

GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRSKY, P.C.

ATTORNEYS AT LAW

CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY

BRIAN J. HEISMAN*
KARA KRAMAN*
DAVID G. SHANNON

ROBERT N. KHARASCH^o
JOHN CRAIG WELLER^o

GEORGE F. GALLAND (1910-1985)

MINNESOTA OFFICE:
700 TWELVE OAKS CENTER DRIVE, SUITE 700
WAYZATA, MN 55391
(T) 952/449-8817 (F) 952/449-0614

WRITER'S DIRECT E-MAIL ADDRESS
dmonroe@gkglaw.com

WRITER'S DIRECT DIAL NUMBER
202/342-5235

*NOT ADMITTED IN DC
^oOF COUNSEL

September 12, 2008

VIA HAND DELIVERY

Karen Gregory, Assistant Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, NW
Washington, DC 20573

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FEDERAL MARITIME COM.

Re: Kawasaki Kisen Kaisha, Ltd. ("K" Line) v. Fashion Accessories Shippers Association, Inc.; Gemini Shippers Association, Inc.; Sara Mayes; and Harold Sachs, Docket No. 07-10

Dear Ms. Gregory:

In connection with the above-referenced matter, and on behalf of Respondents, we are enclosing an original and 15 copies of the following document:

Respondents Fashion Accessories Shippers Association, Inc.'s and Gemini Shippers Association, Inc.'s Reply to Motion for Dispositive Ruling, and Motion to Dismiss and/or for Dispositive Ruling, with Attachment A (Supporting Declaration of Sara Mayes) and Attachment B (Deposition Transcript of Thomas W. Aldridge).

We have also enclosed a copy of the document for date-stamp and return to us via our messenger.

Should you have any questions, please do not hesitate to contact me at the above direct dial number. Thank you for your assistance.

Very truly yours,

David K. Monroe/ldt

David K. Monroe

Enclosures

cc: All Parties of Record per Service List



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**FEDERAL MARITIME COMMISSION
WASHINGTON, DC**

DOCKET NO. 07-10

KAWASAKI KISEN KAISHA, LTD. ("K" LINE)

v.

**FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.;
AND GEMINI SHIPPERS ASSOCIATION, INC.**

**RESPONDENTS FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.'S
AND GEMINI SHIPPERS ASSOCIATION, INC.'S
REPLY TO MOTION FOR DISPOSITIVE RULING,
AND MOTION TO DISMISS AND/OR FOR DISPOSITIVE RULING**

Respondents FASA and Gemini hereby respectfully move for dismissal of the Complaint, and a dispositive ruling that FASA is a bona fide shippers' association and has not violated the Shipping Act as alleged in the complaint. Respondents FASA and Gemini also oppose the motion for dispositive ruling filed by Complainant Kawasaki Kisen Kaisha, Ltd. ("K Line"). FASA and Gemini submit the following brief and attached Declaration of Sara Mayes in support of their motions and in opposition to K Line's Motion for Dispositive Ruling.

I. INTRODUCTION

FASA is a shippers' association that for more than 20 years has been serving the interests of its shipper-members by negotiating favorable ocean transportation rates in service contracts with carriers. Shippers' associations were authorized by Congress in The Shipping Act of 1984 (the "Shipping Act") to allow groups of shippers – particularly small and mid-sized shippers – to pool their volumes of cargo to take advantage of the lower rates available in service contracts based on volume commitments. The Shipping

Act defines shippers' associations in broad terms, but does not impose any regulatory obligations on shippers' associations.

Since the enactment of the Shipping Act, the Federal Maritime Commission ("FMC" or the "Commission") has expressly declined to promulgate regulations relating to the formation or operation of shippers' associations, noting Congress's intent that shippers' associations be allowed to organize themselves and operate in the manner chosen by their shipper-members with a minimum of governmental intervention. As a result, shippers' associations like FASA have become an important force in fostering competition in ocean transportation and affording shippers of all sizes the benefits of lower rates obtainable through service contracts.

K Line is now asking the Commission to effect a fundamental change of its policy of nonregulation of shippers' associations, and to impose comprehensive regulation of the structure and operation of shippers' associations on an *ad hoc* basis. This proceeding is an unprecedented attempt by a carrier to intervene into and direct the internal business affairs of a shippers' association. In what K Line attempts to characterize as a *pro bono* effort to protect FASA's purportedly helpless members, K Line is challenging FASA's very status as a shippers' association, second guessing its business judgments, and seeking to dictate how FASA can operate. K Line never explains, however, why it has chosen to invest considerable amounts of its own resources to prosecute an action in which its interests do not appear to be at stake.¹

¹ K Line's original complaint did not even seek reparations. Although K Line is now seeking reparations – in the form of membership dues it collected from FASA members and remitted to FASA – K Line undoubtedly knows that it has no cognizable legal or beneficial interest in membership dues that belong to FASA and/or its members.

K Line's motives for filing the complaint and continuing to aggressively prosecute this proceeding are relevant to the disposition of this matter. K Line's lack of an apparent legal interest in this proceeding, its legal campaign against FASA in other venues², its abuse of the statutory verification requirement³, its publication in the complaint of unsupported scurrilous allegations against individuals⁴, its misstatement of facts⁵, its reliance on speculation, hearsay and other unreliable information⁶, and even its overheated rhetoric and almost childish practice of assigning pejorative names in its brief⁷, all strongly suggest that the Commission's processes are being employed for improper purposes – specifically to punish a shippers' association with which it has a dispute by imposing on it the substantial legal costs of defending this action. K Line's often strained legal arguments only contribute to the conclusion that the complaint is meritless and should be dismissed.

As set forth more fully below, FASA is a *bona fide* shippers' association, under the Shipping Act. In addition, neither the dues clause nor the MFS/Back Soliciting clause

² See Part II, D *infra*.

³ See Part III *infra*.

⁴ See Part III *infra*.

⁵ See, e.g., K Line's assertion that the collection of dues is not set forth in the FASA/K Line service contract. K Line Motion at 36.

⁶ See Part II, E.

⁷ For example, K Line refers to FASA as "FASA Corp.," presumably to make it sound less like a nonprofit association. Similarly, it refers to the dues clause of the service contract as the "Royalty" clause, and the MFS-Back Soliciting clause as the "Exclusive Dealing Clause," although neither of those terms appear anywhere in the service contracts at issue.

violate the Shipping Act. Accordingly, the complaint filed by K Line should be dismissed and this proceeding terminated.

II. FACTUAL BACKGROUND

A. FASA's Corporate Background

FASA is the corporate successor to the National Fashion Accessories Association (“NFAA”), a trade association that served manufacturers in the fashion accessory industry for more than 100 years. Declaration of Sara Mayes (“Mayes Decl.”) at ¶ 3, attached hereto as Attachment A. FASA was incorporated in November 1986 as a non-stock, not-for-profit corporation under Delaware law for the purpose of operating as a shippers’ association under the Shipping Act, primarily for members of NFAA. *Id.*; Exhibit A. In 1990, FASA’s Certificate of Incorporation was amended to expand the purposes of the organization to perform a broader variety of functions as a trade association and shippers’ association.⁸ *Id.*; Exhibit B. In 2004, FASA merged with NFAA. Mayes Decl. at ¶ 4. After the merger, FASA continued to operate pursuant to its amended Certificate of Incorporation as both a trade association and a shippers’ association for its members. *Id.* FASA has no shareholders; it is operated by and for the benefit of its members pursuant to its Bylaws. *Id.*

FASA’s Bylaws were originally adopted on July 14, 1987. Mayes Decl. at ¶ 5. In conjunction with its merger with NFAA, FASA’s members approved amended and restated Bylaws on May 24, 2004, which, *inter alia*, approved the use of the trade names

⁸ As manufacturing of fashion accessories moved offshore, the interests of NFAA and FASA members transitioned from manufacturing to import activities. As a result, FASA began to expand its services beyond that of a pure shippers’ association.

Gemini Shippers Group and Gemini Shippers Association. *Id.* On April 16, 2008, FASA's members approved additional amendments to the Bylaws. *Id.*; Exhibit C.

FASA's current Bylaws provide for the election of a five person Board of Directors, four of whom are elected by vote of the members, with the fifth Director elected by the other four Directors. Mayes Decl. at ¶ 6; Exhibit C. Each FASA member has one vote. *Id.* Principals of current members of FASA, past presidents of FASA or NFAA, and current active directors or officers of FASA or NFAA are eligible to serve on the FASA Board of Directors. *Id.* FASA's Board of Directors was elected in 2004 in connection with the merger with NFAA, and again in April 2008. Mayes Decl. at ¶ 6. Directors currently serve five-year terms. Mayes Decl. at ¶ 6; Exhibit C. The officers of FASA are elected by the Board of Directors from among its members. *Id.*

FASA's Bylaws may be amended by a two-thirds vote of the members upon a recommendation by the Board of Directors. Mayes Decl. at ¶ 7; Exhibit C. FASA's Bylaws provide for an annual meeting. *Id.* Approximately 60 members attended the last annual meeting, held in April 2008. Mayes Decl. at ¶ 7.

B. FASA's Operation as a Trade Association and Shippers' Association

1. FASA's Membership Agreement

All FASA members enter into membership and confidentiality agreements with FASA. Mayes Decl. at ¶ 8; Exhibit D. Members agree to pay dues on a per container basis. *Id.* Members pay dues directly to FASA unless arrangements have been made for the carrier to collect and pay over the member's dues. *Id.* Unlike other shippers' associations, FASA members are not required to agree to a volume commitment and are not subject to a dead freight obligation. Mayes Decl. at ¶ 8. Members are not restricted

from entering into independent service contracts with carriers, and many of FASA's members book cargo under other service contracts in addition to FASA's service contracts. *Id.* FASA members are responsible for payment of transportation charges to carriers and for making all necessary arrangements to book cargo under FASA service contracts. *Id.*

2. FASA's Use of the Trade Name "Gemini"

In 2004, following the merger of FASA with NFAA, FASA began using the trade names Gemini Shippers Group and Gemini Shippers Association to emphasize FASA's dual role as trade association and shippers' association. Mayes Decl. at ¶ 9. FASA informed its carriers, including K Line, that Gemini was a trade name for FASA and that FASA was the real party in interest to service contracts entered in the name of Gemini. *Id.* Gemini Shippers' Association, Inc. – which has been named as a Respondent in this proceeding – is a non-operating corporation affiliated with FASA, but has no role regarding the service contracts at issue. *Id.*

3. Negotiation of Service Contracts on Behalf of Members

FASA negotiates up to 20 global service contracts per year on behalf of its members. Mayes Decl. at ¶ 10. The expiration dates of FASA's service contracts are usually staggered to optimize the availability and flexibility of rates to FASA's members. *Id.* FASA negotiates both general rates applicable to all FASA members and shipper specific ("bullet") rates on behalf of individual members. *Id.* In addition, FASA negotiates accessorial charges, surcharges, terms of service and other contractual terms for each service contract. *Id.* FASA's broad and deep experience in negotiating with carriers, its ability to make substantial volume commitments, and its extensive knowledge

of the marketplace for ocean transportation enable FASA to obtain favorable rates and other concessions for its members. *Id.*

FASA typically undertakes the negotiation of all general and bullet rates and terms of service on behalf of its shippers, but FASA does allow some members to participate in the negotiation process and/or to deal directly with FASA carriers, generally with the assistance of FASA. Mayes Decl. at ¶ 11. FASA reviews all rates and terms of service negotiated by members, and renegotiates rates that are not competitive. *Id.* FASA's service contracts are constantly being amended to add new rates, routes and terms of service to meet the needs of FASA's members. *Id.*

FASA's service contracts include a minimum quantity commitment that FASA must meet to receive the preferred rates in its service contracts. Mayes Decl. at ¶ 12. FASA's service contracts also include dead freight provisions obligating FASA to pay a per container penalty for any shortfall in the volume shipped under the service contract. *Id.* FASA, and not its members, is responsible for dead freight claims. *Id.* Dead freight penalties are usually \$250 per FEU. *Id.* FASA typically commits to more than 50,000 TEU per year. *Id.* Accordingly, FASA assumes substantial dead freight obligations, potentially totaling millions of dollars. *Id.*

4. Other Membership Services

FASA provides a variety of services to its members in addition to the negotiation of service contract rates. Mayes Decl. at ¶ 13. For example, FASA audits the accuracy of the rates for bills of lading under each of its service contracts. *Id.* FASA also monitors industry developments and provides members with information relating to the industry, Customs requirements, trade data, and other matters of interest to its members.

