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March 29, 2011					
FEDERAL MARITIME COMMISSION					

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 1898(F)

DSW INTERNATIONAL, INC.

v.

**COMMONWEALTH SHIPPING, INC.,
ABOU MERHI LINES, LLC, AND ABOU MERHI LINES, SAL**

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CLAY G. GUTHRIDGE¹

On March 31, 2009, the Secretary received a Complaint filed by complainant DSW International, Inc. (DSW International), a Texas corporation, alleging that Respondents violated several sections of the Shipping Act of 1984 when they failed to deliver two cars that DSW International shipped from Texas to Nigeria. DSW International identified Commonwealth Shipping Lines, Inc. (Commonwealth) and Abou Merhi Lines, LLC (Abou Merhi/LLC) as Respondents in the caption of the Complaint. Commonwealth is a non-vessel-operating common carrier (NVOCC) licensed by the Commission as an ocean transportation intermediary (OTI), FMC License Number 020769N. FMC OTI list, http://www2.fmc.gov/oti/nvos_listing.aspx, last visited March 21, 2011. Abou Merhi/LLC was a United States affiliate of Abou Merhi Lines, SAL (Abou Merhi/SAL),² a vessel-operating common carrier registered with the Commission as Organization No. 020944. FMC vessel-operating common carrier list, <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc>, last visited March 21,

¹ 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.

² “SAL” (or S.A.L.) is the abbreviation for “Société Anonyme Libanaise,” indicating that an entity is a joint stock company organized under Lebanese law. See Investment Development Authority of Lebanon, *Investor’s Guide to Lebanon*, at 8, available at http://www.idal.com.lb/uploadedfiles/Investment_Guide_EN.pdf (last visited Mar. 22, 2011).

2011. The body of the Complaint alleged that Abou Merhi/SAL and Abou Merhi Lines (USA), LLC (Abou Merhi/USA), Abou Merhi/SAL's agent in the United States, also participated in the shipment.

DSW International requested informal adjudication of the Complaint pursuant to 46 C.F.R. Part 502, Subpart S. On May 27, 2009, Commonwealth stated that it did not consent to informal adjudication pursuant to Subpart S and requested that the matter be resolved pursuant to Subpart T. Therefore, on May 27, 2009, the Secretary referred this matter to the Office of Administrative Law Judges. (Memorandum dated May 27, 2009, from the Secretary to the Administrative Law Judge.) See 46 C.F.R. § 502.304(f) ("If the respondent refuses to consent to the claim being informally adjudicated pursuant to this subpart, the claim will be considered a complaint under § 502.311 and will be adjudicated under Subpart T of this part.") See also *DSW Int'l, Inc. v. Commonwealth Shipping, Inc., and Abou Merhi Lines, LLC*, FMC No. 1898(F) (ALJ July 1, 2009) (Notice of Assignment and Order to Supplement the Record).

The parties were instructed to submit documentary evidence on which they rely in an appendix. (*Id.*) No party complied with this order. Therefore, I have compiled the evidence submitted by the parties into an Initial Decision Appendix for more convenient reference and ease of review. Where parties have submitted duplicate copies (*e.g.*, the parties submitted several copies of the bills of lading), I have included only one copy in the Appendix. This decision refers to the evidence by page number in the Appendix; *e.g.*, ID App. at 1.

All of the documents submitted by the parties are hereby admitted into evidence. This Initial Decision is based on the verified Amended Complaint, Commonwealth's Answer to Amended Complaint, evidence, briefs and replies, proposed findings of fact and conclusions of law, and supplemental briefs and replies filed by the parties. On January 8, 2011, DSW International filed a document entitled "Complainant DSW's Reply to Respondent Commonwealth's Answer to Complainant DSW's Amended Complaint and Complainant DSW's [Reply] to Respondent Commonwealth's Brief." As its title indicates, pages 1 through 8 of this document purport to be a reply to Commonwealth's answer. Commission Rule 65 states: "Replies to answers will not be permitted. New matters set forth in respondent's answer will be deemed to be controverted." 46 C.F.R. § 502.65. Therefore, the portion of this filing that purports to respond to Commonwealth's answer is stricken. All of the documents in evidence were considered, even if they are not cited in this Initial Decision.

This Initial Decision addresses only material issues of fact and law. 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); *Steadman v. SEC*, 450 U.S. 91, 98 (1981). Proposed findings of fact not included in this Initial Decision were rejected either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the claim or the defenses thereto. 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 Ry. Co. v. United States*, 361 U.S. 173, 193-194 (1959).

As explained more fully below, DSW International is one of two entities operated by Arinze Udegbune, DSW International’s president. Udegbune also operates DSW Sports & Imports (DSW Sports) as a sole proprietorship. I conclude that DSW International’s claim of ownership of the cars is not supported by the record. Nevertheless, because I also conclude that DSW International’s claim that it and DSW Sports transact businesses on an arm’s length basis is not supported by the record, I find that DSW International is a proper complainant in this proceeding. I conclude that the Commission has jurisdiction over this proceeding and that Commonwealth and Abou Merhi/SAL are proper respondents. The claims against Abou Merhi/LLC, and Abou Merhi/USA are dismissed because the evidence does not support a finding that these entities operated as common carriers on the shipment; therefore, they are not subject to the sections of the Act that DSW International alleges were violated. I find that Abou Merhi/SAL violated section 10(d)(1) of the Act, 46 U.S.C. § 41102(c), but that Commonwealth did not violate the Act. I award reparation of \$11,434.30 to DSW International, payable by Abou Merhi/SAL.

FINDINGS OF FACT AND CONCLUSIONS OF LAW³

I. The Shipment.

In early 2008, DSW International contacted Commonwealth to transport two cars, a Ford Explorer and a Honda Accord, to Nigeria. Commonwealth first booked transportation to Lagos, Nigeria, with Grimaldi USA. The Grimaldi booking notice indicates that cars were scheduled to depart Jacksonville, Florida, on May 28, 2008. (ID App. at 32; 34.)

While the parties do not agree on the reason for the change given by Commonwealth, Commonwealth notified DSW International that Grimaldi would not be transporting the cars to Lagos. Commonwealth then arranged for Abou Merhi/SAL to transport the cars to Cotonou, Benin. The cars were delivered to Jaxport in Jacksonville, Florida, on May 19, 2008. (ID App. at 22.)⁴ Commonwealth issued Commonwealth bill of lading JCS3002-1793-719 identifying DSW International, Inc., as the shipper; Udemba Electronics Coy Ltd., Lagos, Nigeria, as the consignee; Sea Ahmed Voy 806 as the exporting carrier; Jacksonville [Florida] as the port of loading; Cotonou [Benin] as the port of unloading; describing the commodity as used 2004 Ford PK, VIN 1FMZU67K44UB59703; and stating “on board 06/01/2008 at Jacksonville on board named vessel Sea Ahmed, Voy 806 via Abou Merhi Lines as carrier.” (ID App. at 1.) Commonwealth also issued

³ To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law. Similarly, to the extent any conclusion of law may be deemed a finding of fact, it should be considered a finding of fact.

⁴ Although the invoice for the delivery does not identify the two cars delivered to Jaxport, I find that the Ford and the Honda were the two cars delivered.

Commonwealth bill of lading JCS3002-1794-720 identifying DSW International, Inc., as the shipper; Udemba Electronics Coy Ltd., Lagos, Nigeria, as the consignee; Sea Ahmed Voy 806 as the exporting carrier; Jacksonville [Florida] as the port of loading; and Cotonou [Benin] as the port of unloading; describing the commodity as used 2001 Hond 4D; VIN 1HGCG16541A079154; and stating “on board 06/01/2008 at Jacksonville on board vessel Sea Ahmed, Voy 806 via Abou Merhi Lines as carrier.” (ID App. at 2.)

Abou Merhi/SAL issued Abou Merhi/SAL bill of lading CTU0797-217/3013616 identifying Commonwealth Shipping Inc. as the shipper; Udemba Electronics Coy Ltd., Lagos, Nigeria, as the consignee; Sunbelt Dixie as the ocean vessel; Jacksonville [Florida] as the port of loading; Cotonou [Benin] as the port of unloading; and describing the commodity as a second hand motor vehicle 2004 Ford Explorer VIN 1FMZU67K44UB59703. Abou Merhi/USA signed Abou Merhi/SAL bill of lading CTU0797-217/3013616 “as Agent only.” (ID App. at 3.) Abou Merhi/SAL issued Abou Merhi/SAL bill of lading CTU0796-217/3013623 identifying Commonwealth Shipping Inc. as the shipper; Udemba Electronics Coy Ltd., Lagos, Nigeria, as the consignee; Sunbelt Dixie as the ocean vessel; Jacksonville [Florida] as the port of loading; Cotonou [Benin] as the port of unloading; and describing the commodity as a second hand motor vehicle 2001 Honda Accord LX VIN 1HGCG16541A079154. Abou Merhi/USA signed Abou Merhi/SAL bill of lading CTU0797-217/3013616 “as Agent only.” (ID App. at 4.)

