Baltic Chicago for shipments leaving from the port of Savannah; (3) [Empire] always knew that Baltic Savannah was a loading and trucking facility only, and that all of the bookings belonged to Baltic Chicago; (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; and (5) under duress, Alla Kotova made a statement that the five bookings identified in the email correspondence forwarded to ALJ Guthridge, had nothing to do with Baltic Chicago.

(*Id.* at 14.) The motion concludes:

[Baltic] requests that the instant motion be granted in its entirety, and that upon reconsideration, that: (1) the Commission revise the Order to remove the finding of fact that the twenty one shipments do not belong to [Baltic] and have no relation to the shipments at issue; and (2) to the extent that it is appropriate at this time, [Baltic] respectfully requests that the Commission find affirmatively that the twenty one bookings do in fact belong to [Baltic] and are related to the shipments at issue; and (3) that the Commission sanction [Empire] and award complainants attorneys’ fees as a result of [Empire] having made misrepresentations to the Commission regarding the shipments discussed herein . . . .

(*Id.* at 16.)

Baltic attached to the motion and Presniakovas Affidavit a number of exhibits relating to the shipments that occurred before Baltic filed the 2011 D.N.J. Complaint, including emails between

Baltic and Empire, a statement apparently prepared by Empire with information about charges for shipments that occurred on or before June 2, 2011, and an affidavit signed by Alla Kotova, the president of Baltic Savannah, setting forth averments about shipments and events that occurred prior to and during the litigation of the 2011 D.N.J. Complaint. Significantly, Baltic did not attach any contemporaneous documents establishing a connection between complainant Baltic and the twenty-one shipments.

### **C. Discussion.**

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.

Even if the motion were further considered, none of the shipping documents for the Group V shipments gives any indication that complainant Baltic was the shipper. Complainant Baltic contends that evidence submitted with its motion for reconsideration makes five points "very clear." Even if accepted as established, these five points do not establish that complainant Baltic was the shipper on the twenty-one shipments.

Regarding the eight Baltic Savannah shipments and the contention that complainant Baltic and Baltic Savannah have common ownership, there is no dispute that they are separate corporate entities. Each has its own rights and liabilities.

A corporation exists separately from its shareholders, officers, directors and *related corporations*, and those individuals and entities ordinarily are not subject to corporate liabilities. Indeed, one of the primary purposes of incorporation is to limit liability and thereby encourage investment. An exception exists when an "individual or entity uses a corporation merely as an instrumentality to conduct that person's or entity's business." Then a court may pierce the corporate veil, and the individual or entity may be charged for the underlying cause of action. The point is to prevent those who disregard the corporate form from then relying on it to avoid liability for their wrongdoing.

*Laborers' Pension Fund v. Lay-Com, Inc.*, 580 F.3d 602, 610 (7th Cir. 2009) (emphasis added). Absent evidence that would permit piercing the corporate veil, complainant Baltic would not be liable for any obligations of Baltic Savannah. Complainant Baltic cites no authority that would permit complainant Baltic to assert Baltic Savannah's right to assert a claim for injuries allegedly caused by Empire's violations of the Shipping Act on Baltic Savannah shipments because they have "common ownership." Whatever the parties' actions and understanding may have been between

2007 and 2011 when Empire carried the shipments in Groups I through IV for complainant Baltic, the shipping documents indicate that Baltic Savannah was the shipper on the Group V shipments.<sup>8</sup>

Regarding the thirteen shipments for which an entity other than Baltic Savannah was identified as the shipper, complainant Baltic cites no authority that would permit it to assert the claims of these unaffiliated entities.

Complainant Baltic has not set forth grounds to reconsider the Order entered April 1, 2015. Therefore, the motion for reconsideration is denied.

## **VI. CONTROLLING AUTHORITY.**

### **A. Statutory Background.**

Baltic filed its FMC Complaint pursuant to section 41301(a) of the Act.

A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

The FMC Complaint alleges that Empire is an NVOCC non-vessel-operating common carrier within the meaning of the Act. (FMC Complaint ¶¶ 4-6.)

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16).

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<sup>8</sup> 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 Act regulates the conduct of common carriers. The FMC Complaint alleges that Empire violated several sections of the Act. (FMC Complaint Part V.)

Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

46 U.S.C. § 40501(a)(1).

A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

46 U.S.C. § 41102(c).

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not –

\* \* \*

(2) provide service in the liner trade that is – (A) not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under chapter 405 of this title, unless excepted or exempted under section 40103 or 40501(a)(2) of this title.

\* \* \*

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges.

46 U.S.C. § 41104.

The FMC Complaint alleges that the Baltic was injured by Empire’s alleged violations and seeks a reparation award for their injuries. (FMC Complaint ¶ 18; FMC Complaint at 7.) The Act provides:

A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within

3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a). Until December 18, 2014, the Act defined actual injury as follows.

(a) *Definition.* – In this section, the term “actual injury” includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount.* – If the complaint was filed within the [three-year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305. On December 18, 2014, the Act was amended by deleting the phrase “plus reasonable attorney fees” from section 41305(b) and adding a new section 41305(e): “*Attorney Fees.* – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees.” Coble Act, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (emphasis added). This amendment did not change the definition of “actual injury.”

## **B. Evidence and Burden of Persuasion.**

Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981). All documents provided by the parties in support of their arguments on the motion to dismiss or summary decision are admitted as evidence. This initial decision is based on the FMC Complaint and Amended Complaint, the Answer to the Amended Complaint, the parties’ memoranda, the exhibits filed with the memoranda, the supplemental evidence and memoranda filed by the parties, and the parties’ statements in the oral argument on Empire’s motion.

This initial summary decision addresses only material issues of fact and law. It is not necessary to resolve disagreements on matters not material to the outcome of this proceeding. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-194 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

A complainant alleging a violation of the Shipping Act “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Co. v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at \*3 (ALJ June 13, 2005). *See* 5 U.S.C. § 556(d) (“Except as

otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

### C. Motion for Summary Decision.

The Commission has emphasized:

At the summary judgment stage, the role of the judge “. . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 249 (1986)]. The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); [10A]Wright, Miller & Kane, [*Federal Practice and Procedure* § 2727, p. 455 (3d ed. 1998)].

*EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (FMC 2008).*

The party moving for summary decision bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

To defeat a motion, the nonmoving party must do more than “simply show there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586-587. Once the moving party points out an absence of proof on an essential element of the nonmoving party’s case, the burden shifts to the nonmoving party to provide evidence to the contrary. *Celotex*, 477 U.S. 317,

322-323 (1986). The moving party is not required to negate those portions of the non-moving party's claim on which the non-moving party bears the burden of proof. *Celotex*, 477 U.S. at 323.

A party opposing a motion for summary decision cannot rest on the allegations of the complaint but must come forward and designate specific facts, by affidavit or otherwise, showing that a genuine issue of material fact exists that can only be resolved by the trier of fact. *Celotex*, 477 U.S. at 324; *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1103 (9th Cir. 2000); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary decision because Rule 56(c) requires "that there be no genuine issue of *material* fact." *Anderson*, 477 U.S. at 247-248 (emphasis added). Material facts are those which could actually affect the outcome of the lawsuit. *Webb v. Lawrence County*, 144 F.3d 1131, 1135 (8th Cir. 1998).

In evaluating the evidence at the summary decision stage, the Commission considers only those facts which are supported by admissible evidence. "[A] successful summary judgment defense requires more than argument or reallegation; [the opposing party] must demonstrate that at trial it may be able to put on admissible evidence proving its allegations." *JRT, Inc. v. TCBY Sys., Inc.*, 52 F.3d 734, 737 (8th Cir. 1995). See also *Walker v. Wayne Cnty., Iowa*, 850 F.2d 433, 434 (8th Cir. 1988) (holding that courts considering a summary judgment motion "may consider only the portion of the submitted materials that is admissible or usable at trial"), *cert. denied*, 488 U.S. 1008 (1989). The court is not required "to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996), quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995). The court "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

On a motion for summary decision, it is insufficient for the nonmoving party merely to reassert ultimate facts without providing any support for the contentions. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion, *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003), but conclusory allegations as to ultimate facts are not adequate to defeat summary decision. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). "'Ultimate facts' are defined . . . as 'those which the law makes the occasion for imposing its sanctions.'" *Laughlin v. United States*, 344 F.2d 187, 191 (D.C. Cir. 1965), citing *Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944). "[T]he mere fact that the [nonmoving party] vigorously dispute[s] the *legal conclusions* to be drawn from the facts presented by the [moving party is] no bar to the grant of summary judgment." *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 728 n.13 (5th Cir. 1976) (emphasis added). "It is axiomatic that where questions of law alone are involved in a case, summary judgment is appropriate." *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976), *cert. denied*, 429 U.S. 1095 (1977). Where the relevant facts are not in dispute and only one conclusion can be drawn from those facts, entry of summary

judgment may be appropriate. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 719 (7th Cir. 1994) (affirming summary judgment on statute of limitations ground against party that claimed benefit of discovery rule).

Empire contends that Baltic's claim for a reparation award accrued more than three years before Baltic filed the FMC Complaint and moves for summary decision on the affirmative defense that the statute of limitations bars Baltic's claims for a reparation award. A claim that an action is barred by the statute of limitations is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1), made applicable to this proceeding by 46 C.F.R. § 502.12. A party moving for summary decision on an affirmative defense must establish all of the essential elements of the defense to warrant a decision in its favor. *E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 54-55 (1st Cir. 2002); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1264 (11th Cir. 2001).

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

*United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted).

It should not be forgotten that time-limitations provisions [promote] important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

*Delaware State College v. Ricks*, 449 U.S. 250, 259-260 (1980), quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975).

The Commission has adopted what is called the "discovery rule" to determine when a cause of action accrues under the Shipping Act. "The Commission has determined to adopt the discovery rule, and to hold that [a complainant's] cause of action accrue[s] when it [knows or should know] that it [has] a case against [a respondent]." *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 306, 313 (2001) (*Inlet Fish*).

There are compelling reasons suggesting that a flexible approach to the accrual of a cause of action is the better course of action. The Commission has an interest in the precedent established by its adjudication of alleged Shipping Act violations – such

adjudication is a form of private enforcement of the rights established by Congress in the statute. Based on this understanding of the Act, a flexible rule permitting the inclusion of complaints that would otherwise be dismissed under a more strict approach would allow the Commission to pass on the legality of allegedly injurious conduct. Also, application of a stricter rule would exonerate certain respondents even if their conduct were unlawful, simply because a potential complainant was unable to identify the existence of its cause of action. This is, of course, to be distinguished from a case in which a complainant is aware of a cause of action but merely fails to act on that knowledge.

*Id.*

[I]mplementing the rule that a cause of action accrues when a party knew or should have known that it had a claim is consistent with the statutory construction used by numerous courts of appeals. In *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991), the court held that unless Congress has provided a directive that a cause of action accrues when an injury occurs, the discovery rule should apply. Explaining the practical application of the rule, the court in *Connors* held:

[I]f the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time. But if, on the other hand, the injury is not of the sort that can readily be discovered when it occurs, then the action will accrue, and the limitations period commence, only when the plaintiff has discovered, or with due diligence should have discovered, the injury.