Id.; Exhibit F. FASA's password protected website and database offers customized service for each member. Mayes Decl. at ¶ 13. FASA provides detailed tracking and tracing, by container number or bill of lading number, for freight shipped under FASA's service contracts. *Id.* FASA also provides its members access to legal advice on Customs and transportation matters. *Id.*

5. Collection of Dues

FASA currently assesses membership dues on a per container basis for cargo shipped under FASA's service contracts, although FASA and its predecessors have previously assessed dues based upon members' gross revenue. Mayes Decl. at ¶ 14. Members pay their dues directly to FASA on a monthly basis based on the actual volume shipped under FASA's service contracts. *Id.* Several years ago, FASA began negotiating arrangements with carriers under which the carriers agreed to collect dues from FASA's members and pay them over to FASA. *Id.* FASA's members prefer these arrangements because it reduces the members' administrative burden. *Id.* As a result, FASA has negotiated such dues collection clauses with the majority of its carriers. *Id.* For service contracts without such a dues collection clause, FASA members continue to pay their dues directly to FASA. *Id.* Unlike many shippers' associations, FASA does not assess initiation or yearly membership dues. *Id.*

6. FASA's Financial Reserves

FASA maintains a financial reserve, currently totaling about \$7.7 million. Mayes Decl. at ¶ 15. Approximately \$2 million constitutes financial reserves acquired in connection with the merger with NFAA in 2004; the remaining amounts constitute surpluses and accumulated interest over FASA's 20 years of operation. *Id.* FASA

maintains a financial reserve for a number of strategic and operational purposes, including as a reserve against dead freight claims. *Id.* On an annual basis, FASA assumes potential dead freight liabilities in excess of \$10 million. *Id.* FASA insists that carriers agree to hold only FASA, and not its members, responsible for dead freight obligations. *Id.* As a result, FASA must maintain financial reserves sufficient to assure carriers that FASA is financially responsible and capable of meeting its potential dead freight obligations. *Id.* FASA's reserve is also maintained for future investments in infrastructure, additional member services, and possible strategic acquisitions. *Id.* In addition, FASA's reserve fund serves as a buffer against shortfalls in revenue due to adverse economic conditions or unanticipated increases in expenses, including costly litigation such as this proceeding. *Id.*

7. FASA's Tax Status

FASA is a tax-exempt nonprofit organization pursuant to Section 501(c)(6) of the Internal Revenue Code and a determination of the Internal Revenue Service ("IRS") in September 1994. *Mayes Decl.* at ¶ 16. FASA files IRS Form 990, Return of Organization Exempt From Income Tax, on an annual basis. *Id.* FASA's most recent Form 990 was filed for calendar year 2007. FASA's Form 990 filings are publicly-available from the IRS. *Id.*

8. Member Requests for Information

FASA members are entitled to review the books and records of FASA, subject to certain limitations under Delaware law. *Mayes Decl.* at ¶ 17. Such requests must be in writing, must state a proper purpose for the review of financial data, and must confirm that the confidentiality of the information will be maintained. *Id.* All member requests

for review of financial records are referred to FASA's counsel to ensure compliance with these requirements. *Id.* FASA has never refused a proper request from a member for review of books and records. *Id.*

C. The Service Contracts Between FASA and K Line

1. Negotiation of the FASA/K Line Service Contracts

FASA negotiated and entered into annual service contracts with K Line from approximately 1999 until 2007.⁹ *Mayes Decl.* at ¶ 18. The last three service contracts with K Line covered the periods 2004-2005 (No. 14042), 2005-2006 (No. 14683) and 2006-2007 (No. 15115). *Id.* FASA negotiated the terms of its service contracts with K Line primarily through T.Y. Cheng, Tom Aldridge, and Pamela Donovan, all employed by "K" Line America, Inc., the U.S. agent for K Line. *Id.* K Line provided the format and "boilerplate" language for FASA's service contracts with K Line. *Id.* All negotiations were based on K Line's form service contract. *Id.* FASA typically negotiated with K Line about particular contract terms as well as rates, surcharges, and terms of service. *Id.*

The negotiation of service contracts with K Line usually took place over a period of several weeks, and involved numerous communications between FASA, K Line and FASA's members by telephone, email exchanges and face-to-face meetings. *Mayes Decl.* at ¶ 19. K Line prepared the initial draft of each of the service contracts, and revised drafts were circulated between FASA and K Line as changes were made. *Id.* The format of service contracts, including the small-size typeface used, were dictated by K Line. *Id.* When negotiations of a service contract with K Line were finalized, FASA

⁹ Prior to the effective date of the Ocean Shipping Reform Act, FASA negotiated service contracts with carrier conferences of which K Line was a member.

signed the agreement and forwarded it to K line for signature and filing with the Commission. *Id.* FASA's service contracts with K Line were amended on numerous occasions during the terms of the contracts to revise or add rates or to address other matters. *Id.*

2. The MFS – No Back Soliciting Clause in the FASA/K Line Service Contracts

During the negotiations for the first service contract between FASA and K Line, FASA requested a “Most Favored Shipper” clause (hereinafter, “MFS Clause”) to ensure that FASA and its members would receive the most favorable rates available from K line consistent with FASA's volume commitment, and to discourage K Line from back soliciting some FASA members with lower rates to the detriment of FASA's other members. Mayes Decl. at ¶ 20. K Line rejected FASA's proposed MFS Clause, claiming that it would be difficult for FASA to enforce an MFS obligation since any independent K Line service contracts with FASA members would be confidential. *Id.* Ultimately, however, K Line did agree to a revised MFS – No Back Soliciting clause, that provided:

Contract-to-contract MFS; No Back Soliciting During the term of this Service Contract, the Carrier shall not enter into an individual service contract or time volume arrangement with any Member of the Association or any former Member, except upon notice to the Association and subject to mutual agreement between carrier and the Association.

The language of the above MFS – No Back Soliciting clause was specifically negotiated with T.Y Cheng of K Line. Mayes Decl. at ¶ 21; Exhibit E. This MFS – No Back Soliciting clause was included in every subsequent service contract and every amendment between FASA and K Line, including Service Contracts Nos. 14042, 14682, and 11515 and the amendments to those service contracts. *Id.* As a result, K Line

executed and filed contracts and amendments containing the MFS – No Back Soliciting clause numerous times. *Id.*

3. The Dues Collection Clause in FASA/K Line
Service Contract No. 11515

In the last service contract entered into by FASA and K Line, No. 11515, K Line agreed for the first time to a dues collection clause that obligated K Line to collect member dues and remit them to FASA. Mayes Decl. at ¶ 22. The dues collection clause provides, in pertinent part:

GEMINI ASSOCIATION DUES

Carrier agrees to collect from the Member Shipper and forward to the Contract Party Association the following Gemini Association Dues payable on a monthly basis for cargo transported by Carrier under this Contract for which the freight and related charges have been paid in full by Member Shipper.

In 2006, FASA's general outside counsel contacted the Commission staff to confirm that the dues collection clause was acceptable under The Shipping Act. Mayes Decl. at ¶ 23. FASA was informed by two members of the Commission staff – Bryant Van Brackle and Mamie Black – that the dues clause did not raise any regulatory issues. *Id.*

The dues collection clause was included in Service Contract No. 11515 and in every one of its amendments. Mayes Decl. at ¶ 24. K Line collected dues from FASA members and paid those dues to FASA until an unrelated dispute arose between K Line and FASA. *Id.* K Line then attempted to withhold dues K Line had already collected from FASA members. *Id.* During the dispute over K Line's withholding of members' dues, K Line never offered to return the dues it had collected to FASA's members. *Id.* K Line, ultimately, did pay the disputed dues to FASA, but only after FASA demanded arbitration. *Id.*

4. FASA Operations

FASA does not book cargo or make freight payments on behalf of its members. Mayes Decl. at ¶ 25. Members handle all the arrangements necessary to ship cargo under service contracts negotiated by FASA. *Id.*

FASA has grown in the last five years, both in the size of its membership and the volume of cargo shipped under FASA service contracts. Mayes Decl. at ¶ 26.

5. The Dispute Over the MFS – No Back Soliciting Clause

In 2004, K Line entered into a separate service contract with Ann Taylor, then a current FASA member, relating to cargo already covered by FASA's service contract with K Line. Mayes Decl. at ¶ 27. FASA objected to K Line's actions based upon the MFS – No Back Soliciting clause and the fact that Ann Taylor was still a current member of FASA.¹⁰ *Id.* Although the dispute was amicably resolved, FASA specifically discussed the language and applicability of the MFS – No Back Soliciting clause in the service contract with Tom Aldridge of K Line. *Id.* Following the dispute, and the express discussion of the MFS – No Back Soliciting clause, K Line entered into two additional service contracts with FASA as well as numerous amendments, each containing the same MFS – No Back Soliciting clause discussed during the dispute over Ann Taylor. *Id.*

¹⁰ Back solicitation by a carrier is a substantial issue for FASA and its members because carriers like K Line received lists identifying FASA's members. Mayes Decl. at ¶ 29. If a carrier uses its access to FASA's members to poach some members by offering special deals or otherwise, then the remaining members are placed at an unfair disadvantage, the ability of FASA to leverage the combined volume of its members is compromised, and FASA's risk of deadfreight claims due to the loss of the poached volume is increased. *Id.*

In 2006, K Line again negotiated a separate service contract with a FASA member for cargo covered by the FASA service contract. Mayes Decl. at ¶ 28. This time the member was Bag Bazaar. *Id.* Because of the prior dispute, K Line was well aware of the MFS – No Back Soliciting clause. *Id.* Nonetheless, K Line entered into a separate service contract with Bag Bazaar – for volume covered by FASA’s service contract. *Id.* FASA both questioned the apparent back solicitation of a FASA member and asked that K Line reduce the rates for FASA’s other members to match the lower rates given to Bag Bazaar. *Id.* In doing so, FASA pointed out that FASA had committed to a substantially higher volume than Bag Bazaar could pledge, and that FASA’s members were accordingly entitled to lower rates under the MFS – No Back Soliciting clause. *Id.* K Line refused to adjust the rates of FASA’s other members. *Id.* K Line also entered into a third separate service contract relating to cargo covered by the FASA service contract – this time with Samsonite. *Id.*

D. K Line’s Pursuit of a Legal Vendetta Against FASA

As a result of this third incident of apparent back solicitation by K Line, FASA commenced arbitration pursuant to the arbitration clause in the FASA/K Line service contracts. Mayes Decl. at ¶ 30. However, rather than submitting the dispute to arbitration as required by the relevant service contracts, K Line embarked on an expensive campaign to avoid arbitration and to punish FASA – apparently for having the temerity to demand arbitration. *Id.* In particular, K Line filed a complaint against FASA with the Department of Justice, went to federal court in New York in an attempt to enjoin the arbitration, and when the court ordered that the arbitration proceed, sought a stay

from the arbitrator. Having failed everywhere else, K Line filed its “verified” Complaint initiating this proceeding a full 11 months after FASA commenced the arbitration.¹¹ *Id.*

E. Factual Assertions in K Line’s Motion are Unsupported, Inadmissible, Unreliable or Just Plain False

K Line’s Motion relies heavily on factual assertions that are unsupported, inadmissible hearsay or otherwise unreliable, or just plain false. For example, K Line presents as evidence what it calls a purportedly “random” survey of shippers’ associations conducted by K Line in an effort to show the FASA is fundamentally different from other shippers’ associations. Even a cursory review of K Line’s “random” survey demonstrates that there is no evidentiary foundation for the admissibility of the factual assertions contained in K Line’s survey, and that the “questions” the survey is supposed to answer are argumentative characterizations designed to support K Line’s position. For example, one of the first questions K Line poses to itself is whether the “association [is] formed for the benefit of members and not for pecuniary benefit or financial gain of directors or officers.” Not surprisingly, K Line asserts that the answer for FASA is “no,” while the answer for five of the ten the remaining associations K Line selected, is “yes.”¹² K Line provides no admissible evidence to support its conclusions.