Abou Merhi/SAL received the cars in Jacksonville, Florida. Dock receipts indicate that the cars would be loaded on the Sea Ahmed, Voy 806, June 1, 2008. (ID App. at 41; 45.) On June 6, 2008, the cars were loaded on the vessel Sunbelt Dixie. The Sunbelt Dixie left Jacksonville on that date and sailed to Cotonou, Benin, where the cars were discharged on June 21, 2008. Abou Merhi/SAL delivered the cars to the Elissa Group, agent for Abou Merhi/SAL. Elissa Group is no longer Abou Merhi/SAL’s agent. (ID App. at 49-53; 55-58.) The record contains no additional information about the fate of the cars after they arrived in Cotonou and Abou Merhi/SAL delivered them to Elissa Group.

II. The Amended Complaint.

DSW International alleges that Respondents violated five separate provisions of the Act: Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E), 10(b)(10), and 10(d)(1). (Amended Complaint ¶ XVII.) The sections of the Act that DSW International alleges were violated by Respondents have a common feature: Each section regulates the activities of a common carrier. The Act defines “common carrier.”

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). *Inter alia*, a complainant must establish that a respondent is a common carrier to prove the respondent violated section 10(b)(3), 10(b)(4)(D), 10(b)(4)(E), 10(b)(10), or 10(d)(1). The Amended Complaint alleges that DSW International suffered actual injury as a result of the violations and seeks reparation for that injury, plus reasonable attorney's fees.

III. Burden of Persuasion.

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 Company 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 (1994).

IV. Summary of Arguments.

DSW International contends that Respondents assumed the responsibility of transporting two cars to Nigeria. The cars never arrived. Invoking the doctrine of *res ipsa loquitor*, DSW International contends that the failure of the cars to arrive proves that Respondents violated the Shipping Act. Therefore, DSW International contends that Respondents are liable to DSW International for reparation plus interest and attorney's fees.

Respondents argue that this is not a Shipping Act case, but a garden-variety cargo loss claim controlled by the Carriage of Goods by Sea Act, 46 U.S.C. §§1301-1315 (COGSA), not by the Shipping Act; therefore, the dispute is beyond the jurisdiction of the Commission. Commonwealth contends that it would be unconstitutional to bestow power on the Commission to resolve this dispute. Even if there is jurisdiction, COGSA places a limit on damages of \$500 per package; therefore, any recovery for DSW International is limited to \$1000.

V. The Parties.

A. Complainant.

DSW International is a Texas corporation. Arinze Udegbune is an officer or director of DSW International. (ID App. at 5-9; 59; 67.) Udegbune also operates a sole proprietorship under the assumed name of DSW Sports as an automobile dealership licensed by the Texas Department of Transportation. (ID App. at 62; 74-75.)

Commonwealth argues that Udegbune does not have the capacity to act on behalf of DSW International or to hire an attorney to represent DSW International because he is no longer a director of DSW International. Commonwealth bases this claim on a response of the Texas Secretary of State to a business organization inquiry regarding DSW International, Inc. The Secretary of State identifies “Aaire Enegbume” as a director of DSW International and does not identify Arinze Udegbune. (Commonwealth Response to DSW International Proposed Findings of Fact at 1; ID App. at 30.) To the extent a person must be a director in order to hire an attorney for a corporation, based on the evidence cited above, I find that Arinze Udegbune is a director of DSW International and fully competent to take action on its behalf.

DSW International claims that it and DSW Sports operate independently of each other.

Arinze Udegbune is the sole owner of DSW Sports; and he is the current president and a director of DSW [Int’l]. But in terms of the two entities’ business activities and their financial and budget matters, the two entities were separate and independent of each other. Although there is an overlap of ownership and operation between the two entities, the two companies attempt to transact businesses between the two companies on an arm’s length basis. At the same time, however, the Affiant would state that the two companies do not maintain a mutually hostile relationship, but the two companies work on an amicable basis; DSW Sports as an automobile dealer (often as buyer) and DSW [International] as an automobile exporter (often as seller) to foreign countries.

(ID App. at 62.) Based on the following documentary evidence in the record, I find the claim that DSW International and DSW Sports deal “on an arm’s length basis” is not credible.

- Honda transactions: On February 26, 2008, DSW Sports, Udegbune proprietor, bought the Honda for a total (including fees) of \$1750.00. (ID App. at 36.) On February 28, 2008, without improving the car, DSW Sports, Udegbune proprietor, purportedly sold the Honda to DSW International, Udegbune president, for \$16,900. (ID App. at 19; 63.)⁵ No money

⁵ In his affidavit, Udegbune states that DSW Sports purchased the Honda on February 29, 2008, and sold it to DSW International the same day. (ID App. at 63.) The Copart receipt states that DSW Sports bought the Honda on February 26, 2008 (ID App. at 36) and the DSW Sports receipt

changed hands on the transaction. (ID App. at 63.) DSW International claims that it then spent \$500 to ship the Honda to Jacksonville (ID App. at 21), \$200 to install a windshield (ID App. at 20), \$490.62 to store the Honda in Jacksonville (ID App. at 22-25),⁶ and \$1600⁷ to ship the Honda to Nigeria where it claims it had a purchaser who would pay \$16,900. To summarize, DSW International, Udegbune president, claims it purchased the Honda for \$16,900 (\$15,150 more than DSW Sports paid), spent \$2792.62 to improve it and ship it to Nigeria, and expected to sell it for \$16,900, a net loss of \$2792.62.

- The title for the Honda provided to Abou Merhi/SAL when the Honda was shipped indicates that the owner of the Honda was DSW Sports, not DSW International. (ID App. at 42.)
- Ford transactions: At some time before January 28, 2008, DSW Sports bought the Ford Explorer for what Udegbune believes “was about \$5,000.” (ID App. at 64.) DSW Sports did not make any improvements to the Ford. (*Id.*) On January 28, 2008, without improving the car, DSW Sports purportedly sold the Ford to DSW International for \$21,200.00, \$16,200 more than DSW Sports paid for it. (ID App. at 16.) No money changed hands on the transaction. (ID App. at 64.) DSW International claims that it then installed a truck bed cover and other unidentified truck accessories for \$1300 (ID App. at 17; 64) and electronic equipment⁸ for \$1200. (ID App. at 18; 64.) DSW International claims that it then spent \$500 to ship the Ford to Jacksonville (ID App. at 21), \$606.18⁹ to store the Ford in Jacksonville (ID App. at 22-25), and \$1600 to ship the Ford to Nigeria (ID App. at 29) where a purchaser

states that it sold the car to DSW International on February 28, 2008. (ID App. at 19.)

⁶ \$199.02 (March) + 192.60 (April) + 99 (May) = \$490.62.

⁷ DSW International paid \$3200 to ship both cars on the same ship. (ID App. at 29.) I assume this was \$1600 per car.

⁸ The Amended Complaint seeks reparation for “[a]dditional installations such as a night vision camera.” (Amended Complaint ¶ XIX.c.) Federal regulations control export of certain night vision equipment. 22 C.F.R. Parts 120-130. Therefore, I instructed DSW International to demonstrate that it complied with applicable export requirements. *DSW Int’l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F), Order at 2 (ALJ Dec. 6, 2010) (Third Order to Supplement the Record). DSW International responded that the “night vision camera” is actually a car rear view camera system and other electronic equipment. (DSW International’s Response to Third Order to Supplement.) Therefore, I refer to the equipment allegedly installed on the Ford by Bonnie & Clyde as “electronic equipment.”

⁹ \$115.56 (February) + 199.02 (March) + 192.60 (April) + 99 (May) = \$606.18.

agreed to pay \$21,200 for the Ford. (ID App. at 64.)¹⁰ To summarize, DSW International claims it purchased the Ford for \$21,200 (\$16,200 more than DSW Sports paid), spent \$5206.18 to improve it and ship it to Nigeria, and expected to sell it for \$21,200, a net loss of \$5206.18.

- The title for the Ford provided to Abou Merhi/SAL when the Ford was shipped indicates that the owner of the Ford was DSW Sports, not DSW International. (ID App. at 46-47.)
- Although DSW International claims that it bought both cars before they arrived in Jacksonville, the four Port Storage & Delivery, Inc., invoices on which it relies (ID App. at 22-25) are billed to DSW Sports. DSW Sports, not DSW International, paid the storage bill. DSW International claims that “[a]lthough the storage bill was billed to and paid by DSW Sports, [DSW International] subsequently reimbursed the entire amount of the storage bill to DSW Sports.” Neither DSW International nor DSW Sports can locate any documents to support the claim that DSW International reimbursed DSW Sports for these payments. (ID App. at 65.)
- The Second Order to Supplement the Record asked DSW International to respond to the following question: “DSW Ex. 9e [ID App. at 20] is an invoice dated April 8, 2008, from Guardian Auto Glass for installation of a windshield on Honda Accord, VIN 1HGCG16541A079154, with superimposed credit card receipt indicating payment by Mastercard. Identify the account holder of the Mastercard.” *DSW Int’l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F), Order at 6 (ALJ Aug. 31, 2010) (Second Order to Supplement the Record). DSW International could not identify the account holder. (ID App. at 63-64.)

