



## INTRODUCTION

It was agreed among counsel and the ALJ Guthridge that the parties would address the time-bar and settlement issues for the shipments described in attachments “C, D and E” to Complainant’s counsel’s letter of February 9, 2015, and if it could be shown that the claims for reparations for those claims were barred by the Statute of Limitations and/or the Settlement Agreement and Mutual Release, then all claims for all “4,000” shipments occurring from 2007 through 2011 would be time barred<sup>1</sup>.

It is the Respondents’ position that as the C, D and E shipments:

- were all specifically included in the 2011 New Jersey lawsuit – itself begun and settled more than three years before the filing of the FMC Complaint; and
- were booked at agreed-upon rates and shipped more than three years before the filing of the FMC Complaint,

the claims for overcharges, unfair charges, un-tariffed charges, discriminatory charges and the failure to tender shipping documents (alleged by the Complainant to have been required to be delivered at the time of shipment), and any other Shipping Act violations, are time-barred, settled, released and discharged forever.

**POINT I: COMPLAINANT’S CLAIMS FOR REPARATIONS ACCRUED MORE THAN THREE YEARS BEFORE THE FILING OF THE FMC COMPLAINT AND ARE, ACCORDINGLY, TIME-BARRED**

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<sup>1</sup> Recording of February 23, 2015 telephone conference; minutes approx. 34-37

Complainant seeks reparations alleging that the Respondent violated the Shipping Act in connection with Complainant's shipments.

Reparations are compensation for the "actual injury caused" by a violation of the Shipping Act (46 USC 41305 (b)).

Reparations will only be awarded if Complainant's complaint "is filed within 3 years after the claim accrues" (46 USC 41301 (a)).

Complainant's Complaint is that it was harmed because the Respondent:

1. charged it "rates greater than those it charged other shippers" (Complaint, Sec. V. A.);
2. charged it "rates greater than those reflected in its published tariff" (Complaint, Sec V. B.);
3. failed to properly maintain its tariff (Complaint, Sec. V. C.); and
4. did not provide the Complainant with shipping documents as Complainant had requested (Complaint Sec. V. D.).

Insofar as complaining of rates being charged, those claims arose at or before the time of booking, when the rates were given to the Complainant and applied to its shipments. Similarly, insofar as not having rates in the tariff, any such violation also occurred at the time of booking, as Complainant did not have an opportunity to obtain a "correct" tariff rate (although it is difficult to see how this may have damaged Complainant).

The gravamen of these claims is that the Complainant was overcharged. The Complainant (apparently) seeks reparations in the amount of the overcharges.

Insofar as the shipments complained of were booked more than three years before November 28, 2014 (when the FMC Complaint was filed), the claims for reparations for being over-charged, unfairly charged or being charged on an other-than-tariff basis accrued outside of the statute of limitations period are now time-barred.

Insofar as the claims for reparations for not providing requested documents are concerned, the claims accrued at the time of shipment<sup>2</sup> - more than three years before the filing of the Complaint herein, and are likewise time-barred.

Accordingly, as the reparation claims (whether pricing or documentation-related) accrued more than three years prior to the filing of the FMC Complaint, the claims are time-barred and should be dismissed, with the award of attorneys' fees to the Respondent.

POINT II: COMPLAINANT MISCONSTRUES THE CONCEPT OF "CONTINUING VIOLATIONS" AND "CONTINUING INJURY"; BUT IN ANY EVENT ITS CLAIMS FOR LOSSES ACCRUING BECAUSE OF UNRESOLVED CLAIMS ARE TIME-BARRED

Complainant seeks to avoid dismissal of its time-barred claims for reparations by claiming that the Respondent's alleged Shipping Act violations are "continuing", and therefore the statute of limitations has been tolled, or otherwise has not run.

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<sup>2</sup> The attorney for the Complainant has conceded that the documentation claim accrued at the time of shipment:

JUDGE GUTHRIDGE: To the extent ... Empire was not giving Baltic the document that it should have for each shipment, it was doing that at the time of these shipments.