Ironically, despite the argumentative and self-serving nature of K Line’s “random” survey, it nonetheless fails to establish K Line’s central point – that FASA is fundamentally different than other shippers’ associations. For example, on the issue of whether the associations retain all surplus funds, K Line lists “insufficient information”

¹¹ As discussed more fully below, K Line’s verification of the Complaint was a sham, since the K Line employee who verified the Complaint had no knowledge of the key factual allegations in the Complaint.

¹² The remaining five associations are listed as “not sufficient information.”

for six of the ten associations.¹³ Similarly, K Line's survey shows that all 11 associations assess membership dues on a per container basis.

K Line also seeks to rely on hearsay and double hearsay statements of others. For example, the Aldridge Affidavit attached to K Line's motion references statements allegedly made by former FASA members to K Line about the reasons they signed separate contracts with K Line. See Aldridge Affidavit at ¶¶ 6, 13. The Aldridge Affidavit also offers a hearsay statement relating to a former member's request to inspect FASA's records. See Aldridge Affidavit at ¶ 14. As discussed below, there are independent reasons to question the reliability of the Aldridge Affidavit, since Mr. Aldridge improperly verified factual allegations in the Complaint.

K Line's motion also contains factual statements that are just not true. K Line asserts that the collection of dues under the service contract is an illegal rebate because payment of the dues amounts is not provided for in the service contract. K Line Motion at 36. However, the dues collection clause is part of the service contract, and was even attached to K Line's Original Complaint.

III. THE COMPLAINT SHOULD BE DISMISSED AS IMPROPERLY VERIFIED

A. K Line's Sham Verification of the Complaint In This Proceeding

Pursuant to the Commission Rules of Practice and Procedure, the Complaint in this action was required to be verified under the penalty of perjury. See 46 C.F.R. § 502.62. Although Thomas Aldridge, an employee of "K" Line America, Inc., signed the purported verification of the Complaint in this proceeding, it appears that Mr.

¹³ Apparently to emphasize its point, K Line also asks the same question in the negative – *i.e.*, whether the associations distribute surplus to members, and gives the same results.

Aldridge had no personal knowledge of key factual allegations in the Complaint or even any independent basis for believing that the facts he verified were true. Indeed, at his deposition, Mr. Aldridge testified – under oath – that he had no knowledge of the factual basis for numerous material factual allegations of the Complaint. The transcript of Mr. Aldridge’s deposition is attached hereto as Attachment B. Specifically, Mr. Aldridge testified that he had no basis for believing the factual allegations he verified were true, except for what he was told by K Line’s counsel. K Line’s counsel asserted the attorney-client privilege to prevent Mr. Aldridge from testifying as to what he was told by K Line’s counsel, thus rendering the verification of the complaint a complete sham.¹⁴

The factual allegations that Mr. Aldridge purported to verify as true are critical for two reasons. First, they go to the heart of K Line’s claim that FASA is not a *bona fide* shippers’ association, but is instead operating without the knowledge or participation of its members. Second, many of the factual allegations that Mr. Aldridge verified as true are scurrilous attacks on the integrity and reputation of FASA and its employees, officers and directors. For example, paragraph 15 of the Complaint, found in the section of the Complaint entitled “Facts,” alleges that:

The obvious mission of the FASA/Gemini principals is not to act as an association for the benefit of the shippers whom they call (sometimes) “members,” but to benefit the principals, the individual respondents, by amassing wealth from royalties on every box carried by the ocean carriers who bring their negotiated rates within the Gemini contract umbrella.

¹⁴ Mr. Aldridge has submitted an affidavit in support of K Line’s Motion For Dispositive Ruling. Given the lack of foundation and unreliability of Mr. Aldridge’s verification of the factual allegations of the Complaint, FASA requests that his affidavit in support of K Line’s Motion be struck as unreliable.

When Mr. Aldridge was questioned about this allegation in his deposition, he testified as follows:

Q: Let me ask you to look at paragraph 15 on page 9 of the Amended Complaint which is respondents' Exhibit No. 1. The sentence reads, "the obvious mission of the FASA/Gemini principals is not to act as an association for the benefit of the shippers whom they call (sometimes) 'members,' but to benefit the principals, the individual respondents, by amassing wealth from royalties on every box carried by the ocean carriers who bring their negotiated rates within the Gemini contract umbrella. Who are the principals that fit paragraph 15 it refers to?"

A: I don't know.

Q: Do you have any basis for believing that the FASA principals are acting for their own benefit and not the shippers or the members?

MR. KEANE: Objection, attorney-client privileges.

Q: Other than what you have been told by your attorneys.

A: No.

Deposition of Thomas Aldridge (hereinafter "Aldridge Depo."), pp. 100-101.

Mr. Aldridge also admitted that he had no basis for believing a similar allegation, made in paragraph 16 of the Complaint, was true:

Q: Let me ask you to look at paragraph 16 on page 9 of the Amended Complaint, again, that's respondents' Exhibit No. 1. "The FASA/Gemini principals superficially imitate a shippers' association as described in the Act, while in reality operating a service contract franchise business for the principals' benefit." Other than what you've been told by your attorneys, do you have any basis for believing that to be true?

A: No.

Aldridge Depo. at pp. 101-102.

The Complaint contains numerous other material factual allegations that Mr. Aldridge had no basis for believing to be true, except for whatever he might have been told by K Line's attorneys. *See, e.g.*, Aldridge Depo. at page 107, line 8-page 108, line

10 (no basis for belief that respondent Mayes funneled monies into FASA's bank account for her own benefit); page 108, line 11-page 109, line 7 (no knowledge to support allegation that FASA was not a nonprofit); page 112, lines 10-23 (no basis for believing allegation that FASA's principals acted in direct opposition to its purpose); page 112, line 24-page 113, line 12 (no basis for believing truth of allegation that FASA principals acted for their own financial benefit contrary to The Shipping Act); page 128, line 11 through page 129, line 10 (no knowledge whether K Line has been harmed in its dealings with FASA).

B. The Sham Verification of the Complaint Violates The Shipping Act and Is an Abuse of the Commission's Rules and Processes Meriting Dismissal and Sanctions

The verification requirement in the Commission's regulations arises from the Shipping Act itself, which requires that a complaint filed with the Commission be sworn. *See* 46 U.S.C. § 41301. The obvious purpose of the verification requirement is to require the complainant to have a good faith factual basis for its allegations, to prevent abuse of the Commission's processes, and to avoid the unnecessary and wasteful expenditure of the resources of the Commission and private parties on claims for which the Complainant does not have a factual basis. The Commission's regulations require that a complaint be verified whether or not a party is represented by counsel. *See* 46 C.F.R. §§ 502.62 and 502.112.

The signature of a party's attorney does not satisfy the verification required by the Shipping Act and the Commission's regulations. *See* 46 C.F.R. § 502.112 (verification of pleadings signed by attorney not required except where required by statute or rule). Consequently, verification by a person having no basis for believing the allegations to be

true other than what he was told by his attorney cannot be sufficient. Otherwise, verification would not be required where a party is represented by counsel. More to the point, such an indirect verification is deceptive, for it falsely indicates to the Commission and other parties that there is some good faith basis in fact for the allegations in the Complaint beyond the signature of the complainant's attorney.

K Line's use of a sham verification is not only a violation of the Shipping Act verification requirement, it is also an abuse of the Commission's rules and processes. K Line has circumvented a critical barrier designed to prevent vexatious litigation, and has caused exactly the real and substantial harm the verification requirement is designed to prevent. K Line's complaint contains scandalous accusations of misconduct and dishonesty against FASA and its employees, officers and directors. Those accusations, clothed in the cloak of plausibility provided by verification under penalty of perjury, have caused the Commission to institute these proceedings, required FASA to incur substantial legal fees to defend itself, and caused serious harm to FASA's reputation.

The Commission should dismiss the complaint with prejudice as an appropriate sanction for K Line's use of a sham verification in violation of the Shipping Act and Commission regulations. In addition, the Commission should award sanctions to FASA, in the form of its attorneys fees incurred in this proceeding. As discussed more fully below, there is no factual support for K Line's allegation of misconduct, nor is there any merit to its claims that FASA has violated the Shipping Act. Consequently, dismissal of the complaint coupled together with an award of attorney fees would also be in the interests of justice.

IV. THE COMMISSION SHOULD DENY K LINE'S MOTION FOR A DISPOSITIVE RULING, AND ISSUE A DISPOSITIVE RULING IN FAVOR OF RESPONDENTS FASA AND GEMINI

A. FASA is a *Bona Fide* Shippers' Association Under The Shipping Act

1. FASA Meets the Statutory Definition of a Shippers Association Under the Shipping Act

The Shipping Act of 1984 (the "Shipping Act") defines a shippers' association as "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group to obtain carload, truckload, or other volume rates or service contracts." 46 U.S.C. § 40102(23). The Commission previously has made clear that the overriding purpose of the shippers' association provision of the Shipping Act is "to allow small shippers to take advantage of the 1984 Act by permitting them to aggregate their cargos to obtain volume rates and service contracts." *Status of Shippers' Associations Under the 1984 Act*, 22 S.R.R. 1629, 1635 (1984).

Consistent with this overarching purpose, the Commission has declined to promulgate regulations governing the formation or operation of shippers' associations, noting "a Congressional desire that the Commission generally not involve itself in the formation or operation of shippers' associations." *Id.* at 1627. *See also Status of Shippers' Associations Under the 1984 Act*, 22 S.R.R. 896 (1984) (declining to promulgate regulations governing shippers' associations). Accordingly, the Commission has consistently found that "shippers' associations should generally be allowed to operate with a minimum of governmental intervention." *Matter of Petition for Rulemaking on Shippers' Associations*, 22 S.R.R. 1624, 1628 (1984).¹⁵

¹⁵ Shippers' associations have turned out to be an important counterbalance to the immunity of carriers to act collectively, particularly for small and medium-sized shippers.

FASA clearly meets all of the requirements of the statutory definition of a shippers' association. As a preliminary matter, K Line does not contend that FASA's members are not "shippers" under the Shipping Act, nor does it deny that FASA pools the volumes of cargo of its members in order to obtain lower volume rates for its members in service contracts. Moreover, K Line cannot, and does not, dispute that FASA is incorporated as a not-for-profit, non-stock membership corporation under Delaware law. Since FASA is a nonprofit membership organization of shippers that, *inter alia*, negotiates service contracts on behalf of its members based on their pooled volume of cargo, FASA is clearly a shippers' association under the Shipping Act.

K Line attempts to challenge FASA's status as a shippers' association and to seek to intervene in the business affairs of FASA by arguing that (1) the status of a shippers' association under the Shipping Act should be determined in accordance with the definition of a domestic shippers' association under the now repealed Interstate Commerce Act, (2) FASA does not truly operate as a nonprofit organization for the benefit of its members, and (3) the Commission should manage the internal business operations of FASA on an *ad hoc* basis by determining, *inter alia*, whether the benefits received by FASA's members are commensurate with the dues they pay, and whether FASA's financial reserves are appropriate. None of these arguments survive scrutiny.

2. The Interstate Commerce Act Does Not Control the Definition of a Shippers' Association Under The Shipping Act

Although K Line purports to challenge FASA's status as a shippers' association under the Shipping Act, it does not cite any FMC regulations, decisions or other authority

The freedom to organize themselves and operate without extensive regulations has allowed shippers' associations the flexibility to adapt to the ever-changing demands of the ocean transportation industry – a result Congress clearly intended.

in support of its assertion that FASA is not a *bona fide* shippers association.¹⁶ Instead, K Line suggests that the “essential elements” of a shippers association should be determined in accordance with the definition of a shippers’ association in domestic commerce under the now repealed Interstate Commerce Act (“ICA”). In particular, K Line contends that the ICA required that shippers’ associations be “cooperative” associations, and that a similar requirement should be implied under the Shipping Act. K Line’s reliance on the ICA and case law addressing domestic shippers’ associations under the ICA, however, is plainly misplaced.

The Commission has flatly rejected the very argument K Line advances here. In *Status of Shippers’ Associations Under the 1984 Act*, 22 S.R.R. 1629 (1984), the Commission noted the fundamental differences between the terms “shippers’ association” as used in the ICA and the Shipping Act. The Commission made clear that the definition and status of shippers’ associations under the Shipping Act are not controlled by the treatment of domestic shippers’ associations under the ICA:

Although Congress used a definition of shippers’ association which is similar to the description of shipper groups which are exempt from ICC freight forwarder regulation, there is nothing in the statute or its legislative history which indicates that Congress in any way intended that the ICC’s treatment of domestic shipper groups pursuant to this provision should be controlling on the FMC’s treatment of shippers’ associations in international ocean transportation.