These actions rebut the claim that DSW Sports and DSW International “were separate and independent of each other” and Udegbune “attempt[ed] to transact businesses between the two companies on an arm’s length basis.” A corporation that is acting separately and independently does not determine the price that a buyer will pay for a car in Nigeria, purchase a car at that price, then absorb the costs of repairing, storing, and transporting the car. On these facts, DSW International was doomed to a loss on the deal from its inception. Furthermore, although DSW International claims it owned the cars, the car titles indicate that DSW Sports owned the cars when they were loaded on board the Sunbelt Dixie. Port Storage & Delivery invoiced DSW Sports, not DSW International, for the storage of the cars in Jacksonville and DSW Sports, not DSW International, paid the bill. Based on this course of conduct of ignored lines of ownership, billing, and payment, I find it more likely to be true that DSW International, Udegbune president, and DSW Sports, Udegbune proprietor, operated as alter egos for Udegbune and conclude that they did not transact business on an arm’s length basis. *Compare Rose Int’l, Inc. v. Overseas Moving Network Int’l Ltd.*, 29 S.R.R. 119, 167-168 (FMC 2001) (Commission test for piercing the corporate veil).

¹⁰ It is not clear from the record whether the same person was buying both cars. It is clear that they were being shipped to the same consignee.

Furthermore, several of Udegbune's statements in the verified Amended Complaint, his affidavits, and DSW Sports and DSW International business records are contradicted by documentary evidence in the record:

- The Honda title that was signed over to DSW Sports states that the odometer reading is "97,827 miles 01/30/2008 actual" (ID App. at 42) while the receipt of the sale from DSW Sports to DSW International states the mileage is 50,980. (ID App. at 19.)
- The Ford title that was signed over to DSW Sports (and signed by Udegbune) states that the odometer reading is 105,469 (ID App. at 46-47) while the receipt of the sale from DSW Sports to DSW International states the mileage is 29,980. (ID App. at 16.)
- DSW Sports does not have the documents showing when, from whom, or for how much it purchased the Ford Explorer, but Udegbune believes the price was "about \$5,000" and believes that it was purchased in Miami. (ID App. at 64.)¹¹ The bill of sale from DSW Sports to DSW International purports to show the sale was on January 28, 2008. (ID App. at 16.) The receipt for the truck bed cover and accessories indicates they were ordered on January 30, 2008 (ID App. at 17) and the receipt for the electronic equipment indicates it was purchased on January 31, 2008. (ID App. at 18.) The Florida title for the Ford indicates that College Auto Sales transferred the title to DSW Sports on February 4, 2008, several days after the accessories and electronic equipment was allegedly purchased for the Ford. (ID App. at 46-47.)

As discussed in detail in Part VII.C.3. *infra*, the improbability that the cars were shipped from Dallas to Jacksonville as claimed by DSW International also adversely impacts Udegbune's credibility. Given this substantial evidence in the record that contradicts Udegbune's sworn statements, I find that Udegbune is not a credible witness.

These findings raise the question of whether DSW International is a proper complainant in this proceeding. As discussed above, DSW International is (or at least was at the beginning of this proceeding) a valid corporation. It was identified as the shipper on the Commonwealth and Abou Merhi/SAL's bills of lading. Although the car titles were not transferred to DSW International and no money exchanged hands, DSW Sports issued DSW International bills of sale for the cars. DSW International and DSW Sports operate as alter egos for Udegbune. Based on these facts, I conclude that DSW International is a proper complainant in this proceeding.

¹¹ It is surprising that Udegbune, proprietor of DSW Sports, did not preserve these records. Presumably, DSW Sports needed the records for its own business purposes since it had not been paid. The cars went missing less than five months after the purported sale to DSW International.

B. Respondents.

DSW International identified Commonwealth and “Abou Merhi Lines, LLC” as Respondents in the caption of the Complaint.¹² The body of the Complaint alleged that Abou Merhi/SAL and Abou Merhi/USA were also involved in the shipment. Although Commonwealth filed a timely response to the Complaint, no Abou Merhi party responded and DSW International filed a total of three motions for default judgment.

On August 31, 2010, I issued a second order to supplement the record. *Inter alia*, I noted that the bills of lading on which DSW International relies for its claims against respondent Abou Merhi/LLC, the Abou Merhi entity identified in the caption of the Complaint, were issued by Abou Merhi/SAL, not Abou Merhi/LLC, that Abou Merhi/USA signed the bills of lading as agent for Abou Merhi/SAL, and that nothing in the record supported a finding that Abou Merhi/LLC operated as a common carrier on the shipment. I ordered DSW International to file additional affidavits, documents, or memoranda addressing the issue of the alleged liability as a common carrier of respondent Abou Merhi/LLC. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F), Memorandum at 2-4 (ALJ Aug. 31, 2010) (Second Order to Supplement the Record). DSW International filed its response on October 12, 2010. (ID App. at 59-80.)

On October 1, 2010, counsel entered an appearance for Abou Merhi/USA and filed a document entitled “Respondent Abou Merhi Lines (USA), LLC’s Memorandum of Law.” Because Abou Merhi/USA offered no explanation as to why it had not timely filed its Memorandum and why it had not responded to the Complaint, motion for leave to file the Amended Complaint, prior orders, or to DSW International’s motions for default judgment, on November 2, 2010, I issued an Order requiring Abou Merhi/LLC to show cause why its memorandum of law should not be stricken from the record and default judgment entered against it. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F) (ALJ Nov. 2, 2010) (Order Requiring Respondent Abou Merhi Lines, LLC, to Show Cause Why its Memorandum of Law Should not be Stricken and Default Judgment Should not be Entered). Abou Merhi/LLC responded in a memorandum signed by counsel for Abou Merhi/USA, but did not submit evidentiary support for the factual assertions in its response to the order to show cause. Therefore, on November 10, 2010, I issued an Order requiring Abou Merhi/LLC to submit competent evidence supporting its factual assertions. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F) (ALJ Nov. 10, 2010) (Corrected Order to Supplement Response to Order to Show Cause). Abou Merhi/LLC filed an affidavit, then a corrected affidavit, and Respondent Abou Merhi Lines, LLC’s Amended Response to Order Requiring Respondent Abou Merhi Lines, LLC, to Show Cause Why its Memorandum of Law Should not be Stricken and Default Judgment Should not be Entered. I accepted these documents for filing and consideration. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F) (ALJ Nov. 24, 2010) (Order Permitting DSW International, Inc., to Reply to Abou Merhi Lines,

¹² The motion for leave to file the Amended Complaint was granted November 23, 2010. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F) (ALJ Nov. 23, 2009) ([Order on] Motion for Leave to File Amended Complaint).

LLC's Amended Response to Order to Show Cause). On December 6, 2010, I discharged the show cause order and denied the motions for default judgment. I also found that although Abou Merhi/SAL had not been identified in the caption, the Amended Complaint stated a claim against it and it is a proper respondent. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC No. 1898(F) (ALJ Dec. 6, 2010) (Memorandum and Order Discharging Order to Show Cause and Denying Motions for Default Judgment). I reaffirm that Order in this Initial Decision. The same counsel has filed papers for Abou Merhi/USA, Abou Merhi/LLC, and Abou Merhi/SAL. I consider "Respondent Abou Merhi Lines (USA), LLC's Memorandum of Law" also to be the argument of Abou Merhi/SAL and Abou Merhi/LLC.

As set forth above, to prove a Respondent violated the sections of the Shipping Act that DSW International cites in its Amended Complaint, DSW International must establish that the Respondent operated as a common carrier on the shipment. Commonwealth is licensed by the Commission as an NVOCC and Abou Merhi/SAL is registered with the Commission as a vessel-operating common carrier. Therefore, each holds itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. Each issued bills of lading establishing that each assumed responsibility for the transportation of the cars by water from Jacksonville to Cotonou. Therefore, Commonwealth and Abou Merhi/SAL operated as common carriers within the meaning of the Act on the shipment, 46 U.S.C. § 40102(6), and are proper respondents in this proceeding.