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

(Transcript of Oral Argument; June 12, 2015; 59/22 – 60/5) (emphasis added)

The Complainant seems to believe that an unresolved claim “continues” until resolved, and thus it tolls the Statute of Limitations until a final resolution has been achieved. Necessarily, this is a misreading of the “continuing injury” doctrine which requires a similar act to be repeated – causing continuing injury. But even more importantly, there is considerable question as to whether a “continuing violation” or “continuing injury” tolls the Statute of Limitations for a claim for reparations under the Shipping Act. (See discussion in *Maier Terminals, LLC v. The Port Authority of New York and New Jersey*, FMC Docket 08-03; Order, Served 1/31/2013; at pp. 15-17)

When pressed on how injuries were continuing to accrue for shipments made more than three years before the filing of its Complaint, the Complainant’s counsel explained that there was a continuing violation as it was still losing customers because shipping documents had not been provided in the 2007 – 2011 period (Transcript, pp. 25/2 – 37/10):

“JUDGE GUTHRIDGE: ... Is Baltic claiming that shippers it had in 2007 weren’t doing business with Baltic because in 2011, [because] Baltic failed to produce documents from 2007?

MR. NUSSBAUM: Yes, Your Honor”.

(Transcript, p. 37/6-10)

Complainant’s position is unavailing.

The Shipping Act does not provide for the tolling the Statute of Limitations for reparations because of “continuing violations”. The Shipping Act provides for reparations for violations causing “actual injury” if the complaint is filed within three years of the violation. *Maier, supra* at pp. 16-17.

While the Statute of limitations extinguishes claims for reparations, the Complainant is not without the possibility of other relief. It may seek injunctive relief.

As the Commission has explained, the Shipping Act's Statute of Limitations is unique – and self-contained:

“Unlike other statutory schemes, there is no overarching statute of limitation in the [Shipping] Act – that is, parties are not barred from alleging and proving a violation of the Act at any time. The Act merely prohibits a complainant from seeking reparations for an injury to the complainant if the complaint is filed more than three years after the cause of action accrued. 46 USC 41301 (a). Even after the remedy of reparations is no longer available, the remedy of a cease and desist order is available to a complainant who is able to prove a violation of the Act and show that unlawful conduct is ongoing or likely to resume.”

*Id.* (emphasis added)

The Commission has made it clear that it is the act of violating the Shipping Act that marks the accrual of the cause of action for reparations:

“Generally the [Statute of Limitations] period commences on the date the cause of action accrues, that being the date on which the wrongdoer commits an act that injures the business of another”.

*Maher, supra* at footnote 16 (emphasis added).

In sum, the statute runs from the date of the wrongful act – not the date in which the injuries occur. The Complainant's claim for reparations because of “lost customers” are time-barred, as the “acts” – failing to provide shipping documents - occurred more than three years prior to the filing of the FMC Complaint.

Indeed, all of the actions complained of with respect to the Complainant's shipments – over-charging, unfairly charging, charging without benefit of tariff, and not providing documents – all occurred more than three years before the filing of the FMC Complaint, and therefore the claims – for reparations – are time barred.

POINT III: COMPLAINANT’S ARGUMENT THAT THE “DISCOVERY DOCTRINE”  
TOLLS THE STATUTE OF LIMITATIONS FAILS IN THE FACE OF THE  
“CONSTRUCTIVE NOTICE DOCTRINE” (AND COMPLAINANT’S ACTUAL  
KNOWLEDGE OF THE OPERATIVE FACTS)

The Complainant claims that it only learned of disparities in rates, and the lack of a tariff item for its cargo through the 2012 Audit, and therefore the Statute of Limitations was “tolled” until such discovery.

Unfortunately, whether or not the Audit actually proves much of anything, the Complainant is charged with knowing:

- what is in Respondent’s tariffs, and what is not;
- that it was not being charged tariff rates; and
- it was gambling that it was getting a competitive rate (and being an experienced exporter and OTI, it must be deemed to have had a sophisticated understanding of the odds).