*Id.* (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990)). The court also noted that this rule has been adopted by “[a]t least eight federal courts of appeals.” *Id.*

*Inlet Fish*, 29 S.R.R. at 314. The discovery rule is an exception to the time-bar provision. Since complainant Baltic is seeking the protection of the rule, it has the burden of showing that it falls within the exception by demonstrating that even with the exercise of reasonable diligence it could not have known of the purported injury. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d at 717.

The Supreme Court holds that “‘discovery’ refers not only to a plaintiff’s actual discovery of certain facts, but also to the facts that a reasonably diligent plaintiff would have discovered.” *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 645 (2010) (construing statute of limitations for private right of action that provides for filing complaint “not later than the earlier of – (1) 2 years after the

discovery of the facts constituting the violation; or (2) 5 years after such violation.” 28 U.S.C. § 1658(b)).

Thus, treatise writers now describe “the discovery rule” as allowing a claim “to accrue when the litigant first knows *or with due diligence should know* facts that will form the basis for an action.” 2 Corman § 11.1.1, at 134 (emphasis added); see also *ibid.*, n. 1 (collecting cases); 37 Am. Jur. 2d, Fraud and Deceit § 347, p. 354 (2001 and Supp. 2009) (noting that the various formulations of “discovery” all provide that “in addition to actual knowledge of the fraud, once a reasonably diligent party is in a position that they should have sufficient knowledge or information to have actually discovered the fraud, they are charged with discovery”); *id.*, at 354-355, and nn.2-11 (collecting cases).

*Id.* at 646.

## VII. MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE.

### A. Only Disputes of Material Facts Will Prevent a Summary Decision.

Empire has moved for summary decision on the affirmative defense that Baltic’s claim for a reparation award is barred by the Shipping Act’s three year statute of limitations. Empire included thirty-seven paragraphs setting forth facts about which it claims there is no genuine dispute. Baltic responded with a counter-statement of material facts contending that it disputes many of the thirty-seven paragraphs of facts that Empire claims are undisputed and adding an additional thirty-seven facts about the parties’ relationship and the transportation of Baltic’s shipments.

It is readily apparent from the parties’ claims that they disagree about many events that occurred during their relationship. For example, in Paragraph 1 of its statement of material facts, Empire states that Baltic engaged Empire to transport more than 4,000 shipments from approximately November 2007 through November 2011. (Mot. for S/D (3/23/15) Statement of Facts ¶ 1.) In its FMC Complaint, Baltic states that it shipped containers with Empire from approximately November of 2007 through January of 2012.” (FMC Complaint ¶ 12.) In its counter-statement to the motion, Baltic states that the relationship lasted from approximately November 2007 through 2012, (Baltic Opp. to Mot. S/D (5/8/15) Counter ¶ 1), and also states that “an additional 21 bookings were made with respondents between December 23, 2011 through October 18, 2012, solely with respect to shipments departing from Savannah.” (Counter ¶ 16.)<sup>9</sup>

In Paragraph 2, Empire states that “[i]t was the practice of Baltic to negotiate freight rates with EUL” and in Paragraph 3 that “Baltic booked shipments on the basis of the negotiated freight rates.” (Mot. for S/D (3/23/15) Statement of Facts ¶¶ 2-3.) Baltic responds that “[i]t was not the practice of Baltic to negotiate freight rates with the respondents” and “[a]t no time did Baltic ever

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<sup>9</sup> Baltic does not explain why its FMC Complaint states the relationship ended in January 2012, but now contends that the relationship lasted until October 18, 2012. See Part IV above.

enter into a Negotiated Rate Agreement ('NRA') with the respondents, and at all times, the respondents simply presented the rates to Baltic." (Counter ¶¶ 2-3.)

Empire states that Baltic provided Empire with dock receipts identifying relevant information about the shipments and identified charges to be paid at destination. The dock receipts were used as shipping instructions for each shipment. Empire did not issue a bill of lading. An Express Release or a Telex Release would be used to authorize delivery of the cargo once freight charges had been paid or, on a credit shipment, on the consignee's demand. (Motion Statement ¶¶ 4-6.) Baltic disputes Empire's description of how they conducted their relationship. (Counter ¶¶ 4-6.)

This proceeding is before me on Empire's motion for summary decision on its statute of limitations defense. Empire contends that Baltic's claims, assuming they are valid, accrued more than three years before Baltic filed its FMC Complaint; that is, before November 28, 2011. Although some facts described above and many other facts may be in dispute, if they are not relevant to when the issue of when Baltic's claim accrued, they do not need to be resolved on a motion for summary decision on the statute of limitations.

#### **B. Material Facts Not in Dispute.**

1. Complainant Baltic Auto Shipping, Inc. (Complainant or Baltic) is licensed by the Commission as a non-vessel-operating common carrier (NVOCC) and ocean freight forwarder, FMC License No. 021242 NF. (Empire Mot. for S/D. (3/23/15), App. Exh. 4 (Certification of Respondent Michael Hitrinov) ¶ 3 (hereinafter Hitrinov); FMC OTI list, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited September 14, 2015; FMC OTI list, <http://www2.fmc.gov/oti/FF.aspx>, last visited September 14, 2015.)
2. Beginning approximately November 2007, Respondent Empire United Lines Co., Inc. (Empire or EUL) transported by water approximately 4,000 automobiles for Baltic between ports in the United States and foreign ports. (Hitrinov ¶ 3; FMC Complaint ¶ 12; Empire App. Exh. 2 (*Baltic v. Empire and MSC*, No. 2:11-cv-06908-FSH, Complaint ¶ 10 (D.N.J. Nov. 23, 2011) (complaint filed) (hereinafter 2011 D.N.J. Complaint).)
3. Empire is licensed by the Commission as an NVOCC, FMC License No. 012052. (FMC OTI list, <http://www2.fmc.gov/oti/NVOCC.aspx>, last visited September 14, 2015.)
4. At all material times, Empire had a published tariff on file. (Hitrinov ¶ 38; Baltic Supp. Memo (7/10/15), Appendix 6 Empire United Lines Co., Inc., Tariff.)
5. In or around November 23, 2011, 167 Baltic containers shipped with Empire were in transit, or had arrived in the ports of discharge, but were not yet delivered. (Hitrinov ¶ 16; 2011 D.N.J. Complaint ¶¶ 30-34.)

6. Empire established the freight rate for each shipment at the beginning of each shipment and Baltic knew that rate before or at the beginning of each shipment. Transcript at 15.
7. With the exception of the 167 Baltic containers then in transit, all shipments that Empire transported for Baltic between November 2007 and 2011 were delivered before November 22, 2011, more than three years before Baltic filed its Complaint with the Federal Maritime Commission. Transcript at 8.
8. On or about November 14, 2011, Empire amended the freight charges that it claimed were due from Baltic for the 167 containers not yet delivered, increasing the amount due by approximately \$175,000. (Hitrinov ¶ 20; 2011 D.N.J. Complaint ¶¶ 39, 40.)
9. Baltic disputed the additional charges as already being included in the freight rate charged and refused to pay the charges. (Hitrinov ¶ 21; 2011 D.N.J. Complaint ¶ 45.)
10. On November 14, 2011, Baltic demanded that the containers that had arrived be released, but Empire refused to release the containers until Baltic paid the claimed charges. (Hitrinov ¶ 22; 2011 D.N.J. Complaint, ¶¶ 47-49; Empire Mot. for S/D. (3/23/15), App. Exh. 5 (2011 D.N.J. Complaint Exh. G (email from Baltic to Empire dated 11/14/2011; 11:39 AM)).)
11. On November 23, 2011, Baltic filed a verified complaint commencing an action against Empire in the United States District Court for the District of New Jersey lawsuit. *Baltic v. Empire and MSC*, No. 2:11-cv-06908-FSH (D.N.J. Nov. 23, 2011) (Complaint filed). (Hitrinov ¶ 23; Empire Mot. for S/D. (3/23/15), App. Exh. 9 (2011 D.N.J. Docket Sheet).)
12. Baltic sought monetary damages and a writ of replevin for the delivery of the containers. (Hitrinov ¶ 25; 2011 D.N.J. Complaint at 10-18.)
13. In the 2011 D.N.J. Complaint, Baltic alleged that Empire “unlawfully seized [Baltic’s] containers and refused to release them” and that Empire was “illegally and unlawfully holding [Baltic’s] cargo hostage in exchange for a payment of an artificial and unlawful debt . . . .” (Hitrinov ¶ 27; 2011 D.N.J. Complaint ¶¶ 46, 51.)
14. In the 2011 D.N.J. Complaint, Baltic alleged that “[Empire] . . . contact[ed] [Baltic’s] customers, the intended recipients . . . and have offered them the goods shipped by [Baltic] at a radical discount . . . .” (Hitrinov ¶ 26; 2011 D.N.J. Complaint ¶ 50.)
15. In the 2011 D.N.J. Complaint, Baltic alleged that Empire “was required by law to create and deliver a Bill of Lading and invoice . . . to [Baltic] with respect to the Oceangoing . . . transport of [Baltic’s] vehicles . . . (the “House Bills of Lading” or “HBOLS”); and when Baltic “demanded a copy of all HBOLS and invoices”; “Empire failed and refused to deliver

to [Baltic] HBOLs and invoices . . . for the vehicles shipped overseas.” (Hitrinov ¶ 28; 2011 D.N.J. Complaint ¶¶ 28, 29, 30.)

16. In the 2011 D.N.J. Complaint, Baltic alleged that “the imposition [by Empire] of false and excessive shipping charges . . . and the unlawful seizure of [Baltic’s] cargo is a violation of the Shipping Act of 1984, as amended, as well as rules and regulations promulgated by the Federal Maritime Commission.” (Hitrinov ¶ 29; 2011 D.N.J. Complaint ¶ 61.)
17. On November 29, 2011, the parties entered into the Settlement Agreement and Mutual Release resolving the New Jersey case. (Hitrinov ¶ 30; Empire Mot. for S/D. (3/23/15), Exh. 3 (2011 Settlement).)
18. 2011 Settlement Exhibit A identified twenty-three shipments that the Agreement required Empire to release immediately. “The parties agree that Baltic shall be responsible for all storage and demurrage charges, if any, with respect to these twenty-three (23) containers.” (2011 Settlement, ¶ 2 and Exhibit A.)
19. 2011 Settlement Exhibit B identified 139 shipments that “shall be released by Empire to Baltic . . . 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.” (2011 Settlement, ¶ 3 and Exhibit B.)
20. The 2011 Settlement includes a mutual general release: “With the exception of any obligation imposed by this Agreement, . . . the parties hereby release . . . 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.” (2011 Settlement, ¶ 5.)
21. The 2011 Settlement provides: “In addition to any other remedies available at law or in equity, in the event of a breach or default by any party of any obligation imposed by this Agreement, the court shall be authorized to award reasonable attorney’s fees and costs as against the defaulting party. In addition, the Court will retain jurisdiction over the enforcement of this Agreement.” (2011 Settlement, ¶ 10.)
22. The 2011 Settlement provides: “The parties shall execute and/or deliver any and all documents and give such instructions to their agents, designees and counterparties as may be necessary for the effectuation of the terms and conditions of this Agreement.” (2011 Settlement, ¶ 11.)