Abou Merhi/USA signed the Abou Merhi/SAL bills of lading "as Agent only." (ID App. at 3-4.) "A carrier's agent . . . does not transport property." *Trane Co. v. South African Marine Corp. (N.Y.)*, 19 F.M.C. 375, 382 (ALJ 1976). DSW International responded to the Second Order to Supplement the Record with arguments as to why default judgment should be entered against the Abou Merhi entities (ID App. at 59-62), but did not present any evidence indicating that Abou Merhi/LLC operated as a common carrier on the shipment. No evidence in the record supports a finding that Abou Merhi/LLC and Abou Merhi/USA are common carriers governed by the sections of the Act that DSW International claims were violated by Respondents. Therefore, the claims in the Amended Complaint against Abou Merhi/LLC and Abou Merhi/USA are dismissed.

VI. The Commission has Jurisdiction over the Amended Complaint.

A. DSW International's Amended Complaint States a Claim within the Commission's Jurisdiction Established by the Shipping Act.

The Shipping Act provides: "(a) A person may file with the . . . Commission a sworn complaint alleging a violation of this part (c) **If complaint not satisfied.** – If the complaint is not satisfied, the Commission shall investigate the complaint in an appropriate manner and make an appropriate order." 46 U.S.C. § 41301. "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 Act mandates an appropriate investigation and an appropriate order.

[S]ection 11(b) of the Shipping Act provides that if a complainant in a Commission proceeding “is not satisfied, the Commission shall investigate [the complaint] in an appropriate manner and make an appropriate order.” [46 U.S.C. § 41301(c)]. The Commission is also authorized to initiate investigations on its own motion, as a further weapon in its regulatory arsenal. Commission investigations, and private complaint proceedings, are part of a unified system of regulation created by Congress under the Shipping Act. It is important to note that the complaint case, as a regulatory tool, is not fungible with the right to file suit against a party in court. *See National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm’n*, 59 F.3d 1281 (D.C. Cir. 1995) (agency adjudications are not Article III court proceedings); *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409 (9th Cir. 1992) (same); *Ecee, Inc. v. Federal Energy Regulatory Comm’n*, 645 F.2d 339 (5th Cir. 1981) (same); *see also Tennessee Dep’t of Human Servs. v. U.S. Dep’t of Educ.*, 979 F.2d 1162 (6th Cir. 1992) (Eleventh Amendment does not apply to administrative agencies). A private complainant may not bring court action regarding alleged violations of the Shipping Act, as the FMC’s jurisdiction over any such alleged violations is exclusive. *See Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (no implied private cause of action in court under the Shipping Act, 1916); *see also D.L. Piazza Co. v. West Coast Line, Inc.*, 210 F.2d 947 (2nd Cir.), cert. denied, 348 U.S. 839 (1954). This further emphasizes the unitary nature of the regulatory scheme created by the Shipping Act, as all original determinations as to whether the Act has been violated, whether initiated by private complaint or by Commission investigation, are made by the Commission.

South Carolina Maritime Services, Inc. v. South Carolina State Ports Authority, 28 S.R.R. 1385 (FMC 2000) (footnote omitted), *rev’d on other grounds sub nom. South Carolina State Ports Authority v. Federal Maritime Comm’n*, 243 F.3d 165 (4th Cir. 2001), *aff’d* 535 U.S. 743 (2002).

Respondents argue that since DSW International’s Amended Complaint seeks money damages for the loss of two cars in transit between Jacksonville and Cotonou on a maritime contract, this proceeding is a dispute between a shipper and carriers controlled by COGSA, not by the Shipping Act; therefore, the dispute is beyond the jurisdiction of the Commission. Furthermore, they claim that the dispute is subject to COGSA’s one-year statute of limitations and a limitation on damages of \$500 “per package.” DSW International did not file a complaint alleging COGSA violations in a forum that could entertain that complaint within one year of the loss; therefore, Respondents argue, its claims are barred by the COGSA statute of limitations. A car is considered to be a “package” under COGSA. Even if the complaint were timely filed, Respondents claim that their liability would be limited to \$1000. (Commonwealth Brief at 1-3; Respondent Abou Merhi Lines (USA), LLC’s Memorandum of Law at 2-7.)

DSW International filed a sworn complaint alleging violations of the Shipping Act within three years of the alleged violations.¹³ See 46 U.S.C. § 41301(a) (Shipping Act has three-year statute of limitations for claims for reparation). The complaint has not been “satisfied.” Therefore, the Act mandates that Commission conduct an investigation, and if DSW International suffered actual injury as a result of the violation, award reparation to compensate DSW for that injury. The Commission has jurisdiction over the Amended Complaint. Neither the one-year statute of limitations nor the limitation of damages to \$500 per package is applicable in this proceeding.

B. Commonwealth’s Constitutional Claims are Beyond the Commission’s Jurisdiction to Decide.

Commonwealth raises several constitutional arguments that it contends bar Commission jurisdiction over this proceeding, including: (1) The dispute between DSW International and Respondents is a case or controversy committed to the judicial branch of government under the Article III of the Constitution and is beyond the jurisdiction of the Commission; (2) the bills of lading for the carriage of goods by sea are maritime contracts and jurisdiction over maritime contracts is granted to the judicial branch of the federal government by Article III, Section 2 of the Constitution; (3) assumption of jurisdiction over this case by the Commission deprives private parties of certain rights under the Constitution, including the right to have cases decided before a judge who is appointed for life and whose compensation may not be reduced during the judge’s time in office, deprives Commonwealth of the right to a trial by jury under the 7th Amendment to the Constitution, and deprives Commonwealth of due process under the 5th and 14th Amendments to the Constitution since it deprives it of property without the protections provided to private parties by the Constitution; and (4) the existence of the Commission lacks a textual basis in the Constitution. (Commonwealth Brief at 3-7.)

The core of Commonwealth’s argument is grounded on a claim that the statutory grant of power to the Commission to adjudicate claims of violations of the Act and to grant reparation to one private party injured by the violations of another private party is unconstitutional. “No administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer.” *Buckeye Industries, Inc. v. Secretary of Labor*, 587 F.2d 231, 235 (5th Cir. 1979). See also *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (constitutionality of a statutory requirement is beyond the jurisdiction of a federal agency to determine); *Petruska v. Gannon University*, 462 F.3d 294, 308-309 (3d Cir. 2006) (as a general rule, an administrative agency is not competent to determine constitutional issues). Therefore, the arguments that the Shipping Act’s grant of power to the Commission to entertain DSW International’s Amended Complaint is unconstitutional are not addressed in this Initial Decision.

¹³ The FMC complaint was filed March 31, 2009, less than one year after the cars were lost.

VII. Alleged Violations of the Shipping Act.

DSW International alleges that Respondents violated five separate provisions of the Act.

As a common carrier Abou Merhi¹⁴ violated Section 10(b)(3) . . . , which prohibits the common carrier from “retaliat[ing] against any shipper by refusing, or threaten[ing] to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods . . . for any other reason.” Abou Merhi also violated Section 10(b)(4)(D) that provides, “No common carrier, either alone or in conjunction with any other person, directly or indirectly, may engage in any unfair or unjustly [discriminatory] practice in the matter of the loading and landing of freight, or [section 10(b)(4)(E)] the adjustment and settlement of claims.”¹⁵ Abou Merhi further violated Section 10(b)(10) of the Shipping Act, under which an [ocean common carrier] is specifically prohibited from “unreasonably refus[ing] to deal or negotiate” with the shipper. The Respondents additionally violated Section 10(d)(1) of the Shipping Act, which provides “No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

(Amended Complaint ¶ XVII.)¹⁶

It is first noted that because of the wording it used, DSW International appears to have quoted the Act as it existed prior to its reenactment as positive law. On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. Although there are some differences in phraseology, the bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 10(b)(3) of the Act is now codified at 46 U.S.C. § 41104(3), sections 10(b)(4)(D) and (E) at 46 U.S.C. §§ 41104(4)(D) and (E), section 10(b)(10) at 46 U.S.C. § 41104(1), and section 10(d)(1) at 46 U.S.C. § 41102(c). The Commission often refers to provisions of the Act by their section

¹⁴ DSW International did not make clear whether it meant Abou Merhi/SAL, Abou Merhi/USA, or Abou Merhi/LLC.

¹⁵ DSW International does not explicitly cite section 10(b)(4)(E), but quotes section 10(b)(4)(E) as part of section 10(b)(4)(D).

¹⁶ Read strictly, the Amended Complaint does not allege that Commonwealth violated sections 10(b)(3), 10(b)(4)(D) and (E), or 10(b)(10). In its Brief, Commonwealth indicates that it understood the Amended Complaint to allege that Commonwealth had violated section 10(b)(3) (Comm. Brief at 9 (“Amended Complaint alleges that *Respondents* violated Section 10(b)(3)”) (emphasis added)), and argues that Commonwealth did not violate the other sections. (*Id.* at 9-10). Therefore, I will address whether Commonwealth violated these sections.

numbers in the Act's original enactment, references that are well known in the industry. *See, e.g., Sinicway Int'l Logistics Ltd. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 10-09 (Aug. 20, 2010) (Order of Investigation and Hearing). Therefore, to the extent that it could be deemed error to cite to and quote the superseded Act, that error does not prejudice Respondents. After addressing other arguments raised by DSW International, each of these sections will be addressed separately.