In any event, as Complainant had constructive notice of the nature of Respondents’ tariffs at the time of bookings, it also had constructive notice that it was not being charged the tariff rate. As noted earlier in this proceeding, Complainant must have been satisfied with the rates being charged as it shipped over 4,000 automobiles in four years with Respondent.

The “discovery” argument is unavailing. The constructive notice attributable to the Complainant was operative at the time of booking the shipments – more than three years before the filing of the FMC Complaint, and thus time-barred.

The claims for reparations should be dismissed, and attorneys’ fees awarded to the Respondent.

POINT IV: COMPLAINANT'S CLAIMS FOR REPARATIONS FOR POST-SETTLEMENT AGREEMENT DELIVERIES MUST FAIL ON THE GROUNDS THAT IT HAS OFFERED NO EVIDENCE OF ANY PROBLEMS, NOR THAT ANY STORAGE OR DEMURRAGE EXPENSES WERE INCURRED

Complainant tries to make much of the deliveries that were made pursuant to the 2011 Settlement Agreement and Mutual Release as being unduly delayed, causing the Complainant to incur storage and demurrage charges, all of which it claims to be a violation of the Shipping Act. Whether the alleged "delay" amounts to a Shipping Act violation, or not, is moot, as Complainant has offered no evidence of any such delay, or the incurring of any such expenses.

What is even more important is that the deliveries made pursuant to the Settlement Agreement were all made without any contemporaneous complaint. As shown in Complainant's own documents, there was an orderly procedure of vessel arrival, notice of arrival, payment and delivery. A well-oiled machine. Complainant's discomfiture at having to communicate through counsel was a not-unexpected result of the Complainant's filing of a federal lawsuit to solve a commercial problem. But it does not amount to a Shipping Act violation.

The unsupported claim for reparations for delay or storage charges should be dismissed, and attorneys' fees awarded to Respondents.

POINT V: COMPLAINANT'S CLAIMS (AND ANY OTHER PARTY'S CLAIMS) FOR REPARATIONS IN CONNECTION WITH THE "FIVE LONG BEACH SHIPMENTS" ARE TIME-BARRED

As permitted by ALJ Guthridge at Oral Argument on this Motion, Claimant was permitted to offer additional documentation with respect to five shipments that appeared in the 2011 New Jersey lawsuit Complaint, but were not included in the 2011 Settlement Agreement and Release.

Complainant has now offered Certifications and attachments which it claims prove violations of the Shipping Act for which reparations should be awarded – to Complainant.

Unfortunately, the material submitted does not support the Complainant’s position.

The dock receipts (previously supplied by Respondent, and now attached to Certifications of Sawon and Garmus) show that the five shipments sailed in October 2011, presumably booked at a point prior to the date of sailing. The emails attached to the Sawon Certification show that the shipments were paid for by M&E<sup>3</sup> on Nov. 22, 2011 and (presumably) delivered (neither the shipper nor M&E have raised any complaints, and are silent on the matter). Accordingly, whosoever shipments they are<sup>4</sup>, any complaints about overcharges, non-tariff-based charges, discriminatory charges, failure to produce shipping documents at the time of sailing, or making a wrongful delivery to the consignee are time-barred.