* * *

Moreover, the 1984 Act and ICA uses of the term “shippers’ association” occur in different contexts and are clearly intended to serve different purposes. The FMC shippers’ association provision identifies those groups of shippers which can enter into service contracts on behalf of their members, and with which common carriers must negotiate. The ICC shippers’ association provision appears as an exemption to its freight forwarder regulation, so that what might otherwise appear

¹⁶ The two FMC cases cited by K Line relate to collateral matters, and do not address the issue of FASA’s status as a shippers’ association.

to function in the same manner as an ICC freight forwarder would not be subject to the same regulatory requirements.

Status of Shippers' Associations Under the 1984 Act, 22 S.R.R. 1629, 1635 (1984).

Consequently, K Line's suggestion that the *Freight Consolidators* case establishes the analysis applicable to determining whether FASA is a shippers' association under the Shipping Act is without merit. The question at issue in *Freight Consolidator* was whether the activities of a purported domestic shippers' association required it to be licensed as a freight forwarder under the ICA. See *Freight Consolidators Cooperative, Inc. v. U.S.*, 230 F. Supp. 692 (S.D.N.Y. 1964). The analogous question under the Shipping Act – whether FASA is operating as a NVOCC or ocean forwarder – is simply not present here. FASA does not perform the functions of either an NVOCC or an ocean freight forwarder on behalf of its members, and there is no allegation in this proceeding that FASA is required to be licensed under the Shipping Act.¹⁷

3. FASA Operates as a Legitimate Nonprofit Membership Organization Under Delaware Law

K Line argues that, notwithstanding FASA's legal standing as a not-for-profit membership corporation under Delaware corporation law, FASA does not actually function as a membership organization. Specifically, K Line contends that FASA's members are excluded from participation and control of FASA, and that FASA is not governed according to Delaware law. K Line's arguments, including its suggestion that

¹⁷ In any event, FASA's status as a shippers' association does not affect the validity of the FASA service contracts. Whether FASA is called a shippers' association or not, it negotiated the rates and other terms in its service contracts on behalf of its member-shippers, who actually booked cargo and paid the freight charges in the service contracts. Since the member-shippers are identified in the service contracts, and are themselves proper parties to a service contract, the rates and other terms are valid whether FASA is deemed a shippers' association or an agent acting for disclosed shippers.

the Commission intervene in FASA's corporate and business affairs, lack merit for three reasons.

First, the factual predicate for K Line's argument – that FASA's members are excluded from participation and control of FASA's affairs – is simply and plainly false. FASA's members are involved in all major decisions of the association, and actively participate in the governance of FASA. FASA's Bylaws were adopted, and have been amended, by vote of FASA's members. FASA is governed by a Board of Directors elected by its members, most recently in April 2008. FASA members are eligible to serve, and do serve, on FASA's Board of Directors. FASA's members also approved the 2004 merger of FASA and NFAA, and recently voted to elect Directors, and to amend FASA's Bylaws.¹⁸

Second, K Line's suggestion that the Commission should intervene in the internal business affairs of FASA – presumably to protect the interests of FASA's shipper members – ignores the fact that there are effective remedies under FASA's Bylaws, Delaware law, and in the marketplace should any FASA member believe that its rights have been compromised. FASA's members are free to petition FASA's Board of Directors to address any limitations or infringements of the rights of members to participate in the governance of FASA. As K Line itself points out, FASA's members also have legal remedies under Delaware law if their membership rights are not being properly served.

¹⁸ K Line's suggestion that members are denied appropriate access to FASA's books and records is also inaccurate. FASA has never refused a proper member request for access to FASA's books and records.

FASA's members also have a powerful practical remedy if they believe that FASA does not serve their interests – they can vote with their feet by resigning as members of FASA and joining another shippers association. Perhaps the most telling refutation of K Line's allegations is FASA's success. Both FASA's membership and the volume of cargo shipped under FASA service contracts have continued to grow over the years. FASA's members appear by all accounts to be quite satisfied with FASA, its ability to negotiate favorable rates with carriers on their behalf, and its other services. Indeed, FASA members are not clamoring for the Commission's intervention or protection in this proceeding or otherwise. Rather, this proceeding – which K Line incongruously seeks to characterize as a noble crusade to protect the rights of FASA's members – was neither commenced nor joined by any FASA member.

Third, K Line's demand that the Commission regulate the internal affairs of FASA would require the Commission to abandon its longstanding policy that "shippers' associations should generally be allowed to operate with a minimum of governmental intervention." *Matter of Petition for Rulemaking on Shippers' Associations*, 22 S.R.R. 1624, 1628 (1984). The Commission's decision not to regulate shippers' association is grounded not only in Congressional intent as expressed in the Shipping Act and its legislative history, but also sound policy. *See Status of Shippers' Associations Under the 1984 Act*, 22 S.R.R. 1629, 1635 (1984). The remedy K Line seeks – the Commission's legal analysis of FASA's compliance with Delaware corporate law, its assessment of the value of FASA's services to its members relative to the dues paid by members, and its determination whether the level of FASA's reserves are appropriate – would constitute a

far greater intrusion into the internal business affairs of an *unregulated* association than the Commission exercises with respect to *regulated* entities.

Moreover, if the relief K Line seeks is granted, the Commission will have opened a Pandora's box that will be difficult, if not impossible, to close. Despite K Line's attempts to depict FASA as an anomaly, FASA is in fact a typical shippers' association in most respects. Most shippers' associations are organized as nonprofit organizations, most assess per container fees, many generate a surplus, and many retain a strategic financial reserve. If the Commission should determine to intervene in the internal affairs of FASA at the behest of a carrier in this proceeding, it can reasonably be expected that similar actions will be brought by carriers or other non-members seeking to undermine, punish, or create leverage over other shippers' associations. After all, the amount of dues assessed, the level of service provided, the level and type of expenses incurred, and the amount of an appropriate financial reserve at any particular time, are business judgments that are always open to challenge or second guessing. Accordingly, the Commission should not reverse its longstanding policy of allowing shippers' associations to operate with a minimum of government intervention, but instead should find that FASA meets the requirements of a shippers' association under the Shipping Act, and dismiss the Complaint.

4. FASA's Tax Exempt Status is Completely Irrelevant to Its Status as a Shippers Association

K Line spends a considerable portion of its argument section presenting a lengthy exegesis of the law relating to tax-exempt organizations under the Internal Revenue Code ("IRC"), followed by an equally lengthy argument that FASA does not qualify for tax-exempt status under the IRC. *See* Motion at 27-35. Despite the considerable length of

this argument, however, K Line never explains how FASA's tax status – whether it is a tax exempt 501(c)(6) organization or not under the IRC – is relevant to its status as a shippers' association under the Shipping Act. K Line cites no legal precedent and advances no logical rationale for connecting FASA's tax status to its status as a shippers' association under the Shipping Act.¹⁹

The Shipping Act requires that a shippers' association operate on a nonprofit basis, but it neither requires that a shippers' association be tax-exempt nor prohibits it from being tax-exempt.²⁰ As K Line itself points out, a nonprofit organization may be a taxable corporation or it may be tax-exempt. *See* K Line Motion at 28. In either event, it is still a nonprofit organization operating on a nonprofit basis for the purposes of the Shipping Act. Accordingly, whether FASA qualifies as a tax-exempt 501(c)(6) organization or not is completely irrelevant to its status as a shippers' association under the Shipping Act.²¹

¹⁹ K Line argues that FASA does not qualify as tax-exempt, and appears to suggest that the Commission should make a determination that FASA does not qualify as a tax-exempt organization under the Internal Revenue Code. Putting aside the issue of the relevance of FASA's tax status under the Shipping Act (discussed below), K Line does not explain why the Commission is the appropriate federal agency to make such a finding.

²⁰ The materials submitted in K Line's exhibits – specifically, the IRS Form 990 for the American Import Shippers Association – make clear that other shippers' associations also enjoy tax-exempt status. *See* K Line Motion, Exhibit M.

²¹ K Line appears to argue that if FASA were not tax-exempt, then it would have to operate as a cooperative under the IRC and distribute any yearly surplus to its members to avoid paying taxes. But K Line cites no authority under the Shipping Act that a shippers' association must operate as a cooperative. Similarly, K Line cites no authority that a cooperative must distribute any yearly surplus to its members, nor any evidence that shippers' associations that do distribute some part of their surplus to members, do not also retain financial reserves. Accordingly, even if FASA were not tax-exempt, nothing

5. FASA Provides Substantial Benefits to Its Members

K Line's contention that FASA does not provide valuable services to its members is both incorrect and irrelevant to FASA's status as a shippers' association under the Shipping Act. As set forth above and in the affidavit of Sara Mayes, FASA provides a number of valuable services to its members. First and foremost, FASA negotiates service contracts, including general rates, shipper-specific rates, accessorial charges, and terms of service, on behalf of its members. A key benefit to FASA members – and an important reason for FASA's success – is FASA's policy of not requiring members to make volume commitments. Unlike most other shippers' associations, FASA assumes the entire risk of fulfilling service contract minimum volume requirements and undertakes sole responsibility for dead freight claims resulting from any failure to meet minimum volumes.²² In addition, FASA performs on behalf of its members an audit service for bills of lading under its service contracts. FASA also constantly monitors industry developments and provides members with information relating to the industry, Customs requirements, trade data, and other matters of interest to its members. Finally, FASA provides its members access to legal advice on Customs and transportation matters.²³

K Line's suggestion that FASA's membership services are insubstantial or not commensurate with the dues paid by members is belied by FASA's success in

would require it to distribute yearly surpluses or prohibit it from maintaining financial reserves.

²² As noted above, FASA maintains financial reserves, *inter alia*, to cover potential dead freight claims and to demonstrate to carriers that they can rely solely on FASA's financial responsibility regarding dead freight obligations.

²³ In any event, neither the Shipping Act nor Commission regulations impose any requirement regarding the type, nature or extent of services provided by shippers' associations.

maintaining and increasing its membership. Indeed, if FASA's services were so paltry, or its dues so unreasonable, one would expect FASA's members to leave FASA in droves. That has not occurred. To the contrary, FASA's members appear to be quite satisfied with FASA's performance. The only party complaining about FASA services in this proceeding – K Line – is *not* a FASA member.²⁴

B. The 'Dues' Clause in Service Contract No. 15115 Does Not Violate The Shipping Act or Any Commission Regulations

1. The Shipping Act Does Not Prohibit K Line From Agreeing in a Service Contract to Collect Membership Dues on Behalf of a Shippers' Association

The dues clause found in the FASA/K Line service contract No. 11515 obligates K Line to collect member dues and remit those dues to FASA. As described more fully above, the dues clause was designed to streamline the collection of member dues and to reduce an administrative burden on members. FASA's members overwhelmingly favor the inclusion of a dues clause in FASA's service contracts where possible, and prefer to work with carriers that agree to such a clause. As a result, most of FASA's carriers have agreed to a dues clause, and routinely collect and remit FASA dues on behalf of members.

²⁴ K Line's purported concerns about the welfare of FASA's members are more than a little disingenuous. K Line argues that FASA acts on behalf of its members and conducts its operations without sufficient control by FASA's members – an argument that is inconsistent with the facts. But K Line never explains who elected K Line to commence and pursue this proceeding – purportedly on behalf of FASA's members. K Line has no legitimate interest in FASA's internal affairs, nor does it have standing or authority to speak on behalf of FASA's members. To the extent that K Line truly believed that FASA is not a *bona fide* shippers' association, or that the service contract provisions are invalid, it could have easily brought its concerns to the Bureau of Enforcement, and spared itself the considerable expense of prosecuting this action. The fact that K Line has instead undertaken the substantial cost of proceeding by complaint speaks volumes about K Line's true purposes in bringing this proceeding.