A. The Commission Enforces the Shipping Act, not Common Law Obligations.

DSW International argues that as common carriers, Respondents are insurers of the cargo and strictly liable for the loss of the cars, a doctrine that it asserts is developed from the common law and is applicable throughout the United States. DSW International contends that the purpose of the Shipping Act is to enhance enforcement of this common law rule.

If the freight had arrived at the port of destination in a damaged condition, the Respondents would have been clearly liable for such damage and would have been required to pay damages. In this case, however, there was not even a damaged freight. The freight had simply disappeared while the freight was in exclusive possession and control of the Respondents.

(DSW Int'l Brief at 4.) DSW International argues that the Commission should apply the doctrine of *res ipsa loquitor* in this proceeding: Respondents had possession and control of the cars during their transportation; the cars did not arrive at the destination; therefore, Respondents violated the Shipping Act. (DSW Int'l Brief at 4-5.) DSW International does not cite any Commission precedent applying *res ipsa loquitor* to establish a violation of the Shipping Act.¹⁷

The Act authorizes the Commission to investigate complaints against common carriers alleged to have violated the Act. Section 10 of the Act prohibits certain practices by common carriers.

[The] Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation. [We review] the entire record in an attempt to identify with some certainty the particular violations of the Act complained of. Thus, we [do not ignore] the underlying theories of common law wrong, but, rather, [attempt] to pare them down to activities at least colorably justiciable under the mandates of . . . the Shipping Act

¹⁷ A search on March 15, 2011, for the term "*res ipsa loquitor*" in the Westlaw directory with Commission decisions (FMRT-FMC) did not find any case using this term.

European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 F.M.C. 148, 151 (FMC 1976) (construing the Shipping Act, 1916). See *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1512, 1526 n.11 (ALJ 2000) (citing *European Trade Specialists* in proceeding under the Shipping Act of 1984).

The only way that the Commission can order anyone to pay money in a case arising under the 1984 Act is prescribed by that law, namely, by finding a violation of one of the substantive provisions of that law involving prohibited practices and then by ordering reparations pursuant to [46 U.S.C. §§ 41301(a) and 41305].

Hugh Symington v. Euro Car Transport, Inc., 26 S.R.R. 871, 872 (ALJ 1993). Although DSW International may be correct in stating that, based on the concept of *res ipsa loquitur*, one or both Respondents should be liable for the lost cars, that relief must be sought in some other forum, not before the Commission. The Commission may only provide relief if the damage or loss is proximately caused by a respondent's violation of the Shipping Act.

B. Analysis of Sections of the Act that DSW International Alleges Respondents Violated.

In its brief, DSW International contends that Respondents violated five separate sections of the Shipping Act, but does not present any argument as to how a particular act (or failure to act) by a Respondent violated a specific section of the Act. I have reviewed "the entire record in an attempt to identify with some certainty the particular violations of the Act complained of." *European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.*, *supra*. The results of that review are set forth below.

1. Respondents did not violate section 10(b)(3).

Section 10(b)(3) provides:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (3) retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.

46 U.S.C. § 41104. DSW International cites section 10(b)(3), but other than the fact that the cars were not delivered to the consignee, does not offer an argument explaining how the evidence in the record supports a finding that Respondents retaliated against DSW International or was unfair to DSW International in any way because DSW International patronized another carrier, filed a complaint, or for any other reason. (DSW Int'l Brief at 3-5.)

As mentioned above, Commonwealth and DSW International disagree about what Commonwealth stated was the reason for the change from Grimaldi transporting the cars to Lagos to Abou Merhi/SAL transporting the cars to Cotonou. Commonwealth states that when it heard from DSW International that “the hood for the Ford is not on the vehicle” and the Honda had a broken windshield, it determined from Grimaldi’s terms and conditions of carriage that Grimaldi might not transport the cars. Commonwealth states that it called Grimaldi to confirm Grimaldi would transport the cars. When it did not receive a guarantee of carriage, Commonwealth booked transportation to Cotonou with Abou Merhi/SAL. Commonwealth told DSW International that it was making this change. Commonwealth states that it wanted to avoid complications that could result if the cars were delivered to Grimaldi for loading, but Grimaldi then refused to transport them because of their condition. (ID App. at 37.) DSW International states that in May 2008, Commonwealth told DSW International that there was congestion in ocean transportation at that time and that Grimaldi decided to skip voyages to Nigeria. Commonwealth “did not mention a word about the allegedly ‘deteriorated’ condition of the DSW’s [*sic*] two vehicles as the reason why Grimaldi had declined to transport them.” (ID App. at 59.)

Commonwealth’s explanation is contradicted in part by other evidence in the record. Grimaldi issued the booking confirmations with the terms and conditions on April 28, 2008. (ID App. at 32; 34.) The Honda windshield was repaired on April 7, 2008, three weeks earlier. (ID App. at 20.) Therefore, the condition of the Honda windshield would not have been a reason for Grimaldi to refuse to carry the Honda. Commonwealth states the Ford did not have a hood, but nothing else is stated about the condition of the Ford.

It may be that DSW International believes that the alleged misrepresentation of Commonwealth’s reason for changing from Grimaldi to Abou Merhi/SAL violates section 10(b)(3) or some other section of the Act. If so, DSW International has the burden to persuade the trier of fact that Commonwealth misrepresented the reason. As noted above, Commonwealth’s claim that the condition of the cars resulted in the change seems to be contradicted by the fact that the Honda windshield was prepared one month before Grimaldi issued the booking confirmations. As also noted above, Udegbune’s credibility as a witness is compromised. I find that on this record, DSW International has not proven by a preponderance of the evidence that Commonwealth misrepresented the reason for the change. Even if it had and the misrepresentation were a violation of the Act, the violation of the Act – the misrepresentation of the reason for the change from Grimaldi to Abou Merhi/SAL – was not a proximate cause of DSW International’s alleged injury – non-delivery of the cars after the transportation to Cotonou by Abou Merhi/SAL.

It may be that DSW International contends that the change from Grimaldi to Abou Merhi/SAL constitutes a refusal by Grimaldi to carry DSW International’s cargo. Grimaldi is not a party to this proceeding.

No evidence in the record supports a finding that Commonwealth or Abou Merhi/SAL took any action against DSW International because it patronized another carrier or filed a complaint.

DSW International has not identified sufficient credible evidence to support a finding that either Commonwealth or Abou Merhi Lines, SAL violated section 10(b)(3) and my own review of the record finds none. Therefore, this claim is dismissed.

2. Respondents did not violate section 10(b)(4)(D).

Section 10(b)(4)(D) provides: “A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of . . . (D) loading and landing of freight.” 46 U.S.C. § 41104. DSW International cites section 10(b)(4)(D), but other than the fact that the cars were not delivered to the consignee, does not offer an argument explaining how the evidence in the record supports a finding that Respondents engaged in any unfair or unjustly discriminatory practice in the matter of loading and landing of freight. (DSW Int’l Brief at 3-5.) DSW International has not identified sufficient credible evidence to support a finding that either Commonwealth or Abou Merhi/SAL violated section 10(b)(4)(D) and my own review of the record finds none. Therefore, this claim is dismissed.

3. Respondents did not violate section 10(b)(4)(E) or section 10(b)(10).

Section 10(b)(4)(E) provides: “A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of . . . (E) adjustment and settlement of claims.” 46 U.S.C. § 41104. Section 10(b)(10) provides: “A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (10) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41104. DSW International cites sections 10(b)(4)(E) and 10(b)(10), but other than the fact that the cars were not delivered to the consignee, does not offer an argument explaining how the evidence in the record supports a finding that Respondents engaged in any unfair or unjustly discriminatory practice in the matter of adjustment and settlement of claims or unreasonably refused to deal or negotiate. (DSW Int’l Brief at 3-5.)

DSW International proposed several findings of fact that may relate to its claim that Respondents violated sections 10(b)(4)(E) and 10(b)(10). (DSW Int’l Proposed Findings of Fact ¶¶ 45-53.) These proposed findings of fact concern DSW International’s attempts to learn the fate of the cars from Respondents after they were not delivered to the consignee in Nigeria and the alleged difficulty DSW International had in obtaining information from Respondents. It may be that DSW International claims that the alleged difficulty it had in learning the fate of the cars violates one or both of these sections.

With regard to a contention that alleged failure of Respondents to provide DSW International with more information about the fate of the cars violated section 10(b)(4)(E), the evidence presented by DSW International does not prove by a preponderance of the evidence that Respondents’ failure to provide DSW International with more information was an “unfair or unjustly discriminatory practice.” Assuming either Commonwealth or Abou Merhi/SAL violated section 10(b)(4)(E) by

failing to provide DSW International with more information about the fate of the cars, the failure to inform occurred after the cars were lost and was not the proximate cause of their loss.