The Complainant claims that it was not aware of the purportedly delicate negotiations among Respondent, the shipper (G&G Auto) and M&E Baltic<sup>5</sup>. The failure (if any) of Complainant’s customer to keep it advised about these shipments is between the shipper and the Complainant, but cannot be used to support a claim for Shipping Act violations against the Respondents, nor the tolling of the Statute of Limitations under the “discovery rule”:

“Under the discovery rule, adopted by the Commission in *Inlet Fish* [citation omitted] a statute of limitations period will not begin to run until ‘a party knew or with reasonable diligence should have known it had a claim’ [citing *Inlet Fish*] ... As the ALJ

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<sup>3</sup> The “ME Shipments” described in Certification of Michael Hitrinov, ¶¶ 5-7(5/26/2015), and the email correspondence attached as Exhibit 1 to the Certification show that in the course of reconciling accounts with Complainant in connection with the Settlement of the 2011 New Jersey lawsuit, Respondents first identified the shipments as “paid by Me [*sic*]-taken out” (p. 3); the advice from Respondent to Complainant that “Those 5 shipments requested in writing by company ME Baltic to be put on their account” (p. 2), and no objection by the Complainant (p. 1), all occurring November 24-25, 2011.

<sup>4</sup> There is no contemporaneous documentation showing that Complainant had any connection to these shipments.

<sup>5</sup> See Complainant’s “Certification of Kamil Sawon”, ¶¶ 8, 10, 11; Complainant’s “Certification of Gediminas Garmus”, ¶¶ 7, 8.

noted, ‘the discovery rule is an exception to the time-bar provision and [Complainant] 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’ [citations omitted]”, *Maier, supra* p. 10 (emphasis in original).

The Complainant had been timely notified (and more than three years before the filing of the FMC Complaint) that these five shipments were being handled by M&E (either as some sort of principal or agent) and Complainant raised no objections. If these were indeed Complainant’s shipments, one would think that it would have kept better tabs on the situation. In any event, it cannot be said that the Complainant was exercising “reasonable diligence”. Accordingly, it has not satisfied the requirements of the “discovery doctrine” and therefore the Statute of Limitations has run, and any claim for reparations is time-barred.

If Complainant has not been paid its charges – that is between Complainant and its customer.

The only documented involvement about these shipments with Complainant is that G&G, the shipper, forwarded<sup>6</sup> the 2011 payment email correspondence between M&E Baltic and Respondent to Complainant in June 2015.

If the “five Long Beach” shipments a/k/a the “M&E shipments” are truly the Complainant’s (which is doubted), any claims for reparations are time-barred, the claims for reparations should be dismissed, and attorneys’ fees awarded to the Respondents.

**POINT VI: DESPITE THE AGREEMENT AMONG COUNSEL AND THE ALJ, COMPLAINANT CONTINUES TO ARGUE ABOUT THE 21 “BAL TIC SAVANNAH” SHIPMENTS; THE RECORD IS CLEAR THAT THESE ARE NOT THE COMPLAINANT’S; FURTHER, THE CLAIM IS DEFEATED BY THE DOCTRINE OF “EQUITABLE ESTOPPEL”**

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<sup>6</sup> See email attached to Complainant’s “Certification of Kamil Sawon” as Exhibit A.

It was specifically agreed that the status of the 21 shipments of “Baltic Savannah” were not to be addressed in this Motion<sup>7</sup>. Nevertheless, Complainant has raised them and argues in this Motion that:

1. they are Complainant’s shipments; and
2. as they were shipped less than three years from the filing of the Complaint they are not time-barred; nor were they the subject of the Release of the New Jersey lawsuit.

Further, the Complainant raises – for the first time – a “fourth class of shipments” – five shipments that the parties acknowledged in 2011 were not Complainant’s (indeed they were M&E Baltic’s, discussed above at Point V), and some 10 others that are not specifically identified in any meaningful way, and which are to be deduced through an arithmetical exercise<sup>8</sup>.

As the agreed upon procedure was to limit the scope of this motion to the “C, D and E” shipments, the improperly raised claims with respect to the “Baltic Savannah” shipments and the other “fourth class” of shipments should be stricken, ignored or otherwise deemed waived as not raised appropriately.

The Tribunal has yet to rule on the Complainant’s motion to reconsider the Tribunal’s findings that none of the 21 shipments are Complainant’s. The Tribunal might consider a ruling in connection with its decision on this Motion, and considering the unsupported and misplaced arguments explaining why they are Complainant’s shipments, should find that they are NOT.