23. The 2011 Settlement recited that when entering into the agreement the parties had “relied on the legal advice of their respective counsel.” (2011 Settlement, ¶¶ 7(b) and 14.)
24. The 2011 Settlement recited that the parties “have had the opportunity to make whatever investigation or inquiry each may have deemed necessary or desirable in connection with the subject matter of this Agreement prior to its execution. The Parties have voluntarily and knowingly entered into the Agreement with full knowledge and understanding of its contents.” (2011 Settlement, ¶ 7(b).)
25. On or about December 5, 2011, Baltic and Empire submitted a stipulation of dismissal in the New Jersey district court case.
26. On December 7, 2011, the court entered an order dismissing the case. The court wrote by hand the following on the order: “Failure to consummate the settlement 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.” *Baltic v. Empire and MSC*, No. 2:11-cv-06908-FSH (D.N.J. Dec. 7, 2011) (Stipulation of Dismissal), found at Baltic Supp. Memo. (7/10/15), Appendix 8.
27. Empire delivered all of Baltic’s shipments identified in 2011 Settlement Exhibits A and B. (Hitrinov ¶ 37.)
28. On November 18 and 22, 2011 Baltic customers made payments for five shipments not included in the 2011 Settlement, and those shipments were released directly to the customers. (Baltic Supp. Memo. (7/10/15), Appendix 3 (Certification of Kamil Sawon) Exhibit A (Email dated 22 Nov 2011 from *mebaltic at hotmail.com* to *michael at eulines.com*)).
29. In 2014, Baltic’s president instructed a Baltic employee [Laura Supronas] to conduct an audit of the shipping documents. (Baltic Opp. to Empire Motion to Compel (4/3/15), Affidavit of Baltic president Andrejus Presniakovas ¶ 2.)

**FACTS ASSUMED AS TRUE FOR PURPOSES OF MOTION FOR SUMMARY DECISION**

The following facts are assumed to be true for the purposes of this decision.

1. Empire transported shipments for Baltic on routes for which Empire did not have a tariff specified in its public tariff.
2. Empire did not provide Baltic with: (1) proper and lawful documents of ownership (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport even though Complainant paid Respondents. Respondents failed to deal in good faith and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

3. Empire charged Baltic rates greater than those it charged other shippers.
4. Empire charged Baltic rates greater than those reflected in its published tariff.
5. Empire failed to keep open to public inspection in its tariff system tariffs showing all its rates charges classifications rules and practice between all points or ports on its own route and on any through transportation route that has been established.

**VIII. BALTIC'S CLAIM FOR A REPARATION AWARD IS BARRED BY THE STATUTE OF LIMITATIONS.**

**A. Baltic's Claim for a Reparation Award Based on the Allegation That Empire Failed to Provide Shipping Documents is Barred by the Statute of Limitations.**

Baltic contends that Empire violated section 41102(c) of the Act.

EUL violated 46 U.S.C. § 41102(c) by failing to provide Complainant with: (1) proper and lawful documents of ownership (bills of lading); (2) shipping invoices; and (3) the terms and conditions of transport even though Complainant paid respondents. Respondents failed to deal in good faith and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

(FMC Complaint ¶ V.D.) Baltic alleges the following facts that relate to Empire's failure to give Baltic documents related to the shipments.

At all times alleged herein, EUL and Hitrinov failed to provide [Baltic] with proper and lawful documents of ownership (bills of lading), nor did they ever provide shipping invoices nor the terms and conditions of transport even though [Baltic] paid respondents. Respondents failed to deal in good faith and provide proof of ownership with a correct original bill of lading and contract of transport in a timely manner to the Complainant.

(FMC Complaint ¶ IV.21.)

For the purposes of this motion, I assume that Empire provided Baltic with "tariffs included in spreadsheets provided by Empire to [Baltic] from time to time," (2011 D.N.J. Complaint ¶ 27), but violated the Act by failing to provide Baltic with the documents concerning the shipments in Groups I, II, III, and IV, and that Baltic suffered actual injury as a result of Empire's failure to provide the documents.

Empire moves for summary decision on its affirmative defense that Baltic's claim for a reparation award for actual injury resulting from this alleged violation is barred by the Act's three-

year statute of limitations. For summary decision to be entered in favor of Empire on this affirmative defense, the material facts as to which there is no genuine dispute must demonstrate that Baltic knew or should have known that it had this claim against Empire before November 28, 2011. *Inlet Fish*, 29 S.R.R. at 313. For this claim, the undisputed facts must show that for each shipment at issue, Baltic knew or should have known before November 28, 2011, that Empire did not provide it with the documents.

Baltic made substantially identical factual allegations in its complaint verified on November 22, 2011, and filed in the federal district court in New Jersey on November 23, 2011. 2011 D.N.J. Complaint ¶¶ 27-30, *see* page 5 above. If a Commission caption were substituted for the District Court of New Jersey caption and the Shipping Act violations alleged in the Commission complaint were substituted for the causes of action in the New Jersey complaint, the complaint would state the substantially same claim for violation of section 41102(c) as set forth in its FMC Complaint filed November 28, 2014.

All of the shipments in Groups I, II, III, and IV were begun and any obligation imposed on Empire to provide shipping documents arose before Baltic filed its 2011 D.N.J. Complaint, more than three years before Baltic filed its FMC Complaint. Any Shipping Act violation for the alleged failure to provide documents concerning the shipments occurred when Empire incurred an obligation to create the documents, and Baltic knew that Empire had not provided it with the documents more than three years before Baltic filed its FMC Complaint.

The new allegedly unlawful charges imposed on the shipments in Groups II, III, and IV were imposed on November 14, 2011, before Baltic filed its 2011 D.N.J. Complaint and more than three years before Baltic filed its FMC Complaint. 2011 D.N.J. Complaint ¶¶ 39 and 48. *See also* 2011 D.N.J. Complaint ¶ 61 (“the imposition of false and excessive shipping charges, both prospectively and retroactively, and the unlawful seizure of [Baltic’s] cargo is a violation of the Shipping Act of 1984”). Any obligation imposed by the Act requiring Empire to create additional shipping documents for Groups II, III, and IV and to provide them to Baltic arose when Empire imposed the new charges more than three years before Baltic filed its FMC Complaint.

The 2011 D.N.J. Complaint filed by Baltic on November 23, 2011, demonstrates conclusively that Baltic knew more than three years before it filed its FMC Complaint that Empire had not provided the shipping documents for Groups I, II, III, and IV to Baltic. Therefore, the material facts as to which there is no genuine dispute demonstrate that Baltic’s claim for a reparation award for actual injury resulting from the failure to provide new documents required by the new charges accrued more than three years before Baltic filed its FMC Complaint and is barred by the Act’s statute of limitations.

To the extent knowledge of injury may be required, Baltic knew (or at least believed) more than three years before it filed its FMC Complaint that it was being injured by Empire’s failure to provide the shipping documents.

JUDGE GUTHRIDGE: Okay. Assuming – assuming this is a Shipping Act violation – or say it is a Shipping Act violation to fail to give Baltic the documents that you say were not given, what’s the actual injury that Empire suffered as a result of that? I’m sorry, that Baltic suffered as a result of not getting those documents?

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

JUDGE GUTHRIDGE: So customers from 2008 and [2009] walked away?

MR. NUSSBAUM: That’s correct, Your Honor. Customers that Baltic was regularly doing business with.

JUDGE GUTHRIDGE: And they were walking away because in 2011, Baltic was unable to give them documents for shipments that occurred in 2007; is that what you’re saying?

MR. NUSSBAUM: Different clients, Your Honor.

JUDGE GUTHRIDGE: That’s not an answer to my question. Are you saying – is Baltic claiming that shippers it had in 2007 weren’t doing business with Baltic because in 2011, Baltic failed to produce documents from 2007?

MR. NUSSBAUM: Yes, Your Honor.

Transcript at 36-37.

Baltic argues that if a shipper makes a request for the documents within three years of the shipment, the statute of limitations is extended for another three years from the date of request, and that as long as the shipper continues to request the documents before three more years passes, a shipper’s right to a reparation award continues indefinitely.

JUDGE GUTHRIDGE: In regards to the first thing – so, it seems – are you – is Baltic claiming that there’s a continuing obligation such that if a shipper ships one container, let’s say, in 2007, and the carrier fails to provide it with the documents, here in 2015, the shipper could file a complaint with the Commission and it would be timely because there’s been a continuing failure to provide those documents?

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

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

MR. NUSSBAUM: Yes, Your Honor. And again, I just – I respectfully refer the Commission to paragraph 11 of the 2011 settlement agreement, which actually specifically stated that the parties shall execute, deliver any old documents, and get such instructions that their agents deem may be necessary for effectuation of the terms and conditions of this agreement, which at that point, as I said, that brings it within the three years.

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

MR. NUSSBAUM: Both, Your Honor.

Transcript at 26-28. In its supplemental memorandum, Baltic relies on *Seatrain Gitmo, Inc. v. Puerto Rico Maritime Shipping Auth.*, 18 S.R.R. 1079 (ALJ 1979), to support this argument.

In the case of a continuing injury, each time a party is injured by an act of another, a new cause of action accrues to recover the damages caused by that act, and with regard to such damages, the statute of limitations runs from the commission of the new (continuing) act.

(Baltic Supp. Memo. (7/10/15) at 6-7, quoting *Seatrain*, 18 S.R.R. at 1081.)

Baltic misunderstands the holding in *Seatrain*. The administrative law judge stated:

Generally a cause of action accrues and the statute of limitations begins to run when there is the commission of an act which cause injury. In the case of a continuing injury, each time a party is injured by an act of another, a new cause of action accrues to recover the damages caused by that act, and with regard to such damages, the statute of limitations runs from the commission of the new (continuing) act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

18 S.R.R. at 1081. The judge went on to explain:

The Ports Authority contends that *Seatrain*'s cause of action accrued on or before January 1976 [apparently when *Seatrain* resumed service in the Puerto Rican trade] and in any event, *Seatrain*'s effort to obtain "legal action in concert with the FMC" based on the denial of access to the PRMSA cranes in April 1976 was the latest when

the cause of action accrued. And, they argue, that April 1976 being more than two years prior to the filing of the instant complaint, the Commission is without jurisdiction to entertain the complaint.