It may be that DSW International contends that Respondents' alleged failure to provide DSW International with more information about the fate of the cars violated section 10(b)(10). Section 10(b)(10) prohibits a common carrier from unreasonably refusing to deal or negotiate to transport cargo for a shipper that wants to use its services to transport goods by water between the United States and a foreign country. Commonwealth did not refuse to negotiate with DSW International regarding transportation of the cars. In fact, it agreed to transport them. DSW International did not attempt to deal or negotiate to transport cargo with Abou Merhi/SAL. Neither Commonwealth nor Abou Merhi/SAL knew or knows what happened to the cars. Although it is clear that DSW International was unhappy that the shipment went awry and that it was not able to learn what happened to the cars, these facts do not establish that either Commonwealth or Abou Merhi/SAL refused to deal or negotiate.

DSW International has not identified sufficient credible evidence to support a finding that either Commonwealth or Abou Merhi/SAL violated section 10(b)(4)(E) or 10(b)(10). Therefore, these claims are dismissed.

4. Section 10(d)(1).

Section 10(d)(1) provides: "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. Commonwealth did not violate section 10(d)(1).

DSW International describes what it calls a "glaring mismatch and confusion" about the ocean vessel that would transport the cars: The Commonwealth bills of lading identify the vessel as Sea Ahmed, Voy 606, but the Abou Merhi/SAL bills of lading identify the vessel as the Sunbelt Dixie. (DSW Int'l Proposed Findings of Fact ¶ 39.) "DSW International has no means to independently ascertain whether the ocean vessel that carried DSW's two automobiles was SEA AHMED or SUNBELT DIXIE." (*Id.* ¶ 32.)

The evidence shows that Commonwealth issued its own bills of lading to DSW International stating that the cars had been loaded "on board 06/01/2008 at Jacksonville on board named vessel Sea Ahmed, Voy 806 via Abou Merhi Lines as carrier." (ID App. at 1; 2.) Commonwealth then purchased transportation services from Abou Merhi/SAL, a vessel-operating common carrier that is registered with the Commission, to provide the transportation by water. The Abou Merhi/SAL bills of lading correctly identified Sunbelt Dixie as the vessel and were issued "06-06-2008," the date of loading. (ID App. at 3-4; 49-53.) Although the Commonwealth bills of lading did not identify the correct vessel or date, they are consistent with the information provided on the dock receipts,

each of which states that the cars would be loaded on the Sea Ahmed, Voy 806, June 1, 2008. (ID App. at 41; 45.) The terms and conditions of the Abou Merhi/SAL bills of lading provide: “The carrier shall be entitled but not obliged to substitute any vessel or other means of transport and to subcontract on any terms the whole or part of the carriage and the duties undertaken by the Carrier in relation to the goods.” (ID App. at 48.) Therefore, the change from Sea Ahmed to Sunbelt Dixie would not violate the agreement to carry the cars for Commonwealth. *Compare Yang Machine Tool Co. v. Sea-Land Service, Inc.*, 58 F.3d 1350, 1352-1353 (9th Cir. 1995) (construing similar clause, substitution of vessel is not unreasonable deviation under COGSA). Commonwealth did not submit the terms and conditions for its bills of lading as an exhibit.

Although the vessel substitution may have been proper, the question arises whether section 10(d)(1) imposed a burden on Commonwealth to inform DSW International of the change. Commonwealth received a load list from Abou Merhi/SAL showing the cars had been loaded onto the Sunbelt Dixie and forwarded the load list to DSW International. (ID App. at 37; 39.) Commonwealth also received the Abou Merhi/SAL bills of lading showing Sunbelt Dixie as the vessel and forwarded them to DSW International. (ID App. at 37.) Therefore, assuming that section 10(d)(1) imposes a duty on Commonwealth to inform DSW International of the vessel change, Commonwealth performed that duty. I find that in these circumstances, section 10(d)(1) did not impose a duty on Commonwealth to reissue its bills of lading to identify the correct vessel. Even if section 10(d)(1) imposed that duty, failing to perform that duty was not proximate cause of the injury to DSW International.

DSW International also complains that the Commonwealth bills of lading state the cars were carried on a roll-on roll-off (RO-RO) vessel, but also states that the cars were containerized. (DSW Int’l Proposed Findings of Fact ¶ 27.) DSW International has misread the bills of lading. Box 11a on each bill contains two smaller boxes to be checked to indicate whether or not the cargo is containerized. From left to right, there is a check box, the word “Yes,” another check box, and the word “No.” On each bill of lading, Commonwealth checked the “No” box. (ID App. at 1-2.)

DSW International has not identified sufficient credible evidence to support a finding that Commonwealth violated section 10(d)(1). DSW International had the correct information from Abou Merhi/SAL, the vessel operator, as it is set forth on the Abou Merhi/SAL bills of lading. Even if supplying incorrect information about the vessel were a violation of section 10(d)(1), the violation was not a proximate cause of the actual injury to DSW International: the loss of the cars. Therefore, this claim is dismissed.

b. Abou Merhi Lines, SAL, violated section 10(d)(1) and the violation was a proximate cause of the loss of the cars.

The evidence establishes that Abou Merhi/SAL operated as a vessel-operating common carrier on this shipment. When it issued its bills of lading, it assumed responsibility for transportation of the cars from Jacksonville to Lagos, Nigeria, and their delivery to the consignee identified in the bills, Udemba Electronics Coy Ltd.

Abou Merhi/SAL submitted an affidavit of Merhi Abou Merhi, its director, in response to the Third Order to Supplement the Record. (ID. App. at 49-53.) According to the affidavit, Abou Merhi/SAL received payment for the shipment and issued the bills of lading for the cars. The cars were loaded on board the vessel Sunbelt Dixie. Abou Merhi/SAL states that when the Sunbelt Dixie arrived in Cotonou, the cars were unloaded and “[t]he subject cargo was delivered to the Elissa Group, as agent for Abou Merhi Lines, SAL.” (ID App. at 52.) Abou Merhi/SAL contends that the unloading and delivery “fulfill[ed] both Abou Merhi Lines, SAL’s normal business practice and Abou Merhi Lines, SAL’s contract with Commonwealth Shipping, Inc.” (ID App. at 51.) The consignee on both bills of lading was Udemba Electronics Coy Ltd., Lagos, Nigeria, not Elissa Group, however. (ID App. at 3-4.) Delivery to Udemba Electronics, not Elissa Group, is what was required to fulfill Abou Merhi/SAL’s obligations under the bills of lading.

DSW International has established that the cars were not delivered to Udemba Electronics, the consignee on the Abou Merhi/SAL bills of lading. Although Abou Merhi/SAL may have demonstrated that it established just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, in this instance, those regulations and practices were not observed and enforced. Although it may have been Elissa Group, Abou Merhi/SAL’s agent, that failed to carry out the last step of delivery to Udemba Electronics, “a common carrier may not ‘immunize itself from the common carrier responsibilities placed upon it by the Act by dissociating itself from any of its agents’ activities which are brought into question.” *Corpco Int’l Inc. v. Straightway, Inc.*, 28 S.R.R. 296, 299 (FMC 1998), quoting *Hellenic Lines, Ltd. – Violation of Sections 16 (First) and 17*, 7 F.M.C. 673, 676 (FMC 1964). The Shipping Act is “regulatory legislation which evinces strong policy of protecting the public, and there is ample authority for the view that a principal is liable [for] his agents’s violation of such a statute.” *Hellenic Lines, Ltd.*, 7 F.M.C. at 676.

I conclude that Abou Merhi/SAL failed to observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property when it and/or its agent failed to deliver the cars to Udemba Electronics. Therefore, I conclude that Abou Merhi/SAL violated section 10(d)(1) of the Act, the violation of section 10(d)(1) resulted in actual injury to DSW International, and DSW International is entitled to reparation from Abou Merhi/SAL.

VIII. DSW International is Entitled to Reparation.

The Act provides: “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).

(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 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.

As the complainant, DSW International has the burden of proving entitlement to reparation. See *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (“As the Federal Maritime Board explained long ago: ‘(a) damages¹⁸ must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.’”).

The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992).

“In general, the measure of damages in cargo claims has been market value at the port of destination.” *Santiago v. Sea-Land Service, Inc.*, 366 F. Supp. 1309, 1314 (D.P.R. 1973), citing *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial*, 263 U.S. 119, 44 S. Ct. 30, 68 L. Ed. 201 (1923). See also *Atlantic Mut. Ins. Co., Inc. v. CSX Lines, LLC*, 432 F.3d 428, 435 (2d. Cir. 2005) (“It is well-settled that the loss in market value of a plaintiff’s cargo is the presumptive measure of damages in a suit brought under COGSA.”). However, “[t]he test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to, if, for special reasons, it is not exact or otherwise not applicable.” *Illinois Cent. R. Co. v. Crail*, 281 U.S. 57, 64-65 (1930).