K Line initially resisted agreeing to the dues clause, arguing that it should not have to shoulder an administrative burden that is the responsibility of FASA's members. However, when K Line learned that other carriers had agreed to a similar clause, and that FASA's members preferred dealing with carriers that had done so, K Line voluntarily agreed to the dues clause, and executed service contract No. 11515 with the dues clause included. K Line never raised any legal questions with FASA regarding the dues clause until it became embroiled in the dispute over back solicitation issues.

K Line now asserts that the dues clause in FASA/K Line service contract No. 11515 violates the Shipping Act. Curiously, however, K Line neglects to identify any provision of the Shipping Act or Commission regulations that the dues clause is alleged to violate. Indeed, as it does repeatedly in its argument, K Line's position appears to rest more heavily on pejorative characterization and questionable factual assertions, rather than legal analysis. Thus, K Line seeks to transform the dues clause into the presumably more sinister sounding "royalty" clause – a characterization that is not particularly helpful in explaining the basis for K Line's assertion that the dues clause violates the Shipping Act.

The closest K Line comes to describing a violation of the Shipping Act is its assertion that the dues payments it made to FASA are illegal rebates because they do not appear in the service contract or any tariff. K Line Motion at 36. While that argument might require serious consideration if the factual premise underlying it were true, the remarkable assertion that the dues payments are not identified in the service contract is plainly false. The service contract at issue clearly provides for the collection and

payment of member dues, the applicable amounts, and the conditions for payment.²⁵ Indeed, the dues clause is attached to K Line's Complaint. Accordingly, since an illegal rebate is a non-tariff or non-service contract payment, and since these payments are required by the service contract, the payments cannot be unlawful. *See, e.g., Western Overseas Trade & Development Corp. v. ANERA*, 26 S.R.R. 1066 (1993).

2. FASA Sought and Obtained Informal Advice From the Commission Staff That the Dues Clause Does Not Violate The Shipping Act

The conclusion that there is nothing in the Shipping Act or the Commission's regulations that prohibits the inclusion of a dues clause in service contracts is supported by the informal advice FASA sought and received from the Commission staff. *See* Mayes Decl. at ¶ 23. In 2006, FASA's counsel contacted the Commission staff to ask whether there were any regulatory prohibitions to the inclusion of service contract language providing that the carrier collect and pay over dues from members of a shippers' association. FASA's counsel spoke to members of the Commission staff, who indicated that there was no regulatory impediment to such a contractual provision. FASA respectfully submits that the advice it received from the Commission's staff was clearly correct.

²⁵ K Line's assertion that the dues it remitted to FASA were paid out of K Line's own funds is also both factually and legally flawed. K Line had a contractual duty to collect dues from members and remit those dues to FASA. K Line did, in fact, collect dues from FASA members. Although K Line may have had possession of the dues, they clearly were not K Line's funds. Whether the dues collected by K Line belonged to FASA's members or FASA while they were in K Line's possession, one thing is very clear – they did not belong to K Line.

C. The ‘Most Favored Shipper’ Clause in Service Contracts Nos. 14042, 14682 and 15115 Do Not Violate The Shipping Act or Any Commission Regulations

K Line challenges the MFS – No Back Solicitation clause that it negotiated and agreed to in numerous agreements and amendments over the course of many years as anticompetitive, vague, and tantamount to an agreement to refuse to deal.

As a preliminary matter, rather than address the contractual provision in a straightforward manner as it appears in the service contracts, K Line again seeks to set up a straw man that it can more easily attack. In this case, K Line redefines the MFS – No Back Solicitation clause to be a very sinister and anticompetitive sounding “Exclusive Dealing Clause” – a clause that appears nowhere in the service contracts at issue. The MFS – No Back Solicitation clause, as it actually appears in the service contracts between FASA and K Line is neither vague nor anticompetitive, nor does it violate the Shipping Act or Commission regulations.

The MFS – No Back Solicitation clause has two components. First, it provides that K Line will not back solicit FASA’s members – a requirement that K Line voluntarily accepted and which K Line acknowledges is reasonable. Indeed, K Line states that it has a company policy not to back solicit members of shippers’ associations independent of the requirements of the MFS – No Back Solicitation clause. *See* K Line Motion at 14. There is nothing in the Shipping Act that prohibits a shippers’ association and carrier from reaching an agreement that the carrier will not back-solicit the association’s members.

The second component of the MFS – No Back Solicitation clause is the “most favored shipper” element. This part of the MFS – No Back Solicitation does not

necessarily prevent K Line from entering into separate service contracts with FASA members, but it does require K Line to advise FASA that it is doing so, and to reach a mutual agreement with FASA regarding FASA's most favored shipper status. The obvious purpose of this requirement is to prevent an unscrupulous carrier from cherry-picking some FASA members by offering them lower rates to the disadvantage of the remaining members of FASA who are providing higher volumes.

Contrary to K Line's suggestion, the MFS – No Back Solicitation clause is not an exclusive dealing arrangement and it does not require carrier to refuse to deal with shippers. K Line is free to enter into separate service contracts with FASA members, but it cannot do so by back soliciting. Moreover, if K Line offers lower rates to some FASA members, it must offer lower rates to all FASA members consistent with FASA's most favored shipper status, or make some other mutually agreeable arrangement with FASA. That K Line does not wish to do so, and refused to do so when it negotiated a separate service contract with Bag Bazaar, does not make the MFS – No Back Solicitation clause anticompetitive.²⁶

D. K Line is Not Entitled to Reparations

K Line seeks to recover as reparations approximately \$25,000 in dues it collected from FASA members and paid over to FASA in 2007, pursuant to the dues clause in service contract No. 11515. K Line bases its request for reparations on its claim that the dues clause is illegal. As discussed more fully above, the dues clause is not illegal since there is nothing in the Shipping Act or Commission regulations that prohibits a carrier

²⁶ In any event, the proper venue for antitrust claims under the Sherman Act is the Department of Justice, which apparently has already rejected K Line's overtures on this issue.

from agreeing to collect and remit member dues. Accordingly, K Line is not entitled to reparations in the form of dues it collected and paid to FASA.

However, K Line's request for reparations must be rejected for another compelling reason. K Line has suffered no loss as a result of the dues clause, but is instead seeking to recover a windfall in the form of reparations. The funds K Line seeks to recover – dues payments it collected from FASA members – do not belong to K Line, and never did. The funds collected by K Line were dues payments owed by FASA's members to FASA under the FASA membership agreement. K Line never had any entitlement to those funds; it merely held them in trust on behalf of FASA and its members. If the dues clause were found to be invalid, both K Line's collection of the dues and its remittance of the dues to FASA would be affected. Thus, any funds claimed by K Line would instead belong to FASA's members, who in turn would be contractually obligated to pay over those funds back to FASA to satisfy their dues obligations.²⁷

V. CONCLUSION

For all of the foregoing reasons, Respondents FASA and Gemini respectfully contend that the Commission dismiss the Complaint, issue an order denying K Line's Motion for Dispositive ruling, issue an order determining that FASA and Gemini have not violated The Shipping Act, order sanctions against K Line, and terminate this proceeding.

²⁷ K Line undoubtedly understands that it is not entitled to keep for itself membership dues it collected from FASA members. K Line's claim for reparations appears to be driven primarily by its desire to be able to collect attorneys' fees if it can prevail on this issue.

Respectfully submitted,



Edward D. Greenberg

David K. Monroe

GALLAND KHARASCH GREENBERG

FELLMAN & SWIRSKY, PC

1054 Thirty-First Street, NW

Washington, DC 20007

Telephone: 202/342-5200

Facsimile: 202/342-5219

Email: egreenberg@gkglaw.com

dmonroe@gkglaw.com

DATE: September 12, 2008

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and by email transmission, where noted, this 12th day of September 2008:

Thomas Aldridge, VP Sales
"K" Line America, Inc.
890 Mountain Avenue – Suite 200
Murray Hill, NJ 07974

J.P. Meade
"K" Line America, Inc.
6009 Bethlehem Road
Preston, MD 21655
Email: John.Meade@us.kline.com

Eliot J. Halperin
Deana E. Rose
MANELLI DENISON & SELTER, PLLC
2000 M Street, NW – Suite 700
Washington, DC 20036
Email: ehalperin@mdslaw.com
drose@mdslaw.com

Suzanne McDowell
STEPTOE & JOHNSON, LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Edward A. Keane
MAHONEY & KEANE, LLP
11 Hanover Square – 10th Floor
New York, NY 10005

And we are providing a courtesy copy of the foregoing document by messenger delivery and email transmission to ALJ Clay Guthridge as follows:

The Honorable Clay G. Guthridge
Administrative Law Judge
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573
Email: cguthridge@fmc.gov

Linda D. Thomas

ATTACHMENT A

**FEDERAL MARITIME COMMISSION
WASHINGTON, DC**

DOCKET NO. 07-10

KAWASAKI KISEN KAISHA, LTD. ("K" LINE)

v.

**FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.;
AND GEMINI SHIPPERS ASSOCIATION, INC.**

**DECLARATION OF SARA MAYES IN SUPPORT OF
RESPONDENTS FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.'S
AND GEMINI SHIPPERS ASSOCIATION, INC.'S
REPLY TO MOTION FOR DISPOSITIVE RULING,
AND MOTION TO DISMISS AND/OR FOR DISPOSITIVE RULING**

I, SARA MAYES, do hereby declare and state as follows:

1. I am President of Fashion Accessories Shippers' Association ("FASA") and I am also a member of the Board of Directors of FASA.

2. I have been President of FASA since 1989. I submit this affidavit in support of FASA's Motion to Dismiss and/or for Dispositive Ruling, and in opposition to K Line's Motion for Dispositive Ruling in this proceeding.

FASA's Corporate Background

3. FASA is the corporate successor to the National Fashion Accessories Association ("NFAA"), a trade association that served manufacturers in the fashion accessory industry for more than 100 years. FASA was incorporated in November 1986 as a non-stock, not-for-profit corporation under Delaware law for the purpose of operating as a shippers' association under the Shipping Act, primarily for members of NFAA. A true and correct copy of FASA's Certificate of Incorporation is attached as Exhibit A. In 1990, FASA's Certificate of Incorporation was amended to expand the purposes of the organization to perform a broader variety of functions as a trade

association and shippers' association. A true and correct copy of FASA's amended Certificate of Incorporation is attached as Exhibit B. FASA expanded its services when manufacturing of fashion accessories moved offshore, and the interests of NFAA and FASA members transitioned from manufacturing to import activities.

4. In 2004, FASA merged with NFAA. After the merger, FASA continued to operate pursuant to its amended Certificate of Incorporation as both a trade association and a shippers' association for its members. FASA has no shareholders; it is operated by and for the benefit of its members pursuant to its Bylaws.

5. FASA's Bylaws were originally adopted on July 14, 1987. In conjunction with its merger with NFAA, FASA's members approved amended and restated Bylaws on May 24, 2004, which approved the use of the trade names Gemini Shippers Group and Gemini Shippers Association. On April 16, 2008, FASA's members approved additional amendments to the Bylaws. A true and correct copy of FASA's current Bylaws, as restated and amended, is attached as Exhibit C.

6. FASA's current Bylaws provide for the election of a five person Board of Directors, four of whom are elected by vote of the members, with the fifth Director elected by the other four Directors. Exhibit C (Article VII, Section 1). Each FASA member has one vote. Exhibit C (Article III, Section 4). Principals of current members of FASA, past presidents of FASA or NFAA, and current active directors or officers of FASA or NFAA are eligible to serve on the FASA Board of Directors. Exhibit C (Article VII, Section 1). FASA's Board of Directors was elected in 2004 in connection with the merger with NFAA, and again in April 2008. Directors currently serve five-year terms.

Exhibit C (Article VII, Section 1). The officers of FASA are elected by the Board of Directors from among its members. Exhibit C (Article IX, Section 1).

7. FASA's Bylaws may be amended by a two-thirds vote of the members upon a recommendation by the Board of Directors. Exhibit C (Article XI). FASA's Bylaws provide for an annual meeting. Exhibit C (Article IV, Section 1). Approximately 60 members attended the last annual meeting, held in April 2008.

FASA's Membership Agreement

8. All FASA members enter into membership and confidentiality agreements with FASA. True and correct copies of the FASA membership confidentiality agreements are attached as Exhibit D. Members agree to pay dues on a per container basis, unless arrangements have been made for the carrier to collect and pay the dues on the members' behalf. Unlike most shippers' associations, FASA members are not required to agree to a volume commitment and are not subject to a dead freight obligation. Members are not restricted from entering into independent service contracts with carriers, and many of FASA's members book cargo under other service contracts in addition to FASA's service contracts.