Such contention would have validity if there were a single refusal for a single utilization of Isla Grande. But the facts, as alleged, do not support such a conclusion. It is complained that Seatrain has "been attempting to obtain . . . use of . . . Isla Grande . . . since about September, 1975 . . . [and such] attempts have been unsuccessful [to date]." The complaint alleges numerous requests (some prior to July 29, 1976) and numerous refusals (some prior to July 29, 1976) and continuing requests (on and after July 29, 1976) and continuing refusals (on and after July 29, 1976) with continuing use of alternative facilities (subsequent to July 29, 1976) resulting in alleged continuing and accumulative injury.

As alleged, each and every berthing barred is a new act giving rise to alleged injury. *Damages for unlawful acts prior to July 29, 1976, are, of course, barred by the statute of limitations. Any unlawful act, however, which continues becomes not one act but a series of individual acts each time it is enforced, and the statute of limitations is to be measured against each act giving rise to an alleged new injury.*

*Seatrain*, 18 S.R.R. at 1081-1082 (emphasis added).

The decision in *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 248, 277 (ALJ 1992), is consistent with *Seatrain*.

The crane terms agreements of the various tenants at the Port of Seattle had differing rates at different levels of usage. These different terms could favor Seacon, or could favor other tenants, all depending on the volume of usages of the cranes.

To the extent that Seacon's crane terms provided that it had to pay diesel fuel rates, or rates higher than electricity rates, to operate its two diesel Starporter cranes, Seacon appears probably to have suffered rate discrimination, but these fuel charges (rates) were established by the Port in its tariffs, which became effective on Oct. 1, 1982, and which remained unchanged until July 1, 1990. Thus, Seacon's cause of action as to a disparity in fuel costs began to accrue over seven years before its complaint was filed in May 1990, and, of course, the Port was obliged to charge the fuel costs specified in its tariff, unless its lease agreements were amended in this respect. To the extent that the disparity in fuel costs continued after May 30, 1987, these costs would not be barred. Seacon [ceased] operation in July 1988, so that the unbarred fuel disparity was for a relatively short period, and perhaps was offset by payments or lack of payments by Seacon for acres less than suitable for container yard operations.

*Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 248, 277 (ALJ 1992).

All of Empire's alleged unlawful acts (failure to provide shipping documents) occurred more than three years before Baltic filed its FMC Complaint. Neither *Seatrain* nor *Seacon* supports Baltic's contention that when a carrier fails to provide shipping documents, a shipper has the power to extend indefinitely the statute of limitations by asking for the documents every three years.

Baltic also seems to be arguing that if one violation – one failure to provide required shipping documents – occurred less than three years before the complaint was filed (in this case, on or after November 28, 2011), the Complaint is timely for all shipments back to the first shipment in 2007. Even if one or some failures to provide shipping documents occurred three years or less before Baltic filed its FMC Complaint, a claim for a reparation award would only be timely for those shipments for which a failure to provide documents occurred on or after November 28, 2011. *See Seacon*, 26 S.R.R. at 277 (only claims accruing less than three years before complaint filed are timely); *Seatrain*, 18 S.R.R. at 1082 (“Damages for unlawful acts prior to July 29, 1976, are, of course, barred by the statute of limitations.”).

At the hearing on Empire's motion, Baltic argued that the 2011 Settlement obligated Empire to give Baltic copies of all the shipping documents for every shipment from 2007 through 2011, and that Empire's failure to provide those documents occurred after execution of the 2011 Settlement and less than three years before Baltic filed its FMC Complaint; therefore, Baltic may seek a reparation award for injury suffered as a result of Empire's failure to provide the documents. The 2011 Settlement provides: “The parties shall execute and/or deliver any and all documents and give such instructions to their agents, designees and counterparties as may be necessary for the effectuation of the terms and conditions of this Agreement.” (2011 Settlement, ¶ 11.)

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

MR. NUSSBAUM: Yes, Your Honor.

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

MR. NUSSBAUM: Your Honor, it's Baltic's contention that because – because there was a mutual release – from the time up until the date of the release, that it covers the time period that you just mentioned.

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

MR. NUSSBAUM: Yes, Your Honor.

Transcript at 28-29.

Baltic's counsel agreed that when Baltic filed the 2011 D.N.J. Complaint, "its intent [was] to ensure delivery of all the shipments it had – that were in transit at that time." Transcript at 7. The plain meaning of the provision, execution, and delivery of documents necessary to effectuate the 2011 Settlement would appear to relate to Baltic's goal of receiving delivery of its shipments not yet delivered at the time of the it filed the Complaint. Empire's delivery of the shipments as required by paragraphs 2 and 3 of the 2011 Settlement accomplished this goal: The agreement was "effectuated" by the delivery of the shipments. Since the agreement was effectuated, any documents necessary for its effectuation must also have been "execute[d] and/or deliver[ed]," and any documents not delivered must not have been necessary for its effectuation.

To the extent Baltic contends that 2011 Settlement, ¶ 11 required delivery of documents for all shipments beginning in November 2007, the 2011 Settlement explicitly provided Baltic with a remedy pursuant to the agreement if Empire failed to comply: "The Court will retain jurisdiction over the enforcement of this Agreement." (2011 Settlement, ¶ 10.) Furthermore, on December 7, 2011, when the court entered the order dismissing the case, the judge wrote the following by hand on the order: "Failure to consummate the settlement 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." *Baltic v. Empire and MSC*, No. 2:11-cv-06908-FSH (D.N.J. Dec. 7, 2011) (Stipulation of Dismissal), found at Baltic Supp. Memo. (7/10/15), Appendix 8. Now, three and one-half years after the dismissed the 2011 D.N.J. Complaint, Baltic contends that the 2011 Settlement also required Empire to produce shipping documents related to all shipments from 2007 through 2011 even though the Settlement was effectuated without them. If this indeed was the intention of the parties and the court and Empire failed to consummate the settlement by failing to provide the documents, Baltic's remedy was to file a motion to enforce the agreement with the district court.

Baltic contends that in a later order, the New Jersey court:

made clear that the Court is without jurisdiction to enforce the settlement agreement, specifically explaining, in an order on January 16, 2015 . . . : Three years after dismissal and consummation of the settlement, [Empire] sought on order to enforce the settlement agreement and an injunction restraining [Baltic] from proceeding with an action before the Federal Maritime Commission. However, the Court's 2011 Order did not retain jurisdiction indefinitely. The Court is without jurisdiction to enforce a breach of a settlement agreement consummated over three years ago.

(Baltic Opp. to Mot. for S/D at 11.) The court made this statement when it dismissed Empire's motion to enjoin this proceeding before the Commission. *Baltic v. Empire and MSC*, No. 2:11-cv-06908-FSH (D.N.J. Jan. 16, 2015) (Order), found at Baltic Supp. Memo. (7/10/15), Appendix 9. Baltic seems to contend that the court's statement that it is "without jurisdiction to enforce a breach of a 2011 Settlement consummated over three years ago" means the court did not have jurisdiction

to enforce the 2011 Settlement in December 2011 and January-February 2012 when Empire allegedly violated it. This contention is flatly contradicted by the court's statement that it would "entertain an application solely to enforce the terms of the settlement agreement" hand-written on the order of dismissal.

If Baltic believed that Empire violated the 2011 Settlement by failing to produce all of the shipping documents for all of the shipments that Empire carried for Baltic between 2007 and 2011, Baltic should have filed a timely application with the court and the court would have entertained the application. If the court determined that production of the documents for all shipments from November 2007 through 2011 was "necessary for the effectuation of the terms and conditions of this Agreement," it would have ordered appropriate relief and "award[ed] reasonable attorney's fees and costs as against [Empire]." (2011 Settlement, ¶ 10.) The Commission does not have jurisdiction to construe the parties' intentions when they signed the 2011 Settlement and issue an order enforcing the Agreement.

To the extent Baltic could prove that Empire violated the Shipping Act by failing to provide shipping documents for the shipments in Groups I, II, III, and IV, a rational trier of fact could only find that the shipments occurred, Empire's obligation arose, and Empire failed to produce the documents more than three years before Baltic filed its FMC Complaint. Any claim for a reparation award for each alleged violation accrued at the time Empire incurred the obligation to produce the documents. Baltic knew or should have known that it had a claim at the time of each violation. Based on the material facts not in dispute, Empire's obligation arose more than three years before Baltic filed its FMC Complaint. There is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587. Therefore, Baltic's claim for a reparation award based on the allegation that Empire failed to provide shipping documents for these shipments accrued more than three years before Baltic filed its FMC Complaint and is barred by the Act's statute of limitations.

**B. Baltic's Claim for a Reparation Award Based on the Allegation That Empire Charged Baltic Rates Greater than Those Reflected in its Published Tariff and/or Failed to Keep a Tariff Open to Public Inspection Is Barred by the Statute of Limitations.**

Baltic contends that: "EUL violated 46 U.S.C. § 41104(2)(a), 41104(4)(a) and 41104(8) by charging Complainant rates greater than those reflected in its published tariff" (FMC Complaint ¶ V.B.) and "violated 46 U.S.C. § 40501(a) by failing to keep open to public inspection in its tariff system tariffs showing all its rates charges classifications rules and practice between all points or ports on its own route and on any through transportation route that has been established." (FMC Complaint ¶ V.C.) Baltic alleges the following facts that relate to Empire's obligation to charge rates set forth in its tariff.

11. [Empire] failed to keep open to public inspection in its tariff system tariffs showing all its rates charges classifications rules and practices between all

points or ports on its own route and on any through transportation route that has been established.

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13. Due to concerns about the rates it was being charged for transportation services provided by EUL, Complainant conducted an audit of the shipping related documents provided to Complainant by EUL for the period from 2007 through January of 2012. That audit revealed that EUL charged Complainant for shipment in excess of the amounts set forth in EUL's tariff. The amount Complainant was overcharged and the amount it overpaid for shipments was in excess of \$200,000.00 for that period.
14. Upon information and belief, EUL did not have tariffs on file for various shipments handled by it on behalf of Complainant.
15. During the period from November of 2007 through January of 2012, EUL billed [Baltic] in excess of \$200,000.00 for shipments for which it had no tariff on file.
16. Upon information and belief [Baltic] believes that EUL has overcharged it by billing amounts in excess of its lawful tariff from 2007 through January of 2012.
17. Complainant only learned that EUL was billing it for amounts in excess of its published tariff when it conducted an audit of the shipping related documents provided to [Baltic] by EUL for the period from 2007 through January of 2012. [Baltic] engaged in this analysis due to concern as to the rates it was being charged by EUL.
18. Prior to January of 2012 [Baltic] neither knew nor could have known that EUL was charging it for amounts in excess of EUL's published tariff.

(FMC Complaint ¶¶ IV.13-18.) Baltic made similar allegations in paragraphs 17-21 of the 2011 D.N.J. Complaint, set forth at page 5 above, including its knowledge that "an NVOCC can only charge a shipper prices disclosed in a published tariff filed with the . . . Commission." 2011 D.N.J. Complaint ¶ 18.

Because of the closely related nature of the allegations, I treat together the claim that Empire charged a rate in excess of its tariff and the claim that Empire did not have a tariff for the routes over which the shipments were transported. Furthermore, during the hearing on Empire's motion, it became clear that this was consistent with Baltic's contention.