¹⁸ Reparation under the Shipping Act and damages are synonymous. See *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

DSW International contends that it is entitled to reparation in the amount of \$46,284.30 plus interest and attorney's fees. (DSW International Brief at 10.) DSW International calculates this amount as follows:

ITEM	EVIDENCE	REPARATION CLAIMED
Ford Explorer contract sale price in Dallas and purchase price in Nigeria	ID App. at 16; 64	\$21,200
Ford truck bed cover and accessories	ID App. at 17	\$1300
Ford electronic equipment	ID App. at 18	\$1200
Total for Ford Explorer		\$23,700
Honda Accord contract sale price in Dallas and purchase price in Nigeria	ID App. at 19; 63	\$16,900
Honda windshield replacement	ID App. at 20	\$200
Total for Honda Accord		\$17,100
Trucking expenses - Dallas to Jacksonville	ID App. at 21	\$1000
storage charges - Jacksonville	ID App. at 22-25	\$1284.30
shipping charges	ID App. at 29	\$3200
TOTAL		\$46, 284.30

A. DSW International's Recovery Is Limited to the Amount it Expected to Be Paid for the Vehicles.

Although it provides no documentary evidence supporting its claims and concedes that none exists, DSW International contends that a Nigerian purchaser agreed to pay \$21,200 for the Ford Explorer (ID App. at 64) and a Nigerian purchaser agreed to pay \$16,900 for the Honda Accord. (ID App. at 63.) Assuming this to be true, if the vehicles had been delivered to the consignee as contemplated by the bills of lading, DSW International would have received two payments totaling \$38,100 from the Nigerian purchasers. DSW International does not claim and does not present any evidence that the Nigerian purchaser agreed to pay the cost of accessories and repairs to the vehicles, the trucking expenses, the storage expenses, or the shipping charges in addition to the purchase price, costs allegedly incurred preparing the vehicles for shipment, getting them to the port for loading on board the vessel, and transporting them to Nigeria. Therefore, I conclude that even if DSW International were able to prove all of its claims regarding damages, the reparation award could not exceed \$38,100, the amount the Nigerian purchasers allegedly agreed to pay to DSW International upon delivery of the cars.

B. DSW International has not Established Market Value for the Cars in Lagos.

DSW International does not present any credible evidence of the market value of a 2004 Ford Explorer or 2001 Honda Accord in Lagos, Nigeria. DSW International claims that the measure of reparation should be the price that a buyer in Nigeria agreed to pay: \$21,200 for the Ford and \$16,900 for the Honda. DSW International has no documentation of the purported agreements, as “the negotiations with the Nigerian purchaser having been made verbally or by telephone, no documentary evidence exists for such agreement or transaction at this time.” (ID App. at 64.) Furthermore, the Nigerian buyer’s valuation of the cars is not based on any personal knowledge, but on a description the buyer would have received from Udegbune, a description that likely included a statement that the Ford had been driven 29,980 miles (ID App. at 16) when the title indicates it had been driven 105,469 miles (ID App. at 46-47), and the Honda had been driven 50,980 (ID App. at 19) miles when the title indicates it had been driven 97,827 miles. (ID App. at 42.) Udegbune’s overall lack of credibility further mitigates against use of these claimed values to prove the amount of reparation for the injury. Therefore, I find that DSW International’s alleged contracts to sell the cars in Nigeria do not provide credible evidence establishing the value of the cars in the port of destination.

C. Calculation of Alleged Actual Injury.

Although DSW International has not established a market value for the cars in Lagos (and it is likely that it would be difficult to establish a market value), it is clear that the cars had some value. Therefore, I conclude that there are special reasons for discarding the market value test in this proceeding. *Illinois Cent. R. Co. v. Crail, supra*.

Abou Merhi/SAL’s violation of section 10(d)(1) deprived DSW International of its opportunity to sell the cars in Nigeria. I conclude that in the circumstances of this proceeding, reparation should be determined by DSW International’s proven investment in the cars in purchasing, improving, and shipping the cars. Accordingly, I will award reparation calculated as follows.

1. Purchase of Ford Explorer.

DSW International claims that on January 28, 2008, it purchased the Ford Explorer from DSW Sports for \$21,200 (ID App. at 16) in what it claims was “an arm’s length basis.” (ID App. at 62.) DSW International claims that on an unknown date before DSW International purchased the Ford, DSW Sports bought the Ford from Copart, an automobile auctioneer. Udegbune states that “the previous owner was an insurance company other than State Farm Mutual, and . . . the purchase price was about \$5,000. But DSW Sports is not in possession of documentary evidence showing more details for the purchase.” (ID App. at 64.) Udegbune, proprietor of DSW Sports, did not make any improvement to the Ford before selling it to DSW International, Udegbune president. (*Id.*)

As discussed above, I find that the evidence demonstrates that DSW Sports did not transact business at on an arm's length basis, but each acted as an alter ego of Udegbune. DSW Sports did not make any improvements to the Ford between the time it purchased it and the time it sold it to DSW International. The claim of an increase in value of the Ford from "about \$5,000" to \$21,200 is not credible. I find that the value placed on the Ford by DSW Sports and DSW International in their purported transaction is not probative of the value of the Ford.

Udegbune states that DSW Sports bought the Ford for about \$5000. Commonwealth suggests that according to Kelly's Blue Book, the maximum value of a 2004 Ford Explorer in excellent condition is \$11,915. (Commonwealth Brief at 1 n.2.) Despite the finding discussed above that Udegbune's testimony is not entirely credible, I conclude that DSW International has proven that it should receive \$5,000 in reparation for the purchase of the Ford Explorer.

2. Honda Accord.

DSW International claims that on February 28, 2008, it purchased the Honda Accord from DSW Sports for \$16,900 (ID App. at 19) in what it claims was "an arm's length basis." (ID App. at 62.) DSW International claims that on February 26, 2008, DSW Sports bought the Honda from Copart, an automobile auctioneer. Udegbune, proprietor of DSW Sports, does not claim it made any improvements to the Honda before selling it to DSW International, Udegbune president.

As discussed above, I find that the evidence demonstrates that DSW Sports did not transact business on an arm's length basis, but each acted as an alter ego of Udegbune. DSW Sports did not make any improvements to the Honda between the time it purchased it and the time it sold it to DSW International. (ID App. at 63.) The claim of an increase in value of the Honda from \$1750 to \$16,900 is not credible. I find that the value placed on the Honda by DSW Sports and DSW International in their purported transaction is not probative of the value of the Honda.

DSW International provides evidence that DSW Sports bought the Honda for \$1750. (ID App. at 19.) Commonwealth suggests that according to Kelly's Blue Book, the maximum value of a 2001 Honda Accord in excellent condition was \$7700. (Commonwealth Brief at 1 n.2.) The DSW International Honda was not in excellent condition, and in fact needed a new windshield. (ID App. at 20.) Although DSW International has not provided any authority holding that making a \$200 repair to a car increases its value by \$200, I find that it has established that it incurred this cost as I conclude that DSW International has established by a preponderance of the evidence that it should receive \$1750 for the purchase and \$200 for the new windshield in reparation for the Honda Accord, a total of \$1950.

3. Transportation to Jacksonville.

DSW International seeks reparation of \$1000 for "[t]rucking the two vehicles from Dallas, Texas, to Jacksonville, Florida." (Amended Complaint at XIX.f.; DSW Int's Brief at 6.) It relies

on an invoice claimed to be from DF Trucking Company purporting to prove that it spent \$500 each to ship the cars “Dallas Texas to Jacksonville Florida.” (ID App. at 21.)

With regard to the Ford Explorer, DSW International claims that DSW Sports bought the Ford in Miami, then transported it to Dallas where DSW International bought it, improved it, then transported it from Dallas to Miami. I take official notice that the driving distance from Miami to Dallas is 1357 miles and takes 21 hours 45 minutes, and the driving distance from Dallas to Jacksonville is 987 miles and takes 16 hours 34 minutes. (<http://maps.google.com/maps?hl=en&tab=wl>, visited March 18, 2011.)¹⁹ DSW International’s claims would require the following time line and sequence of events:

date unknown	DSW Sports purchases Ford
date unknown	DSW Sports transports Ford from Miami to Dallas, driving distance 1357 miles, time 21 hours 45 minutes, cost \$500+ ²⁰
January 28, 2008	DSW Sports sells Ford to DSW International
January 30, 2008	Auto Interiors installs truck bed cover and accessories
January 31, 2006	Bonnie & Clyde CB & Stereo installs electronic equipment
February 12, 2008	Ford arrives at Port Storage after trip of 987 miles, time 16 hours 34 minutes, cost \$500

I do not find it credible that Udegbune acting as proprietor of DSW Sports would purchase a Ford at auction in Miami, transport it to Dallas (passing less than 70 miles of Jacksonville), sell it to DSW International, Udegbune president, install equipment that could have easily been purchased in Miami or Jacksonville, then transport it to Jacksonville, adding \$1000 or more to his cost of doing business. Since DSW International has not established that it is more likely than not that the Ford was transported from Dallas to Jacksonville, it is not entitled to reparation for the claim that it paid \$500 to transport the Ford from Dallas to Jacksonville.