Complainant has provided no contemporary documentary evidence that the shipments were its shipments – and not Baltic Savannah’s. It has however, offered the Certification of Alla Kotova, who states that the parties “knew” or “understood” that the shipments were

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<sup>7</sup> See Recording of February 23, 2015 telephone conference; minutes approx. 50-52; Complainant was simply to contact the Commission if it found relevant information and the parties would then proceed from that point.

<sup>8</sup> See Complainant’s Supplemental Memorandum at footnote 5 and text at p. 6.

Complainant's. A review of the record demonstrates that such allegation is simply not credible, and should be given no weight.

In trying to sort out payments and charges against various shipments, Respondents asked Baltic Savannah:

“Please send me one more time the explanation that you are separate company and you made bookings directly from Empire”<sup>9</sup>

To which Alla Kotova (President of Baltic Savannah<sup>10</sup>) replied:

“Please release our containers which belongs to corporation in GA, owner Alla Kotova and has nothing to do with Baltic auto in Chicago”.<sup>11</sup>

“This booking was ordered directly form Baltic auto shipping corp and has no connection with Baltic auto Shipping based in Bedford Park, IL.”<sup>12</sup>

“These bookings was ordered directly from Baltic Auto Shipping corp. (bellow) and has no connection with Baltic auto Shipping in Bedford Park.”<sup>13</sup>

(All spelling as in original)

Kotova now claims that the statements were made “under duress”<sup>14</sup>.

But she complicates her story by claiming that as among Baltic Savannah, Complainant and respondent “it was clearly understood ... that the bookings ... were always utilized by Baltic

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<sup>9</sup> M. Hitrinov to Alla Lina/Alla Kotova; 11/22/2011; found at Ex. 4-3 to Presniakovas Affidavit (4/29/2015)

<sup>10</sup> Kotova Affidavit, ¶ 1 ; 4/21/2015

<sup>11</sup> found at Ex. 4-1 to Presniakovas Affidavit, 4/29/2015

<sup>12</sup> found at Ex. 4-2 to Presniakovas Affidavit, 4/29/2015

<sup>13</sup> found at Ex. 4-3 to Presniakovas Affidavit, 4/29/2015

<sup>14</sup> Kotova Affidavit, ¶¶ 13,19,23 ; 4/21/2015

Chicago<sup>15</sup>”, and “the parties ... always had an understanding that these booking numbers were being issued to Baltic Chicago<sup>16</sup>”.

But Kotova’s 2015 position is hardly credible in light of the Respondent’s 2011 demands that Baltic Savannah clarify its status, and Baltic Savannah was adamant that it had no connection with Complainant. If all parties “knew” and “understood” Baltic Savannah’s status – why would Respondent ask the question? And why would Baltic Savannah reply as it did – multiple times?

In any event, Complainant cannot have it both ways. The later-developed story – in the face of a dismissal on Statute of Limitations and Settlement Agreement and Mutual Release grounds, should not be credited.

Baltic Savannah made its contemporaneous statement of “no connection” to obtain Respondent’s services.

It cannot now be heard to change its position – to Respondent’s detriment. It is equitably estopped from taking contradictory positions – to its and Complainant’s benefit – and Respondent’s detriment.

The Commission has expressed its application of the doctrine of equitable estoppel:

“Estoppel is an affirmative defense and the burden of proof is on the party claiming estoppel. Fed. R. Civ. P. 8(c)(1); *U.S. v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987). The elements of equitable estoppel under federal common law are: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party

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<sup>15</sup> Kotova Affidavit, ¶ 8 ; 4/21/2015

<sup>16</sup> Kotova Affidavit, ¶ 10 ; 4/21/2015

asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008); *see also Peacock v. United States*, 597 F.3d 654, 661 n.3 (5th Cir. 2010).”