JUDGE GUTHRIDGE: For the Commission complaint, paragraph 5C alleges – that’s arguably what we’ve essentially been talking about now – Baltic’s contention that Empire violated 40501(a) by failing to keep open the public inspection and its tariff system. What Baltic is claiming there, if I understand you correctly, Mr. Nussbaum, is that you’re not contending that Empire had no tariff; what you’re contending is it did not have a tariff covering the routes for which it was carrying shipments for Baltic; is that right?

MR. NUSSBAUM: That’s correct, Your Honor.

Transcript at 49-50.

For the purposes of this motion, I assume for every shipment in Groups I through IV that Empire violated the Act either by charging Baltic rates greater than those reflected in its published tariff or by failing to keep open a public tariff for the route over which Empire transported the shipment and that Baltic suffered actual injury as a result of Empire’s charging Baltic those rates.

Empire moves for summary decision on its affirmative defense that Baltic’s claim for a reparation award for actual injury resulting from this alleged violation is barred by the Act’s three-year statute of limitations. For summary decision to be entered in favor of Empire on this affirmative defense, the material facts as to which there is no genuine dispute must demonstrate that Baltic knew or should have known that it had this claim against Empire before November 28, 2011. *Inlet Fish*, 29 S.R.R. at 313. The undisputed facts must show that for each shipment at issue, Baltic knew or should have known before November 28, 2011, that Empire charged a rate in excess of its tariff and/or that Empire charged a rate for transportation on a route for which it did not have a tariff.

Empire established the rate for each shipment in Groups I through IV before or at the time it accepted the cargo for shipment. As Baltic acknowledged at the hearing, Baltic knew what Empire was charging for each shipment at the time each shipment commenced.

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

MR. NUSSBAUM: That’s correct, Your Honor, per the – per the emails containing the rates that Baltic was provided with.

Transcript at 15. All of the shipments began more than three years before Baltic filed its FMC Complaint. There is no dispute that Baltic knew what it was being charged for each shipment more than three years before it filed its FMC Complaint.

Baltic alleges that Empire imposed new charges on the Group II, III, and IV shipments. Assuming these new charges violated the Shipping Act, the new charges were imposed November 14, 2011, before Baltic filed its 2011 D.N.J. Complaint and more than three years before

Baltic filed its FMC Complaint. See 2011 D.N.J. Complaint ¶¶ 39 and 48 (referring to revised spreadsheet sent to Baltic by Empire on November 14, 2011). See also 2011 D.N.J. Complaint ¶ 61 (“the imposition of false and excessive shipping charges, both prospectively and retroactively, and the unlawful seizure of [Baltic’s] cargo is a violation of the Shipping Act of 1984”). Therefore, based on the material facts as to which there is no dispute, Baltic knew what Empire charged it for each shipment – the original charges for Groups I, II, III, and IV and the new charges for Groups II, III, and IV – more than three years before Baltic filed its FMC Complaint.

Baltic contends that the statute of limitations should be tolled because “[p]rior to January of 2012 [Baltic] neither knew nor could have known that EUL was charging it for amounts in excess of EUL’s published tariff.” (FMC Complaint ¶ 18.) As discussed above, the Commission applies the discovery rule in its proceedings. *Inlet Fish*, 29 S.R.R. at 314. The burden is on Baltic to show that even with the exercise of reasonable diligence, it could not have known of the purported injury; that is, Baltic must present evidence that would persuade the Commission that Baltic could not have known that Empire did not have a tariff for the routes on which Empire transported the cargo. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d at 717.

Empire published a tariff during the period in which it transported cargo for Baltic. (Baltic Supp. Memo (7/10/15), Appendix 6 (Empire United Lines Co., Inc. Tariff).) “[C]arriers and shippers alike are charged with constructive notice of tariff filings . . . .” *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431, 443 (1994). See also *Fry Trucking Co. v. Shenandoah Quarry, Inc.*, 628 F.2d 1360, 1363 (D.C. Cir. 1980) (“the shipper is charged with constructive notice of the actually filed rate”) (citing *Nyad Motor Freight v. W.T. Grant Co.*, 486 F.2d 1112 (2d Cir. 1973); *Louisville & N. R.R. v. Maxwell*, 237 U.S. 94, 97 (1915); and *Bowser & Campbell v. Knox Glass, Inc.*, 390 F.2d 193, 196 (3d Cir. 1968). While this principle is limited somewhat by the corollary that “the ‘filing of tariff gives constructive notice of only those terms that are required by law to be filed,’” *Comsource Indep. Foodservice Cos. v. Union Pac. R.R.*, 102 F.3d 438, 443 (9th Cir. 1996), quoting *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 n.7 (9th Cir. 1982) (citing *Port of Tacoma v. S.S. Duval*, 364 F.2d 615, 617 (9th Cir. 1966)), the Shipping Act requires the tariff to show the carrier’s rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. 46 U.S.C. § 40501(a)(1). Therefore, the rates for each route are terms that are required by law to be filed and subject to constructive notice.

At the hearing, Baltic conceded that at the very least, it had constructive notice of Empire’s tariff more than three years before it filed the FMC Complaint.

JUDGE GUTHRIDGE: So that could have been for any of them in 2009. In 2009, Empire – I mean, Baltic could have gotten the tariff and seen that there was no – that Empire was charging – allegedly charging – carrying for routes which did not have a tariff, which arguably is a violation of the Shipping Act. And should have known that – and Baltic could have known that in 2009 and filed a case complaint at that time, couldn’t it?

MR. NUSSBAUM: That's correct.

Transcript at 42-42. This was addressed again later in the hearing.

JUDGE GUTHRIDGE: That's still not answering the question. Baltic knew what the tariffs were at that time. They had constructive notice of what the tariffs were at that time; right?

MR. NUSSBAUM: That's correct.

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

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

JUDGE GUTHRIDGE: For the Commission complaint, paragraph 5C alleges – that's arguably what we've essentially been talking about now – Baltic's contention that Empire violated 40501(a) by failing to keep open the public inspection and its tariff system. What Baltic is claiming there, if I understand you correctly, Mr. Nussbaum, is that you're not contending that Empire had no tariff; what you're contending is it did not have a tariff covering the routes for which it was carrying shipments for Baltic; is that right?

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

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

MR. NUSSBAUM: Correct, Your Honor.

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

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

Transcript at 48-50.

To the extent Baltic could prove that Empire violated the Act by charging a rate greater than a rate stated in its public tariff or failed to keep a tariff open to public inspection by transporting shipments on routes for which it did not have a tariff, even if Baltic did not have actual notice of the tariff rate, Baltic was on constructive notice of the tariff rate or failure to have a rate more than three years before it filed its Complaint with the Commission. Therefore, as a matter of law, Baltic knew that Empire did not have a tariff for the routes on which Empire transported Baltic's cargo and its claim for a reparation award for each shipment accrued more than three years before Baltic filed its FMC Complaint.

Furthermore, evidence presented by Baltic in opposition to Empire's motion for partial summary decision suggests Baltic had access to, if not possession of, a hard copy of Empire's tariff before Baltic filed its 2011 D.N.J. Complaint. In the New Jersey complaint, Baltic referred to several other district court cases brought by other customers against Empire, including *Easy Export, Inc. v. Hitrinov*, 09-CV-4714 (E.D.N.Y. 2009). See 2011 New Jersey Complaint ¶ 56. Baltic's FMC Complaint refers to an audit prepared by a Baltic representative that Baltic alleges "revealed that [Empire] charged [Baltic] for shipments in excess of the amounts set forth in [Empire's] tariff." (FMC Complaint ¶ 13.) Baltic included this audit in its exhibits filed in opposition to Empire's motion for partial summary disposition. (Baltic Opp. to Mot. for S/D (5/8/15), Exhibit X (Internal Memorandum dated July 14, 2014).) The audit relied in part on a copy of Empire's tariff that was copied from the *Easy Export* record. (Baltic Opp. to Mot. for S/D (5/8/15), Presniakovas Affidavit, Exhibit X/Exhibit A (Empire tariff with district court annotation indicating that it was filed in Case 1:09-cv-04714-ENV-MDG on November 18, 2009).) See Transcript of Hearing at 41-44 (acknowledging that tariff from *Easy Export v. Hitrinov* was used to prepare the 2014 audit). I take official notice of records of the United States District Court for the Eastern District of New York that on July 12, 2011, more than three years before Baltic filed its FMC Complaint, the court discontinued *Easy Export* after settlement, so all information in the record of that case was available by that date. Had it been reasonably diligent, Baltic would have found all information necessary to file this claim with the Commission no later than the date it filed its 2011 D.N.J. Complaint, more than three years before it filed this proceeding.

Furthermore, Baltic has already settled its claim from damages for the Group II shipments. The 2011 D.N.J. Complaint alleged that Empire charged rates that were not in its tariff and imposed new charges not permitted by the tariff. It further alleged that by imposing those charges, Empire violated the Shipping Act (2011 D.N.J. Complaint Count I) and a number of state and common law claims (Counts II-XV), and that Baltic suffered injury from Empire's unlawful acts. The 2011 D.N.J. Complaint sought an award compensating Baltic for its actual damages, punitive damages, and treble damages. (Id. at 18.)

When Baltic signed the 2011 Settlement, it released "any and all manners of claims . . . of any nature whatsoever that [it] now has or may have had on account of or in any way growing out of shipping charges related to Baltic's cargo . . . from the beginning of time up to the date of this release." (2011 Settlement, ¶ 5.) As Baltic correctly points out, the settlement of the New Jersey case does not deprive the Commission of jurisdiction to determine whether Empire violated the

Shipping Act with the original charges and the new charges imposed on November 14, 2011. (Baltic Brief at 28-29.) *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 999 (FMC 2006) (Commission has jurisdiction over complaint alleging respondent committed acts prohibited by the Shipping Act). Although the 2011 Settlement does not prevent the Commission from deciding whether Empire violated the Act, the release in the 2011 Settlement does prevent Baltic from receiving a reparation award for any actual injuries that it now claims it suffered as a result of the violations.