In his affidavit, Udegbune states that the Honda was located in Miami on February 28 or 29 and arrived in Miami on March 1. (ID App. at 63.) At the time DSW International purchased the Honda, DSW International states that a purchaser in Nigeria had already agreed to purchase it. (*Id.*)

¹⁹ “Federal Rule of Evidence 201 permits courts to take judicial notice of generally known facts ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’ Fed. R. Evid. R. 201(b). Courts commonly use internet mapping tools to take judicial notice of distance and geography. *See, e.g., Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 n.2 (10th Cir. 2007) (taking judicial notice of distance calculated using Google Maps)” *Rindfleisch v. Gentiva Health Systems, Inc.*, --- F. Supp.2d ----, No. 10-CV-2111 (JFB) (ARL), 2010 WL 3980182, at *11 n.13 (E.D.N.Y. Oct. 8, 2010).

²⁰ This assumes claim on the DF Trucking invoice submitted by DSW International that Dallas to Jacksonville is a \$500 trip provides a credible measure of the cost of transporting the longer distance from Miami to Dallas.

DSW International had already purchased the Ford to send to a purchaser in Nigeria, and the Ford was at Port Storage in Jacksonville awaiting shipment. The Ford and the Honda were eventually sent to the same consignee. Although it may physically be possible to transport a car leaving Miami on February 28, 2008 (using the date of sale in the DSW Sports invoice rather than February 29, the date in Udegbune's affidavit), pass less than 70 miles from Jacksonville, arrive in Dallas, then transport the car from Dallas back to Jacksonville arriving March 1, I do not find this claim to be credible. Since DSW International has not established that it is more likely than not that the Honda was transported from Dallas to Jacksonville, it is not entitled to reparation for the claim that it paid \$500 to transport the Honda from Dallas to Jacksonville.

I also note that DSW International does not provide any evidence of how either car was transported from Miami to Dallas.

Based on this record, DSW International has not proven by a preponderance of the evidence that it paid \$1000 to transport the cars from Dallas to Jacksonville. The claim for this cost is denied.

4. Improvements to the Ford.

DSW International contends that on January 30, 2008, it spent \$1300 installing a truck bed cover and accessories (ID App. at 17) and on January 31, 2008, spent \$1200 installing electronic equipment (ID App. at 18) on the Ford. DSW International claims that it purchased the Ford on January 28, 2008. (ID App. at 16.) The title indicates that College Auto Sales signed the title over to DSW Sports/Udegbune on February 4, 2008. (ID App. at 46-47.) Therefore, DSW International has not established that it owned the Ford on January 30 and 31. Furthermore, Udegbune believes the Ford was purchased in Miami (ID App. at 63), which seems to be corroborated by the fact that it was titled in Florida. (ID App. at 46-47.) The improbability of adding \$1000 or more to the investment in the Ford by transporting it from Miami to Dallas then back to Jacksonville casts serious doubt on the claim that the Ford was ever in Dallas. Although the receipt for the truck bed cover and accessories indicates they were installed on a Ford Explorer, it does not further identify the Ford, and the electronic equipment receipt does not identify the vehicle on which it was installed. Based on this record, DSW International has not established that it is more likely than not that the equipment was installed on the Ford.

DSW International has not established by a preponderance of the evidence that the truck accessories and electronic equipment were installed on 2004 Ford Explorer VIN 1FMZU67K44UB59703. Therefore, the claim for this cost is denied.

5. Storage in Jacksonville.

The Ford Explorer arrived at Port Storage & Delivery, Inc., Jacksonville, Florida, on February 12, 2008, and the Honda Accord arrived at Port Storage on March 1, 2008. Other than the day on which the Honda's windshield was replaced, both cars remained at Port Storage until May 19, 2008, when they were transported to Jaxport for shipment to Nigeria. (ID App. at 22-25.)

The storage and other charges at Port Storage totaled \$1284.30. Port Storage invoiced DSW Sports, not DSW International, for the storage. DSW International states that “the storage bill was billed to and paid by DSW Sports” and that DSW International “subsequently reimbursed the entire amount of the storage bill to DSW Sports. See [ID App. at 22-25].” (DSW International Reply to Commonwealth’s Brief at 7.) DSW International does not provide any supporting documentary evidence demonstrating that DSW International reimbursed DSW Sports. As stated above, because I find that DSW Sports and DSW International operated as alter egos for Udegbune, I find that DSW International can seek reparation for expenditures of DSW Sports. Therefore, I conclude that DSW International should receive reparation of \$1284.30 for storage of the cars in Jacksonville.

6. Freight Charges to Nigeria.

DSW International paid \$3200 to ship the cars to Nigeria. (ID App. at 29.) DSW International paid to ship two cars to Nigeria. The cars never arrived. DSW International is entitled to reparation of \$3200 for the shipment that Abou Merhi/SAL did not complete.

7. Conclusion on reparation.

DSW International is awarded the following as reparation for Abou Mehri Lines, SAL’s violation of section 10(d)(1):

Purchase of Ford Explorer	\$5,000.00
Purchase of Honda Accord	\$1750.00
Purchase of Honda windshield	\$200.00
Storage in Jacksonville	\$1284.30
Freight charges to Nigeria	\$3200.00
TOTAL	\$11,434.30

I find that the date of the actual injury was June 21, 2008, the date on which the cars were discharged from the Sunbelt Dixie. (ID App. at 49-53; 55-57.) Therefore, in addition to the principal, DSW International is entitled to interest on the \$11,434.30 from June 21, 2008.

IX. DSW International’s Request for Attorney’s Fees.

DSW International asks for an award of attorney’s fees. Since DSW International has been awarded reparation, it is entitled to reasonable attorney’s fees as directed by 46 U.S.C. § 41305(b).

The Commission’s regulation (46 C.F.R. 502.254) provides that petitions for attorney’s fees shall normally be filed with the presiding judge in cases where there are no exceptions filed by respondents but only after the Commission makes the

judge's initial decision final, normally about 30 days after service of that decision. A ruling on the petition is not normally issued by the judge until the 30-day review period has expired. See Docket No. 99-14 – *Global Transporte Oceanico S.A. v. Coler Independent Lines Co.*, 28 S.R.R. 1162 (1999) (petition for attorney's fees in default case filed within one week after service of Initial Decision; judge's ruling on the petition not issued until after the Commission had made the Initial Decision final). Incidentally, the Commission is authorized only to award reasonable attorney's fees, a term that does not include "costs." See *Global Transporte*, 28 S.R.R. at 1163 n.5.

Safmarine Container Lines N.V. v. Garden State Spices, Inc., 28 S.R.R. 1621, 1623 n.5 (ALJ 2000).

The question of attorney's fees for DSW International will be addressed when and how set forth in 46 C.F.R. § 502.254.

ORDER

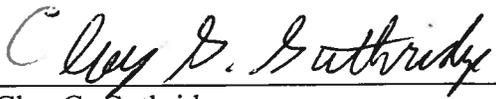
Upon consideration of the record herein, the arguments of the parties, and for the reasons set forth above, it is hereby

ORDERED that the claims against respondents Abou Merhi Lines, LLC, and Abou Merhi Lines (USA), LLC, be **DISMISSED WITH PREJUDICE**. DSW International, Inc., has not established by a preponderance of the evidence that Abou Merhi Lines, LLC, and Abou Merhi Lines (USA), LLC, operated as common carriers subject to the requirements of section 10 of the Shipping Act of 1984. It is

FURTHER ORDERED that the claims against respondent Commonwealth Shipping, Inc., be **DISMISSED WITH PREJUDICE**. DSW International, Inc., has not established by a preponderance of the evidence that Commonwealth, a non-vessel-operating common carrier, violated Section 10 of the Shipping Act of 1984.

Upon consideration of the record herein, the arguments of the parties, the conclusion that respondent Abou Merhi Lines, SAL, violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. § 41102(c), and that complainant DSW International, Inc., suffered actual injury as a result of that violation, and for the reasons set forth above, it is hereby

ORDERED that Abou Merhi Lines, SAL, pay DSW International, Inc., reparation in the amount of \$11,434.30 plus interest from June 21, 2008.



Clay G. Guthridge
Administrative Law Judge