*Worldwide Relocations, et al. – Possible Violations of Sections 8, 10, and 19 of the Shipping Act of 1984 and the Commissions Regulations at 46 CFR §§ 515.3, 515.21 and 520.3*; Initial Decision of Erin Masson Wirth, Administrative Law Judge; Docket 06-01, p. 58.

The Baltic Savannah claim and retraction satisfies each element, accepting that the Baltic Companies now claim to be *alter egos* of one another:

1. If the shipments actually were Baltic Chicago’s (*i.e.*, Complainant’s), then Baltic Savannah misrepresented the fact by claiming the shipments were Baltic Savannah’s and that there was no connection with Baltic Chicago.
2. Necessarily Baltic Savannah and Baltic Chicago knew that the Baltic Savannah shipments were actually those of Baltic Chicago, despite the representation to the contrary;
3. The original claim of no connection was intended to have the effect of continuing to be able to ship with Respondent Empire – and it worked.
4. Respondent Empire did not know – and could not have known the actual relationship between the Baltic Companies – which is why it asked the question in the first place.

Accordingly, even if it is found that the 21 Baltic Savannah shipments are actually the shipments of Complainant (under heaven knows what set of facts), the “fact” should be disregarded on the grounds of equitable estoppel.

But the Complainant has added more fuel to the fire with the “Certification of Darius Varzinskas”. In his Certification (attached to the Nussbaum Certification), unsupported by any

contemporaneous correspondence, Darius Varzinskas states that: he supervised a warehouse /loading facility; and claims that he received the shipments and “completed” the dock receipts (provided to the FMC by the Respondent) “using the booking numbers that were provided to me by Andrejus Presniakovas from Baltic Chicago” (¶ 4). That he could remember those particular shipments from three-and-a-half years ago is remarkable, especially since the booking numbers for each of Complainant’s shipments and Baltic Savannah’s shipments were routinely sent to both Complainant and Baltic Savannah<sup>17</sup> (see Kotova Aff. Para. 6-10). But at this late date he knows that these particular shipments were Complainant’s. Extraordinary!

## CONCLUSION

All pricing and documentation claims with respect to the C, D and E shipments accrued at the time of booking and, perhaps shipment, but all accrued more than three years before the filing of the FMC Complaint, and are therefore time-barred.

As the C, D and E shipment claims for reparations are time-barred, all remaining claims with respect to the “4,000” shipments are time-barred.

(Insofar as Complainant continues to demand delivery of documents – Empire’s House Bills of Lading and invoices – they never existed – as Complainant knows – and therefore Complainant cannot be awarded any injunctive relief with respect to the documents. Recording of February 23, 2015 telephone conference; minutes approx... 43-44)

Accordingly, the Complainant’s Complaint for reparations should be dismissed as time-barred, and, where the shipments complained of are those of third parties (Baltic Savannah and M&E), they should be dismissed as time-barred and/or for failure to state a claim of Complainant’s.

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<sup>17</sup> See discussion about sorting out which shipments were Baltic Savannah’s and which were Complainant’s at Point V, above.

As Complainant has not succeeded in its claim for reparations, Respondent should be awarded attorneys' fees for having to defend the claims.

Respectfully submitted,

By:

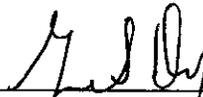


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Dated in Short Hills, NJ this 17<sup>th</sup> day of July 2015.

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the RESPONDENTS' POST-ARGUMENT MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION DISMISSING COMPLAINT FOR REPARATIONS ON THE BASIS OF (1) THE CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS; AND (2) THE CLAIMS ARE BARRED BY THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE upon Complainant's counsel, Marcus A. Nussbaum, Esq., with the address of P.O. Box 245599, Brooklyn, NY 11224 by first class mail, postage prepaid, by fax (347-572-0439) and by email ([marcus.nussbaum@gmail.com](mailto:marcus.nussbaum@gmail.com)); and that the original and five (5) copies are being filed with the Secretary of the Federal Maritime Commission.



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Dated in Short Hills, NJ. this 17th day of July, 2015.