Regarding the shipments in Group III and apparently Group IV, Baltic contends that Empire contacted Baltic's customers and those customers paid either an extra \$175.00 (Baltic Supp. Memo. (7/10/15), at 4) or \$500.00 (Baltic Supp. Memo. (7/10/15), at 5) per container to secure their release. Documents submitted by Baltic indicate that Baltic's customers made the payments for the shipments in Group III on November 18 and 22, 2011. (Baltic Supp. Memo. (7/10/15), Appendix 3 (Certification of Kamil Sawon) Exhibit A (Email dated 22 Nov 2011 from *mebaltic@hotmail.com* to *michael@eulines.com*)). 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. Even if Baltic did have a claim for the extra payments, the evidence submitted by Baltic proves that whether these were Baltic shipments or shipments of some other entity, Empire imposed the charges more than three years before Baltic filed its FMC Complaint on November 28, 2011, and Baltic knew of the contact and payments. (*See* 2011 D.N.J. Complaint ¶¶ 50 and 78; Baltic Supp. Memo. (7/10/15), at 3 (Empire “unlawfully contacted complainants’ (*sic*) customers directed (without complainant’s permission) and provided them the amounts demanded by [Empire] for the containers. That unlawful contact of complainants’ (*sic*) customers resulted in complaint contacting Ms. Tara Nielsen of the Commission on November 21, 2011.”).)<sup>10</sup>

To the extent Baltic could prove that Empire violated the Act by charging a rate greater than a rate stated in its public tariff or charging for a route for which it did not have a tariff, the facts as to which there is no dispute demonstrate the violations for each shipment in Groups I through IV occurred more than three years before Baltic filed its FMC Complaint. While Baltic's knowledge of the *Easy Export* case suggests that it had access to a hard copy of Empire's tariff before filing the 2011 D.N.J. Complaint, even if Baltic did not have actual notice of Empire's tariff rate, it was on

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<sup>10</sup> Baltic's FMC Complaint does not contend that Empire violated the Shipping Act when it contacted the shippers directly. *See* FMC Complaint Part V. In the 2011 D.N.J. Complaint, Baltic alleged that “Defendants have taken it upon themselves to contact [Baltic's] customers, the intended recipients of the . . . containers, and have offered them the goods shipped by [Baltic] at a radical discount, with the expectation that any money paid by the customers will then be seized and applied by Defendants,” 2011 D.N.J. Complaint ¶ 50, and “intentionally interfered with [Baltic's] relationships with actual and/or prospective customers.” *Id.* ¶ 78. To the extent that Baltic may now claim that it is entitled to a reparation award because Empire contacted the shippers, Baltic's claim accrued more than three years ago before Baltic filed its FMC Complaint and even if the claim related back to the FMC filing date, would be barred by the statute of limitations.

constructive notice of the rate or the fact that Empire did not have a rate for a particular route at the time Empire charged the allegedly unlawful rate. Furthermore, with the information that Baltic had available to it, even if Baltic did not have constructive notice of the tariff rates, a reasonably diligent complainant had sufficient knowledge or information to have actually discovered the alleged violations by the time Baltic filed its 2011 D.N.J. Complaint more than three years before Baltic filed its FMC Complaint. This is a case in which Baltic was “aware of a cause of action but merely fail[ed] to act on that knowledge.” *Inlet Fish*, 29 S.R.R. at 313. Baltic’s claim for a reparation award based on the claim that Empire charged rates in excess of its tariff greater than those reflected in its published tariff or failed to keep a tariff open to public inspection accrued more than three years before Baltic filed its FMC Complaint and is barred by the statute of limitations.

**C. Baltic’s Claim for a Reparation Award Based on the Allegation That Empire Charged Baltic Rates Greater Than Those It Charged Other Shippers Is Barred by the Statute of Limitations.**

Baltic alleges that Empire charged Baltic rates greater than it charged other shippers: “EUL engaged in an unfair and unjustly discriminatory practice by charging [Baltic] rates greater than those it charged other shippers.” FMC (Complaint ¶ IV.19.) Baltic contends that “EUL violated 46 U.S.C. § 41104(2)(a), 41104(4)(a) and 41104(8) by charging Complainant rates greater than those it charged other shippers.” (FMC Complaint ¶ V.A.)

For the purposes of this motion, I assume that Empire violated the Act by charging Baltic rates greater than those it charged other shippers and that Baltic suffered actual injury as a result of Empire’s charging Baltic greater rates.

Empire moves for summary decision on its affirmative defense that Baltic’s claim for a reparation award for actual injury resulting from this alleged violation is barred by the Act’s three-year statute of limitations. For summary decision to be entered in favor of Empire on this affirmative defense, the material facts as to which there is no genuine dispute must demonstrate that Baltic knew or should have known that it had this claim against Empire before November 28, 2011. *Inlet Fish*, 29 S.R.R. at 313. For this claim, the undisputed facts must show that Baltic knew or should have known before November 28, 2011, that Empire charged Baltic rates greater than it charged other shippers.

As discussed above, Baltic knew what it was being charged for each shipment and had at least constructive, if not actual, knowledge of Baltic’s tariff rates. Baltic contends that it could not have known that Empire was charging other shippers lower rates than it charged Baltic until it conducted its audit completed July 14, 2014. (Baltic Opp. to Mot. for S/D (5/8/15), Exhibit X (Internal Memorandum dated July 14, 2014).)

On the issue of constructive notice the Commission also asked [at the argument on Empire’s motion for partial summary decision] about a federal lawsuit referred to in [Baltic’s] audit, with docket number: 09-cv-04714, and if the plaintiff in that suit

was charged rates different than what Baltic would [be] charged. For the Commission's reference, that lawsuit was mentioned in the audit solely as an example of how [Empire] provided a rate/tariff to the plaintiff in that case, which same rate/tariff was never provided to [Baltic]. The invoice, house bill of lading, and [Empire's] affidavit from that lawsuit explaining that the rate/tariff was for shipment of personal goods is annexed hereto. The main point is that this rate/tariff (TLI #001-008 rate for Personal Goods at \$700 per cubic meter) was never provided to [Baltic], and there was no way for [Baltic] to know that they were not provided until the audit was conducted.

(Baltic Supp. Memo. (7/10/15), at 9.)

Even if it is assumed that "there was no way for [Baltic] to know that they were not provided until the audit was conducted," a reasonably diligent plaintiff/complainant would have conducted the audit within the limitations period. Baltic states in its supplemental memorandum quoted above that *Easy Export* "was mentioned in the audit solely as an example of how [Empire] provided a rate/tariff to the plaintiff in that case, which same rate/tariff was never provided to [Baltic]." Baltic's citation to *Easy Export* in its 2011 D.N.J. Complaint and reliance on the information in *Easy Export* for its audit in 2014 to show that Baltic gave Easy Export a rate that it did not give to Baltic is proof that no later than 2010, with due diligence and acting in a reasonably diligent manner, Baltic would have known all the facts that would form the basis of its claim that Empire was discriminating against it and in favor of other shippers. *Merck & Co., Inc. v. Reynolds*, 559 U.S. at 645-646.

Based on the facts as to which there is no genuine dispute, as a matter of law, Baltic cannot meet its burden of showing that it falls within the exception to the Act's statute of limitations by demonstrating that even with the exercise of reasonable diligence it could not have known that Empire charged Baltic higher rates than it charged other shippers. *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d at 717. Furthermore, as discussed above, Baltic settled any claims that it may have had regarding the Group II shipments. Therefore, Baltic's claim for a reparation award based on the allegation that Empire charged Baltic rates higher than those it charged other shippers is barred by the Act's statute of limitations.

#### **IX. ALLEGED LATE DELIVERY OF CONTAINERS COVERED BY THE 2011 D.N.J. SETTLEMENT AGREEMENT AND MUTUAL RELEASE.**

Baltic's FMC Complaint alleges that "[d]uring the time period alleged herein, [Empire] accepted money from [Baltic] for the shipment of various shipping containers, then subsequently refused to release these containers." (FMC Complaint ¶ 20.) The FMC Complaint does not claim that this alleged refusal to release the containers, either before or after Baltic signed the 2011 Settlement, violated the Shipping Act. (See FMC Complaint Part V.) Therefore, these claims are beyond the scope of the FMC Complaint.

Addressing the claims nonetheless, by signing the 2011 Settlement, Baltic released its claims for injury caused by delay in releasing containers prior to the date the agreement was signed. (2011 Settlement, ¶ 5 (the parties release all “claims of damages related to the delay in releasing said cargo from the beginning of time up to the date of this release”).) In its opposition to Empire’s motion, Baltic seems to agree.

The facts set forth above establish that these particular violations of the Shipping Act occurred subsequent to the execution of the 2011 Settlement Agreement and that they occurred no earlier than November 30, 2011. Therefore there is no merit to [Empire’s] assertion that this claim is time barred or somehow precluded under the 2011 Settlement Agreement. Furthermore, to the extent that the 2011 Settlement Agreement and mutual release operates as a waiver of claims, the release specifically pertains to claims growing out of *shipping charges* up to the date of the release. The release does not operate as a waiver of claims for *storage and demurrage charges* subsequent to the date of the release, thus warranting denial of [Empire’s] motion.

(Baltic Opp. to Mot. for S/D (5/8/15), at 22-23 (emphasis in original).) The documentary evidence that Baltic submitted, however, addresses alleged delay both before and after the parties signed the Agreement.

2011 Settlement Exhibit A identified twenty-three shipments that the Agreement required Empire to release immediately.

In consideration for a payment of \$8,000.00 made on Friday, November 25, 2011, receipt of which is hereby acknowledged, Empire shall immediately release the twenty-three (23) containers identified in Exhibit A to Baltic and/or its designee. *The parties agree that Baltic shall be responsible for all storage and demurrage charges, if any, with respect to these twenty-three (23) containers.*

(2011 Settlement, ¶ 2 and Exhibit A (emphasis added).) To the extent Baltic’s FMC Complaint can be construed to seek a reparation award for storage and demurrage charges incurred for these twenty-three containers prior to the date the parties signed the 2011 Settlement, Baltic has waived its right pursuant to the 2011 Settlement.

Information supplied by Baltic to support its claims of delay in the release of the Exhibit A shipments after the Agreement was signed does not support a finding that Empire violated the Shipping Act. Baltic contends:

Beginning with the spreadsheet entitled “Empire’s Untimely Release of Containers,” this spreadsheet lists twenty-one separate shipments from Attachment “C” and “E” [to the 2011 D.N.J. Complaint]. For each and every one of those shipments, [Empire] failed to timely release those shipments to Baltic, causing Baltic to incur storage and demurrage charges and attorneys’ fees.

(Baltic Opp. to Mot. for S/D (5/8/15), Presniakovas Affidavit ¶ 42.) Exhibit P to the Presniakovas Affidavit identifies ten of the twenty-three Exhibit A shipments for which the Agreement stated Baltic had paid charges as allegedly delivered “late” after the parties signed the 2011 Settlement. It should be noted that the 2011 Settlement Exhibit A and B references in this and the next table do not appear in Presniakovas Affidavit Exhibit P, but were determined by the undersigned by comparing Attachment A and B Booking Numbers to the Booking Numbers in Exhibit P.

Sett. Agr. Exhibit A reference	Booking Number	Date tariff paid	Telex Release issue date
A-3	038EUL451164 [038EUL451166 on Ex. A]	11/9/2011	11/29/2011
A-4	038EUL475739	11/9/2011	11/28/2011
A-5	038EUL475742	11/9/2011	11/28/2011
A-8	038EUL454130	11/9/2011	11/28/2011
A-9	038EUL455566	11/9/2011	11/28/2011
A-10	038EUL455567	11/9/2011	11/28/2011
A-14	038EUL455628	11/9/2011	11/28/2011
A-16	038EUL455632	11/9/2011	11/28/2011
A-17	038EUL456065	11/9/2011	11/28/2011
A-20	038EUL456069	11/9/2011	11/28/2011

At the hearing on Empire’s motion, Baltic was asked specifically about alleged delay in releasing shipment Reference A-4/Booking No. 038EUL475739.