FASA's Use of the Trade Name "Gemini"

9. In 2004, following the merger of FASA with NFAA, FASA began using the trade names Gemini Shippers Group and Gemini Shippers Association to emphasize FASA's dual role as trade association and shippers' association. FASA informed its carriers, including K Line, that Gemini was a trade name for FASA and that FASA was the real party in interest to service contracts entered in the name of Gemini. Gemini Shippers' Association, Inc. – which has been named as a Respondent in this proceeding –

is a non-operating corporation affiliated with FASA, but has no role regarding the service contracts at issue.

Negotiation of Service Contracts on Behalf of Members

10. FASA negotiates up to 20 global service contracts per year on behalf of its members. A true and correct copy of a FASA-member circular entitled, "Why Join Gemini?" is attached as Exhibit E. The expiration dates of FASA's service contracts are usually staggered to optimize the availability and flexibility of rates to FASA's members. FASA negotiates both general rates applicable to all FASA members and shipper specific ("bullet") rates on behalf of individual members. In addition, FASA negotiates accessorial charges, surcharges, terms of service and other contractual terms for each service contract. FASA's broad and deep experience in negotiating with carriers, its ability to make substantial volume commitments, and its extensive knowledge of the marketplace for ocean transportation enable FASA to obtain favorable rates and other concessions for its members.

11. FASA typically undertakes the negotiation of all general and bullet rates and terms of service on behalf of its shippers, but FASA does allow some members to participate in the negotiation process and/or to deal directly with FASA carriers, generally with the assistance of FASA. FASA reviews all rates and terms of service negotiated by members, and renegotiates rates that are not competitive. FASA's service contracts are constantly being amended to add new rates, routes and terms of service to meet the needs of FASA's members.

12. FASA's service contracts include a minimum quantity commitment that FASA must meet to receive the preferred rates in its service contracts. FASA's service

contracts also include dead freight provisions obligating FASA to pay a per container penalty for any shortfall in the volume shipped under the service contract. FASA, and not its members, is responsible for dead freight claims. Dead freight penalties are usually \$250 per FEU. FASA typically commits to more than 50,000 TEU per year. Consequently, FASA assumes substantial dead freight obligations, potentially totaling millions of dollars.

Other Membership Services

13. FASA provides a variety of services to its members in addition to the negotiation of service contract rates. For example, FASA audits the accuracy of the rates for bills of lading under each of its service contracts. FASA also monitors industry developments and provides members with information relating to the industry, Customs requirements, trade data, and other matters of interest to its members. A true and correct copy of a FASA newsletter is attached as Exhibit F. FASA's password-protected website and database offers customized service for each member. FASA provides detailed tracking and tracing, by container number or bill of lading number, for freight shipped under FASA's service contracts. FASA also provides its members access to legal advice on Customs and transportation matters.

Collection of Dues

14. FASA currently assesses membership dues on a per container basis for cargo shipped under FASA's service contracts, although FASA or its predecessors have previously assessed dues based upon members' gross revenue. Members pay their dues directly to FASA on a monthly basis based on the actual volume shipped under FASA's service contracts. Several years ago, FASA began negotiating arrangements with carriers

under which the carriers agreed to collect dues from FASA's members and pay them to FASA. FASA's members overwhelmingly prefer these arrangements because it reduces the members' administrative burden. As a result, FASA has negotiated such dues collection clauses with the majority of its carriers. For service contracts without such a dues collection clause, FASA members continue to pay their dues directly to FASA. Unlike many shippers' associations, FASA does not assess initiation or yearly membership dues.

FASA's Financial Reserves

15. FASA maintains a financial reserve, currently totaling about \$7.7 million. Approximately \$2 million constitutes financial reserves acquired in connection with the merger with NFAA in 2004; the remaining amount constitutes surpluses and accumulated interest over FASA's 20 years of operation. FASA maintains a financial reserve for a number of strategic and operational purposes, including as a reserve against dead freight claims. On an annual basis, FASA assumes potential dead freight liabilities in excess of \$10 million. FASA insists that carriers agree to hold only FASA, and not its members, responsible for dead freight obligations. As a result, FASA must maintain financial reserves sufficient to assure carriers that FASA is financially responsible and capable of meeting its potential dead freight obligations. FASA's reserve is also maintained for future investments in infrastructure, additional member services, and possible strategic acquisitions. In addition, FASA's reserve fund serves as a buffer against shortfalls in revenue due to adverse economic conditions or unanticipated increases in expenses, including costly litigation such as this proceeding.

FASA's Tax Status

16. FASA is a tax-exempt nonprofit organization pursuant to Section 501(c)(6) of the Internal Revenue Code and a determination of the Internal Revenue Service ("IRS") in September 1994. FASA files IRS Form 990, Return of Organization Exempt From Income Tax, on an annual basis. FASA's most recent Form 990 was filed for calendar year 2007. FASA's Form 990 filings are publicly-available from the IRS.

Member Requests for Information

17. FASA members are entitled to review the books and records of FASA, subject to certain limitations under Delaware law. Such requests must be in writing, must state a proper purpose for the review of financial data, and must confirm that the confidentiality of the information will be maintained. All member requests for review of financial records are referred to FASA's counsel to ensure compliance with these requirements. FASA has never refused a proper request from a member for review of books and records.

Negotiation of the FASA/K Line Service Contracts

18. FASA negotiated and entered into annual service contracts with K Line from approximately 1999 until 2007. The last three service contracts with K Line covered the periods 2004-2005 (No. 14042), 2005-2006 (No. 14683) and 2006-2007 (No. 15115). FASA negotiated the terms of its service contracts with K Line primarily through T.Y. Cheng, Tom Aldridge, and Pamela Donovan, all employed by "K" Line America, Inc., the U.S. agent for K Line. K Line provided the format and "boilerplate" language for FASA's service contracts with K Line. All negotiations were based on K

Line's form service contract. FASA typically negotiated with K Line about particular contract terms as well as rates, surcharges, and terms of service.

19. The negotiation of service contracts with K Line usually took place over a period of several weeks, and involved numerous communications between FASA, K Line and FASA's members by telephone, email exchanges and face-to-face meetings. K Line prepared the initial draft of each of the service contracts, and revised drafts were circulated between FASA and K Line as changes were made. The format of service contracts, including the small-size typeface used, were dictated by K Line. When negotiations of a service contract with K Line were finalized, FASA signed the agreement and forwarded it to K line for signature and filing with the Federal Maritime Commission. FASA's service contracts with K Line were amended on numerous occasions during the terms of the contracts to revise or add rates or to address other matters.

The MFS – No Back Soliciting Clause in the FASA/K Line Service Contracts

20. During the negotiations for the first service contract between FASA and K Line, FASA requested a "Most Favored Shipper" clause to ensure that FASA and its members would receive the most favorable rates available from K line consistent with FASA's volume commitment, and to discourage K Line from back soliciting some FASA members with lower rates to the detriment of FASA's other members. K Line rejected FASA's proposed MFS Clause, claiming that it would be difficult for FASA to enforce an MFS obligation since any independent K Line service contracts with FASA members would be confidential. Ultimately, however, K Line did agree to a revised MFS – No Back Soliciting clause, that provided:

Contract-to-contract MFS; No Back Soliciting During the term of this Service Contract, the Carrier shall not enter into an individual service contract or time volume arrangement with any Member of the Association or any former Member, except upon notice to the Association and subject to mutual agreement between carrier and the Association.

True and correct copies of email correspondence relating to the negotiation of the MFS – No Back Soliciting clause are attached as Exhibit G.

21. The language of the MFS – No Back Soliciting clause was negotiated with T.Y. Cheng of K Line. This MFS – No Back Soliciting clause was included in every subsequent service contract and every amendment between FASA and K Line, including Service Contracts Nos. 14042, 14682, and 11515 and the amendments to those service contracts. K Line executed and filed contracts and amendments containing the MFS – No Back Soliciting clause many times.

The Dues Collection Clause in FASA/K Line Service Contract No. 11515

22. In the last service contract entered into by FASA and K Line, No. 11515, K Line agreed for the first time to a dues collection clause that obligated K Line to collect member dues and remit them to FASA. The dues collection clause provides, in pertinent part:

GEMINI ASSOCIATION DUES

Carrier agrees to collect from the Member Shipper and forward to the Contract Party Association the following Gemini Association Dues payable on a monthly basis for cargo transported by Carrier under this Contract for which the freight and related charges have been paid in full by Member Shipper.

23. In 2006, FASA's general outside counsel contacted the Commission staff to confirm that the dues collection clause was acceptable under The Shipping Act. FASA was informed by two members of the Commission staff – Bryant Van Brackle and Mamie Black – that the dues clause did not raise any regulatory issues.

24. The dues collection clause was included in Service Contract No. 11515 and in every one of its amendments. K Line routinely collected dues from FASA members and paid those dues to FASA without reservation until a dispute arose between K Line and FASA about arbitration. K Line then attempted to withhold the dues K Line had already collected from FASA members. Prior to the dispute, K Line never raised any questions about the legality of the dues clause. During the dispute over K Line's withholding of members' dues, K Line never offered to return the dues it had collected to FASA's members. After FASA demanded arbitration on the issue, however, K Line did pay the disputed dues to FASA.

Booking Cargo and Freight Payment Under the FASA/K Line Service Contract

25. FASA does not book cargo or make freight payments on behalf of its members. Members handle all the arrangements necessary to ship cargo under service contracts negotiated by FASA.

26. FASA has grown in the last five years, both in the size of its membership and the volume of cargo shipped under FASA service contracts.

The Dispute Over the MFS – No Back Soliciting Clause

27. In 2004, K Line entered into a separate service contract with Ann Taylor, then a current FASA member, relating to cargo already covered by FASA's service contract with K Line. FASA objected to K Line's actions based upon the MFS – No Back Soliciting clause and the fact that Ann Taylor was still a current member of FASA. Although the dispute was amicably resolved, FASA specifically discussed the language and applicability of the MFS – No Back Soliciting clause in the service contract with Tom Aldridge of K Line. Following the dispute, and the express discussion of the MFS –

No Back Soliciting clause, K Line entered into two additional service contracts with FASA as well as numerous amendments, each containing the same MFS – No Back Soliciting clause discussed during the dispute over Ann Taylor.

28. In 2006, K Line again entered into a separate service contract with a FASA member for cargo covered by the FASA service contract. This time the member was Bag Bazaar. Because of the prior dispute, K Line was well aware of the MFS – No Back Soliciting clause. Nonetheless, K Line entered into a separate service contract with Bag Bazaar – for volume covered by FASA’s service contract. FASA both questioned the apparent back solicitation of a FASA member and asked that K Line reduce the rates for FASA’s other members to match the lower rates given to Bag Bazaar. In doing so, FASA pointed out that FASA had committed to a substantially higher volume than Bag Bazaar could pledge, and that FASA’s members were accordingly entitled to lower rates under the MFS – No Back Soliciting clause. K Line refused to adjust the rates of FASA’s other members. K Line also entered into a third separate service contract relating to cargo covered by the FASA service contract – this time with Samsonite.

29. Back solicitation by a carrier is a substantial issue for FASA and its members because carriers like K Line received lists identifying FASA’s members. If a carrier uses its access to FASA’s members to poach some members by offering special deals or otherwise, then the remaining members are placed at an unfair disadvantage, the ability of FASA to leverage the combined volume of its members is compromised, and FASA’s risk of deadfreight claims due to the loss of the poached volume is increased.

K Line's Legal Actions Against FASA

30. As a result of the third incident of apparent back solicitation by K Line, FASA demanded arbitration under the arbitration clause in the FASA/K Line service contracts. However, rather than submitting the dispute to arbitration as required by the relevant service contracts, K Line filed a complaint against FASA with the Department of Justice, went to federal court in New York in an attempt to enjoin the arbitration, and when the court ordered that the arbitration proceed, sought a stay from the arbitrator. K Line filed its Complaint in this proceeding 11 months after FASA commenced the arbitration.

I DO HEREBY DECLARE under the penalties of perjury that the foregoing is true and correct to the best of my personal knowledge and belief.