JUDGE GUTHRIDGE: . . . [O]n the second page, Empire’s shipment 475739, the issue date was November 28, 2011.

MR. NUSSBAUM: I see that.

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

MR. NUSSBAUM: Yes, Your Honor.

Transcript at 70.

Baltic's president alleges that:

on November 30, 2011, due to [Empire's] unreasonable refusal to release thirty four containers, Baltic was caused to involve its attorney, who then contacted [Empire's] counsel, . . . (who in turn promised to instruct [Empire] to release the containers). This was a violation of the Shipping Act, which caused Baltic to unnecessarily incur additional attorneys' fees. That email is annexed hereto as Exhibit R.

(Presniakovas Affidavit ¶ 43.) Exhibit R is an email dated November 30, 2011, and states: "As promised see the attached fully executed settlement agreement. I have told Michael he must arrange to the release of the 34 additional containers that were paid for last Friday and will keep you updated on his progress." (Presniakovas Affidavit, Exhibit R (email dated November 30, 2011, from Empire's attorney to Baltic's attorney.) It is clear that Baltic's attorney was involved because the parties were in the midst of settlement negotiations on Baltic's 2011 D.N.J. Complaint. Empire's attorney "attached the fully executed settlement agreement" as a step in those negotiations. The payment made "last Friday" referred to in the email explicitly refers to the payment for the Exhibit A shipments acknowledged in 2011 Settlement, ¶ 2:

In consideration for a payment of \$8,000.00 made on Friday, November 25, 2011, receipt of which is hereby acknowledged, Empire shall immediately release the twenty-three (23) containers identified in Exhibit A to Baltic and/or its designee. *The parties agree that Baltic shall be responsible for all storage and demurrage charges, if any, with respect to these twenty-three (23) containers.*

(2011 Settlement, ¶ 2 (emphasis added).)

As noted above, the New Jersey district court retained jurisdiction over enforcement of the 2011 Settlement. It does not seem to the undersigned that delivery of the shipments before or on the date the parties signed the 2011 Settlement (November 29, 2011) as occurred with the ten Exhibit A shipments in the table above could have violated the Agreement. If Baltic believed that Empire violated the 2011 Settlement by releasing Reference A-4/Booking No. 038EUL475739 or the other shipments before or on the date the parties signed the 2011 Settlement, Baltic had a remedy with the court. Furthermore, any storage and demurrage charges and attorneys' fees that Baltic may have incurred on these shipments were imposed before the parties signed the 2011 Settlement. In the 2011 Settlement, Baltic agreed to "be responsible for all storage and demurrage charges, if any, with respect to these twenty-three (23) containers identified in Exhibit A," (2011 Settlement, ¶ 2), including the ten listed in the table above. As set forth above, any charges for delay accrued more than three years before Baltic filed its FMC Complaint and are barred by the statute of limitations. Furthermore, I find that as a matter of law, Baltic waived any claims for damages resulting from any delay in delivery before the parties signed the agreement. While delay before the parties signed, the Agreement may have violated the Shipping Act, Baltic waived any claim to a reparation award for damages caused by that delay. Therefore, summary decision is entered dismissing Baltic's claim for

a reparation award for alleged delay in delivery of the shipments identified in 2011 Settlement Exhibit A.

2011 Settlement Exhibit B identified 139 shipments that:

shall be released by Empire to Baltic . . . 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.

(2011 Settlement, ¶ 3 and Exhibit B.) To the extent Baltic's FMC Complaint can be construed to seek a reparation award for storage and demurrage charges and attorneys' fees incurred for these 139 containers prior to the date the parties signed the 2011 Settlement, Baltic acknowledges in the 2011 Settlement that it had not yet paid the freight for the transportation, and Baltic was not obligated to deliver before the freight was paid. Any of the pre-settlement delays caused by Empire occurred more than three years before Baltic filed its FMC Complaint, and Baltic agreed to pay these charges in the 2011 Settlement. A reparation award for actual injuries suffered as a result of any pre-settlement delay is barred by the statute of limitations. Furthermore, as with the Exhibit A shipments, Baltic waived its right by signing the 2011 Settlement.

In the argument on Empire's motion, Baltic contended that paragraph 3 of the 2011 Settlement required immediate delivery of the shipments covered by the agreement and that a one-day delay by Empire would violate the agreement.

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

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

MR. NUSSBAUM: Yes, Your Honor.

Transcript at 65. The 2011 Settlement explicitly provided Baltic with a remedy pursuant to the agreement if Empire caused a delay in violation of the 2011 Settlement that resulted in the accrual of storage or demurrage charges. As discussed above, page 37, Baltic's contention that the court's refusal three years later to enjoin the Commission proceeding based on this settlement is contradicted by the court's explicit retention of this power. If Baltic believed that Empire violated the 2011 Settlement by causing a delay that resulted in the accrual of storage or demurrage charges after the settlement, Baltic should have filed a timely motion for enforcement with the court and, if the court found that a one-day delay violated the 2011 Settlement, the court could have found "Empire . . .

responsible for payment of such charges,” (2011 Settlement, ¶ 3), and “award[ed] reasonable attorney’s fees and costs as against [Empire].” (2011 Settlement, ¶ 10.)

Exhibit P to the Presniakovas Affidavit identifies twenty-one of the 139 shipments described in Exhibit B of the 2011 Settlement as allegedly delivered “late” after the parties signed the 2011 Settlement:<sup>11</sup>

Sett. Agr. Exhibit B reference	Booking Number	Date tariff paid	Telex Release issue date
B-158	038EUL489106	12/30/2011	1/5/2012
B-160	038EUL493962	12/28/2011	1/5/2012
B-161	038EUL495173	12/30/2011	1/5/2012
B-24	038EUL456069	1/26/2012	2/6/2012
B-79	038EUL451412	12/15/2011	12/20/2011
B-80	038EUL487788	12/15/2011	12/20/2011
B-94	038EUL487787	12/15/2011	12/20/2011
B-97	038EUL486387	12/15/2011	12/20/2011
B-36	038EUL488509	11/25/2011	11/30/2011
B-39	038EUL454221	11/25/2011	11/30/2011
B-40	038EUL454222	11/25/2011	11/30/2011
B-43	038EUL454223	11/25/2011	11/30/2011
B-44	038EUL454226	11/25/2011	11/30/2011
B-50	038EUL454227	11/30/2011	12/1/2011
B-71	038EUL455664	11/30/2011	12/1/2011
B-75	038EUL486079	11/30/2011	12/1/2011

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<sup>11</sup> Exhibit P to the Presniakovas Affidavit consists of four pages of spreadsheets. The first page includes the twenty-one shipments from 2011 Settlement Exhibit B listed in this table. Without any explanation of why, the first eight shipments in the table (B-158 through B-97) are repeated on page 4 of Exhibit P, and the last thirteen shipments on page 1 (B-36 through B-121) are repeated on page 2 of Exhibit P with the ten shipments from Exhibit A of the 2011 Settlement.

B-81	038EUL486072	11/25/2011	11/30/2011
B-83	038EUL475959	11/30/2011	12/1/2011
B-93	038EUL486073	11/25/2011	11/30/2011
B-117	038EUL487757	11/30/2011	12/1/2011
B-121	038EUL486078	11/30/2011	12/1/2011

Accepting the facts stated in Baltic's Exhibit P as true, Empire released shipments B-36, B-39, B-40, B-43, B-44, B-81, and B-93 one day after the parties signed the 2011 Settlement and released shipments B-50, B-71, B-75, B-83, B-117, and B-121 one day after Baltic paid the tariff. It does not seem to the undersigned that delivery of the shipments within one day of the date the parties signed the 2011 Settlement or within one day of Baltic's payment could have violated the Agreement. If Baltic believed that Empire violated the 2011 Settlement by releasing Exhibit B shipments one day after the parties signed the 2011 Settlement or one day after Baltic paid the tariff, Baltic had a remedy with the court. The time between the date the tariff was paid and the telex release date is somewhat longer for shipments B-158, B-160, B-161, B-24, B-79, B-80, B-94, and B-97 – as long as eleven days for shipment B-24. If Baltic believed that Empire violated the 2011 Settlement by causing a delay that resulted in the accrual of storage or demurrage charges after the settlement, Baltic should have filed a timely motion for enforcement with the court and, if the court found that the delays violated the 2011 Settlement, the court could have found "Empire . . . responsible for payment of such charges," (2011 Settlement, ¶ 3), and "award[ed] reasonable attorney's fees and costs as against [Empire]."

I find that assuming for the purposes of this motion that these fact are true, as a matter of law, Baltic waived any claims for damages resulting from any delay in delivery of the Exhibit B shipments before the parties signed the agreement. Because Baltic conceded in the 2011 Settlement that it had not yet paid for those shipments, delay before the signing could not be attributed to Empire. Assuming that there was pre-settlement delay in violation of the Shipping Act attributable to Empire, Baltic released its claim to a reparation award in the agreement. I find that as a matter of law, the alleged delays after the parties signed the 2011 Settlement set forth in the table of Exhibit B shipments are not evidence of a failure by Empire "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 the Shipping Act. 46 U.S.C. § 41102(c). Furthermore, Baltic does not provide any evidence that it paid any storage or demurrage charges or attorney's fees incurred on these shipments after the parties signed the 2011 Settlement, or even identify evidence that the vessels carrying the shipments arrived before the telex release date for those shipments on which a longer delay is alleged. Therefore, summary decision is entered dismissing Baltic's claim for a reparation award for alleged delay in the shipments identified in 2011 Settlement Exhibit B.

Exhibit P to the Presniakovas Affidavit provides the following information about the five Long Beach shipments in Group III allegedly delivered “late” after the parties signed the 2011 Settlement.

Booking Number	Date Empire ceased contact	Date advised B/L surrendered	Arrival date
038EUL454229	11/29/2011	1/5/2012	11/13/2011
038EUL454218	11/29/2011	1/5/2012	11/13/2011
038EUL455665	11/29/2011	1/5/2012	11/20/2011
038EUL45667	11/29/2011	1/5/2012	11/20/2011
038EUL486081	11/29/2011	1/5/2012	11/20/2011

Baltic states that it contacted the Commission about these shipments on November 21, 2011, after Empire contacted the shippers and that Baltic learned in early January 2012 that the shipments had been released, but otherwise provides no evidence that any delay in delivery caused by an alleged violation of the Act by Empire occurred on or after November 28, 2011, the date that Baltic filed its FMC Complaint, or that Baltic suffered any actual injury if there was a delay.

Baltic does not cite to any evidence of alleged delay of the Group IV shipments. Baltic claims that they were excluded from the 2011 Settlement because “[Baltic’s] customers agreed to pay the extra shipping charges . . . demanded by [Empire],” (Baltic Supp. Memo (7/10/15), at 4), apparently before the settlement. Delay would have occurred more than three years before Baltic filed its FMC Complaint. Therefore, any claim for a reparation award would be barred by the statute of limitations.