9/10/08
DATE

Sara Mayes
SARA MAYES

EXHIBIT A

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTIETH DAY OF JULY, A.D. 2008.

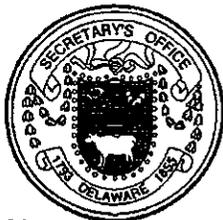
AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC." WAS INCORPORATED ON THE THIRD DAY OF NOVEMBER, A.D. 1986.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE BEEN PAID TO DATE.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL REPORTS HAVE BEEN FILED TO DATE.

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You may verify this certificate online
at corp.delaware.gov/authver.shtml

Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 6760557

DATE: 07-30-08

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[Handwritten Signature]
NOTARIAL PUBLIC

CERTIFICATE OF INCORPORATION

OF

FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.

The undersigned, a natural person, for the purpose of organizing a corporation not for profit and without authority to issue capital stock under the provisions and subject to the requirements of the laws of the State of Delaware (particularly Chapter 1, Title 8 of the Delaware Code and the acts amendatory thereof and supplemental thereto, and known, identified and referred to as the "General Corporation Law of the State of Delaware") hereby certifies that:

FIRST: The name of the corporation (hereinafter called the "corporation") is

FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.

SECOND: The address, including street, number, city, and county, of the registered office of the corporation in the State of Delaware is 229 South State Street, City of Dover, County of Kent, Delaware 19901; and the name of the registered agent of the corporation in the State of Delaware at such address is The Prentice-Hall Corporation System, Inc.

THIRD: The nature of the purposes to be conducted by the corporation is as follows:

To operate as a shippers association within the meaning of 46 USC 1702 (24) consolidating or distributing freight on a non-profit basis for shipper members so as to secure for shipments, carload, truckload or other volume rates or to enter into service contracts with respect thereto.

The corporation shall have the authority to exercise all of the powers conferred upon corporations organized not for profit and without authority to issue capital stock under the provisions of the General Corporation Law of the State of Delaware, provided, that the exercise of any such powers shall be in furtherance of any one or more of the aforesaid purposes of the corporation.

FOURTH: The corporation is not to have authority to issue capital stock.

FIFTH: The name and the mailing address of the incorporator are as follows:

<u>NAME</u>	<u>MAILING ADDRESS</u>
J. A. Kent	229 South State Street, Dover, Delaware 19901

SIXTH: The duration of the corporation is to be perpetual.

SEVENTH: The personal liability of the directors of the corporation is hereby eliminated to the fullest extent permitted by paragraph (7) of subsection (b) of Section 102 of the General Corporation Law of the State of Delaware, as the same may be amended and supplemented.

EIGHTH: For the management of the business and for the conduct of the affairs of the corporation, and for the creation, definition, limitation and regulation of the powers of the corporation and of its governing body and the member or members thereof, as the case may be, it is hereby provided:

1. After the original or other By-Laws of the corporation have been adopted, amended, or repealed, as the case may be, by the incorporator, the power to adopt, amend, or repeal the By-Laws of the corporation may be exercised by the Board of Directors of the corporation.

2. The activities and affairs of the corporation shall be managed by or under the directors of its governing body, which in this certificate of incorporation, is referred to as a Board of Directors, although said Board may consist of only one member, and although the member or members of said governing body may be designated as a trustee or trustees, a manager or managers, a governor or governors, or otherwise under any provisions of the By-Laws.

3. The number of directors constituting the initial whole Board of Directors shall be the number fixed in the original or initial By-Laws. Thereafter, the number of directors constituting the whole Board shall be fixed from time to time in the manner prescribed in the By-Laws. The phrase "whole Board" shall be deemed to mean the total number of directors which the corporation would have if there were no vacancy or vacancies.

4. A director shall have such qualifications as may be prescribed in the By-Laws. The initial Board of Directors shall be elected by the incorporator. Thereafter, each successive Board of Directors shall be elected by the members of the corporation; provided, that, in the interim between annual or special elections by such members, the directors in office, though less than a quorum, may fill any newly created directorship and any vacancy, including a vacancy which results from the removal of any director or directors by such members, but which is unfilled by such members.

5. Except as may otherwise be provided under the provisions of the General Corporation Law of the State of Delaware, any or all of the directors may be removed for or without cause by action of a majority of the members.

6. Any person who is or was a director, officer, agent, or employee of the corporation or is or was serving, at the request of the corporation, as a director, officer, agent, or employee of another corporation, trust, or enterprise shall be entitled to be indemnified by the corporation upon the same terms, under the same conditions, and to the same extent as though he were a present or past director, officer, agent, or employee of a corporation of any type or kind organized under the General Corporation Law of the State of Delaware; provided that his conduct or action was in furtherance of, or in connection with, the exempt purposes of the corporation.

7. The corporation shall have one class of members. Each member shall be entitled to vote in the election of directors of the corporation, to vote for the adoption, amendment, or repeal of the By-Laws pursuant to the provisions of this certificate of incorporation and the provisions of the General Corporation Law of the State of Delaware, and to vote in such other proceedings as the General Corporation Law of the State of Delaware shall confer voting power on members entitled to vote in the election of directors of the corporation. A member shall be entitled to one vote in all proceedings in which a member is entitled as

of right to vote under any of the provisions of the General Corporation Law of the State of Delaware and in all proceedings in which a member is entitled to vote under any provisions of this certificate of incorporation and of the By-Laws. Except as may be otherwise provided by the General Corporation Law of the State of Delaware, a majority of the members, or the sole member if there be only one, shall constitute a quorum at any meeting of members, and, except in the election of directors, a majority of the votes cast, a quorum being present, shall be the act of said member or members. In the election of directors, at which voting need not be by ballot, a plurality of the votes cast shall elect. The By-Laws shall provide for the conditions of membership in the corporation.

8. Meetings of the members shall be held at such place within or without the State of Delaware as may be designated by or in the manner provided in the By-laws. Except as the General Corporation Law of the State of Delaware or as this certificate of incorporation may otherwise provide, the By-Laws of the corporation shall or may provide, as the case may be, for the record date, time, call, lapse or period of time after notice, actual or constructive notice of meetings of said members of or actual or constructive waiver of notice thereof, the authority to vote, consent, or dissent in person or by proxy representation and the duration of any proxy, and the conduct of meetings, including provisions for the adjournment thereof.

NINTH: From time to time, and in furtherance of the purposes for which the corporation is being organized, any of the provisions of this certificate of incorporation may be amended, altered or repealed, and other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted in the manner and at the time prescribed by said laws, and all rights at any time conferred upon the members of the corporation by this certificate of incorporation are granted subject to the provisions of this Article NINTH.

Signed on September 26, 1986.



J. A. Kent
Incorporator

EXHIBIT B

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED ARE TRUE AND CORRECT COPIES OF ALL DOCUMENTS ON FILE OF "FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC." AS RECEIVED AND FILED IN THIS OFFICE.

THE FOLLOWING DOCUMENTS HAVE BEEN CERTIFIED:

CERTIFICATE OF INCORPORATION, FILED THE THIRD DAY OF NOVEMBER, A.D. 1986, AT 9 O'CLOCK A.M.

CERTIFICATE OF AMENDMENT, FILED THE TWENTY-THIRD DAY OF MAY, A.D. 1990, AT 9 O'CLOCK A.M.

CERTIFICATE OF MERGER, FILED THE TWENTY-NINTH DAY OF APRIL, A.D. 2004, AT 12:57 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CERTIFICATES ARE THE ONLY CERTIFICATES ON RECORD OF THE AFORESAID CORPORATION, "FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.".

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You may verify this certificate online
at corp.delaware.gov/authver.shtml



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 6760558

DATE: 07-30-08

750143054
CERTIFICATE OF AMENDMENT
OF
CERTIFICATE OF INCORPORATION
OF
FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.

It is hereby certified that:

FIRST: The name of the corporation (hereinafter called the "corporation") is

FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.

SECOND: The certification of incorporation of the corporation was filed on November 3, 1986.

THIRD: Article THIRD of the certificate of incorporation is hereby amended to read as follows:

"THIRD: The nature of the purposes to be conducted by the corporation is as follows:

To advance and promote the general welfare of shippers of fashion accessories and the members of the corporation.

To foster and promote a high standard of business ethics among shippers of fashion accessories.

To provide a forum for the exchange of ideas and useful, technical information concerning problems, improvements, and developments in the transportation of fashion accessories.

To collect, distribute, and make available information and economic data pertaining to the shipment and transportation of fashion accessories.

To promote activities relating to technical research and development in the transportation of fashion accessories.

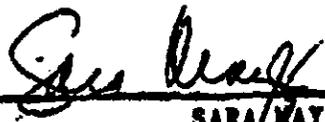
To assist legislative and governmental bodies and agencies and to present the views of its members to such entities concerning matters affecting the welfare and interests of fashion accessories.

To act as a shippers' association as defined in Section 3(24) of the Shipping Act of 1984 (46 USC, Section 1702(24)) on a not-for-profit basis and to engage in other activities on a not-for-profit basis as a shippers' association with respect to the international and domestic transportation of fashion accessories.

The corporation shall have the authority to exercise all of the powers conferred upon corporations organized not-for-profit and without authority to issue capital stock under the provisions of the general corporation law of the State of Delaware, provided that the exercise of any such powers shall be in furtherance of any one or some of the aforesaid purposes of the corporation, and further provided that no part of the assets or earnings of the corporation shall inure to the benefit of its members, directors, or officers, except that the corporations shall be authorized and empowered to pay reasonable compensation for services rendered."

FOURTH: The foregoing amendment of the certificate of incorporation of the corporation was authorized by the unanimous vote of all of the members of the corporation entitled to vote on the said amendment of the certificate of incorporation

IN WITNESS WHEREOF, the undersigned have subscribed this document on May 10, 1990, and do hereby affirm under penalties of perjury, that the statements contained herein have been examined by us and are true and correct.



President **SARA HAYES**



Secretary **ALVIN STICKER**

EXHIBIT C

**First Adopted July 14, 1987
As Amended and Restated May 24, 2004
And Amended April 16, 2008**

**BY-LAWS
OF
FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.**

**ARTICLE I
ASSOCIATION**

SECTION 1. A. The Association is a not-for-profit corporation organized and existing under Delaware Non-Stock Corporation Law.

B. The Association is a shippers association under Section 1702(24) of the Shipping Act of 1984, 46 U.S.C. §1702 (24).

SECTION 2. The name of this Association shall be FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC. (herein "Association"). The Association (or any of its councils) may also operate under the assumed names of Gemini Shippers Group and/or Gemini Shippers Association.

SECTION 3. The Association shall have a seal.

SECTION 4. The Association may, by a three-fifths (3/5) vote of the Directors present at a special meeting called for such purpose on ten (10) days notice change its name.

**ARTICLE II
PURPOSES**

SECTION 1. The following are the purposes for which this Association has been organized.

A. To operate as a shipper(s) association on a not-for-profit basis within the meaning of the Shipping Act of 1984, 46 USC Sec. 1702(24).

B. To encourage high standards of ethics in all dealings among its members and between its members and their carriers.

C. To collect and make available statistics and other information and economic data relating to the transportation, importation, and distribution of members' products.

D. To disseminate among its members information and techniques pertaining to the transportation, importation, and distribution of members' products.

E. To promote activities relating to the transportation, importation, and distribution of members' products, supplies and materials.

F. To publicize the Association, its activities and its services generally.

G. To represent the views and interests of its members before legislative and governmental bodies and agencies on matters pertaining to the transportation, importation, and distribution of Industry Products and matters pertaining to shippers associations in general.

H. To advance, promote and protect the best interests of members of this Association.

I. To exercise all of the powers conferred upon corporations organized not-for-profit and without authority to issue capital stock under the provisions of the general corporation law of the State of Delaware, provided that the exercise of any such powers shall be in furtherance of any one or some of the aforesaid purposes of the corporation, and further provided that no part of the assets or earnings of the corporation shall inure to the benefit of its members, directors, or officers, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered.

ARTICLE III

MEMBERSHIP

SECTION 1. The term “Industry Products” includes but shall not be limited to fashion accessories, ladies handbags, belts, scarves, personal leather goods, jewelry and costume jewelry, sunglasses, gloves, luggage and such other articles or commodities of any kind as determined to be included from time to time by the Board of Directors of the Association.

SECTION 2. Duration of Membership.