In its FMC Complaint, Baltic did not allege that delay in delivery of shipments violated the Shipping Act. Therefore, this claim is beyond the scope of the Complaint. Baltic does not set forth any evidence of actual injury cause by delay in violation of the Shipping Act on or after November 28, 2011. Therefore, amendment to the Complaint would be futile. *Cornelius v. Bank of Am., NA*, No. 13-14905, 2014 U.S. App. LEXIS 18396, at \*9-10 (11th Cir. Sept. 25, 2014) (per curiam); *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam).

**X. IF BALTIC WERE TO PROVE AT HEARING THAT EMPIRE VIOLATED THE SHIPPING ACT, BALTIC IS NOT ENTITLED TO OTHER RELIEF.**

In its FMC Complaint, Baltic states that it seeks:

an order . . . commanding [Empire] to pay to [Baltic] by way of reparations for the unlawful conduct hereinabove described the sums described herein, with interest and attorney’s fees or such other sum as the Commission may determine to be proper as

an award of reparation; and that such other and further relief order or orders be made as the Commission determines to be proper in the premises.

(FMC Complaint ¶ VIII.B.) At the hearing, Baltic conceded that when it filed its FMC Complaint, the primary relief it sought was a reparation award.

JUDGE GUTHRIDGE: Okay. The only [relief] that Baltic explicitly prays for in its complaint is a reparation award. Is that right?

MR. NUSSBAUM: Yes.

Transcript at 77.

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

MR. NUSSBAUM: Yes, it is.

Transcript at 78. With dismissal of Baltic's claim for a reparation award, it is appropriate to consider *sua sponte* what other relief might be available to Baltic should this case proceed.

The Commission has recognized that there is "no overarching statute of limitations in the Act – that is, parties are not barred from alleging and proving a violation of the Act at any time" and that if a complainant "is able to prove a violation of the Act and show that unlawful conduct is ongoing or likely to resume, relief in the form of a cease and desist order could be available." *Maher v. PANYNJ*, FMC No. 08-03, Order at 16-17 (FMC Jan. 31, 2013) (Order granting in part and denying in part Respondent's Motion for Summary Judgment).

The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. *See Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997) ("a cease and desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses"); and *Portman Square Ltd. – Possible Violations of Section 10 (a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998) ("the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities").

*Id.*, at 6 n.8.

Baltic and Empire's business arrangement ended more three years ago.

MR. NUSSBAUM: Well, Your Honor, we're arguing that those 21 [Group V] bookings that came from Savannah belonged to Baltic. Those went into – if I recall correctly, those went into 2012.

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

MR. NUSSBAUM: No.

JUDGE GUTHRIDGE: No shipments in 2015?

MR. NUSSBAUM: Those 21 were the last.

Transcript at 76-77. There is no evidence that the Empire is likely to resume its allegedly unlawful conduct against Baltic. Therefore, a cease and desist order is not warranted.

Baltic was also asked about other relief that it sought.

JUDGE GUTHRIDGE: . . . What other relief, if any, should the Commission be entering if this case were to go forward and Baltic were to prevail?

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

JUDGE GUTHRIDGE: And is that all?

MR. NUSSBAUM: Yes, Your Honor.

Transcript at 77.

Earlier in the hearing, Baltic made it clear that it is seeking an order requiring Empire to produce shipping documents from as long ago as 2007. Transcript at 31 (Baltic came to the Commission alleging Empire violated the Shipping Act by failing to turn over documents from as long ago as 2007). In an affidavit, Baltic's president states:

10. In mid-2008, [Empire] did not respond to Baltic's written request for invoices . . . . In early 2009 after Baltic began high volume shipment of containers through [Empire], Mr. Hitrinov assured Baltic that [Empire] would issue freight invoices and house bills of lading, however, despite repeated requests, the documents were never produced.

11. On November 11, 2011, [Empire] continued to refuse to produce the invoices, despite the numerous requests from Baltic . . . . In that email, Mr. Hitrinov purports to have sent invoices in response to Baltic's requests. As the Commission may be aware, Hitrinov has now changed that position in his motion papers, claiming that he never sent invoices.
12. In light of [Empire's] repeated assurance that the documents would be produced, Baltic agreed to continue to do business with [Empire]. . . .

\* \* \*

15. Subsequent to the end of 2008, at no time did Baltic ever receive house bills of lading, nor a single invoice from [Empire] although such documents were requested from [Empire] on numerous occasions, both verbally and in writing.

(Baltic Opp. to Mot. for S/D (5/8/15), Presniakovas Affidavit.)

Baltic knew in 2008 that Empire was not providing Baltic with the shipping documents, but waited more than six years to file a complaint with the Commission making the claim that failing to provide the documents violated the Shipping Act. Baltic could have filed a complaint with the Commission in 2008 seeking an order that Empire provide the documents, but chose not to file. If Baltic had filed a complaint with the Commission in 2008 and received an order to provide them, the parties would not have gone through their four-year relationship with Empire not providing the documents. Empire allegedly continued to refuse to provide the documents, but Baltic chose not to file in 2009 or 2010. In 2011, Baltic filed its complaint in the district court complaining in part about Empire's failure to provide documents, but chose not to file a complaint with the Commission seeking an order that the documents be provided. Baltic chose not to file a complaint with the Commission in 2012 or 2013. Finally, on November 28, 2014, seven full years after its first shipment with Empire (FMC Complaint ¶ 12), Baltic filed FMC Complaint and now wants the Commission to order Empire to produce documents regarding several thousand shipments, none of which occurred less than three years before Baltic filed its Complaint and some of which occurred nearly eight years before this decision.

Because an order that Empire provide these documents would not be a reparation award, a complaint seeking an order to require Empire to provide the documents would not be subject to the Act's three-year statute of limitations. *Maheer v. PANYNJ*, above. While the Commission may have the *power* to enter an order requiring an NVOCC to provide records of shipments eight years old (although I note that an NVOCC is only required to retain records for five years, 46 C.F.R. § 515.33), the Commission is not required to issue the order.

The elements of the equitable defense of laches are "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the

defense.” *Costello v. United States*, 365 U.S. 265, 282, 5 L. Ed. 2d 551, 81 S. Ct. 534 (1961). These elements are conjunctive, and since laches is a defense, the burden of establishing both is on the defendant. *If a statutory limitations period that would bar legal relief has expired, then the defendant in an action for equitable relief enjoys the benefit of a presumption of inexcusable delay and prejudice. In that case, the burden shifts to the plaintiff to justify its delay and negate prejudice.*

*E.E.O.C. v. A&P*, 735 F.2d 69, 80 (3d Cir. 1984) (emphasis added). “The case law is clear that delay is not unreasonable, and laches does not accrue, where the basis of a claim is not known.” *Holt Cargo Systems, Inc. v. Delaware River Port Authority*, 28 S.R.R. 1282, 1295 (ALJ 2000).

Baltic’s knowledge of Empire’s failure to produce the documents is confirmed by the material facts as to which there is no dispute. According to its own statements, Baltic has known since the beginning of the relationship that Empire was not providing shipping documents that Baltic now contends the Act required Empire to provide. Baltic made demands for the documents beginning in 2008, but Baltic did not seek relief from the Commission until more than three years after Baltic’s last shipment began. No evidence overcomes the presumption of delay, and prejudice to Empire if the Commission were to issue and order is manifest. Nearly four years after the end of its business relationship with Baltic, an order to produce the documents would require Empire to incur significant costs in time and money searching and producing records for shipments between four and eight years old.

Baltic slept on its rights for more than six years before coming to the Commission seeking this relief. In the circumstances of this case, even if Baltic were to prove Empire violated the Act by failing to provide Baltic with documents for shipments between November 2007 and November 2011, a Commission order issued in 2015 requiring Empire to provide the documents is not warranted.

I find that with the dismissal of its claim for a reparation award, even if Baltic were prove that Empire violated the Act as alleged, there is no relief sought by Baltic that the Commission should award. Therefore, Baltic’s FMC Complaint is dismissed in its entirety.

## **XI. ATTORNEY FEES.**

When Baltic filed its FMC Complaint, the Shipping Act provided: “If the complaint was filed within the [three year] period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.” 46 U.S.C. § 41305(b). Not long thereafter, Congress amended the Act to strike the phrase “plus reasonable attorney fees” from section 41305(b) and add a new section 41305(e): “*Attorney Fees.* – In any action brought under section 41301, the *prevailing party* may be awarded reasonable attorney fees.” Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act) (emphasis added).

When controlling law is changed mid-case, the question of retroactivity arises. In one attorney fee case, *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974) [*Bradley*], the Court held that a tribunal should “apply the law in effect at the time it renders its decision.” *Bradley*, 416 U.S. at 711. In another attorney fee case, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) [*Bowen*], the Court stated “retroactivity is not favored in the law. . . . Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen*, 488 U.S. at 711. Tension exists between the holdings of the two cases.

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. Determination of the fee awarded, if any, should be deferred until the decision is final.

## XII. CONCLUSION.

Baltic’s claim for a reparation award accrued more than three years before it filed its Complaint. Therefore, the claim is barred by the Act’s statute of limitations. Baltic does not articulate any other cognizable relief to which it may be entitled. Therefore, Baltic’s Complaint is dismissed with prejudice.

## ORDER

Upon consideration of Complainant’s Motion for Reconsideration of Order Releasing Documents Submitted *In Camera*, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that Complainant’s Motion for Reconsideration of Order Releasing Documents Submitted *In Camera* be **DENIED**.

Upon consideration of Respondents’ Motion for Partial Summary Decision Dismissing Complaint for Reparations on the Bases of (1) the Claim is Barred by the Statute of Limitations; and (2) the Claim is Barred by the Settlement Agreement and Mutual Release, the opposition thereto, the record herein, and the material facts as to which there is no genuine dispute, and for the reasons stated above, it is hereby

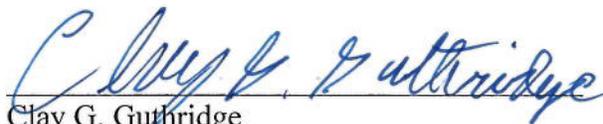
**ORDERED** that Respondents’ Motion for Partial Summary Decision **GRANTED**. Complainant’s claim for a reparation award resulting from Respondents’ alleged violations of the Shipping Act accrued more than three years before Complainant filed its Complaint. Therefore, the

claim for a reparation award is barred by the Act's statute of limitations and is **DISMISSED**. All other pending motions are denied.

Upon consideration of the record herein and the material facts as to which there is no genuine dispute, and for the reasons stated above, it is hereby

**ORDERED**, *sua sponte*, that this proceeding be **DISMISSED**. Even if Complainant were to prove that Respondents violated the Shipping Act as alleged, Complainant has not articulated any cognizable relief. It is

**FURTHER ORDERED** that the attorney fee to be awarded to the prevailing party, if any, be determined after the decision becomes final.

  
Clay G. Guthridge  
Administrative Law Judge