Membership shall be on an annual basis and shall automatically renew from year to year unless the member gives 30 days notice of intention to terminate membership in accordance with rules established by the Board of Directors or unless membership is otherwise terminated in accordance with these By-Laws.

SECTION 3. Membership Eligibility.

The entities eligible for regular membership are: Any person, firm, partnership or corporation (1) engaged in the manufacture, importation, sale or distribution of Industry Products (herein “Industry”) and which (2) is incorporated or organized under the laws of any state and which (3) maintains offices and physical facilities in the United States for the manufacture, storage, or distribution of Industry Products or components thereof. With respect to an Affiliated trade and/or shippers’ association, each member of such affiliate may become an Affiliate member of this Association upon such terms and conditions as determined by the Board of Directors. Affiliate members or any group of them shall have no vote in any matter to come before the membership of the Association unless otherwise provided in these By-Laws or by resolution of the Board of Directors. An applicant for membership which is controlled or owned in whole or part by an entity that is not incorporated or organized under the laws of any state shall be ineligible for

membership if the controlling entity or owner is engaged in selling Industry Products to regular members.

SECTION 4. At meetings of the membership, each member shall have one vote.

SECTION 5. Each firm, partnership, company and corporate member shall appoint and certify to the Secretary of the Association a representative who shall represent, vote and act for the member in all affairs of the Association.

SECTION 6. Any person, firm, partnership, company or corporation eligible for membership under these By-Laws, may make written application to become a member, and shall become a member upon receiving the approval of the Board of Directors or the Executive Committee. The Board of Directors or the Executive Committee shall be the sole judge of eligibility for membership in the Association. As a condition of membership, the Board of Directors may require the applicant to execute such documents, membership agreement, application, service contract volume commitment and service contract participation agreement as it deems appropriate.

SECTION 7. Membership in this Association may terminate by death, dissolution, withdrawal as herein provided, or otherwise pursuant to these By-Laws. The right of a member to vote, and all other rights, privileges and interests of a member in or to the Association or its property (including but not limited to the right to participate in, and ship under, any Association service contract), shall cease on the termination or suspension of membership.

SECTION 8. Membership may be terminated for, among other reasons, non-payment of dues, fees and assignments according to such rules as the Board of Directors shall adopt. Any termination or suspension of membership or of services to the member for non-payment shall not affect the member's obligation to pay such monies. Any purported resignation or withdrawal shall not relieve the member from any of its debts and obligations to the Association including, but

not limited to, payment of all fees and charges arising out of or relating to any service contract negotiated by the Association. Suspension or termination of membership shall suspend or terminate a member's rights to participate in and ship under any Association service contract, however, the member shall continue to be liable for all obligations of any kind, in connection with such service contract, including but not limited to the member's full minimum volume commitment and dead freight liability based thereon and all fees to the Association based thereon.

SECTION 9. A. The Board of Directors or the Executive Committee, pending a meeting of the Board, may suspend or expel a member, with or without cause, by vote of three-fifths (3/5) of the Directors or Members of said Committee. The Board of Directors may afford the member an opportunity to appear in person or by his representative and present any defense to such action.

 B. Any suspended member shall become a member in full standing automatically at the end of its period of suspension. Any expelled member shall have the right to reapply for membership, subject to such terms and conditions as the Board may impose in the best interests of the Association.

ARTICLE IV

MEETINGS OF THE MEMBERSHIP

SECTION 1. The annual membership meeting of this Association will be held on the first Thursday of June, each year or at such other time during the year as the Board may designate. The Secretary shall have caused to be mailed, by ordinary mail, to every member in good standing, at his address as it appears in the records of the Association, a notice specifying the time and place of such annual meeting.

SECTION 2. The presence or written proxy of one-third of the members shall

constitute a quorum necessary to conduct the business and affairs of the Association.

SECTION 3. Special meetings of the Association may be called by the President when he deems it in the best interest of the Association. Unless telephonic notice is given, notice of such meeting shall be mailed to all members at least seven (7) days before the scheduled date set for such special meeting. Such notice may specify the purpose of the meeting and the business to be transacted at such meeting.

SECTION 4. At the request of two-thirds of the members of the Board of Directors or three-fifths (3/5) of the members of the Association, the President shall cause a special meeting to be called, but such request must be made in writing at least ten (10) days before the requested date. No business other than that which is specified in the notice may be transacted at such meeting.

ARTICLE V

ORDER OF BUSINESS

SECTION 1. Unless the body shall determine otherwise, the order of business for meetings of the members and the Board of Directors shall be as follows:

- (1) Roll call.
- (2) Approval of the minutes of the preceding meeting.
- (3) Reports of Committees.
- (4) Reports of Officers.
- (5) Old and Unfinished Business.
- (6) New Business.
- (7) Good and Welfare.
- (8) Adjournment.

SECTION 2. Meetings of the membership and the Board of Directors shall be conducted in accordance with Roberts' Rules of Order unless the body shall otherwise determine.

ARTICLE VI

VOTING

SECTION 1. At all meetings, except those called for the election of Directors by the

members, all votes shall be by voice or hand vote, at the discretion of the President. At meetings called for the election of Directors, secret ballots may be provided.

SECTION 2. At any regular or special meeting, if a majority present so requires any question may be voted upon by secret ballot.

SECTION 3. Wherever a vote by ballot is required, the Chairman of such meeting, prior to the commencement of balloting, shall appoint at least one (1) person who shall act as "Inspector of Election" and who shall, at the conclusion of such balloting, certify in writing to the Chairman the results. The certified copy shall be physically affixed to the minutes of that meeting and shall be included in the minute book of the Association.

SECTION 4. The Board of Directors may prescribe mail or facsimile balloting for any issue and for the election of Officers and Directors.

SECTION 5. Except as otherwise provided in these By-laws vote of the membership shall be determined by a majority of the votes cast by the members present or voting by mail or proxy who are entitled to vote thereon.

ARTICLE VII

BOARD OF DIRECTORS: COMPOSITION, POWERS, NOMINATIONS and ELECTIONS

SECTION 1. The administration of the Association shall be vested in a Board of Directors consisting of five (5) Directors, four of whom are to be selected from the current Industry active past presidents of the National Fashion Accessories Association or the Association or current principals of members in good standing of the Association, who shall elect a fifth Director from among the current Industry active former directors or officers of National Fashion Accessories Association or the Association or current principals of members in good standing. The Board as so constituted shall elect therefrom the officers. All Directors shall serve for a five year term or until

their successors are chosen and without limitation on consecutive terms of office.

SECTION 2. The Board of Directors shall have the power to adopt rules not inconsistent with the provisions of these By-Laws, to delegate authority and power to appoint committees on any specific subject, to audit bills and to adopt the method for disbursement of the funds of the Association; to print and circulate documents and publish articles; to carry on correspondence and to communicate with other organizations interested in the Industry; to maintain such offices and to engage such personnel as they may deem advisable and to delegate authority and power to such personnel to perform any act that the Board of Directors elects so to delegate, to retain or contract for the services of an Executive Director to carry out and manage the day to day affairs of the Association and to negotiate and administer its service contracts, and to devise and to carry into execution such other measures as they may deem proper and expedient to promote the objects of the Association and to best protect the interests and welfare of the members.

SECTION 3. Quorum.

Three (3) Directors shall constitute a quorum for the transaction of business.

SECTION 4. Vacancy.

Any vacancy that may occur on the Board for any reason whatever, may be filled by the Board of Directors for the unexpired term.

SECTION 5. Except as otherwise provided in these By-Laws the vote of a majority of the Directors present at the time of the vote, if a quorum is present at such time, shall be the act of the Board. Any action required or permitted to be taken by the Board or any committee thereof may be taken without a meeting if all members of the Board or committee consent in writing to the adoption of a resolution authorizing such action. Such resolution and consents thereto shall be filed

with minutes of the proceedings of the Board or committee.

SECTION 6. Members of the Board or any committee thereof may participate in a meeting of such Board or committee by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at a meeting.

SECTION 7. There shall be no more than one (1) Director from any member firm of this Association. There shall be a Nominating Committee whose duty it shall be to nominate candidates for the Board of Directors and to certify that each nominee has met these requirements for election to the Board of Directors.

SECTION 8. During the last calendar quarter prior to each triennial elections for Directors, a Nominating Committee shall be designated as hereinafter provided for the nomination of Directors.

SECTION 9. Nominating Committee.

The Nominating Committee shall consist of three (3) members. Two (2) members of the Nominating Committee shall be elected by the Board of Directors and one (1) members shall be appointed by the President. Prior to each triennial election, the Nominating Committee shall nominate candidates for the Board of Directors whose eligibility for office shall be certified to the Board. The Nominating Committee shall so select candidates for the Board of Directors that the Board will be generally representative of the members in terms of the Industry groups, products and interests within the Association.

SECTION 10. Elections to the Board of Directors shall be conducted every five years and may be conducted in person, by mail, fax or proxy. Each member may cast one vote per candidate and for not more than four (4) candidates for the Board of Directors. The four (4)

candidates receiving the greatest number of votes cast shall be declared elected.

ARTICLE VIII

DUES AND BUDGET

SECTION 1. All dues, fees, and assessments for members of the Association, including but not limited to fees imposed in connection with shipments under service contracts negotiated by the Association, shall be determined by the Board of Directors.

SECTION 2. The Executive Committee will recommend to the Board of Directors an annual budget for the Association. The budget shall be adopted by majority vote of the Board of Directors.

SECTION 3. The Board of Directors shall fix and determine the method of assessment of dues for all members. The Board from time to time in its sole discretion may also assess the membership or groups of members for special projects or activities.

ARTICLE IX

NOMINATION AND ELECTION OF OFFICERS

SECTION 1. The officers of the Association shall be elected by the Board of Directors from among its Directors and shall be as follows: President, Vice President, Secretary and Treasurer. Following the election of Directors, officers shall be elected from among the Directors.

SECTION 2. Each Officer shall serve for a three- year term and shall continue in office until their successors are duly elected and without limitation on consecutive terms of office.

SECTION 3. The President's duties are as follows:

- (1) He shall preside at all membership meetings.
- (2) He shall, by virtue of his office, be Chairman of the Board of Directors.

(3) He shall present at each annual meeting of the Association an annual report of the work of the Association.

(4) He shall appoint all Committees with the approval of the Board of Directors.

(5) He shall see that all books, reports and certificates as required by law are properly kept and/or filed.

(6) He shall be one of the officers authorized to sign the checks or drafts of the Association.

(7) He shall have such powers as may be reasonably construed as belonging to the chief executive officer of any association.

SECTION 4. The Vice President shall, in the event of the absence or inability of the President to exercise his office, become acting President of the Association with all the rights, privileges and powers of a duly elected President until a successor is chosen.

SECTION 5. The Secretary shall keep the minutes and records of the Association in appropriate books. His duties shall be as follows:

(1) He shall file any certificate required by any statute, Federal or state.

(2) He shall give and serve all notices to members of this Association, unless otherwise specified herein.

(3) He shall be the official custodian of the records and seal of this Association.

(4) He may be one of the officers required to sign the checks and drafts of the Association.

(5) He shall present to the membership at meetings, any communication of general interest to the members addressed to him as Secretary of the Association.

(6) He shall submit to the Board of Directors any communications which shall be addressed to him as Secretary of the Association.

(7) He shall attend to all correspondence of the Association and shall exercise all duties incident to the office of Secretary.

SECTION 6. The Treasurer shall have the care and custody of all monies belonging to the Association; and shall be solely responsible for such monies or securities of the Association. His duties shall be as follows:

(1) He shall make all deposits to a regular bank or trust company maintained by the Association. The Board of Directors may cause a reasonable part of any funds of the Association to be deposited in a savings account and/or it may cause such funds to be invested in such investments as shall be legal for a trustee or fiduciary in the State of New York,

(2) He must be one of the officers who shall sign checks or drafts of the Association. No special fund may be set aside that shall make it unnecessary for the Treasurer to sign the checks issued upon it.

(3) He shall render at stated periods as the Board of Directors shall determine, written account of the finances of the Association and such report shall be physically affixed to the minutes of the Board of Directors of such meeting.

(4) He shall exercise all duties incident to the office of Treasurer.

SECTION 7. No officer shall, for reason of his office, be entitled to receive any salary or compensation.

ARTICLE X